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THE CIVIL SERVICE IN EUROPE

A RESEARCH COMPANION

Edited by
Karl-Peter Sommermann, Adam Krzywoń, and
Cristina Fraenkel-Haeberle

The Civil Service in Europe

This book opens an often nationally focused field of research to a transnational, common European debate. It addresses the ongoing transformation of the civil service, examining its evolving landscape across Europe and exploring the intricate web of historical, social, and political influences that are shaping its current state and setting the future direction. Written by experts from different European countries, this book offers a transnational and interdisciplinary perspective on the civil service by combining legal analysis with insights from public management, political science, and sociology. It addresses the growing complexity of public administration tasks and the increasing requirements related to the qualification of civil servants, amidst global challenges such as climate change, migration, and technological progress. The book is structured to provide both a broad overview as well as in-depth analyses. It covers national developments, presents comparative studies, and tackles intersecting issues such as employment systems, non-discrimination and human rights, digitalisation, artificial intelligence, the fight against corruption, and administrative culture. It aims to identify common European standards and provide practical guidance for public service reforms. The volume will prove to be an indispensable resource for academics, practitioners, and policymakers concerned with public administration and governance.

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Preface

The contributions in the present volume originate from the research project "The Transformation of Civil Service in Europe", which has been conducted in Speyer (Germany) since 2020 at the *Deutsches Forschungsinstitut für öffentliche Verwaltung – FÖV* (German Research Institute for Public Administration). This project has systematically explored the evolving legal landscape of the civil service across Europe, addressing both theoretical and practical dimensions.

European legal, administrative, and political scientists were invited to contribute to this collected volume. To coordinate the research approaches, an authors' meeting was held in Speyer on June 30th and July 1st, 2022, that also provided an opportunity to highlight and discuss key issues of the civil service. The outcome of the joint efforts can be seen in this volume, which brings together, centred on thematic focuses, the results of comparative and interdisciplinary research. During the realisation of the project, the participants actively engaged in conferences and workshops and disseminated their results through blog posts and research articles.

The editors would like to thank all the authors for their valuable contributions and commitment to the joint endeavour. We owe special thanks to Helen Ampt and Stephen Dersley for their competent and careful linguistic checking, and to Giulia Formici and Nataliia Rozmaritsyna for adapting the texts to the editorial guidelines. Nataliia Rozmaritsyna, a fellow of the Volkswagen Foundation and herself an author, has also supported the project through her participation in the regular meetings of the editors, for which we equally express our sincere thanks.

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Speyer, July 2024

Karl-Peter Sommermann, Adam Krzywoń and Cristina Fraenkel-Haeberle

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Abbreviations

AC	Aarhus Convention
BGBl.	*Bundesgesetzblatt* (German Federal Law Gazette)
BMI	*Bundesministerium des Innern und für Heimat* (German Federal Ministry of the Interior and Community)
CDCJ	European Committee on Legal Co-operation
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union and Court of Justice of the European Communities
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ENA	*École nationale d'administration* (National School of Public Administration of France)
ESC	European Social Charter
ETS	European Treaty Series
EU	European Union
EUPAN	European Public Administration Network
EUROSTAT	Statistical Office of the European Communities
FTE	Full-Time Equivalent
GC	Grand Chamber
GDP	Gross Domestic Product
GRECO	Group of States against Corruption
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
INSP	*Institut national du service public* (National Institute of Public Services of France, successor of ENA)
JORF	*Journal officiel de la République française* (Official Journal of the French Republic)
NGO	Non-Governmental Organization
NPM	New Public Management
OECD	Organisation for Economic Co-operation and Development

PACE	Parliamentary Assembly of the Council of Europe
SIGMA	Support for Improvement in Governance and Management
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series

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Introduction

Karl-Peter Sommermann, Adam Krzywoń, and Cristina Fraenkel-Haeberle

Whoever attempts to approach the phenomena of the civil service in Europe is confronted with a multitude of differentiated institutional frameworks in which, on the one hand, far-reaching historical experiences and relics manifest themselves and, on the other hand, the constant change of State tasks can be perceived. The various civil service systems, their responsibilities, organisation, decision-making procedures, and communication with citizens are closely linked to the respective political and social context and do not remain unaffected by the changes taking place there. However, the civil service also represents – or should represent – an anchor of stability for the order of a well-performing State. Even in a joint project such as the present one, the numerous facets of the issues associated with the civil service in Europe can only be covered to a limited extent. But it is certainly worth a try. The present joint effort undertaken by authors from different European countries is intended as an attempt to open up an often nationally introverted field of research to a transnational, common European debate. The preliminary remarks in this introduction provide a brief explanation of the perceived context from which the project was developed, as well as its objectives and structure.

I. The Civil Service in Motion

The performance of the civil service is crucial for a well-functioning public administration, while the conduct of civil servants towards citizens is fundamental for building trust in the political and constitutional system. Without impartial civil servants, who act in accordance with objective criteria, the legitimacy of democratic States governed by the rule of law can be questioned. With the growing complexity of public tasks, exacerbated by global challenges like climate change, large migration flows, and epidemic diseases, the demands on public administration and thus on civil servants have increased.[1] The acceleration of technological, economic, and societal developments, combined with institutional changes in dynamic systems of multilevel governance, call for new qualification requirements. Since efficacy and efficiency are expected of civil service systems, they must be conceived as learning systems that need to be constantly optimised with regard to the duties and tasks of public administration.

Other factors also have a transformative impact on the modern civil service. We observe the privatisation of infrastructure and public employment. Often these trends are linked

1 Cf. Stone and Moloney (2019), pp. 3 f.; Verheijen et al. (2022), pp. 3 f. (in the further analysis with a focus on Middle East and North Africa).

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to the transition from centralised to decentralised governance of working conditions.[2] In such cases, statutory governance is being replaced by contractual and managerial instruments. This paradigm shift implies that working in the civil service is no longer necessarily synonymous with stability of employment and other privileges.

Civil service systems should be immune to political pressure, and for the most part they still are.[3] Nonetheless, some recent attacks on the political neutrality of civil service systems across Europe are more than worrisome.[4] Public institutions, including the judiciary, are faced with challenges posed by populism, democratic backsliding, and even "illiberal constitutionalism".[5] Political assaults on the civil service have led to a centralisation of public governance and an extension of political power. Interference in social activities and anti-pluralist policies are emerging in quite a few Member States of the European Union and the Council of Europe.

These transformations are taking place at a time of additional challenges caused by European integration and the transfer of competencies to international organisations. Nation States are no longer seen as the only effective means of organising social and political life. A complex system of multilevel governance has been created, and almost every legal domain is confronted with coordination, convergence, and standardisation processes. The same applies to civil service law.[6] The legislation and case law of the Council of Europe and the European Union have a strong transformative influence on national civil service models; the relations governing employment in the civil service; and the status of civil servants, their rights and freedoms, and their accountability.[7] However, there is still considerable heterogeneity among the various European States, as far as their administrative infrastructure and public management systems are concerned.[8]

II. The Objective of the Book

The book proposes to comprehensively explore these transformations from a European and comparative perspective. It is intended to visualise common European standards and development perspectives as well as to provide practical orientation for necessary or expedient civil service reforms. Although the inquiry into the transformation of European civil service systems uses primarily the methods of legal analysis, it follows a trans- and interdisciplinary approach and includes the findings of empirical social sciences. In particular, the results of research in the fields of public management, political science, and sociology play a major role whenever this is appropriate. This is indispensable when it comes to identifying the interaction between social development and the transformation of the civil service.

The concept of the book springs from a project of the German Research Institute for Public Administration (FÖV), Speyer. With its objective of answering the questions of the extent to which European and converging national legal standards exist and current

2 Gottschall et al. (2015).
3 Peters and Pierre (2004).
4 Zankina (2016).
5 Pap (2018); Peters and Pierre (2019).
6 Dimitrova (2005); Petr et al. (2003).
7 E.g. Recommendation No. R (2000) 6 of the Committee of Ministers to Member States on the status of public officials in Europe; Recommendation No. R (2000) 10 of the Committee of Ministers to Member States on Codes of conduct for public officials.
8 As far as the EU is concerned, see Palaric et al. (2018).

transformations and future trends for the civil service can be identified, this volume differs from previous works that contribute to the discussion on the civil service in Europe. However, books to be taken into consideration are in particular the volume on the civil service law in the EU Member States arising from a project conducted at FÖV Speyer some 30 years ago,[9] a book edited at the European Institute of Public Administration in Maastricht (2010),[10] a handbook published in 2011 relating to different regions of the world,[11] and a comprehensive comparative study of modern civil service systems from the perspective of 21st-century challenges.[12]

III. The Structure of the Book

The structure of the book follows the objective of exploring the transformation of the civil service in Europe, individually and from cross-cutting perspectives. It takes a bottom-up approach, using the aforementioned transdisciplinary methods.

Part I addresses the concept and influential traditions of the civil service in Europe and the impact of a changing environment on its evolution. In Part II, the contributions examine the development of the civil service in individual countries. In terms of the selection of countries, this is based as far as possible on their representativeness for the European systems. Thus, different administrative traditions are analysed and, with a view to countries in which the creation or reorganisation of civil service has been a key element of transition processes, both well-established and newly emerging systems are examined. The national chapters pay special attention to the specific constitutional framework and structure of the civil service and the status of its members, as well as to recent reforms and the influence of European and international law on its development. The studies on European countries are followed by a comprehensive comparative analysis. Since the internal structure and operation of the European Union and international organisations cannot be ignored when considering the development of civil service in Europe,[13] Part III looks at their civil services as well.

Parts IV to VIII are dedicated to overarching, cross-cutting aspects of the civil service, making it possible to identify common European standards in key areas on the basis of the results of comparative research. In this sense, Part IV analyses the employment systems of the public sector, and elaborates on common European standards regarding employment on a public or private law basis, highlighting salient features of the civil service, such as independence, apolitical character, and the basic elements of the employment relationship, in particular qualification requirements, disciplinary responsibility, remuneration, and retirement regimes. Part V focuses on fundamental issues of non-discrimination and gender equality in the civil service, while Part VI looks at the challenges facing civil servants in the digital age. The contributions in Part VII take account of the fact that the compliance, performance, and behaviour of civil servants largely depend on the prevailing administrative culture, which, in addition to other instruments of human resources management and leadership, can be enhanced by ethics and anti-corruption rules. Related

9 Magiera and Siedentopf (1994).
10 Demmke and Moilanen (2010).
11 Massey (2011).
12 van der Meer et al. (2015).
13 Benz (2015).

to the behavioural standards, the scope of application of individual rights and freedoms to civil servants are addressed in Part VIII. The contributions elaborate on the relevant standards of human rights protection in Europe, considering the systems of the Council of Europe and the European Union. In addition to the right of access to employment in the public sector, the discussions cover the protection of privacy in the workplace, freedom of expression and religion, the protection of whistle-blowers, the right to unionise and strike, the right to engage in political parties, and the principle of fairness.

Conceptual reflections on the civil service and its future in Europe conclude the volume. Against this background, Part IX deals inter alia with managerialist approaches and their limits, the influence of politics, and the question of the extent to which Europeanisation is contributing to the modernisation of the civil service or whether other trends are gaining importance.

IV. The Civil Service on Trial

Through the public administration and the civil servants who carry out its tasks, the citizen encounters the State "in action" or "at work". This metaphor, coined by Lorenz von Stein in the 19th century,[14] still reflects a common perception in society today, although the relationship between civil servants and citizens has changed considerably since then, and personal contact is decreasing due to automation and digitalisation. This personal element of positive experiences with public officials is, as was mentioned previously, crucial for the acceptance of public institutions and trust in democracy. For this reason and even beyond a corresponding constitutional obligation, all modernisation approaches rendered necessary by new political, social, ecological, and technological requirements must pay particular attention to the citizens and their needs. The present volume is also intended to provide orientation in this regard.

Bibliography

Benz A. (2015), 'European Public Administration as a Multilevel Administration: A Conceptual Framework', in Bauer M.W., Trondal J. (eds), *The Palgrave Handbook of the European Administrative System*, 1st edition, London: Palgrave Macmillan, 31–47.

Demmke C., Moilanen T. (2010), *Civil Services in the EU of 27: Reform Outcomes and the Future of the Civil Service*, Berlin: Peter Lang Verlag.

Dimitrova A.L. (2005), 'Europeanization and Civil Service Reform in Central and Eastern Europe', in Schimmelfennig F., Sedelmeier U. (eds), *The Europeanization of Central and Eastern Europe*, Ithaca, NY: Cornell University Press, 71–90.

Gottschall K., Kittel B., Briken K., Heuer J.-O., Hils S., Streb S., Tepe M. (2015), *Public Sector Employment Regimes. Transformations of the State as an Employer*, London: Palgrave Macmillan.

Magiera S., Siedentopf H. (eds) (1994), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot.

Massey A. (ed) (2011), *International Handbook on Civil Service Systems*, Cheltenham, Northampton: Edward Elgar.

14 Stein (1870), p. 7 ("Wie die Gesetzgebung der wollende, so ist die Verwaltung der thätige Staat.") and Stein (1876), p. 47 ("[Es] wird in der Verwaltung aus dem thätigen Staate der Verfassung die arbeitende Staatsidee").

Palaric E, Thijs N, Hammerschmid G. (2018), 'A Comparative Overview of Public Administration Characteristics and Performance in the EU28', *Report for the European Commission*, https://op.europa.eu/en/publication-detail/-/publication/3e89d981-48fc-11e8-be1d-01aa75ed71a1/language-en.
Pap A.L. (2018), *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy*, Milton Park: Routledge.
Peters B.G., Pierre J. (2019), 'Populism and Public Administration: Confronting the Administrative State', 51(10) *Administration & Society*, 1521–1545.
Peters B.G., Pierre J. (eds) (2004), *The Politicization of the Civil Service in Comparative Perspective. A Quest for Control*, 1st edition, London, New York: Routledge.
Petr D., Česal J., Hampl S. (2003), 'Interactions and Identities of Czech Civil Servants on Their Way to the EU', 10(4) *Journal of European Public Policy*, 637–654.
Stein L.V. (1870), *Handbuch der Verwaltungslehre und des Verwaltungsrechts mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England und Deutschland*, Stuttgart: Cotta.
Stein L.V. (1876), *Handbuch der Verwaltungslehre mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England, Deutschland und Österreich*, 2nd edition, Stuttgart: Cotta.
Stone D., Moloney K. (2019), 'The Rise of Global Policy and Transnational Administration', in Stone D., Moloney K. (eds), *The Oxford Handbook of Global Policy and Transnational Administration*, Oxford: Oxford University Press, 3–22.
van der Meer F.M., Raadschelders J., Toonen T.A.J. (eds) (2015), *Comparative Civil Service Systems in the 21st Century*, 2nd edition, London: Palgrave Macmillan.
Verheijen T., Staroňová K., Elghandour I., Lefebvre A.-L. (2022), *Civil Servants and Globalisation*, Bristol: Bristol University Press.
Zankina E. (2016), 'Backdoor Politics: Politicisation Through Restructuring in the Bulgarian Civil Service', 33(2) *East European Politics*, 291–308.

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Part I

Concepts, Origins, and Challenges

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1 Defining the Civil Service

Towards a Better Understanding of the Nature of Civil Service Systems in Europe

Adam Krzywoń

I. Civil Service: Divergence Versus Europeanisation

Modern bureaucracies are characterised by substantial diversity, which has been influenced by a multitude of factors, such as varying administrative cultures, traditions, historical experiences, and different mindsets. Disparities in legal education systems, training, recruitment, and the disciplinary regimes of civil servants further compound this diversity.[1] These regimes – protected by national authorities as a part of the State's constitutional identity – affect the model of public employment and the terminology applied in social, political, and legal sciences. The terms "civil service" and "civil servants" have different meanings in various languages, and may even have different meanings within the same language, depending on the context.

Simultaneously, there has been a significant Europeanisation of public administration in recent decades. The administration of separate Member States of the European Union (EU) is transforming towards unification across Europe, on the way to ultimately becoming a European public administration.[2] Also, countries often opt for similar technical solutions (transplants) so that the most successful one is adopted everywhere.[3] Furthermore, the Council of Europe (CoE) and the European Court of Human Rights (ECtHR) – setting standards and fostering a shared understanding of principles related to public employment across the continent – are strong driving forces of these processes.

These oscillations between convergence and divergence in European administrative law, including civil service law, enable a multidimensional comparative approach.[4] On the one hand, similarities between the systems lead incrementally to the clarification and development of common principles of European administration. On the other, differences between national legal systems provide an opportunity for legal comparison.[5]

As outlined in the *Introduction*, this book adopts a comparative approach that aims to evaluate the extent to which European norms and shared legal standards shape national civil service systems. Establishing precise definitions and clear terminology is vital for ensuring accurate analysis, since different perspectives on identical issues among European countries often align in substance but lack a common analytical framework.[6]

1 Stelkens et al. (2020), p. 755.
2 Benz (2015), pp. 31–46; Knill (2001).
3 Marique and Slautsky (2021), pp. 14–15.
4 Ongaro and van Thiel (2018), p. 6.
5 D'Alberti (2021), p. 223.
6 De Becker (2011), p. 950; see also Chiti (2021), p. 267.

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Hence, it is crucial to define the terms “civil service” and “civil servant”.[7] This chapter explores their scope and denotation, taking into account arguments emerging from international and constitutional law. Its main hypothesis is that comparative legal analysis should distinguish between the notions of public service and the civil service. The former includes all persons employed by the public authorities, whereas the latter concerns employment in the State’s executive branch, implies a set of special duties and responsibilities, and requires a regular basis.

The chapter begins with an analysis of the relevant provisions of international law and its translations (Section II). This is followed by a comparative examination of the constitutional framework of selected European countries (Section III). The final section proposes a set of substantive elements necessary to define the notion of civil service (Section IV).

II. International Law: Equal Access to the Public Service and Broad Interpretation

This section delves into the role of international law in shaping the fundamental concepts integral to the civil service, including the notions of “civil service” and “public service”. International treaties make reference to these concepts, contributing to their definition within the European legal framework. Additionally, the interpretation provided by prominent international tribunals, notably the ECtHR and the Court of Justice of the European Union (CJEU), further clarify and refine these terms.

1. Universal System of Human Rights Protection

Before analysing the particular provisions of international law, it is crucial to highlight the problems surrounding the translation of treaties and other documents since the methodology employed in translation is one of the fundamental conditions for their understanding and proper application.[8] Accordingly, attention should be drawn to Article 21, paragraph 2 of the Universal Declaration of Human Rights (UDHR) of 1948 and Article 25(c) of the International Covenant on Civil and Political Rights (ICCPR) of 1966 and its official translations. Both provisions stipulate that every citizen has the right of equal access to “public service in his country” (meaning equal access to employment in the public service). However, the English broad term “public service”[9] was officially translated into the French *fonction publique*[10] and the Spanish *función pública*,[11] which have a specific

7 Numerous efforts have been made to define the term “civil service”, yet no universally accepted definition has emerged, largely due to various research objectives and distinct analytical frameworks across different disciplines, including law, political sciences, sociology, see e.g. Hugrée et al. (2015), p. 66. As a result, there is probably no single conception of the civil servant that could serve as a building block for European administrative integration, but rather a complex network of concepts and associations, see Overeem and Sager (2015), pp. 298–300 and Massey (2011), pp. 4–6.

8 Cf. Prieto-Ramos (2017), pp. 185–214; Bianchi et al. (2015) and Linderfalk (2007).

9 www.un.org/en/about-us/universal-declaration-of-human-rights and www.ohchr.org/en/professional interest/pages/ccpr.aspx.

10 www.un.org/fr/about-us/universal-declaration-of-human-rights and www.ohchr.org/FR/Professional Interest/Pages/CCPR.aspx.

11 www.un.org/es/about-us/universal-declaration-of-human-rights and www.ohchr.org/SP/Professional Interest/Pages/CCPR.aspx.

and rather narrow denotation in these languages.[12] Also, the analysis of specific provisions of the EU law shows essential variations in the official translations.[13]

Despite these inconsistencies, the practical interpretation of Article 21, paragraph 2 UDHR and Article 25(c) ICCPR is broad. Their systemic analysis leads to the conclusion that they are aimed at ensuring universal access, free from political interference or pressures, to all public positions.[14] These provisions, therefore, apply to the exercise of all State powers, encompassing the legislative, executive, and judicial branches.[15] Accordingly, to ensure access to employment in the public service on general terms of equality, the criteria and procedures for the appointment, promotion, suspension, transfer, and dismissal of any public employee must be objective and reasonable.[16]

Likewise, the terminology employed by the International Labour Organisation (ILO) is broad. The Labour Relations (Public Service) Convention No. 151 of 1978 illustrates this point by employing the term "public employee", encompassing "all persons employed by public authorities" (Articles 1 and 2).[17] The Convention's preamble emphasises the existence of serious problems regarding the scope and definitions of ILO documents due to differences between private and public employment regimes and the fact that governments apply the provisions of international law in a manner that excludes large groups of public employees.

2. The Council of Europe

Moving to regional human rights protection systems, attention should be drawn to the provisions of the European Convention of Human Rights (ECHR) and CoE soft law. Despite the fact that the ECHR – unlike the aforementioned UDHR and ICCPR – does

12 The term "public service" in English has a vast and comprehensive meaning, as it refers to "a service provided by the government, such as hospitals, schools, or the police", "the government and the work that its departments do" and "the work that elected officials and government employees do for the benefit of the public" https://dictionary.cambridge.org/dictionary/english/public-service. Meanwhile, in French and Spanish, respectively, *fonction publique* and *función pública* have a specific denotation and traditionally refer to the group of government officials who enjoy a stable employment relation governed by public law, see French meaning www.larousse.fr/encyclopedie/divers/fonction_publique/187252, and Spanish meaning https://dle.rae.es/funci%C3%B3n#FHRj5ve.

13 For instance, a directive concerning safe and healthy working conditions stipulates non-applicability where characteristics peculiar to "certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it" (see Article 2, para. 2 of the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L 183, p. 1). Other linguistic versions of the directive present a broad spectrum of meanings, from French *fonction publique* and Spanish *función pública*, through German *öffentliche Dienst*, to Italian *pubblico impiego* and Polish *działalność publiczna i społeczna*. The two last examples are particularly remarkable, as they refer to "public sector" and "public activity and social service", respectively.

14 UN Committee on Human Rights (1996).

15 Taylor (2020), pp. 721–726; the UN Committee on Human Rights in some cases has found the violation of Article 25(c) ICCPR in the context of judicial dismissals and attacks on the independence of the judiciary, see UN Committee on Human Rights, decision of 24 July 2008, *Bandaranayake v. Sri Lanka*, CCPR/C/93/D/1376/2005, para. 120; UN Committee on Human Right, decision of 19 September 2003, *Busyo v. Congo*, CCPR/C/78/D/933/2000, para. 224 and decision of 17 September 2003, *Pastukhov v. Belarus*, CCPR/C/78/D/814/1998, para. 69.

16 UN Committee on Human Rights, decision of 27 March 2006, *Solís v. Peru*, CCPR/C/86/D/1016/2001.

17 www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C151.

not envisage the right of equal access to employment in civil (public) service, there is no doubt that the Convention's individual and collective guarantees extend to all public officials.[18] The ECHR makes no distinction between the functions of a State as a holder of public power and its responsibilities as an employer.[19] Accordingly, ECHR provisions are binding upon the "State as an employer", irrespective of whether its relations with the employees are governed by public or private law.[20]

Consequently, the Convention lacks the explicit inclusion of the notion of public (civil) service and refers only to some associated expressions, such as "the administration of the State" (Article 11, paragraph 2 ECHR *in fine*).[21] However, in interpreting its provisions, the ECtHR has on some occasions examined the meaning of "civil service" and "civil servant" in the context of Articles 6, 8, 9, and 10 ECHR. Against this backdrop, it should be noted that the Court did not strictly adhere to a specific terminology. Rather it frequently employed various categories interchangeably, treating them as synonyms within its discourse.[22]

Three overarching conclusions regarding the terminology emerge upon analysing the ECtHR case law. First, the Court makes a distinction between public and civil service.[23] For instance, when establishing the presumption of applicability of Article 6, paragraph 1 ECHR, it emphasised that the *Eskelinen* test primarily pertains to the situation of civil servants.[24] However, the criteria established therein have been applied by different panels of the ECtHR to disputes concerning members of the judiciary,[25] including presidents of supreme courts.[26] In this context, in one of the leading cases, the ECtHR Grand Chamber

18 Public servants do not fall outside the scope of the Convention since it stipulates that "everyone within [the] jurisdiction" of the contracting States must enjoy the rights and freedoms "without discrimination on any ground" (Articles 1 and 14); see ECtHR (GC), judgment of 26 September 1995, *Vogt v. Germany*, 17851/91, para. 43.

19 ECtHR (GC), judgment of 14 December 2023, *Humpert and Others v. Germany*, 59433/18, 59477/18, 59481/18 and 59494/18, para. 98.

20 ECtHR (GC), judgment of 12 November 2008, *Demir and Baykara v. Turkey*, paras. 107–109, see also ECtHR, judgment of 6 February 1976, *Swedish Engine Drivers' Union v. Sweden*, 5614/72, para. 37 and judgment of 20 February 2006, *Tüm Haber Sen and Çınar v. Turkey*, 28602/95, para. 29.

21 The concept of "the administration of the State" should be interpreted narrowly, in the light of the post held by the official concerned, see ECtHR, *Demir and Baykara v. Turkey* (n. 20), paras. 97 and 107. Also, the Court does not consider it necessary to determine whether teachers with civil servant status could be said to be "members of the administration of the State" for the purposes of Article 11, para. 2 ECHR *in fine*, a question which was left open in ECtHR, *Vogt v. Germany* (n. 18), para. 68 and ECtHR, *Humpert and Others v. Germany* (n. 19), para. 114.

22 See e.g. ECtHR (GC), judgment of 19 April 2007, *Vilho Eskelinen and Others v. Finland*, 63235/00, where the Court used a wide range of terms, including "civil servant" (para. 62), "servant of the State" (para. 42), "employee in the public sector" (para. 46), "civil service" (para. 46), "public servants" (para. 46), "official" (para. 47), and "public administration" (para. 47).

23 See ECtHR, *Humpert and Others v. Germany* (n. 19), para. 65, where the Court analysed the comparative material concerning employment in the public sector.

24 ECtHR, *Vilho Eskelinen and Others v. Finland* (n. 22), paras. 43–49.

25 Leloup (2022), pp. 23–57; see also ECtHR, judgment of 27 January 2009, *G. v. Finland*, 33173/05; ECtHR, judgment of 9 January 2013, *Oleksandr Volkov v. Ukraine*, 21722/11; ECtHR, judgment of 9 July 2013, *Di Giovanni v. Italy*, 51160/06 and ECtHR, judgment of 15 September 2015, *Tsanova-Gecheva v. Bulgaria*, 43800/12.

26 ECtHR, judgment of 5 February 2009, *Olujić v. Croatia*, 22330/05 and ECtHR, judgment of 20 November 2012, *Harabin v. Slovakia*, 58688/11.

emphasised that although the judiciary is not a part of the "ordinary civil service", it should be considered part of the "public service".[27] The latter is, therefore, a broader category which includes judicial officeholders.

Second, the Court emphasises civil servants' significant duties and responsibilities, particularly stressing loyalty, reserve, and discretion. This emphasis justifies granting national authorities a certain margin of appreciation when interfering in the exercise of individual and collective rights of officials.[28] Also, the Court argues that the political neutrality of civil servants is crucial, since citizens are entitled to expect that in their own dealings with public administration, they will be advised by politically neutral officers detached from the political fray.[29]

Third, the ECtHR recognises various employment models for civil servants (employment and career-based systems) and emphasises that they can work on different levels, including central government or local authority.[30] These employment regimes may also affect the specific scope of duties and responsibilities of the official concerned.[31] In particular, the duty of reserve and discretion owed to their employer by employees working under private law cannot be as accentuated as the duty of trust and loyalty required of statutory civil servants.[32]

It might be worth mentioning that additional CoE documents also refer to analysed terminology, in particular, the recommendations regarding the status of public officials, codes of conduct for public officials, and guidelines on public ethics.[33] The CoE was aware of the difficulties concerning a single uniform definition of a civil servant or public official.[34] Accordingly, aiming to establish broad and unified European standards, the mentioned documents employ the term "public officials", encompassing both statutory and contractual employees. However, the particular scope of this notion may vary depending on the specific instrument's purpose.

3. The European Union

As noted at the beginning, EU law is a robust source of convergence in the public administration. Accordingly, some arguments valid for reconstructing the definition of "civil service" emerge from the analysis of primary and secondary EU law and CJEU case law.

As far as primary law is concerned, EU treaties ensure freedom of movement for workers but limit the scope of this right by excluding "employment in the public

27 ECtHR (GC), judgment of 23 June 2016, *Baka v. Hungary*, 20261/12, para. 104.

28 ECtHR, *Vogt v. Germany* (n. 18), paras. 53–59 and ECtHR, judgment of 29 February 2000, *Fuentes Bobo v. Spain*, 39293/98, para. 38.

29 ECtHR, judgment of 2 September 1998, *Ahmed and Others v. United Kingdom*, 22954/93, para. 53.

30 ECtHR, *Demir and Baykara v. Turkey* (n. 20), para. 48.

31 ECtHR, judgment of 15 June 2021, *Melike v. Turkey*, 35786/19, para. 48 and ECtHR, judgment of 17 November 2016, *Karapetyan and Others v. Armenia*, 59001/08, para. 54.

32 ECtHR (GC), judgment of 21 July 2011, *Heinisch v. Germany*, 28274/08, para. 64 and ECtHR, judgment of 9 January 2018, *Catalan v. Romania*, 13003/04, para. 56.

33 Recommendation No. R (2000) 6 of the Committee of Ministers to Member States of 24 February 2000 on the status of public officials in Europe; Recommendation No. R (2000) 10 of the Committee of Ministers to Member States of 11 May 2000 on codes of conduct for public officials and Guidelines CM(2020)27-addfinal of the Committee of Ministers of the Council of Europe of 11 March 2020 on public ethics.

34 Council of Europe (1999), p. 9.

service" (Article 45, paragraph 4 of the Treaty on the Functioning of the European Union, TFEU). It is worth noting that the English term "public service" was used in the broad meaning of public administration, which is evident in the light of different official translations.[35]

The aforementioned exception is grounded in the idea of national sovereignty. Employment in the public service is therefore linked to the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State. Consequently, the legal qualification and organisation of the regulation of public employment still remain in the hands of national authorities and include choosing between different employment models for civil servants. However, in its case law, the CJEU reiterates that the scope of the derogation provided in Article 45, paragraph 4 TFEU should be interpreted very strictly and limited to typical public functions.[36] According to the CJEU, it should not be only a minor and potential participation since the person concerned must actively and effectively exercise public authority.[37] In practice, exemptions from the freedom of movement of workers typically encompass categories like the armed forces, police and other law enforcement bodies, the judiciary, tax authorities, diplomatic services, government departments, regional authorities, and central banks. However, the number of officials falling under this exception is gradually diminishing.[38]

The CJEU has also interpreted the terms "civil service" and "public service" in the context of the non-discrimination rules provided in EU secondary legislation.[39] It indicated that conditions of impartiality, efficiency, and neutrality of public administration may imply a certain permanence and stability of employment. At the same time, these aspects of the civil service, which have no counterpart in standard employment law, explain and justify some level of interference in servants' rights.[40] Moreover, as the Member States enjoy discretion regarding the organisation of their public authorities, they can – within certain limits – differentiate categories of civil servants (e.g. career civil servants and those employed under fixed-term contracts).[41]

35 See French *administration publique* (https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:12012E/TXT), Spanish *administración pública* (https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:12012E/TXT), German *öffentliche Verwaltung* (https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:12012E/TXT).

36 CJEU, judgment of 17 December 1980, *Commission v. Belgium*, C-149/79 and CJEU (GC), judgment of 24 May 2011, *Commission v. Belgium*, C-47/08, paras. 83–86. Also, the Court emphasised that it had not been bound by national definitions of public service since "these legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation" appropriate to the requirements of the EU law, see CJEU, judgment of 12 February 1974, *Sotgiu v. Deutsche Bundespost*, C-152/73, para. 5.

37 CJEU, judgment of 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española*, C-405/01 and CJEU, judgment of 1 February 2017, *Commission v. Hungary*, C-392/15.

38 De Becker (2011), p. 958.

39 See Article 3, para. 1(a) of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303/16; see also CJEU, judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10.

40 CJEU, judgment of 25 July 2018, *Vernaza Ayovi*, C96/17, para. 46.

41 CJEU, judgment of 18 October 2012, *Valenza and Others*, C302/11 to C305/11, para. 57; CJEU judgment of 20 September 2018, *Motter*, C466/17 and CJEU, judgment of 21 November 2018, *Viejobueno Ibánez and de la Vara González*, C245/17.

III. Constitutional Law: Equal Access and the Organisational Basis of Civil Service Systems

The constitutional regulation of selected European countries usually exhibits a twofold approach with regard to public (civil) service. While constitutional norms guarantee an individual the right of equal access to employment in the public service, at the same time, they determine certain features of national civil service systems and their organisation. Ordinary laws subsequently develop these constitutional principles, often establishing different groups of servants and distinct public employment frameworks. Consequently, there may be differences concerning employment models since various institutional and substantial aspects of the civil service are constitutionally underpinned across Europe.

It must be remembered that modern European constitutions regulate institutional and substantive aspects of public administration in different ways due to their traditions, specific administrative cultures, and historical backgrounds. Moreover, European countries are at different stages with respect to the new challenges and paradigms of public administration.[42] Thus, any comparative analysis of civil service systems, including reconstructions of terminological frameworks, must be contextual and consider these political, social, and historical settings.

Against this backdrop, the following comparative analysis is restricted to the United Kingdom, Germany, France, Italy, Spain, and Poland. While this group includes countries representing various administrative cultures and combines different historical experiences, including mature and emergent civil service systems, all of them share specific legal similarities. In this respect, they are suitable for comparative inquiries of this kind.[43]

1. Constitutional Right of Access to Employment in the Public Service

When examining the United Kingdom, certain features of the British system are noteworthy, especially the distinction between the civil service and the public sector. The latter has a broad meaning encompassing a wide range of central and local governments and public corporations.[44] Its employees are usually called "public servants" or "public sector personnel", and they can enjoy the status of a civil servant or that of other categories of public servants.[45]

The act regulating access to the British public sector is the Public Appointments Order in Council 2016.[46] It requires the preparation of a governance code outlining appointment principles and practices, establishing the Commissioner for Public Appointments, and specifying covered bodies and offices. Published in December 2016, the Governance Code regulates public sector appointment rules, emphasising the values of merit-based

42 Report (doc. 9711) of Committee on Economic Affairs and Development of 13 February 2003, *Civil Service Reform in Europe*, para. 11; https://pace.coe.int/en/files/10211.

43 Cf. Dannemann (2019).

44 www.civilservant.org.uk/library/2018-HoC-public_bodies.pdf, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/519571/Classification-of-Public_Bodies-Guidance-for-Departments.pdf.

45 www.ons.gov.uk/employmentandlabourmarket/peopleinwork/publicsectorpersonnel.

46 https://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2017/04/OIC-2016-1.pdf.

recruitment, openness, and fairness.[47] According to the Code, open competition should be a standard in all public appointments, overseen by the Commissioner for Public Appointments, ensuring unbiased recruitment to public bodies. The principles governing access to employment in the civil service, a segment of the broader public service, are outlined in Part 1 of the Constitutional Reform and Governance Act 2010.[48] British civil servants should be appointed on merit through fair and open competition overseen by the Civil Service Commission. The Commission sets competition principles, handles complaints, and reviews recruitment policies to ensure fairness.

On the continent, various constitutional provisions guarantee the right of access to public service employment.[49] Examining these norms from a systemic perspective, it is noteworthy that the right of access is often established within a section of the constitution pertaining to the rights and freedoms of citizens. In France, it forms part of the core historical document on the status of individuals; in Italy, it can be found among provisions regarding the rights and duties of citizens; in Spain, it is in the chapter "Fundamental rights and duties", and in Poland, in "Freedoms, rights and obligations of persons and citizens". However, despite its individual dimension in Germany, Article 33, paragraph 2 of the Basic Law is grouped with provisions concerning the Federation and the *Länder*.

As far as the scope is concerned, the right of access to employment in the public service is broad and refers to eligibility for any public office, including within the executive, legislative, and judiciary powers. In Germany, it guarantees access to any public post,[50] and in France, it refers *expressis verbis* to all high offices, public positions, and employment. In Spain, the constitutional guarantees mention any "public office", in Italy "public offices and elected positions", and in Poland "public service".

The last characteristic of these provisions is that they require equal access to public posts, often combined with the principle of merit-based recruitment. In light of Article 33, paragraph 2 of the German Basic Law, access should be based on suitability, qualifications, ability, and professional performance.[51] In France, the legislator may not specify selection procedures based on criteria unrelated to the capacity of candidates.[52] Article 6 of the Declaration of Human and Civil Rights implies the general rule of recruitment by competitive examination (*concours*), translating the principle of non-discrimination into access to public employment. The same is the case in Italy, as the constitution requires eligibility on equal terms, with particular emphasis on equal opportunities between women and men (Article 51), and guarantees that all employment in the public administration is accessed through competitive examinations (*concorso pubblico*, Article 97, paragraph 4). In Spain

47 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578498/governance_code_on_public_appointments_16_12_2016.pdf.

48 www.legislation.gov.uk/ukpga/2010/25/contents.

49 Article 33, para. 2 of the German Basic Law of 8 May 1949 (www.gesetze-im-internet.de/englisch_gg/englisch_gg.html); Article 6 of the French Declaration of Human and Civil Rights of 26 August 1789 (www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen); Articles 51 and 97 of the Italian constitution of 22 December 1947 (www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf); Article 23, para. 2 of the Spanish constitution of 6 December 1978 (www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf); Article 60 of the Polish constitution of 2 April 1997 (www.sejm.gov.pl/prawo/konst/angielski/kon1.htm).

50 German Federal Constitutional Court, order of 10 June 1958, 2 BvQ 2/58 and order of 6 May 2008, 2 BvR 337/07.

51 German Federal Constitutional Court, judgment of 24 September 2003, 2 BvR 1436/02.

52 Taillefait (2012), p. 53.

(Article 23, paragraph 2) and Poland (Article 60), constitutional norms guarantee the right of access employment in the public service on equal terms.[53]

2. *Constitutional Characteristics of the Civil Service*

The constitutions of European States determine the basic features and organisation of national civil service systems that reflect traditional principles which were conceptualised under the influence of 19th-century political liberalism.[54] Accordingly, modern civil service systems are characterised by a professional corps of officials employed within the executive branch, upholding high substantive and ethical standards. They should maintain neutrality and independence from changing political circumstances. Constitutional provisions outline duties and responsibilities while also protecting the status of civil servants and ensuring the stability of employment mechanisms.

In the United Kingdom, the statutory basis for the civil service is set out in Part 1 of the Constitutional Reform and Governance Act 2010.[55] The fundamental idea behind the British civil service is that of a hierarchical, politically neutral, and highly professional body composed of individuals selected on merit.[56] Civil servants work within a constitutional framework which requires them to be politically impartial. They are also subject to a wide range of ethical and other constraints, as established in the Civil Service Code.[57] The latter includes norms of conduct which form part of the terms of service: integrity, honesty, objectivity, and impartiality.

In Germany, Article 33, paragraphs 4 and 5 of the Basic Law stipulate that the exercise of sovereign authority, as a rule, should be entrusted to members of the civil service, who stand in a relationship of service and loyalty defined by public law, with due regard to the traditional principles of the professional civil service.[58] The principle of objectivity and impartiality in the exercise of public functions finds an institutional safeguard in the guarantee of a professional civil service. The State's obligation of neutrality – of a broader nature – implies a duty of neutrality for civil servants since the State can only act through individuals.[59]

Civil servants' loyalty to the free democratic constitutional order is a crucial feature of the German system, an effect of historical development, and a cornerstone of a "democracy capable of defending itself".[60] There is a rich body of constitutional case law that defines this duty, indicating that it implies being prepared to identify with the idea of the State that the civil servant has to serve, and with the free democratic constitutional order based on the rule of law and social justice.[61] The duty of loyalty applies to every type of appointment

53 Spanish Constitutional Tribunal, judgment of 1 June 2009, STC 130/2009 and judgment of 2 June 2003, STC 107/2003; Polish Constitutional Tribunal, judgment of 23 March 2010, K 19/09 and judgment of 7 May 2013 SK 11/11.

54 Badré and Verdier Naves (2017), pp. 8–11.

55 www.legislation.gov.uk/ukpga/2010/25/contents.

56 See *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume; see also Ruffert (2021), p. 826.

57 www.gov.uk/government/publications/civil-service-code/the-civil-service-code.

58 Sommermann (2021), p. 23; Timmins (2000), pp. 82–84 and Reichard and Schröter (2021).

59 German Federal Constitutional Court, order of 14 January 2020, 2 BvR 1333/17.

60 ECtHR, *Vogt v. Germany* (n. 18), para. 54.

61 See *The Civil Service in Germany: A Service Based on Mutual Loyalty*, by C.D. Classen in this volume; see also German Federal Constitutional Court, order of 22 May 1975, 2 BvL 13/73.

in the civil service, fixed-term appointments, probationary appointments, appointments subject to revocation, and appointments to a permanent post. Other traditional features of the professional civil service in Germany encompass the principles of alimentation,[62] lifetime employment,[63] and the requirement of statutory regulation (Article 33, paragraph 5 of the German Basic Law). The latter enables the legislature to adjust the provisions of civil service law to the corresponding evolution of statehood, thereby adapting it to current circumstances.[64]

The French constitution seems laconic as far as civil service principles are concerned. However, two regulations should be mentioned, Article 13 (providing that the President shall make appointments to the civil service posts) and Article 34 (establishing that statutes shall determine the rules governing the fundamental guarantees granted to civil servants). Both were developed in the case law of the Constitutional Council, which has defined numerous constitutional rules and principles for the civil service.[65] One of them is neutrality, which implies civil servants' duty to refrain from manifesting – in the exercise of their duties – any political, religious, or personal opinions and beliefs. It is often linked to equality, which prohibits any discrimination in the service provided.[66] Furthermore, the principle of continuity is essential for maintaining the regular functioning of the State and its administration. Thus, continuity can limit civil servants' ability to exercise the right to strike. The final principle, adaptability, should allow continuous adjustment of the service to the evolution of collective needs.[67]

The Italian constitution provides a set of principles for the civil service, which can be found in the sections concerning political rights and duties (Article 54) and public administration (Articles 97 and 98).[68] The former requires all public employees to fulfil their functions with discipline and honour. The provisions of Articles 97 and 98 stipulate that public administration should be efficient and impartial, civil servants are exclusively at the nation's service, and the statutes may establish cases of incompatibility.[69]

In Spain, the essential provisions are Article 103, paragraphs 1 and 3 of the constitution. They oblige the public administration to serve the general interest with objectivity and act according to the principles of efficiency, hierarchy, decentralisation, deconcentration, and coordination, being fully subject to justice and the law. Constitutional norms also establish the principles of merit and ability and grant civil servants the right to union membership.[70] The duty of loyalty to the constitution – one of the basic principles governing the Spanish civil service – implies the prohibition of activities that endanger the liberal

62 The principle of "adequate maintenance" (*Alimentationsprinzip*), i.e. that civil servants must be paid appropriate remuneration; see German Federal Constitutional Court, judgment of 6 March 2007, 2 BvR 556/04, para. 60 and judgment of 14 February 2012, BvL 4/10, para. 143; see also ECtHR, *Humpert and Others v. Germany* (n. 19), paras. 133–134.

63 See German Federal Constitutional Court, order of 19 September 2007, 2 BvF 3/02, para. 72 and order of 28 May 2008, 2 BvL 11/07, para. 35.

64 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12.

65 See *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume; see also Taillefait (2012), p. 60 and Owen (2000), pp. 56–59.

66 De Becker (2011), p. 954.

67 Badré and Verdier Naves (2017), pp. 12–13 and Taillefait (2012), pp. 51–52.

68 See *Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

69 Italian Constitutional Court, judgment of 5 June 2006, 233/2006 and judgment of 19 March 2007, 103/2007 and 104/2007.

70 Fernández Delpuech (2015).

democratic order based on the rule of law.[71] Additionally, the statutes should provide details on the system of incompatibilities and guarantees of the impartiality of civil servants in the exercise of their duties.

As far as the Polish constitution is concerned, substantive rules on the civil service can be found in the section "The Council of Ministers and Government Administration". Article 153 requires that civil servants perform their activities in a professional, diligent, impartial, and politically neutral way. This catalogue is partially a consequence of the democratic transition experienced by Central and East European countries. After the democratisation processes began in 1989, the primary aim was to establish the civil service as an independent professional body guided by a properly understood common general interest, and to protect civil servants against dismissals and extensive political interference.[72]

3. *Civil Service Laws and Different Employment Models*

Previous sections have dealt with common constitutional traditions concerning equal access to the public service and a catalogue of basic principles concerning the status and duties of civil servants. Another shared constitutional rule is that there is a reference to ordinary law for the detailed regulation of civil service.[73]

Against this backdrop, national civil service laws provide different organisational and institutional models due to their different administrative cultures and traditions. The national legislator may adopt different legal regimes; however, the scope of the parliament's autonomy in determining various aspects of the civil service in the secondary law depends on the constitutional framework and its rigidity.[74] In some legal systems, strict constitutional law makes major restructuring at the federal level quite challenging (e.g. Germany), whereas, in other countries, the process of changing the machinery of government has long been straightforward (e.g. the United Kingdom).[75]

The laws governing civil service define the categories of public employees who are subject to them. These regulations specify whether they exclusively cover officials performing executive and administrative functions for the central government or whether they extend to local government officials and to political, fixed-term or contract public posts.[76] Moreover, the legislative framework establishes the employment model and classification system,[77] and regulates the conditions of service, the integrity of civil servants' conduct,

71 Duro Carrión (2021), p. 232; see also Spanish Constitutional Court, judgment of 5 October 2000, STC 235/2000.

72 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment, and Insulation from Politicisation* by D. Sześciło in this volume; see also Polish Constitutional Tribunal, judgment of 28 April 1999, K 3/99.

73 See Article 33, para. 5 of the German Basic Law; Article 33 of the French Constitution, Articles 97 and 98 of the Italian Constitution and Article 103, para. 3 of the Spanish Constitution.

74 According to Article 1 of the Recommendation No. R (2000) 6 (n. 33), the legal framework and general principles concerning the status of public officials should be established by law or collective agreements and their implementation should be left to the government and/or other competent authorities or settled through collective agreements.

75 Pollitt and Bouckaert (2017), p. 37.

76 Shim (2001), pp. 323–347.

77 According to Article 3 of the Recommendation No. R (2000) 6 (n. 33), the categories and levels of public officials should be defined in the light of the function performed, to which a certain level of responsibility is attached; see also Council of Europe (1999), pp. 22–24.

rules for their discipline, their rights, provisions for training, mobility and transfers, and anti-corruption measures.[78]

Given this context, it is worth highlighting that systems governing public officials in Europe lie between two models that can be generally defined as career-based and employment systems. The former is the more traditional type of civil service, based on a specific and more protected public law status, usually characterised by unilateral appointment.[79] There are also special rules on career progress, remuneration, labour disputes, and dismissals. In the latter model, public officials are under a contract where conditions apply which are more or less similar to those of employees in the private sector.

The reason for this distinction is that the public salaried labour force in Europe was formed outside the rules of the labour market and was based primarily on the principle of greater employment security – considered as a protection against political pressure – and a remuneration system dependent on officials' statuses and qualifications, not on the wealth they generate or the work they accomplish.[80] Additionally, especially in continental Europe, the existence of a different employment regime for officials is related to the assumption that the State cannot enter into contracts regarding the exercise of public authority, while all public employees, considered a reincarnation of the State, collaborate in exercising this authority.[81]

The relative importance of career-based and employment models varies substantially from one State to another, and no country fully employs either organisational system in its pure form. Instead, they implement a wide range of mixed systems.[82] The choice of a particular model depends on each State's unique circumstances, including historical background and political factors.[83] It is also influenced by its territorial structure (unitary or federal), decentralisation processes, the national concept of the general interest, and its role in delivering public services.[84] Furthermore, no country is immune to processes introducing new, private sector-oriented methods, and statutory governance is often replaced with contractual or even managerial governance.[85]

IV. Civil Service: Employment in the Executive, Special Duties, and Regular Basis

1. Public Service and Civil Service

Building upon the analysis of international and constitutional law conducted in the previous sections, this part of the chapter aims to synthesise these findings and extrapolate key observations pertaining to the definition of civil service.

78 Choi and Whitford (2011), pp. 110–111.
79 Demmke and Moilanen (2010), pp. 51 f.
80 Weber (1971), p. 22; Denhardt and Denhardt (2015), pp. 3 f.
81 De Becker (2011), pp. 963–964.
82 Council of Europe, Report 9711 (n. 42), para. 20; see also ECtHR, *Humpert and Others v. Germany* (n. 19), para. 65.
83 Council of Europe (1999), p. 11.
84 Council of Europe, Report 9711 (n. 42), para. 21.
85 See paras. 3 and 4 of the Recommendation 1617(2003) of the Parliamentary Assembly of 8 September 2003, *Civil service reform in Europe*, https://pace.coe.int/en/files/17135/html; see also Demmke (2018), pp. 25–59.

It is worth remembering that the analysis of international norms has led to the conclusion that there are significant variations in the official translations of treaties, and depending on the version, a broad or narrow notion may be adopted. However, thanks to the methods of systemic and functional interpretation, international law protects various aspects of the right of equal access to employment in the public service. The latter has a broad meaning, including all persons – public officials – employed by the authorities (executive, legislative, and judicial) at both central and local levels. Furthermore, ECtHR and CJEU case law emphasises the existence of different categories of public officials, including civil servants, and specifies various characteristics of their employment relation (e.g. duties and responsibilities, stability of employment).

With regard to the common constitutional European framework, the regulation is usually twofold. On the one hand, there are guarantees for the citizens concerning equal access to all public posts (public service). On the other hand, there are provisions regarding the constitutional principles of civil service. The latter have a narrow scope and usually concern a specific group of employees who work for the government (executive power) and who have special tasks and responsibilities. Constitutional principles on the civil service are usually developed in ordinary legislation, which establishes categories of servants, implements specific employment models, and stipulates working conditions for all the categories.

Against this backdrop, the first terminological assumption is that there should be a distinction between public service and civil service. Public service is a broader concept, a type of professional activity related to exercising every public power (executive, legislative, and judicial). It, therefore, includes all employees of the public sector and all the State bureaucracy, regardless of the legal basis of their employment. This notion of public service corresponds to the broad scope of the right of equal access to employment in the public service, as guaranteed by international treaties and the constitutional norms of the European States considered here.

The second assertion in this chapter is that civil service constitutes a segment of the public workforce – a part of the public service – that includes officials employed by the executive power (government), who have special duties and responsibilities and should often meet specific requirements. Civil servants are employed on a regular basis, meaning that there is stability and permanence of employment. However, the employment model is not decisive for civil servant status.

The proposed framework is tailored for comparative analysis of civil service law in Europe and is aimed at determining the extent to which different concepts and ideas converge in the light of European integration processes. Consequently, the definition of civil service – based on comprehensive notions – enables us, on the one hand, to focus on a broad group of public employees who occupy critical positions in the political-administrative system. On the other, it allows the inclusion of different categories of public employees in various European legal systems.

2. *Employment in the Executive*

The first element defining the status of civil servants concerns employment in the executive (government administration). Members of other State branches – legislative and judicial – are not part of the civil service. Although representatives of the legislature and judiciary also play a crucial role in the political and legal system, these positions are part of the public service and are subject to different international and constitutional rules to officials working for the executive.

Equating employment in the executive and civil service, therefore, makes it possible to reduce the personal scope of comparative research in a rational way and focus on key persons holding public authority and directly involved in the implementation of legislation and policymaking. Furthermore, the concept of executive power should be understood broadly, and this notion is not limited to ministries.[86] Consequently, the term civil servant encompasses all persons employed in government (executive) administration. Officials of bodies (institutions) under the supervision of the government and persons working in independent regulatory authorities or sub-national bodies are therefore also included.[87]

Against this backdrop, it is worth looking at the various dimensions of government, as proposed in political and administrative sciences. The first one refers to the degree of vertical dispersion of authority, i.e. how far authority is shared between different levels of government. Some European States are centralised, with the most significant decisions concentrated at the top level, while others are more decentralised. Similarly, a split in public services between central government and subnational (regional, local) governments varies substantially across Europe. In some strongly decentralised States, most executive competencies are distributed to lower entities. Their personnel might hold a constitutional status, along with special duties and responsibilities, continuously delivering public services to various communities. Accordingly, the notion of civil service should encompass employment in regional and local governments.[88]

The second dimension concerns the degree of horizontal coordination at the central government level. Ranging from "highly coordinated" to "highly fragmented", the vertical dispersion of authority tends to be greatest in federal constitutions and more minimal in the constitutions of unitary and centralised States.[89] In this context, it might also be noted that common law systems use the term "arm's-length bodies". These are formally established organisations funded directly from the State budget to deliver a government service (e.g. non-ministerial departments, non-departmental public bodies, executive agencies, and other bodies, such as public corporations). Formally, the decision-making of arm's-length bodies is independent of the government (ministries), although the latter is ultimately responsible to the parliament for their effectiveness and sufficiency. In many countries, arm's-length bodies employ far more staff and spend much more money than the ministries themselves.[90] Consequently, all these categories of employees should be encompassed by the notion of civil service for the purposes of comparative research, even though the constitutional framework or ordinary legislation of some European States may exclude them from this group.

3. Special Duties and Responsibilities of Civil Servants

A substantial definition should incorporate specific common European attributes of the civil service systems. Certain features, especially duties and responsibilities pronounced in constitutional law and ordinary legislation, are therefore crucial for determining the notion of a civil servant. As the previous sections have shown, legal norms usually establish specific

86 de Vries (2016), pp. 17 f.
87 See ECtHR, *Demir and Baykara v. Turkey* (n. 20), para. 48.
88 Peters (2009), pp. 65–76.
89 Pollitt and Bouckaert (2017).
90 Pollitt and Bouckaert (2017), p. 2.

qualifications necessary to obtain a position in the civil service. Merit-based recruitment ensures that individuals appointed to public positions are selected based on their qualifications and abilities rather than personal connections or favours.[91] Once officials enter the civil service, they are obliged to meet the requisites of political neutrality and impartiality. Moreover, the status of a civil servant implies restrictions in the exercise of individual and collective rights (e.g. freedom of expression,[92] freedom of religion or belief,[93] right to strike,[94] right to collective bargaining).[95] These characteristics are emphasised in European case law as well. Both the ECtHR and CJEU underline the existence of special requirements, especially duties and responsibilities (loyalty, reserve, and discretion), aligned with the obligation of civil servants to safeguard the public interest.

Among the primary duties and responsibilities of the civil servants are loyalty, reserve, and discretion, as well as the requirement of political neutrality. These are fundamental principles which carry a significant weight in the relationship between civil servants and their employers.

The loyalty is based on the idea that a State must be able to trust its officials in safeguarding the constitutional and democratic order. This obligation has, therefore, a twofold character. The first aspect is the loyalty of civil servants to their superiors since hierarchical obedience plays an important role in the integrity and proper functioning of public administration.[96] The second aspect encompasses loyalty to the constitution and the rule of law, which is binding inside and outside the workplace. Consequently, civil servants are expected to demonstrate allegiance not only to the incumbent government and its policies but also to constitutional and other legal and ethical norms.[97]

The reserve and discretion expected from civil servants are linked to the fact that, as agents of the State, civil servants frequently have access to sensitive information that the government may need to keep confidential or secret for legitimate reasons. Thus, they should exercise caution and restraint in their public expressions and other behaviours, refraining from divulging confidential information acquired during their work.[98] Finally, one of the common European requirements is the political neutrality of civil servants.[99] This is closely related to the preservation of public trust in government institutions, since citizens are entitled to expect that, in their own dealings with the government, they will be advised by "politically neutral officers who are detached from the political fray".[100] Consequently, the requirement of political neutrality implies various duties and responsibilities. Civil servants should refrain from behaviours that may undermine their work's professionalism, impartiality, and effectiveness. There is no doubt that the decision-making process in public administration should be based on expertise and objective criteria rather

91 See para. 4 of Recommendation No. R (2000) 6 (n. 33).

92 See *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

93 See *Freedom of Religion or Belief in the Civil Service: How to Stay Loyal to the State While Remaining True to Oneself?* by W. Brzozowski in this volume.

94 See *The Right to Strike in the Civil Service* by G. Buchholtz in this volume.

95 See *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

96 ECtHR, *Catalan v. Romania* (n. 32), para. 54.

97 ECtHR, *Vogt v. Germany* (n. 18), para. 59.

98 ECtHR (GC), judgment of 12 February 2008, *Guja v. Moldova*, 14277/04, para. 71.

99 Cf. Peters (2018), pp. 13–14. However, it should be mentioned that some positions in the civil service (e.g. ministers' political advisers) may imply a certain level of political involvement.

100 ECtHR, *Ahmed and Others v. the United Kingdom* (n. 29), para. 53.

than political affiliations or personal opinions. Furthermore, any exercise of individual rights by civil servants which is deemed to be political in nature or that seeks to promote a specific political agenda should be avoided.

4. Not the Employment Model but a Regular Basis

As far as the employment model is concerned, one of the conclusions of the previous sections of this chapter is that ordinary civil service legislation developing a constitutional framework opts for a specific regime and often creates various categories of servants who have different legal status. Traditionally, norms concerning public employment have been distinct from the private sector since working for the executive implies less flexibility in determining terms and conditions of employment. However, the degree of unilaterality is different across Europe, as some countries allow a wide margin of collective bargaining (e.g. Denmark),[101] while others shift towards a more contractual employment model (e.g. the Netherlands),[102] which overlaps with already mentioned privatisation processes in the public administration. Consequently, the boundary between statutory civil servants and public employment in private law terms varies from one country to another. In some States, the group of civil servants employed on a public law basis can represent up to 90% of the entire public workforce, whereas in other countries, it barely reaches 15%.[103] In other words, in some jurisdictions, statutory civil service includes nearly all of a State's civilian employees, and, in others, it concerns only higher-level positions in the central government departments.[104]

One of the most visible consequences of the different legal regimes is the way of establishing the employment relationship. In the case of an official employed under public law, the most common characteristic is unilateral appointment (nomination). In some legislations, it may have strong public-law-related connotations.[105] In principle, there is no room for individual negotiation, and primarily the parliament is entrusted with the responsibility for fixing or modifying civil servants' employment conditions. It also places the civil servant in hierarchical subordination in return for certain statutory guarantees and obligations.[106]

Since the employment model may be a source of substantial differences as far as the scope of individual and collective rights of officials are concerned, there is an ongoing discussion about whether it is necessary to grant civil servants a special public law status and whether to include in the scope of civil service legislation persons who are performing public tasks of comparable responsibility outside of public administration. Strongly protected public status and differentiation of rights could be partially inadequate in the context of the changing public administration, working culture, and privatisation processes. On the other hand, more flexible and contractual arrangements in public administration could erode the traditional values associated with the civil service.

101 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume.

102 See *The Civil Service in The Netherlands: Normalisation of the Legal Status* by A. De Becker in this volume.

103 Hugrée et al. (2015), p. 52.

104 Massey (2011), p. 4.

105 De Becker (2011), pp. 954–956. It does not apply, however, to the United Kingdom, where the appointment is not regarded as a means to draw a formal distinction between the public and private sector.

106 Badré and Verdier Naves (2017), p. 14.

Nonetheless, since this chapter aims to define the notion of the civil service to create an adequate framework for a comparative study of civil service systems, the preceding discussion is irrelevant within the current context. In this regard, it should be emphasised that the employment model itself cannot be decisive for the status of a civil servant in the light of the proposed definition. A government official – with special duties and responsibilities – can be employed under public or private (labour) law. Accordingly, instead of focusing on the legal regime (employment model), the last constitutive element of the definition of civil service should be employment on a regular basis. The exercise of duties in the civil service must be permanent, ensuring a certain level of stability of employment. This enables us to leave employees who exercise specific executive functions *ad hoc* beyond the scope of consideration.

Since all organised rule demands continuous administration, stability of employment is an important aspect of governance.[107] Consequently, the continuity of service, being a constitutional value in some European States, contributes to the efficiency of the government and enables officials to act effectively in the shifting political context. A mere change in political leadership resulting from democratic processes should not be sufficient grounds for a complete reshuffling of managerial positions within the civil service.

V. Conclusion

The aim of this chapter was to create an analytical framework suitable for a comparative study which explains the impact of European law on civil service systems and demonstrates how the employment of government officials has changed in recent decades.

The proposed framework advocates for distinguishing between public service and the civil service, acknowledging the broader scope of the former that encompasses all public officials. Accordingly, public service concerns a type of professional activity related to the exercise of all public power (executive, legislative, and judicial), and it coincides with the broad notion of the right of equal access to employment in the public service, protected at international and constitutional levels.

Regarding the civil service, central to its definition is the association with employment within the executive, covering individuals employed in various governmental bodies and extending to regional and local government levels. The multidimensional nature of government structures across Europe, with varying levels of vertical and horizontal coordination, further emphasises the inclusivity of the civil service definition. Another key aspect defining the civil service revolves around the specific duties and responsibilities of the officials. These encompass merit-based recruitment, political neutrality, discretion, loyalty to both superiors and constitutional norms, and a commitment to maintaining public trust in government institutions.

The employment model, while significant, cannot be decisive in determining the status of civil servants within the proposed framework. Instead, the emphasis lies on continuous employment, providing stability crucial for effective governance and efficiency in navigating changing political landscapes. Of course, national authorities enjoy discretion concerning the legal definition of the civil service for internal purposes, since the body of public employees is as diverse as the administrative tasks of a modern democratic State. That is why national laws often reduce the personal scope of the civil service or create different

107 Cf. Weber (1994), p. 313.

subcategories of servants who are categorised with different terms. However, this does not change the definition of the civil service proposed here for comparative research purposes.

Bibliography

Aubin E. (2019), 'Le contrat, avenir de la fonction publique?', 40 *L'Actualité Juridique. Droit Administratif*, 23–49.

Badré M., Verdier Naves N. (2017), 'L'évolution de la fonction publique et des principes qui la régissent', *Avis du Conseil économique, social et environnemental, Journal Officiel de la République Française, Mandature 2015–2020*, www.lecese.fr/sites/default/files/pdf/Avis/2017/2017_03_evolution_fonction_publique.pdf.

Benz A. (2015), 'European Public Administration as a Multilevel Administration: A Conceptual Framework', in Bauer M.W., Trondal J. (eds), *The Palgrave Handbook of the European Administrative System*, London: Palgrave Macmillan, 31–46.

Bianchi A., Peat D., Windsor M. (2015), *Interpretation in International Law*, Oxford: Oxford University Press.

Boto Álvarez A. (2020), 'La metamorfosis de la función pública francesa: laboralización y flexibilidad', 53 *Revista General de Derecho Administrativo*.

Chiti E. (2021), 'Negotiating Language Barriers', in Cane P., Hofmann H.C.H., Ip E.C., Lindseth P.L. (eds), *The Oxford Handbook of Comparative Administrative Law*, Oxford: Oxford University Press, 153–174.

Choi S., Whitford A. (2011), 'A Topography of Civil Service Laws', 14(1) *International Public Management Journal*, 106–130.

Council of Europe (1999), *The Status of Public Officials in Europe*, Strasbourg: Council of Europe Publishing.

D'Alberti M. (2021), 'Units and Methods of Comparison', in Cane P., Hofmann H.C.H., Ip E.C., Lindseth P.L. (eds), *The Oxford Handbook of Comparative Administrative Law*, Oxford: Oxford University Press, 119–136.

Dannemann G. (2019), 'Comparative Law: Study of Similarities or Differences?', in Reimann M., Zimmermann R. (eds), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 390–422.

De Becker A. (2011), 'The Legal Status of Public Employees or Public Servants: Comparing the Regulatory Frameworks in the United Kingdom, France, Belgium, and the Netherlands', 32(4) *Comparative Labor Law & Policy Journal*, 949–989.

de Vries M.S. (2016), *Understanding Public Administration*, Cham: Palgrave Macmillan.

Demmke C. (2018), 'The Future of the Civil Service: Blurring of Boundaries, or the Return of *Leviathan*?', in Itrich-Drabarek J., Mazur S., Wiśniewska-Grzelak J. (eds), *The Transformations of the Civil Service in Poland in Comparison with International Experience*, Berlin: Peter Lang, 25–59.

Demmke C., Moilanen T. (2010), *Civil Services in the EU of 27. Reform Outcomes and the Future of the Civil Service*, Frankfurt am Main, Berlin, Bern-Bruxelles, New York, Oxford, Wien: Peter Lang.

Denhardt J.V., Denhardt R.B. (2015), *The New Public Service: Serving, Not Steering*, 4th edition, London, New York: Routledge.

Duro Carrión S. (2021), 'Los valores y principios constitucionales como límites de la actuación de los poderes del Estado y la función pública', 111 *Revista de Derecho Político*, 225–254.

Fernández Delpuech L. (2015), *Una reconstrucción de los principios de mérito y capacidad en el acceso al empleo público*, Madrid: Agencia Estatal Boletín Oficial del Estado.

Gottschall K., Kittel B., Briken K., Heuer J.-O., Hils S., Streb S., Tepe M. (2015), *Public Sector Employment Regimes. Transformations of the State as an Employer*, Cham: Palgrave Macmillan.

Hugrée C., Penissat E., Spire A. (2015), 'Les différences entre salariés du public et du privé après le tournant managérial des États en Europe', 56(1) *Revue française de sociologie*, 47–73.

Knill C. (2001), *The Europeanisation of National Administrations. Patterns of Institutional Change and Persistence*, Cambridge: Cambridge University Press.

Leloup M. (2022), 'Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR', 4(1) *European Convention on Human Rights Law Review*, 23–57.

Linderfalk U. (2007), *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Dordrecht: Springer.
Marique Y., Slautsky E. (2021), 'Resistance to Transplants in the European Administrative Space: An Open-Ended Reading of Legal Changes', 14(1) *Review of European Administrative Law*, 7–36.
Massey A. (2011), 'Civil Service Systems: Introduction and Scope of the Book', in Massey A. (ed), *International Handbook on Civil Service Systems*, Cheltenham, Northampton: Edward Elgar, 3–12.
Ongaro E., van Thiel S. (2018), 'Introduction', in Ongaro E., van Thiel S. (eds), *The Palgrave Handbook of Public Administration and Management in Europe*, London: Palgrave Macmillan, 3–10.
Overeem P., Sager F. (2015), 'Conclusions: Common Ground for a Common Future?', in Sager F., Overeem P. (eds), *The European Public Servant: A Shared Administrative Identity?*, Colchester: ECPR Press, 295–302.
Owen B. (2000), 'France', in Chandler J.A. (ed), *Comparative Public Administration*, London, New York: Routledge, 50–74.
Peters B.G. (2009), 'Regional Government and Public Employment', in Derlien H.-U., Peters B.G. (eds), *State at Work, Volume 2. Comparative Public Service Systems*, Cheltenham, Northampton: Edward Elgar.
Peters B.G. (2018), 'The Civil Service and Political Influence: Balancing Neutral and Responsive Competence', in Itrich-Drabarek J., Mazur S., Wiśniewska-Grzelak J. (eds), *The Transformations of the Civil Service in Poland in Comparison with International Experience*, Berlin: Peter Lang, 13–24.
Pollitt C., Bouckaert G. (2017), *Public Management Reform: A Comparative Analysis – Into the Age of Austerity*, 4th edition, Oxford: Oxford University Press.
Prieto-Ramos F. (2017), Global Law as Translated Text: Mapping Institutional Legal Translation, 22(1–2) *Tilburg Law Review*, 185–214.
Reichard C., Schröter E. (2021), 'Civil Service and Public Employment', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany*, Cham: Palgrave Macmillan, 205–223.
Ruffert M. (2021), 'National Executives and Bureaucracies', in Cane P., Hofmann H.C.H., Ip E.C., Lindseth P.L. (eds), *The Oxford Handbook of Comparative Administrative Law*, Oxford: Oxford University Press, 504–525.
Shim D.-S. (2001), 'Recent Human Resources Developments in OECD Member Countries', 30(3) *Public Personnel Management*, 323–348.
Sommermann K.-P. (2021), 'Constitutional State and Public Administration', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany*, Cham: Palgrave Macmillan, 17–33.
Stelkens U., Andrijauskaitė A., Marique Y. (2020), 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration – Overall Assessment', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness*, Oxford: Oxford University Press, 757–822.
Taillefait A. (2012), 'Constitution et fonction publique', 37(4) *Les Nouveaux Cahiers du Conseil Constitutionnel*, 49–64.
Taylor P.M. (2020), *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge: Cambridge University Press.
Timmins G. (2000), 'Germany', in Chandler J.A. (ed), *Comparative Public Administration*, London, New York: Routledge, 75–97.
UN Committee on Human Rights (1996), *General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service*, www.osce.org/files/f/documents/4/a/19154.pdf.
Weber M. (1971), *Gesammelte Politische Schriften*, Tübingen: Mohr Siebeck.
Weber M. (1994), 'The Profession and Vocation of Politics', in Lassman P. (ed), Speirs R. (trans), *Weber: Political Writings. Cambridge Texts in the History of Political Thought*, Cambridge: Cambridge University Press, 309–369.

2 Governing and Administering

The European Origins and Traditions of the Civil Service

Stefan Fisch

I. Introduction

Ethnology is useful in the study of the elementary tasks of humans living together and their distribution of work. Some field observations of a Swiss missionary in Africa and Asia found their way into a review on contemporary public administration: Bischofberger studied three small indigenous communities (tribes) with non-monarchical governance in Africa and Asia. They all had a group of elders with decisive authority, be it for solving disputes, guiding work in the common interest, or initiating young men into the rules of community life. Guarding against enemies and fire watch were the tasks of some groups, while clearing paths and cleaning wells were those of others. In one case, a special group of adult men had police functions and controlled the work of the different age groups.[1]

From a public administration perspective, we see some people governing, others executing orders, and both tasks are done in groups. A small oligarchy is at the top, and birth cohorts have to fulfil its orders. This mechanism gives everyone in the groups an equal burden and forms the whole in random structures defined by age only. The older leading oligarchs have time for discussion and decisions; in Max Weber's perspective they are available (*abkömmlich*) because they are no longer fully engaged in day-to-day duties.[2] Those doing the real work, perhaps grudgingly, cannot easily become an active critical mass against them since their groups, defined by age only, cannot rely much on strong family bonds or neighbourhood solidarity. As late as the 1950s and 1960s, we observe societies with very basic government and administrative functions in a "constitutional" framework, which is non-monarchical, and based on the whole community (except for women and non-adults).

Conceptions of the interplay between governing and administering emerged with deeper reflection on public administrations in 19th-century societies. In Germany, Barthold Georg Niebuhr (1776–1831), an eminent scholar of ancient history and oriental languages, noted in 1815 that "liberty depends incomparably more upon administration than upon constitution" (*dass Freiheit ungleich mehr auf der Verwaltung als auf der Verfassung beruhe*). For him, the first ever comprehensive work on the functioning of English institutions, especially *local government* (*Selbstverwaltung*), was written by the leading Prussian administrator Ludwig Freiherr von Vincke (1774–1844), a close friend, during his exile in London after 1806. His intimate knowledge of both systems can be viewed as adopting a very

1 Bischofberger (1971). His Swiss background of strong decentralised structures and intense citizen participation gave him a wide perspective.

2 Weber (1922/80), p. 486 in the chapter on the sociology of domination.

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early comparative approach to the functions of local government versus *Selbstverwaltung*.[3] Lorenz von Stein (1815–1890), a German revolutionary of 1848, dismissed from Kiel University in 1852 and subsequently an Austrian professor in Vienna from 1855, developed (in a terminology rather difficult to understand) his central idea that administration is the abstract State if seen "at work" (*der arbeitende Staat*). In 1865, Stein saw the administration as "the whole of the active life of the State" (*Gesammtheit des thätigen Staatslebens*) in contrast to the pure will formulated by the abstract State. This will has to be applied in reality, under the most varied circumstances of place and time (described in Stein's books), hence the administration understands the law in a broader sense than the legislators did. In this same direction, the liberal Swiss-German Johann Caspar Bluntschli (1808–1881) also stressed that administration is more than just execution and may also include original reflection and decision by administrators.[4] Incidentally, in his seminal article "Study of Administration" of 1887, Woodrow Wilson appreciated this discussion "in a foreign science" and "in foreign languages only" and brought it from Europe to the United States.[5]

II. Oligarchical or Monarchical Structures as "Constitutional" Basis

European administrations mostly developed in monarchical contexts, far less in oligarchical ones. The earliest administrative structures were those invented by the (Catholic) church for keeping its communities together. Soon the local election of leaders (bishops) by the whole community became a more centralised nomination, first by metropolitans (archbishops) within their regions; later this was monopolised by the pope. Like the pope in the church as a whole, subordinate bishops were free to lead their dioceses, and in that respect their position was similar to that of an absolutist monarch. The territories of new dioceses often coincided with the areas of former provinces of the Roman Empire and their administrative centres became cathedral cities. The growing hierarchy of pope, bishops and priests, ordained for life, was enacted by a sacrament to the holy orders. Under the regulations of canon law, they alone had the privilege of administering the sacraments. This led to an early and very strict division between the few ordained for life and the many ordinary laypeople.[6] In this fixed hierarchy, a new temporary office arose as early as the 13th century: that of the official or ecclesiastical judge, commissioned by the bishop for his diocese. The official was a priest selected by the bishop on the basis of additional professional skills acquired by study of the law, and was bound by a personal oath to his superior. Oath and office came to an end with the death of the bishop, and the bishop could also unilaterally terminate the relationship at any time.[7]

In European monarchies, similar offices with administrative tasks likewise developed from the centre, at first from positions in the prince's household. This was marked in France by the difference between *le palais* as household proper and *la cour* as a wider circle of leading men counselling the king. Originally a chamberlain cared for the monarch's dwelling, and this denomination switched to the person responsible for revenue

3 Niebuhr (1842), p. 462, followed by texts explaining his statement.

4 Bluntschli (1876), p. 476.

5 Wilson (1887), pp. 202 and 210–212; Rosser (2010).

6 For the Anglican world since 1549, see *The Book of the Common Prayer and Administration of the Sacraments and other rites and ceremonies of the Church after the custom of the Church of England*.

7 Reinhard (1983); Wolter (1997), pp. 30–36 referring to Weber (1922/80), p. 480; for France, see Allorant and Tanchoux (2019), pp. 67, 77, and 107.

and expenditures who became known as *Grand Chambrier* (France) or *Camerlengo* (papal administration) or *Kämmerer* (German-speaking States). Likewise, the chancellor supervising the chancery, first in its technical production of written documents, gained importance when he became keeper of the seal (an outstanding symbol for the monarch's decisions in written communication) and eventually made him an important counsellor of the monarch, if not his substitute. In England the Lord Chancellor is in charge of justice, and in France the title *Garde des Sceaux* is still linked to minister of justice. In contrast to France,[8] in the Holy Roman Empire there were three *Reichserzkanzler* (for Germany, Italy, and Burgundy) with separate large administrations; they even substituted the Emperor in times of *interregnum*. At least in the 19th and 20th centuries, the heads of the government and administration were called *Staatskanzler*, *Reichskanzler*, and *Bundeskanzler* in Germany and Austria. The servant responsible for the monarch's horses became the highest-ranking officer in the army, like the Field Marshal or *Maréchal de France*. Napoleon established a second *Grand Maréchal du Palais* responsible for the security and functioning of his household of more than 2,000 persons. In the Netherlands, a corresponding gendarmerie, the *Koninklijke Marechaussee*, has survived since Napoleon's day and is now active as bodyguards for representatives of the State and for border control.[9]

Originally, all these positions were occupied by persons near the monarch and his family. He knew them well and bound them to him by the close natural relation of kinship and/or by firm trust arising out of personal experience of their loyalty, backed by mutual feudal oaths and promises. This was a relatively stable band until the monarch dissolved it or died.

This logic of personal connections to the monarch, based on mutual trust between two persons, was very different from the logic prevailing under oligarchical structures with multi-personal relations. These systems are not so common in our European perception as the monarchical ones, although in most countries they were relevant at least in the sphere of local government with considerable discretionary power.[10] They were based not so much on a local quasi-monarch, but on a group of men of some standing who were more influential than others. Other examples of groups organising in participative forms were masters and students in universities and the craft guilds in towns.[11] There were also similar oligarchical structures in greater territories following the old European tradition of republics, derived from ancient Athens and the ancient Roman Republic.[12] In the medieval and early modern period, the *Serenissima Repubblica di San Marco* in Venice is the best-known case, and the younger Polish-Lithuanian Commonwealth (a republic of magnates and nobles) like *Rzeczpospolita Korony Polskiej i Wielkiego Księstwa Litewskiego* since 1569 and the Dutch *Republiek der Zeven Verenigde Nederlanden* fighting against domination by the Spanish monarchy since 1588. In the medieval Holy Roman Empire quasi-independent city-States developed, like Hamburg, Bremen, Frankfurt, Straßburg, and Nürnberg, called *Reichsstädte* as they were under no authority but that of the Emperor and the Empire. Up

8 Stein (2001).

9 See the corresponding articles in Lexikon des Mittelalters, 10 volumes (1980–1999), Cabourdin and Viard (1981) and Babot et al. (2007), pp. 222–225 (on *Grands officiers de la couronne*).

10 Page (1991), pp. 20–22.

11 Fisch (2015), pp. 13–15; Kieser (1989).

12 See Reinhard (1999), pp. 235–259 on local communities and republics; for an early overview in a Western European perspective, unfortunately without Poland-Lithuania, see Gamboni and Germann (1991).

to 1648, even Basel, Bern, and Geneva formally still held that status, but they were already full members in the old Swiss Confederacy (*Eidgenossenschaft*) and tried to become fully emancipated from the Empire.

Oligarchical structures among free yeoman communities were a special case. In the small *Repubblica di San Marino,* inland from Rimini, the heads of family met regularly in assembly (*arengo*) to decide essential questions according to a tradition dating back to medieval times. In the 13th century, they began to transfer day-to-day decisions to a council (*gran consiglio*) elected by the people and to elect two (!) *reggenti* as leaders of the republic, the *capitano* (leader) and the *difensore* (protector) controlling each other. With the first written statutes of 1600, the functions of the *arengo* were undermined in favour of a *consiglio principe e sovrano* of 60 who were no longer elected but co-opted. This narrowed oligarchical institution claimed to be the new sovereign and made the *arengo* redundant. Since then, every six months, this council determined the two *reggenti* by a mix of electing and drawing lots from its members. In the 19th century, emerging political parties demanded more democracy, and in 1906 by decision of the first *arengo* to have been held after a very long interruption this council became a universally elected body along modern democratic lines.[13]

After 1800, eight smaller, more rural Swiss cantons had still systems similar to an *arengo* called *Landsgemeinde* (assembly of those in the land) which also had developed to more restricted clan oligarchies. After the French Revolution they were modernised to allow more equality in participation. Today only two of them, Glarus and Appenzell-Innerrhoden, keep that institution and have opened it also to women. Once a year the peoples of the cantons meet to act as legislators and to elect the executive, both still in open (i.e. not secret) votes. Though Switzerland signed a relevant additional European declaration on citizenship rights of 1952 in 1976, it did not ratify it, since the European idea of free and secret vote does not fit all the Swiss usages on cantonal and local levels.[14] The common institutional design of these communities shows less personal trust than in monarchies and more control functions: double positions at the top in San Marino and annual deciding meetings of the people, as in the Swiss *Landsgemeinde* cantons, facilitate mutual control in the interest of all.

Oligarchical is used here descriptively, to indicate a small leading group. In Venice it even shrank to a more clearly defined and therefore static aristocracy by birth. A lock-out of newcomers in 1297 was followed by the establishment in 1315 of a "Golden Book", a register of all recognised male births in those now "noble" families. However, at one point during the financial crisis of 1646, anyone paying 100,000 ducats could be registered as a new nobleman: a special kind of State corruption. The power structure of the Venetian Republic was based on this hereditary oligarchy. Up to 2,500 adult men over 25 were life members of the *maggior consiglio.* In 1423, it took over the last functions of the former *concio* of nobles and ordinary citizens, similar to the *arengo* in San Marino. Up to a third of Venetian noblemen sat in the great council every Sunday and elected from among their ranks the holders of many governing functions in Venice, always on short terms. Only one person, the *doge* (from Latin *dux*), was elected for life, but he held a representative function without real power and was heavily controlled by the other nobles. In fact, decisions

13 Gorgolini and Pivato (2022), pp. 37–40 and 98–116.

14 Auer (2016), pp. 382–384; he sees it as no more than an institutional curiosity now.

were made in an "inner circle" of the doge with six councillors (originally for the six "quarters" of Venice) and three leaders from the tribunal of 40; they formed the dominant institution of the *signoria*. When the *signoria* met with the *collegio dei savi,* a group of 16 further noble officeholders with specific tasks, they formed the *gran collegio*. They met regularly with at least 120 further officeholders like ambassadors or leaders of special offices (the fleet, lagoon management, outlying dominions, etc.), all noblemen, in a *senato*. Political decision-making was continuously rearranged within the nobility and produced a constantly changing Venetian *mosaico* of persons in power. This complex organisation was supervised independently by three *avogadori de comùn* (attorneys) who defended the interests of the whole community of noblemen against those in power.[15] However, these institutional rules and many more laws and decrees about secrecy issues remained largely ineffective due to the informal exchange of information amongst the nobles (*broglio*), especially when they met within their palaces (*ridotto*).[16]

The "constitutional" prescriptions for elections in Venice were studied as exemplary texts throughout Europe, as they mixed the Aristotelian forms of the constitution with the procedures of election by drawing lots.[17] This ballotage had the reduced function of keeping corruption out of the election, but it was not the whole mechanism of decision-making. Lots were important during the constitution of the different commissions which had real elective powers, be it to decide the next commission for a minor post or forming the last group of 41 noblemen who had to elect the doge with a majority of at least 25 in a discussion conclave lasting up to 30 days and nights.[18] The ballotage was not done with balls but with pieces of fabric which fell in silence: secrecy was important for these votes and even more for the discussions which were hidden from European commentators of the system. No other place had the Venetian rule that one could not only vote for one candidate but also against him, which might result in a negative balance of votes, thus disqualifying the candidate.[19]

Since there was a very high quorum at all stages of the election processes, the basic virtue of civic life in city-States (here restricted to the nobility) was still secured, namely to live together in harmonious concordance striving for the common good. Even Gasparo Contarini (1483–1542), the classic author, still described these noblemen as *cives*, citizens, although they were a minority of the city population. They upheld the community ideal of equality amongst them and prevented attempts to establish a monarchy by the permanent precedence of a certain family. Knowing their own innermost temptations, they kept an eye on each other in that respect. So, the ideal of harmonious concordance in the (noble) city ran parallel with hidden distrust among its (noble) citizens.

15 Lane (1973), in detail Heller (1999).

16 See an instructive scheme on how and when the reports of a Venetian diplomat became known among the nobility, De Vivo (2009), p. 66.

17 For a discussion, see Contarini (1543/2019) and Fröhlich (2010); with many comparative perspectives (corruption, efficiency, slowness) Weeber (2016).

18 For a comparison to ancient Athens, see Sintomer (2011), pp. 39–79; in detail Ravegnani (2014), pp. 53–65; Lane (1973), pp. 250–273; for graphic schemes Reinhard (1999), pp. 248–251 and Heller (1999), p. 82.

19 On the basis of the probability of preventing the election of a certain person, one can see a specific protection of minorities as a presumably unintentional result, see Mowbray and Gollmann (2007).

III. Layers of Administration in Oligarchical Structures

Political equality was based on birth into these oligarchical structures. However, for the organisation of society, special skills and knowledge were always necessary, and later also premises for permanent work. The oldest illustrations of European administrators at work are painted wooden book covers for six-monthly reports, the so-called *biccherne*, registers of the income and expenditure of the Italian city-State of Siena. The oldest, number 1, dated 1258, shows the accounting officer (*camarlingo*), a Cistercian monk called Ugo, checking written reports. Number 2 of 1264 shows a nobleman from the Pagliarese family holding the same office, with an open accounting book, a purse, and some coins on his table. In contrast, number 3 of 1267 shows another member of the same family in the role of one of the four supervisors (*provedittori*), distinguished by their coats of arms. This person later changed sides and number 4 of 1270 shows him in the role of accounting officer, a position he had formerly supervised. One may doubt the effectiveness of these very early forms of anti-corruption. After 1276, monks regularly acted as financial managers of the city, possibly parallel to a disempowerment of the former noble elite by the parallel rise of a new merchant elite. Beginning in 1353, the monks were aided by a scribe: the administrative apparatus had begun to grow.[20] Through their vows, monks were sworn to poverty and celibacy and were obliged to maintain a distance from family interests. Their (supposed) disinterest, the short terms of their office, and their institutionalised control by several noblemen were typical of the Siena administration under its oligarchical constitution.

In Venice, the classical view of constitutional issues within the ruling oligarchy of noblemen kept hidden the important administrative apparatus on which it depended. The great chancellor (*cancelièr grande*) was its head.[21] Dealing with State papers and interrogating prisoners of the State, he personally kept the most important administrative and judicial secrets and organised the State archives. His position was reserved for *cittadini* from families outside the nobility who had lived in the city for generations. So the great chancellor, second in rank to the doge and his councillors only, could attend any committee meeting in Venice, up to the ruling *signoria*, and know about all the affairs, but he could never vote as he was not a nobleman. He held his well-paid office for life and there were considerably fewer chancellors than doges in Venice. While the doges' portrait gallery is in the prestigious hall of the *maggior consiglio*, portraits of the chancellors are at their place of work in the ducal palace, in the rather austere room of the State tribunal (*consiglio dei dieci*) near the State prisons and torture chamber, as well as the archives.

Up to 30 secretaries under the great chancellor were recruited based on a school exam. Permanently employed, rotating in allocation, and well paid (better off than many impoverished noblemen), they could gain in-depth knowledge of procedures and precedents in the senate and committees, whereas the elected noble decision-makers changed continuously after short terms. The families of professionals (*dinastie di mestiere*) arose, and these administrators formed a kind of *sottogoverno* (sub-government). The leading nobility knew very well the importance of these administrators and was generous with them when they asked for financial help in the plague years or in difficult family situations.[22] Governing and administering were closely interwoven.

20 The Italian State Archive of Siena provides a virtual museum of over 100 *biccherne*, see www.archiviodistato.siena.it/museobiccherne/it/165/biccherne-1-10.

21 Heller (1999), pp. 205–209.

22 Based on archival sources with detailed cases, see Galtarossa (2021).

Compared to Siena, the Swiss city-State of Berne had a much bigger surrounding territory; by about 1500, it was the largest Swiss canton and the biggest city-State north of the Alps, similar to smaller monarchies elsewhere. In this noble oligarchy, there was no plenary assembly at all. The grand council of 200 was elected indirectly by about 500 adult men from the nobility and had to elect a small governing council of 24. A non-crowned *Schultheiss* presided over both councils from a throne emblazoned with the Berne coat of arms. In the 17th century, this oligarchy-in-an-oligarchy declared itself sovereign by the grace of God – similar to monarchies. Sons of members of the small governing council (*Kleiner Rat*) were even allowed to participate at meetings in order to prepare the next generation for their duties. Since the 16th century there was a kind of outside training institute or *Äusserer Stand* (in opposition to the real inner-government or *Innerer Stand*) in the form of a shadow government of Berne. Not only sons of the oligarchy but even sons of normal citizens could virtually "play" for different offices in the city-State and had powers of decision, but also faced real penalties for misconduct. In 1730, they even built their own "town hall".[23] This remarkable first training institute for civil servants in Europe was dissolved in 1798 with the end of the old Swiss Confederacy under Napoleon.

As in Siena and Venice, Berne noblemen could not become servants (*Zudienende*); such received a precise commission, had to take an oath, were paid, and had to be qualified for their subordinate offices. Already in about 1500, the Berne chancery operated professionally with written documents in its own building near the Town Hall. This was necessary, as the city won more and more surrounding land that needed supervision. It was split into smaller entities under a deputy (*Vogt*) from the noble oligarchy of Berne, who had to account for his actions annually. However, the obligation to change office after three years does not seem to have been respected. This office was unpaid, but it was possible to generate income by acting as a judge. These members of the governing oligarchy had a high degree of independence in the periphery; but about their permanent administrative personnel not much is known.[24]

Until 1795, the Polish-Lithuanian Commonwealth was by far the biggest oligarchic republic in Europe, described as a republic of nobles (*szlachta*, up to 10% of the population), although it was dominated by a small aristocratic oligarchy of very rich magnates. Nobility was not defined by birth but by a family tradition which was relatively open to wide connubium and co-optation. The leading oligarchy held the central positions in court and administration. Much less is known about the administrative personnel working under them, because in current Polish terminology magnates and administrators are grouped together as *urzędnicy* (officials or civil servants).[25] In the three partitions of the Polish-Lithuanian Commonwealth between 1772 and 1795, Prussia tried to change these structures and build new ones; it was a testing ground for the modernisation of their own system. The Polish nobles were forced to swear an oath of allegiance, their political meetings as *sejm* and their private armies were prohibited, and they were excluded from their traditional access to high offices in the new Prussian provinces unless they had studied cameralism at a university and spoke very good German. They became the most important adversaries of the new Prussian administration.[26]

23 For short historical remarks, see Wyss (1974).

24 Studer Immenhauser (2006).

25 See Bömelburg (2013), pp. 195–197 with note 2.

26 For the Prussians, the former administrative structures were full of noblemen, whereas cities had no major rights, see Bussenius (1960), pp. 24–33; mainly based on Polish research, Drozdowski (1991) does not mention non-noble Polish officeholders, probably because there were none.

In general, governing was reserved for constantly changing, unpaid members of small oligarchies (not without chances to profit from the position held), whereas administration was stable, rather well paid and based on a certain professionality.

IV. Layers of Administration in Monarchical Systems

With the widening of their responsibilities, administrative support was needed by the holders of central crown offices in most European monarchies. For these assistants, one can observe a different pattern of recruitment. The leading persons were still closely linked to the monarch and his immediate family, whereas their subordinate personnel came from other, more distant social spheres. More than for their loyalty, they were selected for the requirements of their work, for example, for literacy, knowledge of Latin or relevant foreign languages, or expertise in law. Knowledge and skills were, therefore, the basis of the first merit-based orientation with the growth of administrative work, as it had begun with the monks in Siena.

An important practice of European monarchs was to sell offices in their service. This practice may seem strange to contemporary readers, especially if the buyer also owned the right to transfer the office to other persons and even to bequest it to the next generation, beginning in medieval France. French kings then ruled a rather small territory, and they could bypass financial problems by requesting relatively large sums. *Vénalité des offices* meant that they sold the chance to use the office as patrimony, be it by extracting as much income as possible from it or by transferring it to third persons, again for large sums. The real work was done by a deputy, as was customary in the church when an ordained priest holding a benefice had control of its income and only had a low-paid vicar as deputy.

As their territory widened, French monarchs faced the growing problem that personal trust was lost by these practices. They also developed a double hierarchy in the provinces. *Officiers* were holders of important offices, which could be hereditary, and they were often venal and irremovable, thereby evading the monarch's influence. The innovative solution to this problem was the commissioner (*commissaire*), who held a temporary and revocable position described in detail in a letter of commission; he could even appoint sub-commissioners and thus establish his own staff. The best-known royal controller was the *intendant* in the provinces. From the end of the 16th century, new governors in the provinces were no longer appointed without parallel appointment of corresponding royal commissioners into their councils. These *intendants* were an elite distinguished by their knowledge and experience, and soon they formed a new type of nobility (*nobilité de plume*). They often came from the first professional *grands corps* of civil servants, such as *maîtres de requêtes de l'hôtel du Roi*, who received complaints from the monarch's subjects at the doors of his Paris palace. Other old *corps* were those of technicians in fortifications (*ingénieurs du Roi*) or street and waterway maintenance (*eaux et chaussées*). The latter group was the first to be recruited by the typical French *concours* for entrance to their specific *grande école*. In the central political administration of the four secretaries of State, there were about 500 persons in a hierarchy, with *premiers commis,* a kind of directors, and *commis*. The *grands corps* showed a certain ambivalence between loyalty to the monarch and group solidarity. Unlike those at the top near the monarch, they were the ones who stayed even after the turmoil of the revolution.[27]

27 On *agents de la monarchie* see Bély (2006), pp. 38–40, and for various positions of *intendants,* pp. 667–675.

This pattern of absolutist domination was further centralised by Napoleon and became a kind of blueprint for post-Napoleonic administrations, especially in southern Europe. The French executive is still based on the territorial units of *municipalités*, *départements*, and (new) *régions*, now with the republican *Président* at the centre and parallel centralised structures at the lower levels led by *maires* and *préfets*. No coherent statute for personnel existed until the law of 20 October 1946, which also led to the establishment of a first *direction générale* in Paris (meanwhile a ministry) and to the foundation of the *École Nationale d'Administration* (ENA).[28] Paradoxically, this new *grande école* for top personnel in the public administration also strengthened the importance of the traditional *grands corps* and their schools. In addition, there is a broad sector of (revocable) contract personnel in lower positions. In general, from an insider's viewpoint, France has been shaped culturally by strong administrators showing individualism, intellectual autonomy, and self-confidence, often in conflict with the hierarchical structures. Due to the influence and protection of the *grands corps*, they are in strong competition with politicians for decisive powers.[29]

In Prussia, the concept of royal commissioners (*Kommissare*) became well-known in the gradual process of the dissolution of the Secret Council. From the early 17th century on, independent war commissioners checked the actions of the commanding officer-owners of mercenary troops, and their commission gradually changed to permanent employment. As such, they cared for the needs of the new and growing standing army, through provisioning (food and forage) and finance.[30] Their positions switched from revocable to permanent as they became part of an integrated service to the monarch, and to him only, reducing the role of intermediaries with their specific own interests, who needed to be controlled. So, these commissioners, with secret personal instructions from the monarch, became an important instrument for reducing the influence of estates and their insistence on the laws of the land. These war commissioners (*Kriegskommissare*) widened further into a hierarchy of general (at the central level), higher (in the provinces), and simple commissioners (in smaller districts), thus giving rise to a new administration that depended solely on the monarch.

The general State laws (*Allgemeines Landrecht*) for the Prussian States of 1794 were the first coherent law code, which also applied to State servants (*Diener des Staates*), be they military or civilian, and established a kind of permanent employment. They stipulated that no superior or chief of (ministerial) department could dismiss a person without his consent, but it remained unclear about the monarch's original rights in that respect.[31] This obscured the fact that since the pressure of the French revolution, the monarch held on to the privilege of deciding the fate of "his servants" and even of dismissing them. Thus,

28 Dreyfus (1999), pp. 203–237; Chagnollaud (1991), pp. 149–202; Law no. 46–2294 on the general statute of functionaries of 19 October 1946 (*Loi relative au statut général des fonctionnaires*), JORF of 20 October 1946; www.legifrance.gouv.fr/jorf/id/JORFTEXT000027380680/. See also *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

29 Maestre (1973). The author, a mathematician, was then active in a ministry, later as professor at Paris-Dauphine, and organised the multidisciplinary group Germes on the environment and society. For social self-recruitment in these elite families of a new Republican *state nobility*, see Bourdieu (1989).

30 Classic Hintze (1981, originally 1910).

31 *Allgemeines Landrecht für die Preußischen Staaten* of 1 June 1794, 10 II 98–101 (2nd part, 10th title, § 98–101); https://opinioiuris.de/quelle/1623#Zehnter_Titel._Von_den_Rechten_und_Pflichten_der_Diener_des_Staats.

the medieval pattern of a personal relation to the monarch survived the generalised and abstract Enlightenment legislation of 1794. In the aftermath of the 1848 revolution, the monarch's power to dismiss a civil servant at any time without disclosing a reason was taken over by the monarch's government in order to secure discipline in the top ranks of the Prussian administration. An emergency decree of 1849 provided in the form of a law of 1852 a list of positions that might undergo this special "non-disciplinary" measure of a dismissal which did not at all touch the person's *Ehre* (personal integrity).

With respect to the prevailing political motives in their career, this group was soon officially known as "political civil servants" (*politische Beamte*). This status was also assumed within the new imperial German administration. The legal term enumerates functions with possibly politically restricted permanency of tenure. Typical positions of that kind were secretaries of State, heads and sub-heads of departments in ministries, first presidents (*Oberpräsidenten*) in the provinces and presidents in the regions, heads of police (*Polizeidirektoren*) in big cities, and county administrators (*Landräte*). A much-disputed case was the dismissal in 1899 of 23 (!) high officials who also were elected deputies. In their quality as free members of parliament they had voted as *Kanalrebellen* against a canal building project of the government.[32]. The institution was even extended when Germany became a republic and Prussia a "Free State" (*Freistaat* as the German expression for an independent republic), as it helped the political project of replacing old elites in high positions in favour of candidates from the parliamentary parties.[33] In the Federal Republic, the institution spread to almost all the States. It has even lost its connection with the classical civil servant, as public selection procedures (including specific requirements) are no longer necessary.[34] So one observes a new "spoils system" with replacements of senior civil servants following every change of leading parties or a minister.

In Bavaria however, the leading minister, count Montgelas (1759–1838), centralised the State administration and professionalised staff by selecting by (academic) merit and by personal independence through the offer of life-long employments, appropriate salaries, and pensions for widows and orphans. Already in his 1796 *Ansbach mémoire*, Montgelas defended his project against inappropriate monarchical parsimony, arguing that the salaries of (high) civil servants should match their rank and position in society (as distinct from the court). Montgelas also took the fundamental step towards a new design of civil service: by acting as a group, these new "servants" of the abstract State should be able to prevent any despotism of a minister, they should be a counterweight (*un contre-poids*) against the excessive powers of ministers.[35] These provisions were already a quasi-constitutional permanent law before the formal constitutions of 1808 and 1818 due to the Bavarian *Hauptlandespragmatik*, a law of 1 January 1805 (in Bavaria and Austria the adjective *pragmatisch* meant "fundamental" in the sense of quasi-"constitutional"). Since these basic principles still hold today, the provisions can be considered the oldest piece of constitutional law still in force in Germany.[36] There was a very important difference

32 Fisch (2022), pp. 30–37 and 41–46; Rejewski (1973).

33 Fisch (2022), pp. 46–48.

34 *Bundeslaufbahnverordnung* (BLV) of 12 February 2009, § 4; www.buzer.de/4_BLV.htm.

35 Fisch (2022), pp. 37–41; for the French original of the *Ansbach Mémoire* of 1796, see Weis (1970), pp. 244–245. *Contre-poids* was a current French expression in Montesquieu's writings on the division of powers, and it was used to describe the checks and balances in the American constitution of 1787.

36 Gönner (1808); for the law, see Annex, I-XLVI, and for its constitutional character, XLV.

between the use of the term *contre-poids* by Montgelas and of *Gegengewicht* in Prussia: in Prussia it was seen a counterweight of government and civil servants, especially those in "political" positions, together against parliament and public opinion.[37] So the real German *Berufsbeamtentum* arose in Bavaria at a time when the Holy Roman Empire had not yet come to an end, and it had the form of a constitutional law. On the other hand, prior to the dictatorship of 1933, in Prussia neither monarchy nor democracy (after 1918) cared to provide any similar coherent statute to regulate civil servants.

V. Between Governing and Administering in the 19th and 20th Centuries

Obviously, there is far more to public administration than just governing from above and administering at the bottom. In oligarchical systems there were regular controls by elected commissions, as in Siena; there was a high-ranking official who knew all the State secrets but was excluded from voting, as in Venice; there were subordinate permanent well-paid secretaries who, on the basis of their long expertise, introduced and guided newly elected nobles in presumably subtle ways in their short-term governmental task of decision-making. Under monarchical "constitutions", as in France, those selected for personal loyalty sometimes appropriated high administrative positions for their own interests, and the monarch was to encourage that direction by literally selling such offices. The need for more rational management of resources led then to temporary personal inspectors reporting directly to the monarch. Let us now outline problems for civil servants that are still relevant today and worthy of comparative study.

First, loyalty is challenged by the right to strike. Such disputes are much easier if civil service is based on bilateral contracts and not one-sided nomination according to public law, as for *Beamte* in Germany. The passive right to be elected to parliamentary assemblies sees the free will and decision of the elected person as essential, which may conflict with duties in his service. A special kind of loyalty conflict may arise if a civil servant regards a decision of his superiors as unlawful. In Germany, in such cases, there exists a right of remonstration. A civil servant should then make his reasons for disagreement "public" with an internal written note, and the superior (who has similar obligations to his superiors) can command him to act, against his personal opinion. In that case, the superior alone is held responsible. The documents may be checked later in the course of parliamentary action or with regard to government spending, by the court of auditors; or they may be read by curious historians (unable to search for them systematically). There are also often hidden loyalties to one's group, be it the French *corps*, the Spanish *cuerpos*, or the more general German *Korpsgeist*.[38]

Second, Sweden is a very specific exception due to its general transparency. For more than 250 years, its government and administration have been based on the Freedom of the Press Act of 1766 (*Tryckfrihetsförordningen*), strongly influenced by the enlightened liberal Anders Chydenius.[39] This act made all official material, except defence documents and decisions on single persons, open to the public. It contributed to pragmatic Nordic decision-making that does not give excessive consideration to rights-based principles.[40]

37 Fisch (2022), p. 35.
38 Ruck (1996).
39 Manninen (2006).
40 Petersson (2016).

Third, the alternative to have contracted personnel only. The Swiss system has been reformed in that sense. It never featured civil servants with life tenure but followed the traditional principle of electing its officers for a certain period (a determined *Amtsdauer*), and mostly re-electing them. Meanwhile this principle (*Amtsdauerprinzip*) has given way to revocable contracts under the general norms of labour law, including bonus systems. All civil servants are now employees on open-period contracts for their specific post, who may be dismissed at any time, at relatively short notice. Careers involving upward mobility within the organisation have become rare, because directorships are no longer linked to seniority but are, like all other posts, filled ad hoc. Public advertisements announce them for anyone who feels he or she has the necessary personality, skills, and competence. Pursuing a career involves changing positions and often also administrative units.

VI. Conclusions

There is a certain path orientation in European civil service systems, but it is very difficult to sort cases into patterns. The normal approach to this has been via the basic system of law regulating these paths, as exemplified by Rugge. Raadschelders attempted a functional differentiation, which led him to three slightly different stages, depending on the functional aspect.[41] Here the emphasis is placed more on grey zones between government, in the sense of general central executive power, and administration, in the sense of local executing authorities. Rereading the classics and studying historical varieties in detail reveals many overlaps in the institutional settings necessary for a better understanding of this complex field.

Bibliography

Allorant P., Tanchoux Ph. (2019), *Introduction historique au droit*, 7th edition, Issy-les-Moulineaux: Gualino.

Arango E.R. (1978), *The Spanish Political System. Franco's Legacy*, London: Routledge.

Auer A. (2016), *Staatsrecht der schweizerischen Kantone*, Bern: Stämpfli.

Babot A., Boucaud-Maître A., Delaigue Ph. (2002), *Dictionnaire d'histoire du droit et des institutions publiques (476–1875)*, 2nd edition, Paris: Ellipses.

Bély L. (ed) (2006), *Dictionnaire de l'Ancien Régime. Royaume de France. XVIe–XVIIIe siécle*, 2nd edition, Paris: Presses Universitaires de France.

Bischofberger O. (1971), 'Die Erfüllung öffentlicher Aufgaben in der primitiven Gesellschaft', 25 *Verwaltungspraxis. Monatsschrift für die Verwaltung*, 297–301.

Bluntschli J.C. (1876), *Lehre vom modernen Stat, vol. 3: Politik als Wissenschaft, Stuttgart: Cotta*, www.digitale-sammlungen.de/de/view/bsb11127023?page=6%2C7.

Bömelburg H.-J. (2013), 'Die polnisch-litauischen Magnaten als imperiales Personal und übergreifende Herrschaftselite', in Wendehorst S. (ed), *Die Anatomie frühneuzeitlicher Imperien. Herrschaftsmanagement jenseits von Staat und Nation*, München: DeGruyter Oldenbourg, 195–209.

Bourdieu P. (1989), *La noblesse d'État. Grandes Écoles et esprit de corps*, Paris: Minuit.

Bussenius I.C. (1960), *Die preußische Verwaltung in Süd- und Neuostpreußen 1793–1806*, Heidelberg: Quelle & Meyer.

Cabourdin G., Viard G. (1981), *Lexique historique de la France d'Ancien Régime*, 2nd edition, Paris: Colin.

Chagnollaud D. (1991), *Le Premier des ordres. Les hauts fonctionnaires, XVIIIe–XXe siècle*, Paris: Fayard.

41 Rugge (2003); Raadschelders (2000).

Contarini G. (1543/2019), *The Republic of Venice. De magistratibus et republica Venetorum [1543]*, edition and introduction by Filippo Sabetti, Toronto: Toronto University Press.

De Vivo F. (2009), *Information and Communication in Venice. Rethinking Early Modern Politics*, Oxford: Oxford University Press.

Dreyfus F. (1999), *L'invention de la bureaucratie. Servir l'Etat en France, en Grande-Bretagne et aux Etats-Unis*, Paris: Éditions la découverte.

Drozdowski M. (1991), 'Der Zusammenstoß des preußischen Verwaltungssystems mit den polnischen Verwaltungstraditionen (1772–1806)', in Nitsche P., Klug E. (eds), *Preußen in der Provinz*, Frankfurt am Main: Lang, 22–34.

Fisch S. (2015), *Geschichte der europäischen Universität. Von Bologna nach Bologna*, München: C. H. Beck.

Fisch S. (2022), 'Politische Beamte und Politisierung von Beamten', in Großbölting T., Große Kracht K. (eds), *Verwaltungslogik und kommunikative Praxis. Wirtschaft, Religion und Gesundheit als Gegenstand von Bürokratie in Deutschland 1930–1960*, Stuttgart: Steiner, 25–57.

Fröhlich M. (2010), *Mysterium Venedig. Die Markusrepublik als politisches Argument in der Neuzeit*, Bern: Lang.

Galtarossa M. (2021), 'La cancelleria ducale a Venezia. Resistenze als declassamento e fine del privilegio', in Barbot M., Chauvard J.-F., Levati S. (eds), *L'expérience du déclassement social. France – Italie, XVIe – premier XIXe siècle*, Roma: École Française, 113–131, https://books.openedition.org/efr/8202.

Gamboni D., Germann G. (eds) (1991), *Zeichen der Freiheit. Das Bild der Republik in der Kunst des 16. bis 20. Jahrhunderts. 21. Europäische Kunstausstellung unter dem Patronat des Europarates*, Bern: Stämpfli.

Gönner N.T. (1808), *Der Staatsdienst aus dem Gesichtspunkt des Rechts und der Nationalökonomie betrachtet, nebst der Hauptlandespragmatik über die Dienstverhältnisse der Staatsdiener im Königreiche Baiern mit erläuternden Anmerkungen*, Landshut: Universitätsbuchhändler Krüll, www.digitale-sammlungen.de/view/bsb10373905?page=5.

Gorgolini L., Pivato St. (ed) (2022), *Storia di San Marino. Medioevo – Età moderna e contemporanea – Novecento e tempo presente*, Rimini: Bookstones.

Heller K. (1999), *Venedig. Recht, Kultur und Leben in der Republik 697–1797*, Wien: Böhlau.

Hintze O. (1981, originally 1910), 'Der Commissarius und seine Bedeutung in der allgemeinen Verwaltungsgeschichte', in Hintze O. (ed), *Beamtentum und Bürokratie*, Göttingen: Vandenhoeck, 78–112.

Kieser A. (1989), 'Organizational, Institutional, and Societal Evolution. Medieval Craft Guilds and the Genesis of Formal Organizations', 34 *Administrative Science Quarterly*, 540–564.

Lane F.C. (1973), *Venice. A Maritime Republic*, Baltimore: Johns Hopkins University Press.

Lexikon des Mittelalters (1980–1999), 10 vol., München: Artemis.

Maestre C.-J. (1973), 'Die Grands Corps im französischen öffentlichen Dienst', in Kaiser J.H., Mayer F., Ule C.H. (eds), *Recht und System des öffentlichen Dienstes. Frankreich, Großbritannien, Italien, Japan, Niederlande*, Baden-Baden: Nomos, 83–91.

Manninen J. (2006), 'Anders Chydenius and the Origins of World's First Freedom of Information Act', in *The World's First Freedom of Information Act. Anders Chydenius' Legacy Today*, Kokkola: Anders Chydenius Foundation, 18–53, www.chydenius.net/tiedostot/worlds_first_foia.pdf.

Mowbray M., Gollmann D. (2007), *Electing the Doge of Venice. Analysis of a 13th Century Protocol*, Bristol: HP Paper, https://rangevoting.org/HPL-2007-28R1.pdf.

Niebuhr B.G. (1842), 'Vorrede zu "Darstellung der innern Verwaltung Großbritanniens" von L. Freiherrn von Vincke [1815]', in Niebuhr B.G. (ed), *Nachgelassene Schriften B.G. Niebuhr's nichtphilologischen Inhalts*, Hamburg: Perthes, 462–465.

Ongaro E., van Thiel S. (2018), 'Languages and Public Administration in Europe', in Ongaro E., van Thiel S. (eds), *The Palgrave Handbook of Public Administration and Management in Europe*, London: Palgrave, 61–98.

Page E.C. (1991), *Localism and Centralism in Europe. The Political and Legal Bases of Local Self-Government*, Oxford: Oxford University Press.

Petersson O. (2016), 'Constitutional History', in Pierre J. (ed), *The Oxford Handbook of Swedish Politics*, Oxford: Oxford University Press, 89–102.

Raadschelders J.C.N. (2000), *Handbook of Administrative History*, New Brunswick: Transaction Publishers.

Raadschelders J.C.N., Vigoda-Gadot E., Kisner M. (2015), *Global Dimensions of Public Administration and Governance. A Comparative Voyage*, Hoboken: Jossey-Ba.

Ravegnani G. (2014), *Il doge di Venezia*, Bologna: Il Mulino.

Reinhard W. (1983), 'Die Verwaltung der Kirche', in Jeserich K.G.A., Pohl H., von Unruh G.-C. (eds), *Deutsche Verwaltungsgeschichte, Bd. 1: Vom Spätmittelalter bis zum Ende des Reiches*, Stuttgart: Deutsche Verlags-Anstalt, 143–176.

Reinhard W. (1999), *Geschichte der Staatsgewalt. Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart*, München: C.H. Beck.

Rejewski H.-J. (1973), *Die Pflicht zur politischen Treue im preußischen Beamtenrecht (1850–1918). Eine rechtshistorische Untersuchung anhand von Ministerialakten aus dem Geheimen Staatsarchiv der Stiftung Preußischer Kulturbesitz*, Berlin: Duncker & Humblot.

Rosser Ch. (2010), 'Woodrow Wilson's Administrative thought and German Political Theory', 70 *Public Administration Review*, 547–556.

Ruck M. (1996), *Korpsgeist und Staatsbewußtsein. Beamte im deutschen Südwesten 1928 bis 1972*, München: R. Oldenbourg.

Rugge F. (2003), 'Administrative Traditions in Western Europe', in Peters B.G., Pierre J. (eds), *Handbook of Public Administration*, London: Sage Publications, 177–191.

Sintomer Y. (2011), *Petite histoire de l'expérimentation démocratique. Tirage au sort et politique d'Athènes à nos jours*, Paris: Éditions la découverte.

Stein L. (1865), *Die Verwaltungslehre., Erster Theil: Die Lehre von der vollziehenden Gewalt, ihr Recht und ihr Organismus. Mit Vergleichung der Rechtszustände von England, Frankreich und Deutschland*, Stuttgart: Cotta, www.deutschestextarchiv.de/stein_verwaltungslehre01_1865.

Stein W.H. (2001), 'Les sources de l'histoire des décisions politiques en France et en Allemagne depuis l'époque moderne. Une complémentarité asymétrique', 192 *Gazette des Archives. Revue trimestrielle de l'Association des Archivistes Français*, 21–35.

Studer Immenhauser B.K. (2006), *Verwaltung zwischen Innovation und Tradition. Die Stadt Bern und ihr Untertanengebiet 1250–1550*, Ostfildern: Thorbecke.

Weber M. (1922/1980), *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie [1922]*, 5th edition, Tübingen: J.C.B. Mohr (Paul Siebeck).

Weeber U. (2016), *Republiken als Blaupause. Venedig, die Niederlande und die Eidgenossenschaft im Reformdiskurs der Frühaufklärung*, Berlin: De Gruyter.

Weis E. (1970), 'Montgelas' innenpolitisches Reformprogramm. Das Ansbacher Mémoire für den Herzog vom 30.9.1796', 33 *Zeitschrift für bayerische Landesgeschichte*, 219–256; www.digitale-sammlungen.de/de/view/bsb00009422?page=238%2C239.

Wilson W. (1887), 'The Study of Public Administration', 2 *Political Science Quarterly*, 197–222.

Wolter U. (1997), 'The Officium in Medieval Ecclesiastical Law as a Prototype of Modern Administration', in Padoa-Schioppa A. (ed), *Legislation and Justice*, Oxford: Oxford University Press, 17–36.

Wyss R.L. (1974), 'Die Ratsstube des äusseren Standes von Bern', 25 *Unsere Kunstdenkmäler. Mitteilungsblatt für die Mitglieder der Gesellschaft für Schweizerische Kunstgeschichte*, 183–195.

3 The Changing Tasks and Environment of Public Administration

Challenges for the Civil Service

Karl-Peter Sommermann

I. Introduction: The Civil Service Under the Constitutional State

In liberal democracies, public administration and its officials have one main function: to apply the constitutionally established laws and implement them in accordance with the public interest.[1] Even in States characterised by a legalist culture, i.e. where the law is the central communication medium for civil servants,[2] this increasingly includes policy-shaping tasks (*Gestaltungsaufgaben*, i.e. those allowing elements of creativity on the part of the administration). However, the following applies to all administrative areas: Trust in democracy and the political system as a whole can only grow if citizens encounter objective, non-arbitrary administrative action that protects the rights of the individual, in short, if they experience a State governed by the rule of law.[3] Whether and to what extent this requires a secure public-law status for civil servants as a counterweight against to changing parliamentary majorities[4] and party-political influence still remains controversial.[5]

The perception and categorisation of administrative action becomes more difficult with the increasing differentiation of the legal and administrative system. Furthermore, the growing complexity of the living environment and the associated expansion of new regulation can push the members of the civil service to the limits of their capacity. If the number and qualifications of officials do not keep pace with the ever-increasing number of new tasks, this leads to implementation deficits, which can be observed to a greater or lesser extent in all European countries.[6] The resulting problem has been vividly characterised as "bureaucratic overload and policy triage".[7] New requirements for the civil service,

1 See, for instance, du Gay and Lopdrup-Hijorth (2023), p. 63: "We are not paid to act out our own personal agenda, but to act as agents of the 'public interests' as determined by duly constituted public authority."

2 König (2003), pp. 449, 452: "To the civil servant, the law is the continual and primary communication medium which may even authorize him/her, if necessary, to contradict the political power."

3 These are core elements of both the *rule of law* developed in the sphere of common law and the concept of the *Rechtsstaat* – in international parlance generally simply translated as rule of law, although the latter concept emerged in continental Europe under different conditions and with only partially identical content. On the fusion of both principles in the law of the European Union and in international law, cf. Sommermann (2007). For an analysis and comparison of both concepts cf. Heuschling (2002); Meierhenrich (2021); Wohlwend (2021), pp. 88 f.

4 In this sense, Merten (1994), pp. 187 f.

5 On the strong trend in Europe towards the privatisation of employment regimes in the civil service, see *Civil Service in Transition: Privatisation or Alignment of Employment Conditions?* by C. Fraenkel-Haeberle in this volume.

6 Cf. Knill et al. (2024); cf. also Adam et al. (2019), in particular pp. 93 f.

7 Knill et al. (2024).

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understood as all persons who perform public administration tasks, whether on the basis of a public-law employment relationship or on the basis of an employment contract under labour law,[8] arise from a large number of fundamental changes, referred to here as transformation. The most important changes and their effects on the civil service will be outlined in the following sections: the transformation of administrative tasks (II), the changes in the relevant contexts of administrative action (III), the changing relationship between the State and citizens (IV), and the task-induced changes in the administrative organisation (V). Finally, we will analyse the actual and necessary transformations of administrative culture resulting from these changes (VI).

II. Transformation of the Functions and Tasks of Public Administration

The transformation of the functions and tasks of public administration and thus of the civil service can be illustrated using the paradigms of public order administration, service administration, and risk administration.

1. The Paradigm of Public Order Administration: Responsibility for Security

The central function of the State, which is indispensable for its legitimacy, is to guarantee the security of its citizens, both domestically and in relation to other States.[9] Security is a basic prerequisite for the realisation of the self-determined exercise of freedom, but at the same time it stands in a tense relationship to freedom, as the establishment of security has repeatedly been used in practice, especially in authoritarian systems, as a pretext for the suppression of liberty rights. Therefore, interventions in freedom that appeal to the purpose of security require detailed justification, in which the application of the principle of proportionality is of particular importance. Its dissemination in the public law of many States has been recognised as a central element of an "emerging global culture of justification".[10]

Against the backdrop of experience with patronising, paternalistic, and in many countries absolutist monarchical regimes, political liberalism in the 19th century sought – with varying degrees of success in practice – to reduce the tasks of the State as far as possible to the function of preventing dangers. The focus was on the physical security of citizens;[11] the question of social security or even ecological security initially played a marginal role or no role at all.[12] With regard to the (self-)perception of civil servants, this meant that their role was

8 For the terminology, see in more detail *Defining the Civil Service: Towards a Better Understanding of the Nature of Civil Service Systems in Europe* by A. Krzywoń, in this volume.

9 Cf. Möstl (2002), pp. 3 f.; Sommermann (1997), pp. 113 f., 203; an important aspect of security is legal certainty, cf. Pérez Luño (1991), pp. 17 f. On a corresponding right to security, cf. Powell (2019), pp. 10 f.

10 Cohen-Eliya and Porat (2013), p. 155; cf. also Dyzenhaus (2014), pp. 234 f.

11 Wilhelm von Humboldt formulated this paradigmatically in 1792, see Humboldt (1851), p. 39: "The state should refrain from all care for the positive welfare of its citizens and go no further than is necessary to secure them against themselves and against foreign enemies; it should not restrict their freedom for any other ultimate end." In the 20th century, the concept of the "minimal state" proposed by Nozick (1974), pp. 26 f., went to a similar extreme.

12 Among the authors of the 19th century, Alexis de Tocqueville, for example, warned against a hypertrophic administrative state in his work "De la démocratie en Amérique" published in 1839/40, see Part IV Chapter 7 (ed. 1961, vol. 2, p. 334): "Chez la plupart des nations modernes, le souverain, quels que soient son origine, sa constitution et son nom, est devenu presque tout-puissant, et les particuliers tombent, de plus en plus, dans le dernier degré de la faiblesse et de la dépendance."

largely characterised by tasks to be performed through intervention ("intervention administration"), i.e. by the exercise of sovereign power. This includes the police tasks of establishing security and order as well as monitoring and controlling the security of economic and other private sector activities, such as the surveillance of production facilities or restaurants. The resulting relationship of superiority and subordination between civil servants and citizens highlighted the distinction between the State and society all the more clearly. At the same time, it was the basis for the development of a public law that was to be strictly distinguished from private law. Only empowering norms of public law can provide legitimation for State intervention in the private sphere of citizens, and in this sense they represent a limitation of State power rather than a privilege, as one outstanding common law scholar suggested.[13]

In the public order administration, civil servants work primarily on the basis of a "rationality of subsumption".[14] However, it would be too short-sighted to understand the activity as a mere subsumption of a concrete situation under a norm. In view of the variety of possible hazardous situations, the legislator must also work in this field with general clauses that give the authorities a margin of discretion. A classic example is the so-called general police clause, according to which the competent police authorities can take the necessary measures to avert threats or remove any disruption to public safety and order.[15] Whether and to what extent it authorises the free exercise of discretion by an official or to what extent the discretion can be controlled by certain legal standards was one of the major topics of the developing judicial protection of rights.[16] In a State governed by the rule of law, there are limits to any discretion, which are not only set by the respective authorising norm but also by principles such as the principle of proportionality or the protection of legitimate expectations.[17] It is important to note that the orientation towards public order law also shaped the self-perception and behaviour of the members of the civil service as representatives of public authority.[18]

2. *The Paradigm of Service Administration: Social Responsibility*

Even a political community that emulates the model of a "night watchman State"[19] cannot do without public institutions and services that enable the effective exercise of political and economic freedoms. In his 1776 work *The Wealth of Nations*,[20] which is considered the theoretical foundation of economic liberalism,[21] Adam Smith spoke of

> those publick institutions and those publick works, which, though they may be in the highest degree advantageous to a great society, are, however, of such a nature, that the

13 Dicey (1915), pp. 213 f.

14 König (2024), pp. 33 f.

15 A classical formulation of the clause can already be found in § 10 Part II Title 17 of the Prussian General Land Law of 1794, reproduced in Hattenhauer (1994), p. 626.

16 Cf., e.g., Bourne (1948); Ibler (1999), pp. 294 f.; Woehrling (1999).

17 Meanwhile also recognised in the law of the European Union, cf. Sommermann (2022), pp. 1026 f.

18 Cf. also infra IV.1.

19 The term was coined by Ferdinand Lassalle, cf. Lassalle (1919), pp. 139, 195: "Entsprechend . . . faßt die Bourgeoisie den sittlichen Staatszweck so auf: er bestehe ausschließend und allein darin, die persönliche Freiheit des einzelnen und sein Eigentum zu schützen. Dies ist eine Nachtwächteridee, meine Herren, eine Nachtwächteridee deshalb, weil sie sich den Staat selbst nur unter dem Bilde eines Nachtwächters denken kann, dessen ganze Funktion darin besteht, Raub und Einbruch zu verhüten."

20 Smith (1776).

21 Diatkine (2021), p. 3.

> profit could never repay the expence to any individual or small number of individuals, and which it, therefore, cannot be expected that any individual or small number of individuals should erect or maintain.[22]

He counted public infrastructure facilities – such as roads, bridges, harbours, and educational institutions – among these services, which were later called merit goods.[23] This area of public administration is characterised less by administrators than by specialists such as engineers, technicians, and teachers.

In France, it was in the second half of the 19th century that the term *service public* was developed for infrastructure and service-related State and administrative activities, in contrast to the *puissance publique*,[24] typical of public order administration. Based on the guiding principle of social solidarity, Léon Duguit described the public service as

> *toute activité dont l'accomplissement doit être réglé, assuré et contrôlé par les gouvernants, parce qu'il est indispensable à la réalisation et au développement de l'interdépendance sociale et qu'il est de telle nature qu'il ne 'eut être assuré complètement que par l'intervention de la force gouvernante.*[25]

He added public transport, energy supply, and public lighting as examples. He saw the *service public*, i.e. the service-providing administration, as the more formative part of the public sector and public law.[26] The term "service public" should not be confused with the English "public service", which is sometimes used in the United Kingdom to refer to public servants who do not belong to the civil service in the narrow sense.

In Germany, the idea of the State's responsibility for infrastructure is linked to the concept of the "provision of vital services" (*Daseinsvorsorge*) and the State's "responsibility for existence" (*Daseinsverantwortung*), which, in important areas such as water and energy supply, waste collection, and local public transport, is usually assumed by local authorities.[27] In the second half of the 20th century, the guiding principle of constitutional law in Germany and other countries was the social State governed by the rule of law (*sozialer Rechtsstaat*),[28] in which the State's responsibility for freedom is combined with its social responsibility.[29] In this sense, it has been described as a "planning, directing, providing, distributing State that renders individual and social life possible at all".[30] It is also the State that guarantees social security through labour and social law regulations and benefits.

Today, service administration is a characteristic feature of the State alongside public order administration. The spectrum of tasks and services is wide-ranging. Insofar as the

22 Smith (1776), Book V Chapter I Part III (1976), p. 723.
23 Desai (2003), p. 67.
24 Hauriou (1892), p. V.
25 Duguit (1913), p. 51.
26 Duguit (1913), p. 33.
27 Forsthoff (1938), pp. 6 f.
28 This conceptual combination is featured inter alia in the Spanish constitution (Article 1, para. 1: "España se constituye en un Estado social y democrático de Derecho [. . .]"), the Polish constitution (Article 2: "The Republic of Poland shall be a democratic State ruled by law and implementing the principles of social justice"), and in the Slovenian constitution (Article 2: "Slovenia is a State governed by the rule of law and a social State").
29 Cf. also García-Pelayo (1985), p. 95.
30 Hesse (1990), p. 82.

services provided by the State are strongly determined by law, such as in the area of granting certain social benefits to individuals, the task of implementing the law initially changes little for the civil servants. On the contrary, benefit laws often form the basis for "bound" decisions (if the law does not leave room for discretion) and less for discretionary decisions. However, to the extent that social organisation tasks and the provision of public goods are added, additional skills and abilities of the members of the civil service are required. The classic Weberian bureaucracy model, characterised by rules and hierarchy,[31] is only of limited help here.[32] At the same time, the relationship between the State and society is changing towards a stronger interconnection between the services of public and private actors, particularly in public-private partnerships.[33]

This is all the more true for infrastructure management, which relies heavily on scientific and technical expertise. This places considerable new demands on the members of the civil service entrusted with these tasks, over and above their specialised knowledge.

3. The Paradigm of Risk Administration: Environmental Responsibility

Specialised knowledge in the fields of natural sciences, medicine, and technology is required in the area of risk administration. This has in common with traditional public order administration that it is concerned with protecting the physical integrity and personal rights of citizens and takes preventative action, which is why it often utilises instruments of intervention administration. However, it has a new quality in that its task starts earlier: it is not just a matter of defence against dangers, but of preventing the emergence of concrete dangers.[34] In other words, it is not characterised by classic danger prevention, but by comprehensive risk prevention based on the precautionary principle.[35] The focus is on reducing the probability of a hazard occurring in the event of situations that cannot be completely controlled,[36] and this takes place under conditions of uncertainty and insecurity. Risk administration is concerned with potential dangers to life, limb, the environment, the climate, and other legal interests emanating from certain forms of economic activity and lifestyles in modern society, the so-called risk society.[37] This involves the prevention of

31 Weber (1972) (the first edition was published in 1921), pp. 124 f.; English translation: Weber (1978), p. 217 f.

32 Cf. for the USA Ostrom (1989), pp. 16 f.: "Bureaucratic structures are necessary but not sufficient structures for productive and responsive public service economy. Particular types of public goods and services may be jointly provided by the coordinated actions of multiplicity of enterprises transcending the limits of particular governmental jurisdictions."

33 Cf. the contributions in Hodge et al. (2010); cf. also OECD Recommendation of the Council on Principles for Public Governance of Public-Private Partnership of 4 May 2012.

34 Grimm (2022), pp. 427 and 443. For a detailed analysis of the concept of risk in relation to the concept of danger from a sociological and a legal perspective, cf. Di Fabio (1994), in particular § 3 (pp. 41 f.); Klafki (2017), p. 7 f.

35 For the European perspective cf. Bourguignon (2016); Tosun (2013), pp. 39 f.; cf. also Fisher (2007), in particular pp. 39 f.

36 In this sense, the European Court of Human Rights has inferred from Convention rights an obligation to take measures to reduce risks to them, see e.g. ECtHR (GC), judgment of 30 November 2004, *Öneryildiz v. Turkey*, 48939/99, which concerned inadequate measures against dangerous activities "with regard to the level of the potential risk to human lives" (para. 90).

37 Beck (1992) (original German version: Beck 1986). The first two sentences read: "In advanced modernity the social production of wealth is systematically accompanied by the social production of risks. Accordingly, the problems· and conflicts relating to distribution in a society of scarcity overlap with the problems and conflicts that arise from the production, definition and distribution of techno-scientifically produced risks."

dangers and damage that have a wide impact. Examples include the minimisation of risks in the production of nuclear energy, in road traffic, and in the use of information technologies. Crisis management and crisis prevention also fall under this heading; precautions in the event of natural disasters and pandemics are examples thereof. In this context, the creation of a resilient infrastructure and administrative organisation is often called for.[38] This is where risk management meets "responsibility for existence" (*Daseinsverantwortung*) and precautions taken for ensuring the provision of vital service (*Daseinsvorsorge*).

The examples mentioned make it clear that an administration working solely according to the classic bureaucratic model cannot meet the challenges it faces today. The diversity of tasks requires a great deal of differentiation in specialised administrations,[39] so that the requirement profiles for activities in the civil service cover a wide spectrum. In the areas of risk administration, cooperation not only with external expertise and players in the private sector but also with specialist administrations of other countries and international organisations is becoming particularly important. Today's risk society is a "global risk society"[40] that is subject to volatile conditions due to the acceleration of technological change. Members of the civil service are required to have special communication, coordination, and management skills, from both an internal and external perspective. Certainly, what all civil servants have in common is their being bound to legal requirements – which may be more tightly or more openly structured depending on the area of work – and their commitment to the public interest. Precautions must be taken to ensure that the participation of citizens, associations, and experts does not lead to decisions that are biased in favour of particular interests.[41]

III. Transformation of the Administrative Contexts

The growing demands on national public administrations and their officials described previously are associated with three fundamental contextual changes, which partly explain the transformation of public tasks outlined earlier, and partly have added additional requirements. These are the integration of national administrations into a European administrative space, the reorientation of administrative functions in various areas towards the goal of environmental and climate protection, and ongoing digitalisation.

1. Europeanisation

The integration into a "European administrative space", which can be understood dynamically "as a process of institutionalisation of common administrative capacity",[42] has several dimensions. Firstly, national administrations have to apply law to a large and increasing extent that is either based on the provisions of European Union law, in particular direc-

38 Cf. Atkinson (2014); Shimizu and Clark (2019). On the necessary creation of resilient legal structures, cf. Barczak (2020).

39 See infra, sub. V.1.

40 Cf. Beck (2006).

41 Critical of the situation in the USA (written in the first half of the 20th century) Waldo (1948), p. 93 (with reference to Herring (1936)): "A realistic analysis shows a multitude of special interest competing for favors, creating a welter in which the 'public interest' is but the slightest of considerations."

42 Trondal and Peters (2015). For Olson (2003), and Hofmann (2008), the term describes "an increasing convergence of administrations and administrative practices at the EU level and various member States' administrative structures," see Hofmann (2008), p. 662.

tives, or is to be applied directly by the authorities, as is the case with regulations. The European Union itself only implements Union law to a very limited extent, for example in the area of antitrust law by the Commission and in certain specialised issues by individual decision-making agencies. As a result, national administrations functionally become executive bodies of the Union. The consequence of the *dédoublement fonctionnel*[43] is that, in more and more areas, members of the civil service must have special knowledge of the functioning of European law, its relationship to national law, and its interpretation. Furthermore, common European civil service standards are increasingly arising from Union law, but also from the international treaties ratified by the Member States of the European Union, such as the treaties concluded within the framework of the International Labour Organisation.[44]

Secondly, transnational cooperation relationships are emerging. When developing new legal standards and practices, it is not only the government level, in particular the cooperation between the specialised ministers of the Member States of the European Union in the Council, that must be considered, but also the technical cooperation between national administrations in European formal and informal bodies.[45] This results in a European administrative network (*Europäischer Verwaltungsverbund*).[46] The cooperation in the administrative boards of the EU agencies deserves particular mention.[47] It requires the participation of civil servants who are able to communicate with their foreign colleagues and to develop intercultural sensitivity. Transnational cooperation also includes procedures in which transnational administrative acts are issued, i.e. acts that apply in several or all EU Member States, for example in the area of product authorisation.[48] This involves the exchange of information or procedural steps between national authorities, with the involvement or mediation of the European Commission or EU agencies where applicable.[49] Overall, however, there is still a lack of an overarching framework for the exchange of information and interaction between national administrations.[50] The same applies to the increasing transnational exchange between subnational administrative levels.

Thirdly, the integration of national administrations into the European multilevel system is accompanied by extended control structures.[51] These are manifested in particular in the monitoring of compliance with EU law by the European Commission and, if referred by the Commission or a national court, the Court of Justice of the European Union. In addition, there are controls on the use of EU funds by institutions such as the European Court of Auditors and the European Anti-Fraud Office (*Office de Lutte Anti-Fraude* – OLAF).[52]

43 Scelle (1932), pp. 54–56; for an analysis see Cassese (1990), pp. 210, 212 ff.

44 Cf. *Transformational Impulses of International Law and Union Law for the Civil Service* by T. Ellerbrok in this volume.

45 Benz (2015); Orator (2017), pp. 23 f.

46 Weiß (2010), pp. 47 f.

47 Cf. Simoncini (2018), pp. 132 f.

48 Example: Article 28 ff. of the Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311/67.

49 For an instructive and still valid categorisation of the various cooperation procedures cf. Sydow (2004), pp. 118 f.

50 Schneider (2017), pp. 81, 85 ff.

51 Kahl (2022), pp. 1693 f. He speaks of a “control network” (*Kontrollverbund*).

52 Gundel (2020), pp. 172 f.

2. *Ecologisation*

Environmental protection and, in particular, climate protection have led to a reorientation of the agenda of almost the entire public administration. As an overriding objective enshrined in almost all European constitutions,[53] the goal of protecting the natural foundations of human life determines both the exercise of public authority and the cooperative performance of administrative tasks. Environmental and climate protection is a transversal task that considers the reduction of greenhouse gases to mitigate climate change as a cross-sectoral challenge in accordance with the Paris Agreement of 2015.[54] In this sense, the EU Regulation adopted to implement the Agreement[55] emphasises that "the relevant Union institutions and the Member States shall take the necessary measures at Union and national level, respectively, to enable the collective achievement of the climate-neutrality objective". As for the national level, the German Climate Protection Act[56] stipulates that "public authorities must take into account the purpose of this Act and the objectives set for its fulfilment in their planning and decision-making",[57] and the Spanish Climate Change and Energy Transition Act[58] stipulates that all levels of government must take account of the objective in their respective areas of competence and cooperate to achieve it.[59] The task of climate protection encompasses not only infrastructure planning and those tasks that are subsumed under the term risk administration, but also traditional public order administration. This involves both stopping climate change by reducing greenhouse gas emissions (*mitigation*) and taking measures to cope with the effects of unavoidable climate change (*adaptation*).[60] Across Europe, the goal of a climate-neutral organisation of the administration itself is also being advanced, which should serve as a model for the private sector.[61] For civil servants, this means that they are being sensitised to environmental issues to a particularly high degree; "ecoliteracy"[62] is becoming part of their job profile.

53 Cf. only Article 24, para. 1 of the Greek constitution of 1975, Article 9(e) and Article 66 of the Portuguese constitution of 1976, Article 45 of the Spanish constitution of 1978, Article 21 of the Dutch constitution of 1983, Article 72 of the Slovenian constitution of 1991, Article 23 of the Belgian constitution of 1994, Articles 5 and 74 of the Polish constitution of 1997, the French Environmental charter (adopted by Constitutional Law no. 2005–205 of 1 March 2005), Chapter 1, Article 2, para. 3 of the Swedish constitution of 1974 (as amended in 2011) and Article 9, para. 3 of the Italian constitution (inserted by Constitutional Law of 11 February 2022, no. 1).

54 UNTS vol. 3156, p. 79.

55 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law"), Official Journal L 243, p. 1.

56 *Bundes-Klimaschutzgesetz* of 12 December 2019 (BGBl, 2019 I, p. 2513), last amended by the Law of 18 August 2021 (BGBl, 2021 I, p. 3905).

57 Ibid., § 13. On the scope of the obligation cf. Siegel (2023).

58 *Ley 7/2021 de cambio climático y transición energética* of 20 May 2021, B.O.E. núm. 121 of 21 May 2021.

59 Ibid., Article 1, para. 2. Even more comprehensive is the Portuguese Law, cf. Article 8 of the Basic Climate Law of 2021: Lei n.º 98/2021 of 31 December 2021 (*Lei de Bases do Clima*), Diário da República, 1.a série no. 253.

60 In this sense, the European Climate Law (n. 52) sets the goal of climate neutrality by 2050 on the one hand (Article 2), and adaptation to the climate change on the other (Article 5).

61 Cf. Council of Europe, "Main takeaways" of the Conference "Green Public Administration in the Context of Good Democratic Governance: Exchange of Good European Practice", organised the European Committee on Democracy and Governance (CDDG) in cooperation with the Icelandic Presidency of the Committee of Ministers, Strasbourg, 26 April 2023.

62 Capra and Mattei (2015), p. 180.

3. Digitalisation and Artificial Intelligence

According to the Next Generation Strategy of the European Union, the "green" transition and the "digital" transition go hand in hand ("twin transitions").[63] The far-reaching effects of the digitalisation of public administration and the use of artificial intelligence are still far from being fully predictable.[64] The level of digitalisation varies from country to country in Europe.[65] What is certain is that the effects are multidimensional. Firstly, digitalisation is changing communication between the administration and individuals. This is not only manifested in simple processes such as the submission of applications and enquiries and their processing online, but also, for example, in the reorganisation of information provision and citizen participation. A particular challenge is to ensure the transparency, reliability, and credibility of information.[66] The use of digital technology is often linked to objectives such as greater citizen-friendliness or "citizen-centric remote online digital governance".[67] During the current transition period, however, difficulties can also be identified for parts of the population, particularly for people who are unable to use digital media for various reasons. In order not to deepen the disadvantageous "digital divide", assistance or alternative services must be offered.

Secondly, digitalisation enables more efficient communication within an authority and also between different administrations, not least in transnational relationships. The foreign language problem often associated with transnational communication is alleviated by the use of increasingly optimised linguistic artificial intelligence based on large language models (LLMs). However, this does not relieve national administrations cooperating with foreign authorities of the need to have people with special technical language skills among their civil servants, who are familiar with different administrative cultures and can guarantee the reliability of communication.

Thirdly, and finally, rapidly developing artificial intelligence can be increasingly involved in the preparation of administrative decisions. The use of artificial intelligence is currently controversial, particularly when it comes to the automatic adoption of decisions proposed by artificial intelligence.[68] While there are fewer concerns regarding decisions where the legislator does not grant the administration any discretion and which are essentially based on computational processes (algorithms), as is the case with many tax assessments, the use of artificial intelligence to exercise administrative discretion appears problematic. The argument that artificial intelligence can make decisions considerably faster and with greater objectivity[69] can be countered by the objection that trust in the comprehensive assessment of a specific situation can ultimately only be placed in a (human) public official, as this is the only way to take into account the complexity of human cognitive and decision-making processes. In terms of democratic theory, it is necessary to discuss whether the use of self-

63 Cf. Muench et al. (2022).

64 Cf. the contributions in Charalbidis et al. (2024).

65 See *Internet and Digital Technologies as Essential Tools for the Civil Service by* A. Guckelberger in this volume, and the national reports in "La dématérialisation des procédures administratives et autres téléprocédures" Annuaire Européen d'Administration Publique vol. XXXIX (2016), Aix-en-Provence 2017. A frontrunner and pioneer in the application of AI in Public Administration is Estonia; on the further perspectives cf. Ebers and Tupay (2023).

66 Cf. Doncel Fernández (2022).

67 Milakovich (2022), pp. 88 f.

68 Reference to cases with harmful effects in Faith (2023), pp. 6 f.; MacCarthaigh et al. (2024), pp. 51 f.

69 Burgess (2024), pp. 8 f. and pp. 55 f.

learning artificial intelligence can achieve sufficient democratic legitimacy through legal authorisation. In its Regulation on artificial intelligence,[70] the European Union has taken account of the need to regulate the use of artificial intelligence and create the greatest possible transparency[71] in order to uphold democratic standards and the rule of law. In addition, the guarantee of judicial protection recognised in national legal systems and at the European level requires that a review by way of judicial protection by a human decision-maker remains possible.[72]

IV. Transformation of the Relationship Between the Members of the Civil Service and the Citizens

The national bureaucracies of European States date back to pre-democratic times. While the often estates-based civil service was initially under the control of the monarch,[73] it became detached, under the influence of liberalism, from the patrimonial structures of the monarchy in order to attain a legally secured status[74] and – at least in the republic regimes – to henceforth act in the name of the nation or the people, thus recognisably performing a function for the public. In France, the National Assembly passed decrees concretising Article 6 of the Declaration of the Rights of Man and the Citizen of 1789[75] in the same year, according to which feudal privileges were abolished and public offices were opened to everyone, regardless of social origin.[76] The changed classification of the civil service had an impact on the self-image of civil servants, at least in the long run; initially, the civil servants inherited from the *Ancien Regime* remained in the service.[77] Their relationship to the members of society has also changed considerably since then. Certain stages of development can be identified in the evolution up to the present day.

1. From Subject to Citizen

The step from subject to citizen in Europe received its decisive impetus from the French Revolution. The Declaration of 1789 speaks of the "rights of man and the citizen".[78] The subject as petitioner was to become a citizen with his own rights *vis-à-vis* the public authorities. Nevertheless, it would take some time for the concept of the citizen to become

70 Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) of 13 June 2024, Official Journal L 2024/1689 of 12.7.2024. On the limitations resulting from this Regulation for the public administration, in particular regarding the use of high-risk artificial intelligence systems, see Guckelberger (2025).

71 Cf. Martini (2019), in particular pp. 157 f.

72 Cf. also Burgess (2024), pp. 168 f.

73 Fuenteaja Pastor (2013), pp. 210.

74 van der Meer et al. (2015), pp. 39 f.

75 On this provision, see *The Civil Service in France: Evolution and Permanence of the Career System* by D. Capitant, in this volume.

76 *Décrets de l'Assemblée Nationale des 4, 6, 7, 8 et 11 août 1789*, in particular Article 11 of the Decree of 11 August 1989 (Assemblée Nationale, Archives Parlementaires de 1787 à 1860, Première série, Tome VIII, Paris: Librairie Administrative P. Dupont, 1875, p. 397): "Tous les citoyens, sans distinction de naissance, pourront être admis à tous les emplois et dignités ecclésiastiques, civiles et militaires, et nulle profession utile n'emportera dérogeance."

77 Taillefait (2022), pp. 5 f.

78 *Déclaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of Man and of the Citizen) of 26 August 1789, reproduced in: Godechot (1979), pp. 33 f.

established in Europe.[79] In the meantime, the idea that a citizen could also be a subject persisted.[80] In Germany, for example, under the influence of the French Revolution, the Bavarian constitution of 1808, imposed by King Maximilian Joseph, already spoke of "citizens". Moreover, the term *Staatsbürger* (literally "citizen of the State") became common. However, the German imperial constitution of 1871[81] still spoke in one provision of "subject, citizen"[82] in view of the still traditional monarchical situation in certain *Länder* (members of the federation). At the end of the 19th century, Otto Mayer still used the term "subject" in his influential work on German administrative law.[83]

The role of the individual as an active citizen emphasised in the early years of the French Revolution was to remain unfulfilled for a long time in relation to the administration. The legal regime for civil servants was modelled on that of the military[84] and the individual in France and other Romance countries saw themselves predominantly in the rather passive position of the *administré* or – in Spanish – the *administrado*[85] (literally "the administered"), a term that can still be found today,[86] albeit less and less frequently.[87] In France in particular, attempts to push back the concept have been observed since the 1980s, initially under the heading of *nouvelle citoyenneté*.[88]

2. From Citizen to Customer?

The perception of the individual as a "citizen" and no longer as a "subject" can already lead to a change in the understanding of the role and thus the behaviour of civil servants. However, the fact that they continue to exercise sovereign power has not only created a legal relationship of superiority and subordination in the public order administration but has often also perpetuated the mindset of members of the civil service as part of an "authority". In many countries, reform approaches have been directed against this attitude, of which the concept of New Public Management, which has been gaining ground since the 1980s, initially in the United Kingdom,[89] has been particularly influential. It

79 However, the term subsequently retained its progammatic meaning, cf. Colmeiro (1858), p. 578: "Y aunque la denomionación de ciudadano se aplica en su sentido mas lato a cualquier súbdito de un gobierno libre, en otra acepción mas estrecha significa la persona que está en el pleno ejercicio de sus prerogativas de ciudadanía."

80 Blickle (2006), p. 291.

81 Reichs-Gesetzblatt (RGBl.) 1871, p. 64.

82 Article 3 reads: "Für ganz Deutschland besteht ein gemeinsames Indigenat mit der Wirkung, daß der Angehörige (Unterthan, Staatsbürger) eines jeden Bundesstaates in jedem anderen Bundesstaat als Inländer zu behandeln [. . .] ist."

83 Mayer (1895), pp. 5, 10, 14, *passim*.

84 Taillefait (2022), pp. 6 f.

85 González Pérez (1966). On the debate about the qualification as *administré-objet*, see the analysis by Morio (2021), pp. 101 f.

86 Cf., for example, Alfonso (2009), pp. 8, 61, 87, *passim*. The term is still very present in the Latin American scholarship, see Gordillo (2006); Araujo-Juárez (2022) (the 6th chapter is dedicated to "El administrado").

87 See Chrétien et al. (2016), p. 32: "Signes des temps, on ne parle plus guère d'administré' mais de 'citoyen.'"

88 Cf., in particular, the *Loi n° 2000–321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations* (J.O.R.F. du 14 avril 2000, p. 5646), and earlier the *Décret n°83-1025 du 28 novembre 1983 concernant les relations entre l'administration et les usagers* (J.O.R.F. du 3 décembre 1983, p. 3492), Article Execution: "Le projet de décret qui vous est soumis s'inscrit dans le cadre de la mise en oeuvre de la nouvelle citoyenneté qui a pour corollaire la définition d'un nouveau statut de l'usager du service public."

89 On the emergence and diffusion of New Public Management, cf. Lapsley and Miller (2024), pp. 3 f.

aimed to transfer management concepts from the private sector to the public sector, e.g. the transition from an input-orientation to an output-orientation. The State and the civil service in particular were now primarily perceived as service providers, which turned the individual into a customer in their relationship with the public administration. In fact, the term "customer" was now used in numerous national administrations, which was also intended to change the mindset of public servants accordingly. Customer orientation and the idea of service should now be the main focus.

As much as the concept of customer orientation helps to recalibrate the relationship between public officials and citizens, also against the background of an understanding of citizens as "stakeholders", the criticism of a naïve use of the term that extends to all areas of government action is justified. Citizens, unlike customers in the private sector, often have no choice as to when and how they interact with the public administration; they also have no exit options.[90] It is not even necessary to cite the extreme example of a prisoner in a public penal institution as a "customer" or "client" to illustrate that the term often functions as a euphemism that obscures the actual situation.

3. The Citizen as a Partner and **procureur du droit**

However, the concept of the citizen as part of the "public" takes on greater significance when his or her *status activus* also extends to participation in administrative procedures that go beyond his or her legal sphere. In the USA, where a civic culture is a dominant feature,[91] this approach was materialised early on, in the Administrative Procedure Act of 1946,[92] which opened up consultative participation in the "rule making procedure" to interested persons.[93] In Europe, the issue of citizen participation became increasingly important as a result of the social and ecological movement of the 1960s and 1970s,[94] particularly with regard to major environmental projects.[95] Within the European Community, the Environmental Impact Assessment Directive of 1985[96] obliged Member States to ensure that "the public concerned is given the opportunity to express an opinion before the project is initiated". The Aarhus Convention of 1998[97] further strengthened the participation rights of the public in environmentally relevant projects, which in some cases led to far-reaching reforms in the contracting States.[98] The Aarhus Convention is based on the idea of mobilising citizens for the public interest,[99] in this case for environmental protection. In addition to participation in adminis-

90 Thomas (2015), pp. 14 f.

91 König (2024), p. 22; on the role of civic culture for liberal democracies in general cf. Almond and Verba (1963); Bridges (1997).

92 Administrative Procedure Act (5 U.S.C. Subchapter II).

93 § 553 lit. c reads: "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."

94 Lember et al. (2022).

95 Cf., e.g., the contributions in Blümel (1982).

96 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, Official Journal L 175, p. 40.

97 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998, U.N.T.S. vol. 2161, p. 447.

98 Cf. Sommermann (2017).

99 On the underlying concept, cf. Masing (1997); the translation of the telling book title into English is "The mobilisation of the citizen for the enforcement of the law".

trative proceedings, representatives of the public, in particular environmental organisations, now also have a right of (altruistic) action in legal systems in which judicial protection is aimed at enforcing individual rights. In this sense, the German Federal Administrative Court has spoken of a "procuratorial legal status" of the citizens.[100] In this way, the so-called subjective rights protection systems are moving closer to those countries that traditionally allow for legal action by merely interested parties in favour of safeguarding the integrity of the objective legal order, particularly in France. The concept of the citizen as *procureur du droit* has long been present there.[101] The possibilities of e-participation, opened up by digitalisation, are seen as an opportunity to strengthen this instrument.[102]

In addition to the forms of participation of the public regulated in general procedural laws and specialised laws,[103] mechanisms of so-called deliberative democracy[104] are becoming increasingly important in practice. This refers to the involvement of a random sample of citizens, i.e. a group of citizens selected by lot, in the process of deliberating on programmes or the basis of decisions in order to take into account the perspective of sociologically representative citizens. The so-called "citizens panels",[105] "mini-publics",[106] or "citizens' councils" (*Bürgerräte*)[107] take their place alongside the democratically elected bodies, but because of their lack of democratic legitimation, decisions may not be delegated to them. However, the fact that their recommendations may have a *de facto* binding effect appears problematic.

The new forms of citizen participation place new demands on the civil servants who cooperate with them in the areas of public relations, citizen communication and process management. Citizens cannot be described here as customers of the administration, but rather as active citizens and partners,[108] especially when it comes to deliberative processes. This must once again change how individuals are perceived by members of the civil service. A different relationship between citizens and civil servants, where private actors can be regarded as partners as well, exists in the cooperative fulfilment of public tasks,[109] for example in the context of the aforementioned[110] public-private partnerships.

100 Federal Administrative Court (*Bundesverwaltungsgericht*), Judgment of 5 September 2013–7 C 21.12 –, ECLI:DE:BVerwG:2013:050913U7C21.12.0, para. 46.

101 Cf. Frier and Petit (2014), p. 498.

102 von Lucke and Gollasch (2022), pp. 103 f.

103 Cf., for instance, the general rules on the "Anhörungsverfahren" in §§ 72 ff. of the German Federal Law on Administrative Procedure (*Verwaltungsverfahrensgesetz*) of 1976 (in the version of 23 January 2003, BGBl. 2003 I, p. 102, last amended by the law of 4 December 2023, BGBl. 2023 I Nr. 344), and the rules on the "enquête publique" in Articles L123-1 to 123–19 of the French Environment Code (*Code de l'environnement*) of 2000 (JORF n° 0219 du 21 septembre 2000, last amended by Décret n° 2024–423 of 10 May 2024, JORF n°0108 du of 11 May 2024).

104 See *Europeanisation and the Impact of Deliberative and Participatory Democracy on the Civil Service* by B. Peters in this volume.

105 See already Crosby et al. (1986), pp. 170–178.

106 Landmore (2020), pp. 218 f.; Grönlund et al. (2014); Schlütermann (2024), pp. 72 f.

107 Wernisch-Liebich and Hammoutene (2023). A prominent defender of democracy based on sortition is the Belgian David van Reybrouck; his bi-representative concept, developed in his book "Against Elections. The Case for Democracy" (Eng. translation London: The Bodley Head, 2016) has been influential in Belgium even with regard to procedures of the federal Parliament, cf. the Law of 2 March 2023: *Loi établissant les principes du tirage au sort des personnes physiques pour les commissions mixtes et les panels citoyens organisés à l'initiative de la Chambre des représentants*, Moniteur Belge of 3 April 2023, p. 35826.

108 Cf. Thomas (2013), pp. 786, 788 f. ("Governance and Coproduction: The Public as Partner").

109 Cf. Wißmann (2022), pp. 1091 f.

110 Cf. supra II.2.

V. Transformation of the Administrative Organisation

The rapidly growing and new types of administrative tasks and of decision-making procedures result in changes to the administrative organisation.[111] These include not only a further differentiation of the existing specialised administrations, but also special public-private forms of cooperation in the implementation of complex planning as well as the establishment of new types of authorities for regulatory tasks, which in particular concern the accessibility and safety of services and supplies that are of essential importance to the general public, so that market failure must be prevented.

1. "Classical" Administration

The rationality of the hierarchically structured, rule-bound and procedurally formalised administration described by Max Weber is still fundamental in many areas today. This is true, for example, of the strongly legally determined public order administration, even though, in view of the growing complexity of tasks, it also works not only with conditionally programmed standards but also on the basis of legal objectives to be concretised by the administration itself (final programming). In view of the acceleration of scientific and technological development, the administration itself can no longer provide all the necessary technical knowledge. It is increasingly dependent on external expertise, which raises democratic problems in view of the significant influence of this expertise on administrative decisions.[112] In any case, the administration itself should have sufficient knowledge to be able to categorise and process the information received from the experts competently.[113] This must be taken into account when personnel resources are recruited and planned.

In France and Spain, the professional differentiation of public administration found expression in the formation of professional groupings within the civil service as early as the 18th century. In both countries, the legislature created *corps* or *cuerpos* with their own statutes, which usually regulated hierarchical categories, the respective entry requirements and recruitment procedures as well as salaries.[114] In other countries, there are professionally based internal organisational differentiations that have an impact on the design of decision-making processes and lead to different organisational cultures.[115]

In more and more European countries, the flexibilisation of civil service structures has resulted in the transfer of public employment relationships to those under private labour law, even to the extent that these are linked to the classic principles of bureaucracy. In addition, the privatisation of administrative tasks has been observed in European countries in recent decades, which was expected to reduce the burden on the State[116] and enable it to carry out public tasks more economically, as well as making it easier to attract skilled employees who are sought after on the labour market, as private law forms are not tied to

111 Cf. Ostrom (2008), p. 3: "Organizational arrangements can be thought of as nothing more or less than decision-making arrangements."

112 On this issue, see the comprehensive study by Münkler (2020).

113 Sommermann (2015), p. 20; Münkler (2020), pp. 650 f.; Ladeur (2022), pp. 1545 f., who emphasises the necessity to establish "rules for cooperation between administrative practice and practical expertise" (p. 1546).

114 For France, see *The Civil Service in France: Evolution and Permanence of the Career System* by D. Capitant in this volume, and Taillefait (2022), pp. 140 f.; for Spain, Fuenteaja Pastor (2013), pp. 216 f., pp. 225 f.

115 Cf. Egeberg (2014); Egeberg and Trondal (2018), pp. 1 f.

116 On the problem of the overburdened State, see Ellwein and Hesse (1997).

the often rigid salary structures of the civil service. One example from the area of safety and security is the organisational privatisation of the German Air Traffic Control (*Deutsche Flugsicherung*) in 1993,[117] which is responsible for the safety of the German airspace, in order to be able to pay air traffic controllers in line with the market.[118] However, it is well known that privatisation, for example of water supply and waste collection at the municipal level, did not only have positive effects,[119] which in some cases led to a remunicipalisation, i.e. the return of services to the public sector.[120] In addition, many administrations are becoming aware of the fact that flexible and staff-friendly working conditions, e.g. the option of remote working, and the creation of opportunities for personnel development can be an important element of success in the competition for qualified personnel on the labour market.

2. Planning Administration

Insofar as the public administration is involved in planning, the legislator primarily determines its actions with final-programme standards. This requires planning discretion, which must, however, be exercised in a State governed by the rule of law on the basis of plausible criteria. An essential step is the compilation and weighing of the interests to be taken into account. In view of the great complexity of infrastructure planning (trunk roads, airports, energy lines, etc.) and the large number of public and private interests to be taken into account in complex procedures, the administrative authorities carrying out the planning approval procedure are particularly reliant on expertise. This expertise cannot readily be provided to a sufficient extent by the competent authorities themselves. Special planning agencies or planning companies, which can be organised either under public or private law,[121] are therefore often set up to deal with the enormous demands of planning procedures. In Germany, this was particularly the case after German reunification, when modern infrastructure had to be created in the *Länder* and a large number of planning procedures had to be carried out simultaneously.[122]

3. Regulatory Administration

The administrative organisation of European States has been supplemented by independent authorities or regulatory agencies, particularly since the privatisation of systemically relevant public services and utilities. The basic idea is that the regulatory authorities should ensure that the services necessary for the general public are made available to all in reasonable conditions. In this sense, one speaks in German of a *Gewährleistungsverwaltung*,[123]

117 By the Tenth Act modifying the Air Traffic Act (*Gesetz zur Änderung des Luftverkehrsgesetzes*) of 23 July 1992 (BGBl, 1992 I, p. 1370).

118 Kämmerer (2001), p. 285.

119 From a US perspective, see Becker (2001).

120 Cf. for Germany, Bauer et al. (2012); Bönker et al. (2016).

121 Cf. for urban planning: *Fédération Nationale des Agences d'Urbanisme* (FNAU), Guide pour créer une agence urbaine, Paris: FNAU, 2016 (with examples of big cities on different Continents).

122 A central role was played by the German Unity Motorway Planning and Construction Ltd. (*Deutsche Einheit Fernstraßenplanungs- und -bau GmbH – DEGES*). For the current organisation, see its Corporate Governance Report 2021, available on the internet in the file: DEGES-PCGK-Bericht-2021.pdf.

123 Voßkuhle (2003), pp. 307 f.; Franzius (2008).

in Spanish of an *administración garante*,[124] which can be approximately translated as "performance-guaranteeing administration". This development was largely induced by the European Union. Isomorphic regulatory structures in the Member States, combined with a coordinating regulatory agency at Union level, facilitate the interconnection of national and European administrative action and the establishment of an effective regulatory network. One example is the cooperation between the Agency for the Cooperation of Energy Regulators[125] and the corresponding national regulatory authorities.[126] As already mentioned, the requirements for the regulatory authority staff involved in European cooperation go beyond the classic profile of an administrative official.

The independence of the national regulatory authorities from instructions by the responsible ministry, as required by European Union law in several cases, raises constitutional questions in some countries with regard to democratic legitimation, as authorities cannot be held accountable via the parliamentary responsibility of the respective minister.[127] For the traditional continental administrative systems, independent regulatory agencies represent a foreign body insofar as they are assigned special regulatory and policy-shaping tasks with corresponding regulatory discretion. The independent regulatory agency type of authority has long been known in the United States, where, when it was founded, it was not possible to fall back on an existing administrative organisational structure and administrative tasks were initially performed in a highly decentralised manner by people recruited from the citizenry.[128] Central authorities (agencies) were created for specific tasks; they form the core of a "skilled bureaucracy",[129] often based on specialisation, which is said to be characteristic of the "administrative State". With regard to the *de facto* considerable policymaking power of the regulatory agencies, which goes beyond the implementation of legally predetermined policy objectives and which already came to the fore during the New Deal in the 1930s, the term "administrative State" is also used quite critically in the USA.[130] In the legalistic continental European States, however, there are currently narrower limits to the power of regulatory authorities. Particularly when it comes to the restriction of fundamental rights, it is predominantly demanded that the relevant decisions are to be made by parliamentary legislators and that a general legal delegation of power to the executive is not sufficient.[131] Nevertheless, the ability to shape policy within the framework of the laws will become an important qualification feature in more and more posts with regulatory tasks.

124 Esteve Pardo (2015), pp. 65 f.

125 Established by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009, OJ L 211/1, now replaced by Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019, OJ L 158/22.

126 Cf. Scholz (2020), in particular pp. 72 f.; Schubert et al. (2016), pp. 141 f.

127 Cf. the national reports in Fraenkel-Haeberle et al. (2020).

128 This was the basis of what has been called "civic culture", cf. Novak (2017), pp. 98 f.; König (2024), p. 22.

129 Waldo (1948), p. 93 (term and critique), who points to the influence of the "scientific management techniques" developed in the literature (p. 55).

130 A particularly harsh criticism can be found in Hamburger (2014), cf. p. 4: "Nowadays, however, the executive enjoys binding legislative and judicial power. First, its agencies make legislative rules dictating what Americans can grow, manufacture, transport, smoke, eat, and drink. Second, the agencies make binding adjudications- initially demanding information about violations of the rules, and then reaching conclusions about guilt and imposing fines. Only then, third, does the executive exercise its own power- that of coercion- to enforce its legislation and adjudication."

131 Cf. Weber (2024), pp. 581 f.

VI. Necessary Change in Administrative Culture

The aforementioned challenges for the civil service resulting from the evolving environment of public administration cannot be overcome by "legal and organisational engineering" alone. What is also required is the emergence of a mindset that supports the new tasks, procedures, and forms of communication with corresponding patterns of behaviour, attitudes, and values – in short, a reorientation of administrative culture.[132]

Despite – or rather because of – the major changes, consolidating and further developing a "culture of the rule of law"[133] remains a key objective. The safeguarding of individual rights by public administration, protection against administrative arbitrariness, and the creation of trust through the greatest possible transparency is a prerequisite for the survival of a liberal democracy,[134] especially in a world of complexity and uncertainty. Further development of the culture of the rule of law means, among other things, that a culture of explanation and justification of administrative action is becoming even more important, in view of the fact that administrative action is increasingly being directed by objectives and less by well-defined rules, in particular when it concerns individual legal positions or important community goods. As already mentioned, the literature has rightly spoken of an "emerging global culture of justification" with regard to the dissemination of the principle of proportionality as a limiting regulator of State action even beyond Europe.[135]

Governance through objectives also means that in many areas, administrative staff cannot see themselves merely as enforcers of legal rules but also must recognise that they are empowered to become active in shaping policy. This is not compatible with a mindset of a *burocrazia difensiva*,[136] which is fixated solely on rules and fends off creative tasks as impositions. With regard to a volatile administrative environment, it is therefore not only necessary to develop resilient administrative structures that allow a flexible response to suddenly occurring crises, but also to promote the personal prerequisites for "agile" administrative behaviour.[137]

In the field of policy-shaping administration, elements of citizen participation are becoming increasingly important, which must be supported by the development of a corresponding administrative culture of cooperation and communication. This applies in particular to planning administration, but is also relevant in other policy areas, also in view of new elements of so-called deliberative democracy, such as the establishment of citizens' councils.[138]

Finally, in view of the ongoing digitalisation and involvement with tasks arising from scientific innovations, the technological affinity of members of the civil service is becoming a decisive recruitment criterion in more and more functions. In programmatic terms, there are calls for a "digital cultural change" in the civil service, supported by "digital

132 On the concept of "administrative culture", see Dwivedi (2005), p. 20 ("administrative culture, understood here in its broadest sense as the modal pattern of values, beliefs, attitudes and predispositions that characterize and identify any given administrative system"); Sommermann (2014), pp. 607 f.

133 Nicolaidis and Kleinfeld (2012), pp. 19 f.

134 Sommermann (2010), pp. 11–25.

135 Cf. supra II.1.

136 Cf. Battaglia et al. (2021); Battini and Decarolis (2020).

137 Cf. Hastings (2024); Hill (2018).

138 See supra IV.3.

leadership".[139] It is clear that digital competences[140] are indispensable for the public sector.[141] As far as communication is concerned, the digital dimension applies not only to relations within and between (domestic and foreign) administrations[142] but also to interaction with citizens. However, care must be taken to ensure that the adoption of technology-driven management methods, which are often first modelled in the private sector, does not lead to a disregard of the specific tasks of public administration for the general public and the rights of citizens. Practically speaking, this also means providing low-threshold services for people who for valid reasons are unable to use digital technology.[143]

The necessary transformation of the administrative culture requires considerable efforts in the area of education and training for public officials. In addition, the acceleration of social, technological, and ecological processes, to which the law is also responding with innovative solutions,[144] means that change management is becoming a permanent task.[145] Overall, in view of the requirements outlined previously and against the backdrop of demographic change, it will become increasingly difficult to recruit suitably qualified persons for the civil service if working conditions, development opportunities, and salaries do not become competitive at the same time.[146]

The challenges of change affect all European States. However, the aim cannot be the creation of a uniform European administrative culture, which would be unrealistic anyway given the different national traditions and path dependencies, but rather the development of common minimum standards of administrative culture, which on the one hand leave room for administrative cultural diversity and on the other hand convey administrative cultural coherence and interoperability. The emergence of common European foundations of public administration is not least a prerequisite for the success of European integration. It remains to be seen whether a value-based "European administrative identity" could emerge in this way.[147] In any case, the civil service and its further development have a key role to play.

Bibliography

Adam C., Hurka S., Knill C., Steinebach Y. (2019), *Policy Accumulation and the Democratic Responsiveness Trap*, Cambridge: Cambridge University Press.

Alfonso L.P. (2009), *El concepto del Derecho administrativo*, 2nd edition, Caracas: Universidad del Externado.

Almond G.A., Verba S. (1963), *The Civic Culture: Political Attitudes and Democracy in Five Nations*, Princeton, NJ: Princeton University Press.

Araujo-Juárez J. (2022), *La Administración pública*, Santiago, Chile: Ediciones Jurídicas Olejnik.

139 Hill (2024); on leadership in network administrations cf. Misgeld and Wojtczak (2024), pp. 739 f.; see also Lips (2020), pp. 248 f.

140 On the spectrum of necessary digital competences needed in public administration cf. Catakli (2022), pp. 177 f.

141 On the scope of digitisation in public administration, see the contributions in Seckelmann (2024).

142 Wischmeyer (2022), pp. 1759 f.; von Bogdandy and Hering (2022), pp. 1799 f.

143 Britz and Eifert (2022), pp. 1917 f.

144 Cf. Sommermann (2024).

145 On the role of senior civil servants in changing the administrative culture and the necessary leadership training, see the general considerations and the – still sobering – country reports in Van Wart et al. (2015).

146 In this regard, the competitiveness of the civil service has always been a structural problem, cf. Niedobitek (1994), pp. 57 f.

147 Brachem and Tepe (2015), who focused their research on motivational values, remain sceptical (pp. 266 f.).

Atkinson C.L. (2014), *Toward Resilient Communities: Examining the Impact of Local Governments in Disasters*, New York: Routledge.

Barczak T. (2020), *Der nervöse Staat: Ausnahmezustand und Resilienz des Rechts in der Sicherheitsgesellschaft*, Tübingen: Mohr Siebeck.

Battaglia A., Battini S., Blasini A., Bontempi V., Chiti M.P., Decarolis F., Mento S., Pincini A., Pirri Valentini A., Sabato G. (2021), '"Burocrazia difensiva": cause, indicatori e rimedi', 2021(4) *Rivista Trimestrale di Diritto Pubblico*, 1295–1317.

Battini S., Decarolis F. (2020), 'Indagine sull'amministrazione difensiva', 3(2) *Rivista Italiana di Public Mangement*, 342–363.

Bauer H., Büchner C., Hajasch L. (eds) (2012), *Rekommunalisierung öffentlicher Daseinsvorsorge*, Potsdam: Universitätsverlag Potsdam.

Beck U. (1986), *Die Risikogesellschaft. Auf dem Weg in eine andere Moderne*, Frankfurt am Main: Suhrkamp.

Beck U. (1992), *Risk Society: Towards a New Modernity*, London, Newbury Park, New Delhi: Sage Publications.

Beck U. (2006), 'Reflexive Governance: Politics in the Global Risk Society', in Voß J.-P., Bauknecht D., Kemp R. (eds), *Reflexive Governance for Sustainable Development*, Cheltenham: Edward Elgar, 31–56.

Becker F.W. (2001), *Problems in Privatization. Theory and Practice in State and Local Governments*, Lewiston, NY, Lampeter, Wales: Edwin Mellen Press.

Benz A. (2015), 'European Public Administration as a Multilevel Administration: A Conceptual Framework', Bauer M.W., Trondal J. (eds), *The Palgrave Handbook of the European Administrative System*, London: Palgrave Macmillan, 31–47.

Blickle P. (2006), *Von der Leibeigenschaft zu den Menschenrechten*, 2nd edition, München: C.H. Beck.

Blümel W. (ed) (1982), *Frühzeitige Bürgerbeteiligung bei Planungen*, Berlin: Duncker & Humblot.

Bönker F., Libbe J., Wollmann H. (2016), 'Remunicipalisation Revisited: Long-Term Trends in the Provision of Local Public Services in Germany', in Wollmann H., Koprić I., Marcou G. (eds), *Public and Social Services in Europe: From Public and Municipal to Private Sector Provision*, London: Palgrave Macmillan, 71–86.

Bourguignon D. (2016), *The Precautionary Principle: Definitions, Applications and Governanc*e, Strasbourg: European Parliamentary Research Service.

Bourne C.B. (1948), 'Discretionary Powers of Public Authorities: Their Control by the Courts', 7(2) *The University of Toronto Law Journal*, 395–412.

Brachem J.-C., Tepe M. (2015), Shared Values for a European Administrative Identity? A Cross-National Analysis of Government Employees *Basic Human Values*', in Sager F., Overeem P. (eds), *The European Public Servant: A Shared Administrative Identity*? Colchester: ECPR Press, pp. 245–267.

Bridges T. (1997), *The Culture of Citizenship: Inventing Postmodern Civic Culture*, 2nd edition, Washington, DC: The Council for Research in Values and Philosophy.

Britz G., Eifert M. (2022), 'Digitale Verwaltung', in Voßkuhle A., Eifert M., Möllers C. (eds), *Grundlagen des Verwaltungsrechts*, vol. 1, 3rd edition, München: C.H. Beck, pp. 1887–1984.

Burgess P. (2024), *AI and the Rule of Law: The Necessary Evolution of a Concept*, Oxford: Hart Publishing.

Capra F., Mattei U. (2015), *The Ecology of Law. Toward a Legal System in Tune with Nature and Economy*, Oakland: Berrett-Koehler Publisher.

Cassese A. (1990), 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law', 1 *European Journal of International Law*, 210–231.

Catakli D. (2022), *Verwaltung im digitalen Zeitalter. Die Rolle digitaler Kompetenzen in der Personalakquise des höheren Dienstes*, Wiesbaden: Springer Gabler.

Charalbidis Y., Medaglia R., van Noordt C. (eds) (2024), *Research Handbook on Public Management and Artificial Intelligence*, Cheltenham: Edward Elgar.

Chrétien P., Chifflot N., Tourbe M. (2016), *Droit administratif*, 15th edition, Paris: Sirey.

Cohen-Eliya M., Porat I. (2013), *Proportionality and Global Culture*, Cambridge: Cambridge University Press.

Colmeiro D.M. (1858), *Derecho Administrativo Español*, Tomo I, 2nd edition, Madird y Santiago: Librerías de Don Angel Calleja.

Crosby N., Kelly J.M., Schaefer P. (1986), 'Citizens Panels: A New Approach to Citizen Participation', 46(2) *Public Administration Review*, 170–178.
de Tocqueville A. (1839/40), 'De la démocratie en Amérique', 4 volumes; reproduced, in de Tocqueville A. (ed), *Oeuvres complètes* (1951), Tome I, 2 vol., Paris: Gallimard.
Desai M. (2003), 'Public Goods: A Historical Perspective', in Kaul I., Conceição P., Le Goulven K., U. Mendoza R. (eds), *Providing Global Public Goods*, Oxford: Oxford University Press, 63–77.
Di Fabio U. (1994), *Risikoentscheidungen im Rechtsstaat*, Tübingen: Mohr Siebeck.
Diatkine D. (2021), *Adam Smith and the Wealth of Nations*, Cham: Palgrave, Springer.
Dicey A.V. (1915), *Introduction to the Study of the Law of the Constitution*, 8th edition, London: Macmillan.
Doncel Fernández L.V. (2022), 'Digital Democracy: Political Communications in the Era of New Information and Communication Technologies', in Saura J.R., Debasa F. (eds), *Handbook of Research on Artificial Intelligence in Government Practices and Processes*, Hershey, PA: IGI Global, 105–125.
Du Gay P., Lopdrup-Hijorth T. (2023), *For Public Service: State, Office and Ethics*, London: Routledge.
Duguit L. (1913), *Les transformations du droit public*, Paris: Armand Colin.
Dwivedi O.P. (2005), 'Administrative Culture and Values: Approaches', in Jabbra J.G., Dwivedi O.P. (eds), *Administrative Culture in a Global Context*, Whitby, ON: de Sitter Publications.
Dyzenhaus D. (2014), 'Proportionality and Deference in a Culture of Justification', in Hushcroft G., Miller B.W., Webber G. (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge: Cambridge University Press, 234–258.
Ebers M., Tupay P.K. (eds) (2023), *Artificial Intelligence and Machine Learning Powered Public Service Delivery in Estonia: Opportunities and Legal Challenges*, Cham: Springer.
Egeberg M. (2014), 'How Bureaucratic Structure Matters: An Organizational Perspective', in Peters B.G., Pierre J. (eds), *The SAGE Handbook of Public Administration*, 2nd edition, London: Sage, 143–154.
Egeberg M., Trondal J. (2018), *An Organizational Approach to Public Governance: Understanding and Design*, Oxford: Oxford University Press.
Ellwein T., Hesse J.J. (1997), *Der überforderte Staat*, Frankfurt am Main: Suhrkamp.
Esteve Pardo J. (2015), *Estado garante: idea y realidad*, Madrid: Instituto Nacional de Administración Pública.
Faith B. (2023), *Risks and Benefits of Digital Tools for Social Protection Delivery from a Gender Perspective*, Expert Paper ILO/UN Women, Doc. EGM/WS20024/EP.4.
Fisher E. (2007), *Risk Regulation and Administrative Constitutionalism*, Oxford, Portland: Hart Publishing.
Forsthoff E. (1938), *Die Verwaltung als Leistungsträger*, Stuttgart: Kohlhammer.
Fraenkel-Haeberle C., Socher J., Sommermann K.-P. (eds) (2020), *Praxis der Richtlinienumsetzung im Europäischen Verwaltungsverbund: die Reichweite der Umgestaltung der nationalen Umwelt- und Energieverwaltung*, Berlin: Dunkler & Humblot.
Franzius C. (2008), 'Der Gewährleistungsstaat', 99 *Verwaltungsarchiv*, 351–379.
Frier P.-L., Petit J. (2014), *Droit administratif*, 9th edition, Paris: LGDJ.
Fuenteaja Pastor J.A. (2013), *Pasado, presente y futuro de la función pública. Entre la politicación y la patrimonialización*, Pamplona: Civitas.
García-Pelayo M. (1985), *Las transformaciones del Estado contemporáneo*, 2nd edition, Madrid: Alianza Editorial.
Godechot J. (1979), *Les Constitutions de la France*, Paris: Flammarion.
González Pérez J. (1966), *El administrado*, Madrid: Civitas.
Gordillo A. (2006), *Tratado de Derecho Administrativo, Tomo 2: La defensa del usuario y del administrado*, 8th edition, Buenos Aires: Fundación de Derecho Administrativo.
Grimm D. (2022), 'Grundrechtsbindung der deutschen Verwaltung', in Kahl W., Ludwig M. (eds), *Handbuch des Verwaltungsrechts*, vol. III, Heidelberg: C.F. Müller, 427–454.
Grönlund K., Bächtiger A., Setälä M. (eds) (2014), *Deliberative Mini-Publics: Involving Citizens in the Democratic Process*, Colchester: ECPR.
Guckelberger A. (2025), 'Hochrisiko-KI-Systeme in der Verwaltung', 2 *Die Öffentliche Verwaltung (DÖV)*, forthcoming.
Gundel J. (2020), 'Verwaltung', in Schulze R., Janssen A., Kadelbach S. (eds), *Europarecht. Handbuch für die deutsche Rechtspraxis*, 4th edition, Baden-Baden: Nomos, 148–232.

Hamburger P. (2014), *Is Administrative Law Unlawful?*, Chicago: Chicago University Press.
Hastings C. (2024), *The Agile Government: Blueprint for Modern Public Administration*, Hamburg: Tredition.
Hattenhauer H. (ed) (1994), *Allgemeines Landrecht für die Preußischen Staaten von 1794*, with an introduction by H. Hattenhauer, Neuwied: Luchterhand.
Hauriou M. (1892), *Précis de droit administratif*, Paris: L. Larose & Forcel.
Herring E.P. (1936), *Public Administration and the Public Interest*, New York: McGraw-Hill Book Co.
Hesse K. (1990), *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 17th edition, Heidelberg: C. F. Müller.
Heuschling L. (2002), *État de droit, Rechtsstaat, Rule of Law*, Paris: Dalloz.
Hill H. (2018), 'Agiles Verwaltungshandeln im Rechtsstaat', 13 *Die Öffentliche Verwaltung (DÖV)*, 497–504.
Hill H. (2024), 'Personalentwicklung als Digitalisierungsturbo', 12 *Die Öffentliche Verwaltung (DÖV)*, 524–529.
Hodge G.A., Greve C., Boardman A.E. (eds) (2010), *International Handbook on Public-Private Partnerships*, Cheltenham: Edward Elgar.
Hofmann H.C.H. (2008), 'Mapping the European Administrative Space', 31(4) *West European Politics*, 662–676.
Ibler M. (1999), *Rechtspflegender Rechtsschutz im Verwaltungsrecht*, Tübingen: Mohr Siebeck.
Kahl W. (2022), 'Kontrolle der Verwaltung und des Verwaltungshandelns', in Voßkuhle A., Eifert M., Möllers C. (eds), *Grundlagen des Verwaltungsrechts*, vol. 2, 3rd edition, München: C. H. Beck, pp. 1557–1713.
Kämmerer J.A. (2001), *Privatisierung: Typologie – Determinanten – Rechtspraxis – Folgen*, Tübingen: Mohr Siebeck.
Klafki A. (2017), *Risiko und Recht*, Tübingen: Mohr Siebeck.
Knill C., Steinebach Y., Zink D. (2024), 'How Policy Growth Affects Policy Implementation: Bureaucratic Overload and Policy Triage', 31(2) *Journal of European Public Policy*, 324–351.
König K. (2003), 'On the Typology of Public Administration', 69(4) *International Review of Administrative Sciences*, 449–462.
König K. (2024), *Rationalitäten öffentlicher Verwaltung*, Baden-Baden: Nomos.
Ladeur K.-H. (2022), 'Die Kommunikationsinfrastruktur der Verwaltung', in Voßkuhle A., Eifert M., Möllers C. (eds), *Grundlagen des Verwaltungsrechts*, vol. 1, 3rd edition, München: C. H. Beck, pp. 1511–1585.
Landmore H. (2020), *Open Democracy. Reinventing Popular Rule for the Twenty-First Century*, Princeton, NJ: Princeton University Press.
Lapsley I., Miller P. (2024), 'The Emergence and Resilience of New Public Management (NPM)', in Lapsley I., Miller P. (eds), *The Resilience of New Public Management*, Oxford: Oxford University Press, 3–48.
Lassalle F. (1919), *Das Arbeiterprogramm. Uber den besonderen Zusammenhang der gegenwärtigen Geschichtsperiode mit der Idee des Arbeiterstandes* (1862), reproduced in Lassalle F., Bernstein E. (eds), vol. 2 *Gesammelte Reden und Schriften*, Berlin: Cassirer.
Lember V., Randma-Liiv T., Maria Vooglaid K. (2022), 'Engaging Citizens in Policy Making: The Potential and Challenges of e-Participation', in Randma-Liiv T., Lember V. (eds), *Engaging Citizens in Policy Making*, Cheltenham: Edward Elgar Publishing, 1–10.
Lips M. (2020), *Digital Government: Managing Public Sector Reform in the Digital Era*, London: Routledge.
MacCarthaigh M., Simoes S., Deepak P. (2024), 'AI in the public sector: Fundamental operational questions and how to address them', in Charalabidis Y., Medaglia R., van Noordt C. (eds), *Research Handbook on Public Management and Artificial Intelligence*, Cheltenham: Edward Elgar Publishing, 45–61.
Martini M. (2019), *Blackbox Algorithmus – Grundfragen einer Regulierung Künstlicher Intelligenz*, Berlin: Springer.
Masing J. (1997), *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: Europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht*, Berlin: Duncker & Humblot.
Mayer O. (1895), *Deutsches Verwaltungsrecht*, Bd. 1, Leipzig: Duncker & Humblot.

Meierhenrich J. (2021), 'Rechtsstaat Versus Rule of Law', in Meierhenrich J., Loughlin M. (eds), *The Cambridge Companion to the Rule of Law*, Cambridge: Cambridge University Press, 39–67.
Merten D. (1994), 'Das Recht des Öffentlichen Dienstes in Deutschland', in Magiera S., Siedentopf H. (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot, 181–234.
Milakovich M.E. (2022), *Digital Governance. Applying Advanced Technologies to Improve Public Service*, 2nd edition, New York, London: Routledge.
Misgeld M., Wojtczak M. (2024), 'Führung in der Netzwerkverwaltung', in Seckelmann M. (ed), *Digitalisierte Verwaltung – Vernetztes E-Government*, 3rd edition, Berlin: Erich Schmidt Verlag, 739–762.
Morio C. (2021), *L' administré: essai sur une légende du droit administratif*, Paris: LGDJ.
Möstl M. (2002), *Die staatliche Garantie für die öffentliche Sicherheit und Ordnung*, Tübingen: Mohr Siebeck.
Muench S., Stoermer E., Jensen K., Asikainen T., Salvi M., Scapolo F. (2022), *Towards a Green & Digital Future: Key Requirements for Successful Twin Transitions in the European Union*, Luxembourg: Publications Office of the European Union.
Münkler L. (2020), *Expertokratie*, Tübingen: Mohr Siebeck.
Nicolaidis K., Kleinfeld R. (2012), *Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma*, SIGMA-Paper No. 49, Paris: OECD Publishing.
Niedobitek M. (1994), 'Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft – Rechtsvergleichende Analyse', in Magiera S., Siedentopf H. (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot, 11–66.
Novak W.J. (2017), 'The Administrative State in America', in von Bogdandy A., Huber P.M., Cassese S. (eds), *The Max Planck Handbooks in European Public Law, Vol. 1: The Administrative State*, Oxford: Oxford University Press, 98–124.
Nozick R. (1974), *Anarchy, State, and Utopia*, Oxford: Basil Blackwell.
Olson J.P. (2003), 'Towards a European Administrative Space?', 10(4) *Journal of European Public Policy*, 506–531.
Orator A. (2017), *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen*, Tübingen: Mohr Siebeck.
Ostrom V. (1989), *The Intellectual Crisis in American Public Administration*, 2nd edition, Tuscaloosa: The University of Alabama Press.
Ostrom V. (2008), *The Intellectual Crisis in American Public Administration*, 3rd edition, Tuscaloosa: The University of Alabama Press.
Pérez Luño A.-E. (1991), *La seguridad jurídica*, Barcelona: Ariel.
Powell R. (2019), *Rights as Security. The Theoretical Basis of Security of Peron*, Oxford: Oxford University Press.
Scelle G. (1932), *Précis de droit des gens. Principes et systématique*, vol. I, Paris: Recueil Sirey.
Schlütermann T. (2024), *Ergänzungsimpulse zur repräsentativen Demokratie. Ein deutsch-französischer Verfassungsvergleich*, Tübingen: Mohr Siebeck.
Schneider J.-P. (2017), 'Information Exchange and Its Problems', in Harlow C., Leino P., della Cananea G. (eds), *Research Handbook on EU Administrative Law*, Cheltenham: Edward Elgar, 81–112.
Scholz R. (2020), *Die europäische Energieverwaltung vor dem Hintergrund des Integrationsgefüges in der Europäischen Union*, Baden-Baden: Nomos.
Schubert S.R., Pollak J., Kreutler M. (2016), *Energy Policy of the European Union*, London: Palgrave Macmillan.
Seckelmann M. (2024), *Digitalisierte Verwaltung – Vernetztes E-Government*, 3rd edition, Berlin: Erich Schmidt Verlag, 2024.
Shimizu M., Clark A.L. (2019), *Nexus of Resilience and Public Policy in a Modern Risk Society*, Singapore: Springer.
Siegel T. (2023), 'Zur Relevanz des Klimaschutzes in der Fachplanung', 8 *Die Öffentliche Verwaltung (DÖV)*, 329–334.
Simoncini M. (2018), *Administrative Regulation Beyond the Non-Delegation Doctrine: A Study on EU Agencies*, Oxford, Portland (Oregon): Hart Publishing.

Smith A. (1776), *An Inquiry into the Nature and Causes of the Wealth of Nations*, London: W. Strahan; new edition by R.H. Campbell and A.S. Skinner (eds) (1996), Oxford: Oxford University Press.

Sommermann K.-P. (1997), *Staatsziele und Staatszielbestimmungen*, Tübingen: Mohr Siebeck.

Sommermann K.-P. (2007), 'Entwicklungsperspektiven des Rechtsstaats: Europäisierung und Internationalisierung eines staatsrechtlichen Leitbegriffs', in Magiera S., Sommermann K.-P. (eds), *Freiheit, Rechtsstaat und Sozialstaat in Europa*, Berlin: Duncker & Humblot, 75–89.

Sommermann K.-P. (2010), 'La exigencia de una Administración transparente en la perspectiva de los principios de democracia y del Estado de Derecho', in García Macho R. (ed), *Derecho administrativo de la información y administración transparente*, Madrid: Marcial Pons, 11–25.

Sommermann K.-P. (2014), 'Towards a Common European Administrative Culture?', in König K., Kropp S., Kuhlmann S., Reichard C., Sommermann K.-P., Ziekow J. (eds), *Grundmuster der Verwaltungskultur*, Baden-Baden: Nomos, 605–628.

Sommermann K.-P. (2015), 'Sachverständige Politikberatung: Funktionsbedingung oder Gefährdung der Demokratie? – eine Skizze', in Sommermann K.-P. (ed), *Sachverständige Politikberatung*, Baden-Baden: Nomos, 14–21.

Sommermann K.-P. (2017), 'Transformative Effects of the Aarhus Convention in Europe, in: Transformative Effects of the Aarhus Convention in Europe', 77 *Heidelberg Journal of International Law (HJIL)*, 321–337.

Sommermann K.-P. (2022), 'Les bases constitutionnelles du droit administratif européen', in Auby J.-B., Dutheil de la Rochère J. (eds), *Traité de droit administratif européen*, 3rd edition, Bruxelles: Bruylant, 1019–1036.

Sommermann K.-P. (2024), 'Climate Protection as a Driving Force for Legal Innovation', in Gromek-Broc K., Monica A. (eds), *Quo Vadis Ius Publicum Europaeum? Liber Amicorum in Onore Del Professore Jacques Ziller*, Napoli: Editoriale Scientifica, 81–94.

Sydow G. (2004), *Verwaltungskooperation in der Europäischen Union. Zur horizontalen und vertikalen Zusammenarbeit der europäischen Verwaltungen am Beispiel des Produktzulassungsrechts*, Tübingen: Mohr Siebeck.

Taillefait A. (2022), *Droit de la fonction publique*, 9th edition, Paris: Dalloz.

Thomas J.C. (2013), 'Citizen, Customer, Partner: Rethinking the Place of the Public in Public Management', 73(6) *Public Administration Review (PAR)*, 786–796.

Thomas J.C. (2015), *Citizen, Customer, Partner: Engaging the Public in Public Management*, London: Routledge.

Tosun J. (2013), *Risk Regulation in Europe: Assessing the Application of the Precautionary Principle*, New York: Springer.

Trondal J., Peters B.G. (2015), 'A Conceptual Account of the European Administrative Space', in Bauer M.W., Trondal J. (eds), *The Palgrave Handbook of the European Administrative System*, London: Palgrave Macmillan, 79–92.

van der Meer F.M., Steen T., Wille A. (2015), 'Civil Service Systems in Western Europe: A Comparative Analysis', in van der Meer F.M., Raadschelders J.C.N., Toonen T.A.J. (eds), *Comparative Civil Service Systems in the 21st Century*, London: Palgrave Macmillan, 38–56.

van Reybrouck D. (2016), *Against Elections: The Case for Democracy*, Bodley Head.

Van Wart M., Hondeghem A., Schwella E., Suino P. (2015), *Leadership and Culture: Comparative Models of Top Civil Servant Training*, Houndsmills: Palgrave Macmillan.

Voßkuhle A. (2003), 'Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung', 62 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, 266–335.

von Bogdandy A., Hering L. (2022), 'Die Informationsbeziehungen im europäischen Verwaltungsverbund', in Voßkuhle A., Eifert M., Möllers C. (eds), *Grundlagen des Verwaltungsrechts*, vol. 1, 3rd edition, München: C.H. Beck, pp. 1799–1885.

von Humboldt W. (1851), *Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staats zu bestimmen*, Breslau: Verlag von Eduard Trewendt (the text was written in 1792).

von Lucke J., Gollasch K. (2022), *Open Government*, Wiesbaden: Springer Gabler.

Waldo D. (1948), *The Administrative State. A Study of the Political Theory of American Public Administration*, New York: The Ronald Press Company.

Weber A. (2024), 'Limitation and Derogation of Fundamental Rights', in Babeck W., Weber A. (eds), *Writing Constitutions*, vol. 2, Cham: Springer, 581–604.

Weber M. (1972), *Wirtschaft und Gesellschaft*, 5th edition, Winckelmann J. (rev), Tübingen: Mohr Siebeck.
Weber M. (1978), *Economy and Society*, edited by Roth G., Wittich C., Berkeley: University of California Press.
Weiß W. (2010), *Der Europäische Verwaltungsverbund*, Berlin: Duncker & Humblot.
Wißmann H. (2022), 'Grundmodi der Augabenwahrnehmung', in Voßkuhle A., Eifert M., Möllers C. (eds), *Grundlagen des Verwaltungsrechts*, vol. 1, 3rd edition, München: C.H. Beck, 1025–1111.
Wernisch-Liebich L., Hammoutene C. (2023), 'Bürger:innenräte: ein zukunftsträchtiges Instrument zur Lösung gesellschaftlicher Fragen?', in Fritz J., Tomaschek N. (eds), *Partizipation: Das Zusammenwirken der Vielen für Demokratie, Wirtschaft und Umwelt*, Münster: Waxmann Verlag, 15–28.
Wischmeyer T. (2022), 'Informationsbeziehungen in der Verwaltung', in Voßkuhle A., Eifert M., Möllers C. (eds), *Grundlagen des Verwaltungsrechts*, vol. 1, 3rd edition, München: C.H. Beck, 1743–1798.
Woehrling J.-M. (1999), 'Le contrôle juridictionnel du pouvoir discrétionnaire en France', 52(7) *La Revue administrative*, 75–97.
Wohlwend D. (2021), *The International Rule of Law – Scope, Subjects, Requirements*, Cheltenham: Edward Elgar.

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Part II

The Transformation of National Civil Service Systems

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4 The Civil Service in Austria

Tradition, Reforms, and the Impact of European Law

Barbara Cargnelli-Weichselbaum

I. Introduction and Overview

The civil service in Austria has undergone major changes, especially in the last three decades. At the federal level, the salary law regulations changed from promotion by seniority to a more function-orientated system in 1994.[1] Shortly after and also in 1994, a new provision was implemented in the Austrian constitution allowing civil servants to be entrusted with executive functions for only a certain period of time.[2] In 1999, the *Homogenitätsprinzip* (principle of homogeneity) ensuring homogeneity between federal and provincial as well as municipal employment law of public employees – hitherto laid down in the Austrian constitution – was abolished.[3] Since then the *Bundesgesetzgeber* (federal legislator) and the nine *Landesgesetzgeber* (provincial legislators) have no longer been strictly bound to the *Begriffsbild* (conceptual image) of Austrian civil servants and contractual agents resulting from the case law of the Austrian *Verfassungsgerichtshof* (Constitutional Court, VfGH) on this concept.[4] This means that each became free to create new legal frameworks for employees of the civil service within its legislative competence.

Immediately and in this very context, federal law regulations concerning contractual agents in the Austrian federal administration were fundamentally changed in orientation towards the civil servant law, including its differentiated salary system which also allows

1 See Salary Reform Act of 19 July 1994 (*Bundesgesetz, mit dem das Beamten-Dienstrechtsgesetz 1979, das Gehaltsgesetz 1956, die Reisegebührenvorschrift 1955, das Bundes-Personalvertretungsgesetz, das Ausschreibungsgesetz 1989, das Verwaltungsakademiegesetz, das Pensionsgesetz 1965, das Nebengebührenzulagengesetz, die Bundesforste-Dienstordnung 1986, das Vertragsbedienstetengesetz 1948, das Bundesministeriengesetz 1986, das Auslandseinsatzzulagengesetz, das Einsatzzulagengesetz, das Wehrgesetz 1990, das Bundesgesetz über militärische Auszeichnungen und das Schulorganisationsgesetz geändert werden; Besoldungsreform-Gesetz 1994*), *BGBl.* No. 550/1994; www.ris.bka.gv.at/Dokumente/BgblPdf/1994_550_0/1994_550_0.pdf. More on this in Weichselbaum (2001), pp. 237 ff. Introductory note: all Austrian laws and decisions cited in the text can be downloaded at www.ris.bka.gv.at/. Laws can be downloaded in their original or current version (including amendments). For historical laws or important laws and amendments, extra links will be provided. *BGBl.* is the abbreviation for *Bundesgesetzblatt* (Federal Law Gazette), *LGBl.* for *Landesgesetzblatt* (Regional Law Gazette) and RGBl. for *Reichsgesetzblatt* (Imperial Law Gazette). § means *Paragraph* (*section*).

2 See Article 1, para. 8 of the Federal Constitutional Act Amendment of 21 December 1994 (*Bundesverfassungsgesetz, mit dem das Bundes-Verfassungsgesetz in der Fassung von 1929 geändert wird sowie das EWR-Bundesverfassungsgesetz und das EGKS-Abkommen-Durchführungsgesetz aufgehoben werden; Bundes-Verfassungsgesetz-Novelle 1994 – B-VGN 1994*), *BGBl.* No. 1013/1994; www.ris.bka.gv.at/Dokumente/BgblPdf/1994_1013_0/1994_1013_0.pdf.

3 See Section III for more details and references.

4 For details see Cargnelli-Weichselbaum (2019), margin numbers 101 ff. See also Section III of this chapter.

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high salaries to be paid. This is why it has since been possible to appoint contractual agents even to the highest positions in the federal administration. The provincial legislators followed the example of the federal legislator with different nuances. The quickest and most remarkable reform took place in the westernmost *Bundesland* (province) *Vorarlberg*, where since 1 July 2000 all new employees in the civil service have had to be contractual agents. The federal legislator continued with reforms: since 1997 there have been important pension law reforms. Their main goal has been to constantly reduce the pension entitlements of federal civil servants to those foreseen by the general social security law for contractual agents and people employed under labour law. The example has been followed by the provincial legislators.

Since 2008, the Austrian constitution explicitly mentions contractual agents besides civil servants and elected organs as administrative organs. Since 2019, the Austrian constitution has no longer foreseen that executive functions at provincial and municipal levels of the Austrian administration must be transferred (only) to civil servants. In contrast, the Austrian constitution still explicitly mentions the term *leitende Beamte* (senior civil servants) in the context of the federal ministerial administration and envisages the right of the *Bundespräsident* (Federal President) to appoint civil servants at the federal level.[5]

From outside this may seem confusing. In addition, although the Austrian constitution establishes administrative structures, many public tasks are carried out by outsourced companies and their employees, to whom general labour law applies.[6] It is therefore necessary to be familiar with the constitutional framework and legal provisions, and also with the realities and culture of public administration in order to understand the functioning of the civil service in Austria. All of these factors are going to be addressed in this contribution.

II. Historical and Constitutional Basis of the Civil Service in Austria

The civil service in Austria has a very long tradition dating back to the 15th century.[7] The real *Schöpfer des Beamtenstaates* (creator of the civil service State), however, was Emperor Joseph II.[8] Towards the end of the 18th century, Emperor Joseph II became famous for calling himself *erster Diener des Staates* (first servant of the State). As early as 1783, he wrote an *Erinnerung an seine Staatsbeamten* (reminder to his state officials) also known as *Hirtenbrief* (pastoral letter), pointing out and insisting that state officials were servants and had to serve the State.[9] However, during the Austrian monarchy, this was only valid under his regency. His successor, Franz I, turned civil servants back into the Emperor's servants.[10]

5 More on the reforms at federal and provincial level can be found in Section III of this chapter.

6 For details see Section IV of this chapter, including all relevant references.

7 See Schimetschek (1984), pp. 34 ff.

8 Schimetschek (1984), pp. 94 ff. See also, among others, Öhlinger (1993), pp. 11 f.

9 See the text of *Joseph des Zweyten Erinnerung an seine Staatsbeamten, am Schlusse des 1783ten Jahres*; https://play.google.com/books/reader?id=a0xXAAAAcAAJ&pg=GBS.PP4&hl=de. This text is also called *Hirtenbrief* (pastoral letter) and dates from 13 December 1783 – see Walter (1950), pp. 123 ff., with a quote at the beginning proving this date. See also the reprint in Klueting (1995), pp. 334 ff., and the quotation of this reprint www.jku.at/fileadmin/gruppen/142/Erinnerung_an_seine_Staatsbeamten.pdf.

10 Heindl (1991), pp. 44 f. and 59 f.

Although the (so-called) *Rang- und Gehaltsgesetz* (Rank and Salary Act) of 1873[11] was already a major milestone for setting the employment relationship of civil servants in law,[12] the civil service law was not codified until the *Dienstpragmatik* (Law on Civil Servants and Subordinate Servants) in 1914[13] and thus not until the end of the era of the Austrian (then constitutional) monarchy.[14]

The federal constitutional law of Austria, the main legal source of which is the *Bundes-Verfassungsgesetz* (Federal Constitutional Act, B-VG) of 1920,[15] has always lacked an explicit provision reserving the exercise of public administration (only) to civil servants. In contrast to the German constitution, it does not provide that the exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.[16] However, since its enactment in 1920, the B-VG has contained several provisions which clearly show that civil servants – in Austria, too, understood as employees appointed by administrative decision and not by contract and enjoying lifetime employment[17] – play an important role in the development of the Austrian civil service. In its original version of 1920, the first sentence of Article 20 B-VG stated: *Unter der Leitung der Volksbeauftragten führen nach den Bestimmungen der Gesetze auf Zeit gewählte Organe oder ernannte berufsmäßige Organe die Bundes- oder die Landesverwaltung* ("Under the direction of the people's delegates, organs elected for a limited period of time or appointed professional organs conduct the federal or provincial administration in accordance with the provisions of the laws").[18] Since 1929, Article 20 B-VG has no longer referred to *Volksbeauftragte* (the people's delegates) but to the *obersten Organe des Bundes und der Länder* (supreme organs of the federation

11 The formal title of this law was *Gesetz vom 15. April 1873, betreffend die Regelung der Bezüge der activen Staatsbeamten*, *RGBl.* No. 47/1873; https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1873&page=253&size=45.

12 For more on this "*Magna Charta*" of 1873 and its economic importance for civil servants, see Megner (1985), pp. 108 ff. The same is true for other, less well-known laws passed at the same time; see *RGBl.* No. 48–50/1873, also downloadable at https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1873&page=257&size=45.

13 *Gesetz vom 25. Jänner 1914, betreffend das Dienstverhältnis der Staatsbeamten und der Staatsdienerschaft (Dienstpragmatik), RGBl.* No. 15/1914; https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=19140004&seite=00000087. For the text of this law in its original version, including explanations and a subject index, see also Pace (1914).

14 For more on this and the previous developments, see Weichselbaum (2003), pp. 64 ff. with further references.

15 *Gesetz, womit die Republik Österreich als Bundesstaat eingerichtet wird (Bundes-Verfassungsgesetz)* of 10 November 1920, *BGBl.* No. 1/1920; https://alex.onb.ac.at/cgi-content/alex?aid=bgb&datum=19200004&seite=00000001.

16 See Article 33, para. 4 of the Basic Law for the Federal Republic of Germany of 23 May 1949 (GG, *Grundgesetz für die Bundesrepublik Deutschland*), BGBl. 1949 I p. 1: *Die Ausübung hoheitsrechtlicher Befugnisse ist als ständige Aufgabe in der Regel Angehörigen des öffentlichen Dienstes zu übertragen, die in einem öffentlich-rechtlichen Dienst- und Treueverhältnis stehen*; www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&tocf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F*%5B%40node_id%3D%27990218%27%5D&skin=pdf&tlevel=-2&nohist=1&sinst=EF179FC5. The translated text quoted is from the English version of the Basic Law for the Federal Republic of Germany including its amendments of 19 December 2022, downloaded at www.gesetze-im-internet.de/englisch_gg/englisch_gg.html; see also *The Civil Service in Germany: A Service Based On Mutual Loyalty* by C.D. Classen in this volume.

17 See Cargnelli-Weichselbaum (2019), margin number 101. More on this also in Sections III and V of this chapter.

18 Unofficial translation of Article 20 B-VG in the version *BGBl.* No. 1/1920 (n. 15).

and the provinces), and to the *Verwaltung* (administration).[19] The rest of the sentence was only amended in 2008.[20]

The inclusion of organs elected for a limited period of time in the text of the B-VG was an idea of the Social Democrats, who distrusted the monarchic bureaucracy and therefore believed that the new-born Republic of Austria should not leave exclusive responsibility for state administration to a civil service bureaucracy in monarchic tradition. The idea was never implemented,[21] which is why in actual fact only the *ernannte berufsmäßige Organe* (appointed professional organs) have been responsible for conducting the public administration under the direction of the supreme (executive) organs of the federation and the provinces.[22] These supreme organs at the federal level are mainly the *Bundeskanzler* (Federal Chancellor), the *Vizekanzler* (Vice-Chancellor), and the other *Bundesminister* (Federal Ministers); at the provincial level they are the nine *Landesregierungen* (Provincial Governments) and their members. In 1920, only civil servants employed for life were *ernannte berufsmäßige Organe*. Contractual agents were only employed for subordinate functions or in the private sector administration of the state, but they were never intended for public tasks connected with the exercise of state power. The term *ernannte berufsmäßige Organe* was then considered synonymous with *Beamte* (civil servants).[23]

Although the historical interpretation of Article 20 B-VG, especially the regulations governing the civil service in 1920, clearly shows that the term *ernannte berufsmäßige Organe* does not include *Vertragsbedienstete* (contractual agents),[24] it was increasingly considered legitimate, especially by the Constitutional Court,[25] that the latter should no longer be restricted to the exercise of subordinate functions and private-law activities of the state. The authors who promoted this idea in the legal literature[26] were able to support their argument with an amendment of the text of the B-VG in 1974,[27] which has since used the word *Bedienstete* instead of *Angestellte* in several articles. The intention of the constitutional leg-

19 *Bundesverfassungsgesetz vom 7. Dezember 1929, betreffend einige Abänderungen des Bundes-Verfassungsgesetzes vom 1 Oktober 1920 in der Fassung des B. G. Bl. Nr. 367 von 1925 (Zweite Bundes-Verfassungsnovelle), BGBl.* No. 392/1929; https://alex.onb.ac.at/cgi-content/alex?aid=bgb&datum=1929&page=1363&size=45; translation provided by the Austrian Legal Information System; www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf. General remark: this translation speaks of *Länder* and *Bundesländer* as “provinces” and not “states” or “federate states”. Therefore, the terms “provinces” and “provincial” will also be used in this contribution.

20 See also Section III of this chapter.

21 See Weichselbaum (2003), pp. 86 ff. and p. 91.

22 It is worth noting that subordinate organs are only bound by directions from competent organs and which are not contrary to criminal law – see Article 20, para. 1, sentence 3 B-VG.

23 See Weichselbaum (2003), pp. 118 ff.

24 For the federal Civil Service law see the *Bundesgesetz vom 17. März 1948 über das Dienst- und Besoldungsrecht der Vertragsbediensteten des Bundes (Vertragsbedienstetengesetz 1948)* (Contractual staff Act, VBG), *BGBl.* No. 86/1948; www.ris.bka.gv.at/Dokumente/BgblPdf/1948_86_0/1948_86_0.pdf. For a profound commentary on this law and all its amendments, see Ziehensack (2024).

25 See among others *Verfassungssammlung* (collection of the decisions of the Constitutional Court, VfSlg) 8136/1977.

26 See among others Thienel (1990), pp. 213 ff.

27 *Bundesverfassungsgesetz vom 10. Juli 1974, mit dem das Bundes-Verfassungsgesetz in der Fassung von 1929 geändert wird (Bundes-Verfassungsgesetznovelle 1974)*, *BGBl.* No. 444/1974; www.ris.bka.gv.at/Dokumente/BgblPdf/1974_444_0/1974_444_0.pdf.

islator was to eliminate the "interpretative difficulties" of the word *Angestellte*.[28] However, the word *Bedienstete* is generally regarded as a generic term for *Beamte* (civil servants) and *Vertragsbedienstete* (contractual agents), whereas *Angestellte* was mainly used as a synonym for *Beamte* in the 1920s in various laws concerning the legal relationship between the State and its civil servants.[29] And the constitutional legislator was not consistent in 1974: in Article 65, paragraph 2, point a and Article 66, paragraph 1 B-VG, concerning appointment of civil servants at the federal level, the word *Angestellte* was replaced by *Beamte*.

The latter articles of the B-VG were one of the main reasons why for a long time it was undisputed that high functions in the federal civil service were reserved for civil servants. According to Article 65, paragraph 2, point a B-VG, civil servants at the federal level are as a general rule appointed by the Federal President. The Federal President has the right to delegate this competence, especially to Federal Ministers with regard to the personnel belonging to their portfolio (Article 66, paragraph 1 B-VG). However, he has always reserved the right to appoint civil servants for himself when it came to civil servants in high public functions.[30]

For decades, this prerogative of the Federal President was taken into account and respected by the federal legislator. The service and salary laws provided only for civil servants (and not contract staff) the possibility of attaining senior positions in the administration and receiving a salary commensurate with such positions.[31] Thanks to the principle of homogeneity (enshrined in Article 21, paragraph 1 B-VG) which obliged legislators at the provincial level to create and maintain a legal situation more or less identical to the one existing at the federal level (and vice versa) in order to enable or facilitate changes between service relationships at federal, provincial, and municipal levels, the same was true for the civil service and salary laws of the nine provinces.[32] Interestingly enough, even when the *Dienstpragmatik* of 1914 was partially replaced by the *Beamten-Dienstrechtsgesetz* (civil servants [employment] act, BDG) of 1977 and finally fully by the *Beamten-Dienstrechtsgesetz*

28 See the explanatory notes of the *Regierungsvorlage* (government's legislative proposal) *182 der Beilagen zu den stenographischen Protokollen des Nationalrates XIII. GP* of 2 February 1972, pp. 13 f.; www.parlament.gv.at/dokument/XIII/I/182/imfname_317948.pdf.

29 See for example the *Bundesgesetz vom 18. Juli 1924 über das Diensteinkommen und die Ruhe- und Versorgungsgenüsse der Bundesangestellten (Gehaltsgesetz)* (Wage Act), *BGBl.* No. 245/1924; https://alex.onb.ac.at/cgi-content/alex?aid=bgb&datum=19240004&seite=00000633.

30 See currently the resolution of the Federal President on the appointment of federal civil servants of 1 January 1995 (*Entschließung des Bundespräsidenten betreffend die Ausübung des Rechtes zur Ernennung von Bundesbeamten*), *BGBl.* No. 54/1995, in the version of 14 September 2018, *BGBl.* II No. 245/2018; www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001378.

31 See Weichselbaum (2004), p. 26.

32 See Article 21, para. 1, sentence 2 B-VG in the (former) version *BGBl.* No 1013/1994 (n. 2): "Die in den Angelegenheiten des Dienstrechtes erlassenen Gesetze und Verordnungen der Länder dürfen von den das Dienstrecht regelnden Gesetzen und Verordnungen des Bundes nicht in einem Ausmaß abweichen, daß der gemäß Absatz 4 vorgesehene Wechsel des Dienstes wesentlich behindert wird", downloadable from www.ris.bka.gv.at/eli/bgbl/1930/1/A21/NOR12015122 (unofficial translation: "The laws and ordinances of the provinces enacted in matters of civil service law shall not deviate from the laws and ordinances of the Federation regulating civil service law to such an extent that the change of service provided for under paragraph 4 is significantly hindered"). For more details see Cargnelli-Weichselbaum (2019), margin numbers 101 ff.

1979 (BDG 1979)[33] at the federal level, some provinces continued to call their civil servant laws *Dienstpragmatik*.[34]

In addition, the ten legislators responsible (one at the federal level and nine at the provincial level) therefore complied with provisions in the Austrian constitution which imply (or until a few years ago implied) that at least higher administrative functions are reserved for civil servants. At the federal level, one such provision is Article 71 B-VG. It stipulates that when a Federal Government has resigned, the Federal President may entrust the continuation of the administration to members of the resigning Federal Government or to *leitende Beamte* (senior civil servants) of the Federal Ministries and the chairmanship of the provisional Federal Government to one of them until the new Federal Government is formed.[35] At the provincial level, § 2, paragraph 3 of the *Bundesverfassungsgesetz vom 30. Juli 1925, betreffend Grundsätze für die Einrichtung und Geschäftsführung der Ämter der Landesregierungen außer Wien* (Constitutional Act on Provincial Government Offices except Vienna, BVG ÄmterLReg)[36] stated until its amendment in January 2019 that *Beamte* (civil servants) of the respective *Amt der Landesregierung* (administrative apparatus of the Provincial Government) were at the head of its *Abteilungen und Gruppen* (departments and groups).[37]

III. Important Amendments to the Austrian Constitution Concerning Civil Servants and the Reactions of the Federal and Provincial Legislators

However, civil service laws began to change significantly about 30 years ago. In 1994, two paragraphs were added to Article 21 B-VG, enabling civil service law legislators to enact provisions allowing entrustment of executive functions to civil servants to be limited to a certain period of time.[38] Although civil servants retain their tenure, this was a considerable

33 See the *Bundesgesetz vom 2. Juni 1977 über das Dienstrecht der Beamten (Beamten-Dienstrechtsgesetz – BDG)*, *BGBl.* No. 329/1977; www.ris.bka.gv.at/Dokumente/BgblPdf/1977_329_0/1977_329_0.pdf, and the *Bundesgesetz vom 27. Juni 1979 über das Dienstrecht der Beamten (Beamten-Dienstrechtsgesetz 1979 – BDG 1979)*, *BGBl.* No. 333/1979; www.ris.bka.gv.at/Dokumente/BgblPdf/1979_333_0/1979_333_0.pdf.

34 Still in force in the Province *Niederösterreich* (Lower Austria), see the *Dienstpragmatik der Landesbeamten 1972* (Service pragmatics for the civil servants of the Land of Lower Austria) of 30 November 1972, *LGBl.* (of *Niederösterreich*) No. 2200, in its current version *LGBl.* (of *Niederösterreich*) No. 11/2024; www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrNO&Gesetzesnummer=20000842. In the Province *Steiermark* (Styria), the *Dienstpragmatik* 1914 (n. 13) with certain adaptations was considered provincial law due to a referral provision in the provincial law until 2002. It was only in that year that the *Gesetz über das Dienstrecht und Besoldungsrecht der Bediensteten des Landes Steiermark (Stmk. L-DBR)* (Act on the civil service and salary law for the employees of the Land of Styria) of 19 November 2002, *LGBl* (of *Steiermark*) No. 29/2003 was enacted; www.ris.bka.gv.at/Dokumente/Lgbl/LGBL_ST_20030425_29/LGBL_ST_20030425_29.pdf.

35 Since its amendment due to *Bundesverfassungsgesetz vom 4. April 1986, mit dem das Bundes-Verfassungsgesetz in der Fassung von 1929 geändert wird (B-VG-Novelle 1986)*, *BGBl.* No. 212/1986, www.ris.bka.gv.at/Dokumente/BgblPdf/1986_212_0/1986_212_0.pdf, Article 71 B-VG also envisages that a State Secretary attached to a Federal Minister leaving his post may be entrusted with the continued administration of that ministry, and with regard to senior civil servants, it has since made it clear that a Federal Minister's function may only be entrusted to a senior civil servant belonging to the ministry concerned.

36 *BGBl.* No. 289/1925; https://alex.onb.ac.at/cgi-content/alex?aid=bgb&datum=19250004&seite=00001013.

37 See Section III for more details and references.

38 See *BGBl.* No. 1013/1994 (n. 2); Weichselbaum (2001), p. 239.

cut, especially as it soon became obvious that at least in some cases, the period was not extended for political reasons, i.e. especially in case of a change of minister due to a new political coalition. As a result, top officials, who quite naturally wanted to keep their position, lost a certain form of independence and uninfluenceability. The employment policy for senior officials is therefore often considered a de facto spoils system.[39]

In 1999, the aforementioned principle of homogeneity was abolished by elimination from Article 21 B-VG.[40] At the same time and in this very context, federal law regulations concerning contractual agents in the Austrian federal administration were fundamentally amended. As it was the political will that employment as contractual agents should no longer be limited to subordinate functions, the new provisions were brought into line with the civil servant law. Rights and duties and the salary system were designed as parts of a structure more or less parallel to the civil servant law, except for disciplinary and pension provisions.[41] The federal civil servant law regulations were also amended, including the introduction of a time limit of (only) five years on the possibility for contractual agents employed in the general administration to become civil servants.[42] Since then, more and more contractual agents have been entrusted with senior and even the highest positions in the federal administration, while the Federal President's right to appoint civil servants at the federal level has been ignored. The provincial legislators, being responsible for the civil service law of the provinces and municipalities, soon followed this example, although at that time, Article 20 B-VG did not yet mention contractual agents.[43]

No longer strictly bound to a certain conceptual image of the civil servant,[44] including an *amtsangemessenen Ruhegenuss* (pension payment appropriate to the office held by the civil servant), several important pension reforms also took place at the federal level, the structurally most important between 1997 and 2004. At the federal level, the legislator has decided to gradually bring the amount of the pension benefit into line with the

39 This was unfortunately already the case before this reform – words like *Parteibuchwirtschaft* and *Ämterpatronage* cannot be translated directly but mean that the distribution of posts depends on party membership or at least a close relationship to a political party. Such practices have been happening for decades, see e.g. Öhlinger (1993), pp. 44 ff. Regarding the right to equal access to public employment being "dead law" due to Austrian case law see Section VI.

40 See *Bundesverfassungsgesetz, mit dem das Bundes-Verfassungsgesetz geändert wird*, *BGBl.* No. I 8/1999; www.ris.bka.gv.at/Dokumente/BgblPdf/1999_8_1/1999_8_1.pdf.

41 See the Contractual Agents Reform Act of 8 January 1999 (*Gesetz, mit dem das Vertragsbedienstetengesetz 1948, das Beamten-Dienstrechtsgesetz 1979, das Bundesministeriengesetz 1986, das Ausschreibungsgesetz 1989, das Bundes-Personalvertretungsgesetz, die Reisegebührenvorschrift 1955, das Pensionsgesetz 1965, das Bundesfinanzgesetz 1999 [5. BFG-Novelle 1999], das Beamten-Kranken- und Unfallversicherungsgesetz und das Allgemeine Sozialversicherungsgesetz geändert werden; Vertragsbedienstetenreformgesetz – VBRG*), *BGBl.* I No. 10/1999; www.ris.bka.gv.at/Dokumente/BgblPdf/1999_10_1/1999_10_1.pdf.

42 See § 136a *BDG 1979*, implemented with *BGBl.* I. No. 10/1999 (n. 41), currently in the version *Dienstrechts-Novelle 2011* (civil service law reform 2011) of 28 December 2011, *BGBl.* No. I 140/2011, www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_140/BGBLA_2011_I_140.html.

43 Weichselbaum (2012a), pp. 51 f. and 112 f.

44 Although there has never been a constitutional provision stating this, the Constitutional Court noted certain indispensable elements for the civil servants law which correspond to the requirements of Article 33 para. 5 GG, stating that this law must be regulated and developed taking the traditional principles of the civil service into account. See VfSlg 11.151/1986, see also *The Civil Service in Germany: A Service Based On Mutual Loyalty* by C.D. Classen in this volume.

benefits of the pension insurance scheme.[45] Due to transitional provisions, this is all the more true for civil servants, the younger they are and the later they entered the service.[46] The Constitutional Court may already have had doubts that this was going too far, at least it mentioned the conceptual image of the civil servant in the context of the requirement of *standesgemäßen Unterhalt des Ruhestandsbeamten und der Hinterbliebenen* (maintenance of the retired civil servant and surviving dependants in accordance with their status) in a decision taken in 2005 and therefore taken after the abolition of the principle of homogeneity. The Court also pointed out that the State still had to be responsible for the payments, meaning that it would be unconstitutional to integrate pension payments for civil servants into the social security system.[47] To reduce the impact of these pension law reforms, the federal legislator introduced the *Bundespensionskasse* parallel to them.[48] The *Bundespensionskasse AG* (federal pension fund corporation) is a stock corporation which provides a pension fund system from which civil servants – as well as contractual agents and employees of outsourced companies receiving pensions from social insurance – receive additional benefits on retirement as a kind of "company pension".[49] However, even if the Republic of Austria has been the only shareholder of this company since its foundation in 1999, it is not liable for these benefits. As a consequence, these additional benefits can also be significantly lower than anticipated.[50] As could be expected, the provinces followed the federal approach to pension law. This met the expectations of the Austrian *Rechnungshof* (Court of Audit) in particular, which

45 For more on these reforms, see Weichselbaum (2001), pp. 240 f.; Weichselbaum (2004), p. 27, and Weichselbaum (2007a), pp. 375 ff.; specially from a constitutional point of view, Weichselbaum (2002/2003). For a summary of the current legal situation and a presentation of the developments in the pension sector at federal level, see Bundesministerium für Kunst, Kultur, öffentlichen Dienst und Sport (BMKÖS) (2024), *Monitoring der Pensionen der Beamtinnen und Beamten im Bundesdienst 2024*; https://oeffentlicherdienst.gv.at/wp-content/uploads/2023/03/240408-Pensionsmonitoring_2024-digi.pdf. On the most essential aspects of the former pension law, especially that a civil servant's pension was understood as continued payment and amounted to 80% of the final salary before retirement (not measured, as now, according to an ever-increasing calculation period for pension payments), see Öhlinger (1993), pp. 52 f.

46 Civil servants born after 31 December 1975 or entering the civil service after 31 December 2004 are already fully affected by this reform – see Altersberger (2022a), margin number 17 and Altersberger (2022b), margin numbers 17 ff.

47 VfSlg 17.683/2005. See § 1, para. 14 and Section XIV of the *Bundesgesetz vom 18. November 1965 über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965 – PG. 1965), BGBl.*, No. 340/1965 in the version *BGBl.* No. I 145/2024 which provides that state authorities are also responsible for the enforcement of the provisions of pension law concerning civil servants who only obtain pension payments of the same amount as pension-insured employees and that the Federal Government (also) bears the pension costs for these civil servants. More on this in Weichselbaum (2007a), p. 377.

48 See Weichselbaum (2001), p. 241.

49 See https://bundespensionskasse.at/allgemeines-ueber-die-bundespensionskasse/ueber-uns-1. For further information and a critical analysis, see the report of the Austrian Court of Audit, *Bericht des Rechnungshofes. Bundespensionskasse AG – Veranlagungsstrategien und Asset Management, Reihe BUND 2018/8*; www.rechnungshof.gv.at/rh/home/home/Bundespensionskasse_BF.pdf.

50 See on the economically difficult year 2022 *Vorsorgereport 1/2023. Quartalsbericht der Pensions- und Vorsorgekassen*; www.wko.at/branchen/bank-versicherung/vorsorgeverband/vorsorgereport-1-2023.html. and *Salzburger Nachrichten* of 19 January 2023, *Pensionskassen-Veranlagungsertrag bei minus 9,67 Prozent*; www.sn.at/wirtschaft/oesterreich/pensionskassen-veranlagungsertrag-bei-minus-967-prozent-132799132.

criticised the Province *Tirol* in 2010 because its reforms did not go as far as those of the Federal State and the other provinces.[51]

In 2008, the Austrian constitution was amended so that *vertraglich bestellte Organe* (contractually appointed organs) are now also mentioned in Article 20, paragraph 1 B-VG as personnel conducting the public administration.[52] Since 2008 it is therefore indisputable that entrusting the exercise of public authority to contractual agents is in line with the Austrian constitution. Since 2019,[53] the Austrian constitution has no longer contained rules indicating that employees of the provinces holding high administrative functions must be civil servants. The word *Beamte* is no longer to be found in the BVG ÄmterLReg and this word has also been replaced by *Bedienstete* in Article 106 B-VG on the appointment of the *Landesamtsdirektor* (head of the Provincial Government Office) and in Article 117, paragraph 7 B-VG on the appointment of the *Magistratsdirektor* (head of a magistrate's office).[54] Since the amendment of these constitutional articles and in view of the new version of Article 20, paragraph 1 B-VG in force since 2008, it no longer appears unconstitutional not to employ (new) civil servants at provincial or municipal administrative levels, as has been the case in the westernmost Province *Vorarlberg* since 1 July 2000, i.e. already years before these constitutional amendments.[55]

All these measures have had one important effect: the number of civil servants has steadily decreased. Although Articles 65, 66, and 71 B-VG must always be given special consideration at the federal level, the federal legislator and the Federal Ministers do not pay attention to them, especially with regard to staff in the *allgemeine Verwaltung* (general administration).[56] The only areas in the federal public administration where state employees are generally still appointed as civil servants are the police and the armed forces. The same can be observed at provincial and municipal levels.[57]

51 See Weichselbaum (2012a), pp. 118 ff., especially on the report of the Austrian Court of Audit to the national parliament: *Reformen der Beamtenpensionssysteme des Bundes und der Länder, Reihe Bund 2009/10*, pp. 78 ff.; www.parlament.gv.at/dokument/XXIV/III/88/imfname_168067.pdf. See also previously *Der Standard* of 12 September 2007, *Rechnungshofpräsident Josef Moser fordert Reformen*; www.derstandard.at/story/2994261/rechnungshofpraesident-josef-moser-fordert-reformen; more on the same topic as in this article in the report of the Austrian Court of Audit to the provincial parliament of Lower Austria: *Reform der Beamtenpensionssysteme des Bundes sowie der Länder Burgenland, Niederösterreich und Salzburg, Niederösterreich 2007/8*; https://noe-landtag.gv.at/fileadmin/gegenstaende/16/09/932/932B.pdf.

52 *Bundesverfassungsgesetz, mit dem das Bundes-Verfassungsgesetz geändert und ein Erstes Bundesverfassungsrechtsbereinigungsgesetz erlassen wird*, *BGBl.* I No. 2/2008; www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2008_I_2/BGBLA_2008_I_2.pdfsig.

53 *Änderung des Bundes-Verfassungsgesetzes, des Übergangsgesetzes vom 1 Oktober 1920, in der Fassung des B. G. Bl. Nr. 368 vom Jahre 1925, des Bundesverfassungsgesetzes betreffend Grundsätze für die Einrichtung und Geschäftsführung der Ämter der Landesregierungen außer Wien, des Bundesforstegesetzes 1996, des Datenschutzgesetzes, des Bundesgesetzblattgesetzes, des Niederlassungs- und Aufenthaltsgesetzes und des Bundesgesetzes über die Europäische Ermittlungsanordnung in Verwaltungsstrafsachen*, *BGBl.* I No. 14/2019; www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2019_I_14/BGBLA_2019_I_14.pdfsig.

54 The *Magistratsdirektor* is the head of a municipality with a population of more than 20,000 and with its own statute (the so-called *Stadt mit eigenem Statut*), which means that this municipality has a further important function in the Austrian administrative system: that of district administration (see Article 116, para. 3 B-VG).

55 See the *Landesbedienstetengesetz 2000* (Provincial Staff Act 2000), *LGBl* (of *Vorarlberg*) 50/2000.

56 See for the time limit of (only) five years to become a civil servant above at n. 42.

57 Weichselbaum (2012a), pp. 51 f. and 112 f.

The changes in the civil service system in Austria in the last three decades are a result of a political project to modernise public administration. The idea of New Public Management entered discussion in Austria in the 1990s[58] and with regard to personnel issues, led to the already mentioned phenomenon of *Entpragmatisierung* or *Pragmatisierungsstopp* (de-pragmatisation).[59] Public opinion often regards civil servants as unambitious and inefficient,[60] as a special type of public employee who paralyses the administrative system and impedes new developments.[61] The influence of public opinion led to the political will to make civil servants an *Auslaufmodell* (vanishing model) in the Austrian civil service.

IV. Special Developments *Praeter Constitutionem* and *Contra Constitutionem*

1. Outsourcing Civil Service Tasks

For about 30 years, certain public tasks have been outsourced on a large scale at federal, provincial, and municipal levels.[62] On the one hand, special public-law institutions, such as the *Finanzmarktaufsichtsbehörde* (*FMA*, Financial Market Authority), a public-law institution with legal personality, foreseen in a specific provision of the *Finanzmarktaufsichtsbehördengesetz* (Financial Market Authority Act) with constitutional rank, were founded.[63] The same applies to universities, which were transformed from partially legal entities of the Federal State into legal persons under public law by the *Universitätsgesetz 2002* (Universities Act 2002).[64] On the other hand, more and more private companies, often wholly owned by the State, have taken over typical state tasks, fulfilling them either by private means or by exercising public authority. They may be public-law institutions or private companies: the tasks they took over are accomplished by employees who are neither civil servants nor contractual agents.[65] These employees do not enjoy the

58 Öhlinger (1993), pp. 19 f.

59 Weichselbaum (2001), p. 237.

60 Wieser (2022), p. 397, judges civil servants with reference to New Public Management theories as being less efficient than employees in the private sector due to reduced performance pressure. Interestingly enough and obviously from a contemporary perspective, he also points out that if erosion of the foundations of democracy and the rule of law is to be prevented, it will be necessary to put up with “a few moderately productive civil servants” (translated from p. 398).

61 There are studies that refute this finding, especially for Austria – see *Der Standard* of 15 November 2013, *OECD-Studie. Staatsapparate durchleuchtet: Von wegen nur faule Beamte*, www.derstandard.at/story/1381372135173/staatsapparate-durchleutet-von-wegen-nur-faule-beamte.

62 On the various legal aspects of this phenomenon in Austria, see Baumgartner (2006).

63 In the words of the *FMA* itself www.fma.gv.at/en/copyright-and-disclaimer/: “The FMA is an independent, autonomous and integrated supervisory authority for the Austrian Financial Market, established as an institution under public law. It is responsible for the supervision of credit institutions, insurance undertakings, pension funds, staff provision funds, investment funds, investment service providers, companies listed on the stock exchange as well as stock exchanges themselves.”

64 See especially § 4 of the *Bundesgesetz über die Organisation der Universitäten und ihre Studien (Universitätsgesetz 2002)*, *BGBl.* I. No 120/2002; www.ris.bka.gv.at/Dokumente/BgblPdf/2002_120_1/2002_120_1.pdf.

65 Civil servants who were already working in the respective areas continue to work for these institutions and companies, but only as a “phased-out model”; today they represent a minority of employees.

rights laid down in the civil service laws, which even offer more rights and more protection to contractual agents, especially against dismissal, than does general labour law.[66]

Since the COVID-19 pandemic, a well-known and therefore prominent example is the *Österreichische Agentur für Gesundheit und Ernährungssicherheit GmbH* (*AGES*, Austrian Agency for Health and Food Safety limited liability company).[67] Very often enterprises fulfilling state duties are not even called *Agentur* but have the same name as normal companies in the private sector. An outstanding example of high importance is the *Österreichische Gesellschaft für Zivilluftfahrt mit beschränkter Haftung* (*Austro Control GmbH*, Austrian Civil Aviation limited liability company), the Austrian Civil Aviation Authority responsible for nothing less than "a safe, reliable and efficient air traffic throughout Austrian airspace, with as many as 4,000 flight movements per day".[68]

As a result of the outsourcing of public tasks, the number of people employed by the State has in general decreased.[69] As early as 1996,[70] the Constitutional Court was confronted for the first time with the question of whether or not these measures went too far. It gave the following answer: the system of state administration as provided for in the Austrian constitution is not violated by the delegation of public tasks related to the exercise of public power to a company under private law if the delegation concerns only particular tasks and if it is still possible for a minister or another supreme organ to give instructions to the staff of this company. In addition, the responsibility of the supreme organs must be guaranteed and the delegation must not concern core tasks of the State such as the security police, military affairs, and the exercise of penal power. In a subsequent decision in 2003 the Constitutional Court added foreign affairs to the list of core tasks.[71]

66 To mention a particular example: the special status of railway staff was abolished with the Federal Railways Act 1992 (*Bundesbahngesetz 1992*), *BGBl.* No. 825/1992; www.ris.bka.gv.at/Dokumente/BgblPdf/1992_825_0/1992_825_0.pdf, which provided that from 1 January 1993, new recruits were to be employed on a civil contract taking into account the specific nature of the railway service. However, this law contained an unconstitutional detail: as the new company, *Österreichische Bundesbahnen,* created with this law was not only the new employer of the new recruits, but also of railway employees mainly enjoying the same rights as civil servants, especially the right to a *Ruhegenuss* (retirement salary), the Constitutional Court considered it unconstitutional that according to this law this retirement salary should no longer be paid directly by the State but by the company, which unlike the State does not have *einen praktisch unbegrenzten 'Deckungsfonds'* (a practically unlimited cover fund) (VfSlg 14.075/1995).

67 See www.ages.at/en/. *AGES* is (formally) a private company but cooperates with three Federal Offices belonging to the Federal Ministry of Social Affairs, Health, Care and Consumer Protection: the Federal Office for Food Safety *BAES*, the Federal Office for Safety in Health Care *BASG* and the Federal Office for Consumer Health *BAVG*; see www.ages.at/en/ages/departments/management.

68 See www.austrocontrol.at/jart/prj3/ac/main.jart?reserve-mode=active&rel=en and www.bmk.gv.at/en/topics/transport/aviation/authorities/supreme_civil.html.

69 For statistical data concerning *Bundesbedienstete* (Federal State staff), contract staff and civil servants, see Bundesministerium für Kunst, Kultur, öffentlichen Dienst und Sport (editor), *Das Personal des Bundes 2024. Daten und Fakten*, pp. 60 ff. and 72 ff.; https://oeffentlicherdienst.gv.at/wp-content/uploads/2024/10/Das-Personal-des-Bundes-2024.pdf. The comparison on p. 61 back to 1999 shows a reduction in *Vollbeschäftigtenäquivalente* (full time equivalents) in the federal Civil Service from 166,491 (1999) to 135,497 (2023). The comparison with 1992 when 303,008 persons still worked for the federal Civil Service is even more impressive – see Öhlinger (1993), p. 24.

70 See VfSlg 14.473/1996 (concerning the aforementioned *Austro Control GmbH*) and, referring to this decision, for example Baumgartner (2006), pp. 255 and 258 f. For the previous discussion see Raschauer (1994), pp. 434 ff.

71 See VfSlg 16.995/2003.

A certain core of public tasks, which the Constitutional Court calls *Kernaufgaben*, must, therefore, always be fulfilled by civil servants and contractual agents, which is particularly evident in Article 20, paragraph 1 B-VG. Both categories of public employees are therefore indispensable for the performance of the State's public functions. The Austrian Constitutional Court tolerated many forms of outsourcing for a very long time but recently set new restrictions. In 2022, it initiated an examination procedure concerning the *COVID-19 Finanzierungsagentur des Bundes GmbH* (COFAG, COVID-19 Federal Financing Agency limited liability company), a subsidiary of ABBAG *(Abbaumanagementgesellschaft des Bundes*), also a (state-owned) limited liability company with a task described by a word that does not have an equivalent in English. The best translation might be "dismantling management".[72] The COFAG had been entrusted by law with the task of granting subsidies to compensate for income losses through COVID-19 measures. A considerable part of the state budget had been used for this state aid. In its review decision of 2022, the Constitutional Court considered the legal construction in particular contrary to the rule of law, the principle of objectivity resulting from the constitutional principle of equality, and Article 20, paragraph 1 B-VG concerning the rights of supreme organs to lead and supervise their administrative bodies. In short, among other things, in this preliminary decision, it seemed that the Constitutional Court would not accept the lack of immediacy of the competent Federal Minister's right to issue instructions caused by the relevant law with regard to Article 20, paragraph 1 B-VG and the rule of law.[73] However, in its final decision, the Constitutional Court found that also an only mediatised way to issue instructions would meet the requirements of Article 20, paragraph 1 B-VG, but ruled that the overall legal structure and purpose of the COFAG violated the constitutional principles of objectivity and efficiency. The judgment was also of particular importance because the Constitutional Court qualified the activities of the COFAG as *Verwaltung* (administration) in the sense of Article 20, paragraph 1 B-VG, even though it acted under private law when granting subsidies. Its reasoning was that the COFAG had a special and close organisational and functional relationship to the state.[74]

2. *Political Officials*

Apart from organs elected for a certain period of time, the Austrian constitution does not envisage any type of political official in the public administration.[75] However, political officials exist and special provisions for them can be found in the civil service law. They are envisaged at the federal level as employees for temporary positions in the *Ministerbüros*, mostly named *Kabinette* (ministers' offices), the head of which is called *Kabinettschef*

72 See *Bundesgesetz über die Einrichtung einer Abbaubeteiligungsgesellschaft des Bundes (ABBAG-Gesetz)*, *BGBl.* I No. 51/2014; www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2014_I_51/BGBLA_2014_I_51.pdfsig.

73 See the *Prüfungsbeschluss* (review decision) of the VfGH of 29 September 2022, concerning the *COFAG*, V 139/2022-12, G 108/2022-11, paras. 13 ff.; www.vfgh.gv.at/downloads/pruefungsbeschluesse/VfGH-Beschluss_V_139_2022_vom_29._September_2022.pdf.

74 See the final decision of the VfGH of 5 October 2023, G 265/2022-45, paras. 20 ff., https://www.vfgh.gv.at/downloads/VfGH-Erkenntnis_G_265_2022_vom_5._Oktober_2023.pdf. More on this in Eberhard and Lachmayer (2024), pp. 57 ff.

75 Öhlinger (1993), pp. 18 f.; for a detailed analysis see Weichselbaum (2003), pp. 213 ff.

(head of minister's office). Legal provisions concerning so-called *Kabinettsbedienstete*[76] (staff of ministers' offices) explicitly regulate the duration of their function to coincide with the term of office of the Federal Minister for whom they work.[77] The most important political officer, separate from the staff of the minister's office, is the *Generalsekretär* (General Secretary) of a Federal Minister, also sometimes called *Schattenminister* (shadow minister).[78] The legal provisions for this type of public employee, whose function also coincides with the duration of the minister's term of office, have been amended several times. The constitutionality of the existence of general secretaries is not questioned in most academic literature,[79] but is criticised by the Court of Audit.[80] In practice, the coexistence of two types of political officials can give rise to difficult questions regarding the exercise of the right to issue instructions to subordinate organs of a Federal Ministry.[81] The fact that the heads of ministers' offices are also sometimes seen as shadow ministers makes this very clear.[82]

Political officials not only exist at the federal, but also at the provincial level. The offices they work in are again called *Kabinett* or *Büro*. They exist for the *Landeshauptmann* (Provincial Governor), his deputy and the other members of the provincial government.[83]

Unlike senior civil servants entrusted with an executive function on a temporary basis and who, at least sometimes, have the appearance of being de facto political officials,[84] employees working in a direct and close relationship to the Chancellor, Federal Ministers, or members of the provincial governments are also de iure political officials. However, since the duration of their office is uncertain, they are not civil servants appointed for

76 See among others for the minister's offices of the Federal Chancellor https://bka.ldap.gv.at/#/organisation/gvouid%3DAT%3AB%3A1008466%2Cou%3DOrgUnits%2Cgvouid%3DAT%3AB%3A111%2Cdc%3Dat and for the *Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz* (Federal Minister of Social Affairs, Health, Care and Consumer Protection) www.oesterreich.gv.at/ldap.html#/organisation/gvouid%3DAT%3AB%3A1003218%2Cou%3DOrgUnits%2Cgvouid%3DAT%3AB%3A70%2Cdc%3Dat, each comprising at least 20 staff members (12 November 2024).

77 See § 141 BDG 1979 (n. 33) in the version *BGBl.* I No. 102/2018; § 4a VBG (n. 24) in the version *BGBl.* I No. 205/2022 and § 75 VBG (n. 24) in the version *BGBl.* I No. 102/2018, which likewise deal with employees working in the much smaller offices of *Staatssekretäre* (State Secretaries). State Secretaries are political organs (not public employees) in the ministerial bureaucracy that can be attached to Federal Ministers for assistance or entrusted with the conduct of certain functions; they are appointed and leave office in the same way as a Federal Minister, but are subordinate to the Federal Minister and bound by his instructions (Article 78, paras. 1 and 2 B-VG).

78 For a deep political analysis see Bischof (2022).

79 For further recent references see Wimmer (2020), pp. 153 ff.

80 *Bericht des Rechnungshofes. Generalsekretariate in den Bundesministerien, Reihe BUND 2021/12*, especially pp. 155 ff.; www.rechnungshof.gv.at/rh/home/home/2021_12_Generalsekretariate.pdf.

81 In theory, the staff of a minister's office is not entitled to give instructions; in practice this happens regularly "on behalf of the Federal Minister" – see Klatzer (2022).

82 Klatzer (2022).

83 For a relevant provision, see e.g. § 11, para. 3 of the *Gesetz vom 10. November 1999 über das Dienst- und Besoldungsrecht der Vertragsbediensteten des Landes (Landes-Vertragsbedienstetengesetz 2000 – L-VBG)* (Provincial Contractual Staff Act 2000), *LGBl.* No. 4/2000 (of *Salzburg*), in the version *LGBl.* No. 15/2024. A special case exists in the Land of *Oberösterreich*, where the *Landesamtsdirektor* and his deputy as public employees with the highest rank in the provincial administration are appointed for the period of the Provincial Government. In this respect, they can also be considered a kind of political official – see Article 54 *Oö. Landes-Verfassungsgesetz (Oö. L-VG)* (Provincial Constitutional Act) in the version of 30 April 2019, *LGBl.* (*Oberösterreich*) No. 39/2019.

84 See Section III of this chapter.

a definite period of time and can therefore not be subsumed under the corresponding provisions in Article 21 B-VG.[85] Due to their lack of constitutional anchoring, they must be considered, at least strictly speaking, as an unconstitutional phenomenon. In any case, their growing importance over the last three decades is not reflected in the text of the Austrian constitution.

V. The Constitutional Idea and the Constitutional Framework of Civil Service Law

Even if the Austrian constitution does not explicitly envisage public employees who enjoy more rights than employees in the private sector, in several articles it nevertheless shows that it has a certain idea of the law governing the service relationship between the State and its employees and that this law is different from general labour law.

The articles that distribute legislative and executive competences concerning civil service law between the Federal State and the provinces (the latter having this competence for the law governing the service relationship between the provinces and municipalities and their employees) mention the *Personalvertretung* (representation of personnel) (see especially Article 10, paragraph 1, number 16, and Article 21, paragraphs 1 and 2 B-VG).[86] Article 7, paragraph 4 B-VG explicitly guarantees the full exercise of political rights by public employees, including members of the *Bundesheer* (Federal Armed Forces). Civil servants have the explicit right to apply for and exercise a parliamentary mandate (see Articles 23b, 59a, and 95, paragraph 5 B-VG). However, a special law, the so-called *Unvereinbarkeits- und Transparenz-Gesetz* (incompatibility and transparency act), contains provisions of constitutional rank which bar certain categories of civil servants from exercising their function at the same time as their mandate.[87] The exercise of a mandate in the European Parliament generally has the same consequence (see Article 23b B-VG).

Although the Austrian constitution does not lay down a framework of special rules on civil service law, there are some guidelines which legislators at federal and provincial levels must observe. According to Article 20, paragraph 2, number 6 B-VG, *weisungsfreie Organe* (organs which are free of instructions and therefore autonomous in their decisions) may be foreseen by simple law to decide single matters of civil service and disciplinary law. According to Article 20, paragraph 3 B-VG, in force until 31 August 2025, organs entrusted with tasks of public administration are also obliged to maintain secrecy. According to a new Article 22a B-VG, in force from 1 September 2025 on, the civil service in particular will have to comply with the right to information of individuals and also have the obligation to provide information of general interest on its own. From then on, the civil service must become more transparent.[88]

85 Cargnelli-Weichselbaum (2019), margin number 126; see also Section III and in more detail, Section V of this chapter.

86 For more details see Hattenberger (2017), pp. 326 ff.

87 *BGBl.* No. 330/1983, in the version *BGBl.* I No. 70/2021.

88 See for more on this, especially for all organs obliged to provide information and in particular for the text of the new Article 22a B-VG, the *Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert und ein Informationsfreiheitsgesetz erlassen wird*, *BGBl.* I No. 5/2024; https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2024_I_5/BGBLA_2024_I_5.pdfsig.

Article 21, paragraph 3 B-VG contains the main regulation on *Diensthoheit* (supreme hierarchical power exercised over public employees) at federal and provincial levels.[89] According to Article 118, paragraph 3, number 2 B-VG the appointment of municipal employees and the exercise of hierarchical power are mainly entrusted to the municipality to be carried out in its *eigenen Wirkungsbereich* (own sphere of action) under its own responsibility (Article 118 paragraph 4 B-VG). Article 118, paragraph 3, number 2 B-VG only provides for the competence of *überörtlicher Disziplinar-, Qualifikations- und Prüfungskommissionen* (supra-municipal disciplinary, qualification, and examination commissions) which are civil service authorities of the province in which a municipality is located and which then make decisions instead of the municipal authorities in disciplinary, performance assessment, and examination procedures.

Article 21, paragraph 4 B-VG ensures the right of mobility of public employees at federal, provincial, and municipal levels between the Federal State, the provinces, the municipalities, and the *Gemeindeverbände* (municipal associations). If professional experience acquired is taken into account in the remuneration and promotion system, it is forbidden to differentiate between experience acquired at the three state levels. This is in line with the requirements of European law, where different recognition of previous periods of employment on the basis of the place of work or the status of the employer constitutes discrimination and therefore violates the free movement of workers.[90] The regulation cushions the abolition of the homogeneity principle in 1999 and is considered a subjective right of constitutional rank.[91] However, in a decision of 2022 on the constitutionality of a salary regulation, based on an application for review by the Supreme Court, the Constitutional Court pointed out that the recognition of professional experience in the case of a purely domestic reference only covers employment relationships with the territorial authorities just mentioned, not those with other domestic employers.[92]

Finally, Article 21, paragraph 5 B-VG provides, in particular, the possibility of delegating executive functions to a civil servant only on a temporary basis. This makes it very clear that the Austrian constitution regards the employment of a civil servant as the granting of tenure for life.[93] Only the exercise of a certain function in the civil service can be limited to a certain period of time. If a civil servant is no longer entrusted with an executive function after the end of the period foreseen for this function (usually five years), he or she remains a civil servant and is entrusted with other tasks, which according to Article 21, paragraph 6 B-VG may also be tasks that are inferior to the tasks accomplished until then. Although these constitutional provisions do not mention them, related civil service law provisions

89 Special rules concerning this power exist, for example, for employees of the *Parlamentsdirektion* (Office of the Austrian Parliament) as well as for those of the *Rechnungshof* (Court of Audit) – see Articles 30, para. 4 and 125, para. 3 B-VG. Although neither institution is concerned with administration but rather with legislation, the management of the staff itself (i.e. human resources) is seen as an administrative activity.

90 See Cargnelli-Weichselbaum (2019), margin number 112.

91 See Cargnelli-Weichselbaum (2019), margin number 104.

92 See VfGH, judgment of 1 July 2022, G 17/2022 = VfSlg 20.562/2022, especially margin number 36, where the Constitutional Court calls Article 21, para. 4 B-VG a *lex specialis* on the general principle of equality enshrined in the Austrian constitution (Article 7 B-VG, Article 2 StGG). Referring to this also later VfGH (n. 144).

93 Including a disciplinary responsibility, especially as regards keeping official secrets, even after a civil servant retires – see Öhlinger (1993), pp. 52 f.

not only exist for civil servants, but since the Contractual Agents Reform of 1999, also for contractual agents.[94]

The Austrian constitution uses the word *Dienstbehörde* (civil service authority; see Article 59b, paragraph 2 B-VG) but speaks very clearly of the competence of the *ordentliche Gerichte* (ordinary courts) to decide disputes concerning contractual agents (Article 21, paragraph 1 B-VG). This is also the reason why disciplinary law only applies to civil servants and not to contractual employees.[95] Since the introduction of *Verwaltungsgerichte* (administrative courts) in the B-VG, which came into force in 2014,[96] it has been possible for legislators at federal and provincial levels to assign them competence to decide all disputes between the State and its public employees in first instance (Article 130, paragraph 2, number 3 B-VG). With a few exceptions,[97] the ten administrative courts (nine in the provinces and one federal) currently only decide appeals against a decision of a *Dienstbehörde*, a *Disziplinarkommission* (disciplinary commission) or at the federal level since 2020, also the *Bundesdisziplinarbehörde* (Federal Disciplinary Authority),[98] i.e. only in cases involving civil servants. Depending on the reason, it is possible to appeal to the *Verfassungsgerichtshof* (if the decision is considered unconstitutional) or to the *Verwaltungsgerichthof* (Supreme Administrative Court, VwGH) against decisions of the administrative courts.

In the context of legal protection, the following should not go unmentioned. The *Organe der ordentlichen Gerichtsbarkeit* (organs of ordinary jurisdiction), i.e. judges in civil and criminal jurisdiction as well as prosecutors, are all public-law employees. Not as to their function, but as to the nature of the service law applicable to them, they have always been regarded as a special type of civil servant. The *Staatsgrundgesetz vom 21. Dezember 1867 über die richterliche Gewalt* (Basic State Law of 21 December 1867 on judicial power)[99] called them *richterliche Beamte* (judicial officers) and the *Gehaltsgesetz 1956* (Salary Act

94 For details see Cargnelli-Weichselbaum (2019), margin numbers 120 f.

95 For more details on the federal civil servant disciplinary law and its enforcement, see Kucsko-Stadlmayer (2010).

96 See *Bundesgesetz, mit dem das Bundes-Verfassungsgesetz, das Finanz-Verfassungsgesetz 1948, das Finanzstrafgesetz, das Bundesgesetz, mit dem das Invalideneinstellungsgesetz 1969 geändert wird, das Bundessozialamtsgesetz, das Umweltverträglichkeitsprüfungsgesetz 2000, das Bundesgesetzblattgesetz, das Verwaltungsgerichtshofgesetz 1985 und das Verfassungsgerichtshofgesetz 1953 geändert und einige Bundesverfassungsgesetze und in einfachen Bundesgesetzen enthaltene Verfassungsbestimmungen aufgehoben werden (Verwaltungsgerichtsbarkeits-Novelle 2012)* (Administrative Court Amendment 2012), *BGBl.* No. I 51/2012; www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_I_51/BGBLA_2012_I_51.pdfsig.

97 For example, these exceptions concern the *Leistungsfeststellung* (performance evaluation) of contractual agents in the Province *Salzburg*, see Cargnelli-Weichselbaum (2019), margin numbers 76 ff.

98 Besides the (special) *Disziplinarkommission* (Article 30b B-VG) responsible for civil servants at the *Parlamentsdirektion*, the *Rechnungshof* and the *Volksanwaltschaft* (Ombudsman's office, likewise, an institution belonging to the state function of legislation); more on this *Bundesverfassungsgesetz, mit dem das Bundes-Verfassungsgesetz geändert wird*, *BGBl.* I No. 57/2019; www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2019_I_57/BGBLA_2019_I_57.pdfsig. Since recently, it is also responsible for the civil servants at the *Parlamentarische Datenschutzkomitee* (parliamentary data protection committee) starting its work in 2025, see *Bundesverfassungsgesetz, mit dem das Bundes-Verfassungsgesetz geändert wird*, BGBl. I No. 68/2024; https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2024_I_68/BGBLA_2024_I_68.pdfsig. For a presentation of the *Bundesdisziplinarbehörde* and its duties see www.bmkoes.gv.at/Ministerium/bdb.html.

99 *RGBl.* No. 144/1867; https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=18670004&seite=00000398.

1956) has always mentioned them in a provision entitled *Besoldungsrechtliche Einteilung der Beamten* (salary classification of civil servants).[100] The same applies to judges in the administrative jurisdiction.[101] Prosecutors only became organs of the jurisdiction in 2008;[102] they were previously organs assigned to the state function of administration[103] and thus also functionally civil servants.[104]

Regarding the comparison with civil servant law, the main difference is that the service laws for judges in the ordinary and administrative jurisdictions have to comply with several constitutional requirements concerning the independence of the judiciary, which among other things explicitly exclude appointments for a fixed term. The major constitutional provisions in this context are Articles 87 and 88 B-VG concerning judges in ordinary courts, to which Article 134, paragraph 7 B-VG regarding administrative judges refers. Although judges and public prosecutors are not civil servants in the understanding of this comparative law study, it is worth noting that judges have only existed in administrative courts since 2014.[105] Very often those who became administrative judges in 2014 had been members of an independent administrative panel, predecessor of an administrative court, and in this function they had been civil servants (albeit with constitutional guarantees close to those of judges).[106] Not only judges but also many other employees work in the courts. Besides the general administrative staff, there are also *Rechtspfleger* (judicial officers), who although assigned certain judicial tasks, are organs and civil servants bound by instructions.[107]

100 See in § 2 of the *Bundesgesetz vom 29. Feber 1956 über die Bezüge der Bundesbeamten (Gehaltsgesetz 1956)*, *BGBl.* No. 54/1956 in the version *BGBl.* No. I 137/2023: "*2. Richteramtsanwärter, Richter und Staatsanwälte*" ("2. Trainee judges, judges and public prosecutors").

101 See also the official *Begriffslexikon* (glossary of terms) provided by the Federal Government, for the term *Beamter* including judges and public prosecutors; www.oesterreich.gv.at/lexicon/B/Seite.991030.html.

102 See Article 90a B-VG since the amendment of the B-VG with *BGBl.* I No. 2/2008 (n. 52). Since the introduction of the administrative courts into the B-VG with *BGBl.* I No. 51/2012 (n. 96) they are called organs of the ordinary jurisdiction to clearly assign them to that area.

103 See Wiederin (2011), pp. 33 ff.

104 Their rights and duties were also regulated in a special chapter of the BDG 1979, which has been implemented in the *Richterdienstgesetz* (Judges' Service Act, RDG) since *BGBl.* I No. 96/2007 therefore named *Richter- und Staatsanwaltschaftsdienstgesetz – RStDG.*

105 With the exception of the *Asylgerichtshof* (Asylum court), which existed from 2008 to 2013 and became part of the *Bundesverwaltungsgericht* (Federal Administrative Court) in 2014.

106 A prominent example at federal level was the *Unabhängiger Bundesasylsenat* (Independent Federal Asylum Review Board, UBAS). In 2008 it was replaced by the aforesaid Asylum Court (making former members of the UBAS "real" judges). For a brief summary see the *Lexikon* (glossary of terms) of the Demokratiezentrum Wien, *Unabhängiger Bundesasylsenat* (UBAS): https://www.demokratiezentrum.org/ressourcen/lexikon/unabhaengiger-bundesasylsenat-ubas/. For the provinces, where independent administrative panels were the immediate predecessors of administrative courts, see n. 127.

107 See the *Rechtspflegergesetz – RpflG* (Judicial Officer Act), *BGBl.* No. 560/1985 in the version *BGBl.* No. I 91/2024. Since *Rechtspfleger* are explicitly called *Gerichtsbeamte,* they are supposed to be civil servants, not contractual agents. However, § 136b BDG 1979 provides that contract staff entrusted with the function of a *Rechtspfleger* shall become civil servants at their request, which means that they are not "automatically" civil servants. It is also notable that the Austrian constitution uses the generic term *Bundesbedienstete* – see Article 87a B-VG. Article 87a, para. 3 B-VG makes it clear that, in the performance of the judicial duties assigned to them, judicial officers are bound only by the instructions of the competent judge.

VI. Genuine Austrian Fundamental Rights With Special Relevance for the Civil Service

Article 3 of the *Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger* (State Basic Law on the General Rights of Citizens of 21 December 1867, StGG),[108] a monarchic law classified as a constitutional law by Article 149 B-VG, already envisaged equal access to public offices and therefore also to employment in the civil service. However, this right played almost no role in the jurisdiction, especially that of the *Reichsgericht* (Imperial Court) under the monarchy and later that of the Constitutional Court. In particular, according to their rulings, Article 3 StGG has never included a right to get appointed to a specific public position.[109] Unlike in the case law relating to other fundamental rights, it was never considered that this right should be an effective right, i.e. that it should also include the right to claim equal access to public employment before an administrative or judicial authority.[110] Even the implementation of an *Ausschreibungsgesetz* (Advertisement of Vacancies Act) in the federal civil service law and *Objektivierungsgesetze* (objectification laws) in provincial civil service laws has generally not improved the situation as much as expected.[111] The proposals for appointments in these laws only have the character of recommendations and these laws do not give applicants enforceable rights.[112] Moreover, the Constitutional Court considers that Article 3 StGG only applies when civil servants perform sovereign tasks.[113] Its application to civil servants who fulfil tasks under private law and to contractual agents and employees of outsourced companies is therefore excluded. Thanks in particular to the Equal Treatment Directives and the provisions on various forms of discrimination in the Charter of Fundamental Rights of the European Union (CFR), which overlay

108 *RGBl.* No. 142/1867; https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=18670004&seite=00000394.

109 See already VfSlg 415/1925.

110 See Kucsko-Stadlmayer (2001), margin numbers 24 ff. As Öhlinger (1993), p. 44, aptly puts it with regard to Article 3 StGG and other (additional) constitutional provisions that establish the right to equal access to public office, the practical relevance of all these provisions stands in stark contrast to their prominent placement.

111 See still with rather positive expectations only four years after implementation of the *Bundesgesetz vom 25. Jänner 1989 über die Ausschreibung bestimmter Funktionen und Arbeitsplätze sowie die Besetzung von Planstellen im Bundesdienst und über die Änderung des Bundes-Personalvertretungsgesetzes (Ausschreibungsgesetz 1989 – AusG), BGBl.* No. 85/1989; www.ris.bka.gv.at/Dokumente/BgblPdf/1989_85_0/1989_85_0.pdf, Öhlinger (1993), pp. 45 f. For more on objectification laws, see Weichselbaum (2012a), pp. 55 f. and 88 f. From recent times on this topic, see Kurier of 22 November 2022, *Unbefristete Top-Jobs im Burgenland sorgen für Aufregung. FPÖ gegen geplante Änderung des Objektivierungsgesetzes, SPÖ verteidigt den Plan*, https://kurier.at/chronik/burgenland/unbefristete-top-jobs-im-burgenland-sorgen-fuer-aufregung/402231522; and also the report of the Styrian Court of Audit to the Styrian parliament of 3 October 2024, *Prüfbericht Personalmanagement Land Steiermark*; https://www.landesrechnungshof.steiermark.at/cms/dokumente/12962049_174678476/dfa52cab/Pr%C3%BCfbericht_Personalmanagement.pdf.

112 See Weichselbaum (2012a), pp. 88 f. This is also the case with the recently adopted objectification law in Styria, although it should be mentioned as positive that it provides that the provincial government may only deviate from the appointment proposal of the evaluation commission in justified exceptional cases – see *Gesetz vom 2. Juli 2024 über die Objektivierung der Besetzung leitender Funktionen im Landesdienst (Steiermärkisches Objektivierungsgesetz – StObjG), LGBl.* No. 86/2024; https://www.ris.bka.gv.at/Dokumente/LgblAuth/LGBLA_ST_20240814_86/LGBLA_ST_20240814_86.pdfsig.

113 See VfSlg 7593/1975.

the guarantee provided by Article 3 StGG,[114] all those "deficits" in the interpretation of Article 3 StGG, which rendered this provision practically ineffective and thus dead law, now have less effect. In recent years, not only the laws that implement the Equal Treatment Directives, but also the case law of the Austrian courts concerning the laws regulating the recruitment in the civil service envisage compensation for unlawful and especially discriminatory allocation of positions.[115]

Although Article 7, paragraph 4 B-VG only stipulates that public employees, including members of the Federal Armed Forces, are guaranteed the full exercise of their political rights, there is no doubt today that they are also entitled to other fundamental rights, such as the right to property and the right to freedom of opinion and expression, as guaranteed by Articles 5 and 13 StGG 1867. The right to equality, which is guaranteed in particular by Article 7, paragraph 1 B-VG and Article 2 StGG 1867, is also of great importance in the jurisdiction of the Constitutional Court on civil service law. This is the case, for example, with the reduction of salary or pension payments due to legal amendments. Such cuts by the legislator violate the right to equality, if they are sudden and severe.[116]

VII. Influence of the European Convention on Human Rights and the Law of the European Union

The aforementioned rights to property and freedom of opinion and expression are also guaranteed by Article 1, Protocol No. 1, to the European Convention on Human Rights (ECHR) and Article 10 ECHR. The rights guaranteed in the ECHR, which has constitutional rank in Austria,[117] have great importance for civil servants and contractual agents. Due to the ECtHR case law on the fundamental right to property, not only private-law but also public-law claims and thus also salary claims of civil servants are recognised by the Austrian Constitutional Court as within the scope of protection of this right.[118] Article 10 ECHR also allows civil servants to criticise the State and its institutions if they act in a proportionate way.[119] Article 11 ECHR is of relevance in the

114 See in particular Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204/23, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16; see also *EU Non-Discrimination Law and its Potential Impact on the Civil Service of the Member States* by J. Mulder in this volume.

115 More on this in Gerhartl (2023), pp. 127 ff.

116 See Öhlinger and Eberhard (2022), pp. 366 f. with further references to judgments of the Constitutional Court.

117 See – referring to its ratification already with *BGBl.* No. 210/1958 – Article II *Bundesverfassungsgesetz vom 4. März 1964, mit dem Bestimmungen des Bundes-Verfassungsgesetzes in der Fassung von 1929 über Staatsverträge abgeändert und ergänzt werden*, *BGBl.* No. 59/1964; https://www.ris.bka.gv.at/Dokumente/BgblPdf/1958_210_0/1958_210_0.pdf and www.ris.bka.gv.at/Dokumente/BgblPdf/1964_59_0/1964_59_0.pdf.

118 See Öhlinger and Eberhard (2022), p. 412 with further references to judgments of both courts.

119 Öhlinger and Eberhard (2022), p. 443 with further references to judgments of both courts. The relevant criterion for the proportionality of a disciplinary measure is whether impairment of public confidence in the proper performance of official duties is at stake – see VfSlg 13.978/1994. See also *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

context of the right to strike. This right is not recognised in Austria, but no court decision has yet explicitly forbidden strikes by civil servants.[120] The legal literature argues that norms protecting the State's interest in the proper performance of service must be interpreted in light of Article 11 ECHR. This is supposed to allow strikes by civil servants as long as they do not disproportionately impair the public interest in the proper performance of duties. In the assessment of this question, the position and duties of individual civil servants must be taken into account.[121] Article 8 ECHR has to be considered in disciplinary proceedings concerning off-duty misconduct, but also in other cases concerning application of civil service law.[122] Unfortunately, the Austrian courts generally avoid this until today.[123]

The main impact of the ECHR can be seen in the principle of proportionality. For example, the right to freedom of opinion is also guaranteed by Article 13 StGG but considered on its own and before the rights of the ECHR became constitutionally guaranteed in Austria, this provision allowed (all) interventions, provided they were made by the ordinary legislator. In other words, if it was the legislator who interfered with the right to freedom of opinion as guaranteed in Article 13 StGG, this interference was in any case in accordance with the constitution.[124]

Article 6 ECHR provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of his civil rights and obligations and of any criminal charge against him. Article 47 CFR provides that everyone whose rights and freedoms guaranteed by Union law have been violated has the right to an effective remedy before an independent and impartial tribunal previously established by law. Both scopes have to be taken into account cumulatively by Austria, where, moreover, in the jurisdiction of the Constitutional Court, Article 47 CFR, which has the rank of European primary law, is also considered a subjective right of (quasi) constitutional rank.[125]

Article 6 ECHR and Article 47 CFR ensure that laws falling within their scope are applied at least in the second instance by judges. This applies in particular to disputes involving public officials, which the ECtHR and subsequently the Austrian Supreme Court consider to be disputes about civil rights and obligations.[126] Even if a matter concerns administrative law according to the national legislative concept, a court has to decide on appeal. The requirements of Article 6 ECHR and Article 47 CFR are ultimately the rea-

120 Unlike in Germany, see *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C. D. Dieter Classen and *The Right to Strike in the Civil Service* by G. Buchholtz in this volume. The jurisprudence rather gives the impression of avoiding this question – see VwGH, judgment of 31 January 2007, 2004/12/0032.

121 Julcher and Kneihs (2022), margin numbers 21 f. with further references; see already the detailed analysis of Davy (1989), pp. 101 ff.

122 For a current presentation of the relevant case law, see *Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence*, updated on 9 April 2024; https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng-pdf, pp. 31 ff. and *The Protection of Privacy in Civil Service Employment* by M. Otto in this volume.

123 For more on this, with a special focus on disciplinary proceedings, see Weichselbaum (2007b), pp. 553 ff. and Weichselbaum (2012a), p. 48.

124 See Fellner (2022), E 3 (Decision 3) = VfSlg 775/1927 concerning provisions of the *Dienstpragmatik 1914* about duties of conduct.

125 See the key decision VfSlg 19.632/2012.

126 Öhlinger and Eberhard (2022), p. 290. For details on the (previous) development of ECtHR case law on this issue, see Chojnacka (2002), pp. 201 ff.; and later Weichselbaum (2007b), pp. 574 ff.

son for the existence of Article 134, paragraph 7 B-VG which extends the guarantees of Articles 87 and 88 B-VG to the administrative courts, which have been the main appeal bodies in administrative law and the only appeal bodies in civil servant law in Austria since 2014.[127]

Austria's accession to the EU had two remarkable effects from the start. One effect was the significant reduction of the nationality requirement for civil service employees in order to meet the requirements of European law regarding the free movement of workers. Although Article 3 StGG has a very limited scope of application anyway, it must now additionally be interpreted in conformity with European law and thus even more restrictively.[128] The other effect was the implementation of equal treatment and anti-discrimination laws by the federal and provincial legislators,[129] initially only concerning discrimination against women. Although such a law had already existed for employment relationships under general labour law since 1979, for public employees of the Federal State the *Bundes-Gleichbehandlungsgesetz* was only enacted in 1993 exactly because of Austria's intention to join the EU.[130]

European anti-discrimination law has had a constantly growing impact on Austrian civil service law. Austrian civil service law at federal and provincial levels no longer sets a different age for the retirement of men and women who belong to the contract staff. In this context, it is important to distinguish between the general option for women in Austria who are entitled to a pension from the social security system to retire at an earlier age,[131] often seen as an advantage, from regulations that allowed the public employer to

127 See *BGBl.* I No. 51/2012 (n. 96). The predecessors of the administrative courts in the provinces, the *Unabhängige Verwaltungssenate* (Independent Administrative Authorities, UVS) already enjoyed a degree of independence, which was however not comparable to that of the administrative courts. See Article 129b B-VG introduced by *BGBl.* No. 685/1988 and repealed by *BGBl.* I No. 51/2012. One main difference was that the provincial legislators had the right to limit the function and employment relationship to six years, which was done in some cases. For more on this in the light of Article 6 ECHR, see Weichselbaum (2005), pp. 332 ff.; emphasising this difference between UVS and administrative courts, see VfSlg 20.231/2017. For the responsibility of ordinary courts to decide on disputes concerning contractual agents, see Section V of this chapter.

128 See Weichselbaum (2001), pp. 234 f.; Weichselbaum (2003), pp. 238 ff. and Weichselbaum (2012a), pp. 23 ff. and 46.

129 As far as the Province and City of *Wien* (Vienna) is concerned, the Equal Treatment Act for city employees only covers discrimination on grounds of sex. Provisions concerning other grounds of discrimination in the civil service are mainly integrated into the Civil Service laws – see Weichselbaum (2012a), p. 175 and for details, the commentary of Hutter and Rath (2014), pp. 45 ff., 183 ff., 309 ff. and 439 ff.

130 See Weichselbaum (2001), pp. 236 ff. for the Federal State and Weichselbaum (2012b), pp. 176 ff. for the provinces (on laws that then already included further grounds for discrimination). For the EU law context of the *Bundesgesetz über die Gleichbehandlung von Frauen und Männern und die Förderung von Frauen im Bereich des Bundes (Bundes-Gleichbehandlungsgesetz – B-GBG)*, *BGBl.* No. 100/1993, www.ris.bka.gv.at/Dokumente/BgblPdf/1993_100_0/1993_100_0.pdf, and also for reference to the *Gleichbehandlungsgesetz* (Equal treatment Act) for the general labour law existing since 1979, see the explanatory notes of the *Regierungsvorlage* (Government's legislative proposal) *857 der Beilagen zu den stenographischen Protokollen des Nationalrates XVIII. GP* of 5 November 1990, pp. 14 ff.; www.parlament.gv.at/dokument/XVIII/I/857/imfname_262037.pdf.

131 The earlier pension entitlement of women until 2033 is regulated by the Federal Constitutional Act on different age-limits of male and female social insured persons (*Bundesverfassungsgesetz über unterschiedliche Altersgrenzen von männlichen und weiblichen Sozialversicherten*), *BGBl.* No. 832/1992; https://www.ris.bka.gv.at/Dokumente/BgblPdf/1992_832_0/1992_832_0.pdf.

retire contractually employed women earlier than men.[132] The Court of Justice of the European Union (CJEU) classified the latter as discrimination on the basis of gender under European law.[133]

But discrimination on the basis of age is also an issue. While the federal legislator was evidently slightly quicker to understand that general maximum age regulations for entry into the civil service were in conflict with EU law,[134] many provinces did not follow this example immediately.[135] It was only in 2023 that the Province of *Burgenland*, for example, repealed the corresponding regulation in its provincial civil servant law.[136]

Furthermore, the provinces in particular have adapted their salary rules so that the difference between the wages of younger and older employees has decreased.[137] The Salary Law Reform of 1994 at the federal level, mentioned previously, was a starting point and a kind of role model for reforms at the provincial level, but did not go so far. The aim of the Contractual Agents Reform in 1999 at the federal level was to flatten the salary curve of contract staff. Members of the contract staff now earn significantly more at the beginning of their career and significantly less later on than their civil servant colleagues.[138] Although this reform took place before Directive 2000/78/EC entered into force,[139] it was exactly in its spirit *ex post*. In the long term, however, it could be a problem that some salary laws still foresee biennial leaps.[140]

Regulations on the recognition of previous service periods with regard to classification in salary levels had to be adapted several times at federal and provincial levels after

132 To be precise, civil servants usually retire *ex lege* at 65 years of age in Austria (see e.g. § 13 *BDG 1979*) which is called *gesetzliches Pensionsalter* (the statutory retirement age). They are then entitled to a retirement salary. Public employees who are employed on a contract basis can be dismissed at this age due to their entitlement to pension benefits from the social security system – see recent OGH judgment of 16 February 2023, 9 ObA 3/23s. As contractually employed women will be able to receive pension benefits earlier than men until 2033, today, the law refers to men's pension entitlement (at the age of 65), see e.g. § 32, para. 2, number 7 VBG.

133 For more on this distinction and the relevant decisions of the CJEU, see Windisch-Graetz (2012), pp. 206 f., who also points out that *Zwangspensionierung* (forced retirement) at age 65 for both sexes is not in conflict with EU law as far as the question of age discrimination is concerned. See also Weichselbaum (2012a), pp. 118 and 124 f.; the provision referred to in note 624 has been amended and is now in conformity with EU law. See also recent ECtHR judgment of 20 December 2022, *Moraru and Marin v. Romania*, 53282/18 and 31428/20, on this topic.

134 See § 4, para. 1 BDG 1979 as amended by the *Dienstrechts-Novelle 2011* (n. 42), and Eberhard (2012), p. 159, who points out that the justification was only a general one and that such a regulation was no longer up to date and necessary.

135 Weichselbaum (2012a), pp. 112 f.

136 See § 4, para. 1 *Burgenländisches Landesbeamten-Dienstrechtsgesetz 1997 – LBDG 1997*, *LGBl.* No. 17/1998 as amended on 4 May 2023 by *LGBl.* No. 35/2023. For more on this topic see Wachter (2019), pp. 243 ff., with references to EU law and the relevant judgments of the CJEU. For relevant judgments of the CJEU see also Schmahl (2022), pp. 633 ff.

137 Weichselbaum (2012a), p. 90. The salary reforms regularly envisage the possibility that previously employed staff opt into the new salary system – see recent OGH judgment of 19 December 2022, 9 ObA 112/22v, on this topic.

138 Weichselbaum (2001), p. 239.

139 See n. 114.

140 Weichselbaum (2012a), pp. 92 f. For details on recent judgments of the CJEU on this topic, see Schmahl (2022), p. 628.

judgments of the CJEU had qualified them as age discrimination.[141] That this issue has been a matter of concern for the Austrian courts is not only true for the Supreme administrative court, but also for the Supreme court when issuing final decisions in disputes concerning the employment of contractual agents. A regulation concerning the reduction of expenses for pension payments to civil servants was likewise already the subject of a decision by the CJEU concerning age discrimination.[142]

In view of the aforementioned judgment of the Constitutional Court of 2022 regarding recognition of professional experience according to Article 21, paragraph 4 B-VG,[143] it should not go unmentioned that in 2023, the Supreme Court submitted another application for review to the Constitutional Court with particular emphasis on Article 20 CFR. The Supreme Court qualified a regulation of a provincial civil service law as discriminatory in particular because it recognises previous professional experience acquired with other Austrian territorial authorities and with all kinds of employers in other EU or EEA states, but not professional experience acquired with a private employer in Austria. In its opinion, this provision is not only unconstitutional but also contrary to European law, as among other things it could also affect German citizens and their right to freedom of movement. However, the Constitutional Court, in line with its previous case law and in particular its judgment of 2022, confirmed the constitutionality of the relevant regulation. It did so by emphasising that this regulation served as an objective instrument to make the employment at territorial authorities more attractive and did not measure it against Article 20 CFR, but only the domestic constitutional principle of equality, arguing that the regulation was within the competence of the national legislator. Nevertheless, referring to the regulation in question, it did not exclude that, in individual cases, the primacy of application of EU law would have to be considered to establish a legal situation in conformity with EU law.[144]

Holiday rules also had to be adapted for full and part time jobs and the forfeiture of vacation,[145] but some remained contrary to EU law for a longer time and were therefore not to be applied.[146] A decision of the Austrian Constitutional Court of 2022[147] concerned the (former) disciplinary sanction of compulsory early retirement accompanied by a reduction in pension entitlement. A police officer had received this disciplinary sanction (with the

141 For more on this see e.g. Weichselbaum (2015), pp. 439 ff.; Hartmann (2017), pp. 155 ff. and Wachter (2021), pp. 21 ff. It is significant that many of the decisions of the CJEU on this topic concern Austrian cases – see Schmahl (2022), pp. 627 ff. For the latest reform of the federal salary law needed to comply with recent judgments of the CJEU, see *Bundesgesetz, mit dem das Gehaltsgesetz 1956 und das Vertragsbedienstetengesetz 1948 geändert werden, BGBl.* No. I 137/2023; https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2023_I_137/BGBLA_2023_I_137.pdfsig.

142 CJEU, judgment of 27 April 2023, *Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB) v. BB*, C-681/21; referring to this VwGH, judgment of 18 July 2023, Ra 2020/12/0049.

143 On Article 21, para. 4 B-VG see VfGH (n. 92).

144 See OGH, application for review of 29 March 2023, 8 ObA 82/22z, and VfGH, judgment of 4 October 2023, G 192/2023, referring to VfGH (n. 92).

145 See Weichselbaum (2012a), pp. 79 f.

146 See OGH, judgment of 23 March 2023, 9ObA 103/22w, but also just recently the Styrian civil service and salary law reform of 11 June 2024, *LGBl.* No. 65/2024, with, among others, the aim to establish a legal situation in conformity with EU law; https://www.ris.bka.gv.at/Dokumente/LgblAuth/LGBLA_ST_20240626_65/LGBLA_ST_20240626_65.pdfsig.

147 VfGH, judgment of 19 September 2022, E 3845/2021.

effect of dismissal) in 1976 for being found guilty by a criminal court of attempted same-sex indecency with two male minors aged 14 and 15. As they were under 18 years, this was a criminal offence until 2002, when the Constitutional Court annulled the provision and the federal legislator amended it before the annulment order became effective. After years of previous national court proceedings, in 2019 the CJEU ruled that the ex-police officer should receive compensation for the reduction in his pension payments from the date on which Directive 2000/78/EC entered into force[148] and the Supreme Administrative Court specified this requirement to the effect that the complainant was entitled not only to compensation for the reduction but also to damages because he had suffered discrimination.[149] However, damages were not awarded by the Federal Administrative Court responsible for the matter. In its decision of 2022, in line with European law, the Constitutional Court qualified the proceedings of the Federal Administrative Court concerning the award of damages as arbitrary and therefore violating the constitutional principle of equality.[150] Taking this decision into account, the Federal Administrative Court awarded a damage payment of 20.000 € (instead of 100.000 € demanded in the complaint to the court).[151] Although this case concerning discrimination based in particular on sexual orientation but also on sex is complicated,[152] it clearly shows the high importance of European law for civil service law and that all national courts and authorities are obliged to take it carefully into account in their decisions.

VIII. Final Remarks

In Austria, legislators at federal and provincial levels are quite free to shape the legal relationship between public officials and the State. The Constitutional Court gives them great freedom to regulate the outsourcing of public tasks, but this should not concern a core of important public tasks. However, with regard to discussions on cases of corruption in the appointment of state officials, a trend away from the purely economic considerations of New Public Management and a return to emphasis on the values of the constitutional State are evident. The civil service is no longer viewed from a predominantly economic perspective, but more from the perspective of the rule of law. Today it is again emphasised that public administration by public employees must comply with the Austrian federal constitution and its fundamental principles, in particular democracy and the rule of law.[153] Experts call for reduction of the influence of ministers' offices and revocation of fixed-term appointment of top ministerial positions.[154] The Constitutional Court has recently pointed out the importance of the right of supreme administrative organs to issue instructions in connection with outsourcing of state tasks to private legal entities and the constitutional

148 See n. 114.

149 CJEU (GC), judgment of 15 January 2019, *E.B. v. Versicherungsanstalt öffentlich Bediensteter BVA*, C-258/17. See also the related decision of the VwGH, judgment of 28 February 2019, Ra 2016/12/0072, especially margin number 66.

150 VfGH (n. 147), margin numbers 19 ff.

151 BVwG, judgment of 29 August 2023, W221 2240276-1.

152 For more details on this, see Graupner (2022); in particular for the latest developments and further legal steps Graupner (2023) pp. 2 ff.

153 See Wieser (2022), p. 398.

154 On the status quo and the proposals of *Initiative Bessere Verwaltung*, a civil society initiative on better governance, see https://bessereverwaltung.at/, in particular its *50-Punkte-Plan für eine bessere Verwaltung*; https://bessereverwaltung.at/wp-content/uploads/2023/02/IBV_Gesamtdokument.pdf, pp. 5 ff.

requirement that this outsourcing must comply with the principles of objectivity and efficiency.[155]

Finally, the requirements of European fundamental rights which are also constitutional requirements in Austria have a great impact on civil service law. The same applies to European law in general, which is increasingly influencing civil service law. These European legal requirements have greatly improved the legal position of state employees. They have partially limited the Austrian legislators' scope for shaping civil service law at federal, provincial and municipal levels, but they also bring European civil service systems closer to each other without eliminating the possibility of preserving state traditions in the structure and design of civil service law.

Bibliography

Altersberger C. (2022a), '§ 1 PG 1965. Anwendungsbereich', in Reissner G.P., Neumayr M. (eds), *Zeller Kommentar zum Öffentlichen Dienstrecht*, Wien: MANZ Verlag.

Altersberger C. (2022b), '§ 4 PG 1965. Ruhegenußberechnungsgrundlage', in Reissner G.P., Neumayr M. (eds), *Zeller Kommentar zum Öffentlichen Dienstrecht*, Wien: MANZ Verlag.

Baumgartner G. (2006), *Ausgliederung und öffentlicher Dienst*, Wien: Springer-Verlag.

Bischof D. (2022), 'Generalsekretäre. Der Schatten im Ministerium', *Wiener Zeitung* of 1 July 2022, www.wienerzeitung.at/nachrichten/politik/oesterreich/2153238-Der-Schatten-im-Ministerium.html.

Cargnelli-Weichselbaum B. (2019), 'Art 21 B-VG', in Kneihs B., Lienbacher G. (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, looseleaf edition, 23rd delivery, Wien: Verlag Österreich.

Chojnacka Z. (2002), 'Die Anwendbarkeit des Art 6 MRK auf dienstrechtliche Streitigkeiten öffentlich Bediensteter', (6) *Österreichische Juristenzeitung*, Wien: MANZ Verlag, 201–214.

Davy U. (1989), *Streik und Grundrechte in Österreich*, Wien: WUV-Universitätsverlag.

Eberhard H. (2012), 'Alter im Berufsrecht', in *WiR – Studiengesellschaft für Wirtschaft und Recht, Alter und Recht*, Wien: Linde Verlag, 153–179.

Eberhard H., Lachmayer K. (2024), 'Zur demokratischen Legitimation der Privatwirtschaftsverwaltung. Neue Wege in der Ausgliederungsjudikatur durch das COFAG-Erkenntnis', (1) *Österreichische Zeitschrift für Wirtschaftsrecht*, Wien: Facultas Verlag, 57–71.

Fellner W. (2022), '§ 43 BDG. Allgemeine Dienstpflichten', in Fellner W. (ed), *BDG. Beamtendienstrecht*, Wien: MANZ Verlag.

Gerhartl A. (2023), 'Besetzungen im öffentlichen Dienst und in staatsnahen Unternehmen'. Ausschreibung und Schadenersatz', (4) *Arbeits- und SozialrechtsKartei*, Wien: Linde Verlag, 127–134.

Graupner H. (2022), 'Ewige Diskriminierung: Homosexueller Polizist muss trotz EuGH-Urteils weiter kämpfen', *Der Standard* of 14 December 2022, www.derstandard.at/story/2000141716827/ewige-diskriminierung-homosexueller-polizist-muss-trotz-eugh-urteils-weiter-kaempfen.

Graupner H. (2023), 'Entschädigung für 25 Jahre. 2 Euro pro Tag Diskriminierung', *JusAMANDI* 03/2023, 2–4, https://www.rklambda.at/images/JUS-Amandi/JUS23-03.pdf.

Hartmann K. (2017), 'Wie die Judikatur des EuGH zur Altersdiskriminierung zu einem Umbau der Entlohnungssysteme im öffentlichen Dienst führte', in *Jahrbuch Öffentliches Recht*, Wien: Neuer Wissenschaftlicher Verlag, 155–165.

Hattenberger D. (2017), 'Landes-Vertragsbedienstetenrecht und (Bundes-)Arbeitsrecht – verfassungsrechtliche Aspekte', (4) *Journal für Arbeits- und Sozialrecht*, 318–339.

155 See VfGH, review decision *COFAG* (n. 73), paras. 13 ff. and VfGH, final decision *COFAG* (n. 74) paras. 63 ff. See also concerning *COFAG* and the constitutional requirement not to exempt its organs from instructions from the competent supreme administrative organs, VfGH, judgment of 5 October 2023, V 236/2022-13 and others, paras. 46 ff.; https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_20231005_22V00236_00/JFT_20231005_22V00236_00.pdf.

Heindl W. (1991), *Gehorsame Rebellen. Bürokratie und Beamte in Österreich 1780–1848*, Wien: Böhlau Verlag.

Hutterer H., Rath S. (2014), *Dienst- und Besoldungsrecht der Wiener Gemeindebediensteten*, 3rd edition, Wien: LexisNexis Verlag.

Julcher A., Kneihs B. (2022), '§ 43 BDG. Allgemeine Dienstpflichten', in Reissner G.P., Neumayr M. (eds), *Zeller Kommentar zum Öffentlichen Dienstrecht*, Wien: MANZ Verlag.

Klatzer J. (2022), 'Die Rolle der Ministerbüros', *Österreichischer Rundfunk* of 29 August 2022, https://orf.at/stories/3277094/.

Klueting H. (1995), *Der Josephinismus: ausgewählte Quellen zur Geschichte der theresianisch-josephinischen Reformen*, Darmstadt: Wissenschaftliche Buchgesellschaft.

Kucsko-Stadlmayer G. (2001), 'Art 3 StGG', in Korinek K., Holoubek M., Bezemek C., Fuchs C., Martin A., Zellenberg U. (eds), *Österreichisches Bundesverfassungsrecht. Kommentar*, looseleaf edition, 4th delivery, Wien: Verlag Österreich.

Kucsko-Stadlmayer G. (2010), *Das Disziplinarrecht der Beamten*, 4th edition, Wien: Springer-Verlag.

Megner K. (1985), *Beamte. Wirtschafts- und sozialgeschichtliche Aspekte des k.k. Beamtentums*, Wien: Verlag der Österreichischen Akademie der Wiesenschaften.

Öhlinger T. (1993), *Der öffentliche Dienst zwischen Tradition und Reform*, Wien: Verlag Orac.

Öhlinger T., Eberhard H. (2022), *Verfassungsrecht*, 13th edition, Wien: Facultas Verlag.

Pace A. (1914), *Die Dienstpragmatik*, Wien: MANZ Verlag.

Raschauer B. (1994), 'Keine Grenzen für Privatisierungen?', *ecolex – Fachzeitschrift für Wirtschaftsrecht*, 434–436.

Schimetschek B. (1984), *Der österreichische Beamte*, Wien: Verlag für Geschichte und Politik.

Schmahl S. (2022), 'Die Rechtsprechung der Unionsgerichtsbarkeit zum Verbot der Altersdiskriminierung', 57 (5) *Europarecht – EuR*, 612–638.

Thienel R. (1990), *Öffentlicher Dienst und Kompetenzverteilung*, Wien: Verlag der Österreichischen Staatsdruckerei.

Wachter G. (2019), 'Ernennungserfordernis von "höchstens 40 Jahren" bei Beamten – eine verbotene Altersdiskriminierung?', in *Jahrbuch Altersdiskriminierung*, Wien: Neuer Wissenschaftlicher Verlag, 243–256.

Wachter G. (2021), 'Die Neuregelung der Vordienstzeitenanrechnung bei (Bundes)Vertragsbediensteten', in *Jahrbuch Altersdiskriminierung*, Wien: Neuer Wissenschaftlicher Verlag, 21–49.

Walter F. (1950), *Die österreichische Zentralverwaltung. II. Abteilung. Von der Vereinigung der österreichischen und böhmischen Hofkanzlei bis zur Einrichtung der Ministerialverfassung (1749–1848). 4 Band. Die Zeit Josephs II. und Leopolds II. (1780–1792)*, Aktenstücke, Wien: Adolf Holzhausens Nachfolger.

Weichselbaum B. (2001), 'Neuere Entwicklungen im Recht des öffentlichen Dienstes in Österreich', *Zeitschrift für Beamtenrecht*, 233–244.

Weichselbaum B. (2002/2003), 'Abschied von der Beamtenpension – verfassungskonform?', (4) *Juristische Ausbildung und Praxisvorbereitung*, Wien: MANZ Verlag, 249–254.

Weichselbaum B. (2003), *Berufsbeamtentum und Verfassung*, Wien: Verlag Österreich.

Weichselbaum B. (2004), 'Berufsbeamtentum in Österreich in Erosion? Eine Bestandsaufnahme verfassungsrechtlicher Vorgaben und ihrer Negierung durch Gesetzgebung und Vollziehung', *Zeitschrift für Beamtenrecht*, 19–29.

Weichselbaum B. (2005), 'Warum (noch) Berufsbeamte?', (4) *Journal für Rechtspolitik*, 327–349.

Weichselbaum B. (2007a), 'Dienstrechtliche Homogenität und Mobilität im öffentlichen Dienst: Eine Bestandsaufnahme aus österreichischer Sicht', *Zeitschrift für Beamtenrecht*, 371–380.

Weichselbaum B. (2007b), 'Disziplinarrecht der Beamten und Europäische Menschenrechtskonvention', 62 *Zeitschrift für öffentliches Recht*, 537–594.

Weichselbaum B. (2012a), 'Dienst- und Personalvertretungsrecht der Länder und Gemeinden', in Pürgy E. (ed), *Das Recht der Länder. Band II/1: Landesverwaltungsrecht*, Wien: Jan Sramek Verlag, 1–148.

Weichselbaum B. (2012b), 'Antidiskriminierung', in Pürgy E. (ed), *Das Recht der Länder, volume II/1: Landesverwaltungsrecht*, Wien: Jan Sramek Verlag, 149–192.

Weichselbaum B. (2015), 'Altersdiskriminierung im öffentlichen Dienst', (3) *Zeitschrift für Verwaltung*, 439–442.

Wiederin E. (2011), 'Staatsanwaltschaft und Bundesverfassung', in Österreichische Juristenkommission (ed), *Strafverfolgung auf dem Prüfstand*, Wien: Linde Verlag, 33–53.

Wieser L. (2022), 'Der ineffiziente demokratische Rechtsstaat. Staatstheoretische Perspektiven auf eine möglichst effiziente staatliche Organisation', (3) *juridikum. Zeitschrift für Kritik, Recht, Gesellschaft*, 393–400.

Wimmer A. (2020), 'Der Generalsekretär im Bundesministerium: Renaissance eines Organtypus von langer Tradition', in *Jahrbuch Öffentliches Recht*, Wien: Neuer Wissenschaftlicher Verlag, 153–167.

Windisch-Graetz M. (2012), 'Das Alter im Arbeitsrecht', in *WiR – Studiengesellschaft für Wirtschaft und Recht*, Wien: Linde Verlag, 197–210.

Ziehensack H. (2024), *Vertragsbedienstetengesetz. Praxiskommentar* (online), Wien: LexisNexis Verlag, https://360.lexisnexis.at/tocnav/Kommentare/Vertragsbedienstetengesetz:%2BPraxiskommentar,%2BZiehensack?node=lnat:taxo_source_30cdf2&origin=bct.

5 The Civil Service in Belgium

Between Fragmentation and Common Principles

*Yseult Marique and Emmanuel Slautsky**

I. Introduction

In recent decades, four trends have characterised the evolution of the Belgian civil service: the federalisation of the country, the Europeanisation of the administrative system, the influence of *New Public Management* ideas, and the growing importance over time of private law employment contracts. Taken together, these trends have contributed to reshaping deeply the law regulating the Belgian civil service and the logic of the "career system" that it encompasses, even though the main logics of hierarchy, neutrality, and professionalism remain standing. These trends have further contributed to the fragmentation of the law regulating the Belgian civil service, while also introducing and protecting some elements of uniformity in the form of common principles.

This contribution explains this paradox, first by providing an overview of the traditional Weberian administration and its transformations in Belgium (Section II), then explaining the constitutional framework within which the Belgian civil service operates (Section III), the increasing application of ordinary law to public employees (Section IV), and the influence of European instruments on the Belgian civil service (Section V).

II. A Weberian Administration and Its Recent Transformations

The Belgian "civil service" can be defined as

> all staff members who do not hold an elective mandate of a political nature, who ensure, in any capacity whatsoever the functioning of the services of the various authorities, whatever their level and missions, under the hierarchical power or supervision of the latter, within the framework of a system of public law derogating from ordinary law.[1]

As Gosselin puts it, slightly differently, the civil service can be understood organically, to refer to "all the people who perform public service tasks by being subject to a *statut*, which is defined as the set of rules drawn up unilaterally by the administrative authority

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1 Lewalle et al. (1997), p. 43. Definition adopted by de Broux (2005), pp. 158 f. who notes that the definition has been debated over time.

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and which apply indiscriminately to all the agents subject to them".[2] However the recent transformation of the Belgian civil service makes this organic definition outdated, hence a functional definition seems more adequate, namely "all persons who participate in the activity of the public authority",[3] with no reference to the specific regulations applicable to them. The notion of "public authority" includes all legal persons of public law at the federal, regional, and community levels, the so-called *organismes d'intérêt public*[4] (i.e. agencies in various forms, though not necessarily independent agencies) and local government. Teachers and medical staff may be civil servants or not, depending on the public or private law nature of their employer.[5]

This situation calls for three comments: first, about the historical background of the Belgian administrative model (Section II.1); second, about the main traditional features of the Belgian civil service (Section II.2); and third, about the level of employment in the civil service today (Section II.3).

1. Historical Background

When the Belgian State was set up in 1831, the civil service was limited and weak, so much so that for a significant period in the 19th century, legal scholarship was not concerned with possible abuses of power by civil servants but rather with a perennial lack of professionalism and administrative inertia.[6] A number of reforms were attempted to remedy this problem.[7] Only in 1937, under the pressure of extremist movements threatening the legitimacy of administrative action, did a reform produce an enduring change: the enactment of the so-called *statut Camu* (named according to the person who drafted it)[8] or the Royal Decree of 2 October 1937 *portant le statut des agents de l'État*.[9] This statute remains the cornerstone of the general principles applicable to Belgian civil servants in practice,[10] even if their formal legal bindingness across the whole sets of various civil services has been strongly eroded, as this chapter will explain. Five different periods (1937–1945, 1945–1979, 1980–1999, 1999–2014, post-2014) can be distinguished in terms of their respective federal and management reforms, which have radically transformed the structure of the civil service as a whole even though the main logics of hierarchy, neutrality, and professionalism remain standing.

The *statut Camu* heralded the first major reform of the Belgian civil service: it is the first codification of principles and norms that until then had been scattered across different documents. This meant that the organisation of the civil service became more logical. The *statut* clearly consecrated the distinctive legal relationship that was supposed to link public bodies

2 Gosselin (2017), p. 99 (our translation).

3 Gosselin (2017).

4 Some of these public bodies are regulated by the Law regarding the control of certain organisms of public interest of 16 March 1954 (*Loi relative au contrôle de certains organismes d'intérêt public*), *Official Gazette*, 24 March 1954); www.ejustice.just.fgov.be/eli/loi/1954/03/16/1954031601/justel.

5 Durviaux (2012), pp. 9–10 (teachers).

6 Wodon (1920), pp. 111–112.

7 Thijs and Van de Walle (2005), pp. 38–54. For more details of an earlier reform (1859), see Crabbe (1956), pp. 566–590.

8 Louis Camu was the chair of a royal commission gathering high civil servants, university professors and trade union leaders, see de Broux (2005), p. 160.

9 *Official Gazette*, 8 October 1937; www.ejustice.just.fgov.be/eli/arrete/1937/10/02/1937100201/justel.

10 For details: Leurquin-De Visscher (1991), p. 333.

with civil servants.[11] Seeking to ensure administrative efficiency, the *statut* provides general principles of appointment and advancement with a significant role for "merits" (based on an open competition organised by an appointment commission known then as the *Secrétariat permanent au recrutement*)[12] and general principles regulating the rights and duties of civil servants. These principles were mostly a uniformisation of the existing practices with little, if any, substantive innovation.[13] Since its adoption, the *statut Camu* has been a major point of reference for the regulation of the Belgian civil service in general.[14]

Between the Second World War and 1979, Belgian administrations became more diverse and specialised, which led to detailed regulations kept within the mindset of uniformisation. In practice, new specialised administrations were given technical regulations for their civil service, referring in large part to the *statut Camu*.[15] Political parties, however, found ways to influence appointment and advancement in the civil service.[16]

In 1980, Belgium adopted the first piece of legislation relating to the powers of the regions and communities – two types of federated entities. Federalisation was then deepened through a number of reforms, leading to a complexification of the administrations and the civil service. Federal civil servants were transferred to the regions and communities in order to maintain the continuity of the public service, thanks to skilled civil servants whose entitlements were protected.[17] Regions and communities increasingly gained autonomy over time in regulating their civil service,[18] while, until 2014, the King retained the power to define the general principles applicable throughout the Belgian (federal, regional, and *communautarian*) civil service.[19] This means that from there on one part of the principles applicable to the civil service remained shared across Belgium while another part depended on the specific administration to which the civil servant belonged.[20] During this period, contractual relationships between public employees and the administration

11 De Broux (2005), p. 161.

12 Some functions were exempted from open competition, namely auxiliary functions, temporary functions and individuals with "une haute valeur administrative, scientifique, technique ou artistique". These functions remain peculiar within the civil service as they are also the functions where private law contracts are most often applicable (see Section IV).

13 de Broux (2005), p. 161.

14 Lombaert, Mathy and Rigodanzo (2007), p. 13.

15 de Broux (2005), p. 164.

16 de Broux (2005), pp. 165–166.

17 Barbeaux and Beumier (1989), pp. 14–19; de Broux (2005), p. 167.

18 Leus et al. (2016), pp. 302–314.

19 Article 87 of the Special law of institutional reforms of 8 August 1980 (*Loi spéciale de réformes institutionnelles*), *Official Gazette*, 15 August 1980 (further abbreviated as LSRI); www.ejustice.just.fgov.be/eli/loi/1980/08/08/1980080801/justel), as modified by *Loi spéciale* of 8 August 1988, *Official Gazette*, 13 August 1988, and by *Loi spéciale* of 16 July 1993, *Official Gazette*, 20 July 1993 (now repealed). These general principles have been enacted in successive royal decrees. An example is the Royal Decree laying down the general principles of the administrative and financial status of State employees applicable to the staff of the Executive and the legal persons governed by public law dependent on it of 22 November 1991 (*Arrêté Royal fixant les principes généraux du statut administratif et pécuniaire des agents de l'Etat applicables au personnel des Exécutifs et aux personnes morales de droit public qui en dépendent*), *Official Gazette*, 24 December 1991; www.ejustice.just.fgov.be/eli/arrete/1991/11/22/1991000690/justel. On these general principles of the Belgian civil service, see Leurquin-De Visscher (1995), pp. 84–91; Leus (2002), pp. 55–73; Weekers (2004), p. 68.

20 For the details, see Stenmans (1999), pp. 183–333.

strongly increased, reaching approximatively 20%.[21] The politicisation of higher functions became more structural, although within objective limits.[22]

The federalisation of the civil service in the 1980s was succeeded by its managerialisation in the period between 1999 and 2004, under the name of "Copernic Reform". The main idea was to modernise the civil service according to the principles of the *New Public Management* and to introduce business management methods within the administration. Four key ideas were put forward: the involvement of citizens; subsidiarity in public management, allowing the delegation of certain tasks to the private sector; administrative efficiency and simplification; and clarification of the roles of politics and the administration.[23] As part of the "Copernic Reform", specific rules were also introduced for civil servants in (top) management positions. They are recruited for a limited period of time and can be recruited either from the civil service or from the private sector. A specific regime also applies to several aspects of their legal position, such as their evaluation.[24]

In 2014, the power of the King to define the general principles applicable throughout the entire Belgian civil service was abolished.[25] This opened the door to increasing divergences between the laws that apply to civil servants depending on whether they work at the federal, the Walloon, the Flemish, the French-speaking Community, the German Community, or the Brussels levels of government. Constitutional principles such as the equality principle and European law constraints, however, remain unifying factors,[26] as will be explained later. Mobility between administrations must also remain possible,[27] while the appointment of regional or community civil servants working in ministerial departments must still involve the *Secrétariat permanent du recrutement du personnel de l'État* (now called SELOR).[28] The latter must guarantee uniformity in the quality of the civil service throughout the different levels of the Belgian government.[29] Furthermore, issues such as retirement wages and collective bargaining remain federal responsibilities.[30]

2. Historic Features of the Belgian Civil Service

The overall Belgian administrative structure was strongly influenced by Napoléon, as it followed in the wake of his European conquests: the Belgian territorial organisation is a direct transposition of the "departments" and "communes" as they were set out in France.

21 de Broux (2005), p. 170.
22 de Broux (2005), p. 170.
23 de Broux (2005), p. 172.
24 Royal Decree on the designation and exercise of management functions in federal public services and federal public programming services of 29 October 2001 (*Arrêté royal relatif à la désignation et à l'exercice des fonctions de management dans les services publics fédéraux et les services publics fédéraux de programmation*), *Official Gazette*, 31 October 2001; www.ejustice.just.fgov.be/eli/arrete/2001/10/29/2001002158/justel.
25 Articles 37 and 42 of the Special Law concerning the Sixth State Reform of 6 January 2014 (*Loi spéciale relative à la Sixième Réforme de l'Etat*), *Official Gazette*, 31 January 2014; www.ejustice.just.fgov.be/eli/loi/2014/01/06/2014200341/justel.
26 Leus et al. (2016), p. 309.
27 Article 87 § 3 LSRI.
28 Article 87 § 2 LSRI.
29 Sarot (1994), p. 118.
30 Leus et al. (2016), pp. 311–314. See also Article 87 §5 LSRI (collective bargaining). Peeters and Vanpraet (2020), pp. 1–51, give a comprehensive account of the division of powers regarding the civil service under Belgian constitutional law.

The general principles applicable to the Belgian civil service were the outcome of a deep concern for the risks of arbitrariness entailed by the politicisation of the civil service, leading to the adoption of a Weberian model of administration based on hierarchy, neutrality, and professionalism in the first half of the 20th century.[31]

These general Weberian principles translate into the career system of the Belgian civil service (in an organic way): once appointed in the civil service, the person starts an administrative career, which in principle entails the advancement of staff in the administrative hierarchy,[32] which is divided into "niveau", "grade", and "rang". The "niveau" or level is fixed according to the qualification, in terms of training and skills, that must be demonstrated to hold a job.[33] There are four levels: level A for holders of university degrees (such as doctors, chemists, civil engineers, commercial engineers, or those holding a master's degree (60 credits at least), levels B and C for holders of bachelor degrees or non-university degrees, and level D for holders of no degrees. "Grades" have been reformed and have taken new names over the years, but they aim to identify a level of complexity, technical expertise, and responsibility. They exist only for levels B, C, and D at the federal level. Article 4 § 2 of the *Statut Camu* specifies that:

> Level B shall comprise the grades of administrative expert, financial expert, technical expert and ICT expert. Level C shall comprise the grades of administrative assistant and technical assistant. Level D shall comprise the grades of administrative assistant and technical assistant.

"Rang" refers to the "title which entitles the agent to occupy a specific post".[34] The hierarchy is not merely a matter of a pyramidal design; it also translates into a sophisticated disciplinary system and a duty to comply with orders from superiors.

No training school similar to the French ENA (now *Institut national du service public*)[35] has ever been set up in Belgium (either at the national/federal level or the regional level). However, professional training, including specific degrees tailored to the administration, has been set up and is run in various forms (internal, external, university, higher education).[36] Since 2014, Belgian federal civil servants spend approximatively three days a year doing professional training; this is less than in previous periods.[37] One significant area of professional development is language learning, with specific statistics about this important area for professional progression, as bilingualism (French/Dutch) is often mandated for accessing a higher position, in particular in Brussels and at the federal level of government.[38]

31 de Broux (2005), pp. 160–167.

32 Durviaux (2012), p. 104.

33 Art. 3 § 1 (2) of the Royal Decree on the status of State employees of 2 October 1937 (*Arrêté Royal portant le statut des agents de l'État*).

34 Durviaux (2012), p. 105.

35 See *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

36 *Arrêté Royal* of 16 July 2013. For an example of this formation, see https://web.umons.ac.be/fweg/fr/offre-de-formation/formation-pour-fonctionnaires-federaux. *Add* Gosselin's book (2017) which is aimed at these students of level B studying to gain a university degree allowing these students to reach level A.

37 https://infocenter.belgium.be/fr/statistiques/ensemble-institutions-publiques-federales/developpement-du-personnel/formations.

38 https://infocenter.belgium.be/fr/statistiques/ensemble-institutions-publiques-federales/developpement-du-personnel/langues.

3. *Key Figures at the Federal Level*[39]

The Belgian Infocenter released four key figures about the Belgian federal civil service in 2021, revealing namely that 53.5% are women, 81.6% of individuals work under a "statute", 71.7% work full time, and they are 46 years old on average.[40] It does not appear that the Belgian statistics keep records of the degrees (e.g. law, engineering, classics, management studies, etc.) held by civil servants, although it is possible to infer that most civil servants at level A have a university degree (at master's level), while civil servants at other levels do not have one in principle. The current allocation between level A and other levels in the Belgian federal civil service is about 25,000 Full-Time Equivalent (FTE) at level A, among 75,000 FTE for all levels, making holders of a university degree approximately one-third of Belgian federal civil servants.[41]

When it comes to diversity, the Belgian statistics seek to monitor the increase in employment of individuals with disabilities and of non-Belgian nationals. Since 2009, a special commission has been in charge of ensuring that the level of employment for individuals with disabilities reaches a target of 3%.[42] Yet, as of 2021, the official figure remains at a disappointing 1.22%.[43] When it comes to non-nationals employed in the Belgian federal civil service, their figures have plummeted, from about 700 in 2011 to zero in 2016, when statistics stopped being available.[44]

III. The Constitutional Framework and its Structure

Despite major changes in the structure of the Belgian civil service and in its activities since the 19th century, the constitutional framework regulating the civil service has remained strikingly unchanged since the enactment of the Belgian constitution in 1831. The courts, however, have arguably interpreted the constitutional provisions protecting the equality between civil servants and equal access to the civil service increasingly stringently, while also seeking to articulate the Belgian constitutional framework with the process of European integration. In addition, judicial review in the context of the civil service has changed considerably over time and has become more effective than in the 19th century, notably with the creation of the Council of State in 1946. Fundamental rights such as the right to administrative transparency and the duty to give reasons for individual decisions were also enacted at the constitutional or legislative level in the 1990s.[45]

39 For statistics at other levels: in Wallonia, the civil service working in ministerial departments accounts for approximately 10,000 staff (https://spw.wallonie.be/actualites/des-chiffres-et-des-etes-qui-sont-les-agents-du-spw). For Flanders, see here https://www.vlaanderen.be/statistiek-vlaanderen/overheidspersoneel?order_publicationdate=desc.

40 https://infocenter.belgium.be/fr. The numbers cover civil servants working in ministerial departments.

41 https://infocenter.belgium.be/fr/statistiques/ensemble-institutions-publiques-federales/emploi/effectifs.

42 Royal Decree on various measures relating to comparative selection for recruitment and probationary periods of 6 October 2005 (*Arrêté Royal portant sur les diverses mesures en matière de sélection comparative de recrutement et en matière de stage*), *Official Gazette*, 25 October 2005.

43 https://fedweb.belgium.be/fr/a_propos_de_l_organisation/administration_federale/la-diversite-au-sein-de-l-administration-federale/thematiques/personnes-avec-un-handicap/carph.

44 https://infocenter.belgium.be/fr/statistiques/ensemble-institutions-publiques-federales/diversite/etranger.

45 Article 32 of the Belgian constitution (www.ejustice.just.fgov.be/eli/constitution/1994/02/17/1994021048/justel); Law regarding the formal motivation of the administrative acts of 29 July 1991 (*Loi relative à la motivation formelle des actes administratifs*), *Official Gazette*, 12 September 1991; www.ejustice.just.fgov.be/eli/loi/1991/07/29/1991000416/justel.

In the 19th century, the Belgian administration at the national level was unitary for the most part, in the sense that there were few public bodies operating outside the ministerial departments of the central government.[46] The 1831 Belgian constitution did not envisage that public power should be exercised outside of either the legislature or the executive at the central level, although the existence of local authorities was constitutionally entrenched.[47] The organisation of powers in Belgium has not, however, remained static since the 19th century. Since the beginning of the 20th century, an increasing number of administrative tasks have been taken up by public bodies located outside the ministerial departments, enjoying variable degrees of autonomy from the government.[48] A significant number of Belgian civil servants work for these public bodies, even though consolidated numbers are hard to compile. Since the 1990s, an increasing number of public bodies that enjoy even greater autonomy from the government have also appeared, often under the influence of European Union law.[49] These are the *autorités administratives indépendantes*. This fragmentation of the Belgian civil service between ministerial departments and other public bodies has come on top of the fragmentation resulting from the transformation of Belgium into a federal State since the 1970s, as described previously. The multiplication of public bodies outside of ministerial departments can be observed both at the federal level and at the level of the federated entities.

The law regulating the Belgian civil service is characterised by its lack of a statutory footing: the Belgian constitution protects the competence of the executive to appoint civil servants who work in ministerial departments,[50] and this competence has been interpreted as encompassing the power to define the law applicable to the civil service as well. This interpretation of the Belgian constitution dates back to 1937 and the enactment of the *statut Camu*.[51] Since then it has been repeatedly accepted by the Belgian courts.[52] The constitutional competence of the executive to define the law regulating the position of civil servants in ministerial departments in Belgium means that the legislature can intervene in this area only under limited circumstances, such as to protect the fundamental rights of civil servants.[53] Large delegations of powers to the executive are also standard as far as civil servants working outside ministerial departments are concerned, even though essential choices remain a responsibility of the legislature.[54] As a result, most of the rules applicable to the Belgian civil service are contained in Royal and governmental decrees, rather than statutes. This entails that these executive rules must comply with the general principles of administrative law, such as the rights of the defence or *audi alteram partem*, as these have been developed by the courts and have judicially been found to be of general applicability.[55] The general principles of administrative law outrank the administrative acts in most

46 de Broux (2010), pp. 4–6.

47 Article 162 of the constitution, see Slautsky (2021a), p. 52.

48 Buttgenbach (1954), pp. 112–113.

49 Slautsky (2021a), pp. 45–46.

50 Article 107 of the Belgian constitution. For the Belgian Regions and Communities, see Article 87 § 2 LSRI. This second provision is interpreted per analogy with Article 107 of the Belgian constitution, see e.g. Peeters and Vanpraet (2020), p. 7.

51 Adriaenssen and Lombaert (2019), pp. 390–394.

52 See e.g. Constitutional Court, decision of 2 June 2004, 99/2004, para. B.6.2.

53 The position under Belgian law is summarised e.g. in Belgian Council of State, Opinion of 5 October 2018, 64,133/AG, pp. 5–8. See also De Becker (2007), pp. 148–159.

54 Belgian Council of State, Opinion of 15 May 2019, 65, 877/4, p. 6.

55 Belgian Council of State, decision of 9 May 1985, 25,299 *Van Belleghem*.

cases in the hierarchy of norms.[56] The executive character of the rules regulating the civil service in Belgium also means that cases regarding the position of civil servants or regarding the validity of the rules applicable to them are often litigated before the Administrative Litigation Section of the Council of State, as it is the Council of State that has jurisdiction to annul individual decisions or regulations from the executive that are contrary to higher norms and to suspend their enforcement in case of emergency.[57] The Council of State was created in 1946 and its powers have been extended over time. Ordinary courts must also set aside administrative acts applicable to their case that are contrary to higher norms,[58] and they also have jurisdiction as far as the enforcement of individual rights is concerned (e.g. disputes regarding labour law contracts or the payment of wages). This is a role that ordinary courts have had since 1831. The rules regulating the civil service are also normally reviewed as to their legality prior to their enactment by the Legislation Section of the Council of State.[59]

Other constitutional provisions that matter for the organisation of the Belgian civil service are those that protect the equality between citizens and prohibit discrimination.[60] The courts have decided that these provisions also protect equal access of Belgian citizens to employment in the civil service,[61] as well as the equality between civil servants throughout their career, including promotion.[62] This is in line with the Weberian model of public administration adopted in Belgium, and with the idea that access to positions in and progression through the civil service should be merit-based. This constitutional protection of the equality between civil servants is regularly enforced by the courts[63] and it is also one of the main principles on the basis of which the Legislation Section of the Council of State reviews amendments to the rules regulating the civil service. For example, the Legislation Section of the Council of State is of the opinion that the constitutional principle of equality requires that procedural and institutional guarantees against bias or arbitrariness should be put in place as far as recruitment procedures are concerned.[64] Both the federal government and the regions and communities must abide by the constitutional principle of equality when regulating their civil service, which puts a brake on the extent to which they might diverge from one another.

Despite the aim of neutrality underlying this choice for a Weberian model, however, a significant degree of politicisation of the Belgian civil service has long remained. The main Belgian political parties have tended to informally share between them the highest positions within the administration so as to ensure proportional representation of different

56 Goffaux (2015), p. 503.

57 Articles 14 and 17 of the Coordinated laws on the Council of State of 12 January 1973 (*Lois coordonnées sur le Conseil d'État*), *Official Gazette*, 21 March 1973; www.ejustice.just.fgov.be/eli/loi/1973/01/12/1973011250/justel.

58 Article 159 of the constitution.

59 Article 3 of the Coordinated laws on the Council of State of 12 January 1973 (n. 57).

60 Articles 10 and 11 of the constitution.

61 Belgian Constitutional Court, decision of 1 June 2005, 96/2005, para. B.16; Belgian Council of State, Opinion of 11 April 2012, 50, 047/2, p. 8; Belgian Council of State, Opinion of 5 March 2014, 54, 917/2, p. 5.

62 Belgian Council of State, decision of 29 October 1954, 3, 775 *De Kempeneer.*

63 See, e.g. the case law discussed in Marique (2021), pp. 613–624.

64 Belgian Council of State, Opinion of 11 June 2018, 63.386/4, with references to decisions from the Council of State of 7 September 2001, 98, 735 *Jadot*; 5 June 2015, 231,454 *Bessem and Vildaer* and 5 June 2015, 231, 455 *Bossuroy*. Opinion of 5 October 2018, 64,133/AG.

political affiliations in these top positions.[65] Faced with an attempt to formalise this arrangement within certain parts of the civil service, the Belgian Constitutional Court ruled in 1993 that this was in breach of the constitutional principle of equality and non-discrimination, as it makes access to, and progression through the civil service dependent on the personal views of the civil servant.[66] The practice nonetheless remains widespread.

IV. From a Special Status for Civil Service Employees to a More Ordinary Status

The nature of the employment relationships between civil servants and their public body has changed over time. Partly under the influence of the *New Public Management* ideas fostering efficiency principles and encouraging public bodies to borrow managerial techniques from the private sector, private law employment has been increasing over time within the Belgian civil service, compared to the number of civil servants working for public authorities under a more traditional public law regime. The Belgian courts have, however, made sure that some public law principles also remain applicable to civil servants working under a private law regime.

After years of controversy in the legal scholarship regarding the public law or the private law character of the relation between civil servants and the State, the *statut Camu* of 1937 established the rule that most Belgian civil servants should fall by default under a public law regime,[67] the so-called *statut*, already mentioned. The *statut* is unilaterally enacted by the State and contains the administrative (appointment, promotions, duties, disciplinary regime, etc.) and financial rules applicable to civil servants. This choice was in line with the case law of the Belgian Supreme Court for civil matters (*Cour de cassation/Hof van cassatie*). In a 1932 decision,[68] the Court decided that:

> *La collation des emplois publics et les allocations qu'ils comportent sont en dehors des tractations contractuelles,*[69] and *En vertu des principes généraux du droit administratif, le caractère public d'une institution implique que le régime de son personnel est normalement le régime statutaire, notamment en ce qui concerne le licenciement et la suppression d'emploi.*[70]

The Belgian Council of State reaffirmed this default application of a public law regime to civil servants after World War II.[71]

65 Hustedt and Houlberg Salomonsen (2014), pp. 754–755.

66 Belgian Constitutional Court, decision of 16 December 1993, 86/93.

67 Feyt (2006), pp. 227–228; De Wilde et al. (2017), pp. 368–372.

68 *Cour de cassation*, decision of 8 December 1932, *Pasicrisie* (1933 I), p. 44; 22 October 1942, *Pasicrisie* (1942 I), p. 249; 13 June 1973, *Pasicrisie* (1973 I), p. 949.

69 "The collation of public jobs and the allowances they entail fall outside the scope of contractual negotiations" [the authors' translation].

70 "According to the general principles of administrative law, the public nature of an institution implies that the regime for its staff is normally the statutory regime, in particular as regards dismissal and redundancy" [the authors' translation].

71 Council of State, decision of 13 July 1979, 19,754 *Solon*: "the staff of a public service is, as a rule, placed in a public law relationship with that service and is therefore, in the absence of its own staff regulations, deemed to be subject to the general principles that underlie the legal situation of staff in public service" [the authors' translation].

The choice of a public law regime for the Belgian civil service was influenced by French administrative law and, in particular, the work of Maurice Hauriou.[72] It has been further justified by the text of Article 107 of the Belgian constitution, which gives the King the power to (unilaterally) appoint civil servants; the general character of the rules defining the legal regime applicable to civil servants and the impossibility of altering them in individual cases; the fact that civil servants may have to exercise part of the *imperium* and the need to do so under a public law regime; the need for public bodies to be able to unilaterally amend the rules regulating the civil service when the general interest so requires; and the need to protect (local) civil servants from undue political influence by submitting them to a legal regime of general application.[73] The existence of a core of civil servants employed in a public law regime and operating within a career system has also been presented in the scholarship as a condition to ensure the stability and continuity of administrative activities over time.[74]

This choice of a public law regime for the Belgian civil service never meant, however, that contractual employment under an ordinary labour law regime was not allowed. On the contrary, some civil servants remained employed under a private law regime after the *statut Camu*,[75] but the choice made in the 1930s meant that contractual employment had to be explicitly provided in order for it to be possible and that the default rule should be public law employment.[76] Since then, most legal texts regulating the Belgian civil service at the different levels of government have limited the possibilities to employ civil servants under a private law regime to specific cases. For example, one of the principles enacted by the King, thanks to his former power to define the general principles applicable throughout the Belgian (federal, regional, and *communautarian*) civil service was that all Belgian civil servants should fall under a *statut*, except for civil servants hired to undertake temporary and exceptional work, civil servants hired to replace civil servants who are absent, civil servants hired to undertake auxiliary or specific tasks, and civil servants hired to undertake tasks requiring specific or advanced expertise or experience.[77]

In time, however, the proportion of civil servants employed under a private law regime has increased substantially at the different levels of the Belgian government (federal, regional, community, and local), and particularly at the local level. This is both because the number of legally provided exceptions to public law employment has increased and because these exceptions have been used liberally in some cases.[78] As an example, data for 2018 collected by De Becker and Heirbaut give the following numbers regarding

72 De Wilde (2017), p. 369.

73 De Becker (2007), pp. 101–256.

74 Stenman (1999), p. 51.

75 Feyt (2006), pp. 228–229.

76 De Wilde (2017), pp. 371–372.

77 Article 2, § 1 (2) of the Royal Decree establishing the general principles of the administrative and economic statut of the civil servants of 22 December 2000 (*Arrêté Royal fixant les principes généraux du statut administratif et pécuniaire des agents de l'Etat applicables au personnel des services des Gouvernements de Communauté et de Région et des Collèges de la Commission communautaire commune et de la Commission communautaire française ainsi qu'aux personnes morales de droit public qui en dépendent*), *Official Gazette*, 9 January 2001; www.ejustice.just.fgov.be/eli/arrete/2000/12/22/2000002114/justel.

78 For an overview, see De Becker and Heirbaut (2020), pp. 470–488.

the proportion of private law versus public law employment throughout the Belgian civil service:[79]

	Public law regime	*Private law regime*	*Total*
Federal government	148,351 (74.36%)	51,151 (25.64%)	199,502
Flemish government	165,210 (59.90%)	110,577 (40.10%)	275,787
Local governments	124,496 (35.08%)	230,421 (64.83%)	354,916

Updated figures for 2022 read as follows:[80]

	Public law regime	*Private law regime*	*Total*
Federal government	132,947 (73,9%)	46,726 (26.1%)	179,673
Flemish government	157,964 (62,7%)	93,922 (37.3%)	251,887
Local governments	91,866 (41,7%)	128,263 (58.2%)	220,129

This trend towards increased contractual employment in the civil service is likely to continue in future years, as the application of a public law regime to civil servants is often perceived as cumbersome, rigid, and too formalistic.[81] Legislation has been passed or envisaged at the different levels of Belgian government to augment the possibilities of hiring civil servants under a private law contract rather than under a public law regime.[82] In an important opinion of 5 October 2018, the Legislation Section of the Council of State accepted the constitutional validity of a reform at the federal level that would have limited the benefit of a public law regime to positions requiring the exercise of *imperium* powers.[83] In other cases, the default rule for employment in the civil service would have been a private law contract, which would be a reversal of the current state of the law.[84] The reform has been postponed for the moment, but it may be revived in the future.

The coexistence of large groups of civil servants working under a private law contract with other civil servants working under a public law contract raises difficulties of different

79 De Becker and Heirbaut (2020), p. 469. The authors use figures from the Belgian social security system, which seem to include both ministerial departments and non-departmental public bodies. Compare with the numbers available here for the same year (numbers for ministerial departments at the federal level of government): https://infocenter.belgium.be/fr/statistiques/services-publics-federaux/emploi/repartition.

80 ONSS, *Emploi salarié pour le deuxième trimestre 2022*, title IV, table II, available at www.onss.be/stats/analyse-du-marche-de-lemploi-donnees-trimestrielles-detaillees#data. Thank you to Inger de Wilde for pointing us in the direction of this update.

81 Feyt (2006), pp. 257–259.

82 See e.g. Article 1 of the Decree of the Flemish Government amending the Flemish personnel statute of 13 January 2006, regarding the harmonisation of working conditions of 26 April 2019 (*Besluit van de Vlaamse Regering tot wijziging van het Vlaams personeelsstatuut van 13 januari 2006, wat betreft de harmonisering van de arbeidsvoorwaarden*); www.ejustice.just.fgov.be/eli/arrete/2019/04/26/2019012962/justel; Article 184, § 1 of the Decree on local government of 22 December 2017 (*Decreet over het lokaal bestuur*), *Official Gazette*, 15 February 2018; www.ejustice.just.fgov.be/eli/decret/2017/12/22/2018030427/justel.

83 Belgian Council of State, Opinion of 5 October 2018, 64, 133/AG, p. 9. See also Lombaert (2019), pp. 501–515.

84 Lombaert (2019), pp. 509–510.

kinds.[85] For example, a change of position of civil servants employed under labour law contracts can at times be hampered when this change of position is unilateral,[86] or when it implies a shift to a public law regime of employment, and differences in financial or administrative status between both categories may lead to discrimination when the individuals concerned exercise similar functions.[87] These differences, however, have been partly reduced through the combined action of governmental measures and decisions by the courts, which have both led to a gradual standardisation and publicisation of the rules that apply to civil servants employed under a private law contract. Executives at the different levels of Belgian government have sought, by means of decrees, to standardise the provisions that apply to civil servants employed under private law contracts, as far as their recruitment, duties, financial status, and so on, are concerned, in order to guarantee uniformity, prevent arbitrariness, and organise their careers within the civil service.[88] These rules apply on top of, or as a complement to, the provisions from the Act of 3 July 1978 regulating labour law contracts in general. The regulation of the procedures followed to employ someone as a civil servant under a private law contract is even a constitutional requirement, as the Legislative section of the Council of State has stated that the constitutional principle of equality and non-discrimination requires that rules should be enacted to guarantee equality between candidates in regard to accessing the contractual Belgian civil service.[89] Furthermore, the Belgian courts have held that public law principles such as the principles of good administration should also apply to civil servants employed under a private law regime, and not only to those falling under a public law regime. For example, the Constitutional Court ruled in 2018 that the principle *audi alteram partem* should apply both to civil servants working under a public law regime and civil servants employed through a labour law contract.[90] This is because the difference in the nature of their legal employment does not justify that they should be treated differently from this perspective according to the Court. This reasoning applies to public law principles of good administration in general.[91] It is a further brake on the divergence in the legal positions between civil servants working under a public law regime and those working under a private law contract.

V. The Influence of European Union Law and the European Convention on Human Rights

Another trend is related to the influence of the law of the European Union and the law of the European Convention on Human Rights on the regulation of the Belgian civil service. For instance, this has resulted in the recognition of a right to strike for civil servants and

85 On this topic see: Janvier (2015).

86 De Wilde (2017), p. 423.

87 See e.g. Belgian Council of State, Opinion of 10 February 2014, 54, 934/3, pp. 13–16.

88 As far as the Brussels Region is concerned, see e.g. the *Arrêté du Gouvernement de la Région de Bruxelles-Capitale relatif à la situation administrative et pécuniaire des membres du personnel contractuel des organismes d'intérêt public de la Région de Bruxelles-Capitale* of 21 March 2018, *Official Gazette*, 30 March 2018; www.ejustice.just.fgov.be/eli/arrete/2018/03/21/2018011464/justel.

89 Belgian Council of State, Opinion of 5 October 2018, 64, 133/AG, p. 16.

90 Constitutional Court, decision of 22 February 2018, 22/2018. The Supreme Court (Cass., 12 October 2015, R.G. s.13.0026.N, *J.L.M.B.* (2016) 14, p. 628) decided against this principle, but the Constitutional Court (decision of 6 July 2017, 86/2017) decided in its favour. De Somer and Vuylsteke (2016), pp. 125–138; Vuylsteke (2016), p. 8; Cuypers (2015), pp. 9–72.

91 Belgian Council of State, Opinion of 5 October 2018, 64,133/AG, p. 17.

in opening up the Belgian civil service to foreign nationals, despite constitutional provisions to the contrary. The latter evolution is a result of the well-known insistence of the Court of Justice of the European Union (CJEU) that only positions in the civil service that involve the exercise of the imperium of the State can be reserved for State nationals. This case law has put pressure on the career logic that underlies the Belgian civil service, by creating a divide within the civil service between positions that may or may not be reserved for Belgian nationals. This European influence, however, goes in different directions, sometimes clearly strengthening individual protection, and sometimes less clearly, as the following selection of examples illustrate.[92]

1. Nationality, Access to the Civil Service, and Recruitment

A priori Article 10(2) of the Belgium constitution reserves some offices for Belgians. In theory this contradicts the European freedom of movement and the interdiction to discriminate on the grounds of nationality.[93] However, Article 45, paragraph 4 of the Treaty on the Functioning of the European Union (TFEU) provides for an exception in the case of "employment in the public service". As this is an exception to a freedom, it is interpreted restrictively. The European case law has been received in Belgium, but the constitutional text has not been amended. This point led to a landmark administrative law case, the *Orfinger* case decided in 1996.[94] In that decision, the Belgian *Conseil d'État* decided that, with direct effect, European law had priority over the constitutional provision – and in this way followed the Belgian Supreme Court (*Cour de Cassation/Hof van Cassatie)* for the first time.[95] This case was an opportunity for the *Conseil d'État* to justify its position by reference to Article 34 of the constitution, according to which "[t]he exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law" and by reference to the case law of the Court of Justice.[96] This reasoning has been debated,[97] but it currently constitutes the applicable law.[98] In subsequent times, the CJEU was e.g. asked whether the restrictions on nationality should apply to *référendaires* to the Belgian Supreme Court.[99]

92 This selection is by no means exhaustive. The landmark case on the application of the principle of non-discrimination in pay for men and women for equal work both in private and public employment was a Belgian case, for instance: CJEU, judgment of 8 April 1976, *Defrenne v. Société anonyme belge de navigation aérienne Sabena*, C-43/75, para. 22: "[the principle of non-discrimination] applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private". For a detailed analysis of the European influence on the Belgian civil service, see De Becker (2021), pp. 13–28; Gosselin (2017), pp. 421–704; De Becker (2010), pp. 418–436; Lombaert, Mathy and Rigodanzo (2007), pp. 183–229; Krenc (2005), pp. 213–258; Lombaert (2001), p. 169.

93 De Becker (2010), p. 424.

94 Belgian Council of State, decision of 5 November 1996, 62,922 *Orfinger*. Add. decisions 62,923 (*Gerfa*); 62,924 (*De Baenst*) and 62,926 (*Menu*) also of 5 November 1996, and decision 62,921 (*Goosse*). Commented by Slautsky (2021b), pp. 37–49.

95 Cass of 27 May 1971, (1971-I) *Pasicrisie* 886, *S.A. Fromagerie franco-suisse Le Ski,* concl Procureur Général van der Meersch. *Add*. Ganshof van der Meersch (1968), p. 485–496.

96 CJEU, judgment of 2 July 1996, *Commission v. Grand-duché de Luxembourg*, C-473/93.

97 For two distinct interpretations of this reasoning, see Gehlen (2006), pp. 29 and 31 and Vandernoot (2007), pp. 1618–1621. *Add*. Gilliaux (1999), pp. 499–505; Ergec (1997), p. 256.

98 See e.g. Opinion of 4 November 2005, 39, 192/3, para. 46.3.

99 CJEU, judgment of 6 October 2015, *Brouillard v. Jury de recrutement de référendaires près la Cour de cassation et État belge*, C-298/14, para. 33.

2. The Right to Strike

Article 11 of the European Convention on Human Rights (ECHR), Article 6 of the European Social Charter, and Article 28 of the European Charter of Fundamental Rights protect freedom of association and the right to collective bargaining. Belgian civil servants have enjoyed freedom of association (in particular under the form of trade unions) since the early 20th century.[100] The right to strike has long been forbidden for civil servants for reasons of continuity of State activities,[101] and it was only in 1990, when Belgium approved the European Social Charter, that the right became accepted.[102] However, there is no specific provision to this effect in the *statut Camu*. If a civil servant uses her right to strike, part of her pay can be withheld, but no disciplinary sanctions can be taken.[103] In addition, the right to strike cannot be exercised in an abusive manner,[104] and it can be regulated for reasons of public order, such as security reasons.[105]

3. Other Individual Freedoms

The ECHR and in particular the provisions pertaining to privacy, freedom of association, and conscience, as well as Article 6, paragraph 1 when it comes to the right to a fair trial[106] – including the case law developed around these provisions regarding civil servants, in particular the *Pellegrin*[107] and the *Vilho Eskelinen*[108] cases – are relevant when assessing the influence of European law on the Belgian civil service. Over time, the Belgian system has become aligned with the European interpretation of these provisions, although problems do surface periodically. Three illustrations can be provided.

First, the Belgian *Conseil d'État* promptly applied article 6 to disciplinary proceedings (reasonable time, impartiality) in two cases following the *Vilho Eskelinen* case of the European Court of Human Rights (ECtHR).[109] However, its interpretation is considered to have been mistaken, as Belgian civil servants had enjoyed a right to appeal to a judge in disciplinary matters for a long time and the European cases do not need to lead to an application of Article 6, paragraph 1 in the administrative phase of disciplinary proceedings.[110] In subsequent case law, the Belgian *Conseil d'État* has reiterated that Article 6 does

100 Batselé and Scarcez (2015), para. 324.

101 Belgian Council of State, decision of 3 November 1961, 8, 913 *Magrez*; decision of 9 January 1964, 10, 362 *Steyls and Dudicq*.

102 Law approving the European Social Charter of 11 July 1990 (*Loi approuvant la Charte sociale européenne*), *Official Gazette*, 28 December 1990; www.ejustice.just.fgov.be/eli/loi/1990/07/11/1990015185/justel. Mayence (2021), p. 222.

103 Gosselin (2017), para. 777.

104 Belgian Council of State, decision of 22 March 1995, 52, 424.

105 Civ. Brussels, (réf.), 16 October 2015, R.G. 15/161/C and 15.162/C (not published) mentioned in footnote 2540 in Gosselin (2017). See also Law on the continuity of passenger rail services in the event of strikes of 29 November 2017 (*Loi relative à la continuité du service de transport ferroviaire de personnes en cas de grève*), *Official Gazette*, 17 January 2018; www.ejustice.just.fgov.be/eli/loi/2017/11/29/2017040982/justel and Belgian Constitutional Court, decision of 14 May 2020, 67/2020.

106 Renders and Caccamisi (2007), pp. 640–642.

107 ECtHR, judgment of 8 December 1999, *Pellegrin v. France*, 28541/95.

108 ECtHR, judgment of 19 April 2007, *Vilho Eskelinen et al. v. Finland*, 63235/00.

109 Belgian Council of State, decision of 7 May 2007, 170,887 *Darville*; Belgian Council of State, decision of 4 December 2007, 177,593 *Beaumont*.

110 Gosselin (2017), para. 800.

not apply to disciplinary proceedings *per se*, and that an appeal to the administrative judge complies with the requirement of Article 6.[111]

Secondly, the right to property (Article 1 of the Protocol no. 1) applies to civil servants. The situation pertaining to their pension, however, is intricate. In 2002, the third Chamber of the ECtHR decided that Article 1 of the Protocol no. 1 does not in itself protect civil servants' pensions, but "the right to a pension which is based on employment can in certain circumstances be assimilated to a property right".[112] The circumstances in that case included the fact that the "employer (. . .) has given a more general undertaking to pay a pension on conditions which can be considered to be part of the employment contract".[113] It seems that the automatic revocation of a pension would infringe the right to property. The Belgian case law has been hesitant – with some cases following it,[114] while others have done so less clearly.[115] In *L v. Belgium*,[116] a civil servant lost his public law pension as a consequence of repeated non-respect for his professional duties. This meant that he fell into a private law pension for part of his past career. The ECtHR considered that in such a system, the claimant could not invoke Article 1 of the Protocol no. 1. In its subsequent case law, the Belgian *Conseil d'État* has followed this solution.[117] In short, this illustrates that although there was some hesitation in the Belgian case law, the less favourable interpretation for the civil servant was not considered to infringe Article 1 of the Protocol no. 1 by the ECtHR, which allowed the Belgian *Conseil d'État* to stabilise its case law around the less favourable interpretation.

Finally, Article 10 of the ECHR protects freedom of expression (as does Article 11 of the European Charter). The case law of the ECtHR tries to draw a balance between this freedom and other concerns specific to the civil service, such as the hierarchy principle and civil servants' duties to obey their superior, to respect confidentiality and to be loyal.[118] This leads to potential problems in cases of whistle-blowing. Belgium adopted a specific system to protect whistle-blowers in the civil service in 2013.[119] It needed to modify the criminal procedure code (Article 29 of the Code of Criminal Procedure, *Code d'instruction criminelle)* pertaining to the obligation of civil servants to denounce infractions directly to the public prosecutor immediately. This system was updated following the implementation[120] in Belgium of the Directive 2019/1937 of the European Parliament and of

111 Gosselin (2017).

112 ECtHR, judgment of 20 June 2002, *Azinas v. Cyprus*, 56679/00, para. 32 [reformed by GC, 28 April 2004].

113 ECtHR, judgment of 20 June 2002, *Azinas v. Cyprus*, 56679/00, para. 34.

114 Belgian Council of State, decision of 24 May 2007, 171, 523 *Dassonville*.

115 Belgian Council of State, decision of 9 February 2007, 167, 662 *Dolinsky*.

116 ECtHR, judgment of 9 March 2006, *L. v. Belgium*, 73511/01.

117 Belgian Council of State, decision of 25 March 2008, 181, 466 *Blondeel*; Belgian Council of State, Decision of 25 October 2010, 208,407 *Ansion*.

118 Blay-Grabarczyk (2018), pp. 855–871; ECtHR, judgment of 9 January 2018, *Catalan v. Romania*, 13003/04, para. 56; Bychawska-Siniarska (2017), pp. 66–71.

119 Law concerning the reporting of a suspected breach of integrity within a federal administrative authority by a member of its staff of 15 September 2013 (*Loi relative à la dénonciation d'une atteinte suspectée à l'intégrité au sein d'une autorité administrative fédérale par un membre de son personnel*), *Official Gazette*, 4 October 2013; www.ejustice.just.fgov.be/eli/loi/2013/09/15/2013002044/justel.

120 Law on reporting channels and the protection of whistleblowers in federal public sector bodies and the integrated police force of 8 December 2022 (*Loi relative aux canaux de signalement et à la protection des auteurs de signalement d'atteintes à l'intégrité dans les organismes du secteur public fédéral et au sein de la police intégrée*), *Official Gazette*, 23 December 2022.

the Council of 23 October 2019 on the protection of persons who report breaches of Union law.[121]

Overall, the European instruments increased the legal protection of Belgian civil servants in terms of access to employment in the civil service, and the right to strike, but the achievements are more limited when it comes to freedom of expression for potential whistle-blowers and the (non-existing) right to a pension in principle.

VI. Conclusion

The product of a 1937 reform, the Belgian civil service was organised alongside the logic of a "career system" based on hierarchy, neutrality, and professionalism, with extensive power assigned to the King (executive power) to regulate it. Since then, the Belgian civil service has been reshaped by the federalisation of the country, the influence of *New Public Management* ideas, and the increasing use of private law employment contracts. These factors have led to a fragmentation of the law regulating the Belgian civil services – in terms of the different frameworks applicable to the federal, regional, and *communautarian* levels, and in terms of the distinction between public law and private law employees. Against this background of fragmentation, some factors provide a level of uniformity across the different Belgian civil services. First, there are the constitutional provisions pertaining to equality, and in particular equality in accessing the civil service, as well as the general principles of administrative law. Second, there is the application of principles of good administration across the public/private divide thanks to the constitutional case law. Third, there is the influence of the European instruments and their case law. These factors of uniformity generally contribute to protecting civil servants (access to employment in the civil service for European Union nationals, the right to strike or the right of defence). However, some of these protections result from judicial interpretation and not from legislative or constitutional reforms, potentially weakening this protection. In addition, the European case law is at times less protective of civil servants and their rights than the national judges might be inclined to be (e.g. the non-existing right to a pension). All in all, this leads to a fragmented landscape where the specificities of the civil servant as an agent of the State, acting under its authority, remain standing, although they are more in the shadows than they have been in the past.

Bibliography

Adriaenssen S., Lombaert B. (2019), 'Le pouvoir réglementaire autonome du Roi face aux ingérences du législateur: le statut de la fonction publique', in Detroux L., El Berhoumi M., Lombaert B. (eds), *La légalité. Un principe de la démocratie belge en péril*, Brussels: Larcier, 387–421.

Barbeaux M., Beumier M. (1989), *Administration, parastataux et réforme de l'Etat*, Faculté de droit de Namur, Centre de droit régional.

Batselé D., Scarcez M. (2015), *Abregé de droit administratif*, Brussels: Larcier.

Blay-Grabarczyk K. (2018), 'Le statut du lanceur d'alerte dans les arrêts de la Cour européenne des droits de l'homme', *Revue trimestrielle des droits de l'homme*, 855–871.

Buttgenbach A. (1954), *Principes généraux, organisation et moyens d'action des administrations publiques*, Brussels: Larcier.

Bychawska-Siniarska D. (2017), *Protecting the Right to Freedom of Expression under the European Convention on Human Rights – A Handbook for Legal Practitioners*, Strasbourg: Council of Europe.

121 OJ L 305/17.

Crabbe V. (1956), 'Etude sur la réforme administrative d'Edouard Ducpétiaux', *Revue internationale de sciences administratives*, 566–590.

Cuypers D. (2015), 'Beginselen van behoorlijk bestuur in personeelsmateries: Zowel voor ambtenaren als voor overheidscontractanten', in Janvier R., De Becker A. (eds), *Le statut juridique du personnel des services publics en évolution*, Bruges: La Charte, 9–72.

De Becker A. (2007), *De overheid en haar personeel*, Bruges: die Keure.

De Becker A. (2010), 'De invloed van de rechtspraak en de regelgeving van de Europese Unie op de rechtspositie van het Belgische overheidspersonneel', *Chroniques de Droit public – Publiekrechtelijke Kronieken*, 418–436.

De Becker A. (2021), 'De rol van het EU-recht in the publieke sector: Een moeilijke tweestrijd tussen bestuursrecht en arbeidsrecht', *Revue de Droit Social/Tijdschrift voor Sociaal Recht*, 13–28.

De Becker A., Heirbaut I. (2020), 'Het bestuurlijk landschap volgens de Grondwet en de bijzondere wetten', in De Somer S. (ed), *Bestuursorganisatierecht*, Bruges: die Keure, 470–488.

De Broux P.-O. (2005), 'De Camu à Copernic: l'évolution de la fonction publique en Belgique', *Administration Publique – Trimestriel*, 158–177.

De Broux P.-O. (2010), 'Introduction à la décentralisation administrative: évolutions théoriques et pratiques politiques', in Jadoul P., Lombaert B., Tulkens F. (eds), *Le paraétatisme*, Bruges: La Charte, 1–32.

De Somer S., Vuylsteke V. (2016), 'De Wet Motivering Bestuurshandelingen en het ontslag van de overheidscontractant: het langverwachte oordeel van he Hof van Cassatie en een blik op de toekomst', *Tijdschrift voor gemeenterecht*, 125–138.

De Wilde I. (2017), *Flexibiliteit of paradoxale rigiditeit? De wijzigbaarheid van de arbeidsvoorwaarden van de overheidscontractant*, Bruges: die Keure.

De Wilde I., Janvier R., De Becker A. (2017), 'Naar een principiële contractuele tewerkstelling in de Belgische publieke sector?', *Chroniques de droit public – Publiekrechtelijke Kronieken*, 368–372.

Durviaux A.L. (2012), *Droit de la fonction publique*, Brussels: Larcier.

Ergec R. (1997), 'Observations sous C.E., 5 novembre 1996, n° 62.922, Orfinger', *Journal des tribunaux*, 254–259.

Feyt A. (2006), 'La fonction publique de demain sera-t-elle de carrière ou d'emploi?', *Revue de droit de l'ULB*, 223–260.

Ganshof van der Meersch W.G. (1968), 'Réflexions sur le droit international et la révision de la Constitution', *Journal des tribunaux*, 485–496.

Gehlen S. (2006), 'Hiérarchie des normes', 30 *Administration publique – Trimestriel*, 20–32.

Gilliaux P. (1999), 'L'intégration du droit européen selon le Conseil d'État: primauté et efficacité', in Bléro B. (ed), *Le Conseil d'État de Belgique*, Brussels: Bruylant, 473–530.

Goffaux P. (2015), *Dictionnaire de droit administratif*, 2nd edition, Brussels: Bruylant.

Gosselin F. (2017), *Droit de la fonction publique belge à l'aune du droit européen*, Brussels: Bruylant.

Hustedt T., Houlberg Salomonsen H. (2014), 'Ensuring Political Responsiveness: Politicization Mechanisms in Ministerial Bureaucracies', 80(4) *International Review of Administrative Sciences*, 746–765.

Janvier R. (ed) (2015), *Le droit social de la fonction publique*, Bruges: La Charte.

Janvier R., De Becker A. (eds) (2015), *Le statut juridique du personnel des services publics en évolution*, Bruges: La Charte.

Krenc F. (2005), 'Le fonctionnaire et la Convention européenne des droits de l'homme: éléments de synthèse', *Annales de droit de Louvain*, 213–258.

Leurquin-De Visscher F. (1991), 'Les principes généraux du droit de la fonction publique et la réforme de l'État', 51(3–4) *Annales de Droit de Louvain*, 333–350.

Leurquin-De Visscher F. (1995), 'Heurs et malheurs de l'arrêté royal fixant les principes généraux du droit de la fonction publique', *Administration Publique – Trimestriel*, 84–91.

Leus K. (2002), 'Sens et non-sens de l'arrêté royal contenant les principes généraux de la fonction publique', in Andersen R., Leus K. (eds), *La réforme de la fonction publique*, Bruges: La Charte, 55–73.

Leus K., Belleflamme F., Slautsky E. (2016), 'Droit bruxellois de la fonction publique – Brusselse recht van ambtenarenzaken', in de Broux P.-O., Lombaert B., Yernault D. (eds), *Le droit bruxellois. Un bilan après 25 ans d'application (1989–2014)*, Brussels: Bruylant, 301–398.

Lewalle P., Herbiet M., Dressen C., Coumont P. (1997), 'Le concept de fonction publique en droit belge. Essai de définition', *Administration Publique – Trimestriel*, 25–45.

Lombaert B. (2001), *La Convention européenne des droits de l'homme dans le contentieux de la fonction publique belge*, Brussels: Bruylant.
Lombaert B. (2019), 'S.O.S. statut! ou quand le Conseil d'État sonne le glas du principe statutaire', *Administration publique – Trimestriel*, 501–515.
Lombaert B., Mathy I., Rigodanzo V. (2007), *Éléments du droit de la fonction publique*, Waterloo: Wolters Kluwer.
Marique Y. (2021), 'Comparaison des titres et mérites', in Goffaux P., Slautsky E., Sohier J. (eds), *Les grands arrêts du droit administratif*, Brussels: Larcier, 613–624.
Mayence A. (2021), 'La continuité du service public', in Goffaux P., Slautsky E., Sohier J. (eds), *Les grands arrêts du droit administratif*, Brussels: Larcier, 213–224.
Peeters Y., Vanpraet J. (2020), 'Het bestuurlijk landschap volgens de Grondwet en de bijzondere wetten', in De Somer S. (ed), *Bestuursorganisatierecht*, Brugge: die Keure, 1–51.
Renders D., Caccamisi D. (2007), 'L'irrésistible extension du champ d'application de l'article 6, § 1er, de la Convention européenne des droits de l'homme', *Journal des Tribunaux*, 640–642.
Sarot J. (1994), *Précis de fonction publique*, Brussels: Bruylant.
Slautsky E. (2021a), 'Independent Economic Regulators in Belgium: Contextualising Local Resistance to a Global Trend in the Light of the Belgian Economic Constitution', 14(1) *Review of European Administrative Law*, 37–73.
Slautsky E. (2021b), 'C.E. (VIe ch.), arrêt Orfinger n° 62.922 du 5 novembre 1996', in Goffaux P., Slautsky E., Sohier J. (eds), *Les grands arrêts du droit administratif*, Brussels: Larcier, 37–49.
Stenmans A. (1999), *La transformation de la fonction administrative en Belgique*, Brussels: CRISP.
Thijs N., Van de Walle S. (2005), 'Administrative Reform Movements and Commissions in Belgium, 1848–2004', 20(4) *Public Policy and Administration*, 38–54.
Vandernoot P. (2007), 'Regards du Conseil d'État sur une disposition orpheline: l'article 34 de la Constitution', in *En hommage à Francis Delpérée: itinéraires d'un constitutionnaliste*, Brussels: Bruylant, 1599–1630.
Vuylsteke V. (2016), 'Motivation formelle du licenciement des agents contractuels: la fin de l'histoire ou l'histoire sans fin?', 8 *Publicum*.
Weekers B. (2004), *Ambtenarenrecht: het koninklijk besluit tot bepaling van de algemene principes. Een raamwerk voor de rechtspositieregeling van het personeel bij de diensten en instellingen van de Gemeenschappen en de Gewesten*, Brugge: die Keure.
Wodon L. (1920), *Le contrôle juridictionnel de l'administration et la responsabilité des services publics en Belgique*, Brussels: Lamertin.

6 The Civil Service in Denmark

From a Public to a Private Law Employment Regime

Mette Søsted Hemme

I. Introduction

Denmark is a Scandinavian country of 5.8 million inhabitants. It is a constitutional monarchy, and State powers are divided between the Folketing (legislative), government (executive), and the courts (judiciary).[1]

Pay and working conditions in Denmark are determined primarily by way of negotiating collective agreements, both in public and private sector employment. Denmark has a unionisation rate of 67% and a collective agreement coverage of 82%. The collective agreement coverage is close to 100% in the public sector, where the private sector coverage is estimated at 73%.[2] The public sector in Denmark employs close to 900,000 persons (covering both full and part-time employees), which amounts to almost a third of the active labour force.[3] While approximately 200,000 of the public employees are employed in central government (State sector),[4] the rest are employed in municipalities, regions, or semi-public institutions. Collective bargaining agreements are the main form of employment in the public sector today (hereinafter *contractual civil servants*).[5] The other type of employment in the public sector is as civil servant (*tjenestemand*) under the Civil Servants Act (hereinafter *statutory civil servants*).[6] Employment as statutory civil servant has been declining for many years and now this group accounts for approximately 5% of the public employees.[7] Today, status as statutory civil servant is reserved for positions of higher management and other specific positions in e.g. the judiciary, the police, and the military.[8]

1 On the separation of powers principle in the Danish constitution, see Jensen (2022), pp. 237–298.

2 Analysis by The Confederation of Danish Employers (DA Analyse), 2020; www.da.dk/politik-og-analyser/overenskomst-og-arbejdsret/2018/hoej-overenskomstdaekning-i-danmark/.

3 Covering both full and part time employees, the public sector employs 871,377 persons. The total number of employees in Denmark is 2,984,512 persons. A few jobs cannot be divided by sector but are included in the total. The data do not account for the employees' working time. Source: Statistics Denmark, employees divided by sector, dataset from September 2022, table LBESK02; www.statistikbanken.dk/10312.

4 In total, 208,474 employees, of which 186,267 work as full-time employees. Source: Statistics Denmark, employees divided by sector, unit and time, dataset from September 2022, table LBESK21; www.statistikbanken.dk/10312.

5 The use of employment on individual contract is limited but does occur also in public employment relations.

6 Civil Servants Act of 18 May 2017 (*Tjenestemandsloven*), no. 511; www.retsinformation.dk/eli/lta/2017/511.

7 Revsbech et al. (2023b), p. 11.

8 Ministerial Circular on use of employment as statutory civil servant in the State and national church of 11 December 2000 (*Cirkulære om anvendelse af tjenestemandsansættelse i staten og folkekirken*), no. 210 (with amendments); www.retsinformation.dk/eli/mt/2000/210.

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This development of the Danish civil service – from a public law to a private law employment regime – is the focal point of this chapter. The transformation of the civil service over more than 150 years will be briefly outlined to provide a historical backdrop of the development. Which reforms and tendencies in the administration have driven the development, and which challenges have been associated with statutory civil servant status? How did the Danish model enter the public labour market, and to what extent may the distinction between public law and private law be upheld in the civil service today? Has EU law or the European Convention on Human Rights had an impact on the transformation of the civil service?

II. The Danish Civil Service: Key Concepts

The Danish central government (State sector) is comprised of a hierarchical system of 23 Ministries and a vast number of subordinate agencies, supervisory authorities, and so on. In addition, there are 98 municipalities and five regions (local government) that are responsible for public services such as education, social services, and healthcare. This section outlines some key aspects of the Danish civil service.

Denmark is a country based on the rule of law.[9] All civil servants must act professionally and are obliged to observe legislation, the fundamental principles of law and the principles of good administration.[10] The public administration is a politically headed organisation with the minister as chief executive. The minister is at the same time a member of the government and accountable to the Folketing. The principles of ministerial responsibility are embedded in the Ministerial Responsibility Act.[11] It follows from these principles – as well as an employer's right to give instructions – that the minister has the authority to issue directions to civil servants.[12] Civil servants are correspondingly subject to a duty of obedience to the minister. As part of the duty of obedience, civil servants must follow orders, provided that the orders are within the boundaries of the law.[13] The civil servants' duty of loyalty also implies that they must loyally advise and assist any government of the day in political matters.[14] All levels of the civil service are party-politically neutral, meaning that they are not obliged to political indulgence or to assist ministers in their relationship with their political party.[15] Only for the special role as adviser to the minister (*særlig rådgiver*) does the principle of party-political neutrality present itself differently.[16] Each minister may employ one special adviser who provides, e.g. political-tactical advice, assists in speechwriting, and communicates the minister's political line to permanent civil servants.[17]

9 Jensen (2022), pp. 254–255.

10 Revsbech et al. (2023b), p. 40; Mathiassen (2000), p. 89.

11 Ministerial Responsibility Act of 15 April 1964 (*Ministeransvarlighedsloven*), no. 117; www.retsinformation.dk/eli/lta/1964/117.

12 For a description of an employer's right to give instructions (*ledelsesret*), see Kristiansen (2023), chapter 7.

13 Civil servants are obligated as well as entitled not to follow orders that are obviously unlawful, cf. Revsbech et al. (2023b), pp. 40–44; Kristiansen (2018a), p. 192; Mathiassen (2000), pp. 95–97.

14 Revsbech et al. (2023b), pp. 50–52; Kristiansen (2018a), pp. 188–189; Mathiassen (2000), p. 101.

15 Revsbech et al. (2023b), p. 52.

16 Report of Parliamental Committee on advice and assistance from the civil service, 1443/2004 (*Betænkning om embedsmænds rådgivning og bistand*), Chapter 6; https://fm.dk/media/14691/Betaenkning1443Embedsmaends-raadgivningogbistand.pdf.

17 Report of Parliamental Committee on Ministers' Special Advisors, 1537/2013 (*Betænkning om ministrenes særlige rådgivere*), pp. 181–184. Special advisers are subject to the permanent secretary's (*departementchefens*) authority, in line with other civil servants in the ministerial department.

The objective is to have a professional and neutral civil service. It is a key principle in the Danish public administration that vacancies should be filled with the most qualified candidate.[18] In the employment process the authority is obliged to observe general principles of administrative law regarding the content of decisions, such as the principle of misuse of powers (*saglighedskravet*).[19] Moreover, to attract the relevant candidates, public authorities are obliged to make information on (most) vacancies publicly available.[20] This obligation was established for statutory civil servants with the reform of the Civil Servants Act in 1969.[21] The reform was fostered inter alia by the idea of a more transparent and open civil service system, and it was a novel feature to make it a legal requirement that information on vacancies must be made available to people outside the administration.[22] Today, the principle of public announcement follows directly from the Civil Servants Act, Section 5(1), and it is regarded as a general principle of law for all vacancies in the public sector, i.e. also for contractual civil servant positions.[23]

The aforementioned mentioned duties are mainly unwritten principles of law,[24] and they are common for civil servants irrespective of the public law or private law nature of the employment (as either statutory or contractual civil servant). The differences in regulation for the two main types of civil servants will be elaborated on in the following sections.

III. Transformation of the Civil Service (Historical Context)

The Danish constitution (*Danmarks Riges Grundlov*) was adopted in 1849. At that time, the civil service looked very different from today, both in numbers and types of employment. The nature of the tasks performed in public administration has since then undergone a development that mirrors the complexity of modern society. The historical context and transformation of the Danish civil service is briefly outlined in the following Sections.

18 Revsbech et al. (2023b), p. 28; Kristiansen (2018b), p. 215; Mathiassen (2000), pp. 69–70.

19 Revsbech et al. (2023b), p. 28; Waage (2022), p. 368; Kristiansen (2018b), pp. 213–214.

20 Public employers are obliged to put (most) vacant positions on an online public job-database, cf. Act on the organisation and support of employment efforts of 20 September 2022 (*Lov om organisering og undersøttelse af beskæftigelsesindsatsen*), no. 1294, Section 35(2).

21 Act on civil servants in the State and national church of 18 June 1969 (*Lov om tjenestemænd i staten, folkeskolen og folkekirken*), no. 291; *Folketingstidende* 1968–69, Appendix C, columns 1315–1334. The reform in 1969 relied to some extent on existing rules for civil servants, but effectively it expanded the principle of public announcement.

22 Preparatory works to the Act on statutory civil servants of the State of 20 February 1969, (*Forslag til lov om tjenestemænd i staten*), no. 167, *Folketingstidende* 1968–69, Appendix A, columns 3876–3878 (comments for Section 5); www.folketingstidende.dk/ebog/19681A.

23 Revsbech et al. (2023b), pp. 23–25; Kristiansen (2018b), pp. 209–210. See also *Folketingets Ombudsmand*, Opinion of 26 January 2022, 21/02816 (FOB 2022–1). For State employees, see Ministerial Circular on announcement of employment positions and paid positions in the State of 26 June 2013 (*Cirkulære om opslag af stillinger og lønnede hverv i staten*), no. 9299. Exceptions apply for, e.g. holiday substitutes, temporary positions and other short-term positions that do not exceed one year.

24 They are also outlined in Kodex VII, which is a governmental publication from 2015, where the government released a codex of seven key duties for the civil service: legality, truthfulness, professionalism, development and cooperation, responsibility and management, openness about errors, and party-political neutrality. The publication summarises earlier reports on the civil service and reflects the government's view on (or wishes for) duties for civil servants, cf. Revsbech et al. (2023b), pp. 53–54.

1. Constitutionalism and Parliamentarianism

The adoption of the Danish constitution in 1849 marked the transition from absolute monarchy to constitutional monarchy and to more democratic rule in Denmark. Seen through the eyes of the time, the constitution was democratic, but effectively only approximately 14% of the population were given the right to vote.[25]

At the time, the civil service in central government (State sector) was staffed by so-called "genuine" civil servants (*embedsmænd*) and more subordinate officials (*bestillingsmænd*).[26] Genuine civil servants were those handed independent responsibility to promote State purposes, such as implementing and observing the legislation that applied to the various tasks in the public administration.[27] Besides administrative positions, the group of genuine civil servants included bishops, teachers, and military officers.[28]

Parliamentarianism was not achieved with the constitution in 1849. The King appointed governments after the adoption of the constitution, and the governments were dominated by conservative landowners. In the late decades of the 19th century, parliamentary decision-making eventually came to a freeze.[29] The liberals, dominating the lower house, refused to pass much of the legislation proposed by the government, which was dominated by conservatives. Against the backdrop of these intense antagonisms, a new type of government became a reality after a parliamentary election in 1901 (*Systemskiftet*). Parliamentarianism, meaning the principle of government having to enjoy the support of the Folketing, was achieved, and it received the recognition of the King.[30] During the preceding "constitutional battle", civil servants had been subject to political pressure, and political loyalty was to some extent expected during this time.[31] With the introduction of parliamentarianism in 1901, the political neutrality of civil servants was strengthened.

2. Industrialisation and the Growing Welfare State

In the late 19th century, Denmark was increasingly industrialised.[32] Especially the expansion of the Danish infrastructure (railway, communication, etc.) led to an increase in public employees.[33] The nature of the performed work in the public sector changed from being confined to statutory administration to various work tasks in different geographical locations around the country.[34] Public employees were mainly statutory civil servants, with the rest forming a heterogeneous group of contractual workers, some regulated by various regulations, others by agreements. In 1919, the first Civil Servants Act was adopted, in response to the increase in and complexity of the many different regulations for different

25 Zahle (2006), p. 4.
26 Mathiassen (2000), p. 8. The more subordinate officials were e.g. police officers, clerks, and messengers, cf. Holck (1870), p. 36.
27 Holck (1870), p. 35.
28 Knudsen (2011), p. 206; Hasselbalch (2009), p. 63; Holck (1870), p. 36.
29 Christiansen (2022), p. 302.
30 Christiansen (2022), p. 302. Parliamentarianism has since then been a fundamental principle of the Danish political system, and it was codified in the Danish constitution in 1953.
31 Knudsen (2011), p. 207.
32 Skyggebjerg (2019).
33 Høgedahl (2019), pp. 59–60.
34 Høgedahl (2019), p. 60.

groups of civil servants that existed at the time. The legislation covered statutory civil servants (and the distinction between "genuine" civil servants and subordinate officials was abandoned).

Relying on earlier reforms, the Danish welfare State grew rapidly in the 1960s.[35] Women's entry into the labour market resulted in the construction of childcare facilities, and public institutions such as hospitals, nursing homes, and educational institutions.[36] With the welfare State, the composition of public sector tasks changed, and since then service and welfare tasks have to a wide extent supplemented the statutory and more administrative tasks related to the exercise of authority.[37] In 1961, the number of public employees reached around 125,000 persons in the State sector alone. Of this group, approximately 64% were employed as statutory civil servants or in similar types of employment (with equivalent pension rights).[38] It was during this time that collective agreements in the public sector began to increase, and eventually, negotiated collective agreements replaced any previous unilateral regulations for non-statutory civil servants.[39] Overall, the public sector was drastically expanded in the 1960s and 1970s, with more than 20% of the active labour force employed in the public sector in 1975.[40] In comparison, the number was 8% in 1950.[41]

The last decades of the 20th century were characterised by reforms, inter alia with the objective of removing the restriction of free competition as well as improving the efficiency of the entire public sector.[42] New public management reforms in Denmark have been moderate, and some argue that the reform path taken have been "modernisation" rather than "marketisation".[43] There have been examples of decentralisation in the civil service, inter alia when the government introduced performance-related pay in 1987 by establishing a local pay scheme (*lokalløn*).[44] In 1998, the model was adopted by social partners, and today local wage determination is an integral part of many public collective agreements. It was also during this time that the occupational pension system, which is embedded in collective agreements, was established in Denmark. The occupational pension system may be described as a special form of privatisation of a public service involving social partners.[45] The number of public sector employees was reduced in the early 1990s but has since then increased.[46]

The increase in welfarist activities and responsibilities also resulted in several administrative reforms at the beginning of the 21st century, e.g. the Structural Reform of 2007, which inter alia resulted in increased public responsibilities and tasks for the municipalities

35 Bejder and Kristensen (2016).
36 Bejder and Kristensen (2016).
37 Emborg and Schaumburg-Müller (2010), p. 17.
38 Report of Parliamental Committee concerning the future forms of employment for permanent State personnel no. 282/1961 (*Betænkning vedrørende de fremtidige ansættelsesformer for statens faste personale*), p. 6.
39 Hoffmann (1999), p. 84.
40 Bejder and Kristensen (2016).
41 Bejder and Kristensen (2016).
42 Pedersen (2022), p. 558.
43 Mailand and Hansen (2016), p. 229.
44 See the description of performance-related pay in Denmark, OECD (2005) Modernising Government: The way forward, p. 176. The purpose was to increase the individualisation of wage payments, inter alia to improve recruitment, cf. Hasselbalch (2007), p. 116.
45 Mailand and Hansen (2016), p. 229.
46 Mailand and Hansen (2016), p. 219.

and regions.[47] The transfer of civil servants from central to local government revealed some legal challenges, for more detail on which see Section IV.2. With local municipalities being the main point of contact for citizens, the ambition was to bring welfare closer to the population.[48] Ministerial departments and agencies are instead performing more political-strategic tasks. In the 2010s, subcontracting of public services became widely used, e.g. within emergency services, cleaning services, and long-term care services. In 2011, 25% of all municipal public services that were legally capable of being subcontracted were exposed to competition.[49] Notwithstanding the reforms and increased outsourcing of the public sector, the civil service has – on a relatively stable level – accounted for almost a third of the active labour force in Denmark during the last 20 years.[50]

After this brief introduction to the transformation of the Danish civil service over time, the next section will examine in more detail the legal framework for the civil service. The two main groups of public employees, statutory civil servants (*tjenestemænd*) and contractual civil servants (*overenskomstansatte*), will be dealt with separately.

IV. The Legal Framework for the Civil Service

1. The Constitutional Framework for Statutory Civil Servants

It was considered essential for the Danish constitution to include a provision dedicated to the regulation of statutory civil servants. Today, it is Section 27 of the Danish constitution.[51] The main feature of the provision is that it leaves the competency to the legislative branch, when it comes to the regulation and protection of statutory civil servants. The details of the constitutional regulation are elaborated in the following paragraphs. The constitutional requirement that statutory civil servants have Danish citizenship is dealt with in Section V.

In the original constitution from 1849, the King (the government) was given authority to fill all civil servant positions (royal appointment), but the legislator was entitled to carry out amendments in this right.[52] The constitutional framework was amended in 1953, and Section 27(1) now states that rules governing the appointment of statutory civil servants shall be laid down by statute. The 1953 constitution also leaves the competency to regulate matters on the dismissal, reassignment and pensioning of statutory civil servants to the legislator, as established in Section 27(2). This was regarded as only confirming what was applicable at the time without express mention in the constitution.[53] As already mentioned, the legislator had regulated the terms and conditions for statutory civil servants in the Civil Servants Act since 1919.

47 Revsbech et al. (2023a), p. 15; Jensen (2022), p. 267. Other reforms in this period include the Welfare Reform of 2006 and the Quality Reform of 2007, see e.g. Mailand and Hansen (2016), pp. 229–230.

48 See e.g. Governmental Paper (2004) on the reform: www.oim.dk/media/15592/det-nye-danmark.pdf.

49 Mailand and Hansen (2016), p. 230.

50 Mailand and Hansen (2016), p. 219.

51 The Danish constitution of 5 June 1953, *Danmarks Riges Grundlov (Grundloven)*, no. 169; www.thedanish-parliament.dk/-/media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/the_constitutional_act_of_denmark_2018_uk_web.pdf.

52 *Danmarks Riges Grundlov (Grundloven)* of 5 June 1849, Section 22(1).

53 Report of Governmental Committee of 1946 concerning the Danish constitution (*Betænkning af forfatning-skommissionen af 1946*), no. 66/1953, p. 32; www.elov.dk/media/betaenkninger/Betaenkning-_afgivet_af_Forfatningskommissionen_af_1946.pdf.

For those statutory civil servants, that are appointed by the King, the constitution does provide special protection in case of reassignments (*forflyttelse*). From Section 27(3), it follows that they

> shall be transferred without their consent provided that they do not suffer loss of income in respect of their posts or offices, and that they have been offered the choice between such reassignment or retirement on pension under the general rules and regulations.

The provision does not apply to every change in the employment conditions. The concept of "reassignment" in the constitution means that the statutory civil servant is made subject to a change in his or her employment position to an extent that exceeds what that civil servant must accept.[54] In case of such reassignment, the statutory civil servant is entitled to be dismissed with pension rights as an alternative to accepting the reassignment. This protection, which dates back to the original constitution from 1849, aims to protect statutory civil servants, first and foremost from personal and political pressure, thereby ensuring the independence of the statutory civil servant, but also from excessively intrusive changes in their employment conditions.[55] It may be added that other statutory civil servants, i.e. those who are not royally appointed, are overall subject to the same legal protection in the case of reassignments under the Civil Servants Act (Section 12).[56] The legal framework for reassignments does not in practice differ for the different types of the statutory civil servants (but is different for contractual civil servants). In the existing literature, the two groups of statutory civil servants are also often treated as one. Overall, the constitutionally protected rights for those statutory civil servants, who are appointed by the King, does not differ from the rights awarded to statutory civil servants under the Civil Servants Act. Thus, in a broader perspective it may be held that Section 27 of the Danish constitution is without many practical implications today.

The constitutional provision does, however, have some broader legal implications for the public employer. First, it is worth stressing that the fact that it has been considered a matter to regulate statutory civil servants in the Danish constitution is connected to the objective of having a loyal, impartial, and incorruptible civil service.[57] These values are indirectly embedded in the constitution. Second, it is commonly held that the constitution rests on the precondition that some statutory civil servants should be appointed by the King.[58] The public employer cannot reduce this type of public law employment entirely, and a certain part of such employees must be appointed by the King.[59] It follows that employment as a statutory civil servant as such cannot be entirely discontinued by

54 Revsbech et al. (2023b), p. 106.

55 Report of Parliamental Committee concerning statutory civil servants – part one (*Betænkning afgivet af tjenestemandskommissionen af 1965 – del 1*), no. 483/1969, p. 23; *Betænkning vedrørende de fremtidige ansættelsesformer for statens faste personale* (n. 38), p. 9.

56 *Betænkning af forfatningskommissionen af 1946* (n. 53), p. 32; Revsbech et al. (2023b), p. 107. In literature, the limit of reassignments is described as being "merged" for the two groups of statutory civil servants, cf. Revsbech et al. (2023b), pp. 107–108.

57 Christensen et al. (2015), p. 207; Emborg and Schaumburg-Müller (2010), p. 26; Zahle (2006), p. 242.

58 Emborg and Schaumburg-Müller (2010), p. 28; Mathiassen (2000), p. 5; Andersen (1965), p. 131.

59 Emborg and Schaumburg-Müller (2010), p. 28.

the legislator without changing the constitution. Today, royal appointment of statutory civil servants is mainly reserved for higher positions in the State and the national church.[60]

2. The Civil Servants Act and Its Reforms (Statutory Civil Servants)

Statutory civil servants are traditionally referred to as public law employees, as the terms and conditions for their employment are regulated by statutory legislation – the Civil Servants Act.[61] The decision to employ a statutory civil servant is typically regarded as an administrative act by the authority (*forvaltningsakt*).[62] A resignation by a civil servant was, historically, considered an application that should be approved by the authority for the employment relationship to be terminated.[63] Moreover, rules regarding wages were traditionally unilaterally determined by statute, i.e. without any right to negotiation. Statutory civil servants are entitled to a pension from the State and are not covered by (contractual) occupational pension schemes. These features of the employment relationship are closely tied to public administrative law, and, historically, the contractual nature of employment as statutory civil servant was largely disregarded in the literature.[64]

Over time, the legal framework for statutory civil servants has developed towards the general labour law system in many aspects. As the Danish Supreme Court stated in a recent ruling:

> The statutory civil servants have traditionally been considered part of public administrative law, as their salary and working conditions were strictly regulated by law. Today, the statutory civil service is almost considered part of employment law, as employment as a statutory civil servant to a wide extent has been adapted to the general labour law system.[65]

The main example of such adaptation is the development of wage-setting mechanisms. With the original Civil Servants Act from 1919, the competency regarding the setting of wages was solely with the legislator, as wages were unilaterally determined by statute. In practice, over the years negotiations between the Minister for Finance and employee organisations begun to take place in connection with the legislative process, thus, providing the procedure with some sort of collective aspect.[66] The Civil Servants Act was subject to a large reform in 1969, and in this connection, this informal practice of negotiation was codified. Today, wages and working conditions for statutory civil servants are primarily determined by negotiation and laid down in an agreement between the Minister for

60 Ministerial Order on royal appointment of some civil servants of 18 May 2004 (*Bekendtgørelse om kongelig udnævnelse af visse tjenestemænd*), no. 371; www.retsinformation.dk/eli/lta/2004/371.

61 *Tjenestemandsloven* (n. 6).

62 Mathiassen (2000), p. 55; Andersen (1965), p. 147.

63 This applied to royally appointed civil servants until 1969. See Andersen (1965), pp. 200–201. Now all statutory civil servants have a right to demand their own resignation, while observing a three-month notice period, cf. *Tjenestemandsloven* (n. 6), Section 27.

64 Andersen (1965), pp. 159–161.

65 Danish Supreme Court, judgment of 14 August 2019, U 2019.3552.

66 *Betænkning vedrørende de fremtidige ansættelsesformer for statens faste personale* (n. 38), p. 9.

Finance and four specified employee confederations.[67] In this way, the reform, which was fostered by the idea of a more transparent and open civil service system, also to some extent adapted the regulation to private forms of employment.[68]

The wage system is set out in an agreement between the parties, i.e. the wage adjustment agreement (*lønjusteringsaftalen*), which is renewed every third year in connection with the ordinary collective bargaining negotiation in the public sector.[69] The collective agreements for civil servants cannot be described as tri-partite, as only two parties are represented in the negotiation. The agreement is of a special nature, as the negotiating employer is the government itself. Moreover, it is important to note that these agreements are not subject to Denmark's ordinary collective dispute resolution system, i.e. the Danish Labour Court, the Public Conciliation Institution, and so on (see Section IV.3).[70] In the event that the parties should not be able to agree on the financial framework for wages to statutory civil servants, industrial action is not allowed.[71] Instead, the Minister for Finance is entitled to propose legislation on this matter.[72] Thus, wage setting for statutory civil servants may – theoretically – be set by law. It must be noted that there are no recent examples of such extraordinary legislation.

As was mentioned, statutory civil servants are prohibited from engaging in industrial action. This is derived from the Civil Servants Act, which explicitly states the legislative procedure to be followed when the parties should not be able to agree on salary and working conditions.[73] In other words, the statutory civil servant's framework does not contain any legal basis granting the right to industrial action. Any participation in industrial action is, therefore, considered a breach of the duty to perform work under the employment relationship.[74] Industrial action such as strikes have, nonetheless, occasionally occurred among statutory civil servants. As a consequence, the Civil Servants Tribunals were set up in the early 1980s and given the authority to issue warnings, reprimands, or fines for unlawful industrial action.[75] Besides disciplinary sanctions, a statutory civil servant may also have pay deducted by the public authority (employer) for the hours during which work was not performed.[76] A review of the tribunals' case law over the last 20 years shows that on average there is approximately one case each year concerning unlawful industrial action by statutory civil servants.[77]

67 *Tjenestemandsloven* (n. 6), Section 45. The Act reads "The Minister of Public Innovation", but the responsibility now lies with the Minister for Finance, cf. Royal Decree of 15 December 2022 (*Kongelig resolution*); www.stm.dk/media/11780/kgl-resolution-af-15-december-2022.pdf.

68 Hasselbalch (2009), pp. 63–64.

69 Wage adjustment agreement as of 1 April 2021of 10 January 2023 (*Cirkulære om aftale om justering af tjenestemandslønninger mv. fra 1. april 2021*), no. 9005; www.retsinformation.dk/eli/retsinfo/2023/9005.

70 Hasselbalch (2009), p. 64.

71 Andersen (1965), p. 196; Hoffmann (1999), p. 83.

72 *Tjenestemandsloven* (n. 6), Section 46(1).

73 *Tjenestemandsloven* (n. 6), Sections 45 and 47.

74 Andersen (1965), p. 196.

75 *Tjenestemandsloven* (n. 6), Section 54(2). The municipal and regional civil servant tribunals are regulated separately, cf. Act on a municipal and regional civil service law of 23 August 2016 (*Lov om en kommunal og regional tjenestemandsret*), no. 1124; www.-retsinformation.dk/eli/lta/2016/1124. In addition to the individual sanctions, the tribunals may sanction unions that have been supportive of – or have neglected to try to stop or prevent – industrial action.

76 Pay deduction is regulated in more detail, cf. Ministerial Circular on pay deduction and pay calculation for statutory civil servants of 30 November 2021 (*Cirkulære om lønfradrag og lønberegning for tjenestemænd*), no. 9978; www.retsinformation.dk/eli/retsinfo/2021/9978.

77 The author's own review conducted based on case law published by the Tribunals.

The establishment of the Tribunals was a direct response to an increase in (unlawful) strikes among statutory civil servants.[78] As noted in a report by a Parliamentary Committee from the late 1980s, the fact that statutory civil servants engaged in strikes was earlier considered unthinkable.[79] It was also regarded as a change in attitude that rendered one of the preconditions for this type of employment less effective, namely ensuring continuity in service. The Committee noted that the development speaks for carefully assessing the use of statutory civil service employment in the future.

Another important aspect of the legal framework for statutory civil servants concerns changes in working conditions. The public authorities (employers) have over time sought more flexibility regarding wages, working time, work location, and so on, in the civil service.[80] As mentioned, the public sector has undergone many administrative structural reforms, and thus flexible and individual working conditions that could be adapted to the needs of the public sector have been sought after. Already in the 1960s, a report by a Parliamentary Committee pointed out that the statutory civil servant's legislation lacked "flexibility", especially since there was limited possibility of changing and adapting the employment conditions of statutory civil servants.[81] Under the Civil Servants Act, Section 12(1), conversely, a statutory civil servant is not obliged to accept such changes that entail the position is no longer suitable for him or her. If this "limit" is exceeded, the statutory civil servant may take the change as a dismissal that cannot be attributed to the civil servant. This will trigger a claim for pension payments, normally a so-called "current personal pension", which is paid upon dismissal from the position and is, in principle, paid for life, until the death of the statutory civil servant.[82]

The statutory civil servant, furthermore, enjoys a special protection, if the public authority (employer) decides to abolish the statutory civil servant's position due to changes in the authority's organisation or work tasks (*stillingsnedlæggelse*). If the person cannot be transferred to another position in the State (which he or she is obliged to accept as part of the employment relationship), the abolishment of the position results in a dismissal, where the civil servant, as a general rule, continues to receive his or her ordinary pay for the following three years, as provided in Section 32(1) of the Civil Servant Act. This is typically referred to as "availability pay" (*rådighedsløn*).[83] Depending on the circumstances, restructuring of public bodies with many statutory civil servant positions may be very costly.

It should be noted that in connection with public administration reforms undertaken at the beginning of the 21st century, some solutions have been found. With regard to transfers of State tasks to the municipalities or to State-owned limited liability companies, a form of "secondment" has been applied to avoid the financially burdensome claims of availability pay. This secondment will typically entail that the statutory civil servant is still employed by the State, but perform the tasks that now have been transferred to a municipality or a State-owned company.[84] This approach has been acknowledged by the Danish

78 Kristiansen (2018a), p. 184.

79 Report of Parliamental Committee concerning the 90ies agreements and collective agreements (*Betænkning om 90'ernes aftaler og overenskomster*), no. 1150/1988, p. 56; www.elov.dk/media/betaenkninger/-90_ernes_aftaler_og_overenskomster.pdf.

80 Hartlev (1995), p. 116.

81 *Betænkning afgivet af tjenestemandskommissionen af 1965 – del 1* (n. 55), p. 23.

82 Revsbech et al. (2023b), p. 107.

83 Revsbech et al. (2023b), p. 120.

84 Revsbech et al. (2023b), p. 121.

Supreme Court as not granting the statutory civil servant the right to availability pay.[85] In general, it remains a fact that restructurings or privatisations that involve statutory civil servants cannot be described as uncomplicated.[86]

As described at the beginning of this chapter, statutory civil servants only amount to approximately 5% of the civil service today. From being the defining type of public employment a century ago, the use of statutory civil servant status is now reserved for a limited number of specific positions. This development may in part be explained by some of the identified challenges. Employment as a statutory civil servant does not come with the same flexibility in connection with reforms as contractual public employment, and reorganisations may potentially be very costly. Moreover, the assumption that civil servants do not strike has been challenged and even led to the establishment of special tribunals to handle breaches of the restriction on strikes. At the same time, the legal framework for statutory civil servants has undergone a development from unilaterally decided rules to (increased) negotiated rights. Some of the great differences between the two main types of employment in the civil service have evened out over time.

3. "The Danish Model" in the Public Sector (Contractual Civil Servants)

It is a general characteristic of the Danish labour market that wages and working conditions are primarily determined by collective agreements rather than statutory acts.[87] The regulation is a result of negotiations between the social partners, with only minimal interference by the legislator. This is often referred to as "the Danish model".

The right to collective bargaining was formally recognised in Denmark in 1899 with the conclusion of the so-called September Agreement.[88] Here the social partners in the private labour market mutually agreed on basic collective rights, e.g. the employees' right to carry out collective negotiations, the employer's managerial prerogative, as well as the right to take industrial action. The so-called peace obligation (*fredspligten*), that neither party may take industrial action during the time when collective agreements are in force, was recognised later.[89] Another important development took place in 1908, when the so-called August Committee formed the institutional framework for handling collective labour law disputes. The institutions include the Danish Labour Court (*Arbejdsretten*), which mainly rules on disputes concerning breaches of collective agreements, the Industrial arbitration tribunals (*Faglig voldgiftsretter*), which mainly rule on disputes concerning interpretation of collective agreements, and finally the Public

85 Danish Supreme Court, judgment of 7 December 1982, U 1983.88 H.

86 Hartlev (1995), p. 131.

87 As expressed, e.g. by the Danish Labour Court, judgment of 12 December 2007, AR 2007.831.

88 Collective agreement between the Confederation of Danish Employers and Master Craftsmen and the Confederation of Danish Trade Unions (Septemberforliget) of 5 September 1899 (*Overenskomst mellem Dansk Arbejdsgiver- og Mesterforening og De samvirkende Fagforbund (Septemberforliget)*); https://danmarkshistorien.dk/vis/materiale/septemberforliget-5-september-1899. The development can be traced back to the 1860 with the Industrial Revolution, which inter alia led to competition between profit-oriented companies, cf. Høgedahl (2019), p. 53.

89 Kristiansen (2021), p. 551. It was adopted in Main Agreement between the Confederation of Danish Employers and the Danish Trade Union Confederation of 1973 with later amendments (*Hovedaftalen mellem DA og LO*); https://fho.dk/wp-content/uploads/lo/2017/03/hovedaftaledalo.pdf.

Conciliation Institution (*Forligsinstitutionen*).[90] The Institution acts as a mandatory conciliator for social partners when a conflict over the renewal of a collective agreement has substantial damaging effects on society, but it cannot force the parties to reach a settlement. The purpose of establishing these institutions was to support and stabilise industrial relations, and the institutions were established and regulated by statutory acts. The institutional framework for dispute resolution and conciliation has undergone only a few changes over the last century and has been able to ensure relatively peaceful collective bargaining processes. The Danish Folketing supports the model of negotiation inter alia by promoting tripartite negotiations before passing legislation in areas affecting the labour market.[91]

The use of collective bargaining in the Danish public sector can be traced back to the beginning of the 20th century.[92] For some of those contractual workers who fell outside the scope of statutory civil service positions wages and working conditions were determined through collective bargaining, with the public administration as the employer. This may be derived from the fact that the Permanent Arbitration Court (now the Labour Court) settled at least some disputes in the public labour market at the beginning of the 20th century.[93]

The Danish Model was, however, not formally recognised in the public sector until 1973. In a reform of the Danish Labour Court, its jurisdiction was extended to cover all collective agreements in the labour market, including collective agreements with public authorities as the employer.[94] This was recognition and confirmation of contractual civil servants being covered by general collective labour law in Denmark. The Labour Court's jurisdiction does not cover statutory civil servants, as already mentioned in Section IV.2. Some key elements of the Danish voluntaristic collective bargaining model are briefly outlined in the following paragraphs.

Under the Danish model, there is no formal duty to negotiate with any organisation. The model is voluntaristic in that the conclusion of collective agreements is left to the initiative of the organisations, who can initiate negotiations with any employer with a view to covering the work performed with a collective agreement. It may also be legitimate to initiate negotiations (and eventually take industrial action; see the following paragraph) with the aim of covering work, where the employer is already covered by a collective agreement for the same work.[95]

Most employers are motivated to engage in negotiations for collective agreements due to the risk of conflict (industrial action). The right to take industrial action is broad, and it includes the right to engage in secondary action. Industrial action is legitimate to conclude

90 Act on the Labour Court and industrial arbitration tribunals of 24 August 2017 (*Lov om Arbejdsretten og faglige voldgiftsretter*), no. 1003; www.retsinformation.dk/eli/lta/2017/1003; Act on conciliation in industrial action of 20 August 2022 (*Lov om mægling i arbejdsstridigheder*), no. 709; www.-retsinformation.dk/eli/lta/2002/709.

91 Søsted and Munkholm (2020), pp. 7–8, examining the cooperation between the Government and social partners during the COVID-19 crisis.

92 Kristiansen (2021), p. 79; Hoffmann (1999), p. 83.

93 See e.g. Danish Permanent Arbitration Court (now the Danish Labour Court), judgment of 21 October 1914, 1914.83.

94 Preparatory works to Act on a Labour Court (*Forslag til Lov om arbejdsretten*), FT 1973–73, Appendix A, columns 5661–5662: www.folketingstidende.dk/ebog/19721A#.

95 Kristiansen (2021), pp. 508–517. Exceptions apply for unions organised under the same main organisation, cf. e.g. Danish Labour Court, judgment of 9 December 1999, AR 1999.72.

collective agreements, but also in connection with the renegotiation or termination of collective agreements. Strikes or lockouts are not unusual in the public sector. In 2021, there were 63 work stoppages (strikes or lockouts), and the number of lost working days was calculated to 238,400 days in that year.[96]

Collective agreements are binding for signatories and their members.[97] As a rule, the agreement applies to all workers performing work within the professional scope of the agreement, regardless of the workers' union status. Collective bargaining is commonly structured as a multilevel system, but the structure varies in different areas. In the State sector, the collective bargaining model generally comprises main agreements (*hovedaftaler*) and joint agreements (*fællesoverenskomster*), which are negotiated with large employee confederations, and collective agreements (*organisationsaftaler*), which are negotiated with individual trade unions. The Minister for Finance is the competent employer authority in the State to negotiate wages and working conditions for civil servants. The centralisation of the role of the State employer means that not every State institution can act as a party to collective negotiations.[98] Being hierarchical in their structure, lower-ranking agreements cannot, as a rule, derogate from provisions in higher-ranking agreements unless this is mandated in the (higher) collective agreement.[99] The public sector mirrors the basic principles of collective labour law laid down in the private sector, namely in the Main Agreement between the Confederation of Danish Employers and the Danish Trade Union Confederation (*Hovedaftalen mellem DA og LO*).[100]

There is a strong enforcement system in place. Collective agreements are subject to mandatory dispute resolution mechanisms (the Act on Labour Court and Industrial Arbitration Tribunals).[101]

The system is built on mandatory negotiation and conciliation; typically in three steps with local negotiation at the workplace, followed by conciliation and then central negotiation at the organisational level.[102] Ultimately, disputes are subject to judicial review by the Labour Court or an industrial arbitration tribunal. The Labour Court may sanction breaches of collective agreements with penance. Penance is neither a criminal sanction, nor compensation for damages, but it is a sui generis sanction for breach of the parties' collective agreement, and penance is calculated by the Courts' discretion.

The overall legal framework for collective bargaining in the public sector is, on the one hand, subject to and forms an integral part of the general labour law system in Denmark. On the other hand, the special nature of the public employer – also operating as the Treasury – has certain consequences for collective bargaining in the public sector, as will be elaborated in the following paragraphs.

96 Statistics Denmark, strikes divided by sector, unit and time, dataset from 2021, table ABST1; www.statistikbanken.dk/10312.

97 The binding nature results in inter alia that both unions (signatories) and employees (members) may be sanctioned with penance for unlawful strikes.

98 In principle, each institution may enter into collective agreements if mandated by the Minister for Finance (former Minister of Taxation), cf. Kristiansen (2021), p. 81.

99 Hasselbalch and Munkholm (2019), pp. 88–92; Jacobsen (1994), pp. 519–520.

100 Kristiansen (2021), p. 81. *Hovedaftalen mellem DA og LO* (n. 89).

101 *Lov om Arbejdsretten og faglige voldgiftsretter* (n. 90).

102 Cf. Norm between Confederation of Danish Employers and the Danish Trade Union Confederation of 2006 (*Normen mellem DA og LO*), cf. *Arbejdsretsloven* (n. 91), Section 33(2). Social partners are obliged to observe the so-called Norm, if they have not themselves agreed on adequate rules.

First, the general principles of administrative law must be observed, when the public authority acts as a negotiating party to a collective agreement.[103] This was established in a Supreme Court judgment from 1999.[104] The questions in the case were whether the public employer, the Confederation of Councils, was subject to the general principles of administrative law when concluding collective agreements and, more specifically, whether the public employer had failed to observe the principle of equal treatment. The claim was put forward by a trade union representing dieticians, who argued that the public employer had breached the principle of equal treatment by rejecting negotiations with that trade union, while having concluded a collective agreement with another trade union. The Supreme Court stated that the Confederation of Councils exercised public law competencies in their role as public employers and were, therefore, in connection with the conclusion of collective agreements subject to the general principles of administrative law. The Supreme Court recognised that negotiations for collective agreements take place within the ordinary collective labour law system, and that the application of administrative law principles must be evaluated in light thereof. In this situation, the Supreme Court exercised considerable restraint in the evaluation of the public employers' discretion in terms of concluding collective agreements. In the specific case, the public employer had been entitled to reject negotiations with the said trade union, and there was no breach of the principle of equal treatment.[105]

Second, industrial action is in principle subject to the same general principles of labour law in the public and the private sector. However, the effect of strikes is somewhat reduced in the public sector compared to the private sector, because strikes in the public sector in many cases result in a reduction of public spending (salaries) rather than loss of production.[106] There are exceptions to this statement, for example, if public services are simply postponed during a strike, but for many services, this will not be the case, such as in childcare institutions, in the long-term care sector, and in educational facilities.[107] The State employer does not experience the same threat on the basis of its existence as the private company that is prohibited from producing goods, serving customers, and so on, during strikes. Thus, at least the economic power balance in relation to industrial action can be described as asymmetric in the public sector.[108]

Third, the Folketing has the ultimate power to bring existing conflicts to an end. It forms an integral part of the general labour law system in Denmark, such that if social partners do not manage to solve a conflict for the renewal of a collective agreement, the Folketing may (as a last resort) intervene with legislation.[109] Since 1933, it has been accepted that the Folketing may dictate the parties' terms for the subsequent agreement period in statutory legislation. The parties will often have tried to reach a settlement in the Public Conciliation Institution, but this is not an express precondition for legislative intervention. The government will typically only intervene with legislation when the conflict has been long-lasting, when the conflict has damaging effects on society, and when there

103 Kristiansen (2021), p. 82.
104 The Danish Supreme Court, judgment of 10 November 1999, U 2000.321 H.
105 The same result is seen in subsequent Supreme Court judgments, e.g. judgment of 9 September 2013, U 2013.3306 H. See also Kristiansen (2021), p. 83.
106 Høgedahl (2019), p. 158; Pedersen (2022), p. 552.
107 Høgedahl (2019), p. 158.
108 Høgedahl (2019), pp. 159–160.
109 Due et al. (1993), p. 158.

is little prospect of the social partners coming to an agreement.[110] There are, however, no formal rules that establish certain requirements for legislative intervention or that safeguard against political interests in the process.[111] The government will typically base the legislation on the previous result of a (rejected) negotiation between the parties or a (declined) settlement proposal put forward by the public conciliator.[112] If no common ground can be established between the parties, the government may have to dictate the framework for legislative intervention.[113] This does in principle provide a possibility to include political ambitions, e.g. increased productivity in the public sector, into the collective agreements.[114]

Finally, the State employer may push demands through the parliamentary arena instead of through negotiations (for collective agreements).[115] Although this avenue is rarely taken, the Government's recent plan to abolish a Danish public holiday (the Great Prayer Day) by statutory legislation, without consultation of the social partners, could provide an example thereof.[116] Even though the classification of public holidays is a legislative matter in Denmark, the Government's proposal interferes with negotiated rights in collective agreements, and some social partners from both sides, but especially employee confederations, have criticised the proposal.

4. *The Dual Legal Basis for Contractual Civil Servants*

As described previously, contractual civil servants in the public sector are employed under collective agreements. The legal basis for the employment is fundamentally a contract and thus of a private law nature. There are many examples of private law (employment law) principles also applying in the context of public employment, such as the principles on reimbursement (*condictio indebeti*),[117] on the contracts' basic assumptions (*forudsætningslæren*),[118] on breach of contract (*misligholdelseslæren*),[119] and on liability for damages (*erstatningsansvar*).[120]

The legal basis for employment is not only regarded as an employee-employer relationship, but also a citizen-public authority relationship, which brings the contract into the

110 Høgedahl (2019), p. 171.
111 Høgedahl (2019), p. 172.
112 Kristiansen (2021), p. 548.
113 Kristiansen (2021), p. 549.
114 It has been put forward in the literature that the government took account of political ambitions in connection with a legislative intervention in 2013 that concerned schoolteachers' working time rules, cf. Høgedahl (2019), p. 172. Kristiansen (2021), p. 549, characterises the legislative intervention as "special".
115 Pedersen (2022), p. 552.
116 Legislative Proposal to Act on the consequences of abolishing the Great Prayer Day as a public holiday of 24 January 2023 (*Forslag til lov om konsekvenser ved afskaffelsen af store bededag som helligdag*), no. 13; www.ft.dk/ripdf/samling/20222/lovforslag/l13/20222_l13_som_fremsat.pdf.
117 The principle provides, as a main rule, that an employee may keep a payment that was paid by mistake if the payment was received in good faith, cf. Hasselbalch and Munkholm (2019), p. 578. See e.g. *Folketingets Ombudsmand*, Opinion of 14 March 2013, FOB 2013–3, regarding a public employer's claim for reimbursement of wages that were paid to an employee by mistake.
118 See e.g. *Folketingets Ombudsmand*, Opinion of 12 May 2011, FOB 2011 20–3, where the *Ombudsmand* found that a public authority's summary dismissal (*bortvisning*) of an employee was not – in the specific case – justified by the authority's claim that the basic assumptions for the employment had failed.
119 Revsbech et al. (2023b), p. 62.
120 Mørup et al. (2022), p. 579.

sphere of public law. This is not expressly stated in statutory legislation, but it has been established in case law that public authorities are obliged to observe administrative law rules when dealing with contractual civil servants.[121] This special nature of the employment relationship for contractual civil servants is typically referred to as "the dual legal basis" (*det dobbelte retsgrundlag*).[122]

The fact that public administrative law forms part of the legal basis for employment has several implications. On the substantive side, the public authority as employer must observe the general principles of administrative law regarding the content of decisions, such as the principle of the misuse of powers (*saglighedskravet*), of equal treatment (*lighedsgrundsætningen*), of proportionality, and the duty to exercise discretion (*forbud mod skøn under regel*), in relation to its employees.[123] As a consequence, the public authority must base its decisions regarding whom to employ, whom to terminate, which sanctions to choose, and so on, on valid grounds and by individual assessment.

On the procedural side, a public authority, as an employer, must observe the general principles and rules of administrative law regarding procedure. First, the principle of investigation (*officialprincippet*) entails that an authority is obliged to examine the merits of the case before a decision is made.[124] Second, an authority is obliged to conduct a hearing of the affected employee before a decision is made (*partshøring*), if the employee is not already aware of the relevant information which is to the detriment of the employee (Section 19 of the Danish Public Administration Act).[125] In connection with disciplinary sanctions, an authority is moreover obliged to observe the general (unwritten) principle of an "expanded" duty to conduct a hearing of the affected employee (*udvidet partshøring*).[126] In these situations, the employee is entitled to receive not only information about the facts of the case, but also the authority's assessment of the law and the evidence of the case. Third, an authority is obliged to state its reasons for the decision (*begrundelse*), as required by Sections 22–24 of the Danish Public Administration Act. This provides the employee with an explanation of the underlying considerations, legal basis and relevant facts pertaining to the authority's decision.[127]

Overall, the public authority is subject to different legally binding rules on both the content and procedure of decisions regarding employees laid down in administrative law (in addition to those requirements that may follow from general employment law). It is in particular the administrative rules on procedure that differ from what applies to a private employer under general employment law.[128] For the private employer, the failure to observe a good procedure may result in a case of unfair dismissal (and is thus ultimately a

121 Leading cases are the Danish Supreme Court, judgment of 17 June 1958, U 1958.868 H, and the Danish Supreme Court, judgment of 12 September 1996, U 1996.1462 H.

122 See e.g. Revsbech et al. (2023b), p. 17; Hemme (2022), pp. 24–25.

123 Revsbech et al. (2023b), pp. 74–83; Kristiansen (2018b), pp. 207–208; Mathiassen (2000), pp. 153–161.

124 Revsbech et al. (2023b), p. 68; Hemme (2022), p. 113; Waage (2022), p. 371.

125 Danish Public Administration Act of 22 April 2014 (*Forvaltningsloven*), no. 433; www.retsinformation.dk/eli/lta/2014/433. See Revsbech et al. (2023b), pp. 69–70; Hemme (2022), pp. 141–144; Waage (2022), pp. 372–373.

126 The rule is not limited to disciplinary sanctions, but may be extended to decisions, where the employee is subject to criticism, cf. Hemme (2022), pp. 170–174. The scope of application has not (yet) been defined clearly in case law.

127 More procedural rules apply, such as rules on impartiality, guidance (*vejledningspligt*), and the party's right of access to documents (*partsaktindsigt*).

128 Hemme (2022), pp. 73–74 and pp. 462–463.

risk assessment); for the public authority such a failure would amount to a breach of legally binding rules and potentially an instance of misconduct (*tjenesteforseelse*) by the responsible public employee.[129]

V. Influence From European Union Law and the European Convention on Human Rights

This section examines the extent to which EU law or the ECHR has influenced the development of the Danish civil service. As described previously, over time the Danish civil service has moved from a statutory public law regime to mainly private forms of employment, i.e. collective agreements. Neither European Union law nor the ECHR can be attributed with influencing this development as such. It may be remarked that freedom of association has been protected in the Danish constitution since 1849.[130] Moreover, it is prohibited to use union membership as a basis for making administrative law decisions towards employees; case law on the issue dates back to 1940s.[131]

However, the regulation of the civil service in Denmark by no means remains unaffected by EU law and the ECHR. In recent years, employment law legislation on issues such as equal treatment, atypical work (part-time, time-limited, temporary agency work), working time, and so on, has been adopted. The legislation is mainly adopted in order to ensure that Denmark lives up to international obligations, in particular to implement EU law directives.[132] As a rule, these statutory acts apply without distinction to both private and public employers, and as such, EU labour law rights form an integral part of public labour law. In the following paragraphs, a few examples will be provided of situations in which EU law has led to amendments in existing regulations with (particular) implications for public employees.

First, Section 27(1) of the Danish constitution requires that statutory civil servants be Danish citizens.[133] The provision only applies to employment as s statutory civil servant in the State (not in municipalities or regions), and does not apply to contractual civil servants.[134] The nationality requirement may have legal implications for the right to free movement of workers in EU law laid down in Article 45 of the Treaty on the Functioning of the European Union (TFEU). Although the principle of free movement is not extended to employment in the public service (Article 45, paragraph 4 TFEU), this provision has been interpreted strictly by the Court of Justice of the European Union (CJEU), and the State functions that can be reserved for national citizens in the Member States are limited.[135] In order to live up to the EU law principle of free movement of workers, the Civil Servants Act was amended in 1990 to allow EU citizens to be employed on similar conditions as

129 Hemme (2022), pp. 462–463.

130 *Grundloven* (n. 52), Section 78. Where the constitution only protects the positive freedom of association, the negative freedom of association is protected by Act on Freedom of Association of 8 May 2006 (*Foreningsfrihedsloven*), no. 424; www.retsinformation.dk/eli/lta/2006/424.

131 The Danish Western High Court, judgment of 2 February 1945, U 1945.532 V; the Danish Supreme Court, judgment of 17 June 1958, U 1958.868 H. Also established in literature, Mørup et al. (2022), p. 231; Kristiansen (2018b), p. 243.

132 Kristiansen (2018a), p. 178.

133 *Grundloven* (n. 52).

134 Andersen (1965), p. 139; Mathiassen (2000), p. 62.

135 See e.g. CJEU, judgment of 17 December 1980, *Commission v. Belgium*, C-149/79, and CJEU, judgment of 30 September 2003, *Colegio*, C-405/01. In more detail, see Barnard (2012), pp. 178–182.

civil servants (with the exception of royal appointment).[136] The relevant provision in the Civil Servants Act, Section 58(c), has since been amended several times and now includes all EU and European Economic Area (EEA) citizens as well as other citizens without Danish citizenship (still with the exception of royal appointment).

Second, the development of individual rights in the EU, in particular in the area of non-discrimination, has challenged parts of the Danish legal framework. One example concerns the right to payment of severance allowance to employees covered by the Danish Salaried Employees Act. Contractual civil servants may be covered by the scope of the Act, depending on the nature of the work performed.[137] Under the act, it was established case law that an employee's claim for severance allowance was rejected if the employee was eligible for an old-age pension, irrespective of whether or not the employee did in fact draw his or her pension. In the judgment of 12 October 2010, *Ingeniørforeningen i Danmark*, the CJEU found that the Equality Framework Directive precluded the Danish legislation in question, as it amounted to discrimination on grounds of age (which could not be justified).[138] The Danish legislation was finally amended in 2015.[139] Moreover, the prohibition of discrimination on grounds of age in EU law has led to changes in regulation for statutory civil servants. In the judgment of 26 September 2013, *Toftgaard*, the CJEU found that the refusal to grant availability pay to statutory civil servants who had reached the age of 65 and were entitled to retirement pension contravened Articles 2 and 6, paragraph 1 of the Equality Framework Directive.[140] As a consequence, the Civil Servants Act was amended accordingly.[141] In the last few years, more cases before the Danish Supreme Court have concerned the civil servant pension scheme and its compatibility with the rules on the prohibition of discrimination on the grounds of age, but neither of the cases was successful in establishing a breach of the Equality Framework Directive.[142]

VI. Conclusion

The overall legal framework for the Danish civil service has been relatively stable for many years. The defining reforms took place more than 50 years ago with, in particular, the reform of the Civil Servants Act in 1969 and the reform of the Danish Labour Court in 1973. Despite recent public policies such as contracting out public services and

136 Act no. 384 of 13 June 1990 amending *Tjenestemandsloven* (n. 6), by introducing then Section 58 c.

137 The Danish Salaried Employees Act of 24 August 2017 (*Funktionærloven*), no. 1002; www.retsinformation.dk/eli/lta/2017/1002. Statutory civil servants are not covered by the Act, cf. Section 1(3).

138 CJEU, judgment of 12 October 2010, *Ingeniørforeningen i Danmark*, C-499/08. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('the Equality Framework Directive'), OJ L 303/16. See also *EU Non-Discrimination Law and its Potential Impact on the Civil Service of the Member States* by J. Mulder in this volume.

139 For employees in the private sector the issue was not yet resolved. The Danish Supreme Court subsequently ruled in the so-called *Ajos case* that the Danish Law on accession did not provide legal basis for allowing the unwritten EU law principle prohibiting discrimination on grounds of age to take precedence over the Danish legislation (*contra legem*), cf. The Danish Supreme Court, judgment of 6 December 2016, U 2017.824 H, https://domstol.dk/media/2udgvvvb/judgment-15-2014.pdf.

140 CJEU, judgment of 26 September 2013, *Toftgaard*, C-546/11.

141 Act no. 1551 of 13 December 2016 amending *Tjenestemandsloven* (n. 6), Section 32(4)-(2).

142 Danish Supreme Court, judgment of 16 April 2020, U 2020.2179 H, and Danish Supreme Court, judgment of 18 June 2021, U 2021.4240 H.

decentralisation strategies, the number of public employees has been relatively stable during the last 20 years and amounts to almost a third of the active labour force in Denmark.

The Danish civil service has largely developed from a public law regime to mainly private forms of employment. Historically, the majority of civil servants were subject to wages and working conditions laid down in a statutory act – the Civil Servants Act, whereas today most public employees are employed under collective agreements. Despite the differences in their regulation, over time many differences between the two types of employees have decreased. This evening out of legal differences has probably contributed to the reduced interest in employing public employees as statutory civil servants. Other contributory factors may be the high expense levels in cases of termination (related to pension rights), the legal challenges connected to reorganisations, and the statutory civil servants' participation in (unlawful) industrial action. Today, statutory civil servants only account for approximately 5% of the employees. Even though they are declining in numbers, the Danish constitution rests on the precondition that employment as a statutory civil servant cannot be removed entirely.

Collective bargaining agreements have been used in the public sector since the beginning of the 20th century, but their use grew rapidly in the 1960s and 1970s. The collective agreements in the public sector form an integral part of the general labour market system in Denmark, and, in this way, the public employment regime has to a wide extent adapted to private forms of employment. Disputes and negotiations are in general subject to the same principles and mechanisms as in private sector collective agreements. As a supplementary legal basis, principles of administrative law also apply to the employment relationships of contractual civil servants. This is often referred to as "the dual legal basis" in public employment.

In conclusion, the legal framework for the Danish civil service is a complex mix of public and private (labour) law, making the traditional dichotomy impossible to uphold in this field of law.

Bibliography

Andersen P. (1965), *Dansk Forvaltningsret*, 5th edition, Copenhagen: Gyldendal.

Barnard C. (2012), *EU Employment Law*, 4th edition, Oxford: Oxford University Press.

Bejder P., Kristensen B. (2016), *Velfærdsstaten og de universelle rettigheder, efter 1849*, https://danmarkshistorien.dk/vis/materiale/velfaerdsstaten-og-de-universelle-rettigheder.

Christensen J.P., Jensen J.A., Jensen M.H. (2015), *Grundloven med kommentarer*, Copenhagen: Jurist-og Økonomforbundets Forlag.

Christiansen F.J. (2022), 'Danish Consensus Democracy – Legislative Competition and Cooperation', in Nielsen P.A., Olsen J. (eds), *Public Law – Insights into Danish Constitutional and Administrative Law*, Copenhagen: Hans Reitzels Forlag, 299–327.

Due J., Madsen J.S., Jensen C.S. (1993), *Den danske model: En historisk sociologisk analyse af det kollektive aftalesystem*, Copenhagen: Jurist-og Økonomforbundets Forlag.

Emborg O., Schaumburg-Müller P. (2010), *Offentlig arbejdsret*, 2nd edition, Copenhagen: Thomson Reuters.

Hartlev M. (1995), 'Privatisering og offentlig ansættelse', in Adrian L., et al. (eds), *Ret og Privatisering*, Copenhagen: GadJura, 111–136.

Hasselbalch O. (2007), *Lokalaftaler*, Copenhagen: Thomson.

Hasselbalch O. (2009), *Den Danske Arbejdsret – Bind 1: Arbejdsrettens Almindelige Del*, Copenhagen: Jurist-og Økonomforbundets Forlag.

Hasselbalch O., Munkholm N.V. (2019), *Lærebog i ansættelsesret og personalejura*, 6th edition, Copenhagen: DJØF Forlag.

Hemme M.S. (2022), *Afskedigelse – processuelle krav i forvaltningsretten og arbejdsretten*, Copenhagen: Karnov Group.

Hoffmann F. (1999), 'Den danske model og den offentlige sektor', in *100-året for Septemberforliget*, Copenhagen: Finansministeriet, 75–106.

Høgedahl L. (2019), *Den danske model i den offentlige sektor*, Copenhagen: DJØF Forlag.

Holck C.G. (1870), *Den Danske Statsforvaltningsret*, by Goos C., Nellemann J., Copenhagen: Den Gyldendalske Boghandel.

Jacobsen P. (1994), *Kollektiv arbejdsret*, 5th edition, Copenhagen: Jurist-og Økonomforbundets Forlag.

Jensen J.A. (2022), 'The Three Constitutional Powers', in Nielsen P.A., Olsen J. (eds), *Public Law – Insights into Danish Constitutional and Administrative Law*, Copenhagen: Hans Reitzels Forlag, 237–256.

Knudsen T. (2011), 'Den politiserende embedsmand i Danmark,' 88(3) *Nordisk Administrativt Tidsskrift*, 206–211.

Kristiansen J. (2018a), 'Retsgrundlaget for offentlig personaleforvaltning', in Fenger N. (ed), *Forvaltningsret*, Copenhagen: Jurist-og Økonomforbundets Forlag, 171–206.

Kristiansen J. (2018b), 'Konkrete personalebeslutninger', in Fenger N. (ed), *Forvaltningsret*, Copenhagen: Jurist-og Økonomforbundets Forlag, 207–248.

Kristiansen J. (2021), *Den kollektive arbejdsret*, 4th edition, Copenhagen: Jurist-og Økonomforbundets Forlag.

Kristiansen J. (2023), *Ansættelsesret*, 2nd edition, Copenhagen: Jurist-og Økonomforbundets Forlag.

Mailand M., Hansen N.W. (2016), 'Denmark and Sweden: The Consequences of Reform and Economic Crisis for Public Service Employment Relations', in Bach S., Bordogna L. (eds), *Public Service Management and Employment Relations in Europe*, New York: Routledge, 218–243.

Mathiassen J. (2000), *Forvaltningspersonellet – Tjenestemænd og overenskomstansatte*, 2nd edition, Copenhagen: Jurist-og Økonomforbundets Forlag.

Mørup S., Garde J., Jensen J.A., Madsen H.B., Revsbech K., Terkelsen O. (2022), *Forvaltningsret – Almindelige Emner*, 7th edition, Copenhagen: DJØF Forlag.

Pedersen D. (2022), 'The Danish Model in The Labour Market', in Nielsen P.A., Olsen J. (eds), *Public Law – Insights into Danish Constitutional and Administrative Law*, Copenhagen: Hans Reitzels Forlag, 539–572.

Revsbech K., Garde J., Mørup S.H. (2023a), *Kommunalret*, 5th edition, Copenhagen: Jurist-og Økonomforbundets Forlag.

Revsbech K., Hemme M.S., Mørup S.H. (2023b), *Forvaltningspersonalet*, 5th edition, Copenhagen: Jurist-og Økonomforbundets Forlag.

Skyggebjerg L.K. (2019), *Industrilandet Danmark fra 1888*, danmarkshistorien.dk., https://danmarkshistorien.dk/vis/materiale/industrilandet-danmark.

Søsted M., Munkholm N.V. (2020), 'Covid-19 and Labour Law: Denmark', 13(1S) *Italian Labour Law e-Journal*, 1–5.

Waage F. (2022), 'General Principles of Danish Administrative Law', in Nielsen P.A., Olsen J. (eds), *Public Law – Insights into Danish Constitutional and Administrative Law*, Copenhagen: Hans Reitzels Forlag, 361–375.

Zahle H. (2006), *Danmarks Riges Grundlov med kommentarer*, 2nd edition, Copenhagen: Jurist-og Økonomforbundets Forlag.

7 The Civil Service in France

The Evolution and Permanence of the Career System

David Capitant

French civil service law has recently undergone significant changes, marked in particular by the entry into force of Law no. 2019–828 of 6 August 2019 on the transformation of the civil service,[1] which gives a new place to contract agents, by the reform of the senior civil service carried out by Order no. 2021–702 of 2 June 2021 on the reform of the senior management of the civil service[2] and, more recently, by the publication of the General Civil Service Code (CGFP) on 1 March 2022,[3] which brings together all the statutory provisions applicable to permanent and contract civil servants and makes civil service law clearer and more accessible.

We will begin with a few general facts and figures to give an idea of what the civil service represents in France today (Section I) before looking at the conditions under which the French civil service model was forged (Section II), and finally examining the changes underway (Section III).

I. The Civil Service – Facts and Figures

According to the latest available figures, published in 2022 by the Ministry for the Transformation and Civil Service,[4] as of 31 December 2020, France employed 5.66 million civil servants, i.e. 18.8% of the working population (30.1 million people),[5] for an average civil service ratio of 74 civil servants per 1,000 inhabitants. The number of civil servants in France is constantly increasing, in order to meet the needs of a population that is itself growing, in a more complex society in which expectations of public intervention are ever more extensive. Having risen from around 650,000 in 1900 to 1,500,000 in the 1950s[6] before exceeding five million today, the civil service workforce grew by a further 0.5% per year between 2011 and 2019, at the same rate as total employment.[7]

1 Law no. 2019–828 on the transformation of the civil service of 6 August 2019 (*Loi n° 2019–828 du 6 août 2019 de transformation de la fonction publique*), JORF of 7 August 2019; www.legifrance.gouv.fr/jorf/id/JORFTEXT000038889182.

2 Order no. 2021–702 on the reform of the senior management of the civil service of 2 June 2021 (*Ordonnance n° 2021–702 du 2 juin 2021 portant réforme de l'encadrement supérieur de la fonction publique de l'Etat*), JORF of 3 June 2021; www.legifrance.gouv.fr/jorf/id/JORFTEXT000043590607.

3 General Civil Service Code of 1 March 2022 (CGFP, *Code général de la fonction publique*); www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000044416551/2022-03-01.

4 DGAFP (2022a); also INSEE (2023).

5 INSEE (2022).

6 Chapus (2001), p. 8.

7 DGAFP (2022a), p. 75.

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It should be noted at this stage that administrative structures in France have largely taken over the functions that are performed by churches in some other European Union (EU) countries, particularly in the social and health sectors. This must be taken into account when comparing the figures.

In France, civil servants are classically divided into three categories, each with its own status, which differs in certain respects and gives structure to the statistics.

The State civil service, which groups together the employees of the State and its public establishments, not only the employees of the central administrations, but also those of the local State administrations located in the regions and departments, the so-called *services déconcentrés*; the State civil service employed 45% of public employees in 2020 (2.52 million). This includes around one million teachers, or 42% of the State civil service. On the other hand, employees working in central administration represent only 4% of the workforce.[8] The local civil service comprises the employees of local authorities (regions, *départements*, municipalities, and their public establishments). In 2020, it employed 34% of all public sector employees (1.93 million). With the exception of strictly medical staff (doctors, biologists, pharmacists, orthodontists), the public hospitals civil service includes employees of public health establishments (hospitals and residential centres for the elderly, disabled, children, etc.). It employs 21% of all public sector employees (1.21 million).

When considering public employment, a distinction must be made between, on the one hand, civil servants who are in a so-called "legal and regulatory" situation, i.e. their legal situation does not derive from a contract, but from acts unilaterally adopted by the legislator or the administration, whether in terms of their appointment or the conditions under which they carry out their duties, and, on the other hand, contract staff, who are employed on the basis of a contract that may be either a private law employment contract subject to the Labour Code, under the jurisdiction of labour courts, or a public law contract, under the jurisdiction of the administrative courts. The public or private nature of the contract binding an employee to the administration depends largely on the nature of the duties he or she performs, depending on whether they are administrative or industrial and commercial.[9]

The French civil service model, which is envisaged as a career civil service in which civil servants are expected to spend their entire professional career, was designed in such a way that all permanent civil service posts were filled by civil servants, with the result that for a long-time contract staff were considered to be no more than an adjustment variable to meet non-permanent needs. In this respect, the French civil service model differs from models in which the status of statutory civil servant is reserved for staff exercising functions of authority. In 2020, the number of contract staff amounted to 21% of all civil servants.[10] However, this figure is rising, and recent reforms, to which we will return later, tend to encourage greater use of contract staff. For example, the number of contract staff was only 17% in 2011.[11] Fifty-five per cent of contract staff are employed under a

8 DGAFP (2022a), p. 81.

9 Article L. 332–21 CGFP and Decree no. 2019–1414 on the recruitment procedure to fill permanent civil service jobs open to contract agents of 19 December 2019 (*Décret n° 2019–1414 relatif à la procédure de recrutement pour pourvoir les emplois permanents de la fonction publique ouverts aux agents contractuels*), JORF of 21 December 2019; www.legifrance.gouv.fr/loda/id/JORFTEXT000039654288.

10 DGAFP (2022a), p. 85.

11 DGAFP (2022a).

fixed-term contract, but the proportion of those with a permanent contract, reflecting the permanence of their duties, is far from negligible and even stands at 59% in the State civil service.[12]

In terms of hierarchy, civil servants are divided into three or even four categories. Category A civil servants occupy design, management, supervisory, or teaching posts. Category B civil servants occupy positions involving application and drafting, while category C civil servants are responsible for executive functions. Until 1992, there was a category D for the most menial functions, which has gradually been integrated into category C, both because of the ever-increasing technical nature of the professions and because of the constant movement to re-evaluate the careers of civil servants, which is also expressed in the regular reclassification between the other categories.[13] At the same time, it is common to distinguish within category A, a sub-category A+ which, although it does not have a legally defined existence in the Staff Regulation Statute of civil servants, groups together employees who perform higher management functions, expertise, control, inspection or teaching.[14] Category A+ accounts for 2% of civil servants, category A for 36%, category B for 17%, and category C for 45%.

In terms of gender distribution in the civil service, women account for 63% of public sector employees (excluding the military), compared with 46% of private sector employees, with significant variations depending on the type of activity. Women account for 78% of hospital civil servants, 57% of State civil servants and 61% of local civil servants. Between 2011 and 2020, their share rose by two points. Although they are still in the minority in the A+ category, where they make up only 43% of the workforce, they are catching up, since the proportion they represent has increased by five points over the same period.[15]

The average net monthly salary is 2,378 EUR, compared with 2,518 EUR in the private sector, with a more moderate increase: +2% compared with +3.2% between 2019 and 2020. That said, it appears that the remuneration offered within the civil service is higher than in the private sector for junior functions, while it is lower for senior functions. The salary scale is tighter in public employment,[16] with the net monthly salary of category C civil servants in 2019 amounting to 1,854 EUR, that of category B to 2,457 EUR, and that of category A to 2,958 EUR, a ratio of only 1 to 1.5. The lowest-paid 60% of civil servants earn more than in the private sector, while the highest-paid 1% earn 27.5% less than the same category in the private sector.[17] This flattening of the pay pyramid has been further accentuated recently by the implementation in 2016 of a protocol agreement on careers and pay (P.P.C.R.),[18] which merges grades for category C civil servants and transfers category B bodies to category A.

12 DGAFP (2022a), p. 87.

13 DGAFP (2022a), p. 88.

14 Order no. 2021–702 on the reform of the senior management of the civil service of 2 June 2021 (n. 2) gives a certain legal existence to the A+ category under the term “senior State management”. See, in particular, Section III.2.1 of this chapter.

15 DGAFP (2022a), p. 93.

16 DGAFP (2022a), p. 154.

17 Pény and Simonpoli (2022), pp. 13 f.

18 Article 148 of the Law no. 2015–1785 on the 2016 Budget of 29 December 2015 (*Loi n° 2015–1785 de finances pour 2016*), JORF of 30 December 2015; www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000031734652.

II. The Construction of the Sources and Regime of Civil Service Law in France

The French civil service developed gradually as the country's ministerial departments and administrative structures were established. Until the 18th century, the royal administration relied on officers and commissioners. The former were responsible for the day-to-day administration of the kingdom. They held their office, acquired from the king, and were therefore relatively independent and irremovable. For more specific tasks, the king appointed commissioners, whose term of office was limited and whose duties were specific, but who remained under his immediate authority and could therefore be dismissed. Officers and commissioners were assisted by clerks, who reported directly to them and whose numbers would grow as the number of functions taken on by the administration increased.

It was not until the 17th century that civil servants in the modern sense of the term appeared as bodies of agents recruited by competitive examination and entrusted with permanent, technical missions, unlike commissioners, who were placed directly under the hierarchical control of the royal authority, unlike officers.[19] The royal professors, responsible for teaching civil law, were created in 1679, the fortification engineers in 1690, whose function clearly reflected their military character, and the *Ponts et Chaussées* engineers in 1716. Their structure, inspired by military organisation, would be adopted when it came to organising the careers of the many clerks who, initially recruited directly by officers and commissioners, were responsible for the day-to-day running of the administrations, and whose numbers grew steadily.

Unlike Germany, which adopted a general statute for its civil service as early as 1873,[20] France had only piecemeal regulations, coordinated to some extent by case law in the form of general principles. It was not until 1941 and 1946 that a general statute for civil servants was adopted. It was extended, not without adaptation, to the local civil service in 1984 and has recently been codified.

1. *Before the Civil Service Statute*

Throughout the 19th century and the first half of the 20th century, although several attempts were made to adopt a General Statute,[21] they came up against a number of obstacles due to the differing views of governments and representatives of civil service organisations.[22] While the latter, wishing to extend to civil servants the social achievements of labour law, in particular the right to strike and collective bargaining, were opposed to a statute adopted unilaterally, the governments did not want to abandon the distinction between civil servants and employees under private law, which protected the State against the influence of trade unions on its employees.[23]

19 Sueur (1993), pp. 316 f.; also Burdeau (1994), pp. 20 f.

20 *Reichsbeamtengesetz* of 31 March 1873; www.deutsche-digitale-bibliothek.de/item/MM2XYITAD345XIGYDYYWQC2RCHZ7NHQ7.

21 On these projects from 1844 or 1873, see Lefas (1913), pp. 233 f. and the dossier in RFAP 1983, pp. 629 f.

22 Drago (1995), pp. 13 f.

23 Pochard (2021), pp. 119 f.

In the absence of a General Statute, special statutes were gradually adopted for each ministry and each *corps* of civil servants, in the greatest diversity.[24] The law of 23 October 1919[25] also required municipalities with more than 5,000 inhabitants to adopt a set of statutes applicable to their civil servants, organising recruitment, promotion, and discipline, in particular by setting up a disciplinary committee. This obligation was extended to all municipalities by the law of 12 March 1930.[26]

The existence of these special statutes was a further obstacle to the adoption of a General Statute, since ministerial departments were not in favour of adopting such a General Statute that would interfere with their freedom to organise their services, while organisations of civil servants did not always wish to call into question the achievements they had reached in particular departments. However, these special statutes were gradually being brought closer together, either through the application of general texts that clarified certain points of the civil servants' regime (Subsection 1.1), or through case law (Subsection 1.2).

1.1. Texts of General Application

The special statutes were based on common principles, derived in particular from the Law of 19 May 1834 on the status of officers.[27] This text establishes the principle of the distinction between rank (*grade*) and employment (*emploi*), thus clarifying Article 69 of the Constitutional Charter of 1830, which stated: "The following will be provided for successively by separate laws and as quickly as possible: (. . .) 6° Provisions that legally guarantee the status of officers of all ranks on land and at sea." Officers thus held their rank, which could not be arbitrarily taken away from them once it had been granted, while the employment of each officer remained at the discretion of the administration; the same applied to civil servants.

In addition to these founding principles, a number of texts, although adopted without a general plan, imposed common rules in a wide variety of areas. For example, procedural guarantees were introduced for the careers of public servants by several acts, such as the

24 See for example, Decree containing public administration regulations for the organisation of the departments of the Ministry of Justice of 30 December 1884, supplemented by decree of 1 February 1885 containing internal regulations for the Ministry of Justice (*Décret du 30 décembre 1884 portant règlement d'administration publique pour l'organisation des services du ministère de la justice, complété par un arrêté du 1er février 1885 portant règlement intérieur du ministère de la justice*), *Ministère de la justice, Imprimerie nationale*, 1885; https://gallica.bnf.fr/ark:/12148/bpt6k5823637h.texteImage; or the Decree containing public administration regulations on the central organisation of the Ministry of Finance of 19 January 1885 (*Décret du 19 janvier 1885 portant règlement d'administration publique sur l'organisation centrale du ministère des finances*), Journal official of 14 February 1885, p. 822; https://gallica.bnf.fr/ark:/12148/bpt6k2013048d/f14.item.

25 Law supplementing Article 88 of the law of 5 April 1884 in order to provide municipal employees with guarantees of stability of 23 October 1919 (*Loi complétant l'art. 88 de la loi du 5 avril 1884 en vue de donner aux employés communaux des garanties de stabilité*), JORF of 26 October 1919, pp. 11910 f.

26 Law amending Article 88 of the municipal act of 5 April 1884 in order to provide municipal officials, employees and workers with guarantees of stability of 12 March 1930 (*Loi modifiant l'art. 88 de la loi municipale du 5 avril 1884 en vue de donner aux fonctionnaires, employés et ouvriers communaux des garanties de stabilité*), JORF of 17 March 1930, pp. 2923 f.; https://gallica.bnf.fr/ark:/12148/bpt6k2028831q/f3.item.

27 Duvergier (1834), pp. 91 f.; https://gallica.bnf.fr/ark:/12148/bpt6k6383988h/f2.image.

Law of 30 August 1883 on the reform of the organisation of the judiciary (Article 15) for magistrates,[28] the Law of 27 February 1880 establishing the disciplinary system for secondary schoolteachers,[29] supplemented by the Law of 30 October 1886 for primary schoolteachers (Article 26(f)),[30] which, in addition to the involvement of the academic councils, provided for the communication of the case file in the event of dismissal, or the Law of 10 July 1896 for higher education teachers,[31] Article 3 of which entrusts the university council with the adjudication of contentious and disciplinary cases relating to public higher education.

Article 65 of the Law of 22 April 1905[32] laid down the principle that all civil and military servants must be given access to their files before any disciplinary measure, compulsory removal, or delay in promotion on the basis of seniority, after the scandal of the "files affair" (*affaire des fiches*), caused by the creation by the Minister of War, General Louis André, with the help of the Masonic networks of the Grand Orient de France, of files of officers, distinguished according to their religious practices. Anti-clerical officers were promoted, while Catholic officers saw their careers blocked.[33]

Mention should also be made of the Law of 9 June 1853 on civil pensions,[34] which extended to civil servants the right to a retirement pension previously reserved for military personnel, in order, as the explanatory memorandum explains, to strengthen the commitment of civil servants and retain high-quality staff despite low salaries. Similarly, the Law of 27 February 1912[35] extended to all civil servants in central government the promotion table mechanism for promotion by choice, while the so-called Roustan Law of 30 December 1921 laid down rules of general application for bringing together civil servant spouses.[36]

28 Law on the reform of the organisation of the judiciary of 30 August 1883 (*Loi du 30 août 1883 sur la réforme de l'organisation judiciaire*), JORF of 31 August 1883, pp. 4569 f.; https://gallica.bnf.fr/ark:/12148/bpt6k20125230/f1.item.

29 Law on the Higher Council for Public Education and Academic Councils of 27 February 1880 (*Loi relative au conseil supérieur de l'instruction publique et aux conseils académiques*), JORF of 28 February 1880, pp. 2305 f.; https://gallica.bnf.fr/ark:/12148/bpt6k2096370d.

30 Law on the organisation of primary education of 30 October 1886 (*Loi portant sur l'organisation de l'enseignement primaire*), JORF of 31 October 1886, pp. 4997 f.; https://gallica.bnf.fr/ark:/12148/bpt6k2013657f/f1.item.

31 Law on the establishment of universities of 10 July 1896 (*Loi relative à la constitution des universités*), JORF of 11 July 1896, p. 3957; https://gallica.bnf.fr/ark:/12148/bpt6k6233900j.

32 Law setting the expenditure and revenue budget for the 1905 financial year of 22 April 1905 (*Loi portant fixation du budget des dépenses et des recettes de l'exercice 1905*), JORF of 23 April 1905, p. 2573; https://gallica.bnf.fr/ark:/12148/bpt6k20202382.

33 Vindé (1989).

34 Duvergier (1834), p. 192.

35 Article 34 of the Law to fix the general expenditure and revenue budget for the financial year 1912 of 28 February 1912 (*Loi portant fixation du budget général des dépenses et des recettes de l'exercice 1912*), JORF of 28 February 1912, p. 1849; https://gallica.bnf.fr/ark:/12148/bpt6k20226790/f2.item.

36 Law bringing together civil servants from outside the (ministerial) department who are married either to civil servants from the department or to persons who have taken up residence there of 30 December 1921 (*Loi rapprochant les fonctionnaires qui, étrangers au département (ministériel), sont unis par le mariage, soit à des fonctionnaires du département, soit à des personnes qui y ont fixé leur résidence*), JORF of 31 December 1921, p. 14270; https://gallica.bnf.fr/ark:/12148/bpt6k2026186n/f2.item.

1.2. The Role of Administrative Case Law

When civil servants and their organisations[37] were given the possibility of legal recourse before the administrative courts, in matters of legality, thanks to the extension of the *recours pour excès de pouvoir* at the beginning of the 20th century,[38] as well as in matters of liability,[39] the *Conseil d'Etat* developed a body of case law laying down general principles applicable to the most diverse situations, thus constituting a general body of case law which subsequent texts would largely adopt.[40]

2. Adoption of the 1946 Civil Service Statute

It was at the Liberation in 1946 that a General Statute applicable to all civil servants was adopted. This was the culmination of a long-standing effort to unify the civil service, which had first been achieved in 1941 during the Occupation, but which had not been implemented due to the circumstances of the time.

2.1. The First Attempts to Adopt a General Civil Service Statute

In 1939, at the very end of the Third Republic, a new draft of the Civil Service Statute was drawn up by an administrative reform committee[41] set up under the President of the Council of Ministers.[42] The Second World War, which began at the same time, temporarily halted the adoption process. In fact, a Decree of 18 November 1939 removed all disciplinary guarantees for civil servants for the duration of the war,[43] while under the Occupation, the Law of 17 July 1940 allowed public service employees to be relieved of their duties and to carry out severe purges.[44] However, the project to adopt a General Civil Service Statute was resumed in March 1941.[45] The *Conseil d'Etat* was tasked with drawing up a draft, largely based on the draft drawn up by the administrative reform committee in 1939, before discussing it with the ministries. The Civil Service Statute was finally published in the form of three Laws of 14 September 1941.[46] It largely stabilised

37 *Conseil d'État*, 11 December 1903, *Lot*, Rec. p. 780, Recueil Sirey 1904, 3, p. 113, note by M. Hauriou.

38 *Conseil d'État*, 26 December 1925, *Rodière*, Rec. p. 1065, Recueil Sirey 1925, 3, p. 49, note by M. Hauriou.

39 *Conseil d'État*, 29 May 1903, *Le Berre*, Rec. p. 414, Recueil Sirey 1904, 3, p. 121 s. concl. G. Teissier, note by M. Hauriou.

40 Kessler (1980), pp. 147 f. and Querrien (1952), pp. 311 f.

41 Known as the "axe committee" (*comité de la hache*) because its aim was to make public administration more efficient by cutting unnecessary expenditure in order to limit the public deficit.

42 Thullier (1979b), pp. 480 f.

43 Decree on measures to be taken against individuals dangerous to national defence or public safety of 18 November 1939 (*Décret-loi relative aux measures à prendre à l'égard des individus dangereux pour la défense nationale ou la sécurité publique*), JORF of 19 November 1939, p. 13218; https://gallica.bnf.fr/ark:/12148/bpt6k20318112/f2.item.

44 Law concerning access to jobs in public administrations of 17 July 1940 (*Acte dit loi concernant l'accès aux emplois dans les administrations publiques*), JORF 18 July 1940, p. 4537; https://gallica.bnf.fr/ark:/12148/bpt6k2032027g#.

45 Thuillier (1979b), pp. 480 f.

46 These three texts, published with a report by Admiral Darlan, Vice-Président of the Council of Ministers, in the *Journal official de l'Etat français* of 1 October 1941, p. 4210 f. are (1) the Law relating to the general status of civil servants in the State and State public establishments (*Acte dit loi portant statut général des fonctionnaires civils de l'Etat et des établissements publics de l'Etat*); (2) the Law relating to the organisation of executives in the public services and State public establishments (*Acte dit loi relative à l'organisation des cadres du services publics et des établissements publics de l'Etat*) and (3) the Law extending Article 22 and title VIII of the Law of 14 September 1941 to civil servants in local authorities and to agents and workers in public administrations (*Acte dit loi portant extension de l'article 22 et du titre VIII de la loi du 14 septembre 1941 aux fonctionnaires des collectivités locales et aux agents et ouvriers des administrations publiques*); https://gallica.bnf.fr/ark:/12148/bpt6k2032465j/f2.item.

the solutions previously established by case law and unified the diversity of special statutes in a single text. Most notably, it authorised the formation of associations of civil servants, which had previously only been tolerated, as case law had already granted them the right to take legal action.

Above all, the 1941 Law adopts a solution that was subsequently rejected, even though it is frequently adopted abroad and remains the reference model for certain current trends, which consists of reserving the status of civil servant "to those occupying permanent posts corresponding to the specific purpose of the public service, to the exclusion of those whose jobs are similar to private sector jobs".[47] Thus, Article 1 of the Law of 14 September 1941 relating to the organisation of the staff of the public services and public establishments of the State affirms that "all jobs which do not correspond to the specific purpose of the public service and all those which, by their nature, are similar to private jobs are occupied by employees. Other jobs are filled by civil servants." This solution was extended to municipal staff by the Law of 9 September 1943 relating to the organisation of the staff of the public services and public establishments of the municipality.[48]

Although it never came into force and was expressly abolished by the Order of 9 August 1944 relating to the re-establishment of republican legality in mainland France,[49] this first Statute prevented any future return to the previous solution of having different statutes for each department. It also provided for some of the structures that would be adopted after the war, in particular, the interministerial recruitment of central administration executives, the creation of a steering structure under the Presidency of the Council, and a common training school in the form of an Institute of Advanced Administrative Studies. The text also included provisions imposing a strict separation between the civil service and the private sector to remedy the difficulties experienced before the war: *pantouflage* (Article 8), conflicts of interest (Article 9 and 20). It therefore fell to the Provisional Government of the French Republic in 1945 and the Constituent Assembly in 1946 to take up the project of a general status for civil servants.

2.2. *The 1946 Compromise*

Even before the 1946 Statute was adopted, the Provisional Government led by General de Gaulle adopted measures to reorganise the senior civil service. The principles were the same as those formulated in the 1939 project and taken up by the 1941 Statute. Order no. 45–2283 of 9 October 1945 on the training, recruitment and status of certain categories of civil servants and establishing a civil service directorate and a permanent civil service council[50] introduced centralised recruitment for senior civil servants in cen-

47 Report by Admiral Darlan, Vice-President of the Council of Ministers, JOEF of 1 October 1941, p. 4210; https://gallica.bnf.fr/ark:/12148/bpt6k2032465j/f2.item.

48 Law relating to the organisation of the staff of the public services and public establishments of the State of 9 September 1943 (*Acte dit loi relative à l'organisation des cadres des services publics et des établissements publics de la commune*), JOEF of 13 and 14 September 1943, p. 2414; https://gallica.bnf.fr/ark:/12148/bpt6k20330805/f2.item.

49 Order relating to the re-establishment of republican legality in mainland France of 9 August 1944 (*Ordonnance relative au rétablissement de la légalité républicaine sur le territoire continental*), JORF of 10 August 1944, p. 688; https://gallica.bnf.fr/ark:/12148/bpt6k9615408s/f4.item.texteImage.

50 Order on the training, recruitment and status of certain categories of civil servants and establishing a civil service directorate and a permanent civil service council of 9 October 1945 (*Ordonnance n° 45–2283 relative à la formation, au recrutement et au statut de certaines catégories de fonctionnaires et instituant une direction de la fonction publique et un conseil permanent de l'administration civile*), JORF of 10 October 1945, p. 6378; https://gallica.bnf.fr/ark:/12148/bpt6k2033707f/f6.item.

tral government departments, a common training programme in the form of the *École nationale d'administration* (ENA),[51] and interministerial management entrusted to the *Direction générale de l'administration et de la fonction publique* (DGAFP). It also replaces the employment statutes for senior civil servants with a genuine inter-ministerial body, that of civil administrators, to ensure that appointments are not made for career development purposes.

However, it was up to the government that emerged from the elections of 21 October 1945 to replace the first Statute of 1941 with a new General Statute for civil servants. The coalition in power at the time, made up of Communists, Socialists, and Christian Democrats, reached a "compromise" in which the idea of a statute was taken up again, to the detriment of the application of labour law, which had long been favoured by the civil servants' organisations, but in a way that made ample room for social rights, particularly participation rights.[52] The text, prepared by the team of Communist minister Maurice Thorez, General Secretary of the Communist Party, was promulgated on 19 October 1946.[53] It was intended to apply to all civil servants in permanent employment in the State administration and therefore rejected the distinction between civil servants and employees made in the 1941 Statute. On the other hand, with the 1946 text, effort was made to codify the principles previously developed by the case law. The legal and regulatory status of civil servants, although already recognised, was now clearly established in Article 1 of the Statute. In 1909, the *Conseil d'Etat* had attempted to qualify the relationship between civil servants and the administration as a public law contract,[54] but this idea was immediately criticised by legal writers[55] and was expressly abandoned by the courts in 1937.[56]

Above all, the 1946 Statute extended to civil servants the social principles that would be enshrined a few days after their promulgation in the preamble to the constitution of 27 October 1946, as "particularly necessary for our times". Civil servants were granted freedom of association[57] (Article 6 of the Statute) and joint structures were established: joint technical committees were responsible for decisions concerning civil servants personally, while joint technical committees were responsible for matters concerning the organisation or operation of the administration or service (Article 20 of the Statute), thus implementing the principle of participation.[58]

The question of the right to strike is not mentioned in the statute itself, but the case law, relying precisely on the preamble to the constitution of 27 October 1946,[59] will ensure

51 Kesler (1977), pp. 354 f.; Thuillier (1977) pp. 236 f.; Thuillier (1979a), pp. 16 f.; Thuillier (1992), pp. 113 f.

52 Chevallier (1996), pp. 7 f.

53 Law on the general status of civil servants of 19 October 1946 (*Loi n° 46–2294 relative au statut général des fonctionnaires*), JORF of 20 October 1946, p. 8910; https://gallica.bnf.fr/ark:/12148/bpt6k96177716/f2.item.

54 *Conseil d'État*, 7 August 1909, *Winkell*, Rec. p. 826 and concl. Tardieu, p. 1296.

55 Jèze (1938), p. 121.

56 *Conseil d'État*, 22 October 1937, *Demoiselle Minaire et autres. Leb.* 1937, p. 843, concl. Lagrange.

57 Paragraph 6 of the constitution of 27 October 1946: "Everyone is entitled to defend their rights and interests through trade union action and to join the trade union of their choice."

58 Paragraph 8 of the constitution of 27 October 1946: "All workers participate, through their delegates, in the collective determination of working conditions and in the management of undertakings."

59 Paragraph 7: "The right to strike shall be exercised within the framework of the laws which regulate it."

that public employees benefit from this right.[60] Although the Statute of 19 October 1946[61] was silent, the right to strike, which is constitutionally guaranteed, was considered by the case law as also benefiting public employees. This represented a complete reversal of the previous case law, which had prohibited civil servants from striking, on pain of a penalty that could be imposed outside any disciplinary procedure,[62] a prohibition expressly taken up by the 1941 Statute.[63]

However, the case law recognises that the administrative authority may restrict the right of public employees to strike in order to protect "the needs of public order", in particular the continuity of public services, which also has constitutional status,[64] or to take account of the need to meet the "essential needs of the country".[65] The right to strike is thus prohibited by law for certain categories of public employees: e.g. police, prison staff, magistrates, Ministry of the Interior transmission services, military personnel, and so on. These legislative prohibitions may be supplemented by the administrative authority at ministerial level or by each head of department, under the supervision of the administrative court: e.g. air traffic controllers, level crossing guards, certain prefecture staff, and so on.

In addition to these prohibitions, both the legislator and the administrative authorities may regulate the exercise of the right to strike, for example by imposing notice periods and obligations to negotiate in advance, or by prohibiting certain types of strike, such as rotating strikes or surprise strikes.[66] It is also within this framework that the authorities may requisition certain employees to provide a minimum service, where this appears necessary to preserve public order or meet the essential needs of the nation.

It remains certain that in this eminently political area, the law cannot do everything, and many practices must be resolved through negotiation.

In 1946, the extension to public employees of the principles that had emerged in the private sector as a result of trade union struggles represented a veritable upheaval in civil service law.[67]

60 *Conseil d'État*, *assemblée du contentieux*, 7 July 1950, *Dehaene*, Recueil p. 426.

61 The 1959 statute remained silent, while the law of 13 July 1983 merely reproduced the constitutional provisions. There is now a chapter devoted to the right to strike in the new General Civil Service Code (Articles L. 114–1 f.).

62 *Conseil d'État*, 7 August 1909, *Winkell*, Rec. p. 826 and concl. Tardieu, p. 1296.

63 See Article 17.

64 French Constitutional Council, no. 79–105 DC, 25 July 1979, *Loi modifiant les dispositions de la loi n° 74–696 du 7 août 1974 relatives à la continuité du service public de la radio et de la télévision en cas de cessation concertée du travail*; www.legifrance.gouv.fr/cons/id/CONSTEXT000017665765.

65 *Conseil d'État*, 12 April 2013, *Fédération Force Ouvrière Energie et Mines*, no. 329.570, RFDA 2013, p. 637, concl. Aladjidi, chr. A. Roblot-Troizier.

66 See e.g. Article 57 of the Law on Freedom of Communication of 30 September 1986, concerning the right to strike on radio and television (*Loi n° 86–1067 relative à la liberté de communication*), JORF of 1 October 1986; www.legifrance.gouv.fr/jorf/id/JORFTEXT000000512205; or the Law on social dialogue and the continuity of the public service in regular passenger land transport of 21 August 2007 (*Loi n° 2007–1224 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs*), JORF of 22 August 2007; www.legifrance.gouv.fr/loda/id/JORFTEXT000000428994, recently extended by the Civil Service Transformation Law of 6 August 2019 (n. 1), which allows local authorities to introduce a minimum service in certain areas such as public transport, rubbish collection, childcare, and catering.

67 Rivero (1947), p. 149 f.

The 1946 Civil Service Statute was subsequently amended slightly in 1959[68] to take account of the new division of powers introduced by the constitution of 4 October 1958 between the legislative authority, which retained sole responsibility for setting "rules concerning the fundamental guarantees granted to civil servants", and the regulatory authority. However, the 1959 regulations did not call into question the options adopted in 1946.

2.3. Extension of the General Civil Service Statute to the Local Civil Service

Following the election of socialist François Mitterrand as President of the Republic on 10 May 1981, a major decentralisation policy was implemented.[69] In order to enable local and regional authorities to exercise the new powers granted to them in the best possible conditions, it was felt that the local civil service needed to be reformed to make it more attractive, and it was envisaged that this could be achieved by offering local and regional authority employees broader career prospects and by regulating recruitment conditions. The principles adopted since the 1946 General Statute, which still only apply to the State civil service, are thus extended to the civil servants of local authorities and their public establishments.

The core of the reform was the adoption of the Law of 26 January 1984 on the local civil service,[70] which extended to the local civil service the principles laid down by the 1946 State Civil Service Statute, adapting them to take account of the constitutional autonomy of local authorities.[71] This was followed by the Law of 9 January 1986 on the hospital civil service, which took account of the specific features of the healthcare professions.[72]

At the same time, the 1959 status of State civil servants was replaced by a law bringing together the general principles applicable to the three types of civil service: Law no. 83–634 of 13 July 1983 on the rights and obligations of civil servants and by the Law of 11 January 1984 on the State civil service, which incorporated and modernised the main provisions of the previous status.[73]

The four statutory laws in force since 1983–1986 have been codified, in accordance with the law as it stands, in order to improve the readability of the texts, which may have been affected by successive reforms since their adoption. Planned on several occasions since the end of the 1990s,[74] this codification work was effectively completed with the adoption of Order no. 2021–1574 of 24 November 2021 on the legislative part of the General Civil

68 Order on the general status of civil servants of 4 February 1959 (*Ordonnance n° 59–244 relative au statut général des fonctionnaires*), JORF of 8 February 1959; www.legifrance.gouv.fr/jorf/id/JORFTEXT000000875201.

69 In particular, Law on the rights and freedoms of municipalities, departments and regions of 2 March 1982 (*Loi n° 82–213 relative aux droits et libertés des communes, des départements et des régions*), JORF of 3 March 1982; www.legifrance.gouv.fr/loda/id/JORFTEXT000000880039.

70 Law on statutory provisions relating to the local civil service of 26 January 1984 (*Loi n° 84–53 portant dispositions statutaires relatives à la fonction publique territoriale*), JORF of 27 January 1984; www.legifrance.gouv.fr/loda/id/JORFTEXT000000320434.

71 Articles 72 f. of the constitution of 4 October 1958.

72 Law on statutory provisions relating to the hospital civil service of 9 January 1986 (*Loi n° 86–33 portant dispositions statutaires relatives à la fonction publique hospitalière*), JORF of 11 January 1986; www.legifrance.gouv.fr/loda/id/JORFTEXT000000512459.

73 Law on statutory provisions relating to the State civil service of 11 January 1984 (*Loi n° 84–16 portant dispositions statutaires relatives à la fonction publique de l'Etat*), JORF of 12 January 1984; www.legifrance.gouv.fr/loda/id/JORFTEXT000000501099.

74 Melleray (2019a), pp. 309 f.

Service Code (CGFP), which came into force on 1 March 2022.[75] The regulatory part is not expected before the end of 2025. The Code extends the presentation adopted in 1983 of the cross-cutting nature of the sources of civil service law, but takes it a step further still, by adopting a thematic organisation for the Code as a whole that no longer places the three levels of the civil service in the foreground: state, territorial, and hospital.

From a socio-economic point of view, the implementation of the General Civil Service Statute has led to the civil service becoming a showcase for the government's social policy in favour of workers. As a result, the general trend has been towards a pay policy that favours the lower echelons of the civil service, and hence a gradual flattening of the hierarchy to the detriment of the senior civil service,[76] leading to a decline in the attractiveness of civil service competitive examinations.[77] The need to renew the organisation of the civil service will thus lead to the gradual emergence of greater recourse to contract staff, in an attempt to encourage more flexible management of civil servants, thereby calling into question the global application of the Statute to all civil servants.

III. Changes in the French Concept of the Civil Service

The French civil service model, as set out in the 1946 Civil Service Statute, sees the civil service as essentially distinct from the private employment sector. Designed to govern the recruitment and employment of civil servants who must devote their entire careers to serving the public interest, in accordance with the career civil service system, the statute is based on the stability of public employment and consequently offers civil servants full career development prospects.[78] Civil servants are recruited into a civil service body following a competitive examination that ensures equal access to public service as guaranteed by Article 6 of the Declaration of the Rights of Man and of the Citizen, which retains constitutional value.[79]

This model of a closed civil service, which of course has always had its moments, is now moving towards a more open model, also promoted by the need to encourage the mobility of European nationals,[80] and is gradually moving towards greater openness to the private employment sector, coming closer in some respects to an employment-based civil service model (Subsection 1). At the same time, within the Civil Service Statute itself, there has been a trend towards greater mobility of civil servants between the various jobs available to them, and a change in the conditions of participation of civil servants in the management

75 Salins et al. (2022), pp. 287 f. and Clouzot (2022), pp. 9 f.

76 Rouban (2009), p. 681.

77 DGAFP (2022a), p. 109.

78 Melleray (2019b), p. 2372, who quotes Grégoire (1954) pp. 24–25, the first director of the civil service: "We refuse to 'think' the State service using the categories valid for other professions; civil servants must, in our view, have a different training and state of mind from those required of other workers. Specially adapted to their mission, they should normally devote their entire lives to it; in return, they should be guaranteed stability and a career."

79 "All citizens are equal (in the eyes of the law) and are equally eligible for all public dignities, positions and jobs, according to their ability, and without any distinction other than that of their virtues and talents."

80 See the Law containing various measures transposing Community law to the civil service of 26 July 2005 (*Loi n° 2005–843 portant diverses mesures de transposition du droit communautaire à la fonction publique*), JORF of 27 July 2005; www.legifrance.gouv.fr/jorf/id/JORFTEXT000000265767, see also Lemoyne de Forges (2005), pp. 2285 f. and Pochard (2003), pp. 1906 f.

of the civil service, which has been one of the distinctive features of the Civil Service Statute since 1946 (Subsection 2).

The Law of 6 August 2019 on the transformation of the civil service,[81] the latest in a long series of texts accompanying changes in the way the civil service operates,[82] continues this dual movement. Adopted as part of a policy to transform – the term undoubtedly signifies a desire to go further than mere reform – the public action presented on 13 October 2017 by the Prime Minister, at the start of President Emmanuel Macron's first five-year term, under the title "Public Action 2022" – with the threefold objective of improving the quality of public services by stepping up the digitisation of administrative procedures; of modernising the framework of the civil service; and of reducing public spending[83] – the law finds its source in the preliminary report drawn up by the Public Action 2022 Committee (or CAP 22) comprising some 40 members, encompassing economists, personalities from the public and private sectors, and elected representatives, set up within this framework.[84]

1. Increased Openness of the Civil Service to the Private Employment Sector

The most recent developments seem to be increasing the use of contract agents, thereby encouraging greater fluidity between public and private employment (Subsection 1.1). Do these developments go so far as to call into question the career system? (Subsection 1.2) In any case, such a blurring of boundaries does not occur without strengthening the mechanisms designed to protect the ethics of the civil service and to combat conflicts of interest (Subsection 1.3).

1.1. Use of Contract Agents

There have always been exceptions to the strict separation between the civil service and the private employment sector that the career civil service system implies in principle. On the one hand, competitive recruitment of civil servants, while mainly aimed at young candidates at the start of their careers, through "external" competitive examinations, which are the first means of access to the civil service,[85] also makes it possible to recruit employees who have spent part of their working life in the private sector. The "external" competitive examinations are not closed to them, and specific "third" competitive examinations have often been organised to encourage such professional profiles to enter the civil service. For example, the *Institut national du service public* (INSP, previously *École nationale d'administration*) organises a third competition alongside the external competition, aimed mainly at young candidates, and the internal competition, aimed at civil servants. This third competition is open to people working in the private sector, those involved in voluntary

81 Law on the transformation of the civil service of 6 August 2019 (n. 1). See the dossier 'Les transformations de la fonction publique', *Revue Droit social*, March 2020, pp. 196 f. and the dossier 'L'avenir incertain de la fonction publique', *L'Actualité juridique. Droit administrative*, 2019, pp. 2342 f. See the Explanatory memorandum, *Assemblée Nationale*, 15th legislature, Document no. 1802 and the Opinion of the *Conseil dÉtat*, no. 397088 of 29 March 2019 on the Law on the transformation of the civil service.

82 See Melleray (2019b), p. 2372.

83 See www.gouvernement.fr/action/action-publique-2022-pour-une-transformation-du-service-public.

84 Bedague-Hamilius et al. (2018). For another report already advocating a break with the career civil service system, Silicani (2008).

85 In 2020, 91% of all vacancies in the civil service were filled in this way, see DGAFP (2022a), p. 109.

work, and local elected representatives, who can show proof of eight years of professional experience, without the necessity of having a diploma. Competitive examinations of this kind exist for access to a very large number of bodies, whatever their hierarchical rank.

Furthermore, while the principle remains that only civil servants may fill permanent public-sector posts, the possibility of using contract staff for certain types of posts has always been open. Contract staff are not integrated into a body of civil servants within which they would be expected to develop their careers. On the contrary, their relationship with the government is based on the contract that binds them to it, and the duration of the relationship is fixed by the contract. While some of these contracts are open-ended, the majority are fixed-term, meaning that the people who hold them are expected to continue their careers in the private sector.

Lastly, the *disponibilité* scheme,[86] which allows civil servants to be released from their duties for a certain period of time while retaining their civil service grade, thus enabling them to be reinstated at the end of this period in a job equivalent to the one they held, is designed to enable civil servants to hold positions in the private sector, or even in politics, and helps to enrich careers without calling into question the principle of a career civil service.

However, a trend seems to be emerging in favour of a strengthening of these restrictions, in a direction that could, in time, call into question the principle of a career civil service in favour of an employment-based civil service, particularly through the increased use of contractual civil servants.

The career system was generalised in 1946, establishing the principle that all permanent posts should be filled by civil servants. This was a significant development, given that in 1946, contract employees accounted for around 40% of civil servants.[87] The Law of 13 July 1983, adopted by a majority sharing the political preferences of 1946, clearly aimed to restore the monopoly of civil servants to occupy permanent civil service posts, whereas the previous period had led to the development of the role of contract staff.[88] While it reaffirms the principle that jobs meeting permanent requirements are, in principle, entrusted to civil servants,[89] the text does allow for the possibility of using contract agents in certain cases, which are listed exhaustively. For example, in the case of the State civil service, contract agents may be appointed to senior posts whose appointment is left to the decision of the government.[90] The list is set out in a decree by the *Conseil d'Etat* (directors general and directors of central administration, prefects, ambassadors, and certain consuls general in particular).[91] They are then incorporated into a set of employment regulations that determine who can access the posts in question, under what conditions and with what

86 Article L. 514–1 ff. CGFP.

87 Rouban (2009), p. 682.

88 See Derboulles (2023), p. 376, who refers to a proportion of contract staff ranging from one-fifth to one-third of total State staff and from one-third of local authority staff for communes to one-half for *départements*.

89 Article L. 311–1 CGFP: "Unless otherwise stipulated in this book, permanent civilian posts in the State, regions, *départements*, communes, and their public administrative establishments are filled either by civil servants governed by this code, or by civil servants in parliamentary assemblies, judges or military personnel under the conditions stipulated by their status."

90 Article 3 of the Law on statutory provisions relating to the State civil service of 11 January 1984 (n. 73).

91 Decree implementing Article 25 of Law no. 84–16 of 11 January 1984 setting out the senior posts for which appointments are left to the decision of the Government of 24 July 1985 (*Décret n°85–779 portant application de l'article 25 de la loi n° 84–16 du 11 janvier 1984 fixant les emplois supérieurs pour lesquels la nomination est laissée à la décision du Gouvernement*), JORF of 27 July 1985; www.legifrance.gouv.fr/loda/id/JORFTEXT000000886985/; see Article L. 341–1 ff. CGFP.

remuneration. This derogation is justified by the political nature of these senior posts and the necessary proximity to the government to ensure the proper transmission of the political impetus that the administration is responsible for implementing.

Contract staff may also be appointed to certain posts in certain public establishments because of the special nature of their tasks.[92] Similarly, by way of derogation, contract staff could be recruited for permanent posts where this was justified by "the nature of the duties or the needs of the service", for example in cases where "there is no body of civil servants capable of carrying out these duties or where the duties are newly taken on by the administration or require highly specialised technical knowledge".[93] Lastly, contract staff could be recruited to fill permanent positions requiring incomplete service or to meet seasonal or occasional requirements,[94] and to ensure that their numbers do not increase, specific mechanisms have been set up to integrate them into the statutory civil service, as part of the policy of "eliminating precarious employment".

While the Law of 6 August 2019 does not call into question the principle of the primacy of civil servants to fill permanent civil service posts, it does extend and perpetuate the use of contract agents.

On the one hand, it extends the cases in which contract agents may be used.[95] All public establishments of the State may now employ contract staff, without limitation.[96] Similarly, with regard to the use of contract agents justified by "the nature of the duties and the needs of the service", the 2019 Law reverses the restriction on the use of contract agents to fill permanent posts to category A agents, introduced in 1987.[97] Instead, it reverts to the previous Civil Service Statute of the 1984 Law and opens it up to all categories, while a new possibility is opened up when the job does not require statutory training leading to tenure in a body of civil servants, which opens up very broad possibilities.[98]

The Law of 6 August 2019 also introduces the possibility of recruiting contract staff for a specific project or operation. These "project contracts"[99] implement an innovation in the Labour Code, introduced by one of the so-called Macron ordinances, designed to make open-ended employment contracts more flexible by making it possible to hire an employee for a fixed term when the aim is to respond to a specific project.[100]

Above all, in addition to political posts decided by the government, the 2019 Law extends the possibility of using contract agents to all management posts. In addition to directors-general and directors, who were already affected because of their "political" nature, it is now the case that the jobs of head of department or deputy director of central administration, deputy director of a hospital, director-general of services (DGS) of municipalities with more than 40,000 inhabitants, and so on, may be entrusted to contract

92 Article 3 of the Law on statutory provisions relating to the State civil service of 11 January 1984 (n. 73).

93 Articles 5 and 6 of the Law on statutory provisions relating to the State civil service of 11 January 1984 (n. 73), now Article L. 332–2 CGFP.

94 Article 6 of the Law on statutory provisions relating to the State civil service of 11 January 1984 (n. 73), a provision included in Article L. 332–22 CGFP.

95 Aubin (2019), pp. 2349 f.

96 Article L. 332–1 CGFP.

97 Article 76 of the Law on various social measures of 30 July 1987 (*Loi n° 87–588 portant diverses mesures d'ordre social*), JORF of 31 July 1987; www.legifrance.gouv.fr/loda/id/LEGISCTA000006101441.

98 Article L. 332–2 CGFP.

99 Article L. 332–24 CGFP.

100 Sweeney (2020), pp. 202 f.

staff[101] (Article L. 342–1 ff. CGFP). In total, almost 5,700 jobs could be filled by non-civil servants.[102] These contract staff are in no way intended to be integrated into the civil service, since their contracts cannot be transformed into open-ended contracts, nor can they be given permanent status.[103] But the Law of 6 August 2019 makes contractual employment in the civil service more permanent, since a large proportion of these contracts can now be concluded from the outset for an indefinite period.[104]

Such an extension of the use of contract agents to fill permanent civil service posts was made possible by the Constitutional Council's interpretation of the relevant constitutional provisions. During its preliminary examination of the constitutionality of the Law of 6 August 2019, the Council ruled[105] that the principle of equal access to public employment, guaranteed by Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789, "does not prevent the legislature from providing that persons who are not civil servants may be appointed to posts that are in principle occupied by civil servants" and that "there is no constitutional requirement that all posts involved in the exercise of 'sovereign functions' must be occupied by civil servants". This solution thus departs from the principle contained in Article 33, paragraph 4 of the German Basic Law, according to which "the exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law".

1.2. A Rethink of the Career System?

The entry into force of these new provisions could be seen as a further step towards the deconstruction of the career civil service system towards the employment system[106] and, in fact, although the number of contractual staff in France remains well below that in other European Union countries,[107] it has increased significantly in recent years, in contrast to what had been going on since 1946. From 17% in 2011, it will rise to 21% in 2021.[108] In 2021, while the number of civil servants will fall by 0.5%, the number of contract staff will rise by 2.8%.[109] Between 2010 and 2017, the number of contract staff, expressed in full-time equivalent (FTE) terms, grew faster (15.8%) than that of all public sector staff (5.9%).

101 Decree relating to senior posts in the State of 31 December 2019 (*Décret n° 2019–1594 relatif aux emplois de direction de l'État*), JORF of 1 January 2020; www.legifrance.gouv.fr/loda/id/JORFTEXT000039727701; Decree relating to direct recruitment to senior posts in the local civil service of 13 March 2020 (*Décret n° 2020–257 relatif au recrutement direct dans les emplois de direction de la fonction publique territoriale*), JORF of 15 March 2020; www.legifrance.gouv.fr/jorf/id/JORFTEXT000041723053 and Decree of 31 July 2020 relating to senior posts in the hospital civil service of 31 July 2020 (*Décret n° 2020–959 relatif aux emplois supérieurs de la fonction publique hospitalière*), JORF of 2 August 2020; www.legifrance.gouv.fr/loda/id/JORFTEXT000042185337.

102 *Éclairage, Le recours aux contractuels élargi par la loi de transformation de la fonction publique*, Vie Publique, 22 January 2021, www.vie-publique.fr/eclairage/271623-elargissement-recours-aux-contractuels-loi-6-aout-2019-fonction-publique.

103 Article L. 342–3 CGFP.

104 Article L. 332–4 CGFP.

105 French Constitutional Council, decision no. 2019–790 DC of 1 August 2019, *Loi de transformation de la fonction publique*; see Montecler (2019), pp. 1669 f. and Firoud (2019), pp. 364 f.

106 Aubin (2019), pp. 2349 f.

107 Cour des Comptes (2020): Germany (60%), United Kingdom (92%), Italy (85%), Spain (47%).

108 DGAFP (2022b), p. 11.

109 INSEE (2023).

The very form taken by the new General Civil Service Code, which came into force in 2022, seems to be moving in the direction of relativising the place of civil servants among all public employees.[110] The second article of the Code states that it "also applies to contract agents". Similarly, the rule that permanent government posts are in principle filled by civil servants, which was previously at the head of the Staff Regulation Statute, is not repeated until much later in the new Code,[111] nor is the principle of recruitment by competitive examination[112] or the distinction between grade and post.[113]

However, it should be noted that the 2019 reform did not follow the recommendation contained in the preliminary report drawn up by the *Action publique 2022* committee. This recommended "broadening the use of private law contracts as a 'normal' means of access to certain public service functions",[114] thus returning to the solution that had been adopted in 1941. However, the Law of 6 August 2019 has maintained the solution established by the case law of the *Tribunal des conflits,*[115] according to which contractual agents of administrative structures, i.e. non-economic structures, are bound to them by public law contracts. However, the fact that these contracts are classified as public law contracts means that they are not covered by the Labour Code but are subject to a regime that is largely based on case law and copied from the statutory law applicable to civil servants, so that they are virtually in a legal and regulatory situation.[116] The case law has recently reiterated this by strictly applying the principle of equality between civil servants and contract civil servants,[117] in line with the case law of the Court of Justice of the European Union.[118] This applies in particular to the recruitment of contract staff, which the General Civil Service Code stipulates must follow a procedure that guarantees equal access to public employment.[119] Thus the use of contract agents does not really call into question the status of the civil service insofar as its provisions are extended to these agents. The explicit inclusion of contract agents in the scope of application of the General Civil Service Code provides a further illustration of this[120] and this trend towards the "functionarisation" of contract agents gradually puts into perspective the greater flexibility of their management, which is due in particular to the fact that these agents do not benefit from promotion by seniority reserved for civil servants, and that they can be recruited and promoted without having to take into account the constraint represented by membership of civil service *corps* with competences defined by the specific statutes. Their salary and career development are determined by the contract that binds them to the administration. The only obligation laid down in the texts[121] is to assess the professional situation of employees on permanent contracts on the basis of a regular professional interview; the same applies to employees on

110 Clouzot (2022), pp. 9 f.
111 Article L. 311–1 CGFP.
112 Article L. 320–1 CGFP.
113 Article L. 411–5 CGFP.
114 Bedague-Hamilius et al. (2018), p. 37.
115 *Tribunal des conflits*, 25 March 1996, *Berkani*, no. 03000.
116 Gaudemet (1977), p. 614 and Jean-Pierre (2015), no. 50.
117 *Conseil d'État*, 12 April 2022, *Fédération Sud Education*, no. 452547; Zarca (2022), p. 290.
118 CJEU, judgment of 20 June 2019, *Arostegui v. Navarre*, C-72/18, on the bonus scheme.
119 Article L. 332–21 CGFP and Decree on the recruitment procedure to fill permanent civil service jobs open to contract agents of 19 December 2019 (n. 9).
120 Fortier (2020), pp. 65 f.
121 See e.g. Decree for the State civil service of 12 March 2007 (*Décret n° 2007–338 pour la fonction publique d'Etat*), JORF of 14 March 2007; www.legifrance.gouv.fr/loda/id/JORFTEXT000000649279.

fixed-term contracts of more than one year. However, these interviews do not entail any obligation to increase the remuneration of contract staff. Only if they are appointed as permanent civil servants will they be able to have their seniority recognised. The introduction of an automatic pay rise system similar to that applied to civil servants would be illegal.[122]

The increased use of contract agents should therefore be analysed primarily as a factor in making the management of civil servants more flexible, rather than as a factor in the evolution of a career civil service towards an employment civil service. It is often the rigidity or slowness of recruitment or mobility procedures for civil servants that lead to the hiring of contract agents to fill vacancies.[123] Similarly, when the remuneration conditions laid down in the Staff Regulation Statute are not adapted to certain segments of the employment market, the use of contract agents makes it possible to dispense with them.[124] In this respect, there is a significant dichotomy between two types of contract staff.[125] Some remain in a precarious situation and occupy menial jobs corresponding to needs that are sometimes recurrent but non-permanent. They are mainly to be found in the hospital civil service and the local civil service, as well as in the State civil service when the jobs are subsidised to promote access to employment and transformed into contract agent posts. Their situation is often worse than that of civil servants. In contrast, other contract staff are employed in short-staffed or highly technical jobs where competition between the public and private sectors is strong, and their salaries can be negotiated favourably.[126] In the latter case, the use of contract staff enables employees to escape the constraints imposed by the statutory system and its general salary scale, which has gradually led to a flattening of the pay pyramid.

It is remarkable in this respect that the use of contract agents has been developed especially recently in the context of management functions, so that the French civil service system remains a long way from mixed systems, such as that which applies in Germany, where, in contrast, management functions are reserved for civil servants, while subordinate posts are taken on by contract agents.

1.3. The Development of an Ethical Framework

The extension of the use of contract agents, in particular to secondary management positions (deputy directors, heads of department, directors of public establishments) raises the question of the resurgence of a spoils system that could undermine the neutrality of the civil service; all the more so as the law expressly states that these jobs are filled by

122 Court of Appeal (*Douai Administrative*), 20 October 2011, *Préfet de la région Nord-Pas de Calais*, no. 10DA00144.

123 Decree on contract staff in the local civil service of 15 February 1988 (*Décret n° 88–145 relatif aux agents contractuels de la fonction publique territorial*), JORF of 16 February 1988; www.legifrance.gouv.fr/jorf/id/JORFTEXT000000871608, which provides for the possibility of dismissing a contract employee when a civil servant is recruited (Article 39–3).

124 Cour des Comptes (2020).

125 Pény and Simonpoli (2022), p. 61.

126 See e.g. the joint directive in the joint circular of 15 December 2021 from the Director General of Administration and the Civil Service, the Interministerial Director of Digital and the Director of the Budget relating to a remuneration reference framework for the 56 professions in the digital and information and communication systems sector; www.numerique.gouv.fr/uploads/note-referentiel-remuneration-filiere-numerique.pdf.

fixed-term contracts that cannot be converted into open-ended contracts.[127] Whereas the stability of civil servants and the neutrality that necessarily goes with it were a guarantee of continuity of public service regardless of political changes, the risk of politicisation is closely linked to the use of contract agents, particularly in local authorities. In addition to the instability this creates, the increased use of contract staff recruited outside the framework of competitive examinations and lacking stability could encourage nepotism or at least recruitment based on criteria other than the quality expected of a civil servant who is likely to serve various political personalities throughout his or her career. Moreover, in his opinion on the 2019 draft law, the *Défenseur des droits* (ombudsman) noted that "the increasing use of contractual staff, and therefore of recruitment processes that are often much less regulated (than those applicable to civil servants), calls for greater vigilance on the part of public employers" to prevent increased risks of discrimination.[128]

The desire to open up the civil service to the private employment sector, to encourage the transition from public to private employment and vice versa, to move away from a closed career civil service model towards a civil service model in which civil servants are invited to develop their careers equally in the public and private sectors can sometimes lead to new contradictions with the renewed interest in combating conflicts of interest. It is important to ensure that the information to which civil servants have access in the context of the public service, and which is protected by the obligation of confidentiality to which civil servants are bound, cannot be used in the context of a job in a private company, or that the powers held in the context of public functions cannot be used in the service of private companies with which a civil servant has had, still has or is considering having, special relations in the field of employment.[129]

The Law of 6 October 1919[130] already introduced into the Criminal Code the provisions that are now set out in Article 432–13, prohibiting any person who, as a public official, has been entrusted, by virtue of his position, with the supervision or control of a private company, or with expressing an opinion on the operations carried out by a private company, from holding a position in the said company before the expiry of a period of five years following the cessation of the aforementioned supervisory or control functions. The case law of the *Conseil d'Etat* does not hesitate to rely on these provisions and apply them even outside the rules specific to the civil service.[131]

A public service ethics commission was set up by decree on 17 January 1991,[132] responsible for monitoring the departure of public servants and certain private-sector employees planning to work in the private or competitive public sector. More recently, the issue of ethics in the exercise of public functions has been the subject of various texts. Law 2016–483

127 Article L. 342–3 CGFP.

128 *Défenseur des droits*, opinion of 26 Apr. 2019, no. 19–07, p. 6.

129 Taillefait (2019), pp. 2356 f.

130 Article 10, JORF of 7 October 1919, p. 11002; https://gallica.bnf.fr/ark:/12148/bpt6k2025392r/f2.item.

131 *Conseil d'État* (Assemblée du contentieux), judgment of 6 December 1996, *Soc. Lambda*, n° 167502. See Auby (1997), pp. 571 f.

132 Decree for the application of article 72 of Law no. 84–16 of 11 January 1984 on statutory provisions relating to the State civil service of 17 January 1991 (*Décret n° 91–109 pris pour l'application de l'article 72 de la loi no 84–16 du 11 janvier 1984 portant dispositions statutaires relatives à la fonction publique de l'Etat*), JORF of 29 January 1991; www.legifrance.gouv.fr/loda/id/JORFTEXT000000171229/.

of 20 April 2016 on the ethics, rights, and obligations of civil servants[133] enshrines in the General Civil Service Statute the obligations of dignity, impartiality, integrity, probity, neutrality, and respect for secularity, already recognised by the administrative courts.[134] It also introduces the concept of conflicts of interest into the general status of civil servants, defined as "any situation of interference between a public interest and public or private interests which is likely to influence or appear to influence the independent, impartial and objective performance of one's duties"[135] and the obligations of civil servants faced with such a situation.

Following a parliamentary report in 2018 on the ethics of civil servants and the management of conflicts of interest,[136] the Law of 6 August 2019 modified the conditions for ethics checks on civil servants when they leave for the private sector (*pantouflage*) and created a new check for the transition from the private to the public sector, which is consistent with the development of the recruitment of contract agents.

On an institutional level, the *Commission de déontologie de la fonction publique* (public service ethics commission) has been merged with the *Haute Autorité pour la transparence de la vie publique* (High Authority for the Transparency of Public Life, HATVP), an independent administrative authority created in 2013[137] to take over from the *Commission pour la transparence financière de la vie politique* (Commission for the financial transparency of political life) created in 1988 and to monitor the assets of elected representatives and certain senior civil servants. The HATVP, which now comprises two separate colleges, one for political staff and the other for civil servants, is made up of magistrates and qualified individuals appointed by Parliament and the government. The HATVP is now responsible for examining the declarations of interest and assets made by certain senior civil servants when they are appointed and again when they leave office,[138] but it also intervenes in cases where civil servants are planning to set up or take over a business and are applying to work part-time, or where civil servants are planning to leave for the private sector (*pantouflage*).[139]

Whereas the *Commission de déontologie* used to be consulted by administrations on requests pertaining to all civil servants for authorisation to work part-time in order to create or take over a business, or to leave for the private sector, referral to the HATVP is only compulsory for the most exposed positions (directors of central administrations, certain directors of public State establishments, directors-general of services of regions,

133 Aubin (2016), pp. 1433 f. See also the report preceding the law, by Jean-Louis Nadal, chairman of the *Haute Autorité pour la transparence de la vie publique* (2015).

134 Article L. 121–1 ff. CGFP.

135 Article L. 121–5 CGFP.

136 Matras and Marleix (2018).

137 Organic Law on transparency in public life of 11 October 2013 (*Loi organique n° 2013–906 relative à la transparence de la vie publique*), JORF of 12 October 2013; www.legifrance.gouv.fr/jorf/id/JORFTEXT000028056223/ and Law on transparency in public life of 11 October 2013 (*Loi n° 2013–907 relative à la transparence de la vie publique*), JORF of 12 October 2013; www.legifrance.gouv.fr/loda/id/JORFTEXT000028056315.

138 Decree on the management of financial instruments held by civil servants or agents occupying certain civil posts of 13 April 2017 (*Décret n° 2017–547 relatif à la gestion des instruments financiers détenus par les fonctionnaires ou les agents occupant certains emplois civils*), JORF of 15 April 2017; www.legifrance.gouv.fr/jorf/id/JORFTEXT000034427984.

139 Decree on ethical controls in the civil service of 30 January 2020 (*Décret n° 2020–69 relatif aux contrôles déontologiques dans la fonction publique*), JORF of 31 January 2020; www.legifrance.gouv.fr/loda/id/JORFTEXT000041506165.

departments and municipalities with more than 40,000 inhabitants, members of ministerial cabinets, and employees of the President of the Republic, etc.)[140] In the case of other public-sector employees, whether civil servants or under contract, checks are carried out by their hierarchical superiors, with the assistance of the organisation's ethics officer[141] and, if necessary, referral to the HATVP.[142] The proposed move to the private sector may then be authorised, with or without reservations, or refused.

The 2019 Law also introduced a new ethics check when contract staff are recruited or when civil servants who have worked in the private sector in the previous three years return to the civil service, in order to verify that the activities carried out in the private sector are compatible with the duties envisaged within the civil service. Contract staff appointed to managerial posts are required to undergo ethics training.[143]

In addition, new measures have been adopted in terms of pay transparency, in particular the obligation to publish each year on the websites of the ministries, the largest local authorities and the largest hospitals, the ten highest salaries paid to employees (with the share of the number of women and men). In 2018, the top 1% of civil servants earned more than 6,718 EUR.[144] This compares with more than 8,680 EUR net per month in the private sector.[145]

2. Making the Statutory Framework More Flexible

While the use of contract agents makes it possible, to a certain extent, to get round the cumbersome management of civil servants, in terms of recruitment, mobility, and promotion, the desire to facilitate the management of civil servants and at the same time offer them more varied career prospects has led to changes in the very structures of the civil service. As set out in the explanatory memorandum to the Law of 6 August 2019, the aim is to

> strengthen and empower public-sector managers by developing the levers that will enable them to be real team leaders: by recruiting the skills needed for their departments to run smoothly, by promoting the professional commitment of their teams, and by taking decisions as close to the ground as possible, without systematically reporting back to national level.[146]

The aim has been to modernise the conditions under which civil servants' careers are managed, in particular by reorganising the *corps* structure (Subsection 2.1) and simplifying the rules governing civil servant participation (Subsection 2.2).

140 Article 2 of Decree no. 2020–69 on ethical controls in the civil service of 30 January 2020 (n.139).

141 Articles L. 124–2 ff. CGFP; see Demontrond (2020), pp. 298 f.

142 Decree on the obligation to submit a declaration of assets and liabilities as provided for in Article 25 of Law no. 83–634 of 13 July 1983 on the rights and obligations of civil servants of 28 December 2016 (*Décret n° 2016–1968 du 28 décembre 2016 relatif à l'obligation de transmission d'une déclaration de situation patrimoniale prévue à l'article 25 quinquies de la loi n° 83–634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*), JORF of 30 December 2016; www.legifrance.gouv.fr/loda/id/JORFTEXT000033736715.

143 Article L. 342–2 CGFP.

144 DGAFP (2022a), p. 151.

145 INSEE (2020).

146 *Exposé des motifs, Projet de loi de transformation de la fonction publique*, Assemblée Nationale, no. 1802, p. 7; see Froger (2019), pp. 2364 f.

2.1. The Evolution of the Corps *Structure*

In principle, civil servants are recruited into a *corps*, which corresponds to a specific profession, and each civil servant's career is destined to develop within this *corps*, with promotion being triggered by the passage of time (seniority) from one step to the next, which has purely financial consequences, and by choice for advancement from one grade to the next, which has consequences not only in terms of remuneration but also in terms of responsibilities. Each *corps* is therefore responsible for a certain number of jobs,[147] determined by the *corps*' specific statutes. The first corps appeared as early as the *Ancien Régime*, as a kind of guild of public servants,[148] such as the *Ponts et Chaussées*, mines and rural engineers. Having been very few in number until the middle of the 20th century, their numbers then increased under the 1946 Civil Service Statute to reach around a thousand, under the dual impetus of administrations, which wanted to have their own staff, and civil servants' associations, which found it a convenient way of guaranteeing their career prospects. However, such inflation led to excessive segmentation of the civil service, limiting the scope for personnel management, with each civil servant seeing his or her career confined within the confines of highly specialised *corps*, both by professional speciality and by hierarchical level.

There are, of course, the usual exceptions to this rule, which make it possible to go beyond the strict confines of civil service *corps*. Firstly, there is the possibility of seconding a civil servant to a *corps* other than the one to which he or she belongs, with the guarantee that he or she will be able to return to his or her original *corps* or be integrated into the *corps* he or she has joined.[149] There are also ways of accessing civil service *corps* that encourage the recruitment of staff belonging to another civil service *corps*, thus enabling mobility between *corps*. These internal competitions are reserved for civil servants who have worked for a certain number of years in the civil service. Lastly, a number of special staff regulations allow the government, in addition to recruitment by competitive examination, to promote civil servants within a *corps* other than the one from which they come, "*au tour extérieur*", i.e. on a discretionary basis, often subject to a simple condition of age and length of service. In the *Conseil d'Etat*, for example, while auditors are recruited from the INSP competition, a quarter of the *maîtres des requêtes*, the second grade, are appointed by the external route, and a third of the *conseillers d'Etat*.[150]

These mobility options have been gradually extended, for example by Law 2009–972 of 3 August 2009 on mobility and career paths in the civil service, which created a right to integration for civil servants on secondment after five years.

In addition to the possibility of changing *corps* during one's career, there has been a move to reduce the number of *corps*. For the local civil service, the Law of 26 January 1984

147 See Articles 411–1 f. CGFP.

148 Pochard (2011), pp. 20 f.

149 Articles L. 513–1 f. CGFP.

150 Lévy-Rosenwald (2016). See also Article 4 of Decree on the special status of the corps of State administrators of 1 December 2021 (*Décret n° 2021–1550 portant statut particulier du corps des administrateurs de l'État*), JORF of 2 December 2021; www.legifrance.gouv.fr/jorf/id/JORFTEXT000044394397 and the Order setting the procedures for examining professional qualifications and drawing up the list of suitable candidates for access to the corps of State administrators of 18 October 2022 (*Arrêté fixant les modalités de l'examen des titres professionnels et de l'établissement de la liste d'aptitude d'accès au corps des administrateurs de l'État*), JORF of 19 October 2022; www.legifrance.gouv.fr/jorf/id/JORFTEXT000046441716, which define the procedures for this two-stage procedure: ministerial preselection and inter-ministerial selection.

favoured the concept of job categories, which correspond to that of *corps*, but from the outset organised them in a much broader way. While there were still around 700 State civil service *corps* in 2004, there were only around 350 in 2012, with mergers taking place mainly in the C category.[151] In 2020, there were still 288 civil service bodies, then 284 in 2021 and 280 in 2022, with a target of 270 bodies by 2023.[152]

These mergers have given rise to interministerial bodies with ministerial management, such as the central administration *attachés*,[153] which facilitate the mobility of staff from one ministry to another.

More recently, the senior civil service was reorganised along these lines by Order no. 2021–702 of 2 June 2021 on the reform of the senior civil service,[154] which led to the abolition of around 15 other civil service *corps*. The result of an initiative by the President of the Republic, Emmanuel Macron, based on a report commissioned by the government in 2019,[155] in parallel with the drafting of the Law of 6 August 2019 on the transformation of the civil service, this Order, in addition to changing the name of the *École nationale d'administration* (ENA) to the *Institut national du service public* (INSP), an essentially symbolic measure,[156] merges most of the *corps* that had previously structured the senior civil service, thereby enabling functional management of the State's senior jobs. In practical terms, the new *corps* of State administrators has been created,[157] which will be responsible for taking on former INSP students and now includes the *corps* of civil administrators and economic advisers, the *corps* of public finance administrators, the *corps* of administrators of the Economic, Social and Environmental Council, the *corps* of sub-prefects and the *corps* of prefects, the *corps* of foreign affairs advisers and the *corps* of plenipotentiary ministers, as well as the inspectorates (Inspectorate General of Finance, Inspectorate General of Administration at the Ministry of the Interior, Inspectorate General of Agriculture, Inspectorate General of Cultural Affairs, Inspectors General and Inspectors of Administration for Sustainable Development, Inspectorate General of Economics and Finance, Inspectorate General of Social Affairs, Inspectorate General of Education, Sport and Research).

On the other hand, the major *corps* exercising jurisdictional functions retain their organic independence, due to the guarantee they provide for the independence of the jurisdictional functions they are called upon to exercise and which is protected by the constitution.[158] Thus, the *corps* of members of the *Conseil d'Etat* and the *Cour des Comptes*, as well as the magistrates of the *chambres régionales des comptes* and the *tribunaux administratifs et cours administratives d'appel* retain their independence. In the case of the *Conseil*

151 Gagnaire (2012), pp. 40 f.; Gourault (2011), pp. 13 f.

152 Scordia (2022).

153 Decree on the special status of the interministerial corps of State administration attachés of 17 October 2011 (*Décret n° 2011–1317 du 17 octobre 2011 portant statut particulier du corps interministériel des attachés d'administration de l'Etat*), JORF of 19 October 2011; www.legifrance.gouv.fr/loda/id/JORFTEXT000024683056.

154 Melleray (2021), pp. 1443 f.

155 Thiriez (2020).

156 It should be noted, however, that the INSP's remit has been extended with the creation of a common core curriculum for 14 public service schools, including the *École nationale de la magistrature*, in addition to its own students.

157 Decree on the special status of the corps of State administrators of 1 December 2021 (n. 150).

158 Montecler (2021), pp. 1116 f.

d'Etat, for example, it will recruit its youngest members from among State administrators with two years' effective public service.

Members of the corps of State administrators are appointed to senior management positions in the State, which include so-called government decision-making positions (directors-general and directors of central administration, ambassadors and certain consuls-general, prefects, etc.), management positions in the State (deputy directors, heads of department, etc.), directors or senior managers of public State establishments, and son o,[159] i.e. around 13,000 people.[160]

The Interministerial Delegation for Senior State Personnel (DIESE) was set up to manage all these jobs on an interministerial basis. The *École nationale d'administration*'s grading system, which was used to classify students into the various civil service *corps*, is no longer applicable, as students join the *corps* of State administrators. Within this *corps*, interviews are organised by the DIESE to determine the job to which each civil servant will be appointed.

This mechanism, which replaces the rigour of competitive examinations, has given rise to fears about the impartiality of the procedure, particularly as regards jobs in the inspectorates. Special measures have been adopted to guarantee their independence. Article 6 of the Order of 2 June 2021 lays down the conditions for appointing the heads of the inspection departments by decree in the Council of Ministers for a renewable term. Their duties may only be terminated before the end of this term at their request, following the opinion of a commission, which will be made public. Similarly, employees performing general inspection duties within the same departments are recruited, appointed and assigned under conditions that guarantee their ability to perform their duties independently and impartially.[161] These measures have been validated by the *Conseil d'Etat*.[162]

2.2. Reform of Employee Co-Determination

Since 1946, the Civil Service Statutes provided for broad participation by civil servants through various bodies involved both in the specific management of civil servants' careers and in negotiating the general conditions for the organisation and operation of services. These elements have not escaped a certain evolution, to which the Law of 6 August 2019[163] has recently contributed.

In order to simplify the procedures applicable to the management of civil servants' positions, and consequently their mobility, the law has changed the remit of the joint administrative committees (*Commissions administratives paritaires*, CAP),[164] made up of representatives of the administration and staff, which are now only responsible for

159 Decree implementing Article L. 412–1 of the General Civil Service Code of 29 April 2022 (*Décret n° 2022–760 portant application de l'article L. 412–1 du code général de la fonction publique*), JORF of 20 April 2022; www.legifrance.gouv.fr/jorf/id/JORFTEXT000045726999.

160 Bassères (2021), p. 15.

161 Decree relating to general inspection or control services and to posts within these services of 9 March 2022 (*Décret n° 2022–335 relatif aux services d'inspection générale ou de contrôle et aux emplois au sein de ces services*), JORF of 10 March 2022; www.legifrance.gouv.fr/jorf/id/JORFTEXT000045327395.

162 *Conseil d'État*, judgment of 21 July 2023, *Association A3I*, no. 463874.

163 Taillefait (2023), pp. 21 f.

164 Similar structures exist for contractual civil servants: the joint consultative commissions (*commissions consultatives paritaires*).

examining individual decisions unfavourable to employees (refusal of tenure, dismissal, training, part-time work or teleworking, discipline, etc.) However, they are no longer responsible for transfers and mobility, nor for promotions.[165] For these non-adverse decisions, management guidelines (*Lignes directrices de gestion*, LDG)[166] have been introduced, which now set the general guidelines for transfers and mobility in the civil service and for promotion throughout the civil service. They must include a multi-year human resources management strategy defining the "challenges and objectives" of the administration's policy. The number of CAPs has also been reduced, since they are no longer organised for each body – the number of which has also been reduced – but for each hierarchical category, so that they can deal with the careers of civil servants belonging to different *corps* in the same hierarchical category. Depending on the size of the organisation, several such committees may be set up.

In terms of collective bargaining, since 1946 the civil service statute has provided for public employee participation bodies, in particular through the establishment of joint technical committees designed to give employees a voice on issues relating to the operation and organisation of services. The Law of 6 August 2019 also simplifies matters by bringing together the powers previously divided between the technical committees (*Comités techniques*, CT) and the health, safety, and working conditions committees (*Comités d'hygiène, de sécurité et des conditions de travail*, CHSCT) in the new social committees (*Comités sociaux*).[167] These social committees are consulted on issues relating to the operation and organisation of the service, management guidelines (LDG) for transfers, mobility, internal promotion and grade advancement of staff, and so on.

Above all, the reform initiated by the Law of 6 August 2019, and specified by the Order of 17 February 2021,[168] also promotes the conclusion of collective agreements in a number of areas such as apprenticeships, quality of life at work, social support for service reorganisation measures, or collective profit-sharing and the terms and conditions for implementing compensation policies, by now recognising them as having normative value and providing a framework for their conclusion,[169] whereas previously, consultation resulted in the adoption of memorandums of understanding with no legal effect, which had to be transposed unilaterally by law or regulation. The first collective agreement

165 Cochereau (2023), pp. 16 f.

166 Decree on management guidelines and changes to the remit of joint administrative committees of 29 November 2019 (*Décret n° 2019–1265 relatif aux lignes directrices de gestion et à l'évolution des attributions des commissions administratives paritaires*), JORF of 1 December 2019; www.legifrance.gouv.fr/loda/id/JORFTEXT000039434533.

167 See e.g. Decree relating to administrative social committees in State administrations and public establishments of 20 November 2020 (*Décret n° 2020–1427 relatif aux comités sociaux d'administration dans les administrations et les établissements publics de l'État*), JORF of 22 November 2020; www.legifrance.gouv.fr/jorf/id/JORFTEXT000042545890.

168 See the Order on collective bargaining and agreements in the civil service of 17 February 2021 (*Ordonnance n° 2021–174 relative à la négociation et aux accords collectifs dans la fonction publique*), JORF of 18 February 2021; www.legifrance.gouv.fr/jorf/id/JORFTEXT000043149112, adopted on the basis of Article 14 of the Law on the transformation of the civil service of 6 August 2019 (n. 1) and included in Articles L. 221–1 to L. 227–4 CGFP, and Decree on the procedures for negotiating and concluding collective agreements in the civil service of 7 July 2021 (*Décret n° 2021–904 relatif aux modalités de la négociation et de la conclusion des accords collectifs dans la fonction publique*), JORF of 8 July 2021; www.legifrance.gouv.fr/jorf/id/JORFTEXT000043768038.

169 Marc (2021), pp. 133 f.

negotiated under this ordinance was concluded on 13 July 2021 to implement teleworking in the civil service. The level of negotiation is set at the national level for pay and purchasing power, as the State wishes to retain control over the budgetary aspect of such measures, while issues relating to working conditions can be negotiated at the national and local levels.

IV. Conclusion

The French civil service model was established in 1946, based on the principle that all civil servants, whatever their hierarchical level, should be subject to the same legal and regulatory framework. This status ensured that all civil servants enjoyed the social rights guaranteed to all workers, including the right to strike and the right to participate, both individually and collectively. The civil service was also based on a career system, with civil servants expected to spend their entire careers in the service of the government, thereby establishing a relatively strict separation between the public and private employment sectors and minimising conflicts of interest. This model, established in 1946 for state employees, was extended in the 1980s to local authority employees, including hospital staff.

The civil service is a powerful force in social policy because of the large number of people it employs under a coordinated status. Depending on the government in power, the civil service has acted as a showcase or a counterweight, but over the years it has not escaped a certain petrification of its management methods, particularly through the multiplication of bodies, or a squeezing of the pay conditions of the staff it employs.

In order to maintain its attractiveness and attract quality candidates, the status of the civil service has had to evolve. These changes have taken several forms. This is exacerbated by the fact that all civil servants remain more or less subject to the statutory system, which, particularly in terms of pay, complicates any policy designed to promote the attractiveness of public sector jobs because of the domino effect of any increase, and the resulting cost. More generally, the Civil Service Statute has incorporated the new forms of social rights that have emerged in parallel in private employment law.

In this respect, the question is often raised of a rapprochement between civil service law and labour law.[170] It is true that some of the elements recently introduced into civil service law are inspired by developments in labour law. This is the case, for example, with the new role accorded to collective agreements, the development of staff representative bodies based on the model introduced in 2017 in private companies, the introduction of the "*rupture conventionnelle*" (contractual termination),[171] and the replacement of staff appraisals by individual interviews.

However, this kind of approximation was already a feature of the 1946 Civil Service Statute, which introduced into civil service law some of the social advances achieved in labour law. It is therefore only natural that civil service law should continue to evolve in line with general changes in working conditions, especially as fundamental rights and European law apply relatively uniformly to employment relationships. The development of the use of contracts in the civil service also leads us to take a nuanced look at their role in this rapprochement, since they are considered to be an element of employee protection

170 See e.g. Loiseau and Bloch (2019), pp. 1315 f.

171 Article 72 of the Law on the transformation of the civil service of 6 August 2019 (n. 1) and implementing decrees of 31 December 2019.

in labour law, whereas in the civil service they are considered to be a factor associated with precariousness.[172]

It therefore seems that, through these developments, the French model of a career civil service integrating all civil servants under a common status is finding the means to ensure its continued existence, by adapting to the requirements of European law and freedom of establishment and by developing new instruments enabling it to keep pace with the social developments taking place in general labour law, and to maintain its competitive nature on the job market in order to continue to attract the talent needed to manage public services.

Bibliography

Aubin E. (2016), 'L'entrée de la déontologie dans le titre Ier du statut général', 26 *L'Actualité juridique. Droit administratif*, 1433–1438.

Aubin E. (2019), 'Le contrat, avenir de la fonction publique?', 40 *L'Actualité juridique. Droit administratif*, 2349–2356.

Auby J.-M. (1997), 'Commentaire sous CE, Assemblée du contentieux, 6 déc. 1996, Soc. Lambda, n° 167502', *RDP*, p. 567.

Bassères J. (2021), *Préfiguration de la Délégation interministérielle à l'encadrement supérieur de l'État (DIESE) – Rapport de la commission présidée par Jean Bassères*, 1 November, www.gouvernement.fr/upload/media/default/0001/01/2021_12_rapport_diese.pdf.

Bedague-Hamilius V., Mc Innes R., Mion F. (2018), *Service public, se réinventer pour mieux servir – Nos 22 propositions pour changer de modèle. Report by the Comité d'action publique*, June, www.modernisation.gouv.fr/files/2021-06/rapport_cap22_vdef.pdf.

Burdeau F. (1994), *Histoire de l'administration française du 18e au 20e s.*, Paris: Montchrestien.

Chapus R. (2001), *Droit administratif général*, Paris: Montchrestien.

Chevallier J. (1996), 'Le statut général des fonctionnaires de 1946: un compromis durable', 49 *La Revue administrative*, 7–21.

Clouzot L. (2022), 'Le code général de la fonction publique, instrument du glissement statutaire', 4 *Droit administratif*, 9–15.

Cochereau M. (2023), 'Les compétences des nouvelles instances représentatives du personnel: le nouveau visage du dialogue social', 1 *L'Actualité juridique. Fonctions publiques*, 15–34.

Cour des Comptes (2020), *Les agents contractuels dans la fonction publique, Exercices 2010–2019*, September, www.ccomptes.fr/system/files/2020-09/202000922-rapport-contractuels-fonction-publique.pdf.

de Montecler M.-Ch. (2019), 'La loi fonction publique passe l'obstacle constitutionnel', 29 *L'Actualité juridique. Droit administratif*, 1669–1670.

de Montecler M.-Ch. (2021), 'Une transformation profonde de la haute fonction publique', 20 *L'Actualité juridique. Droit administratif*, 1116–1117.

de Salins C., Chavanat B., Michel J. (2022), 'Le code général de la fonction publique, enfin!', 5 *L'Actualité juridique. Droit administratif*, 287–293.

Demontrond N. (2020), 'La montée en puissance des référents déontologues', 6 *L'Actualité juridique. Fonctions publiques*, 298–303.

Derboulles L. (2023), 'Permanent mais non immuable: que reste-t-il de l'article 3 de la loi du 13 juillet 1983', 7–8 *L'Actualité juridique. Fonctions publiques*, 376–379.

DGAFP (2022a), *Rapport sur l'état de la fonction publique*, November, www.fonction-publique.gouv.fr/files/files/Publications/Rapport%20annuel/2022/RA_2022_web.pdf.

DGAFP (2022b), *Fonction publique – Chiffres clés 2022*, www.fonction-publique.gouv.fr/files/files/Publications/Rapport%20annuel/2022/CC-2022-web.pdf.

Drago R. (1995), 'Les fondements d'une nouvelle fonction publique: Rappel historique', 48 *La Revue administrative*, 13–15.

172 Sweeney (2020), p. 202.

Duvergier J.B. (1834), *Collection complète des lois, décrets, ordonnances, réglemens, et avis du Conseil d'État*, Paris, https://gallica.bnf.fr/ark:/12148/bpt6k54923448.
Firoud M. (2019), 'Transformation de la fonction publique: du nouveau sous le soleil!', 9 *L'Actualité juridique. Collectivités territoriale*, 364–369.
Fortier C. (2020), 'La dynamique statutaire du contrat de fonction publique', 2 *L'Actualité juridique. Fonctions publiques*, 65–68.
Froger C. (2019), 'La loi du 6 août 2019 et le déroulement de la carrière des agents publics – Une pierre managériale supplémentaire dans l'édifice statutaire', 40 *L'Actualité juridique. Droit administratif*, 2364–2372.
Gagnaire J.-L. (2012), *Annexe n°29 (Gestion des finances publiques et des ressources humaines – Fonction publique – Provisions) au rapport n° 251 sur le projet de loi de finance 2013*, 10 October, www.assemblee-nationale.fr/14/budget/plf2013/b0251-tIII-a29.asp.
Gaudemet Y. (1977), 'Existe-t-il une "catégorie" d'agents publics contractuels de l'administration', 12 *L'Actualité juridique. Droit administratif*, 614–619.
Gourault J. (2011), *Avis n° 112 (2011–2012) Fonction publique, Projet de loi de finance 2012*, 17 November, www.senat.fr/rap/a11-112-10/a11-112-10_mono.html.
Grégoire R. (1954), *La fonction publique*, Paris: Armand Colin.
INSEE (2020), *Les hauts salaires dans le secteur privé*, INSEE première, no. 1800, April, www.insee.fr/fr/statistiques/fichier/version-html/6436313/ip1898.pdf.
INSEE (2022), *Projections de population active: le nombre d'actifs diminuerait à partir de 2040*, 30 June, www.insee.fr/fr/statistiques/fichier/6453758/ECRT2022-E1.pdf.
INSEE (2023), *En 2021, l'emploi augmente de nouveau dans la fonction publique*, INSEE Première, no. 1947, May, www.insee.fr/fr/statistiques/fichier/version-html/7621088/ip1947.pdf.
Jean-Pierre D. (2015), 'L'amélioration des conditions d'emploi des agents contractuels de l'Etat', 50 *Semaine Juridique – Administrations et Collectivités territoriales*, 2347–2352.
Jèze G. (1938), 'Note sur CE 7 August 1909 Winkell', 1 *Revue du droit public*.
Kesler J.-F. (1977), 'La création de l'ENA', 30 *Revue administrative*, 354–369.
Kessler M.-C. (1980), 'Conseil d'Etat et fonction publique, de l'époque napoléonienne à la Libération', 32 *Conseil d'État, Études et Documents*, 147–157.
Lefas A. (1913), *L'Etat et les fonctionnaires*, Paris: Giard et Brière.
Lemoyne de Forges J.-M. (2005), 'La loi transposition du droit communautaire à la fonction publique', 41 *L'Actualité juridique. Droit administratif*, 2285–2290.
Lévy-Rosenwald M. (2016), *Les nominations au tour extérieur: quels apports pour la Cour des Comptes*, www.ccomptes.fr/sites/default/files/2017-06/20160125-nominations-Tours-exterieurs-Cour-des-comptes.pdf.
Loiseau G., Bloch S. (2019), 'Vers une "travaillisation" du droit de la fonction publique', 45 *Semaine juridique. Social*, 1315–1316.
Marc E. (2021), 'L'ordonnance du 17 février 2021: extension substantielle et maîtrisée de la négociation collective', 3 *L'Actualité juridique. Fonctions publiques*, 133–138.
Matras F., Marleix O. (2018), 'Rapport d'information n° 611 sur la déontologie des fonctionnaires et l'encadrement des conflits d'intérêts', *Assemblée Nationale*, 1 January, www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b0611_rapport-information.
Melleray F. (2019a), 'Le code général de la fonction publique: une arlésienne', 6 *L'Actualité juridique. Fonctions publiques*, 309–313.
Melleray F. (2019b), 'La loi du 6 août 2019 fera-t-elle date?', 40 *L'Actualité juridique Droit administratif*, 2372–2376.
Melleray F. (2021), 'La réforme de l'encadrement supérieur de la fonction publique de l'Etat', 21 *L'Actualité juridique Droit administratif*, 1443–1450.
Nadal J.-L. (2015), *Renouer la confiance publique, Renouer la confiance publique – Rapport au Président de la République sur l'exemplarité des responsables publics*, 7 January, https://medias.vie-publique.fr/data_storage_s3/rapport/pdf/154000023.pdf.
Pény P., Simonpoli J.-D. (2022), *Conférences sur les perspectives salariales de la fonction publique, restitution des travaux*, 14 March, www.transformation.gouv.fr/files/presse/Rapport_Restitution_perspectives_salariales.PDF.
Pochard M. (2003), 'Les implications de la libre circulation: plus qu'une banalisation, la normalisation du droit de la fonction publique', 36 *L'Actualité juridique. Droit administratif*, 1906–1910.
Pochard M. (2011), *Les 100 mots de la fonction publique*, Paris: Presses Universitaires de France

Pochard M. (2021), *Les 100 mots de la fonction publique*, Paris: Presses Universitaries de France.
Querrien M. (1952), 'La part du Conseil d'Etat dans l'élaboration du statut de la fonction publique', *Livre jubilaire du Conseil d'Etat*, 311–320.
Rivero J. (1947), 'Vers la fin du droit de la fonction publique?', *Recueil Dalloz*, 149–152.
Rouban L. (2009), 'Le statut des fonctionnaires comme enjeu socio-historique', 4 *Revue française d'administration publique*, 673–687.
Scordia B. (2022), 'La réduction du nombre de corps de fonctionnaires est en train de s'accélérer', *Acteurs publics*, 6 October, https://acteurspublics.fr/articles/la-reduction-du-nombre-de-corps-de-fonctionnaires-est-en-train-de-saccelerer.
Silicani J.-L. (2008), *Livre blanc sur l'avenir de la fonction publique, Faire des services publics et de la fonction publique des atouts pour la France*, https://medias.vie-publique.fr/data_storage_s3/rapport/pdf/084000231.pdf.
Sueur P. (1993), *Histoire du droit public français – XVe–XVIIIe s., t. 1 – La constitution monarchique*, 2nd edition, Paris: Presses Universitaires de France.
Sweeney M. (2020), 'Transplantation du contrat de projet ou d'opération dans les fonctions publiques: point de vue d'un travailliste', 3 *Droit social*, 202–208.
Taillefait A. (2019), 'Déontologie et égalité professionnelle après la loi Dussopt', 40 *L'Actualité juridique. Droit administratif*, 2356–2363.
Taillefait A. (2023), 'Commissions administratives paritaires et nouvelles instances du dialogue social: vers un dépérissement du droit statutaire des fonctionnaires?', 1 *L'Actualité juridique. Fonctions publiques*, 15–34.
Thiriez Fr. (2020), *Mission haute fonction publique. Propositions*, 30 January, www.gouvernement.fr/upload/media/default/0001/01/2020_02_rapport_de_m._frederic_thiriez_-_mission_haute_fonction_publique_-_18.02.2020.pdf.
Thuillier G. (1977), 'Les projets d'École d'Administration de 1936 à 1939', 30 *La Revue administrative*, 177–182.
Thuillier G. (1979a), 'Aux origines de l'ENA. Le projet d'institut des Hautes Études administratives 1939–1941', 45 *La Revue administrative*, 113–120.
Thuillier G. (1979b), 'Le statut des fonctionnaires de 1941', 32 *La Revue administrative*, 480–494.
Thuillier G. (1992), 'Aux origines de l'ENA: L'Institut des Hautes Études administratives de l'Organisation des Fonctionnaires Résistants (1945)', 45 *La Revue administrative*, 113–120.
Vindé F. (1989), *L'Affaire des fiches (1900–1904): chronique d'un scandale*, Paris: Éditions universitaires.
Zarca A. (2022), 'Fonctionnaires et agents contractuels: vers un contrôle "normal" d'égalité', 5 *L'Actualité juridique. Fonctions publiques*, 290–295.

8 The Civil Service in Germany

A Service Based on Mutual Loyalty

Claus Dieter Classen

I. Fundamental Principles

*1. The Guiding Principles of the Specific Civil Service (***Beamtentum***)*

The civil service has been the defining structural element of the people working in German public administration, and this continues to be the case to the present day. Its decisive structural features are intended to ensure that the administration can convincingly fulfil the tasks incumbent upon it in a democratic constitutional State. Accordingly, central principles are anchored in the constitution itself. Article 33, paragraph 4 of the Basic Law (*Grundgesetz*, BL)[1] stipulates: "The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law." Article 33, paragraph 5 BL continues: "The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service." This refers to the so-called *Beamtentum*.

A few years ago, the German Federal Constitutional Court (FCC), drawing on numerous earlier decisions, summarised the main idea of this institution as follows:

> Whereas the civil servant was originally bound solely to the regent, he changed from being a servant of the prince to a servant of the State as the understanding of the State changed. His or her task was and is to uphold the Constitution and the law in the interest of the citizens, even and especially against the head of State. The Basic Law's incorporation of the functionally essential traditional basic structures of the civil service is based on a definition of the function of the civil service as an institution that, founded on expertise, professional performance and loyal fulfilment of duty, is intended to ensure a stable administration and thus form a balancing factor vis-à-vis the political forces shaping the State system. At the same time, the institutional guarantee in Article 33, paragraph 5 of the Basic Law takes into account the fact that in a democratic State, power is always granted only for a limited period of time, and the administration must be neutral, if only in view of the changing political orientation of the respective State leadership. In this respect, the strict commitment to the law and the common good, to which the historical development of the German civil service is geared, can also be understood as a functional condition of democracy. The civil service can fulfil its task only if it is legally and economically secure. Only if internal and external independence is guaranteed and the willingness

1 German constitution of 23 May 1949 (*Grundgesetz für die Bundesrepublik Deutschland*), last amended by Act of 19 December 2022 (BGBl. I 2022, p. 2478).

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to criticize and, if necessary, contradict does not entail the risk of threatening the livelihood of the public official and his or her family can it realistically be expected that a public official will insist on conducting his or her duties in accordance with the rule of law, even if it should be (party-) politically undesirable. The employer's obligation to pay judges and civil servants who devote all their energies to their office adequate compensation is therefore not only in their personal interest, but also serves the general interest in a professionally efficient, impartial administration of justice and public administration based on the rule of law, i.e. it also has a quality-assurance function.[2]

Briefly summarised, as in some other countries, the idea of the civil service is associated with the notion of the administration as a machine on which the democratic constitutional State depends, going back to Max Weber. Expertise, professional performance and loyal performance of duty are its central characteristics. In this way, it is supposed to provide a counterbalance to the political forces that shape the State system.[3]

The main principles of the civil service are the following. First, civil servants have a special obligation to ensure the neutrality of the State and its administration, to observe the law, and to show loyalty to the constitution. The ordinary law, the Civil Servants Status Act (*Beamtenstatusgesetz*, BStG),[4] concretises this: "Civil servants serve the whole people, not one party. They must perform their duties impartially and justly and conduct their office for the common good" (§ 33, paragraph 2). And § 34, paragraph 2 reads as follows:

> "Civil servants (. . .) shall perform assigned duties disinterestedly to the best of their knowledge and conscience. Their conduct within and outside the service must be in keeping with the respect and trust required by their profession. (. . .) In the performance of their duties, civil servants must show consideration for the trust placed in their office, also with regard to their appearance, in the course of their activities and in direct relation to their duties."

In particular, they are obliged to object if they are given instructions that they believe to be unlawful (for details, see Section III.1).[5]

Second, civil servants are bound to full devotion to the State (for details, see Sections III and IV.1). Third, as a counterpart to this obligation, in principle, they are employed for life and also have the right to appropriate remuneration, including retirement and survivors' benefits. This has many consequences, also concerning civil servants' social security (for details, see Section IV.3).

Fourth, the rights and obligations of civil servants are essentially regulated by statutory law and administrative acts.[6] The federal civil service is governed by federal laws, mainly the Federal Civil Servants Act (*Bundesbeamtengesetz*).[7] For the other civil servants,

2 FCC, decision of 4 May 2020, 2 BvL 6/17, para. 28.

3 See also FCC, judgment of 12 June 2018, 2 BvR 1738/12, para. 118.

4 Law governing the Status of Civil Servants in the *Länder* – Civil Servants Status Act of 17 June 2008 (*Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern*; *Beamtenstatusgesetz – BeamtStG*; BGBl. 2008 I, p. 1010), last amended by Act of 20 December 2023 (BGBl. 2023 I nr. 389).

5 Reichard and Schröter (2021), pp. 213 f.

6 Reichard and Schröter (2021), pp. 211 f.

7 Federal Civil Service Act of 5 February 2009 (*Bundesbeamtengesetz*; *BBG*; BGBl. 2009 I, p. 160), last amended by Act of 19 July 2024 (BGBl. 2024 I nr. 247).

the basic questions of employment status are regulated by the aforementioned federal Civil Servant Status Act, which was drafted to be analogous to the Federal Civil Servant Act, and which, because of its fundamental importance, is the only law cited herein. The status of judges and soldiers is regulated in a comparable manner (German law on Judges, *Deutsches Richtergesetz*,[8] completed by laws of the *Länder*, and law on soldiers, *Soldatengesetz*).[9]

2. Civil Service and Private Law Contracts

With these characteristics, the civil service differs quite fundamentally from the structure of private employment relationships. The latter have a contract as their central basis, even though this must, of course, comply with the applicable legal requirements. However, an employee's duty of loyalty is to the employer; he must serve the employer, not the common good. So, it is not possible for a private employer to employ *Beamte*.

On the other hand, not all persons employed by the State are civil servants employed on a public law basis. As mentioned previously, Article 33, paragraph 4 BL stipulates that – only – "the exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law". Nevertheless, the civil service is the formative element of public administration. So, particularly in ministerial administrations and security authorities, i.e. the police, the penal system and alike, most people are civil servants, but there are also personnel employed under private law, for example, to deal with internal administrative tasks, i.e. secretaries and the like.[10]

In contrast, concerning employees in the areas of services which can be provided in a comparable manner by private parties, such as in the area of healthcare, the State is free to determine the status of the employees, and quite often personnel are employed on a private contract basis. The classification of the education sector is controversial. In practice, university professors are usually civil servants, which is rarely the case with other university staff. At schools,[11] the responsible *Länder* repeatedly change their attitude: for some years they systematically employed teachers as civil servants, then they did not, or vice versa. Accordingly, the type of employment relationship varies greatly within this profession. It is regrettable that this decision was frequently influenced by various financial considerations.

Regarding statistics as of 30 June 2022, in total, there were 5,201,700 people employed by the State. In this context, "State" means the Federation (524,900), the *Länder* (2,559,700), the municipalities (1,701,400), and the social security agencies (3,756).[12] The relation between civil servants and private contract employees is quite different at the different levels of the State. On the federal level, there were 198,600 civil servants

8 German Law on Judges of 8 September 1961 (*Deutsches Richtergesetz*; *DRiG*), in the version of 19 April 1972 (BGBl. 1972 I, p. 713), last amended by Act of 22 October 2024 (BGBl. 2024 I nr. 320).

9 Law on the Legal Status of Soldiers of 19 March 1956 (*Gesetz über die Rechtsstellung der Soldaten*; *Soldatengesetz – SG*), in the version of 22 January 2024 (BGBl. 2024 I nr. 17), last amended by Act of 20 August 2021 (BGBl. 2021 I, p. 3932).

10 On this partition of the civil service in Germany, see also Reichard and Schröter (2021), p. 205 f.

11 Against the application of Article 33, para. 4 BL to teachers, see FCC, judgment of 19 September 2007, 2 BvF 3/02, para. 65.

12 On the federal structure of the German administrative system, see Behnke and Kropp (2021).

(including judges), 170,500 soldiers, and 155,800 employees, while on the level of the *Länder*, there were 1,333,500 civil servants (including judges) and 1,263,800 employees, and on the municipal level, there were 188,400 civil servants and 1,513,100 employees.[13]

3. *Historical Development*

The central guiding principle of public law employment is that the special status of civil servants defined by public law makes an important contribution to ensuring the legality and neutrality of public administration, a principle that forms a central element of the modern constitutional State.

This special status of public law employees emerged in Germany at the turn of the 18th and 19th centuries. The pioneers were Bavaria in particular, but also Prussia and later Württemberg. At that time, all these States undertook considerable internal reforms with the aim of modernising and rationalising the State and the State administration. Most of the other German States followed only a little bit later. Special features of the civil service relationship were the obligation of civil servants to the constitution and all other laws, as well as the guarantee of the permanence of the employment relationship, which could only be terminated under special circumstances. This guaranteed a certain independence of the civil servants vis-à-vis the monarch. In the middle of the 19th century, the *Beamtentum* was so widely recognised that it was also enshrined in the project of the German constitution elaborated in 1848–1849, which mentioned the *Beamten* in several provisions (Articles 67, 160, and 191 – the latter mentions the oath of the civil servants).

During the following decades, the civil servants were loyal supporters of the monarchic system existing at that time. The duty of loyalty associated with their status exposed the civil servants to repeated criticism in the period that followed because civil servants were not always particularly receptive to demands for social reform. In particular, the enthusiasm of the civil servants in favour of the democratic republic established in 1919 was quite limited.[14] Nevertheless, the Constitution of Weimar stipulated that civil servants have to serve the common good, not a party (Article 130, paragraph 1) and guaranteed the life-time employment as a rule (Article 129, paragraph 1). After the traditional idea of civil servants as competent and neutral employees of the States had been completely perverted during the Nazi regime (1933–1945), all legal relations between the State and the civil servants were ended, as decided later on by the FCC in a largely contested judgment of 1953.[15] In spite of these difficult historical experiences, the framers of the Basic Law established in 1948/49 still believed in the idea of the *Beamtentum* by voting the aforementioned stipulations of Article 33.

4. *Legal Foundations*

Elementary basic rules dealing with the public service can be found, as mentioned previously, in the BL as well as in most State constitutions. These apply in part to the

13 Statistisches Bundesamt: www.destatis.de/DE/Themen/Staat/Oeffentlicher-Dienst/Tabellen/beschaeftigungsbereiche.html.

14 For the historical development of the civil service law, see Schmidt (2017), MN 11 ff.; Summer (1986), pp. 15 f.; Günther (2021), pp. 31 f.

15 FCC, judgment of 17 December 1953, 1 BvR 157/52.

public service in general, in part only specifically to public law employment. The relevant European Union (EU) law applies to all employment relationships. There are no special provisions for employment relationships under private law. They are governed by general labour law, which is essentially based on federal laws.[16] These laws are supplemented by collective agreements concluded by public employers, i.e. in particular the Federation, the *Länder*, and the municipalities (or their umbrella organisations) on the one hand and the respective trade unions on the other hand.[17] Quite a large number of their stipulations refer to the laws governing employment relationships under public law.[18]

Public law employment relationships, on the other hand, are regulated by special laws. Within the limits defined in Article 80 BL, the legislature may delegate its power to the executive. The legislature must regulate the essential issues itself. In civil service law, these are in particular the so-called status-forming norms, which are also relevant to fundamental rights (Section III.3), among which the FCC includes, for example, the questions of age limits.[19]

In particular, there are specific laws for civil servants, judges, and soldiers. The federal civil service is governed by federal laws, mainly the Federal Civil Servants Act (*Bundesbeamtengesetz*). For the other civil servants, the basic questions of employment status are regulated by the federal Civil Servant Status Act (BStG), which is drafted analogously to the Federal Civil Servant Act and, because of its fundamental importance, is the only one cited herein. The legislatures of the *Länder* deal with all other questions. In particular, the legislatures of the *Länder* are responsible for regulating remunerations and pensions.

With regard to judges, the situation is similar, as there are judges in the federal service and in the service of the *Länder*. According to Article 98 BL, the status of judges is to be regulated in specific laws. In practice, the aforementioned German Law on Judges and the corresponding Laws of the *Länder* contain a number of provisions related to particular activities. Apart from that, however, these laws refer to the respective (general) laws pertaining to civil servants. The status of judges is, therefore, similar to that of civil servants in many respects. With regard to soldiers, reference should be made to the Federal Law on Soldiers (*Soldatengesetz*, SG). Here, the situation is similar: the SG contains some specific regulations and otherwise refers to the (general) law of civil service.

Since, according to the traditional German understanding, a strike must necessarily relate to the conclusion of a collective agreement (Article 9, paragraph 3 BL),[20] the circumstance that all these issues are regulated by law also means that there is no right to strike. However, there are discussions about the compatibility of this understanding with European law.[21] Anyway, the central justification for the ban on strikes for civil servants is different: it is derived from the special relationship of loyalty already mentioned. In the view of the FCC, this restriction on the right to strike constitutes a traditional principle of

16 Germelmann (2019a), MN 14; Reichard and Schröter (2021), p. 213 f.

17 Germelmann (2019a), MN 15.

18 Germelmann (2019a), MN 36 ff.

19 FCC, decision of 21 April 2015, 2 BvR 1322/12, paras. 57 ff.

20 Federal Labour Court, judgment of 5 March 1985, 1 AZR 468/83, *Neue Juristische Wochenschrift* 1985, 2545; see Ricken (2019), MN 38.

21 Zöllner et al. (2015), § 44, MN 8. See also *The Right to Strike in the Civil Service* by G. Buchholtz in this volume.

civil service within the meaning of Article 33, paragraph 5 BL. It is thus anchored in the BL even without being explicitly enshrined.[22]

Moreover, in the eyes of the FCC, this prohibition is also in line with the requirements under the European Convention on Human Rights (ECHR),[23] a stance accepted recently by the European Court of Human Rights (ECtHR).[24] Also, with regard to other countries, the ECtHR has declared a ban on strikes that is linked to a purely formal status and not to the concrete activity carried out that violates the Convention.[25]

II. Access to and Promotion in the Civil Service

1. Basis: The Merit Principle (Article 33, Paragraph 2 BL)

In general, employment in the civil service, i.e. not only as far as public-law employment relationships are concerned, is characterised by the principle of merit. This follows from Article 33, paragraph 2 BL. According to this provision, every German has "equal access to every public office", i.e. to all functions in the public service, "according to his aptitude, ability and professional performance". Professional performance refers to previous achievements in the professional field. Ability means, in general terms, all general requirements or performance-related requirements for the specific office. Aptitude refers to all criteria apart from professional criteria. These include health issues, social skills, and the like.[26]

Other criteria may, in principle, not be taken into account for recruitment or promotion. This applies, for example, to political or religious convictions, gender, or age. An exception naturally applies where a characteristic is a mandatory requirement for a profession. With regard to gender, however, it is accepted that the State may, within certain limits, take measures to compensate for disadvantages suffered by the under-represented female part of society (Article 3, paragraph 2 BL). In the event that all competing applicants prove to be equally capable, women may be given preference. In addition, federal and *Länder* laws contain numerous other requirements, especially of a procedural nature, which serve the goal of equality between men and women, such as the participation of a special Equal Opportunities Officer[27] in the recruitment procedure. There are also special regulations for people with disabilities, which now even find explicit constitutional expression (Article 3, paragraph 3 BL).[28]

In the hiring of private law employees, the law never provided any age limit. In contrast, in the area of public-law employment, there are traditionally age limits in the form of maximum ages for recruitment. However, recently the prohibition of age discrimination under EU law[29] has set limits to this practice. Accordingly, age limits are only permissible

22 FCC, judgment of 12 June 2018, 2 BvR 1738/12, paras. 144 ff.

23 FCC, judgment of 12 June 2018, 2 BvR 1738/12 para. 172 ff.

24 ECtHR (GC), judgment of 14 December 2023, *Humpert and Others v. Germany*, 59433/18, 59477/18, 59481/18 et al.

25 ECtHR, judgment of 21 April 2009, *Enerji Yapı-Yol Sen v. Turkey*, 68959/01, para. 24; ECtHR, judgment of 21 April 2015, *Junta Rectora Del Ertzainen Nazional Elkartasuna v. Spain*, 45892/09, para. 32.

26 For details, see Jachmann-Michel and Kaiser (2018), art. 33, MN 17.

27 Germelmann (2019b), MN 4.

28 Germelmann (2019c), MN 6.

29 Article 21 of the Charter of the Fundamental Rights; see also Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

where they are typically related to the aptitude for a job, as can be assumed for the army or fire brigades.[30] In the opinion of the FCC, age limits can also be justified if they are justified by special structural features of the public-law employment relationship, which is characterised in particular by the principle of lifetime employment and the principle of remuneration. Accordingly, a certain length of the active employment relationship until retirement may be made a requirement for recruitment.[31]

Religious convictions can play a role only in very specific contexts. Despite the fundamental separation of church and State, Article 7, paragraph 2 BL requires religious education at State schools, and some State universities have theological faculties. The respective religious community has a right to employ appropriate teachers and professors belonging to the corresponding denomination.[32]

With regard to nationality, with some exceptions public law employment relationships were traditionally restricted to Germans. Here, EU law, specifically the freedom of workers movement,[33] has brought about significant widening. Today, employment may be reserved to Germans only if this is required by the duties to be performed (§ 7, paragraph 2 BStG). This refers, in particular, to Article 45, paragraph 4 of the Treaty on the Functioning of the European Union (TFEU) and the case law of the Court of Justice of the European Union (CJEU) on the subject.[34] For example, there are still no foreign judges.

2. Prerequisites for Recruitment and Promotion

Accordingly, the prerequisites for recruitment and promotion are, in particular, professional qualifications. These are initially acquired through professional training.[35]

The State has created its own training centres only for some areas, especially for the medium positions. For the higher service, personnel are recruited from graduates of the general, predominantly State-run universities. The age limits under civil service law have already been mentioned (Section II.1).

3. Selection Decisions

The procedure for determining the criteria to be taken into account for selection and promotion, as well as the decisions themselves, are, in principle, little formalised in Germany. The Federal Foreign Office traditionally recruits its staff through a *concours*. Otherwise, particularly in the case of recruitment decisions, selection decisions are made on the basis of grades acquired in the course of training or university studies and, in the case of promotions, on the basis of assessments received in the course of previous activities. Personal interviews are another important element. Job advertisements are common and often compulsory. At its own discretion, the State may limit the group of applicants to persons already employed in the civil service or in a certain field. For a number of years now, it has been mandatory to have an equal opportunities officer in the public service who is also

30 CJEU, judgment of 12 January 2010, *Colin Wolf v. Stadt Frankfurt am Main*, C-229/08, paras. 38 ff.

31 FCC, decision of 21 April 2015, 2 BvR 1322/12, paras. 74 ff.

32 FCC, decision of 28 October 2008, 1 BvR 462/06 paras. 111 ff.

33 See Article 45 TFEU.

34 E.g. CJEU, judgment of 10 September 2014, *Iraklis Haralambidis v. Calogero Casilli*, C-270/13, paras. 44 ff.

35 Reichard and Schröter (2021), pp. 215 f.

involved in the recruitment process. Staff representatives also usually participate in the recruitment process (Section VI). After the decision has been made, all applicants have the right to inspect the complete documentation of the decision process.[36] In order to safeguard the rights of applicants, key steps in the selection process must be adequately documented.[37] Finally, in Germany, there exists a possibility for unsuccessful applicants to initiate a relatively intensive – compared to other States – judicial review of recruitment and promotion decisions (Section VII).

III. Status of the Employees

1. Subjection to Instructions and Its Limits

Public service employees, like all employees, have to follow the instructions of their respective superiors. For employees under private law, this results from § 106 *Gewerbeordnung*;[38] for employees under public law, from § 35 BStG. In the civil service, according to the German understanding, this is also a consequence of the principle of democracy: since parliamentary control is an indispensable element of the democratic legitimisation of the administration and only the top of the executive is subject to direct parliamentary control, subordinates in an administration must be subject to instructions from their superiors. Only the head of the executive can assume responsibility vis-à-vis parliament for the activities of the entire administration.[39]

Under both private labour law and the law of public service, however, this right to issue instructions is subject to limits. Section 106 *Gewerbeordnung* refers relatively succinctly to the employment contract, work agreements, collective agreements, and statutory regulations and, overall, links the right to issue instructions to "reasonable discretion". In civil service law, the legal frame is more precise. In particular, it is expressly provided that if a civil servant has concerns about the legality of an instruction given by his or her superior, he or she must approach the superior and present his or her concerns. If the instruction is upheld, he may turn to the next superior. If the latter also confirms the instruction, the civil servant must comply with it unless the instruction violates human dignity or entails criminal or administrative offence. The confirmation upon request must be given in writing (§ 36 BStG). There are special rules for cases in which urgent action is required.

2. Special Characteristics of Public Service Relationships

2.1. Preservation of the Neutrality of the State Administration

As mentioned in Section I.2, civil servants have special obligations regarding the neutrality of their actions and the observance of the law. The main idea is that the civil servant, in the performance of his or her duties, should be guided solely by legal obligations and should

36 Federal Administrative Court, judgment of 20 November 2012, 1 WB 4/12, para. 30.

37 Federal Administrative Court, judgment of 27 January 2010, 1 WB 52/08, para. 27.

38 Trade, Commerce and Industry Regulation Act of 21 June 1869 (*Gewerbeordnung*) in the version of 22 February 1999 (BGBl. 1999 I, p. 202), last amended by Act of 23 October 2024 (BGBl. 2024 I nr. 323).

39 FCC, decision of 24 May 1995, 2 BvF 1/92, para. 134 and FCC, decision of 5 December 2002, 2 BvL 5/98, paras. 157 ff.

at all times take these fully into account on his or her own initiative. Whereas an employee has the right to act in a biased way in favour of his or her employer, a civil servant is not allowed to behave in such a manner. The civil servant even has the obligation to swear that he will respect the laws and fulfil his obligations conscientiously (§ 38 BStG).

This obligation applies first and foremost to conduct in the workplace. Thus, unlike an employee, a civil servant may not wear political insignia or similar while on duty; on the controversial issue of religiously motivated clothing, see Section III.3.2. However, this obligation also has an impact on off-duty behaviour. Here, too, a particular degree of integrity is expected from civil servants. For this reason, off-duty offences – provided they are sufficiently serious (such as driving under the influence of alcohol) – also constitute official misdemeanours which can be sanctioned.

2.2. *Faithfulness to the Constitution*

A specific feature of the public service relationship is the obligation to be faithful to the constitution. The civil servants "must by their entire conduct commit to the free democratic basic order in the sense of the Basic Law and stand up for its observance" (§ 33 BStG). In principle, all employees are obliged to behave loyally towards their employer. However, private employment law is characterised by the fact that an employee gives only part of his or her time and labour power to the employer. In private life he or she is free as long as he or she does not harm the employer; in particular, he or she may be indifferent to any values of the employer.[40] A State employee, therefore, may not actively fight the constitution.[41]

In contrast, the law of civil service requires generally and without exception: "Civil servants must commit themselves to the free democratic basic order of the Basic Law through their entire conduct and stand up for its observance" (§ 33 BStG). As a consequence, civil servants may not, for example, take up leadership positions in parties that fight the constitution, even if the party as such is not banned.[42] Nevertheless, their fundamental rights, including freedom of expression, have to be respected. Some judgments of the ECtHR clearly show how to establish the right balance between loyalty and freedom: States have to establish that specific activities of the civil servant justify doubts concerning their loyalty; the fact that a certain person is member of a party reputed to be unconstitutional but not forbidden as such.[43]

3. *Protection of Fundamental Rights*

At the same time, however, it is also recognised that all public service employees, i.e. particularly civil servants, can invoke fundamental rights.[44] It is true that their official activities do not enjoy the protection of fundamental rights as such. However, the protection of civil servants' fundamental rights is not limited to their leisure time. All public service employ-

40 Reichold (2021b), MN 45 ff.

41 For the case law, see e.g. Federal Court of Labor, *Juristische Wochenschrift* 1981, 71, concerning schoolteachers; 1983, 779, concerning prospective schoolteachers; 1987, 1100, concerning social workers.

42 FCC, *Neue Zeitschrift für Verwaltungsrecht* 2002, 847; Schmidt (2017), MN 324.

43 See, on the one hand, ECtHR, judgment of 26 September 1995, *Vogt v. Germany,* 17851/91, and – on the other hand – ECtHR, judgment of 29 November 2022, *Godenau v. Germany,* 80450/17.

44 Schmidt (2017), MN 111 ff.

ees also have the right to engage in trade union activities. Employees also have the right to strike without any special limits. In contrast, civil servants, as mentioned in Section I.4, do not have a right to strike. Furthermore, "civil servants shall exercise such moderation and restraint in their political activities as results from their position vis-à-vis the general public and out of consideration for the duties of their office" (§ 33, paragraph 2 BStG).

How the duty of official neutrality and the protection of fundamental rights can be brought into harmony with each other will be examined in more detail in two areas of conflict.

3.1. Expressions of Opinion and Political Engagement

Civil servants enjoy fundamental rights and are accordingly allowed to engage in political activity.[45] Nevertheless, a certain duty of moderation, as already mentioned, applies here (Section III.2.1). In essence, however, this only relates to the way in which certain opinions are expressed and political goals are pursued.[46] With regard to the official's service activity, neutrality in this context justifies the expectation that a civil servant, despite certain political convictions, will be guided solely by the law. In principle, political commitment is also possible without restrictions. Even the assumption of municipal mandates is permissible. Yet, membership in a Land parliament or the Bundestag (Article 137 BL) – for reasons associated with ensuring the separation of powers – has the consequence of the employee having to leave the civil service. However, there is a right to return after the end of the mandate.

3.2. Religiously Motivated Clothing

If civil servants – or even employees of the public service – want to wear certain clothing, for example, for religious reasons, they can, in principle, do so on duty with reference to freedom of religion.[47] The starting point is that clothing with religious connotations is generally not worn to proclaim a religious message – that would be inadmissible in public service – rather, it is an expression of personality. In particular, the Islamic headscarf, which in Germany has solely practical relevance in this context, cannot be regarded as a sign of oppression of women. In the cases decided by the FCC, it was worn by highly qualified women – teachers and prospective judges. So, at schools, only a concrete threat to "school peace" justifies a ban on religious clothing.[48] For the judiciary, on the other hand, in view of the traditional obligation of professional judges to wear a robe during oral proceedings, a ban on religious clothing was considered permissible.[49] From the reasoning of the FCC, one can deduce that such a ban is also constitutional when uniforms are worn by the

45 Reichard and Schröter (2021), p. 218.

46 On the European standards of protection of freedom of expression in the civil service, see *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume. On civil servants' right to join political parties, see *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

47 On restrictions imposed on manifestations of religion by civil servants in Europe, see *Freedom of Religion or Belief in The Civil Service: How to Stay Loyal to the State While Remaining True to Oneself?* by W. Brzozowski in this volume.

48 FCC, decision of 27 January 2015, 1 BvR 471/10, paras. 97 ff.

49 FCC, decision of 14 January 2020, 2 BvR 1333/17 paras. 81 ff.

executive branch, such as the police. More far-reaching regulations, on the other hand, are inadmissible.

4. Duty of Confidentiality

Public service employees are under a general obligation to keep matters that have come to their knowledge in the course of their official duties confidential. For civil servants, this duty is contained in § 37 BStG; for employees under private law, in the collective agreements.[50]

5. Devotion

The obligations of the civil servant also include “devoting themselves to their office with full personal commitment and perform the assigned tasks unselfishly to the best of their ability” (§ 34 BStG). This clearly distinguishes the civil servant from an employee. The latter is only obligated to work for the employer during his contractually and freely defined working hours in compliance with the statutory maximum limits; overtime can only be demanded within narrow limits. In contrast, employment as a civil servant is basically on a full-time basis. Overtime can be requested much more easily, and part-time employment is only possible with the consent of the person concerned. Consequently, the salary is not a concrete payment for the service rendered but an alimentation aimed at ensuring an adequate livelihood.

6. Appraisals

As a consequence of the principle of merit that applies to the entire public service, employees in the public service are regularly evaluated – in principle every three years – by their superiors. For civil servants, there have to be explicit legal regulations in this respect.[51] In substance, however, the same applies to employees. The purpose of the appraisal is twofold: on the one hand, it should show the employee his or her level of performance and whether there are possibilities for improvement. On the other hand, it is intended to give a comparative overview of the performance of different employees so that in the case of promotions, a selection based on merit is possible. Accordingly, there is also a right to an appraisal when someone applies for a new post. Assessments must be specific, as with undifferentiated evaluations, a decision based on merit is not possible.[52] In order to ensure uniformity, the respective supreme authorities regulate criteria and procedures of appraisal. Often a system of second appraisals is provided, in the sense that the superior of the appraising superior gives an assessment of the appraisal. The evaluation must be made available to the person concerned, who may raise objections and ultimately have the assessment reviewed by the courts.[53]

50 Battis (2021), MN 42.
51 For details, see Federal Administrative Court, judgment of 7 July 2021, 2 C 2.21, para. 32.
52 Federal Administrative Court, judgment of 28 October 2004, 2 C 23.03, para. 15.
53 For details see Schmidt (2017), § 28.

7. *Misconduct*

All public service employees can be held accountable for their misconduct. A distinction must be made between sanctions imposed by the employer on the one hand and obligations to pay damages on the other. With respect to the first point, it should be mentioned that the rules of general labour law also apply in the case of employees under private law. The instruments to be considered are, in particular, a formal warning, which is placed in the personnel file, and in serious cases, especially in case of repeated misconduct after a warning has already been given, termination of the employment relationship without notice, or at least an orderly termination of the contract.[54] If provided for in a collective agreement or a company agreement, a fine may also be imposed.[55] For civil servants, a whole range of measures is provided for as formal disciplinary measures, from reprimands to various financial sanctions, bans on promotion, demotions, and dismissals (§ 47 BStG as well as special laws). A criminal conviction of a civil servant followed by a sentence to imprisonment of one year or more automatically terminates the civil service relationship by operation of law when the sentence becomes final (§ 24 BStG).

If an employee in the public service – a civil servant or also an employee under private law – causes damage in his official capacity, he is not liable himself; but the State assumes liability (Article 34 BL). However, the employer, equally for employees under private and public law, can demand compensation or take recourse if the damage was caused intentionally or by gross negligence (§ 48 BStG).

IV. Duration of Employment, Transition to and From the Private Sector

Civil servants are, in principle, employed for their entire lifetime (§ 4, paragraph 1 BStG). This principle is part of the constitutional relationship of loyalty and is also regarded as a traditional principle of the professional civil service within the meaning of Article 33, paragraph 5 BL. It gives the civil servant the legal and economic security necessary for the neutrality required for the performance of his or her duties mentioned in Section III.2.1.[56] In principle, recruitment for life must be preceded by a probationary period of several years (§ 10 BStG). In certain special cases, a civil servant relationship may also be established for a fixed term.[57]

In the case of employees under private law, the employment contract forms the basis of employment. If it has been concluded for an indefinite period, it may be terminated in accordance with the relevant legal rules unless this is excluded in the contract itself or by collective agreement.[58] However, the right of employers to terminate an employment contract has been severely restricted by the so-called Employment Protection Act[59] for social policy reasons. Accordingly, the regime of terminations differs significantly depending on the reasons for the termination. Specifically, a termination may first be conduct-related,

54 For dismissal with notice, see Zimmermann (2019); for dismissal without notice, see Rachor (2019).

55 Reichold (2021a), MN 13.

56 FCC, decision of 28 May 2008, 2 BvL 11/07, para. 35 and FCC judgment of 12 June 2018, 2 BvR 1738/12, para. 11.

57 Concerning the prerequisites and limits, see FCC, decision of 24 April 2018, 2 BvR 10/16, paras. 49 ff.

58 Germelmann (2019c), MN 14 ff.

59 Employment Protection Act of 10 August 1951 (*Kündigungsschutzgesetz*; *KSchG*), in the version of 25 August 1969 (BGBl. 1969 I, p. 1317), last amended by Act of 14 June 2021 (BGBl. 2021 I, p. 1762).

i.e. it may be the consequence of certain misconduct (Section III.6). Furthermore, a dismissal can take place for person-related reasons. This is the case if the employee is no longer able to perform his or her work, e.g. due to illness. In this case, a notice period must be observed, the length of which depends on the duration of the employment contract.[60]

Finally, a termination of the contract due to redundancy can be considered if the employer no longer has a need for the employee.[61] But if there are several comparably qualified employees in a certain area and only some of them have to be dismissed – and this is practically always the case in the public sector – there is an obligation under general labour law to make an appropriate social selection between the employees who are dismissed and those who are allowed to stay.[62] As this is very difficult in practice, dismissals for "redundancy" are largely ruled out in the public sector. De facto, therefore, employees under private law are also employed until retirement age, provided they do not commit serious mistakes or become incapacitated for other reasons.

A fixed-term employment contract is possible within the framework of relatively strict legal rules, especially the Part-Time and Fixed-Term Employment Act; these are intended to prevent circumvention of the legal protection against dismissal.[63]

Linked to the question of length of employment is the question of how easy it is to switch between a job in the public service and the private sector. A distinction must be made here: in the case of employment under private law in the public sector, such a change does not pose a problem because the basic structures of the contractual arrangement of employment relationships, as well as the social security regulations, are naturally largely the same for private and public employers. However, a change from civil servant status to the private sector and vice versa is not without problems. Here, the concept of a civil servant relationship for life raises questions. Specifically, in the first case, there is a great difference in retirement benefits between civil servants and employees under private law (Section V.2). It is possible to leave the civil service at any time upon application, but traditionally this had important consequences concerning the pension. Only in recent times, one has been able to keep some advantages concerning pension when leaving public employment (Section V.4). Conversely, as mentioned previously, civil service law stipulates age limits for recruitment with the consequence that at a certain age, employment in the civil service after previous employment in the private sector is only possible on the basis of a private law employment contract.

V. Time and Place of Work, Salary, Pensions

1. General Principles

Of course, every employee in the public service has the right to remuneration. Nevertheless, as already mentioned (Section I.3), there is a difference between public and private law employees. For civil servants, the State has a comprehensive obligation to care (§ 45 BStG). Beyond the life-employment (Section IV), there exists a statutory regulation of the salary, and also the pension, i.e. the payment of retired persons; in this

60 Kiel (2019), MN 50 ff.
61 Kreft (2019), MN 12 ff.
62 Kreft (2019), MN 177 ff.
63 Wank (2019a) and Wank (2019b).

respect, contractual regulations are, in principle, inadmissible. According to the so-called principle of "alimentation", the remuneration is also not a direct consideration for the concrete service activity rendered but for the aforementioned duty to place one's full labour power at the disposal of the State.[64] It must ensure an adequate living standard for the latter.[65] There are also differences in social security coverage that need to be explained in more detail (Section V.4).

2. *Time and Place of Work*

The right to issue instructions mentioned previously also applies to the time and place of work. With regard to working time, there are clear differences between civil service law and collective agreements. First of all, by law a civil servant is a full-time employee. According to § 34, paragraph 1 BStG, civil servants must "devote themselves to their profession with full personal commitment". Part-time employment is possible, but only at the request of the person concerned.[66] In principle, this request is to be granted for reasons connected with family responsibilities, but only if there are no other reasons against it. In this case, however, the possibility of further employment is strictly limited. The extent of service to be performed by the civil servant is determined by legal provisions. In the case of employees under a private-law contract, on the other hand, the working hours are determined by the respective work contract and collective agreement rules.

With regard to overtime work, according to collective agreements, there is a fundamental obligation to abide by the hours agreed in the contract; overtime work can only be agreed on with the consent of the staff representatives. For civil servants, on the other hand, the duty to work overtime is inferred from the aforementioned provision (§ 34, paragraph 1 BStG). Depending on the amount of overtime work, however, there has to be some compensation in time or in money. This is in fact partly required by European law, which does not distinguish between civil servants and other employees, but only contains possibilities for specific regulations in certain areas. The hurdles for requesting overtime work are therefore much lower here than in private labour law. At the same time, financial compensation for overtime work is not guaranteed in the same way as for employees under private law.

3. *Remuneration*

Questions of remuneration for employees under private law are regularly regulated in a collective agreement. The decisive criterion for the classification of the employee is the activity performed. In this respect, the collective agreements contain a number of characteristics which, if fulfilled, lead to a certain classification. Collective agreements used to be concluded uniformly for the entire public sector. At present, however, there is one collective agreement for the Federation and the municipalities and another for (most of) the *Länder*.

64 FCC, decision of 25 November 1980, 2 BvL 7/76, paras. 100 ff. and FCC decision of 15 October 1985, 2 BvL 4/84, paras. 100 ff.

65 FCC, decision of 13 November 1990, 2 BvF 3/88, para. 31 and decision of 24 November 1998, 2 BvL 26/91, para. 35.

66 FCC, 2 BvR 1738/12 (n. 3), para. 77 ff.

For civil servants, remuneration is determined by law. Since, according to Article 33, paragraph 5 BL, the law of civil service is to be regulated with due regard to the traditional principles of professional civil service, and since these principles include the aforementioned principle of alimentation (Section I.1), the FCC has developed a number of rules in this regard. The alimentation principle obliges the employer to regulate the appropriate salary according to the rank, the responsibility associated with the respective office, the importance for the general public, the development of the general economic and financial circumstances, and the general standard of living. The appropriate amount shall be established in relation to both the income and expenditure situation of the population as a whole and to the situation of the State finances.[67] The guarantee of a legally and economically secure position forms the basis of the lifelong duty of loyalty and, thus, also for the prohibition of strikes, as already mentioned (Section I.4).[68]

The legislator has a wide margin of appreciation in the structuring of salaries. In recent years, however, the FCC has significantly tightened its control in this respect. In order to prove how intensively the Court controls the legislation, the principles laid down in its case law will be presented here in detail. First, the Court has developed five criteria intended to enable an initial assessment of the reasonableness of the amount of remuneration. These include a comparison of the development of salaries with the development of collective wages in the public sector, the nominal wage index, the consumer price index, a comparison of salaries within the system of civil service, and a cross-comparison with the salaries of the federal government and other *Länder*. In the intra-system salary comparison, in addition to the change in the gap to other salary groups, the question is whether, in the lowest salary group, the customary minimum gap to the level of the so-called basic security is maintained (i.e. the social benefits that everyone who is not employed receives). In doing so, the Court assumes that if three parameters of the first stage of the examination are fulfilled, there is a presumption of alimentation in line with the constitution, which can be refuted or supported in the context of an overall weighing. Conversely, if all parameters are above the threshold values, there is a presumption of adequate alimentation. If one or two parameters are fulfilled, the results of the first stage must be assessed in detail together with the relevant criteria at the second stage, which must be fulfilled in the same way, within the framework of an overall assessment. If the overall view shows that the remuneration under examination does not fulfil the threshold values at the third stage of the examination, it is necessary to examine whether this exceptional case can be justified under constitutional law.[69] In light of this, in recent years, the FCC has classified several laws as unconstitutional.[70] This strict control is one of the reasons why the Court considers the ban on strikes to be permissible.

In legal practice the trade unions first negotiate salary improvements for employees under private law, and these are then adopted for civil servants as well – albeit sometimes only with modifications. In this way, the conditions for employees under private law influence those for civil servants.

67 FCC, decision of 24 November 1998, 2 BvL 26/91, para. 40; FCC, decision of 5 December 2002, 2 BvL 5/98, para. 67 and FCC, judgment of 27 September 2005, 2 BvR 1387/02, para. 113.

68 FCC, judgment of 12 June 2018, 2 BvR 1738/12, paras. 152 ff.

69 FCC, decision of 21 April 2015, 2 BvR 1322/12, paras. 97 ff.

70 See furthermore, FCC, decision of 17 November 2015, 2 BvL 19/09; FCC, decision of 11 September 2018, 2 BvQ 60/18; FCC, decisions of 4 May 2020, 2 BvL 4/18 and 2 BvL 6/17; and previously, FCC, decision of 24 November 1998, 2 BvL 26/91, para. 40.

In the case of both private-law employees and civil servants, remuneration is based not only on the activity performed or the office held but also on the duration of employment. In the past, for employees under private law, this was measured according to their age. Today, however, this constitutes inadmissible discrimination on grounds of age, according to EU-directive 2000/78/EC.[71] Therefore, as was the case for civil servants in the past, the so-called “experience levels” are now used as a basis. Civil servants, and in some cases also employees under private law, may also receive supplements if they are married or have children to care for. Occasionally there are also allowances for special functions assumed by the civil servant.

The right to leave for employees under private law is governed by the respective collective agreement – for civil servants by statutory regulations. The requirements of EU law must be observed in both cases.

4. Social Security

There are also major differences between civil servants and employees under private law in terms of social security. Employees under private law are subject to the general regulations of labour and social law. At retirement age, they receive a pension from the State pension insurance, the amount of which is based on the pension entitlements acquired in the course of their entire working life. Contributions to the pension insurance are regularly paid in equal amounts by the employer and the employee. A similar regime applies in the event of illness, where contributions to the statutory health insurance scheme are also, in principle, divided equally. In the case of illness, the employer must continue to pay the wage for six weeks; in the case of longer illnesses, health insurance benefits take the place of the wage. Finally, there is an obligation to pay into the unemployment insurance scheme, which is also organised by the State; in the event of unemployment, there are corresponding benefits.

With regard to civil servants, reference should be made to the aforementioned principle of lifetime employment. The amount of pension that a civil servant receives in retirement is generally based on the office he or she last held.[72] They, therefore, tend to be significantly higher than if someone had been employed on a private-law basis. In the event of illness, the salary is still paid.[73] In the event of permanent incapacity, the civil servant may be retired. Above all, however, a considerable percentage, usually 50–80% of the medical costs, is regularly reimbursed by the State. Apart from that, the civil servant must insure himself privately against illness. In view of the fact that civil servants are appointed for life, the question of unemployment insurance does not arise. If a civil servant leaves the civil service prematurely upon application or for other reasons, this entails an important financial loss. During the last decade, the law was changed so one can get a pension even when one decides to leave the public service. The main reason is that the traditional system constituted an unjustified limitation on the freedom of workers in the European Union (Article 45 TFEU).[74]

71 See Council Directive 2000/78/EC (n. 29); see also CJEU, judgment of 8 September 2011, *Sabine Hennigs v. Eisenbahn-Bundesamt und Land Berlin,* C-297/10 and C-298/10, paras. 75 ff.

72 Reichard and Schröter (2021), p. 217.

73 For constitutional limits of cuts in salary, see FCC, decision of 28 November 2018, 2 BvL 3/15, paras. 37 ff.

74 CJEU, judgment of 13 July 2015, *Joachim Pöpperl v. Land Nordrhein-Westfalen,* C-187/15; see also Federal Administrative Court, judgment of 4 May 2022, 2 C 3.21.

VI. Staff Representation

In Germany, the co-determination of employees in decisions on issues relevant to labour law is considered of high importance. In this respect, general labour law provides, on the one hand, for the establishment of a workers' council elected by the employees for every enterprise with more than five employees. On the other hand, employees at the company level are entitled to one-third of the seats to be filled on the supervisory board, and in the case of large companies (more than 2,000 employees), even to almost equal representation.

However, special rules apply in this exceptional case also to employees under private law. This is because in practical terms there are no situations where there are only employees employed under private law, or where there are only civil servants. However, in the administration, the staff representation must be organised uniformly for all employees; it makes little sense to create separate staff representations for the two different status groups. There is also another peculiarity: the civil service has a service function in relation to the general public. This sets limits to the powers of a staff representation. In a democracy, as is well known, all State powers derive from the people. The staff of the civil service does not form a people of its own, and its representation accordingly does not form a parliament of its own. For this reason, the FCC ruled as early as 1959 that there are limits to the co-determination of a staff representation insofar as it concerns issues of fundamental importance to the government in question.[75]

In detail, the relevant laws differ. Nevertheless, certain commonalities can be found: a staff council must be set up in every department, which is regularly elected for a four-year term.[76] The employees under private law, on the one hand, and the civil servants, on the other, each elect their own representatives. The proportion of representatives depends on the strength of the respective group in the department concerned. In addition, staff councils also exist at a higher level, for example, in a ministry, especially in the case of subdivided administrations.

These staff councils participate in various ways. In some cases, they have the right to be informed, in some the right to comment, and in others a decision is subject to their approval. The type of reasons which can justify a comment, or due to which consent can be refused, are sometimes limited. In particular, co-determination or participation rights regularly exist in the case of a certain catalogue of social matters, certain organisational matters (design of the workplace, work processes, and the working environment) and in human resources issues (recruitment, promotion, dismissal). If there is no agreement between the management of the agency and the staff council on a matter requiring their consent, a conciliation board with equal representation usually has to be called upon. In general, the decision of the conciliation board is binding unless the aforementioned governmental reservation applies.[77]

VII. Legal Protection

By virtue of the Basic Law, anyone who can claim that his rights have been violated has a right to judicial protection. For protection against acts of the State, this is enshrined in

75 FCC, decision of 27 April 1959, 2 BvF 2/58, paras. 66 ff.; comprehensively later, FCC decision of 24 May 1995, 2 BvF 1/92, paras. 133 ff. See also the references in footnote n. 26.

76 Germelmann (2019d), MN 58 ff.; Reichard and Schröter (2021), p. 215.

77 For details, see Battis (2021), § 89.

Article 19, paragraph 4 BL. Accordingly, all legal disputes from the aforementioned areas can be decided by the courts. It should be emphasised in particular that only a few measures can be shielded from judicial review with the argument that they are purely internal administrative measures because they do not touch on the rights of the person concerned and therefore do not have be subject of judicial review. This only applies to such official orders that do not have effects on private legal positions and thus do not affect the so-called basic relationship.[78]

In particular, actions by competitors for vacant positions, actions against appraisals, and actions against disciplinary measures can therefore be brought before the courts. Some disciplinary measures are even a judge's prerogative. Likewise, disputes in connection with the participation and co-determination rights of staff representatives can be brought before the courts.

In many cases there is a risk that a court decision will come too late. This applies in particular to competitor disputes.[79] Once an employment contract has been concluded or a civil servant has been appointed, this can usually not be reversed by way of a competitor's action, even if there has been a violation of the law. Accordingly, there is the possibility, but also the necessity, for those affected to assert rights by way of interim legal protection. As legal protection in the main proceedings regularly comes too late, the courts here examine comparatively intensively, and in the event of serious doubts about the legality of the decision in question they regularly prohibit the planned measure, i.e. the filling of a vacancy, until the conclusion of the main court proceedings.

In order to guarantee the right to legal protection, labour courts are available to employees under private law. Civil servants have to turn to the administrative courts. All these courts are also part of the State judiciary. Both jurisdictions are organised in three instances, whereby it must be taken into account that disputes concerning questions of Land law cannot be decided by the Federal Administrative Court, but only by the highest administrative court of the respective Land.

Finally, there is the possibility of a constitutional complaint to the FCC if constitutional guarantees are violated. In this respect, it should be recalled that according to Article 33, paragraph 2 BL, every German has the right of access to employment in the civil service in accordance with the principle of merit, and furthermore, every civil servant is entitled to respect for the traditional principles of professional civil service guaranteed in Article 33, paragraph 5 BL. Accordingly, the FCC intervenes time and again in competitor disputes,[80] or decides on the constitutionality of statutory regulations on the law of civil service,[81] in particular on remuneration, as mentioned previously.

VIII. Outlook

Public service in Germany is strongly characterised by the civil service (*Berufsbeamtentum*). This service is characterised by an elaborated legal framework and by administrative acts. The main idea is to guarantee an administration based on expertise, professional

78 Schmidt (2017), MN 72.

79 For details, see Schmidt (2017), MN 746 ff. for civil servants; for employees, see Germelmann (2019a), MN 69 ff.

80 FCC, decision of 20 September 2016, 2 BvR 2453/15.

81 FCC, 2 BvR 1738/12 (n. 3); FCC, decision of 28 May 2008, 1 BvL 11/07 and FCC, decision of 24 April 2016, 2 BvL 10/16.

performance and the loyal performance of duty. It ensures a neutral administration guided by the rule of law. Even if historically, this concept was developed under a monarchical system, it is still well recognised in the actual republican State as it hinders public administration from a far-reaching politicisation. As a consequence, after elections and a political change of government, there is no major change in the personnel of public administrations, even not in the ministries. Only with regard to very high positions do changes occur in such a situation.

Certainly, there is a large proportion of people working in public administration who are not civil servants but who are employed on the basis of a private law contract. In theory, the guiding principles between private and public-law employment relationships differ considerably. When it comes to the question of what significance this difference has in practice, a distinction should probably be made: it can be justifiably doubted that the work of a salaried employee differs fundamentally from that of a civil servant in the normal course of everyday life. This can be observed above all where, for whatever reason, both categories of personnel work side by side and perform comparable activities. The differences between the two statuses are most evident not where it should play a role – i.e. with regard to the quality of their respective work, but in the comparison of pay and pensions. The State is also much more flexible in structuring employment relationships for salaried employees than for civil servants. In addition, the differences are particularly evident in crisis situations, i.e. when there is a conflict between the employer and the employee: in private law constellations, the scope of possibilities to react within the employment relationship is significantly smaller, but the freedom to terminate the employment relationship is significantly larger. In public law employment relationships, the situation is exactly the opposite.

From these differences, the continued significance of civil service law to this day becomes clear. If an administrative authority (also) employs civil servants, this circumstance alone protects this authority as a whole, to a certain extent, from political instrumentalisation, because it is hardly conceivable from a practical point of view that such an instrumentalisation can take place solely via employees under private law contracts.

There is internal and external pressure for reform. In some cases, the FCC has set limits to attempts by some *Länder* to make employment relationships more flexible. This holds true, for example, for the regulation of compulsory part-time work ordered by the employer,[82] the promotion to senior positions on a temporary basis,[83] and a two-year delay in the adjustment of the salary to a new post in the case of promotion to higher positions.[84]

There is also an urgent need for consistent practice in deciding whether to employ certain groups of people as civil servants. One can easily get the impression that financial considerations of various kinds, rather than the guiding principles expressed in Article 33, paragraph 4 BL, are the central criterion for such decisions. This has a delegitimising effect on the law of the civil service.

In certain cases, European law has also ushered in a certain opening; whether further developments will follow remains to be seen. There are different views on this development: some certainly see the status of civil servants as an obstacle to necessary progress in shaping the structure of the personnel of the public authorities. Others see it, not without

82 FCC, decision of 19 September 2007, 2 BvF 3/02.

83 FCC, decision of 28 May 2008, 1 BvL 11/07; decision of 24 April 2016, 2 BvL 10/16.

84 FCC, decision of 17 January 2017, 1 BvL 1/10.

reason, as a guarantee of the rule of law within public administration, independent of the whims of the political leadership.

IX. Concluding Remarks

The German civil service is governed by a status defined by public law, which assures a certain personal independence of the people working in the public administration. Lifetime employment and the right to remonstrate in case of presumed illegal instructions are the characteristic elements, but also a special status concerning payment and social security. Certainly, not all persons working in public administration are civil servants, but even the personnel working on a private law contract basis are de facto protected by the civil service law.

Bibliography

Battis U. (2021), 'Arbeitnehmer im öffentlichen Dienst', in Ehlers D., Fehling M., Pünder H. (eds), *Besonderes Verwaltungsrecht*, 4th edition, vol. 3, § 88, Heidelberg: Hüthig Jehle Rehm.

Behnke N., Kropp S. (2021), 'Administrative federalism', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany*, Cham: Palgrave Macmillan, 35–51.

Germelmann C.F. (2019a), 'Arbeitsverhältnisse der Arbeitnehmer im öffentlichen Dienst', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 154, München: C.H. Beck.

Germelmann C.F. (2019b), 'Rechte und Pflichten im Arbeitsverhältnis des öffentlichen Dienstes', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 155, München: C. H. Beck.

Germelmann C.F. (2019c), 'Sonstige Rechtsverhältnisse im öffentlichen Dienst', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 157, München: C. H. Beck.

Germelmann C.F. (2019d), 'Grundlagen des Personalvertretungsrechts', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 4, § 359, München: C. H. Beck.

Günther F. (2021), 'Kontinuitätswahrung in Zeiten des Umbruchs? Die Abteilung Öffentlicher Dienst des Reichsinnenministeriums und des Bundesinnenministeriums 1920–1989', in Hollah A. (ed), *Zur Geschichte der Dienstrechtpolitik im Innenministerium*, Baden-Baden: Nomos, 31–86.

Jachmann-Michel M., Kaiser A.-B. (2018), 'Art. 33', in v. Mangoldt H., Klein F., Starck C. (eds), *Grundgesetz Kommentar*, vol. 2, München: C.H. Beck, 907–895.

Kiel H. (2019), 'Soziale Rechtfertigung der personenbezogenen Kündigung', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 113, München: C.H. Beck.

Kreft B. (2019), 'Soziale Rechtfertigung der betriebsbedingten Kündigung', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 115, München: C.H. Beck.

Rachor S. (2019), 'Wichtiger Grund', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 124, München: C.H. Beck.

Reichard S., Schröter S. (2021), 'Civil Service and Public Employment', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds) *Public Administration in Germany*, Cham: Palgrave Macmillan, 205–223.

Reichold H. (2021a), 'Durchsetzung des Anspruchs auf Arbeitsleistung', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 5th edition, vol. 1, § 42, München: C.H. Beck.

Reichold H. (2021b), 'Arbeits- und Ordnungsverhalten', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 5th edition, vol. 1, § 55, München: C.H. Beck.

Ricken O. (2019), 'Rechtmäßigkeitsvoraussetzungen des Streiks', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 3, § 272, München: C.H. Beck.

Schmidt T.I. (2017), *Beamtenrecht*, Tübingen: Mohr Siebeck.

Summer R. (1986), *Dokumente zur Geschichte des Beamtenrechts*, Bonn: Verlagsanstalt des Deutschen Beamtenbundes.

Wank R. (2019a), 'Befristung nach dem TzBfG', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 102, München: C.H. Beck.

Wank R. (2019b), 'Befristung nach Sondergesetzen', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 103, München: C.H. Beck.

Zimmermann R. (2019), 'Soziale Rechtfertigung der verhaltensbedingten Kündigung', in Kiel H., Lunk S., Oetker H. (eds), *Münchener Handbuch zum Arbeitsrecht*, 4th edition, vol. 2, § 114, München: C.H. Beck.

Zöllner W., Loritz K.-G., Hergenröder C.W. (2015), *Arbeitsrecht (Studium und Praxis)*, 7th edition, München: C.H. Beck.

9 The Civil Service in Hungary

Differentiation and Privatisation Trends

*Petra Lea Láncos**

I. Introduction

Hungarian public service regulation and scholarship have long been marked by a desire for a uniform solid basis, whereas historically regulation has been characterised by increasing diversity. While legislative and personnel policy reforms of the past decade have achieved relative uniformity in the narrower realm of civil service regulation, differentiated rules were formulated to accommodate differences between political and quasi-political appointments and civil service regulation. More flexible solutions were also introduced to overcome recruitment issues, side-stepping statutory wage grids undermining the hiring of professionals in highly competitive sectors. In the regulatory trends of recent decades, we can therefore discern trends towards privatisation and flexibility in certain sectors, and efforts to buttress the *Lebenszeitprinzip* in others by facilitating interoperability and the building of a solid career path.

This chapter mainly relies on Hungarian academic literature and legal sources. However, in order to provide a comprehensive picture of civil service regulation in Hungary, the author conducted three personal interviews, regarding the background of the specific design of Hungarian public service regulation, with former government officials in April 2022. The chapter details the concept of civil/public service in Hungarian law and scholarship, highlighting the policy and regulatory consequences of the broad notion of *közszolgálat*. It then describes the development of the civil service in Hungary from the eve of modern civil service regulation in the Austro-Hungarian Monarchy in a context of absolutist rule to civil service regulation preceding the change of the political system. It proceeds to describe the civil service system in democratic Hungary and specifically the three-tier system in force today, with a focus on discerning any privatisation and differentiation trends. The chapter concludes with a summary of the research.

II. The Concept of Civil Service and Civil Servant in Hungarian Law and Literature

A crucial trait of the relevant Hungarian scholarly literature and regulation is that they fail to meaningfully distinguish between the notions of public service and civil service, conflating them in the notion of *közszolgálat*. The concept of *közszolgálat* includes employment in the public administration, including political appointments, but also employment in law

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enforcement and the military sector. Other forms of public employment, such as in the education, cultural, and healthcare sectors, are not part of *közszolgálat*.[1]

Hungarian scholarship recognises and discusses the problems inherent to operating with the broad concept of *közszolgálat*. Some refer to the notion of *civil közszolgálat* (civil public service) to delimit the ambit of civil service from military and law enforcement, the latter being referred to as *hivatásos közszolgálat* (professional or career public service). Hungarian scholarship considers *hivatásos közszolgálat* to entail positions linked to sensitive areas of State sovereignty, especially internal and external security, "where independence from politics and from any and all influence must be preserved".[2] By contrast, those employed in *civil közszolgálat* are responsible for applying and enforcing the law without the use of force and enjoy much wider leeway in their conduct than members of the *hivatásos közszolgálat*. The *civil közszolgálat* is responsible for client-oriented administration, providing direct services to the public. As such, Mélypataki considers civil servants and also public servants (e.g. teachers and doctors) falling under the personal scope of Act no. XXXIII of 1992 on the legal status of public servants,[3] to pertain to *civil közszolgálat*.[4]

Perhaps this broad (and fuzzy) notion of *közszolgálat* is why Hungarian administrative scholars urge, and the legislation aspires to, uniform regulation of those employed in the civil service, the military sector, and law enforcement. This may have regulatory pitfalls and failures. Legislating for a common career structure and achieving interoperability in this broad *közszolgálat* seems a challenge that the Hungarian legislator has failed to meet, for reasons discussed later. Bearing in mind this broad notion of *közszolgálat*, the present study concentrates on describing the system and regulation of the civil service in Hungary in the narrow sense, where appropriate referring to instances of regulation affecting other sectors and the public service in general.

It is worth noting that a definition of civil service relationship and the notion of civil servant is missing from Hungarian law, scholarly literature, and jurisprudence. Horváth defines public service as an "umbrella category in Hungary, including those employment relationships, with which the State and local municipalities fulfil obligations imposed on them by law. The legislative acts governing these employment relationships are (. . .) considered as public labour law."[5] Horváth therefore approaches the public service from the perspective of public service employment, where the employer is the State or a State body. He argues that a functional approach may be misguided, for "while the service may be identical, only municipal kindergartens and State-run universities form part of the public service, private kindergartens and higher education institutions run by the church do not".[6] Furthermore, certain public services are rendered by public companies, which perform their tasks with personnel employed under special rules of the Labour Code, even if the substance of their work is the same as that performed by public servants.[7] This employer-focused approach stands in stark contrast to definitions that con-

1 Horváth (2015), pp. 13–32; Petrovics (2019), p. 89.
2 Mélypataki (2017), p. 136.
3 Act no. XXXIII of 1992 on the legal status of public servants (*A közalkalmazottak jogállásáról szóló 1992. évi XXXIII. Törvény*).
4 Mélypataki (2017).
5 Horváth (2015), pp. 13–14.
6 Horváth (2015).
7 Mélypataki (2017).

centrate on the functions of public service and the nature of public service employment relationships.

In Decision no. 8/2011 (II 18) ABH concerning the civil service relationship, the Constitutional Court seems to confirm Horváth's findings. The Constitutional Court emphasises that

> [t]he essential feature of a closed civil service system is that the substance of the civil service relationship, the rights and obligations of the subjects of the legal relationship are not determined by agreement between the parties, but by law, an act of Parliament. Status is not established by a contract between equal parties, but by a unilateral act of the State, in which it appoints a civil servant, entrusting him with a specific task, position or office. The civil servant does not have an active role in shaping the content of the legal relationship, he can only decide whether or not to accept the appointment under the conditions specified by law. The substance of the civil servants' status is regulated by law, which takes into account the fact that civil servants perform State duties and exercise public authority in the performance of their duties, which requires that the law impose additional requirements on civil servants as compared to other employees. The activities of civil servants must be in the public interest, professional, impartial, free from influence and partiality, subject to up-to-date and cutting-edge professional requirements, increased responsibility for their work and strict conflict-of-interest rules.[8]

Rendered in 2011, the decision still refers to civil service as following a "closed model", where civil service employment does not entail any bargaining power of the civil servant, but additional obligations and requirements.

As far as statutory definitions of civil servants are concerned, an early modern understanding includes the 1874 Financial Service Rules, which defined "State officials" as those appointed to a position listed in the appointing authority's paygrade, who swear an oath of office and take part in the State administration or the management of State assets.[9] By contrast, the current acts governing the status of civil servants in a broad sense fail to provide a statutory definition of civil servant. In fact, there does not seem to be any general concept of civil servant, just different categories within the scope of one of the three public law acts applicable to those employed in the civil service.

III. The Development of Civil Service Regulation in Hungary

1. *Modern Civil Service Regulation From the Mid-19th Century to the Fall of the Socialist Regime*

The creation of a professional civil service in Hungary dates to the mid-19th century following the Austro-Hungarian compromise of 1867, which established a closed career system under the Monarchy.[10] Yet it was the Holy Roman Emperor, Joseph II, who laid the basis for a professional public administration in Hungary, where hitherto unqualified

8 8/2011 (II. 18.) AB Decision, ABH 2011, 49, 70.
9 Ladik (1908), p. 1, cited by Mélypataki (2017).
10 Linder (2020), MN 46.

noblemen had carried out administrative tasks *nobile officium*.[11] The enlightened absolutist, referred to as the "hatted king" for refusing to be crowned, launched a social, political, and economic overhaul of the Monarchy, making incremental involvement of professional experts in the execution of State policies an unavoidable necessity.[12] Hazafi and Gerencsér emphasise the monarch's circulars of 13 February and 8 March 1784, in which the

> emperor formulated his expectations regarding good administration and the good civil servant. (. . .) Today we may even say that the circular reflects management ideas, referring to the importance of communication, motivation of officials, employee satisfaction, dedicated and exemplary leadership, deputisation and innovation.[13]

In fact, Hazafi sees the emperor's efforts towards establishing a professional civil service as a means to curb nepotism and break power struggles with the nobility through administrative centralisation and a career-based model for the civil service. Accordingly, the century of administrative reforms that followed was marked by questions like who would exercise employers' rights over civil servants, framed as an issue of centralisation/decentralisation, and whether public servants should be elected or appointed, in other words, to whom would they be loyal.[14]

This power struggle, coupled with an expansion of State functions, may have helped shift the composition of the Hungarian civil service. As Lőrincz notes, owing to increasing public administrative functions, the headcount of the Hungarian civil service grew from 26,000 in 1867 to 35,000 in 1935. This meant that positions could no longer be filled exclusively by the gentry, and the ranks of the civil service had to be opened to members of the working class and eventually to women. As far as the qualifications of civil servants were concerned, lawyers made up 80% of the civil service in the period between the two world wars,[15] marking a shift towards the professionalisation of the Hungarian civil service.

An important milestone in the regulation of the civil service was the adoption of the aforementioned Financial Service Rules of 1874, which quickly rose to the function of general rules in all areas of the civil service. They regulated the qualifications necessary to enter the civil service, and the rights, privileges, and obligations of civil servants, marking "the first step in developing a closed system of civil service".[16] While the rules governing the Hungarian civil service in the 19th century were typically lower-level rules, the 20th century saw adoption of various acts of more general reach, such as Act no. XXX of 1929 on the qualification, employment and remuneration of county and city officials,[17] Act no. XVI of 1933 on the administrative qualification exam,[18] the fascist

11 Mélypataki (2015), p. 183.

12 Hazafi (2009), p. 334; Mélypataki (2015), p. 177.

13 Hazafi (2009), p. 335; Gerencsér (2012).

14 Hazafi (2009), pp. 340–341.

15 Lőrincz (2009), pp. 1–5.

16 Linder (2010a), p. 35.

17 Act no. XXX of 1929 on the qualification, employment and remuneration of county and city officials (*A közigazgatás rendezéséről szóló 1929. évi XXX. Törvénycikk*).

18 Act no. XVI of 1933 on the administrative qualification exam (*1933. évi XVI. törvénycikk a közigazgatás rendezéséről szóló 1929:XXX. törvénycikk módosításáról és kiegészítéséről*).

Act IV of 1939 barring Jews from employment in the civil service,[19] and Act no. XXII of 1942, which converted elected county and city positions into appointed positions.[20] The ensuing system differentiated between public administration employees on the basis of qualifications, resulting in the three main categories: clerks, administrators (clerical assistants), and servants (physical workers). A further categorisation was based on the employer: civil servants were either employed by the government or the municipality, sometimes both.[21]

After World War II, loyalty to the party replaced professional qualifications and experience in civil service priorities under the communist regime. Linder and Hazafi refer to the approach to public administration in the first years after the war as a "spoil system", where civil service positions free of enemies of the State became the prize.[22] Many positions were opened up to laymen with no qualifications, resulting in an "open model" of civil service and, with it, a high turnover of administrative staff, a rapid decline in the quality of administrative services and disintegration of the "career model".[23] Since all workers were employees of the State, by 1951 all special rules governing civil service officials had been abolished, subjecting civil servants to the general rules of the Labour Code.[24] Yet as Hazafi notes, measures soon had to be reintroduced to balance the decline in the quality of administrative services, establishing first a so-called Council Academy to train civil servants, while in the 1960s, qualification requirements were set for officials, prioritising professional expertise over political loyalty.[25] It was not until the 1970s that special rules governing the status and employment of public administrative personnel were reintroduced.[26] Note that besides civil servants (the core personnel of the public administration), new employees were engaged through private law contracts or civil service labour contracts, marking an element of privatisation. While the latter employees did not have the status of civil servants, they had similar rights and obligations, including confidentiality, and they had to swear an oath of office.[27] Just before the change of political system, the public administration was relieved of direct political control and data on political affiliation (party membership and position, political past, etc.) was deleted from the personal files of civil servants.[28]

2. *Civil Service Regulation Following the Change of Political System*

In the 1990s, Hungary found itself tackling the twofold challenge of reorganising the public administration after the change of political system and preparing for accession to

19 Act IV of 1939 barring Jews from employment in the civil service (*A zsidók közéleti és gazdasági térfoglalásának korlátozásáról szóló 1939. évi IV. Törvénycikk*).

20 Act no. XXII of 1942 which converted elected county and city positions into appointed positions (*A vármegyei, városi és községi tisztviselők alkalmazásának, valamint egyes szolgálati viszonyainak átmeneti szabályozásáról szóló 1942. évi XXII. Törvénycikk*); Hazafi (2009), pp. 342–343.

21 Hazafi (2009).

22 Hazafi (2009), p. 352.

23 Hazafi (2009).

24 Hazafi (2009), p. 353.

25 Hazafi (2009), pp. 353–354.

26 Decree of the Council of Ministers no. 38/1973 (XII. 27.).

27 Mélypataki (2015).

28 Hazafi (2009), p. 354.

the European Union.[29] In Linder's words, in the course of this Europeanisation process, Hungary

> had to comply with both classical and common European administrative and public service values, while the implementation of New Public Management methods was also expected of us. This double challenge resulted in several anomalies and confusion, to the detriment of elaborating the operating principles of public service, as well as the development and implementation of personnel policy.[30]

Nevertheless, following the change of the political system in 1989, plans to establish a uniform legal basis for the civil service were laid down in the *1990 Concept on Civil Service (with particular regard to State administration)* by the Ministry of the Interior. In 1992, the Hungarian Parliament passed an act on the status of civil servants and those employed in the public administration, regulating employment in the civil service for a period of two decades (Civil Servants Act).[31] Berke considers this "civil service system change" to have happened quite late after the change of the political system.[32] In 1992, separate laws were enacted on the status of public servants[33] and general labour relations.[34] In Berke's view, the Hungarian legislator produced an unprecedented "trichotomous" structure, where all relationships were regulated in three independent acts: the Labour Code governing private labour relations, the Public Servants Act and the Civil Servants Act (the latter two governed by public law). An important trait of this system was that the Labour Code operated as a subsidiary law to the acts governing the status of civil servants and public servants, so that issues left unregulated by these acts came under the Labour Code. The ensuing system therefore showed some uniformity through the generally applicable rules of the Labour Code, while also including differentiation through separate acts governing civil servants and public servants. Hence, the system duly accommodated the dual quality of the civil and public service as labour relationships, as well as their special nature of exercising State powers and functions.

While the acts on civil servants and public servants included differentiated rules specific to their field, they also provided the legal basis for further specific regulation to be laid down in separate legislative acts.[35] Some lamented the obvious split between the regulation of public service and civil service.[36] As Sipos-Szabó underlines, this structure and the resulting special rules undermined the uniform regulation of the public service, adding that "as long we cannot speak of a uniform and coherent statutory regulation, the uniform regulation (meaning in a single act) of the entire public sphere remains an illusion".[37] Hazafi emphasised that

29 Ágh (1999), pp. 839–854.

30 Linder (2010a), p. 91.

31 Act no. XXIII of 1992 on the legal status of civil servants (Civil Servants Act, *A köztisztviselők jogállásáról szóló 1992. évi XXIII. Törvény*). The Act was repealed in 2012.

32 Berke (2019), p. 63.

33 Act no. XXXIII of 1992 on the legal status of public servants (Public Servants Act, *A közalkalmazottak jogállásáról szóló 1992. évi XXXIII. Törvény*).

34 Act no XXII. of 1992 on the Labour Code (*A Munka Törvénykönyvéről szóló 1992. évi XXII. Törvény*).

35 Separate laws were enacted to regulate the legal status of government officials, civil servants, military personnel, elected State leaders, judges, prosecutors, judicial staff and mayors. This differentiation "quickly eroded the merits of the career system and the [Civil Servants Act] could no longer fulfil its role", Hazafi (2012), p. 15.

36 Hazafi also notes that "[a]lthough the [Civil Servants Act] determined its personal scope according to the principle of 'one body, one legal status', later on, this principle deteriorated", with the emergence of so-called mixed-status bodies employing civil servants, public servants and employees under the Labour Code; Hazafi (2014), p. 13.

37 Sipos-Szabó (2008), p. 46.

aspirations for uniform public service regulation were due to the remarkable differentiation of statutory regulation and the inequalities stemming from the different wage grids:

> [t]he essence of the first problem is that after the change of political regime, instead of a comprehensive regulation of the public service, laws governing different areas of employment in the public service were enacted in several steps (. . .) resulting in contradictions and unjustified parallels in regulation. One such contradiction became a source of tension, namely the unjustified pay gap, which was to be solved by a single civil service act.[38]

Nevertheless, as Mélypataki observes, in this highly differentiated regulatory context, "no coherent legislation ensued, just like a puzzle missing several pieces cannot give us the full picture".[39]

The deficiencies of the Civil Service Act were to be remedied on the basis of the so-called Zoltán Magyary Public Administration Development Programme, launched in 2011 for the strategic renewal of the Hungarian public service system. On the tailwind of a Neo-Weberian turn and a Hungarian notion of a "strong State", the Magyary Programme was based on the broad concept of *közszolgálat*, including not only personnel employed by the civil service but also by law enforcement and the military. It had the ambition of developing an attractive, stable, and predictable career system to retain dedicated and professional public servants based on uniform values and principles and allowing vertical and horizontal mobility alike (interoperability). The Government's Personnel Strategy (2014–2020) was devised to implement the Magyary Programme. It took the approach that public service relationships should follow the closed model, differentiating it from general labour relationships, however since individual positions within the system differ greatly (e.g. political appointment, use of force, exercise of State privileges, etc.), a graduation in the regulation of these statuses was called for. Thus the Strategy foresaw the development of specialised career structures, the establishment of the Hungarian Government Officials' Corps to elaborate rules of professional ethics, the development of a job position evaluation system, the creation of a joint personnel pool to enable a special public administrative recruitment system,[40] establishment of a uniform exam and qualification system at the National University of Public Service and the development of an integrated Public Service Performance Management System.[41] As we shall see, the Magyary Programme and the Strategy for its implementation inspired the reorganisation of the latest civil service regulation reforms and led to the emergence of new systems and solutions.

38 Hazafi (2014), p. 9.

39 Mélypataki (2015), p. 184.

40 An important novelty in the Government Officials Act's approach to staffing is that it repealed the system of job position, establishing a system with a centralised personnel pool that focused on posts and tasks. In this system, the discretionary power of the Government determines the number of posts in line with an increasing or decreasing volume of civil services. Government administrative bodies have a core headcount, and when they require further staff to provide their services, they may apply to the Government Office of the Prime Minister for further posts from the centralised personnel pool. Such posts do not become part of the core headcount of the body in question. If a body or the Government terminates a post or a fixed-term project lapses, this staff is returned to the centralised personnel pool. Government Decree no. 88/2019 (IV 23) (*a kormányzati igazgatási létszámgazdálkodásról, valamint a kormányzati igazgatási szerveket és azok foglalkoztatottjait érintő egyes személyügyi kérdésekről szóló 88/2019. (IV. 23.) Korm. rendelet*) also envisages establishment of "authorised posts", thus giving the government administrative body more flexibility in human resource management, since it allows unfilled positions to be maintained without the obligation to return the staff to the centralised personnel pool; Horváth (2019).

41 Hazafi (2012).

Table 9.1 Harmonisation of public service career structures[42]

	Predictable, attractive career structure			*Development of personnel management*		
Magyary Programme	*Dedicated employees*	*Improved competencies*	*Interoperability*	*Building employers' capacities*	*Development of management skills*	*Development of interest reconciliation*
Government's Personnel Strategy	Creation of a value and career-based civil service	Efficient recruitment	Development of a joint personnel pool	Development of central coordination	Renewal of management training	Act on the Hungarian Government Officials' Corps
	Development of a system of career advancement based on job positions	New further training system	More uniform statutory regulation	Standardisation of the exercise of employers' rights		
	Development of a career management system	New administrative examination system				
	Passing on experiences, expertise	Review of the training system				

42 Hazafi (2012), p. 2.

IV. Recent Reforms in Hungarian Civil Service Regulation

1. Repeated Regulatory Overhaul and Differentiation

Criticising the perceived rigidity of domestic civil service regulation, Linder noted in 2010 that while modernisation processes are geared towards implementing more flexible solutions from the private sphere, adapted to specific local circumstances in time and space in order to enhance efficiency, in Hungary, these solutions are "introduced immediately through legislation and generally through centrally determined regulatory overkill, with no particular concern for specifics or context".[43] Indeed, the next phase of civil service regulation seems to confirm her observation.

Marking the beginning of a period of differentiation, an overhaul of the Hungarian civil service regulation was launched with Act no. LVIII of 2010 on the legal status of government officials (Government Officials Act),[44] excluding officials employed by public administrative bodies controlled by the government from the scope of the Civil Servants Act, and reregulating their status. The Government Officials Act established a separate status for government officials, with the intent of elaborating a separate career structure for them.

Just one year later, the legislator repealed the Civil Servants Act and the Government Officials Act to make way for more comprehensive legislation, adopting Act no. CXCIX of 2011 on the legal status of public service officials (Public Service Officials Act).[45] The Public Service Officials Act regulated the status of government officials employed by government-controlled bodies and civil servants employed by independent public administrative bodies, but there were different rules for the two categories. The two categories of officials were referred to jointly as public servants. The purpose of the draft bill on the Public Service Officials Act was to remedy the fact that the many amendments made to the Civil Servants Act had eroded career system values, disrupting the coherence of the civil service system, and it was also purportedly time to develop a new career structure for public servants.[46] The new act established the so-called Hungarian Government Officials' Corps in the form of a public body that brought government officials together in a sort of professional chamber. A Legal entity and self-governing body, the Corps operated on the basis of compulsory membership of government officials and adopted the Code of Ethics for civil service employees.

The Public Service Officials Act allowed for different regulations of the status of civil servants employed by autonomous administrative bodies and independent regulatory bodies. This kickstarted differentiation in the status of those employed by the public administration, as well as fragmentation of statuses in the categories of autonomous and regulatory bodies without exhibiting any consistent regulatory concept.[47] György vividly illustrates this fragmentation with an example involving autonomous administrative bodies: employees of the Equal Treatment Authority and the Public Procurement Authority were governed by rules on conflict of interest and remuneration different from

43 Linder (2010b), p. 3.

44 Act no. LVIII of 2010 on the legal status of government officials (Government Officials Act, *A kormánytisztviselők jogállásáról szóló 2010. évi LVIII. törvény a kormánytisztviselők jogállásáról*).

45 Act no. CXCIX of 2011 on the legal status of public service officials (Public Service Officials Act, *A közszolgálati tisztviselőkről szóló 2011. évi CXCIX. törvény*).

46 György (2019), pp. 99–110.

47 György (2019).

employees of the National Election Office. György concludes that as far as autonomous administrative and independent regulatory bodies are concerned, "no uniform personnel policy existed". The sort of rules (mostly privileges) that apply to their employees were completely random and presumably flowed from the individual bargaining power of the different bodies.[48]

It would have been reasonable to expect that the legislative effort surrounding the status of civil servants would now at least temporarily pause and that the "the Minister responsible for administrative quality policy and personnel policy and for the development of public service careers" would focus on elaborating a uniform public service career structure, as envisaged by the Magyary Zoltán Public Administration Development Programme. Instead, Act no. LII of 2016 on the status of State officials (State Officials Act)[49] introduced a new status encompassing employees of district offices, authorities with general competence, and regional government offices, with the long-term goal of also incorporating employees of ministerial and central government administrative bodies. The State Officials Act meant a move away from the career system, amplifying the discretion of the employer regarding the classification of employees and their remuneration. Yet this act was repealed just a few years later, and plans to compile the rules governing the civil service into a single act never came to fruition.[50]

2. The Civil Service Regulation in Force

In 2018, the regulation of the status of civil servants was reshuffled yet again. First, the legislator passed Act no. CXXV of 2018 on government administration (Government Administration Act),[51] regulating the status of "officials of government administrative bodies".[52] Szilágyi remarks that a theoretical turn towards the Neo-Weberian State ideal and "good government" took place during the period between 2008 and 2018 and was swiftly followed by administrative reform under the Zoltán Magyary Public Administration Development Programme.[53] The Government Administration Act may be considered a Neo-Weberian response to reform needs, especially in its striving for professionalism and flexibility, a strong civil service ethos and citizen-friendly good administration goals.[54] Interestingly, this Act is not confined to regulating the legal status of government officials, but also contains detailed provisions on the organisation and tasks of government bodies. As such, it cannot be considered to concern solely a regulation of the civil service.

48 György (2019), p. 104.

49 Act no. LII of 2016 on the status of State officials (State Officials Act, *Az állami tisztviselőkről szóló 2016. évi LII. törvény*).

50 Mélypataki (2015), p. 178; Horváth et al. (2021), p. 125.

51 Act no. CXXV of 2018 on government administration (Government Administration Act, *A kormányzati igazgatásról szóló 2018. évi CXXV. törvény*).

52 Section 2, paras. 1–4 of the Government Officials Act (n. 44) determine the scope of the bodies employing the officials: central government administrative bodies and their regional and local branches; the former include the Government, Government Office of the Prime Minister, ministries, senior government offices (Hungarian Central Statistical Office, Hungarian Intellectual Property Office) and central offices.

53 Szilágyi (2015), pp. 7–10.

54 Stumpf (2009), pp. 110–123; Linder (2010a).

Next, the legislator enacted Act no. CVII of 2019 (Special Legal Status Act) to govern persons employed by "bodies with special legal status".[55] The mixed bag of bodies with special legal status includes independent regulatory bodies, administrative authorities, and political and judicial organs. As a result, starting in 2020, a three-tier system emerged with three main acts governing the status of civil servants: the 2011 Public Service Officials Act, the Government Administration Act, and the Special Legal Status Act. In 2019, scholars described the ensuing civil service regulation as "extraordinarily differentiated",[56] "difficult to track",[57] and as bringing together different legal statuses, where the State, the government, or an administrative authority acts as employer.[58] In fact, in an interesting twist of legislative design, while the Public Service Officials Act is subsidiary to the Government Administration Act, at various points the three acts actually contain the same rules almost verbatim on many regulatory issues, as we shall see.

Let us now examine the systems put in place for the training and recruitment of civil servants, the statutory and ethical rules governing their conduct, and the rules stipulating termination of the civil service relationship.

2.1. Training and Recruitment

A decisive move towards the implementation of a broadly conceived, interoperable public service based on uniform values as envisaged by the Magyary Programme was made with the establishment of the National University of Public Service in 2011. While specialised training for civil servants had been available in Hungary since the 18th century, modern civil service training was launched in 1953 under the so-called Council Academy, set up to ensure the training and recruitment of loyal cadres for the socialist regime. The Academy was superseded by the College of Public Administration in 1978, which was englobed into other State universities and became a faculty of the National University of Public Service. The University also integrated the Miklós Zrínyi National Defense University and the Police College, bringing together and monopolising the training of professionals in the three main areas foreseen by the Government Personnel Strategy of 2014 and encompassed by the broad notion of *közszolgálat*.[59] According to Act no. CXXXII of 2011

55 Act no. CVII of 2019 on special statute bodies and the status of their employees (Special Legal Status Act, *A különleges jogállású szervekről és az általuk foglalkoztatottak jogállásáról szóló 2019. évi CVII. Törvény*). According to Section 2, para. 1 of the Special Legal Status Act these are: the Office of the President of the Republic; the Office of the Constitutional Court; the National Authority for Data Protection and Freedom of Information; the Office of the Commissioner for Fundamental Rights; the Hungarian Energy and Public Utility Regulatory Authority; the National Media and Infocommunications Authority; the Office of the Competition Authority; the Secretariat of the Hungarian Academy of Sciences; the Secretariat of the Hungarian Academy of Arts; the Historical Archives of the State Security Services; the Supervisory Authority for Regulated Activities; the Public Procurement Authority; the National Election Office; the Office of the Committee on National Remembrance and the Hungarian Atomic Energy Agency.

56 Petrovics (2019), pp. 86–113.

57 Linder (2020).

58 Petrovics (2019).

59 It is worth noting that initially the National University of Public Service had no monopoly on launching courses on public administration or international relations. In 2015, János Lázár, then minister of the Prime Minister's Office, introduced bill T/5050 to amend Act no. CCIV of 2011 on national higher education in this sense. Following a circular of the Law Faculties' College of Deans protesting against losing courses on public administration and international relations, the amendment was abandoned. Instead, such courses were deleted from those offered by universities or colleges other than the National University of Public Service on the basis of Section 20/A, para. 3 of Government Decree 363/2011 (XII 30) and the newly enacted Section 7, para. 10 of Decree of the Minister for Education 10/2006 (IV 3). Thus, a monopoly on courses for the training of public servants was already foreseen when the National University of Public Service was founded.

on the National University of Public Service and higher education in administration, law enforcement, and defence,[60] the University was established to facilitate the recruitment of officials and to ensure interoperability between public service positions.

A peculiarity of the Hungarian civil service is that it does not operate on a centrally regulated recruitment system. The general requisites for employment under the three acts currently in force governing civil service employment relationships are Hungarian citizenship, legal capacity, a clean record, and at least a secondary school diploma; otherwise, recruitment takes place by invitation or calls for applications.[61] To facilitate recruitment, the Personnel Centre operates a recruitment database for interested applicants who comply with the general requisites for civil service employment.[62] The Personnel Centre also keeps records and manages application procedures, competency assessments, and performance evaluations. As Linder notes, the broad discretion enjoyed by public employers in recruitment allows the spoils system to spread in Hungary. In fact, there are no statutory rules on the selection of civil service leaders, no qualification or management requirements, no compulsory calls for applications or fixed terms for such positions, rendering the system amenable to political influence.[63] This remains the case, notwithstanding the efforts of the Government's Personnel Strategy to establish a joint personnel pool, develop management skills, and achieve central coordination of the different sectors of civil service.

It is worth noting that while Act no. XX of 1949 on the Hungarian constitution,[64] amended to serve as a democratic constitution after the change of political system, and the Fundamental Law replacing it in 2011 were equally silent on the civil service; they nevertheless both included the provision that "[e]very Hungarian citizen shall have the right to hold public office according to his or her aptitude, qualifications and professional competence". The Fundamental Law also foresees that "public offices that may not be held by members or officials of political parties shall be specified in an Act".[65] Thus, beyond the right to freely choose work and employment,[66] Hungarian citizens are entitled to hold a public office as well, and this not only includes elected offices but also civil service employment.[67] The civil service relationship comes about by appointment: the terms of employment are largely determined by the law, and the candidate can only accept or decline them, with no room for bargaining. As of 2020, the Special Legal Status Act introduced the so-called civil service labour contract with an element of privatisation: the parties agree on the salary, benefits, additional days of vacation, working hours, and working conditions of the employee.[68] However, the civil service labour contract and negotiation of the employee's salary are the exception, as the three acts governing civil service employment

60 Act no. CXXXII of 2011 on the National University of Public Service and higher education in administration (*A Nemzeti Közszolgálati Egyetemről, valamint a közigazgatási, rendészeti és katonai felsőoktatásról szóló 2011. évi CXXXII. Törvény*).

61 Section 45, para. 2 of the Public Service Officials Act (n. 45); Section 82, para. 1 of the Government Officials Act (n. 44); Section 24, para. 1 Special Legal Status Act (n. 55).

62 Section 83, para. 3 of the Government Officials Act (n. 44), to which the Public Service Officials Act (n. 45) and Special Legal Status Act (n. 55) both refer.

63 Linder (2020).

64 Act No. XX of 1949 on the Hungarian constitution (*A Magyar Köztársaság alkotmányáról szóló 1949. évi XX. Törvény*).

65 Section 70, para. 6 of the constitution; Section XXIII, para. 8 of the Fundamental Law.

66 Section XII, para. 1 of the Fundamental Law.

67 Koi (2021).

68 Section 98, para. 2. The Act foresees that civil servants shall be employed under a civil service labour contract at the Hungarian Energy and Public Utility Regulatory Authority, the Public Procurement Authority, the Hungarian Atomic Energy Agency, the National Media and Infocommunications Authority, the Supervisory Authority for Regulated Activities and the Office of the Competition Authority.

regulate grading, salary, and advancement on the basis of seniority of service, with the possibility of considering merit-based elements, such as performance or specific qualifications. Although there are similarities in grading and advancement, the wage grids of the three acts are highly differentiated, resulting in wage tension between civil servants employed by different public bodies.

2.2. Appointment and Termination

Civil service appointment is subject to an oath[69] with identical wording under the three acts: "I (name) pledge upon my honour and conscience that I shall be loyal to Hungary and the Fundamental Law, keep its laws and enforce it against others; I shall exercise my (position) for the good of the Hungarian nation", with the optional phrase: "So help me God!"

While civil servants under the Public Service Officials Act and the Special Legal Status Act can directly enforce their rights in the courts, government officials must first turn to the so-called Civil Service Arbitration Committee comprising "independent members"[70] as a forum of redress prior to labour law proceedings in the courts. According to the homepage of the Civil Service Arbitration Committee, reviewing the lawfulness of government body measures

> requires special expertise and experience, as well as in-depth knowledge of the internal conditions, procedures and working methods of the public administration. As the internal organisation and operation of the public administration can change rapidly, the taking of evidence can prove difficult and drag out proceedings, involving considerable litigation costs.[71]

It is surprising that only labour law cases of government officials "require special expertise and experience" and therefore cannot be heard in ordinary courts, especially since the Civil Service Arbitration Committee itself relies on the jurisprudence of labour courts, which includes resolutions of the Labour Law College of the erstwhile Supreme Court. Whether this solution is meant to have a chilling effect or speed up procedures is not clear.

An extraordinary element of Hungarian civil service legislation is the power of the employer to unilaterally change the appointment of an official. This is envisaged under all three acts. Officials may request termination of their legal relationship if the change in their appointment reduces their salary by more than 20% or if they are no longer appointed to a management position, and in some cases, if the new employment conditions change their working time. Further possible grounds for requesting termination include transfer to a different locality or to a position at variance with the official's qualifications or experience. Criticising these unilateral powers, Horváth et al. note that they create an opportunity for employers to force officials "through a unilateral change of appointment for which the employer does not have to give reasons, into a situation

69 The Fundamental Law also contains constitutional provisions on the oath of office: Section 11, para. 6 of the Fundamental Law prescribes the taking of an oath of office by the President, while Section 16, para. 9 foresees the same obligations for members of the Government.

70 The Civil Service Arbitration Committee was set up by Government Decree no. 69/2019 (IV 4).

71 See https://kdb.gov.hu/.

where [the official] sees no other 'way out' but to ask for termination" of his legal relationship, rendering this legal institution "the ante-room of termination".[72] Besides the customary grounds for cessation (expiry, death, retirement, appointment to a new position, conflict of interests) and termination (mutual agreement, resignation, dismissal) of the civil service relationship, the legal relationship can be terminated if not deserved or if the civil servant becomes incapable of carrying out their duties for health reasons.[73] Undeservedness includes unworthiness and loss of trust; it may arise if the official's conduct outside the workplace could severely impair the reputation of the government body employing them or trust in good administration, or if the official does not perform their work with reasonable professional dedication.

As far as the termination of civil service relationships is concerned, the Hungarian Constitutional Court referred to point 16 of Recommendation no. R (2000) 6 of the Committee of Ministers of the Council of Europe on the status of public officials in Europe, which foresees that "termination should only occur in the cases and for the reasons provided for by law". In decision no. 8/2011 (II 18) ABH, the Constitutional Court recalled that

> while the [Labour Code] generally grants the employer a free and unrestricted right of termination, in the public sector the principle of non-dismissibility applies, namely, dismissal can only take place on grounds foreseen by the law. The specificity of the grounds for dismissal is a guarantee related to the specific nature of the employment relationship of civil servants (public servants), namely the fact that the legislator has established a closed (career) system in the public sector, unlike the regulation governing the private sector. In the regulation of the closed system of the civil service, the legislator may not refrain from enforcing the principle of stability. It would clearly be contrary to this principle if it were possible to terminate a civil service relationship entirely at the discretion of the employer.[74]

The Constitutional Court ruled that the constitutional right to hold a public office implied that the State is obliged to protect those holding a public office against any arbitrary dismissal by the employer. As such, the legislation should ensure that government officials cannot be dismissed for no reason.[75]

2.3. General Rules of Conduct and the Code of Ethics

The three acts governing civil service relationships state the principles of good faith and fairness, prohibition of abuse of rights, and protection of personal rights in almost identical words. According to the principle of good faith and fairness, in the exercise of their rights and the fulfilment of their obligations, the official and their employer must proceed in good faith and fairness, in mutual cooperation, including informing each other of all relevant facts, data and information, while refraining from conduct that may infringe the other's

72 Horváth et al. (2021), pp. 128–129.
73 Hazafi and Ludányi (2019), p. 63.
74 A 833/B/2003 AB Decision, ABH 2004, 1775, 1780.
75 8/2011 (II. 18.) AB Decision, ABH 2011, 49, 79.

rights or rightful interests.[76] Officials must abide by the rules governing the exercise of their profession; they cannot abuse rights or behave in a way that violates or could threaten others' rightful interests, nor can they restrict the opportunity to enforce rights or harass/suppress free expression. Finally, all acts foresee the protection of personal rights.

The Government Officials Act also contains the principles of professionalism and efficiency. In line with the former, the government official must carry out his work in compliance with the law and other professional rules, with due consideration for the public interest. Interestingly, the legislator has placed the rule that the employer shall determine the remuneration of the government official based on his professional skills, qualifications, experience and performance in the regulation regarding the principle of professionalism. The act regulates the principle of efficiency by reference to the "primacy of civil service", a sense of responsibility and maintaining people's trust in the public administration. The official is expected to conduct their work effectively, cost-efficiently, and economically, to the satisfaction of the citizens and to meet any deadlines. Fülöp notes that although the Government Officials Act does not require equal treatment of officials, since the Public Service Officials Act is a subsidiary rule, its application of Act no. CXXV of 2003 on the promotion of equal treatment and equal opportunities[77] extends the scope of this principle to employment by government administrative bodies.[78] As far as the principle of professionalism is concerned, the Public Service Officials Act does not place this requirement among the general rules of conduct but elsewhere, under the obligations of the government official. In fact, professionalism is defined here as "commitment to the professional values set by the superior, constructive cooperation with superiors and colleagues, disciplined and meaningful performance of tasks with professional dedication".

Table 9.2 Comparison of general rules of conduct and principles under the three acts governing civil service relationships[79]

Comparison of general rules of conduct and principles		
Public Service Officials Act	*Government Officials Act*	*Special Legal Status Act*
Principle of good faith and fairness (Section 9)	Principle of good faith and fairness (Section 63)	Principle of good faith and fairness (Section 9)
Prohibition of abuse of rights (Section 10)	Prohibition of abuse of rights (Section 64)	Prohibition of abuse of rights (Section 10)
Protection of personal rights (Sections 11–12)	Protection of personal rights (Section 67)	Protection of personal rights (Section 11)
Principle of equal treatment (Section 13)	–	–
Principle of professionalism (Section 76, paragraph 2)	Principle of professionalism (Section 65)	–
–	Principle of efficiency (Section 66)	–

76 Section 9 of the Public Service Officials Act (n. 45).

77 Act no. CXXV of 2003 on the promotion of equal treatment and equal opportunities (*Az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2003. évi CXXV. Törvény*).

78 Fülöp (2019).

79 Fülöp (2019).

The three acts stipulate the general duties of officials, subject to certain statutory exceptions. These duties include the obligation of civil servants to appear and remain at their place of work "in a fit state to work", to perform their work personally, as ordered by their superior and in the public interest, to observe the law, the decisions of management and work safety, and finally, to comply with confidentiality requirements.

In a non-exhaustive list, the acts also provide that "the ethical principles applicable to government officials are commitment, primacy of the national interest, justice, fairness, dignity, decency, freedom from prejudice, responsibility". The Government Officials Act empowers the Hungarian Government Officials' Corps to lay down a detailed professional ethics code and to establish and conduct disciplinary procedures to "safeguard the prestige of the civil service career".[80] The preamble of the Code of Ethics reiterates the general rules of conduct and principles, as well as the obligations of government officials, complemented by the requirements of loyalty, decency, proportionality, and transparency.[81] The Code then goes on to elaborate on the individual principles and requirements. In particular, it defines loyalty as complying with the Fundamental Law, international obligations and European Union law on one hand, and striving to achieve the goals set by superiors on the other. Decency is defined as exemplary conduct inside and outside the workplace, with due respect for legal and moral requirements, including avoidance of undue influence. Finally, the Code of Ethics also foresees performing tasks in a proportional manner, without causing undue burden to the public or others, working transparently in a properly documented way to allow superiors to review the work and enable citizens to access public information. It is telling that the Code also includes the sentence: "We do not acquire or maintain an interest in an offshore company registered abroad in order to avoid paying public dues in Hungary"; apparently, this problem is sufficiently widespread to require some kind of resolution in the Code.

The Code includes an important provision on whistle-blowing: if an instruction that is unlawful or otherwise contrary to professional requirements or ethics is issued, civil servants must draw attention to the risk of abuse. If the instruction is nevertheless maintained, it must be reported to the Integrity Adviser or the person designated to receive such reports. Where the law precludes refusal to execute such instructions, the instruction shall be executed with a concurrent report on the risk of abuse. The Code of Ethics provides for the protection of whistle-blowers, so that "the whistle-blower acting in good faith does not suffer any harm", while superiors are required to support employees in reporting risks of abuse. The Code also includes provisions to combat nepotism, conflict of interests, and undue influence through rejection and reporting of "undue advantages".

Civil servants are responsible for ethical violations and subject to ethics procedures conducted against them. Such procedures are governed by the principles of lawfulness, fairness, efficiency, good faith, and trust and are conducted by independent ethics councils, specifically the Regional Ethics Committee in the first instance and the National Ethics Committee on appeal. Those subject to an ethics procedure enjoy the presumption of innocence and have the right to access files and information regarding their case, except the identity of witnesses who wish to remain anonymous.

80 Hazafi and Ludányi (2019), p. 98.
81 Gerencsér (2012).

V. Differentiated Civil Service Regulation – Possible Reasons and Consequences

In light of the aforementioned developments, the observation that "civil service legislation of past years was marked by dynamic change" may be an understatement.[82] When I interviewed three former government officials in April 2022 to gauge the possible reasons for such dynamic and, in certain areas, also differentiated regulation, several possible explanations emerged, but no single, decisive reason for maintaining three different acts to govern civil service regulation.

Perhaps the main reason for this three-legged regime may be the need for parallel application of the closed, career-type system (Public Service Officials Act) and the open, spoil system (Government Officials Act), where appropriate. Meanwhile, the Special Legal Status Act, a sort of hybrid of the two, opens limited scope for wage bargaining. Opening up the system is meant to offer an opportunity to deviate from the public sector wage grid, a major deterrent in recruiting professionals. It also means that there is a real chance for professionally qualified persons to join the public administration mid-career without having to start at the bottom. Positions close to the government are typically open-system, where loyalty, flexibility, and higher wages but also greater employer control over the conditions of employment and dismissal are preferred. Since these positions are tied to the incumbent government, they are less stable, and this may be compensated in an open spoil system. This remains the case, although the incumbent Hungarian Government is now in the middle of its fourth period of government. Meanwhile, partial abandonment of the career system impedes internal mobility and breaks with the privileges and guarantees enjoyed by civil servants.

Differentiated treatment of civil servants, especially in the framework of sectoral legislation, can also be explained by the different lobbying powers of individual groups for special status and wage grids. In addition, owing to budgetary restrictions, cascading wage development through a selective and gradual increase in public sector salaries proved more feasible, justifying the differentiated regulation of different civil service statuses. This, however, has historically led to wage tensions, which the uniform civil service regulation that never materialised was meant to solve. As a consequence, the Hungarian civil service system is neither a purely merit or spoil system but applies different combinations of the two from sector to sector.

VI. Summary of Findings

This overview of Hungarian civil service regulation shows that the legislator is torn between the persisting desire to achieve a uniform legal status and regulation for public servants and the realities of different priorities, permanent budgetary restrictions, the need for flexibility, and recruitment challenges in the different sectors of the civil service where professional expertise is necessary. The broad concept of *közszolgálat* does not seem to help further plans of convergence in the legal status of officials; indeed, it covers sectors beyond the civil service which have not proven amenable to uniform regulation.

From a bird's-eye view and from the perspective of a narrower sense of *közszolgálat,* limited to the ambit of civil service, the existing regulatory differentiation does not seem

82 Ludányi (2019), p. 8.

excessive. Nevertheless, the three-tier regulation and ensuing differentiation mean an erosion of the career system, where "the adapted legal institutions more often than not stem from the toolkit of private labour law. The solutions thus adapted, placed in a public law 'context' and relegating contractual methods bring an extraordinary new quality to civil service regulation."[83]

In fact, the differentiation achieved under the Government Officials Act or the Special Legal Status Act does not amount to a fully-fledged spoil system but draws heavily on the logic of the private sphere. Differentiation appears to be a trade-off between relative security and career advancement in the Public Service Officials Act with lower wages and less predictability, precarious career opportunities compensated by higher wages under the Government Officials Act, and private labour law-like contracts under the Special Legal Status Act. Since the various civil service regimes came into force, the corresponding wage grids and career structures have developed differently. Interoperability and, consequently, horizontal mobility are low.

While mobility may be low, the turnover of employees at certain public employers has become remarkably high. In fact, although the development of wage grids (including additional payments) is an important factor in employee satisfaction in the civil service,[84] other elements such as the public benefit of the work, job security, and public esteem also make joining the civil service attractive and worthwhile.[85] Indeed, higher wage grids or even the possibility of negotiating the salary at certain public employers notwithstanding. The interviews conducted for this research showed that certain institutions suffer higher turnover rates than others, while positions with others are highly sought-after. This is due to the prestige and reputation of certain institutions, which is difficult to measure but continues to shape the civil service landscape.

Bibliography

Ágh A. (1999), 'Europeanization of Policy-Making in East Central Europe: The Hungarian Approach to EU Accession', 6(5) *Journal of European Public Policy*, 839–854.

Berke Gy. (2019), 'A közszolgálat egysége és differenciáltsága jogforrástani szempontból', in Kiss G. (ed), *Közszolgálati életpályák jogi szabályozása*, Budapest: Dialóg Campus, 63–78.

Fülöp T. (2019), 'Általános magatartási követelmények és alapelvek (63–67. §)', in Ludányi D. (ed), *A kormányzati igazgatásról szóló 2018. évi CXXV. törvény rövid magyarázata*, Budapest: Nemzeti Közszolgálati Egyetem.

Gerencsér B. (2012), *Ethics in Autonomous Public Service – New Trends*, Passau: Schenk Verlag.

György I. (2019), 'Egységesség és differenciáltság a kormányzati szolgálati, közszolgálati és állami szolgálati jogviszonyban', in Kiss G. (ed), *Közszolgálati életpályák jogi szabályozása*, Budapest: Dialóg Campus, 99–110.

Hazafi Z. (2009), *Közszolgálati jogunk a változó nemzetközi és hazai térben*, Pécs: Doctoral Dissertation.

Hazafi Z. (2012), 'Közszolgálati életpályák összahangolása', 4(2) *Új Magyar Közigazgatás*, 2–9.

Hazafi Z. (2012), *A közszolgálati tisztviselői törvény magyarázata*, https://jak.ppke.hu/uploads/articles/12040/file/A%20k%C3%B6zszolg%C3%A1lati%20tisztvisel%C5%91i%20t%C3%B6rv%C3%A9ny%20%20magyar%C3%A1zata.pdf.

83 Horváth et al. (2021), p. 126.

84 Krauss (2013).

85 Linder (2010a), p. 204.

Hazafi Z. (2014), 'Új közszolgálati életpálya – a közszolgálat fejlesztésének jogi és emberi erőforrás dimenziói', in Hazafi Z. (ed), *Közszolgálati életpálya és emberi erőforrás gazdálkodás*, Budapest: Magyar Közlöny Lap-és Könyvkiadó, 9–88.
Hazafi Z., Ludányi D. (2019), *Közszolgálati jog I.*, Budapest: Nemzeti Közszolgálati Egyetem.
Horváth I. (2015), 'A közszolgálati munkajog sajátosságai, alapelvei', in Gyulavári T., Horváth I., Hős N., Kártyás G., Petrovics Z., Takács G., Tánczos R. (eds), *Bevezetés a közszolgálati munkajogba*, Budapest: ELTE Eötvös Kiadó, 13–32.
Horváth I. (2019), 'A kormányzati igazgatási létszámgazdálkodás (§ 51–60)', in Ludányi D. (ed), *A kormányzati igazgatásról szóló 2018. évi CXXV. törvény rövid magyarázata*, Budapest: Nemzeti Közszolgálati Egyetem, 15–23.
Horváth I., Kun A., Petrovics Z. (2021), 'Adalékok a közszolgálati jog jogágiságának kérdéséhez', 11(2) *Pro futuro*, 120–133.
Koi Gy. (2021), 'A közhivatal viseléséhez való jog', in Jakab A., Könczöl M., Menyhárd A., Sulyok G. (eds), *Internetes Jogtudományi Enciklopédia*, https://ijoten.hu/szocikk/a-kozhivatal-viselesehez-valo-jog.
Krauss F.G. (2013), *A közszolgálat személyi állományának véleménye a közszolgálat kompenzációs és javadalmazási rendszeréről*, Közszolgálati Humán Tükör, Survey.
Ladik G. (1908), *A közszolgálati alkalmazottak jogviszonyai*, Budapest: Pesti Könyvnyomda Részvénytársaság.
Linder V. (2010a), *Személyzeti politika – Humánstratégiai a közigazgatásban*, Doctoral dissertation, Debrecen.
Linder V. (2010b), 'Konvergencia, mintakövetés a közszolgálati rendszer korszerűsítésében', 3(11) *Új Magyar Közigzagatás*, 1–18.
Linder V. (2020), 'Közszolgálati jog', in Jakab A., Könczöl M., Menyhárd A., Sulyok G. (eds), *Internetes Jogtudományi Enciklopédia*, https://ijoten.hu/szocikk/kozszolgalati-jog.
Lőrincz L. (2009), 'Az állam szerepének változása, különös tekintettel a közszolgálatra', 2(3) *Új Magyar Közigazgatás*, 1–5.
Ludányi D. (2019), 'Előszó', in Ludányi D. (ed), *A kormányzati igazgatásról szóló 2018. évi CXXV. törvény rövid magyarázata*, Budapest: Nemzeti Közszolgálati Egyetem, 9.
Mélypataki G. (2015), 'A közszolgálati jog történetének állomásai – a hivatásos közszolgálat megjelenésétől a XX. század első feléig', XXXIII *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, 175–191.
Mélypataki G. (2017), 'A civil közszolgálat terjedelmének határai', 4 *Pro Publico Bono – Magyar Közigazgatás*, 134–143.
Petrovics Z. (2019), 'Összehasonlító európai közszolgálat, a közszolgálati jogviszony alanyai az Európai Unió tagállamaiban', 1 *Pro Publico Bono – Magyar Közigazgatás*, 86–113.
Sipos-Szabó Z. (2008), 'Egységes vagy egységesebb közszolgálat II. Első lépés: egységesítés a jogviszonyok szintjén', 1(2) *Új Magyar Közigazgatás*, 70–71.
Stumpf I. (2009), 'Az állam újrafelfedezése és a neoweberiánus állam', in Virág G. (ed), *OKRI Szemle*, Budapest: OKRI, 110–123.
Szilágyi E. (2015), 'Centralizációs lépések – az erős állam eszméje', 1(2) *KÖZJAVAK*, 7–10.

10 The Civil Service in Italy

A Flood of Legislative Reforms and a Few Safe Harbours

Elena Buoso

I. Overview: The Civil Service in Italy

The notion of civil servant depends on the classification criteria used. In Italy, there are different notions of civil servant depending on whether the employment relationship is defined under public or private law or on the public or private nature of the employer. In the first case, only workers not employed under private law are considered civil servants. In the current system, this is a minority of civil servants, specified by law, as explained later in this chapter. In the second case, those who work for a public employer are included, irrespective of whether the employment relationship is subject to public or private law. This is the taxonomy currently used by the Italian legal system.

The position of civil servant in Italy is characterised by (1) the public nature of the employing institution; (2) the link between the position, the institutional purposes of the employer and the public interest pursued; (3) access to employment through public tender or other type of formal procedure ruled by law; (4) subordination of the employee with (stable) inclusion in the administrative structure of the institution; (5) a continuous employment relationship; (6) exclusivity, i.e. incompatibility with other jobs; and (7) remuneration set by law or collective agreement.[1] The area has evolved in a complex way due to a stratification of legislative reforms and some rethinking of the strategy pursued by the legislator, also depending on the contingent but dramatic need to reduce public spending in recent decades.[2] The aim of saving resources has been pursued quite effectively at times but at the expense of the quality of services and administrative performance.[3]

II. Historical Background and Development of the Legal Framework

1. The Pre-Republican Phase

The first codification of public employment after the unification of Italy in 1861 was approved by the Giolitti Act of 1908,[4] named after the President of the Council of Ministers

1 De Cesaris (2020), para. 1. For a more detailed list, see Giannini (1970), p. 299.
2 Topo (2008), pp. 66 and 142; Tenore (2020a), p. 40; Albanese (2022), p. 694.
3 Albanese (2022), p. 701.
4 Law no. 290 on the legal status of civil servants of 25 June 1908 (*Legge sullo stato giuridico degli impiegati civili*), *Gazzetta Ufficiale*, 26 June 1908, no. 149.

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of the Kingdom of Italy in charge at the time.[5] This regulation framed subordinate working activity for the State and other non-economic public bodies under public law.[6]

Under the Giolitti Act, civil servants were not distinguished from other public employees by their relationship with the employer (subordinate service relationship – *rapporto di servizio*) but by being classified as directly instrumental to the public function, i.e. the public interest.[7] The strong link to the public interest made employees a substantial part of the administration, although not all civil servants were (or are today) regarded as administrative organs (*organi amministrativi*),[8] holders of a special qualified relationship with the administrative body (*rapporto organico*).[9] The latter were (and still are) the only subjects who could/can issue administrative acts and measures, the effects of which on parties outside the public administration were/are directly imputed to the public body.[10] This distinction is traditionally underlined using the expression *pubblico impiegato* for civil servants and *funzionario* for employees of public bodies who perform a public function.[11] However, the Italian legislator is not very consistent in its use of the two terms, which sometimes appear to be interchangeable.[12]

In the civil service of the time, the public administration as employer was in a dominant position with respect to the employee. This was reflected in all aspects of the employment relationship from appointment by unilateral act of the public authority, to the administrative form of the acts of personnel management, and the special nature of the subjective rights/legitimate interests that characterised the employment relationship.[13] These characteristics were developed further by the De Stefani reforms of 1923[14] and since 1924 by the jurisdiction of administrative judges for all disputes regarding the civil service.[15]

By unilateral appointment, civil servants acquired a special status that reflected the connection of their position with the achievement of the public interest; this somehow raised them above ordinary citizens.[16] By accepting appointment, civil servants did not enter into a contractual relationship with the public administration but became duty-bound to perform the necessary services. In this context, the supremacy of the public administration over its employees was expressed through the special duties of loyalty, obedience, and professional secrecy and through limits on the exercise of certain rights, such as membership

5 Giovanni Giolitti (27 October 1842–17 July 1928) was an Italian statesman of the Historical Left and the Liberal Union and was the Prime Minister of Italy five times between 1892 and 1921. See Ansaldo (2019).

6 Fiorillo (2019), p. 2 and Boscati (2021), p. 22.

7 Boscati (2021), p. 23.

8 Romano (1947), p. 145 and Giannini (1970), p. 300.

9 Sandulli (1974), p. 162.

10 Clarich (2022), pp. 309–311.

11 Giriodi (1900), p. 228.

12 Terranova (1969), p. 280.

13 Fiorillo (2019), p. 2.

14 Royal decree n. 2395, Hierarchical ordering of State Administrations of 11 November 1923 (*Regio decreto, Ordinamento gerarchico delle amministrazioni dello Stato*), *Gazzetta Ufficiale*, 17 November 1923, no. 270; Royal decree no. 2960 Provisions on the legal status of civil employees of the State Administration of 30 December 1923 (*Regio decreto, Disposizioni sullo stato giuridico degli impiegati civili dell'Amministrazione dello Stato*), *Gazzetta Ufficiale*, 21 January 1924, no. 17; see Colacito (1970), p. 310.

15 Royal decree no. 1054, Approval of the consolidated text of the laws on the Council of State of 26 June 1924 (*Regio decreto, Approvazione del testo unico delle leggi sul Consiglio di Stato*), *Gazzetta Ufficiale*, 7 July 1924, no. 158.

16 Clarich (2022), p. 384.

of political organisations and trade unions and freedom of expression.[17] Remuneration was not a wage but a non-distrainable public law credit.[18]

2. The Constitution and Subsequent Development After World War II

The Italian Constitution of 1948[19] dedicates Title III to "economic relations and the protection of workers" (Articles 35 to 47), but several provisions specifically dedicated to civil servants are in other titles.[20] Article 51 of the Constitution specifies the principle of equality, already stated in Article 3, for access to public service. The provision was amended in 2003, expressly introducing the duty of the Republic to promote equal opportunities for women and men.

Access to the civil service shall be through public competitive examinations (literally *pubblico concorso*, which means public tender), except in the cases established by State law (Article 97, paragraph 4 of the Italian Constitution). This limitation causes frequent constitutional disputes between the State and the regions and has led to many judgments of unconstitutionality and, thus, annulment of laws that seek to circumvent the constitutional obligation of public competitions for public service recruitment.[21]

Article 54, paragraph 2 of the Constitution establishes that citizens entrusted with public functions have the duty to carry them out with discipline and honour, according to their oath, in the cases established by law. According to Article 28 of the Constitution, they are directly liable not only under criminal law but also under civil and administrative law for acts carried out in violation of rights.

Public offices are organised by ordinary law to ensure smooth running and neutrality (*buon andamento* and *imparzialità*). This provision (Article 97, paragraph 2 of the Constitution) contains an unqualified reservation clause referring to ordinary law but also enabling government regulation in the matter. The clause affects the regulation of all aspects of civil service and assigns the guidelines for the organisational structure of public offices to ordinary law.[22] However, since the 1960s, the legislative process on the subject has included a phase of negotiation with the trade unions. This was provided initially for hospital personnel, subsequently extended to other categories,[23] and finally incorporated in the Framework Act on the Civil Service of 1983.[24]

Lastly, Article 98 of the Italian Constitution states that civil servants are at the exclusive service of the nation. If they are members of parliament, they can be promoted only by seniority. The Constitution also allows the law to establish limitations on the right of public prosecutors, judges, professional military personnel, members of the police, and diplomatic and consular representatives abroad to subscribe to political parties.

17 Colacito (1970), p. 309.
18 Fiorillo (2019), p. 3.
19 The Italian Constitution was enacted on 27 December 1947 (*Gazzetta Ufficiale*, no. 298) and has been in force since 1 January 1948.
20 For an overview, see Gragnoli (2021), p. 55.
21 See recently Italian Constitutional Court, judgment of 27 February 2020, no. 36 and Italian Constitutional Court, judgment of 2 September 2020, no. 199.
22 See Italian Constitutional Court, judgment of 5 May 1980, no. 68.
23 See Article 40 of the Law no. 132 on hospital institutions and hospital care of 12 February 1968 (*Legge su enti ospedalieri e assistenza ospedaliera*), *Gazzetta Ufficiale*, 12 March 1968, no. 68.
24 See Section II.3 of this chapter.

The first comprehensive regulation of public employment in the post-war period was the Consolidated Law on State Civil Servants of 1957.[25] It combined all existing rules and incorporated the traditional public law structure just mentioned, characterised by four elements:

1. employment by appointment in the form of a unilateral act by the public administration (*decreto di nomina*), expression of public power;
2. lack of bargaining autonomy regarding regulation of the employment relationship, which is entrusted exclusively to the law or regulations;
3. governance of all other aspects of employment by administrative acts;
4. competence of administrative judges for all disputes.[26]

3. The First Reform: The 1983 Civil Service Framework Act

In 1983, the civil service was reformed by the Civil Service Framework Act,[27] establishing common rules for the entire public sector and extending regulation not only to State employees but also to the personnel of regions and local authorities. The Framework Act established the aspects that needed to be regulated: (1) by law, (2) by government regulation, and (3) by collective agreement, eventually implemented by government regulation. The major innovation concerned the introduction of collective negotiation with major trade unions.[28] Negotiation was aimed at proposing a collective agreement to be implemented by government regulation and establishing common rules for economic conditions.

The representativeness of trade union organisations was (and is currently) defined by government regulation.[29] According to Article 39 of the Italian Constitution, workers can form unions, and the only obligation of unions is to be registered, if so required by law. The only condition for registration contemplated by the Constitution is a democratic basis of the union, although this part of the constitutional provision was never implemented, and no law was ever enacted. At this stage of the evolution of the law, the collective agreement was merely the prerequisite for government regulation, i.e. it allowed the government to evaluate the agreement. There was no collective contract.

4. Reforms Since the 1990s: "Contractualisation" of the Civil Service

Since the 1990s, reforms have brought civil service employment closer to that in the private sector. Known as "contractualisation" (*contrattualizzazione*) of the civil service, the process has not been linear but sinusoidal[30] and sometimes contradictory. Still, it has

25 Decree of the President of the Republic no. 3, Consolidated Law on State Civil Servants of 10 January 1957 (*Testo unico degli impiegati civili dello Stato*), *Gazzetta Ufficiale*, 25 January 1957, no. 22.

26 Colacito (1970), pp. 312 f.

27 Civil Service Framework Act Law no. 93 of 29 March 1983 (*Legge Quadro sul pubblico impiego*), *Gazzetta Ufficiale*, 6 April 1983, no. 93.

28 See Bologna (2021), p. 103.

29 Decree of the President of the Republic no. 395 of 23 August 1988, *Gazzetta Ufficiale*, 9 September 1988, no. 212.

30 Tenore (2020a), p. 40.

ultimately led to the convergence of civil service and private (labour) law employment and the exclusion of many categories of civil servants from the public law regime. This evolution required a new interpretation of the limits set by Article 97 of the Constitution.[31]

The transition to the contractual regime of private law occurred with several legislative decrees (*decreti legislativi*),[32] issued by the government on five laws of delegation of legislative power to the government by parliament (*leggi delega*).[33] These can be classified as five cycles of reforms, each introducing quite complex and wide-raging new regulation of whole sectors of the Italian public administration and the civil service.[34] This revolution[35] took place in the early 1990s and opened the second season of civil service reforms in Italy. In 1993, the civil service and the private sector were put in the same regulatory

31 Italian Constitutional Court, judgment of 25 July 1996, no. 313; Italian Constitutional Court, judgment of 16 October 1997, no. 309.

32 A legislative decree (*decreto legislativo*) has the same force as an ordinary law of the parliament but is issued by the government. According to Articles 76 and 77 of the Italian Constitution, the parliament could delegate legislative power to the executive, specifying by law the purpose of the delegation, the guiding principles and criteria for the new regulation and the time limit of the delegation. Legislative decrees are commonly used to introduce comprehensive reforms and technical regulations.

33 First came the Delegation of power to the government for the rationalisation and revision of healthcare, the civil service, social security and regional finance regulation of 23 October 1992, no. 421 (*Delega al Governo per la razionalizzazione e la revisione delle discipline in materia di sanità, di pubblico impiego, di previdenza e di finanza territoriale)*, *Gazzetta Ufficiale* of 31 October 1992, no. 257, followed by legislative decree of 3 February 1993, n. 29; legislative decree of 18 November 1993, no. 470; legislative decree of 23 December 1993, no. 54. Then the Bassanini Reform (also known as the Bassanini Laws after the Minister for the Public Function, Franco Bassanini): Delegation of powers to the government for the transfer of functions and tasks to regions and local authorities, for the reform of public administration and for administrative simplification of 15 March 1997, no. 59 (*Delega al Governo per il conferimento di funzioni e compiti alle regioni ed enti locali, per la riforma della pubblica amministrazione e per la semplificazione amministrativa*), *Gazzetta Ufficiale*, 17 March 1997, no. 63; and Urgent measures for streamlining administrative activity and decision-making and control procedures of 15 May 1997, no. 127 (*Misure urgenti per lo snellimento dell'attività amministrativa e dei procedimenti di decisione e di controllo*), *Gazzetta Ufficiale*, 17 May 1997, no. 113, followed by legislative decree of 4 November 1997, no. 396; legislative decree of 31 March 1998, no. 80; legislative decree of 29 October 1998, no. 387; legislative decree of 30 March 2001, no. 165. Third came the Delegation to the government on employment and the labour market of 14 February 2003, no. 30 (*Delega al Governo in materia di occupazione e mercato del lavoro*), *Gazzetta Ufficiale*, 26 February 2003, no. 47, followed by legislative decree of 10 September 2003, no. 276; legislative decree of 23 April 2004, no. 124; legislative decree of 6 October 2004, no. 251. Fourth came the Brunetta Reform (after Minister Renato Brunetta): Delegation of powers to the government aimed at optimising the productivity of public work and the efficiency and transparency of public administrations, as well as additional provisions on the functions attributed to the National Economic and Labour Council and the Court of Auditors of 4 March 2009, no. 15 (*Delega al Governo finalizzata all'ottimizzazione della produttivita' del lavoro pubblico e alla efficienza e trasparenza delle pubbliche amministrazioni nonché disposizioni integrative delle funzioni attribuite al Consiglio nazionale dell'economia e del lavoro e alla Corte dei conti*), *Gazzetta Ufficiale*, 5 March 2009, no. 53, followed by legislative decree of 27 October 2009, no. 150. Finally the Madia Reform (after Minister Marianna Madia), Delegations to the government on the reorganisation of Public Administrations of 7 August 2015, no. 124 (*Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche*), *Gazzetta Ufficiale*, 13 August 2015, no. 187, followed by legislative decree of 20 June 2016, no. 116; legislative decree of 25 May 2017, no. 74 and no. 75. For reasons of space, this footnote does not include all the publication details of the legislative decrees, but all legislative measures can be consulted on the official website for legislative and regulatory acts, set up by the Italian Presidency of the Council of Ministers: www.normattiva.it.

34 Busico (2020), p. 125.

35 Fiorillo (2019), p. 12.

private (labour) law framework after the introduction of individual employment contracts for all civil servants, except senior managers and certain categories, such as judges, public prosecutors, military and diplomatic personnel, and university professors.[36]

A few years later, the entire Italian public administration was changed by the Bassanini reforms. Regarding public service, the Bassanini laws revised the system of consultations between trade unions and public management and led to the approval of the Consolidated Act on Public Employment of 2001 (TUPI, *Testo Unico del pubblico impiego*).[37] Although the Consolidated Act set a milestone,[38] the civil service has been subject to many changes over the last 20 years. These changes have always pursued the aim of reducing public spending and have introduced new tools for evaluating and rewarding performance.

A progressive general erosion, albeit non-linear, of the range of public law, could be observed in the field since private (labour) law is also applied to some aspects of office organisation, and collective agreements have increased. However, there are still some differences with respect to the private sector. The distance between public and private employment has narrowed gradually but has not completely disappeared because public employees are better protected. In the civil service, fixed-term and flexible contracts are subject to strict limits. Worker protection also has negative aspects because a certain stability often means less flexibility, slower career advancement, and quite low remuneration. Stability and low wages as typical elements of the civil service have also affected the composition of office staff. Since the last century, these jobs have been very attractive to personnel from economically less-developed areas of Italy, leading to a massive presence of employees from central and southern Italy throughout the Italian administration.[39]

The praxis after the reform showed many problems related to collective bargaining,[40] highlighting particularly strong positions of trade unions and a certain weakness of management that tended to overstep the limits set by approved collective agreements.[41] In 2009, the Brunetta reform,[42] therefore, eliminated the possibility of deviating from the provisions of the law by means of collective agreements, a measure introduced previously with Article 2 TUPI, reducing the influence of trade unions.[43] Under the new rule, derogation of the law by collective agreement is only admitted when expressly provided for by specifying the aspects that may be derogated from. Moreover, in the event of a conflict, the legislative source automatically prevails, irrespective of whether or not the collective agreement offers the employee more favourable conditions. In fact, TUPI qualifies as a

36 Article 2 of the legislative decree of 3 February 1993, no. 29.

37 Legislative decree, General rules on the organisation of employment in Public Administrations of 30 March 2001, no. 165 (*Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche*), *Gazzetta Ufficiale*, 9 March 2001, no. 106.

38 Fiorillo (2019), p. 11; Boscati (2021), p. 38.

39 This trend was accentuated with massive recruitment campaigns in these areas. Another cause of "southernisation" (*meridionalizzazione*) is related to the predominantly legal-humanistic cultural education of high-school and university graduates in those areas. In the 1990s, it was estimated that over 70% of civil servants were from the South and Lazio Region, while only 45% of the national population resided in those areas. The consequences of this development are many and sometimes questionable, both in terms of representative bureaucracy and in terms of the long-term organisation of work, considering legitimate expectations of relocation, see Cassese (1994), p. 16; D'Orta and Diamanti (1994), p. 51.

40 Romei (2019), p. 215.

41 Fiorillo (2019), p. 21.

42 See footnote n. 33.

43 Boscati (2021), p. 42.

mandatory provision, and pursuant to Article 1339 of the Italian Civil Code, any contractual provisions that breach it are null and void.[44] This constitutes a further distinction from the private sector, where collective agreements may derogate from the law or regulations when they provide the employee with more favourable conditions (Article 2077 of the Italian Civil Code).

The trend changed again with the Madia reform of the public administration of 2015–2017,[45] which reopened the possibility of contracts while introducing mechanisms for rationalising recruitment, including new tools for performance evaluation.[46] The latest step in the reform of the civil service involves the National Recovery and Resilience Plan of 2021 (PNRR, *Piano nazionale di ripresa e resilienza*),[47] designed to manage the funds made available to Italy by the Next Generation EU Plan. The PNRR includes reform of the whole civil service as a milestone and was implemented with several law-decrees (*decreti legge*),[48] but so far, it mostly seems limited to simplifying and accelerating the recruitment process.[49]

III. The Civil Service Under Private and Public Law

In the current system, it is also possible to distinguish two legal regimes for civil servants. Public employment is subject to a contract under private (labour) law (*pubblico impiego contrattualizzato*), which is now the general regime according to TUPI. It applies to State, regional, provincial, and municipal administrations and to the companies in which State authorities have a majority shareholding. Private (labour) law civil service currently has the following sectors: central State finance, local government functions, education, research, and health. These employees of the public administration are subject to TUPI, some provisions of the Civil Code and individual and collective agreements (Article 2 TUPI). Disputes are dealt with by ordinary judges acting as labour judges (Article 63 TUPI).[50]

44 Mainardi (2021), p. 83.

45 See footnote n. 33.

46 Boscati (2021), p. 46.

47 PNRR, pp. 48 f., see www.programmazioneeconomica.gov.it/tag/pnrr-testo/. See also Section IV.6 of this chapter.

48 According to Article 77 of the Italian Constitution, in extraordinary cases of necessity and urgency, the government can issue, on its own responsibility, provisional measures with the force of law, called law-decree (*decreto legge*). The governmental law-decree must be submitted to the parliament for conversion into law on the same day. A law-decree loses its force unless converted into law within 60 days.

49 See law-decree, Urgent measures to strengthen the administrative capacity of public administrations functional to implementation of the National Recovery and Resilience Plan and for the efficiency of justice of 9 June 2021, no. 80 (*Misure urgenti per il rafforzamento della capacità amministrativa delle pubbliche amministrazioni funzionale all'attuazione del Piano nazionale di ripresa e resilienza e per l'efficienza della giustizia*) converted with amendments by law of 6 August 2021, no. 113, *Gazzetta Ufficiale*, 7 August 2021, no. 188; and Article 10 of the law-decree, Urgent measures to contain the COVID-19 epidemic, SARS-CoV-2 vaccinations, justice and public tenders of 1 April 2021, no. 44 (*Misure urgenti per il contenimento dell'epidemia da COVID-19, in materia di vaccinazioni anti SARS-CoV-2, di giustizia e di concorsi pubblici*), converted with amendments by law of 28 May 2021, no. 76, *Gazzetta Ufficiale*, 1 April 2021, no. 79; law-decree, Further urgent measures to implement the National Recovery and Resilience Plan of 30 April 2022, no. 36 (*Ulteriori misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza*), *Gazzetta Ufficiale*, 30 April 2022, no. 100.

50 Jurisdiction-related aspects are problematic and controversial, see De Giorgi Cezzi (1999), p. 1023.

Pursuant to Article 3 TUPI, a few categories of employees are excluded from this regime and are governed by special regulations and public law, e.g. judges, public prosecutors, State lawyers, university professors, soldiers, police personnel, firefighters, diplomatic personnel, and employees of the Chambers of Deputies, Constitutional Court, Bank of Italy, Consob (the Italian Companies and Exchange Commission), and independent authorities. These civil servants (currently about 630,000 employees) are completely subject to public law (although for some groups, such as diplomatic staff, the law leaves room for collective bargaining). This group of civil servants is subject to special laws and the jurisdiction of administrative judges for all disputes.[51]

Even in the case of private (labour) law civil servants, however, there is no real correspondence with the regime for private sector employees. Many aspects also remain governed by public law for private law civil servants: e.g. the rules on administrative responsibility of employees when performing their duties; the powers of bodies and the way they are conferred; recruitment by public tender; the guarantees of freedom of teaching and research; the rules on incompatibilities and exclusivity.

With regard to organisational acts of public bodies, scholars have clarified that the law distinguishes between acts of macro-organisation and micro-organisation. Macro-organisation concerns the fundamental principles of organisation and acts that could be defined as structural, which is why they are governed by the instruments of public and administrative law. Micro-organisation refers to acts of internal relevance and comes under the private law of management (Article 5, paragraph 2 TUPI).[52] Acts of management of labour relations and certain administrative choices have, therefore, been removed from the area of administrative law, considerably streamlining decision-making and alleviating the obligation of stating the reason for administrative acts, generally required by Article 3 of the Italian Administrative Procedure Act of 1990.[53]

Between these two poles, there is a grey area[54] where public and private regimes intersect: these are cases (such as economic authorities) where the employer formally has a public legal personality but does not come under TUPI, and where the employer has a private legal personality, subject to total public control, as in the case of certain foundations (e.g. opera-symphonic foundations), associations (the Red Cross) and above all companies resulting from the divestment of public assets and privatisation, but which are essentially public since the State retains a majority of the shares (e.g. the Italian postal service and State railways).

51 Article 69, para. 7 of the legislative decree of 31 March 1998, no. 80, New provisions on organisation and labour relations in public administrations, jurisdiction in labour disputes and administrative jurisdiction, issued in implementation of Article 11, para. 4, of Law no. 59 of 15 March 1997 (*Nuove disposizioni in materia di organizzazione e di rapporti di lavoro nelle amministrazioni pubbliche, di giurisdizione nelle controversie di lavoro e di giurisdizione amministrativa, emanate in attuazione dell'articolo 11, comma 4, della legge 15 marzo 1997, n. 59*), *Gazzetta Ufficiale*, 8 April 1998, no. 82.

52 Fiorillo (2019), p. 37; Cerbone (2021), p. 937.

53 New rules on administrative procedure and the right of access to administrative documents of 7 August 1990 (*Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*), *Gazzetta Ufficiale*, 18 August 1990, no. 192.

54 The expression is used with reference to the recruitment systems of public enterprises by Falsone (2021), p. 297.

IV. The Current Regulation of the Civil Service in Italy

1. Collective Bargaining and Collective Agreements

Collective bargaining for the public sector must follow the rules laid down in Title III TUPI and is, in this respect, different from collective bargaining for workers in the private sector. This difference is explained by the fact that the rules are not only aimed at protecting employees, as in the private sector but must protect the public interest, consolidate public finances and ensure smooth running and impartiality according to Article 97 of the Constitution.[55]

For private law civil servants, the employment relationship is no longer established by designation in a unilateral administrative act but by an individual contract (Article 35 TUPI). This creates a relationship of legal equality between employer and employee, but the parallels with individual employment contracts in the private sector are limited. For example, Article 2077 of the Civil Code requires individual contracts to comply with the collective agreement, allowing a derogation if the contract is more favourable to the employee (*derogatio in melius*). However, this exception does not apply to civil servants (Article 40, paragraph 4 TUPI).[56] Some scholars, however, disagree with this restrictive interpretation of the law and Article 2077 of the Civil Code is seldom enforced, even in relation to private collective agreements.[57]

The collective agreement determines the basic content of individual contracts and the setting of remuneration. Collective bargaining takes place between trade unions and a specially established non-economic public body, the Negotiation Agency for Public Administrations (ARAN, *Agenzia per la Rappresentanza Negoziale nelle pubbliche Amministrazioni*), as provided by Article 46 TUPI. ARAN has the power to bargain and sign collective agreements binding on the public administrations it represents but also to screen trade union partners on the basis of their representativeness. ARAN also monitors salary trends and the implementation of collective agreements.[58]

Trade unions are chosen on the basis of the so-called membership indicator (*dato associativo*), i.e. the number of mandates received from public administration workers, and the electoral indicator (*dato elettorale*), i.e. the number of votes obtained during the election of representatives out of the total number of votes cast for that public service area (Article 43 TUPI). The stages of collective bargaining are strictly proceduralised and described in detail by the legislator; they are subject to control by the Court of Audit (*Corte dei Conti*), regarding compatibility with financial and budget planning of State, regions, and local public bodies. Collective agreements last three years and are subject to tacit renewal. In the event of express renewal, the collective agreement for the public sector is not republished in its entirety, but only the part that has been amended. Previous collective agreements, therefore, remain in force unless amended.

55 See Italian Constitutional Court, judgment of 24 June 2015, no. 178.
56 Mainardi (2021), p. 91.
57 Fiorillo (2019), p. 44.
58 Bologna (2021), p. 108.

2. *Recruiting Systems: Public Tender and Selective Procedure*

The Italian legal system includes the principle that all staff in public administrations must be recruited by public tender (Article 97, paragraph 4 of the Italian Constitution). The absoluteness of this constitutional principle is not, however, reflected in its application and in fact the doctrine has described it as a "forgotten" part of the Italian Constitution.[59] As already mentioned, ordinary laws of the State and regions[60] have very often exploited the possibility of derogation offered by the second part of Article 97, either by giving permanent tenure to employees with fixed-term contracts, hired without public competition or years later by rolling over the lists of applicants found eligible but who were not appointed.[61] On many occasions, the Italian Constitutional Court has declared these exceptions unconstitutional,[62] but a solution has not yet been found.

Public tender is a recruitment method chosen to ensure equality, neutrality, and impartiality in access to public administration jobs (Articles 51 and 97 of the Italian Constitution), but it is not always suitable for selecting the most appropriate personnel for a given assignment.[63] The ordinary legislator has interpreted this constitutional concept by identifying two types of recruitment procedure: the public tender in the strict sense (*concorso pubblico*), requiring a comparison of candidates and choice of the best one, and the selective procedure (*procedura selettiva*), which involves checking the requirements for recruitment and the minimum preparation required, without comparing applicants, but ranking them on the basis of other, e.g. social, criteria.[64]

Both recruitment methods are highly procedural and formal, resulting in frequent legal disputes.[65] The procedures are subject to common principles of publicity and transparency of the selection process, the use of automated and digital methods (such as pre-selection tests),[66] observance of gender equality,[67] a quota system for disabled and protected persons,[68] centralisation of procedures, and the professional competence and neutrality of the selection committee (Article 35 TUPI).

These provisions concern employees linked to the public body by a so-called clerical service relationship (*rapporto impiegatizio*), which is always remunerated and is normally of

59 Allena and Trimarchi (2021), p. 379.

60 See footnote n. 21.

61 On this problem, see Cassese (2020), pp. 146–147.

62 See, recently, Italian Constitutional Court, judgment of 15 October 2021, no. 195; Italian Constitutional Court, judgment of 2 December 2021, no. 227. See also Cassatella and Fraenkel-Haeberle (2022), p. 771.

63 Mattarella (2017), p. 417; Marra (2019), p. 236; Allena and Trimarchi (2021), p. 381; Cassatella and Fraenkel-Haeberle (2022), pp. 767 f.

64 Ferrara (2021), p. 205.

65 Allena and Trimarchi (2021), p. 402. On the consequences of litigation vicissitudes, particularly the annulment of the public competition procedure and its reiteration on the career reconstruction of civil servants, see Perongini (2022), p. 97.

66 Indeed, the civil service is an interesting field of application of algorithms for automated administrative acts, including those related to local assignment. Some of these cases led to the first judicial rulings interpreting and developing rules on the use of algorithms by the public administration, see Italian Council of State, judgment of 8 April 2019, no. 2270 and Italian Council of State, judgment of 13 December 2019, no. 8472, no. 8473 and no. 8474; see Galetta (2020), p. 501; Nassuato (2022), p. 182; see also Cardarelli (2015), p. 227.

67 Little attention is dedicated to gender equality issues in the Italian public service; see Pasqualetto (2022), p. 2.

68 Protected categories include, for example, persons disabled for health reasons, organisations and widows of persons killed in war or in the service of the public security forces or at work, victims of terrorism or organised crime, and witnesses subject to protection measures.

indefinite duration. There are also those who act in the administration and for the administration in an honorary capacity (*rapporto onorario*). In this case, the relationship derives from an elective or honorary position that is not exercised in a professional capacity. These persons are not employees and are therefore not paid but only receive compensation.

In many cases, Italian law requires that civil servants have Italian citizenship, thus placing many limits on the employment of EU citizens. In fact, the Italian legislator extensively interprets the limits to the free movement of workers allowed by Article 45 of the Treaty on Functioning of the European Union (TFEU).[69] In contrast, the Court of Justice has ruled that derogating from the principle of freedom of movement for employees in public administration should be interpreted restrictively and is only applicable when a public authority is conferred and functions are exercised to safeguard the general interest.[70] The Italian rules apply the derogation, regarding even one of these two conditions as sufficient. According to this approach, the government indicates positions which must be held by Italian citizens by decree, identifying them as managerial and top positions in the administration, judiciary, government, and some ministries (such as the foreign, internal, justice, and finance ministries).[71] Italian citizenship is required to perform functions involving the drafting, issuance or execution of authorisation, coercive, or control measures, but the list also includes employees who are not exercising public authority or positions, and are not directly connected to protecting the national interest. Italian national courts have therefore declared the domestic regulation incompatible with the EU principle of free movement of workers. The Plenary Assembly of the Council of State ruled that the requirement of Italian citizenship for all management-level positions is contrary to Article 45 TFEU and, therefore, not applicable.[72] The case concerned directors of national museums and started with a complaint against the appointment of an Austrian citizen as director of the Ducal Palace in Mantua. This precedent caused a massive change in the criteria for selecting museum directors, which has given a very different imprint to the management of some of Italy's best-known museums, such as the Uffizi Gallery in Florence.

Afterwards, civil labour jurisprudence has held that it is contrary to EU law to require Italian citizenship for all employees of certain ministries, without checking whether the position really needs it. It is necessary to check case-by-case whether the conditions required by the Court of Justice are met.[73] The decree of 1994 should, therefore, be read in this way today and, if necessary, disapplied, but a change in the rule would be preferable.[74] The situation of third-country nationals holding a residence permit from another EU country remains unclear and has not yet been resolved.[75]

69 Palazzo (2017), p. 753.

70 CJEU, judgment of 16 June 1987, *Commission v. Italy*, C-225/85; CJEU, judgment of 11 March 2008, *Commission v. France*, C-89/07 and CJEU, judgment of 26 May 1982, *Commission v. Belgium*, C-149/79; see Ziller (2011), pp. 6 f.

71 Regulation on access of citizens of EU Member States to job positions in the Public Administration of 7 February 1994, no. 174 (*Regolamento recante norme sull'accesso dei cittadini degli Stati membri dell'Unione europea ai posti di lavoro presso le amministrazioni pubbliche*), *Gazzetta* Ufficiale, 15 March 1994, no. 61.

72 Italian Council of State (*Adunanza Plenaria*), judgment of 25 June 2018, no. 9.

73 *Tribunale di Firenze*, judgment of 26 June 2018, no. R.G. 1090/2017; *Tribunale di Milano*, judgment of 11 June 2018, no. 15759; *Tribunale di Roma*, judgment of 28 January 2019, no. 798.

74 Albanese (2019), p. 1.

75 Chiaromonte (2021), p. 291.

3. *Grading (Inquadramento), Task Allocation, and Code of Conduct*

Employees have the right to be assigned to the tasks for which they were recruited or to equivalent tasks (Article 52 TUPI).[76] In order to be promoted, i.e. to move to a higher position and higher pay, a selective procedure (no longer a public tender since law-decree no. 80/2021) is required. The procedure is open to outsider staff and, in limited cases, may reserve a number of positions for internal staff.[77]

Special rules, which differ from those laid down in the Civil Code for private-sector employment, apply to duties performed de facto, i.e. without a formal assignment. In this case, TUPI envisages that de facto performance of the function is not relevant for grading and career progression purposes but only for economic purposes (Article 52, paragraph 2 ff. TUPI). The lawmaker seeks to prevent practices linked to the contingent situation of individual offices from affecting the administrative organisation as a whole,[78] i.e. promotions that circumvent the constitutional principle of public competition.

Civil servants are subject to a Code of Conduct (Article 54-bis TUPI) established by the government for contractual employees and by the public administration itself according to the special rules for the categories under public law.[79] Violation of the Code of Conduct results in disciplinary sanctions[80] and may possibly result in civil, administrative and accounting liability whenever such liability is linked to the violation of duties, obligations, laws, or regulations.[81] This broad liability is based directly on Article 28 of the Constitution.[82] Serious and repeated violations may lead to dismissal (Article 55-quarter TUPI).[83]

4. *Whistle-blower Protection*

In 2017, a regulation was introduced to protect “whistle-blowers”.[84] A public employee who, in the interest of the integrity of the public administration, reports unlawful conduct of which he/she has become aware by virtue of his/her employment relationship may not be sanctioned, downgraded, dismissed, transferred or subjected to any other organisational measure having direct or indirect negative effects on working conditions as a result of the report. Unlawful conduct may be reported to the person responsible for the prevention of corruption and transparency, to the National Anti-Corruption Authority, to the ordinary judicial authority or the audit authority.

The provision offers several solutions for protecting the identity of whistle-blowers. These allow for derogation from the general rule of transparency (Article 54-bis TUPI), although transparency is a fundamental principle according to the General Administrative

76 Gentile (2020a), p. 198.
77 Pallini (2021), p. 436.
78 Fiorillo (2019), p. 124.
79 Bottino (2021), p. 719.
80 Olivieri (2021), p. 748.
81 Tenore (2020b), pp. 473 f.
82 Cafagno (2008), p. 720.
83 Picco and Zilli (2021), p. 821.
84 Article 1, para. 7 of the Provisions for the prevention and repression of corruption and illegality in the public administration, of 6 November 2012, no. 190 (*Disposizioni per la prevenzione e la repressione della corruzione e dell’illegalita’ nella pubblica amministrazione*), *Gazzetta Ufficiale*, 13 November 2012, no. 265.

Procedure Act of 1990 and legislative decree no. 33/2013.[85] This new rule has occasionally been criticised for its subjective area of application, which is much narrower than the European rules set out in Directive (EU) 2019/1937,[86] and for the lack of an incentive for employees who report.[87]

5. Public Management

A special part of the regulation is devoted to public management. The position of public manager is not separate from other employees regarding private (labour) law regulation, being the person with the highest level of grading and responsibility, but also from the point of view of public law, being an administrative organ, i.e. a unit of the institution that can act on its behalf towards external parties. Manager positions have also undergone regulatory evolution, reflecting the transition from the public to the private law system.[88]

Under the initial hierarchical model, typical of the civil service before the reforms, the minister was the only organ competent to adopt administrative acts with external effect. Managers only performed functions preparatory to the minister's decisions. In the current management model, public managers are responsible for adopting administrative acts and are linked to the highest political organ by a management relationship (*rapporto di direzione*) rather than a hierarchical one (*rapporto di gerarchia*).[89] The political organ sets the guidelines to be implemented, but it is up to the managers to decide how to implement them in practice through the necessary administrative acts and measures.

The reform of public management has extended the space for governance decisions of managers.[90] At the same time, their responsibility for the choices made has increased: managerial liability is an additional form of liability of public employees (Article 21 TUPI), besides the other four (civil, criminal, disciplinary, and accounting liability).[91] The fundamental change was the separation of political governance from administrative management. The new relationship between political bodies and public managers is confirmed by the loss of the prerogatives that the minister possessed as hierarchical superior. The provisions now prohibit the minister from revoking, reforming, or calling back acts that are under the responsibility of managers (Article 14, paragraph 3 TUPI) and exclude hierarchical recourse for acts of managers (Article 16, paragraph 4 TUPI). However, the connection between managers and political organs is very close. Italy, therefore, adopted the "spoil-system rule", which entails the automatic termination of general management positions in the State (e.g. Secretary General of Ministries) 90 days after a new government receives the vote of confidence (Article 19, paragraph 8 TUPI).[92]

85 Article 1 of the General Administrative Procedure Act 241/1990 and legislative decree of 14 March 2013, no. 33, Reorganisation of the rules concerning the right of civic access and the rule of publicity, transparency and dissemination of information by public administrations (*Riordino della disciplina riguardante il diritto di accesso civico e gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni*), *Gazzetta Ufficiale*, 5 April 2013, no. 80.

86 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305/17.

87 Novaro (2019), p. 737; Zilli (2021), p. 646.

88 Gentile (2020b), p. 702.

89 Cerbone (2021), p. 933.

90 Ricci (2016), p. 3.

91 Riccardi (2021), p. 1015.

92 Pensabene Lionti (2021), p. 1002.

After the public manager has passed the selection test and has been placed on the public manager ranking list, he or she is assigned to a post for a minimum of three and a maximum of five years by the unilateral act of the public administration (Article 19 TUPI).[93] Temporary assignments must be distinguished from permanent employment, which takes place on the basis of an individual contract and regards only salary aspects and not – as for other employees – the tasks assigned.[94] Appointments are renewable. Previously, public managers were subject to the principle of rotation to avoid consolidation of positions of power and the fostering of corruption, but in 2002 the legislator removed this rule "to foster efficiency and exchange of experience and interaction between public and private sectors".[95]

6. *The Current Condition of the Civil Service in Italy and the Development Planned Under the National Recovery and Resilience Plan*

At the beginning of 2021, there were 3,212,450 civil servants in Italy – 31,000 fewer than the previous year (–0.97%) and the lowest number in the last 20 years.[96] The last few decades have been characterised by a contraction in the number of public administration staff due to the freeze on recruitment and salary increases.[97] In the last three years, the freeze on public competition procedures due to the pandemic and some measures to accelerate retirements have made the situation worse.

Italian public administration is branded with an ageing employee profile: the average age is 50 years and over, and 500,000 civil servants are over 62. In addition, 183,000 have at least 38 years of seniority and are entitled to retire if they wish. This has contributed to a growing mismatch between the skills available in the civil service and the skills required by the current economic model and society.[98] Recent decades have been characterised by a low investment in further training, with an average of 1.2 training days per employee per year.[99] This situation of inefficiency due to structural deficiencies is matched by a nega-

93 However, the Italian Court of Cassation (*Corte di Cassazione*) considers it to be a unilateral act of private law. Fiorillo (2019), p. 304.

94 Zilio Grandi and Pavin (2021), p. 497.

95 Provisions for the reorganisation of State management and to encourage exchange of experience and interaction between public and private sectors of 5 July 2002, no. 145 (*Disposizioni per il riordino della dirigenza statale e per favorire lo scambio di esperienze e l'interazione tra pubblico e privato*), *Gazzetta Ufficiale*, 24 July 2002, no. 172.

96 The data comes from research of 2021 on public employment, see www.funzionepubblica.gov.it/articolo/notizie-alfabeto-della-pubblica-amministrazione/21-06-2021/forumpa-2021-presentata-la.

97 The salary freeze has affected not only productivity incentives but also cost-of-living and inflation adjustments, Albanese (2022), p. 701.

98 PNRR, p. 48, available at www.programmazioneeconomica.gov.it/tag/pnrr-testo/.

99 In 2019, total investment in training was 163.7 million EUR, 110 million EUR less than in 2009. Graduates in public administration are 41.5%, up 21.5% in the last 10 years, but with a predominance of lawyers: 3 out of 10 are law graduates, 17% studied economics and 16% political science or sociology. According to the Italian National Institute of Statistics, training is mainly on specialised technical skills (45.2% of participants) and legal-regulatory skills (30.9%), while only a minority has taken courses to increase digital (5%) or project management skills (2.3%). In ten years, investment in training has almost halved, from 262 million EUR in 2008 to 164 million EUR in 2019: an average of 48 EUR per year per employee. This limited training activity is also poorly targeted: in 2018, training involved only 7.3% of local public administration employees, a decrease of 0.4% compared to 2015. These problems are more severe in peripheral administrations. Indeed, regional and local administrations have suffered particularly from the spending restraint policies implemented during the years of economic crisis, and experienced cuts of more than 26.6 billion EUR in transfers between 2007 and 2015, a reduction of about 50%. See PNRR, p. 48.

tive perception of the population: 76% of Italians consider the public administration to be unequipped to provide the services they need. This percentage is significantly higher than the European average (51%).[100]

Since the financial crisis of 2007–2008, there has been a strict cost-cutting policy for public administration staff.[101] This included measures to freeze turnover after retirements and new recruitment in 2008–2019, both for private (labour) law staff and public law employment sectors, such as universities. The replacement of existing staff amounted to one new entry for three employees leaving in central administrations and one for every two in local administrations. The cycle of crisis legislation and strict spending-reducing measures was accompanied by a freeze on bargaining (and thus a freeze on salary adjustments) and, for public law employees, a freeze on salary increases by seniority between 2010 and 2015. This policy led to a sharp downsizing in 2015 after the Italian Constitutional Court declared the unconstitutionality of recurring recourse to the collective bargaining stop as a tool for limiting public spending.[102]

Reforming the Italian public administration has been one of the main requests of the European Commission in its Country Specific Recommendations to Italy.[103] This is why the civil service is one of the focal points of the National Recovery and Resilience Plan. The planned reform has four main axes: (1) *accesso* (access) to streamline selection procedures and make them more effective and targeted and to encourage a generational change; (2) *buona amministrazione* (good administration) to simplify rules and procedures; (3) *competenze* (skills) to align knowledge and organisational skills with the new requirements of the world of work and modern administration; (4) *digitalizzazione* (digitisation) as a cross tool to better implement these reforms.[104]

The planned spending is impressive: the PNRR foresees investments for the reform of the administration of 1.3 billion EUR, plus a further 0.4 billion EUR from EU structural funds and some additional national co-financing. In detail, 1.6% (20.5 million EUR) of the total amount is designated for policies and tools for recruitment; 57.9% (734.2 million EUR) for good administration; and 40.5% (514.2 million EUR) for the skills and careers

100 See footnote 96.

101 Comparative data with other European and non-European countries in the latest Report of the Court of Auditors (*Corte dei Conti*), Report of the Cost of Public Employment 2020, pp. 52 f. is interesting: see www.corteconti.it/Home/Organizzazione/UfficiCentraliRegionali/UffSezRiuniteSedeControllo/RelCostoLavoro. It highlights opposing policies. In the first phase (2010–2014), the countries most affected by the crisis adopted restrictive policies that resulted in a contraction of public expenditure on labour income. These include Greece (–23%), Portugal (–17%), Spain (–8%) and, to a lesser extent, Italy and Ireland (–5%). Other countries, such as Belgium (+15%) and Germany (+11%), showed an upward spending trend. In the subsequent phase (to 2018), there was a generalised recovery of income expenditure (with the sole exception of Greece), which for some countries (Portugal and marginally Italy) did not permit recovery of the previously accumulated negative differential (see p. 56 of the Report).

102 Italian Constitutional Court, judgment of 24 June 2015, no. 178.

103 European Commission, *Recommendation for a Council Recommendation on the 2019 National Reform Programme of Italy and Delivering a Council Opinion on the 2019 Stability Programme of Italy* of 5 June 2019, COM(2019)512 final, https://ec.europa.eu/info/publications/2019-european-semester-country-specific-recommendations-commission-recommendations_en, and European Commission, *Recommendation for a Council Recommendation on the 2020 National Reform Programme of Italy and Delivering a Council Opinion on the 2020 Stability Programme of Italy* of 20 May 2020, COM(2020)512 final, https://ec.europa.eu/info/publications/2020-european-semester-country-specific-recommendations-commission-recommendations_en.

104 PNRR, p. 49.

of employees. This is a dimension of investment that the Italian legal system has never seen before and a unique opportunity that Italy seems determined to seize.

Change is needed to restore the public administration to being a factor for development and not a brake on civic progress.[105] In this perspective, aspects related to the civil service, from recruitment to task allocation, incentives and employee accountability, are one of the keys to a better future.

Bibliography

Albanese A. (2019), 'L'accesso degli stranieri al lavoro nella pubblica amministrazione e l'adeguamento (solo giurisprudenziale) alla disciplina europea', *Questione giustizia*, www.questionegiustizia.it/articolo/l-accesso-degli-stranieri-al-lavoro-nella-pubblica_19-09-2019.php.

Albanese A. (2022), 'Der öffentliche Dienst in Italien: vom öffentlichen Recht zum Sonderarbeitsrecht', 17 *Die Öffentliche Verwaltung*, 693–701.

Allena M., Trimarchi M. (2021), 'La Costituzione "dimenticata": il principio del concorso pubblico', 71(1) *Rivista Trimestrale di Diritto Pubblico*, 379–404.

Ansaldo G. (2019), *Il ministro della buona vita. Giovanni Giolitti e i suoi tempi*, Milano: Le Lettere.

Bologna S. (2021), 'La contrattazione collettiva nazionale di comparto', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 103–124.

Boscati A. (2021), 'L'evoluzione storica', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 21–54.

Bottino G. (2021), 'Le responsabilità del dipendente pubblico', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 711–722.

Busico L. (2020), 'Contrattazione collettiva e relazioni sindacali', in Tenore V. (ed), *Il manuale del pubblico impiego privatizzato*, 4th edition, Roma: EPC Editore, 125–148.

Cafagno M. (2008), 'Efficienze ed inefficienze nei modelli di responsabilità della P.A.', 3 *Diritto pubblico*, 719–778.

Cardarelli F. (2015), 'Amministrazione digitale, trasparenza e principio di legalità', 31(2) *Il Diritto dell'informazione e dell'informatica*, 227–273.

Cassatella A., Fraenkel-Haeberle C. (2022), 'La selezione del personale amministrativo', 3 *Rivista trimestrale di Diritto Pubblico*, 765–802.

Cassese S. (1994), 'Il sistema amministrativo italiano, ovvero l'arte di arrangiarsi', in Cassese S., Franchini C. (eds), *L'amministrazione pubblica italiana*, Bologna: Il Mulino, 11–18.

Cassese S. (2020), 'Amministrazione pubblica e progresso civile', 1 *Rivista trimestrale di Diritto Pubblico*, 141–158.

Cerbone A. (2021), 'Il modello della dirigenza dello Stato', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 933–950.

Chiaromonte W. (2021), 'L'accesso degli stranieri al pubblico impiego', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 281–296.

Clarich M. (2022), *Manuale di diritto amministrativo*, 5th edition, Bologna: Il Mulino.

Colacito M. (1970), 'Impiego statale', in *Enciclopedia del diritto*, vol. XX, Milano: Giuffrè, 305–367.

D'Orta C., Diamanti E. (1994), 'Il pubblico impiego', in Cassese S., Franchini C. (eds), *L'amministrazione pubblica italiana*, Bologna: Il Mulino, 39–56.

De Cesaris A.L. (2020), 'Pubblico Impiego – Lavoro Pubblico', *Dizionario dei Diritti del Lavoratori*, www.wikilabour.it.

De Giorgi Cezzi G. (1999), 'Perseo e Medusa: il giudice ordinario al cospetto del potere amministrativo', 4 *Diritto processuale amministrativo*, 1023–1075.

Falsone M. (2021), 'L'accesso al lavoro nelle imprese pubbliche', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 297–315.

105 Cassese (2020), p. 142.

Ferrara M.D. (2021), 'Il sistema di reclutamento tramite concorso e le modalità alternative al concorso', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 201–230.
Fiorillo L. (2019), *Il diritto del lavoro nel pubblico impiego*, 2nd edition, Padova: Piccin.
Galetta D.-U. (2020), 'Algoritmi, procedimento amministrativo e garanzie: brevi riflessioni, anche alla luce degli ultimi arresti giurisprudenziali in materia', 3–4 *Rivista Italiana di Diritto Pubblico Comunitario*, 501–516.
Gentile M. (2020a), 'Diritti non patrimoniali del rapporto di lavoro', in Tenore V. (ed), *Il manuale del pubblico impiego privatizzato*, 4th edition, Roma: EPC Editore, 191–252.
Gentile M. (2020b), 'La dirigenza e la responsabilità dirigenziale. Il ruolo del dirigente nel sistema di misurazione e valutazione della performance', in Tenore V. (ed), *Il manuale del pubblico impiego privatizzato*, 4th edition, Roma: EPC Editore, 701–824.
Giannini M.S. (1970), 'Impiego pubblico (profili storici e teorici)', in *Enciclopedia del diritto*, vol. XX, Milano: Giuffrè, 293–305.
Giriodi M. (1900), 'I pubblici uffici e la gerarchia amministrativa', in Orlando V.E. (ed), *Primo Trattato completo di diritto amministrativo*, vol. I, Milano: Società Editrice Libraria, 223–446.
Gragnoli E. (2021), 'I principi costituzionali', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 55–78.
Mainardi S. (2021), 'L'assetto delle fonti tra legge e contrattazione collettiva', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 79–102.
Marra A. (2019), 'I pubblici impiegati tra vecchi e nuovi concorsi', 1 *Rivista Trimestrale di Diritto Pubblico*, 233–248.
Mattarella B.G. (2017), 'Il principio del concorso e la sua parodia', 4 *Giornale di Diritto Amministrativo*, 417–418.
Nassuato F. (2022), 'Legalità algoritmica nell'azione amministrativa e regime dei vizi procedimentali', 1 *CERIDAP*, 150–202.
Novaro P. (2019), 'Principali criticità della disciplina italiana in materia di whistleblowing alla luce della nuova direttiva europea: limitato campo di applicazione e scarsi incentivi', 29(5) *Rivista Italiana di Diritto Pubblico Comunitario*, 737–760.
Olivieri A. (2021), 'Gli obblighi del pubblico dipendente e la rilevanza disciplinare del codice di comportamento', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 733–752.
Palazzo D. (2017), 'L'accesso al pubblico impiego nell'ottica della libertà di circolazione dei lavoratori', 4 *Diritto Amministrativo*, 753–798.
Pallini M. (2021), 'L'inquadramento, lo ius variandi e le progressioni', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 429–448.
Pasqualetto E. (2022), 'Le pari opportunità di genere nell'accesso e nelle carriere nel pubblico impiego: dati, normativa, criticità e soluzioni', 3 *Lavoro Diritti Europa*, 2–22.
Pensabene Lionti G. (2021), 'Il conferimento degli incarichi dirigenziali e il trattamento economico', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 989–1014.
Perongini S. (2022), *La formula "ora per allora" nel diritto pubblico*, 2nd edition, Torino: Giappichelli.
Picco G., Zilli A. (2021), 'Il licenziamento disciplinare', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 821–846.
Riccardi A. (2021), 'La responsabilità dirigenziale e la responsabilità disciplinare del dirigente', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 1015–1045.
Ricci M. (2016), 'La dirigenza pubblica rivisitata: luci e ombre', 1–2 *Lavoro nelle Pubbliche Amministrazioni*, 3–14.
Romano S. (1947), *Frammenti di un dizionario giuridico*, Milano: Giuffrè.
Romei R. (2019), 'Prerogative e tutele delle organizzazioni sindacali nel pubblico impiego', 1 *Rivista Trimestrale di Diritto Pubblico*, 213–232.
Sandulli A.M. (1974), *Manuale di diritto amministrativo*, 12th edition, Napoli: Jovene.
Tenore V. (2020a), 'Privatizzazione del rapporto di lavoro con la pubblica amministrazione: storia, fonti normative e natura degli atti di gestione del personale', in Tenore V. (ed), *Il manuale del pubblico impiego privatizzato*, 4th edition, Roma: EPC Editore, 37–123.

Tenore V. (2020b), 'Responsabilità e incompatibilità nel pubblico impiego', in Tenore V. (ed), *Il manuale del pubblico impiego privatizzato*, 4th edition, Roma: EPC Editore, 472–590.
Terranova S. (1969), 'Funzionario (diritto pubblico)', in *Enciclopedia del Diritto*, vol. XVIII, Milano: Giuffrè, 280–289.
Topo A. (2008), *Legge e autonomia collettiva nel lavoro pubblico*, Padova: CEDAM.
Zilio Grandi G., Pavin A. (2021), 'La retribuzione nel lavoro pubblico, nel 2020', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 491–514.
Ziller J. (2011), 'Free Movement of European Union Citizens and Employment in the Public Sector', 2 *Online Journal on Free Movement of Workers within the European Union*, 6–18.
Zilli A. (2021), 'Dalla repressione alla prevenzione della corruzione e dell'illegalità nel lavoro pubblico', in Boscati A. (ed), *Il lavoro pubblico. Dalla contrattualizzazione al Governo Draghi*, Santarcangelo di Romagna: Maggioli, 633–648.

11 The Civil Service in the Netherlands

The Normalisation of the Legal Status

Alexander De Becker

I. Introduction

In recent years, the Netherlands has introduced a fundamental reform of its civil service law. The aim of this contribution is to place the Netherlands historically within the European systems. The Netherlands has always been part of the Franco-German tradition but is now moving towards the Swedish and Danish approach.

The chapter will therefore begin with a historical overview of Dutch civil service law. The second section deals with fundamental rights and how they are guaranteed under Dutch law. The domain of Dutch civil service law encounters minimal legal difficulties regarding these issues; nevertheless, it remains crucial to underscore their significance. The third section deals with the reform and the consequences of the so-called normalisation of the legal status of civil servants. Since 1 January 2020, civil servants in the Netherlands have been employed under employment contracts. This has led to interesting new developments and new and interesting insights into the use of employment contracts in the public sector.

II. Historical Framework of the Civil Service Law in the Netherlands

The development of the status of civil servants in the Netherlands at the end of the 19th century was perfectly in line with European developments of that era. In 1898, two experts in the field were appointed: Krabbe and Fokker were asked whether the employment relationship should be qualified as a contractual relationship or whether it should be governed by other rules.[1] Krabbe explicitly referred to German and French legal scholars to support his analysis.[2] Fokker stated that a distinction between civil servants who exercise public authority and those who do not cannot lead to a distinction in their legal status. With this approach, he followed the analysis of the French jurist Laband.[3]

In short, Krabbe and Fokker were strongly influenced by the German and French ideas that civil servants should not be employed with employment contracts or contracts in general. They concluded that civil servants had to be appointed unilaterally by the Crown because public law should govern their employment status.[4]

1 Krabbe (1897), pp. 63–102 and Fokker (1897), pp. 136–203.
2 Krabbe (1897), p. 73.
3 Fokker (1897), pp. 140–141; see also De Becker (2007), p. 113.
4 Krabbe (1897), p. 73 and Fokker (1897), pp. 202–203.

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The Dutch parliament followed Fokker and Krabbe's advice a few decades later by enacting the Civil Service Act of 12 December 1929.[5] The debate on the content of the concept of a civil servant in the Netherlands was interrupted by the First World War. However, civil servants were considered to be unilaterally appointed agents of the State. The development of the legal status of civil servants took off with the advice of the so-called Dresselhuys State Commission in 1917.[6] The Commission delivered an important legal opinion on the substance of the legal status of civil servants. The Commission pointed out the need for protection against arbitrary administrative action and stated that this protection could best be guaranteed by a stable employment relationship.[7]

The scope of the Civil Service Act remained a point of debate within the Dutch Civil Service Act. After all, the group of civil servants included local agents, who were considered to have a special status under public law.[8] It was a well-considered decision to include local civil servants.

But the choice remained limited. The Civil Service Act of 12 December 1929 solely mandated the assurance of secure employment for civil servants, lacking a thorough exposition on the substantive legal standing of these individuals.[9] Besides this fundamental choice, the Civil Service Act of 12 December 1929 only provided for this procedural regulation. The Act did not deal with the substance of the legal status of civil servants, but only with the procedures to be followed in the event of litigation, in order to ensure the unity of jurisprudence. The institutions responsible for regulating the substance of the legal status of civil servants (both at national and local levels) remained the same.[10] In fact, the law of 12 December 1929 provided a definition of the term "civil servant". Article 1, paragraph 1 of the law of 12 December stated that "a civil servant is a person who is unilaterally appointed to work in the public service". Article 1, paragraph 2 of the same law stipulates that the public service includes all services and enterprises administered by the State and public bodies. It is interesting to note that the law used the undefined term "public service" to frame who should be considered a "civil servant". The Dutch civil service legislation subsequently avoided using this terminology.[11]

The concept of "public service" in Dutch law had no real content. Jeukens struggled to define the concept of "public service" as used by the Dutch parliament in the Act of 12 December 1929 and tried to find inspiration in France.[12] The author shifted his perspective and focused on the extent to which the entities employing civil servants were governed by public law.[13] According to Jeukens, the public authorities are the employers of civil serv-

5 Civil Service Act of 12 December 1929 (*Ambtenarenwet*), *Staatscourant,* 1929, 530; see also De Becker (2007), p. 113.

6 Advisory Report on the general rules with regard to the legal status of civil servants by the State Commission Dresselhuys of 1919 (*Rapport van advies inzake de algemene regelen betreffende de rechtstoestand van de ambtenaren van de staatscommissie-Dresselhuys*); www.kennisvandeoverheid.nl/documenten/publicaties/1919/01/01/verslag-staatscommissie-dresselhuys.

7 State Commission Dresselhuys of 1919 (*Rapport van advies inzake de algemene regelen betreffende de rechtstoestand van de ambtenaren van de staatscommissie-Dresselhuys*); www.kennisvandeoverheid.nl/documenten/publicaties/1919/01/01/verslag-staatscommissie-dresselhuys.

8 Oppenheim and van der Pot (1928), p. 213.

9 De Becker and Deckers (2013), p. 2.

10 Hessels (2018), p. 34; see also van der Pot (1932), p. 65.

11 Jeukens (1959), p. 287 and De Becker (2007), p. 440.

12 Explanatory Memorandum of the Civil Service Act of 12 December 1929 (*Memorie van Toelichting bij de Ambtenarenwet*), *Ned. Stb.* 1929, 530; Jeukens (1959), p. 88.

13 Jeukens (1959).

ants. He thus linked the form of employment (the typical status of civil servants) to the legal form given to the organisation by the law. If an organisation was governed by private law, it did not employ civil servants.[14]

The constitutional framework of the Netherlands is not too complex. It is neither a federal nor a regionalised State. The number of bodies governed by public law that are included in the definition of "public service" pursuant to Article 1 of the Civil Service Act of 12 December 1929 is limited.[15]

However, it was not only public bodies that could be brought within the scope of Article 1 of the Civil Service Act of 12 December 1929. Article 1, paragraph 2 of the law clarified what was to be understood by the term "public service". It included all services and enterprises administered by the State and public bodies. This would seem to cover a wider range of services and enterprises than those governed purely by public law. Van Zutphen correctly pointed out that private-law entities could also employ civil servants, provided that they met four formal requirements:

1. the authority has a decisive influence on the composition of the board and the appointment of board members (the right to appoint and dismiss board members);
2. the authority has a significant influence on the management of the legal entity (approval of the budget and accountability of the legal entity to the authority);
3. the authority has a role in the management of staff (approval and power to appoint and dismiss staff, including setting the terms and conditions of employment);
4. the authority approves some of the decisions of the legal entity (significant influence over the legal entity).[16]

The case law endorsed van Zutphen's analysis and ruled until the legal status of civil servants was normalised. Pure privatisation is not considered to allow civil servants to retain their status.[17] Therefore, the authority must retain a predominant influence on the legal entity's objective, management, and policy.[18] In short, Dutch civil service law provided for a specific legal status for civil servants, governed by public law. With regard to the employment of its civil servants, the Netherlands was inspired by the French and German models of administrative law.

The debate even went somewhat further. The legal status of civil servants was linked to the dual role of the State. Dutch jurisprudence focused strongly on the fact that the State was both employer and legislator. It was therefore considered necessary to guarantee the status of civil servants by providing a constitutional basis that explicitly gave the legislator the power to deal with the legal status of civil servants.[19]

It concerned the only provision of the Dutch constitution that directly dealt with, and still deals with, the status of the Dutch Civil Service. As outlined in Article 109 of the

14 Jeukens (1959), p. 25.
15 Jeukens (1959).
16 Van Zutphen (1991), p. 92.
17 See e.g. Dutch Central Appeals Tribunal (*Centrale Raad van Beroep*), judgment of 16 May 2013, ECLI:NL:CRVB:2013:CA0376.
18 Dutch Central Appeals Tribunal (*Centrale Raad van Beroep*), judgment of 6 September 2007, LJN BB4033.
19 The legislator does not mean that Parliament had to deal with the legal status of civil servants in total. It indicated that the regulatory framework could be delegated to a lower institutional entity, such as the Crown of local institutions, see on this topic Hofman (2008), p. 225.

Dutch constitution, since its implementation on 17 February 1983, "an Act of Parliament stipulates the legal status of civil servants. The Act also deals with the regulation with regard to the protection at work and concerning co-determination."

This specific constitutional provision on the legal status of civil servants was only enacted in 1983.[20] The Dutch Parliament considered it necessary to deal with this issue, given the special role of civil servants in executing the duties of the State. The employer (the State or other authorities) is also the guardian of the public interest.[21] Article 109 of the Dutch constitution obliged Parliament to regulate the legal status of civil servants (Civil Servants Act). However, it does not make any distinction between civil and military civil servants nor between the civil servants of the central government and the civil servants of decentralised government entities.

It is still generally accepted in Dutch law that the provision does not provide that the legal status of civil servants should be unilaterally determined by public law, or to what extent a private law regulation of the employment relationship between the government and its employees can be chosen. The constitution actually indicates that legal development here should be left to legislation in the broad sense (meaning Parliament, the executive, or local authorities).[22] The preparatory documents clearly indicate that no choice has to be made concerning the legal status, nor is any indication given as to the desired content of the legal status.[23]

III. Fundamental Rights of Civil Servants and Their Boundaries

Basic human rights for civil servants are fully recognised under Dutch constitutional law. The Dutch constitution guarantees the following fundamental rights to its citizens, including civil servants.

1. Freedom of Expression

Article 7 of the Dutch constitution guarantees the freedom of expression. Paragraph 3 of this article provides that no prior approval may be required to express an opinion. Limitation of this freedom can only be established through an Act of Parliament.

Civil servants in general enjoy this freedom of expression in full. The Netherlands go even quite far in guaranteeing the freedom of expression for their civil servants. This can best be illustrated with the decision that the freedom of expression of a military civil servant ensured that a military civil servant could declare that he would no longer serve on the day that the Netherlands got involved in a nuclear war. The military authorities had penalised the military officer for this opinion because it limited the possibility to engage military civil servants in the future, according to the army authorities.[24] The Dutch judge held that a military civil servant may not be punished for expressing this opinion.

The Dutch legal system did not acknowledge a sharp distinction between freedom of expression for civil servants and for normal employees. Article 10 of the European

20 Geurink (2013), p. 30.

21 *Memorandum of Understanding*, Parliamentary Papers I 1980/81, 15048, 17, p. 1.

22 Bovend'eert et al. (2004), p. 155.

23 *Memorandum of Understanding*, Parliamentary Papers II 1977/78, 15048, 3, p. 4.

24 Dutch Dutch Central Appeals Tribunal (*Centrale Raad van Beroep*), judgment of 11 May 1983, *AB* 1987, 148 note HH; *TAR* 1986, 208; https://linkeddata.overheid.nl/front/portal/spiegel-metadata?id=http%3A%2F%2Flinkeddata.overheid.nl%2Fterms%2Fjurisprudentie%2Fid%2FECLI%3ANL%3ACRVB%3A1983%3AAK2803&callback=&dates=&fields.

Convention on Human Rights (ECHR) does not make a distinction between employees and civil servants. However, it took some time before Article 10 ECHR was fully recognised for civil servants.[25] The case law of the European Court of Human Rights (ECtHR) set some boundaries. The principal case *Vogt* recognised in full that freedom of expression also exists for civil servants.[26] The later cases extended the freedom of expression. In the *Guja* case, the ECtHR extended the scope of freedom of expression for civil servants. The freedom of expression potentially included a duty to speak in specific circumstances if a civil servant is not heard by his hierarchy. In such a situation, the civil servant possesses not only the right to express himself but even the duty to do so to safeguard the democratic society.[27] The control by judges is based on the limitations which are provided in Article 10, paragraph 2 ECHR. That means that limitations have to be prescribed by law, serve a legitimate aim, and be proportionate and necessary in a democratic society.

Dutch civil servants fully recognised these principles. Freedom of expression within the limits set out by Article 10 ECHR (as judged by the ECtHR) is fully respected. The case law of the Dutch judges respects the case law of the ECtHR when limiting the freedom of expression. Freedom of expression does not allow a civil servant to intimidate their superiors.[28] That, however, does not exclude the possibility of moderate criticism.[29]

In the Netherlands, the new Act of 9 March 2017, which entered into force on 1 January 2020, provides a duty to act with integrity. The Code of Conduct explicitly states that discretion with regard to sensitive information has to be respected. Dismissals which are linked to the exercise of the freedom of expression by civil servants are carefully weighed. The judge considered it not proportionate to dismiss a civil servant who had posted a tweet that the Islamic State of Iraq and Syria (ISIS) could not be equated with Islam and that it was a Zionist conspiracy. The fact was that the civil servant had, on her own initiative, deleted the tweet herself after a few hours and explained that she should not have used the term Zionist.[30] The judge, however, found instant dismissal appropriate for a local civil servant who criticised the local policy during COVID-19 (which was in accordance with the national regulatory framework) and leaked her opinions to the press after not finding enough support internally (according to her own judgment).[31]

To conclude, the Netherlands does not seem to have major legal difficulties in respecting the boundaries as set out by the ECtHR with regard to freedom of expression.

25 On civil servants' freedom of expression under ECHR, see *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

26 ECtHR, judgment of 2 September 1996, *Vogt v. Germany*, 17815/91.

27 ECtHR, judgment of 12 February 2008, *Guja v. Moldova*, 14277/04.

28 Dutch Central Appeals Tribunal (*Centrale Raad van Beroep*), judgment of 24 February 2022, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:CRVB:2022:444&showbutton=true&keyword=ambtenarenwet,meningsuiting,vrijheid&idx=1.

29 Dutch Central Appeals Tribunal (Centrale Raad van Beroep), judgment of 24 January 2017, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:CRVB:2022:444&showbutton=true&keyword=ambtenarenwet,meningsuiting,vrijheid&idx=1. Read on this topic De Becker et al. (2015), p. 13.

30 Dutch Central Appeals Tribunal (*Centrale Raad van Beroep*), judgment of 7 January 2010, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:CRVB:2010:BK9640&showbutton=true&keyword=ambtenaar,%2Bvrijheid%2Bvan%2Bmeningsuiting,meningsuiting&idx=5.

31 Dutch Tribunal of First Instance Gelderland, judgment of 17 July 2020, ECLI:NL:RBGEL:2020:3599, *Rechtbank Gelderland*, 8479205 (rechtspraak.nl).

2. *The Right to Strike*

The right to strike has a very specific history in Dutch Civil Service Law. The Netherlands ratified the European Social Charter only in 1980 with an important reservation with regard to Article 6, paragraph 4. This paragraph provides the right to collective bargaining and explicitly includes the right to strike as being a part of the fundamental right to collective bargaining. The Dutch Parliament stated that it considered the right to strike not to be recognised for civil servants. The Dutch Parliament indicated that civil servants' right to strike had to be regulated by an Act of Parliament.[32] However, this interpretation, in accordance with the Act of 22 April 1980, did not last for long. In 1986, the Dutch High Council (the Highest Court in the Netherlands) decided that the right to strike had to be fully recognised for civil servants because no Act of Parliament had been enacted, and what was stipulated in Article 6, paragraph 4 of the European Social Charter was clearly enough stated to be directly applicable in the Netherlands.[33]

Judges in the Netherlands weigh the competing interests in order to identify the limits of the exercise of the right to strike. The boundaries had to be in accordance with Article G of the European Social Charter. That means that limitations must be prescribed by law, necessary in a democratic society, and serve a legitimate aim. Against this backdrop, the Dutch courts have e.g. limited the possibility of prolonging a strike in the ambulance sector due to the potential health risks.[34]

In general, however, judges allow civil servants to strike even if they perform basic tasks, such as cleaning the streets.[35] It needs to be noted, however, that judges in the Netherlands tend to weigh the proportionate character of a strike very heavily. Dutch judges considered that a public transport strike leads to disproportionate harm for the users of regional public transportation and even for the employer.[36]

3. *Other Fundamental Rights*

Dutch civil service law does not really have many difficulties with regard to most of the fundamental rights and freedoms. Civil servants are in general not allowed to join an organisation or association, and to express their thoughts or opinions when the execution of this freedom may be considered to be incompatible with the performance of the duties of civil servants.

Two specific derogations are stipulated in the second paragraph of Article 10 of the Civil Service Act. This paragraph provides that the prohibition in Article 10, paragraph 1 of the Civil Service Act shall not apply, with regard to the right of association, to the

32 Ratification of the European Social Charter by the Act of 22 April 1980, *Ned. Stb.* 1980, 530.

33 Dutch High Council (*Dutch Hoge Raad*), judgment of 30 May 1986, www.navigator.nl/document/id15761986053012698nj1986688dosred/ecli-nl-hr-1986-ac9402-nj-1986-688-hr-30-05-1986-nr-12698-ns.

34 Dutch Tribunal of First Instance Midden-Nederland, judgment of 14 October 2015, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBMNE:2015:7579&showbutton=true&keyword=ambtenaar,%2Bstakingsrecht&idx=28.

35 Dutch Tribunal of First Instance Den Haag, judgment of 28 April 2010, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBSGR:2010:BM3051&showbutton=true&keyword=ambtenaar,%2Bstakingsrecht&idx=25.

36 Dutch High Council (*Dutch Hoge Raad*), judgment of 21 March 1997, NJ 1997, 437; JAR 1997, 70 quoted in Spengers and Van der Stege (2004), p. 651.

membership of a political group whose appellation is registered in accordance with the Elections Act and for the membership of a trade union.

That means that civil servants are free to become members of a political party or to join a trade union. The recognition of these two fundamental rights has not generated a great deal of case law. It is considered to be granted to civil servants, and the Minister of Civil Service in December 2020 explicitly confirmed in its guidelines that the right to become a member of a (recognised) political party and to become a member of a trade union cannot be subjected to any restrictions.[37] This includes thus the possibility of forming a trade union, as the positive right of association cannot be restricted.

Dutch Civil Service Law also respects the right to a private life as foreseen in Article 8 ECHR. However, a civil servant can be subject to a disciplinary penalty if a civil servant behaves in his private life in a manner which is in breach of the ethical regulatory framework for civil servants. Judges, therefore, considered it appropriate that a civil servant who cultivated cannabis in their private time was dismissed.[38] However, inappropriate allegations in a private WhatsApp group were not considered to be sufficient for a dismissal.[39]

IV. Reform of the Status of Civil Servants Before the Act of 9 March 2017

It was not long after the Second World War that the debate on the status of civil servants became a dominant legal debate in the Netherlands. The choice for civil service status was originally governed by public law and was thus inspired by German and French administrative ideas.[40]

It was not until 1952 that a new State commission was established, which was tasked with granting advice on the legal status of civil servants. This State commission was presided over by Professor Kranenburg.[41] In 1952, the so-called Kranenburg Commission advised that it would be preferable to keep the specific legal status for civil servants because they exercise public authority. However, a minority within the Kranenburg Commission considered that persons employed in the civil service are not different from employees in the private sector.[42] The minority stated that civil servants execute their tasks under the authority of an employer, just like any other employee.

The minority statement greatly influenced the debate in the subsequent decades. However, it was not until 1982 that new guidelines on the desired legal status of civil servants were issued. The Dutch Society for Lawyers requested advice on the extent to which it was preferable to employ civil servants with a specific legal status or whether a contract of employment was more suitable. Two different advisers expressed two different views: the first, de Jong, stated that a contract of employment would be more suitable than a specific

37 Regulation of the Prime Minister, Minister for General Affairs of 18 December 2020, reference 4177136, laying down the Instructions for external contacts of government officials, *Staatscourant* 28 December 2020, 68088.

38 Dutch Tribunal of First Instance Dordrecht, judgment of 3 July 2020, ECLI:NL:RBROT:2020:6327.

39 Dutch Tribunal of First Instance Limburg, judgment of 2 December 2020, ECLI:NL:RBLIM:2020:9474.

40 Krabbe (1897), p. 73.

41 Advisory Report concerning the status of civil servants provided by the State Commission Kranenburg of 1958 (*Rapport van advies inzake de status van de ambtenaren van de staatscommissie Kranenburg*), p. 77.

42 State Commission Kranenburg of 1958 (*Rapport van advies inzake de status van de ambtenaren van de staatscommissie Kranenburg*), p. 117.

legal status for civil servants. The second, Niessen, claimed that a specific legal status for civil servants could be suitable to the extent that it was based on its substantial merits.[43]

This advice initiated a major modification of the Dutch Civil Service. The modification first took place with regard to social security regulations. In 1986, the Dutch Parliament considered enacting equal legislation for jobless persons in the public and in the private sector.[44] The idea of harmonisation and, even further – to equalise regulation between the public and private sector, constituted an idea which became irreversible. The advice of 1986 let the genie out of the bottle. The shift in the approach towards the legal status of civil servants led to a report in 1993 where the term "normalisation" was launched. The idea behind the normalisation of the legal status of civil servants was to constitute the regulation which governed the status of civil servants through a regulatory framework which was based on market conformity.[45] However, the view in the mid-nineties was that it seemed too ad hoc, in that some elements of the legal status of civil servants were "normalised" while others were not. It seemed that the normalisation process was undertaken in a step-by-step approach.[46] Some legal scholars explicitly pleaded for a uniformisation of the regulatory framework of civil servants and employees in the private sector. That would have led to a less complex legal situation.[47] Some others argued that each specific element of the status of civil servants had to be weighed in order to find out whether normalisation was the best option or not.[48]

Given the debate among legal scholars, Parliament asked for an advisory opinion from a specific Council for Civil Service. In 1998, this Council concluded that the natural moment to abolish the specific status of civil servants had not yet been reached.[49] This conclusion, however, does not negate the fact that significant steps were put forward in order to harmonise the legal statuses of civil servants and employees in the private sector in general.

The idea of normalisation, meaning the enactment of regulation which was similar (even equal) in private and public sectors, was largely set out in two domains of Civil Service Law in the years following the advisory opinions of Niessen and de Jong in 1982. The modifications first concerned regulations with regard to collective negotiations and collective consultations. Second, it concerned the reform of the social protection regulation of civil servants with a specific status. Further elaboration on both subjects shall be provided in subsequent sections.

1. Collective Bargaining

The first reform towards a normalised model of collective bargaining was introduced in 1984. It should be underlined that the public sector did not recognise – and still does not

43 De Jong (1982), pp. 55–56 and Niessen (1982), pp. 138–150.

44 Van Kessel (1985), pp. 537–550.

45 Lanting (2009), p. 8, who indicates that the term "normalisation" was first used in an internal note within the Ministry of Interior in 1990. Normalisation is considered that the employment conditions in the market sector are considered to be "normal" and that the model in the public sector has to be aligned with this "normal" model.

46 Rood (1993), no. 6/7, pp. 16–21 and no. 8, pp. 16–21.

47 Sprengers (1998), p. 761.

48 Van Peijpe (2005), pp. 403–405.

49 Advisory Report of The Council for Civil Service Management no. 17 of 1998, 3 (*Advies van de Raad voor het Overheidspersoneelsbeleid*) quoted by Lanting (2009), p. 26.

recognise – the fundamental principle that collective negotiations need to lead to binding collective agreements. Article 7 of International Labour Organization (ILO) Convention no. 151 only provides that with regard to modifications of regulation in the public sector measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for the negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

That also leads to the consequence that Article 28 of the EU Charter of Fundamental Rights, which stipulates that both employers and workers have the right to negotiate collective agreements, and to make collective decisions to protect their interests (for example, to take strike action), may not be interpreted for the public sector as containing an obligation to sign binding collective bargaining agreements in the public sector. This right needs to be developed within the existing national framework.

The Dutch Act of 12 December 1929 was modified in the 1950s and 1960s to provide a system where collective consultations were legally necessary but did not lead to binding collective agreements.[50] However, that had an important consequence, namely that civil servants had to ensure the continuity of public services. Therefore, originally, the right to strike was not recognised as a fundamental right for civil servants.[51] However, the jurisprudential evolution modified this element. The Netherlands ratified the European Social Charter by the Act of 22 May 1980, as mentioned before.[52] Article 6, paragraph 4 of the European Social Charter, stipulated that with regard to effectively exercising the right to collective bargaining, the Contracting Parties undertake and recognise the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.[53] The Netherlands had made a reservation in that act that this paragraph should not be applied in the public sector until the Dutch Parliament had enacted legislation which provided limitations to the execution of the right to strike in the public sector.[54] The ratification included a reservation with regard to the recognition of the right to strike for civil servants. An Act of Parliament had to deal with this topic. However, in autumn 1983, numerous strikes took place among the staff of Dutch Railways. Those persons were considered to be civil servants. It led to a principal recognition by the Highest Court in the Netherlands of the right to strike without exception. The Dutch Railways had to respect the right to strike of its civil servants. The High Council of the Netherlands decided that Article 6, paragraph 4 has a direct effect on the Dutch legal order.[55] It actually even led to the interpretation that the right to bargain collectively, including the right to strike, was not subject to any boundaries.[56]

50 Lanting (2009), pp. 53–55.

51 Rood (1981), pp. 249–259.

52 Act of 22 April 1980 ratifying the European Social Charter, *Staatscourant* 1980, 530.

53 Article 6, para. 4 of the European Social Charter.

54 Dijkstra (1998), p. 329; Hummel (2020a), p. 510.

55 Dutch High Council (*Dutch Hoge Raad*), judgment of 30 May 1986, NJ 1986, 688; ECLI:NL:PHR:1986:AC9402, www.navigator.nl/document/id15761986053012698nj1986688dosred/ecli-nl-hr-1986-ac9402-nj-1986-688-hr-30-05-1986-nr-12698-ns.

56 Dutch High Council (*Dutch Hoge Raad*) explicitly affirmed this interpretation in the judgment of 11 December 1992, *NJ* 1996, 229.

An important step towards mediation in case of a collective conflict was the installation of the Advice and Arbitration Commission which issued and still issues advice in case of conflicts between the authority as Employer and the trade unions. This can be seen as a first step towards a correct application of the European Social Charter and ILO Convention no. 151.[57]

The judicial interpretation had a big impact. It led, in combination with the report of the Council on the Reform of the Civil Service, to a significant modification of the Act on Employee Participation in 1995. The Dutch Parliament enacted an Act on 14 February 1995 that enlarged the scope of the Act on the Works Councils to the public sector. The Act on Employee Participation stipulated in Article 7(b) that the participation had to be executed in conformity with the market. The two exceptions to this market conformity are:

- the limitation of the Works Council to deal with issues which primarily belong to the political authorities;
- the possibility that the Minister of Foreign Affairs excludes some competencies of the Works Council and transfers them to the Socio-Economic Council.

This act included a vital shift in the collective bargaining framework. The Act on the Works Council stipulates in Article 27 that the Works Council has a right to consent to employment conditions. It included an important reform of the procedure of collective bargaining in the public sector. As a consequence, Article 105 of the General Decree on the Civil Service of the State was modified, and a duty to reach consent between the State as an employer and the trade unions on employment conditions was enacted.

The most significant modification was actually that the concertation with regard to regulatory modifications of Parliament had to take place in another organ (the Central Commission for Organized Concertation with regard to Civil Service Law) than the one where the State acted as employer. The role of the State as an employer and the State as a legislator was thus also legally separated. Collective concertation had to take place within the Sectoral Negotiations for the State. This duty to find consent with regard to employment conditions can be considered more severe than what is stipulated in Convention no. 151 of the ILO.

2. Social Protection of Civil Servants

Legal scholars also tried to find the legal foundations for the social security protections of civil servants. They started with a debate on the correct legal foundation for the pensions of civil servants. In the 19th century, pensions were considered to be delayed wages,[58] as was the case in Bavaria where pensions for civil servants were created.[59] As in other countries such as France,[60] most of the civil servants were noble persons who could earn more money outside of their public office.[61]

57 Hummel (2020b), p. 26.
58 Ferf (1864), pp. 120–121.
59 Hattenhauer (1980), p. 140. See also *Civil Service Retirement Pension Regimes* by C. Hauschild in this volume.
60 Kaftani (1998), pp. 31–33.
61 Ferf (1864), p. 77.

The low income for civil servants, in comparison with the other noble persons, implied the necessity for the State to provide a decent income during their retirement.[62] It could be regarded as a form of maintenance income because somebody dedicated his professional activities to the State. The idea was based on the German *Alimentationsprinzip*.[63] The Act of 5 May 1922 stipulated that a pension had to be provided for civil servants after the end of their professional career. As a part of the so-called normalisation wave, the pension regulation for civil servants was fundamentally reformed with the Act of 1996, which privatised the pension funds for civil servants. In reality, the pension system has been based, since 1996, on the pension system in the private sector.[64]

The social protection of civil servants was enlarged after the Second World War. Some important reforms were made in order to provide social protection for civil servants. Civil servants were provided with a waiting loan in case it was impossible to provide them with a job within the administration. This waiting loan was reformed by the Decree of 31 August 1959, which included the duty to take care of the civil servants who had lost their function. The waiting loan was the first form of social protection before unemployment benefits were introduced in the private sector.[65] When unemployment benefits were introduced into the private sector with the Act of 18 February 1966, it was advised that it would be better to include civil servants. The Dutch Parliament preferred not to extend the scope of this Act to civil servants. It went even further and excluded civil servants, with their specific status, also from the scope of the Unemployment Benefits Act.

Those regulations were modified during the 1980s in order to harmonise the legal status of civil servants and employees in the private sector. The Sickness Act and the Employment Benefits Act were modified in order to enlarge the scope of both Acts to the public sector. This had significant consequences. It brought civil servants under the scope of the unemployment regulation which existed for the private sector. It also brought civil servants under the scope of application of the social protection regulations which normally governed the legal status of employees in the private sector. Even if specific extra-legal pecuniary regulations were enacted in order to grant civil servants who lose their jobs a better income than just the unemployment benefits available for employees in the private sector. The impact of the modification of the Sickness Act is limited, as employers in the private sector are obliged, according to Article 7:629 of the Dutch Civil Code, to pay 70% of the wage of their sick employee during a period of 104 weeks.[66]

3. Good Employership

Another reform which took place between the advice of Council of the Civil Service in 1998 and 2005 was the introduction of Article 125 in the Civil Service Act. This article obliges the State to behave as a good employer and each civil servant to behave as a good civil servant. This principle may seem obvious, but it has a great impact on the so-called

62 The idea dates back from the Bavarian concept of Civil Service Law: Wagner (2002), p. 9.

63 Krabbe (1883), pp. 148–150; Fokker (1897), p. 234; see also *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume.

64 Lanting (2009), pp. 218–219.

65 Lanting (2009), pp. 46–48.

66 Lanting (2009), p. 251.

normalisation process. The concept of "good employership" was used by judges in order to guarantee the fundamental rights of employees.[67] Judges even enlarged the scope of good employership to situations of dismissals.[68] The idea of the good employership is based on the so-called principles of good employership which are principles of reasonableness and fairness.[69]

The consequence of this modification was once again that the State as employer had to respect regulations similar to those incumbent upon employers in the private sector. It can therefore be considered as a step in the normalisation process. Furthermore, the principles of good employership are based on similar principles in the public sector. The behaviour of the State as employer was often controlled by Administrative Tribunals taking the principles of good administration into account. The principles of reasonableness and fairness are important principles of good administration.[70]

In conclusion, the intermediate steps between the two advisory opinions of the Council for Civil Service in 1998 and 2005 significantly modified the legal status of civil servants. With regard to collective bargaining, they were no longer subject to an exceptional regulatory framework which entailed that collective negotiations did not have to lead to binding collective agreements. The State had to respect the legislation regarding the installation of Works Councils, and therefore the trade unions of the civil service had to be consulted for secondary employment conditions. Social protection between civil servants and employees in the private sector was "normalised" with regard to the regulatory framework for pensions, unemployment benefits, and sickness benefits. Last but not least, the concept of good employership was introduced as a duty for the State to respect as an employer. It is therefore evident that the path was cleared to introduce a full "normalisation" of the legal status of civil servants in the Netherlands.

V. The Final Step in the Normalisation Process: The Act of 9 March 2017

The report of the Council of the Civil Service in 2005 advised that the moment for normalisation had been reached. The intermediate steps had been taken, and some choices still had to be made.

The last step in the normalisation process was set because of some recent developments. The most important one was the reform of dismissal law. The advisory opinions of the Council of the Civil Service in 2005 affirmed that protection against arbitrary action of the State is not necessarily linked to a system of closed dismissal grounds.[71] It is important to note that the Netherlands has a rather unique procedural system with regard to dismissal in the private sector. In order to dismiss a person, a preven-

67 Klinckhamers (2009), p. 250.

68 Dutch Tribunal of First Instance Haarlem, judgment of 10 December 2003, ECLI:NL:RBHAA:2003:AO1227; Dutch Central Appeals Tribunal (*Centrale Raad van Beroep*), judgment of 4 May 2004, ECLI:NL:CRVB:2004:AQ1484; Dutch Tribunal of First Instance Alkmaar, judgment of 13 June 2005, ECLI:NL:RBALK:2005:AT8257.

69 Heerma van Voss (1999), pp. 119–159.

70 Heerma van Voss (2003), p. 100.

71 Advisory Report of the Council of Civil Servants on the normalisation of the legal status of civil servants of 2006 (*Advies Raad voor het Overheidspersoneel over de normalisatie van de rechtspositie van de ambtenaren*), p. 25, (raadvoorhetoverheidspersoneelsbeleid.nl).

tive control of the reasons for the dismissal exists in the Netherlands. Specifically, it concerned an administrative procedure before the so-called UWV (*Uitvoeringsinstituut Werknemersverzekeringen*, the Employee Insurance Agency) which can recommend the dismissal of a person for economic reasons or because of long-lasting professional incapacity. A judge could preventively allow the dismissal of an employee for reasons which were linked to the person of the employee.[72]

1. Content of the Act of 9 March 2017

The process culminated in a rather simple Act on the normalisation of the legal status of civil servants. The Act of 9 March 2017 stipulates in Article 1 what the scope of the Act actually covers. It actually enlarges the substance of what a civil servant is. Persons employed in the public and in the private sector can be considered civil servants. The scope of application of the Act is described as follows:

> Public entities as Employer in the sense of this Act are: a. the State; b. the provinces; c. the municipalities; d. the Water Authorities; e. The public bodies for profession and company; f. The other public bodies which received regulatory powers according to the Constitution; g. The European grouping of territorial cooperation with a statutory seat in the Netherlands; h. the other legal entities installed through public law procedures; and i. legal entities which are not installed through public law including an organ exercising public authority where this exercise of public authority constitutes the core business of the legal entity.

This thus includes the employment of civil servants within the private sector becoming an option. However, the basis for the application of the Act remains difficult. Until today, no case law can be quoted on applying the Civil Service Act in the private sector. Education and research are explicitly excluded from the scope of this act: "a. municipalities as long as they deal with public schools; b. public entities dealing with education".

The reason educational institutions were not included in the Act of 9 March 2017 was that educational institutions should have the freedom to organise their employment relations. It is therefore linked to the fact that public and private schools exist in the Netherlands. The Dutch Parliament amended the bill to normalise the legal status of civil servants in order to exclude educational staff.[73]

Besides the enlargement of the original Civil Service Act, Article 2 additionally delineates specific civil servants exempted from transitioning from a status governed by public law to contractual employment arrangements. It concerns judges and civil servants working

72 Zwemmer (2014), p. 69; see also Preparatory Documents in the Second Chamber, no. 32.550–3 (*Parlementaire Voorbereidingen in de Tweede kamer*), pp. 7–8, https://zoek.officielebekendmakingen.nl/kst-32550-22.html#gerelateerd; Sprengers (1998), p. 700.

73 The reason behind this was that collective bargaining agreements can be signed with regard to the educational sector. These collective bargaining agreements are binding in the public and the private sector. Therefore, educational employees are excluded of the scope of this Act. See Parliamentary Pieces II, no. 32.550–22 of 29 March 2019 (*Kamerstukken II*), https://zoek.officielebekendmakingen.nl/kst-32550-22.html#gerelateerd.

for the judiciary, police and military officers, and teachers. These groups are excluded for the following reasons:

- for persons employed in the judiciary, preparatory documents clearly state that independence is the crucial factor for the judiciary power. It is, as a consequence, considered to be impossible to mend this element with an employment relationship where authority plays a key role;[74]
- for military officers, the preparatory documents clearly indicate that these officers are excluded because they have to meet far-reaching requirements. These requirements also limit some fundamental rights, such as the right to strike. Therefore, the Dutch Parliament prefers to keep the specific legal status for military officers.[75] The Act does not limit the scope of application to a status for military officers, but it also includes the non-military civil servants. No distinction between these groups is made;
- the last group in the Act concerns a group of persons who execute a public task. It concerns not only Ministers and Secretaries of State but also notaries and bailiffs.[76]

During the parliamentary debate, police officers were also excluded from the normalisation by keeping the specific status for this group of civil servants. The reason for excluding the police officers is the same as for military officers. Police officers have an exceptional duty. They have to guarantee law and order and aid persons in need. Police officers have some specific privileges, such as the right to wear (and exceptionally) use arms. Moreover, police officers have to act in their leisure time when necessary, and they have to remain discrete in their private lives. That led to the conclusion that police officers had to be excluded from the normalisation. Police officers kept their specific status.[77]

The consequence of the normalisation process is that, apart from the exceptions, all civil servants are subject to labour and employment regulation. Article 1 of the Act of 9 March 2017 does not leave any room for interpretation as to how it should be applied. It is clearly stated that civil servants are employed with contracts of employment. Article 13b adds to the individual contract of employment the possibility of extending the applicable employment conditions to those which are stipulated in collective bargaining agreements that are signed between the State and the representative trade unions. That means that employment and labour conditions are fully organised as under "normal" Dutch labour and employment law.[78]

2. *Procedural Reasons*

Before the reform, civil servants were subject to administrative law procedures. Those procedures were based on guaranteeing a maximal protection of the citizen vis-à-vis the authorities. The act starts from the viewpoint that the authority has difficulties dealing with the possibility that its decisions can be quashed by an Administrative Tribunal.[79] After the first procedure, there exists a specific administrative law appeal procedure

74 *Kamerstukken II*; see also Sprengers (1998), p. 700.
75 See *Kamerstukken II* (n. 74), pp. 3 and 9.
76 *Kamerstukken II* (n. 74), pp. 9–10.
77 *Kamerstukken II* (n. 74), pp. 3, 9–10.
78 Hummel (2017), pp. 2–4.
79 See *Kamerstukken II* (n. 74), pp. 3, 10–12.

which, according to the parliamentary preparatory documents, undermined the role of authorities to act as proper employers. The administrative procedure is considered to paralyse the role of the authorities as employers due to fear of the potential consequences of a procedure.

A first analysis of the case law within civil services after the modification of the Civil Service Act has indeed shown that the number of cases between civil servants and authorities has decreased.[80]

3. *Reform of Dutch Labour Law*

The reform of the Dutch dismissal law through the so-called Act on Employment and Security of 14 June 2014 strongly influenced the debate.

Dutch dismissal law was reformed when a system of closed dismissal grounds was introduced. Dismissals were only possible based on the grounds provided in Article 7:669 of the Dutch Civil Code. Nine grounds are foreseen within its provisions.[81]

It is important to know that this reform was made because the Dutch Parliament desired to protect employees better against the potentially arbitrary behaviour of the employer. The preventive control of the dismissal intention should ensure good protection against arbitrary actions of employers.[82] Dutch legal scholarship correctly stated that the reform of dismissal law in the private sector actually meant the introduction of the civil service system into private labour law.[83]

80 Janssen (2021), p. 1.

81 These nine grounds are the following:

> a. job cuts as a result of the termination of the company's activities or the necessary job cuts, viewed over a future period of at least 26 weeks, as a result of taking measures for efficient management of the company's business due to economic circumstances; b. illness or disability of the employee as a result of which he is no longer able to perform the stipulated work, provided that the period referred to in Article 670(1) and (11) has elapsed and it is plausible that recovery will not occur within 26 weeks and that the stipulated work cannot be performed in an adapted form within that period; c. the regular inability to perform the stipulated work as a result of illness or infirmity of the employee with unacceptable consequences for the operational management, provided that the regular inability to perform the stipulated work is not the result of insufficient care on the part of the employer for the working conditions of the employee and that it is plausible that recovery will not occur within 26 weeks and that the stipulated work cannot be performed in modified form within that period; d. the employee Ontslag van de genormaliseerde ambtenaar: veertien maanden Wnra s incapacity to perform the stipulated work, other than as a result of illness or infirmity of the employee, provided that the employer has informed the employee in good time and has given him sufficient opportunity to improve his performance and the unsuitability is not the result of insufficient care by the employer for training the employee or for the working conditions of the employee; e. culpable acts or omissions of the employee, such that the employer cannot reasonably be required to continue the employment contract; f. refusal of the employee to perform the stipulated work due to a serious conscientious objection, provided it is plausible that the stipulated work cannot be performed in modified form; g. a disrupted working relationship, such that the employer cannot reasonably be required to continue the employment contract; h. circumstances other than those mentioned above that are such that the employer cannot reasonably be required to continue the employment contract i. a combination of circumstances mentioned in two or more of the grounds referred to in subsections (c) to (e), (g) and (h) that are such that the employer cannot reasonably be required to continue the employment contract.

82 Karssen (2014), p. 163.

83 Bij de Vaate and Hummel (2014), pp. 10–14. See also Schneider and de Witte van den Haak (2015), pp. 1–7.

The new regulatory framework provided a backbone for the ongoing reform of Civil Service Law. Private companies have major difficulties in respecting the limited number of dismissal grounds. Judges did not allow dismissals in case a combination of grounds or the wrong ground was cited to base the dismissal. Therefore, the act was modified in 2020 in order to add a new ground which allows a combination of different grounds to be invoked to dismiss somebody.

It was interesting to know to what extent other case law would appear with regard to dismissals of civil servants and employees in the private sector. The judges normally view the demands to dissolve the existing contracts of employment in a similar manner. Some judges refer to specific rules applicable to civil servants. This can be found in a judgment of 29 September 2022, where the judge refers to the specific integrity rules. It concerned a case where the civil servant had abused the IT system of a local municipality to search for information about her ex-partner. This abuse was considered to be in breach of the integrity duties of the civil servant. The judge therefore allowed the dissolution of the contract of employment without severance pay.[84] Similarly, a judge in Rotterdam considered it specifically unacceptable for a civil servant to perform a side job in a company that is known for not respecting social security regulations.[85]

In general, it can, however, be stated that judges do not clearly indicate what the extra dimension for integrity issues for civil servants may be. It is often mentioned, but the distinction is never clarified.[86]

4. Collective Elements

The reform of Dutch labour law has led to difficulties with regard to how civil service law has to be applied. Individual civil service law is no longer distinct from individual employment law. The collective element of labour law, however, may not be forgotten.

It has been underlined before that collective negotiations in the public sector had to lead to an agreement between the authorities and the trade unions. Collective bargaining in the private sector in the Netherlands has much fewer guarantees than the collective concertation model had in the private sector. A binding collective agreement can be signed with a very small trade union. This is sufficient according to Dutch labour law.[87] During the preparatory works in Parliament, it was stated that the trade unions of the civil servants would not easily be separated.[88] It remains to be seen how this evolves in the future. Not all legal scholars seem to be convinced that this will count in the future.[89]

It becomes even more technically complicated when the impact of collective bargaining agreements in the private sector is assessed. Until now, civil servants are bound by the regulatory framework which existed before the Act of 9 March 2017 entered into force on 1 January 2020. Nevertheless, in the future new collective bargaining agreements can

84 Tribunal of First Instance Den Haag, judgment of 26 August 2022, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:9928&showbutton=true&keyword=ambtenarenwet,integer&idx=1.

85 Tribunal of First Instance Rotterdam, judgment of 9 March 2022, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBROT:2022:1907&showbutton=true&keyword=ambtenarenwet,integer&idx=2.

86 Van den Brekel (2021), pp. 22–24; van Waegeningh and van Maurik (2021), pp. 60–61; Stavleu (2021), pp. 137–144.

87 Hummel (2017), p. 4.

88 Parliamentary Pieces I 2014/15, 32550 – G (*Kamerstukken I*), p. 5.

89 Sprengers (2008), pp. 729–737.

be signed between authorities as employer and a single trade union. This does not bind all civil servants, though. It only binds the members of the trade union who sign the collective bargaining agreements.[90] As a consequence, a large part of the regulatory framework in Dutch Civil Service Law stands under serious pressure.

Besides that, the Dutch government can decide to make collective bargaining agreements generally binding. That means that all private employers in the Netherlands have to respect the employment conditions which are agreed in that collective bargaining agreement. However, the consequences of this decision also affect the "normalised" civil servants. Authorities are no longer distinct employers which have to deal with a legal status which is distinct from the one in the private sector. When the Dutch government decides to declare a collective bargaining agreement generally binding, it implies that the role of the State as an employer is mingled with the role of the State as a legislator. Exactly these two functions needed to be separated according to the original normalisation ideas.[91] Furthermore, it could lead to pressure being put on certain private companies to respect the employment relations which are assigned to the public sector.

VI. Conclusion

The Netherlands underwent a fundamental reform with regard to Civil Service Law. Until 1 January 2020, the Netherlands kept a public law governed legal status for its civil servants. Civil servants were unilaterally appointed. From 1 January 2020, civil servants have been employed with contracts of employment. This is considered to be the end point of a long-lasting "normalisation process".

The normalisation process took place between 1982 and 2020. The normalisation started with reforms in the collective bargaining procedure and social protection regulatory framework reforms. After those reforms, the debate turned to what extent a full normalisation (meaning submitting civil servants to common labour and employment law) should take place. Parliament decided with the Act of 9 March 2017 to take this final step.

Some civil servants are still excluded from contracts of employment. These groups are the judiciary, police servants, and military servants. The main reasons for excluding these groups were distinct. The judiciary civil servants have to maintain their independence, while for the police and military civil servants, the major difficulty is that they do not fully enjoy the right to strike.

The reform has led to some new difficulties. Collective bargaining agreements with trade unions may lead to distinct rules which are applicable to different civil servants employed by the same authority. Under Dutch labour law, collective bargaining agreements are only binding for members of the trade unions which have signed the collective bargaining agreement. That means that the employment conditions which constitute the subject of binding collective agreements may be applicable to some civil servants (members of the trade union which signed the collective agreement) and not to some other civil servants (non-members of the trade union(s) which signed the collective agreement). Such a distinction had been unknown to civil servants. It may be difficult to accept this element, given the task of an authority to treat every person equally in equal circumstances.

90 Hummel (2017), p. 4.
91 Hummel (2017), p. 4.

A second difficulty concerns the possibility of declaring some collective agreements generally binding. This implies that the authority, in this instance the State, assumes the dual roles of both legislator and employer. It becomes a difficult assessment for social partners to advise the State because it entails that specific employment conditions will become applicable to all employees in the Netherlands. It does include the possibility to enlarge the extent of the employment conditions of civil servants to all employers in the Netherlands.

A third issue that arises is that a new debate has been opened. Some legal scholars argue that police officers and military officers should also be "normalised".[92] It is no longer entirely correct to state that police officers and military officers do not enjoy a right to strike at all.[93]

It remains to be seen to what extent the normalisation may lead to a new debate. Anyhow, it is the outcome of a very interesting and challenging adventure in Dutch Civil Service Law since the 1950s.

Bibliography

Becker de A. (2007), *De overheid en haar personeel: de juridische grondslagen van de rechtspositie van de ambtenaar*, Bruges: die Keure.
Becker de A. (2023), 'De collectieve grondrechten bij de militairen in België: een vingeroefening in afwachting van fundamenteler rechtsvergelijkend onderzoek', 1 *Tijdschrift voor Sociaal Recht*, 151–165.
Becker de A., Deckers K. (2013), 'Normalisering van de ambtelijke status: een rechstvergelijkende kijk op de Nederlandse situatie', 33 *Tijdschrift voor Recht en Arbeid*, 5–11.
Becker de A., van Noorloos L., Sparrius C. (2015), 'Vrijheid van meningsuiting van ambtenaren in Nederland', 8–9 *Tijdschrift voor Recht en Arbeid*, 10–16.
Bij de Vaate D., Hummel N. (2014), 'De Wet werk en zekerheid: omgekeerde normalisering?', 8–9 *Tijdschrift voor Arbeid en Recht*, 10–14.
Bovend'eert P., Bunschoten D., Fleuren J., Kortmann C., van der Nat M. (2004), *Grondwet voor het Koninkrijk der Nederlanden: de tekst van de Grondwet, voorzien van commentaar*, Deventer: Kluwer.
Brekel van den M. (2021), 'Ruim één jaar integriteit sinds de Wnra: de balans opmaken', 3 *Tijdschrift voor Ambtenarenrecht*, 21–26.
Dijkstra T. (1998), 'Arbeidsvoorwaardenoverleg in de overheidssector: de formalisering van het Overlegstelsel', *Militair Rechterlijk Tijdschrift*, 329–356.
Ferf H. (1864), *De regten der ambtenaren*, Leiden: Dissertatie.
Fokker E. (1897), 'Welke is de aard van de rechtsverhouding van de staat tot zijn ambtenaren; moet zij wettelijk worden geregeld; en zoo ja, hoe in hoofdzaak?', *Handelingen van de Nederlandse Juristenvereniging*, 136–203.
Geurink E. (2013), 'Het wetsvoorstel normalisering rechtspositie ambtenaren', 1 *Tijdschrift voor Constitutioneel Recht*, 28–42.
Hattenhauer H. (1980), *Geschichte des Beamtentums*, Cologne: Heymanns.
Heerma van Voss G. (1999), *Goed werkgeverschap als bron van vernieuwing van het arbeidsrecht*, Deventer: Kluwer.
Heerma van Voss G. (2003), *Inleiding Nederlands sociaal recht*, The Hague: Boom.

92 Hummel (2020a), pp. 750–760.

93 De Becker (2023), p. 165. In a first advice, the European Committee on Social Right (ECtSR) of the Council of Europe advised that police officers cannot be fully denied the right to strike: ECtSR, Advice of 8 December 2013, Complaint no. 83/2012, *European Confederation of Police (Euro-COP) v. Ireland*. In a later advice, the European Committee of Social Rights states that a full denial of the right to strike to military staff violates Article 6, para. 4 of the European Social Charter: ECtSR, Advice of 22 January 2019, Complaint no. 140/2016, *CGIL v. Italy*.

Hessels J. (2018), *Raad zonder raadgevers. Ambtelijke bijstand en fractieondersteuning na de invoering van de wet dualisering gemeentebestuur*, Deventer: Kluwer.
Hofman J. (2008), *Grondwet voor het Koninkrijk der Nederlanden naar de tekst 2002*, Deventer: Kluwer.
Hummel N. (2017), 'Het ambtenarenrecht is dood, lange leve het ambtenarenrecht!', 20 *Arbeids Recht*, 1–4.
Hummel N. (2020a), *De bijzondere rechtspositie van de militair*, Weert: Celsus.
Hummel N. (2020b), 'Derdeninterventie bij collectieve conflicten na de Wnra', 2 *Arbeidsrechtelijke Annotaties*, 26–55.
Janssen L. (2021), 'De jurisprudentie van het eerste jaar Wnra', 1–2 *Tijdschrift voor Ambtenarenrecht*, 1–8.
Jeukens H. (1959), *Het ambtenarenrecht*, Alphen aan de Rijn: Samsom.
Jong de E. (1982), 'Bestaat er aanleiding de rechtspositionele verschillen tussen ambtenaren en civielrechtelijke werknemers te handhaven?', *Handelingen van de Nederlandse Juristenvereniging*, 1–124.
Kaftani C. (1998), *La formation du concept de fonction publique en France*, Paris: Dalloz.
Karssen T. (2014), 'Ontwikkelingen initiatiefwetsvoorstel normalisering rechtspositie ambtenaren en hervorming civiele ontslagrecht', *Tijdschrift voor Ambtenarenrecht*, 159–166.
Kessel van J. (1985), 'Ziektekosten en ambtenaren: eigen regeling of integratie in de ziekenfondswet?', *Juridische Berichten voor het Notariaat*, 537–550.
Klinckhamers J. (2009), 'Goed werkgeverschap in het ambtenarenrecht', *Tijdschrift voor Ambtenarenrecht*, 245–255.
Krabbe H. (1883), *De burgerlijke staatsdienst in Nederland*, Dissertation, Leiden.
Krabbe H. (1897), 'Welke is de aard van de rechtsverhouding van den staat tot zijn ambtenaren; moet zij wettelijk worden geregeld; en zoo ja, hoe in hoofdzaak?', *Handelingen van de Nederlandse juristenvereniging*, 63–102.
Lanting B. (2009), *Sociale zekerheid van ambtenaren en overheidswerknemers*, Antwerp: Maklu.
Niessen C. (1982), 'Bestaat er aanleiding de rechtspositionele verschillen tussen ambtenaren en civielrechtelijke werknemers te handhaven?', *Handelingen van de Nederlandse Juristenvereniging*, 125–239.
Oppenheim J., Van der Pot W. (1928), *Het Nederlandsch Gemeenterecht*, Haarlem: De Erven F. Boom.
Peijpe van T. (2005), 'Deze maand: AW of BW?', 9 *SMA*, 403–405.
Pot van der W. (1932), *Het Nederlandsch Gemeenterecht*, Haarlem: De Erven F.
Rood M. (1981), 'Ontwikkelingen rond de werkstaking, in het bijzonder in de publieke sector', *NJB*, 249–259.
Rood M. (1993), 'Over ontwikkelingen in het ambtenarenrecht en hun grenzen', 6/7 *Openbaar Bestuur* and 8 *Openbaar Bestuur*, 16–21.
Schneider M., de Witte van den Haak M.B. (2015), 'Lessen uit het ambtenarenrecht', 32 *Arbeidsrecht*, 1–7.
Sprengers L. (1998), *De Wet op de ondernemingsraden bij de overheid. Op weg naar één arbeidsrecht voor ambtenaren en werknemers?*, Deventer: Wolters Kluwer.
Sprengers L. (2008), '25 jaar collectief overleg bij de overheid: terug- en vooruitblik', 12 *Tijdschrift voor Ambtenarenrecht*, 729–737.
Sprengers L., van der Stege W. (2004), 'Slechts een beetje staken mag?', 5 *Nederlands Tijdschrift voor de Mensenrechten*, 651–668.
Stavleu V. (2021), 'De onkreukbare ambtenaar onder het civiel arbeidsrecht', 32 *Tijdschrift voor Ambtenarenrecht*, 137–144.
Waegeningh van S., Maurik van J. (2021), 'Ontslag van de genormaliseerde ambtenaar: veertien maanden Wnra', 2 *Tijdschrift voor Ontslagrecht*, 56–64.
Wagner F. (2002), *Beamtenrecht*, Heidelberg: UTB.
Zutphen van A. (1991), *De rechtspositie van de Rijksambtenaar*, Den Haag: Vuga.
Zwemmer J. (2014), 'Uitzenden, payrolling, schijnzelfstandigen en de Wet werk en zekerheid', 21(11) *Arbeids Recht*, 63–69.

12 The Civil Service in Poland

A Turbulent Path Towards Professionalism, Merit-based Recruitment, and Insulation From Politicisation

Dawid Sześciło

I. Introduction

Instead of a more classical description of the core elements of the legislative framework for the civil (public) service in Poland, this chapter is structured around key dilemmas and tensions that have dominated both in theoretical discourse and the practice of civil service evolution and reforms over the past decades. This format of analysis places the specific institutional and organisational arrangements into a broader context of trends and tendencies in public sector employment. It also enables the Polish civil (public) service system to be presented in a dynamic perspective, identifying patterns of transformation, successful and failed reforms, as well as future prospects.

The catalogue of dilemmas and tensions discussed in this chapter is not exhaustive, but it should provide the reader with sufficient insight into the overall architecture of the civil (public) service system and its key problems. This analysis will focus on the evolution of the legislative framework, accompanied with takeaways from available research on the effects and impacts of these legal arrangements in administrative practice. Although research on the civil (public) service in Poland is rather scarce, some major problems (e.g. politicisation) have already been diagnosed and measured by public administration researchers, largely corresponding with the claims of legal scholarship.

In the opening part of this chapter, the overall landscape of public service employment is presented, concentrating on fragmentation of the legal framework. Further, the largely failed attempts to depoliticise the public service are discussed, followed by analysis of another failure, i.e. unsuccessful endeavours to introduce some elements of centralised functions in the human resources management system. Subsequently, the popular perception (or myth) of the stability of public sector jobs is contrasted with the actual legal arrangements relating to this matter. The last section depicts the creeping tendency towards the "privatisation" of the regulatory framework for public sector employment and the practical consequences of this process.

II. Fragmentation Versus Unification – The Multitude of Legal Regimes for Public Service Employment

No uniform legislative framework for public sector employment exists in Poland, though in the past the legal landscape was a bit less complex and patchy. Shortly after Poland regained independence in 1918, the first Law on State Civil Service[1] was adopted, covering

1 Law on State Civil Service of 17 February 1922 (*Ustawa o państwowej służbie cywilnej*), Dziennik Ustaw 1922, 21, 64; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19220210164/O/D19220164.pdf.

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staff of all government bodies. Following the Second World War, this law stayed in force throughout most of the socialist era, until it was repealed by the 1974 Labour Code.[2] This act practically deprived public servants of special status and legal regime, putting them under general employment standards.[3] Even the term "public (or civil) servant" was eradicated from legislation. The adoption of the Labour Code marked the only and very short period, i.e. until 1982, when the status of all public employees was not only unified within this category of the workforce, but also with all other employees.

The process in which the current – much more fragmented – picture emerged began even before the start of the democratic transition. In 1982, the Law on Employees of State Institutions[4] was adopted, reinstating the autonomous legislative framework for public service. It applied to the whole administrative apparatus of the State, both at the central and territorial levels.[5] At least nominally, considering the limitations stemming from the autocratic nature of the socialist State, it reintroduced guarantees of stability of employment and promoted professionalism, e.g. by introducing of mandatory induction training for new public servants and initiating appraisals for public servants.[6]

This law remains in force until today. However, the scope of its application was considerably reduced in two steps:

1. the adoption of the 1990 Law on Self-Government Units' Employees[7] (currently the law adopted in 2008 is in force);[8]
2. the establishment of the civil service system for government administration. The first out of four laws on civil service was passed in 1996.[9]

The Law on Self-Government Employees was part of the legislative package marking the restitution of the autonomous local self-government that took over key tasks of the territorial apparatus of the central government. While a shift towards decentralisation was at the heart of the democratic transition, the idea of the separate regulation of the status of self-government bodies' employees was not such an obvious choice. Adding special provisions to the Law on Employees of State Institutions was considered as an alternative.[10] Eventually, the creation of a new category of public servants was deemed necessary to

2 Labour Code of 26 June 1974 (*Ustawa Kodeks pracy*), Dziennik Ustaw 1974, 24, 141; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf.

3 Drobny (2017), p. 74.

4 Law on Employees of State Institutions of 16 September 1982 (*Ustawa o pracownikach urzędów państwowych*), Dziennik Ustaw 1982, 31, 214; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19820310214/U/D19820214Lj.pdf.

5 Already in the early days of the socialist era (1950), autonomous local self-government was abolished and transformed into an administrative apparatus under the full control of the central government.

6 Korczak (2019), pp. 99–100.

7 Law on Employees of Self-Government Units of 22 March 1990 (*Ustawa o pracownikach samorządowych*), Dziennik Ustaw 1990, 21, 124; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19900210124/U/D19900124Lj.pdf.

8 Law on Employees of Self-Government Units of 21 November 2008 (*Ustawa z 21 listopada 2008 r. o pracownikach samorządowych*), Dziennik Ustaw 2008, 224, 1458; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20082231458/U/D20081458Lj.pdf.

9 Law on Civil Service of 5 July 1996 (*Ustawa o służbie cywilnej*), Dziennik Ustaw 1996, 89, 402; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19960890402/U/D19960402Lj.pdf.

10 Korczak (2010), p. 390.

underline the formal separation of the newly established self-government units from the bureaucratic apparatus of central government, even if the scope of new regulation was narrow and the employment rules set up there were similar to those in the State institutions.

The adoption of the first laws on civil service from 1996 and 1998 completed the process of forming the three main categories of public servants. While the Law on Self-Government Units' Employees extracted the bulk of the territorial administration from the regime of the Law on Employees of State Institutions, the first Law on the Civil Service was far less ambitious and impactful. Although it covered all the bodies of the government administration ("government administration offices"), it abstained from regulating the status of all the staff of these institutions. Instead, it established a Civil Service Corps encompassing civil servants who went through the centralised qualification procedure followed by an appointment act that concluded the process of admission to the Civil Service Corps. The title of appointed civil servants enabled them to apply for managerial and specialist positions in the government bodies, provided special guarantees of stable employment, and a special salary system ensuring a gradual salary increase every two years.

This short-lived law adopted by the coalition of post-communist parties deserves some attention today, mainly as an interesting experiment with a classical career system, where the individuals join the civil service through a special entry mechanism and then climb their career ladder within government.[11] Quantitatively, its impact was negligible, as only 116 civil servants were appointed in total on the basis of this law.[12] The most tangible outcome of the law was blocking access to managerial positions in the government administration for the younger generation of candidates or those whose careers could not progress due to political reasons, as access to the top managerial positions was restricted to candidates with at least seven years of experience, including four years in managerial or independent positions.[13]

Another important legacy of the first civil service law was the creation of the position of director general in ministries and other central government bodies, as the formal head of administration of the government bodies. Directors general were expected, on one hand, to relieve ministries from administrative responsibilities. On the other hand, this position was designed to maintain institutional memory, and to ensure stability and business continuity, irrespective of the changes at the level of political leadership.[14]

The 1998 Law on the Civil Service, passed by the coalition of parties originating from the democratic opposition from the socialist era, led to the proper emergence of the civil service system as a fully-fledged, separate pillar in the public employment system. It embraced all the employees of government administration bodies, except for technical staff. Appointed civil servants (both those appointed according to the 1996 law and those under new rules) remained a part of this system. However, the core role in the system was assigned to a second group, i.e. civil service employees. Their employment relations are regulated by employment contracts. Though the status of both categories of staff evolved with the later changes in the civil service legislation,[15] the distinction between these two

11 On the distinction between the career-based and position-based models of civil service, see e.g. Coleman Selden (2007), p. 43.

12 Arcimowicz (2014), p. 86.

13 Article 28 of the Law on Civil Service of 5 July 1996 (n. 9).

14 Springer (2012), p. 79.

15 Law on Civil Service of 18 December 1998 (*Ustawa o służbie cywilnej*), Dziennik Ustaw 1998, 49, 483; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19990490483/U/D19990483Lj.pdf; Law on Civil Service of 24 August 2006 (*Ustawa o służbie cywilnej*), Dziennik Ustaw 2006, 170, 1218; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20061701218/U/D20061218Lj.pdf; and Law on Civil Service of 21 November 2008 (*Ustawa o służbie cywilnej*), Dziennik Ustaw 2008, 227, 1505; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20082271505/U/D20081505Lj.pdf.

categories of employees in the civil service system remains. As we will discuss later, the rationale for keeping the category of appointed civil servants is questionable, considering that – when compared to the 1996 and 1998 laws – they no longer enjoy exclusive access to top managerial positions.

After 1998, the legislative framework underwent numerous amendments, but this fragmented landscape of employment relations in the public service persists. The old Law on Employees of State Institutions has been largely hollowed out, and laws on the civil service and employees of self-government units remain the most extensive in scope. The application of the Law on Employees of State Institutions is confined to two categories of employees:

1. all the staff of bodies located outside the executive branch, such as offices of the legislature, the President of the Republic, the Supreme Court, the Constitutional Court, ombuds institutions, the National Council of Radio and Television, the State Advocate Office, the National Electoral Office, regional financial audit chambers, and the personal data protection authority;
2. employees of the government bodies generally governed by the civil service legislation, who are not civil servants.

The latter category of staff is a particularly interesting case. As a rule, the civil service regime applies to all employees of government bodies in "administrative positions" (positions relating to the performance of public functions). This term lacks a legal definition or guidelines drawing a clear demarcation line between administrative and other (technical, supportive) positions in the government bodies. The Polish legislation relies on the formal method of specifying the scope of application of the civil service regime, i.e. the executive acts of the government determine the types of administrative positions.[16] Staff employed in all the remaining positions are subject to the Law on Employees of State Institutions.

Legitimate concerns could be raised about this flexibility of the government to determine the exact extent of the civil service, especially considering that the regime of the Law on Employees of State Institutions is considerably more lenient and less demanding in terms of transparency requirements. In particular, there is no explicit standard of open, competitive and merit-based recruitment established. Thus, the extensive autonomy of the government in delineating the boundaries of the civil service creates a perverse incentive for those political decision-makers who are less committed to the core values of the public service. According to the latest data, in half of the ministries the share of staff subject to the civil service legislation is decreasing and on average, 13% of the ministerial staff fall under the regime of the Law on Employees of the State Institutions.[17]

The Law on Civil Service is more ambitious and comprehensive not only in comparison with of the Law on Employees of the State Institutions, but also with the Law on Employees of the Self-Government Units, often criticised for superficial and overly general regulation of employment relations in local and regional administrative apparatus.[18] Table 12.1 provides a more detailed comparison of the employment standards established by each law, demonstrating the diversity of legal regimes for each category of staff.

16 Stelina (2017), p. 9.

17 Stowarzyszenie Absolwentów Krajowej Szkoły Administracji Publicznej, *Ile jest służby cywilnej w ministerstwach?*, 1 March 2021; https://saksap.cdn.prismic.io/saksap/bf9d7882-6a0d-4d8b-8e81-8af3c511c4af_Ile-jest-s%C5%82u%C5%BCby-cywilnej-w-ministerstwach.pdf.

18 Szewczyk (2012), p. 27.

Table 12.1 Scope of regulation of key laws relating to the status of public servants in Poland

	Law on the Civil Service	*Law on Employees of the State Institutions*	*Law on Employees of the Self-Government Units*
Key requirements for applicants/ employees	• General formal requirements for all civil servants and specific requirements for 'higher positions in civil service' (managerial positions)	• General formal requirements for all candidates	• General formal requirements for all candidates
Open, competitive and merit-based recruitment and promotion	• Detailed requirements on the announcement of vacancies, the selection committee and the publication of results of the recruitment process	N/A	• Detailed requirements on the announcement of vacancies, the selection committee and the publication of results of the recruitment process
Induction training of new staff	• Mandatory induction programme for all new employees (up to four months) with the possibility of exemption upon decision of the head of the institution	• Mandatory induction programme (minimum six months, up to one year) for all new employees	• Mandatory induction programme for all new employees (up to three months) with the possibility of exemption upon decision of the head of the institution
Appraisals/ performance evaluation	• Compulsory performance appraisal every two years; • Centralised model – assessment methods, criteria and procedure to be established by the regulation of the Prime Minister	N/A[19]	• Compulsory performance appraisal at least every two years, not more often than every six months; • Decentralised model – assessment methods, criteria and procedure to be established by the heads of institutions
Transfer of employees	• Rules on transferring civil servants between government bodies • Special guarantees of employment stability in the event of reorganisations apply only to the appointed civil servants	N/A[20]	• Rules on transferring civil servants between self-government bodies • No guarantees of employment stability in the event of reorganisation
Suspension and termination of employment	• Prerequisites for suspension of employment established • Specific grounds for termination of employment established for appointed civil servants; for other civil servants – general rules of labour law apply	N/A[21]	• Prerequisites for suspension of employment established • Grounds for termination of employment are not regulated exhaustively, but there are two cases explicitly indicated (two consecutive negative performance appraisals and violation of specific integrity rules)

(Continued)

19 The appraisal mechanism applies to so-called appointed State employees regulated by this law. However, in 1994 the possibility for new appointments expired, hence this mechanism is now defunct.

20 Rules regarding transfer relate solely to the historical category of "appointed State employees".

21 As previously, rules regarding termination of employment relate solely to the historical category of "appointed State employees".

Table 12.1 (Continued)

	Law on the Civil Service	*Law on Employees of the State Institutions*	*Law on Employees of the Self-Government Units*
Ethical standards and conflict of interest rules	• Detailed obligations and restrictions regarding integrity, prevention of nepotism, conflict of interest, undertaking additional employment etc. • Delegation for the Prime Minister to establish ethics code for civil servants	• General obligations and restrictions regarding integrity, prevention of nepotism, conflict of interest, undertaking additional employment	• General obligations and restrictions regarding integrity, prevention of nepotism, conflict of interest, undertaking additional employment
Salary regime	• Law specifies the components of the salary and the mechanism for calculation; coefficients for each type of position are established in the executive act, while the basic amount is adjusted annually in the State budget	• The salary regime is established by the government regulation based on the Law on Employees of State Institutions – the regulation specifies job positions in all institutions and salary ranges for each type of position	• The salary regime is established by the government regulation based on the Law on Employees of Self-Government Units – the regulation establishes the minimum and maximum salaries for key positions in the self-government administration; as well as the minimum salaries for all other (lower level) positions
Trainings and professional development standards	• Training system established, including e.g. central trainings organised by the Head of Civil Service and open trainings organised by the director general of each institution; • Mandatory individual plans for professional development to be agreed between the employee and the direct superior (top managers exempted);	N/A	• General long-life learning obligation and ensuring sufficient funding for this purpose
Disciplinary proceedings	• A special disciplinary regime established, including disciplinary commissions of the first and second instance	N/A	N/A
Responsibilities for systemic modernisation and developing horizontal employment policies	• Head of Civil Service tasked with, in particular, developing standards for human resources management in civil service and proposing normative acts	N/A	N/A

Source: The author's own analysis of relevant laws and executive acts.

It should be further noted that none of the three laws regulates the status of the relevant categories of employees exhaustively. Each act contains clauses envisaging subsidiary application of the Labour Code. In the case of the Law on the Civil Service and the Law on Employees of Self-Government Units there is a general reference to the Labour Code in all matters not regulated by these acts. With regard to employees of State institutions, the subsidiary application of the Labour Code is confined to some issues only, e.g. labour-related disputes, termination of employment, or bonuses.

In quantitative terms, detailed and reliable data on the number of employees are available only for the civil service system. According to the annual reports of the Head of the Civil Service, employment in this group remains at the stable level of around 120,000 employees, slightly less than half the workforce of the self-government units, but significantly more than group of employees subject to the regime of the Law on the Employees of State Institutions. The size of the latter group is most difficult to estimate, considering the lack of any mechanism for the systematic collection of statistical data.

This fragmented picture and the overlapping regulations naturally provoke discussions about the necessity and feasibility of integrating and consolidating the legal framework. Uneven requirements on transparency, competitive and merit-based recruitment, and separate salary regimes lack a substantial rationale. However, irrespective of the political and technical challenges associated with the implementation of a uniform act regulating employment across the whole public service, the constitutional framework may create additional obstacles. According to Article 153, paragraph 1 of the 1997 Constitution of the Republic of Poland:[22] "A corps of civil servants shall operate in the bodies of government administration in order to ensure a professional, diligent, impartial and politically neutral discharge of the State's functions." Furthermore, this provision established the Prime Minister's superiority over the civil service system. With regard to other categories of public servants, Article 60 – enshrining equal right of access to the public service employment – appears to be the only relevant provision of the constitution.

Constitutionalisation confined to the employees of the government administration requires preserving the separate legal identity of this group and, at the same time, delineates the boundaries of the civil service. The staff of the self-government units and, for example, the administrative staff of the legislature or judicial institutions cannot be included in civil service legislation. Simultaneously, the amalgamation of civil servants into a broader category of e.g. State employees, is also excluded. On the other hand, there are no constitutional obstacles to the adoption of a single law on the public service applicable to all categories of staff, as long as it recognises the civil service as a standalone, separate ingredient of this system. It would be also entirely legitimate to extend the constitutional principles of civil service (professionalism, diligence, impartiality, and political neutrality) to other categories of public servants, as these standards reflect the universal values of public service in any democratic State.

Should the unification of the three major subsystems of public service ever happen, it will also require consideration of the status of several groups of public employees, who currently – for various reasons – remain outside the three major subsystems. This includes e.g. teachers in public schools and universities, staff of public healthcare institutions,

22 The Constitution of the Republic of Poland of 2 April 1997 (*Konstytucja Rzeczpospolitej Polskiej*), Dziennik Ustaw 1997, 78, 483; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf.

soldiers, administrative staff of judicial and prosecutorial bodies, and staff of government bodies that, irrespective of constitutional guidelines, are exempted from the civil service system.[23]

III. Professionalisation Versus Politicisation – The Impossibility of Autonomisation From Political Supremacy

The issue of status, as well as the appointment and dismissal rules for managerial positions, has remained, for the past decades, the main focus of debate around the issue of politicisation of the civil service. According to the Law on the Civil Service, the catalogue of managerial positions ("higher positions in the civil service") comprises, in particular, directors general in the ministries and agencies, as well as voivodes' offices, heads of units in these bodies (and their deputies) and heads of territorial units of the revenue administration.[24] This category represents nearly 3% of the total number of staff of the civil service (around 3,400 positions).[25]

The formal status of mandarins (top civil servants) and their relations with politicians is subject to long-standing debate structured around numerous dilemmas encapsulated e.g. by Pollitt and Bouckaert:

> are political careers separate from, or integrated with, the careers of "mandarins"? Are senior civil service positions themselves politicised, in the sense that most of their occupants are known to have (and have been chosen partly because they have) specific party political sympathies? (. . .) how secure are senior civil service jobs? Do mandarins enjoy strong tenure, remaining in post as different governments come and go? Or are their fortunes tied to party political patronage, so that they face some of exile – of 'being put out to grass' if the party in power changes?[26]

The Polish input to this debate combines the evolution of the legislative framework with the case law of the Constitutional Court. The story of legislative changes might be ultimately summarised as a failed attempt to depoliticise mandarins' appointments, despite clear constitutional guidelines to do so. The very idea of depoliticisation of managerial positions in the civil service was introduced by the 1998 Law on the Civil Service, which established the general principle of open, competitive, and merit-based recruitment for all positions in the civil service system, including managerial positions. The introduction of open competitions was the first, though rather cautious, step towards depoliticisation at the top level of the civil service, considering that appointees enjoyed weak guarantees of the stability of their employment. Depending on their status, they could be dismissed at any time through transferring to another position or through the standard procedure of termination of employment.

The first act of this "depoliticisation drama" took place already in 2002, when the Constitutional Court analysed the revision of the 1998 Law on the Civil Service,

23 The latter category of employees is discussed in Section VI of this chapter.

24 Article 52 of the 2008 Law on Civil Service (n. 15).

25 Kancelaria Prezesa Rady Ministrów, *Sprawozdanie Szefa Służby Cywilnej o stanie służby cywilnej i o realizacji zadań tej służby w 2021 roku*, March 2022; www.gov.pl/web/sluzbacywilna/sprawozdaniessc, p. 44.

26 Pollitt and Bouckaert (2004), p. 50.

introducing a special exemption from the principle of an open, competitive, and merit-based appointment procedure for the managerial positions in the civil service. This exemption allowed, in cases "justified by the needs of the institution", vacant higher positions to be filled without a standard requirement procedure, just with the discretionary decision of the Head of the Civil Service upon the request of the director general of the respective institution (e.g. ministry or agency). It was possible for such appointments to be made only for a specified period, until this position was filled by a competitive procedure, but for no longer than six months.

This relatively narrow exemption from the principle of open, competitive, and merit-based recruitment for managerial positions was contested by the Constitutional Court. The Court declared a violation of the aforementioned Article 153, paragraph 1 of the constitution, concluding that: "Introducing such a far-reaching exception (. . .) as to the rules of procedure for filling civil service positions, undermines the essential values of the civil service system itself."[27] This conclusion was accompanied with some more detailed and substantial remarks.

The Court specified that in order to fulfil the constitutional standard of the professional character of the civil service, "it is necessary to ensure professional stability and to create transparent rules for the recruitment and verification of the knowledge and experience",[28] which in practice means the obligation to maintain the competitive procedure of recruitment for positions in the government administration. As further noted:

> A different view, calling for the possibility of autonomy in terms of the rules for deciding on employment or appointment through non-verifiable "recognition" of the professionalism of a given candidate, would lead to the creation of non-transparent rules for the functioning of the civil service. This would mean the possibility of the practical elimination of the competition procedure, and, consequently, would open the way to arbitrary decisions on the selection criteria, and thus the practical undermining of the need for objective and clear rules. It would therefore also open up the possibility for political and interest groups to influence the appointment of various positions in the civil service system.[29]

The apolitical nature of the civil service system requires – according to the Constitutional Court – "shaping the mechanism of establishing and functioning of the civil service that would guarantee the absence of any, even temporary, interference in this respect by politicians in power". The status of the civil service should ensure the stability of the basic principles of its functioning, regardless of changes at the political level. This does not exclude the possibility of reviewing performance of the civil service and introducing adjustments aimed at improving effectiveness and efficiency. In this context, the sole change of the political leadership resulting from democratic processes does not serve as a sufficient basis for reshuffling the managerial positions in the civil service.

To sum up, the Constitutional Court firmly rejected the vision of mandarins as political appointees, underlining their apolitical position, their role of guarantors of stability, continuity and professionalism, as well as guardians of the institutional memory of

27 Polish Constitutional Court, judgment of 12 December 2002, K 9/02, para. 113.
28 Polish Constitutional Court, judgment of 12 December 2002, K 9/02, para. 92.
29 Polish Constitutional Court, judgment of 12 December 2002, K 9/02, para. 94.

government bodies. A clear demarcation line between political leadership and top civil servants was drawn, excluding the possibility for even temporary or exceptional mechanisms enabling political appointments for the managerial positions in the civil service system.

The principles formulated by the Constitutional Court were generally sustained until 2015 (except for the 2006–2008 period),[30] though their practical effectiveness in securing merit-based rather than political appointments, was widely criticised.[31] A comparative study of senior civil service politicisation in the post-socialist countries of Central and Eastern Europe, indicated Poland along with Slovakia as the administrations suffering the most from politicisation.[32] On the other hand, the overall score presented in this study is slightly misleading, as it is based on an aggregated assessment of politicisation at four levels of managerial positions in the ministries, among which two in the Polish system are political by nature and are thus excluded from the civil service system, i.e. secretaries and undersecretaries of State. Based on data for the remaining two types of positions (director general and director of department; deputy director of department and head of unit), the politicisation index remains of similar value to other countries included in this review.

The parliamentary elections of 2015, marked by a landslide victory of the right-wing coalition led by *Prawo i Sprawiedliwość* (PiS), paved the way for dismantling the formal separation of mandarins from the political level of management in the government bodies. In parallel with massive reshuffles in key positions across all public sector (agencies, State-owned companies, etc.) and other measures highlighting a strong break with the policies of the past governments, the new parliamentary majority decided to completely abandon the very idea of apolitical top civil servants. The 2015 revision of the Law on the Civil Service[33] abolished the compulsory open competition for mandarins' positions and enabled the heads of institutions (ministries, directors of agencies) to autonomously appoint and dismiss (at any time) the top civil servants. In addition, the requirements for candidates for senior positions in the civil service have been substantially relaxed. Such persons are not required to demonstrate any work experience in managerial positions in the public sector. Only the conditions of having completed higher education and having gained managerial competences were retained (with no procedure for assessment or verification established). The official justification of this legislative proposal referred to the unspecified ineffectiveness of the recruitment

30 In 2006, the coalition led by the Law and Justice party adopted the new Law on the Civil Service, abolishing open competitions for the higher positions in the civil service. Instead, the so-called National Human Resources Reserve was created, consisting mainly of active civil servants, but also persons who passed a special exam. The appointment of a member of the reserve for a managerial position did not require an open competition. This system was abolished one year after the parliamentary election won by the opposition coalition led by the Civic Platform (PO). The new Law on the Civil Service adopted in 2008 restored open competition for the higher positions in the civil service.

31 Gadowska (2009), pp. 51–90.

32 Meyer-Sahling and Veen (2012), pp. 4–22. The study covered Czech Republic, Hungary, Estonia, Latvia, Lithuania, Slovakia, and Slovenia.

33 Law of 30 December 2015 Amending the Law of 22 November 2008 on Civil Service (*Ustawa z 30 grudnia 2015 r. o zmianie ustawy z 22 listopada 2008 r. o służbie cywilnej*), Dziennik Ustaw 2015, 34; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000034/O/D20160034.pdf.

system based on open competition, but it failed to provide any data or evidence supporting this claim.[34]

Compared to the previous attempt (from 2001) to dismantle open and competitive recruitment for top civil service positions, the 2015 revision of the Law on the Civil Service went much further, effectively shifting mandarins to the category of classical political appointees. Moreover, the number of higher positions in the civil service increased as a result of transferring to this category, i.e. to include the heads of local and regional units of the revenue administration, as well as heads of local and regional veterinary services. With this regrouping, the share of the higher positions in the total number of civil servants doubled, which further amplified the impact of the formal politicisation of this category of staff. In practice, as demonstrated by the annual reports of the Head of the Civil Service, increased flexibility in filling managerial positions in the civil service was eagerly and immediately exploited, leading already in the first year of functioning of the new regulation to massive reshuffles that embraced around two-thirds of the higher positions in the civil service.[35]

One could ask why the revised provisions of the Law on the Civil Service have not been reviewed and repealed by the Constitutional Court, considering their sharp conflict with the standards elaborated by the Court already in the previously described 2002 ruling. Explaining this requires reference to the Polish rule of law crisis that is, among other events, marked by the capture of the Constitutional Court by the PiS loyalists and the dismantling of the independent mechanism for constitutional review.[36] The 2015 revision of the 2008 Law on the Civil Service was initially challenged by the Ombudsman. However, the Ombudsman eventually withdrew its motion, as the case was assigned to the persons illegitimately performing the functions of judges of the Constitutional Court. This resulted in the discontinuation of the constitutional review.[37]

With regard to the questions and dilemmas articulated by Pollitt and Bouckaert about the status and institutional locus of mandarins, we may conclude that the evolution of the legislative framework in Poland offers a rather pessimistic illustration of failed depoliticisation attempts that eventually resulted in dropping all pretence of an open, competitive, and merit-based recruitment system, and transforming mandarins into classical political appointees who come and go with their political patrons.

IV. Centralisation Versus Human Resources Management (HRM) Autonomy – Failures in Imposing Central Controls and Steering

Centralised functions in public service management may rely on various arrangements, including, e.g. centralised recruitment for all positions or top managerial positions, centralised pre-service and in-service training, central supervision of recruitment and other HRM-related activities, and centralised information systems containing data on employment across all public bodies. In the Polish case, with regard to employees of State institutions and employees of self-government units, no attempts to centralise any major HRM

34 Samol (2016), p. 73.
35 Mazur et al. (2018), p. 79.
36 See more: Koncewicz (2018), pp. 116–173.
37 Polish Constitutional Court, decision of 19 November 2019, K 6/16.

functions have ever been undertaken. In the civil service system, large-scale centralisation has never been seriously considered, but some initiatives deserve attention.

In the early days of the civil service, i.e. under the 1996 and 1998 Laws on the Civil Service, the centralisation initiatives were represented particularly by setting up an institution of the Head of the Civil Service. While under the 1996 Law on the Civil Service, the powers of this body were rather limited,[38] the 1998 Law on the Civil Service strived to equip it with powers more adequately reflecting its title. The Head of the Civil Service, assisted by the Civil Service Office, acquired several tangible instruments to manage and control the HRM processes in the government administration. In particular, the Head of the Civil Service conducted recruitment for the top managerial positions in the government institutions and organised the qualification procedure for the candidates for the title of appointed civil servants. Other recruitment procedures were decentralised to the level of individual institutions, though the Head of the Civil Service had the general oversight responsibility for monitoring the compliance of these institutions with the civil service standards. As one of the oversight instruments, the 1998 Law on the Civil Service listed the power of the Head of the Civil Service to conduct performance appraisals of the directors general of the government institutions.

In addition to these recruitment-related powers, the Head of the Civil Service was responsible for preparing an induction training programme for new civil servants, as well as developing the offer of in-service training. This mandate was supplemented by responsibilities relating to data collection, coordination, and cooperation. The position of the Head of the Civil Service, stemming from its extensive responsibilities, was further strengthened by the institutional setup for this body. It was appointed by the Prime Minister for a fixed term of five years with strictly limited grounds for premature dismissal. The establishment of the Civil Service Office created adequate technical conditions for the performance of the Head's responsibilities.

Establishing the institution with relatively extensive powers and a stable mandate provided a unique opportunity to develop, implement, and oversee the execution of the central standards for human resources management across the civil service system. However, in practice, this mission faced major organisational and political constraints. For example, there was no centralised human resources management information system containing at least basic data on all employees in the civil service system. What is more, the authority of the Head of the Civil Service was, on numerous occasions, undermined by the top politicians. In some cases, the directors general of the ministries and central government agencies were discretionarily appointed by the relevant ministers, who ignored the legal obligation of open recruitment organised by the Head of the Civil Service. Some government agencies also openly refused or boycotted their obligations to cooperate with the Head of the Civil Service in cases required by the law.[39] It was clear that the effective introduction of any elements of centralisation with regard to key HRM functions is a challenging process that could succeed solely with continuous political support and adequate technical support.

38 The Head of the Civil Service was responsible for: issuing the Civil Service Bulletin, collecting data on the civil service system and publishing this data in an annual report, classifying jobs in the civil service system, developing proposals for legislative acts, disseminating information about civil service system, cooperating with trade unions, and international cooperation (Article 24, para. 1 of the 1996 Law on the Civil Service).

39 Burnetko (2003), p. 48.

Nevertheless, the 1998 Law on the Civil Service marked the heyday of centralisation attempts. Further legislative developments represented the opposite direction. The short-lived 2006 Law on the Civil Service abolished the Head of the Civil Service and the Civil Service Office completely. The existence of such an institution and its key role in recruitment for top managerial positions did not correspond well with the idea of transforming these jobs into classical political appointees. Eliminating this body also dovetailed with the rhetoric of simplification and budgetary savings that accompanied the adoption of the new legislative framework for the civil service system.[40] Only some of the powers of the abolished Head of the Civil Service remained at the central level, but were allocated to the Head of the Chancellery of the Prime Minister.[41] As a crucial change, the centralised model of recruitment for the top managerial positions was eradicated.

The Head of the Civil Service returned after a change in power, with the adoption of the 2008 Law on the Civil Service. However, the second coming of the Head of the Civil Service was far from a return to glory. The new or rather re-established Head of the Civil Service is an institution that under its misleading title refers to a body lacking any direct or significant powers with regard to key processes of human resources management in the government administration. Its mandate is confined to elaborating the human resources management strategy for the civil service, preparing an annual report on the situation in the civil service system, setting standards for human resources management, organising central in-service trainings, requesting information and documents from the directors general of the government institutions, requesting inspections or auditing, and conducting the qualification procedure for candidates for the status of an appointed civil servant. The last listed responsibility is practically irrelevant, as recently qualification procedures have not been used at all (more on this issue follows). The most tangible and direct competence of the Head of the Civil Service appears to be the power of transferring appointed civil servants between institutions, if it is "justified by the needs of the civil service".[42] The same transfer mechanism applies in the case of abolishment of the institution.[43]

It is striking that the person nominally labelled as the Head of the Civil Service is not involved in any recruitment processes in the government administration. This person has no mandate neither for ex-ante (organising recruitment, participation in selection) nor ex-post (overseeing the process, cancelling recruitments in case of violation of the rules) engagement. The actual position of the Head of the Civil Service could be described as a body assisting in the formulation of policies relating to the civil service system and supporting the performance of HRM functions at the level of individual organisations, though recognising their strong autonomy with regard to core decisions and activities.

Moreover, the institutional status of the Head of the Civil Service was considerably downgraded, compared to the 1998 Law on the Civil Service. First of all, the Civil Service Office abolished in 2006 has not been restored and the Head of the Civil Service is technically supported by one of the departments in the Chancellery of the Prime Minister. Further, the Head of the Civil Service could be appointed and dismissed at any time (no fixed term mandate) by the Prime Minister, without an open competition. Initially, the Head of the Civil Service could have been selected only from among appointed civil servants, but this

40 Przywora (2012), p. 172.
41 Article 8, para. 3 of the 2006 Law on Civil Service.
42 Article 63 of the 2008 Law on Civil Service.
43 Article 66 of the 2008 Law on Civil Service.

restriction of the pool of candidates was eliminated by the PiS-led coalition in 2015, along with the other changes described previously that fostered the politicisation of the civil service.

Another failed attempt to put some aspects of human resources management in the civil service under stronger central control was the establishment of the National School of Public Administration (*Krajowa Szkoła Administracji Publicznej*, KSAP) in 1990. The concept of a central institution providing an intense postgraduate training programme for future civil servants was clearly inspired by the French *École nationale d'administration*.[44] The formal position of KSAP in the civil service system has not changed significantly for the past three decades, yet its role, reputation, and impact have gradually faded, or perhaps have never reached any meaningful level.

In formal terms, the graduates of KSAP are required to accept one of the job offers for civil service positions presented to them upon completion of their training. More importantly, once they join the civil service, they may apply for the status of an appointed civil servant without going through the qualification procedure. In other words, the completion of 18–20 months training at KSAP secures the status of the appointed civil servants. Given the suspension of regular qualification procedures, KSAP is currently the only option for joining this category of civil service members.

Successful implementation of the KSAP-based career model from the beginning relied on two preconditions that are no longer in place. First, it was essential to ensure a clear perspective of employment in managerial positions for KSAP graduates. Secondly, it was necessary to promote KSAP graduates among government institutions as top-quality candidates for vacant positions, demonstrating both substantial knowledge and practical management skills.

Ensuring both prerequisites for KSAP success remains highly problematic. Already the first Law on the Civil Service from 1996 blocked the appointments of KSAP graduates for managerial positions by introducing the requirement of seven years of work experience, including four years of experience in managerial positions. The 1998 Law on the Civil Service brought KSAP graduates back to the pool of candidates for managerial positions. It stipulated that the higher positions in the civil service could be populated only by appointed civil servants, which naturally improved the standing of KSAP graduates. Unfortunately, the 2006 Law on the Civil Service opened up the top civil service positions for all other members of the civil service system and candidates who passed a special exam. In addition to this, the open competition was abolished.

While the competitive recruitment procedure for top civil service jobs returned in 2008, the restriction of this category of positions to candidates from the pool of appointed civil servants has never been reinstated, effectively undermining one of the major benefits associated with the KSAP-based career path. The renewed eradication of open competition in 2015 further deteriorated the situation, making clear that the shortest way to a managerial job in the civil service leads through appropriate connections with the ruling political bosses rather than the KSAP.

It also appears clear that the KSAP has never managed to overcome distrust among government institutions towards its graduates. The study of Gadowska, combining statistical data with interviews with KSAP graduates and representatives of government bodies, provides numerous examples documenting tensions between KSAP graduates and other staff of government institutions. On the one hand, KSAP graduates are often unhappy with the

44 Przywora (2012), p. 248.

positions they were offered and the organisational culture they find in their new workplace. On the other hand, the staff of institutions hosting them tend to criticise the specific career drive ("careerism") of KSAP-ers and their lack of sufficient practical experience.[45]

In addition to these problems, the current role of KSAP in supplying the government workforce is marginal. Every year, it recruits only around 30 participants from a sharply dropping number of candidates and the focus of the institution appears to be shifting more towards in-service trainings for civil servants. This leads to the conclusion that the idea of centralised initial training for civil servants is dying slowly but surely, with no intention among political decision-makers to reinvigorate it.

V. Stability Versus Flexibility – How Secure Is a Civil Service Job?

The popular perception of civil service jobs as characterised by stable employment, regardless of the individual performance of employees and the organisational performance of public bodies, remains strongly present also in Poland. However, the actual formal status of public servants in Poland does not correspond well with this picture. Special guarantees of employment stability are provided only to a small and ever-decreasing group of employees, i.e. appointed civil servants. This group constitutes only 6% of the total number of staff in the civil service system.[46] In the case of other categories of public servants, the general rules of the employment law with minor adjustments apply, which provides employers with extensive autonomy and flexibility in shaping their staffing.

Terminating the employment of appointed civil servants is possible only in the circumstances exhaustively listed in the Law on the Civil Service. In addition to situations involving established violations of law or other types of misbehaviour, the appointed civil servant might be laid off in the event of two consecutive negative performance appraisals. It should be noted that this process is conducted only every two years, so completion of the procedure for performance-based termination of employment may even take four years. Furthermore, this possibility of terminating employment appears to be highly unlikely, considering that negative performance assessment remains *rara avis* in the Polish civil service. In 2021, they amounted to 0.33% of all appraisals.[47]

It should be noted that the category of appointed civil servants is expected to further lose its relevance. In 2021, for the second year in a row, no qualification procedure for the title of appointed civil servant was conducted. Only graduates of KSAP obtained this title.[48] The intention of the government to gradually phase out this type of employment appears to be clear.

This development fits the trend visible in the evolution of employment relations in the Polish public service for past decades, i.e. the gradual fading out of the special type of employment based on appointment (not an employment contract), securing greater stability of employment. With regard to the servants falling under the regulation of the Law on Employees of State Institutions, appointment as a form of establishment of the employment

45 Gadowska (2015).

46 Kancelaria Prezesa Rady Ministrów, *Sprawozdanie Szefa Służby Cywilnej o stanie służby cywilnej i o realizacji zadań tej służby w 2021 roku*, March 2022; www.gov.pl/web/sluzbacywilna/sprawozdaniessc, p. 24.

47 Kancelaria Prezesa Rady Ministrów, *Sprawozdanie Szefa Służby Cywilnej o stanie służby cywilnej i o realizacji zadań tej służby w 2021 roku*, March 2022; www.gov.pl/web/sluzbacywilna/sprawozdaniessc, p. 40.

48 Kancelaria Prezesa Rady Ministrów, *Sprawozdanie Szefa Służby Cywilnej o stanie służby cywilnej i o realizacji zadań tej służby w 2021 roku*, March 2022; www.gov.pl/web/sluzbacywilna/sprawozdaniessc, p. 12.

relation was abolished already in 1994.[49] The new Law on the Self-Government Employees adopted in 2008 envisaged phasing out the appointment regime in the local and regional self-government units in two steps: new appointments were excluded from the entry of the law into force and existing appointments were transformed into classical employment contracts *ex lege* with the expiration of the three-year transition period.[50]

While the shift towards flexibility is evident, the principle of stability has not completely disappeared from the catalogue of values underpinning the normative framework for the civil service system. It re-emerged in the specific context of the 2010 law on the rationalisation of employment in the State budget entities and selected other entities of the public financial system in the years 2011–2013 (Rationalisation Act). Poland, like numerous other European countries, reacted to the global economic crisis with some austerity measures that involved salary freezes in the public administration or banning new recruitments. The Rationalisation Act envisaged some more far-reaching mechanisms. It introduced a "guillotine", forcing each institution to reduce the number of its staff by 10%. This target applied to all staff members, including both civil service employees and appointed civil servants.

The idea of massive layoffs was widely applied in the European administrations following the 2008 crisis. For example, the Greek government committed to reducing public employment by 150,000 positions within four years. The Irish government announced a plan to cut the number of staff in public administration by nearly 12% between 2011 and 2015.[51] The crisis also fostered large-scale restructuring programmes, leading to a considerable reduction in the number of institutions (mainly government agencies) in some countries.[52]

However, the Polish Rationalisation Act has yet to enter into force, due to the decision of the Constitutional Court. The Court focused particularly on the effect of the proposed mechanism on the status of the appointed civil servants. It pointed out that: "Temporary suspension of the protection of employment stabilisation of appointed civil servants by the possibility of terminating the employment relationship, based on the formula indicated in the Rationalisation Act, is inconsistent with Article 153, paragraph 1 of the Constitution."[53] This does not imply that any restriction of job stability for civil servants is unacceptable. However, the Court made it clear that: "Reductions in respect of appointed civil servants must be based on clear and transparent criteria that enable proper selection of the dismissed officials."[54]

With regard to civil service employees, the Court noted that

> the requirement for the legislator to define the minimum content elements in relation to the criteria constituting the basis for dismissal of employees is not limited only to the appointed civil servants, but applies to all employees affected by the Rationalisation Act (. . .). The absence of clear and transparent criteria for selecting employees to be dismissed, thus creating an opportunity for arbitrary and discretionary decisions on the

49 Itrich-Drabarek (2009), p. 87.

50 Stelina (2015), pp. 415–416.

51 European Public Service Union, *Cuts in public sector pay and employment: the impact on women in the public sector*, May 2013; www.epsu.org/sites/default/files/article/files/Impact_of_cuts_final_report.pdf.

52 Sześciło (2022).

53 Polish Constitutional Court, judgment of 14 June 2011, Kp 1/11, para. 103.

54 Polish Constitutional Court, judgment of 14 June 2011, Kp 1/11, para. 94.

> category and number of dismissed staff members, also undermines the status of people employed on the basis of an employment relationship (. . .) who do not have the status of appointed civil servants.[55]

In other words, the obligation to formulate clear and objective criteria for staff reduction applies to all groups of employees indiscriminately.

Considering this argumentation, the principle of stability in the civil service cannot as yet be declared completely defunct. Although the pendulum has swung towards flexibility, the constitutional framework still recognises the special nature of civil service employment, curbing the autonomy of decision-makers in the human resources management sphere. On the other hand, these restrictions appear to relate only to extraordinary and macro level measures, such as massive layoffs based on a simplistic guillotine mechanism. No special guarantees of stability apply to ordinary staff management at the micro (individual employees) and meso (organisations) levels of public administration.

VI. Public Law Versus Private Law Regime of Employment – A Great Escape From the Civil Service Regime?

Traditionally, one of the distinctive features of public service is a special legal regime regulating employment relations in the public sector, separate and considerably different from the rules governing private sector employment relations.[56] Nominally, the legislative framework on the public administration workforce in Poland continuously sticks to this model, but more and more often it is only paying lip service to this element of the administrative tradition. The share of employees remaining subject to the special public law regime of employment (in particular: the Law on the Civil Service, the Law on Employees of State Institutions, and the Law on Self-Government Units Employees) in the total public sector workforce is systematically decreasing. While it is extremely difficult to estimate the scale of this decrease (lack of detailed statistics), the main trajectories of this “great escape” from the public law regime towards employment based on the same rules as in the private sector can be identified.

In the government administration, this process is particularly interesting but also problematic, considering its potential conflict with constitutional standards. As discussed previously, Article 153, paragraph 1 of the constitution establishes the civil service regime for the “offices” (units) of the government administration. This provision should be interpreted as both narrowing the scope of civil service regime to the government administration, but also requiring all “offices of the Government administration” to fall under the civil service regime.[57] As regards the definition of the government administration in this context, the Constitutional Court noted that in order

> to recognise an office as a government administration office, two conditions must be met jointly: performing the tasks of public administration and institutional locus in

55 Polish Constitutional Court, judgment of 14 June 2011, Kp 1/11, para. 104.

56 Bach and Bordogna (2016), p. 3.

57 Górzyńska (2012), pp. 440–441.

the segment the State apparatus that is led by the Government, i.e. the Council of Ministers.[58]

This definition is extensive enough to embrace the staff of a large and ever-increasing number of institutions that are not part of the civil service system, yet fall under the general, private law regime of employment. The exact number of government administration bodies exempted from the civil service system cannot be provided due to the lack of a comprehensive inventory of public bodies. However, some key categories of such institutions can be distinguished:

1. Executive agencies regulated by the Law on Public Financial Management.[59] This type of public administration bodies is characterised by a special financial regime and separate legal personality. There are no functional criteria established for the selection of this organisational form, but it is clear that all of them operate within the government administration, performing public functions under the oversight of the government. In practice, ten executive agencies have been created so far, in various areas of public administration.[60]
2. Public funds managing compulsory systems of social insurance (the Social Insurance Institution and the Agricultural Social Insurance Fund) and health insurance (National Health Fund).
3. Bodies of various functions and organisational setup directly supporting core functions of the ministries, e.g. analytical institutes (e.g. the Polish Institute of Economics, the Pilecki Institute, the Institute for the Polish-Hungarian Cooperation) and bodies providing support services to the government administration (e.g. the Central Information Technology Unit, the IT Centre of the Ministry of Finance, the Support Centre for Government Administration).

This list includes only evident cases of bodies exempted from the civil service regime that remain firmly located within the government administration. There are also large groups of institutions where this issue is more ambiguous, e.g. research institutes supervised by the ministries or classical agencies assisting ministries but operating in the form of companies. A good illustration of the latter case is the "Critical Applications" limited liability company developing IT tools for the tax administration and the Ministry of Finance.

The intention to enhance flexibility and curb the transparency of human resources management is not the only reason for this tendency to escape the civil service regime.

58 Polish Constitutional Court, judgment of 28 April 1999, K 3/99, para. 69.

59 Articles 18–22 of the Law on Public Financial Management of 27 August 2009 (*Ustawa o finansach publicznych*), Dziennik Ustaw 2009, 157, 1240; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20091571240/U/D20091240Lj.pdf.

60 A list of executive agencies is published annually in the justification for the Government's proposal for budgetary law. This list includes: the National Institute of Freedom – Center for Civil Society Development, the Governmental Agency for Strategic Reserves, the Polish Agency for Enterprise Development, the Polish Space Agency, the National Center for Research and Development, the National Science Center, the Military Property Agency, the Agency for Restructuring and Modernisation of Agriculture, the National Agricultural Support Center with the financial plan of the State Treasury Agricultural Property Resource, and the Central Research Center for Cultivar Testing.

Some objective circumstances cannot be ignored either. In particular, the restrictions on salaries in the civil service may significantly limit the pool of good-quality candidates for high-skilled jobs, especially in the IT area. This explains why a large part of the IT support for the government is provided by bodies operating outside the civil service regime. This also sheds light on another phenomenon of recent years that could be described as a circumvention of the civil service legislation, i.e. the emergence of so-called body leasing in some ministries. Under this arrangement, the ministries conclude contracts with private IT companies that are required to ensure the availability of an IT workforce of specific profiles. These specialists formally do not join ministries but remain under the disposal of the ministry within the agreed scope of services and perform specific tasks assigned by the ministry throughout the whole period of contract (e.g. two years).[61]

Nevertheless, most of the exemptions from the civil service regime are not justified by such rather objective circumstances, but instead reflect the idea of intentionally downgrading the human resources management standards in the government administration. This is particularly striking, considering that the Law on the Civil Service does not impose any extremely rigid and detailed employment regime that would not fit the specific characteristics of the institutions currently excluded from this system.

It should be noted that this problem is present not only in the government administration, but also in the local and regional self-government administration. In this case, the way outside the regime of the Law on Employees of the Self-Government Units leads through the corporatisation of administrative bodies, i.e. the transformation of public law entities (so-called self-government budgetary units) subject to this regulation into joint stock or limited liability companies owned by the local and regional self-government units. The staff of these companies are not recognised as employees of self-government units under this law, though the salaries of the management are subject to some limitations imposed by a particular law (*lex specialis*).[62]

VII. Concluding Remarks

Mazur depicts the evolution of public administration in the post-socialist countries of Central Europe by distinguishing three phases. During the early transformation stage, the idea of a democratic law-governed State and the market economy emerged. In the second, the consolidation stage, the public administration reforms were driven by the aspirations for EU and NATO accession. The current phase could be described as the disintegration stage, a mixture of illiberal ideology and idea of statisation. This crucial term is defined as follows:

> In the normative sphere, it expresses the yearning for an omnipotent State. In the practice of governance, its effects are manifested in the strengthening of central government power, increased State involvement in the economic sphere, State capture, the

61 See Pasławski (2020).

62 Law on rules for setting salaries of persons managing selected companies of 9 June 2016 (*Ustawa o zasadach kształtowania wynagrodzeń osób kierujących niektórymi spółkami*), Dziennik Ustaw 2016, 1202; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20160001202/U/D20161202Lj.pdf.

colonization of the administrative apparatus and its politicization, as well as weakening the position of local governments.[63]

As demonstrated in this chapter, the trajectory of the civil service evolution in Poland largely reflects this three-phase scenario. The early years were characterised by a breakup – at least declared – with the legacy of heavily politicised public employment, and a drive towards "Western standards" of professionalism, merit-based recruitment, and the insulation of the civil service from undue political influence. The constitutionalisation of the civil service in 1997 and adoption of the 1998 Law on the Civil Service marked the heyday of this era of depoliticisation and professionalisation.

However, the internalisation of these values never succeeded and quickly turned out to be rather superficial, lacking continuous political commitment and strong procedural safeguards. The story of the evolution of the legal framework for the recruitment of top positions is a particularly good illustration of this failure. It began with the ambitious idea of centrally organised, competitive recruitment open only to appointed civil servants, but it ended with transforming these positions into classical political appointees, with no open competition and no safeguards against the politicisation of these positions. The prospects for any re-emergence of professionalism are rather grim and Peters is most likely right, predicting that the pattern of politicised administration will persist, not only in Poland, but in the whole region.[64]

However, politicisation is not the only challenge. The public employment system suffers not only from politicisation, but also fragmentation of the legal framework, lack of central oversight and steering, as well as the "great escape" from the public law regime of employment. These tendencies result in an untransparent system, dominated by individually crafted and politically negotiated exemptions and exceptions, as well as different employment arrangements (including salaries) for staff performing similar jobs across the public administration.

Mitigating these destructive tendencies would require large-scale, horizontal reform, covering all the components of the public employment system, from the civil service, through employees of State institutions, employees of self-government units, to staff of all bodies controlled by the State or local and regional governments who now enjoy the benefits of the private law-based employment regime. The likelihood of such reform is low, not only because of clear absence of political will, but also great potential resistance from the ever-increasing group of beneficiaries of the current (dis)order.

Bibliography

Arcimowicz J. (2014), 'Kadry administracji publicznej', in Pawlak M., Srokowski Ł. (eds), *Pomiędzy i wewnątrz: Instytucje, organizacje i ich działania*, Warszawa: Instytut Profilaktyki Społecznej i Resocjalizacji UW, 75–98.

Bach S., Bordogna L. (2016), 'Emerging From the Crisis. The Transformation of Public Service Employment Relations?', in Bach S., Bordogna L. (eds), *Public Service Management and Employment Relations in Europe. Emerging from the Crisis*, Abingdon: Routledge, 1–28.

Burnetko K. (2003), *Służba cywilna w III RP: punkty krytyczne*, Warszawa: Fundacja im. Stefana Batorego.

63 Mazur (2020), p. 69.

64 Peters (2020), p. 102.

Coleman Selden S. (2007), 'Innovations and Global Trends in Human Resources Management Practices', in Peters B.G., Pierre J. (eds), *The Handbook of Public Administration*, London: Sage, 39–48.

Drobny W. (2017), 'Kierunki zmiany tożsamości polskiego prawa urzędniczego', LXIV(2) *Annales Universitatis Mariae Curie-Skłodowska, Lublin – Polonia, Sectio G*, 71–82.

Gadowska K. (2009), 'Działania pozorne. Problem upolitycznienia procesu obsady wyższych stanowisk w służbie cywilnej w Polsce', 58(1) *Przegląd Socjologiczny*, 51–90.

Gadowska K. (2015), *Dysfunkcje administracji. Służba cywilna w perspektywie neoinstytucjonalnej*, Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Górzyńska T. (2012), 'Konstytucyjne podstawy służby cywilnej', in Hauser R., Niewiadomski Z., Wróbel A. (eds), *Konstytucyjne podstawy funkcjonowania administracji publicznej. Tom 2*, Warszawa: C.H. Beck, 415–454.

Itrich-Drabarek J. (2009), 'Transformacja administracji publicznej', 15 *Studia Politologiczne*, 80–103.

Koncewicz T.T. (2018), 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', 43(2) *Review of Central and East European Law*, 116–173.

Korczak J. (2010), 'Status prawny pracowników samorządowych w II i III RP', in Korczak J. (ed), *20 lat samorządu terytorialnego w II i III Rzeczypospolitej*, Wrocław: Kolonia Limited, 379–404.

Korczak J. (2019), 'Stulecie polskiego prawa urzędniczego', 327 *Acta Universitatis Wratislaviensis. Prawo*, 83–113.

Mazur S. (2020), 'The Competition of Ideas and Ideational Disruption', in Mazur S. (ed), *Public Administration in Central Europe: Ideas and Causes of Reforms*, Abingdon: Routledge, 57–74.

Mazur S., Możdżeń M., Oramus M. (2018), 'The Instrumental and Ideological Politicisation of Senior Positions in Poland's Civil Service and Its Selected Consequences', 11(1) *The NISPAcee Journal of Public Administration and Policy*, 63–89.

Meyer-Sahling J.H., Veen T. (2012), 'Governing the Post-Communist State: Government Alternation and Senior Civil Service Politicisation in Central and Eastern Europe', 28(1) *East European Politics*, 4–22.

Pasławski K. (2020), *Ministerstwo Finansów wypożyczy fachowców IT za 90 mln zł. 23 firmy w przetargu*, https://crn.pl/aktualnosci/ministerstwo-finansow-wypozyczy-fachowcow-it-za-90-mln-zl-23-firmy-w-przetargu/.

Peters B.G. (2020), 'Politicians and Bureaucrats in Central and Eastern Europe: Governance with Increased Politicisation', in Mazur S. (ed), *Public Administration in Central Europe: Ideas and Causes of Reforms*, Abingdon: Routledge, 96–105.

Pollitt C., Bouckaert G. (2004), *Public Management Reform: A Comparative Analysis*, Oxford: Oxford University Press.

Przywora B. (2012), *Transformacje ustrojowe służby cywilnej*, Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Samol S. (2016), 'Zmiana modelu służby cywilnej po nowelizacji ustawy o służbie cywilnej', 1 *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 71–79.

Springer B. (2012), 'Wybrane instytucje polskiej służby cywilnej na przestrzeni lat 1996–2009. Perspektywa porównawcza', 21(3) *Zarządzanie publiczne*, 66–82.

Stelina J. (2015), 'Podstawy zatrudnienia pracowników samorządowych', XXXIV *Gdańskie Studia Prawnicze*, 407–417.

Stelina J. (2017), *Prawo urzędnicze*, Warszawa: C.H. Beck.

Sześciło D. (2022), 'Agencification Revisited: Trends in Consolidation of Central Government Administration in Europe', 88(4) *International Review of Administrative Sciences*, 995–1012.

Szewczyk H. (2012), *Stosunki pracy w samorządzie terytorialnym*, Warszawa: Wolters Kluwer.

13 The Civil Service in Spain

The Deficit of Organisation in Public Employment and the Principle of Democracy

Ricardo García Macho

I. Background

Public employment must be properly organised for the Spanish government to meet its objective of effectively serving the general interest, as set out in Article 103, paragraph 1 of the Spanish constitution (SC).[1] However, public employment in Spain has organisational deficiencies with historical roots that have yet to be resolved, that undermine the smooth running of the government, and that threaten to derail the entrenching of democracy in Spanish institutions, both now and in the future. The political problems that politicians have historically been incapable of resolving and that have led to the decadence of the Spanish State have been highlighted by historians, who have pointed out the deficiencies of these politicians, notably their corruption and incompetence, and have drawn attention to a dark past that burdens Spain's present and future.[2] These unresolved political problems, which afflict the operation of Spanish democracy, have a direct impact on the disorganised state of public employment in Spain, and this has led to the ineffective running of national, regional, and local political and administrative institutions.

The bureaucracy of the 19th century – and part of the 20th – was organised in line with the requirements and operation of a State established as a constitutional monarchy[3] in which the king ruled and governed. However, with the coming into force of the SC in 1978, Spain became a parliamentary monarchy (Article 1, paragraph 3), with the king holding no executive power. Major differences in the organising and running of the State as a result of this transition might have been expected to have an impact on the organisation of public employment. The establishment of a democratic State should have affected how the bureaucracy was implemented, and this in turn should have led to a restructuring of public employment in line with the principles established in the SC (e.g. Articles 23, paragraph 2, and 103, paragraph 3) or – and notably so – the principle of democracy (Article 1, paragraph 1).

1 Spanish constitution of 29 December 1978 (*Constitución Española*), BOE no. 311; www.boe.es/buscar/act.php?id=BOE-A-1978-31229.

2 Of note is Preston, who in Un pueblo traicionado highlights the historical burden that Spanish politicians represent, see Preston (2019), pp. 11 f. Also of note is Álvarez Junco, who in his monograph Que hacer con un pasado sucio examines solutions to the problems caused by the legacy of this dark past (which cannot be denied, as much as some political parties might try) that afflicts the present, see Álvarez Junco (2022), pp. 263 f.

3 This was the most prevalent form of State during the 19th and part of the 20th century in Spain, aside from the Republic in two stints (1873–74 and 1931–39) and the Franco dictatorship (1939–75).

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This, however, did not occur, or it occurred but clearly insufficiently. There has never been the political will or capacity to democratically carry out this task, in other words, to take into account the needs of the people. This would require that the government effectively serve the general interest. It is on this basis that government administration should be organised. But this has never, neither historically nor today, been the case in Spain.

History has determined the development of government administration in Spain, which, it should be noted, does not have deep historical roots.[4] Indeed, it was created in the course of the 19th century, starting with the Statute of Bravo Murillo, regulated by the Royal Decree of 18 June 1852 on the civil service.[5] This statute was intended to establish a general framework for civil service careers, but this was not achieved, and instead it refers to the regulations of each ministry, which thus helped to promote the development of specialised bodies of civil servants. The bureaucracy was never properly structured. This deficit of structure has given rise to corporatism not concerned with the public interest but rather the particular interests of the specialised bodies or groups of civil servants (i.e. concerning their salaries, professional categories, promotions, etc.). The government does what it can in terms of day-to-day administration, but it lacks the organisational or planning capacity to truly serve the needs and interests of citizens.

This historical legacy has remained until today, meaning that Spanish public entities do not have a well-organised bureaucracy with the capacity and flexibility to effectively meet the challenges posed by modern society. The law on civil servants of 1964 aimed to make certain organisational changes to the inordinate corporatism and ineffectiveness of the bureaucracy at the time, creating general bodies of civil servants and coordination agencies such as the General Directorate for the Civil Service. However, the Franco dictatorship was at its height, and being the corrupt regime not inclined to innovation that it was, there was no authentic modernisation of government administration. The regulations passed following the enactment of the SC in 1978, particularly Law 30/1984[6] and Law 7/2007,[7] which became the Basic Staff Regulations for Public Employees of 2015,[8] greatly improved the previous body of legislation. However, substantial changes are still needed to meaningfully modernise public employment in Spain and put it in the service of the general interest, as set out in Article 103, paragraph 1 SC.

II. Public Employment Since the Constitution of 1978

The coming into force of the SC had a positive effect on various aspects of public employment, directly via Articles 23, paragraph 2, and 103, paragraph 3, and less so but still significantly through Article 103, paragraph 1. The principle of democracy (Article 1,

4 It did not follow the tradition of the previous system from the point of view of an experienced bureaucracy capable of resolving problems, as France, for instance, had done; see García de Enterría (1985), pp. 114 f.

5 Royal Decree on the civil service of 18 June 1852, *Gaceta de Madrid* no. 6572.

6 Law on measures for the reform of the Civil Service of 2 August 1984 (*Ley 30/1984 de medidas para la reforma de la Función Pública*), BOE no. 185, pp. 22629–22650; www.boe.es/eli/es/l/1984/08/02/30/con.

7 Law on the Basic Statute of the Public Employee of 12 April 2007 (*Ley 7/2007 del Estatuto Básico del Empleado Público*), BOE no. 89, pp. 16270–16299; www.boe.es/eli/es/l/2007/04/12/7/con.

8 Royal Legislative Decree approving the revised text of the Law on the Basic Statute for Public Employees of 30 October 2015 (*Real Decreto Legislativo 5/2015 por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público*), BOE no. 261, pp. 103105–103159; www.boe.es/eli/es/rdlg/2015/10/30/5/con.

paragraph 1) should have had a decisive effect on the modernisation of public employment, but it barely made a dint. This first provision establishes the right to access the civil service and public jobs in accordance with the principle of equality applicable to all public employees. Article 103, paragraph 3 SC on civil servants (1) refers to access to public positions based on merit and ability; (2) guarantees the right to unionisation, subject to certain conditions; (3) establishes that there are to be rules governing conflicts of interest; (4) guarantees impartiality in the provision of civil services; and (5) determines that the staff regulations for civil servants constitute non-delegable legislation (reserve of law) that can only be regulated in the Spanish Parliament.[9] The implementation of these provisions has meant a major streamlining of the bureaucracy and thus a professionalisation of public employment in Spain.

On the distribution of powers between the national and regional governments, Article 149, paragraph 1, subparagraph 18 SC provides that the national government is to pass the basic staff regulations for civil servants and, while observing these basic regulations, the regional Autonomous Communities may implement their own regulations. In fact, most Autonomous Communities have passed such laws. One example is Law 4/2021 of 16 April on the Civil Service of the Valencian Autonomous Community,[10] which was passed to implement Final Provisions One and Two of the Basic Staff Regulations for Public Employees of 2015.

The first major law passed to implement these provisions of the SC was Law 30/1984 of 2 August 1984 on Measures for Reforming the Civil Service.[11] However, it is considered to be a law that tended to downgrade regulatory legitimacy, as it transferred to the executive branch the regulatory authority on matters that should be handled by the legislative branch.[12] It is for this reason that the Spanish Constitutional Court, in Decision 99/1987 of 11 June 1987, ruled that the matters that must be regulated in the Spanish Parliament under statute law[13] on the staff regulations for civil servants set out in Article 103, paragraph 3 SC should be spelt out. This Decision found that the following should be reserved for regulation by the Spanish Parliament:

> the acquisition or loss of status as a civil servant; promotion requirements in civil service careers; the situations that can arise in such careers; the rights, obligations and liability of civil servants and disciplinary rules; the creation and integration of civil-servant bodies and grades; and how recruiting for government jobs is carried out.

This Decision was essential in stopping the downward transfer of regulatory authority that had created legal uncertainty and arbitrariness.[14]

9 See García Macho (1994a), pp. 732 f.

10 Law on the Civil Service of the Valencian Autonomous Community of 16 April 2021 (*Ley 4/2021 de la Función Pública Valenciana*), BOE no. 127, pp. 64542–64685; www.boe.es/eli/es-vc/l/2021/04/16/4/con.

11 Law on Measures for Reforming the Civil Service of 2 August 1984 (n. 6).

12 Garrido Falla points out that Article 15, para. 1; Article 22, para. 2 and Article of the 27 Law 30/1984 gave the government the power to regulate matters as important as the merging, amending or removing of civil-servant groups or grades via regulations, which gave it broad powers of discretion, see Garrido Falla (1985), p. 75.

13 There is no doubt of the "statutory relationship" linking civil servants to the government, the Constitutional Court having ruled in this way in various decisions (e.g. judgment of 18 October 1993, STC 293/1993).

14 See the commentary on this important decision made at the time: Sainz Moreno (1988), pp. 321 f.; Cámara del Portillo (1988), pp. 101 f.

However, Law 30/1984 did have positive effects, in that it restructured many civil servant bodies and strengthened the powers of the central agencies of coordination and management of the civil service, thus entailing a certain streamlining of Spanish bureaucracy. It also strengthened access to public employment via labour-law contracts, thereby promoting this type of contract and making access to public employment more flexible. However, even though this law modernised some aspects of the operation of government administration, it did not constitute a true regulation of public employment. This did not occur until 2007, when the Basic Staff Regulations for Public Employees were passed.

Another important law passed in the 1980s was Law 53/1984 of 26 December 1984 on Conflicts of Interest of Administration Employees.[15] This law was introduced in accordance with Articles 103, paragraph 3 and 149, paragraph 1, subparagraph 18 SC, with its Final Provision One establishing it as framework legislation. This law is based on the general principle that each person can only hold one job in the public sector (Article 1 of Law 53/1984). The aim was to raise the moral standing of Spanish public life given that it had been typical for public servants to have two or three public jobs. This had hindered the effectiveness of government administration and encouraged corruption. The law on conflicts of interest was a big step towards the proper operation of government administration. However, today many question the lax rules on holding public positions while engaging in private professional activities. The current provisions pose a risk to the impartiality of civil servants, both while they are carrying out their public duties when employed by the State and, especially in the case of senior officials, after they leave the government to work in the private sector, where they can use the knowledge they acquired to the detriment of the Administration to which they owe their training and professional development.[16]

The most important reform since the SC in 1978 took place in 2007, with the passing of Law 7/2007 of 12 April 2007 on the Basic Staff Regulations for Public Employees.[17] This law was reformed by Royal Legislative Decree 5/2015 of 30 October 2015, which is the current legislation.[18] These staff regulations aim to provide a common basis for both civil servants and labour-law contract staff (Article 1), although a significant part of the regulations affecting labour-law staff are stipulated in the Workers' Statute.[19]

III. The Basic Staff Regulations for Public Employees (BSRPE)

These regulations currently regulate public employment in Spain. They constitute framework legislation (in line with Article 149, paragraph 1, subparagraph 18 SC and Final Provision One BSRPE) and have entailed a qualitative change, as they are true staff regulations, the first of their kind, introduced 29 years after the passing of the SC. So it took the

15 Law on Conflicts of Interest of Administration Employees of 26 December 1984 (*Ley 53/1984 de Incompatibilidades del personal al servicio de las Administraciones Públicas*), BOE no. 4, pp. 165–168; www.boe.es/eli/es/l/1984/12/26/53/con.

16 These senior public employees undoubtedly have the right to move to the private sector. However, they should be prohibited from litigating against the State for a period of time on matters (e.g. tax or administrative law) they were responsible for in their jobs in the public sector.

17 Law on the Basic Staff Regulations for Public Employees of 12 April 2007 (n. 7).

18 Royal Legislative Decree approving the revised text of the Law on the Basic Statute for Public Employees of 30 October 2015 (n. 8).

19 Royal Legislative Decree approving the revised text of the Workers' Statute Law of 24 March 1995 (*Real Decreto Legislativo 1/1995 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), BOE no. 75, pp. 9654–9688; www.boe.es/eli/es/rdlg/1995/03/24/1/con.

lawmakers three decades to enact staff regulations for public employees. This was far too long, especially given that Article 103, paragraph 3 SC sets out that "the staff regulations of public employees are to be regulated by law" and also makes mention of these regulations in Article 149, paragraph 1, subparagraph 18, considering it framework legislation.

1. *Access to Public Employment via Two Routes: The Civil Service or a Labour Law Contract*

Before the SC, most public employees were civil servants, and hiring staff via labour-law contracts was rare. However, following Law 30/1984 of 2 August 1984 on Measures for Reforming the Civil Service,[20] the panorama significantly changed, as this legislation expanded the options for accessing public employment via labour-law contracts. Although Decision 99/1987 of 11 June 1987 of the Constitutional Court of Spain[21] did limit this option, it did not remove it entirely, thus this route had been opened, and in fact was used ever more frequently, especially at the local level by both municipal and provincial governments.

The BSRPE entrenched the labour-law contract route, providing for the civil-servant route (Article 1, paragraph 1), which was and is still the main way public employees are hired, but also strengthening the contract option (Article 1, paragraph 2) This was a very positive development. In effect, the BSRPE, by providing for the route to public employment via labour-law contracts (Article 1, paragraph 2), in addition to stating that labour-law contract staff were public employees (Article 2(c)), greatly broadened the options for flexibly organising public employment, allowing it to operate more effectively. Having two routes to public employment, i.e. as a civil servant and via a labour-law contract, represents a big leap forward in the capacity politicians have to organise this sector efficiently in the service of the general interest (Article 103, paragraph 1 SC). Whether politicians make use of this capacity to its full potential or just use it in their own interests for political motives, or in response to pressure from lobby groups is another question.

The trend towards using the contract route for public employment began to be significantly extended when Law 30/1984 was introduced. Article 15 of this law even lists the jobs that can be carried out via labour-law contract staff, although these are mostly entry-level jobs (maintenance, surveys, etc.), with the exception of very specialised technical jobs or jobs entailing artistic expression. However, when this law was passed in 1984, the relationship between citizens and the government was not what it is today. Today, the functions of government in leading and organising society are not solely based on hierarchical and subordinate relationships with citizens, but also on the principles of equality, cooperation and consensus, whereby, via a variety of administrative structures, the multifaceted democratic legitimacy of the State plays a crucial role.[22]

When the government faces a range of situations requiring different decision-making processes in the process of applying the law, this is the context in which the labour-law contract route to public employment should be placed. It is clear that Article 15 Law 30/1984 is insufficient to meet the challenge entailed by the new relationship between citizens and the government. However, the BSRPE considerably broadens access to

20 Law on Measures for Reforming the Civil Service of 2 August 1984 (n. 6).

21 Constitutional Court, judgment of 11 June 1987, STC 99/1987.

22 See Schmidt-Assmann (2003), pp. 15 f. and Schmidt-Assmann (2021), pp. 46 f.

public employment through hiring via labour-law contracts. Indeed, part of the aim of the BSRPE, stated in Article 1, paragraph 1, is to specify the laws that apply to labour-law staff, from which it can be deduced that the lawmakers clearly opted for this mode of access.[23]

Article 11 BSRPE, covering the term types for labour-law contracts, establishes in point two that the laws implementing this statute should specify the jobs to be performed by labour-law contract staff, taking into account the limits established in Article 9, paragraph 2. It is true that this provision sets major limits on the contract route, given that only civil servants can perform duties that entail participating in the direct and indirect exercise of powers conferred by public law or safeguarding the general interest of the State or public authorities. However, the powers conferred by public law and the general interest are indeterminate legal concepts, and this provides the lawmakers and the courts with some interpretive leeway. Although it is clear that the lawmakers meant, and correctly so,[24] for this provision to apply to the performing of senior duties, which would remain reserved for civil servants, and not to all duties performed in State institutions. The remaining duties – the majority in public institutions – should be carried out by labour-law contract staff. This would allow for a more flexible and efficient administrative organisation than we find at present, as administrative bodies would have greater capacity to adapt and be flexible in the face of the rapid social and economic changes that occur as society evolves – to which administrations must respond.

In the case of local government, Article 92 of the Framework Law on Local Government[25] establishes that civil servants are to perform jobs entailing carrying out duties of public authority or protecting the general interest. This means that senior duties are reserved for civil servants, but other duties can be carried out by labour-law contract staff. In fact, in local government, hiring by labour-law contract has gradually risen for more than a decade. Although it dropped after the financial crisis of 2008, it began to rise again after 2018, to the extent that, according to the Spanish government's Statistical Bulletin on State employees of January 2022, 320,633 local government employees are labour-law contract staff versus 188,120 civil servants. In other words, 54% are contract staff versus 31% civil servants. The 14% remaining employees are classified as "other personnel".[26]

These figures mean that at the local government level, the main route for access to public jobs is via labour-law contract, with civil servants essentially performing duties that entail exercising powers conferred by public law or safeguarding the general interest. This situation allows for flexibly and effectively organising services and provides capacity to

23 French law, similar to Spanish law in terms of public employment organisation, has firmly opted for access to public employment via labour-law contracts in its new law on the transformation of the civil service, see Boto Álvarez (2020), pp. 2 f.

24 It is evident that the Spanish government at all levels (national, regional and local) needs a thorough restructuring based on the principle of democracy to truly serve the general interest as stipulated in the SC and other laws and more efficiently carry out its role than at present. This restructuring would also benefit the Spanish economy as a whole.

25 Framework Law on Local Government of 2 April 1985 (*Ley 7/1985 Reguladora de las Bases del Régimen Local*), BOE no. 80, pp. 8945–8964; www.boe.es/eli/es/l/1985/04/02/7/con.

26 Data for January 2022 from the Central Staff Register, Government of Spain (edited by the Ministry of Finance and Civil Service, General Technical Secretariat, General Subdirectorate of Information, Documentation and Publications, Publication Centre).

adapt to societal changes, which must be addressed precisely by local governments – the level of the State closest to citizens and most in touch with their needs.

In contrast to local government, the ratio of civil servants to contract staff is very different in the national and regional governments. At the national level, 82% of public employees are civil servants, with labour law staff making up only 15%. In the Autonomous Communities, 52% of staff are civil servants, while staff hired under labour-law contracts only make up around 13%, with 34% classified as other personnel.[27] The fact that the majority of public employees at the national level are civil servants is not conducive to making this level of public administration effective and adaptable to social and economic changes. In the governments of the Autonomous Communities, there are significantly fewer civil servants than at the national level, but the proportion of labour-law staff is very insufficient, at only 13%. Notably, "other personnel" make up 34%. This is a very high figure. So regional governments do not have a sufficiently high number of contract staff that would enable them to be effective and adaptable to societal changes.

2. Legal Status of Public Employees

The status of public employees differs depending on whether they are civil servants or labour-law contract staff. In both cases, employees perform remunerated duties in the service of the general interest (Article 8, paragraph 1 BSRPE). In the first case, employees are subject to a statutory relationship. In the second case, employees are covered by labour-law contracts. All citizens are entitled to access public employment according to the principles of merit, ability, and equality (Article 103, paragraph 3; Article 23, paragraph 2 SC; and Article 55, paragraph 1 BSRPE). To guarantee this right and the constitutional principles, guideline principles are set out in the BSRPE, including the publicity of the calls, transparency, impartiality, and professionalism of the members of selection bodies, and so on (Article 55, paragraph 2 BSRPE).

2.1. Selection of Public Employees

Civil servants and labour-law contract staff are selected via competitive exams with or without merit-based assessment, although labour-law staff may be selected via merit-based assessment alone (Article 61, paragraphs 6 and 7 BSRPE). Selection via competitive exam, which has been used extensively for decades in Europe, gives rise to many problems, including some serious ones. First, the competitive exam procedure is based essentially on learning subjects by heart to subsequently recite them before a board, in a few minutes and without any reflection. This is, stated in simple terms, the procedure used especially for select civil-service positions, such as notaries, registrars, State lawyers, judges, tax inspectors, council secretaries, and so on.[28] Second, these professions, occupying important seg-

27 Data for January 2022 from the Central Staff Register, Government of Spain (edited by the Ministry of Finance and Civil Service, General Technical Secretariat, General Subdirectorate of Information, Documentation and Publications, Publication Centre).

28 This selection system determines many curricula and teaching plans at university law departments in which essentially a rote-learning exam system is used, to a certain extent in preparation for the competitive civil-service exams. Such an education does little to encourage reflective or critical thinking and is far from scientific in nature. Given this superficiality, students find it hard to develop legal expertise, and this hamstrings their subsequent professional development.

ments of power at the heart of Administration, act as lobby groups, and this can hinder the objectivity of these employees in serving the general interest.[29]

Selecting public employees via competitive exam might have made sense 50 or 70 years ago, but not today. Rote learning is often irrelevant to the duties that the person selected must later carry out on the job, this being contrary to Article 61, paragraph 2 BSRPE, which requires adapting selection testing to the performance of job duties. Furthermore, there are other selection methods in which the legal and technical expertise of candidates could be assessed via theoretical tests in which the most important factor is not memorisation but rather the ability to reflect on and resolve complex legal or technical problems. Practical tests of differing types are also available, as is offering training internships in public bodies.[30]

Preparing for high-level competitive entrance exams requires long periods of full-time study, something not everyone can permit.[31] This constitutes discrimination contrary to the right to access public employment in equal conditions set out in the SC (Article 23, paragraph 2). To mitigate this infringement of constitutional law, rules have been introduced for awarding grants for preparing for these competitive exams.[32] However, at best this solution mitigates the problem in a few isolated cases. It does not solve the problem at its root. This would entail making profound changes, especially in the curricula and operation of university law departments,[33] although also in curricula in the sciences, in addition to overhauling the selection processes, especially for senior civil-servant positions.

2.2. Conflicts of Interest

Law 53/1984 of 26 December on conflicts of interest of public employees[34] implements the constitutional mandate of Article 103, paragraph 3 SC, and its provisions are considered the basis for the statutory framework of the civil service in accordance with Article 149, paragraph 1, subparagraph 18 SC (Final Provision One Law 53/1984). This law, by stipulating in Article 1, paragraph 1 that a person can have only one public sector job and that a second job is only allowed subject to major limitations[35] (Article 3, paragraph 1) in the teaching and health sectors, has as its main objectives solidarity, raising the moral

29 These select professional bodies lobby in defence of their interests and decisively influence key government decisions. This appears to conflict with Article 103, para. 1 SC, which establishes that the government, and all parts of the government, must objectively serve the general interest.

30 See Boix Palop and Soriano Arnanz (2021), pp. 59 f.

31 See Sánchez Morón (2022), pp. 146 f.

32 For example, Royal Decree approving the public employment offer for 2019 of 29 March 2019 (*Real Decreto 211/2019, de 29 de marzo, por el que se aprueba la oferta de empleo público para el año 2019*), BOE no 79, pp. 33966–33986; www.boe.es/eli/es/rd/2019/03/29/211 and Decree 26/2019 of approval of the regulatory bases for the granting of aid to highly qualified young people for the preparation of selective tests for access to the different bodies or scales of the professional classification group A of the Administration of the Generalitat of 1 March 2019 of the Valencian Government (*Decreto 26/2019, de 1 de marzo, del Consell, de aprobación de las bases reguladoras de la concesión de ayudas, a personas jóvenes altamente cualificadas, para la preparación de pruebas selectivas para el acceso a los distintos cuerpos o escalas del grupo de clasificación profesional A de la Administración de la Generalitat*); https://hisenda.gva.es/documents/90598607/167982703/Decret+26–2019.pdf/26d164c2-349b-4b22-8bd3-64b8f2818a5d.

33 The German model described by Boix Palop and Soriano Arnanz is a good example, although without doubt there are others. For more on these other models, see Boix Palop and Soriano Arnanz (2020), pp. 52 f.

34 Law on conflicts of interest of public employees of 26 December 1984 (n. 15).

35 This second job can only be performed under a labour-law contract, part-time and for a fixed term, as specified in the labour legislation.

standing of the civil service and government effectiveness.[36] In a country like Spain, with high unemployment, each person only being able to occupy one public job is a display of solidarity. It also helps the government to operate more effectively if public employees are required to commit themselves exclusively to one job.[37]

The rules on holding public employment while engaging in private professional activities are very broad in Articles 11 and following Law 53/1984. Even though Article 11, paragraph 1 states that public employees cannot engage in private activities, subsequent exceptions are set out that are extended upon in following articles. This results in a broad range of exceptions,[38] and in some cases the discretion is so broad that it violates the principle that a person can only hold one public job.[39] Furthermore, as specified in Section II, the fact that public employees, especially senior civil servants, can go over to the private sector should be regulated so that the general interest is not harmed. This could be achieved, for instance, by stipulating a long period during which the ex-public employee is prohibited from litigating against the State that professionally developed them. The justification for these undoubtedly lenient rules on conflicts of interest has always been the notoriously[40] low salaries paid to public employees, especially senior civil servants.

A complete overhaul of the conflict-of-interest rules for public employees must be undertaken to bring them into line with an effectively run administration that serves the general interest. However, these rules cannot be reformed without reorienting and entrenching the principle of democracy so that serving the general interest means serving the needs and interests of citizens.[41] This requires a paradigm shift, which in turn requires the political will to implement it.

2.3. *Rights and Obligations*

Public employees have a series of individual and collective rights, in addition to their fundamental rights. They are also subject to a series of obligations. Civil servants have the same fundamental rights as any other citizen, and only in very specific situations when performing work duties can any of these rights be limited, which, in any case, are subject to the safeguard that they can only be regulated by the Spanish Parliament.[42]

36 All these principles are referred to in the preamble of the law. The BSRPE also refers to them in Article 53, where it sets out the ethical principles that public employees are required to observe.

37 See García Macho (1994a), p. 763 f.

38 See Martínez Marín (2018), p. 465 f.

39 For example, parliamentary counsel, under their staff regulations, which regulates this matter as provided for in Final Provision Two of the Law on conflicts of interest of public employees of 26 December 1984 (n. 15), are allowed to have two public jobs, even if part-time, at the same time as engaging in private professional activities.

40 Sánchez Morón (2022), p. 329 f. has highlighted this point.

41 For example, the interest of citizens is not being served by certain select professional bodies or lobby groups having power sufficient to colonise the running of the government. Determining the general interest is undoubtedly a complex task that includes many diverse interests, including the interests of these lobby groups. However, it is unacceptable that the interests of these lobby groups always prevail to the detriment of the great majority of citizens.

42 In Spain, the concept of the special relationship of subordination based on the employment relationship between civil servants and the State has been used to restrict the fundamental rights of civil servants. This concept has been used excessively by the courts, and not just against public employees. For instance, it has also been used to limit the fundamental rights of taxi drivers and companies regarding the use of designation of origin. In the case of public employees, their fundamental rights can only be limited when they are acting in service of the administrative organisation, i.e. performing their work duties, see García Macho (1992), p. 235 f.

Owing to the nature of their statutory relationship, civil servants have certain rights that staff hired under labour-law contracts do not have. However, the rights of both types of public employees are converging, especially in the case of civil servants and permanent labour-law contract staff. There is in fact a general framework of rights established in Articles 14 and 15 BSRPE common to all public employees. However, there are rights, such as tenure, the right to a professional career and so on, that have historically been considered the rights of civil servants. On the other hand, labour-law contract staff are protected not only by the BSRPE but also the Workers' Statute[43] in the case of, for example, collective agreements.

Article 14 BSRPE establishes the individual rights of public employees; the collective rights are set out in Article 15. There are two rights of civil servants that come with historical baggage: the right to a position and the right to tenure. The right to a position is not provided for in the BSRPE, although it was in the law on civil servants of 1964. This right, which entails the right to keep a particular position, has been replaced by the right to the effective performance of the duties of a professional category (Article 14 (b) BSRPE). This is thus merely a change in terminology, with essentially the same substance remaining. The right to tenure, linked to the right to a position, is provided for in Article 14 (b) BSRPE. Although it is aimed at civil servants, permanent labour-law contract staff can be considered de facto entitled to this right. There is a direct link between this right and impartiality in the provision of civil services (Article 103, paragraph 3 SC) that implies a guarantee of protection against individual interests and even political power.[44]

The individual rights of Article 14 BSRPE[45] include certain fundamental rights, such as the right to privacy (Article 14 (h)); the right to non-discrimination owing to birth, sex, religion, or opinion (Article 14 (i)); and the right to freedom of expression within the limits of the legal order (Article 14 (k)).[46] Article 14 also provides for certain employee benefits, such as the right to occupational health and safety protection, leave permissions, holidays, and other social security benefits (Article 14 (l), (n), and (o)).

Collective individual rights are set out in Article 15 BSRPE. For the most part, these are fundamental rights linked to unionism in the civil service, although they find their origin in the struggle of the working class to find its place in society from the 19th century onwards. These rights include the right to unionise, set out in Article 28, paragraph 1 SC and Article 15 (a) BSRPE, with the SC imposing major limits on this right for the armed forces, prohibiting this right for them, with bodies subject to military discipline (the *Guardia Civil*) having a very restricted version of this right.[47] Article 28, paragraph 1 SC

43 Royal Legislative Decree approving the revised text of the Workers' Statute Law of 24 March 1995 (n. 19).

44 For instance, it is widely known that municipal and provincial governments often pressure secretaries, inspectors, etc. to issue reports or rulings favourable to the interests of these bodies – interests which in certain cases do not align with those of the majority of citizens.

45 See Palomar Olmeda (2021), pp. 342 f. and Sánchez Morón (2022), pp. 235 f.

46 The case law justifies this limiting of the freedom of expression of public employees on the basis of the special relationships of subordination deriving from the employment relationship, thus giving rise to doubts whether it makes sense to maintain this concept, which has led to abuses in the limiting of the rights of citizens; see García Macho (1994b), pp. 125 f.

47 In, among others, judgment of 16 November 1989, STC 194/1989, the Constitutional Court ruled that the *Guardia Civil*, a body subject to military discipline, has the right to professional association, subsequently set out in Organic Law regulating the rights and obligations of members of the *Guardia Civil* of 22 October 2007 (*Ley Orgánica 11/2007, de 22 de octubre, reguladora de los derechos y deberes de los miembros de la Guardia Civil*), BOE no. 254, pp. 42914–42922; www.boe.es/eli/es/lo/2007/10/22/11/con.

also sets out that how this right is to be exercised by civil servants must be regulated by law. Thus, this right is subject to the limitations imposed by the statutory relationship linking civil servants and the government. However, the existence of bodies for representation and participation in the negotiation of work conditions is not excluded.[48] This case law of the Constitutional Court has become a right set out in Article 15 (b) and Article 31 and following BSRPE. The right to strike is also provided for in Article 15 (c), in accordance with Article 28, paragraph 2 SC. However, this right is not given to the armed or police forces. Nor do judges have this right, who also do not have the right to unionise, although they do have the right to professional association. Civil servants do have the right to strike, as has been established in various judgments of the Constitutional Court.[49]

The obligations of civil servants are set out in Article 52 BSRPE, with the same chapter VI of Title III of this law stipulating the principles of ethics (Article 53) and conduct (Article 54), with these three provisions together making up the Code of Conduct. The obligations, which to some extent overlap with the principles of ethics[50] and conduct, are wide-ranging and have one aim: the modernisation and more effective running of government administration. Many of these obligations can be understood in this way, such as the obligations of neutrality, responsibility, impartiality, transparency, effectiveness, and the promotion of the cultural and environmental surroundings. But to what extent are these obligations compulsory? In practice, this is a complicated question.[51] The only provision articulated in Article 52 is that the principles established are to form the basis for the application and interpretation of the disciplinary rules for public employees.

2.4. *Disciplinary Rules*

The disciplinary rules for public employees are based on the need for them to perform their obligations so that the constitutional objectives of the Administration can be achieved. For the administrative organisation to effectively serve the general interest (Article 103, paragraph 1 SC), disciplinary rules for public employees are a must.[52] The government's authority to impose administrative penalties and the criminal jurisdiction of the courts form part of the State's *ius puniendi* or right to punish,[53] exercised as a monopoly on the basis of the principles of democracy and the rule of law. These powers are based on the fundamental right in Article 25 SC and can only be regulated by laws (reserve of law), meaning that disciplinary offences (very serious, serious, and minor) must be set out by law.

Both civil servants and labour-law contract staff are subject to the disciplinary rules of the BSRPE (Article 93, paragraph 1), although labour-law staff are also bound by the labour legislation and collective agreements (Article 93, paragraph 4). There are other special disciplinary rules, such as those for the armed forces and the *Guardia Civil*. The

48 See Constitutional Court, judgment of 29 July 1985, STC 98/1985.

49 See Constitutional Court, judgment of 8 April 1981, STC 11/1981, which rules that civil servants have this right, although in a somewhat euphemistic manner.

50 For example, safeguarding the general interest is mentioned in Article 52 BSRPE on the obligations and Article 53, para. 2 BSRPE on the principles of ethics.

51 See Sánchez Morón (2022), pp. 313–314, who notes that the committee that drafted the BSRPE recommended that a list of obligations to be directly complied with be included in the law. However, this did not occur.

52 See Palomar Olmeda (2021), pp. 653 f. with further references.

53 For an in-depth look at the system of administrative penalties, see Nieto (1993), pp. 19 f.

government imposes disciplinary penalties on public employees via a series of general law principles based on the SC and the principle of the rule of law. These principles are a necessary part of administrative penalty law. They are set out in Articles 25 to 31 Law 40/2015 of 1 October on the Legal Regime of the Public Sector (LRPS)[54] and constitute framework legislation. Thus, Article 94, paragraph 2 BSRPE merely compiles the general law principles of Articles 25 to 31 LRPS. Among the principles in Article 94, paragraph 2[55] is legality, linked to Articles 25, paragraphs 1 and 9, paragraph 3 SC, requiring that unlawful conduct and the associated penalties have a basis in law (reserve of law). A further closely related general principle in this provision (Article 94, paragraph 2 (a)) requires that the penalties for serious and very serious offences be specified in law passed by the Spanish Parliament, as established in Article 95, paragraph 3 BSRPE. For minor penalties, reference is made to the laws on the civil service, which are to establish the applicable rules (Article 95, paragraph 4), meaning that this type of offence can be set out in regulations.[56] Another general principle of law in Article 94, paragraph 2 (e) BSRPE is the non-retroactivity of unfavourable provisions, in accordance with Article 9, paragraph 3 SC. Finally, Article 94, paragraph 2 (e) sets out the principle of the presumption of innocence, provided for in Article 24, paragraph 2 SC, which applies to both criminal and administrative penalties, and means that penalties cannot be imposed without evidence.

2.5. Liability for Misconduct and State Liability

Liability for the misconduct of public employees (Article 93 BSRPE) is linked to the culpability principle, provided for in Article 24, paragraph 2 (d) BSRPE, and is based on the principle of legality. Public employees are liable for misconduct[57] when they induce others to commit a disciplinary offence (Article 93, paragraph 2) or when they cover up a very serious or serious offence that harms the State or citizens (Article 93, paragraph 3).

State liability arises when harm is caused to the State or citizens by a public employee, giving rise to the need for compensation to be provided to the injured parties. This liability of the authorities and public employees is set out in Article 36 (administrative liability) and Article 37 (criminal liability) of Law 40/2015 (LRPS). Under the procedure established for administrative liability, first, the person whose property or assets were damaged by a public employee claims damages from the State (Article 36, paragraph 1 LRPS). Second, once the injured party has been compensated, if the claim was successful, the State may hold the public employee accountable if they engaged in wilful misconduct, negligence or

54 Law on the Legal Regime of the Public Sector of 1 October 2015 (*Ley 40/2015 de Régimen Jurídico del Sector Público*), BOE no. 236, pp. 89411–89530; www.boe.es/eli/es/l/2015/10/01/40/con.

55 Sánchez Morón (2022), pp. 343 f. undertakes, with ample case law citations from the Constitutional Court and the Supreme Court, the study of these principles.

56 The case law on minor penalties is nuanced. Although it is possible to set these penalties out in regulations – for civil servants there are, in fact, regulations: Royal Decree approving the Regulations on the Disciplinary Regime for Civil Servants in the State Administration of 19 January 1986 (*Real Decreto 33/1986, de 10 de enero, por el que se aprueba el Reglamento de Régimen Disciplinario de los Funcionarios de la Administración del Estado*), BOE no. 15, pp. 2377–2380; www.boe.es/eli/es/rd/1986/01/10/33/con – it depends on the provisions of the laws implementing the BSRPE, see Trayter Jiménez (2008), p. 918 f. and Sánchez Morón (2022), p. 344 f.

57 Articles 93 and ff. BSRPE (Title VII) apply to civil servants and labour-law contract staff. However, the labour legislation is also applicable to the latter (Article 93, para. 4).

gross negligence (Article 36, paragraph 2 LRPS), in accordance with a procedure, i.e. with all type of guarantees.[58]

IV. The Impact of European Union Public Employment Law on Spanish Legislation

European Union (EU) law on public employment can be studied from two perspectives. First, it can be examined from the point of view of the organisation of public employment in the EU and the regulations that have developed it, given that the EU has its own administrative structure with its public employees in the service of European institutions.[59] This law on the European civil service has evolved from the passing of the Treaty establishing the European Coal and Steel Community of 1951 to the passing of Regulation (EEC, Euratom, ECSC) 259/1968[60] and Council Regulation (EC, Euratom) 723/2004 of 22 March 2004[61] amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.[62] These regulations on the European civil service guarantee the autonomy of the system and regulate the legal relationships between the institutions and the civil servants, establishing rights and obligations.[63] The autonomy of the system was further ensured by the creation of a specialised jurisdiction by Decision 2004/752 EC of 2 November 2004,[64] establishing the European Civil Service Tribunal (dissolved on 1 September 2016).

Second, it can be studied from the point of view of the impact that this law on the European civil service has had on the Member States. Given that it is EU law, it has primacy and direct effect, and therefore prevails over any conflicting law of the Member States. Article 45, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU) refers to the free circulation of workers within the EU. However, Article 45, paragraph 4 establishes an exception for public employees that has been interpreted restrictively by the Court of Justice of the European Union (CJEU), which in an early judgment,[65] found that the restriction in Article 45, paragraph 4 applied to jobs "involving direct or indirect participation in the exercise of powers conferred by public law and duties

58 In practice, only very rarely does the State seek to hold public employees accountable, despite the fact that the Law on the Legal Regime of the Public Sector of 1 October 2015 (n. 54) exempts public employees from cases of ordinary negligence, thus providing a margin of protection in their actions, see García Macho (1994a), pp. 768 f. and the list of bibliography.

59 See *The Civil Service of the European Union* by S. Magiera in this volume.

60 Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, OJ L 56/1.

61 Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, OJ L 124/1.

62 On the broad development of the European civil service, see Ruano Vila (2015), pp. 103 f. and the list of references cited.

63 Statutory and contractual links are established, with the statutory link giving greater job stability and being the result of a unilateral decision of the competent authority. The contractual link can be for an indeterminate term.

64 Decision 2004/752 EC of 2 November 2004 establishing the European Union Civil Service Tribunal, OJ L 333/7.

65 CJEU, judgment of 17 December 1980, *Commission v. Kingdom of Belgium*, C-149/79.

designed to safeguard the general interests of the State or of other public authorities". In subsequent judgments,[66] Article 45, paragraph 4 TFEU was construed in such a way as to limit its application to the exercise of powers conferred by public law and the safeguard of the general interest of the State.

As a rule, only Spanish nationals can access public employment in Spain (Article 56, paragraph 1 (a) BSRPE). However, based on the freedom of circulation of workers (Article 45, paragraph 1 TFEU), nationals of EU Member States are permitted to work as civil servants in public jobs under the same conditions as Spanish nationals, with the exception of jobs requiring the exercise of official authority or those that affect the safeguarding of the general interest of the State or government administration (Article 57, paragraph 1 BSRPE). To define these indeterminate legal concepts, European Commission Communication 88/C 72/02 "Freedom of movement of workers and access to employment in the public service of the Member State – Commission action in respect of the application of Article 48 (4) of the EEC Treaty [current Article 45, paragraph 4 TFEU]" was issued, in which the activity sectors where this exception applied were specified.[67] The sectors included the armed forces, the police, and other forces for the maintenance of order, the judiciary, and so on, and certain jobs in regional governments, central banks, and so on. However, this communication established that Member States must demonstrate, for the recruitment of certain jobs, the link between the activity and the exercise of official authority of the State, in which case the requirement of nationality can be maintained. A number of judgments of the CJEU established that the activity of a secondary schoolteacher did not imply the exercise of powers conferred by public law, and thus in this case the requirement of nationality cannot be maintained.[68]

On the basis of European civil service law, the BSRPE establishes in Article 9, paragraph 2, referring to civil servants, that no public administration job can be reserved for Spanish citizens unless it entails exercising powers conferred by public law or safeguarding the general interest, in accordance with the terms of the implementing laws of the public entity in question. As a continuation of this provision, Article 57, paragraph 1 (2) BSRPE establishes that the governing bodies of the public administrations determine the groupings of civil-servant jobs set out in Article 76 for which foreign nationals cannot be hired. Therefore, it is the governing bodies of each public administration that determine the civil-servant job groupings that nationals of other Member States cannot access. For the State administration, Royal Decree 543/2001 of 18 May 2001[69] governs the access of foreign nationals to which the free circulation of workers applies to public employment in the

66 E.g. CJEU, judgment of 24 May 2011, *Commission v. French Republic*, C-50/08, para. 106, finding that the activities of notaries do not entail the exercise of official authority, or CJEU, judgment of 10 September 2014, *Haralambidis v. Casilli*, C-270/13, which defines the concept of public employment under Article 45, para. 4 TFEU.

67 Commission Communication Freedom of movement of workers and access to employment in the public service of the Member States – Commission action in respect of the application of Article 48 (4) of the EEC Treaty, 88/C 72/02 (1988), OJ C 72/2.

68 E.g. CJEU, judgment of 3 July 1986, *Lawrie-Blum v. Land Baden-Württemberg*, C-66/85.

69 Royal Decree on access to public employment in the General State Administration and its public bodies for nationals of other States to which the right to free movement of workers applies of 18 May 2001 (*Real Decreto 543/2001 sobre acceso al empleo público de la Administración General del Estado y sus Organismos públicos de nacionales de otros Estados a los que es de aplicación el derecho a la libre circulación de trabajadores*), BOE no. 130, pp. 19087–19089; www.boe.es/eli/es/rd/2001/05/18/543/con.

State administration and autonomous entities. The regional Autonomous Communities have also passed laws and decrees on the access of Member State nationals to government jobs.[70]

V. Final Considerations: Public Employment and the Principle of Democracy

Spain's history, in which the true problems faced by the country were never addressed,[71] significantly conditions any deep reform of the organisation of public administration. This is the context in which public employment sits, and is the cause of its deficiencies. There has never been a firm political will to profoundly reform government administration, and this is still the case. Deep reform would be complex, but it must happen as soon as possible if Spain is to put itself at the forefront in administrative organisation.

Certain deficiencies in public employment have been highlighted over the previous pages.[72] In local government, the number of public employees hired under labour-law contracts has grown substantially, and this is positive for the flexible and effective running of the administrative organisation. However, this has not occurred at the national and regional levels, where there are far more civil servants than labour-law contract staff. This hinders the efficient running of government.

The selection system for public employees, especially senior civil servants, suffers deficiencies that thwart effective operation in the service of the general interest of government (Article 103, paragraph 1 SC). The selection of the specialised civil-servant bodies via essentially rote-learning processes (the competitive entry exams), which furthermore require many years to prepare for, amounts to a violation of the right of equal access under Article 23, paragraph 2 SC. Likewise, this exam system makes the government less efficient and creates lobby groups that can work against the general interest. Also, the shameless politicisation in the selection of the so-called positions of trust is a heavy burden on the operation of government.[73] Linked to this are the rules on conflicts of interest. In 1984, these rules constituted a major advance in the fight against corruption and inefficiency, but today, they are inadequate for the operation of a modern and efficient government.

These contradictions in the administrative organisation, along with the others highlighted throughout this contribution, demonstrate the lack of political will to address

70 This has occurred, for instance, in Catalonia (Decree 389/1996 of 2 December 1996), Aragon (Decree 14/1996 of 26 July 1996), Madrid (Decree 230/2001 of 11 October 2001), etc.

71 When there was a will in the Second Republic, a coup put an end to it. But even much earlier, following the Constitution of Cadiz of 1812, attempts were made at resolving Spain's political and socio-economic problems, but they failed, owing to the opposition of the Spanish oligarchy.

72 These and other deficiencies have been highlighted by Sanchez Morón (2012), pp. 21 f. and Fuentetaja Pastor (2012), pp. 73 f.

73 This politicisation is seen in Article 12, para. 1 BSRPE, which allows political leaders (ministers, mayors, etc.) to hire the so-called positions of trust or special advisers at their discretion. Individuals hired in this way usually hold positions in the party governing the body in question and are neither impartial nor politically neutral, in addition to being a waste of money.

this situation, the roots of which lie in the deficient operation of the democratic system.[74] The principle of democracy gives a central role to citizens in forming the political will, and this includes the democratising of administrative policy,[75] in other words, the application of this principle to the actions of the administration. This principle of democracy must also be applied to the deep restructuring of public employment in Spain if the aim is to achieve an effective administration in the service of the interests and needs of citizens.

Bibliography

Álvarez Junco J. (2022), *Que hacer con un pasado sucio*, Barcelona: Galaxia Gutenberg.

Boix Palop A., Soriano Arnanz A. (2020), *El acceso al empleo público en España: Estudio comparado y propuestas de mejora*, Valencia: Publicacions de la Universitat de València (PUV).

Boix Palop A., Soriano Arnanz A. (2021), 'Sobre las posibilidades de reforma del modelo de empleo público español: límites constitucionales y jurídicos al modelo actual y sus sistemas de acceso', 20 *Revista Vasca de Gestión de Personas y Organizaciones Públicas*, 52–73.

Boto Álvarez A. (2020), 'La metamorfosis de la función pública francesa: laboralización y flexibilidad', 53 *Revista General de Derecho Administrativo*, 1–9.

Cámara del Portillo D. (1988), 'La Función Pública ante el Tribunal Constitucional: una oportunidad perdida', 57 *Revista Española de Derecho Administrativo*, 101–120.

Fuentetaja Pastor J.A. (2012), 'De la Función Pública en tiempos de crisis a la crisis de la Función Pública', in Fuentetaja Pastor J.A., Cantero Martínez J. (eds), *Crisis económica y Función Pública*, Navarra: Thomson Reuters Aranzadi, 73–107.

García de Enterría E. (1985), *Administración española*, 4th edition, Madrid: Civitas.

García Macho R. (1992), *Las relaciones de especial sujeción en la Constitución española*, Madrid: Tecnos.

García Macho R. (1994a), *Das Recht des öffentliches Dienstes in den Mitgliedstaaten der Eruropäischen Gemeinschaft*, Berlin: Duncker und Humblot.

García Macho R. (1994b), *Secreto profesional y libertad de expresión del funcionario*, 1st edition, Valencia: Tirant lo Blanch.

García Macho R. (2011), 'La transparencia en el sector público', in Blasco Esteve A. (ed), *El Derecho Público de la crisis económica. Transparencia y sector público. Hacia un nuevo Derecho Administrativo (Actas del VI Congreso de la AEPDA)*, Madrid: Instituto Nacional de Administración Pública (INAP), 247–282.

García Macho R. (2019), 'La crisis de Podemos versus la crisis de los Partidos políticos', *Levante*, www.levante-emv.com/opinion/2019/02/12/crisis-versus-crisis-partidos-politicos-13924951.html.

Garrido Falla F. (1985), *Reformas de la Función Pública*, Madrid: Real Academia de Ciencias Morales y Políticas.

Martínez Marín A. (2018), *Estudio sistemático del Derecho Administrativo*, Navarra: Thomson Reuters Aranzadi.

Nieto A. (1993), *Derecho Administrativo Sancionador*, 1st edition, Madrid: Tecnos.

Palomar Olmeda A. (2021), *Derecho de la Función Pública*, 15th edition, Madrid: Dykinson S.L.

Preston P. (2019), *Un pueblo traicionado*, Barcelona: Penguin Random House Grupo Editorial.

Ruano Vila J.V. (2015), *Medidas de ajuste del empleo público en tiempos de crisis económica*, unpublished doctoral thesis, Valencia.

Sainz Moreno F. (1988), 'El Estatuto de la Función Pública después de la Sentencia TC 99/1987 y de la ley 23/1988', 117 *Revista de Administración Pública*, 321–365.

74 The political process in Spain does not work properly owing to a system of representation in which the interests of the people, channelled through the political parties, are not sufficiently represented, this leading to a growing dissatisfaction; see García Macho (2011), pp. 251 f. and García Macho (2019).

75 In this chapter on public employment, the democratic legitimacy of the government, a topic of great weight and significance for the future, cannot be dealt with in detail.

Sánchez Morón M. (2012), 'Ajustes y reformas en el empleo público: situación actual y perspectivas', in Fuentetaja Pastor J.A., Cantero Martínez J. (eds), *Crisis económica y Función Pública*, Navarra: Thomson Reuters Aranzadi, 21–37.

Sánchez Morón M. (2022), *Derecho de la Función Pública*, 15th edition, Madrid: Tecnos.

Schmidt-Assmann E. (2003), *La teoría general del Derecho Administrativo como sistema*, Madrid: Instituto Nacional de Administración Pública (INAP) and Marcial Pons.

Schmidt-Assmann E. (2021), *La dogmática del Derecho Administrativo*, Sevilla: Global Law Press.

Trayter Jiménez J.M. (2008), 'El régimen disciplinario de los funcionarios públicos en el TREBEP', in Del Rey Guanter S., Férez Fernández M. (eds), *Comentarios al Estatuto Básico del Empleado Público*, Madrid: La Ley, 901–925.

14 The Civil Service in Sweden

Duality and Non-specific Status of Civil Servants

*Petra Herzfeld Olsson and Erik Sjödin**

I. Introduction

Civil servants in Sweden are characterised above all by two things: so-called duality and their non-specific status. Their duality refers to the fact that the public administration is independent of the government. Of course, the government is in charge of agencies which must apply the rules adopted by government and parliament, but when applying these rules in particular instances, involving the exercise of public authority, or when interpreting the law and taking decisions, the public administration acts totally independently. The government is prohibited from intervening in individual decision-making by agencies.

Non-specific status means that virtually no civil servants have a regulated status. Judges and a few very particular functions, such as the Chancellor of Justice (JK), are nowadays the only categories with such protected status.[1]

Duality has a very long history, which we shall touch upon briefly in the next section. The removal of civil servants' specific status is part of an ongoing ambition – at least since World War II – to equalise the status of civil servants with that of other workers.[2]

When talking about the public sector in Sweden, it is important to keep in mind that it is divided into three parts. First, there are the ministries, government offices (*regeringskansliet*), and government agencies (*förvaltningsmyndigheter*) at the national level. The government decides which agencies are needed to implement its policies and governs them via specific instructions. There are 367 government agencies. The largest is the police, with 35,500 full-time equivalent employees, and only five agencies have more than 10,000. Indeed, about 40% of agencies have fewer than 50 full-time equivalent employees.[3] The courts also belong to this first category, and they are of course totally independent *vis-à-vis* the government.

The other two parts of the public sector are the municipalities (*kommuner*) and the counties (*regioner*). The municipalities are responsible for schools, social services, and so

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1 For professors at the universities this type of employment was abolished in the late 1990s and the ones with this type of special employment have retired. Previously also officers of the Swedish Armed Forces were employed with a specific status. That was abolished in 1994, when the Swedish armed forces were reorganised into one agency, see Section 3 of the Act respecting the authority of public servants in positions of authority (*Lag om fullmaktsanställning*, 1994:261); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994261-om-fullmaktsanstallning_sfs-1994-261.

2 Hinn and Aspegren (1994), pp. 30 f.

3 Statskontoret (2024), pp. 11 and 23.

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on. The counties are responsible for healthcare, but also public transport. The number of people working for the municipalities and counties is much larger than in the case of government offices and agencies, totalling about 1.2 million.

This chapter will focus on civil servants employed by government agencies. The number of people working for the executive, government, and public administration was 294,146 in 2024, constituting 5.5% of the total workforce.[4] Among these, 53% are women, and 22.7% have a foreign background.[5] Almost 80% have a postsecondary education.[6]

The largest sectors in which civil servants operate are (1) research and education (21%), (2) administration and the economy (18%), (3) investigation (17%), and (4) legal work (17%).[7]

A comparative study on civil servants from 2010 asked what kind of reforms were being prioritised by the countries under discussion. Twenty-eight types of reform were included in the study, ranging from salary and working time reforms to ethics and anti-corruption measures. Country representatives were asked to rank them. It turned out that the Swedish representatives did not regard most of the proposed reform issues as priorities in Sweden, on the grounds that many of them had already been implemented.[8] Since then opinions about some of these issues have changed considerably. For example, "ethics and the fight against corruption" and "reform of principles of good administration/good governance" would probably be ranked as important and certainly not to be taken for granted. We shall return to this point.

The chapter is structured as follows. In Section II, we explain the meaning of duality and the separate status of the government and the agencies. In Section III, we provide an overview of the constitutional provisions governing the civil service. Section IV explains the differences between labour law regulation for civil servants and for private employees, as well as their implications. In Section V, the specific mechanisms aimed at ensuring that civil servants act in accordance with the law are introduced, and in Section VI, we discuss the extent to which the fundamental rights in the Swedish constitution (*Regeringsformen*, hereafter the Instrument of Government) also apply to civil servants.[9] In Section VII, we highlight issues currently under debate and end our chapter with some conclusions.

II. Duality

"Agencification" in Sweden is a comparatively old tradition.[10] Strong government agencies and the importance of the Swedish public administration – and thereby the work of civil servants – were established as early as the 17th century, when Chancellor Axel Oxenstierna governed the country, first on behalf of King Gustaf II and then as a caretaker, because of Queen Kristina's youth and later on her ascendence to the throne.[11] During this period,

4 See https://www.arbetsgivarverket.se/statistik-och-analys/staten-i-siffror-anstallda-i-staten.
5 See https://www.arbetsgivarverket.se/statistik-och-analys/staten-i-siffror-anstallda-i-staten.
6 Statskontoret (2024), p. 41.
7 Statskontoret (2024), p. 38.
8 Demmke and Moilanen (2010), p. 113.
9 Instrument of Government (*Regeringsformen*, SFS 1974:152); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/kungorelse-1974152-om-beslutad-ny-regeringsform_sfs-1974-152.
10 Larsson and Bäck (2008), p. 50.
11 Larsson and Bäck (2008), p. 54.

a strong central administration was created.[12] Duality was established later, during the first part of the 18th century.[13] Today, the central public administration is divided into ministries and government agencies. Comparatively few civil servants work in ministries, and expert knowledge is in many cases to be found among the civil servants in the 367 government agencies.[14]

The agencies are steered by the government or, in a few cases, Parliament. According to the Instrument of Government, "The Chancellor of Justice (JK) and other State administrative authorities come under the Government unless they are authorities under the Riksdag according to the present Instrument of Government or by virtue of other law."[15]

The government rules by means of instructions, ordinances, and government assignments, as well as informal contacts.[16] Instructions, for example, can lay down how the economic resources allocated to a given agency should be used.[17] The government also appoints the heads of government agencies, normally for six years, with a possible prolongation for three years.[18] This process has been made more transparent in recent years.[19] There is an ongoing discussion about the politicising of appointments of directors general of government agencies.[20] A new government with a clear political ambition to change the direction in a particular policy field is likely to appoint a new director general for the agency responsible. At the beginning of 2023, for example, the new right-wing/conservative government decided to appoint new director generals for the Swedish Migration Agency and the Swedish International Development Cooperation Agency. The responsible ministers justified these decisions as follows: "New eyes are needed to pursue reform" and "we think that at this point international development policy will benefit from a new start."[21] Instructions and appointments are important instruments of authority.[22] However, the uniqueness of the Swedish system is connected to government agencies' semi-autonomous character.[23] This reflects their relationship with the government and the prohibition against ministerial rule.[24] Neither a minister nor the government as a whole can interfere with an administrative authority's or a civil servant's interpretations of the laws adopted by the Parliament (*Riksdag*). The administration's independence is also protected by the Instrument of Government (Chapter 12).[25]

According to Chapter 12, Section 2,

> No public authority, including the Riksdag, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law.

12 Larsson and Bäck (2008).
13 Heckscher (2020), p. 18.
14 Larsson and Bäck (2008), p. 192.
15 Section 1, Chapter 12 of the Instrument of Government.
16 Ahlbäck Öberg and Wockelberg (2016), pp. 133–134.
17 Larsson and Bäck (2008), p. 188; Pierre (2004), p. 49.
18 Larsson and Bäck (2008), p. 189.
19 Heckscher (2020), pp. 23–24.
20 Pierre (2004), p. 43.
21 Olsson (2023).
22 Larsson and Bäck (2008), p. 191.
23 Larsson and Bäck (2008), p. 175.
24 Larsson and Bäck (2008), pp. 175 and 188.
25 Ahlbäck Öberg and Wockelberg (2016), p. 132.

Chapter 12, Section 3, spells out the division of power between the parliament and the administration: "No administrative function may be performed by the Riksdag except inasmuch as this follows from fundamental law or from the Riksdag Act."

Thus, the agencies have constitutionally granted autonomy or, as it has been characterised in recent years, "separate status".[26] This is what the duality mentioned in the introduction refers to. When exercising public authority vis-á-vis an individual or applying the law, agencies are as independent as the courts.[27] It is clear, however, that there is a difference between judges and other civil servants. A civil servant who repeatedly makes mistakes and misinterprets the law can be reassigned and even dismissed, but that is not the case with regard to judges.

The aim behind this independence "is to secure the rule of law and uphold barriers against the abuse of power, to ensure that the State authorities take responsibility for their judgements".[28] Ragnemalm points out that the high quality of the Swedish administration is, to a large extent, attributable to the fact that it is exercised by autonomous agencies with integrity and responsible decision-makers, who are unable to blame others if anything goes wrong.[29] The public administration is thereby well equipped to handle international adjustments, being flexible without the need for continuous supervision by the highest political power.[30] Nevertheless, "informal contacts between departments and agencies are extremely frequent, primarily at the middle and lower institutional levels".[31]

Larsson and Bäck point out that it is difficult to politically corrupt or manipulate agencies or civil servants because they can refer to their "own autonomy on constitutional grounds".[32] This, together with the principles of equality and impartiality that govern decision-making, has laid the ground for the strong legitimacy of the Swedish administration.[33] The argument against politicising the appointment of director generals is precisely that it "undercuts professionalism, efficiency, merit-based career systems, and in the longer term the apolitical nature of the civil service".[34]

There is research that purports to show that civil servants' autonomy may be a corruption risk, but in fact, Sweden is well known for having one of the lowest levels of corruption in the world.[35] The foundation for this in Sweden was established in the second part of the 19th century when recruitment strategies were changed to emphasise merit and openness and decent wages.[36] The civil service was professionalised at that time.[37]

Thus, the responsibility for individual decisions taken by the agencies lies with the relevant civil servants. The corresponding responsibility – *tjänstemannaansvaret* – is

26 Hecksher (2020), p. 22.
27 Ragnemalm (2020), p. 38.
28 Ahlbäck Öberg and Wockelberg (2016), p. 133.
29 Ragnemalm (2020), p. 42.
30 Bull (2012), p. 8.
31 Pierre (2004), p. 50; Jacobsson and Sundström (2016), pp. 355–356.
32 Larsson and Bäck (2008), p. 194.
33 Rothstein (2020), p. 47.
34 Pierre (2004), p. 49.
35 Sweden is ranked as one of the least corrupt countries by Transparency International. Sweden is in fifth place in the Corruption Perception Index, see www.transparency.org/en/cpi/2022; see on this theme Rothstein (2020), p. 48.
36 Rothstein (2020), p. 52.
37 Rothstein (2020), referring to Anders Sundell, *Sveriges väg ut ur korruptionens grepp, Forskning och framsteg 2015*, 20 November 2022, https://fof.se/artikel/2015/10/sveriges-vag-ut-ur-korruptionens-grepp/.

therefore a unique and important aspect of the Swedish system, a point we will return to (see Section V).[38]

Duality, however, has been challenged to some extent by the multilevel governance that has evolved because of EU membership. This is something else we will come back to in Section VII.4 of this chapter.[39]

III. Still Governed by Specific Constitutional Provisions Whether Provided by a Specific Status or Not

Sweden is a monarchy, and the King is the head of State.[40] However, Sweden is also a parliamentary democracy. Four basic laws (*grundlagar*) regulate different aspects of how Sweden is governed. The Act on the Order of Succession (*Sucessionsordningen*)[41] regulates the passing of the crown to the monarch's eldest child. The Instrument of Government (*Regeringsformen*) contains the fundamental rules concerning how Sweden is governed and proclaims the central values of Swedish democracy. The Freedom of the Press Act (*Tryckfrihetsförordningen*)[42] and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*)[43] contain specific rules to guarantee freedom of expression, particularly via printed media, as well as television broadcasting. Together, these four basic laws are the equivalent of the Swedish constitution.

Three of these basic laws – the Instrument of Government, the Freedom of the Press Act, and the Fundamental Law on Freedom of the Expression – directly affect Swedish civil servants in different ways. Primarily, they affect how civil servants should perform their job assignments, for example, upholding equality before the law (Chapter 1, Section 9), and the fundamental rights civil servants have, like all citizens, *vis-à-vis* the State, which they can also assert against the State in its capacity as an employer. The basic law, which we believe is the best known – and the most cherished – at least by Swedes, is the Freedom of the Press Act. The principle of openness (*offentlighetsprincipen*) affects all civil servants because they know that most of their correspondence and documents may be released to anyone who requests this.[44]

The Instrument of Government also contains provisions with a direct focus on civil servants. One of the most fundamental obligations found in the Instrument of Government is that of equality before the law. According to Chapter 1, Section 9, "Courts of law, administrative authorities and others performing public administration functions shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality." This principle must be applied when civil servants fulfil their duties in relation to citizens. But it is also considered to apply when a government agency acts

38 Hecksher (2020), p. 26.

39 Larsson and Bäck (2008), p. 193.

40 Chapter 1, Section 5 of the Instrument of Government.

41 The Act of Succession (*Successionsordning*; SFS 1810:0926); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/successionsordning-18100926_sfs-1810-0926.

42 Freedom of the Press Act (*Tryckfrihetsförordningen*; SFS 1949:105); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/tryckfrihetsforordning-1949105_sfs-1949-105.

43 Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*; SFS 1991:1469); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/yttrandefrihetsgrundlag-19911469_sfs-1991-1469.

44 See, in general, Chapter 2 of the Freedom of the Press Act (n. 42); see also Hall (2016), p. 305.

as an employer in relation to its employees.[45] The principle of legality is also central to the Swedish administration. This principle is expressed in the Administrative Procedure Act (5 § *Förvaltningslagen*),[46] which states that an authority may take only such measures that are grounded in law.

Chapter 12 of the Instrument of Government contains provisions on government agencies. As already mentioned, the independence of government authorities has a long tradition and is also expressed in the Instrument of Government. Chapter 12, Section 2, contains the aforementioned prohibition of ministerial rule.

Civil servants are employed by the government or an agency (Chapter 12, Section 5). According to the government ordinance (*Myndighetsförordningen*), director generals of government agencies are employed by the government. Other employees are employed by the agency itself.[47] The Instrument of Government curtails the otherwise applied principle of contractual freedom when entering an employment contract. Only "objective factors such as competence and merit" may be considered when appointing civil servants.[48] The provision is supposed to promote recruitment of the most suitable candidates and to prevent nepotism (see Section IV.2).

Nowadays, there is a citizenship requirement only for specific positions in public administration. The main rule is that anyone may be employed, independently of citizenship.[49] The remaining citizenship requirements, besides those for judges and some very high ranking public officials – such as *riksdagens ombudsman*, *riksrevisorerna*, and *justitiekanslern* (Chapter 12, Section 6) – are not explicitly regulated in the Instrument of Government, but in laws, according to which prosecutors, the police and military personal must be Swedish citizens.[50] A special act concerning employees who perform duties of importance for Swedish security also lays down a citizenship requirement. This is for people performing work that is security-rated (*säkerhetsklassad*).[51]

As for judges, the basic rules for the status of civil servants are laid down by law (Chapter 12, Section 7). But only the "basic" rules must be established in that way.[52] Other regulations on employment relationships can be regulated by collective agreement. This is discussed further in Section IV. Chapter 2 of the Instrument of Government contains a charter of fundamental rights. Its role for civil servants is discussed in Section VI of this chapter.

45 The Swedish Labour Court, judgment of 13 March 1986 (AD 1986 no. 28).

46 Administrative Procedure Act (*Förvaltningslagen*; SFS 2017:900); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forvaltningslag-2017900_sfs-2017-900.

47 Section 23 of the Public Agency Ordinance (*Myndighetsförordning*; SFS 2007:515); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/myndighetsforordning-2007515_sfs-2007-515; see also Ehn (2016), pp. 340–341.

48 Chapter 12, Section 5 of the Instrument of Government, see Ehn (2016), p. 341.

49 Pfeiffer (2019), p. 36.

50 Section 5 of the Act on Public Employment (*Lag om offentlig anställning*; SFS 1994:261); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994260-om-offentlig-anstallning_sfs-1994-260.

51 Chapter 3, Section 11 of the Public Security Act (*Säkerhetsskyddslag*; SFS 2018:585); www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/sakerhetsskyddslag-2018585/_sfs-2018-585.

52 The Swedish word is *grundläggande*. It can also be translated as "fundamental".

IV. Civil Servants as Employees Regulated by Law

1. *Introduction*

Civil servants are workers, according to Swedish law. In accordance with reforms introduced after World War II, there has been an aspiration to align the regulation of their employment relationships with the rest of the labour market.[53] The Swedish labour market can be considered unique in a number of ways. Trade union density, as well as that of employers' organisations, is very high by international comparison. The social partners have historically been entrusted with the regulation of terms and conditions not only for the private sector but also for civil servants.

In this section, we will highlight some of the characteristics of civil servants. The focus will be on their employment relationships, collective bargaining, employee involvement, disciplinary sanctions, additional assignments, and dismissals. As a result of the aforementioned reforms, civil servants are governed by the same private law as the private labour market. The laws governing employment protection, vacations, and discrimination, as well as collective relations, all apply to civil servants.[54] Because of the requirements stipulated in Chapter 12, Section 7, of the Instrument of Government, introduced in Section III of this chapter, there are also some special regulations in different laws.

2. *Establishing Civil Servants' Employment Relationships*

As already mentioned, government agencies are employers.[55] There are today two ways of establishing employment: for most, it involves appointment (*förordnande*), but for some, it involves power of attorney (*fullmaktsanställning*). Individual government agencies are considered to bear employer responsibilities.

Besides the relevant contract, a decision to employ is also officially made by the government agency. Civil servants have a contract of employment with the relevant government agency, but the decision to employ is an official decision that can be appealed, for example, by other persons who have applied for the position.[56] The appeal is usually handled by a specific board of appeal (*Överklagandenämnd*).[57] The board can obviate the employment decision if, for instance, a less qualified candidate has been employed. This does not mean, however, that there are objective reasons for terminating the contract of employment of the person who was employed.[58]

53 Hinn and Aspegren (1994), p. 37; Ehn (2016), p. 333.

54 Employment protection Act (*Lagen om anställningsskydd*; SFS 1982:80); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-198280-om-anstallningsskydd_sfs-1982-80; Annual Leave Act (*Semesterlagen*; SFS 1977:480); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/semesterlag-1977480_sfs-1977-480; the Discrimination Act (*Diskrimineringslag*; SFS 2008:567); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/diskrimineringslag-2008567_sfs-2008-567; Co-determination Act (*Lag om medbestämmade i arbetslivet*; SFS 1976:580); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1976580-om-medbestammande-i-arbetslivet_sfs-1976-580; see also Ehn (2016), p. 341.

55 Section 23, para. 2 of the Public Agency Ordinance (n. 47).

56 Section 42 of Administrative Procedure Act (n. 46).

57 Hinn et al. (2015), p. 152; Ehn (2016), p. 341.

58 Swedish Labour Court, judgment of 14 December 2016 (AD 2016 no. 74). The fact that such a decision is not considered an objective reason to terminate an employment contract is being discussed. A government-appointed inquiry in 2022 suggested making such a decision an objective reason, SOU 2022:8, pp. 81–83 and 177–178. It is still unclear if the government will act on this proposal.

One difference from the private sector is that only objective factors, namely competence and merit, may be considered when selecting a suitable candidate. This is stated in the Instrument of Government, is then repeated in the Public Employment Act, and complements the obligation of equality before the law.[59] Competence includes theoretical and practical education, as well as previous experience. An overall evaluation is supposed to be made and other personal characteristics may also be included.[60] Merit includes experience obtained via previous service. This is often seen as expressed by a person's number of years employed as a civil servant, but private employment and parental leave may also be considered.[61]

As already mentioned, there is a citizenship requirement for some types of employment. There may also be a need to pass a security check.

There are also several provisions on how government agencies are supposed to inform people about vacant positions.[62]

According to the Employment Protection Act, contracts of employment can be either permanent or fixed-term.[63] An employer's ability to conclude fixed-term contracts may be altered in collective agreements.[64] This applies also to civil servants, and the Employment Protection Act governs the types of employment available.[65] There are also some additional options in the Public Employment Ordinance.[66]

3. Collective Bargaining for Civil Servants

As already mentioned, collective agreements are central to setting terms and conditions of employment in Sweden. This applies also to civil servants. They are, to a large extent, organised in trade unions. Trade union density has decreased in recent years, in the public sector as well. In 1995, 94% of public employees were organised, falling to 79% by 2022.[67]

Civil servants are organised in a number of trade unions. Some unions organise civil servants with a specific occupation, such as the Swedish Police Union (*Polisförbundet*) and those that aim to organise all workers employed by the State, such as the Union of Civil Servants (*Fackförbundet ST*). Some unions organise workers in the private sector, as well as civil servants. One such organisation is the trade union Akavia, which, among other groups, organises lawyers and, to some extent, also judges. Few statutory rules apply to

59 Chapter 12, Section 5, para. 2 of the Instrument of Government and Section 4 of the Public Employment Act (n. 50); see Ehn (2016), pp. 340–341.

60 Legislative proposal, Prop. 1973:90, pp. 405 f.

61 Legislative proposal, Prop. 1984/85:219, p. 20.

62 See, for example, Sections 6–8 of the Public Employment Ordinance (*Anställningsförordningen*; SFS 1994:373); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/anstallningsforordning-1994373_sfs-1994-373 and Section 2 of the Ordinance on governmental employee notification (*Förordning om statliga platsanmälningar*; SFS 1984:819); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-1984819om-statliga_sfs-1984-819.

63 See Sections 4–6 of the Employment Protection Act, (*Lagen om anställningsskydd*; SFS 1982:80); www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-198280-om-anstallningsskydd_sfs-1982-80/.

64 On this subject, see Fahlbeck (2006/07), pp. 42 f.

65 E.g. a new collective agreement for post-doctoral researchers was concluded in 2022, Agreement on fixed-term post-doc employment (2022).

66 Section 9 of the Public Employment Ordinance (n. 62).

67 Medlingsinstitutet (2023), p. 156. The numbers also include workers employed by municipalities and regions.

trade unions; apart from the prohibition of discrimination, they are primarily governed by their statutes.[68]

In collective bargaining, the State is represented by a government agency, namely the Swedish Agency for Government Employers (*Arbetsgivarverket*).[69] This Agency is organised as a type of employers' federation and the different government agencies (343 in all) are members of *Arbetsgivarverket*. Their primary duty is to bargain with trade unions and to conclude collective agreements for the approximately 270,000 civil servants.[70] *Arbetsgivarverket* has concluded several central collective agreements with different unions: on wages, working time, and collaboration.

According to the Codetermination Act, collective agreements bind the parties to the agreement but also their members (Section 26). For civil servants, collective agreements have something that resembles an *erga omnes* effect. According to the ordinance on public collective agreements, government agencies shall apply collective agreements to all their employees, regardless of whether they are bound by them.[71] The coverage of collective agreements for civil servants employed by government agencies is thus 100%.

According to the Instrument of Government, workers and employers have the right to resort to collective action to settle their conflicts of interest.[72] Limitations are to be set by law or agreement. Civil servants thus have the right to collective action within collective bargaining to support their demands.[73] It is rare for civil servants to take collective action, but it has happened. The Swedish Codetermination Act contains some general rules on collective action, the most important of which is that the conclusion of a collective agreement is followed by a peace obligation (Section 41 of the Codetermination Act).[74] As regards civil servants, certain rules limit the right to resort to collective action. Concerning civil servants whose work involves the exercise of official authority (*myndighetsutövning*) only strikes, refusal to perform overtime or blockade on new hiring are allowed as collective action (Section 23, paragraph 1 of the Public Employment Act).[75]

Civil servants are also banned from taking part in political strikes, that is, collective action aimed at influencing domestic political circumstances: this applies to all civil servants, not just those whose labour includes the exercise of official authority.[76] Traditionally, there are very few political strikes in Sweden.[77] Civil servants are allowed to take part in collective action only after a decision has been taken by their trade union (Section 25 of the Public Employment Act). Noncompliance with these provisions may result in an obligation to pay punitive damages.

68 See, for example, Hemström (2011).

69 Ehn (2016), p. 333.

70 www.arbetsgivarverket.se/in-english/.

71 See Section 7 of the Ordinance on collective agreements in the public sector (*Förordning om statliga kollektivavtal, m.m*; SFS 976:1021); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-19761021-om-statliga_sfs-1976-1021.

72 Sigeman (2008), pp. 156 f.

73 Ryman (1999), pp. 259 f.

74 On the peace obligation that follows a collective agreement see, for example, Källström et al. (2022), pp. 41 f.

75 Swedish Labour Court, judgment of 2 October 1986 (AD 1986 no. 111) and judgment of 19 September 1983 (AD 1983 no. 129).

76 Section 23, para. 3 of the Public Employment Act (n. 50) and Swedish Labour Court, judgment of 3 October 1986 (AD 1986 no. 113) and judgment of 1 October 1986 (AD 1986 no. 108).

77 See, for example, Fahlbeck (2007).

There is also a special collective agreement for civil servants (*huvudavavtal*) that regulates the right to resort to collective action. According to Collective Agreement HA 2000, there are for example specific rules on collective action that may be harmful to the community. If a party considers that a proposed action may be of that type, they can have it referred to the board (*Statstjänstenämnden*) established in the agreement. If the board considers that a conflict may unduly disrupt important societal functions, the board can order the parties to desist.[78]

4. Employee Involvement for Civil Servants

As already mentioned, civil servants are considered to be regular workers and are, to a large extent, organised in trade unions. Sweden has a single-channel system when it comes to employee involvement.[79] Involvement is exercised through and by trade unions, primarily those with a collective agreement. The rules on employee involvement are found primarily in the Codetermination Act. Most of the EU *acquis* on employee involvement is implemented in the Codetermination Act and it is also applicable to civil servants.[80] There are, however, some limitations in line with the exercise of democracy in general elections (Section 2 of the Codetermination Act).

Trade unions are entitled to be informed about general developments (Section 19 of the Codetermination Act). Trade unions are also entitled to consultations (Sections 11–13 of the Codetermination Act). Employers must initiate consultations before a decision to significantly change their activities. This includes, for example, redundancies but also the introduction of new processes. The employer must do the same concerning significant changes in working or employment conditions. This concerns the relocation of individual workers.[81]

We have also mentioned that contracts of employment are concluded with specific government agencies. When it comes to employee involvement, it is clear from the judgments of the Labour Court that sometimes consultations need to be carried out at the level at which decisions are taken.[82] For civil servants, there is also some equivalent to board-level representation. Swedish government agencies have boards, and an employee representative has the right to participate in the board's work. An employee representative is to be appointed by the trade union.[83]

5. Additional Assignments

The Public Employment Act contains specific rules on civil servants' ancillary activities (*bisysslor*). That could include various things, such as selling merchandise in your spare time, working for a sports club, and so on. According to Section 7, a civil servant may not have any assignment or pursue any activity that may adversely affect confidence in their

78 See further Nyström (2019).

79 Compare Jacobs (2010) and Jacobs (2009).

80 See Sjödin (2015), passism.

81 Swedish Labour Court, judgment of 23 June 2010 (AD 2010 no. 52).

82 Swedish Labour Court, judgment of 14 December 2016 (AD 2016 no. 74).

83 Employee Representative Ordinance (*Personalföreträdarförordning*; SFS 1987:1101); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/personalforetradarforordning-19871101_sfs-1987-1101.

impartiality or that may harm the reputation of the government agency. This prohibition may come into effect whether the civil servant receives payment or not. It is the risk of harm to faith in the civil servant's impartiality that is decisive.

Civil servants are supposed to inform their employer of any additional activities so that the latter can assess any potential risk. The employer may decide that a civil servant must desist from such activities or not commence them (Sections 7(b) and 7(c)).

The employer's decision is usually taken by the Personal Liability Board and may be appealed to the Labour Court. There are several judgments from the Labour Court that concern the permissibility of ancillary activities. For example, in one case, a policeman was not permitted to sell trailers on the side.[84] In another judgment, the issue was whether two policemen could join the board of the association for supporting the Swedish national football team. The Labour Court ruled that it was permissible, primarily because they both served in the north of Sweden, and national team football matches were regularly played in the south of Sweden.[85]

6. Dismissal of Civil Servants

As already mentioned, the Instrument of Government contains special rules on employment protection for judges. These grounds are repeated in the act on proxy employment, which applies to judges. The very strict employment protection is to guarantee their independence.[86]

For other civil servants, the general Swedish Employment Protection Act is applicable. In 2022 Swedish employment protection was reformed.[87] The reform has highlighted the position of civil servants and the fact that basic provisions concerning their position must be stated in the law. Part of the reform is that the social partners may agree upon what constitutes objective reasons for terminating a contract of employment. The social partners for the private sector concluded such an agreement on 22 June 2022. This will not apply to civil servants, however.

According to the Employment Protection Act, there are primarily two ways in which an employer can end a contract of employment. Either through termination (*uppsägning*), according to Section 7, or dismissal (*avsked*), according to Section 18. A termination is followed by a period of notice that usually depends on the time the person has been employed. The employer's termination decision requires objective reasons, which may be related to either personal conduct or redundancy. As for reasons concerning personal conduct, the employer bears the burden of proof, and the employer's reasons may be scrutinised by the court.

Redundancy (*arbetsbrist*) is considered an objective reason for termination. In the case of redundancy, the principle of seniority applies. In other words, the last person to be employed will be the first to leave in the case of redundancy.

Dismissal is more or less immediate and is generally reserved for the worst cases of misconduct, such as violence at the workplace and theft from the employer. According to case

84 Swedish Labour Court, judgment of 25 May 2005 (AD 2005 no. 55).

85 Swedish Labour Court, judgment of 30 March 2022 (AD 2022 no. 18).

86 Sections 5–7 of the Act Respecting the Authority of Public Servants in Positions of Authority (n. 1).

87 Ulander-Wänman (2022); see also Sjödin and Selberg (2022); Herzfeld Olsson (2022).

law, there is less acceptance of crimes committed outside the workplace; such crimes can lead to dismissal when this is not the case in the private sector.[88]

V. Control Mechanisms, Including Disciplinary Sanctions

As already mentioned, the first chapter of the Instrument of Government entails the basic obligation to uphold equality before the law. Not following the laws that govern the specific activities of government agencies is one obvious way of not upholding equality before the law and also the principle of legality.

There are two quite different mechanisms that can be used to remedy such behaviour. First, there is a specific crime in the Swedish penal code, official misconduct (*tjänstefel*). But before we turn to the Criminal Code, we shall introduce two other fundamental public institutions with an important role in remedying civil servants' wrongdoing.

Two public institutions supervise compliance with the basic laws and administrative standards. The first is the *Justieombudsman* (JO, Parliamentary Ombudsman) who is appointed by the Swedish Parliament (*Riksdag*). One of the JO's assignments is to monitor whether government agencies and their employees follow the laws that govern their activities.[89] One of the JO's most significant powers is that they issue statements after individual complaints or after a review, which may contain criticisms, as well as referrals to public prosecutors to instigate criminal charges against an individual employee. In their statements, the JO can express "criticisms" of an individual civil servant, such as a judge. Receiving such criticism is perceived as serious among civil servants. The other institution is the *Justiekansler* (JK, Chancellor of Justice), who is tasked, among other things, with monitoring whether the freedom of the press is infringed. This is one way in which the importance of freedom of the press is emphasised in the Swedish constitutional context. The JK regularly issues criticism against managers in the public administration for having investigated employees who may have contacted the media, something that is prohibited by the Freedom of the Press Act.[90]

The decisions of the JO and the JK are an important source when determining demands made on civil servants. The JO's and the JK's interpretation of the obligations of civil servants in their public sector activities must be respected. Criticism, especially from the JO, is taken seriously, and most civil servants try to avoid it.

Official misconduct (*tjänstefel*), as already mentioned, is specifically applicable to civil servants in the Swedish penal code. This is when someone intentionally or through negligence disregards their duties by action or omission when exercising public authority. To deprive someone of their freedom without legal cause can be one such example.[91] A policeman's uncalled-for use of a police dog has also been considered official misconduct.[92] Official misconduct may result in imprisonment of up to two years.

There are, however, several forms of wrongdoing that do not meet the criteria for criminal sanctions for official misconduct. For such misdemeanours, there is a specific regulation in the law on public employees, governing disciplinary procedures. For civil servants, there

88 Swedish Labour Court, judgment of 15 June 2011 (AD 2011 no. 56).

89 See, for example, Chapter 13, Section 6 of the Instrument of Government.

90 In Swedish, this is called *efterforskningsförbud*, see Chapter 2, Section 18 of the Freedom of the Press Act (n. 42), see also Hall (2016), p. 305.

91 Swedish Supreme Court, judgment of 9 June 2016 (NJA 2016 s. 463).

92 Swedish Supreme Court, judgment of 12 June 2017 (NJA 2017 s. 491).

are specific sanctions for dereliction of duty (*tjänsteförseelse*). That is when a civil servant intentionally or negligently breaches their employment obligations.[93] Sanctions include a warning or a wage deduction.[94] At government agencies, such sanctions are often decided by a Personnel Liability Committee (*personalansvarsnämnd*).[95] Their decisions can be appealed to the Labour Court.

According to the Labour Court, the aim of the provisions is to protect citizens' interest in the fulfilment of State activities without irrelevant considerations,[96] and to ensure the proper functioning of the public administration.[97]

VI. Civil Servants' Fundamental Rights

Chapter 2 of the Instrument of Government contains a charter of fundamental rights. The chapter contains political and civil, as well as a few social and economic fundamental rights. Some rights are absolute and cannot be restricted, such as the right to freedom of religion and the negative rights of freedom of opinion, but also prohibitions against capital punishment, torture, and retroactive punishment.[98] Others are relative and can be restricted by law, if proportionate, for example in order to satisfy appropriate purposes in a democratic society.[99] The rights to freedom of expression and freedom of association belong among the relative rights, as does the right to physical integrity.[100] The charter rights apply within the framework of relations between public institutions and the individual.[101] Public institutions within this meaning include not only the public administration but also the parliament, regions, and the municipalities, both in their capacity as legislators and when exercising their power practically.[102]

These fundamental rights also apply when public institutions act as employers in relation to their employees. The extent of their application within that employment relationship has been described in various ways. It has previously been claimed that the fundamental rights do not apply in cases in which a measure is adopted by an employer in public administration on the basis of a private law relationship.[103] The public employer would, from that perspective, be acting in two different capacities:

> On one side is the public body, a party to the private law employment relationship. On the other side it comes under the notion of "public institution", which has to respect workers' fundamental rights in accordance with the Instrument of Government.[104]

The distinction may reflect a view that the idea of providing public employees with stronger protection for fundamental rights than employees in the private sector is connected to the

93 Section 14 of the Public Employment Act (n. 50).
94 Section 15 of the Public Employment Act (n. 50).
95 Section 25 of the Public Agency Ordinance (n. 47).
96 Swedish Labour Court, judgment of 16 March 1977 (AD 1977 no. 44).
97 Swedish Labour Court, judgment of 26 May 1999 (AD 1999 no. 69).
98 Chapter 2, Section 1, point 6; Sections 2–5 and 10 of the Instrument of Government.
99 Chapter 2, Sections 20–24 of the Instrument of Government.
100 Chapter 2, Section 1, points 1 and 5 and Section 6 of the Instrument of Government.
101 Eka et al. (2018), p. 80.
102 Bull and Sterzel (2023), p. 60.
103 For an overview of the discussion, see Westregård (2002) pp. 221–231.
104 Larsson (2015), p. 91.

particular tasks associated with public authority. This is not the right place to reflect upon this further, however, and it is clear that this distinction is mainly overruled. Nowadays, according to the Labour Court, there is very limited room for setting aside obligations stemming from constitutional fundamental rights. The fact that the employment relationship is based on private law does not lead to the conclusion that individuals' constitutional freedoms should be set aside when the State acts as an employer.[105] The outcome may differ in exceptional cases, such as when an employee is in a particular position and responsible for an agency's decision-making or when serious collaboration problems are at stake.[106] This does not, however, prevent public employers from intervening if an employee does not fulfil their commitments in accordance with the employment contract, as long as the aim of the intervention is not to limit freedom of expression.[107] The JO and the JK shared this view in their decisions in recent decades.[108]

The case law from the Labour Court and the decisions of the JO and the JK, to a large extent, concern freedom of expression. Freedom of expression has a particularly strong position in Swedish law because of the corresponding rights in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The JO has, however, clarified that already, on the basis of freedom of expression in the Instrument of Government, employees have a right to express themselves without fear of reprisals.[109] Agencies accordingly may not act, either formally or informally, against employees who express views about the agency to the media or in other ways, as long as they do not breach their obligations laid down in the employment contract.[110] This starting point seems to apply on the basis of the provision in the Instrument of Government itself and is likely to apply along the same lines in relation to all the rights in Chapter 2 of the Instrument of Government. The Labour Court, for example, has concluded that the requirement to submit to mandatory medical examinations during the period of employment is a violation of the right to bodily integrity, which is part of the right to physical integrity in Chapter 2, Article 6, and must therefore be established by law.[111] The fact that the employer, in a given case, ordered the employee to submit to a medical examination was enough to establish that a violation had occurred.[112] The presumption in labour law doctrine is that anyone employed by a government agency can invoke their constitutional rights against their employer.[113] This interpretation is in line with how the European Court of Human Rights (ECtHR) interprets the provisions of the European Convention on Human Rights (ECHR). In *Heinisch*

105 Swedish Labour Court, judgment of 7 September 2011 (AD 2011 no. 74), see also Swedish Labour Court, judgments of 28 May 2003 (AD 2003 n. 51) and of 7 March 2007 (AD 2007 no. 2). For a discussion on these cases, see also Selberg and Sjödin (2013) and Persson (2020), pp. 245–253.

106 Swedish Labour Court, judgments of 18 June 2003 (AD 2003 no. 51) and of 9 March 2011 (AD 2011 no. 15).

107 Larsson (2015), p. 92; Persson (2022), p. 541.

108 Larsson (2015), pp. 92–93.

109 For example, see the following decisions by JO: JO 2009/10, p. 456 and JO 2010/11, p. 605.

110 Bull and Sterzel (2023), p. 64.

111 Swedish Labour Court, judgment of 22 August 1984 (AD 1984 no. 94).

112 Swedish Labour Court, judgment of 22 August 1984 (AD 1984 no. 94).

113 Nyström (2019), p. 37; Grahn and Kjallström (2017), pp. 27–28; Källström and Malmberg (2022), pp. 279 f. and pp. 302 f.

v. Germany, for example, which dealt with freedom of expression in (Article 10 ECHR), the ECtHR stated that:

> Article 10 of the Convention also applies when the relations between employer and employee are governed, as in the case at hand, by private law and the State has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals.[114]

It is somewhat unclear at what point in the employment relationship the Swedish constitutional fundamental rights begin to play a role. When talking about the right to privacy, for example, the wording in the section is that "everyone shall be protected in their relations with public institutions against any physical violation" and also "protected against bodily searches, house searches and other invasions of privacy, against the examination of mail or other confidential correspondence, and against eavesdropping and the recording of telephone conversations or other confidential communications".[115] This also includes medical examinations and vaccinations.[116] A requirement to submit to a medical examination during a recruitment process is considered to fall outside this protection, as such a demand is deemed to be a condition of employment and thereby not forced upon the job seeker.[117]

It is not clear whether this interpretation is still valid. For example, taking the jurisprudence of the European Court of Human Rights into consideration, it is clear that no one has a right to a specific position within the civil service or elsewhere. But when a decision is taken, a person's conventional rights must not be violated.[118] Hendrickx and Van Bever explain this in relation to the right to privacy under Article 8 ECHR in the following way: the employer "must, however, exercise that right with respect to the right to privacy of the job applicant", although they add that "the latter's reasonable privacy expectations are (. . .) in this case reduced because of the specific context".[119] The same applies to other rights in the ECHR.[120] The important aspect to take into account here is that job applicants are also covered by the rights laid down in the ECHR.

Independently if the interpretation of the Instrument of Government may be influenced by the interpretation of the ECHR, a wider application will come into play. The ECHR has a specific status in Chapter 2 of the Instrument of Government. Article 19 states: "No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental

114 ECtHR, judgment of 21 July 2008, Heinisch v. Germany, 28274/08, para. 44. See also Voorhoof and Humblet (2013), pp. 241 f. and *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

115 Chapter 2, Section 6 of the Instrument of Government.

116 Eka et al. (2018), p. 77.

117 Eka et al. (2018).

118 ECtHR, decision of 11 February 2020, *Steen v. Sweden*, 62309/17, paras. 20–22.

119 Hendrickx and Van Bever (2013), p. 186 and 189 ff.; see also *The Protection of Privacy in Civil Service Employment* by M. Otto in this volume.

120 See, for example, ECtHR, judgment of 11 January 2006, *Sørenssen and Rasmussen v. Denmark*, 52562/99 and 52620/99, paras. 59–61 and 64, concerning freedom of association (Article 11 ECHR); see also *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

Freedoms." The ECHR has been incorporated into Swedish law and is directly applicable in courts and by public agencies.[121]

In cases in which Swedish courts interpret the fundamental rights protected by both the Instrument of Government and the ECHR a thorough analysis of the meaning of both is carried out, and the most far-reaching right should be applied.[122] This would mean that in a case in which a job applicant finds their constitutional rights violated in a recruitment process and there is no legal basis for such a measure, the ECHR may be invoked and provide support for claims that the measure taken must be supported by law. That is perfectly natural as the ECHR is part of Swedish law and must be applied.

Besides the provisions we have mentioned, which apply to relations between public institutions and individuals, the right to take collective action is a constitutional right with wide application. It applies also in relations between private parties.[123] The right can be restricted by law and agreement. In Section IV, we discussed the restrictions that apply to civil servants.

VII. Recent Reforms

1. Articulated Goals for the Public Administration

In 2010 the Parliament adopted new goals for the public administration. The public administration should be innovative and collaborative, governed by the rule of law, effective, guided by high-quality services and accessibility, and thereby contribute to Swedish development and effective EU aims.[124] The Parliament thereby identified new values for the administration, such as innovation and collaboration.[125] Legal certainty and effectiveness are perceived as well-known concepts by agency heads, but collaboration and innovation need to be supplied with content.[126] The Swedish Agency for Public Management (*Statskontoret*, APM) claims that the ability of agency heads to provide balanced governance based on these different values presupposes that they have experience, but also courage and sensitivity. This is especially true when making trade-offs between the values of innovation and effectiveness.[127] Since 2022 APM has been assigned the responsibility to provide all State employees with brief training that includes the values governing their work.[128] The government has explained that the absence of corruption is key to the legitimacy and functioning of the public administration. A low level of corruption is central to

121 The Law on the European Convention on Human Rights and Fundamental Freedoms (*Lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*; SFS1994:1219); www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19941219-om-den-europeiska-konventionen_sfs-1994-1219; see also Legislative proposal, Prop. 1993/94:117, p. 33.

122 Legislative Proposal, Prop. 1993/94:117, pp. 37 and 39.

123 Chapter 2, Section 14 of the Instrument of government; see Swedish Labour Court, judgment of 28 May 2003 (AD 2003 no. 46); see also Eka et al. (2018), p. 110.

124 Legislative proposal, Prop. 2009/10:175, Parliamentary proposal, bet. 2009/10:FiU28, Parliamentary decision, rskr. 2009/10:315.

125 Statskontoret (2020), p. 5.

126 Statskontoret (2020), p. 6.

127 Statskontoret (2020), p. 7.

128 Marcusson (2022), pp. 84 and 88.

efficiency and the rule of law in the public administration and is thereby intrinsic to its goals.[129]

2. *Increased Efforts to Combat Corruption*

Although the Swedish public administration has one of the lowest levels of corruption in the world, efforts to prevent corruption have been intensified.[130] The web of rules governing the public administration plays an important role in preventing corruption.[131] It is not obvious that those rules are insufficient but the importance of embedding their active and faithful application must be continuously emphasised.[132] However, the new role of artificial intelligence in public decision-making and new modes of influencing public servants may require an update in this regard.[133]

The situation in Sweden, according to Transparency International, has deteriorated in recent years, and Swedes seem to be more worried about corruption than Danes or Finns.[134] In its reports, the Swedish National Audit Office (*Riksrevisionen*) has identified gaps in agencies' work against corruption.[135]

Against this background government offices have adopted an action plan for 2021–2023 to fight against corruption in the public administration.[136] The Swedish Agency for Public Management (*Statskontoret*) is tasked with monitoring the implementation of the action plan.[137] The action plan underlines that each agency is responsible for preventing corruption in its operations.[138] The action plan should therefore be regarded as providing guidance and help to agencies in this regard.

Among the measures implemented to contribute to this work is the new law (2021) on whistle-blowing, which replaces the previous one from 2016. The new law is part of the implementation of EU Directive 2019/1937 on the protection of persons who report breaches of Union law.[139] Other measures supporting the aim of the action plan include the training of civil servants in the underlying values that are supposed to govern their work (see Section VII.1). Also, an inquiry instigated in 2020 tasked with considering whether to strengthen criminal responsibility for official misconduct may be mentioned in this regard.[140]

The recommendations of the National Audit Office have clear implications for civil servants' work. Besides explicit rules on how to act to prevent corruption, concrete measures

129 Regeringens förvaltningspolitik (skr 2013/14:155).

130 For a historical overview of how Sweden went from a country with systemic corruption to a country with, in Rothstein's words, a "working social contract", see Rothstein (2021), pp. 60–74.

131 Persson (2022a), pp. 123–140.

132 Persson (2022a), p. 142.

133 Persson (2022a), p. 141.

134 Transparancy International (2021), p. 11.

135 Riksrevisionen (2013); Riksrevisionen (2019); Riksrevisionen (2020).

136 Regeringskansliet (2021).

137 Regeringsbeslut (2020).

138 Regeringskansliet (2021), pp. 5 and 13.

139 Legislative proposal, Prop. 2020/21:193, Parliamentary Proposal, bet. 2021722:AU3, Parliamentary decision, rsk. 2021/222:9. On EU whistle-blowers' protection, see *The Development of a Legal Framework on Whistleblowing by Public Employees in the European Union* by P. Provenzano in this volume.

140 Regeringskansliet (2021), pp. 15–16. The inquiry published its report in 2022 and did not suggest any changes, see SOU 2022:2, p. 364.

have been suggested, such as the "four eyes principle" and work rotation.[141] Critical areas identified include public procurement and payments, monitoring, strategic information, and permissions and certifications.[142] Increased control, risk analyses, routines, and information sharing are also listed as important areas, moving forward.

3. Discussion on Strengthening Responsibility for Official Misconduct

Since the reform governing civil servants' responsibilities (*Ämbetsansvarsreformen*) entered into force in 1976, the scope of criminal liability for civil servants in the performance of their duties has been discussed.[143] The 1976 reform significantly limited criminal responsibility to the exercise of public authority.[144] The aim of the sanctions introduced was to protect citizens' interest in the proper performance of public functions without taking irrelevant factors into account.[145] The main question that has been discussed in the meantime is whether stricter responsibility should be introduced in order to meet the aims of the sanctions.[146] In 1989, the scope was widened to cover not only decisions made in the exercise of public authority but also measures taken in connection with such decisions.[147] In a later inquiry studying the consequences of the reform it was clear that it was still mainly police officers and judges who were being prosecuted on these grounds.[148] The question was whether the threshold for reporting suspected official misconduct was too low. At that point no measures were taken affecting civil servants, as discussed in this chapter. Today, about half of the prosecutions for official misconduct concern police officers. People connected to law enforcement are still in the majority, but one-third belong to other categories.[149] In the discussion on where the line should be drawn between the interests at stake, it is clear that right-wing and economic-liberal parties tend to push for stricter criminal liability, while the Social Democrats, the Green Party and the left, in general, tend to find the present approach satisfactory. The most recent inquiry was instigated by the Parliament (right-wing and economic-liberal parties supported by the nationalist party) against the wishes of the government (a minority government).[150] The argument is that the rule of law and public trust in public administration require consideration of stricter criminal liability for official misconduct.[151]

The inquiry, however, clarified that the system of accountability is not built on criminal sanctions. Civil servants who intentionally or negligently disregard their duties in the course of their employment can be disciplined or lose their job (see Sections IV.6 and 5). Civil servants are also monitored by the JK and the JO. People who have experienced wrongdoing can also claim damages.[152] The inquiry did not find any strong reasons to

141 Regeringskansliet (2021), p. 17.
142 Regeringskansliet (2021), pp. 19–20.
143 Legislative proposal, Prop. 1975:78.
144 SOU 2022:2, p. 318.
145 Legislative proposal, Prop. 1975:78, p. 109.
146 SOU 2022:2, p. 321.
147 Legislative proposal, Prop. 1988/89:113, pp. 13 f.
148 SOU 1996:173, p. 143.
149 SOU 2022:2, pp. 336 f.
150 Parliament proposal, Bet. 2017/18:KU37, Parliament decision, rskr. 2017/18:229.
151 SOU 2022:2, p. 360.
152 SOU 2022:2, p. 365.

expand the scope for criminal misconduct, and did not suggest any changes.[153] In October 2022, a new right-wing/conservative government took office and already in its Statement of Government Policy it promised to expand the scope of criminal misconduct.[154] It remains to be seen what the result of this ambition will be.

Another inquiry has suggested that an increased possibility of suspending employees because of improper behaviour that jeopardises public confidence in agencies should be included in the law on public employees. Any practical change brought about by such an inclusion may be limited, as this is already possible in the collective agreements governing the sector.[155] One argument is that the important aspect of taking responsibility for the decision-making, which is crucial for a State under the rule of law (*Rechtsstaat*), is – for the moment – divided between criminal law and labour law in an incoherent way.[156] It is unclear whether the present government will pursue this last-mentioned proposal.

4. The EU's Effect on Civil Servants

EU membership has changed the framework within which the Swedish public administration operates, in several ways.[157] The government is no longer the only body steering their work. Many tasks are allocated to them directly through the EU law. Civil servants themselves also take an active part in implementing and developing EU law when interpreting Swedish law in light of EU obligations, and when they act as national representatives in the EU legislative process within the framework of so-called comitology.[158] A shift of power has taken place from the Parliament and government to the courts and government agencies.[159] Another observation is that EU-related work has led to an increase in informal cooperation between government and agencies.[160] Even if a lot of EU policymaking processes are allocated to the agencies due to a lack of resources and expertise within government offices, the government instead may "use and instruct the agencies in ways that may come close to ministerial rule".[161]

These aspects are important and affect the work of civil servants. Their duties have changed, as has the allocation of powers between government and agencies. However, these aspects of EU membership have not changed the labour laws governing their work, although legislative implications of EU membership in some cases have had such implications. As explained earlier, civil servants have far-reaching rights related to freedom of expression. Also, although EU Directive 2019/1937 on the protection of persons who report breaches of Union law may not have conferred any new rights on civil servants by requiring that public agencies set up a specific kind of organisation to handle whistleblowing issues in a more structured and rule of law–based way, the exercise of such rights

153 SOU 2022:2, pp. 367 f.; KU 2021/22:KU27.
154 Statement of government policy, 18 October 2022, p. 19.
155 SOU 2022:8, pp. 99–101; Djurberg Malm and Sannerholm (2022), p. 16.
156 Djurberg Malm and Sannerholm (2022), p. 14.
157 See, for example, Reichel (2006); Reichel (2010) and Hall (2016), p. 302.
158 Reichel and Åhman (2020), p. 64; Nergelius (2012), p. 90. See also Bergström (2005); Ahlbäck Öberg and Wockelberg (2016), p. 135.
159 Reichel and Åhman (2020), p. 65.
160 Hall (2016), p. 303.
161 Ahlbäck Öberg and Wockelberg (2016), p. 135.

is likely to increase.[162] The Swedish law on protection for persons reporting misconduct also covers not only EU law–related issues but a broader range. Unexpectedly, EU law has therefore provided Swedish civil servants with stronger protection within an already fairly well-protected field. EU membership and the incorporation of the ECHR have provided civil servants with more far-reaching fundamental rights, however. As a result, damages may be applicable if those fundamental rights are violated.[163] In Section VI, we mentioned that the personal scope of the fundamental rights in the Instrument of Government has been increased by the incorporation of the ECHR. Incorporation was considered necessary when entering the EU. The ECHR has also, in different ways, provided all workers, both civil servants and others, with more far-reaching rights.[164] The case law of the Swedish Labour Court establishing this fact concerns only private employees, but the implications are the same for civil servants. The same can be said of the EU Charter of Fundamental Rights (CFR). Many CFR rights are not protected as fundamental rights in the Instrument of Government: the right to annual leave, a maximum working week and rest periods, which are part of Article 31 CFR on fair and just working conditions, are not, for example.[165] These rights are, as discussed, of course protected in law but the implications of conferring on them the dignity of fundamental rights remain to be seen.

VIII. Concluding Remarks

We began this chapter by stating that civil servants in Sweden are characterised above all by two things: so-called duality and their non-specific status. In the chapter, we explain what all this means. Duality refers to the fact that the public administration, as laid down in the constitution in the Instrument of Government, is independent of the government. Of course, the government is in charge of agencies, which must apply the rules it and parliament adopt, but when applying these rules in particular instances, involving the exercise of public authority or when interpreting the law and taking decisions, the public administration acts totally independently. Thus, the government is prohibited from intervening in individual decision-making by agencies.

Non-specific status means that virtually no civil servants have a regulated status. The latter does not preclude, however, that civil servants to a certain degree are governed by different rules from those applying to private sector employees. A number of such provisions are found in the constitution. For example, in the Instrument of Government, the obligation to uphold equality before the law, the protection of fundamental rights, and the fact that only objective factors, such as competence and merit, may be considered when appointing civil servants apply. Freedom of expression is protected in several laws with constitutional status, as well as the principle of openness, both of which affect the work of public employees. Basic rules governing the work and employment conditions for civil servants must also, according to the Instrument of Government, be laid down by law. Still,

162 Djurberg Malm and Sannerholm (2022), p. 16.

163 Legislative proposal, Prop. 2017/18:7; see Bengtsson (2018) and Stenlund (2021), pp. 150 f.

164 Swedish Labour Court, judgments of 24 October 2012 (AD 2012 no. 75) and 15 August 2018 (AD 2018 no. 51).

165 CJEU, judgment of 25 November 2021, *WD v. job-medium GmbH*, C-233/20; CJEU, judgment of 16 July 2020, *B. K. v. Republika Slovenija (Ministrstvo za obrambo)*, C-242/19; CJEU, 17 March 2021, *Academia de Studii Economice din București v. Organismul Intermediar pentru Programul Operațional Capital Uman – Ministerul Educației Naționale*, C-585/19.

collective agreements play a crucial role in the public sector, and coverage is 100%. The right to resort to collective action is protected in the Instrument of Government. And for employees exercising official authority and, to a certain degree, also other public servants, specific restrictions regarding the right to collective action apply, both in law and collective agreements. The right to consultation is restricted only with regard to the exercise of democracy in general elections. Specific rules also apply to civil servants' ancillary activities. Such activities may not adversely affect confidence in the impartiality or harm the reputation of the government agency.

Civil servants' work is monitored by the JO and the JK to ensure that constitutional provisions are followed. A public servant can also, in contrast to employees in the private sector, be charged with official misconduct.

These rules illustrate a kind of ambivalence in relation to this sector. On one hand, the ambition has long been to emphasise the contractual aspect of the employment relationship and include civil servants within the scope of ordinary labour laws applicable to employees in the private sector. On the other hand, some aspects of their work are still considered to be so special that a number of specific rules apply. This ambivalence is illustrated very clearly in the doctrinal discussion of the basis on which civil servants should be protected by the fundamental rights in the Instrument of Government. Is it because when they act they promote the public interest, or is it because their employers represent the public?

Recent reforms may also be a sign of this ambivalence. The new emphasis on enforcing the goals of the public administration and increasing efforts to combat corruption illustrate that irrespective of whether the gap between the laws governing the working conditions of public and private employees is narrowed, the functions of the public administration require specific attention. The ongoing discussion on whether it would be beneficial to strengthen responsibility for official misconduct could also be seen from that perspective. After all, the public administration's tasks are fundamentally different from those of the private sector.

EU membership plays an important role in the public administration. A power shift between the government/parliament and the administration has to some degree taken place through the new venues for decision-making within the EU framework. New duties have been allocated to public servants in this regard. The EU has also provided public servants with better protection when whistle-blowing, while the implications of the EU Charter of Fundamental Rights and its strengthening of the legal status of rights such as annual leave, a maximum working week and rest periods remain unclear. The European Convention for Human Rights has extended the scope of fundamental rights in a way that can also be beneficial both to prospective public servants and those already on the inside.

To conclude, the question of how best to promote the integrity of civil servants in Sweden is likely to continue to involve labour-related issues, and the EU is likely to continue to play an important role in this regard.

Bibliography

Ahlbäck Öberg S., Wockelberg H. (2016), 'The Public Sector and the Courts', in Pierre J. (ed), *The Oxford Handbook of Swedish Politics*, Oxford: Oxford University Press, 130–146.

Bengtsson B. (2018), 'Skadestånd vid överträdelse av Europakonventionen – den nya lagstiftningen', *SvJT*, 93–127.

Bergström C.F. (2005), *Comitology – Delegation of Powers in the European Union and the Committee System*, Oxford: Oxford University Press.

Bull T. (2012), 'Oxenstierna och omvärlden', in Bull T., Halje L., Bergström M., Reichel J., Nergelius J. (eds), *Arvet från Oxenstierna – reflektioner kring den svenska förvaltningsmodellen och EU*, Stockholm: Sieps, 7–19.

Bull T., Sterzel F. (2023), *Regeringsformen – en kommentar*, Lund: Studentlitteratur.

Demmke C., Moilanen T. (2010), *Civil Services in the EU of 27: Reform Outcomes and the Future of the Civil Service*, Frankfurt am Main: Peter Lang.

Djurberg Malm K., Sannerholm R. (2022), 'Rättsstaten i den svenska förvaltningen', in Djurberg Malm K., Sannerholm R. (eds), *Rättststaten i den svenska förvaltningen – En forskningsantologi*, Stockholm: Statskontoret, 5–22.

Ehn P. (2016), 'The Public Servant', in Pierre J. (ed), *The Oxford Handbook of Swedish Politics*, Oxford: Oxford University Press, 332–346.

Eka A., Hirschfeldt J., Jermsten H., Svahn Starrsjö K. (2018), *Regeringsformen: med kommentar*, Stockholm: Norstedts Juridik.

Fahlbeck R. (2006), 'Derogation from Labour Law Statutes under Swedish Law', 1 *Juridisk Tidskrift*, 42–56.

Fahlbeck R. (2007), *Stridsåtgärder, särskilt sympatiåtgärder, på arbetsmarknaden och kollektiv reglering av anställningsvillkor: en internationell jämförelse*, Lund: Juristförlaget.

Grahn E., Kjällström S. (2017), A*nställdas integritetsskydd – och dataskyddsförordningen*, Stockholm, Warszawa: Norstedts Juridik.

Hall P. (2016), 'The Swedish Administrative Model', in Pierre J. (ed), *The Oxford Handbook of Swedish Politics*, Oxford: Oxford University Press, 299–314.

Heckscher S. (2020), 'Den Svenska förvaltningsmodellen med ett domstolsperspektiv', in Sandström L., Peterson C. (eds), *Den svenska förvaltningsmodellen*, Tallin: Institutet for rättshistorisk forskning, 16–27.

Hemström C. (2011), *Organisationernas rättsliga ställning*, 8th edition, Stockholm: Norstedts Juridik.

Hendrickx F., Van Bever A. (2013), 'Article 8 ECHR: Judicial Patterns of Employment Privacy Protection', in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, Oxford: Hart, 183–208.

Herzfeld Olsson P. (2021/2022), 'Den svenska modellen i en ny era', 3 *Juridiskt Tidskrift*, 783–798.

Hinn E., Aspegren L. (1994), *Statlig anställning: en lagkommentar och vägledning*, Stockholm: Fritze.

Hinn E., Aspegren L., Karlsson C.J. (2015), *Offentlig arbetsrätt: en kommentar till lagreglerna om statlig och kommunal anställning*, 3rd edition, Warszawa: Norstedts juridik.

Jacobs A. (2009), 'Collective Labour Relations', in Hepple B., Veneziani B. (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004*, Oxford: Hart, 201–232.

Jacobs A. (2010), 'Collective Self-Regulation', in Hepple B. (ed), *The Making of Labour Law*, Oxford: Hart.

Jacobsson B., Sundström G. (2016), 'The Europeanization of the Swedish State', in Pierre J. (ed), *The Oxford Handbook of Swedish Politics*, Oxford: Oxford University Press, 515–528.

Källström K., Malmberg J. (2022), *Anställningsförhållande: Inledning till den individuella arbetsrätten*, 6th edtion, Uppsala: Iustus.

Källström K., Malmberg J., Öman S. (2022), *Den kollektiva arbetsrätten: en lärobok*, 3rd edition, Uppsala: Iustus.

Larsson P. (2015), *Skyddet för visselblåsare i arbetslivet: en konstitutionell och arbetsrättslig studie*, Stockholm: Jure.

Larsson T., Bäck H. (2008), *Governing and Governance in Sweden*, Lund: Studentlitteratur.

Markusson L. (2022), 'Värdegrundsarbete som förvaltningspolitiskt verktyg', in Djurberg Malm K., Sannerholm T. (eds), *Rättsstaten i den svenska förvaltningen – En forskningsantologi*, Stockholm: Statskontoret, 81–102.

Medlingsinstituet. (2023), *Avtalsrörelsen och lönebildningen 2022*. Stockholm: Medlingsinstitutet.

Nergelius J. (2012), 'Om Oxenstiernas ständiga aktualitet', in Bull T., Halje L., Bergström M., Reichel J., Nergelius J. (eds), *Arvet från Oxenstierna – reflektioner kring den svenska förvaltningsmodellen och EU*, Stockholm: Sieps, 75–90.

Nyström B. (2019), 'Samhällsfarliga konflikter i svensk arbetsrätt', in Mannelqvist R., Ulander-Wänman C., Ingmanson S. (eds), *Festskrift till Örjan Edström*, Umeå: Juridiska insitutionen vid Umeå universitet, 373–386.

Olsson G. (2023), *Migrationsverkets generaldirektör lämnar*, 13 February, DN.se www.dn.se/sverige/migrationsverkets-generaldirektor-lamnar/

Persson V. (2020), 'Offentlig anställning och privat yttrandefrihet', 2 *Förvaltningsrättslig tidskrift*, 243–260.

Persson V. (2022a), 'Korruptionsbekämpning skyddar rättsstaten', in Djurberg Malm K., Sannerholm T. (eds), *Rättsstaten i den svenska förvaltningen – En forskningsantologi*, Stockholm: Statskontoret, 123–146.

Persson V. (2022b), 'Myndigheters och myndighetsanställdas yttranden', 4 *Förvaltningsrättslig tidskrift*, 525–548.

Pfeiffer K. (2019), *Lagen om offentlig anställning – en kommentar*, Turenki: Norstedts Juridik.

Pierre J. (2004), 'Politicization of the Swedish Civil Service – A Necessary Evil – or Just Evil', in Peters G.B., Pierre J. (eds), *The Politicization of the Civil Service in Comparative Perspective: A Quest for Control*, London: Routledge, 41–54.

Ragnemalm H. (2020), 'Självständighetsprincipen i svensk förvaltning', in Sandström L., Peterson C. (eds), *Den svenska förvaltningsmodellen*, Tallinn: Institutet för rättsvetenskaplig forskning, 28–43.

Regeringskansliet. (2021). "Ett utvecklat arbete mot korruption i den offentliga förvaltningen – Handlingsplan mot korruption 2021–2023".

Regeringsbeslut (2020), Uppdrag att främja arbetet mot korruption FI2020/04961 2020-12.10.

Reichel J. (2006), *God förvaltning i EU och i Sverige*, Stockholm: Jure.

Reichel J. (2010), *Ansvarsutkrävande – svensk förvaltning i EU*, Stockholm: Jure.

Reichel J., Åhman K. (2020), *Tjugofem år av Europarätt i Sverige*, Stockholm: Sieps.

Riksrevisionen. (2013), *Statliga myndigheters skydd mot korruption*, Stockholm: Riksrevisionen.

Riksrevisionen. (2019), *Myndighetsgemensamt arbete mot organiserad brottslighet: brister i styrning och uppföljning*, Stockholm: Riksrevisionen.

Riksrevisionen. (2020), *Statens insatser mot exploatering av arbetskraft: regelverk, kontroller samt information och stöd till de drabbade*, Stockholm: Riksrevisionen.

Rothstein B. (2020), 'Myndigheter att lita på. Den svenska demokratins grundbult', in Sandström L., Peterson C. (eds), *Den svenska förvaltningsmodellen*, Tallinn: Institutet för rättsvetenskaplig forskning, 44–76.

Rothstein B. (2021), *Controlling Corruption – The Social Contract Approach*, Oxford: Oxford University Press.

Ryman S.H. (1999), 'Förhandlings – och strejkrätt inom den offentliga sektorn – en historisk återblick', 5 *Arbetsmarknad och arbetsliv*, 259–269.

Selberg N., Sjödin E. (2012/2013), 'Anställningsavtal, lojalitetsplikt och mänskliga fri- och rättigheter. Ny rättspraxis om yttrandefrihet på Internet ur arbetsrättslig synvinkel – i offentlig respektive privat anställning', 24(4) *Juridisk Tidskrift*, 846–877

Sigeman T. (2008), 'Grundlagsskydd för facklig stridsätt: Några svenska erfarenheter', 2 *Tidskrift utgiven av Juridiska Föreningen i Finland*, 156–173.

Sjödin E. (2015), *Ett europeiserat arbetstagarinflytande: en rättslig studie av inflytandedirektivens genomförande i Sverige*, Skrifter från juridiska fakulteten i Uppsala, Uppsala: Iustus.

Sjödin E., Selberg N. (2022), '2020-talets modernisering av anställningstryggheten', 28 *Arbetsmarknad & Arbetsliv*, 69–83.

Statskontoret (2020), *En innovativ och samverkande förvaltning. 10 år med det förvaltningspolitiska målet*, Stockholm: Statskontoret.

Statskontoret (2024), *Statsförvaltningen i korthet*, Stockholm: Statskontoret.

Stenlund K. (2021), *Rättighetsargumentet i skadeståndsrätten*, Uppsala: Iustus.

Transparancy International (2021), *Global Corruption Barometer, European Union 2021, Citizens' views and experiences of corruption*. https://www.transparency.org/en/gcb/eu/european-union-2021

TT Nyhetsbyrå (2023), *Carin Jämtin lämnar som chef för Sida*, 17 February, DN.se www.dn.se/sverige/jamtin-lamnar-som-chef-for-sida/

Ulander-Wänman C. (2022), 'The Social Partners as Actors in New Labour Law Legislation in Sweden', 13 *European Labour Law Journal*, 292–304.

Voorhoof D., Humblet P. (2013), 'The Right to Freedom of Expression in the Workplace under Article 10 ECHR', in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, Oxford: Hart, 237–286.

Westregård A.J. (2003), *Integritetsfrågor i arbetslivet*, Juristförlaget i Lund, 2002.

15 The Civil Service in Switzerland

Between Flexibility and Tradition*

François Bellanger

I. Introduction

Most of the civil service reforms undertaken in Switzerland since the beginning of the 1990s aim to create a flexible modern civil service statute that allows the administration to function more like a company and permits the mobility of workers from the private to the public sector and vice versa. As is customary in Switzerland, there is no single model of civil service law. Each federal, canton or municipal authority has its own rules.

At the federal level, civil servant status was formalised in the Federal Law on the Status of Civil Servants of 30 June 1927.[1] This text, which came into force on 1 January 1928, has been revised 20 times and given concrete form with almost 50 ordinances and numerous directives, circulars and explanatory notes. In 1998, the Swiss government or Federal Council drew up a reform of this statute to modernise the legal regime applicable to public employees, to make it more flexible. This legislative amendment was one element of a profound reform of the organisation of the federal administration, consisting of deregulation of various markets, such as telecommunications, with privatisation (total or partial) of federal agencies (e.g. the Post Office, the Confederation's armaments companies, the Federal Railways and SWISSCOM) and new management methods, either within the administration or through grant of legal autonomy to some administrative units, allowing them, for example, to have their own civil service statute or to use ordinary employment law and contracts.

The cantons and municipalities have their own regulations on the status of their staff, based on the classic model of the appointed civil servant. They also generally have special rules for certain categories of public employees: teachers, police, hospital staff, and so on. At the canton and municipal levels, this field has undergone major changes. For the last two decades, many cantons and municipalities have been working on a partial or complete overhaul of their civil service legislation.

To illustrate these important changes, we start by presenting the specificity of the Swiss civil service regime (Section II) and explaining the legal regime adopted by the Federal State (Section III). Then, we outline the main aspects of the canton reforms (Section IV) and draw conclusions (Section V).

* All citations and case law references are up to date to 1 January 2023.

1 The former Statute of Civil Servants of 30 June 1927 (aStF), RS 172.221.10, the acronym RS stands for systematic collection of federal law, available online (partly in English), see www.fedlex.admin.ch.

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II. The Specificity of the Swiss Civil Service Regime

1. Great Diversity

Swiss civil service law is very diverse due to the federal structure of the country and the absence of a federal constitutional norm in this area.[2] The federal State, each canton, the municipalities and often the public companies have adopted their own rules. In addition, the law governing government personnel, traditionally referred to as civil service law, has undergone profound changes over the last 20 years. The Confederation and most of the cantons have sometimes completely reformed their personnel statutes, often with the aim of abolishing the system of appointment for an indefinite period or a fixed period, generally four years, modifying personnel appointment mode with an employment contract, relaxing dismissal rules, changing the system of remuneration or reducing the role of disciplinary sanctions. The common trend in these reforms is to make civil service law more similar to private labour law, although the degree of similarity may vary greatly between cantons and other public entities. In principle, however, public law remains applicable to the employment relationship between public employers and their employees, rather than regulating employment contracts established by private law.

Several factors explain the predominance of the public law employment relationship. First, the particular nature of the State and the tasks performed by its personnel match those of a public law system: the staff is assigned tasks of public authority or public service; hiring is by unilateral act, or if contractual, the conditions of employment and especially the salary are subject to little or no negotiation; employees have major obligations linked to their duties of function and loyalty, which imply sometimes substantial limitation of their fundamental freedoms; finally, staff is still sometimes subject to a disciplinary regime.[3]

Second, the public employer is subject to constitutional constraints that justify the use of public law. All acts of the employer that are likely to affect the legal position of the employee as a holder of rights and obligations towards the State, notably because their purpose goes beyond the performance of the tasks that are incumbent on the employee in his or her usual sphere of activity or the instructions given to him or her in the performance of these tasks, must be subject to judicial review.[4]

Finally, public employers must not only respect fundamental rights,[5] notably the right to equal treatment, the principle of proportionality, and the prohibition of arbitrariness but must also observe the procedural rules that apply to decision-making in order to ensure that employees have proper access to justice.[6] Even if the State chooses a private law employment relationship, when applying private law, it must comply with the constitutional principles and uphold the rights that govern all its activities. Application of a public law regime therefore seems more consistent with these constraints.

2 Federal Supreme Court of Switzerland (*Tribunal federal*, TF), judgment of 22 March 2016 (*Arrêts du Tribunal federal*, ATF), 142 II 154, para. 5.2.

3 Candrian (2021), pp. 109 f.

4 Article 29a of the Federal Constitution of the Swiss Federation of 18 April 1999 (FCSF, *Constitution fédérale de la Confédération Suisse*); www.fedlex.admin.ch/eli/cc/1999/404/fr; see TF, judgment of 16 August 2010, ATF 136 I 323, para. 4.5.

5 Article 35, para. 2 FCSF; see TF, judgment of 22 September 2015, ATF 141 V 557, para. 5.3; TF, judgment of 14 August 2012, ATF 138 I 289, para. 2.8.1 and TF, judgment of 7 May 2002, ATF 129 III 35, para. 5.2.

6 Article 35, para. 2 FCSF.

2. *The Legislator's Competence to Choose Between Public and Private Law*

All public employers are entitled to choose their own rules for staff governed by public law. They can freely organise these civil service regulations, subject to the points set out in the previous paragraph. The content of the public law regulations depends on whether the public employer chooses to have a contractual system or one based on appointment by decision, to determine the extent of rights and obligations, to impose a disciplinary system or not, or to restrict the power to dismiss. Such a statute may be more favourable or more restrictive than the provisions of private labour law, depending on the options chosen: for example, the public employer may theoretically deviate from minimum wages applicable in the private sector.[7]

The use of private law remains possible for all staff if an express legal basis envisages it[8] or does not prohibit it.[9] It is also possible for certain categories, provided such use has a legal basis.[10] In principle, these will be positions intended for the performance of special tasks or specific missions, seasonal or of limited duration, for the temporary replacement of permanent employees, or for training.[11] In addition, the nature of the tasks may justify recourse to private law when the public employer provides predominantly marketable services.[12] For example, Article 6, paragraph 5 of the Federal Law on the personnel of the Confederation[13] provides that the Federal Council may subject certain categories of personnel, especially auxiliary personnel and trainees, to the Swiss Code of Obligations (CO), i.e. private employment law,[14] when this is justified.[15] In addition, the Federal Council may lay down minimum rules applicable to these employment relationships. These categories of personnel would therefore have employment contracts under private law. However, the difference with the private sector will be that insofar as their public employer performs public tasks, it is obliged to respect their fundamental rights.[16]

Public law statutes may refer to the rules on employment contracts in a specific or general way. In this case, the norms of the Code of Obligations are used as a complement to the statute, either to regulate a particular point or to fill a gap.[17] In this case, they constitute

7 TF, judgment of 13 January 2012, ATF 138 I 232, para. 7.2.

8 TF, judgment of 22 March 2016, ATF 142 II 154, paras. 5.2 and 5.3; for example, according to Article 9, para. 1 of the Federal Act on the Organization of the Swiss Post of 17 December 2010 (RS 783.1); www.fedlex.admin.ch/eli/cc/2012/587/fr, "Swiss Post personnel are employed under private law". See also Article 16, para. 1 of the Federal Act on the Organization of the Federal Telecom Company of 30 April 1997 (RS 784.11); www.fedlex.admin.ch/eli/cc/1997/2480_2480_2480/fr or Article 6, para. 1 of the Federal Act on the Armament Companies of the Confederation of 30 April 1997 (RS 934.21); www.fedlex.admin.ch/eli/cc/1998/1202_1202_1202/fr.

9 TF, judgment of 27 May 1992, ATF 118 II 213, para. 3.

10 TF, judgment of 22 March 2016, ATF 142 II 154, paras. 5.2 and 5.3.

11 Dubey and Zufferey (2014), no. 1543; Moor et al. (2018), p. 558 and Subilia-Rouge (2003), p. 292.

12 Defago Gaudin (2016), pp. 270–271; Aubert et al. (2016), pp. 205–206.

13 Federal Law on the personnel of the Confederation of 24 March 2000 (LPers; *Loi sur le personnel de la Confédération*), RS 172.220.1; www.fedlex.admin.ch/eli/cc/2001/123/fr.

14 See Articles 319 ff. CO.

15 Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (*Loi fédérale complétant le Code civil Suisse*), RS 220; www.fedlex.admin.ch/eli/cc/27/317_321_377/fr.

16 Article 35, para. 2 FCSF; see TF, judgment of 22 September 2015, ATF 141 V 557, para. 5.3.

17 Federal Administrative Tribunal of Switzerland (*Tribunal administratif federal*, TAF), judgment of 25 August 2014, Judgments of the Federal Administrative Tribunal of Switzerland (*Arrêts du Tribunal administratif fédéral Suisse*, ATAF), 2014/44, 769, para. 9.1.

suppletive public law:[18] they are incorporated into the body of federal or cantonal public law and thus lose their private law character to become federal or cantonal law.[19]

If a State task is transferred to a legal person governed by private law, the latter remains governed by private law, although it performs public tasks. Its personnel are therefore governed by private law and the mere fact that it performs a public law task cannot justify a reclassification of the employment relationship as being governed by public law. The same applies if a State task is transferred to a private law entity created for this purpose.[20]

III. Federal Law

1. Scope of Application

The Federal Act on the Personnel of the Confederation (LPers or the Personnel Law, *Loi sur le personnel de la Confédération*) was adopted by the Federal Assembly on 24 March 2000. Following the successful conclusion of a referendum launched by some of the civil servant unions, the people accepted this new law on 26 November 2000 with a majority of 67%.[21] On 1 January 2002, LPers replaced the previous Statute of Civil Servants of 30 June 1927.[22] According to a press release of the Federal Personnel Office of 11 July 2002, the entry into force of the new system resulted in the conversion of employment relationships based on the old law into employment contracts based on the new law for more than 98% of the staff of the Confederation. Only 400 employees chose to continue their employment under the old law for a limited period (until the end of September 2002 at the latest). In addition, there were only eight cases in which no common solution could be found for an employment contract in accordance with LPers. As a result, the Confederation terminated the employment relationships in question in March 2002, and no appeals were lodged against these decisions.

At the federal level, LPers applies in particular to personnel of the general administration, the services of the Parliament and the judicial authorities of the Confederation, as well as to the Swiss Federal Railways (CFF/SBB).[23] It is supplemented by a framework ordinance, the Federal Ordinance on the personnel of the Confederation,[24] which specifies the scope of the law, in particular regarding personnel policy, the creation, modification and termination of employment relationships, the employer's services, the duties of personnel and the rules on employee participation and social partnership. These general texts are enriched by numerous specialised ordinances of the Federal Council or the departments.[25]

18 TF, judgment of 13 January 2012, ATF 138 I 232, para. 6.1.

19 TF, judgment of 15 October 2014, ATF 140 I 320, 322 and TF, judgment of 13 January 2012, 138 I 232, 236 ff.

20 TF, judgment of 22 March 2016, ATF 142 II 154, para. 5.3; TF, judgment of 4 December 2008, ATF 135 III 483, para. 5.2.2; see also Moor et al. (2018), p. 559.

21 Arrêté du Conseil fédéral constatant le résultat de la votation populaire of 26 November 2000, Feuille fédérale (FF) 2001 1077; www.fedlex.admin.ch/eli/fga/2001/198/fr.

22 See footnote n. 1.

23 Article 2 LPers; see Helbling (2013), Article 2, no. 31 ff.

24 Federal Ordinance on the personnel of the Confederation of 3 July 2001 (OPers, *Ordonnance sur le personnel de la Confédération*), RS 172.220.111.3; www.fedlex.admin.ch/eli/cc/2001/319/fr.

25 The Federal Administration is directed by the Federal Council and the heads of departments. Each member of the Federal Council heads a department. The Federal Council allocates the departments among its members; members have a duty to take over their designated department, see Article 35 of the Government and Administration Organization Act of 21 March 1997 (AOA), RS 172.010, www.fedlex.admin.ch/eli/cc/1997/2022_2022_2022/fr.

Employers within the meaning of LPers are the administrations in charge of personnel subject to its scope of application, i.e. the Federal Council in its capacity as the supreme governing body of the administration, the Federal Assembly for the Services of Parliament, the Federal Railways, the Federal Supreme Court, the Public Prosecutor's Office of the Confederation as well as the Supervisory Authority of the Public Prosecutor's Office of the Confederation.[26] The departments, the Federal Chancellery, the offices[27] and the decentralised units[28] function as employers only if the Federal Council delegates the necessary powers to them for this purpose.[29] The Federal Administrative Court, the Federal Criminal Court and the Federal Patent Court are also considered employers if the corresponding laws or the Federal Council delegate the necessary powers to them.[30]

The Federal Council is entrusted with coordinating and directing the implementation of personnel policy. In this respect, the Federal Council must ensure that the personnel policy objectives set out in Article 4, paragraph 2 LPers are achieved:

- recruitment and retention of adequate staff;
- the personal and professional development of employees, their improvement, their motivation, and their versatility;
- training and succession of managers and development of management capacities;
- equal opportunities and equal treatment of women and men;
- a representation of the national linguistic communities corresponding to the resident population;
- promoting the language skills of employees in the official languages necessary to perform their duties, as well as promoting active knowledge of a second official language and passive knowledge of a third official language for senior managers;
- equal opportunities for the disabled, their access to jobs and their integration;
- protection of the personality, health and occupational safety of its personnel;
- development of environment-friendly behaviour in the workplace;
- working conditions that allow staff to fulfil their family responsibilities and social commitments;
- creation of apprenticeships and traineeships;
- extensive information to its staff.

2. *Creating the Employment Relationship*

The Personnel Law replaced the prior system of civil servant appointment based on an administrative decision for an administrative period of four years existing under the Former Statute of Civil Servants of 30 June 1927, with appointment by public law contract,[31] of

26 Article 3, para. 1 LPers.
27 The individual departments are divided into offices, which may be organised into groups. Each has a General Secretariat, see Article 2, para. 2 AOA.
28 The Federal Administration also includes decentralised administrative units in accordance with the terms of its organisational directives, see Article 2, para. 3 AOA.
29 Article 3, para. 2 LPers.
30 Article 3, para. 3 LPers.
31 Article 8, para. 1 LPers.

indefinite or definite duration,[32] between the administration, as employer, and the employees who form the staff. Only certain employees who have a limited term of office determined by a special law are appointed by decision.[33]

In principle, the employer and employee sign a contract for an indefinite period after a public call for tenders for the position.[34] In the case of a fixed-term contract, also after a public call for tenders, the duration of the contract may not exceed three years, unless the Federal Council has made an exception for certain categories of profession.[35] The employment relationship generally begins with a trial period of three months, which may be extended contractually to a maximum of six months for certain categories of profession, unless the parties agree otherwise.[36]

3. Compensation and Other Benefits

The Personnel Law introduces a flexible system of remuneration in place of the traditional seniority increase.[37] Salary depends on function, experience, and performance. Regular evaluations of staff members are intended to ensure that they are fairly paid for their performance and that their development meets the objectives.[38] According to Article 15 of the Federal Ordinance on the Personnel of the Confederation (OPers), supervisors conduct personal interviews with their employees and evaluate them once a year. The interview serves the professional development of the employee and is intended to examine working conditions and to agree on objectives. It also enables the line manager to receive feedback from his employees on how he manages his unit. Personal assessment is the basis for salary increases, which are based on agreed performance and behavioural and competency objectives. Article 16, paragraph 1 OPers prohibits the use of non-professional criteria such as gender, age, language, position, nationality or religion in personal assessment and salary determination. The influence that these criteria can have on perception and judgment must be considered in the preparation and training for the interview, as well as during the interview itself. To enable employees to prepare themselves for the interview, they are informed of the decisive elements for the personal evaluation and for salary determination in accordance with Article 16, paragraph 2 OPers.

In addition, a performance bonus may be awarded to an employee for above-average performance and special commitments.[39] A spontaneous bonus is also authorised for the immediate reward of special services and commitments, and may be in kind up to an equivalent value of 500 CHF.[40] However, the combined amount of the performance bonus and the spontaneous bonus for a given employee must not exceed the following amounts per calendar year: either 10% of the maximum amount of the salary grade set in the employment contract for employees whose salary has reached the maximum of the salary grade

32 Article 9 LPers.
33 Article 14 LPers.
34 Article 7 LPers; see Helbling (2013), Article 7, no. 11 ff.
35 Article 9, paras. 1 and 2 LPers.
36 Article 8, para. 2 LPers and Article 27 OPers.
37 Article 4, para. 3 and Article 15, para. 1 LPers; Article 39 OPers; see Malla (2013), Article 15, no, 101 ff.
38 Article 4, para. 3 LPers.
39 Article 49 OPers.
40 Article 49a OPers.

or 5% of the maximum amount of the salary grade set in the employment contract for employees whose salary has not yet reached the maximum of the salary grade.[41]

Employees are also entitled to allowances, usually for inconvenience, which are also financial entitlements: residence allowance, cost-of-living allowance, allowance for Sunday and night work, allowance for standby duty, duty bonus for employees who perform particularly demanding tasks that do not, however, justify permanent assignment to a higher salary grade, special allowance for risks inherent in the function or its performance under difficult conditions, allowance for stays abroad and social allowances (marriage, children), and so on.[42]

In the case of difficulties in recruiting or retaining employees with specific skills due to the labour market situation, Article 50 OPers authorises the employer to grant a labour market allowance of up to 20% of the maximum amount of the salary grade fixed in the employment contract.[43] The labour market allowance may be granted for a maximum of five years. This allowance requires prior approval by the Federal Department of Finance or Federal Council.[44]

Finally, employees are entitled to social security benefits, such as disability, death and maternity benefits.[45] The legislation envisages the payment of salaries during incapacity to work due to illness or accident, often for a period exceeding the ordinary rules of private law; the same applies to maternity leave. Social insurance legislation applies to employees and their employers. In some cases, local authorities set up their own insurance funds for old age, disability, and occupational benefit insurance.

4. The Main Obligations of Employees

Employees of the Confederation are subject to the usual public sector obligations, such as the duty of loyalty (Subsection 4.1), the duty of care (Subsection 4.2), the prohibition of receiving gifts or benefits (Subsection 4.3), the prohibition of exercising official functions for a foreign State or accepting titles or decorations granted by foreign authorities (Subsection 4.4), the limitation of the right to strike (Subsection 4.5), the specific requirements related to their position (Subsection 4.6), the duty to denounce crime or report irregularities (Subsection 4.7) and the duty of secrecy (Subsection 4.8).

4.1. The Duty of Loyalty

An employee subject to LPers has a duty of loyalty to the employer. Traditionally, this duty has two components, one positive and one negative.[46] The positive obligation means the obligation to do everything in the interest of the State.[47] The employee must carry out his task, to the extent that corresponds to his duties, with diligence, observing the law and respecting the public interest. He must ensure that his actions comply with the law; it is his responsibility to inform his superiors of any problems that may arise and of any improve-

41 Article 49b OPers.
42 Article 18, para. 2 and Article 32 LPers; Articles 43 to 48 OPers.
43 Article 50, para. 1 OPers.
44 Article 50, para. 2 OPers.
45 Articles 29 to 32m LPers; Articles 56 to 63 OPers.
46 Dubey and Zufferey (2014), no. 1562 ff.; Hänni and Schneider (2004), pp. 153–154; Hänni (2017), no. 246 ff.; Helbling (2013), Article 20, no. 15 ff.
47 Article 20, para. 1 LPers.

ments to be made to the service. The duty of loyalty also implies that in carrying out his task, the employee defends the interests of the community beyond the performance of his actual work. The negative obligation obliges employees to refrain from any act that could be detrimental to the State. Both in the performance of their duties and outside of them, employees must show themselves worthy of the consideration and trust that their official position requires and must behave in such a way that the population can have confidence in the administration entrusted with the management of public affairs.[48]

As LPers envisages reference to private labour law as a supplementary law, the extent of this duty is interpreted according to Article 321e CO, considering the professional risk, the education or technical knowledge necessary to perform the promised work, as well as the aptitudes and qualities of the employee that the employer should know.[49]

4.2. The Duty of Care

According to Article 20, paragraph 1 LPers defining the duty of care, the employee is obliged to carry out the work entrusted to him with care and to defend the legitimate interests of the Confederation and of his employer.

4.3. The Prohibition of Receiving Gifts or Benefits

The employee is prohibited from accepting, soliciting or being promised gifts or other benefits for himself or for other persons in the performance of activities related to the employment contract.[50] This provision is important to avoid any conflict of interest or risk of bribery. Article 93 OPers sets precise rules. The acceptance of small benefits in accordance with social custom is not considered to be acceptance of gifts within the meaning of the law. For that purpose, a small benefit is defined as a gift in kind with a market value of up to 200 CHF. However, employees involved in purchasing or decision-making processes are also prohibited from accepting such small benefits if offered by an actual or potential bidder in a public procurement, a person involved in or affected by the decision-making process, or if it is impossible to exclude any connection between the granting of the benefit and the purchasing or decision-making process. Should an employee not be able to refuse a gift for reasons of courtesy, he shall hand it over to the employer. Finally, acceptance of gifts for reasons of courtesy must serve the general interests of the Confederation. The acceptance and possible selling of such gifts shall be carried out by the employer and shall be for the benefit of the Confederation. In the case of doubt, the employee shall discuss whether the benefits can be accepted with his or her superior.

4.4. The Prohibition of Exercising Official Functions for a Foreign State or Accepting Titles or Decorations Granted by Foreign Authorities

To guarantee the independence of all employees from foreign countries, it is forbidden to exercise an official function for a foreign State or to accept titles or decorations granted by foreign authorities.[51]

48 TF, judgment of 31 August 2010, ATF 136 I 332 (c. 3.2); TF, judgment of 28 November 1996, ATF 122 I 360 (c. 5d).
49 Helbling (2013), Article 20, no. 42 ff.
50 Article 21, para. 3 LPers; see also Grebski and Malla (2013), Article 21, no. 76 ff.
51 Article 21, para. 4 LPers; see also Grebski and Malla (2013), Article 21, no. 90 ff.

4.5. Limitation of the Right to Strike

The ban on strikes that existed in the old statute has been largely removed. Now the right of staff to strike can only be restricted to safeguard essential interests such as the security of the country or its supply of vital goods and services.[52]

4.6. Specific Requirements

There is no longer a general requirement of Swiss nationality in order to be able to work in the federal administration. Article 8 LPers only limits access to certain positions involving the exercise of public power to persons of Swiss nationality and sometimes to persons with Swiss nationality only. The implementing regulations may set down special requirements related to the nature of the duties, such as a residence requirement[53] or the use of special clothing or instruments.[54]

4.7. The Obligation to Denounce and the Right to Report

Employees are subject to an obligation to denounce and a right to report and protection.[55] On the one hand, employees are obliged to report all crimes and offences prosecuted ex officio of which they have knowledge or which have been brought to their attention in the course of their duties to the prosecuting authorities, to their superiors or to the Swiss Federal Audit Office.[56] There are few exceptions to this obligation.[57] On the other hand, employees are entitled to report any other irregularities of which they become aware or which are brought to their attention in the course of their duties to the Federal Audit Office. The Federal Audit Office establishes the facts and takes the necessary measures.[58] To ensure the protection of employees reporting irregularities, Article 22a, paragraph 5 LPers states that no one shall suffer professional disadvantage as a result of reporting an offence or an irregularity in good faith or of giving evidence as a witness.

4.8. The Duty of Secrecy

Employees are subject to professional, business, and official secrecy.[59] Official secrecy is the prohibition on public officials of disclosing confidential information they have obtained in the course of their duties. This prohibition, violation of which may be a criminal offence, is limited by the scope of information considered public, as citizens have a right of access to it.[60] Professional secrecy is the silence and discretion to which certain professions are bound with respect to the status or private life of their clients as well as the information

52 Article 24 LPers; Article 96 OPers, see also Helbling (2013), Article 21, no. 76 ff.

53 For example, according to Article 89 OPers, the departments may, after agreement with the Federal Department of Finance, require certain categories of personnel to reside in a specific location if the needs of the service so require.

54 Article 21, para. 1 LPers.

55 Article 22a LPers; see Nötzli (2013), Article 22a, no. 4 ff.

56 Article 22a, para. 1 LPers.

57 Article 22a, para. 3 LPers.

58 Article 22, para. 4 LPers.

59 Article 22 LPers.

60 Federal Act on Freedom of Information in the Administration of 17 December 2004 (FoIA, *Loi fédérale sur le principe de la transparence dans l'administration*), RS 152.3; www.fedlex.admin.ch/eli/cc/2006/355/fr.

or documents that their clients entrust to them. The definition of professional secrecy depends on the profession according to the administrative, contractual and/or deontological rules that govern it. In terms of criminal law, Article 321, paragraph 1 of the Swiss Criminal Code contains an exhaustive list of professions for which violation of a secret entrusted to them by virtue of their profession or of which they had knowledge in the exercise of their profession may constitute a criminal offence. These are clergymen, lawyers, court defenders, notaries, patent attorneys, auditors bound by professional secrecy under the Code of Obligations, doctors, dentists, chiropractors, pharmacists, midwives, psychologists, and their assistants or students. The scope of a civil servant's professional secrecy and the effects of its possible violation therefore depend on the special rules governing the duty of confidentiality of these persons during their activity.

5. Participation

The consultation and informing of employees are institutionalised for the purpose of achieving a social partnership. The principle of extensive information to personnel is one of the objectives of the personnel policy in Article 4 LPers. The details are set out in Article 33 LPers, which requires that staff and their representative associations be informed and consulted on important personnel matters. Secondly, a periodic and bilateral declaration of intent concerning collaboration and objectives in relation to personnel policy is envisaged in Article 107 OPers, and a monitoring committee is set up in the following article.[61] Personnel committees can also be set up in accordance with Article 109 OPers. Finally, collective agreements are concluded within the framework of the decentralised administration.

The Personnel Law requires the Federal Railways and other employers, to whom the Federal Council has delegated the necessary authority, to conclude collective labour agreements governing the contractual relationship with all their employees.[62] The Federal Railways has had a collective agreement since 2001, which serves as the implementing ordinance for LPers. The latest agreement came into force on 1 May 2019, for an initial period of four years, when it will be tacitly extended for an indefinite period unless terminated by one of the parties.[63]

6. Disciplinary Sanctions

The Personnel Law contains a comprehensive list of disciplinary sanctions to respond to breach of duty by employees. For negligent breaches of duty, these are warning, reprimand and change of activity. For grossly negligent or intentional breaches of duty, a reduction of salary, a fine or a change of working hours or place of work are possible.[64]

7. Termination of Employment

A simplified procedure for the dismissal of employees has been introduced. Examples of circumstances that may constitute objectively sufficient grounds for termination are

61 Grebski and Malla (2013), Article 33, no. 21 ff.

62 Article 38 LPers.

63 Article 198 of the 2019 Collective Bargaining Agreement of the Swiss Federal Railways (CFF/SBB); https://sev-online.ch/fr/tes-droits/cct/cct-cff/.

64 Article 25 LPers.

provided.[65] While violation of important legal or contractual obligations[66] is still a traditional reason for dismissal, shortcomings in performance or behaviour, or unwillingness of the employee to perform other work that could reasonably be required of him[67] are more flexible grounds, not necessarily based on a fault on the part of the employee, which allows the employer to invoke insufficient or unsatisfactory work on the part of the employee in order to dismiss him. Dismissal based on major economic or operational imperatives is also possible, to the extent that the employer cannot offer the employee other work that could reasonably be required of him or her.[68]

The relationship is terminated by mutual agreement of the parties due to an automatic termination event (expiry of the fixed-term contract, retirement, or death of the employee) or in the event of termination by one of the parties.[69]

During the trial period, notice of termination is given seven days in advance[70] and may be given during a period of incapacity.[71] After the trial period, a contract with no fixed term may be terminated after one month, provided that time limits of Article 30a, paragraph 2 OPers are observed, namely two months in the first year of service, three months from the second to the ninth year of service and four months from the tenth year of service. These periods of notice may be extended or shortened.[72]

The employer must have objectively sufficient reasons for terminating the employment contract, such as those (not exhaustive) set out in Article 10, paragraph 3 LPers:

- violation of important legal or contractual obligations;
- shortcomings in performance or behaviour;
- insufficient ability or capacity to perform the work agreed upon in the contract or unwillingness of the employee to perform such work;
- unwillingness of the employee to perform other work that may reasonably be required of him or her;
- major economic or operational imperatives, to the extent that the employer cannot offer the employee other work that could reasonably be required of him or her;
- failure to meet any of the conditions of employment set forth in the law or in the employment contract.

In addition, the employer must respect the principle of proportionality so that termination is excluded if the employer may be required to take less intrusive measures than the termination of the employment relationship.[73] The Federal Administrative Tribunal expects the employer to demonstrate that it has taken all reasonable steps in the particular case, or that such steps are totally unnecessary or impossible. Should the termination occur through no fault of the employee, the employer takes all reasonable steps to retain the employee in the

65 Article 10, para. 3 LPers, see Nötzli (2013), Article 12, no. 15 ff.
66 Article 10, para. 3(a) LPers, see Nötzli (2013), Article 12, no. 18 ff.
67 Article 10, para. 3(b) and 3(d) LPers, see Nötzli (2013), Article 12, no. 28 ff.
68 Article 10, para. 3(e) LPers, see Nötzli (2013), Article 12, no. 40.
69 Article 10 LPers.
70 Article 30, para. 1 OPers.
71 Article 31a, para. 1 OPers.
72 Article 30a, paras. 3 and 4 OPers.
73 Federal Administrative Tribunal, judgment of 1 September 2009, A-2164/2009, para. 3.21.

administration.[74] In addition, the employer must always respect other general principles of administrative law such as equal treatment and prohibition of arbitrariness.

In the event of restructuring or reorganisation of administrative units or areas of activity involving the termination of the employment relationship of one or more employees or the abolition or reorganisation of one or more jobs, the Departments shall take all necessary measures to ensure that these terminations are socially acceptable and economically sound. The administrative units shall arrange the allocation of personnel in such a way that as many affected employees as possible can find employment in the Federal Administration. The main aim is to assign employees to other work that can reasonably be expected of them, and to reorient and develop their careers. Employees are required to cooperate actively with the measures taken and to show initiative, particularly in finding new work that can reasonably be expected of them and in their career transition and development.[75]

In all cases, termination of the contract with immediate effect for just cause is possible according to Article 10, paragraph 4 LPers. The principles established by the Federal Supreme Court case law for immediate termination for just cause for employees subject to ordinary employment law according to Article 337 CO apply by analogy.

If possible, the employee and employer must agree on the terms of termination. If this is not possible, the employer must issue a termination decision that is subject to appeal to the Federal Administrative Tribunal.[76] This court examines the decisions with the full power of cognition. The appellant may therefore raise not only the complaints of violation of federal law and inaccurate or incomplete establishment of the facts, but also the plea of inadequacy.[77] Thus the Federal Administrative Court must not only determine whether the decision of the administration complies with the law, but also whether it is an adequate solution in view of the facts. In reviewing the appropriateness of the decision, however, the Court will examine with restraint questions relating to the assessment of employee performance and administrative organisation or cooperation within the service, and will not substitute its own assessment power for that of the administrative authority.

If an appeal against a termination is successful, the employer is required to pay compensation to the employee. In some cases, the employer may also be required to continue to pay the employee's salary.[78]

If the appeal body approves an appeal against a decision by the employer to terminate an employment relationship and decides not to refer the case back to the previous body, it is obliged to award compensation to the appellant if there has been ordinary termination in the absence of objectively sufficient grounds, or immediate termination in the absence of just cause, or if the procedural rules have not been observed.[79] The amount of compensation is generally at least six months' salary and at most one year's salary (Article 34b, paragraph 2 LPers).

If an immediate dismissal has been pronounced without just cause, the appeal authority will order the payment of the salary until the expiry of the ordinary notice period or the fixed-term employment contract (Article 34b, paragraph 1(b) LPers). Thus, the

74 Article 19, para. 1 LPers.

75 Article 104 OPers.

76 Article 36 LPers.

77 Article 49 of the Federal Act on Administrative Procedure of 20 December 1968 (APA, *Loi fédérale sur la procédure administrative*), RS 172.021; www.fedlex.admin.ch/eli/cc/1969/737_757_755/fr.

78 Article 34b LPers.

79 Article 34b, para. 1(a) LPers.

employee will continue to receive his or her salary until the ordinary period of dismissal expires. If the provisions relating to the notice period have not been observed, the authority will order an extension of the employment relationship until the expiry of the notice period.[80]

The employee may be reinstated if the appeal body accepts the appeal against a decision to terminate the employment relationship because the termination: (1) was based on the fact that the employee had, in good faith, reported an offence or an irregularity according to Article 22a LPers, or that he had given evidence as a witness; (2) was abusive under Article 336 CO;[81] (3) was pronounced during one of the protection periods in case of sickness or accident referred to in Article 336c, paragraph 1 CO; (4) was discriminatory under Article 3 or 4 of the Equality Act.[82] In lieu of reinstatement, the employee may request that the appeal authority award compensation generally equivalent to at least six months' salary and no more than one year's salary.[83]

Although LPers has greatly facilitated dismissal procedures, these provisions mean that protection against dismissal is still better in the federal administration than in the private sector.

Finally, in a more general way, LPers attempts to bring the regime applicable to federal employees closer to that of the Code of Obligations by allowing employers and employees more room for manoeuvre and more flexibility so that the Confederation as an employer can respond sustainably to the demands of the labour market and improve its competitiveness. To this end, LPers refers to CO, which applies in the absence of provisions in LPers, its implementing provisions or other federal laws.[84]

IV. Cantonal Laws

The limited nature of this report and the great diversity of cantonal systems do not allow a complete presentation of cantonal laws. Here we highlight the major changes in the last 20 years regarding the employment conditions of employees, their rights and obligations, disciplinary sanctions, and termination of service.

1. Creation of the Employment Relationship

Historically, service relationships in Switzerland were created by appointment of personnel by decision. However, this decision was subject to acceptance by its addressee. Since this approval is a necessary condition for the validity of the decision, it may be difficult to distinguish such a decision from an administrative law contract.[85] However, this classification

80 Article 34b, para. 1(b) LPers.

81 This provision of private employment law defines several cases of wrongful termination such as termination on a account of an attribute pertaining to the person of the other party, unless such attribute relates to the employment relationship or substantially impairs cooperation in the business, or because the other party exercises a constitutional right, unless the exercise of such right breaches an obligation arising from the employment relationship or substantially impairs cooperation in the business.

82 Federal Act on Gender Equality of 24 March 1995 (GEA, *Loi fédérale sur l'égalité entre femmes et hommes*), RS 151.1; www.fedlex.admin.ch/eli/cc/1996/1498_1498_1498/fr.

83 Article 34c, para. 2 LPers.

84 Article 6, para. 2 LPers; Helbling (2013), Article 6, no. 21 ff.

85 Uhlmann (2013), Article 5, no. 25; Wurtzburger (2022), Article 82, no. 36 ff.

is excluded once the authority determines, unilaterally, the content of the act and notably the rights and obligations of the addressee according to the law, even if prior negotiation has taken place.[86] The fact that this act then requires the agreement of the addressee does not, therefore, change its unilateral character, as it has no influence on the content of the decision, which results from application of the law and is limited to taking note of it.[87]

Most cantons have decided to hire their staff by public law contract.[88] A minority of three cantons continue to hire their staff by decision.[89] Four have a hybrid system.[90] However, this evolution must be put into perspective.

The contract is bilateral only in form. Its content is strictly defined by law. It is generally the last element of a complex legal pyramid that leaves little or no contractual freedom. The cantonal laws set out in detail the rights and obligations of the parties. The regime that these norms institute could be applied in the same way to an employee appointed by decision. The scope of possible negotiations with the future employee, which normally accompanies the conclusion of a contract, is restricted. A discussion on salary is possible, but its scope would be very limited because the administration must follow the scale of functions and salaries for reasons of equal treatment. Moreover, subject to agreement between the parties, the contract will generally be terminated by decision subject to appeal, as for appointment by decision. Finally, the choice of contractual employment does not mean that the employment relationship is subject to private law; in principle, the cantons apply public law in their dealings with their personnel, with a possible reference to the Code of Obligations as supplementary public law. The use of a contract does not, therefore, change the legal regime of the employment relationship.

Employees hired under a public law contract are in a very similar situation to those appointed by decision.[91] Faced with this situation, one may wonder about the reasons for choosing the contractual regime. One explanation lies in the desire of administrations to modernise their status, at least in appearance, both by abandoning the term "civil servant" to designate employees and by moving to a contractual regime. Moreover, even if the contractual relationship can be punctuated by decision-making, the fact of having a contract, and moreover a contract whose possible shortcomings can be remedied by application of the Code of Obligations, brings the employment relationship of public servants closer to that of private sector employees. As a result, the switch to public law employment contracts rather than to appointment by decision is not so much a change in the legal system as a psychological or cosmetic change.

2. *Compensation and Other Benefits*

The traditional compensation model for civil servants is based on a salary grid with salary grades and progressive steps in each grade. The functions are divided into classes: each

86 TAF, judgment of 12 February 2015, ATAF 2015/15, para. 2.4.1 ff.; see Dubey and Zufferey (2014), no. 1081.

87 Müller (2008), Article 5, no. 33.

88 Aargau (AG); Appenzell Innerrohden (AI); Appenzell Ausserrohden (AR); Basel Landschaft (BL); Basel Stadt (BS); Bern (BE); Fribourg (FR); Glarus (GL); Graubünden (GR); Jura (JU); Nidwalden (NW); Obwalden (OW); St.Gallen (SG); Schaffhausen (SH); Schwyz (SZ); Solothurn (SO); Uri (UR); Vaud (VD); Zug (ZG).

89 Geneva (GE), Neuchâtel (NE), and Tecino (TI).

90 Lucerne (LU), Thurgau (TH), Valais (VS), and Zurich (ZH).

91 Häfelin et al. (2020), no. 2012.

function has one or more consecutive classes, and each class has a minimum and maximum salary. Each job is classified by function and salary grade according to the characteristics of its specifications, the tasks to be performed and the responsibilities involved. This mechanism ensures equal treatment insofar as all persons occupying the same position are remunerated on the same basis. Any differences depend on individual training, experience or performance. The salary is increased annually according to seniority, regardless of the employee's performance, subject to possible sanctions.

This model has essentially disappeared in almost all cantons.[92] The current approach is to consider the performance of employees in determining pay. However, the impact of performance varies greatly. In some cantons, it may only be considered in determining the annual increase, excluding any decrease. Other cantons assess performance in determining remuneration and allow a reduction in salary in the event of insufficient performance. In addition, most cantons contemplate bonuses or rewards for various reasons, such as performance.

To ensure equal treatment, these variable remuneration methods require the implementation of evaluation rules and procedures to guarantee that differences between employees are based on concrete and objective elements, such as matching objectives and results. It must also be possible for the employee to contest an evaluation in the event of disagreement.

3. *The Main Obligations of Employees*

Employees of the administration have specific duties because of the special legal relationship between them and their public employer. Here we examine five important duties: the duty of loyalty, the duty of care, the residency obligation, the prohibition of strikes, and the nationality requirement.

3.1. *The Duty of Loyalty and the Duty of Care*

The duty of loyalty is an essential duty in an employment relationship under public law. It has two components, one positive and one negative.[93] All cantons except Glarus (GL) include this duty in their civil service law. The same is true of the duty of care required in all cantons. There have been no developments in this area, which is not surprising as these duties are inherent to the proper functioning of the administration and are not incompatible with the modernisation of civil service law.

3.2. *The Residency Obligation*

The traditional model requires that all public employees reside in the territory of the public employer. This important restriction on freedom of residence has been challenged by the Federal Court for several decades.[94] In almost all cantons, the residence obligation is no longer generalised but limited to certain employees for objective reasons related to their functions.[95]

92 All but GE and TI.

93 Dubey and Zufferey (2014), no. 1562 ff.; Hänni and Schneider (2004), pp. 153–154 and Hänni (2017), no. 246 ff.

94 TF, judgment of 11 October 1985, ATF 111 Ia 214, para. 3.

95 VS has no obligation, and OW has a strict obligation.

3.3. Prohibition of Strikes

At the canton level, some cantons still prohibit all their employees from striking. Other cantons envisage the possibility of prohibiting certain public employees from going on strike or even allow strikes but impose minimum service. Finally, some cantons do not regulate this issue.

3.4. The Nationality Requirement

In the historical model of State personnel law, the nationality requirement was generalised with the effect that only holders of Swiss nationality could work for a local authority. This requirement has been greatly relaxed, both because of changes in mentality and the need to have access to a wider labour pool and because of obligations arising from agreements with the European Union.

The prohibition of discrimination (Article 8 FCSF) and the free movement agreement[96] require that restrictions on access to public office based on nationality be objectively justified. The Agreement on the Free Movement of Persons (AFMP) explicitly authorises restrictions for positions involving the exercise of public authority or intended to safeguard public interests (Article 10 of Annex I of the AFMP). Since not all jobs in a public authority are of this type, a Swiss nationality requirement for all staff is not in line with higher law.

Most cantons have abandoned the nationality requirement for all their personnel, although they may still restrict access to certain positions to Swiss nationals. Some cantons more or less retain restrictions, but the question of their conformity with higher law remains open.

4. Participation

In the traditional model, civil servants have little involvement in the drafting and implementation of the laws and regulations governing their status. This mechanism has evolved since broad participation of staff, or associations representing them, was introduced by most cantons following the example at the federal level.

5. Disciplinary Sanctions

A slight evolution has been taking place regarding disciplinary sanctions, although it is not yet possible to detect a trend towards their abolition. Some cantons have a list of sanctions in their regulations, which may or may not be exhaustive. In principle, these cantons all envisage a warning or reprimand. A pay reduction or suspension of a pay increase is also generally possible in all these cantons except Neuchâtel. A smaller number of cantons envisage dismissal or removal from office as a final sanction. Other cantons simply foresee a disciplinary procedure without listing the possible sanctions. Finally, some cantons have decided to waive disciplinary sanctions.

96 See Article 8 of the Agreement on the Free Movement of Persons between Switzerland and the European Community of 21 June 1999 (AFMP; *Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit*), RS 0.142.112.681; www.fedlex.admin.ch/eli/cc/2002/243/de.

6. Termination of Employment

There is a great diversity of cantonal regimes for the dismissal of employees. Several cantons have enacted an exhaustive list of grounds for dismissal. For example, the cantons of Basel-Landschaft and Basel-Stadt list five reasons, which the former calls essential, for dismissal: impediment to the performance of duties, abolition of post and impossibility of transfer, commission of a criminal act incompatible with the function, unsuitability or inadequacy of performance and breach of duty; for the last two, a probationary period is foreseen before dismissal.[97]

Other cantons have a list of examples of grounds for dismissal. For example, in the canton of Geneva, a valid reason for dismissal exists when the continuation of the employment relationship is no longer compatible with the proper functioning of the administration for serious reasons, such as insufficient performance, inability to fulfil the requirements of the position, or permanent cessation of a reason for employment.[98]

Some cantons qualify the grounds for dismissal without making a list. The absence of a list does not mean that dismissal is unrestricted; it must, in any case, be based on objective elements. Some cantons refer to the Code of Obligations to regulate permissible grounds for dismissal.[99] As in the previous case, this reference does not allow the public employer to dismiss without cause. Dismissal must still be sustained by a plausible reason.

With respect to the consequences of unlawful dismissal, diversity is also the rule. Some cantons have a mechanism similar to that applicable under federal law.[100] Others provide for reinstatement or compensation at the discretion of the public employer.[101] A few cantons have aligned themselves with private labour law limited to compensating unfairly dismissed employees.[102] Two cantons foresee a right to reinstatement in cases of unjustified dismissal.[103] The canton of Geneva upholds a right to reinstatement if termination of the employment relationship is not based on a serious ground;[104] if the termination is based on a serious ground but is nevertheless contrary to law, reinstatement is optional for the employer.[105]

The cantons of Geneva and Schaffhausen envisage the sanction of disciplinary dismissal, which must be distinguished from ordinary dismissal. Disciplinary dismissal is the formal sanction for misconduct. It implies that the employee has violated the duties of his or her position, either intentionally or through negligence and that the seriousness of the misconduct justifies such a severe disciplinary sanction. In fact, disciplinary dismissal is the most severe sanction, and it requires a very serious or continuous violation of the duties

97 Article 19 of the Law of the employment relationships with the employees of canton Basel Landschaft of 25 September 1997 (*Gesetz über die Arbeitsverhältnisse der Mitarbeiterinnen und Mitarbeiter*; RS/BL 150; https://bl.clex.ch/app/de/texts_of_law/150; Article 30 of the Law on the personnel of the canton Basel Stadt of 17 November 1999 (Personalgesetz; RS/BS 162.100); www.gesetzessammlung.bs.ch/app/de/texts_of_law/162.100.

98 Article 22 of the General Law on the personnel of the cantonal administration, the judiciary and public medical institutions of 4 December 1997 (LPers GE, *Loi générale relative au personnel de l'administration cantonale, du pouvoir judiciaire et des établissements publics médicaux*; RS/GE B 5 05); https://silgeneve.ch/legis/index.aspx.

99 AI and OW.

100 BE, FR, GL, JU, and SO.

101 AR, LU, NW, OW, SH, SZ, VD, VS, and ZH.

102 AI, AG, GR, Thurgau (TG), and ZG.

103 BL and BS.

104 Article 31, para. 2 LPers GE.

105 Article 31, para. 3 LPers GE.

of service. It is especially necessary in cases where the employee's behaviour demonstrates that he or she is no longer worthy of remaining in office.

Ordinary dismissal is possible when the continuation of the service relationship is no longer compatible with the proper functioning of the administration, notably due to insufficient performance, inability to fulfil the requirements of the position or breach of duty by the employee. These are all circumstances, which according to the rules of good faith, exclude continuation of the service relationship, with or without fault. These circumstances may be of any nature and may be the result of events or circumstances that the employee could not avoid, or on the contrary, of activities, behaviours, or situations for which the employee is responsible. This termination of the employment relationship can be described as ordinary. It can occur whether or not the employee is at fault.

These two methods of terminating the employment relationship lead to the same result: termination of the employment relationship. The difference is their basis: disciplinary dismissal necessarily requires serious misconduct on the part of the employee and means that the employee suffers a form of punishment, whereas ordinary termination only requires an objective reason, whether or not it is misconduct, which may be the result of incompetence or ill-will, or a violation of the duties of the service, irrespective of the fact that the same conduct could possibly be subject to a sanction. Moreover, when dismissal is a sanction, the requirements for establishing the facts are often higher than for ordinary dismissal since the elements constituting a violation of the duties of service must be precisely established.

V. Conclusions

This overview of federal and cantonal legislation on civil service law highlights the great diversity that still exists. The federal State and the cantons that have reformed their civil service law have certainly moved closer to private labour law but have not automatically aligned themselves with it.

However, some cantons stand out either for the extent of their closeness to private law or, on the contrary, for their proximity to the traditional model that they maintain. Thus, the cantons of Appenzell Innerrohden and Aargau are probably among the cantons that are closest to private law on all points studied. These cantons revised their legislation in 1998 and 2000, respectively, namely before or at the same time as the Confederation. In contrast, the cantons of Valais, Ticino, and Geneva still mostly apply the traditional model. Their legislation is older, dating to 1983, 1995 and 1997, respectively, which partly explains why the later reforms did not entrain them.

Two lessons can be drawn from this analysis of the reforms that have taken place over the last 20 years. On one hand, after the great temptation to resort to private labour law, it now seems to be accepted that the public law regime is the only one applicable to personnel working for public administrations exercising public power or public service tasks. The place of private law remains limited to certain decentralised entities, mainly those active on the market as private companies. On the other hand, while preserving a personnel management policy that respects the rights of employees and sometimes even innovates, personnel statutes are progressively abandoning historical elements, such as disciplinary powers and limitations on dismissals. The choice is that of moving closer to private labour law while preserving the specificities of a State job.

Bibliography

Aubert G., Curran J., Däubler W., De Becker A., Défago Gaudin V., Fortier C., Gagliardi B., Geiser T., Laborde J.-P., Malaret E., Pärli K., Weber M.-A. (2016), 'Les origines et l'évolution du droit de la fonction publique', in Dunand J.-P., Mahon P., Perrenoud S. (eds), *Le droit de la relation de travail à la croisée des chemins: Convergences et divergences entre le droit privé du travail et le droit de la fonction publique*, Zurich: Schulthess, 184–212.

Candrian J. (2021), 'La double pertinence du principe de la bonne foi dans l'exécution des contrats de travail conclus par la Confédération: impératif contractuel et impératif de l'Etat de droit', in Boillet V., Favre A., Largey T., Martenet V. (eds), *La contractualisation en droit public*, Zurich: Schulthess Verlag, 109–138.

Defago Gaudin V. (2016), 'Les obstacles à la privatisation de la fonction publique', in Dunand J.-P., Mahon P., Perrenoud S. (eds), *Le droit de la relation de travail à la croisée des chemins: convergences et divergences entre le droit privé du travail et le droit de la fonction publique*, Genève: Schulthess éd. romandes, 256–278.

Dubey J., Zufferey J.-B. (2014), *Droit administratif général*, Bâle: Helbing Lichtenhahn Verlag.

Grebski L. and Malla J. (2013), in Portmann W. and Uhlmann F. (eds), *Bundespersonalgesetz (BPG)*, Bern: Stämpfli.

Häfelin U., Müller G., Uhlmann F. (2020), *Allgemeines Verwaltungsrecht*, 8th edition, Zürich-St. Gallen: Dike Verlag.

Hänni P. and Schneider A. (2004), *Droits et devoirs des collaborateurs*, Revue Fribourgeoise de Jurisprudence, 151–167.

Hänni P. (2017), *Personalrecht des Bundes*, Bâle: Schweizerisches Bundesverwaltungsrecht.

Helbling P. (2013), in Portmann W. and Uhlmann F. (eds), *Bundespersonalgesetz (BPG)*, Bern: Stämpfli.

Malla J. (2013), in Portmann W. and Uhlmann F. (eds), *Bundespersonalgesetz (BPG)*, Bern: Stämpfli.

Moor P., Bellanger F., Tanquerel T. (2018), *Droit administratif, vol. III: L'organisation des activités administratives. Les biens de l'Etat*, Bern: Stämpfli.

Müller M. (2008), in Auer C., Markus M., Schindler B. (eds), *Kommentar zum Bundesgesetzüber das Verwaltungsverfahren (VwVG)*, Zürich: Dike Verlag.

Nötzli H. (2013), in Portmann W. and Uhlmann F. (eds), *Bundespersonalgesetz (BPG)*, Bern: Stämpfli.

Portmann W., in Portmann W. and Uhlmann F. (eds) (2013), *Bundespersonalgesetz (BPG)*, Bern: Stämpfli Verlag.

Subilia-Rouge L. (2003), 'La nouvelle LPers: quelques points de rencontre avec le droit privé du travail', *Revue de droit administratif et de droit fiscal*, 289–317.

Uhlmann F. (2016), in Waldmann, B., Weissenberger, P., (eds), *VwVG – Praxiskommentar Verwaltungsverfahres gesetz*, Zürich: Schulthess Verlag.

Waldmann B., in Weissenberger P. (eds) (2016), *Praxiskommentar Verwaltungsverfahrensgesetz (VwVG): unter Einschluss des Reglements über die Kosten und Entschädigungen vor dem Bundesverwaltungsgericht (VGKE)*, Zurich-Bâle-Genève: Schulthess.

Wurtzburger A. (2022), *Commentaire de la LTF*, 3rd edition, Bern: Stämpfli.

16 The Civil Service UK Style

Facing Up to Change?

Peter Leyland *

I. Introduction

This chapter is not intended as a description of the contemporary civil service nor does it deal with the routine process of public administration, rather, it seeks to review the constitutional role of the civil service as the organisation responsible for the implementation of central government policy.[1] The United Kingdom (UK) Civil Service is defined as the organ of State falling under purview of the Civil Service Commission under section 2 of the Constitutional Reform and Governance Act 2010; as such, it is responsible for the implementation of policy by central government. Its members are employed as Crown Servants who formally owe allegiance to the Crown.[2] The service operates as part of a multilayered constitution and since its culture and structure were formed in the latter part of the 19th century it has been subject to many waves of reform. Against the background of empire, war, political turmoil, and latterly economic decline, until recently the ship of State might appear to have weathered the storm almost intact. There are constitutional commentators who would attribute this resilience, in part at least, to the leadership and support it has derived from "a professional civil service populated by high-minded, classically educated apostles of orderly administration who brought probity and consistency to the conduct of public policy".[3] In his insightful study of the civil service Professor Peter Hennessy draws attention to the fact that civil servants occupy a unique place as the permanent residents of the House of Power and that in this capacity the service might claim that they occupy a position as the real rulers of the country. By way of contrast other writers point to what they regards as a fatal myth of a perfectly working government machine, and find instead a civil service staffed at the top by generalists with crossword puzzle minds, out of touch with the complex technical demands of contemporary government and it is this palpable lack of expertise where it is most needed that renders it, at least partly, culpable for failing to address the deep malaise of post second world war economic decline.[4]

* The Author would like to thank Professor Andrew Harding for his comments on an earlier version of this chapter.

1 Apart from the Civil Service which is the subject of this chapter, Public Sector employment in the UK amounts to approximately 5.74 million employees. Given the national distribution of these employees under devolution the breakdown is complex but this includes: 3.54 million employed by central government (e.g. armed forces, police, education); 1.88 million employed by the National Health Service and 2.01 million employed by local government; see Office of National Statistics (2022).

2 De Smith-Brazier (1994), pp. 209 f. For an official definition, see: www.civilservant.org.uk/information-definitions.html.

3 Hennessey (2001), p. 9.

4 Hennessey (2001), p. 6.

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This survey commences by referring to the origins of public administration in order to identify the emergence of many of the characteristics of the contemporary civil service. In particular, this allows us to see how a 19th-century conception of public service was reconciled with the evolving model of parliamentary democracy in which ministers rather than civil servants are directly answerable to a mainly democratically elected Parliament. In one sense a statistical audit and basic description might suggest that the ostensible characteristics of the civil service have remained constant. For example, it is a strictly hierarchical in structure and the rules under which it operates conform to the requirements of the pivotal constitutional convention of ministerial responsibility. In the second part of the chapter it is argued that the impression of a permanent unchanging service is in fact illusory. The civil service has periodically been rocked by waves of reform and reorganisation which have been multidimensional, affecting the external shape in response to devolution and departmental reconfiguration but equally affecting the internal management and structure. The chapter concludes by arguing that very recent trends towards politicisation of the service, with the proliferation of special advisers and interventions by ministers to prompt the resignation of senior officials, threatens to undermine fundamental assumptions relating to the permanence, anonymity, and neutrality of the public service.

II. History and Constitutional Context

If we first consider the distant origins, the intricacy of public administration is recognised by medieval historians. To cite one example, by the mid-13th century under an absolute monarchy:

> Sheriffs controlled the bailiffs of the hundreds by the same processes, such as the action of account, that private lords used to control their estate bailiffs. Sheriffs too had central offices and staff to supervise the execution of the king's writs and the reporting back which held together the whole royal administration.[5]

Such mechanisms remained in place for many centuries to impose Royal authority and raise taxation but for the purposes of this discussion the foundations of the modern civil service were laid following the publication of the Northcote-Trevelyan Report (NTR) of 1854.[6] The report commissioned by W. E. Gladstone (later to become Prime Minister – PM – on four occasions between 1868 and 1894) not only coincided with the Crimean War and the rapid enlargement of the British Empire, but also, domestically it was coterminous with the introduction of a flood of legislative reforms at central and local government level.[7] The result was an expansion in the purview of government activity leading to an exponential rise in public business. The existing service was not only small in size but the Crimean War had highlighted many gross deficiencies in administrative competence. This groundbreaking report confirmed the need for a permanent professional civil service in which there was a demarcation between administrative tasks and political roles. The report established the idea of the appointment and the promotion of officials on merit until retirement

5 Harding (1993), pp. 154–155.

6 Northcote-Trevelyan (1854).

7 The reforms extended into an expanding range of policy areas. For example, relevant statutes include: Public Health Acts 1848 and 1875 (Public Health), Municipal Corporation Acts 1835 and 1882 (Local Government), Education Acts 1870 (Universal Primary Education).

in contrast to politicians who come and go with regular changes in government. The separation of officials from politicians was achieved once the appointment process to the service was by competitive examinations and thus placed beyond the reach of political preferment from elected party politicians. The report embedded cultural leaders at the apex of society, while promoting the idea that an efficient technocratic elite was being established.[8] The civil service mandarin class has been recruited from elite universities, mainly Oxford and Cambridge, ever since. Among the ablest minds joining the service were legendary figures such as John Maynard Keynes at the Treasury.[9] Moreover, the report led to the creation of a strong internal culture founded on integrity and probity with hardly any corruption. In regard to its structural characteristics the recommendations also led to the division of the civil service into classes comprising, on the one hand, at the pinnacle a small coterie of mandarins involved in policymaking and directly advising minsters, and, on the other, the officials responsible for policy implementation.[10]

At the time of writing, 511,000 full-time equivalent home civil servants were recorded as working for the central government,[11] an increase of nearly 21,000 from the previous year.[12] In place of the homogeneous image of previous generations caricatured by white upper middle-class males clad in dark pin-striped suits, wearing bowler hats and carrying umbrellas[13] now we find that women comprise 54% of the total workforce. There has been a progressive dispersal of the civil service away from its Whitehall hub, but London continues to be the base for just over 100,000 of the total. The remainder of the service is dispersed throughout the nation.[14] A glance at the breakdown of these figures reveals that an emphasis on achieving greater diversity has impacted on the personal profile within the service: 14.3% of staff are from ethnic minority backgrounds, another 13.6% of staff have a disability of some kind, while 5.6% declare their sexual orientation as Lesbian, Gay, Bisexual, and Other (LGBO). The proportion of senior grades has increased in recent years, 70% of the current workforce is employed at the Executive Officer level or above. At the elite level the Senior Civil Service (SCS) adds up to only 7,290. Here women are still under-represented, comprising 47.7% but with only six departments having female permanent secretaries at their head, and there is a gender pay gap throughout the service.[15] In common with most other public bodies, large private corporations and other businesses during the COVID-19 pandemic, many staff converted to working online. This change in practice has to some degree remained in place and consolidated the acceptance of flexible working patterns, with 20% of staff employed on a part-time basis.

8 Tonge (1999), p. 9.

9 Very few women have reached the top. Baroness Evelyn Sharp was the first female Permanent Secretary at the Ministry of Housing and Local Government 1955–66.

10 Hennessey (2001), pp. 38 f.

11 Office of National Statistics (2022). A high proportion work for the 5 largest departments: Department for Works and Pensions (89,030), Ministry of Justice (86,070), His Majesty (HM) Revenue and Customs (70,950), Ministry of Defence (58,010), Home Office (35,650). It should also be noted that the Department of Health and Social Care totals only (11,760) as the Civil Service (CS) statistics do not feature National Health System (NHS) employees.

12 Civil Service Statistics (2018).

13 Jobs are organised according to a hierarchical grading system: Administrative Officer, Executive Officer, Senior Executive Officer, Grades 6 and 7 (significant policy responsibilities), Senior Civil Service.

14 The total includes the devolved Scottish Government (22,230) and Welsh Government (5,780).

15 www.instituteforgovernment.org.uk/explainers/gender-balance-civil-service; Civil Service Statistics (2021), p. 3.

The reputation for permanence and continuity which has been recognised as a prime characteristic of the service conflicts with the internal career trajectory for upwardly mobile personnel within the service. For instance, a recent report points out that in order to gain experience across the administration, the average time in a departmental posting for the highest grade Senior Civil Service is less than two years:

> This is shorter than the tenure of many of the ministers they serve, and makes a nonsense of the idea of a permanent Civil Service providing ministers with the subject expertise, long experience and corporate memory they are entitled to expect.[16]

In order to progress and gain promotion there is an expectation that a wide range of experience across departments will be gained as rapidly as possible. In consequence, officials leave their internal posts frequently and secure transfers to other departments. This is a tendency which not only undermines a sense of continuity within departments, but it also means that individuals lack the opportunity to acquire deeper expertise in a particular field of public administration.[17]

1. Legal Status and Codes of Practice

Civil servants in the United Kingdom have a special position in law as they are employed as servants of the Crown, reporting to ministers, as such, they can be transferred freely between departments and between England and the Scottish Executive and the Welsh Government. The conditions of their employment are in conformity with employment legislation,[18] and once appointed, civil servants are bound by the Official Secrets Act[19] and by the Freedom of Information Act 2000. However, until the Constitutional Reform and Governance Act 2010 reached the statute book there was no specific legislation establishing the constitutional role of the civil service or regulating the conduct of civil servants. The 2010 Act recognises the Civil Service Commission as a body regulating the employment and working conditions of the civil service and it requires the publication of a code of conduct for civil servants.[20] The conduct of civil servants in respect to their key function in supporting the government of the day is controlled by this "soft law" code of practice (CS code). The influential Scott Report into the internal working of government had criticised the way civil service impartiality had been undermined on occasions when officials were drawn into misleading Parliament.[21] The CS code, which replaced the very general Armstrong Memorandum (1985) prepared by the then Cabinet Secretary, is designed to embed core values of integrity, honesty, objectivity, impartiality. In places the CS code is explicit about unacceptable conduct which would include: the misuse of their official role,

16 House of Commons, Public Administration and Constitutional Affairs Committee, The Minister and the Official: The Fulcrum of Whitehall Effectiveness, Fifth Report of Session 2017–19, HC 497, p. 24.

17 House of Commons, Public Administration and Constitutional Affairs Committee, *The Minister and the Official: The Fulcrum of Whitehall Effectiveness*, Fifth Report of Session 2017–19, HC 497, pp. 23 f.

18 For example, the Equal Pay Act 1970, the Employment Protection Consolidation Act 1978, the Sex Discrimination Act 1975, and the Race Relations Act 1976 apply to the civil service.

19 See Official Secrets Act 1989, Sections 1–4.

20 Section 2, schedule 1.

21 Tomkins (1998), pp. 74 f.

deceiving or knowingly misleading Parliament, frustrating the implementation of policy.[22] Moreover, the CS code reminds civil servants advising ministers that "they should be aware of the constitutional significance of Parliament and of the conventions governing the relationship between Parliament and the government". This code is linked to the Civil Service Management Code which sets out in greater detail the terms and conditions of employment under which they are expected to operate, including the detailed application of matters of conduct and discipline.[23]

The question of enforcement is not straightforward since a failure to follow the code is not, in itself, illegal. If a civil servant believes that any request or activity is in conflict with the CS code the matter should be reported to a senior official in the department. If this proves unsatisfactory, the matter may be referred to the Civil Service Commission for investigation. If necessary, the commission will make a recommendation and refer to each appeal in its annual report. In order to protect whistle-blowers, the Public Interest Disclosure Act 1998 protects civil servants from dismissal if they make a protected disclosure of malpractice or criminality. The high-level resignations of senior officials which followed in the wake of revelations as part of the "Partygate Scandal" were not for breaches of the CS code but because their involvement with celebratory events during COVID-19 lockdowns was unlawful. A senior civil servant and other ministerial aids resigned in 2022 following revelations that they were present at gatherings organised in breach of the COVID-19 regulations[24] but Dominic Cummings (the PMs chief adviser) did not resign earlier in the pandemic despite having breached the legally enforced lockdown rules.

In a different sense the issue of legal accountability for government decision-making arises. The legal framework of legislation will frequently leave scope for the exercise of discretionary power by officials, with the traditional model regarding ministers and civil servants as partners in policy implementation.[25] In explaining the principle of the rule of law, great emphasis was placed by Dicey[26] in his seminal constitutional work on the role of the ordinary courts in controlling any abuse of power, and the principles of the modern law of Judicial Review are geared towards placing legal limits on the way in which discretionary powers are exercised.[27] Indeed, the "Judge Over Your Shoulder"[28] which first appeared in the 1980s stands as testimony to the increased prospect of facing judicial review. Discretionary powers, whether under a statutory framework or the prerogative are set within strict legal limits recognised through the overlapping grounds of judicial review.[29] The result is that "judicial review (. . .) is a fundamental and inalienable constitutional protection: the rule of law in action".[30]

22 www.gov.uk/government/publications/civil-service-code/the-civil-service-code, April 2021.
23 www.gov.uk/government/publications/civil-servants-terms-and-conditions, November 2016.
24 "Four Johnson aides quit in fallout from Downing Street parties", in *The Guardian*, 3 February 2022.
25 The Carltona Principle is discussed later.
26 Dicey (1931), pp. 183 f.
27 Leyland and Anthony (2016), pp. 37 f.
28 Government Legal Department (2018).
29 These grounds were outlined by Lord Diplock in *Council for the Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.
30 Fordham (2020), p. 6.

2. *Civil Service Accountability and the Convention of Individual Ministerial Responsibility*

The civil service that emerges from the Northcote-Trevelyan reforms after they were introduced in the latter part of the 19th century (described earlier) is characterised as amounting to a permanent system of centralised hierarchical administration. It is subordinate to ministers and is comprised of trained professionals, who operate according to prescribed and objective rules. The structure is designed to enable those at the base of the pyramid of administration to carry out the commands of those at the pinnacle. Professor Bogdanor has explained that in Britain, the character of the civil service has been shaped by a particular understanding of parliamentary government based on the convention of ministerial responsibility to Parliament.[31]

A central role of the civil service is to implement policy, often by putting into effect detailed legislative provisions, and as we have just observed, it establishes a system which is intended to limit the arbitrary exercise of power by officials. Each department is directed by a board which is chaired by the Secretary of State (cabinet minister), and comprises a combination of junior ministers, officials including special advisers (SPADS), experts, scientists, and other non-executive board members.[32] The civil service is there to assist at the highest level in the formulation of policy, and it is primarily responsible for the implementation policy,[33] but according to constitutional orthodoxy under the convention of individual ministerial responsibility (however discredited and mythical), ministers (and not civil servants) are identified as the authors of government policy.[34] In theory at least, they not only take the credit and the blame for it, but also explain or account for the actions of their department in Parliament.[35] In order to perform this function all ministers must be member of one of the Houses of Parliament. The policy or action taken by the department will be defended by the minister in formal debates in the House of Commons and/or House of Lords, at Question Time and before Departmental Select Committees and other parliamentary committees. Of course in answering to Parliament ministers are routinely briefed by senior officials and the Permanent Secretary as departmental accounting officer will often give evidence to select committees (notionally under the direction of the minister). This orthodox view of ministerial responsibility reflected in the Code of Practice for Ministers unequivocally recognises that the Minister in charge of a department is solely accountable to Parliament for the exercise of the powers on which the administration of that department depends.[36] This adds up to ministers being held responsible before Parliament for the actions of their departments in a formal and procedural sense, but it is also unsatisfactory and rather simplistic in identifying a "chain of accountability" in which officials answer to ministers, who answer to Parliament. In turn, Members of

31 Bogdanor (2003), p. 237.

32 House of Commons, Public Administration and Constitutional Affairs Committee, *The Minister and the Official: The Fulcrum of Whitehall Effectiveness*, Fifth Report of Session 2017–19, HC 497, 18 June 2018, p. 30.

33 This might be directly, through executive agencies, or by contractual arrangements with the private or independent sector. See e.g. Davies (2013).

34 Marshall (1984); Woodhouse (2003), p. 283.

35 For a comparative constitutional perspective, see Harding (2023).

36 Ministerial Code 2024, chapter 1.

Parliament (MPs) at the ballot box ultimately answer to the electorate.[37] While accountability in the sense used here refers to the procedural requirements of answerability before Parliament,[38] no clear guidance is offered on the vexed question, much debated by constitutional commentators, of ultimate responsibility for policy failure when one or more ministerial resignations might be expected or when a general election might be triggered.[39] The accountability for policy blunders by government departments seldom results in ministers taking full responsibility by offering their resignation. Their continuation in office depends politically on whether the minister concerned has sufficient political support in Parliament.[40]

In recent years the reputation of the civil service has suffered from examples of serious maladministration.[41] The infamous Windrush Scandal erupted in 2017 when it emerged that a substantial cohort of long-standing UK residents were wrongly classed as illegal immigrants because they had not been issued with formal documentation when they entered the UK lawfully before 1973. Systemic oversights within the Home Office caused this gross injustice. In order to tackle illegal immigration, new policies required official documentation to be produced to obtain routine public services.[42] In the meantime, the Home Office had lost or destroyed its own records relating to these individuals. Without the proof now required of their immigration status and citizenship a cohort of mainly former West Indians were denied access to employment, pensions, healthcare, and other services. Some individuals were targeted for removal and deported to the West Indies. Subsequent inquiries by the parliamentary departmental select committee found that this treatment had demonstrated gross institutional ignorance and thoughtlessness towards the issue of race and history. The revelations and furious public reaction prompted public apologies in Parliament from the Home Secretary in post,[43] but in a further twist there were subsequent issues of fairness and delay arising from the compensation scheme set up to address the problem.[44] The only ministerial resignation relating to Windrush was not about the policy itself and how it had been applied, but came about because Parliament had been misled by a statement from a later Home Secretary about whether targets for deportation had been adopted as part of the policy.[45]

This issue of apportioning blame between minister and civil servants remains highly topical as the convention of individual ministerial responsibility has been called into

37 Turpin (1994), p. 127.

38 See Cabinet Office (2011). Evidence is given to Select Committees on behalf of ministers and under their directions.

39 For detailed up-to-date discussion of political responsibility for departmental actions, see Young (2021), pp. 684 f.

40 Leyland (2021), pp. 160 f.

41 See Griffith (1995).The famous *Crichel Down* case (1954) drew attention to the limits of parliamentary accountability and also led to the eventual introduction of a parliamentary ombudsman to investigate maladministration.

42 House of Commons, Committee of Public Accounts, *The Windrush generation and the Home Office*, Eighty-Second Report of Session 2017–19, HC 1518, p. 8.

43 Theresa May, who became PM, served as Home Secretary from 2010–16 when this controversial policy was first adopted.

44 M. Gower, *Windrush generation: Government action to "right the wrongs"*, House of Commons Library Briefing Paper, CBD 8779, 22 June 2020.

45 "Amber Rudd resigns hours after Guardian publishes deportation targets letter", in *The Guardian*, 30 April 2018.

question by internal reforms discussed later and by a very recent trend whereby ministers have scapegoated senior civil servants for manifest failures in administration rather than taking any of the blame themselves. To cite a recent example, it was not possible during the COVID-19 pandemic to conduct school examinations required for university entrance (A levels and General Certificates of Secondary Education, GCSEs).[46] Instead, the government agency responsible for the conducting of examinations, the Office of Qualifications and Examinations Regulator (Ofqual), relied on a complex algorithm using a combination of teacher rankings of pupils, and expected grades for each school, calculated from their previous results. The formula used resulted in the downgrading of 35% of pupils nationally. This caused a huge outcry as it was the students with high results predicted but from low-achieving schools that had been downgraded by this formula. Unless the scheme was abandoned they faced the possibility of losing their chance of being offered a university place. According to the constitutional convention of individual ministerial responsibility, it was the Secretary of State for Education (minister) who should answer to Parliament for this disastrous policy based on a defective algorithm. However, at variance with accepted practice, it was the senior departmental official, in this instance the chief executive of Ofqual, who was forced to resign.[47]

III. Transformations

Thus far the origins and basic form of the civil service has been presented in a constitutional context, drawing particular attention to legal status and core accountability issues. As we move on, the remainder of this chapter concentrates on the waves of reform initiatives and transformations that have affected the civil service since the end of the World War II. The discussion is not presented as linear narrative, but thematically in relation to the institutional structure affected by departmental reconfiguration, devolution and Brexit; radical changes under Next Steps and New Public Management (NPM) to internal organisation, management, and culture; the contribution of science and professional expertise; and debates surrounding the political role of SPADS. At one level this selective review will offer an evaluation of how the contemporary service operates as an effective tool for policy implementation, at another, it will highlight a tendency towards politicisation which has the potential to further impact on a reputation for impartiality and consequently also the crucial question of the effectiveness of constitutional accountability mechanisms.

1. Drawing Up Departmental Boundaries

The "corridors of power" in the UK at the heart of Westminster run directly from the Georgian Prime Ministerial residence at 10 Downing Street into the Cabinet Office next door, giving an impression of stasis, often associated symbolically with the civil service located at the political core housed in historic buildings in Whitehall, all located in easy reach of Parliament and Buckingham Palace. Any such image is deceptive and has to be matched against the dispersal of the civil service nationally and a constantly evolving

46 House of Commons, Education Committee, *Getting the grades they've earned: Covid 19: the cancellation of exams and "calculated" grades: Response to Committee's First Report*, Second Special Report of Session 2019–21, HC 812, 24 September 2020, pp. 19 f.

47 Harlow and Rawlings (2021), p. 254.

departmental morphology. In regard to departmental organisation, “there has been a continuous process of creation, fission, fusion, and transfer, rapid at some times, slower at others”.[48] The PM is the minister for the civil service. In this capacity, he or she can call on the prerogative power to command the setting up of departments and the re-allocation of departmental responsibilities without any recourse to legislation. The Haldane committee in its post–World War I evaluation[49] had attempted to define this systematically as a choice to be made between distribution according to the persons or classes to be dealt with and distribution according to the services to be performed.[50] But, as we observe later, there does not seem to be any discernible principle governing the distribution of functions between government departments. Rather, the re-designation of functions has been made by individual PMs for pragmatic reasons.[51]

The examples which follow demonstrate that a reshuffling of the departmental pack to cope with events has become a routine feature which might follow a change of government or as a response to the political and economic circumstances of the moment. The exigencies of wartime resulted in the formation of a Ministry of Food to cope with rationing and a Ministry of Aircraft Production to oversee the manufacture and distribution of aircraft. In 1964, as the extent of the armed forces was scaled back, the War Office, Admiralty and Air Ministry were combined to form the Ministry of Defence. Prime Minister Wilson, who as an economist had himself served as a civil servant, experimented by setting up in 1964 a Department of Economic Affairs as an offshoot of the Treasury to deal with economic planning, but this department failed to perform as anticipated and only lasted until 1968.[52] The handling of the Blair government’s constitutional reform agenda, including devolution and the Human Rights Act, was mainly given to the former Lord Chancellor’s Department which was first morphed into a Department of Constitutional Affairs. Less than ten years later this department expanded even further into the Ministry of Justice after being allocated responsibility for the prison service from the Home Office.[53] A Department for Exiting the European Union (EU) was temporarily established (2016–2020) under PM May to oversee negotiations to leave the EU and support the Brexit process. Most recently the fusion of the Foreign Office with the Department for Overseas Development was put in place in 2020.[54]

2. *The Civil Service and Multilayered Governance*

Since the advent of devolution, the changing face of the civil service has also come to reflect the “multilayered” character of the contemporary constitution. From a vertical UK viewpoint, the launch of devolution following the referendums held in 1999 in Scotland and Wales was implemented by establishing a new layer of democratic government based on an elected legislatures at devolved level,[55] but considered from the standpoint of the impact upon UK-wide public administration the devolved executives set up in Scotland and Wales

48 See Hanson and Walles (1990), p. 146.
49 Ministry of Reconstruction (1918).
50 Hanson and Walles (1990), p. 150.
51 Hennessey (2000).
52 Hennessey (2000), p. 305.
53 Drewry (2011), pp. 187 and 192.
54 Dickson and Brien (2020).
55 Hazell and Morris (1999), pp. 137 f.

were staffed almost exclusively by officials previously employed by central government departments, mainly the Scottish Office and Welsh Office. Devolution simply called for the transfer of personnel to the devolved administrations located in Edinburgh and Cardiff[56] (and elsewhere in Scotland and Wales) but officials of all ranks continued to be employed under the same conditions and remunerated out of national taxation.[57]

In order to address the inevitable questions of policy co-ordination between devolved government and the Westminster government, a series of mainly bi-lateral soft law concordats were drawn up between the devolved executives and Whitehall departments.[58] The devolution legislation sets out circumstances where "devolution issues" might be legally contested[59] but there have been relatively few inter-governmental disputes decided in the courts.[60] These concordats were designed to assist at a bureaucratic level with the handover of power upon the launch of devolution, and to serve as the routine method of conflict resolution where powers were shared or where powers overlapped. A general Memorandum of Understanding (MOU) contains a set of principles and guidelines. These include: good communication and information-sharing, early warning of policy proposals, cooperation on matters of mutual interest, and rules of confidentiality to be applied within the workings of the post-devolutionary system of government.[61] Further, the system of concordats and policy implementation has been overseen by a Joint Ministerial Committee (JMC),[62] which operates at ministerial level as part of a consultative process and it is chaired in plenary session by the UK PM. The system was mainly designed to finally resolve disputes between administrations.[63] In support of these arrangements, at the heart of government there is a Cabinet Office team of civil servants responsible for coordinating the meetings of the JMC in partnership with officials from the devolved administrations and relevant UK government departments.[64] In the estimation of Professor Rawlings: "The associated processes [of intergovernmental relations] were disjointed and unstable, discretionary and ripe for central domination, and lacking in transparency and accountability."[65] The fact that the management of the JMC and the process of drafting concordats has been veiled in secrecy and tended to be Whitehall-led introduced an element of controversy from the outset which has become much more pronounced with the upsurge of support for the Scottish and Welsh nationalist parties in the Scottish and Welsh parliaments and with a Scottish Nationalist government assuming power in Edinburgh.[66]

The management of the nationwide impact of the Brexit withdrawal process exposed the limitations of the inter-governmental machinery. Brexit negotiations at devolved level led to the immediate resuscitation of the JMC in 2016. A European Negotiations

56 McMillan and Massey (2004), p. 238.

57 Staff migrated mainly from the Scottish Office and the Welsh Office often to carry out the same functions at devolved level but answerable through Scottish, Welsh, or Northern Ireland ministers to the devolved legislatures.

58 Torrance (2021).

59 See Gee (2005), p. 252.

60 See www.assemblywales.org/qg12-0019.pdf.

61 See Memorandum of Understanding and Supplementary Agreements, Cm 4806, July 2000.

62 Memorandum of Understanding and Supplementary Agreements, Cm 4806, July 2000, pp. 15 f.

63 House of Lords, Select Committee on the Constitution, *Inter-governmental relations in the United Kingdom*, 11th Report of Session 2014–15, HL Paper 146, pp. 12 f.

64 Torrance (2021), p. 14.

65 Rawlings (2017), p. 15.

66 The Civil Service in NI has a separate structure (beyond the scope of this chapter).

sub-committee was formed, tasked with preparing for the complexity of facilitating Brexit. In general terms it identified principles for *Common Frameworks* relating to 154 areas where EU law intersects with devolved competences.[67] In doing so, there was also an acknowledgment in this forum of the policy divergence in many fields where repatriated EU law was likely to impact on devolved competences. In the wider political arena, however, the Scottish and Welsh governments were strongly opposed to any attempt to use Brexit as an excuse to water down their powers under the devolution settlement.[68] Notwithstanding the intensity of the opposition, the Westminster government proceeded with its legislation. The UK Internal Markets Act 2020 (UKIM) is capable of imposing uniform trading standards across the nation but also its provisions cut across devolved competences and its passage through Parliament went ahead without obtaining (Sewel) legislative consent motions from the devolved legislatures.[69] The upshot is that UKIM establishes the post-Brexit UK wide trading relationship between England and Scotland, Wales and Northern Ireland, but it clashes with the fundamentals of devolution without resolving the underlying issues.[70] This complexity of overlapping competences and the underlying conflict of interest exposed here signals the importance of establishing a workable protocol in order to cope with regulatory divergence and the necessity for executive cooperation and inter-parliamentary working between the layers of government UK-wide.[71]

3. The Next Steps Initiative and Its Legacy

This section focuses on questions of organisation and management impacting upon the internal configuration of the civil service. A series of reports have been commissioned over the years to address a range of problems particularly designed to improve the efficiency of policy delivery and augment specialist expertise in policy fields. The outcomes have affected not only departmental structure and the staffing and recruitment to the service but have also impacted on the channels of political accountability to Parliament.

Mrs Thatcher (1979–1990), as PM, was ideologically committed to delivering public services more efficiently, competitively, and at a lower cost base to the taxpayer. In some areas the shift towards contracting and market principles took the form of trimming down the administration by outright privatisation of services or a transfer of functions to private sector organisations.[72] At the time of her election in 1979 she inherited a central government bureaucracy of around 750,000 full-time equivalent civil servants. By the time the Conservative Party left office in 1997 there were less than 500,000 remaining. The reforms, which were continued under her successors as PM, also had a profound impact on the internal running of the civil service. In particular, the Ibbs report set out a blueprint for the so-called Next Steps Agencies.[73] Some key elements of Ibbs were taken from the Swedish agency model. However, in contrast to the UK Next Steps variant, Swedish

67 Cabinet Office (2020).

68 The Northern Ireland Assembly was suspended until January 2020.

69 Armstrong (2020).

70 See United Kingdom Internal Markets Act 2021, part 6.

71 Sargeant and Stojanovic (2021).

72 For example the service needed to escort prisoners and suspects from custody to courts was opened to tender and has since been performed by private companies such as Group Four.

73 See PM's Efficiency Unit (The Ibbs Report) (1988). The Government Trading Act 1990 and the Civil Service (Management Functions) Act 1992 were passed to facilitate these changes.

executive agencies had greater independence from government[74] by reporting directly to Parliament and they were made subject to external audits.

In response to Ibbs, the internal organisation of central government departments was radically changed. Policymaking powers remained with ministers, their special advisers (SPADS; more on this follows), and the mandarin elite at the pinnacle of the service, but policy implementation was assigned to newly created agencies that were made responsible for the detailed day-to-day implementation.[75] These newly fashioned agencies were created by what has been termed a "pseudo-contract" (not legally enforceable) in the form of a framework agreement which sets out the relationship between the agency and the parent department.[76] Although an agency is still staffed by officials employed by the civil service, in the way it functions the agency shares certain features of a run-for-profit private sector business. For example, it might be required to conduct "market testing" to ascertain whether service delivery can be achieved more efficiently. The framework agreement typically sets through put targets and provides for a regular review of the performance. Next Steps brought with it corporate responsibility and corporate identity for the executive agencies, but without giving them corporate legal personality. Rather, the agency Chief Executive, who is responsible for the day-to-day operation, is designated by the department's Permanent Secretary as Accounting Officer for the agency so that a direct line of accountability is established to the department's Principal Accounting Officer.

The Carltona principle[77] qualifies the rule against delegation of statutory powers granted to ministers but it has allowed powers or discretions to be exercised by officials in accordance with the dictates of good administrative practice. This principle now extends to officials working in all executive agencies, as the Civil Service Management Functions Act 1992 has allowed management functions to be delegated from central government departments to executive agencies.[78] This conferral of powers has meant that Next Steps Agencies have frequently exercised a primary decision-making function. At the same time, the cloak of civil service anonymity was removed from the chief executive.

Full details of the tasks the agency has been given, and its performance against them, are published in its annual report and accounts.[79] The impact of the change can be gauged by the fact that by the time the Next Steps programme was wound up with closure of the unit in 1996 out of a total of 466,000 civil servants, 362,000 were assigned to 138 Next Steps Agencies. Subsequently, the number of executive agencies serving departments and other non-departmental public bodies has fluctuated wildly and there is now a choice of two models, the first operates closer to the home department while the second which is led by a management board has a higher degree of independence.[80]

A further characteristic of Next Steps Agencies was the adoption of revised approaches to staffing and management. Not only does the Framework Document needed to set up the agency establish something akin to a contractual relationship between the minister and chief executive, but the doctrine of NPM seeks to promote an ethos of a more professional

74 Gay (1997), p. 10.
75 Harlow and Rawlings (2021), pp. 46 f.
76 Cabinet Office (2018).
77 See *Carltona v. Commissioner of Works* [1943] 2 All ER 560.
78 Leyland and Anthony (2016), p. 100.
79 Next Steps Review, 1993 (Cm 2430). HMSO December 1993.
80 The current list of central government organisations consists of 23 ministerial departments, 20 non-ministerial departments, 300 agencies and other public bodies.

management style in the public sector, with agency recruitment and industrial relations placed firmly in the hands of the chief executive.[81] In general, staff have remained civil servants, but the changes within agencies may well affect the uniformity of the civil service in order "to give agencies the specific tools and facilities they need to carry out their own immensely varied tasks".[82]

The objective of the Thatcher government in making these reforms to the internal structure of the civil service was to establish across government an entrepreneurial mindset driven by "the whip of customer satisfaction".[83] However, from the outset, accountability problems arose with Next Steps, and these can be illustrated by briefly considering the relationship between the Prison Service and the Home Office (responsibility for the Prison Service has since shifted to the Ministry of Justice, created in 2007).[84] It became ever more apparent as time passed that the "Next Steps" initiative introduced questions regarding the impartiality and general accountability of public service employees. In part, this is because, as we have just noted, the established line of command between ministers and civil servants is called into question. A highly publicised series of escapes of Irish Republican Army (IRA) prisoners from Parkhurst and Whitemoor prisons drew attention to the difficulties in trying to clarify the relative duties and responsibilities of civil servants and ministers. The public outcry prompted the Home Secretary to set up an enquiry[85] with a view to deflecting the media spotlight away from departmental incompetence. The report made wide-ranging criticisms of the Home Office itself and of the Prison Service (now a government Next Steps Agency). The Home Secretary not only refused to take ultimate responsibility for the many shortcomings identified, but he also took the unprecedented step of dismissing the senior civil servant in charge of the Prison Agency for what was claimed to be operational failures at the level of the agency. The minister had acted without giving cogent reasons and in breach of the Civil Service Management Code.[86] This action was widely regarded as a departure from constitutional practice under the convention of ministerial responsibility.[87] After the 1997 election, the Labour Home Secretary stated that ultimate responsibility would again rest with the Secretary of State. The revised ministerial code recognises that "the ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies".[88]

In some respects this reorganisation has led to a significant redefinition of the doctrine of ministerial responsibility. Under the revised version, less emphasis is placed upon detailed day-to-day supervision of the entire department. Accountability between the department and the agency tends to be mainly in respect of overall finance and budgeting matters. Particular emphasis is placed on assessing measurable criteria such as financial efficiency.

81 For example, it provided the opportunity to recruit private sector managers as agency chiefs, who could be "incentivised" by high salaries.

82 P. Kemp, House of Commons, Treasury and Civil Service, *Progress in the Next Steps Initiative, 8th Report*, HC 481 (1989–90).

83 Harlow and Rawlings (2021), p. 50.

84 The Home Office has been divided into a range of such bodies including the UK Border Agency, HM Passports Office, National Fraud Authority and the National Crime Agency.

85 Woodcock (1994).

86 Following his sacking Derek Lewis, the former Chief Executive, successfully made a legal claim against the department for unfair dismissal.

87 Tomkins (1998), p. 45.

88 Ministerial Code (2024), 1.6.b.

In consequence, greater autonomy brought about by agency status has promoted a divergence of interests between the agency and the department. It has resulted in a division into two distinct accountabilities, but no revised mechanism to address the problem.[89] For example, ministerial responses to parliamentary questions on matters of detailed financial policy might fall under the remit of the agency chief executive, and in some cases the answers to questions provided by the chief executive may be considered inadequate.

The functioning of government agencies has continued to raise concerns, particularly in sensitive areas of public administration. Nearly 20 years later, once again under the skirts of the Home Office, operational problems within an executive agency recurred as the target for criticism, but on this occasion, there was a different outcome. The gross under performance of the Border Agency and the failure to take responsibility for many glaring deficiencies by the agency chief executive was subject to robust criticism by MPs on the departmental select committee which shadows the Home Office:

> It is appalling that a senior civil servant (the Chief Executive) should have misled the committee (. . .). The whole episode [relating to the shambolic processing of asylum cases] raises serious concerns about the accountability of most senior civil servants to Parliament.

It was made abundantly clear that this was an organisation not fit for purpose which had been allowed to continue unchecked. Following the publication of this damming report and related criticism, the Border Agency lost its separate identity and was re-absorbed back into the Home Office.[90] Over time, many Next Steps agencies across the government have been reconstituted with new titles, or they have had responsibilities re-assigned.[91]

4. Professionalising the Civil Service

The extent to which the civil service is fit for purpose in having the expertise called for in many areas of policymaking has frequently been raised as a matter of concern. Critics have observed that new government initiatives are introduced without the capacity and skills to implement them. A recurring problem has been reconciling a strong internal culture at the pinnacle of the service with recruitment processes and talent management to attract talented outsiders with special expertise. The Fulton Report commissioned by PM Harold Wilson in 1968 to modernise public administration was intent on creating: "a civil service that is truly professional – expert both in the subject-matter and in the methods of public administration".[92] The Fulton critique called into question the culture at the highest level, not so much whether the mandarin generalist, lacking technical knowledge should contribute in some way to the policy process, but rather it pointed to a general problem arising from the structure itself. This was a deficiency that meant that the contribution of experts tended to be marginalised as their status within the service was not sufficiently recognised

89 Barberis (1998).

90 The work of the UK Border Agency (July–Sept. 2012) Home Affairs Committee, *Fourteenth Report of Session 2012–13*, March 2013, HC 792, p. 41.

91 See further Davies (2013).

92 Fulton Report (1968), p. 46, para. 134.

at a high enough level, especially under the hierarchy of classes and grades which applied across the service. The report noted that:

> scientists, engineers and members of other specialist classes were frequently given neither full responsibilities and opportunities, nor the corresponding authority they ought to have exercised, and it further recommended that for promotions to posts at the level of Assistant Secretary, Under Secretary (. . .) the Permanent Secretary should be assisted by a small committee [which] should always include one of the specialists in the department.[93]

Indeed, a Fulton-inspired approach to professionalisation has continued to resonate in Whitehall. An internal report compiled in 2019 recommends that:

> Every department should have a clearly defined science system. A central role here is leadership in the articulation of the entire range of a department's science needs in a single document which is endorsed by the department's Executive Committee. This should form an integral part of overall business planning within departments: unlike Areas of Research Interest (. . .) it should address the whole range of science activity conducted within the department and at arm's length from it. Further, it should include mechanisms for how non-government funded Research and Development (R&D) will be used and incentivised.[94]

The report also concludes that "a core part of the departmental Chief Scientific Adviser's role is to be made accountable for the existence of such a plan".[95]

More than 50 years on from the Fulton Report there is still an absence of skills in many specialist areas. But over-reliance on external recruitment has its drawbacks when it comes to attracting and integrating staff as part of the internal culture of the department. It would appear to follow that a greater proportion of in-house-trained expertise is required.[96] The Civil Service Fast Stream runs a leadership development programme to recruit talented graduates by providing a range of relevant experience in particular fields with the prospect of accelerated promotion. At the same time, there is a regular staff turnover and leakage as staff with civil service training and experience resign from their posts to seek financially rewarding opportunities outside the service. This is a problem largely caused by the discrepancy between the rates of salary offered within the civil service and those available at an equivalent level in the private sector.[97]

A policy involving the appointment of expert scientists at senior level has been pursued by most civil service departments, but there are still issues related to recruitment and retention of experts, including scientists and doctors, but also a chronic lack of skills in a number of other fields such as mathematics, statistics, procurement science, and engineering. Within the service there is a Modernisation and Reform team and a new Skills and

93 Fulton Report (1968), p. 41, para. 120.

94 Government Office for Science (2019), p. 20.

95 Government Office for Science (2019).

96 Baxendale (2014).

97 House of Commons, Public Administration and Constitutional Affairs Committee, *The Minister and the Official: The Fulcrum of Whitehall Effectiveness*, Fifth Report of Session 2017–19, HC 497, 18 June 2018, p. 21.

Curriculum Unit.[98] It is further noted that the Functions Initiative launched in 2013 to address this problem has been "frustratingly slow".[99] The problem once again often boils down to possessing sufficient pay flexibility for the government service to compete in a marketplace of talent available.

During the COVID-19 pandemic senior government scientists in the guise of the Chief Government Scientist and the Government Chief Medical Officer appeared regularly at press conferences alongside the PM and other senior ministers as far-reaching measures were imposed on all citizens. The scientists became the main performers in presenting and explaining the complex implications of COVID-19 and the rules designed to control the disease.[100] Their formal presentations were followed up by taking detailed questions from the press and from members of the public. The multiple appearances of the "experts" lifted a veil of confidentiality concerning key aspects of the question of policy formulation and the advice provided on the application of the resulting policy. The change brought about by this visibility has constitutional implications as the practice departs radically from the accepted version of ministerial responsibility, where individual civil servants and scientific advisers would expect to be anonymous and thus shielded from the attention of the public. As a result of this exposure Chris Whitty, the Government Chief Medical Officer, was identified and then assaulted in a central London park on 27 June 2021 by a group of thugs reacting to the effects of government policy relating to lockdown conditions and vaccination strategy (ostensibly reached on the basis of scientific advice).[101]

5. The Political Dimension: Special Advisers (SPADs)

The appointment of special advisers, referred to as SPADs, on relatively short-term contracts is another way in which the civil service has been exposed to outside influence. The Prime Minister and other ministers appoint close political associates and, in the case of the PM, teams of advisers within 10 Downing Street itself may be appointed to cover a range of policy areas.[102] Instead of going through a formal selection process and working their way up the internal civil service hierarchy, these advisers are appointed directly by their political masters as temporary civil servants. They not only provide advice to ministers but brainstorm ideas and take on important responsibilities on behalf of ministers.[103] As the number of these advisers has proliferated, so has their influence in the process of government.

The increased profile and contribution of SPADs is part of a tendency towards the politicisation of the civil service.[104] One reason for this is that SPADs are invariably selected because of their association with the political party of government. In short, they personally identify with the policy commitments of the PM or minister responsible for appointing

98 Guerin et al. (2021).

99 'Specialist Skills in the Civil Service' Report House of Commons, Public Accounts Committee, Thirty-Second Report of Session 2019–21, 11 December 2020, HC 686, pp. 5 f.

100 Harlow and Rawlings (2021), pp. 79–80. "Reflecting and reinforcing the resurgence of executive power, the sheer scale and fast-moving character of the regulations cannot go unremarked. Extending through the various 'tiers' of restriction and successive 'lockdowns', ministers laid some 330 coronavirus-related statutory instruments before the UK Parliament in 2020."

101 "Chris Whitty's attacker given suspended jail sentence", in *The Times*, 30 July 2021.

102 Blick and Jones (2013).

103 See Yong and Hazell (2014).

104 King (2007), p. 233.

them. An obvious problem is that these appointees may appear to exercise authority over senior career civil servants (permanent secretary/deputy secretary/assistant secretary) officially accountable through the minister to Parliament but without their respective positions being clearly delineated. There have been conspicuous examples of high-handed intervention by SPADs acting as trouble-shooters. Under PM Blair, the already powerful Chief Downing Street Press Secretary, Alistair Campbell, successfully lobbied for an augmented role in charge of a Strategic Communications Unit tasked with coordinating all government activity.[105] On his appointment as PM, Johnson's Chief Adviser Dominic Cummings stated that his intention was to set the agenda for the entire government and drive for change.[106] The assumption of such a proactive role with profound ramifications in the political arena without democratic legitimacy is inherently problematic from the standpoint of constitutional accountability. In fact, both Campbell and Cummings ended up resigning in circumstances clouded with controversy.[107] The very high turnover of SPADs also means that they frequently make a transient contribution to policy formation.

The position of SPADs as temporary civil servants has been to some extent formalised although it might be argued that the quest for defined boundaries, where politics and administration intertwine is misguided. Individuals who have served at the highest levels of government would recognise that "[a]mbiguity, fuzziness, and grey areas are assets since they enable flexibility, and practical responses to unexpected happenings".[108] However, the Parliamentary Committee on Standards in Public Life recommended that the role of the civil service, including SPADs, should be placed on a statutory footing.[109] The Constitutional Reform and Governance Act 2010 now requires that a code of conduct is published for special advisers.[110] This code forms part of their terms and conditions of service and it recognises that the core values of integrity, honesty, objectivity, and impartiality set out in the act must be upheld at all times.[111]

IV. Conclusion: Politics, Permanence, and Neutrality

Career civil servants expect to implement policy for whichever government is in power.[112] To this end, during general election campaigns, shadow ministers from opposition parties have opportunities to brief senior officials on policy changes likely to follow should the opposition be elected to become the party of government. Permanent civil servants must avoid any association with party politics, especially at election time. Also, throughout an election campaign, SPADs who are openly partisan are required to step down from any active role in government. The civil service prides itself on having the capacity to provide high-quality impartial and objective advice to ministers. While the advice provided by

105 Waller (2014), p. 115.

106 Durrant et al. (2020), p. 9.

107 Campbell was implicated in a cover up over UK intervention in the Iraq war, while Cummings was caught breaching COVID-19 rules.

108 Jones (2002), p. 6.

109 See Parliamentary Committee on Standards in Public Life, *Ninth Report: Defining the Boundaries within the Executive: Ministers, Special Advisors and the Permanent Civil Service*, 2003; Public Administration Select Committee, *8th Report, 2001–02*, published 19 July 2002. Oliver (2003).

110 See sections 5, 6, and 8.

111 Sections 5, 6, and 8, s 7(4).

112 Cabinet Office, The Cabinet Manual, 2011, p. 57.

the Permanent Secretary, other senior officials, scientists and other experts employed by government will be routinely impartial in a party political sense, this does not necessarily mean that it will be neutral or uncontroversial in its implications. During the COVID-19 pandemic, while the scientific advice which influenced policy might have been presented in good faith, it could also be contestable. For example, not all scientists and statisticians agreed on the implications of making changes to the regulations requiring the tightening or loosening of lockdown conditions. A more serious allegation is that senior officials, in common with the Sir Humphrey character in the famous BBC TV satire *Yes Minister*,[113] might sometimes appear to have their own agenda or wish to defend long-established departmental practices. For instance, a former Cabinet Office Minister stated before the Public Administration and Constitutional Affairs Select Committee that he found the contemporary CS insufficiently responsive to government priorities. In some situations, ministerial instructions appear to have been resisted, and there has been evidence presented of blocking initiatives.[114] However, Ferdinand Mount views this same tendency through a very different lens, observing that: "The civil service is not ashamed of regarding itself as the unofficial brake in a constitutional system which has become so deficient in effective checks and balances."[115] The existence of tension between ministers and officials adds a critical edge to the process of policymaking. Advice is frequently provided by the Permanent Secretary informally and in confidence to ministers. This input might well clash with and inhibit the thrust of politically sensitive policies under consideration. However, such a relationship arguably not only alerts ministers to the wider legal, constitutional and political implications but it also has the potential to improve the quality of the end product.[116]

The contemporary civil service is faced with having to function during a period of tumultuous uncertainty on the domestic and world stage. The new instant chat-line politics, whether within existing parties or on their extreme fringes has given rise to currents of nascent populism as demonstrated by the unexpected outcome of the Brexit referendum.[117] The essence of this trend is a particular celebration of the supposed "will of the people" and, at the same time, the articulation of deep-seated mistrust of democratic institutions dominated by established elites, which many populists claim are out of touch with popular opinion. Regardless of whether there is a rational basis for this hostility, such institutions are epitomised by the traditional image of the permanent civil service. Moreover, between the 2016 Brexit referendum and the UK withdrawal from the EU, an often rancorous debate within and between the main political parties ensued over the approach to Brexit negotiations between committed remainers seeking a soft Brexit within the customs union on the one hand, and equally passionate advocates of EU withdrawal seeking a clean break on the other. Parliamentary sessions under PM May reflected this polarisation of opinion and there have been unfounded accusations by MPs and ministers that the resistance to

113 The Sitcom dating from the 1980s is based on the relationship between a Cabinet Minister/PM and the departmental Permanent Secretary/Cabinet Secretary.

114 House of Commons Public Administration and Constitutional Affairs Committee, The Minister and the Official: The Fulcrum of Whitehall Effectiveness, Fifth Report of Session 2017–19, HC 497, 18 June 2018, p. 7.

115 Mount (1992), p. 147.

116 Hennessey (2001), pp. 507 f.

117 Harlow and Rawlings (2021), pp. 56 f.

Brexit penetrated beyond the political class and extended to the officials who were tasked with delivering Brexit.[118]

Indeed, the manifest conflict of ideas linked to the upsurge in populism has a fallout with possibly far-reaching constitutional consequences in the field of public administration. In the aftermath of the December 2019 General Election an orchestrated campaign within the government prompted by ministers and the PM's most senior adviser led to the removal from office of the Cabinet Secretary at the head of the service and other departmental heads, a course of action that is radically at variance with established constitutional practice and it has been widely criticised as an attack on civil service neutrality.[119] First, it will be evident from the foregoing analysis in this essay that such intervention is contrary to the principle recognised in the CS code and Cabinet Manual indicating that full-time officials of all ranks loyally serve the government of the day of whatever complexion.[120] Second, in the light of high-profile policy setbacks and blunders associated with Brexit and the response to the COVID-19 pandemic, this shift towards the identification of officials and scapegoating of senior civil servants, and also senior government scientists, inverts the pivotal convention of ministerial responsibility (discussed earlier). As Professor Brazier tellingly puts it "[it has] the effect of allowing civil servants to be used as air raid shelters to protect ministers from flak".[121] Third, the government, under current recruitment procedures, has an indirect influence on the selection process.[122] Although replacement Permanent Secretaries are chosen from within the service on merit by open competition, the procedure in place requires that where the relevant Minister has an interest in an appointment, the Chair of the appointment panel must ensure that the minister is consulted and the minister should also agree on the composition of the selection panel. As ministers will have to work closely with senior officials, their involvement in their selection process has some justification. But the wider concern here is whether this impulsive political intervention, taken together with the proliferation of SPADs, is a further step on the path towards turning the civil service into a USA-style "spoils system" with an expectation that heads of executive departments and agencies and layers of officials below are routinely appointed and dismissed by the head of the executive branch (PM rather than President in the UK) and the corollary is that officials forming the administration would be overtly involved in politics by attempting to influence Parliament in matters relating to their departments and agencies.[123]

Bibliography

Armstrong K. (2020), 'Governing with or Without Consent – The United Kingdom Internal Market Act 2020', *UK Constitutional Law Blog*, 18 December, https://ukconstitutionallaw.org/2020/12/18/kenneth-armstrong-governing-with-or-without-consent-the-united-kingdom-internal-market-act-2020/.

Barberis P. (1998), 'The New Public Management and a New Accountability', 76(45) *Public Administration*, 451–470.

118 Thomas (2020).

119 "The growing list of civil servants frozen out while Johnson's ministers remain", in *The Guardian*, 26 August 2020. These permanent Secretaries were forced into resignation.

120 Cabinet Manual, chapter 7.

121 Brazier (2020).

122 Civil Service Commission (2018), pp. 5 f.

123 Tushnet (2015), pp. 94 f.

Baxendale C. (2014), *How to Best Attract, Induct and Retain Talent Recruited into the Senior Civil Service*, www.civilservant.org.uk/library/2014-Baxendale_Report.pdf.

Blick A., Jones G. (2013), *At Power's Elbow: Aides to the Prime Minister from Robert Walpole to David Cameron*, London: Biteback Publishing.

Bogdanor V. (2003), 'The Civil Service', in Bogdanor V. (ed), *The British Constitution in the Twentieth Century*, Oxford: Oxford University Press, 237–279.

Brazier R. (2020), 'Contempt for the Constitution?', *UK Constitutional Law Blog*, 6 October, https://ukconstitutionallaw.org/2020/10/06/rodney-brazier-contempt-for-the-constitution/.

Cabinet Office (2011), *The Cabinet Manual: A Guide to Laws, Conventions and Rules in the Operation of Government*, 1st edition, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf.

Cabinet Office (2018), *Executive Agencies: A Guide for Departments, Public Bodies Handbook*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690636/Executive_Agencies_Guidance.PDF.

Cabinet Office (2020), *Breakdown of Areas of EU Law That Intersect with Devolved Competence in Scotland, Wales and Northern Ireland. Framework Analysis*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031808/UK_Common_Frameworks_Analysis_2021.pdf.

Cabinet Office (2021), *Civil Service Statistics 2021*, www.gov.uk/government/statistics/civil-service-statistics-2021.

Civil Service Commission (2018), *Recruitment Principles*, https://civilservicecommission.independent.gov.uk/wp-/uploads/2019/03/02a_RECRUITMENT-PRINCIPLES-April-2018-FINAL-.pdf.

Davies A.C.L. (2013), 'Beyond New Public Management: Problems of Accountability in the Modern Administrative State', in Bamforth N., Leyland P. (eds), *Accountability in the Contemporary Constitution*, Oxford: Oxford University Press, 333–353.

De Smith S., Brazier R. (1994), *Constitutional and Administrative Law*, 7th edition, London: Penguin.

Dicey A.V. (1931), *Introduction to the Study of the Law of the Constitution*, 8th edition, London: Macmillan.

Dickson A, Brien P. (2020), *DFID and FCO Merger: Implications for International Development*, House of Commons Library, 18 June.

Drewry G. (2011), 'The Executive: Towards Accountable Government and Effective Governance', in Jowell J., Oliver D., O'Cinneide C. (eds), *The Changing Constitution*, 7th edition, Oxford: Oxford University Press, 187–211.

Durrant T., Backlaws N., Zodgekar K. (2020), *Special Advisers and the Johnson Government*, London: Institute for Government, www.instituteforgovernment.org.uk/sites/default/files/publications/special-advisers-johnson-government.pdf.

Fordham M. (2020), *Judicial Review Handbook*, Oxford: Hart Publishing.

Fulton Report (1968), *The Civil Service: Report of the Committee 1966–68 (Lord Fulton)*, HMSO, June 1968, Cmnd 3638.

Gay O. (1997), *The Accountability Debate: Next Steps Agencies. House of Commons Research Paper 97/4*, https://researchbriefings.files.parliament.uk/documents/RP97-4/RP97-4.pdf.

Gee G. (2005), 'Devolution and the Courts', in Hazell R., Rawlings R. (eds), *Devolution, Law Making and the Constitution*, Exeter: Imprint Academic, 252–294.

Government Legal Department (2018), *The Judge Over Your Shoulder – A Guide to Good Decision Making*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf.

Government Office for Science (2019), *Realising Our Ambition Through Science: A Review of Government Science Capability*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844502/a_review_of_government_science_capability_2019.pdf.

Gower M. (2020), *Windrush Generation: Government Action to "Right the Wrongs"*, House of Commons Library Briefing Paper, CBD 8779, https://researchbriefings.files.parliament.uk/documents/CBP-8779/CBP-8779.pdf.

Griffith J. (1995), 'The Crichel Down Affair', 18 *Modern Law Review*, 557–570.

Guerin B., Thomas A., Clyne R., Vivra S. (2021), *Finding the Right Skills for the Civil Service*, London: Institute for Government, www.instituteforgovernment.org.uk/sites/default/files/publications/civil-service-skills.pdf.

Hanson A., Walles M. (1990), *Governing Britain*, 5th edition, London: Fontana.

Harding A. (1993), *England in the Thirteenth Century*, Cambridge: Cambridge University Press.

Harding A. (2023), 'Conventions and Practical Interpretation in Westminster Type Constitutional Systems', 1 *International Journal of Constitutional Law*, 1–23.

Harlow C., Rawlings R. (2021), *Law and Administration*, 4th edition, Cambridge: Cambridge University Press.

Hazell R., Morris B. (1999), 'Machinery of Government: Whitehall', in Hazell R. (ed), *Constitutional Futures: A History of the Next Ten Years*, Oxford: Oxford University Press, 136–155.

Hennessey P. (2000), *The Prime Minister: The Office and Its Holders Since 1945*, Harmondsworth: Penguin.

Hennessey P. (2001), *Whitehall*, London: Pimlico.

House of Commons, Committee of Public Accounts (2018), *The Windrush Generation and the Home Office. Eighty-Second Report of Session 2017–19*, HC 1518, https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/1518/1518.pdf.

House of Commons, Education Committee (2020), *Getting the Grades They've Earned: Covid-19: The Cancellation of Exams and "Calculated" Grades: Response to Committee's First Report*, Second Special Report of Session 2019–21, HC 812, 24 September 2020, https://committees.parliament.uk/publications/1834/documents/17976/default/.

House of Commons, Public Accounts Committee (2020), *Specialist Skills in the Civil Service. Report House of Commons: Thirty-Second Report of Session 2019–21*, 11 December 2020, HC 686, https://committees.parliament.uk/publications/3932/documents/39375/default/.

House of Commons, Public Administration and Constitutional Affairs Committee (2018), *The Minister and the Official: The Fulcrum of Whitehall Effectiveness*, Fifth Report of Session 2017–19, HC 497, 18 June 2018, https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/497/497.pdf.

House of Lords, Select Committee on the Constitution (2014), *Inter-Governmental Relations in the United Kingdom. 11th Report of Session 2014–15*, HL Paper, https://publications.parliament.uk/pa/ld201415/ldselect/ldconst/146/146.pdf.

Jones G. (2002), 'Against a Civil Service Act', 22(4) *Public Money and Management*, 5–6.

Kemp P. (1989), *Treasury and Civil Service, Progress in the Next Steps Initiative*, 8th Report (1989–90), HC 481.

King A. (2007), *The British Constitution*, Oxford: Oxford University Press.

Leyland P. (2021), *The Constitution of the United Kingdom: A Contextual Analysis*, 4th edition, Oxford: Hart Publishing.

Leyland P., Anthony G. (2016), *Textbook on Administrative Law*, 8th edition, Oxford: Oxford University Press.

Marshall G. (1984), *Constitutional Conventions: The Rules and Forms of Constitutional Accountability*, Oxford: Oxford University Press.

McMillan J., Massey A. (2004), 'Central Government and Devolution', in O'Neill M. (ed), *Devolution and British Politics*, Harlow: Pearson, 231–250.

Ministry of Reconstruction (1918), *Report of the Machinery of Government Committee*, www.civilservant.org.uk/library/1918_Haldane_Report.pdf.

Mount F. (1992), *The British Constitution Now*, London: Mandarin.

Northcote S.H., Trevelyan C.E. (1854), *Report on the Organisation of a Permanent Civil Service*, www.civilservant.org.uk/library/1854_Northcote_Trevelyan_Report.pdf.

Office of National Statistics (2022), *Public Sector Employment, UK: March 2022*, www.ons.gov.uk/employmentandlabourmarket/peopleinwork/publicsectorpersonnel/bulletins/publicsectoremployment/march2022.

Oliver D. (2003), *Constitutional Reform in the UK*, Oxford: Oxford University Press.

Parliamentary Committee on Standards in Public Life (2003), *Ninth Report: Defining the Boundaries within the Executive: Ministers, Special Advisors and the Permanent Civil Service*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336889/9th_report.pdf.

PM's Efficiency Unit (1988), *Improving Management in Government: The Next Steps. The Ibbs Report*, www.civilservant.org.uk/library/1988_improving_management_in_government_the%20_next_steps.pdf.

Public Administration Select Committee (2002), *8th Report, 2001–02*,19 July.

Rawlings R. (2017), *Brexit and the Territorial Constitution: Devolution, Reregulation and Intergovernmental Relations*, London: The Constitution Society, https://consoc.org.uk/wp-content/uploads/2017/10/Brexit-and-devolution-final.pdf.

Sargeant J., Stojanovic A. (2021), *The United Kingdom Internal Market Act 2020*, London: Institute for Government, www.instituteforgovernment.org.uk/sites/default/files/publications/internal-market-act.pdf.

Thomas A. (2020), *Has the Civil Service Been Resisting Brexit*, London: Institute for Government, www.instituteforgovernment.org.uk/article/comment/has-civil-service-been-resisting-brexit.

Tomkins A. (1998), *The Constitution After Scott, Government Unwrapped*, Oxford: Oxford University Press.

Tonge J. (1999), *The New Civil Service*, London: Baseline Book.

Torrance D. (2021), *Intergovernmental relations in the United Kingdom. Research Briefing House of Commons*, CBP-8371, https://researchbriefings.files.parliament.uk/documents/CBP-8371/CBP-8371.pdf.

Turpin C. (1994), 'Ministerial Responsibility', in Jowell J., Oliver D. (eds), *The Changing Constitution*, 3rd edition, Oxford: Oxford University Press, 109–153.

Tushnet M. (2015), *The Constitution of the United States: A Contextual Analysis*, 2nd edition, Oxford: Hart Publishing.

UK Border Agency (2012), *Home Affairs Committee, Fourteenth Report of Session 2012–13*, March 2013, HC 792.

Waller P. (2014), 'Special Advisers and Communication', in Yong B., Hazell R. (eds), *Special Advisers: Who They Are, What They Do and Why They Matter*, Oxford: Hart Publishing, 111–128.

Woodcock J. (1994), *Report of the Enquiry into the Escape of Six Prisoners from the Special Security Unit at Whitemore Prison*, Cambridgeshire, Cm 2741.

Woodhouse D. (2003), 'Ministerial Responsibility', in Bogdanor V. (ed), *The British Constitution in the Twentieth Century*, Oxford: Oxford University Press, 280–332.

Yong B., Hazell R. (eds) (2014), *Special Advisers: Who They Are, What They Do and Why They Matter*, Oxford: Hart Publishing.

Young A.L. (2021), *Turpin and Tomkins' British Government and the Constitution*, 8th edition, Cambridge: Cambridge University Press.

17 The Civil Service in Ukraine

Transformation in Times of War

Nataliia Rozmaritsyna *

I. Concept and Characteristics of the Civil Service

Today the concept of the civil service in Ukraine is rooted in the country's aspiration for a transparent, accountable, and efficient public administration system that serves the interests of its citizens.[1] The current definition of the Ukraine civil service is outlined in the Law of Ukraine on Civil Service (Law).[2] Section I delineates the concept of the civil service, outlines its attributes and enumerates its responsibilities and obligations. It defines the civil service as an impartial professional State activity that contributes to the practical fulfilment of the tasks and responsibilities of the State. These criteria are the basis for the classification and organisation of the civil service, recruitment of its members, and evaluation of their performance.

1. The Classification System

The classification system of the Ukrainian civil service is a comprehensive framework that categorises government positions based on responsibilities, qualifications, and levels of authority. Central to this classification is a dedication to merit-driven appointments, where it is sought to choose individuals for government roles based on their qualifications, expertise, and experience rather than on their political associations. The career of a civil servant[3] is organised in three categories, A, B, and C (Table 17.1), each with its own qualifications and abilities.[4] In each category, civil service positions are further organised into nine ranks that can be awarded to civil servants every three years based on their performance.[5] These ranks denote the level of responsibility, qualifications, and experience required for the position. Ranks also influence salary scales and career progression.

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1 For more approaches to the disclosure of the definition of "civil service", see e.g. Ishchenko et al. (2019).

2 Law No. 889-VIII of 10 December 2015 on Civil Service (as amended by Law No. 2849-IX of 13 December 2022).

3 Essential and conceptual characteristics of a civil servant are detailed by Stets (2020).

4 See footnote n. 2, Article 6.

5 Footnote n. 2, Article 20.

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Table 17.1 Categories of civil servant[6]

Category	*Positions that can be held by employees of this category*
A	Head of the Verkhovna Rada (Parliament) of Ukraine and his deputies
	Head of the secretariat of the permanent auxiliary body established by the President of Ukraine
	State Secretary of the Cabinet of Ministers of Ukraine and his deputies, State secretaries of ministries
	Heads of central executive bodies who are not Cabinet of Ministers and their deputies
	Heads of departments of the Constitutional Court, Supreme Court, higher specialised courts and their deputies, heads of secretariats of the High Council of Justice, High Qualification Commission of Judges of Ukraine and their deputies, Head of the State Judicial Administration of Ukraine and his deputies
	Heads of the civil service in other State bodies with jurisdiction over the entire territory of Ukraine, and their deputies
B	Heads and deputy heads of State bodies with jurisdiction over the territory of the Autonomous Republic of Crimea (ARC), one or more oblasts,[7] the cities of Kyiv and Sevastopol, one or more districts, districts in cities, cities of regional significance
	Heads of the civil service in State bodies with jurisdiction over the territory of ARC, one or more oblasts, the cities of Kyiv and Sevastopol, one or more districts, districts in cities, cities of regional significance
	Heads and deputy heads of structural subdivisions of State bodies, irrespective of their level of jurisdiction
C	All other positions not assigned to categories A and B

The upper echelons (category A) comprise senior positions responsible for policy formulation, decision-making, and high-level strategic planning. These positions often require extensive experience in public administration, a deep understanding of legal frameworks, and the ability to navigate complex political landscapes.

Beneath the senior civil service, the middle-level civil service (category B) comprises professionals who bridge the gap between high-level policy design and its practical implementation. These civil servants oversee the day-to-day operations of various government departments, ensuring efficient execution of policies and delivery of public services to citizens. Their expertise and experience are pivotal in maintaining the continuity of government operations and in translating strategic goals into tangible outcomes.

Lastly, there are entry-level positions (category C) that provide opportunities for recent graduates and early-career professionals to embark on a civil service line of work. These civil servants often form the backbone of administrative functions, assisting in the implementation of policies and programs initiated by higher-ranking officials. Although their responsibilities may be more focused on specific tasks, their contributions play a crucial role in upholding overall efficiency.

Each tier in the classification system is associated with specific qualification requirements, which may include educational credentials, professional experience and specialised skills (Table 17.2). These prerequisites are designed to ensure that individuals in the civil service have the competence necessary to fulfil their duties effectively.

6 Footnote n. 2, Article 6.

7 Based on Article 133 of the Constitution of Ukraine: "Ukraine consists of 24 oblasts, which include 490 rayons, and ARC".

Table 17.2 General requirements for civil service applicants[8]

Category	*Requirements*
A	A higher education qualification not below a master's degree Work experience: at least seven years of total work experience, or experience in category A or B civil service positions or in positions not lower than heads of structural units in local self-government bodies, or at least three years' experience in management positions in the relevant field Fluency in the State language, knowledge of a foreign language among the official languages of the Council of Europe
B	A higher education qualification not below a master's degree Work experience: at least two years in category B or C civil service positions or experience in local self-government bodies, or at least two years' experience in senior positions in enterprises, institutions, and organisations irrespective of ownership Fluency in the State language
C	A higher education qualification not below a junior bachelor's degree or a bachelor's degree as decided by the appointing authority Fluency in the State language

The classification system also accounts for technical and support positions that provide essential services to facilitate the smooth operation of government offices. These roles include administrative assistants, clerks, and technical support staff, who are not considered civil servants according to the law.

The multi-tiered structure of the classification system aligns with various of public administration sectors. These sectors include but are not limited to finance, health, education, defence, and justice. Each sector demands specialised knowledge and skills, which are reflected in the distinct requirements for positions within them. The classification system also fosters a sense of progression and growth for civil servants. Clear paths for career advancement are outlined, allowing individuals to move vertically in their sector or horizontally across different sectors based on their competencies and interests. This keeps experienced professionals in the civil service and promotes continuing learning and innovation.

In recent years, Ukraine has been actively modernising its civil service classification system to meet evolving challenges and global best practices. This involves incorporating digital technologies, streamlining administrative procedures, and fostering a culture of innovation in the civil service. Efforts are also being made to align the classification system with international standards. The future prospects of Ukraine's civil service depend on sustained commitment to reform and effective modernisation. Through ongoing reforms, Ukraine is striving to build a civil service that upholds meritocracy, professionalism, and the public interest, contributing to the overall development and stability of the nation.

2. *Organisation of the Civil Service*

Civil service structure in Ukraine is governed by the Law, which establishes a system of specialised bodies responsible for managing and coordinating the civil service.[9] We now examine the key aspects.

8 See footnote 2, Article 20.

9 Conceptual principles and problematic issues of civil service in Ukraine highlighted by Solotkyi (2021).

At the top level, the central executive authorities (Cabinet of Ministers of Ukraine, CMU, and National Agency of Ukraine for Civil Service) formulate and implement government policies and programs. Each ministry or agency is headed by a minister or head of agency, who is appointed by the President of Ukraine or the Cabinet of Ministers. These are regional and local administrations that represent the executive power at regional and local levels. Each region and local administrative unit has its own civil service unit that manages civil servants in their territories.

3. Competitive Recruitment to Civil Service Positions

Competitive recruitment to civil service positions is an essential process governed by the provisions of the Law and the Procedure for Holding a Competition for Civil Service Positions.[10] The competition is designed to select the most qualified applicants for vacant positions in the civil service. For positions related to mobilisation training, State secrets, defence and national security, a closed competition may be conducted, since the sensitivity and specialised nature of these positions calls for a more selective and confidential recruitment process. If no competition for vacant civil service positions is announced in the course of a year, the number of such positions may be reduced.

According to Article 31^1 of the Law, individuals appointed to civil service positions can enter a contract, typically for a period of up to three years. Civil servants can also be appointed to positions for an indefinite period. On appointment, the civil servant undergoes a probationary period of a clearly defined length to evaluate his/her suitability for the position.

In times of martial law, there are no special procedures or exceptions for filling civil service positions.[11] A personnel reserve is established and lists of potential candidates for civil service positions are created. This proactive approach allows qualified individuals who can readily be appointed to civil service positions when needed to be identified and trained. Building a robust talent pipeline is essential for maintaining continuity and efficiency in the civil service.

4. Performance Evaluation

In Ukraine, evaluation of the performance of civil servants is conducted every six months. The quality of their work is assessed, appropriate bonuses are determined, and their career is planned.[12] Each civil servant is assigning a negative, positive or excellent grade, backed by observations. Negative evaluations can lead to dismissal or termination of the civil service contract, whereas excellent grades are rewarded with bonuses. Motivational factors are influenced by the complexity of tasks, creativity, specific characteristics of the job, and the high-value orientation of functions. These factors aim to encourage highly skilled professionals with practical work experience.[13] Overall, the evaluation is an important way to assess and motivate civil servants, ensuring their accountability and enhancing professionalism.

10 CMU Resolution No. 246 of 25 March 2016 on Approval of the procedure for conducting competitive selection for civil service positions.

11 Kornuta (2022), pp. 66–67.

12 For more details on the evaluation procedure see Fostikova (2020).

13 Bondarenko (2021), pp. 100–101.

II. Development of the Civil Service Since the 20th Century

Concerning the historical development of the civil service in Ukraine, several periods can be distinguished.

1. Soviet Era (1920s–1991)

Ukraine was part of the Soviet Union and its civil service operated under the control of the Communist Party. Its structure was centralised and hierarchical, and the Communist Party had significant control over the bureaucracy. Civil servants were appointed according to loyalty to the Communist Party and had limited autonomy.[14]

2. Post-Soviet Transition Period (1991–2004)[15]

With the restoration of State independence in 1991 and the establishment of a democratic model of public administration, there was an urgent need to create a modern, effective civil service that would serve Ukrainian society. Thus, in 1992,

> an important event took place in the process of forming the civil service institute: the Institute of Public Administration and Self-Government under the Cabinet of Ministers of Ukraine began its activities, which for the first time in Ukraine launched the training of professional civil servants under a master's program. On 30 May 1995, the Ukrainian Academy of Public Administration under the President of Ukraine was established to provide effective training, retraining and advanced training for civil servants and local self-government officials.[16]

An attractive feature of this educational institution was its openness and accessibility to society, irrespective of the applicant's previous field of study.

The primary focus of this phase was to establish the legal and institutional framework for the civil service. The law laid the foundation for the modern civil service in Ukraine and was the first law drawn up by a country of the former Union of Soviet Socialist Republics. It established "the special legal status of persons authorised to perform State functions – civil servants". For the first time, the general principles of administrative activity and the legal status of civil servants were defined at legislative level, and the right of Ukrainian citizens to hold a civil service position was legally defined. The Law also formulated the main elements of civil service:

> professional ethics of civil servant behaviour; structure of civil service management; rights, duties, restrictions, disciplinary responsibility of civil servants and completion of civil service; career growth of civil servants; grounds for termination of civil service; material and social support of civil servants, etc.

14 For more information see e.g. Bogovis (2017); Perov (2018); Ivanov Ye (2021); Hryshchuk (2018); Drozd (2016a).

15 Dovzhenko et al. (2021).

16 Tymtsunyk (2013), pp. 7–8.

However, it did not regulate a number of the following key issues:

- distinction between professional public service and political activity in the field of public administration;
- regulation of the civil service on the basis of public law;
- legal consolidation and practical implementation of the role of the civil service in ensuring the legality and continuity of public administration;
- ensuring sufficient legal protection of public servants;
- introduction of an adequate classification of positions and a system of remuneration for public servants.

However, since political interference and corruption continued to prevail in the civil service, on 19 December 1992, the *Verkhovna Rada* of Ukraine (VRU) adopted a resolution to establish a Temporary Parliamentary Commission of the VRU to combat organised crime, corruption, and bribery. This launched the government's efforts to fight corruption in Ukraine after the country gained independence. Over the next three years, a number of anti-corruption laws and regulations were adopted, and the Law on Combatting Corruption came into force.[17] This law establishes the legal and organisational principles for prevention, detection and elimination of corruption, restoration of legal rights and interests, and elimination of the consequences of corruption. It defined the concept of corruption and related actions and laid the foundation for the creation of a formal regulatory framework for additional regulation of the fight against corruption.

The next stage was the establishment on 2 April 1994 of the Main Department of Civil Service under the CMU (now the National Agency of Ukraine for Civil Service, NAUCS),[18] the central body of executive power that ensures the formulation and implementation of State policy in the field of the civil service and participates in the development of State policy on the role of the civil service in local self-government bodies.

On 28 June 1996, the constitution of Ukraine, according to which citizens have equal rights of access to the civil service and of participation in local self-government, was adopted.[19] The constitution also enshrines the concept of the separation of powers into legislative, judicial, and executive branches and specifies the organisation and procedure of their activities. This was not discussed in the legislation of the Soviet Union. However, although the constitution established the foundations of the civil service, it did not define how it would develop. The Law on Local Self-Government in Ukraine, adopted in 1997, introduced the term "local self-government official" into the national legislation, meaning a "person who works in local self-government bodies, has the appropriate official powers in the exercise of organisational, administrative and advisory functions and receives a salary from the local budget".[20]

17 Law No. 356/95 BP of 5 October 1995 on Combatting Corruption.

18 Based on the Decree of the President of Ukraine (PU) No. 769/2011 of 18 July 2011 on the Issues of civil service management in Ukraine.

19 Part 2, Article 38 of the Constitution of Ukraine, adopted in the fifth session of the VRU on 28 June 1996.

20 Law No. 280/97 BP of 21 May 1997 on Local Self-Government in Ukraine.

Since 2000, the process of improving legislative support of the civil service institute has been intensified. The Law on Service in Local Self-Government Bodies

> regulated the organisational, legal, material and social principles of ensuring the exercise by citizens of Ukraine of the right to serve in local self-government bodies, established the basic principles of organising the activities of local self-government officials, their legal status, procedure and legal guarantees of service in local self-government bodies.[21]

3. *Orange Revolution (2004–2010)*

The Orange Revolution in 2004 marked a significant turning point in Ukraine's political landscape and had implications for the civil service. It was a mass protest movement against electoral fraud and corruption, which led to a rerun of the presidential election and a change in government. The emphasis was on reducing corruption, enhancing professionalism, and strengthening the rule of law.[22] On that basis, the "Concept of adaptation of the civil service in Ukraine to the standards of the European Union"[23] aims to ensure further reform of the civil service in Ukraine in the process of its harmonisation with the standards of the EU, which will result in a fuller guarantee of constitutional rights, freedoms and legitimate interests of citizens, and provision of public services of appropriate quality.

An important stage in the evolution of the civil service institution was the adoption of the Concept of the Development of Civil Service Legislation,[24] which stipulates that civil servants should be the only employees of State bodies to formulate and implement State policy, prepare draft regulations on the use of State budget funds, control and supervise the implementation of legislation, issue administrative acts, preserve State secrets or perform other functions in the field of public administration. The Concept initiated significant changes in the civil service system. However, considering the difficult transition period of the Ukrainian State formation, the very fact of institutionalisation of the civil service became an important factor in the development of the civil service.

4. *The Yanukovych Era and Setbacks (2010–2014)*

During the presidency of Viktor Yanukovych, the civil service faced challenges related to increasing political influence and corruption. The government undermined the independence of civil service institutions, politicised appointments, and restricted civil society participation.[25] Adaptation of a number of laws was an important step in pro-

21 Law No. 2493-III of 7 June 2001 on Service in Local Self-Government Bodies.

22 See e.g. Åslund and McFaul (2006); Hrycak (2007); Sherr (2005); Wilson (2005); Åslund (2009); Kuzio (2005).

23 PU Decree No. 278/2004 of 5 March 2004 on Approval of the Concept of Adaptation of the Civil Service Institution in Ukraine to the Standards of the European Union.

24 PU Decree No. 140/2006 of 20 February 2006 on the Concept of Development of Legislation on Civil Service in Ukraine.

25 Dabrowski et al. (2020), pp. 2–3 and pp. 17–18.

viding legal support for the civil service.[26] Frequent changes in political leadership fuelled public dissatisfaction and were one of the factors that led to the Euromaidan protests.

5. *Maidan Revolution and Reform Acceleration (2014–2016)*

The Euromaidan protests in 2013–2014, triggered by a desire for closer integration with the European Union (EU) and the fight against corruption,[27] resulted in a political crisis and the ousting of President Yanukovych. The revolution led to political and administrative changes, triggering a wave of reforms aimed at combatting corruption, decentralising power and improving governance. The subsequent period witnessed comprehensive reforms to rebuild the civil service system. For this purpose, the Law on Purification of Power[28] defined the legal and organisational framework for cleaning up the government,[29] i.e. lustration.[30] The lustration of power is still regulated by this law.

The new Law on Prevention of Corruption outlined the legal and organisational framework of the country's anti-corruption system, the content and procedure for applying preventive mechanisms, and rules for overcoming the consequences of corruption.[31] This law establishes the status and powers of a new central body with a special role in the fight against corruption, in which the National Agency for the Prevention of Corruption plays a special role.

It is important to highlight that the Law[32] shows several positive distinctions with respect to the previous Law of 1993. The new law sets up the organisational and legal structure for a professional, impartial, politically neutral, and citizen-centric civil service, dedicated to serving the State and society's interests. It also outlines the process through which Ukrainian citizens can exercise their right to equal access to the civil service, on the basis of their personal qualities and achievements.

6. *Ongoing Challenges and Future Prospects (since 2017)*

The current period focuses on sustaining and furthering the reforms implemented in the previous stages. The Ukrainian government has prioritised the digitisation of administrative processes, aiming to reduce bureaucracy and improve service delivery. Another important step is that NAUCS approved the methodological recommendations for determining key performance indicators, efficiency and quality of work of civil servants holding

26 Law No. 2591-VI of 7 October 2010 on the Cabinet of Ministers of Ukraine; Law No. 3166-VI of 17 March 2011 on Central Executive Bodies; Law No. 5203-VI of 6 September 2012 on Administrative Services; PU Decree No. 1085 of 9 December 2010 on Optimization of the System of Central Executive Bodies.

27 Shveda and Park (2016).

28 Law No. 1682-VII of 16 September 2014 on the Purification of Power.

29 Prudyus (2016), p. 71.

30 According to Ukrainian legislation, lustration refers to the prohibition of individuals from occupying specific positions (except elected roles) in State agencies and local self-government bodies. This restriction applies specifically to positions in judicial governance, the civil service, the armed forces and executive governance.

31 Law No. 1700-VII of 14 October 2014 on Prevention of Corruption.

32 Law No. 889-VIII of 10 December 2015 on the Civil Service.

positions of categories B and C (no longer in force),[33] according to which decisions on awarding a civil servant, career planning and determining the need for professional training are based on an evaluation. On the basis of NAUCS Order No. 217–20 of 20 November 2020, methodological recommendations were approved for the definition of tasks and key indicators of effectiveness, efficiency, and quality of work of civil servants holding positions of categories B and C, monitoring their implementation and review. Unlike the previous version, the main purpose of the 2020 Guidelines was to plan and define tasks and key indicators (determined individually for each civil servant) using SMART criteria (specific, measurable, achievable, realistic, and timely), monitor their implementation, and review them. It is recommended that the monitoring results be taken as confirmation that the civil servants have fulfilled or not fully fulfilled the tasks and key indicators assigned to them. Unfortunately, the existing system of training and professional development of civil servants at that time was not of sufficient quality and content to meet modern standards. In particular, there was no system for systematic evaluation and assessment of the quality of educational services provided for the professional training of civil servants in accordance with European education quality standards. In this regard, the concept of reforming the system of professional training of civil servants, heads of local State administrations, their first deputies and deputies, local self-government officials, and deputies of local councils was adopted.[34] The Concept defines the main components, principles and strategic goals of the new system of professional training of civil servants, local self-government officials and deputies of local councils.

Thus, the institution of civil service in Ukraine has undergone complex transformations. While significant reforms have been implemented, ongoing efforts are required to address persistent challenges and ensure the integrity and effectiveness of the civil service, especially during the ongoing war with the Russian Federation.

III. The Strategies of Civil Administration Reform in Ukraine in the 2000s

The 2000s witnessed resolute efforts to restructure and optimise the civil administration framework. Building on the democratic aspirations of the early 1990s, the country embarked on a series of strategies aimed at aligning its administrative practices with European standards and global best practices. These strategies sought to address issues such as corruption, bureaucratic inefficiencies and lack of transparency, which had hindered Ukraine's progress on various fronts. The civil administration reform strategies were motivated by several factors, including the desire to strengthen democratic governance, enhance public service delivery, attract foreign investment and facilitate the country's integration into international organisations. The legacy of the Soviet-era administrative system, characterised by centralisation and opacity, called for a comprehensive overhaul to meet the demands of a rapidly evolving global landscape.

33 NAUCS Order No. 217–20 of 20 November 2020 on Approval of methodological recommendations for determining key performance indicators, efficiency and quality of service of civil servants holding civil service positions of categories B and C.

34 CMU Ordinance No. 974 of 1 December 2017 on Approval of the Concept of reforming the system of professional training of civil servants, heads of local State administrations, their first deputies and deputies, local self-government officials, and deputies of local councils.

The initial Strategy for Reforming the Civil Service System in Ukraine[35] set the foundation for subsequent reforms. It focused on building human resources, creating a professional civil service, improving administrative culture, and enhancing motivation and responsibility among civil servants. Furthermore, the Sustainable Development Strategy "Ukraine-2020"[36] identified 62 reforms, including reform of the diplomatic corps and public administration, civil service efficiency, and decentralisation. It aimed to align Ukraine with European standards of living. The Strategy of the State Personnel Policy for 2012–2020[37] played a significant role in reforming and modernising the civil service. It focused on training and developing senior civil servants, creating professional profiles for different civil service positions, and establishing a unified system for evaluating and promoting civil servants. However, the comprehensive assessment of the public administration system conducted in 2018 by the Support for Improvement in Governance and Management Programme (SIGMA) highlighted shortcomings in financial support, coordination at the central level, internal and external communication, and unrealistic time frames for implementing measures.[38]

Ukrainian scientists such as Komoniuk and Chorna emphasised the importance of international cooperation and of changing negative perceptions of the civil service as corrupt.[39] The Strategy for Public Administration Reform of Ukraine[40] up to 2021 was consequently revised and approved, focusing on streamlining central executive bodies, enhancing accountability and interaction between these bodies, improving e-government coordination, and implementing monitoring and evaluation mechanisms. The first stage of civil service system reform was planned to run from 2016 to 2021. The next stage began with the adoption of the State Administration Reform Strategy for 2022–2025.[41] The updated strategy considered lessons learned from the previous stage and SIGMA's approaches to strategy development.[42] Key objectives of the new strategy include expanding electronic public services,[43] creating electronic registers, updating civil service competitions, implementing human resource management systems in State bodies,[44] establishing an electronic archive, and aligning Ukrainian legislation with EU standards.

Despite ongoing hostilities and martial law in Ukraine, reform of the civil service system continues. While obstacles remain, the success of these strategies provides a foundation on which Ukraine can continue its journey towards a stronger and more responsive civil

35 PU Decree No. 599/2000 of 14 April 2000 on the Strategy for Reforming the Civil Service System in Ukraine.

36 PU Decree No. 5/2015 of 12 January 2015 on the Strategy of Sustainable Development Ukraine-2020.

37 PU Decree No. 45/2012 of 1 February 2012 on the Strategy of State Personnel Policy for 2012–2020.

38 Laboratory of Legislative Initiatives (2019), *Shadow Report "Public Assessment of Public Administration Reform"*, p. 6.

39 Komonyuk and Chorna (2022), p. 149.

40 CMU Ordinance No. 1102-p of 18 December 2018 on Amendments to ordinances of the Cabinet of Ministers of Ukraine No. 474 of 24 June 2016 and No. 1013 of 27 December 2017.

41 CMU Ordinance No. 831-p of 21 July 2021 on Some Issues of Civil Service Reforming in Ukraine.

42 Koval (2020), pp. 5–7.

43 Approved in accordance with CMU Resolution No. 606 of 8 September 2016 on Some issues of electronic interaction of State electronic information resources.

44 Approved with CMU Resolution No. 1343 of 28 December 2020 on Approval of the Regulation on the information system of human resource management in State bodies and NAUCS Order No. 6–21 of 16 January 2021 on Implementation of the information system of human resource management in State bodies.

administration framework. Implementation of the strategies is monitored, and progress reports are regularly submitted to the CMU. While progress was made in this period, continued dedication to the strategies remains imperative to sustain the momentum of reform and ensure a brighter future for the country.

IV. Local Self-Government Reform and Decentralisation: Analysis of Government Decisions

A considerable number of public officials[45] are working in local administrations. Due to Ukrainian legislation, they are not a part of the civil service, as a special law[46] nominates them "local servants" (*посадова особа місцевого самоврядування*).[47] To illustrate ongoing processes concerning modifying territorial integrity, we describe Ukraine's system of local self-government and its recent achievements.

Local self-government reform and decentralisation have been significant priorities for the Ukrainian government in recent years. These reforms were initiated after the Euromaidan protests in 2013–2014. The reform aims to transfer power and resources from the central government to local authorities, enabling them to make decisions and implement policies that are tailored to the specific needs of their communities.

One of the significant milestones was the adoption of the Law on Local Self-Government, which serves as the foundation for the decentralisation process. It introduced a three-tier system of local government, comprising the *community* (basic level) – *rayon* (subregional level) – and *region* (ARC and oblasts). The government implemented territorial reform to restructure local administrative units, such as amalgamating smaller municipalities into larger, more capable entities.[48] One of the main goals of decentralisation is to optimise the administrative-territorial structure of Ukraine. This was done to create more effective and sustainable local governments.[49] By reducing the number of local authorities, resources can be better allocated and the capacity for local governance can be enhanced.[50] Therefore, the number of amalgamated territorial communities (ATCs) is increasing gradually every year (Table 17.3).[51] However, the process of voluntary amalgamation of ATCs is very slow, due to complex bureaucratic mechanisms and weak active participation of citizens in the reform process.

Table 17.3 Decentralisation of power and local self-government reform monitored in 2015–2019[52]

Year	*2015*	*2016*	*2017*	*2018*	*2019*
Total no. ATCs	159 (+**207**)	366 (+**299**)	665 (+**140**)	805 (+**204**)	1009

45 Exact numbers are not yet available.
46 Law No. 280/97 BP of 21 May 1997 on Local Self-Government in Ukraine.
47 Law No. 280/97 BP of 21 May 1997 on Local Self-Government in Ukraine, Article 1.
48 CMU Ordinance No. 333-p of 1 April 2014 on Approval of the Concept of reforming local self-government and territorial organisation of power in Ukraine.
49 Lelechenko et al. (2017), p. 83.
50 Law No. 157-VIII of 5 February 2015 on Voluntary amalgamation of territorial communities (as amended by the Law No. 562-IX of 16 April 2020).
51 Monitoring of the process of power decentralisation and local self-government reform, https://decentralization.gov.ua/mainmonitoring, last accessed 21 December 2023.
52 Compiled excluding temporarily occupied territory in ARC.

To implement decentralisation effectively, the government established the State Agency for Local Self-Government Development and the Ministry of Regional Development, Construction and Housing and Communal Services.[53]

In June 2020, the CMU adopted a number of decrees on the determination of administrative centres and approval of the territories of territorial communities of 24 regions of Ukraine,[54] in which local elections were held.[55] The new system of administrative and territorial structure at the *basic level* (excluding the temporarily occupied ARC) consists of 1,469 communities and the city of Kyiv, including 410 cities, 433 towns, and 627 village administrative centres.[56] A new system of administrative-territorial structure at the *sub-regional (rayon) level* is also being formed,[57] resulting in the liquidation of 490 rayons and the formation of 136 new rayons (17 of which are in temporarily occupied territories).[58] It is this foundation of the reform that is the basis for building a qualitatively new system of local self-government bodies. Overall, some regions have made significant progress, while others are still in the early stages of implementation.

V. Traditions and Experience: What Were the Major Recent Reforms?

The following are examples of successful civil service reform in Ukraine.

- An important area of modernisation of civil service during the present war is the creation of a comprehensive information system for personnel management in government agencies based on the latest information and communication technologies.[59]
- CMU created the Unified Civil Service Vacancies Portal (https://career.gov.ua),[60] which is designed to promote transparency of the State apparatus and attract the most qualified specialists to the civil service. Additionally, the Concept of introducing the positions of reform experts was also approved.[61]
- Ukraine has made significant progress in digitalisation (diia.gov.ua),[62] as it has changed the way services are delivered and the internal procedures of government organisations,

53 These institutions have been responsible for coordinating and supporting decentralisation efforts.

54 CMU Ordinances No. 730-p – No. 730-p of 11 June 2020 on the Determination of administrative centers and approval of the territories of territorial communities of Vinnytsia, Volyn, Dnipropetrovsk, Donetsk, Zhytomyr, Zakarpattia, Zaporizhia, Ivano-Frankivsk, Kyiv, Kirovohrad, Luhansk, Lviv, Mykolaiv, Odesa, Poltava, Rivne, Sumy, Ternopil, Kharkiv, Kherson, Khmelnytskyi, Cherkasy, Chernivtsi and Chernihiv oblasts.

55 VRU Resolution No. 795-IX of 15 July 2020 on Scheduling regular local elections in 2020.

56 *Monitoring of the reform of local self-government and territorial organization of power*, p. 3; www.minregion.gov.ua/wp-content/uploads/2019/01/10.02.2021.pdf, last accessed 21 December 2023.

57 VRU Resolution No. 807-IX of 17 July 2020 on the Formation and liquidation of districts.

58 Gogol' and Mel'nichuk (2022), p. 222.

59 CMU Ordinance No. 844-p of 1 December 2017 on Approval of the Concept of implementation of the human resource management information system in State bodies and the approval of the Action Plan for its implementation.

60 NAUCS Order No. 114–22 of 15 November 2022 on Approval of the Regulation on the Unified Civil Service Vacancies Portal, registered in the Ministry of Justice of Ukraine No. 1496/38832 of 29 November 2022.

61 CMU Ordinance No. 905-p of 11 November 2016 on Approval of the Concept of the introduction of positions of reform specialists.

62 CMU Resolution No. 1137 of 4 December 2019 on Issues of the Unified State Web Portal of Electronic Services and the Register of Administrative Services.

e.g. an electronic procurement system (https://prozorro.gov.ua/)[63] to increase transparency in public procurement processes.
- In 2016, Ukraine introduced an electronic tax declaration system for civil servants and other public officials and their family members.[64] In addition, laws that provide legal protection for civil servants against pressure and harassment were also adopted.[65]
- The Ukrainian government has been implementing reforms to improve the quality and efficiency of public service delivery. This includes the establishment of the "One-Stop Shop" principle,[66] where citizens can access multiple government services in a single location, reducing bureaucracy and enhancing convenience.
- NAUCS has developed educational training for civil servants and launched online courses based on the free education platform "Prometheus" (prometheus.org.ua). This step allowed creation of "social elevators" in central executive bodies and a system for in-service training of civil servants.

Among the achievements in civil service in Ukraine is the introduction of the system of e-government[67] and e-reporting,[68] which reduced bureaucracy and improved the availability of services for citizens. However, despite these successes in public administration reform, the civil service institution still needs to be improved.

VI. Civil Service in Private and Public Law

Civil service in Ukraine is governed by both private and public law, as it involves a combination of legal regulations and employment practices.[69] Some researchers believe that "public law should be applied to civil service relations, and private law to relations of other hired labour".[70]

In Ukraine, civil servants are typically employed through a formal employment contract with the State or a government agency. These contracts establish terms and conditions of employment, including salary, benefits, and job responsibilities, mirroring private law employment relationships. The Civil Code of Ukraine[71] and the Labour Code of Ukraine[72] provide the legal framework for private law aspects of the civil service. Civil servants enjoy

63 Order of the Ministry of Economic Development and Trade of Ukraine No. 1220 of 26 July 2016 on Renaming the State enterprise "ZOVNISHTORGVYDAV" of Ukraine and approval of the Statute of the State enterprise "PROZORRO".
64 Law No. 1700-VII of 14 October 2014 on Prevention of Corruption (as amended by the Law No. 2849-IX of 13 December 2022).
65 Article 4 of Law No. 889-VIII of 10 December 2015 on the Civil Service (as amended by the Law No. 2849-IX of 13 December 2022).
66 Law No. 5203-VI of 6 September 2012 on Administrative Services (as amended by Law No. 2849-IX of 13 December 2022).
67 CMU Ordinance No. 649-p of 20 September 2017 on Approval of the Concept for the Development of e-governance in Ukraine.
68 Law No. 2524-IX of 16 August 2022 on Official Statistics.
69 Drozd (2016b), p. 27.
70 Kovbasyuk Yu et al. (2012), p. 43.
71 Civil Code of Ukraine No. 435-IV of 16 January 2003 (as amended by Law No. 2888-IX of 12 January 2023).
72 Labor Code of Ukraine No. 322-VIII of 10 December 1971 (as amended by Law No. 2839-IX of 13 December 2022).

certain labour rights, such as protection against unfair dismissal and the right to join trade unions. Thus, Prodaevich notes that

> civil service [. . .] is a complex public law sub-institution [. . .], which determines the regulation of civil service by the norms of various branches of law (constitutional, administrative, financial, labour, criminal, civil), i.e. both branches of public and private law.[73]

It encompasses constitutional provisions, statutes, regulations, and administrative procedures that govern the recruitment, appointment, and activity of civil servants.

Public law also encompasses the regulatory framework for civil service examinations and competitions, which aim to ensure merit-based selection and appointment of civil servants. These procedures are designed to promote transparency, fairness, and equal opportunities for candidates seeking to enter the civil service.[74] Public law in Ukraine also establishes the principle of political neutrality in the civil service. Civil servants are expected to perform their duties in a politically neutral manner, avoiding partisan activities or involvement in political campaigns.

From a public law perspective, Ukrainian civil servants are classified in several groups:

- *State Civil Servants.* These individuals work directly for State bodies and institutions, including ministries, agencies, and other executive bodies. They implement government policies and decisions.
- *Local Servants.* This category includes those working at local level, as in municipal and regional authorities responsible for implementing local policies and delivering services to citizens.
- *Special Ranks.* Some civil servants hold special ranks. These include judges, prosecutors, and law enforcement officers. These positions have specific legal requirements and responsibilities.

The categories of Ukrainian civil servants are complex and multifaceted. They are defined from public and private law perspectives, public law outlining their roles and responsibilities in the government and private law regulating their employment relationships and individual rights with the State.

In addition to specific manifestations of public and private law, let us focus on certain types of civil service, including an "advisory service, the functional purpose of which is to carry out consultative, analytical and communication functions in order to support the activities of senior employees of State bodies and local self-government bodies".[75] In this regard, appointment to a position of advisory service may be made through a competition or without competition by decision of the head to sign a contract. In this case, the effect of private law is dispersed, since such relations are focused on private interests, with minimum State participation. In addition, the legislation establishes a list of grounds for termination of employment with an advisory service employee.[76]

73 Prodaevich (2008), p. 6.

74 The State Employment Service of Ukraine is responsible for managing the recruitment process for civil service positions.

75 Malinovsky (2018), p. 55.

76 Part 3 of Article 92 of the Law No. 889-VIII of 10 December 2015 on Civil Service.

Under the current legislation, a group of employees of State bodies performing service functions is singled out: referred to as “service functions” are the activities of employees of a State body, activities that do not involve the exercise of powers directly related to the performance of State tasks and functions.[77] For this group, the criteria for determining the positions of employees of State bodies who perform service functions have been approved.[78] Thus, this group of employees is subject to private law.

In summary, while private law principles regulate certain aspects of civil service employment, the overall structure, organisation, and functioning of the civil service system in Ukraine are predominantly governed by public law.

VII. New Legislation on the Civil Service During the Period of Armed Aggression of the Russian Federation Against Ukraine

The armed aggression of the Russian Federation against Ukraine has had significant impacts on various aspects of Ukrainian society, including the civil service. In response to the challenges posed by the war, Ukraine has implemented new legislation to address the specific needs and circumstances arising from the ongoing hostilities. The specifics of the legislation may differ depending on the time frame and the particular laws enacted. Here we explore the key aspects and implications of the new legislation.

- The legislation introduced transparent, merit-based recruitment and selection procedures for civil service positions, e.g. the conclusion of fixed-term employment contracts and the details of their termination, transfer and change of essential working conditions (the employer has the right to transfer the employee to another job, not stipulated by the employment contract, without the employee’s consent), the length of the working week (may be increased to 60 hours) and the granting of vacation (may be limited to 24 calendar days at employer’s discretion).[79]
- Recognising the urgency and critical nature of decision-making during the war, the legislation aimed to streamline administrative processes within the civil service. It sought to reduce bureaucratic barriers, simplify procedures and expedite decision-making to ensure timely and effective responses to the evolving situation, e.g. the introduction of remote work for civil servants.[80]
- The amendments[81] also envisage cancellation of competitive selection and appointment of civil servants on the basis of submission of a simplified list of documents in relation to the requirements of the position (appointed civil servants cannot be transferred to other positions).

77 Part 3 of Article 92 of the Law No. 889-VIII of 10 December 2015 on Civil Service, Article 2.

78 CMU Resolution No. 271 of 6 April 2016 on Approval of the criteria for determining the list of positions of employees of State bodies performing service functions.

79 Law No. 2136-IX of 15 March 2022 on the Organization of labor relations under martial law (as amended by Law No. 2352-IX of 1 July 2022).

80 Based on CMU Resolution No. 440 of 12 April 2022 on Some issues of organizing the work of civil servants and employees of State bodies during martial law.

81 Law No. 2259-IX of 12 May 2022 on Amendments to some laws of Ukraine, on the functioning of the civil service and local self-government during martial law.

Another innovation is that candidates do not have to undergo special checks or submit a tax declaration (which saves time and speeds up the process of applying for a civil service position, but there are also risks that could destabilise the work of a State body). A competition will be announced for civil service positions to which persons were appointed no later than six months after the date of termination or lifting of martial law.

- The legislation includes provisions for financial compensation and benefits for civil servants injured or affected by the war. Special provisions have been put in place to protect civil servants in conflict-affected areas and those facing threats or intimidation by pro-Russian separatist groups. It also provides support mechanisms such as counselling and rehabilitation for civil servants affected by the war. Special provisions have been made to address the specific needs of internally displaced persons and vulnerable populations, including assistance in finding employment in the civil service, and programs have been implemented to rebuild infrastructure and promote economic development in affected areas.
- Under martial law,[82] heads of public-law legal entities independently determine the amount of payment for idle time of employee downtime (not less than two-thirds of the official salary).[83]

It should be noted that changes are also taking place in the system of remuneration of civil servants. Thus, according to the provisions of the draft Law,[84] a number of changes are envisaged from 1 January 2024:

- Remuneration of civil servants will depend on their qualifications and experience, the importance and complexity of the work, and the efficiency and quality of their duties.
- The salary of civil servants may be fixed (fixed payment guaranteed by law)[85] or variable (bonus based on annual evaluation, monthly and quarterly bonuses, compensation for additional workload).
- The salaries of civil servants[86] are set considering the Catalogue of typical civil service positions and the criteria for classifying such positions.[87]

The new civil service legislation is therefore playing a vital role in maintaining the resilience and functionality of the Ukrainian State during the war. The results at this stage are already visible, but some will take time to take effect and be properly funded.

82 PU Decree No. 64/2022 of 24 February 2022 on the Introduction of martial law in Ukraine.

83 Based on CMU Resolution No. 221 of 7 March 2022 on Some issues of remuneration of employees of State bodies, local self-government bodies, enterprises, institutions, and organizations financed or subsidized by the budget under martial law.

84 Draft Law No. 8222 of 23 November 2022 on Amendments to the Law of Ukraine on Civil Service regarding the introduction of uniform approaches to remuneration of civil servants based on the classification of positions.

85 Based on Article 50 of Law No. 889-VIII of 10 December 2015 on the Civil Service (as amended by Law No. 2849-IX of 13 December 2022).

86 Established on the basis of CMU Resolution No. 15 of 18 January 2017 on Issues of remuneration of employees of State bodies (as amended by the CMU Resolution No. 32 of 6 January 2023).

87 NAUCS Order No. 246–20 of 18 December 2020 on Approval of the Catalogue of typical civil service positions and Criteria for classification of such positions (as amended by the NAUCS Order No. 3–21 of 12 January 2021).

VIII. What Impact Do International Standards and EU Legislation Have on the Development of the Ukrainian Civil Service?[88]

1. European Convention on Human Rights

With adoption of the constitution in 1996, Ukraine chose the vector of independent self-sufficient development and enshrined fundamental principles, including protection of human and citizen rights and freedoms. At national level, this decision was confirmed by ratification of the European Convention on Human Rights (ECHR) and its Protocols in 1997.[89] The country's commitment to implementing the principles and standards of the ECHR is an essential aspect of its European integration process and democratic reforms.

According to the Convention, human rights and freedoms are of absolute value, inalienable, and belong to everyone from birth. So it is no coincidence that the constitutions of modern countries define the central place of human and citizen rights and freedoms. Thus in Ukraine,

> the human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the State's activities. The State is responsible to the people for its activities. Affirmation and ensuring human rights and freedoms is the main duty of the State.[90]

One of the key impacts of the ECHR on the development of the civil service in Ukraine is the promotion and protection of human rights, especially for civil servants. The ECHR emphasises the right to a fair trial, the right to freedom of expression, and the right of access to information. These principles have helped foster a more open and accountable civil service in Ukraine, as public officials are expected to uphold these rights and ensure transparency in their decision-making.

The ECHR has also influenced the development of civil service legislation in Ukraine. To align with the convention's standards, Ukraine has implemented reforms to strengthen the legal framework of the civil service and ensure compliance with human rights principles. For example, the Law on Civil Service incorporates provisions on non-discrimination, equal opportunities and protection of civil servants' rights, in line with ECHR standards.

The ECHR has also played a role in enhancing the professionalism and integrity of the civil service in Ukraine. This has led to the creation of civil service institutions and processes that promote accountability and transparency, such as ombudsman offices and anti-corruption bodies. Furthermore, the ECHR provides a mechanism for individuals to seek redress for human rights violations. Ukrainian citizens can file complaints with the European Court of Human Rights if they believe their rights have been violated by the actions of public authorities, including the civil service. This avenue has helped address systemic issues and promote positive change. Not all Ukrainian legislation currently meets ECHR requirements: some provisions are still awaiting adoption of the relevant laws.

88 Information based on the NAUCS letter No. 1818/54-22 of 13 May 2022.

89 According to Law No. 475/97-BP of 17 July 1997 on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention (as amended by Law No. 3436-IV of 9 February 2006).

90 Article 3 of the Constitution of Ukraine.

2. United Nations Convention against Corruption

In Ukraine, corruption has been a long-standing issue that has hindered the country's development and affected various sectors, including the civil service. Ukraine has always taken an active position in preventing and combatting corruption.[91] This led to ratification of the United Nations Convention against Corruption (UNCAC),[92] and measures have since been taken to implement its provisions. The main achievements are following:

- Ukraine has implemented various laws and regulations to prevent and combat corruption in its civil service.[93] These include laws on public procurement, asset declaration, whistle-blower protection, and conflict of interest.
- UNCAC prompted Ukraine to undertake institutional reforms aimed at improving the efficiency and integrity of its civil service. This has involved the establishment of specialised anti-corruption bodies, such as the National Anti-Corruption Bureau of Ukraine (NABU),[94] the National Agency for the Prevention of Corruption[95] and the Specialized Anti-Corruption Prosecutor's Office (SAPO), a structural unit in the General Prosecutor's Office.[96] These institutions operate independently and have the authority to tackle high-level corruption, including that occurring in the civil service.
- The National Agency of Ukraine for Finding, Tracing and Managing Assets derived from Corruption and Other Crimes was established to identify, search for, recover, and manage assets.[97] Additionally, the State Bureau of Investigation was established to uncover and investigate crimes committed by officials holding particularly responsible positions and by NABU officials, the head of SAPO and other prosecutors of SAPO, as well as war crimes.[98] All civil servants do advanced training on corruption prevention and integrity.[99]

  The final stage of the anti-corruption reform was the establishment of the High Anti-Corruption Court,[100] which administers justice as a court of first instance and appeal, leading to direct consideration of corruption cases.

91 Article 7 of Law No. 964-IV of 19 June 2003 on the Fundamentals of National Security (repealed by the Law No. 2469-VIII of 21 June 2018).

92 Law No. 251-V of 18 October 2006 on Ratification of the United Nations Convention against Corruption.

93 For example Law No. 221-VII of 18 April 2013 on Amendments to certain legislative acts on harmonization of national legislation with the standards of the Criminal Convention on Corruption was adopted to punish bribery (and/or aiding and abetting bribery) and receipt of unlawful benefit by an official of a legal private-law entity; Law No. 222-VII of 18 April 2013 on Amendments to the Criminal Code and Code of Criminal Procedure of Ukraine regarding the implementation of the Action Plan on the visa liberalization by the European Union for Ukraine was adopted to introduce special confiscation and fines for such crimes.

94 It operates according to Law No. 1698-VII of 14 October 2014 on the National Anti-Corruption Bureau of Ukraine.

95 Article 1 of the Law No. 1700-VII of 14 October 2014 on Prevention of Corruption.

96 Based on Article 8 of Law No. 198-VIII of 12 February 2015 on Amendments to certain legislative acts of Ukraine on ensuring the activities of the National Anti-Corruption Bureau of Ukraine and the National Agency for the Prevention of Corruption.

97 Law No. 772-VIII of 10 November 2015 on the National Agency of Ukraine for Finding, Tracing and Managing Assets derived from Corruption and other crimes.

98 According to Article 5 of Law No. 794-VIII of 12 November 2015 on the State Bureau of Investigation.

99 Based on the CMU Resolution No. 106 of 6 February 2019 on Approval of the Regulation on the system of professional training of civil servants, heads of local State administrations, their first deputies and deputies, local self-government officials, and deputies of local councils.

100 Based on Law No. 2447-VIII of 7 June 2018 on the High Anti-Corruption Court.

- Asset declaration systems have also been established to monitor and prevent illicit enrichment among civil servants.

While progress has been made, corruption still remains a significant problem in Ukraine, and further reforms and sustained efforts are necessary to ensure an impact on the civil service. Implementation challenges, such as political will, ongoing war with the Russian Federation, and capacity gaps, can influence the outcomes.

3. Association Agreement Between Ukraine and the European Union

In July 1993, the groundwork was laid for building relations with Western European States, expanding Ukraine's participation in European structures, and for future integration.[101] However, these provisions were left on paper due to the weak (if any) political will of Ukrainian Presidents to promote European integration and their unwillingness to make significant changes in society. The official date of closer relations with the EU was the signing of the Partnership and Cooperation Agreement between Ukraine and the European Communities and their Member States,[102] which came into force on 1 March 1998. Kruglashov et al.[103] note that "since 1 May 2004, as a result of the largest enlargement in its history, the European Union has become Ukraine's immediate neighbour".

For almost 20 years, there have been constant negotiations between Ukraine and the EU to launch a full integration process. However, the turning point in Ukraine's history was November 2013, when the Revolution of Dignity (or Euromaidan) took place. The Ukrainians reclaimed their ability to decide whether to join the EU, demonstrating a deliberate commitment to becoming a Member State and being prepared for a comprehensive overhaul of Ukraine's government institutions. Thus, the Association Agreement between Ukraine and the European Union[104] (Association Agreement) was signed and came into force on 1 September 2017. It covers a wide range of areas, including political cooperation, economic integration, trade, energy, and sectoral cooperation.[105]

The Association Agreement has provided a roadmap for Ukraine's civil service reform. It includes provisions for the modernisation of the civil service, such as improving recruitment procedures, enhancing training and professional development opportunities, and implementing merit-based promotion systems. These reforms aim to build a professional, competent, and independent civil service that can effectively serve the needs of Ukrainian society.

101 Based on VRU Resolution No. 3360-XII of 2 July 1993 on the General directions of the foreign policy of Ukraine (repealed by Law No. 2411-VI of 1 July 2010).

102 According to Law No. 237/94-BP of 10 November 1994 on Ratification of the Agreement on Partnership and Cooperation between Ukraine and the European Communities and their Member States (expired on the basis of Agreement No. 984_011 of 27 June 2014).

103 Kruglashov et al. (2010), p. 6.

104 Based on Law No. 1678-VII of 16 September 2014 on Ratification of the Association Agreement between Ukraine on one hand, and the European Union, the European Atomic Energy Community, and their Member States, on the other hand.

105 According to the CMU Resolution No. 1106 of 25 October 2017 on the Implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community, and their Member States, on the other hand (as amended by CMU Resolution No. 808 of 9 September 2020).

The Association Agreement has facilitated cooperation and exchange of knowledge between Ukrainian and EU institutions. This collaboration has allowed Ukrainian civil servants to participate in training and exchange programs with their EU counterparts, fostering the transfer of knowledge and best practices. The EU provides technical and financial assistance to support Ukraine's civil service reform efforts under the Association Agreement. This assistance includes advisory support and funding for specific projects aimed at improving the efficiency and professionalism of the civil service. It should be stressed that on 23 June 2022, EU Member States voted to grant Ukraine the status of an EU candidate country. However, the granting of EU candidate status is only the first step. In order to join, Ukraine needs to implement a number of reforms and continue to adapt national legislation to EU standards.

IX. Conclusions

Ukraine has made significant progress in establishing the foundations of a democratic society and in forming the civil service since its independence from the Soviet Union. The adoption of the Law on Civil Service in 1993 laid the foundations for the legal regulation of civil servants, placing Ukraine ahead of many other post-Soviet States. However, compared to many European countries, Ukraine is still in the process of transforming its civil service and faces various challenges.

The current state of civil service regulation in Ukraine does not meet modern conditions and EU standards. Urgent improvements are necessary as part of the civil service reform agenda. Several problematic issues exist in the current legislation, including a lack of clear delineation between public and private law, inadequate regulations for preventing conflicts of interest in the civil service, the absence of a legislative distinction between political and managerial positions in the executive authorities, and the lack of harmonisation between special legislation (e.g. diplomatic, tax, customs), and civil service legislation. These shortcomings require the development of numerous regulatory documents to address them effectively.

In order to fulfil the Ukrainian people's aspiration to become a full-fledged member of the EU, Ukraine must continue implementing a wide range of reforms. Civil service reform is a crucial aspect of this process. While there is still much work to be done, it is important to acknowledge that Ukraine has already achieved certain milestones in civil service reform, and active legislative work is underway. By addressing these shortcomings, Ukraine can further strengthen its civil service and pave the way for closer integration with the European Union.

Bibliography

Åslund A. (2009), *How Ukraine Became a Market Economy and Democracy*, Washington, DC: The Peterson Institute for International Economics.

Åslund A., McFaul M. (eds) (2006), *Revolution in Orange: The Origins of Ukraine's Democratic Breakthrough*, JSTOR: Carnegie Endowment for International Peace.

Bogovis Є.V. (2017), 'Historical and legal aspect of formation of the institute of public service of Ukraine', 43(2) *Naukovij visnik Uzhgorods'kogo nacional'nogo universitetu*, 33–37.

Bondarenko L.I. (2021), 'Udoskonalennya sistemi motivacії praci derzhavnih sluzhbovciv', 23 *Investicії: praktika ta dosvid*, 98–104.

Dabrowski M., Domínguez-Jiménez M., Zachmann G. (2020), 'Six Years after Ukraine's Euromaidan: Reforms and Challenges Ahead', 14 *Policy Contribution*, 1–24.

Dovzhenko V.A., Voitenko A.B., Kravets I.V. (2021), 'Public management in Ukraine: development history and peculiarities of modern system', 1(13) *Ekspert: paradigmi yuridichnih nauk i derzhavnogo upravlinnya*, 115–125.

Drozd O. (2016a), 'Rozvitok derzhavnoї sluzhbi v Ukraїni z chasiv isnuvannya SRSR po tepereshnij chas', 3 *Nacional'nij yuridichnij zhurnal: teoriya ta praktika*, 82–85.

Drozd O. Yu. (2016b), 'Do problemi viznachennya pravovogo statusu derzhavnogo sluzhbovcya yak sub'єkta trudovogo prava', 1–2 *Naukovij visnik publichnogo ta privatnogo prava*, 24–29.

Fostikova V. (2020), 'Activities of Civil Servants: Features of Evaluation in Ukraine', 3(27) *Krakowskie Studia Małopolskie*, 50–60.

Gogol' T.V., Mel'nichuk L.M. (2022), 'Transformaciya teritorial'nih gromad v umovah decentralizaciї v Ukraїni', *Pravo ta derzhavne upravlinnya*, 216–225.

Hrycak A. (2007), 'Seeing Orange: Women's Activism and Ukraine's Orange Revolution', 35(3/4) *Women's Studies Quarterly*, 208–225.

Hryshchuk A.B. (2018), 'Theoriginand development of public service on the territory of Ukraine. History and modernity', 1 *Naukovij visnik L'vivs'kogo derzhavnogo universitetu vnutrishnih sprav*, 125–133.

Ishchenko M.I., Mishchuk Ye.V., Radko V.V. (2019), 'Pidkhody do rozkryttia definitsii "derzhavnyi sluzhbovets" u konteksti poniattia "derzhavna sluzhba"', 12 *Derzhavne upravlinnia: udoskonalennia ta rozvytok*, 1–6.

Ivanov Ye.V. (2021), 'History of the origin and development of the civil service in Ukraine in the context of the challenges of today', 2 *Teoriya ta istoriya publichnogo upravlinnya*, 7–11.

Komonyuk A.Є., Chorna V.G. (2022), 'Problemni pitannya adaptaciya derzhavnoї sluzhbi do standartiv Єvropejs'kogo soyuzu', 13 *Naukovi zapiski*, 146–151.

Kornuta L.M. (2022), 'Okremi pitannya provadzhennya derzhavnoї sluzhbi v umovah voєnnogo stanu', 2 *Dniprovs'kij naukovij chasopis publichnogo upravlinnya, psihologiї, prava*, 64–69.

Koval H.V. (2020), 'Reforming the Civil Service process in Ukraine', 1 *Teoriya ta praktika derzhavnogo upravlinnya i miscevogo samovryaduvannya*, 1–16.

Kovbasyuk Yu.V., Obolens'kij O.Yu., Bilins'ka M.M., Ser'ogin S.M., Lipovs'ka N.A., Tolkovanov V.V., Suraj I.G. (2012), '*Teoretichni osnovi derzhavnoї sluzhbi*', in SHimans'ka S.M., Shevel'ova V.G. (eds), *Derzhavna sluzhba*, *Tom 1*, Kiїv-Odesa: Nacional'na akademiya derzhavnogo upravlinnya pri Prezidentovi Ukraїni.

Kruglashov A.M., Ozimok I., Astapenko T.S., Russu V.V. (2010), *Єvropejs'ka integraciya na pochatku novogo tisyacholittya*, ch. 1, Chernivci.

Kuzio T. (2005), 'Ukraine's Orange Revolution: The Opposition's Road to Success', 16(2) *Journal of Democracy*, 117–130.

Lelechenko A.P., Vasil'єva O.I., Kujbida V.S., Tkachuk A.F. (2017), *Misceve samovryaduvannya v umovah decentralizaciї povnovazhen*, Kiїv: Rada Єvropi.

Malinovsky V.Ya. (2018), *Publichna sluzhba v Ukraїni*, Kiїv: Kondor.

Perov A.P. (2018), 'Administrativno-pravove regulyuvannya derzhavnoї sluzhbi Ukraїni: istoriko-pravovij aspekt', 30 *Pravova derzhava*, 108–113.

Prodaevich O.S. (2008), *Prohodzhennya derzhavnoї sluzhbi v Ukraїni: organizacijnopravovij aspekt*, Odesa: Nacional'nij universitet "Odes'ka yuridichna akademiya".

Prudyus L.V. (2016), 'Harmonization of the Ukrainian civil service with international and EU standards', 6–7 *Public administration aspects*, 66–76.

Sherr J. (2005), 'The Orange Revolution's Challenge to Ukraine, Russia and Europe', 1(Spring Issue) *Politique étrangère*, 9–20.

Shveda Y., Park J.H. (2016), 'Ukraine's Revolution of Dignity: The Dynamics of Euromaidan', 7(1) *Journal of Eurasian Studies*, 85–91.

Solotkyi S.A. (2021), 'Conceptual Principles of Civil Service in Ukraine: Problematic Issues', 1(21) *Fìlosofs'kì ta metodologìčnì problemi prava*, 127–134.

Stets O.M. (2020), 'Essential and conceptual characteristics of a civil servant as a subject of civil service relations', 2(10) *Scientific legal journal*, 85–90.

Tymtsunyk V.I. (2013), *Publichne administruvannya*, Kiїv: Kiїvs'kij nacional'nij torgovel'no-ekonomichnij universitet.

Wilson A. (2005), *Ukraine's Orange Revolution*, New Haven: Yale University Press.

18 Development of the Civil Service in a Comparative Perspective

Matthias Niedobitek

I. Introduction

The present chapter's intention is not to provide a detailed comparison of the country chapters contained in this handbook,[1] but rather to carve out the broad lines of the civil service systems of the States compared and to deal with several key questions communicated by the editors. This intention will require a certain order: we will have to consider the basic concepts of civil service (Section IV), the constitutional and historical dimensions of the civil service revealed in the country chapters (Section V), the concept of the civil service and the status of civil servants (Section VI), the influence of European law on the civil service systems (Section VII), and endeavours to reform the civil service (Section VIII). Whether or not the civil service systems are "converging" will finally be assessed in the Conclusions (Section IX). Before starting this work, a few words must be dedicated to the States compared in this handbook (Section II) and to the problem of comparative law in a multilingual context (Section III).

The present chapter will also comment on the country chapters and the notions used therein to help the readers reflect on linguistic doubts which might arise. The information in this chapter is taken from the national chapters unless otherwise noted.

II. The States Compared and Their Civil Service

1. The 14 States

Before starting the comparative work, it is first vital to reiterate the States we are dealing with. These are, in the order of the handbook structure, Austria, Belgium, Denmark, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain, Sweden, Switzerland, United Kingdom, and Ukraine – 14 European States altogether.

All these States are members of the Council of Europe (CoE) and parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and – apart from Switzerland and Ukraine – to the European Social Charter (ESC).[2] Thus, the ECHR, including the jurisprudence of the European Court of Human Rights (ECtHR), the ESC and further CoE Conventions, may have a harmonising influence on the civil service of all the States. This will be dealt with in Section VII.

1 As it was the intention of the comparative report of Niedobitek (1994).
2 Instead, Ukraine ratified the revised European Social Charter.

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Among the 14 States are 11 States that belong to the European Union: France, Germany, Italy, Spain, Poland, Hungary, the Netherlands, Belgium, Austria, Denmark, and Sweden. Ukraine is a candidate country for European Union (EU) accession and is already linked to the EU by an association agreement.[3] Regarding these States, a possible harmonising effect of EU law – or, in the case of Ukraine, of the association agreement and the accession process – on their civil service systems comes into play, which will also be dealt with in Section VII.

The States covered in this handbook, among which are six monarchies (the United Kingdom, Spain, the Netherlands, Belgium, Denmark, and Sweden), represent a broad spectrum of State organisation. What is clear from the outset is that all these States are – to a greater or lesser extent – decentralised. Thus, the civil service can appear at all levels of government (central, regional, municipal) and within all functional bodies (such as social security, health service, etc.). However, the competence for legal regulation of the civil service depends on the degree of autonomy of the subnational units. Unitarian States such as France, the United Kingdom, Hungary, the Netherlands, Poland, Denmark, Sweden, and Ukraine, even if they are regionalised or decentralised, normally assign their civil service legislation to the central government, while stronger decentralised States – federations or federated States such as Germany, Austria, Switzerland, and Belgium – involve their subnational units in lawmaking.

Some States (particularly Spain, Poland, Hungary, and Ukraine) still suffer from their authoritarian history, which, as the country chapters demonstrate, has had lasting effects on the political-administrative systems and, in particular, on the civil service. Here (notably in Poland),[4] there is a persistent problem with drawing boundaries between the civil service and political leadership, and thus with safeguarding the civil service's neutrality and apolitical nature.[5]

All 14 States have one or more official languages. As in the case of the European Union, there are fewer official languages than States, namely 11: French (France, Belgium, Switzerland),[6] English (United Kingdom), German (Germany, Austria, Switzerland, Belgium), Italian (Italy, Switzerland), Spanish (Spain), Polish (Poland), Hungarian (Hungary), Dutch (the Netherlands, Belgium), Danish (Denmark), Swedish (Sweden), and Ukrainian (Ukraine). All the different official languages, including their notions, terms, and concepts, have been shaped by different national legal cultures and traditions.[7] This makes a comparison even more complicated than calculating a currency basket.

The States included in the present handbook represent a great variety of European civil service systems, traditions, and developments,[8] which will be demonstrated in this chapter. Therefore, including all the European members of the Council of Europe in the

3 See the Website of the European Union Council at https://www.consilium.europa.eu/en/policies/ukraine/.

4 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Szesciło in this volume, footnote 32, where the author refers to a comparative study concerning senior civil service politicisation in several post-socialist countries, among which, the study concludes, Poland and Slovakia suffered most from politicisation.

5 See Krzywoń (2022), p. 36.

6 In Switzerland, Rhaeto-Romanic is a fourth official language which is, according to the Swiss language law (*Sprachengesetz*), an official language only when communicating with persons using that language.

7 Krzywoń (2022), p. 8.

8 Krzywoń (2022), p. 23.

comparison would not have provided added value. However, the selection of States is sufficient to draw a reliable picture of the civil service systems in Europe.

2. The Autonomy of the States to Regulate Their Civil Service

Within the limitations of international law and European law, which derive from treaties, customary law and general principles of law, the States are free to organise their internal structure and administrative organisation. It will be shown (see Section VII) that European law (understood in a broad sense as encompassing the law of the Council of Europe and the law of the European Union) has some impact on the civil service of the States presented in this handbook, but this impact is limited and selective. Regarding the EU Member States covered by this handbook, this is confirmed by Article 4, paragraph 2 of the Treaty on the Functioning of the European Union (TFEU), which commits the Union to respecting the national identity of the Member States, which is inherent in their fundamental structures – political and constitutional, including regional and local self-government. The Union shall also respect the essential State functions of the Member States. Thus, the EU Member States (and of course the other States covered by this handbook) are essentially free to establish their own administrative organisation, including a civil service.[9] Not surprisingly, the country chapters implicitly assume that the establishment of the civil service is a national *domaine réservée*. It should, however, not be forgotten, that according to Article 4, paragraph 3 of the Treaty on European Union (TEU) (the loyalty principle), the EU Member States are not only entitled but also obliged to provide an efficient State administration, including a civil service, which is "necessary to guarantee the application and effectiveness of EU law".[10]

Maybe as a result of the autonomy of the States to regulate their civil service, the construction, development and reform of national civil service systems normally do not seem to take account of foreign experiences, as the country chapters suggest. The chapters reveal only a few examples where comparative law considerations probably played a role (e.g. Belgium → France; the United Kingdom → Sweden; the Netherlands → reference to the French–German tradition and the Swedish and Danish approach). It is certainly difficult, if not impossible, to transfer foreign models and experiences to other national civil service systems, which are usually strongly rooted in national history and culture and in the constitution.[11] However, instead of comparative law considerations, it seems that the Weberian legacy[12] has served many States in this handbook as a common tradition. Even though only few country chapters – those focused on Belgium, Germany, and Hungary – explicitly mention Weber's conception of bureaucracy, it shines through in many of the other chapters.

The autonomy of the States to regulate the concept of civil service does not necessarily lead to a clear and undisputed definition – the opposite is rather the case. In most States, the concept of civil service is predominantly based on academic literature or jurisdiction. Two examples deviating from this picture are Hungary and Ukraine. While the Hungarian

9 See Kahl in Calliess and Ruffert, Art. 4 EUV Rn. 127.

10 CJEU, judgment of 10 July 2014, Kalliopi Nikolaou v. Court of Auditors, C-220/13 P, para. 51.

11 On the possibility and the different view on "legal transplants", see Cabrelli and Ghio (2024), pp. 23 and 24.

12 See Barberis (2011).

chapter reveals an almost total absence of conceptual coherence in this regard, in Ukraine the civil service is clearly legally defined in the Civil Service Law.

III. The Problem of Comparative Law in a Multilingual Context

Comparative law does not necessarily occur in a multilingual context. As shown prevously, States may have the same official language (e.g. Germany and Austria), but this does not mean that the same words must necessarily have the same meaning. In the present context, the meaning of the same words depends on the respective national legal concepts and may result in different terminologies.

Comparative law typically becomes even more complicated when different languages are involved. Ironically but inevitably, the present handbook agreed on English as a working language, which, among the States compared, represents the only State with a common law tradition and with a special conception of the civil service, not the least in terms of the employment relationship of civil servants.[13] At first sight, the choice of English may appear as an advantage for the United Kingdom country chapter since the words and the concept of "civil service" inherently belong to the English language, tradition, and culture. However, for the purpose of this handbook, the editors and authors borrowed from the English language only the words (the phrase) "civil service" but not the concept. Thus, the phrase "civil service" as used in the present context must be distinguished from the English concept of "civil service" and be understood as an open concept – a keyword – suitable for all the country chapters. That does not prevent the authors from using other designations complementarily, such as "public service", to designate groups of employees that do not fulfil the criteria of a "civil servant" as defined in the chapter. Others add the designation in the national language (for example, *közszolgálat* in the Hungarian chapter) to distance themselves from the working language and its implications. This is perfectly justified. At any rate, the authors were required to use the chosen terms consistently, although this was not entirely successful. Readers, however, must always be careful not to fall into the "keyword trap" and to identify the English words with their English concepts.[14]

Furthermore, the distinction between private law and public law, which governs the classification of public employment relationships on the continent, is basically irrelevant in the United Kingdom.[15] Consequently, the United Kingdom (UK) country chapter does not use the terms "public law" or "private law" at all.

The objective of comparative law is manifold,[16] but in the present context, comparative law must serve the academic interests of the editors and authors. These are basically (1) to treat the civil service as an indispensable – in a way axiomatic – means of fulfilling State tasks, (2) to identify the relevance of history, including the constitutional background, for the respective development and current state of the civil service, (3) to discover the differences in the employment relationships between the States, and (4) to check whether or not European law exerts a converging influence on the civil service systems of the States. These objectives will be pursued in the following sections.

13 See Krzywoń (2022), p. 31.

14 On the "keyword trap", see Chirico and Larouche (2013), pp. 17–18.

15 This was already stated by Johnson (1994), p. 406.

16 See Michaels (2021).

IV. Basic Concepts

The present section of this chapter is devoted to several concepts which appear in the country chapters, and which have, beyond national peculiarities, some aspects in common and need some explanation: (1) the public sector, (2) private and public law, (3) the civil service, (4) statute, (5) *corps*, (6) employment, (7) appointment, and (8) contract.

1. The Public Sector

The civil service is part of the public sector. As Adam Krzywoń rightly states,

> [t]he term [public sector; M.N.] is a broad notion encompassing central and local governments and public corporations. Thus, it includes a wide range of public bodies and public offices. Workers in the public sector are usually called "public servants" or "public sector personnel". Public sector employees enjoy different employment statuses: that of civil servant and that of other categories of public servant.[17]

To conclude, all persons and activities beyond the public sector are strictly private and not relevant for the present handbook.

2. Private Law and Public Law

In all the States dealt with in this handbook except the United Kingdom (see Section III), the distinction between private and public law plays an important role in the classification of public servants. This distinction is not axiomatic but is part of the national legal order of the States. The delimitation between private law and public law in the States concerned leads, it must be assumed, to similar although different results. Even within the national legal orders of the States concerned, the delimitation is not straightforward or undisputed. In the case of Germany, several theories are employed to explain the distinction.[18] The very core of these theories, however, is certainly converging. Marginal differences are not relevant in the present context. Even though all country chapters (except that on the United Kingdom) refer to the distinction between private and public law, they do not provide demarcations, a fact that must be interpreted as suggesting that such a demarcation is assumed across Europe.

3. Civil Service

"Civil service" in the meaning adopted by the present handbook designates *persons* employed in the public sector – "civil servants" – rather than a public task.[19] The individual "civil servants" form, if aggregated, the "civil service" and are part of State administration. Both interpretations of civil service – persons and tasks – are legitimate and cannot be strictly separated from each other, but they focus on different aspects of the public sector. Persons are necessary to fulfil public tasks, public tasks define the fields of activity of persons. One interpretation mirrors the other, but they are different, two sides of the same

17 See Krzywoń (2022), p. 24 (footnotes deleted from the text).
18 See Suckow et al. (2021), pp. 61 and 62.
19 See Krzywoń (2022), pp. 34 f.

coin. Bearing this in mind, some country chapters tend to blur the lines between the two interpretations and focus more on public tasks than on persons, i.e. employees (regarding employees, see the following Subsection 6).

The term "civil service" as conceptualised by Adam Krzywoń[20] is used differently in the country chapters. This is certainly the result of the linguistic prerequisites and inconsistencies of its usage mentioned in Section III. Some take it as a broad term equivalent to "public service" or "public servants", some restrict its meaning to a (more or less) narrow group of State servants. Others refer to the term "public service" in addition to "civil service", probably to indicate a broad concept (e.g. the Polish country chapter). Thus, readers must be careful not to confuse the terms.

4. *Statute*

Depending on the legal nature of employment in the public sector, employees are part of the normal labour market or are subject to a "statute", with many possible gradations in between. A statute can broadly be defined as "the set of rules drawn up unilaterally by the administrative authority [or the legislator; M.N.] and which apply indiscriminately to all the agents subject to them".[21] A statute may also include the affiliation of the employees to a *corps* (see Subsection 5).

5. Corps

Corps are typical of the French civil service and have a long history in French State administration.[22] Originally, as the French chapter says, *corps* formed a kind of guild of public servants, related to the guilds of merchants in the Middle Ages. A *corps* is one of the basic categories which determine a French civil servant's career.[23] French *corps* are characterised by their specific statutes, their privileges and their (increasingly watered down) inflexibility. *Corps* are also mentioned in the Hungarian and Polish country chapters, but it seems that only in the case of Hungary is the term *corps* used in a technical sense.

6. *Employment*

As with most concepts discussed in the present part, the notion of employment can be construed in a broad and in a narrow way. A broad interpretation refers to all the legal techniques which integrate a person – the employee – into the civil service and make him/her a civil servant. These techniques are (1) the bilateral conclusion of a contract and (2) the unilateral appointment. In a narrow sense, employment only refers to the mechanisms of the labour market, including, inter alia, collective agreements, the competence of the

20 See Section VI.

21 See the chapter The Civil Service in Belgium: Between Fragmentation and Common Principles by Y. Marique and E. Slautsky in this volume, which quotes and translates (in footnote 2) Gosselin F. (2017), Droit de la fonction publique belge à l'aune du droit européen, Brussels: Bruylant.

22 See The Civil Service in France: The Evolution and Permanence of the Career System by D. Capitant in this volume, Section III.2.1.

23 See The Civil Service in France: The Evolution and Permanence of the Career System by D. Capitant in this volume and Kroos (2010), pp. 11 f.

labour courts, or means of dismissal under labour law. Both interpretations of "employment" can be found in the country chapters.

7. *Appointment*

The term "appointment" is also used in the country chapters in two meanings. The narrow version refers to a unilateral decision of the competent authorities to integrate a person into the civil service, to transfer an office to him or her and to assign him or her a task. Sometimes, however, the term "appointment" is also used to designate the decision of the competent authorities to conclude a contract with a person with a view to integrating him or her into the civil service, as the result of a selection process.

Some country chapters address doubts about the unilateral nature of appointments (and reject them at the outset), since they always involve the participation of the persons to be integrated into civil service and are, thus, similar to a contract. From a legal standpoint, however, the two notions – appointment and contract – must be strictly distinguished.

8. *Contract*

By definition, a contract is the result of an agreement of wills between at least two parties and is aimed at creating legally binding force.[24] The binding force of contracts necessarily results from a particular legal order. In the present context, only national legal orders come into question. This is, of course, different within the civil service of international organisations, as dealt with in other chapters.[25] The parties to a contract may be individuals or corporations, such as trade unions. In the former case, "contracts" are concluded, in the latter case "collective agreements". An employment contract may belong to private law or to public (administrative) law. The country chapters provide evidence of that dual usage within the States compared.

V. The Constitutional and Historical Dimensions of the Civil Service

The constitutional and historical dimensions of the civil service are often closely interwoven and cannot be dealt with separately. Constitutions are the very bases of the civil service, and this is often reflected in their wording. The States we are dealing with, and their constitutions, sometimes have a long history. Some constitutions currently still in force date back even to the early 19th century, as is the case of Belgium and the Netherlands.

Not all States considered in this handbook have a classic constitution enshrined in a single text.[26] The United Kingdom is renowned for lacking a constitution in that sense. To quote the UK Parliament, the UK's constitution "has never been codified in this way; instead, the various statutes, conventions, judicial decisions and treaties which, taken together, govern how the UK is run are referred to collectively as the British Constitution";[27] its parts

24 See Niedobitek (2001), p. 114.

25 See The Civil Service of the European Union by S. Magiera and The Civil Service in International Organisations: The Example of the Coordinated Organisations by A.-M. Thévenot-Werner in this volume.

26 Much more differentiated is the classification of constitutions in Albi and Bardutzky (2019).

27 See the website of the UK Parliament at www.parliament.uk/site-information/glossary/constitution/.

normally have no special legal status[28] due to the all-important sovereignty of parliament. Second, the Austrian constitution is also composed of several texts, potentially unlimited in number, with the *Bundes-Verfassungsgesetz* as its core and "the main legal source",[29] with other important texts incorporated into the constitution, such as the *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* of 1867 (in the following: *Staatsgrundgesetz*) or the ECHR. Finally, the Swedish constitution consists of four texts, among which the Instrument of Government (*Regeringsformen*) is the most important. The other States not mentioned here have a classic constitution.

The fundamental rights of civil servants are part of the fundamental rights catalogues of the national constitutions (see Section VI), but they are also contained in the ECHR (in that regard, see Section VII). All the States discussed here have incorporated the ECHR into their national legal order[30] but only a few have given it constitutional status. As already mentioned, Austria is one of these States: the ECHR was assigned constitutional rank here in 1964.[31] The Netherlands has gone even further and recognised the primacy of the ECHR (and other international treaties) over the constitution.[32] In Sweden, although the ECHR is mentioned in the Instrument of Government (IoG) which is part of the constitution (Chapter 2, Article 19),[33] the ECHR is not constitutionally incorporated.[34]

Some States have anchored special civil service provisions in the constitution. Among these States are Germany (Article 33), Austria (Article 20 B-VG), Italy (Articles 97 and 51), Spain (Article 103), Sweden (IoG, Chapter 12, Articles 5–7), Poland (Article 153), and Denmark (§ 27). These provisions do not normally cover all civil servants but are either restricted to the national tier (as in the case of Sweden or Denmark) and/or to a specific status (as in the case of Germany or Denmark). In other States, for example, the Netherlands (Article 109), Hungary ("The State", Article 17, paragraph 5), or Ukraine (Article 92), the legal status of civil servants or the civil service in general must be regulated by law.

Historically, public servants were not employed by contract but by appointment. They had a special status and a special affiliation to the State, different from labour law.[35] This "traditional" approach is still present in the German constitution (the Basic Law, BL). Article 33, paragraph 5 states that "[t]he law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service".[36] A similar legal situation exists in Austria due to the jurisdiction of the

28 See the website of the UK Parliament at https://lordslibrary.parliament.uk/uk-constitution-proposals-and-ministerial-responsibility/.

29 See *The Civil Service in Austria: Tradition, Reforms, and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume, Section II.

30 Grabenwarter (2009), p. 35.

31 Grabenwarter (2009), p. 36.

32 Besselink and Claes (2019), pp. 179, 180, and 184; Grabenwarter (2009), p. 36.

33 This provision says: "No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms."

34 Sveriges Riksdag (2016), p. 29: "An issue discussed in the reasons for the decision was whether or not the Convention should be part of the Swedish constitution or of ordinary law. Ordinary law was chosen, but the Convention was given special status. A ban on regulations conflicting with Sweden's commitments under the Convention was written into the Instrument of Government." See also Nergelius (2019), pp. 329, 330.

35 On the history of labour law, see Preis (2012), pp. 23 f.

36 English translation taken from the website of the Federal Ministry of Justice at www.gesetze-im-internet.de/englisch_gg/.

Constitutional Court.[37] The Dutch country chapter refers to the French–German tradition, which was formerly the basis of the Dutch civil service. The Belgian country chapter points to the French legal order, which influenced the Belgian civil service. Finally, the Danish country chapter characterises the statutory civil servant as the "defining type of public employment a century ago". To conclude, history plays an important role for the understanding of the present state of civil service in each State covered in this handbook. Nevertheless, this does not prevent the Swiss country chapter from stating that "personnel statutes are progressively abandoning historical elements".[38]

An important right of citizens is the right to equal access to the civil service. This right is often constitutionally enshrined. Again, the German Basic Law may serve as an example. Article 33, paragraph 2 says: "Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements." Other constitutions regulate the same or are interpreted in the same sense (e.g. Italy, Poland, Hungary, Belgium, Ukraine), unless equal access to the civil service is regulated by ordinary law. In the case of Austria, the *Staatsgrundgesetz*, which is part of the constitution, contains, in Article 3, the right of equal access to public offices but this right is, according to the Austrian country chapter, dead law, since it was never considered to grant an effective right.[39] A general reservation of access to the civil service for the country's own nationals, as the German Basic Law seems to require, would certainly be in conflict with the freedom of workers (Article 45 TFEU).[40] However, this provision can certainly be interpreted in conformity with EU law as not excluding nationals from other Member States.[41]

VI. The Concept of the Civil Service and the Status of Civil Servants

Within a comparative handbook, the terms to be used in the country chapters were to be specified in advance. This work was done by Adam Krzywoń.[42] He concludes that civil servants should be defined as officials employed by the executive. "[T]hey have special duties and responsibilities and are often subject to specific requirements."[43] The employment regime (public or private), Krzywoń argues, is not decisive. Furthermore, civil servants should enjoy stability of employment.[44] Even though this is a broad definition, for some country chapters it is still too narrow: the restriction of civil servants to the executive does not seem to fit for all the States. In Switzerland, to give an example, where no definition of the civil service exists, officials working for the parliament and the judiciary are included in

37 See *The Civil Service in Austria: Tradition, Reforms, and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume, footnote 44.

38 See *The Civil Service in Switzerland: Between Flexibility and Tradition* by F. Bellanger in this volume, Section V.

39 See *The Civil Service in Austria: Tradition, Reforms, and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume, Section VI.

40 See Hense in Epping and Hillgruber (2024), Article 33 BL, para. 21. Hense and others confusingly contend that although Article 33, para. 2 BL cannot be applied to EU citizens due to the primacy of EU law, the provision does not contradict EU law.

41 Whether or not such an interpretation is sufficient to meet the requirements of EU law, is, however, doubtful.

42 See his research study as quoted in the bibliography and his contribution to this handbook: *Defining the Civil Service: Towards a Better Understanding of the Nature of Civil Service Systems in Europe* by A. Krzywoń.

43 Krzywoń (2022), p. 39.

44 Krzywoń (2022).

the – broadly construed – civil service. As a result, the country chapters, while mostly using the term "civil service", unfolded their national understandings of this concept.

There are essentially two statuses of civil service which mark the outermost poles between which the civil service systems can be positioned: (1) the narrow, "classic" civil service of the French–German statutory kind, sometimes even restricted to the national level, and (2) the broad "private-contract-solution" as currently, e.g. in the Netherlands. Between the two poles there exists a continuum of civil service models which should be suitable to catch all States, with the exception of the United Kingdom. The choice of a particular model reflects a certain understanding of what the role of the "State" is – or should be – in the respective country. While the first model (1) should be deemed as representing a "strong State" with a lively public law tradition and hierarchical ideas, the second model (2) should be regarded as representing – not a "weak State" but – a liberal State close to its citizens. The first model, it is suggested – with some exaggeration, stands for (unilateral) "decision", the second model for (bi- or multilateral) "negotiation". In reality, of course, both models can merge.

The statuses of civil servants differ considerably between the States compared. This results from the different notions, traditions of structures of these States. The civil service may be reserved for the national level as in the United Kingdom or Poland, while the regional or local administration is not included. Civil service legislation may extend to all tiers of the State, encompassing legislation for each tier (e.g. Germany, Italy, or – based on a broad conception – Sweden). Other States (Switzerland, Austria, Spain, or Belgium) allow their sub-national units (cantons, *Bundesländer*, Autonomous Communities, Communities) to – sometimes supplementary (in the case of Germany) – employ their own civil service legislation. But even country chapters on unitary States such as Poland or Hungary lament the fragmented civil service legal situation. Some States exclude private law regimes from the civil service, as Poland does. Finally, the civil service may be defined by the exercise of sovereign rights (e.g. Germany), the permanence of the posts (e.g. France), or the special nature of the task (e.g. Denmark). All in all, the picture of civil service legislation in the States under consideration is anything but standardised.

A "streamlining" effect on the civil service systems, however, seems to have been brought about by the New Public Management movement,[45] which is mentioned in several country chapters. The methods and instruments of New Public Management[46] include "privatisation" which resulted in an increasing use of private law contracts in some States, notably in Belgium.[47] Only in Denmark have the New Public Management reforms "been moderate",[48] maybe due to an already comparatively "modern" state of public administration. Be that as it may, it is remarkable how the States follow the tendency to strengthen contractual employment relationships at the expense of statutory employment.

The dividing line between statutory and contractual employment cannot be drawn between public law and private law but instead must be drawn between unilateral and contractual regulation. Many States, to mention only Switzerland with its Cantons, use a

45 On the "new paradigm" of the public sector, see Reinermann (2011).

46 Reinermann (2011), pp. 265–267.

47 See *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume, Sections IV and VI.

48 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume, Section III.2.

public law regime even when they prefer contracts for the establishment of employment relationships. Others, such as France or Belgium, use private and public law contracts side by side. Some country chapters, notably the Danish and the Ukrainian chapters, highlight the "dual" nature of public employment contracts as belonging – certainly in different aspects – to private law and to public law at the same time. It is, however, questionable that this is something peculiar or rather valid for all private employment contracts in the public sector.

Obviously, all possible variations between the two poles mentioned previously have emerged in the States under consideration. Still, contracts are clearly on the rise and the "special type of employment based on appointment" is on the retreat and gradually fading out.[49] Nevertheless, some States, such as Germany, France, Spain, or Denmark, are sticking to statutory relationships, at least regarding top or management positions and sovereign tasks (judges, military, diplomatic personnel), and in Italy this applies even to professors. In other States, aspirations to abolish statutory relationships entirely would conflict with the national constitution. In Denmark, for example, it is said to be unconstitutional to do without civil servants appointed by the King.[50]

New Public Management was important not only for the privatisation impulses of the public sector (discussed earlier) but also, notably in the United Kingdom,[51] for the introduction of agencies, such as the so-called Next Steps Agencies in the UK.[52] The starting point for the establishment of agencies was, however, not the United Kingdom but Sweden. The history of Swedish agencies dates back, as the Swedish country chapter says, to the 17th century, which cannot be understood literally but sheds light on the Swedish self-understanding and tradition of its special administration. Today, the Swedish agencies are important parts of government administration. Agencies and the civil servants employed by the agencies enjoy constitutional autonomy, they are "semi-autonomous", "as independent as the courts", referred to as "duality".[53] Today, the autonomy of agencies and their employees is certainly a constituent element of Swedish agencies. They must be understood as the prototype of agencies as such. New Public Management brought the idea of "agencification" to all European States.[54] The country chapters, with only a few exceptions, deal with "agencies" to some extent. However, it seems that autonomy as an important feature of agencies of the Swedish type is less pronounced in the other States. The UK country chapter, while dealing with the British Next Steps Agencies, draws a parallel to the Swedish agencies but points to their greater independence.[55] Most probably, the Swedish "duality" – the constitutionally guaranteed absence of the ministerial rule – is unique among the States considered.[56] If they address this issue at all, the other country

49 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment, and Insulation from Politicisation* by D. Szesciło in this volume, Section V.

50 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume, Section IV.1.

51 See Promberger and Rauskala (2003), p. 10.

52 On these agencies, see Lodge (2007).

53 See *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfeld Olsson and E. Sjödin in this volume, Section II.

54 On the connection between New Public Management and agencies, see Jann and Döhler (2007).

55 See *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume, Section III.3.

56 See *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfeld Olsson and E. Sjödin in this volume, Section II, where the authors point to the "uniqueness" of the Swedish system which is connected to government agencies' semi-autonomous character.

chapters indicate that the civil service is subject to directives issued by the competent ministers.

According to national legislation or national constitutional law, access to the civil service usually requires national citizenship, as the country chapters demonstrate. This requirement is sometimes restricted to specific posts, such as judges, public prosecutors, police, military staff, or specific high-ranking positions. In the case of the EU Member States, the restrictions arising from EU law (Article 45 TFEU) must be observed. According to the settled jurisdiction of the Court of Justice of the European Union (CJEU), the nationality requirement may only be applied to

> posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities and thus presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.[57]

Not infrequently, the country chapters refer to this jurisdiction. In the case of Switzerland, Article 10 of Annex I of the agreement on the free movement of persons of 21 June 1999 is of similar relevance.[58] The international agreements of the EU with the United Kingdom and Ukraine – the EU–UK Trade and Cooperation Agreement[59] and the EU–Ukraine Association Agreement[60] – do not contain any comparable provisions.

Civil servants are not only employees and as such – statutorily or contractually – obliged to the State and all other public employers, but they are also citizens and, as such, holders of fundamental rights which predominantly stem from national constitutional law or European law, notably the Charter of Fundamental Rights of the European Union, the ECHR or the European Social Charter (ESC). This starting point is undisputed among the country chapters. However, depending on the status and the tasks assigned to civil servants, national restrictions on fundamental rights may apply. Such restrictions concern, inter alia, the right to strike and the right to freedom of expression. The Spanish country chapter, in the light of bad experiences, warns of abuses when limiting the rights of citizens.[61] Regarding the right to strike, major differences between the States under consideration must be observed. Most restrictive in that regard are the States where statutory civil servants are not allowed to strike, such as Denmark or Germany. Most liberal are States where civil servants have the right to take part in industrial action, just like other citizens, such as the Netherlands or Sweden. Switzerland is somewhere in between, given that the right to strike differs between the Confederation (with a liberal attitude) and some Cantons (with a very strict attitude). But also States with a "classic" or "traditional"

57 CJEU, judgment of 10 September 2014, Iraklis Haralambidis v. Calogero Casilli, C-270/13, para. 44.

58 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 114/6 of 30 April 2002.

59 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ 2021 L 149/2.

60 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161/3 of 29 May 2014.

61 See *The Civil Service in Spain: The Deficit of Organisation in Public Employment and the Principle of Democracy* by R. García Macho in this volume, footnote 46.

civil service with a career system like France can take a liberal stance regarding the right to strike, as the French country chapter suggests.[62] The fundamental right of expression is also frequently mentioned in the country chapters, mostly, however, in the context of European Law, which will be dealt with in Section VII. This will also concern the protection of whistle-blowing, which is frequently also regulated by national law.[63]

VII. Influence of European Law

In the present chapter, the term "European law" is construed in a broad way, so as to include not only the law of the European Union, including the EU Charter of Fundamental Rights (CFR), but also conventions adopted under the auspices of the Council of Europe, notably the ECHR and the ESC. To start with, the influence of European law on the development of the civil service is only indirect, in that it contains no provisions aimed particularly at the national civil service systems, as the Danish country chapter correctly states.[64] However, as the Danish country chapter continues, "the regulation of the [. . .] civil service by no means remains unaffected by EU law and the ECHR". The civil service is part of the labour market and as such an addressee of European law dealing with workers' rights and working conditions. It is neither possible nor necessary to list all European law acts affecting civil servants, for this purpose the country chapters should be utilised instead. Regarding the law of the European Union, several country chapters refer to Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,[65] which, in accordance with the jurisdiction of the CJEU, also applies to public workers or civil servants.[66] This directive is constitutionally embedded in the EU Charter of Fundamental Rights, notably Article 21 CFR, as indicated in the Germany country chapter.[67]

Returning to the civil servants' rights mentioned in Section VI – the right to strike and the freedom of expression – these rights will now be analysed from the perspective of European law.[68]

Although the right to strike is explicitly mentioned in the EU Charter of Fundamental Rights in Article 28 CFR and indirectly in Article 12 CFR,[69] both provisions are substantially based on the ECHR and the ESC.[70] In the light of this, it is not surprising that the country chapters only occasionally refer to the EU Charter of Fundamental Rights.

62 See *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume, Section II.2.2.

63 See, e.g., *The Civil Service in Hungary: Differentiation and Privatisation Trends* by P.L. Láncos, Section IV.2.3 or *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume, Section IV.4.

64 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume, Section V.

65 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.

66 See recently CJEU, judgment of 20 April 2023, BF v. Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB), C-52/22; CJEU, judgment of 15 April 2021, AB v. Olympiako Athlitiko Kentro Athinon – Spyros Louis, C-511/19.

67 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C. D. Classen in this volume, footnote 28.

68 For an overview, see Niedobitek (2010).

69 For an analogous argument, see ECtHR (GC), judgment of 14 December 2023, *Humpert and Others v. Germany*, 59433/18, 59477/18, 59481/18 et al.

70 See the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17.

Rather, they emphasise the significance of the ECHR or/and the ESC for the right to strike.[71] Only recently, the ECtHR clarified the meaning of Article 11 ECHR in relation to the right to strike.[72]

Regarding the ESC, the Dutch country chapter mentions a reservation to Article 6, paragraph 4 ESC made by the Netherlands when ratifying the ESC.[73] Article 6, paragraph 4 ESC reads as follows: the Contracting Parties recognise "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into".[74] The Dutch reservation stipulates that the Kingdom of the Netherlands considers itself bound inter alia by "Article 6, paragraph 4 (except for civil servants)".[75] The reservation which the Netherlands made to the revised ESC reads differently and more restrictively: "The Netherlands will consider itself bound by Article 6, paragraph 4, of the European Social Charter (revised), except with respect to military personnel in active service and civil servants employed by the Ministry of Defence."[76]

Freedom of expression is regulated in Article 11 CFR as well as in Article 10 ECHR; both provisions are referred to in the Austrian, Belgian, Dutch, and Swedish country chapters. The former article corresponds to the latter.[77] The ECtHR's case law on Article 10 ECHR is vividly summarised on the Court's website.[78] The freedom of expression must be balanced, as the Belgian country chapter accurately claims, with "other concerns specific to the civil service, such as the hierarchy principle and civil servants' duties to obey their superior, to respect confidentiality and to be loyal".[79] This is particularly the case with so-called whistle-blowing. In the United Kingdom, for example,

> whistleblowing refers to when a worker makes a disclosure of information which they reasonably believe shows wrongdoing or someone covering up wrongdoing. Types of wrongdoing include criminal offences, the endangerment of health and safety, causing damage to the environment, a miscarriage of justice, or a breach of any legal obligation.[80]

The protection of whistle-blowers is mentioned in several country chapters and seems to be of general importance. A few country chapters (Belgium, Italy, Sweden) make explicit

71 See, above all, *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C. D. Classen, Section I.4., *The Civil Service in the Netherlands: Normalization of the Legal Status of Civil Servants* by A. De Becker, Section 3.b., and *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky, Section V.2, in this volume.

72 ECtHR (GC), judgment of 14 December 2023, *Humpert and Others v. Germany*, 59433/18, 59477/18, 59481/18 et al.

73 See *The Civil Service in the Netherlands: Normalization of the Legal Status of Civil Servants* by A. De Becker in this volume.

74 Not amended in the revised ESC.

75 See the Treaty Office of the Council of Europe at: www.coe.int/en/web/conventions/.

76 See the Treaty Office of the Council of Europe at: www.coe.int/en/web/conventions/.

77 See the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17.

78 See the rather new and very helpful "Knowledge Sharing" platform of the ECtHR at https://ks.echr.coe.int/en/web/echr-ks/.

79 See *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume, Section V.3.

80 See the website of the British Government at www.gov.uk/government/publications/review-of-the-whistleblowing-framework/review-of-the-whistleblowing-framework-terms-of-reference.

reference to Directive 2019/1937/EU of 23 October 2019 on the protection of persons who report breaches of Union law,[81] the so-called Whistle-blower Directive. The scope of application of the Whistle-blower Directive is obviously narrower than the UK definition, even though it serves to protect not only workers but also persons having self-employed status. At any rate, it covers both the private and public sector. The transposition of this Directive by the Member States was frequently taken as an opportunity to comprehensively regulate whistle-blowing, as, e.g. in Germany.[82] Thus, the Whistle-blower Directive, though with a limited scope of application, has given impetus in some EU Member States to broadly regulate the issue in national law.

Regarding Ukraine as a non-EU Member State, the chapters prepared during the accession process look critically inter alia into civil service and salary reform, and call for the depoliticisation of civil service.[83] These chapters are aimed specifically inter alia at the Ukrainian civil service.

All in all, as the country chapters demonstrate, European law exerts some influence on the civil service systems of the States who are subject to its acts and provisions. This influence, however, is – except in the case of Ukraine – unspecific and untargeted, meaning that the civil service is treated as part of the general labour market.

VIII. Civil Service Reform

Almost all country chapters deal with civil service reform efforts, whether historical or current. In this regard there is hardly a common line among the States under comparison, which corresponds to what was said at the beginning (Section II.2), namely, that States usually – and sadly – do not take notice of foreign experiences. As a result, the experiences are as different as they can be.

Civil service reform is often regarded as important for society, which is reflected in the terms used alongside the term "reform". Some even call it a "revolution" (as the Italian country chapter), some "transformation" (as the French legislator), others even a "Copernican" reform (as in Belgium).

Some States – Switzerland, Austria,[84] and Belgium[85] – have moved towards a differentiation of the civil service statutes, which reflects the autonomy of the competent subnational

81 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305/17.

82 See the Act to improve the protection of whistle-blowers and to implement the Directive on the protection of persons who report breaches of Union law of 31 May 2023 (*Gesetz für einen besseren Schutz hinweisgebender Personen sowie zur Umsetzung der Richtlinie zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden – Vom 31. Mai 2023*), BGBl. 2023 I Nr. 140 of 2 June 2023. The law entails amendments to the relevant federal civil service legislation.

83 See the Commission Staff Working Document "Ukraine 2023 Report", SWD(2023) 699 of 8 November 2023.

84 Due to the abolition of the constitutionally enshrined "homogeneity principle", which served to ensure homogeneity between federal and provincial as well as municipal employment law of public employees; see *The Civil Service in Austria: Tradition, Reforms, and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume, Section I.

85 Due to the abolition of the power of the King to define general principles for civil service. At the same time – paradoxically, as the Belgian country chapter says – elements of uniformity were introduced; see *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume, Sections I and II.1.

entities. Other States – France, Italy (*Testo Unico del pubblico impiego*, TUPI),[86] Spain (Basic Staff Regulations for Public Employees, BSRPE),[87] and Hungary – endeavour to achieve uniform legislation for all civil servants. Still other States – Denmark, Poland – are reported not to have current reform ambitions or to regard them as improbable. In the case of Denmark, the decisive reforms were already enacted 50 years ago, in the case of Poland reform reluctance is based on the "great potential resistance from the ever-increasing group of beneficiaries of the current (dis)order".[88]

However, some reform trends can be identified. Two overall tendencies lasting for years are "contractualisation" and "privatisation" (which are not the same, see Section VI), both influenced by New Public Management. The keyword for this is "normalisation", which is even used in the title of the Dutch country chapter, and which might lead to "full normalisation", meaning the inclusion of all civil servants who are still excluded who work for the judiciary, police, and military, as well as teachers. Other country chapters, for example, those on Belgium, Italy, Sweden, and Denmark, without using that keyword, reveal similar aspirations aiming at an approximation of civil service to private employment and market mechanisms. This summary was, of course, made from a bird's eye view, while ignoring the details.

The question of civil service reform cannot be separated from the motives lying behind it. All country chapters comment on this to a greater or lesser extent. Not surprisingly, the motives for reform correspond to the trends revealed before. These are – of course not complete and without referring to the individual country chapters – (1) the need for greater flexibility and efficiency, (2) to bring civil service closer to the private sector, (3) performance-related payment instead of salary grids, (4) to reduce public spending, (5) to gain staff which is effective and adaptable to change. Furthermore, from a reverse perspective, (6) statutory civil servants are accused of being unambitious and paralysing the civil service. Finally (7), public law is regarded as cumbersome, rigid, and formalistic. Obviously, all these "motives" overlap and sometimes require further explanation (such as motive 2).

However, it should not be underestimated that the Belgian country chapter quotes literature that emphasises the significance of a "core of servants under a public law regime/career system necessary for the stability and continuity of administrative activities".[89] This remark leads us to some final remarks of the German country chapter, which points out that

> [t]here is also an urgent need for consistent practice in deciding whether to employ certain groups of people as civil servants. One can easily get the impression that financial considerations of various kinds, rather than the guiding principles expressed in

86 Legislative decree, General rules on the organisation of employment in Public Administrations of 30 March 2001, no. 165 (*Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche*), Gazzetta Ufficiale, 9 March 2001, no. 106.

87 Law on the Basic Statute of the Public Employee of 12 April 2007 (*Ley 7/2007 del Estatuto Básico del Empleado Público*), BOE no. 89, pp. 16270–16299; www.boe.es/eli/es/l/2007/04/12/7/con.

88 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-based Recruitment, and Insulation from Politicisation* by D. Szescilo in this volume, Section VII.

89 See *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume, footnote 74.

Article 33, paragraph 4 BL, are the central criterion for such decisions. This has a delegitimising effect on the law of the civil service.

Finally, it must be emphasised that reform directions are not irreversible. Here, the Austria country chapter is worth quoting:

> [W]ith regard to discussions on cases of corruption in the appointment of State officials, a trend away from the purely economic considerations of New Public Management and a return to emphasis on the values of the constitutional State are evident.[90]

IX. Conclusions: The State of Convergence of National Civil Service Systems

The present chapter attempts to compare the country chapters with a view to discovering differences and similarities – and preferably converging tendencies – between the States which are covered by this handbook. All in all, a great variety of civil service systems and different stages of development can be observed.

On the other hand, the earlier section (Section VIII) revealed some common tendencies, including a trend towards "normalisation". These tendencies, if they are specific for the civil service, are rooted in *New Public Management* or, if they are unspecific, in European law.

Certain groups of employees are often treated separately, inter alia judges, public prosecutors, healthcare staff, teachers, military, police, and so on. Despite some efforts aimed at "full normalisation" (see Section VIII), certain posts like those mentioned will certainly continue to be treated differently from "normal" civil servants in the future.

"Convergence", however, understood in a formal sense,[91] is more than observing the approximation of legal systems. The notion of convergence used in the present context should be understood as containing a voluntaristic, deliberate element[92] which could hardly be detected in the country chapters. On the contrary, the States under consideration seem to exist isolated from each other. To conclude, there is no true "convergence" of the civil service systems among the States compared. The lack of convergence is perhaps the result of the formative power of the individual civil service system for the State in question. But this result is not carved in stone. The States should, wherever possible, make efforts to apply the comparative law method to develop their civil service systems.

Bibliography

Albi A., Bardutzky S. (eds) (2019), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports*, The Hague: T.M.C. Asser Press.

Barberis P. (2011), 'The Weberian Legacy', in Massey A. (ed), *International Handbook on Civil Service Systems*, Cheltenham, Northampton: Edgar Elgar, 13–30.

90 See *The Civil Service in Austria: Tradition, Reforms, and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume, Section VIII.

91 On the distinction between formal and functional convergence see Platsas (2024), p. 29.

92 Which is typical of formal convergence; see Platsas (2024), p. 29.

Besselink L., Claes M. (2019), 'The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution', in Albi A., Bardutzky S. (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports*, The Hague: Asser Press, 179–220.

Cabrelli D., Ghio E. (2024), 'Terminology', in Ghio E., Perlingeiro R. (eds), *Are Legal Systems Converging or Diverging? Lessons from Contemporary Crises*, Cham: Springer, 15–25.

Calliess C., Ruffert M. (eds) (2022), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 6th edition, München: C.H. Beck.

Chirico F., Larouche P. (2013), 'Convergence and Divergence, in Law and Economics and Comparative Law', in Larouche P., Cserne P. (eds), *National Legal Systems and Globalization*, The Hague: T.M.C. Asser Press, 9–33.

Epping V., Hillgruber C. (eds) (2024), *Beck'scher Online-Kommentar zum Grundgesetz*, 57th edition, München: C.H. Beck, https://beck-online.beck.de.

Grabenwarter C. (2009), 'Nationale Grundrechte und Rechte der Europäischen Menschenrechtskonvention', in Merten D., Papier J. (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol. VI/2, Heidelberg: C. F. Müller Verlag, 33–62.

Jann W., Döhler M. (2007), *Agencies in Westeuropa*, Wiesbaden: VS Verlag für Sozialwissenschaften.

Johnson N. (1994), 'Das Recht des öffentlichen Dienstes in Großbritannien', in Magiera S., Siedentopf H. (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten in der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot, 343–433.

Kroos D. (2010), 'Warum hat "Marianne" so viele Diener? Zum Wachstum des französischen öffentlichen Dienstes entgegen internationalen Trends', *TranState Working Papers* No. 115, Bremen: Universität Bremen.

Krzywoń A. (2022), 'The Notion of Civil Service in Europe: Establishing an Analytical Framework for Comparative Study', *FÖV Discussion Paper* 91, Speyer: Deutsches Forschungsinstitut für öffentliche Verwaltung, https://dopus.uni-speyer.de/frontdoor/deliver/index/docId/5606/file/DP-091.pdf.

Lodge M. (2007), 'Next Steps und zwei Schritte zurück? Stereotypen, Executive Agencies und die Politik der Delegation in Großbritannien', in Jann W., Döhler M. (eds), *Agencies in Westeuropa*, Wiesbaden: VS Verlag für Sozialwissenschaften, 48–78.

Michaels R. (2021), 'Comparative Law', in *Max Planck Encyclopedia of European Private Law*, https://max-eup2012.mpipriv.de/index.php/Comparative_Law.

Nergelius J. (2019), 'The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power', in Albi A., Bardutzky S. (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports*, The Hague: T.M.C. Asser Press, 315–358.

Niedobitek M. (1994), 'Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft – Rechtsvergleichende Analyse', in Magiera S., Siedentopf H. (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot, 11–66.

Niedobitek M. (2001), *Das Recht der grenzüberschreitenden Verträge*, Tübingen: Mohr Siebeck.

Niedobitek M. (2010), 'Denationalisierung des Streikrechts – auch für Beamte? Tendenzen im europäischen und im internationalen Recht', 58(11) *Zeitschrift für Beamtenrecht*, 361–368.

Platsas A.E. (2024), 'The Concept of Legal Convergence', in Ghio E., Perlingeiro R. (eds), *Are Legal Systems Converging or Diverging? Lessons from Contemporary Crises*, Cham: Springer, 27–44.

Preis U. (2012), *Arbeitsrecht – Individualarbeitsrecht*, 4th edition, Köln: Verlag Dr. Otto Schmidt.

Promberger K., Rauskala I. (2003), 'New Public Management – An Introduction from the UK Perspective', *Institut für Verwaltungsmanagement Working Paper 6/2003*, Innsbruck: Universität Innsbruck.

Reinermann H. (2011), 'New Public Management', in Lewinski-Reuter V., Lüddemann S. (eds), *Glossar Kulturmanagement*, Wiesbaden: VS Verlag für Sozialwissenschaften, 263–271.

Suckow H., Weidemann H., Barthel T.F. (2021), *Allgemeines Verwaltungsrecht und Verwaltungsrechtsschutz*, 17th edition, Stuttgart: W. Kohlhammer.

Sveriges Riksdag (2016), *The Constitution of Sweden*, Stockholm: Sveriges Riksdag.

Part III

Supra- and International Systems of Civil Service

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19 The Civil Service of the European Union

Siegfried Magiera

I. Origin and Development

1. Treaty Foundations

With the founding of the European Coal and Steel Community (ECSC) in 1951 as the forerunner of today's European Union (EU), and with the establishment of the main institutions (High Authority, Assembly, Council, Court), the need for additional employees arose at the same time. Their number, remuneration, and pensions were determined by a committee made up of the Presidents of the main institutions (Article 78 ECSC Treaty). For the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) of 1957, the Council, acting unanimously with the Commission and after consulting the other institutions concerned, adopted the Staff Regulations of officials and the Conditions of Employment of other servants (Article 212 EEC Treaty, Article 186 EAEC Treaty).

By the Merger Treaty of 1965, the officials and other servants of the ECSC, EEC and EAEC became officials and other servants of the three communities (Article 24). The Council adopted the provisions by qualified majority on a proposal of the Commission and after consulting the other institutions concerned. These provisions were incorporated into the Amsterdam Treaty of 1997 without changing their contents (Article 283). According to the Lisbon Treaty of 2007, the Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the other institutions concerned, shall lay down the Staff Regulations of officials and the Conditions of Employment of other servants of the Union as "legislative acts" (Article 336 and 289 Treaty on the Functioning of the EU; TFEU). In order to carry out their tasks, all institutions, bodies, offices, and agencies of the Union rely on an open, efficient, and independent European administration. Provisions for this purpose shall also be adopted in compliance with the provisions of the Staff Regulations and the Conditions of Employment in accordance with Article 336 (Article 298 TFEU).

2. Legal Acts of the European Union

In accordance with the provisions of the ECSC Treaty, Staff Regulations were adopted for the first time for the employees by the Presidents of the four main institutions with effect

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from 1 July 1956,[1] but were not published in the Official Journal.[2] These "Montana Staff Regulations" included detailed regulations on remuneration, social security, working hours, and pensions.[3] Previously, the staff had to be recruited by the individual institutions on the basis of (private law) service contracts.[4] On 18 December 1961, the Council of the EEC and the Council of the EAEC adopted the comprehensive Staff Regulations of Officials (SR) and the Conditions of Employment of Other Servants (CEOS) of the EEC and the EAEC, which came into force on 1 January 1962.[5] Previously, the necessary staff had to be recruited by each institution through fixed-term contracts and aligned with the Montana Staff Regulations. Subsequent to the Merger Treaty of 1965, the ECSC was integrated into the Staff Regulations and the Conditions of Employment by a Council regulation of 1968.[6]

Since its first version, the Regulation laying down the Staff Regulations and Conditions of Employment in 1961 has been amended 152 times and corrected 17 times by the end of 2022. Significant changes concerned the inclusion of agencies, non-discrimination, social benefits and function groups (2004), parliamentary assistants (2009) and posts, permanent posts and retirement age (2013). Other changes were mainly required by the yearly salary adjustments regarding the remuneration of officials and other servants. In addition, the Staff Regulations (Article 110) and the Conditions of Employment (Article 141) as "legislative acts" enable the institutions involved to issue additional "implementing rules".[7]

II. Members of the Civil Service

1. Appointing Authorities

The officials and other servants employed by the European Communities and now by the European Union are in practice assigned to the various individual institutions. Within the framework of the ECSC, each of the institutions (High Authority, Assembly, Council, Court) had to draw up an estimate of its budgetary expenditure, while the Committee of Presidents of the institutions determined the number and remuneration of the respective staff (Article 78 ECSC Treaty). The officials and other servants of the subsequent EEC and EAEC were also assigned to the institutions (Assembly/Parliament, Council, Commission, Court of Justice) and – on an equal footing – to the Economic and Social Committee.[8] The agencies (e.g. Europol, EU Agency for Fundamental Rights, Frontex),

1 General advertisement of vacancies, Communication, Official Journal of the European Coal and Steel Community of 29 November 1956 (*Allgemeine Stellenausschreibung, Mitteilung, Amtsblatt der Europäischen Gemeinschaft für Kohle und Stahl*), pp. 342/56 (not available in English).

2 CJEU, judgment of 18 April 1989, *Retter v. Caisse de pension des employés privés,* C-130/87, para. 10.

3 Wohlfahrt et al. (1960), p. 557.

4 *EGKS-Vertrag, § 7 Abs. 2 Satz 3 Abkommen über die Übergangsbestimmungen*, S. 168 (ECSC Treaty, § 7 para. 2 final clause, Convention on the Transitional Provisions; not available in English).

5 EEC/EAEC Council, Regulation 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 45/1385 (DE, FR, IT, NL), English special edition: Series I Volume 1959–1962 P. 135–200; latest consolidated act: Document 01962R0031-20230101.

6 Regulation (EEC, Euratom, ECSC) 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, OJ L 56/1.

7 More on this in Section III.1; for further details on European service law cf. Rogalla (1992), pp. 3 f.; Gauer (2007), pp. 29 f.

8 Articles 1 SR, Article 6 CEOS.

the Committee of the Regions, the European Ombudsman, the European Data Protection Supervisor,[9] and the European External Action Service,[10] were also placed on an equal footing with the institutions for the application of the Staff Regulations and the Conditions of Employment. The European Central Bank and the European Investment Bank are not covered by these rules, as they determine the staff Conditions of Employment on their own.[11]

2. Officials and Other Servants

Under the ECSC Treaty, officials were initially referred to as employees.[12] The Montana Staff Regulations, on the other hand, distinguished between officials, probationary, temporary, and local employees.[13] In contrast, the EEC and EAEC Treaties distinguished only between two main groups, officials and other servants, which have survived up to the present day (Article 122 EEC Treaty, Article 186 EAEC Treaty, Article 336 TFEU).

2.1. Officials

An official of the Union is a person who has been appointed to an established post on the staff of an institution or an agency by an instrument issued by that institution or agency. General rules for civil servants, supplemented in particular in 2004 and 2013,[14] concern the prohibition of discrimination, equality between women and men, access to social measures, the classification of posts in function groups and their minimum requirements, the secondment to another institution, and the integration of a Staff Committee, a Joint Committee, a Disciplinary Board, a Staff Regulations Committee as well as trade unions and staff associations (Article 1–10c SR).[15]

2.2. Other Servants

There are five groups of other servants engaged by contract of the Union, i.e. temporary staff, contract staff, local staff, special advisers and accredited parliamentary assistants. Temporary staff can be employed to fill a post for a fixed or indefinite period of time or to assist specific officials or chairpersons in the Union. Contract staff can be recruited without a post for manual or administrative support, in agencies, in Representations and Delegations of Union institutions, and in other entities outside the Union.

9 Articles 1a, 1b SR, Article 6 CEOS.
10 Articles 1b, 95–99 SR.
11 Article 36 Protocol (No 4) on the Statute of the European System of Central Banks and the European Central Bank, OJ 2012 C 326/230; Article 11, para. 7 Protocol (No 5) on the Statute of the European Investment Bank, OJ 2012 C 326/251.
12 Article 78 EGKS-Vertrag (Bedienstete/agents in German/French, not available in English).
13 Wohlfahrt et al. (1960), p. 557.
14 Council Regulation (EC, Euratom) 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, OJ L 124/1; Regulation (EU, Euratom) 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, OJ L 287/15.
15 Further details in Annex II SR ("Composition and procedure of the bodies provided for in Article 9 of the Staff Regulations").

Additional contract staff for auxiliary tasks can carry out activities for a limited period of time without being assigned to a listed post or to replace persons not able to perform their duties for the time being. Local staff may be recruited in places outside the Union for manual or service duties in accordance with local practice. Because of their exceptional qualifications and regardless of their other gainful activities, special advisers are employed to assist an institution of the Union on a regular or temporary basis. Accredited parliamentary assistants are persons selected by Members of Parliament to assist them and are employed by the Parliament (Article 1–7a CEOS).

3. Rights and Obligations

Union officials have numerous rights and obligations, some of which are very detailed. They must act solely in the interests of the Union and may not take instructions or accept favours from outside their institution. Secondary employment or candidacy for public office require the approval of the Appointing Authority. The spouse's professional activity must be reported and, if it is incompatible with the official's activity, may lead his[16] transfer to another post. After leaving the service, the official shall behave with integrity and discretion as regards the acceptance of appointments or benefits. All rights to his work belong to the Union; he may be granted a bonus for a patented invention (Article 11–20 SR).

The official shall advise and assist his superiors; if he considers their orders to be irregular, he can also inform his immediate superior without suffering any prejudice on that account. In the event of serious misconduct in the performance of his duties, he may be required to compensate the Union for any damage suffered. If he becomes aware of any illegal activities in the course of his duties, the official must immediately inform one of his superiors or the European Anti-Fraud Office. The Union assists him and his family members in the event of insults, threats and attacks by reason of his position or duties. It makes it easier for him to continue his professional development and grants him freedom of association, particularly in trade unions or professional associations of European officials (Article 21–26a SR).

Similar rights and obligations as for officials apply to other servants of the Union (Articles 11, 81, 127 CEOS). Special provisions exist for officials and other servants serving in a third country (Article 101a SR,[17] Article 10, 118 CEOS). Officials and other servants of the Union, regardless of their nationality, are also entitled to certain privileges and immunities within the territory of the Member States, e.g. in the areas of jurisdiction, immigration, and customs regulations.[18] Taxes on their salaries, wages, and other Union emoluments are also exempt from national taxes but are levied by the Union.[19]

16 Reference to a person of the male sex also constitutes a reference to a person of the female sex, and vice versa, unless the context clearly indicates otherwise (Article 1 c SR, Article 1 CEOS).

17 Further details in Annex X SR ("Special and exceptional provisions applicable to officials serving in a third country").

18 Articles 11–16 Protocol (No 7) on the privileges and immunities of the European Union, OJ 2012 C 326/266; see also Eggers and Linder (2016), pp. 6–7.

19 Article 12 Protocol (No 7) on the privileges and immunities of the European Union, OJ 2012 C 326/266; Regulation (EEC, Euratom, ECSC) 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities, OJ L 56/8.

4. *Recruitment and Career*

Union officials should be recruited on the basis of the highest standard of ability, efficiency and integrity, and on the broadest possible geographical basis from among nationals of Member States; the nationality requirement can be waived. As a rule, a selection process[20] takes place on the basis of qualifications or tests. A selection board draws up a list of suitable candidates. A thorough knowledge of one and a satisfactory knowledge of another language of the Union are necessary for the performance of their duties. Before becoming an official, the candidates must successfully complete a nine-month probationary period. Administrative status positions of officials comprise their regular active employment as well as more detailed exceptions, such as secondment, non-active status, leave on personal, family, official grounds, or for military service.[21]

Officials are subject to an annual performance report regarding their ability, efficiency, and conduct in the service. Unless their performance was unsatisfactory, they automatically advance to the next step in their grade after two years or, in cases of necessary improvement, after up to four years. When considering comparative merits for promotions, in particular the reports of the officials and the ability to work in a third language should be taken into account. Services of the officials are terminated by retirement upon completion of the 66 years – exceptionally of the 58 or the 70, or by resignation, compulsory resignation, retirement in the interests of the service or dismissal for incompetence (Article 27–54 SR). Corresponding provisions on recruitment and career apply to other servants of the Union (Article 12–15, 82–84, 128–130 CEOS).[22]

5. *Working Conditions*

Depending on the working conditions of officials, the normal working week ranges from 40 to 42 hours. Each institution can introduce flexible working arrangements and require officials to remain on standby duty outside normal working hours if necessary. Officials may be granted part-time employment, to which they are entitled in cases of caring for dependent children, family members in need of care, further training, or during the last three years before reaching their pensionable age.[23]

Special regulations apply to overtime work,[24] shift work, standby duty, and arduous working conditions. Officials are entitled to annual leave of between 24 and 30 working days,[25] to sick leave due to illness or accident, and maternity leave for 20 weeks. In the event of unauthorised absence from work, in addition to any disciplinary measures, the annual leave or, if it is used up, the remuneration of the official will be reduced (Articles 55–61 SR). Corresponding provisions on working conditions apply to other servants of the Union (Articles 16–18, 91, 131 CEOS).

20 Further details in Annex III SR ("Competitions").
21 Further details in Annex V SR ("Leave").
22 For perspectives regarding the performance of officials cf. Mehde (2022), pp. 1699 f., 1718 f.
23 Further details in Annex IVa SR ("Part-time work").
24 Further details in Annex VI SR ("Compensatory leave and remuneration for overtime").
25 Further details in Annex V SR ("Leave").

6. *Remuneration*

Officials are entitled, by virtue of their appointment, to the remuneration carried by their grades and steps. Remuneration includes the basic salary as well as family and other allowances.[26] The salary level is updated annually. The updates take into account the increases in the civil service of the Member States and the requirements of Union recruitment. In the function groups of administrators (AD) and assistants (AST) with 16 grades and five steps,[27] in 2022 the basic monthly salary comprised amounts from 3,272 to 22,649 EUR. In the function group of secretaries and clerks (AST/SC) with six grades and five steps, the monthly amounts ranged from 2,869 to 6,018 EUR.

The family allowances include a household allowance consisting of a basic amount of 210 EUR plus 2% of the basic salary, a child allowance of 459 EUR per month, and an education allowance for paid school and university attendance of up to 312 EUR per month. An expatriation allowance of not less than 623 EUR is paid equal to 16% of the basic salary, the household and the child allowance. Furthermore, officials receive reimbursement of various expenses, e.g. in the form of installation and resettlement allowances, travel and daily subsistence, and mission expenses (Articles 62–71 SR). Corresponding provisions on remuneration apply to other servants of the Union (Articles 19–27, 92–94, 132–134 CEOS).

7. *Social Security*

As to their social security, officials and their relatives are insured against sickness up to 80% and in particularly serious cases up to 100% of the expenditure. In addition, they are covered in the event of occupational illnesses and accidents. As a rule, after ten years of service they are entitled to a retirement pension.[28] The retirement age is 66 years. The pension shall not exceed 70% of the final basic salary in the last grade in which the official was classified for at least one year. He is entitled to 1.8% for each accountable year of service. In the event of permanent incapacity, officials are entitled to an invalidity allowance. The surviving spouse is entitled to a survivor's pension equal to 60% of the retirement or disability pension. Dependent children are entitled to an orphan's pension (Articles 72–85a SR). Corresponding provisions on social security apply also to other servants of the Union (Articles 28–44a, 95–115, 135–136 CEOS).

8. *Disciplinary Measures and Legal Protection*

Officials may be liable to disciplinary action in cases of failure to comply with their obligations under the Staff Regulations.[29] In cases of suspicion, the Appointing Authority or the European Anti-Fraud Office can launch administrative investigations. Any person to whom the Staff Regulations apply may submit to the Appointing Authority a request to take a decision relating to this person or a complaint against an act affecting this person adversely. The person can also contact the Director of the European Anti-Fraud Office or

26 Further details in Annex VII SR ("Remuneration and reimbursement of expenses").

27 Further details in Annex I SR ("A. Types of posts in each function group, as provided for in Article 5, para. 4 [job titles]").

28 Further details in Annex VIII SR ("Pension scheme").

29 Further details in Annex IX SR ("Disciplinary proceedings").

the European Data Protection Supervisor in connection with an investigation. The person may also appeal to the Court of Justice of the European Union after lodging an unsuccessful complaint against the Appointing Authority (Articles 86–91a SR). Corresponding provisions on complaints and legal protection apply to other servants of the Union (Articles 46, 117, 138 CEOS).

III. Practice of the Civil Service

1. Provisions Implementing the Staff Regulations and the Conditions of Employment

General implementing provisions for the Staff Regulations and the Conditions of Employment are adopted by the Appointing Authority of each institution (Article 110 SR, Article 141–142a CEOS).[30] The general and other implementing provisions adopted by the Commission apply by analogy to the agencies. The latter can also submit their own implementing rules to the Commission for approval. The rules are brought to the attention of the staff but are not published in the Official Journal of the Union. The Court of Justice of the Union administers a register of all implementing rules, accessible to the institutions, agencies, and Member States.[31] In contrast, internal directives that are not based on Article 110 of the Staff Regulations merely set forth rules of conduct. They are based on the general organisational powers of each institution. However, the administration may not depart from them without justification, as this would be in violation of the principle of equality.[32]

The Commission presents a report to the Parliament and the Council every three years on the implementing rules adopted.[33] The report covers implementing rules adopted by agreement between the Union institutions (e.g. on annual leave, sickness insurance, unemployment benefit), general implementing provisions (e.g. on performance appraisal, mission expenses, recruitment procedure), general implementing provisions (including performance assessment, business trip expenses, recruitment procedures), and other implementing provisions (e.g. on whistle-blowing, part-time work, unemployment allowance).

As far as quantitative assessment is concerned, the number of implementing rules adopted by the institutions differ only slightly between the reporting periods 2014–2016 and 2017–2019. The total number changed from 591 to 630, increasing with the lowest proportion from 37 to 41 at the European Ombudsman and decreasing with the highest proportion from 95 to 86 at the Commission. In the same periods, the number of implementing rules applicable by analogy in the agencies increased from 593 to 749 and the number approved by the Commission from 284 to 689. At the end of 2019, the Union had a total of six executive agencies (including EACEA for Education and Culture, CINEA for Innovation and Networks), 36 decentralised agencies and bodies (including

30 See also Hatje (2019), p. 3229.

31 For public access, see Commission, Report on the rules adopted by the appointing authority of each institution to give effect to the Staff Regulations, COM(2021) 258 final, p. 1 (n. 4).

32 CJEU, judgment of 30 January 1974, *Louwage v. Commission*, C-148/73; CJEU, judgment of 17 December 1981, *Demon v. Commission*, C-791/79; CJEU, judgment of 6 July 1983, *Geist v. Commission*, C-117/81; cf. also Reithmann (2015), pp. 1807–1808.

33 See Commission, Report on the rules adopted by the appointing authority of each institution to give effect to the Staff Regulations, COM(2017) 632 final; Commission, Report on the rules adopted by the appointing authority of each institution to give effect to the Staff Regulations, COM(2021) 258 final.

CdT for Translations, ENISA for Cybersecurity, EEA for Environment, FRONTEX for Border and Coast Guard), and nine joint undertakings (including EuroHPC for High-Performance Computing, Innovative Medicines IMI 2).

The qualitative assessment of compliance with the Staff Regulations and the Conditions of Employment shows that the institutions have largely complied with the framework of the Staff Regulations and the Conditions of Employment, and that only limited areas appeared to still lag behind the statutory framework. A further convergence in the subject matters of implementing rules between the institutions was to be noted in various areas (notably anti-harassment, training, working time, telework), but also more limited in other areas (e.g. health and safety, ethics and integrity, disciplinary proceedings). Furthermore, new subject matters were introduced during the reporting period (including equal opportunities, early retirement, mobility of civil servants). With regard to the qualitative assessment of the register kept by the Court of Justice of the European Union, it can be stated that the submission of implementing provisions by the institutions and agencies is to be assessed differently. The entries are complete for the provisions adopted by common accord, but not for the general and other provisions. This is probably due to ambiguities in the exact scope of the requirements to submit implementing rules to the register and the lack of an inter-institutional agreement to remedy them.

2. Use of Contract Staff

Contract staff were created in 2004 as a new category of non-permanent staff. They were intended to gradually replace the auxiliaries and Category D officials and generally perform duties under the supervision of officials or temporary staff. Their rights and obligations were to be equivalent to those of temporary servants, in particular with regard to social security, allowances and working conditions.[34] The necessary provisions have been laid down in detail in the Conditions of Employment of other servants of the Union (Articles 79–119 CEOS).

Contract staff can be engaged for a fixed or indefinite period. They are subdivided into four function groups (I. Manual and administrative support duties, II. Clerical and secretarial duties, III. Executive duties, and IV. Administrative and advisory duties) and a total of 18 grades, each with six steps according to their qualifications. They are paid from the appropriations of the budget relating to the institution concerned. In 2022, the basic salaries in function group I were between 2,278 and 3,297 EUR, and in function group IV between 3,877 and 8,135 EUR.[35] In 2019, the Union employed a total of 14,505 contract agents, of which 52% were employed by the Commission, 30% by the agencies and joint undertakings, and 19% by other institutions.[36] Of those employed by the Commission, 61% were women and 39% were men.[37]

34 Council Regulation (EC, Euratom) 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, OJ L 124/1 (Recital 36).

35 Article 93 CEOS.

36 Commission, Report on the use of contract staff in 2019, COM(2021) 648 final, p. 5.

37 Commission, Report on the use of contract staff in 2019, COM(2021) 648 final, p. 8.

3. Recruitment Needs, Remuneration Levels, and Geographical Balance

Officials and other servants of the Union shall be selected on the highest standard of ability, efficiency and integrity, and on the broadest possible geographical basis from among nationals of Member States of the Union.[38] Their selection must take into account the principle of equality between the citizens of the Union, the prohibition of discrimination on grounds of nationality and of various particular grounds, such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (Articles 1d SR, Article 12, 82 CEOS).[39]

Recruitment needs are regularly communicated by the institutions of the Union to the European Personnel Selection Office (EPSO) which decides annually on the organisation of competitions, selection methods, and procedures. In general, EPSO was able to meet the required recruitment needs; however, the number of applicants to Administration (AD) generalist competitions declined for all Member States. In order to meet recruitment needs, the Commission increasingly placed temporary agents in permanent posts which are usually occupied by permanent officials. The Commission also found it difficult to recruit staff on as broad a geographical basis as possible. This applies in particular to the number of significantly under-represented nationalities among junior administrators which has increased to 13 (including German, Dutch, Austrian, Polish, and Swedish). The participation of nationals of the Union in competitions fairly correlates with net earnings in the Member States, but only weakly or not with the national unemployment rate, the image of the Union or personal financial prospects. In comparison, the United Nations can guarantee interest from candidates by setting the salary level according to that of the Member State with the highest salary (most recently, the United States).[40]

With regard to the level of remuneration, the purchasing power of officials and other servants follows the principle of parallel development of purchasing power, i.e. it follows the evolution of the average purchasing power of civil servants in national central governments and of recruitment needs.[41] The remuneration of officials is subject to a weighting at a rate below or equal to 100%, depending on the living conditions at the place of employment. No correction coefficient is applicable in Belgium and Luxembourg because of their reference role as the main original seats of the Union institutions.[42] In 2021, six Member States were below 80% (upwards: Bulgaria, Romania, Poland, and others), and nine Member States were above 100% (downwards: Denmark, Ireland, Sweden, France, and others).[43]

Officials and other servants should be selected from among the nationals of the Member States on the broadest possible basis. Exceptionally, the nationality of a Member State can

38 Article 27 SR, Articles 12 and 82 CEOS.

39 See also Article 9 TEU, Article 18 TFEU and Article 21 Charter of Fundamental Rights of the European Union; Streinz (2018), p. 2574; Reithmann (2015), pp. 1809 f.

40 See Commission, Report on the application of Annex XI to the Staff Regulations and Article 66a thereof, COM(2022) 180 final, pp. 1 f.

41 Article 65 SR; Commission, Report on the application of Annex XI to the Staff Regulations and Article 66a thereof, COM(2022) 180 final, pp. 4 f.

42 Article 64 SR; Commission, Report on the application of Annex XI to the Staff Regulations and Article 66a thereof, COM(2022) 180 final, pp. 10 f.

43 Article 64 SR; Commission, Report on the application of Annex XI to the Staff Regulations and Article 66a thereof, COM(2022) 180 final, pp. 1 f.

be waived. At the beginning of 2018, 1,041 officials and temporary staff had declared more than one nationality. At the Commission, the guiding rates for geographical balance are up to 1% for six Member States (ascending: Malta, Luxembourg, Cyprus, Estonia, and others) and up to 13.8% for the other Member States (descending: Germany, France, Italy, Spain, Poland, and others). Since limited deviations cannot be avoided, a significant imbalance should be assumed, if the deviation is lower than 80% of the relevant guiding rate. The focus of the Commission's report is on the administration (AD) function group, because the requirements to ensure national diversities are more stringent for officials in this group than in the assistant (AST) or clerical and secretarial (AST/SC) function groups. Examined were grades AD5-AD8 (which are the most common grades for appointment) and AD9-AD12 (where appointments cannot exceed 20% of all AD appointments in any given year). The grades AD13-AD14 are, in general, not recruitment grades and are reserved to management or advisory functions.[44]

At the beginning of 2017, ten nationalities were under-represented in the AD5-AD8 grade bracket (in relative terms especially Luxembourgers, Swedes, and Danes; in absolute terms Germans and French), and 14 nationalities were under-represented in the AD9-AD12 grade bracket (in relative terms especially Croats, Bulgarians, and Romanians; in absolute terms especially Poles and Romanians). The shortage of successful candidates for some nationalities is not due to their performance, but rather to their lower number of participants. In the period 2010 to mid-2017, the success rate in AD5 competitions (without linguists) ranged between 1.6% (downwards: Netherlands, Germany, Austria, Belgium, and others) and 0.0% (upwards: Luxembourg, Cyprus, Estonia, Lithuania, Slovenia, and others). In the period 2010 to 2016, the success rate of AD specialist competitions (without linguists) ranged between 11.1% (downwards: Romania, Denmark, Germany, Austria, and others) and 1.0% (upwards: Bulgaria, Cyprus, Malta, Portugal, and others).[45]

The institutions also experience geographical imbalances in the composition of their staff. However, these appear to be significant only in a few cases and were justified by objective reasons, in particular because of the so-called "seat" effect. Most agencies did not observe any significant geographical imbalance in their staff. Two agencies reported problems with regard to the applicable correction coefficient in remuneration and the employment difficulties for spouses in the local market.[46]

4. Pension Scheme for Officials and Other Servants

The normal pensionable (retirement) age of officials and other servants is 66 years, but can exceptionally be reduced to 58 years by early retirement or extended to 70 years.[47] It is to be assessed every five years since the beginning of 2014, in particular with regard

44 Commission, Report pursuant to Article 27 of the Staff Regulations of Officials and to Article 12 of the Conditions of Employment of Other Servants of the European Union (Geographical balance), COM(2018) 377 final/2, pp. 1 f.

45 Commission, Report pursuant to Article 27 of the Staff Regulations of Officials and to Article 12 of the Conditions of Employment of Other Servants of the European Union (Geographical balance), COM(2018) 377 final/2, pp. 8 f.

46 Commission, Report pursuant to Article 27 of the Staff Regulations of Officials and to Article 12 of the Conditions of Employment of Other Servants of the European Union (Geographical balance), COM(2018) 377 final/2, pp. 13 f.

47 Article 77 SR; Articles 39 and 109 CEOS, Annex VIII ("Pension scheme").

to the evolution of the pensionable age in the civil services of the Member States and the life expectancy of officials of the Union institutions. In 2018, the normal pensionable age in the central civil services of the Member States ranged from up to 60 years (Bulgaria, Estonia, Luxembourg, Poland, Romania, Czech Republic) to up to 67 years (Denmark, Greece, Italy), with a slight difference between male and female employees. The normal pensionable age in all Member States was between 58 and 67 years in 2014 and between 59 and 67 years in 2018. At the end of 2018, more than 89% of all reporting Member States had a normal pensionable age equal to or below that of the Union's 66 years. The life expectancy of Union staff in 2013 and 2018 ranged from 65.7 to 65.8 years (men) and 67.8 to 68.3 years (women) at age 18, and from 19.8 to 20.0 years (men) and 21.5 to 22.2 years (women) at age 66.[48]

The pension benefits are paid from the budget of the Union and guaranteed jointly by the Member States. The officials contribute one-third of the cost. The contribution amounted to 10.1% of the official's basic salary in 2020 and is deducted monthly from the salary. It is updated annually by the Commission and reviewed every five years by an actuarial assessment of the balance of the pension scheme. This is to determine whether the civil servants' contribution of one-third to the costs of the pension scheme is still sufficient. Between 2014 and 2018, the contribution rate ranged marginally between 9.8% and 10.1%. The Pension Scheme for EU Officials (PSEO) is not an actual investment fund, but a notional (virtual) fund with defined benefits, where staff contributions serve to finance the future pensions of those contributing.[49]

5. Case Law of the Court of Justice of the European Union

The Court of Justice of the European Union has jurisdiction in disputes between the Union and its servants under the rules laid down in the Staff Regulations of officials and in the Conditions of Employment of other servants (Article 270 TFEU). Until the beginning of 2023, a total of 1,746 judgments were rendered, of which 767 by the Court of Justice, 662 by the General Court, and 317 by the (temporary) Civil Service Tribunal.[50] They also brought about changes in the Staff Regulations and the Conditions of Employment.[51]

48 Commission, Report pursuant to Article 77 of the Staff Regulations of Officials, COM(2021) 94 final; Commission, Report on the application of Annex XII to the Staff Regulations ["Rules for implementing article 83a of the Staff Regulations"], COM(2018) 829 final; for the period before 2014 see Commission, Report on the Pension Scheme of European Officials and Other Servants of the European Union, COM(2012) 37.

49 Articles 83 and 83a SR, Annex XII SR ("Rules for implementing article 83a of the Staff Regulations"); Article 41, 111 CEOS; Commission, Report on the application of Annex XII to the Staff Regulations, COM(2018) 829 final.

50 Council Decision (2004/752/EC, Euratom) of 2 November 2004 establishing the European Union Civil Service Tribunal, OJ L 333/7; Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 conferring on the General Court jurisdiction to hear disputes at first instance in disputes between the European Union and its servants, OJ L 200/137. For detailed information on the jurisdiction of the Union Courts cf. Magiera and Niedobitek (1994/95 ff.); Reithmann (2015), pp. 1804–1852.

51 CJEU, judgment of 22 March 1972, *Costacurta v. Commission*, C-78/71, on Article 1, para. 1(g), Annex III SR (maximum age) changed by Article 48, para. 3 Regulation (Euratom, ECSC, EEC) 1473/72 of the Council of 30 June 1972, OJ L 160/1; CJEU, judgment of 17 January 1989, *Vainker v. Parliament*, 293/87, on Article 45 SR (promotion) amended by Article 1 (27) Regulation (EU, Euratom) 1023/2013 of the European Parliament and of the Council of 22 October 2013, OJ L 287/15.

One hundred and sixty-four of the staff cases before the Court of Justice were well-founded. The first of the successful lawsuits concerned the unlawful dismissal of a driver in the service of the Assembly of the European Coal and Steel Community as a result of the loss of his post.[52] A few other cases may be cited as further examples. One of the first successful cases under the Staff Regulations of 1961 clarified issues relating to the establishment of servants in the grade and at the step impliedly accorded to them before the new regulations entered into force.[53] In a case that was successful on other grounds, the Court held that there was no infringement of equal treatment for men and women if the Appointing Authority did not use its wide margin of discretion in the allocation of posts in a manifestly incorrect way.[54] The recruitment of officials and other servants on the broadest possible geographical basis must give way to the requirements of the interests of the service and to the personal merits of the candidates, but may exceptionally be justified where specific skills are required from candidates from a particular Member State.[55]

Officials who are unlawfully not reinstated at the end of their leave on personal grounds are entitled to compensation for loss of their salary, but not to reconstruction of their career, as it is not possible to determine the prospects for their promotion.[56] In the field of social security, a person may be considered as suffering invalidity if the person is unable to lead a normal active life as a result of an accident or an occupational disease, including a mental injury which only affects the emotions. Unlike the invalidity pension awarded in the case of incapacity for work, the invalidity benefit is paid regardless of any incapacity for work. The degree of invalidity as one of the factors determining the amount of the benefit is fixed at flat rates according to a general scale, regardless of the nature of the official's employment.[57] The Protocol on the Privileges and Immunities prohibits Member States from levying taxes on salaries, wages, and emoluments paid by the European Community/Union.[58]

Unsuccessful cases before the Court of Justice also contributed to a clarification of controversial legal issues. For example, successful candidates in competitions and included in lists of suitable candidates have not yet acquired a right to be appointed, but only to an entitlement at the discretion of the Appointing Authority.[59] A disciplinary measure is to be decided independently of a disciplinary measure regarding another officer, even if the facts to be judged are related.[60] The Appointing Authority has a wide margin of discretion with regard to the classification in grade and step upon recruitment, so that judicial review must be restricted to whether the authority exercised its powers in a manifestly erroneous manner.[61] An official who utters in public serious insults against a person violates the

52 CJEU, judgment of 19 July 1955, *Kergall v. Common Assembly*, C-1/55, European Court Reports (ECR) 1955, pp. 151 (159 ff.).

53 CJEU, judgment of 19 March 1964, *Maudet v. Commission*, C-20/63 and 21/63, ECR 1964, pp. 113 (119).

54 CJEU, judgment of 12 February 1987, *Bonino v. Commission*, C-233/85, para. 9.

55 CJEU, judgment of 29 October 1975, *Marenco v. Commission*, C-81/74 to 88/74, paras. 34 ff.

56 CJEU, judgment of 5 May 1983, *Pizziolo v. Commission*, C-785/79, paras. 6 ff.

57 CJEU, judgment of 2 October 1979, *Miss B. v. Commission*, C-152/77, paras. 9 ff.

58 CJEU, judgment of 16 December 1960, *Humblet v. Belgian State*, C-6/60, ECR 1960, para. 559 (574 ff.); CJEU, judgment of 5 July 2012, *Bourgès-Maunoury and Heinz v. Direction des service fiscaux d'Eure-et-Loire*, C-558/10, paras. 20 ff.

59 CJEU, judgment of 22 December 2008, *Centeno Mediavilla v. Commission,* C-443/07 P, paras. 32 ff.

60 CJEU, judgment of 2 June 1994, *de Comte v. Parliament*, C-326/91 P, paras. 51 ff.

61 CJEU, judgment of 29 June 1994, *Klinke v. Court of Justice*, C-298/93, paras. 15 and 31.

reputation of his office and thus his official duty. In assessing the lawfulness of a disciplinary measure, it is not necessary to examine whether the conduct corresponds to a defamation in criminal law.[62]

The official's duty of discretion in the context of his duty of loyalty must not be narrowly construed, particularly when he exercises his right to add pertinent remarks to the report by the Appointing Authority on his performance level, unless he uses seriously insulting or disrespectful language undermining the respect due to the reporting officer.[63] An official may not disseminate information that he becomes aware of in the course of his duties without authorisation unless that information is open to the public. Since this is a serious interference with the freedom of expression in a democratic society, the refusal is to be interpreted narrowly and is only permissible where publication is liable to cause serious harm to the interests of the Community.[64] According to the law of the Member States and the Staff Regulations, the term "marriage" means a union between two persons of the opposite sex. Therefore, the Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. This can only be done, where appropriate, by measures of the legislature.[65]

6. Functioning of the Staff Regulations and Conditions of Employment

In accordance with its statutory obligation, the Commission submitted to the Parliament and the Council its report assessing the functioning of the Staff Regulations and the Conditions of Employment of other servants of the Union for the period from the beginning of 2014 to the end of 2019 (Articles 113 SR, Article 142a CEOS).[66] With regard to the rights and obligations of the officials, in particular the ethical legal framework to be respected on the subject of lobbying or advocacy during leave on personal grounds (Article 16 SR), authorisation decisions are regularly reviewed and, in the event of a conflict with the Commission's legitimate interests, rejected. The requirements of the Staff Regulations are thus a solid base for containing the risks of any conflict of interest and are regularly reviewed and adjusted.[67]

Regarding the working conditions of officials, special allowances are used by the Commission mainly for standby duty (security and safety, technical assistance, IT services) and arduous working conditions (Joint Research Centers, Directorate-General for Energy, Office for Infrastructures and Logistics), by the Parliament and the Council mainly for shift

62 CJEU, judgment of 21 January 1997, *Williams v. Court of Auditors*, C-156/96 P, para. 21.

63 CJEU, judgment of 16 December 1999, *Economic and Social Committee v. E*, C-150/98 P, paras. 11 ff.

64 CJEU, judgment of 13 December 2001, *Commission v. Cwik*, C-340/00, paras. 18 ff.

65 CJEU, judgment of 31 May 2001, *D and Sweden*, C-122/99 P and C-125/99 P, paras. 33 ff.; see also Article 1 para. 2(c) Annex VII SR (regarding non-marital partnership), added by Annex I, para. 97(a)(ii) Council Regulation (EC, Euratom) 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, OJ L 124/1.

66 Commission, Report assessing the functioning of the Staff Regulations of officials and the Conditions of employment of other servants of the European Union, COM(2021) 439 final.

67 See e.g. Commission, Decision of 29 June 2018 on outside activities and assignments and on occupational activities after leaving the Service, COM(2018) 4048 final.

work, the level of which is higher than payment for overtime.[68] The annual update of the salary level led to an above-average increase in 2015 and 2016 due to a catch-up effect after the financial crisis of 2008–2012, but again to moderate increases in the following years 2017 and 2018. The equality of purchasing power among Union staff at different places of employment has raised a few issues that still need to be followed.[69] The combination of the automatic annual update with an automatic crisis clause (such as in the COVID-19 pandemic) has effectively replaced the difficulties of the previous methods. In order to guarantee the balance of the Pension System of European Officials (EPSO), reforms of the Staff Regulations in 2004 and 2014 have led to increasing yearly savings resulting from reduced benefits and increased pensionable age. If necessary, the Commission will submit further proposals for amendments.

The reform of the function groups meant that from 2014 secretarial and clerical staff were no longer recruited in the assistant group (AST) but in the function group for secretarial and clerical functions (AST/SC). By the end of 2019, the number of AST officials and temporary staff had dropped by 24%. The decrease is partly due to the creation of the new AST/SC function group as well as a reduction in the total number of AST functions. Overall, the AST/SC staff comprises 10% of the combined AST and AST/SC staff or 2.7% of the total Commission staff.

The Commission has the power to adopt delegated acts (Article 290 TFEU) on certain aspects of working conditions, remuneration, and social security (Articles 111–112 SR). Adoption will follow a procedure agreed with the Parliament and the Council.[70] So far, the Commission has adopted a delegated regulation on reimbursement of travel expenses[71] and considered another one on unemployment insurance, but subsequent improvement rendered it unnecessary.[72] The Commission regularly exchanges information with partners in a social dialogue (including Staff Committees, Joint Committees, and trade unions).

Regular assessments of practice under the Staff Regulations and Conditions of Employment are also carried out by other Union institutions. The Court of Auditors has adopted special reports on the improvement of the ethical frameworks of audited institutions[73] and on the implementation of the 2014 staff reform package.[74] The Ombudsman successfully cooperated with the Commission on improvements in various areas of concern, such as access to information, treatment of persons with disabilities,

68 See also Council Regulation (EEC, Euratom, ECSC) 495/77 of 8 March 1977 determining the categories of officials entitled to, and the conditions for and rates of, allowances for regular standby duty, OJ L 66/1; Commission, Report on the use made in 2020 by the institutions of Council Regulations 495/77, last amended by Regulation 1945/2006 (on standby duty), 858/2004 (on particularly arduous working conditions), and 300/76, last amended by Regulation 1873/2006 (on shift work), COM(2022) 42 final.

69 See also Commission, Report on the application of Annex XI to the Staff Regulations and Article 66a thereof, COM(2022) 180 final, pp. 12 f.

70 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (Annex), OJ L 123/1.

71 Commission, Delegated Regulation (EU) 2016/1611 of 7 July 2016 on reviewing the scale for missions by officials and other servants of the European Union in the Member States, OJ L 242/1.

72 For the practice relating to the implementing provisions of the Staff Regulations and the Conditions of Employment see Section III.1.

73 Court of Auditors, The ethical frameworks of the audited EU institutions: scope for improvement, Special Report 13/2019.

74 Court of Auditors, Implementation of the 2014 staff reform package at the Commission – Big savings but not without consequences for staff, Special Report 15/2019.

leave rights of staff members, child welfare, the revolving doors phenomenon (transition from Union officials to the private sector or vice versa). Recommendations from the Parliament budgetary committee have been implemented by the Commission in various areas, such as underperforming staff, whistle-blowing, managers' internal mobility, or equal representation of women and men in managerial positions. The Council adopted conclusions on reports from the Court of Auditors on ethics policy in the Commission, on the implementation of the Staff Regulations and on long-term budgetary implications of Union pension costs.[75]

Overall, in the period since 2014, the Staff Regulations and the new provisions have been implemented by the institutions and other bodies of the Union and integrated into their daily work. In this respect, the Commission has fulfilled its reporting obligations and overall assessment – also taking into account the input from the other Union institutions.

IV. Evaluation of the Civil Service

As in any well-ordered community or polity, the European Union had to assemble and organise the necessary personnel from the outset. The source for the beginning and the subsequent development was and is the primary Treaty law, but with regard to the civil service regulations only with a general mandate to adopt the necessary detailed provisions by secondary legal acts. The development has been very rapid and continuous – starting with the Treaty on the European Coal and Steel Community from 1951 up to the Treaties on the European Union of 2007. Leading the way by laying down the Staff Regulations and the Conditions of Employment for the officials and other servants of the Union are the Commission, the Council and the Parliament through their detailed legislation, but also the Court of Justice through its cautiously groundbreaking jurisdiction.

The development of the Union since more than 70 years has been unique in world affairs. It comprises the creation of a new State system that resembles a federal State, but is not (yet?) one. It consists of States that were previously torn apart in a world war and subsequently split into two blocs. It is open towards admitting other States that share its values. It is therefore not surprising that this new State structure has to create a civil service that has to meet many different requirements and objectives. In this respect, an ever-increasing number of different Member States, an ever-increasing variety of Union competences and an ever-increasing amount of common tasks must be taken care of by this service.[76]

Some special features should be noted by way of example.[77] The requirement of national citizenship is defined differently in the individual Member States, additionally secured in Union law and also required for Union staff. Exceptions are possible and unavoidable in a time of increasing international professional activities. The current 24 official languages of the Union are, with a few exceptions, used in the written documents of the Union, but can orally be used only to a limited extent in speeches or conversations. Officials and servants of the Union must have a thorough knowledge of one of the languages of the Union and a satisfactory knowledge of a second and – before their first promotion – of a third language.

75 For the practice of the Court of Justice of the European Union concerning the Staff Regulations and the Conditions of Employment see Section III.5.

76 For the "interaction process" between the Union and the Member States, see Kämmerer (2001), p. 47.

77 Cf. also Niedobitek (1994), pp. 12 f.

In practice, at the beginning mostly French and German were used, later mainly English (which is also an official language in Ireland and Malta).

A ban on strikes, as in different Member States, is not provided for in the Staff Regulations. However, officials may join trade unions or staff associations of European officials which act in the general interest of the staff without prejudice to the statutory powers of the Staff Committees. The performance of officials is subject to continuous review, initially when they are recruited and during the nine-month probationary period, and subsequently on an annual basis to assess possible promotion, demotion or dismissal. In parallel, the Staff Regulations require the recruitment of officials from among nationals of the Member States of the Union on the broadest possible geographical basis, but only on recruitment criteria based on merits.

Bibliography

Eggers B., Linder Ch. (2016), 'Art. 336 [Beamtenstatut; Beschäftigungsbedingungen]', in Grabitz E., Hilf M., Nettesheim M. (eds), *Das Recht der Europäischen Union*, Band III, München: Verlag C. H. Beck, 1–27.

Gauer M. (2007), *Die Reform des Europäischen öffentlichen Dienstrechts*, Köln-Berlin-München: Carl Heymanns Verlag.

Hatje A. (2019), 'Artikel 336 [Beamtenstatut; Beschäftigungsbedingungen]', in Becker U., Hatje A., Schoo J., Schwarze J. (eds), *EU-Kommentar*, 4th edition, Baden-Baden: Nomos Verlag, 3228–3229.

Kämmerer J. (2001), 'Europäisierung des öffentlichen Dienstrechts', 36 *Europarecht*, 27–48.

Magiera S., Niedobitek M. (1994/95 ff.), 'Der Gerichtshof'', in Weidenfeld W., Wessels W. (eds), *Jahrbuch der Europäischen Integration*, Bonn: Europa Union Verlag, Baden-Baden: Nomos Verlag.

Mehde V. (2022), '§ 35 Europäisches Dienstrecht', in Terhechte J. (ed), *Verwaltungsrecht der Europäischen Union*, Baden-Baden: Nomos Verlagsgesellschaft, 1695–1719.

Niedobitek M. (1994), 'Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft – Rechtsvergleichende Analyse', in Magiera S., Siedentopf H. (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot, 12–66.

Reithmann U. (2015), 'Artikel 336 [Beamtenstatut; Beschäftigungsbedingungen]', in von der Groeben H., Schwarze J., Hatje A. (eds), *Europäisches Unionsrecht*, 7th edition, Baden-Baden: Nomos Verlagsgesellschaft, 1804–1852.

Rogalla D. (1992), *Dienstrecht der Europäischen Gemeinschaften,* Köln, Berlin, Bonn, München: Carl Heymanns Verlag.

Streinz R. (2018), 'Art. 336 [Beamtenrecht]', in Streinz R. (ed), *EUV/AEUV*, 3rd edition, München: Verlag C. H. Beck, 2573–2578.

Wohlfahrt E., Everling U., Glaesner H.J., Sprung R. (1960), *Die Europäische Wirtschaftsgemeinschaft*, Berlin, Frankfurt am Main: Verlag Franz Vahlen.

20 The Civil Service in International Organisations

The Example of the Coordinated Organisations

Anne-Marie Thévenot-Werner

I. Concept and Origins

Since the existence of the international civil service as we know it today, which substantially crystallised with the creation of the League of Nations, international organisations struggle to convince public opinion and national governments of the need to maintain high working-condition standards with public money for international civil servants.[1] Yet the legal context giving rise to an international civil service law may explain this necessity. It may also explain – though not necessarily justify – gaps in the guarantees offered to some agents of international organisations. Indeed, there are many different categories of relationship between international organisations and persons working for them, the legal framework of which may be more or less sophisticated. Every organisation has its own terminology and its own rules, creating an impression of lack of unity.[2] Translation issues do not make things easier: for instance we have agents, officials, international civil servants, personnel, staff, international staff, local staff, seconded staff, permanent staff, temporary staff, young professionals, consultants, short-term staff, interns, and experts. So what makes an official in an international organisation? Why recognise special status to officials of international organisations and what are currently the main challenges for the international civil service?

In order to answer these questions briefly in the context of the general analysis of the civil service in Europe in this book, taking a special look at the so-called Coordinated Organisations may give instructive examples in this large field.[3] The Coordinated Organisations currently form a network of six international organisations having their main headquarters in Europe: the Council of Europe, the Organisation for Economic Co-operation and Development (OECD), the North Atlantic Treaty Organisation (NATO), the European Space Agency (ESA), the European Centre for Medium-Range Weather Forecasts (ECMWF), and the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT). The Western European Union was part of the coordination until its dissolution in 2011.[4] Together, the organisations have more

1 See e.g. Cohen (2009), p. 1110, where the image of a civil servant at the League of Nations is lazy and ambitious.

2 On the difficulty of finding a common definition of international civil servant, see e.g. Bettati (1987), pp. 221–229.

3 Fürst and Weber (2009), pp. 623–653; for a brief overview see Pellet and Ruzié (1993), pp. 19–20 and Ullrich (2018), p. 45.

4 On this organisation, see Dumoulin (2011), pp. 561–583 and Piquemal (2012), pp. 295–330.

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than 14,000 staff members.[5] All Coordinated Organisations had their staff regulations amended in 2023. The Council of Europe Staff Regulations also apply to the Council of Europe Development Bank (CEB) "in any matter not covered by a specific decision of [its] Administrative Council",[6] while the Central Commission for the Navigation of the Rhine (CCNR), The Hague Conference on Private International Law (HCCH) and the Intergovernmental Organisation for International Carriage by Rail (OTIF) are affiliated with the Council of Europe Administrative Tribunal (CEAT). The OECD framework also covers the Financial Action Task Force, the International Energy Agency, the International Transport Forum, the Nuclear Energy Agency, the Sahel and West Africa Club, and the Multilateral Organisation Performance Assessment Network (MOPAN). Despite their significance in Europe, the civil service law of the Coordinated Organisations has rarely been the subject of specific studies.[7] Here we argue that despite the differences in terminology, a common sense of what is meant by the terms may be gleaned by delving into their underlying meaning (Subsection I.1). Historical background (Subsection I.2) may help us understand why a common set of rules applies to the law of the international civil service, even if every organisation also has its own set of special rules.

1. Terminology

The administrations of international organisations operate through agents. The International Court of Justice (ICJ)

> understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organisation with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.[8]

However, not all agents are part of the civil service of an organisation.

In the law of international organisations, the category of "agents" includes the subcategory of "officials" or "civil servants" (*fonctionnaires*), two terms which are synonymous in this context but have a different meaning in national systems.[9] In 1931, Suzanne Basdevant-Bastid defined international civil servants (*fonctionnaires internationaux*) as

> any individual requested by the representatives of more than one State or by a body acting in their name, after an intergovernmental agreement and under the control of the

5 According to the official numbers published on the different organisations' websites, NATO employs some 6,000 civilians worldwide, the OECD secretariat officially has 3,300 employees, ESA about 2,200, the Council of Europe headquarters over 2,000, EUMETSAT about 711 and ECMWF about 430. From the sites it is unclear what categories of staff are included in the numbers.

6 CEB Staff Regulations, *Staff Rules*, January 2023, Preamble.

7 See nevertheless Aubenas (1967), pp. 587–606; Plantey (1977), pp. 874–883.

8 ICJ, Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports 1949*, p. 177.

9 See e.g. Council of Europe, *Staff Regulations and Staff Rules*, 1 January 2023, Article 1, para. 1, opening sentence: "Staff members of the Council of Europe are international civil servants" and Preamble, para. 3: "These Regulations shall apply to any person who, under the conditions set out herein, has been appointed as a member of staff ('official') of the Council of Europe."

> former or the latter, to exercise in a continued and exclusive manner functions in the interest of all the States in question, while coming under special legal rules.[10]

This last element ("coming under special legal rules") is more a consequence than a condition. However, where the organisation agrees to apply the special legal rules of the international civil service to a relationship with a person, for instance its staff regulations and rules, it may be assumed that the organisation considers the person to be an official. Moreover, the condition of continuity does not mean that the official must be engaged on an open-ended basis, but rather that the exercise of the individual's functions is likely to last for an indeterminate period or until a specific task is accomplished.[11] This is why the Administrative Tribunal of the International Labour Organisation (ILOAT) considers that "any employees having any link other than a purely casual one with a given organisation" may come under the term "official".[12] The exclusivity criterion may be understood in the sense that for the official to have another professional activity besides working for the organisation, the latter must be informed and accept the exercise of that activity.

Suzanne Basdevant-Bastid defined the international civil servant. In the staff rules of various organisations, it is clarified that "staff members" are "international civil servants".[13] In the context of a case concerning the competence *ratione personae* of the ILOAT, the ICJ ruled that the words "staff member" and "official" "may be considered to have the same meaning".[14] However, it has been suggested that the categories "staff member" and "official" are not necessarily identical: a judge of the International Criminal Court may be considered to be an official under the Statute of the ILOAT but not an official, defined as staff member, under the organisation's staff rules.[15] How do the terms "staff member" and "official" or "civil servant" stand to one another? And what about the other categories of persons working for the organisation, such as local or temporary staff or consultants?

The key to solving this apparent lack of coherence may depend on how we qualify a position, which in turn indicates what set of rules may be applied. If the issue is the competence of an administrative tribunal, its statute defines its competence, interpreted against the background of the principle prohibiting denial of justice. Generally speaking,

10 Basdevant (1931), p. 53: "Est fonctionnaire international tout individu chargé par les représentants de plusieurs États ou par un organisme agissant en leur nom, à la suite d'un accord interétatique et sous le contrôle des uns ou de l'autre, d'exercer, en étant soumis à des règles juridiques spéciales, d'une façon continue et exclusive, des fonctions dans l'intérêt de l'ensemble des États en question." The definition has been taken up and confirmed e.g. by Bedjaoui (1958), pp. 17–53, especially p. 53, Pellet and Ruzié (1993), p. 11 and Ruzié (2009), p. 2, para. 2.

11 Basdevant (1931), p. 46.

12 ILOAT, judgment of 15 October 1968, *Chadsey v. Western Postal Union*, 122. In this case, the applicant was appointed on a six-month contract, renewed twice, and was assigned work in one of the permanent services of the organisation.

13 E.g. Council of Europe, *Staff Regulations and Staff Rules*, 1 January 2023, Article 1, para. 1, first phrase.

14 ICJ, Advisory Opinion of 1 February 2012, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, ICJ Reports 2012*, p. 39, para. 71: "The Court notes that the word 'official', used in the ILO Staff Regulations, as well as in the Statute of the Tribunal, and the words 'staff member', used in the staff regulations and the rules of many other organisations, may be considered to have the same meaning in the present context; the Court thus will use both terms interchangeably."

15 Petrovic (2021), p. 61.

it therefore requires some kind of employment relationship with the organisation.[16] For instance, the NATO Administrative Tribunal (NATOAT) is competent to hear applications from "staff members" who include "international civilian staff, consultants, temporary staff, and seconded staff",[17] it being specified that consultants at NATO are under some kind of employment relationship.[18] It does not make any difference whether the person is employed under a contract or under a letter of appointment: what counts is that there was an offer that was accepted.[19] In that sense, where staff is regularly employed on the basis of a letter of appointment, the ILOAT considered that "there is a binding contract if there is manifest on both sides an intention to contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement".[20] This excludes the case of occasionally consulted experts, (real) consultants[21] and staff of a third actor providing services to the organisation.[22] It does not preclude organisations from explicitly recognising the competence of their administrative tribunal beyond the category of officials. For instance, the OECD Administrative Tribunal (OECDAT) is also competent for applications filed by "Council experts and consultants, auxiliaries or employees", their Staff Association, trade union or professional organisation and external candidates in some cases.[23]

If the issue is whether the staff rules and regulations apply, the sense may be more restricted, depending on the definition given by said rules and regulations. For instance, in the case of NATO, its Civilian Personnel Regulations (CPR) specify that "International civilian personnel, staff or members of the staff" means "personnel of a NATO body recruited from among the nationals of members of the Alliance and appointed to the Organization and assigned to international posts appearing on the approved establishment of that NATO body".[24] While according to some organisations, a "staff member"

16 See Thévenot-Werner (2016), pp. 336–362, paras. 364–391, especially pp. 344–345, para. 370, p. 347, para. 374 and pp. 349–362, paras. 378–391.

17 NATO, *Civilian Personnel Regulations* (CPR), Annexe IX, Article 6, para. 2.1 and Article 1, para. 1, applied in NATOAT, judgment of 10 May 2016, *B et al. v. Supreme Headquarters Allied Powers Europe*, Joined Cases 2016/1056-1064, para. 30.

18 NATO, *CPR*, Chapter XVI, Article 69.

19 Pellet and Ruzié (1993), pp. 25–27.

20 ILOAT, judgment of 6 June 1977, *Labarthe v. Food and Agriculture Organisation (FAO)*, 307. See also United Nations Appeals Tribunal (UNAT), judgment of 11 March 2011, *Gabaldon v. Secretary General of the United Nations*, 2011-UNAT-120; implicitly CEAT, order of the Chair of 27 June 2012, *Ellen Penninckx v. Secretary General of the Council of Europe*, para. 37.

21 Langrod (1963), p. 16: "Fonctionnaire public international. Il s'agit du membre du personnel d'un Secrétariat international, qu'il soit permanent ou temporaire (par opposition au consultant, chargé d'une mission déterminée)." See also ESA, *Staff Regulations and Rules*, February 2023, Regulation 1.1: "These Staff Regulations shall apply to staff appointed pursuant to Art. XII.3 of the Convention for the establishment of the European Space Agency. They shall not apply to personnel governed by local labour legislation or to experts and consultants except in so far as may be provided for in the rules applicable to them or in the terms of their employment." For a definition of "real" consultants see Petrovic (2021), p. 69: " 'Real' consultants [. . .] perform a defined task and are to be paid once the task is completed in a satisfactory manner. These consultants often work for several clients in parallel or have employment elsewhere (professors, retirees, self-employed specialists, etc.). They have no immediate interest in obtaining an employment contract with or pursuing a career in international organizations, but are engaged by organizations in order to provide expertise in a specific area in connection with particular projects in which the organizations are involved."

22 E.g. OECDAT, judgment of 11 October 2022, *AA v. Secretary-General*, 103, concerning external staff and the case law cited in para. 25.

23 OECDAT, *Statute*, Article 1.

24 NATO, *CPR*, Preamble, B (c).

is any employee of the organisation who holds a letter of appointment,[25] others consider that Staff Regulations "apply to all persons employed by the Organisation whose letter of appointment states that they are officials of the Organisation"[26] and even others that the Staff "Regulations shall apply to any person who, under the conditions set out herein, has been appointed as a member of staff ('official')" of the organisation.[27] Although organisations translate usually "official" to *"fonctionnaire*" in French,[28] the Council of Europe and the OECD translate "official" to "*agent*" in the French version of their regulations,[29] while clarifying that the term "staff member" ("*membre du personnel*") is synonymous with "international civil servant" ("*fonctionnair[e] internationa[l]*")[30] and "official" ("*agent*").[31] However, in light of the ICJ's definition of "*agent*", such a practice may be somewhat confusing,[32] and it may be therefore suggested to adjust the terminology in the Staff Regulations and Rules of these organisations accordingly. For the purpose of this contribution, we generally refer to the organisation's staff in the broad sense and as a whole, i.e. persons in any kind of employment relationship with the organisation – including those exercising their functions independently – and we use the appropriate term of the relevant subcategories where necessary.

25 E.g. EUMETSAT, *Staff Rules*, 1 January 2023, Article 1, para. 1: "For the purpose of these Staff Rules, a 'staff member' means any employee of EUMETSAT who holds a letter of appointment subject to the provisions of these Rules." Article 1, para. 3: "These Rules shall apply to all staff members. The Council shall decide to which extent these Rules apply to the Director-General." Article 1, para. 4: "These Rules shall not apply to experts and consultants of EUMETSAT except as may be provided in special Rules for them, pursuant to the terms of their appointment by the Director-General." In that sense also ESA, *Staff Regulations*, ESA/REG/007, rev.7, February 2023, para. 1.1: "These Staff Regulations shall apply only to staff appointed pursuant to Article XII.3 of the Convention for the establishment of the European Space Agency. They shall not apply to personnel governed by local labour legislation or to experts and consultants except in so far as may be provided for in the rules applicable to them or in the terms of their employment." Article XII, para. 3 of the *Convention for the establishment of the European Space Agency*: "a) Senior management staff, as defined by the Council, shall be appointed and may be dismissed by the Council on the recommendation of the Director General. Appointments and dismissals made by the Council shall require a two-thirds majority of all Member States. b) Other staff members shall be appointed and may be dismissed by the Director General, acting on the authority of the Council. c) All staff shall be recruited on the basis of their qualifications, taking into account an adequate distribution of posts among nationals of the Member States. Appointments and their termination shall be in accordance with the Staff Regulations. d) Scientists who are not members of the staff and who carry out research in the establishments of the Agency shall be subject to the authority of the Director General and to any general rules adopted by the Council."

26 OECD, *Staff Regulations, Rules and Instructions applicable to Officials of the Organisation*, January 2023, Regulation 1(a). See also "1(c) These Regulations shall not apply to other categories of staff employed by the Organisation except to the extent determined by the Council."

27 Council of Europe, *Staff Regulations and Staff Rules*, 1 January 2023, Preamble.

28 See e.g. ILOAT Statute, Articles II.2 and II.5.

29 Council of Europe, *Staff Regulations and Staff Rules*, 1 January 2023, Preamble; OECDAT, *Statute*, Article 1.

30 Council of Europe, *Staff Regulations and Staff Rules*, 1 January 2023, Article 1, para. 1, first phrase: "Staff members of the Council of Europe are international civil servants."

31 Council of Europe, *Staff Regulations and Staff Rules*, 1 January 2023, Preamble, para. 3: "These Regulations shall apply to any person who, under the conditions set out herein, has been appointed as a member of staff ("official") of the Council of Europe. They shall not apply to temporary or local staff, trainees or seconded officials, unless the Secretary General has rendered certain provisions applicable to them by way of a Rule."

32 See Bettati (1987), p. 225.

2. History

The history of the law of the international civil service is intimately linked to the history of international organisations: "International administration was born under the pressure of the facts, gradually institutionalised and staffed by competent personnel."[33] The first international organisation as we understand it today with a precursory civil service was the Central Commission for the Navigation of the Rhine, established by the Final Act of the Congress of Vienna in 1815.[34] It was composed of a commissioner for each riparian state[35] with a permanent authority to ensure Commission functions between Commission meetings.[36] The permanent authority was composed of a chief inspector and three sub-inspectors, each in charge of a different part of the Rhine. The chief inspector was nominated by the Central Commission; one sub-inspector was nominated by Prussia, the second alternatingly by France and the Netherlands and the third by the other German principalities.[37] These were the first "employees" of an international organisation: they were nominated for life, enjoyed international pension rights and were protected against dismissal by a qualified two-thirds majority vote against them.[38] Their salary was fixed by international rules (*Le réglement pour la navigation du Rhin* [*sic*]) and paid by the riparian states, who contributed in proportion to their nominations.[39] Employees of the local national offices were obliged to obey the chief inspector and offer assistance in any matters concerning execution of the rules regulating navigation on the river Rhine.[40]

In parallel to the organisation of international conferences throughout the 19th century, which in some cases had their own secretariat,[41] the institutionalisation of international cooperation through administrative unions led to pragmatic and heterogeneous solutions concerning their staff. It was not always clear how to perceive these structures in terms of the law and the outcome of such attempts was not always satisfactory.[42] While in some cases a State, often the host State, had the responsibility of ensuring the union's secretariat, in others Member States seconded their staff to the union and in others there was even a mix of both, as in the case of the Universal Postal Union, through which the Federal

33 See e.g. Langrod (1963), p. 21 and pp. 29–40. See also Bedjaoui (1958), pp. 2–16.
34 Actes du Congrès de Vienne, Traité de Vienne, 9 juin 1815, annexe n° 16, Règlements pour la libre navigation des rivières. B, Articles concernant la Navigation du Rhin, Article 10.
35 Actes du Congrès de Vienne, Traité de Vienne, 9 juin 1815, annexe n° 16, Règlements pour la libre navigation des rivières. B, Articles concernant la Navigation du Rhin, Article 11.
36 Actes du Congrès de Vienne, Traité de Vienne, 9 juin 1815, annexe n° 16, Règlements pour la libre navigation des rivières. B, Articles concernant la Navigation du Rhin, Article 12.
37 Actes du Congrès de Vienne, Traité de Vienne, 9 juin 1815, annexe n° 16, Règlements pour la libre navigation des rivières. B, Articles concernant la Navigation du Rhin, Article 13.
38 Actes du Congrès de Vienne, Traité de Vienne, 9 juin 1815, annexe n° 16, Règlements pour la libre navigation des rivières. B, Articles concernant la Navigation du Rhin, Article 14.
39 Actes du Congrès de Vienne, Traité de Vienne, 9 juin 1815, annexe n° 16, Règlements pour la libre navigation des rivières. B, Articles concernant la Navigation du Rhin, Article 18.
40 Actes du Congrès de Vienne, Traité de Vienne, 9 juin 1815, annexe n° 16, Règlements pour la libre navigation des rivières. B, Articles concernant la Navigation du Rhin, Article 15.
41 E.g. the Second Conference of The Hague in 1907 had a secretariat of 25 Members nominated by the participating Member States, see Langrod (1963), p. 31.
42 See e.g. Rapisardi-Mirabelli (1925), pp. 352–359, criticising for instance Renault (1896), pp. 14–17.

Helvetic Council managed its staff.[43] A strong administrative link between the States and the staff of their nationality remained. The increase in competences exercised by these secretariats and especially practical implications crystallised the necessity for impartiality of the staff, which was supposed to act in the common interest of all Member States and indeed independently of the Member States in the administration of this staff.

These different experiences contributed to a sophisticated international civil service with the creation of the League of Nations and the International Labour Organisation by the Treaty of Versailles in 1919 which were key references in the elaboration of international civil service law as a branch of international law, also thanks to the League of Nations Administrative Tribunal.[44] While the law of the international civil service refers traditionally to the law governing international staff, today the general logic of that law and a number of its principles and rules also apply to other categories of staff of the organisation. Here this branch of law is understood in a broad sense and refers generally to the law governing the relationship between international organisations and their staff.

Indeed, the need for special status for staff of international organisations may be explained by the fact that said status comes under international law (Section II)[45] and that it is necessarily determined by the principle of independence (Section III).

II. A Status Coming Under the International Civil Service Law

The relationship between international organisations and their staff is governed by the organisation's partial legal order (Subsection II.1) and general international law (Subsection II.2).

1. A Status Coming Under the Organisation's Partial Legal Order

The organisation's partial legal order[46] is governed by the principle of hierarchy of sources (Subsection II.1.1). Its material rules are largely under administrative law dynamics with an increasing influence of contract law (Subsection II.1.2).

1.1. Hierarchy of the Organisation's Internal Sources

To the extent that the organisation is created by an international act, most commonly an international treaty, the organisation may exercise competencies necessary to fulfil its purpose only within the explicit and implicit limits of that act, in coherence with the principles of speciality and the theory of implied competencies. Generally speaking, that constituent act – or documents completing it[47] – provides for the creation of a secretariat[48] and the

43 Langrod (1963), pp. 37–38.

44 Siraud (1942), p. 152.

45 Concerning the law governing international organisations, see our developments in Thévenot-Werner (2021), para. 29–59.

46 Lagrange (2002), pp. 46–48.

47 As in the case of NATO, North Atlantic Council, document C9-D4 (Final), 17 March 1952, *Reorganization of the North Atlantic Treaty Organization. Note by the Executive Secretary*, para. 4, 3rd sentence and para. 16.

48 See e.g. *Statute of the Council of Europe*, 5 May 1949, European Treaty Series No. 1, Article 10; *Convention for the establishment of a European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT)*, Article 6, para. 3.

nomination of a head of a secretariat.[49] It usually allows the plenary body to adopt any act necessary for its functioning[50] – e.g. general norms concerning staff[51] – and vests the head of a secretariat with appointing authority for the organisation's staff,[52] which includes the authority to adopt general rules concerning staff, e.g. staff instructions, in coherence with those adopted by the plenary body.[53] Here again, an issue of terminology may arise: where the Council of Europe, ESA, NATO, OECD, and ECMWF call the rules adopted by their plenary body "administrative regulations" or "regulations",[54] other organisations talk here about "rules".[55] So the constituent act gives rise to a hierarchy of sources of law, topped by this constituent act, followed by acts adopted by the plenary body, such as resolutions and decisions, and acts adopted by the head of the secretariat, such as bulletins and administrative instructions. "Information circulars, office guidelines, manuals and memoranda are at the very bottom of hierarchy and lack the legal authority vested in properly promulgated administrative issuances", as pointed out by the United Nations Dispute Tribunal.[56] The hierarchy of sources is determined by which body is accountable to which other body. The administrative tribunals of the Coordinated System apply the same logic.[57]

1.2. Increasing Contract Law Influence on the Internal Dominantly Administrative Law Dynamics

In the first place, the law of the international civil service is governed by the vertical dynamics of public law,[58] or more precisely, administrative law. On one side of the relationship

49 E.g. *Statute of the Council of Europe*, Article 36(a) and (b); *Convention for the Establishment of a European Space Agency*, 30 May to 31 December 1975, Article X and XII, para. 1(a); *Convention on the Organisation for Economic Co-operation and Development (OECD)*, 14 December 1960, Article 10; *Convention establishing the European Centre for Medium-Range Weather Forecasts*, 11 October 1973, Article 1, para. 2 and Article 6, para. 3(d).

50 E.g. *Statute of the Council of Europe*, Article 16 and 20, esp. 20(d), referring to "financial and administrative regulations"; *Convention on the OECD*, Article 7, implied; *North Atlantic Treaty*, Washington D.C., 4 April 1949, Article 9.

51 E.g. *Convention for the Establishment of a European Space Agency*, Article XI, para. 5(i), referring to "Staff Regulations"; *Convention for the establishment of EUMETSAT*, Article 5, para. 2(b) vi; *Convention establishing the European Centre for Medium-Range Weather Forecasts*, Article 6, para. 3(b).

52 E.g. *Statute of the Council of Europe*, Article 36(c); NATO, North Atlantic Council, document C9-D4 (Final), 17 March 1952, *Reorganization of the North Atlantic Treaty Organization. Note by the Executive Secretary*, para. 18; *Convention establishing the European Centre for Medium-Range Weather Forecasts*, Article 9, para. 2(b).

53 See e.g. *Convention for the Establishment of a European Space Agency*, Article XII, para. 1(b), second phrase; EUMETSAT, *Staff Rules*, Preamble, para. 4; ECMWF Staff regulations, Preamble, para. 4.

54 See also ESA, *Convention for the Establishment of a European Space Agency*, Article XI, para. 5(i). *Convention on the OECD*, Article 11, para. 1, second phrase: "Staff regulations shall be subject to approval by the Council"; NATO referring to "Civilian Personnel Regulations", as amended in January 2023; *Convention establishing the European Centre for Medium-Range Weather Forecasts*, Article 6, para. 3(b).

55 See e.g. *Convention for the establishment of EUMETSAT*, Article 5, para. 2(b) vi.

56 United Nations Dispute Tribunal, judgment of 12 July 2011, *Villamoran v. Secretary General of the United Nations*, UNDT/NY/2011/056, para. 29.

57 See e.g. CEAT, appeal of 13 March 2014, *Staff Committee (XIV) v. Secretary General*, 540/2013, § 36: "in accordance with the principle of the hierarchy of sources of law, the Secretary General could not depart from norms derived from a source of law hierarchically superior to his own"; EUMETSAT Appeals Board, Decision No. 6, 26 September 2018, para. 49: A "Guidance Booklet" concerning the procedure applying to appraisal reports "is no more than [a]n internal guidance which covers the 'appraisal report making procedure'. It is not an independent source of law such that it creates legally enforceable norms and is in any event lower in hierarchy than the Staff Rules or Staff Instructions and cannot derogate or supersede them."

58 League of Nations, Official Journal, 1925, 6th year, p. 1443, concerning the *Monod* case, confirmed e.g. in Akehurst (1967), p. 113.

is an international public body vested with public authority, without being sovereign, but composed at least in part of sovereign States who have transferred some of their powers voluntarily to the organisation, such as the power to recruit staff. On the other side of the relationship are individuals employed to facilitate the implementation of the action of the organisation. In other words, this international public authority is created to facilitate the implementation of decisions taken in a cooperative manner by its members; it forms an administration, served by employed servants. The latter are the first individuals administered by the organisation. Because of this inequality of power between the international administration and the administered servants, both pursuing the common interest, a logic of administrative law applies to this relationship. This vests the administration with certain powers, e.g. the *privilège du préalable*, allowing it to make decisions regarding its servants which are binding for the staff from adoption, according to the needs of the service or section, in the exercise of discretionary power.[59] For instance, the administration can reassign its staff to posts that are at least equivalent,[60] and in cases such as abolition of the post, unsatisfactory performance or serious misconduct, may terminate the relationship.[61] It also implies duties, such as conducting performance appraisals regularly and promptly,[62] protecting the health of the staff, e.g. by adopting measures to protect against an ongoing pandemic,[63] protecting staff against harassment even in the absence of a written rule,[64] or caring for staff, e.g. by helping permanent staff find another equivalent post if their post is abolished.[65] Indeed, international organisations

> are bound by the duty of care and the principle of good administration; these imply in particular that when taking a decision on a staff member's situation, the Organization must take into consideration all the elements to weigh in its decision, and thus take account of not only the interests of the service but also of the staff member concerned.[66]

Although the organisation's head has discretionary power in deciding staff management, the decisions must not be taken without authority, breach a rule of form or procedure, or be based on a mistake of fact or law, abuse of authority or a manifest abuse of discretion.[67]

A second, more horizontal dynamic is that of an employment relationship with contractual characteristics. For instance, in the case of a fixed-term contract, there is no right of renewal. However, non-renewal decisions are adopted in compliance with the legal framework and in a non-arbitrary manner,[68] which includes the duty to motivate such a

59 Concerning the exercise of discretion, see e.g. Ullrich (2018), pp. 152–170; Akehurst (1967), pp. 113–129; Gentot (2008), pp. 23–30; concerning the CEAT: Valticos (2008), pp. 31–36. See also the comments in Ziadé (2008), pp. 37–68.

60 E.g. Council of Europe Appeals Board, appeal of 11 June 1982, *Frans Vangeenberghe (I) v. Secretary General*, 77/1981.

61 See e.g. Amerasinghe (1994), pp. 17–91 and 188–220; Plantey and Loriot (2005), pp. 186–187 and 193–208.

62 E.g. OECDAT, judgment of 30 March 2004, *Mrs. G.-D. v. Secretary-General*, 56, p. 5 and the case law cited.

63 Thévenot-Werner (2022a), pp. 97–99.

64 ESA Appeals Board, decision of 7 November 2014, *Consorts Kieffer v. ESA*, 93, p. 6.

65 See e.g. OECD Appeals Board, decision of 10 June 1989, 116, qualifying this duty as a general principle of the law of the international civil service, confirmed in its decision of 9 July 1991, 128 and integrated in the organisation's Instruction 111/1.7. See also OECDAT, *Mrs. G.-D. v. Secretary-General* (n. 62), p. 4.

66 NATOAT, judgment of 12 May 2022, *JT v. NATO Support and Procurement Agency*, 2021/1332, para. 40.

67 See e.g. OECDAT, judgment of 14 November 2014, *XXX v. Secretary-General*, 76, para. 16, confirming the previous case law.

68 See e.g. OECDAT, judgment of 14 November 2014, *XXX v. Secretary-General*, 76, paras. 14–16.

decision.[69] Staff members are generally in a hybrid relationship with the organisation, with contractual elements concerning the individual situation of staff members and statutory elements concerning the general impersonal rules that may be applied.[70]

There is currently a move towards increased contractualisation of the relationship between international organisations and their staff. The objective is more flexibility for the organisation and a reduction of costs, for instance by reducing permanent staff and increasing project staff, by recruiting without the need for civil-service entrance examinations and by creating more posts for staff with a negotiated salary. Career advancement, too, is increasingly contractualised by reducing automatic career possibilities and keeping staff longer in the same category.[71]

Although this trend may appear interesting for Member States from an economic perspective, it makes the organisation fragile in the long run. It makes it less attractive to be an international civil servant in such organisations. Staff cannot plan a family because of long-term job insecurity. Guarantees of independence of the organisation are also at stake: marginalisation of posts with staff recruited by competition (*concours*) enhances lack of transparency in the recruitment procedure and makes recruitment more vulnerable to inequality of treatment. The organisation may be less protected against national pressures in the recruitment procedure. Although constituent acts require the best possible staff, leaving space for negotiated salaries also enhances inequality of treatment, may cause an organisation to recruit less qualified staff willing to work for less and sheds doubt on compliance with the principle of equal pay for equal work. Having a high staff turnover may lead to loss of institutional memory, vital for the good functioning of the organisation, and may again leave more space for influence from governments or the private sector, as staff is forced to migrate from one employer to another. Insider information of the organisation may be put to the service of other actors, not necessarily in the interest of the organisation. Staff may be pressured (not necessarily consciously) to prepare their future careers outside the organisation while still working for the organisation.

These two dynamics, the predominantly vertical dynamics of administrative law and the minor horizontal dynamics of contract law, are completed by a third deep dynamic, possible because the status of international civil servants also comes under general international law.

2. A Status Coming Under General International Law

The partial legal orders of organisations are embedded in general international law (Subsection II.2.1). This and the fact that the disparity of interests (*Interessengefälle*) between international organisations and their different categories of staff is comparable from one organisation to another enhances mutual influence among internal laws of international organisations (Subsection II.2.2).

69 CEAT, appeal of 12 June 2023, *Natalia Zaytseva v. Secretary General of the Council of Europe*, 723/2022, para. 42, concerning the non-renewal of a contract because the staff member (of Russian nationality) was no longer a national of a Member State.

70 Pellet and Ruzié (1993), pp. 25–27.

71 For instance, at the Council of Europe, the staff rules have been modified in the sense that staff may only advance to the next step on the scale of their category and grade in the case of satisfactory performance 48 months after entering service: Council of Europe, *Staff rule 530.1*, in force as from 1 June 2023.

2.1. *A Partial Legal Order Embedded in General International Law*

As the constituent act of the organisation comes under international law, the organisation itself also comes under international law, including its relationships with its staff. International treaties to which the organisation is party are therefore opposable to the organisation also in its relationships with its staff.[72] However, the international law governing these treaties only applies to the treaties themselves, and not directly to the contract or letter of appointment between the organisation and its staff, which is not a treaty in itself.[73] Moreover, international custom, as distinct from institutional practice,[74] may apply, as long as the party invoking it manages to prove it.[75] The most important source of general international law for the law of the international civil service are the general principles.[76] In line with the thesis of Alain Pellet,[77] there are distinctions between general principles of law inspired by national law, and general principles of international law inherent to international law, as well as general principles of the law of the international civil service or of international administrative law, as principles inherent to these fields.

A tricky question with which case law is still struggling is how the sources of the organisation's partial legal order and the sources of general international law stand to one another. Because of the absence of hierarchy of sources in general international law, treaties, and custom are logically on the same level as the organisation's constituent act. General principles of law are, however, suppletive in nature and are, therefore, usually used to complete lacunae in the written internal law of the organisation. General principles of international law are however inherent to the logic of international law and therefore join the legal value of custom in international law. Hence it may be argued that general principles of international law, such as the principle of independence of international organisations, are on the same level as the constituent act of the organisation, i.e. they are preponderant over written law adopted by the organisation's plenary body and which derives from that constituent act. The same is true for general principles of the international civil service, such as

72 See e.g. CEAT, appeals of 5 September 1994, *Ernould (I and II) v. Governor of the Council of Europe Social Development Fund*, 189/1994 and 195/1994, para. 15; CEAT, appeals of 25 April 1994, *Lelégard (I, II, III and IV) v. Governor of the Council of Europe Social Development Fund*, 190/1994, 196/1994, 197/1994 and 201/1995, para. 15; CEAT, appeal of 29 November 2018, *Victor Soloveytchik v. Secretary General of the Council of Europe*, 589/2018, para. 19, interpreted in para. 57–58; NATOAT, judgment of 30 May 2022, *UK v. NATO International Staff*, 2021/1327, para. 55; NATOAT, judgment of 21 June 2022, *AB v. NATO International Staff*, 2021/1329, para. 47.

73 CEAT, appeals of 28 October 2020, *Ulrich Bohner (V) and others v. Secretary General of the Council of Europe*, 627/2020 and 636/2020; CEAT, appeal of 19 April 2022, *Stanislas Frossard v. Secretary General of the Council of Europe*, 637/2020; CEAT, appeal of 23 May 2022, *Silvia Muños Botella (II) v. Secretary General of the Council of Europe*, 663/2020, para. 56, concerning the inapplicability of the *rebus sic stantibus* clause in the 1969 Vienna *Convention on the Law of Treaties* and the 1986 Vienna *Convention on the Law of Treaties between States and International Organisations or between International Organisations.* The staff members contested the organisation's decision not to adjust their salary because of the organisation's budgetary crisis of 2017–2019 and the Russian Federation's non-payment of its contributions.

74 See on this distinction Thévenot-Werner (2021), para. 36.

75 CEAT, appeals of 16 April 2012, *Marie-Rosa Prévost and others v. Secretary General of the Council of Europe*, 477/2011 and 484/2011, para. 64.

76 See concerning their applicability e.g. EUMETSAT Appeals Board, decision of 21 January 2008, *Complainant v. Director-General of the EUMETSAT*, 1, p. 6.

77 Pellet (1974), pp. lxiii–504.

the principle protecting acquired rights of staff,[78] and for principles protecting the human dignity of staff, such as general principles protecting their human rights.[79]

Inversely, national law is in principle not opposable to the organisation in its staff relations,[80] unless the organisation's internal law explicitly refers to it.[81] This is the case of EUMETSAT. According to its constituent convention: "Where the conditions of employment of a staff member of the Secretariat are not governed by the [Staff] Rules, they shall be governed by the law applicable in the country where the person concerned is carrying out his duties."[82] More ambivalently, the ECMWF Convention provides: "If the terms of employment of a staff member of the Centre do not fall under these Staff Regulations, they shall be subject to the law applicable in the State in which the person concerned carries out his duties."[83] However, according to the Regulations, they "shall apply to all staff members except where the Council has taken decisions to the contrary".[84] In practice, the case law of these organisations indicates that relationships between an organisation and its staff are governed predominantly by the law of the international civil service, leaving space for application of national law in some cases only. In order to enhance legal certainty, it is in the interest of the organisation and the concerned individual to state explicitly in the contract where personnel is hired under local labour legislation, and which legislation. Accepting to be subject to a national law reduces the organisation's independence, which is a fundamental principle of the law of the international civil service and allows it to function properly.

2.2. A Partial Legal Order Influenced by the Internal Law of Other International Organisations

The two dynamics of administrative law and contract law mentioned previously are largely inspired by national laws. As the law of the international civil service also comes under international law, it becomes possible to draw inspiration from other international organisations on the basis of their specific nature, which takes us to a third (deep) dynamic. This for instance is the case of the principle of independence of international organisations and their staff from their Member States. Although the internal law of an organisation is not opposable to another international organisation as such,[85] when adopting new rules or adjusting their current rules, international organisations will therefore in the first place consider the practice of other international organisations[86] and turn to national law if the issue is not (yet) sufficiently clarified by said practice. For instance, the wording of the EUMETSAT Staff Rules

78 See e.g. Administrative Tribunal of the League of Nations (ATLN), judgment of 29 January 1929, *Di Palma Castiglione v. International Labour Office*, 1.

79 See e.g. CEAT, appeal of 10 April 1973, *Artzet (I) v. Secretary General of the Council of Europe*, 8/1972, para. 24 and 25, setting aside a decision based on a resolution violating the general principle of non-discrimination based on sex and the principle of equal pay for workers of either sex.

80 See e.g. OECDAT, judgment of 25 March 2011, *Mrs. I. v. Secretary-General*, 69, p. 4.

81 See e.g. CEAT, appeals of 27 April 2021, *Ulrich Bohner (VII) and Antonella Cagnolati v. Secretary General*, 661/2020 and 662/2020, para. 91–93; 105, on national tax legislation applying to pensioners.

82 *Convention on the establishment of EUMETSAT*, Article 7, para. 1, second sentence.

83 *Convention establishing the ECMWF*, Article 10, para. 1, second sentence.

84 ECMWF, *Staff Regulations*, Article 1, para. 4.

85 See e.g. German Federal Constitutional Court, decision of 7 December 2017, 2 BvR 444/17, paras. 17–20, commented in *Revue générale de droit international public (RGDIP)*, Vol. 122, 2018, No. 4, pp. 1094–1095.

86 This practice is enhanced by international administrative tribunals, see e.g. ILOAT, judgment of 29 January 1991, *Liégeois v. Intergovernmental Council of Copper Exporting Countries (CIPEC)*, 1082/1991, para. 17.

and ECMWF Staff Regulations is often close, if not identical. Beyond these organisations, the phenomenon can for instance be observed in the institution of procedures to protect against harassment or in anonymisation of international administrative tribunal case law. It also encourages international administrative tribunals to consider and even sometimes to endorse case law interpreting similar norms internal to the organisations.

Although the project, promoted by the Council of Europe, of elaborating a model statute for the European civil service[87] has not materialised,[88] collaboration and harmonisation between the Coordinated Organisations in matters concerning staff remuneration, allowances and pension rights are enhanced by the recommendations of the Co-ordinating Committee on Remuneration (CCR). The CCR was created on 1 July 1991 and includes all member countries of the Co-ordinated Organisations. It works in conjunction with the Committee of Representatives of the Secretaries/Directors-General (CSRP) and the Committee of Staff Representatives (CRP).[89] These recommendations may be implemented in the internal partial legal order of each organisation by exercise of its rule-maker's discretionary power. However, that implementing act may be subject to judicial review with the organisation's administrative tribunal, in a logic similar to that applied by the Court of the European Communities in the famous *Kadi* case.[90]

Such measures have recently given rise to an interesting series of case law. On 26 September 2019, in a trilateral CCR-CSRP-CRP meeting, the CCR recommended adjusting the pensions applied to certain staff in line with inflation instead of by the previous Remuneration Adjustment Method, which was composed of (1) a reference index, (2) a national Harmonised Index of Consumer Prices, and (3) the Purchasing Power Parity. At the same meeting, the CCR also recommended restricting the conditions of entitlement to an education allowance for future pensioners. These measures have been subject to judicial review with all six administrative tribunals of the coordinated system. Although CCR recommendations may be implemented with slight adjustments in the different coordinated organisations, each of which has its own tribunal with its own case law, in a series of judgments passed down in 2021 and 2022, all six tribunals accepted the principle of exercising judicial review of decisions implementing these recommendations, but did not find any illegality in them.[91] This homogeneous decision-making was also possible thanks to informal consultations between the tribunals.[92] These were undertaken to avoid conflicting case law as occurred in the past[93] for lack of a common jurisdiction and organisational nationalism (*nationalisme d'organisation*).[94] The tribunals recognised the principle of acquired

87 Aubenas (1967), pp. 587–606; Daussin (1968), pp. 11–27.

88 See Pellet and Ruzié (1993), pp. 19–20 and Ruzié (2009), p. 2, para. 5.

89 See e.g. OCDE, Decision of the Council of 30 March 2004, [C(2004)6 and CORR1].

90 CJEU (GC), judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, paras. 281–327.

91 CEAT, appeals of 20 April 2021, *John Parsons (V) et al. v. Secretary General of the Council of Europe* and *Nathalie Verneau (III) et al. v. Secretary General of the Council of Europe*, 640/2020 and 644/2020 *et al.*; NATOAT, case of 1 June 2021, no. 2020/1303; OECDAT, case of 30 June 2021, *Mr AA, Mr BB, Ms CC, Ms DD, Mr EE v. Secretary-General*, 94; ESA Administrative Tribunal (ESAAT), case of 15 October 2021, *G. e. a. v. ESA*, 122–128; EUMETSAT Appeals Board, case of 18 October 2021, 9–14; ECMWF Appeals Board, case of 15 March 2022, *H.G. et al. v. ECMWF*, 7–11 and case of 15 March 2022, *A. et al. v. ECMWF*, 12–16.

92 See Thévenot-Werner (2022b), p. 371.

93 Fürst and Weber (2009), pp. 625–633.

94 Term conceived by Pellet (1981), p. 19, para. 10.

rights, as understood in the law of the international civil service, to be applicable but not violated. An acquired right in this context is "one the staff member may expect to survive any amendments of the rules".[95] For instance, "officials may claim an acquired right to a method providing for periodic adjustments of salaries and pensions to compensate the effect of inflation on their salaries and pensions".[96] The issue here was whether or not the actual method for calculating the adjustment is an acquired right, i.e. an essential part of the pensioner's rights. As the ECMWF Appeals Board clarified,

> The [t]est whether or not a right is of a fundamental and essential nature and so substantial and important that it was decisive for the staff member to accept the appointment with [the organisation] and, later, induced him to stay, requires an assessment which must be done in a generalised manner, i.e. from the objective perspective of persons concerned.[97]

The principle of acquired rights is part of the general principles of the international civil service and even applies in the absence of a written rule to rules adopted by the organisation's plenary body.[98] Because of the employer's monopoly in rule-making power, counterbalanced by no other body (e.g. a parliament in national systems), this principle forms an essential safeguard against arbitrariness. Recent case law in which the United Nations system of administration of justice set aside the original meaning of this principle is therefore of considerable concern.[99]

In this section, we have shown that the status of an international organisation's staff member is influenced by the three-dimensional dynamics of (1) mainly administrative law (vertical dynamic), (2) increasingly contract law (horizontal dynamic), and (3) international law (deep dynamic) giving rise to a legal framework of its own that differs from national systems: the law of the international civil service. This law is part of international administrative law, more broadly the law governing international organisations and international law in general. A particularly characteristic principle of the international civil service law with its own meaning in this field is that of independence.

III. A Status Determined by the Principle of Independence

Although many general principles frame the law of the international civil service,[100] the principle of independence may be considered one, if not the core, principle of the international civil service and it explains various aspects of the law and practice in this field.

95 ECMWF Appeals Board, cases of 15 March 2022, *H.G. et al. v. ECMWF*, 7–11, para. 74, citing ESA Appeals Board's decisions of 8 July 1986, 24–27 and decision of 18 July 2003, 76; ILOAT, judgment of 5 June 1987, *Ayoub et al. v. ILO*, 832, para. 13; judgment of 26 June 2018, *D. (No. 3), D. (No. 4) and F. v. International Telecommunication Union*, 4028, para. 13 and judgment of 18 February 2021, *B. v. FAO*, 4380, para. 10.

96 ECMWF Appeals Board, *H.G. et al. v. ECMWF* (n. 91), para. 75.

97 ECMWF Appeals Board, *H.G. et al. v. ECMWF* (n. 91), para. 76. See also ESAAT, decision of 26 July 2021, 132, para. 85.

98 See e.g. ATLN, *Di Palma Castiglione v. ILO* (n. 78); ATLN, judgment of 15 January 1929, *Phelan v. ILO*, 2; ATLN, judgment of 15 January 1929, *Maurette v. ILO*, 3.

99 See especially UNAT, judgment of 29 June 2018, *Lloret Alcañiz et al. v. Secretary General of the United Nations* (six judges), 2018-UNAT-840, and the following judgments, as well as our commentary in Thévenot-Werner (2018), pp. 442–457.

100 For their interpretation by the ILOAT, see Germond (2009), p. 376.

Indeed, its direct (Subsection III.1) and indirect (Subsection III.2) corollaries protect the perennial functioning of the organisation. Attempts to erode these guarantees of independence in recent decades are a matter of concern.

1. Direct Corollaries of the Principle of Independence

Although recognition of the principle of independence as such is now well established (Subsection III.1.1), recent State practice still puts it to the test (Subsection III.1.2).

1.1. General Framework

The crux for international organisations is that they depend de facto on their Member States, which collectively hold the decision-making power and contribute substantially to the organisation's budget. More indirectly, their nationals form the organisation's workforce. Governments may want to influence the organisation's action to make sure it is in line with government interests.[101] However, exercise of such influence is detrimental to the good functioning of the organisation, which requires pursuit of the common goal identified in its constituent act and serving the whole community of its members, not just the most powerful.[102] Legal guarantees are therefore necessary to protect the organisation's independence.[103] The general principle of the international civil service prohibiting Member States from interfering in the relationship between the organisation and its staff is one such "essential guarantee",[104] which is mentioned frequently even in the organisation's constituent act.[105] The principle of independence of the international civil service was particularly developed by the Balfour report of 1920, presented to the Council of the League of Nations, and is inspired by the neutrality principle rooted in the British and French civil service traditions.[106] Linked to this principle is the staff duty of loyalty, integrity and confidentiality regarding the organisation.[107] The duty of the organisation to provide functional protection of its agents also derives from the principle of independence.[108]

101 Ali (2009), pp. 3–20.

102 Ali (2009).

103 On this principle see the contributions on this topic in part III of De Cooker C (2009), pp. 483–570.

104 ILOAT, judgment of 16 July 2003, *Bustani v. Organisation for the Prohibition of Chemical Weapons*, 2232, para. 16.

105 *Statute of the Council of Europe*, Article 36(f); *Convention for the Establishment of a European Space Agency*, Article XII, para. 4; *Convention establishing the ECMWF*, Article 10, para. 7, first phrase; *Convention for the establishment of EUMETSAT*, Article 7, para. 5, first phrase.

106 Pellet and Ruzié (1993), pp. 11–13. See also Langrod (1963), p. 4. "Staff of the Secretariat", Report presented on 19 May 1920 by the British representative M.A.J. Balfour to the Council of the League of Nations, Official Journal, No. 1, issue 4, June 1920, pp. 137–139.

107 ILOAT, judgment of 26 April 1955, *Duberg v. United Nations Educational, Scientific and Cultural Organisation (UNESCO)*, 17, not overturned in ICJ, Advisory Opinion of 23 October 1956, *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO, ICJ Reports 1956*, p. 77; *Statute of the Council of Europe*, Article 36(e); Council of Europe, *Staff Regulations and Staff Rules*, Article 1; *Convention establishing the ECMWF*, Article 10, para. 7, second sentence; ECMWF Staff Regulations, Article 2; *Convention for the establishment of EUMETSAT*, Article 7, para. 5, second sentence; EUMETSAT, *Staff Rules*, Article 2; *Convention on the OECD*, Article 11, para. 2; NATO, CPR, Article 13; ESA, *Staff Regulations and Rules*, Regulation 3; OECD, *Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation*, Regulations 2 and 3.

108 ICJ, Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, *ICJ Reports 1949*, p. 174; NATO Appeals Board, decision of 3 December 1997, 361; CEAT, appeal of 16 April 1998, *Veronica Tonna v. Secretary General of the Council of Europe*, 241/1998.

The organisation may claim privileges and immunities for all its agents, to the extent envisaged by the relevant treaties, interpreted quite extensively.[109] The privilege of tax-free income stems from a combination of the principle of equal pay for equal work, the principle of prohibition of double taxation (since the remuneration of staff is taxed by the organisation itself) and the principle of independence from the exercise of national public authority. However, privileges and immunities are granted to protect the independence of the organisation itself. Although retired staff may in some cases benefit from the privilege of not having their pensions taxed, nevertheless where national authorities levy such taxes, disputes between the organisation and that State may occur, as the primary aim of this privilege is to protect the organisation itself.[110]

1.2. A Principle Still Being Put to the Test

The issue of protecting the organisation from government influence concerning the management of its relations with staff was strongly felt during the Cold War,[111] and has resurfaced again. For instance, in some organisations, staff who are also Russian nationals are subject to measures such as transfer to positions of less responsibility. In organisations, such as the Council of Europe,[112] where the Russian Federation has been excluded, some governments are pushing for dismissal of all Russian staff members, even if they are also nationals of another Member State. It is feared that these nationals may act in the interests of the excluded State rather than in the interests of the organisation. This led the Council of Ministers of the Council of Europe to ask the administration to "ensure an appropriate level of risk management" regarding "[s]taff from the Russian Federation",[113] even if "international officials do not 'represent' their countries".[114] Taking measures against persons of a specific nationality without any proof of misconduct may be problematic, including from a legal perspective. Being a national of a Member State is a condition for recruitment in most international organisations. The organisation's rules may also envisage dismissal if the State of which the staff member is a national is no longer a Member State, although the possibility of terminating such appointments ("appointments may be terminated") does not imply that the Secretary General is duty-bound to do so.[115] Where staff also has the nationality of a State that is still a member, things may be different. Indeed, the condition of nationality of a Member State is a formal one. The criterion of equitable geographic distribution is subsidiary, the criterion of excellence being decisive.[116] So, given two candidates of

109 ICJ, Advisory Opinion of 15 December 1989, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, *ICJ Reports 1989*, p. 177.

110 E.g. NATOAT, *UK v. NATO International Staff* (n. 72), paras. 55–56; judgment *AB v. NATO International Staff* (n. 72), paras. 47–48.

111 See e.g. Hammarskjöld (1962), pp. 329–353; Pellet and Ruzié (1993), pp. 46–47 and 91–92.

112 Council of Europe, Resolution CM/Res(2022), adopted by the Committee of Ministers on 16 March 2022, *on the cessation of the membership of the Russian Federation to the Council of Europe*.

113 Council of Europe, Decision CM/Del/Dec(2023) 1460/2.3, 15 March 2023, *Consequences of the aggression of the Russian Federation against Ukraine. Staff from the Russian Federation*, para. 3.

114 Ali (2009), p. 7.

115 Council of Europe, *Staff Regulations and Staff Rules*, Article 6.5.6, in force since 1 January 2023.

116 Council of Europe Appeals Board, appeal no. 170/1992, Decision of 25 September 1992, *Muller-Rappard (II) v. Secretary General*, para. 14; ILOAT, judgment of 8 July 1999, *Coates (Nos. 1 and 2) v. FAO*, 1871; ILOAT, judgment of 6 July 2016, *P. (Nos. 1 and 2) v. FAO*, 3652; *Convention for the Establishment of a European Space Agency*, Article XII, para. 3(c).

different nationalities, under-representation of one nationality in the organisation's staff may only be a criterion for recruitment if the candidates have equivalent competencies. Although recruitment must be transparent, by competition, guarantee fairness and be without discrimination,[117] in the end the relation with staff remains *intuitu personae*. Once staff is recruited by the organisation, it must be entirely loyal to that organisation. It may not be presumed that because staff also has a certain nationality, it would be more loyal to the government of that State than to the organisation or that it poses a risk for the organisation. Otherwise, if staff of that nationality wanted treatment equal to that of other staff members, it would be under indirect pressure to give up that nationality, including the right to vote, which would touch on its fundamental rights. Such policies also undermine the fact that nationals may be quite critical towards their own government. If there is evidence that staff has not fulfilled its duties, the organisation in any case can initiate a disciplinary procedure with procedural guarantees for the staff member, including the presumption of innocence.[118] Moreover, recruitment conditions are also part of the indirect corollaries of the principle of independence.

2. Indirect Corollaries of the Principle of Independence

In brief, main corollaries that indirectly safeguard the organisation's independence may include attractive employment conditions with consistent recruitment rules (Subsection III.2.1) and guarantees against arbitrariness (Subsection III.2.2).

2.1. Retaining Staff by Attractive Employment Conditions

Staff expertise and excellence are one indirect guarantee of independence of the organisation and are generally set out in the organisation's constituent act or staff rules, together with the formal criterion of being a national of a Member State. The selection procedure must be transparent, competitive, fair, and without discrimination.[119] However, organising competitions may be time consuming, costly, and give the organisation less flexibility. Positions are therefore increasingly subject to recruitment by more spontaneous procedures, such as consultants or outsourcing; they involve shorter contracts and have fewer guarantees. This hampers transparency and makes the organisation more vulnerable. Administration may be weakened as it does not administer such positions entirely and directly. It should also be noted that EU directives, e.g. concerning the posting of workers in the framework of provision of service, do not apply to other international organisations.[120] This may weaken the guarantees and rights of such external staff.

117 CEAT, appeal of 29 November 2006, *Caroline Ravaud v. Secretary General of the Council of Europe*, 360/2006.

118 Ullrich (2018), pp. 425 and 509 and the case law cited; see also e.g. CEAT, appeal of 7 May 2004, *Anne Kling (I) v. Secretary General of the Council of Europe*, 316/2003, para. 17: principle applied by the organisation's disciplinary board.

119 CEAT, *Caroline Ravaud v. Secretary General of the Council of Europe* (n. 117).

120 Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173/16; On the fact that EU directives do not apply to other international organisations, see e.g. German Federal Constitutional Court, decision of 7 December 2017, 2 BvR 444/17, paras. 17–20, commented in *RGDIP*, Vol. 122, 2018, No. 4, pp. 1094–1095.

Principles governing the determination of salary are a further indirect corollary. While staff members must be at the exclusive disposal of the organisation,[121] they are necessarily paid by the organisation, in principle excluding remuneration by a State,[122] and may be subject to the *Noblemaire* (international staff) or the *Fleming* principle (local staff). The *Noblemaire* principle was developed in 1920 by the League of Nations and was taken up by the United Nations. It is a customary rule that applies to international organisations belonging to the UN-system.[123] As the ILOAT explains:

> The *Noblemaire* principle, which dates back to the days of the League of Nations and which the United Nations took over, embodies two rules. One is that, to keep the international civil service as one, its employees shall get equal pay for work of equal value, whatever their nationality or salaries earned in their own country. The other rule is that in recruiting staff from their full membership international organisations shall offer pay that will draw and keep citizens of countries where salaries are highest.[124]

Governments and international organisations including of the Coordinated System may be hesitant to apply the opposability of this principle to other organisations for political and budgetary reasons or may even be against it. Nevertheless, its applicability has been recognised to other organisations under ILOAT jurisdiction.[125] It may be argued that it is also relevant for the Coordinated Organisations, such as the Council of Europe, as it springs from the sentence of *Jeannin (II) and Bigaignon v. Secretary General*: the applicants and the organisation refer to the principle as defined by ILOAT.[126] Indeed, the reasons mentioned previously that gave rise to this principle are not specific to the United Nations (UN) system. The *Fleming* principle, on the other hand, is named after the president of a UN working group of 1949 and requires that "the conditions of service for locally recruited staff reflect the best prevailing conditions found locally for similar work".[127] Here again, the objective of attracting the best local staff – or in cases such as the OCDE, the best temporary staff – is not specific to the UN system. Nevertheless, although the principle has been applied in substance by the Coordinated Organisations[128] and although a study is conducted, for instance at OECD, to examine the local labour market every five

121 EUMETSAT, *Staff Rules*, Article 29, para. 2: "If the exigencies of the work make it necessary, a staff member may be required to work overtime. A and L grades may be granted exceptionally compensatory time, B and C grades overtime payment, if compensatory time cannot be granted. The hourly rate will be assessed by dividing the monthly basic salary by 173." OECD Staff Regulations, rules and instructions applicable to officials of the organisation, Regulation 20(b): "When an official is required to work overtime he/she shall be entitled to compensation within the limits and according to the conditions determined by rules established by the Secretary-General and approved by the Council." ESA Staff Regulations and Rules, February 2023, Regulation 23.2(i): "Staff members may be required to work overtime or outside normal working hours."

122 Plantey and Loriot (2005), p. 314, para. 1022.

123 ILOAT, judgment of 23 November 1989, *Ayoub (No. 2), von Knorring, Perret-Nguyen (No. 2) and Santarelli v. ILO*, 986, para. 7.

124 ILOAT, judgment of 5 June 1987, *Beattie and Sheeran v. ILO*, 825, para. 1.

125 See e.g. Ullrich (2018), p. 47 and the case law cited.

126 Council of Europe Appeals Board, cases of 26 June 1992, *Jeannin (II) and Bigaignon (I) v. Secretary General*, 164/1990.

127 E.g. ILOAT, judgment of 28 June 2017, *B. and others v. ILO*, 3883, para. 4.

128 Fürst and Weber (2009), p. 627.

years,[129] the organisation avoids referring to this principle explicitly and does not seem keen to apply it strictly, preferring rather to maintain some flexibility by determining a minimum and a maximum wage by statute.[130]

More generally concerning relations between the organisation and its staff, we have the duty of care, which obliges the organisation to help its staff.[131] It stems from the relation of confidence between the organisation and its staff and implies, for instance, the duty to treat applications diligently. Although it also applies to Coordinated Organisations, tribunals do not readily conclude that it has been breached.[132]

Staff independence is also enhanced by offering promising career prospects, by strict dismissal conditions and by recruitment on the basis of open-ended contracts or nominations in order to ensure and protect the existence and quality of institutional memory. This also encourages organisational efficiency, avoiding loss of time in training new staff to replace current staff and in having different staff repeat the same mistakes.

2.2. Guarantees Against Arbitrariness

Guarantees against arbitrariness also encourage institutional independence indirectly. Legal certainty is offered by laying down in writing the internal law of the organisation that applies to its agents. The duty to comply with acquired rights or essential conditions of employment also ensures that bodies composed of States maintain the rule of law, as well as protecting the employment relationship. It may nevertheless be noted that tribunals do not lightly question the exercise of the rule-maker's power and the case law suggests that individual decisions applying general rules violating acquired rights are only set aside in cases of manifest excess.[133] Finally, setting up effective legal remedies to ensure the rule of law within the organisation for all its agents not only protects against arbitrariness, but also protects the organisation against the risk of seeing its immunity set aside by a national court. In this context, the broad jurisdiction of the NATOAT and the OECDAT may offer a good example. One may wonder, however, why organisations hesitate to extend the competence of their administrative (*sic*) tribunals more generally to any dispute in international administrative law, i.e. all disputes between the organisation and any kind of agent, or even any dispute between the organisation and an individual.[134]

129 See Plantey and Loriot (2005), p. 330, para. 1080.

130 OECD, *Statut, règlement et instructions applicables aux membres du personnel temporaire de l'organisation*, Article 9.

131 Germond (2009), p. 74.

132 See e.g. CEAT, appeal of 18 October 2021, *Laurence Nectoux v. Secretary General of the Council of Europe*, 671/2020, para. 58; OECDAT, judgment of 26 April 2022, *AA v. Secretary-General*, 100, para. 70.

133 E.g. ATLN, *Di Palma Castiglione v. ILO* (n. 78); World Bank Administrative Tribunal, decision of 5 June 1981, *de Merode et al. v. The World Bank*, 1; Council of Europe Appeals Board, appeals of 17 February 1987, *Stevens and Others v. Secretary General*, 101–113/1984; ILOAT, *Ayoub et al. v. ILO* (n. 95); ILOAT, *Ayoub (No. 2), von Knorring, Perret-Nguyen (No. 2) and Santarelli v. ILO* (n. 123); CEAT, Appeal No. 640/2020-644/2020 *et al.*, 20 April 2021, *John Parsons (V) et al. v. Secretary General of the Council of Europe and Nathalie Verneau (II) et al. v. Secretary General of the Council of Europe.*

134 E.g. ESA prefers to set up specialized appeals boards for different types of disputes, see G. Süß (2021), pp. 167–179, and the Council of Europe prefers to provide for arbitration with the Permanent Court of Arbitration concerning disputes with regard to a data subject other than with a staff member, former staff member, claimant of their rights or job candidate, Resolution CM/Res(2022)14, *on establishing the Council of Europe Regulations on the Protection of Personal Data*, 15 June 2022, Article 18.6.

IV. Conclusion

Its staff is the organisation's backbone: it is in the interest of the organisation to protect the status of its staff, and generally speaking any agent of the organisation, in order to function properly. Recognising special status of staff is justified by the principle of independence of the organisation and by the fact that organisations are not subject to the guarantees of national laws. For instance, they are usually not covered by unemployment insurance.[135] The international staff of the Coordinated Organisations has access to the international pension regime after only ten years of service;[136] if their service ends before that, their pension contributions are reimbursed.[137] National legislation that strictly limits renewal of contracts and short-term contracts, or that concerns abuse of the status of consultants, does not apply. However, the law of the international civil service is more extensively framed than it may appear, being part of the law of international organisations and part of international law. Although each organisation may adopt its own internal law as *lex specialis*, it is in the end in the interest of each organisation to abide by the rule of law and the general principles of the international civil service. Besides the argument of legal coherence, how else can the organisation legitimately request Member States to comply with the rule of law and international law? As far as the Coordinated Organisations are concerned, on the whole these requirements seem to be observed by virtue of their international administrative tribunals. Nevertheless, in an evolving legal environment, it is necessary to be vigilant in order to maintain this fragile equilibrium and to strengthen compliance with these fundamental principles.

Bibliography

Akehurst M.B. (1967), *The Law Governing Employment in International Organizations*, Cambridge: Cambridge University Press.

Ali A. (2009), 'The International Civil Service: The Idea and the Reality', in De Cooker C. (ed), *International Administration. Law and Management Practices in International Organisations*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 3–20.

Amerasinghe C.F. (1994), *The Law of the International Civil Service*, Vol. II, 2nd edition, Oxford: Clarendon Press and New York: Oxford University Press.

Aubenas B. (1967), 'Réflexions sur une fonction publique européenne', 13 *Annuaire français de droit international*, 587–606.

Basdevant S. (1931), *Les fonctionnaires internationaux*, Paris: Recueil Sirey.

Bedjaoui M. (1958), *Fonction publique internationale et influences nationales*, Paris: Pedone.

Bettati M. (1987), 'Recrutement et carrière des fonctionnaires internationaux', 204 *Collected Courses of the Hague Academy of International Law*, 171–444.

Cohen A. (2009), *Belle du Seigneur*, Paris: Gallimard.

Daussin A. (1968), 'Réflexions sur le statut-type de la fonction publique européenne', in *Mélanges offertes à Polys Modinos: problèmes des droits de l'homme et de l'unification européenne*, Paris: Pedone, 11–27.

De Cooker C. (ed) (2009), *International Administration: Law and Management Practices in International Organisations*, Dordrecht, Boston, London: Martinus Nijhoff Publishers.

Dumoulin A. (2011), 'La disparition d'une organisation internationale: l'Union de l'Europe occidentale (1954–2011)', 12 *Annuaire français de relations internationales*, 561–583.

135 As in the case for instance of the officials of the Council of Europe. Exceptionally, EUMETSAT foresees unemployment benefits.

136 OECD, *Staff Regulations, Rules and Instructions applicable to Officials of the Organisation*, Annex X, Article 7.

137 OECD, *Staff Regulations, Rules and Instructions applicable to Officials of the Organisation*, Annex X, Article 11.

Fürst W., Weber H. (2009), 'Uniformity in Service Law and Judicial Remedies for Staff Members of the European Coordinated Organisations', in De Cooker C. (ed), *International Administration. Law and Management Practices in International Organisations*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 623–653.

Gentot M. (2008), 'Le contrôle du pouvoir discrétionnaire par les tribunaux administratifs internationaux', in Ziadé N.G. (ed), *Problems of International Administrative Law. On the Occasion of the Twentieth Anniversary of the World Bank Administrative Tribunal*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 23–30.

Germond L. (2009), *Les Principes généraux selon le Tribunal administratif de l'OIT*, Paris: Pedone.

Hammarskjöld D. (1962), 'The International Civil Servant in Law and in Fact', in Foote W. (ed), *Servant of Peace: A Selection of Speeches and Statements of Dag Hammarskjöld*, New York: Harper & Row, 329–353.

Lagrange E. (2002), *La représentation institutionnelle dans l'ordre international: une contribution à la théorie de la personnalité morale des organisations internationales*, The Hague, London, New York: Kluwer Law International.

Langrod G. (1963), *La fonction publique internationale. Sa genèse, son essence, son évolution*, Leiden: A.W. Sythoff.

Pellet A. (1974), *Recherche sur les principes généraux de droit en droit international public*, Thesis, University Paris II.

Pellet A. (1981), *Recherche sur quelques questions d'actualité. L'exemple de l'O.C.D.E. Les voies de recours ouvertes aux fonctionnaires internationaux*, Paris: Pedone.

Pellet A., Ruzié D. (1993), *Les fonctionnaires internationaux*, Paris: Puf.

Petrovic D. (2021), 'Access to Justice – an Unfinished Task', in Dileita A. (ed), *International Administrative Justice and International Organizations: Overview and Prospects*, Abidjan: African Development Bank.

Piquemal M. (2012), 'Le Continuum de la protection juridictionnelle en cas de dissolution d'une organisation internationale: le cas de l'Union de l'Europe occidentale (UEO)', in Palmieri G. (ed), *New Developments in the Legal Protection of International and European Civil Servants*, Bruxelles: Bruylant, 295–330.

Plantey A. (1977), 'L'institutionnalisation d'un régime de pension dans les organisations occidentales coordonnées', 23 *Annuaire français de droit international*, 874–883.

Plantey A., Loriot F. (2005), *Fonction publique internationale. Organisations mondiales et européennes*, Paris: CNRS éditions.

Rapisardi-Mirabelli A. (1925), 'Théorie générale des unions internationales', 7 *Collected Courses of the Hague Academy of International Law*, 341–393.

Renault L. (1896), 'Les Unions internationales. Leurs avantages et leurs inconvénients', 3 *Revue générale de droit international public*, 14–26.

Ruzié D. (2009), 'Fonctionnaires internationaux', in *Répertoire de droit international*, Paris: Dalloz.

Siraud P. (1942), *Le Tribunal administratif de la Société des Nations*, Paris: Librairie Mariale.

Süß G. (2021), 'L'accès au juge en droit des marchés publics internationaux', in Jaber L.K., Lüer S. and Thévenot-Werner A.-M. (ed), *Rechtsweggarantie im vergleichenden Verwaltungsrecht*, Berlin: Springer, 167–179.

Thévenot-Werner A.-M. (2016), *Le droit des agents internationaux à un recours effectif*, Leiden, Boston: Brill-Nijhoff.

Thévenot-Werner A.-M. (2018), 'Activité et jurisprudence des tribunaux administratifs des Nations Unies et de l'OIT', 64 *Annuaire français de droit international*, 437–457.

Thévenot-Werner A.-M. (2021), 'Introduction au droit des organisations internationales', 110 *JurisClasseur Droit International.*

Thévenot-Werner A.-M. (2022a), 'L'adaptation des tribunaux administratifs internationaux à la pandémie', in Maurel R. (ed), *L'adaptation des procédures contentieuses en temps de pandémie. Comparaison internationale et limites éthiques*, Bruxelles: Bruylant, 87–109.

Thévenot-Werner A.-M. (2022b), 'Activité et jurisprudence des tribunaux administratifs des Nations Unies et de l'OIT (2021–2022). Focus: "juge résident" au TAOIT et projet d'une "chambre conjointe"', 68 *Annuaire français de droit international*, 353–372.

Ullrich G. (2018), *The Law of the International Civil Service. Institutional Law and Practice in International Organisations*, Berlin: Duncker & Humblot.

Valticos N. (2008), 'A propos du contrôle du pouvoir discrétionnaire par les tribunaux administratifs des organisations internationales', in Ziadé N.G. (ed), *Problems of International Administrative*

Law. On the Occasion of the Twentieth Anniversary of the World Bank Administrative Tribunal, Leiden, Boston: Martinus Nijhoff Publishers, 31–36.

Ziadé N.G. (ed) (2008), *Problems of International Administrative Law. On the Occasion of the Twentieth Anniversary of the World Bank Administrative Tribunal*, Leiden, Boston: Martinus Nijhoff Publishers.

Part IV

In Search of Common European Standards

Public Sector Employment Regimes

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21 Civil Service in Transition

Privatisation or Alignment of Employment Conditions?

Cristina Fraenkel-Haeberle

I. Introduction

According to a collective volume on the civil service published by Speyer almost 30 years ago, the distinction between public-law and private-law employment relationships was necessarily a point of reference in all States of the European Community (now European Union, EU).[1] With the exception of the United Kingdom (UK), where this dichotomy is blurred, the book emphasised that even in European countries that recognise the public-private divide, the two types of employment relationship showed considerable differences.[2]

In the last three decades, huge transformations have taken place in Europe. They are due to evolution of the role and conception of the State (New Public Management, institutional privatisation, outsourcing, and budget constraints), as well as to the need to adapt to extraordinary events of different kinds (financial crisis, immigration, pandemics, etc.).[3] Theoretical considerations and pragmatism both play an important role in privatisation of the public service. Here both levels are borne in mind, exploring privatisation processes in the context of national administrative tradition and general considerations.

The comparative research shows that various European States are facing similar challenges. Today in countries like Denmark, Italy, Finland, the Netherlands, Poland, Sweden, and Switzerland,[4] comprehensive privatisation of the civil service has taken place or is underway; in others, like Belgium,[5] France, Germany, Greece, Luxemburg, and Spain, the

1 Niedobitek (1994), p. 21. In this context "civil servants in the narrow sense" (*Beamte*, *fonctionnaires*) are distinguished from the workforce employed on a contractual basis (*Arbeitnehmer*innen im öffentlichen Dienst, Vertragsbedienstete, agents contractuels*); see *Transformational Impulses of International Law and Union Law for the Civil Service* by T. Ellerbrok in this volume. The percentage of civil servants in the total public workforce varies enormously from one country to another: from 90% in Croatia to 9% in Sweden, as highlighted in *Civil Service Adaptation and Reform in the Context of European Governance, (De-) Europeanisation and National Competition* by C. Demmke in this volume.

2 On the public-private divide in general, see Auby (2021), pp. 467 f.

3 See the concept of "flexicurity", which combines flexibility and security in the labour market and has attracted great attention in the perspective of the financial crisis starting in 2008. Currently, the EU considers flexicurity a point of reference for structural reforms; Bekker and Mailand (2017), p. 142.

4 The new Swiss Constitution of 18 April 1999 no longer even mentions the civil service, since the employment system in this country is traditionally subject to private law, which is why the public salaried labour force no longer has the status of civil servant (see *The Civil Service in Switzerland: Between Flexibility and Tradition* by F. Bellanger in this volume).

5 As highlighted in *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume, under the influence of French administrative law, civil servants in Belgium "fall by default under the public law regime", according to the Statut Camus of 1937 that defines the appointment and duties of civil servants. The general status is that of a civil servant, whereas contractual employment is exceptional.

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pre-eminent function of civil service employment is ensured even at constitutional level.[6] These rules, as explained in the following pages, even envisage a ban on the complete privatisation of public employment in some cases.

The percentage of the two categories varies from country to country: geographically, a distinction has been made between central[7] and south-eastern Europe,[8] where civil servants are still a large share of public employees, especially in central government, and certain Scandinavian countries, where contractual employment is now the standard system, regulated by labour law and collective agreements.[9]

Another relevant category is the distinction between career-based and position-based systems. The first is particularly widespread in continental Europe. Its features are mainly a clean separation from labour law and strict recruitment policy and promotion. This regime has been interpreted as a necessary condition for the stability and continuity of administrative activity. It is widely based on a corps of generalists, who can be easily moved within the public administration. The second, widely adopted in Sweden and the UK, has more flexible and performance-oriented recruitment, promotion, and remuneration, and largely constitutes an employment system.[10]

A main distinction can be made between the openness of position-related recruitment, combined with exchange and mobility with the private sector, and the closed nature of career-related recruitment. There are of course exceptions, e.g. in Denmark, where a career-based system is combined with much openness, and the Czech Republic, which on the contrary is characterised by a closed position-based system.[11]

Despite these developments, a transition from employment relationships under public law to employment regulated by private law can generally be observed throughout Europe. The differences between public employees and civil servants in the narrow sense are fading, or rather appear less evident than their legal status may suggest. A "process of hybridisation" between the two spheres may be observed.[12] This means that even if this duality is maintained, a convergence in working conditions is taking place. This is one reason it is advisable to look at the substance of the regulations and not just the labels.[13] Here, we examine the reasons for this phenomenon, the criteria and limits of the privatisation process and the implications of this transition.

II. How Do Public- and Private-Law Regimes Differ?

The first question that arises in the context of privatisation of the civil service concerns definition of the scope of the public sector, a concept interpreted differently in the various countries. Since the definition of civil service and public tasks is unclear, we have to accept

6 Krzywoń (2022), pp. 26 f. and De Becker (2011) pp. 967 f. explain that in France, Article 34 of the constitution empowers Parliament to enact rules concerning the safeguards attributed to civil and military public servants, even if their public-law status is not enshrined in the constitution. Also, Article 109 of the Dutch constitution foresees that the legislature can regulate the legal status of civil servants.

7 Austria, Belgium, France, Germany, and Luxembourg.

8 Bulgaria, Cyprus, Croatia, Greece, Romania, and Spain.

9 Thijs et al. (2018), p. 22; on civil service in central, eastern and western Europe, see Van der Meer et al. (2015), pp. 15 f.

10 Hugrée et al. (2015), p. 43.

11 Thijs et al. (2018), p. 25.

12 Hugrée et al. (2015), p. 46.

13 Thijs et al. (2018), p. 23.

some uncertainty of the comparison criteria in the different national systems, although some general patterns can still be identified.

1. The Special Status of Civil Servants

The status of employees is a well-known criterion, also suggested by the Organisation for Economic Co-operation and Development (OECD).[14] A distinction can be made on the basis of the rules of the public employment relationship, since the civil service in a formal sense is essentially regulated by statutory law and administrative acts. The civil servant does not play an active role in design of its content; he can only decide whether or not to accept appointment under the conditions specified by the law. Thus, his/her status is not established by a contract between equal partners, but by a unilateral act of the State.[15]

This *summa divisio* concerns the traditional type of public service based on more protected public law status with unilateral appointment, and public employment, based either on public or on private law, with employment conditions similar to private-sector employment.[16] For example under German law (*Bundesbeamtengesetz*, BBG),[17] the distinction between civil service in a formal sense and private law employment is determined by an administrative act under public law instead of a contract, by the legal definition of remuneration instead of a collective agreement, by remuneration based on position and qualifications instead of the tasks performed, by the jurisdiction of administrative courts instead of labour courts, by employment for life, and by the special disciplinary duties of civil servants.[18] The democratic commitment of the civil service, aimed at the common good and public value, is not under the rules of private autonomy and market competition that characterise private labour law and collective bargaining.[19]

Statutory civil servants are generally defined by two criteria: the exercise of powers conferred by law, which are often connected with national sovereignty and a responsibility to defend public interests (judges, military personnel, tax and customs officers, police).[20] Their status differs from that of public employees in terms of remuneration and career prospects. Particular benefits include access to continuing education, better health coverage, and more generous pensions.[21]

14 See http://stats.oecd.org/glossary. According to this definition, the *status criterion* is considered satisfactory in countries where the vast majority of government workers are civil servants. But since the trend in many OECD countries is to recruit staff on fixed-term (i.e. not civil service) contracts, a distinction can be made between personnel subject to public law and those subject to private law. Moreover, the far-reaching changes that have affected the civil service since the late 1980s will probably make that distinction irrelevant in an increasing number of countries, where all salaried workers in the public and private sectors are subject to the same labour legislation.

15 The contribution *The Civil Service in Hungary: Differentiation and Privatisation Trends* by P.L. Lancos in this volume highlights that the status of civil servant is not established by a contract between equal parties, but by a unilateral act of the State, which appoints a civil servant, entrusting him with a specific task (*közszolgálat* in the narrow sense).

16 Thijs et al. (2018), p. 22.

17 Federal Civil Service Act of 5 February 2009 (Bundesbeamtengesetz; BBG), BGBl. 2009 I p. 160; www.gesetze-im-internet.de/bbg_2009/BJNR016010009.html.

18 Battis (2022), § 5, para. 9.

19 Krzywoń (2022), p. 30.

20 Krzywoń (2022), p. 42.

21 Krzywoń (2022), pp. 42 f.

Another distinctive feature of civil service in a narrow sense is the special legal regime regulating employment relations in this sector, and including the special duties of civil servants (bonds of trust, loyalty, political neutrality, etc.). Nevertheless, even in Sweden, where abolition of the specific status of civil servants and its alignment with that of other workers has quite a long tradition (since World War II), there remain special rules for public employment (regarding the employment relationship, strikes, and criminal law aspects).[22]

2. Formal Criteria of the Civil Service Regime

Often legislation formally specifies the scope of the civil service regime, i.e. executive acts of the government define the types of administrative positions. As highlighted in the chapter on Poland, the civil service regime applies as a rule to all employees of government bodies in "administrative positions" (positions relating to performance of public functions), who enjoy special guarantees of employment stability, while staff employed in all other positions is subject to the Law on Employees of State Institutions. By contrast, in Hungary a split between the different categories of civil servants is alleged to cause fragmentation of the public service career structure.[23]

3. Identity of the Public Employer

The "employer's identity" criterion was adopted by the OECD Public Management Service in its work on public sector pay trends. In this context, wage bill trends may be analysed to determine the nature of the corresponding employment (i.e. personnel paid directly by public authorities).[24] Thus, the public-law character of the "State as an employer" applies regardless of whether the employment relationship is subject to public or private law. Even in countries like Great Britain, where general labour law applies to the area of public administration and to the private sector, this public-law character does not exclude the application of special provisions of labour law for certain public administration sectors, provisions that, among other things, take into account the institutional purposes of the employer and goals of public interest; nor does it exclude access to employment through public competitions.[25]

Also in France, the public employer identity criterion can be linked to the notion of *fonction publique*, which is also used for public administration employees who are not

22 See *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfled Olsson and E. Sjödin in this volume.

23 Krzywoń (2022), p. 30.

24 Employer identity is the criterion used by the OECD Public Management Service in its work on public sector pay trends. The survey highlights that this approach shows its limitations when the volume of public employment has to be compared across countries. The first difficulty is the different ways of financing public expenditure of central governments, regions, provinces and municipalities, and in some cases of a federal government and States. If the criterion is "who pays?" employees of UK National Health Service (NHS) Trusts (health service provider units that have opted to change their status and which now operate with independent financing arrangements) should not be counted; OECD (1997), p. 89.

25 According to the definition of Krzywoń (2022), p. 24 concerning the right of access to employment in the public (civil) service, the meaning of the term "public sector" is at stake and includes a wide range of public bodies and public offices. Consequently, workers in the public sector are usually called "public servants" or "public-sector personnel", which is a different employment status.

subject to the regulations of civil service law (*statut de la fonction publique*) and whose employment relationship is formally assigned to contractual regulation.[26] In this country, three different categories exist, namely *fonction publique de l'État* (Central Government Public Service), *function publique territoriale* (Sub-Central Government Public Service), and *fonction publique hospitalière* (Public Health Sector).[27]

A large share of non-civil-servant staff, especially in local government, is made up of "agents publics", who are mostly bound to the administration by contracts.[28] Actually, among contractual employees in the public sector under the French legal system, most contracts concerning public services are currently ruled by public law.[29]

4. The Functional Criterion

In order to sidestep the different definitions of civil service foreseen by the Member State legal systems, the Court of Justice of the European Union (CJEU) interprets the concept of public service in a union law perspective, by the functional criterion: what counts is not affiliation with a specific administrative unit but the nature of the activity itself. According to this conception, institutional aspects can be ignored. Likewise, in the eyes of the CJEU, judiciary and military activities, which are sovereign functions outside the tasks of public administration, belong in the spectrum of activities covered by Article 45, paragraph 4 Treaty on the Functioning of the European Union (TFEU).[30] From the point of view of European law, public service is related to the guarantee of freedom of movement, whereby the main focus is on paragraph 4, which is deemed a "bastion" of Member State autonomy.[31] The scope of the notion "employment in the public service" is also quite controversial, as explained in the following section.

This choice of the CJEU also has institutional motivations, since it is not easy to identify and compare public service employees in Member States. Consequently, it has been remarked that EU law aims to remove obstacles to the free movement of workers, and not to develop criteria for comparing the legal structure of Member States, which is outside its regulatory competence.[32]

III. What Are the Criteria and Limits of the Privatisation Process?

About 20 years ago, a German commission chaired by Hans Peter Bull, *Die Zukunft des öffentlichen Dienstes – öffentlicher Dienst der Zukunft* (The future of the public service – public

26 On this point see Ziller (2006), p. 234. The author explains that this regime includes the employees of *Société Nationale des Chemins de fer Français* (SNCF) (railways) and other public transport companies, and the energy supply companies *Electricité de France* (EDF) and *Gaz de France* (GdF). While the employers are considered part of the public administration, the companies they work for adopt a *statut* for their staff with private-law employment contracts. These can be reviewed by an ordinary judge. The workers have a special pension fund and special rules regarding the right to strike.

27 Gotschall et al. (2015), p. 128. In each service there are different career paths and posts (*corps*), including a specific elitist group (*grands corps de l'État*). See also Badré and Verdier Naves (2017), pp. 11 f.

28 See *Leading Trends in the Development of the Civil Service in Europe* by J.-B. Auby in this volume.

29 De Becker (2011), p. 970 f. See also *Do Public Management Concepts Have an Impact on Civil Service Regimes?* by J. Ziller in this volume.

30 Kämmerer (2001), p. 36.

31 Kämmerer (2001), p. 36.

32 Ziller (2006), p. 237; Schwarz (2021), p. 1668.

service of the future)[33] and set up by the government of North Rhine-Westphalia, identified a major cause of bad developments in civil service legislation in the dichotomy between civil servants and public employees. It suggested uniform regulation extending to all categories of public administration personnel.[34] Since then, discussion about streamlining the civil service has not ceased. This development is very much in line with the current trend of increasing privatisation and contractual arrangements in public service employment relations throughout Europe, a trend representing a change of paradigm with respect to the traditional forms of professional civil service.

In countries like Italy, civil service and public employment are distinguished by sector. Since 1993, there has been a general privatisation of public employment and the relationship is mostly ruled by collective bargaining.[35] Very few categories, such as diplomats, judges and prosecutors, military personnel, police, university professors and local government officials, are not under these rules but are governed by special regulations and public law.[36] This massive privatisation was seen rather as a “simplification measure”, since it was considered opportune to align workers of the public sector with those of the private sector, the latter category being considered particularly protected.[37]

Other criteria may be inconsistencies in the employment of human resources in a civil service position, as well as cost-saving and budgetary constraints during the financial crisis of 2008, which prompted many countries to recruit fixed-term workers to replace civil servants.[38] Several States linked budgetary constraints with reform or abolition of special civil servant status.[39] For example, in the Polish public service, a gradual phasing out of employment by appointment has been observed.[40] Similarly, since the advent of restrictive appointment policy (so-called *Pragmatisierungstopp*) in Austria, the workforce with civil servant status has been decreasing steadily.[41] Measures to reduce the number of federal civil servants concern professional categories (as in administration, teaching, and nursing) where a contractual relationship can be an alternative to public service employment.[42] This also means that retired civil servants in the categories in question are replaced by contract employees. The proportion of civil servants is therefore significantly lower in the younger cohorts.[43]

33 See www.vbe-nrw.de/vbe_download/bullka.pdf; Bull (2004), p. 158.

34 See also Jung (1971), pp. 32 and 65.

35 Demmke and Moilanen (2010), p. 74 and *Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

36 Albanese (2022), p. 694.

37 Ziller (2006), p. 239.

38 See *Civil Service Adaptation and Reform in the Context of European Governance, (De-) Europeanisation and National Competition* by C. Demmke in this volume.

39 Demmke (2016), p. 215.

40 See *The Civil Service in Poland: A Turbulent Path Towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

41 *Pragmatisierung* indicates a career public servant who has absolute protection against dismissal; see Demmke and Moilanen (2010), p. 71, as well as *The Civil Service in Austria: Tradition, Reforms, and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume.

42 See Das Personal des Bundes 2023 – Daten und Fakten, p. 70. Available at https://oeffentlicherdienst.gv.at/wp-content/uploads/2023/01/Das-Personal-des-Bundes-2022.pdf.

43 Demmke and Moilanen (2010), p. 71. It is around 58% among those over 50 years of age, only about 43% among under 40s.

On the contrary, in Germany and France, where the hierarchical principle has a long tradition, the importance of the rule of law and of loyalty to the democratically elected government hinders comprehensive privatisation of the civil service.[44] The German constitution (Basic Law – BL) explicitly prevents a total privatisation of public employment, specifying that the continuous exercise of sovereign powers (*hoheitsrechtliche Befugnisse*) must be entrusted as a rule as a permanent task to members of the civil service who are in a public-law service and loyalty relationship.[45] Accordingly, any attempt to align the working conditions of civil servants and public employees must comply with Article 33, paragraph 4 BL (the so-called *Funktionsvorbehalt*) and the principles established by the Federal Constitutional Court.[46] A similar provision, with a ban on complete privatisation of the civil service, can be found in the Polish constitution of 1997.[47]

This choice can be explained on the basis of the assumption that comprehensive regulation of the employment relationship ensures greater continuity, objectivity and impartiality of administrative action.[48] On the other hand, the principle of greater job security, beyond the rules of the private labour market, is deemed to protect against political interference.[49]

Thus, the democratic shortcomings of the privatisation process are highlighted by German doctrine, which views this development as compressing the role of Parliament, transparency and the democratic principle. In a public employment relationship, the remuneration of civil servants is established by law and is included in the budget approved by Parliament. The State budget is a core element of a democratic State and the power of Parliament to approve the budget is a cornerstone of its competences. With the privatisation of public services, this function disappears. Remuneration of the workforce must no longer be included in the State budget, being entrusted to employment contracts and negotiation with trade unions. In this sense, privatisation is deemed to weaken modern parliamentarism.[50]

Conversely, the particular flexibility of the reforms of the British civil service traces back to the constitutional principle, according to which organisation of the civil service (i.e. the administration of the State) belongs to the Royal Prerogative and therefore does not require the approval of Parliament, which is one reason why the government

44 Demmke (2016), p. 217.

45 About 5,095,000 public employees worked in the German public administration in 2021, approximately 11% of all human resources; 3,189,000 of them are employees hired under a private-law contracts, leaving about 38% civil servants. Source: *Statistisches Bundesamt*, 4 August 2022, Public service – German Federal Statistical Office (destatis.de).

46 See more extensively Demmke and Moilanen (2010), p. 71.

47 According to Article 153, para. 1 of the 1997 Constitution of the Republic of Poland: "A corps of civil servants shall operate in the bodies of government administration in order to ensure professional, diligent, impartial and politically neutral discharge of the State's functions." See *The Civil Service in Poland: A Turbulent Path Towards Professionalism, Merit-Based Recruitment, and Insulation from Politicisation* by D. Sześciło in this volume.

48 In detail, according to Jarass and Pieroth (2022), Article 33, para. 4 BL covers "besides the armed forces, the police and other public security agencies, the administration of justice, tax administration, diplomacy and administrative bodies at federal, State and municipal level, involved in the drafting of legal acts, their implementation and supervisory functions" (Federal Administrative Court, judgment of 27 February 2014, BVerwGE 149, 117, para. 61), but not teachers in public schools (Federal Constitutional Court, order of 19 September 2007, BVerfGE 119, 247, 267).

49 Hugrée et al. (2015), p. 46.

50 Hennecke (2021), pp. 131 f.

is free to act in this area.[51] Furthermore, in the UK there is only a limited legal basis for public law status of civil servants. Traditionally, the recruitment of civil servants was regulated by the Orders of the Council of 1870, after introduction of the Civil Service Commission 15 years earlier, which had to guarantee an open competition policy. The Orders of the Council were part of the Royal Prerogative and were not under the control of Parliament, being a task of the Privy Council (a body of advisers to the sovereign).[52] In this context, the Head of State originally had the right, the so-called *ius honorum,* to appoint its staff. In the past, civil servants were therefore appointed unilaterally by the Crown and considered an "incarnation of the State" in the UK, and in Belgium and the Netherlands.[53]

This explains why in the UK, most reforms affecting the civil service were introduced by reports (Northcote-Trevelyan Report 1853, Fulton Report 1968 and Next Steps Report 1987) rather than by legislation.[54] Notably, the Northcote-Trevelyan Report, establishing the main principles of the civil service, such as competitive merit-based recruitment, political neutrality, a generalist tradition, and lifelong career-paths (career-system), expressed the so-called "Whitehall-model system of government" (from the name of a London street with many government offices), which was highly centralised and maintained until the 1990s.[55]

IV. Switching From Public Service to the Private Sector

Even in countries like the UK, where there are no formal barriers between public service and private employment, practical problems exist, such as the portability of existing pension rights from the public sector to the private sector and vice versa.[56]

Germany is deemed a latecomer in public service reforms. There civil service is characterised by lifelong employment (*Lebenszeitprinzip*), high work security and career progression based on seniority, as well as guarantee of a certain lifestyle for civil servants and their families.[57] These are the traditional principles of the professional civil service.[58] The question of how easy it is to switch between jobs in the public service and the private sector is linked to the duration of employment. As highlighted in the chapter on Germany,[59] distinction must be made between the case of employment under private law in the public sector, where switching does not pose a problem, and a change from civil servant status to the private sector and vice versa, which is not easy, due to the great difference in retirement benefits between civil servants and employees. Mobility within the German civil service does not pose major problems, since civil service status is the same throughout

51 Ziller (2006), p. 238. The government may not independently make regulations that affect civil service only in cases where a statute of parliament applies, such as in matters of retirement.

52 De Becker (2011), p. 972.

53 De Becker (2011), pp. 963 f. The author adds that also in Belgium, Article 107, para. 2 of the constitution, which dates back to 1831, states that public servants (of the central administration) are appointed by the Crown.

54 Ziller (2006), p. 238.

55 Gotschall et al. (2015), p. 109.

56 Johnson (2003), p. 13.

57 Gotschall et al. (2015), p. 116.

58 Article 33, para. 5 BL.

59 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume.

the system.[60] By contrast, outward mobility has a negative impact on pension rights, since quitting the service entails loss of the right to retirement benefits.

These unequal retirement conditions were brought before the CJEU in a preliminary ruling.[61] The Court ruled that retrospective replacement of a generous civil service pension by a general old-age pension for employees did not comply with Articles 45 and 48 TFUE. According to the relevant law of North-Rhine Westfalia, a resigning civil servant loses his/her rights to a higher pension unless he becomes a civil servant of another German administration at federal or *Land* level. The CJEU ruled that these provisions did not comply with EU law if they hindered workers from exercising their right of freedom of movement in terms of employment in different Member States, instead of remaining all their lives in the service of the administration of a single Member State.[62] In conclusion, the Court stated that the principle of life-long employment (*Lebenszeitprinzip*), continuity and stability of the civil service may not be an overriding reason of public interest that can justify restricting the freedom of movement of workers. The restriction must be appropriate for meeting that goal and not go beyond what is necessary.[63] In line with this interpretation of EU law, the German Administrative Court (*Bundesverwaltungsgericht*) recently prompted the legislator to adopt appropriate measures, establishing that if a civil servant makes use of the freedom of movement for workers under EU law and therefore resigns from the civil service, he has a right to a supplement to the statutory old-age pension.[64] Until the legislator regulates the amount of the entitlement, this should be determined on the basis of the difference between the value of the pension for the time employed in the civil service and the value of the statutory old-age pension for the time employed outside the civil service.

V. Why Is This Transition Taking Place?

The United Kingdom is deemed to be the cradle of the privatisation process and serves as a reference point with its neoliberal ideas on public management. It is considered a forerunner of public sector substantial reforms.[65]

This may seem paradoxical because civil servants did not traditionally rely on contractual regulation as they depended on the Crown and could be dismissed at any time. It was also accepted that civil servants had no right to strike because they "owed allegiance to the Crown".[66] These conventions were recently relaxed by the Constitutional Reform and Governance Act of 8 April 2010 (CRGA), which removed prerogative powers of the Crown, making it more difficult to talk about special duties of civil servants.[67]

60 See *Civil Service Retirement Pension Regimes* by C. Hauschild in this volume.

61 CJEU, judgment of 13 July 2015, *Joachim Pöpperl v. Land Nordrhein-Westfalen*, C-187/15.

62 CJEU, judgment of 13 July 2015, *Joachim Pöpperl v. Land Nordrhein-Westfalen*, C-187/15, paras. 25–26.

63 CJEU, judgment of 13 July 2015, *Joachim Pöpperl v. Land Nordrhein-Westfalen*, C-187/15, para. 30–31.

64 German Federal Administrative Court, judgment of 4 May 2022, 2 C3.21, para. 19 ff.; Hellfeier and Hendricks (2022), p. 874.

65 Gotschall et al. (2015), p. 108; Bozeman (2007), pp. 68 f.

66 See *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume. Also in France, the "principle of continuity" of the civil service is considered a general legal principle by the case law of the Conseil d'État; see Taillefait (2012), p. 52.

67 Johnson (2003), p. 14; De Becker (2011), p. 951.

The civil service in UK is only a small part of the public workforce, but it was nevertheless a role model for public employment. Far-reaching changes took place under Prime Minister Margaret Thatcher (1979–1990) towards a "managerial, client-oriented, competitive public service".[68] Public service was deemed "overstaffed", inefficient and unresponsive to public needs.[69] In some areas, outright privatisation of services or transfer of functions to the private sector have taken place. The objective of these reforms to civil service structure was to establish entrepreneurial criteria driven by "the whip of customer satisfaction".[70]

Another important development was the delegation of policy implementation to agencies, which were run according to the principles of private businesses.[71] They had significant independence from government in the performance of their duties, including management of their own human resources and budgets. Through the doctrine of NPM, the government sought to promote a more managerial style in public administration. The creation of more than 100 executive agencies, similar to the Swedish agency model, under the "Next Steps Programme" (1988) led to a decentralisation of government tasks and to the introduction of performance management and (individualised) contractualisation of employment.[72]

New Public Management has fostered privatisation of the public sector in many European countries based on a neoliberal understanding of the economy, efficiency considerations, and depoliticisation.[73] Only in France does the public employment system seem to have resisted NPM: entry requirements, recruitment, and pay are still centralised and uniform. Promotion is based on the seniority principle (*ancienneté*). The system is a closed one since the *corps* (job family) allows little horizontal mobility.[74] In Belgium, the civil service regime remains the general rule. Nevertheless "managerialisation" of the civil service with "managerial techniques borrowed from the private sector" has taken place, though a shift in important public-law principles has also been observed since partial privatisation of working conditions.[75]

In Italy, privatisation of the civil service has been based on the NPM doctrine, aiming at more flexible management of the public administration through private law. The civil service is now run more like a private company and the results show improvement over those produced by the cumbersome instruments of public law. In 1993,[76] the legislator made fundamental reforms to ensure normative standardisation of employment relationships in

68 Gotschall et al. (2015), p. 111.

69 Gotschall et al. (2015).

70 See *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume.

71 Gotschall et al. (2015).

72 Gotschall et al. (2015), p. 112. Since 1988, many State tasks have been decentralised to so-called executive agencies. Their introduction was connected with a short Report entitled "Improving Management in Government: the Next Steps" which was submitted to the then Prime Minister Margaret Thatcher in 1988, hence the name *Next Steps Agencies*; see Johnson (2003), p. 11.

73 However, some scholars state that "correlation does not necessarily imply causation" and that a reference to NPM seems "a typical label": see *Do Public Management Concepts Have an Impact on Civil Service Regimes?* by J. Ziller in this volume.

74 Gotschall et al. (2015), p. 132.

75 See *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume.

76 Legislative Decree of 3 February 1993, no. 29, G.U. of 6 February 1993, no. 30 (*Razionalizzazione della organizzazione delle Amministrazioni pubbliche e revisione della disciplina in materia di pubblico impiego, a norma dell'articolo 2 della legge 23 ottobre 1992, n. 421*).

the public service and the private sector.[77] In the wake of this process, only 18% of public employees are now civil servants.[78]

According to the Polish mindset, the individual performance of employees and the collective performance of public bodies are less important than job security. More flexible human resource management seems to be the reason for downsizing the civil service, though many exemptions from the civil service regime are not justified by such circumstances but reflect the idea of intentional downgrading of human resource management standards in government administration.[79]

VI. Are the Two Regimes Converging?

A certain convergence of civil service and private employment regimes is undeniable and is promoted by the egalitarian approach of EU law in different ways, among others through alignment of working conditions in the public and private sectors.[80] However, a formal differentiation is considered in Article 336 TFUE, which distinguishes "officials" and "other servants" in the EU's own administration. This can be attributed to the fact that the EU notes the distinction existing in various Member States but does not actually consider it a criterion for different treatment of the two categories, while contributing with its jurisprudence to convergence of the two.[81]

Likewise, the Council of Europe does not seem to perceive the difference between public-law and labour-law employment.[82] The European Court of Human Rights (ECtHR) makes no distinction between the functions of a State as holder of public power and its responsibilities as an employer. As a consequence, Article 11 of the European Convention of Human Rights (ECHR) on freedom of assembly and association concerns – with few exceptions – the "State as employer", irrespective of whether the relationship is under public or private law.[83] Also, from the perspective of Article 10 ECHR on freedom of expression, the Court emphasised that it applies to civil servants and public employees.[84] When relations are governed by private law, "the State has a positive obligation to protect

77 Albanese (2022), p. 694. The author highlights that the reform introduced in 1993 has undergone several amendments leading to a unified text with a coordinating function: Legislative Decree of 30 March 2001, no. 65, G.U. of 9 May 2001, no. 106 (*Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche*), today the major law concerning the public service.

78 Albanese (2022), p. 695.

79 See *The Civil Service in Poland: A Turbulent Path Towards Professionalism, Merit-Based Recruitment, and Insulation from Politicisation* by D. Sześciło in this volume.

80 See *Transformational Impulses of International Law and Union Law for the Civil Service* by T. Ellerbrok in this volume.

81 Husemann (2020), p. 258.

82 See Council of Europe Recommendation no. R (2000) 10 on codes of conduct for public officials, which refers only to "all public officials" (Article 1, para. 1) without further differentiation of the employment relationship, as highlighted in *Transformational Impulses of International Law and Union Law for the Civil Service* by T. Ellerbrok in this volume.

83 ECtHR (GC), judgment of 12 November 2008, *Demir and Baykara v. Turkey*, 34503/97, para. 151: "As to the practice of European States, the Court reiterates that in the vast majority of them, the right of civil servants to bargain collectively with the authorities has been recognised, subject to various exceptions to exclude certain areas regarded as sensitive or certain categories of civil servants who hold exclusive powers of the State [. . .]." See *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

84 See *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* A. Krzywoń in this volume.

the right to freedom of expression even in the sphere of relations between individuals".[85] However, the ECtHR claimed that civil servants employed under public law may have stronger obligations concerning "a bond of trust and loyalty" and discretion owed to the employer than those under a private-law employment relationship.[86]

Regarding Article 6, paragraph 1 ECHR on the right to a fair trial, "the determination of civil rights and obligation" has often been deemed not applicable to civil servants with public-law status. The ECtHR held that all litigation with civil servants, implying "direct or indirect participation in the exercise of public authority", were not included in the scope of Article 6, paragraph 1 ECHR according to a "functional criterion, based on the nature of the employee's duties and responsibilities".[87] This interpretation was further clarified by the Court in the judgment *Vilho Eskelinen*, where it held that exceptions from the scope of Article 6, paragraph 1 ECHR required express mention of exclusion in legal sources and justification on objective grounds in the State's interest.[88] These decisions show that derogation based on the exercise of public authority are not frequent, the State being increasingly considered a common employer.[89]

In the European Union, according to the jurisprudence of the CJEU, exemptions for civil servants under EU law (Article 45, paragraph 4 TFUE) have a rather narrow scope of application.[90] Already in *Sotgiu v. Deutsche Bundespost* (1974), the CJEU held that this rule should be restricted to the exercise of public functions (public authority).[91] In *Commission v. Belgium*, the CJEU ties application of the national requirement to two basic conditions: "the exercise of powers conferred by public law and the conferment of responsibilities for safeguarding the general interests of the State".[92] This necessarily weakens the link between national sovereignty and the appointment of civil servants, even if internal preference for public-law status cannot be completely abandoned.[93] Thus, only activities particularly close to the State come under the *domaine réservé* of national administration.[94]

An example of the irrelevance of the distinction between the two categories is provided by the *Milkova* judgment, where the CJEU stated that different special protections against

85 ECtHR, judgment of 21 July 2011, *Heinisch v. Germany*, 28274/08, para. 44, recalling ECtHR, judgment of 29 February 2000, *Fuentes Bobo v. Spain*, 39293/98, para. 38.

86 ECtHR, judgment of 15 June 2021, *Melike v. Turkey*, 35786/19, para. 48; ECtHR, decision of 9 January 2018, *Catalan v. Romania,* 13003/04, para. 54.

87 ECtHR (GC), judgment of 8 December 1999, *Pellegrin v. France*, 28541/95, para. 64.

88 ECtHR, judgment of 19 April 2007, *Vilho Eskelinen and others v. Finland*, 63235/00, para. 62. See *The Right to a Fair Trial for Civil Servants and the Importance of the State's Interest in Applying Article 6, para. 1 ECHR* by F. Aperio Bella in this volume.

89 ECtHR, judgment of 17 March 1997, *Neigel v. France*, 18725/91, paras. 43 ff.; De Becker (2011), pp. 961 f.

90 See *ex multis* CJEU, judgment of 3 June 1986, *Commission of the European Communities v. French Republic,* C-307/84, para. 27; CJEU, judgment of 3 July 1986, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, C-66/85, para. 26; CJEU, judgment of 2 July 1996, *Commission of the European Communities v. Kingdom of Belgium*, C-173/94, para. 2; CJEU, judgment of 2 July 1996, *Commission of the European Communities v. Hellenic Republic*, C-290/94, para. 32; CJEU, judgment of 15 January 1998, *Kalliope Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg*, C-15/96, para. 13.

91 CJEU, judgment of 12 February 1974, *Sotgiu v. Deutsche Bundespost*, C-152/73, para. 4.

92 CJEU, judgment of 17 September 1980, *Commission of the European Communities v. Kingdom of Belgium. – Free movement of workers*, C-149/79, para. 21; see also CJEU, judgment of 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española v. Administración del Estado*, C-405-01, paras. 59 ff.

93 De Becker (2011) pp. 956 f.

94 Kämmerer (2001), p. 33.

dismissal for disabled people employed in a civil service relationship in Bulgaria (i.e. the necessary approval of the Labour Inspectorate in the first and not in the second case) may conform with Union law.[95] In this context the framework directive 2000/78/EG for equal treatment in employment and occupation was deemed irrelevant, since the unequal treatment was not linked to disability (an aspect covered by the directive), but the nature of the employment relationship. However, the general principle of equality under Union law may have been violated.[96]

Privatisation of the civil service has also been induced by withdrawal of the public sector (institutional privatisation), i.e. by the fact that public-law tasks are increasingly performed by private-law entities, which leads to privatisation of the labour relationship. European law promoted the liberalisation and privatisation of public services like the postal service, telecommunications and rail transport, after which civil servants in a formal sense can no longer be hired.[97] These organisations, notably the railways (i.e. train drivers) and the postal service, employed many civil servants. The transition to a private law regime can of course take several decades.[98]

In conclusion, national civil-service systems show considerable path dependency and are greatly affected by national traditions, as shown by the German "traditional principles of the professional civil service" in Article 33, paragraph 5 BL. They are influenced by EU developments but are not all converging.[99]

VII. Professionalised Top Management Functions in the Public Administration

The top management of the public administration can be considered the link between the political representatives and the bureaucratic apparatus and is of strategic importance in the context of civil service privatisation. Even in "closed" civil service systems, where personnel is recruited for life and organised according to a "career mechanism", specific rules were introduced in the wake of NPM for top management of the public administration, recruited for a limited time from the civil service or private sector.[100] In various countries,

95 CJEU, judgment of 9 March 2017, *Petya Milkova*, C-406/15, para. 33.

96 Jakobs (2018), p. 269; Husemann (2020), p. 258. Accordingly, in a recent judgment (Federal Administrative Court, judgment of 7 July 2022, 2 A 4.21, guiding principle), the German Federal Administrative Court (*Bundesverwaltungsgericht*) stated that pursuant to § 168 of the Ninth Book of the Social Code (*Neuntes Buch Sozialgesetzbuch – SGB IX*), of 30 December 2016, BGBl. I p. 3234, the integration office did not have to be involved in the retirement of severely disabled civil servants due to incapacity to work. The Court first argued that domestic law does not require approval of the Integration Office prior to retirement of a lifetime civil servant due to invalidity. Secondly, the Court stated that the protection established by the procedure for retiring lifetime civil servants is not inferior to the provisions concerning employees (§§ 168 et seq. SGB IX). In the case of employees, approval of the integration office was required in order to provide a prior state review of the right of dismissal by the private employer, and was meant to compensate the lower competitiveness of severely disabled people on the private labour market. This aspect was not deemed relevant by the Court in the case of retirement of a lifetime civil servant due to invalidity.

97 See *Transformational Impulses of International Law and Union Law for the Civil Service* by T. Ellerbrok in this volume.

98 See *Civil Service Retirement Pension Regimes* by C. Hauschild in this volume.

99 See *Civil Service Adaptation and Reform in the Context of European Governance, (De-) Europeanisation and National Competition* by C. Demmke in this volume.

100 See *The Civil Service in Belgium Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume; Perry (2021), p. 8.

the emergence of fixed-term contracts and weak protection against political pressure can be observed at higher levels of the public administration, as in the case of the *haute fonction publique* in France, the *rapporti fiduciari* in Italy, the "special advisers – SPADs" in UK and the *politische Beamte* in Germany. This shows that even in closed career-based systems, positions near the government are typically assigned to external managers, and more flexible agreements are permitted in exchange for political appointments and greater political control over the employment relationship.[101] Top management positions in the public administration seem open to external influence and recruitment of civil servants seems to take place without a formal selection process. Various management positions are open to executives from the private sector, who can be dismissed if they do not achieve their objectives.[102]

Against this backdrop, employment relations become increasingly similar to those of other areas of the public service and the private sector.[103] In countries like Italy, this development has entailed an expansion of the areas of responsibility of managers and a major distinction between political leadership and administrative management tasks.[104] Some managerial positions qualified as "acts of high administration", normally excluded from penetrating review by administrative judges, are therefore assigned on the basis of personal confidence.[105]

On the other hand, the trend of employing temporary civil servants, usually with relatively short-term contracts, leads to their politicisation, calling into question the traditional neutrality of civil servants and often leaving room for turnover typical of the so-called spoils system. For top positions, this trend is also widespread in countries with a career-based system (like Belgium and Germany) and entails position-based employment, while other civil servants generally maintain their position after a change of government.[106] Here the challenge is to provide specific regulation to establish merit-based Human Resources (HR) systems (that consider personal skills, efficiency gains, performance appraisal, as well as assessment- and performance-related pay rather than political patronage) and to prevent arbitrary political interference in matters of public administration in order to promote meritocracy and a well-functioning public sector.[107]

VIII. In Which Areas of the Public Administration Are Civil Servants Mostly Employed?

The aforementioned differences between countries having an established civil service tradition, where civil service is associated with job stability and social prestige (but also with bureaucracy and privileges) and countries where civil servants are a much narrower category, makes it particularly difficult to evaluate data and figures relating to the public sector, as the lack of uniformity in the scope of the civil service in the various countries makes

101 See *The Civil Service in Hungary: Differentiation and Privatisation Trends* by P. Lancos in this volume; Moore (1995), pp. 20 f.; Bozeman (2007), pp. 68 f.; Bryson et al. (2015), pp. 19 f.

102 Hugrée et al. (2015), p. 55.

103 Johnson (2003), p. 13.

104 Albanese (2022), p. 695.

105 See more extensively Cassatella and Fraenkel-Haeberle (2022), p. 792.

106 Thijs et al. (2018), pp. 24 f.

107 Thijs et al. (2018), p. 27.

comparisons difficult. Public-law status is now questioned in general, as well as its link to the exercise of public authority.[108]

In some countries, like Italy, civil service and public employment are distinguished by sector; in other countries, the distinction between civil servants and employees is not necessarily related to their function. In certain fields (not in the "core civil service" *Randbereichsbeamte,* e.g. teaching), German public employees and civil servants with the same tasks work together in the same organisations and perform comparable activities.[109] To avoid discrimination in the case of similar functions, the rules for these mixed worker categories are gradually being standardised and made to converge. Thus the main question is whether public servants who do public tasks should be distinguished from employees whose tasks are like those of the private sector.[110]

As a general rule, the trend in favour of contractual employment is also felt in the administrations of central government departments, where the public-law regime is more common, but it is felt particularly at regional and local level.[111] For example in Austria, civil servants predominate with respect to contractual employees in the federal administration (50% calculated on the basis of full-time equivalents), for the important reason that in some professional groups, such as Ministry administrations, the armed forces and the judiciary (judges and public prosecutors), there is no alternative to civil service in a formal sense.[112]

Instead the low number of civil servants in Great Britain is not only due to the mentioned wave of privatisation under the Thatcher government, but also to the fact that the British civil service only includes "Crown servants" (i.e. civil servants of the central government) excluding executive agencies, local government, police, school and National Health Service employees, which in France are all considered *fonction publique*.[113] There is also a terminological idiosyncrasy in Irish law, where "civil service" is usually associated with "State officials", whereas "public servants" also include local authority employees.[114]

Concerning the areas in which civil servants operate, consensus only exists on the need for a special regime for judges, who even have protected status in Sweden.[115] Because the principle of equality is a cornerstone of the Swedish model, harmonisation of working conditions between the public and private sectors has been promoted by trade unions

108 De Becker (2011), p. 982.

109 See *Civil Service Adaptation and Reform in the Context of European Governance, (De-) Europeanisation and National Competition* by C. Demmke in this volume. This word is used inter alia in Federal Constitutional Court, judgment of 12 June 2018, – 2 BvR 1738/12 – 2 BvR 1395/13 – 2 BvR 1068/14 – 2 BvR 646/15, para. 68. In France but not Italy, teachers are civil servants.

110 De Becker (2011), p. 951.

111 As described in *The Civil Service in Transition – The Ongoing Transformation of Administrative Culture* by A. Ritz and K. S. Weißmüller and in *The Civil Service in Poland: A Turbulent Path Towards Professionalism, Merit-Based Recruitment, and Insulation from Politicisation* by D. Sześciło in this volume.

112 See *Das Personal des Bundes 2023, Daten und Fakten*, p. 70. Available online at *Das Personal des Bundes 2023 – Daten und Fakten*. The Austrian Federal Civil Service 2023 – facts and figures (oeffentlicherdienst.gv.at).

113 Ziller (2006), p. 235.

114 Ziller (2006), p. 245.

115 See *The Civil Service in Sweden: Duality and Non-Specific Status of Civil Servants* by P. Herzfeld Olsson and E. Sjödin in this volume, according to which special status for university professors was abolished in the late 1990s. Officers of the Swedish Armed Forces also had special status that was abolished in 1994, when the Swedish armed forces were reorganised into one agency.

since the 1960s through introduction of collective bargaining instead of unilateral determination of working conditions for central government employees.[116] The civil service was originally inspired by a career-based system. After reforms starting in the 1960s, it was largely harmonised with private sector employment through application of general labour law. Except for a few positions (judges), there is no lifelong employment guarantee for Swedish government employees, and almost the same labour-law rules are applied in the public and private sectors.[117]

In France, judges are civil servants in a formal sense, unlike in Germany.[118] Soldiers also often have special status, but for example in France they are not civil servants.[119] In Poland, university professors, public healthcare staff, judicial administrative and government staff, and even soldiers are excluded from the civil-service regime.[120] Also in the Netherlands, narrow categories of public servants, such as judges, members of the army and some political functions, are linked to the exercise of public authority.[121]

Although we lack a Europe-wide definition of civil service and associated professional categories, some general patterns are still evident. In this context, Support for Improvement in Government and Management (SIGMA) has selected the following groups of institutions to form the core of the civil service: ministries, customs administration, tax administration, foreign service, other bodies reporting directly to the government, parliamentary administration, the president and prime minister, regulatory authorities, and the ombudsman.[122] In a comparative approach, these categories of workers are deemed to be predominantly civil servants in a narrow sense.

IX. Conclusions

According to E. Schmidt-Aßmann, "Europeanization" is a process of "progressive influencing, transformation and reshaping of a legal area by the provisions of European law and by the legal thinking that can be derived from it".[123] It is not a unilateral transformation of the national law of the Member States, but rather the result of cross fertilisation with reciprocal and multiple effects on national legal systems. In the civil service, path-dependence on national traditions is particularly noticeable.

As already mentioned, Europeanisation of the public service is influenced by the principle of freedom of movement of workers (again limited by the State requirement under Article 45, paragraph 4 TFEU) by application of EU directives to civil servants and public employees, and by privatisation and liberalisation of public services and infrastructure.[124] Separation of the concepts of civil service and public employment is becoming increasingly

116 Gotschall et al. (2015), p. 145.
117 Gotschall et al. (2015), p. 141.
118 See more extensively Demmke and Moilanen (2010), p. 69.
119 Demmke and Moilanen (2010), p. 73.
120 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment, and Insulation from Politicisation* by D. Sześciło in this volume.
121 De Becker (2011), p. 983.
122 See OECD-SIGMA (www.sigmaweb.org), *Methodological Framework of the Principles of Public Administration*, 2019, p. 68, www.sigmaweb.org/publications/Methodological-Framework-for-the-Principles-of-Public-Administration-May-2019.pdf.
123 Schmidt-Aßmann (1993), p. 513.
124 See *EU Non-Discrimination Law and its Potential Impact on the Civil Service of the Member States* by J. Mulder in this volume.

difficult due to alignment of working conditions, unclear definitions of civil service and public tasks and the shift from public law to labour law.[125]

This contribution has shown that there is often no direct connection between the change in the content of the regulation affecting the employment relationship and the public or private character of this regulation. Due to the lack of clear comparative and universally applicable legal criteria for distinguishing civil servants from other workers, it makes little sense to focus on their legal status, since legal consequences are attached to it in fewer and fewer European countries. Nevertheless, experts of the OECD-SIGMA programme highlighted in their report that "in principle, all positions involved in the exercise of public authority and safeguarding the interest of the State should be held by public/civil servants".[126] Thus the question at stake is whether the civil service should be limited to sensitive areas of State sovereignty, according to the predominant interpretation of Article 45, paragraph 4 TFUE, or to the notion of "members of the armed forces, police or the administration of the State", as foreseen by Article 11, paragraph 2 ECHR.

Conversely, in each category of employee, the extent to which bipartition of civil servants and public employees is justified could be checked. Privatisation is a big game-changer for the public administration. Compared to the private sector, the State has often been considered inefficient and inflexible. It has been a common opinion that public services are better provided by private companies in a spirit of competition than by State monopolies.[127] Under this assumption, privatisation ensures the same quality of goods and services at a lower cost or higher quality at the same cost.[128] While NPM has shown the need to reform "dusty" old-fashioned civil service jobs and to focus on the public interest through a managerial approach, classical bureaucratic countries with an established civil service tradition, such as Belgium, France, and Germany, where the cultural mindset is legalistic, remain disinclined to implement fully-fledged privatisation. They justify this orientation on the grounds that civil servants are committed to a particular ethos, based on loyalty and trust.[129] On the other hand, the hiring of personnel under private law contract and its effects on working conditions and salary developments, linked to budgetary constraints, should not irremediably damage the attractiveness of civil service employment relationships. Civil servants should be entitled to social status, in line with the "principle of selecting the best" (*Prinzip der Bestenauslese*), a fundamental value not only of the German civil service.

Bibliography

Albanese A. (2022), 'Der öffentliche Dienst in Italien: Vom öffentlichen Recht zum Sonderarbeitsrecht', 17 *Die Öffentliche Verwaltung*, 693–701.

Auby J.-B. (2021), 'Public/Private', in Cane P., Hofmann H., Ip E.C., Lindseth P.L. (eds), *The Oxford Handbook of Comparative Administrative Law*, Oxford: Oxford University Press, 467–480.

Badré M., Verdier Naves N. (2017), 'L'évolution de la fonction publique et des principes qui la régissent', *Avis du Conseil économique, social et environnemental, Journal Officiel de la République francaise, Mandature* 2015–2020.

Battis U. (2022), *Bundesbeamtengesetz (BBG), Kommentar*, München: C.H. Beck.

125 See more extensively Demmke and Moilanen (2010), p. 69.

126 See OECD-SIGMA, *Methodological Framework of the Principles of Public Administration*, 2019, p. 68.

127 Hodgson (2021), p. 38.

128 Hodgson (2021), p. 38.

129 Demmke (2016), p. 218.

Bekker S., Mailand M. (2017), 'The European Flexicurity Concept and the Dutch and Danish Flexicurity Models: How Have They Managed the Great Recession', 53(1) *Social Policy & Administration*, 142–155.

Bozeman B. (2007), *Public Values and Public Interests – Counterbalancing Economic Individualism*, Washington, DC: Georgetown University Press.

Bryson J.M., Crosby B.C., Bloomberg L. (2015), *Public Value and Public Administration*, Washington, DC: Georgetown University Press.

Bull H.P. (2004), 'Das öffentliche Dienstrecht in der Diskussion', 4 *Die Öffentliche Verwaltung*, 155–162.

Cassatella A., Fraenkel-Haeberle C. (2022), 'La selezione del personale amministrativo: un raffronto tra Italia e Germania', 3 *Rivista Trimestrale di Diritto Pubblico*, 765–802.

De Becker A. (2011), 'The Legal Status of Public Employees or Public Servants: Comparing the Regulatory Frameworks in the United Kingdom, France, Belgium and the Netherlands', 32(4) *Comparative Labour Law & Policy Journal*, 949–989.

Demmke C. (2016), *Doing Better with Less? The Future of the Government Workforce – Politics of Public HRM Reforms in 32 Countries*, Frankfurt am Main: Peter Lang.

Demmke C., Moilanen T. (2010), *Civil Services in the EU of 27*, Frankfurt am Main: Peter Lang.

Gotschall K., Kittel B., Briken K., Heuer J.-O., Hils S., Streb S., Tepe M. (2015), *Public Sector Employment Regime*, Hampshire: Palgrave Macmillan.

Hellfeier M., Hendricks S. (2022), 'Wegweisend – Das Urteil zur Beamtenversorgung bei Wechsel in das EU-Ausland', 11 *Forschung & Lehre*, 874–875.

Hennecke F. (2021), 'Privatisierung eine streitbare Überlegung', 4 *Zeitschrift für Rechtspolitik*, 130–132.

Hodgson L.-P. (2021), 'Privatization, Efficiency, and the Distribution of Economic Power', in Dorfman A., Harel A. (eds), *Cambridge Handbook of Privatization*, Cambridge: Cambridge University Press, 38–51.

Hugrée C., Penissat E., Spire A. (2015), 'Differences between Public and Private Sector Employees Following the Managerial Turn in European States', 56(1) *Revue française de sociologie*, 39–63.

Husemann T. (2020), 'Die Bedeutung des europäischen Diskriminierungsrechts für deutsche Beamte', 5 *Recht der Arbeit*, 257–316.

Jacobs M. (2018), 'Aktuelle Entwicklungen im deutschen und europäischen Antidiskriminierungsrecht', 5 *Recht der Arbeit*, 263–270.

Jarass H., Pieroth B. (2022), *Grundgesetz für die Republik Deutschland*, 17th edition, München: C.H. Beck.

Johnson N. (2003), 'Der öffentliche Dienst in Großbritannien: ein Prozess der stetigen Anpassung', in Bull H.-P. (ed), *Die Zukunft des öffentlichen Dienstes – öffentlicher Dienst der Zukunft*, Düsseldorf: Report, 5–30.

Jung J. (1971), *Die Zweispurigkeit des öffentlichen Dienstes*, Berlin: Duncker & Humblot.

Kämmerer J.A. (2001), 'Europäisierung des öffentlichen Dienstes', 1 *Europarecht*, 28–48.

Krzywoń A. (2022), *The Notion of Civil Service in Europe: Establishing an Analytical Framework for Comparative Study*, FÖV Discussion Paper, 1–47. https://dopus.uni-speyer.de/frontdoor/deliver/index/docId/5606/file/DP-091.pdf.

Moore M.H. (1995), *Creating Public Value – Strategic Management in Government*, Cambridge, MA: Harvard University Press.

Niedobitek M. (1994), 'Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft', in Magiera S., Siedentopf H. (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot, 11–66.

OECD (1997), *Measuring Public Employment in OECD Countries: Sources, Methods and Results*, Paris: OECD.

Perry J.L. (2021), *Managing Organization to Sustain Passion for Public Service*, Cambridge: Cambridge University Press.

Schmidt-Aßmann E. (1993), 'Zur Europäisierung des allgemeinen Verwaltungsrechts', in Badura P. (ed), *Wege und Verfahren des Verfassungslebens (Festschrift für Peter Lerche zum 65. Geburtstag)*, München: C.H. Beck, 513–527.

Schwarz M. (2021), 'Beamtenstatus und EU-Recht', 22 *Neue Zeitschrift für Verwaltungsrecht* 1662–1668.

Taillefait A. (2012), ‘Constitution et Fonction Publique’, 37(4) *Le Nouveaux Cahiers du Conseil constitutionnel*, 49–64.

Thijs N., Hammerschmid G., Palaric E. (2018), ‘A Comparative Overview of Public Administration Characteristics and Performance in EU28’, *Report for the European Commission, Directorate-General for Employment*, Social Affairs and Inclusion.

Van der Meer F.M., Raadschelder J.C.M., Toonen T.A.J. (eds) (2015), *Comparative Civil Service Systems in the 21st Century*, 2nd edition, Basingstoke, Hampshire: Palgrave Macmillan.

Ziller J. (2006), ‘Das öffentliche Dienstrecht aus der Perspektive der vergleichenden Verwaltungswissenschaft’, 6 *Die Öffentliche Verwaltung*, 233–241.

22 The Particular Status of the Civil Service

Catherine Haguenau-Moizard

I. Introduction

Public officials or civil servants in the broad sense generally have a particular status, consisting of rights and duties. Civil service vocabulary may be misleading.[1] The phrase may be used in a broad sense to encompass all public officials or in a narrow sense to designate those in a statutory position as opposed to those under contract. To avoid confusion, here we use the terms "public officials", typical of Council of Europe institutions and "civil service in the broad sense" as equivalents. We use "civil service in the narrow sense" when referring to civil servants in a statutory position and "contractual employees" for those under contract. All public officials, irrespective of their legal position (civil servants in the narrow sense and contractual employees), have a number of rights. Most such rights do not differ from those of employees under Labour law. Those that do are usually considered privileges with respect to the rights of private-law employees. The main privilege applies to civil servants recruited for life. Another privilege is legal protection in specific circumstances. These privileges are readily explained by the special functions of civil servants and the special link of public officials with the administration. Nevertheless, they tend to be criticised because they seem unfair to those who do not have them and because the State wants to have more flexibility and fewer financial ties. Many governments have reformed the civil service in recent years with such ideas in mind. As a result, contractual employment has developed in many countries. The scope of the civil service in the narrow sense tends to shrink, except in Germany, where the Basic Law imposes that some functions must be fulfilled by civil servants.

All public officials must also fulfil common duties. Civil servants in the narrow sense, and sometimes only those in the highest positions, are subject to specific duties. We distinguish the different categories when necessary.

It is not possible to detail all European national legal systems. For reasons of time, space and language, we draw examples from British, French, German, Italian, and Polish law. We also refer to European law stemming from the Council of Europe or the European Union. We first contemplate the reasons why the civil service in the broad sense (including contractual employees) has particular status (Section II). We then outline the rights of

1 See Krzywoń (2022) and *Defining the Civil Service: Towards a Better Understanding of the Nature of Civil Service Systems in Europe* by A. Krzywoń in this volume.

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public officials (Section III) and analyse their three main obligations: loyalty (Section IV), neutrality (Section V), and impartiality (Section VI).

II. The Reasons for Particular Status of the Civil Service

The civil service in the broad sense was created to fulfil a number of State functions in the interest of the public at large. It plays an essential role in sustaining democratic institutions and the rule of law. Public officials are therefore in a special relationship with national, regional, and local public authorities, with whom they have a special bond of trust. They are also supposed to have the confidence of the population. This is even more so for civil servants in the narrow sense. This places public officials under specific duties, although they remain citizens of democratic States, and their rights should not be forgotten, even if they may be adapted. Public officials therefore have a dual nature: they are instruments of the State but at the same time individuals holding rights enshrined in international, European and national laws.

The Council of Europe has highlighted the dual nature and the particularities of the civil service through soft-law instruments and the case law of the European Court of Human Rights (ECtHR). As far as soft law is concerned, the Parliamentary Assembly of the Council of Europe was very active in the late 1990s. It issued recommendations to the Committee of Ministers asking for harmonisation of the law applied to the public service.[2] It even requested the drafting of a "European Public Service Charter" (in 1996) or a "European Civil Service Code" (in 1997). The Committee of Ministers did not go so far, but issued a recommendation in February 2000 insisting on the importance of public administration in democratic societies and acknowledging the dual nature of public officials who "have specific duties and obligations due to the fact that they serve the State but above all are citizens and in so far as possible should have the same rights as other citizens".[3] The Committee of Ministers then made a list of basic "principles of good practice" which constitute minimum standards and should guide Member States when drafting or applying their own legislation on the civil service in the broad sense. Those principles cover all aspects of the law applicable to public officials, from recruitment to termination of employment. Concerning their rights, the Committee of Ministers explained that as a rule, public officials should enjoy the same rights as other citizens but that those rights may be accommodated to their specific duties as members of the civil service (point 8 of the recommendation). Concerning their duties, the Committee of Ministers acknowledged that "inherent obligations" are part of the law applicable to public officials because they exercise public functions and should devote themselves to those functions (point 13 of the recommendation). It added a non-restrictive list of those obligations: "respect for the rule of law, loyalty to democratic institutions, discretion, neutrality, impartiality, hierarchical subordination and respect for the public and accountability" and "restrictions to

2 Parliamentary Assembly Recommendation 1303 (1996) on the proposal for a second summit of Heads of State and Government of the Council of Europe and Parliamentary Assembly Recommendation 1322 (1997) on civil service in an enlarged Europe, both available on the PACE website: www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15337&lang=en and https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15356&lang=en.

3 Recommendation no. R (2000) 6 of the Committee of Ministers to Member States on the status of public officials in Europe of 24 February 2000, https://rm.coe.int/native/09000016804c3142.

other activities in order to avoid conflicts of interest". Though a recommendation of the Committee of Ministers has no legally binding effect, it may inspire national authorities. Above all, it reflects a consensus among the governments of the Member States of the Council of Europe on the civil service in general and the rights and duties of public officials in particular.

The ECtHR has also developed minimum standards applicable to public officials and insisted on their dual nature. Contrary to the recommendations of the Committee of Ministers, its decisions are binding. A number of provisions of the European Convention on Human Rights (ECHR) have been applied to public officials, in particular procedural rights (Article 6),[4] the right of respect for private and family life (Article 8),[5] freedom of religion (Article 9),[6] freedom of expression (Article 10),[7] and freedom of assembly and association (Article 11).[8] Since its very first decisions on public officials, the Court has emphasised that the Convention should be interpreted in a manner that takes their specific duties into account.[9]

For the Committee of Ministers and for the ECtHR, public officials cannot be considered ordinary citizens. Their positions mirror those of national authorities. As we see next, national rules on the rights and duties of public officials are underpinned by the particularities of their position towards public authorities and the public at large.

III. The Rights of Public Officials

There are many similarities in national laws on the rights of public officials. Under German law, those rights derive from constitutional principles, the "alimentation principle" (*Alimentationsprinzip*) and the "duty of care" (*Fürsorgepflicht*). In the other countries, there is no general theory about the rights of public officials. They have rights because they are employed by public authorities. The rights of public officials mirror the duties of the State as employer and sometimes these duties are similar to those of employers under labour law, though most of the time they are different.

Public officials have rights concerning their salaries and pensions, which are not entirely different from those of employees in the private sector (Subsection III.1). They also have a right to legal protection (Subsection III.2). A specific group of public officials, civil servants in the narrow sense, are entitled to life employment but their privileges are shrinking (Subsection III.3) because most public authorities prefer to recruit employees by contract.

4 Sudre (2023), p. 365; Leloup (2023), pp. 23–57. Since the ECtHR (GC), judgment of 19 April 2007, *Vilho Eskelinen and Others v. Finland*, 63235/00, which expressly overturned the previous case law, Article 6 ECHR is in principle applied to civil servants and the exceptions are very limited. See also *The Right to a Fair Trial for Civil Servants and the Importance of the State's Interest in Applying Article 6, para. 1 ECHR* by F. Aperio Bella in this volume.

5 ECtHR, judgment of 26 March 1987, *Leander v. Sweden*, 9248/81. See also *The Protection of Privacy in Civil Service Employment* by M. Otto in this volume.

6 See *Freedom of Religion or Belief in the Civil Service: How to Stay Loyal to the State While Remaining Loyal to Oneself* by W. Brzozowski in this volume.

7 See Sudre (2023), p. 365. See also *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

8 See *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

9 ECtHR, judgment 8 April 1976, *Engel and Others v. the Netherlands*, 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 54, about members of the armed forces; ECtHR, judgment of 26 September 1995, *Vogt v. Germany*, 17851/91, para. 53 about civil servants in general and para. 60 about teachers.

1. Financial Rights of Public Officials

Public officials must be paid for their work and are entitled to a pension on retirement.[10] The right to wages is enshrined in the legislation applicable to public officials. Trade unions play a variable role in determining wages. This role is more important in countries like Denmark and Sweden, where the wage-setting mechanisms are aligned with the private sector and wages for all public officials are determined by collective agreement.[11] It is less important in countries like France or the United Kingdom (UK) where informal discussions with trade unions may take place but the government retains its power to determine the wages of all public officials (France) or civil servants in the narrow sense (UK).

In France, the wages of civil servants in the narrow sense are determined unilaterally by the public authority – though there may be discussions beforehand with the trade unions – and are not personalised. They are calculated by a point system (*point d'indice*). A number of points is attributed to each position in the civil service. The value of the point is determined by the government. The wages are calculated by multiplying the number of points by the value of the point. An easy way to reduce public expenses is to freeze the value of the point. The value was frozen for several years until the government decided on an increase of 3.5% in July 2022 to cover inflation. Bonuses may also be awarded to civil servants. Some bonuses are granted automatically, and some depend on the discretionary power of the head of the department. Many bonuses have been created over the years. It is difficult to discover who is entitled to a bonus and under what circumstances. In any case, the bonuses are not part of wages and are not considered when calculating the retirement pension. The statutory system of points does not apply to contractual employees. The public authority may decide wages comparatively freely in that respect, if it does not violate certain legislative principles. Under the Transformation of the Civil Service Act of 2019,[12] wages of employees must be determined in accordance with their functions, qualifications, and experience.

Since 1946, public officials have been entitled to a pension upon retirement. The rules on pensions in the public and private sectors are based on inter-generational solidarity. The basic pension of public officials is financed by contributions paid by those in office ("repartition"), though since 2003 public officials also receive a compulsory occupational supplement based on their own contributions over the years ("capitalisation"). The French rules on pensions have been modified several times. A controversial new reform was passed in 2023 after a hefty debate in Parliament and many demonstrations.[13] According to the government, the reform was to raise money to finance the health sector and unify the rules. It applies to public officials and private-sector employees. Since 2010, the minimum

10 See *The Basic Principles of Civil Servants' Remuneration: A Legal and Human Resource Management Analysis from a European Perspective* by V. Franca and A. Arzenšek and Civil Service Retirement Pension Regimes by C. Hauschild in this volume.

11 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme and *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfeld Olsson and E. Sjödin in this volume.

12 Law no. 2019–828 on the transformation of the civil service of 6 August 2019 (*Loi n° 2019–828 du 6 août 2019 de transformation de la fonction publique*), JORF of 7 August 2019; www.legifrance.gouv.fr/jorf/id/JORFTEXT000038889182.

13 Law no. 2023–270 amending financing of social security for 2023 of 14 April 2023 (*Loi n° 2023–270 du 14 avril 2023 de financement rectificative de la sécurité sociale pour 2023*), JORF of 15 April 2023; www.legifrance.gouv.fr/jorf/id/JORFTEXT000047445077.

retirement age has been 62 years unless specific rules apply. Since 2014, to obtain a full-rate pension, a minimum contribution period of 42 years was required, with a number of exceptions. Below the minimum age and contribution period, it is not possible to obtain a full pension. Under the new legislation, the minimum age will gradually be raised to 64 in 2030, and the contribution period will be increased to 43 years in 2027. The minimum age will be even lower, though higher than it used to be, for public officials exposed to special risks or with particularly onerous functions. They are qualified as "active" (59 instead of 57) or "super active" (54 instead of 52) and defined by statutory instruments. For example, nurses working in public hospitals are considered active and police officers super active.[14] All public officials will be entitled to a full pension at 67 years, even if they have not worked for 43 years, and can work until 70 years of age.

In the UK, pay scales are determined by each department at national level. Pay freezes (officially named "pay pauses") are decided from time to time (in 2010 for all civil servants, in 2020 for those paid 24,000 GBP a year or more). Bonuses may also be granted by heads of departments according to civil servant performance. They are meant as rewards. They are not part of the wages and are not taken into account in pension contributions. On retirement, public officials are also entitled to a pension, based on the contributions of those currently in office. Since 2012, the retirement age has been 67 and may be raised to 68.

In Germany, the right to wages is derived from the constitutional alimentation principle, which means that the State must care for the public officials and ensure their living standard, whatever their status (whether civil servants in the narrow sense or employees). As a result, wages are not subject to ordinary contract law but to legislation for civil servants in the narrow sense and to collective agreements for employees.[15] Under the case law of the Federal Constitutional Court, wages must be adapted to various circumstances, for example, rank, responsibilities and the overall economic situation. The right to a pension is also derived from the alimentation principle. As a consequence of this principle, civil servants in the narrow sense have a supplementary privilege, compared with other countries. They are exempt from contributing to pension schemes, although they are entitled to a pension on retirement.

In Italy, reform of the civil service and its contractualisation have affected the financial rights of public officials.[16] Wages are usually governed by ordinary Labour law and are determined by negotiations leading to collective agreements. The pension system was reformed at the same time as the civil service and pursued the same main objective: to reduce public expenses (so-called *Amato* Act n° 503/1992, *Dini* Act n° 335/1995, *Prodi* Act n° 449/1997, *Monti* Act n° 214/2011). The retirement age is 67, and employees may join a voluntary and supplementary scheme.

In Poland, various acts of Parliament decide the wage-setting mechanisms for different categories of public officials, but they are always determined by government regulations

14 Under a statutory instrument implementing the new Act: Decree 2023–436 concerning the implementation of Articles 10 and 11 of Law No. 2023–270 of 14 April 2023 on the supplementary financing of social security for 2023 of 3 June 2023 (*Décret n° 2023–436 du 3 juin 2023 portant application des Articles 10 et 11 de la loi n° 2023–270 du 14 avril 2023 de financement rectificative de la sécurité sociale pour 2023*), JORF of 4 June 2023; www.legifrance.gouv.fr/jorf/id/JORFTEXT000047625782; see the working document published by the Orientation Council on retirement: Conseil d'orientation des retraites, *Les catégories actives de la fonction publique: définition et historique* of 23 March 2023, www.cor-retraites.fr/sites/default/files/2023-03/Doc_15_SG_Catégories%20actives_fonction%20publique.pdf.

15 See *The Public Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume.

16 See *Civil Service in Italy: AFlood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

based on statutory law.[17] The statutory requirements are less comprehensive for contractual employees at national, regional or local levels than for civil servants in the narrow sense. The latter category is becoming less numerous. Although under Article 153, paragraph 1, of the constitution, government administration functions should be exercised by civil servants in the narrow sense, the government tends to recruit contractual employees even for those functions.[18] When determining wages, qualifications, experience, and the specific department of employment are important. According to the Organisation for Economic Co-operation and Development (OECD), the autonomy of each ministerial department as regards human resources seems particularly wide compared with that of other OECD countries.[19] Bonuses may be added to the basic salary. Some are based on seniority. The pension system was reformed in 1999 to unify the rules applied in the public and private sectors. The pension system of the civil service was seen as privileged. The basic pension is financed by social security contributions which are integrated by a voluntary scheme established in 2019 to cover more workers in the private and public sector. In 2017, the retirement age was lowered to 65 for men and 60 for women. This difference constitutes direct discrimination based on age and is prohibited by EU law.[20]

As the rules on the financial rights of civil servants and the cost of living differ from country to country, it is difficult to make reliable comparisons or determine whether they are financially privileged. International data shows that most OECD countries reduced overall financing of the civil service in the 1990s and highlights differences in *per capita* income but does not provide additional information.[21]

2. The Right to Legal Protection

In many countries, public officials have privileges when subject to abusive claims or other offences by third parties. By virtue of their specific functions, they are entitled to support from their employers, and this has no equivalent in ordinary Labour law. They serve the State and are granted its protection when abused on the grounds of their functions.

In its case law on freedom of expression (Article 10 ECHR), the ECtHR has confirmed that public officials should be protected and that they are not in quite the same position as politicians, who must accept wider criticism. As the ECtHR has repeatedly decided,

> civil servants [in the broad sense] must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.[22]

17 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

18 *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

19 OECD (2013).

20 Under the constant case law of the CJEU on the principle of equal pay for equal work (Article 157 Treaty on the Functioning of the European Union, TFUE, ex Article 119). On the applicability of this principle to pensions of civil servants in the narrow sense: CJUE, judgment of 28 September 1994, *Beune*, C-7/93; CJUE, judgment of 29 November 2001, *Griesmar*, C-366/99. On different retirement ages for Polish judges: CJEU, judgment 5 November 2019, *Commission v. Poland*, C-192/18.

21 World Bank (1997).

22 ECtHR, judgment 21 September 1999, *Janowski v. Poland*, 25716/94, para. 33; ECtHR, judgment 21 December 2004, *Busuioc v. Moldova*, 61513/00, para. 60.

In France, all public officials are entitled to so-called functional protection (*protection fonctionnelle*) if subject to verbal or physical abuse in office (Article L134-1 General Civil Service Code, CGFP).[23] This protection may take various forms. The authority may publicly support the agent, order an internal inquiry, help financially if the agent goes before a court and award damages. The administration may choose among these forms of protection, provided it puts an end to the abuse. Agents are not entitled to functional protection if they have violated the law. The right to legal protection ends when a court has decided in favour of the agent. It does not include a right to be supported in the higher courts.[24]

In Germany, the administration owes a general duty of care (*Fürsorgepflicht*) to civil servants in the narrow sense (§ 78 of the Federal Civil Service Act for civil servants at the federal level[25] and § 45 of the Law governing the Status of Civil Servants in the *Länder*).[26] This is considered a consequence of civil servants' duty of loyalty. There is no such thing as a specific right to functional protection as in France, but its elements can nevertheless be found as part of the general duty of care. The duty of care entails the right of civil servants to be taken care of financially, to have a safe working place and the right to be protected against abuse. If a civil servant is criticised publicly and violently, the administration must defend his/her honour with an official statement (*Ehrenserklärung*). Under its duty of care, the administration must also provide an allowance to cover the costs of legal defence for civil servants sued because of their function. According to the Federal Administrative Court (*Bundesverwaltungsgericht,* BVerwGE), this allowance may be subject to conditions but is not limited to complex cases.[27]

In the UK, there do not seem to be general rules on the matter. To protect freedom of speech, public bodies are not allowed to sue for defamation.[28] They may financially support an agent who does, but there appears to be no general right to financial support.

3. *The Shrinking Privileges of Civil Servants*

Civil servants in the narrow sense enjoy a special relationship with the authorities they are recruited to serve and require stability to perform their duties. As a result, they are employed for life. Civil servants may not be dismissed, except in very limited circumstances, such as being found guilty of a gross breach of their duties. From a legal point of view, this rule reinforces the link between civil servants and the State. As they do not risk being fired, nor should fear of dismissal affect their duties.

From a sociological point of view, civil servants are often seen as a privileged group that should not voice any complaints or ask for pay raises. Statistically speaking, the proportion of civil servants among public officials has been decreasing steadily over the years, except

23 General Civil Service Code of 1 March 2022 (*Code général de la fonction publique*); www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000044416551/2022-03-01.

24 Conseil d'Etat, Ass. 14 February 1975, *Teitgen*, 87730.

25 Federal Civil Service Act of 5 February 2009 (*Bundesbeamtengesetz*, BBG), last amended by law of 17 July 2023 (BGBl. 2023 I No. 190); www.gesetze-im-internet.de/bbg_2009/.

26 Law governing the Status of Civil Servants in the Länder – Civil Servants Status Act of 17 June 2008 (*Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern; Beamtenstatusgesetz – BeamtStG*; BGBl. 2008 I, p. 1010), last amended by Act of 28 June 2021 (BGBl. 2021 I, p. 2250); www.gesetze-im-internet.de/beamtstg/BJNR101000008.html.

27 BVerwGE, 3 December 2013, 2 B 65.12.

28 House of Lords, *Derbyshire County Council v. Times Newspapers* (1993), 1 All ER 1011.

in Germany. Under Article 33, paragraph 4 of the German Basic Law, the "exercise of sovereign authority" is reserved for civil servants. Public authorities cannot choose entirely freely between recruiting a civil servant or an employee. They must recruit civil servants in the judiciary, the armed forces, the police and ministerial departments. In some areas, such as education, the choice between the two categories of public officials seems more open. The two categories may perform the same kinds of functions and work together; regional authorities (*Länder*) tend to recruit employees for financial reasons rather than for reasons of principle based on Article 33, paragraph 4.[29]

A similar provision is enshrined in the Polish constitution, where Article 153, paragraph 1 provides that "a corps of civil servants shall operate in the organs of government administration" but as we have seen, they nevertheless tend to be replaced by contractual employees (see Subsection III.1). In other countries, there is no such rule and public authorities have a choice.

Since the 1980s, reforms of the civil service (in the broad sense) have spread across Europe for financial and political reasons. In many countries, the public authorities wanted to cut spending and modernise the civil service. Reforms have often been qualified as forms of "new public management".[30] Public authorities have been required to copy private businesses, which is deemed more efficient. Public services were first privatised in the UK and then in Italy and France. Privatisation may take different forms, for example, contracting out to private companies or introducing new management methods. As regards the status of the agents, privatisation has meant that civil servants (in the narrow sense) are increasingly seen as a burden for the State and are replaced by contractual employees. Since the scope of the civil service (in the narrow sense) has been reduced, the specific rights and privileges of civil servants apply to fewer and fewer people.

When Margaret Thatcher became Prime Minister, the civil service had already been widely criticised. The Fulton report commissioned by Labour Prime Minister Harold Wilson concluded in 1968 that the civil service was oversized and inefficient and should be reformed.[31] The Thatcher government reduced the number of civil servants in the UK to reduce State intervention and costs simultaneously. Subsequent governments, Conservative and Labour, continued this same policy. There were 571,000 civil servants in 1977, 475,000 in 1999, and 511,000 at the end of 2022.[32]

In Italy, civil servant status has been steadily reduced since 1993. Since Legislative Decree 29/1993, public employment has been subject to private-law contracts, except for categories such as judges and prosecutors, members of the armed forces, diplomats, and university professors. This has reduced the number of civil servants. Only 15% of the three million public officials are civil servants.[33]

In France, public employment is also increasingly subject to contract law, albeit much less than in Italy. In 2020, there were 5.7 million public officials in France: 67% were

29 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume.

30 On the ambiguity of "new public management", see *Do Public Management Concepts Have an Impact on Civil Service Regimes?* by J. Ziller in this volume.

31 The Fulton Report of 1968; www.civilservant.org.uk/csr-fulton_report-findings.html.

32 See www.Civilservant.org.uk/information-numbers.html and *The Civil Service UK Style: Facing up to Change?* by Peter Leyland in this volume.

33 See *Italie, Donnees Generales*, www.fonction-publique.gouv.fr. For further figures and developments about the numerous reforms, see *Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

civil servants. The number of civil servants had decreased by 0.6%, while the number of employees had risen by 6.3%.[34] These figures include the three areas of public employment: State, local authorities, and hospitals. Contracts for the recruitment of public employees are not ordinary labour law contracts but administrative law contracts, which often run for a limited period and are renewed. Renewals are forbidden beyond 6 years. In order to keep people working in the public sector, the 2012 Act on Access to the Civil Service enabled a number of employees to become civil servants after six years as employees:[35] 19,000 employees benefited from this possibility, which existed from 2013 to 2020. The 2019 Act on transformation of the civil service lifted the limitation on recruitment by contract in most circumstances. Contractual agents are usually paid less than civil servants and are not recruited for life. Contracts make recruiting more flexible, less expensive, and raise concerns about the independence of the agents.[36]

IV. The Duty of Loyalty

The duty of loyalty stems from the function of public officials. They are recruited to serve the public at large and must be faithful to those they serve. The ECtHR has often insisted on the duty of loyalty and the duty of discretion imposed on public officials, which may justify specific restrictions to their freedom of expression (Article 10 ECHR) or association (Article 11) or to their right to a private life (Article 8). As the Court explained in the *Vogt* case: "A democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded."[37] The duty of loyalty is especially important and may be stricter in States like Germany and Hungary that wanted to break with their totalitarian past.[38] But it is by no means limited to those States. It is "an inherent condition of employment with State authorities responsible for protecting and securing the general interest" because, unlike employees in the private sector, they are "depositaries of the sovereign power vested in the State".[39] The public authorities must be able to trust the people they employ and to ascertain that they always bear the general interest in mind. The public needs to trust public officials and to believe that their political opinions will not affect their functions.[40]

The duty of loyalty may be reinforced for holders of special powers such as higher civil servants (in the broad sense), members of the armed forces, police officers, intelligence

34 See www.insee.fr/fr/statistiques/6215551. See also *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

35 Law no. 2021–347 concerning access to permanent employment and the improvement of contractual agents in the public service, the fight against discrimination and various provisions related to the civil service, known as the "Sauvadet Law" of 12 March 2012 (*Loi n° 2021–347, 12.3.2012, relative à l'accès à l'emploi titulaire et à l'amélioration des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique, known as "loi Sauvadet"*), JORF of 13 March 2012, www.legifrance.gouv.fr/loda/id/JORFTEXT000025489865.

36 Aubin et al. (2021), pp. 175–209.

37 ECtHR (GC), *Vogt v. Germany* (n. 9), para. 59. See Sudre et al. (2022), n° 59.

38 About Germany: ECtHR (GC), *Vogt v. Germany* (n. 9) and the cases on the ban on strike quoted in Section IV.3. About Hungary, see ECtHR (GC), judgment 20 May 1999, *Rekvényi v. Hungary*, 25390/94, para. 43.

39 ECtHR, judgment 27 July 2004, *Sidabras and Džiautas v. Lithuania*, 55480/00 and 59330/00, para. 57.

40 About civil servants advising politicians at local level, see ECtHR, judgment of 2 September 1998, *Ahmed and Others v. the United Kingdom*, 65/1997/849/1056, para. 53. About police officers, see ECtHR, *Rekvényi v. Hungary* (n. 38), para. 41.

officers, and judges. As the ECtHR has often repeated, a "special bond of trust and loyalty" is required from civil servants who take part directly "in the exercise of State power".[41] Members of the armed forces must observe military discipline, which has no equivalent for civilians. This may justify specific procedural rules[42] or restrictions to their freedom of association.[43] Police officers have special powers and a "crucial role" in democratic societies; the public needs to be able to trust in their neutrality.[44] The authority and impartiality of the judiciary must be protected and this may justify specific restrictions to the freedom of expression of judges,[45] although being independent, judges owe their duty of loyalty "to the rule of law and democracy and not to holders of State power".[46]

Despite this common background, the legal foundation and general meaning of the duty of loyalty (Subsection IV.1) are not exactly the same in every country. A specific duty of loyalty is imposed on higher civil servants (Subsection IV.2) but tends to be understood as loyalty to the politicians of the time. In some countries, civil servants are forbidden from striking by virtue of their duty of loyalty (Subsection IV.3).

1. The Foundation and Meaning of the Duty of Loyalty

The duty of loyalty may be based on the constitution (Germany, Italy), legislation (Italy), case law (France), or a mere code of conduct (UK). In Germany, the duty of loyalty is enshrined in the Basic Law. Article 33, paragraph 4 provides that the "exercise of State authority" is reserved for "members of the public service who have a status of service and loyalty under public law". In Italy, the duty of loyalty is derived from Article 98 of the constitution ("Civil servants are exclusively at the service of the nation"). In Poland, public officials must observe their statutory duty of loyalty (Article 76, paragraph 1 of the Law on Civil Service of 2008).[47]

Oddly enough, the duty of loyalty is not codified in France but is based on case law. The Council of State (*Conseil d'Etat*) insists that civil servants (in the broad sense) must be loyal to the institutions.[48] The duty of loyalty is derived from the more general duty of dignity. Public officials must act in a dignified manner in all circumstances (Article L 121–1 CGFP). This may be why loyalty is not included in the relevant laws.

In the UK, the code of conduct drafted by the Civil Service Commission refers to civil servants' duty of loyalty.[49] It is the first general principle of conduct listed in the code.

In Poland and Germany, civil servants must be loyal to the Constitution, in Italy, to the Nation, in the UK, to the Crown, and in France, to the Republic. The wording does not necessarily make a difference to the content of the duty of loyalty, but from a historical and

41 E.g. ECtHR (GC), *Vilho Eskelinen and Others v. Finland* (n. 4), para. 47 and the case law quoted *supra* footnotes n. 37 to 40.

42 ECtHR, *Engel and Others v. the Netherlands* (n. 9), para. 57 ff.

43 ECtHR, judgment of 2 October 2014, *Matelly v. France*, 10609/10, para. 55 ff.

44 ECtHR, *Rekvényi v. Hungary* (n. 38).

45 ECtHR, judgment of 28 October 1999, *Wille v. Lichtenstein*, 28396/95, para. 64.

46 ECtHR, judgment of 9 March 2021, *Bilgen v. Turkey*, 1571/07, para.79; ECtHR, judgment of 29 June 2021, *Broda and Bojara v. Poland*, 26691/18 and 27367/18, para. 120; ECtHR (GC), judgment of 15 March 2022, *Grzęda v. Poland*, 43572/18, para. 264.

47 Law on Civil Service of 21 November 2008 (*Ustawa o służbie cywilnej*), Dziennik Ustaw 2008, 227, 1505; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20082271505/U/D20081505Lj.pdf.

48 *Conseil d'Etat*, 11 January 1935, *Bouzanquet*, 40842.

49 The Civil Service code; www.gov.uk/government/publications/civil-service-code/the-civil-service-code.

symbolic point of view, it shows that national civil services have been built around various values, attached to the Constitution, Nation, Crown, or Republic, closely linked to the historical development of the State.

The duty of loyalty may be shaped by an oath. All German, Italian and Polish civil servants must take an oath. In France and the UK, the oath is only compulsory for a few categories of civil servants, for example judges.

The duty of loyalty means that public officials must behave in a dignified manner in and out of office. Not only do they dedicate part of their time to an employer, but they also serve the State, even outside working hours. The duty of loyalty must be observed at all times. This may restrict their right to a private life. In France, it is expressed by the duty of discretion (*devoir de reserve*), derived from the duty of dignity and loyalty. All public officials must dress and behave in an appropriate manner. For example, a police officer was sanctioned after leaving a nightclub in a drunken state and taking part in a fight.[50]

In Germany, the Federal Civil Service Act (*Bundesbeamtengesetz*) provides that civil servants behave "with the attention and trust commanded by their profession" in and out of office (§ 61 (1)).[51] This provision was violated, for example, by a civil servant who was standing for mayor in his hometown, despite the fact that he had been on sick leave for two years.[52] The Federal Administrative Court insisted on the contradiction between the duration of sick leave and standing for election. Civil servants must also show their loyalty in their appearance, which must reflect the "trust placed in their office" (§ 61 (2)). Until recently, tattoos were prohibited by the German legislation. In May 2022, at the request of a police chief, the Federal Constitutional Court judged that the prohibition infringed the right of personal autonomy and physical integrity under Article 2 of the Basic Law.[53] The law was changed, and tattoos are no longer prohibited, unless they prove inconsistent with function (§ 61 (2) of the Federal Civil Service Act).

2. The Specific Duty of Loyalty for Higher Civil Servants

The duty of loyalty is even stronger for higher civil servants in managerial positions. They must be loyal to the government and/or to the minister they work for. Their recruitment and end-of-office differ from those of the rest of the civil service. They are chosen for their political opinions and are often replaced when the majority changes. In their case, loyalty becomes loyalism,[54] which paves the way to politicisation. Durkheim's ideal of apolitical civil servants, identified only by their functions, seems somewhat outdated as far as higher civil servants are concerned.

Politicisation does not seem to be an issue in Germany, though differences should probably be made between civil servants in central government and at regional or local level.

At the other end of the spectrum, politicisation seems strong in Poland. It has never completely disappeared since 1989 but is definitely stronger since the victory of the Law and Justice Party (PiS) in the general elections of 2015. The PiS majority put an end to the attempt to depoliticise the higher civil service and adopted very flexible rules on its

50 *Conseil d'Etat*, Section, 1 February 2006, *M. Henri-Jacques X*, 271676.
51 Federal Civil Service Act (n. 25).
52 BVerwGE, 27 June 2013, 2 A 2.12.
53 BVerfGE, 18 May 2022, 2 BvR 1667/20.
54 Dord (2021), pp. 228 f.

recruitment. The Civil Service Act was amended by the law of 30 December 2015 that abolished proceedings for open competitive recruitment in the higher civil service, resulting in instability and politicisation.[55]

In Italy, reforms passed in 1993, 1998, and 2002 created a kind of spoils system. Like most public officials, higher civil servants are no longer protected by status. They are recruited by contract and their position is rather insecure.[56]

In France, heads of ministerial departments, prefects, and ambassadors have always been freely chosen by the government (*à la discrétion du gouvernement*). They are appointed by the government and may be changed at any time, although few higher civil servants have been replaced after general elections. Changes have occurred since the mid-1980s, when the management methods of the private sector were introduced under the heading of "new public management". These changes have accelerated since President Macron was elected in 2017. President Macron wanted to introduce more competition in the higher civil service. Before the 2019 Act on Transformation of the Civil Service, half the managerial functions in ministerial departments were reserved for civil servants in a narrow sense. Since then, they are all open to contractual agents. The number of managers has also been reduced. A government order of June 2021 further modified the higher civil service.[57] The order of 2021 has created a new category of the higher civil service, called "State administrators" (*administrateurs de l'Etat*), that merges most of the existing categories (including the finance, social, and general administrative inspectorates, prefects, and most diplomats, who used to have separate status). State administrators are not to be managed by ministerial departments but by the Prime Minister,[58] although the Council of State and the National Audit Office (*Cour des Comptes*) maintain their separate status. President Macron explained that the reform was necessary to build a modern civil service, enable higher civil servants to move swiftly from one function to another, and avoid lifetime positions.[59] Others fear that the higher civil service will lose its autonomy with respect to the government and that it will become more political and less qualified.[60]

The order of 2021 also replaced the *Ecole Nationale d'Administration publique* (ENA) with the *Institut National du Service Public* (INSP) on 1 January 2022. Not a mere name change, the rules of appointment were changed by the government order of January 2023 so that those who have just finished training in the INSP do not begin their career in Paris

55 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicization* by D. Sześciło in this volume and Wójcicka (2018), pp. 111–128.

56 Melis (2014), pp. 681–696.

57 Ordinance 2021–702 relating to the reform of the senior management of the state civil service of 2 June 2021 (*Ordonnance n°2021-702 portant réforme de l'encadrement supérieur de la fonction publique de l'Etat*), JORF of 3 June 2021; www.legifrance.gouv.fr/jorf/id/JORFTEXT000043590607. It is a piece of delegated legislation, based on Section 38 of the constitution and has the value of an Act of Parliament.

58 Ordinance 2021–702 (n. 57) and Articles 1 to 4 and Decree 2021–1550 establishing the specific status of the State's administrative body of the 1 December 2021 (*Décret n° 2021–1550 portant statut particulier du corps des administrateurs de l'Etat*), JORF of 2 December 2021; www.legifrance.gouv.fr/jorf/id/JORFTEXT000044394397.

59 Speech before the "State managerial convention", 8 April 2021, www.elysee.fr/emmanuel-macron/2021/04/08/intervention-du-president-de-la-republique-emmanuel-macron-a-loccasion-de-la-convention-manageriale-de-letat.

60 De Montecler (2021), pp. 1116 f.

in the highest positions.[61] Most are appointed as "State administrators". In the long run, most higher civil servants will be trained at least partly together: despite their statutory independence, judges will thus be trained with other higher civil servants in the INSP instead of the *Ecole Nationale de la Magistrature* (ENM) created in 1945.

In the UK, the civil service has a long-standing tradition of political neutrality which has been noticed by the ECtHR.[62] Controversies broke out when a Prime minister attempted to politicise the higher civil service. A recent example was Liz Truss, who, when she became Prime Minister in September 2022, dismissed the permanent Secretary for the Treasury, who had been a civil servant for 30 years and served many governments. She was adamant that "treasury orthodoxy" should give way to a major tax cut.[63] She also wanted to dismiss the cabinet secretary but changed her mind when politicians and former top civil servants protested.

3. Loyalty and the Ban on Strikes

As a rule, French, British, and Italian civil servants are allowed to strike. A ban on strikes applies to specific categories of civil servants, such as members of the armed forces and police officers. To ensure continuous service, notice of a strike must be given a few days in advance and minimum service must be organised. In France, these rules apply for air safety, public broadcasting, and schools. The new CGFP (adopted in 2021; in force since 1 March 2022) provides that agreements on the continuity of service may be concluded in various areas, such as public transport and public nurseries. In Italy, Act 146 of 1990,[64] extended in 2000, states that advanced notice and minimum service apply in "essential public services" such as health, transport, and social assistance. In the UK, since the Thatcher government, the right to strike of all workers, public and private, has been subject to strict conditions, including organisation of a secret ballot requiring at least a 50% turnout (Trade Union Act 2016). In July 2022, the ban on hiring replacement workers through agencies was repealed (Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022). These rules also apply to public officials.

In Germany, all civil servants in the narrow sense are banned from striking.[65] The ban stems from the duty of loyalty. In Germany, the ban was first decided after the 1922 railway strike under the Weimar Republic. It has since been maintained and is considered a traditional and fundamental principle of the civil service.[66] Nevertheless, the ban on strikes gave rise to a judicial controversy. In 2009, the ECtHR ruled that Turkey had violated Article 11 of the Convention (freedom of assembly and association, which includes the

61 Articles 23 to 35 of the Decree 2023–30 regarding access conditions and training at the National Institute of Public Service of 25 January 2023 (*Décret n°2023–30 relatif aux conditions d'accès et aux formations à l'Institut National du Service Public*), JORF of 26 January 2023; www.legifrance.gouv.fr/jorf/id/JORFTEXT000047055171.

62 ECtHR, *Ahmed and Others v. The United Kingdom* (n. 40), para. 53.

63 Quoted by J. Elgot, *The Guardian* of 11 September 2022.

64 **Law** on the exercise of the right to strike in essential public services and the safeguarding of constitutionally protected individual rights. Establishment of the Guarantee Commission for the implementation of the law of 12 June 1990, no. 146 (*Norme sull'esercizio del diritto di sciopero nei servizi pubblici essenziali e sulla salvaguardia dei diritti della persona costituzionalmente tutelati. Istituzione della Commissione di garanzia dell'attuazione della legge*), Gazzetta Ufficiale of 14 June 1990, no. 137.

65 See *The Right to Strike in the Civil Service* by G. Buchholtz in this volume.

66 BVerfGE, 12 June 2018, 2 BvR 1738/12, para. 117 ff.

right of trade unions to launch collective actions) because of the ban on strikes imposed on all public officials.[67] As a result, in 2014 the Federal Administrative Court ruled that the German legislation was not compatible with the Convention and should be modified, opening the way for enactment of different rules for different categories of civil servants.[68] In 2018, the Federal Constitutional Court made a contrary decision,[69] explaining that the Administrative Court had not contextualised the decision of the ECtHR, that Turkish law applied to all public officials, whereas German law only prohibited strikes by civil servants in the narrow sense, that no distinction should be made between civil servants and that the German law was perfectly compatible with the Convention. The ECtHR had to decide between these opposing interpretations. On the whole, the ECtHR confirmed the position of the Federal Constitutional Court.[70] In a sixteen-to-one decision, the Grand Chamber dismissed the claim of four teachers. Although the ban on strike, being absolute, is a "severe" (para. 123) restriction imposed on civil servants, it is part of the German democratic tradition and is justified by the "overall objective of good administration" (para. 136). It does not preclude civil servants from exercising their collective or individual rights by other means. They may defend their occupational interests by joining trade unions, which are consulted by the authorities whenever they want to change the legislation on civil servants. They are also protected by the "alimentation principle", which may be enforced in court. As a result, the ECtHR found that Germany had not exceeded its margin of appreciation.

In Poland, the situation is complex because the rules governing the civil service stem from a variety of Acts of Parliament, each governing a very specific category of public officials. On the whole, some civil servants are not allowed to strike, in particular those belonging to the Civil Service Corps, a body of civil servants attached to the central government (Article 78, paragraph 3 of the Law on Civil Service of 2008).[71] Most public officials recruited by contract are allowed to strike, as are some civil servants in the narrow sense, including teachers.

V. The Duty of Neutrality

Public officials do not serve a political party. They must serve the State in every circumstance, observing political (Subsection V.1) and religious neutrality (Subsection V.2).

1. Political Neutrality

The duty of political neutrality is quite developed in ECtHR case law and is a specific duty that may be imposed on public officials. The Court has repeatedly admitted that national laws might compel public officials to observe political neutrality in order to maintain the trust of public employers and the public at large in the civil service.[72] National legislations

67 ECtHR, judgment of 21 April 2009, *Yapi-Yol Sen v. Turkey*, 689569/01.

68 BVerwGE, 27 December 2014, 149,117 (163 ff.).

69 BVerfGE, 12 June 2018, 2 BvR 1738/12.

70 ECtHR (GC), judgment of 14 December 2023, *Humpert and Others v. Germany*, 59433/18, 59477/18, 59481/18 and 59494/18.

71 Law on Civil Service (n. 47).

72 E.g. ECtHR, *Ahmed and Others v. The United Kingdom* (n. 40), para. 53; ECtHR, *Rekvényi v. Hungary* (n. 38), para. 41.

impose a duty of political neutrality on all public officials, though the extent of that duty varies from country to country.

In the UK, the legislation is comparatively recent despite the long-standing tradition of political neutrality of the British civil service. Under the Constitutional Reform and Governance Act 2010, Section 7(2): “The code must require civil servants who serve an administration mentioned in subsection (3) to carry out their duties for the assistance of the administration as it is duly constituted for the time being, whatever its political complexion.” In Germany, § 60 (1) of the Federal Civil Service Act provides that “civil servants serve the people as a whole and not a party”. The neutrality of the main body of Polish civil servants (the Civil Service Corps) derives from two provisions of the Law on Civil Service of 2008.[73] Under Article 78 paragraph 2, “Civil Service Corps members shall not be allowed to manifest their political beliefs publicly”, and under Article 78 paragraph 5, they “are not allowed to establish or participate in political parties”. In France, public officials have a general duty of neutrality, which includes political neutrality. Under Article L-121-2 CGFP, “when in office, the agent is under a duty of neutrality”.

The extent of the duty of political neutrality may vary from one country to another, and within a country among various categories of public officials. Civil servants in the narrow sense cannot be elected to Parliament in any of the five countries considered here. They may not work to implement Acts of Parliament and vote for them. Public officials under contract are not subject to this prohibition.

Civil servants may be elected to local councils in France and Germany, also in the UK except for politically restricted posts, such as chief officers. It is prohibited in Poland, where moreover certain civil servants (Civil Service Corps, armed forces, judges) are not allowed to join political parties. The Constitutional Tribunal ruled that this prohibition does not infringe the constitution, being warranted by the “principles of citizens’ trust in the State, the protection of State security and public order and the protection of the rights of third parties”.[74]

Public officials may usually join trade unions. According to the long-standing case law of the ECtHR, Article 11 of the ECHR on freedom of assembly and association, which includes the right to join or not join a trade union, applies to public officials.[75] Article 11, paragraph 2 allows “lawful restrictions on the exercise of these rights by members of the armed forces, the police or the administration of the State”. Beyond the police and armed forces, which are expressly mentioned, Article 11, paragraph 2 ECHR may also apply to public officials under a stronger duty of loyalty because of their functions, such as judges, prosecutors, diplomats, and tax officials.[76] The ECtHR is careful not to allow blanket bans on the right to join a trade union while admitting that the freedom of expression of public officials under a stronger duty of loyalty may be reduced. They may be forbidden from opposing decisions made by politicians.[77]

Under the national legislation of the five countries here studied, public officials may as a rule join trade unions, except for senior members of the civil service corps in Poland.

73 Law on Civil Service (n. 47).

74 Polish Constitutional Tribunal, 10 April 2002, K 26/00, available in English: https://trybunal.gov.pl/en/case-list/judicial-decisions/art/5938-statutory-prohibitions-of-political-party-membership.

75 ECtHR, *Engel and Others v. the Netherlands* (n. 9), and the cases mentioned in *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

76 ECtHR, *Engel and Others v. the Netherlands* (n. 9).

77 ECtHR, *Engel and Others v. the Netherlands* (n. 9).

Members of the armed forces are usually subject to specific rules. In a decision against France, the ECtHR judged that a State could restrict the activities of trade unions in the armed forces but could not simply prohibit trade unions.[78] As a result, the French legislation was changed. National associations of members of the armed forces may be created but members are not allowed to join other trade unions (Article L4121-4 of the Defence Code, as modified in 2015). Ten national associations were then set up. In France, members of the armed forces are either in the army or members of the military police (*gendarmerie*).

In Italy, members of the armed forces were banned from joining or establishing trade unions until a ruling of the Constitutional Court in 2018.[79] Since then, many military unions have been created. After long and difficult discussions, a new Act on Union Rights in the armed forces was enacted on 28 April 2022 (Act no. 46/2022). It applies to soldiers and members of the military police (*Carabinieri* and *Guardia di Finanza*). As in France, military trade unions may be established, and members of the armed forces are not allowed to join other trade unions. In Germany, members of the armed forces may join a trade union, more or less like other civil servants. The main specialised trade union, the *Deutsche BundeswehrVerband* (DBwV), has approximately 200,000 members.

In the UK, the regulations applying to members of the armed forces are stricter. They are allowed to "become members of civilian trade unions and professional associations in order to enhance their trade skills and professional knowledge and as an aid to resettlement into civilian life". They are banned from joining industrial disputes or other political activities organised by trade unions (Section 5.082 of the Queen's Regulations for the Army of 1975). A national association, the British Armed Forces Federation, was set up in 2006 to represent all members of the armed forces. On its internet site, it stresses that it is not a trade union because attempts to adopt legislation setting up an official body representing the armed forces have so far failed.

A blanket ban on joining trade unions still applies to members of the armed forces in Poland. The Constitutional Tribunal decided the ban was not contrary to the constitution as long as there were alternatives for exercising the right of freedom of association.[80] The legislation was changed in 2003 to authorise representative bodies of members of the armed forces.

The duty of political neutrality also entails a limitation to public officials' freedom of expression. They are usually banned from expressing political preferences in office and sometimes also out of office. In France, public officials are not allowed to criticise French and foreign politicians outside of office on a personal blog. Such a behaviour is deemed incompatible with their functions.[81] In the UK, the Civil Service code does not allow civil servants to manifest agreement or disagreement with government members, or to let their political preferences affect their advice as officials.

Higher civil servants are in a particular situation. Since they are chosen for their political affiliation, they must not only avoid criticising the government publicly but also actively support its policies. Although no European country has officially created a spoils system

78 ECtHR, *Matelly v. France* (n. 43).

79 Italian Constitutional Court, judgment of 13 June 2018, 120, available in English www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_120_EN.pdf.

80 Polish Constitutional Tribunal, 7 March 2000, untranslated, quoted in OSCE (2008), p. 70.

81 *Conseil d'Etat*, 23 April 2009, *Guigue*, 316862.

as in the United States, there is a growing tendency for the governments to politicise the higher civil service and build a type of spoils system.

2. Religious Neutrality

Religious neutrality means first that discrimination on the grounds of religion is forbidden in the administration. This may also entail restrictions to public officials' religious freedom. When interpreting Article 9 ECHR on freedom of religion, the ECtHR tends to leave a wide margin of appreciation to Member States of the Council of Europe because of the diversity of national conceptions.[82] In decisions about women wearing Islamic headscarves, it is accepted that public officials may be banned from wearing a religious symbol at work.[83] The reasoning is similar to that on political neutrality: public officials represent the State and may therefore be prevented from manifesting their religion in the interest of a neutral public service.[84]

Restrictions on public officials' religious freedom are particularly broad in France because religious neutrality is part of the constitutional principle of secularity, which is construed broadly. Under Article L121-2 CGFP, public agents "must respect the principle of secularity when fulfilling their function. In particular, they must not express their religious beliefs". This provision implements the constitutional principle of secularity (Section 1 of the constitution). The Republic was forged through protracted conflict with the Catholic Church. The principle of secularity has been part of the constitution since 1946, and those who serve the Republic are expected to embody it. Public officials are forbidden from wearing religious signs in office, for example, in schools.[85] The ban applies to public officials and all employees who contribute directly to public service, even if they are ruled by private law.[86] Because of their function, they are considered equivalent to public officials. Public officials must not exploit their function for proselytism. A public agent may be sanctioned for using his office mailing list to send information about his church.[87] France also has a tradition of controversies regarding secularism. In recent years, there has been much debate on the scope of the principle of secularity. The Council of State had to stress that the principle applied only to public officials, not to anyone dealing in one way or another with a public service. Parents who help teachers during school outings are not subject to the principle of secularity.[88] The scope of the principle of secularity is nevertheless widening. The Supreme Court recently made a decision that seems to extend its scope without mentioning it expressly. Lawyers may not wear a religious sign with their gown because

82 See *Freedom of Religion or Belief in the Public Service: How to Stay Loyal to the State while Remaining True to Oneself* by W. Brzozowski in this volume.

83 ECtHR, judgment of 15 February 2001, *Dahlab v. Switzerland*, 42392/98 about a primary schoolteacher; ECtHR, judgment of 24 January 2006, *Kurtulmuş v. Turkey*, 65500/01 about an associate professor in a University; ECtHR, judgment of 26 November 2015, *Ebrahimian v. France*, 64846/11 about a social worker under a contract in a hospital.

84 ECtHR, *Ebrahimian v. France* (n. 83), para. 57 and *Freedom of Religion or Belief in the Civil Service: How to Stay Loyal to the State While Remaining Loyal to Oneself* by W. Brzozowski in this volume.

85 *Conseil d'Etat*, Avis of 3 May 2000, *Dlle Marteaux*, 217017.

86 *Cour de cassation*, Chambre sociale, 19 March 2013, *Mme X v. CPAM de Seine St Denis*, 12–11.690 about an employee in a social security fund.

87 *Conseil d'Etat*, 15 October 2003, *O.*, 244428.

88 *Conseil d'Etat*, Avis of 23 December 2013, not published.

they are part of the judicial public service and must show their independence.[89] Although they contribute to the functioning of the justice system, they are freelancers, not public officials. A recent Act of Parliament also extended the scope of the principle of secularity. In 2021, Parliament adopted new legislation called the "Act Supporting the Observance of Republican Principles", known as the "Separatism Act" because its aim was to fight "Islamic separatism".[90] Under section 1 of the Act, the "principle of secularity and neutrality of the public service" must be observed not only by employees who contribute directly to public services, regardless of their status (as the Supreme Court had already decided) but also by the parties to public procurement contracts entirely or partly dealing with the provision of public services. The party to the contract must ensure that its employees observe the principle of secularity and neutrality of the public service when they contribute even partially to the provision of public services (section 1 II of the 2021 Act). This applies not only to the main party to the contract but also to subcontractors. The new rule leads to intricate distinctions between employees of the same company. The Department for the Economy has published guidelines explaining the new legislation.[91] They show that fine distinctions must be made. Some employees are considered to participate in public service even if they only have support functions, such as hospital cleaners and security employees, whereas other support functions, such as human resources, are not concerned. The principle must also be applied when signing a public procurement contract. Offers to subcontractors must observe the principle without discriminating against religious groups. The new Act not only makes the legislation on public procurement more complex but also extends the scope of the principle of secularity beyond public officials.

In other countries, the religious freedom of public officials is sometimes restricted because of their specific functions. Some public officials may be required to remain neutral. In Germany, the Federal Constitutional Court has judged that legal trainees (*Rechtsreferendaren*) must remain neutral and can be forbidden from wearing religious signs in courtrooms because they represent the State.[92] The situation of public officials working in schools is different. A general prohibition on religious signs in schools is contrary to the Basic Law.[93] In the UK, lawyers may wear religious signs in court.

VI. The Duty of Impartiality

1. The Foundation and Meaning of the Duty of Impartiality

Public officials must not serve specific interests, either their own, or those of members of their families or lobbies. These rules are set out in civil service legislation. They may derive from the general duty of loyalty, as in Germany, or be expressly envisaged. In France,

89 *Cour de cassation*, First Civil Chamber, 2 March 2022, *Mme Asmeta et M. Ziatt*, D 20–20.185.

90 Law 2021–1109 strengthening the respect for the principles of the Republic of 24 August 2021 (*Loi n°2021-1109 confortant le respect des principes de la République*), JORF of 25 August 2021; www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778.

91 *Fiche technique, Mise en oeuvre de l'Article 1er de la Loi n° 2021–1109 du 24 août 2021 prévoyant l'insertion de clauses relatives à l'égalité devant le service public, au respect de la laïcité et de la neutralité, dans les contrats de la commande publique ayant pour objet l'exécution d'un service public, Ministère des Finances, de l'Economie et de la Souveraineté industrielle et numérique*, 4 July 2022.

92 BVerfGE, 14 February 2020, 2 BvR 1333/17.

93 BVerfGE, 27 January 2015, 1 BvR 471/10.

Article L121-1 of the General Code of the Civil Service refers to the duty of impartiality of public agents. In the UK and Italy, the codes of conduct impose a specific duty of impartiality on British civil servants and Italian public officials. The same duty is imposed on members of the Polish Civil Service Corps, although the formulation is different. Under Article 78, paragraph 1 of the Civil Service Act, "Civil Service Corps members cannot be guided in executing their duties by their particular or any group interests", which means they must be impartial.

If public officials do not observe the duty of impartiality, they face disciplinary proceedings. Administrative decisions made in breach of the duty of impartiality may be quashed. Accordingly, the French Council of State quashed the decision to transfer an agent of the National Archives to another department after her husband criticised the director of the Archives.[94]

2. Rules on Conflict of Interest

Rules about financial conflict of interest have been adopted in every country. Public officials must not use their function to obtain extra money from private businesses, to favour relatives or to go from the public to the private sector, where they use their connections in the administration. Some rules apply while civil servants are in office, others when a civil servant joins a private business. The rules are many and varied and can be found in legislation and/or codes of conduct. In the interests of unity, the Committee of Ministers of the Council of Europe issued a recommendation on codes of conduct for public officials.[95]

Problems with the implementation of those rules often arise. Although the legislation covers most situations, the prevention of conflict of interest is not solely a legal matter but requires a political and administrative culture, which does not seem as widespread as it should be. Moreover, many citizens appear to be less tolerant than they used to be as regards conflict of interest.

In France, a chapter of the CGFP deals with the prevention of conflict of interest and regroups the relevant legislative provisions (Articles L122-1 to L122-25). Public agents have a duty to report any risk of conflict of interest to their superiors. Senior public officials must make a declaration of interests before their appointment. They must also make a financial declaration. An independent agency, the High Authority for the Transparency of Public Functions (HATVP) was created in 2013, and its powers were increased in 2019. It decides whether a public agent may be employed in the private sector and whether he/she may subsequently be reintegrated into the civil service. Ethics officers have been appointed in all State and local administration departments. They may be consulted about conflict of interest. The rules do not prevent senior civil servants to enter the private sector and later return to the public sector. Oddly enough, senior civil servants of the Finance Department go to work for businesses they used to supervise, and vice versa.[96] Such movements are seldom prevented by the competent authorities or condemned by the courts.[97]

94 Conseil d'Etat, 31 October 1973, *Dame Gille*, 86953.

95 See Article 13 of Recommendation No. R (2000) 10 of the Committee of Ministers to Member States of 11 May 2000 on codes of conduct for public officials; https://rm.coe.int/16806cc1ec.

96 List established by the Anticor NGO, https://francecorruption.fr/pantouflages/.

97 For an example, Conseil d'Etat, Ass., 6 December 1996, 167502 quashing the government order appointing a senior civil servant of the Finance Department as deputy governor of a bank he used to supervise.

In Germany, the rules are highly detailed. Prevention of conflict of interest stems from the general duty of impartiality (§ 60 of the Federal Civil Service Act), which must continue to be observed after the functions have ended (§ 105). The same Act also forbids civil servants from accepting grants or gifts (§ 71). The rules are detailed in directives on the prevention of corruption issued by the government in 2004.[98] The administration must be informed of any plans of a civil servant to change to a job in the private sector. For five years, the ex-servant's new functions must be entirely detached from his previous function in the administration. The administration is entitled to check that these rules are observed. A special office in the Federal Department for Home Affairs (the Integrity Office) may be consulted for advice and publishes a yearly report. The report for 2020 showed few disciplinary or criminal proceedings initiated for violations of the rules on corruption.[99] They concerned 0.0037% of federal agents. This may mean that there is little corruption at the federal level or that most cases remain unknown. Besides, most public officials work for the *Länder*, not the federal administration. We were unable to gather information on administration in the 16 *Länder*, each of which has enacted its own legislation and has its own system of control.

In Italy, the rules seem looser than in other countries since there is no constraint on changing jobs from the public to the private sector. The competition agency may only control activities *ex post*. A code of conduct applies to all public officials and contains provisions on transparency of financial interests. The head of the office must obtain information of all kinds on remunerated collaborations and shares held by agents and their families and must also be informed if the agents suspect they might be in conflict of interest.

In conclusion, certain specific rules governing public officials still differ from one country to another. The duty of religious neutrality has a very wide scope in France. The duty of care and the alimentation principles are specific to Germany. Many rules are similar because the position of public officials who serve the State justifies special rules or because of the introduction of contractual employment and other cost-saving measures under the influence of "new public management" and other factors. The future of the civil service is debated in many countries.

Bibliography

Aubin E., Eymeri-Douzans J.-M., Kerléo J.-F., Saison J. (2021), *Quelle déontologie pour la haute fonction publique?*, Paris: LGDJ.

Battis U., Grigoleit K.-J., Hebbeler T. (2022), 'Entwicklung des Beamtenrechts in den Jahren 2021 und 2022', *Neue Zeitschrift für Verwaltungsrecht*, 379–390.

Becker U. (2019), 'Grundrechte der Arbeit in Europa – Zu Funktionen Verschränkungen und Konfliktlinien vernetzer Grundrechtsordnungen', *Europarecht*, 469–502.

Bredemeier J. (2018), 'Hate-speech im Internet – Reaktionsmöglichkeiten des Arbeitsgebers im öffentlichen Dienst', 11 *öAT Zeitschrift für das öffentliche Arbeits- und Tarifrecht*, 220–223.

Bundesministerium des Innern, für Bau und Heimat (2020), *Integrität in der Bundesverwaltung*, Jahresbericht.

De Montecler M.-C. (2021), 'Une transformation profonde de la haute fonction publique', *Actualité juridique du droit administratif*, 1116–1117.

98 VerhKodex, www.verwaltungsvorschriften-im-internet.de/BMI-O4-0001-NF-673-A001.htm; English: www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2014/rules-on-integrity.pdf?__blob=publicationFile&v=3.

99 Bundesministerium des Innern, für Bau und Heimat (2020).

Dord O. (2021), *Droit de la fonction publique*, Paris: Presses Universitaires de France.

Gaillet A., Classen C.-D. (2020), 'Droit constitutionnel allemand – Quelques étapes de l'année 2018', 1 *Revue Française du Droit Constitutionnel*, 251–262.

Harlow C., Rawlings R. (2021), *Law and Administration*, Cambridge: Cambridge University Press.

Itrich-Dabarek J. (2015), *The Civil Service in Poland. Theory. Experience*, Lausanne: Peter Lang.

Kawik M., Dechmann C. (2021), *Beamtenrecht*, München: Beck.

Krzywoń A. (2022), 'The Notion of Civil Service in Europe: Establishing an Analytical Framework for Comparative Study', *Speyer: Deutsches Forschungsinstitut für öffentliche Verwaltung, Discussion Paper 91*, https://dopus.uni-speyer.de/frontdoor/deliver/index/docId/5606/file/DP-091.pdf.

Leloup M. (2023), 'Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR', 4(1) *ECHR Law Review*, 23–57.

Loeffler E., Bovaird T. (2018), *Public administration characteristics and performance in EU 28*, Luxemburg: EU Office of Publications.

Melis G. (2014), 'Le paradoxe des élites administratives italiennes', *Revue Française d'Administration Publique*, 681–696.

Morris G.S. (1999), 'Fragmenting the State: Implications for Accountability of Employment Practices in Public Services', *Public Law*, 64–83.

OECD (2013), 'Human Resources Management in the Government of Poland', in *Poland: Implementing Strategic-State Capability*, Paris: OECD Publishing, https://doi.org/10.1787/9789264201811-11-en.

OSCE (2008), *Handboook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, www.osce.org/odihr/31393.

Page E.C., Wright V. (1999), *Bureaucratic Elites in Western European States*, Oxford: Oxford University Press.

Sudre F. (2023), *Droit européen et international des droits de l'homme*, Paris: Presses Universitaires de France.

Sudre F., Andriantsimbazovina J., Gonzalez G., Gouttenoire A., Machadier F., Milano L., Schahmaneche A., Szymczak D. (2022), *Les grands arrêts de la Cour européenne des droits de l'homme*, Paris: Presses Universitaires de France.

Sura S. (2019), 'Das verfassungsgemäße aber menschenrechtswidrige Beamtenstreikverbot?', (1–2) *Neue Juristische Online Zeitschrift*, 1–8.

Taillefait A. (2022), *Droit de la fonction publique*, Paris: Dalloz.

Wójcicka E. (2018), 'The New Model for Filling Senior Positions in the Civil Service in Poland', Special Issue *Transylvanian Review of Administrative Sciences*, 111–128.

World Bank (1997), *Report for the World Bank. Government Employment and Pay in Global Perspective*, https://documents1.worldbank.org/curated/en/113501468739142552/101501322_20041117163501/additional/multi-page.pdf.

23 Ensuring the Independence of the Civil Service

Civil Service, Rule of Law, and Democratic Backsliding

Peter M. Huber

I. Introduction

The establishment of a professional civil service having a special relationship of service and loyalty to the State, whose members enjoy life tenure and are, therefore, at least to a certain extent economically independent, is part of the common European heritage.[1] In Germany, Greece, Italy, Austria, Poland, and Spain, to name a few examples, the existence of a professional civil service is even directly anchored in the constitution. As a rule, a special regime applies, and the basic features of its detailed design are often defined in the constitution and sometimes differentiated according to the regional subdivisions of nation States.

Nevertheless, in most European countries, the public service is characterised by civil servants with special status as well as employees on a private law basis, the former typically supporting the State leadership in ministerial administration and exercising sovereign power in the armed forces, police, administration, and judiciary.

Originally, the purpose of civil service was to serve the monarch based on loyalty and devotion, and it was the task of civil servants. This is still the case in the United Kingdom where members of the civil service are employed as Crown Servants and are formally bound by their allegiance to the Crown.[2] Although these times have passed and monarchy has been abolished in most Western States, the idea of a special group of employees serving the republic with loyalty and devotion has prevailed in many European countries. In this respect, kings and princes have been replaced by the people, and popular sovereignty (the nation)[3] or by the rule of law. A certain need for specific rights and duties of public servants has obviously persisted: French administrative law continues to

1 For Germany, see Kahl (2014), § 74 para. 54; for France, Gonod (2014), § 75 para. 61 ff.; for Greece, Efstratiou (2014), § 76 paras. 33 ff.; for Italy, de Pretis (2014), § 78 paras. 39 ff.; for Austria, Holoubek (2014), § 79 paras. 61 ff.; for Poland, Biernat and Dabek (2014), § 80 paras. 98 ff.; for Portugal, Pereira da Silva and Salgado de Matos (2014), § 81 paras. 63 ff.; for Sweden, Marcusson (2014), § 82 paras. 15 ff.; for Spain, Mir (2014), § 84 paras. 42 ff.; for Hungary, Szente (2014), § 85 paras. 64 ff. The United Kingdom does not contemplate specific status for civil servants. However, the basics of the civil service are laid down in the *Constitutional Renewal Bill 2008*; Craig (2014), § 77 paras. 21 ff.

2 See *The Civil Service UK Style: Facing up to Change?* by P. Leyland in this volume; critical with regard to Spain, see *The Civil Service in Spain: The Deficit of Organisation in Public Employment and the Principle of Democracy* by R. García Macho in this volume.

3 For Germany, see Article 20, para. 2, sentence 1 of the Basic Law (German constitution, GG), German constitution of 23 May 1949 (*Grundgesetz für die Bundesrepublik Deutschland*), last amended by Act of 19 December 2022 (BGBl. 2022 I, p. 2478).

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support this through its dedication to the *service public*. At the same time, the status of civil servants is intended to ensure the independence of the administration from political influence. Though this may conflict with the democratic legitimacy of the administration, it is generally viewed as a prerequisite for the possibility of using its expertise in the best possible way.

II. Democratic Backsliding

Since the turn of the century, developments in Hungary, Israel, Turkey, and Russia and until recently also in Poland[4] have shown that the rule of law and democracy are not established once and for all. They are constitutional principles or values that must be fought for and defended every day and they may even be threatened in countries which have honoured the principles of the rule of law and democracy for a long time.

Democratic backsliding in the aforementioned countries has shown similar patterns which can be likened to a slippery slope. The slope begins in a constitutional framework in which the rule of law and the principle of democracy are well established. Governments, elected directly or installed indirectly by sometimes narrow majorities in Parliament, claim a "democratic mission" superior to despised values of the constitution, such as the protection of minorities, free media, and independence of the courts, and set those values aside. "Illiberal democracies" (Viktor Orbán), authoritarian States and dictatorships try to obtain control of the judiciary, especially the constitutional and supreme courts, by nominating judges from their own political party or by limiting court competences. Further steps often include intimidation and alignment of the (electronic) media, the press, and universities. Finally, "illiberal democracies" manipulate the electoral system by gerrymandering and other even blunter instruments.

It is self-evident that illiberal democracies are not based on the principles of the rule of law and democracy. As the one-sided stress on "democracy" shows, the rationale is to achieve certain political objectives at any (constitutional) cost and in any event. This inevitably leads to tensions with the judiciary as long as the latter remains unaligned and increases the likelihood of populist politicians challenging its legitimacy by stipulating a "counter-majoritarian difficulty".[5] However, people who argue that way do not understand that the horrified counter-majoritarian difficulty is just a necessary consequence of the rule of law and the constitution. In a legal system based on the rule of law, courts are meant to function as a "structural opposition" to the government and the parliamentary majority supporting it.[6] Against this backdrop, upholding the constitutional order cannot be summoned under an imagined "counter-majoritarian difficulty" unless the democratic legitimacy of the constitution is questioned too.[7] On the contrary, in a State based on the principles of the rule of law and democracy, the courts have to question the objectives of politicians if those entail infringements of the constitution or statutes.

In legal terms, "democratic backsliding" or a shift from a liberal to an illiberal democracy may be less an assault on the principle of democracy if democracy is understood as

4 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

5 See Bickel (1962), p. 16; Breyer (2010), pp. 3 f.; Gosh (2010), pp. 327 f.; also Huber (2021), § 123, para. 42.

6 Huber (2014), p. 38.

7 See Loughlin (2022), *passim*.

a government based on the will of the majority of citizens and not on the rule of law.[8] Backsliding is linked to the dispute of the principle of legality, i.e. the legal institutions and instruments that keep the political process in a society open and allow today's minorities to become the majority of tomorrow. "Democratic backsliding" and "illiberal democracy" are, therefore, circumscriptions of a lack of respect for the constitution and its supremacy, which undermine the effectiveness of fundamental rights. Such rights are especially needed by those who find themselves in a minority position. Against this background, what promoters of illiberal democracies or authoritarian governments and regimes really want becomes clear: they want to preserve the power they once gained legitimately. They, therefore, seek to eradicate every obstacle that might keep them from maintaining power: the courts, the media, science, political parties of the opposition, and civil society.

III. The Civil Service as a Guardian of the Rule of Law and Democracy

1. Special Status for Civil Servants

1.1. Germany

In Article 33, the German constitution of 23 May 1949 (*Grundgesetz*, GG) addresses the civil service from different perspectives, two linked to the topic of independence. Article 33, paragraph 4 GG, the so-called *Funktionsvorbehalt*, requires that the exercise of sovereign rights as a regular task be in the hands of civil servants who owe service and loyalty to the State on the grounds of their special legal status (*besonderes Dienst- und Treueverhältnis*). Article 33, paragraph 5 GG requires that the status of civil servants be regulated and further developed in line with the traditional principles of the civil service, which date back to at least when the Weimar constitution of 1919 was in force (so-called *hergebrachte Grundsätze des Berufsbeamtentums*).[9] These principles entail duties and rights. The major duty is "devotion and readiness for sacrifice" (*Pflicht zur aufopferungsvollen Hingabe*).

This wording may sound antiquated, but it communicates the idea that being a public servant, a judge or a soldier is not just an ordinary job but service to the State and its people requiring dedication. Though more reminiscent of feudal than of modern employer–employee relationships, the duty of devotion and readiness for sacrifice is a figure used frequently in civil service law and is quoted by Parliament, the courts and authors in academic writing. It is not just symbolic, but a principle in the true sense of the word. It has different practical consequences regarding working hours, readiness to transfer, and willingness to shoulder workloads beyond regular standards. Devotion and readiness for sacrifice are the principal duties of a civil servant; other aspects come second unless set in law.

The idea that the relationship between the State and the civil servant is not based on a contract under private law between equals but on special status goes hand in hand with the idea that civil servants owe obedience and that their remuneration (in German *Alimentation*) is not considered pay for the service they render but an entitlement to adequate subsistence from Parliament, which provides the necessary funds in the budget.

8 For the distinction between these two principles, see Huber (2024), § 6 paras. 27 ff.

9 Critical dissenting opinion of Huber to German Federal Constitutional Court, decision of 14 January 2020, 2 BvR 2055/16, para. 14.

1.2. General European Perspective

Although the specific regime under which public servants act differs from country to country, similar – though often less far-reaching – guarantees of special status for civil servants can be found in many European States. Most require that the details of their status be regulated by statute. Such is the case in Italy (Article 97 of the Italian constitution),[10] the Netherlands (Article 109 of the Dutch constitution),[11] Poland (Article 153 of the Polish constitution),[12] and Spain (Article 103, paragraph 3, of the Spanish constitution).[13]

On the other hand, many European countries, such as France,[14] do not have specific constitutional standards for the status of civil servants and leave it to ordinary legislation. Others only have precise requirements for specific groups such as judges (see Articles 20 and 86 of the Austrian constitution).

Given these circumstances, it also becomes plausible that civil servants, who in principle are entitled to strike[15] do not necessarily have to resort to strikes in order to improve their remuneration or working conditions. Against this background, the Federal Constitutional Court[16] and the European Court of Human Rights (ECtHR)[17] upheld the ban on strikes for this group derived from Article 33, paragraph 5 GG.[18] In other countries, the ban on strikes is restricted to civil servants who exercise sovereign rights, such as the police, armed forces or judges.[19]

2. The Special Status of Civil Servants and Their Constitutional Function

Constitutional provisions such as Article 33, paragraphs 4 and 5 GG are not a contingent, primarily historically rooted disposition. They are meant to ensure a high level of know-how, professional performance and loyal discharge of duties on which parliament, government, and society can rely. Such provisions aim at maintaining administrative

10 See *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

11 See *The Civil Service in the Netherlands: Normalisation of the Legal Status of Civil Servants* by A. De Becker in this volume.

12 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

13 See *The Civil Service in Spain: The Deficit of Organisation in Public Employment and the Principle of Democracy* by R. García Macho in this volume.

14 Article 34 of the French constitution: "La loi fixe également les règles concernant [. . .] les garanties fondamentales accordées aux fonctionnaires civils et militaires de l'État".

15 For Belgium see *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume; for Germany German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12.

16 *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume; for Germany German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12.

17 ECtHR (GC), judgment of 14 December 2023, *Humpert and others v. Germany*, 59433/18, 59477/18, 59481/18, 59494/18.

18 Likewise for Ukraine, see Article 10, para. 5 of Law of Ukraine on Civil Service: ban on strikes for civil servants.

19 For the Netherlands, see *The Civil Service in the Netherlands: Normalisation of the Legal Status of Civil Servants* by A. De Becker in this volume; for Spain, see Article 28, para. 2 of the Spanish constitution and *The Civil Service in Spain: The Deficit of Organisation in Public Employment and the Principle of Democracy* by R. García Macho in this volume.

stability irrespective of political majorities and act as a balancing factor with respect to the regularly changing political forces that in a certain moment represent democratic will. The guarantee of a special status for civil servants is linked to the rule of law, i.e. a State governed by the rule of law (*Rechtsstaat*),[20] and should foster the objective that statutes and regulations remain within the boundaries of the constitution and administrative acts respect all applicable statutes. By doing so, the special dedication of the civil service supports the rule of law in a "legalistic" perception,[21] the Archimedean point of which is marked by the primacy of the constitution (*Vorrang der Verfassung*) and the legality of administrative measures (*Gesetzmäßigkeit der Verwaltung*). The principle of legality (*Vorrang des Gesetzes*) binds the executive power to the laws passed by Parliament, while the requirement that measures touching fundamental rights passed by the executive need a statutory basis – the reservation of the law (*Vorbehalt des Gesetzes*) – protects people's personal interests from non-legitimised encroachments on their freedom and property. In this respect, the civil service can be regarded as a guardian of the rule of law.

At the same time, the civil service is also a guardian of democracy. By binding civil servants to the constitution and statutes passed by Parliament, its dedication to the principle of legality ensures that the democratically expressed will of the people as laid down in the aforementioned acts is loyally put into effect.[22] Civil servants are also obliged to follow the orders of their democratically elected or nominated superiors, who are normally accountable to Parliament or a president.

Against this background, civil servants are and should be watchdogs of the principle of legality rooted in the principles of the rule of law and democracy and against any misuse of power, be it by politicians or other influential powers in society. In this respect, the civil service can be described as a personal device securing the rule of law and the principle of democracy,[23] a trustee at the service of citizens.[24]

In order to guarantee this function of the civil service, the statutes defining the aptitudes of civil servants require their loyalty to the constitution and readiness to stand up for its values (§ 7, paragraph 1 of the Civil Servants Status Act, BeamtStG).[25] This is one aspect of the concept of militant democracy (*wehrhafte Demokratie*)[26] and has practical consequences. Candidates who are not reliable in this sense lack the aptitude to become civil servants. This has occurred with communists and right-wing party sympathisers. Furthermore, civil servants who become unreliable in the course of their service can be dismissed under a special disciplinary procedure.[27]

20 See Huber (2024), § 6 paras. 27 ff.

21 Instructive Schindler (2021), § 152 paras. 17 ff.

22 In Germany this idea is rooted in Article 33, para. 5, read in conjunction with Article 20, paras. 1 and 2 GG.

23 German Federal Constitutional Court, decision of 17 October 1957, 1 BvL 1/57; decision of 19 September 2007, 2 BvF 3/02; decision of 28 May 2008, 2 BvL 11/07; decision of 17 November 2015, 2 BvL 19, 20/09 et al., para. 101; decision of 24 April 2018, 2 BvL 10/16, paras. 33 and 35; judgment of 12 June 2018, 2 BvR 1738/12 et al., para. 118; decision of 14 January 2020, 2 BvR 2055/16, paras. 30 and 66.

24 Special emphasis is given to the democracy-supportive function of the civil service in Ukraine, see *The Civil Service in Ukraine: Transformation in Times of War* by N. Rozmaritsyna in this volume.

25 Law governing the Status of Civil Servants in the Länder – Civil Servants Status Act of 17 June 2008 (*Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz – BeamtStG)*, BGBl. 2008 I, p. 1010), last amended by Act of 20 December 2023 (BGBl. 2023 I, p. 389).

26 See Loewenstein (1937).

27 See German Federal Constitutional Court, decision of 14 January 2020, 2 BvR 2055/16.

3. The Waning Lustre of Civil Servant Status

In recent years, most European countries have gradually abandoned the idea of the civil service as a special precaution for the rule of law and democracy however, and have increasingly resorted to regular labour contracts under private law. This has been the case in Denmark[28] and the Netherlands, where the special regime for public servants has been abolished. Countries like Italy,[29] Austria,[30] Poland,[31] and the United Kingdom[32] have also significantly reduced the percentage of civil servants. In Belgium, the percentage of public employees at the federal level remains at only about 26%.[33] But even in countries where the traditional role of the civil service has remained more or less unchallenged (France and Germany), the specific link between the civil service and the rule of law and democracy is fading. Since the fall of the Iron Curtain, one country after another has reduced the differences between the regime under which civil servants and regular employees must discharge their duties. Some countries have even completely abolished special regulations for civil servants. Others seem to have lost their orientation and lack a rational concept with regard to State functions requiring special status for the persons in charge.[34] The status quo and practice are characterised by a rather unreflected deployment of civil servants, based on contingent historical circumstances or political concerns such as preventing strikes or saving social security contributions. Principal institutional and regulatory considerations are hard to find. Many sovereign powers are exercised by public employees because the State is unwilling or unable to recruit the necessary staff. This has a delegitimising effect because it impedes democratic accountability and control.[35]

Additionally, to the extent that civil servants are employed side by side with public employees to whom collective agreements apply, civil labour law gains a strong influence on the regulation of the civil service. Working-time regulations and remuneration adjustments as a result of collective agreements and the parallelisation of aid and social security regulations can be mentioned here *pars pro toto*. This has led to a levelling of the differences between civil servants and public employees and to an increasingly homogeneous civil service and an increasing pressure for even further harmonisation of working and employment conditions. It obviously also contributes to a delegitimisation of the traditional idea of the civil service.

28 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume.

29 See *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

30 See *The Civil Service in Austria: Tradition, Reforms and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume.

31 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

32 Under the Thatcher government, the Civil Service was reduced from 750,000 to 500,000 persons and has been stable since. For more, see *The Civil Service UK Style: Facing up to Change?* by P. Leyland in this volume.

33 See *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume. The situation is more striking at regional and local government levels, where more than 50% of civil servants are on private-law contracts (41.7% under public-law regime versus 58.2% under private law).

34 For Germany see Huber (2015), pp. 127 f.

35 See Sommermann (2024), Article 20, paras. 164 ff.

IV. The Civil Service Between Obedience and Independence

Nevertheless, speaking from a constitutional perspective, the civil service is in a period of constitutional tensions marked by the dichotomy of obedience and independence. On the one hand, the civil service is not legitimised to create counter-majoritarian difficulties as caricatured in the TV series "Yes, Minister" broadcast by the BBC in the 1980s. Civil servants' duty or "devotion and readiness for sacrifice" does not imply a situation in which they are so powerful that they may ignore or even undermine the will of the democratically elected majority. On the contrary, they must regularly obey or follow their superiors' instructions as the latter typically represent the will of the (democratically elected) majority and the laws this was able to pass in Parliament. Obeying the orders of democratically accountable politicians or their representatives therefore means paying tribute to the rule of law and the democratic will as expressed by the majority. However, this does not include illegal orders (§ 35 and 36 BeamtStG).

On the other hand, superiors can also be mistaken. They may not observe the laws as far as they encroach on their political preferences, or their assessment of legal requirements may simply be mistaken. Civil servants are nevertheless expected to enact the will of the democratically legitimised sovereign even in such cases and, in so doing, contribute to a system of governance based on the rule of law and democracy. They are, so to speak, the first threshold on which the rule of law and the principle of democracy can and must be defended, thus avoiding that illegal measures are taken, that legal action becomes necessary or that political scandals or upheavals occur.

In general, civil servants will only be ready to act in this constructive and stabilising way if the risk that comes with it is predictable and reasonable. This will only be the case if they enjoy a certain independence in an institutional, personal, and financial sense. If the greatest risk to which they are exposed involves losing the goodwill of their superiors and a possible promotion, they will be more likely to act in the interests of the integrity of the law than if they risk their job, social status, and standard of living. Against this background, it is clear that there must be devices to prevent civil servants from being at the complete disposal of their superiors and subject to arbitrary decisions and orders.

1. The Independence of Civil Servants

Therefore, rules and concepts of the civil service are based on the consideration that civil servants can only be expected to persevere in an administration if they have a certain independence from their superiors, politics, and the public. This can be ensured by personal, substantial, and institutional devices.

1.1. Personal Devices

Looking at the personal dimension, the most important instrument for ensuring the discharge of duties of a specific function within the civil service is life tenure or at least a tenure with a duration fixed in advance so that nobody can sanction public servants for discharging their duty. In this respect, the provision of § 4, paragraph 1 BeamtStG emphasises that the purpose of civil servants' lifelong tenure is to concentrate the exercise of sovereign powers in the hands of people who are legally obliged to devotion and sacrifice.

A certain protection against arbitrary decisions of politicians and superiors derives from the fact that promotions and sanctions are not at their discretion. Mostly, administrative

acts are largely regulated by law and subject to judicial control. In Denmark[36] and Germany, the best selection principle (*Prinzip der Bestenauslese*) provides that access to any function in the civil service has to follow the criteria of aptitude (*Eignung*), capability (*Befähigung*), and professional performance (*fachliche Leistung*). If politicians or superiors violate this principle, civil servants or applicants can sue the administration with a competitor's complaint (*Konkurrentenklage*) before the administrative courts in order not to be discriminated against. Things have been similar in Poland since the Law on the civil service was introduced in 1998.[37]

1.2. Substantial Devices

From a substantial perspective, a hierarchy of obligations headed by the principle of legality can be another instrument to preserve the rule of law and democracy. Though civil servants are meant to obey and follow the orders of their superiors, this obligation is limited by legal requirements. If a civil servant is ordered by a superior to commit an illegal action, statutes governing the civil service can envisage that loyalty to the rule of law ranks higher than personal loyalty to superiors.

Some legal systems do so. In Germany, § 35 BeamtStG codifies the duty of obedience (*Folgepflicht*) and states that civil servants must advise and support their superiors. They are obliged to follow individual orders and general guidelines. This is not the case if civil servants are independent and dispensed from obeying orders by specific statutes i.e. if they are only subject to the rule of law. However, different requirements may result from § 36 BeamtStG, which states that civil servants carry the whole responsibility for the measures they take. If the legality of an order or a guideline is questionable, civil servants in charge must protest immediately (§ 36, paragraph 2, sentence 1 BeamtStG). If superiors insist on the order being executed, they have to obey unless the order would involve an infringement of human dignity or a criminal or administrative offence (§ 36, paragraph 2, sentence 3 BeamtStG). With a similar objective, Swiss Civil Service Law foresees an obligation of civil servants to denounce and a specially protected right to report in Article 20a of the Personnel Law.[38]

1.3. Institutional Devices

Parliaments, courts, accounting offices, ombudsmen, the media and even trade unions can also act as watchdogs for the rule of law and democracy. If they do their job properly, they may also act as an institutional safeguard for the civil service and its independence.[39] A report of one of these institutions might for example criticise the government for nominating candidates on the grounds of their membership in a political party supporting the

36 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume.

37 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

38 See *The Civil Service in Switzerland: Between Flexibility and Tradition* by F. Bellanger in this volume.

39 Obviously, this only applies to countries where the aforementioned institutions have not lost their integrity. In Poland, with a politicised constitutional court, the ombudsman was powerless. Though he challenged the Law and Justice (PiS) government's 2015 amendment to the civil service law, the case was assigned to an unlawfully elected judge of the constitutional court. Consequently, the ombudsman withdrew the complaint and the constitutional review was halted.

governing majority[40] or for violating selection principles (*Bestenauslese*). At best, this may trigger legal action and public protest.

Another institutional tool to ensure the independence of civil servants is legal protection against sanctions by their superiors, i.e. typically disciplinary measures. The easier these measures can be used in practice, the less independent civil servants are. Against this background, the imposition of the heaviest disciplinary measures should be reserved for the courts, as is mostly the case in Germany and the Netherlands.[41]

In Germany, only administrative courts can remove a civil servant from service as a disciplinary measure. If superiors consider a civil servant's behaviour unacceptable, the State as employer has to sue the civil servant before the competent administrative court. Consequently, the State bears the risk of litigation, the burden of proof and the consequences of a *non liquet*. This has been the case since World War II at the federal level and at the level of the single States. The situation changed in 2008, however, when the State of Baden-Württemberg amended its statute on disciplinary measures and introduced the possibility of removing a civil servant from service also by administrative act. The Federal Constitutional Court approved this amendment in an order of 14 January 2020,[42] arguing that the restrictions mentioned above would not be a traditional principle of civil service in the sense of Article 33, paragraph 5 GG.[43]

There are other instruments, too. The independence of civil servants can also be strengthened by rules on their liability for any damage they cause. Civil servants are more likely to be influenced by external threats if they bear personal liability for negligence. In contrast, when aware that the primary responsibility lies with the State and that the State will only seek compensation for intentional or grossly negligent actions, civil servants tend to feel more secure in their roles. The independence of judges is also ensured by the fact that this idea is lying behind § 839, paragraph 2 BGB[44] (the so-called *Richterprivileg*), an understanding which the Court of Justice of the European Union (CJEU), has shown focusing solely on the *effet utile* of European Union (EU) law, obviously lacks as the *Köbler* case.[45]

2. The Autonomy and Independence of Administrative Bodies

A device to increase the independence of the civil service and the resilience of the administration as a whole might be to bestow them with an autonomy that politicians have to respect. Sweden, for example, has established a categorical distinction between the political level of the government and the more technical level of the administration, where civil servants and employees have to discharge their duties. The State administration in Sweden consists of central, regional, and local authorities and administrative branches. The central

40 See *The Civil Service in Austria: Tradition, Reforms and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume.

41 See *The Civil Service in the Netherlands: Normalization of the Legal Status of Civil Servants* by A. De Becker in this volume.

42 German Federal Constitutional Court, judgment of 14 January 2020, 2 BvR 2055/16, including my dissenting opinion.

43 See *The Civil Service in Switzerland: Between Flexibility and Tradition* by F. Bellanger in this volume. Swiss Civil Service Law envisages procedural safeguards regarding dismissals such as judicial appeal; the standard of review includes the adequacy of the dismissal.

44 German Civil Code of 18 August 1896 (*Bürgerliches Gesetzbuch (BGB)*) in the version of 2 January 2002 (BGBl. 2002 I, p. 42, 2909; 2003 I, p. 738), last amended by Act of 22 December 2023 (BGBl. 2023 I, p. 411).

45 CJEU, judgment of 30 September 2003, *Köbler v. Republik Österreich*, C-224/01.

authorities are (only) responsible to the government as a whole and not to individual ministers. Instructions must be issued by the government jointly and by consensus in the form of general guidelines, so that individual ministers are not entitled to issue instructions directly to the authorities unless they have special authorisation to do so. Thus, when a director-general receives an instruction from a minister, he can question the legality of that instruction and demand a government decision. This prohibition of ministerial rule (*ministerstyre*) is considered an important principle for maintaining the independence and accountability of the administration. Government decisions addressed to the authorities may not be made in the form of individual case decisions. Rather, the latter must be made by the administration itself in accordance with the legal regulations. This important principle of administrative independence is set out in Chapter 12, paragraph 2 of the Instrument of Government (Swedish Constitution, *Regeringsformen*).[46]

The other side of the coin, however, is that individual ministers cannot be held legally responsible for decisions made by the authorities. Over the last 40 years, there has been an intense debate in Sweden about whether and to what extent the government can actually control the administration, despite this constitutionally mandated independence and the prohibition of ministerial rule. In any case, the government is authorised to appoint and dismiss the heads of authorities, to decide on the organisational and financial structure of the authorities and to prescribe what competencies, tasks, and goals the authorities should have. In addition, instructions may be provided through general guidelines.[47]

Institutional autonomy of the civil service has its price because it lowers the level of democratic legitimation. Though this may not be evident at first glance, a consequence is that the courts, too, have to respect this autonomy and are unable to ensure substantive independence of individual civil servants and employees. Looking more closely at the problem and the interests at stake, it becomes clear that if an administrative body enjoys some sort of autonomy, the (political) influence of superiors and ministers on its civil servants and employees is typically replaced by the influence of others, such as trade unions, political parties, and their networks. Scandals in the Italian *Consiglio Superiore della Magistratura*,[48] which is meant to guarantee the independence of the judiciary in Italy, underline the fact that the autonomy of a body is not a reliable tool when it comes to ensuring the independence of the civil service and that there are thousands of ways in which influence can be exercised informally.

The same applies to independent bodies and agencies.[49] Their enhanced use, pushed forward by the European Commission and the CJEU,[50] is a rather problematic tool that undermines the democratic legitimacy of the public administration in Member States[51] in order to increase the influence of EU institutions, but it is not a device that makes the civil service more resilient against pressures from outside. It simply replaces the political

46 Marcusson (2014), § 82 para. 7.

47 Marcusson (2014), para. 8.

48 For an overview of the role and history of the *Consiglio Superiore della Magistratura* in Italy, see Caponi (2014), pp. 135 and 146; on the recent scandals, see e.g. Ferri (2021), pp. 1–22.

49 For a negative assessment of Next Step Agencies in the UK see *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume.

50 CJEU (GC), judgment of 9 March 2010, *Commission v. Germany*, C 518/07; CJEU, judgment of 2 September 2021, *Commission v. Germany*, C-718/18.

51 See German Federal Constitutional Court, judgment of 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14, paras. 127 ff.

influence of national governments by the political influence of EU institutions, specialist fraternities and lobby groups.

V. Possible Devices to Ensure Independence

With regard to the risk of democratic backsliding, one should rethink the diminishing persuasiveness of the idea of civil service as a personalised guardian of the principles of the rule of law and democracy. It seems self-evident that a certain scale of independence of civil servants may enable them to meet constitutional expectations. There may be instruments at institutional level that support this, to make the civil service as a whole an effective device against authoritarian and populist takeovers.

1. Individual Level

Civil servants who are not threatened by criminal, disciplinary or economic consequences if they observe the constitution and the rule of law and if they refuse (illegal) orders from their superiors can undoubtedly impede, slow down or at least mitigate democratic backsliding. Such independence of individual civil servants can be achieved in different ways. Nevertheless, in a realistic assessment, any procedural, organisational or content-related precaution to secure the personal independence of civil servants offers only a possibility. Whether these precautions fulfil their function, whether they remain law in the books or become law in action, whether individual civil servants are loyal to their duty to uphold the rule of law and democracy depends on preconditions that law itself cannot guarantee: character, education, ambition, personal situation, and so forth.

1.1. Status and Legal Certainty

In order to prevent superiors from using their power over subordinates in a partisan or arbitrary way, the obligations of civil servants have to be laid down clearly and reliably. Ideally, specific rights and obligations of civil servants are defined in a statute, a regulation or an equivalent general rule which bestows legal certainty and cannot be manipulated "pragmatically" from case to case.

An important device to ensure the readiness of civil servants to discharge their duties in the interests of the rule of law and democracy, even when pressured by their superiors, is to grant them a status which entails "irremovability" and protection against humiliation and arbitrary assignment of work. Such precautions make it easier for civil servants to reject illegal orders from their superiors, to resist them and to set unethical motivations aside.

Since "black sheep" are unavoidable among civil servants, there also have to be instruments that allow the State to dismiss a civil servant. Thus, almost all legal systems have a disciplinary regime with staggered sanctions, ranging from admonition to dismissal.

In these cases, independence and reliability of the status can be considered the higher the more possible encroachments are embedded into a due process of law and judicial control. If severe disciplinary sanctions cannot be imposed by superiors via administrative acts but only by courts, and if they are the result of a formal procedure in which the civil servants accused can rely on a fair trial entailing the right to be heard, to hear witnesses, to give proof and explanations, they will be more resilient to illegal instructions. Against this backdrop, the order of the Second Senate of the Federal Constitutional Court of Germany approving the removal of civil servants from service in Baden-Württemberg by a mere administrative act not

only sets aside the provision that for over 70 years, a dismissal could only be ordered by administrative courts, it also diminishes an integral part of the institutional guarantee of the civil service under Article 33, paragraph 5 GG which regularly envisages life tenure, whether or not it has become established as a specific new "traditional principle of civil service". Giving up the key role of administrative courts in imposing disciplinary measures, such as dismissal, is a substantial reduction in the personal independence and resilience of civil servants, as it shifts the risk of litigation, the burden of proof, the consequences of a *non liquet* and the need to ask for temporary injunctions from the State to the civil servant.[52] It makes it easier for superiors and ministers to get rid of civil servants who belong to the "wrong" political party or whom they do not like. It also increases the latter's fear of losing their jobs, and it gradually increases their readiness to obey even if instructions are illegal.

1.2. Life-long or Non-renewable Tenure

The most important instrument for ensuring the independence of the civil service is that civil servants do not have to fear for their jobs if they uphold the constitution, democracy and the rule of law. This can be achieved to a large extent if they are accorded life tenure, which is regularly the case in Germany,[53] Italy,[54] and Austria,[55] but not in many other European countries. Things seem to be especially problematic in Hungary, where since the fall of the Iron Curtain, civil servants can practically be dismissed without major thresholds.[56]

The second-best solution is to appoint civil servants for a certain but non-renewable period of time. This is the case where civil servants such as mayors or district administrators are directly elected by the people[57] and has become state-of-the-art for most constitutional or supreme courts. It is based on the insight that renewable terms of office are detrimental to the independence of their holders. The mere possibility of renominations regularly works like "scissors in the head" (self-censorship) because the civil servant depends on the approval of those who decide on his second or third nomination: in the case of international courts or institutions the governments; for other positions politicians or other groups of peers. The CJEU is a telling example of why unlimited renewability of the six-year term (Article 19,

52 Critical dissenting opinion by Huber to German Federal Constitutional Court, decision of 14 January 2020, 2 BvR 2055/16, para. 28 ff.

53 German Federal Constitutional Court, judgment of 27 April 1959, 2 BvF 2/58; decision of 30 March 1977, 2 BvR 1039, 1045/75; decision of 3 July 1985, 2 BvL 16/82; decision of 10 December 1985, 2 BvL 18/83; decision of 28 May 2008, 2 BvL 11/07; decision of 16 December 2015, 2 BvR 1958/13, para. 38; decision of 24 April 2018, 2 BvL 10/16, para. 35; decision of 24 April 2018, 2 BvL 10/16, para. 64.

54 Article 97 of the Italian constitution; see also *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

55 See *The Civil Service in Austria: Tradition, Reforms and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume.

56 See *The Civil Service in Hungary: Differentiation and Privatisation Trends* by P. Láncos in this volume.

57 For the Free State of Bavaria, see Article 34 of the Municipal Code for the Free State of Bavaria of 22 August 1998 (*Gemeindeordnung für den Freistaat Bayern*, BayGO); Article 31 of the County Code for the Free State of Bavaria of 22 August 1998 (*Landkreisordnung für den Freistaat Bayern*, LKrO); Article 39 of the Law on the Election of Municipal Councilors, Mayors, County Councils and District Councilors of 7 November 2006 (*Gesetz über die Wahl der Gemeinderäte, der Bürgermeister, der Kreistage und der Landräte,* GLKrWG).

paragraph 2 of the Treaty on the European Union) may not only be an incentive for judges and advocates-general to maintain close contacts with "their" domestic governments but also fosters the establishment of power structures within the Court. It strengthens those who are repeatedly renominated by their Member States, impeding the fresh air that newcomers tend to bring. It harms the professional discourse on the right interpretation and concretisation of EU law and the necessary openness of people in charge to question a line of jurisprudence if it proves to be outdated or even misguided.[58]

This is widely acknowledged as far as the judiciary is concerned[59] and has led the Council of Europe to restrict the office of judges at the ECtHR to a single nine-year period (Article 23, paragraph 1 of the European Convention on Human Rights, ECHR). Nevertheless, it also applies to civil servants in the administration and military personnel, even if their "independence" ranks on different (lower) levels.

1.3. Remuneration and Financial Security

Furthermore, independence of civil servants requires sufficient remuneration for an appropriate standard of living that keeps them from earning money with other jobs or from other sources. Insufficient remuneration is not only detrimental to their "devotion and readiness for sacrifice" and limits civil service performance; it also encourages corruption.

Sufficient remuneration of civil servants remains a major problem all over Europe. Since the fall of the Iron Curtain it has been so low in Poland and other Eastern European countries that civil servants were forced to seek other sources of income.[60] In France, there is a growing gap between the salaries of high-ranking officials and the income of private sector employees.[61] In Germany, the remuneration of judges and other civil servants has been repeatedly declared unconstitutionally insufficient.[62] It also ranks poorly compared to other European States, deterring possible applicants from joining the judiciary.

2. Institutional Level

2.1. Recruitment and Promotion

The civil service can only be a guardian of the principles of the rule of law and democracy if it functions effectively. This requires personnel sufficiently suited for the task. Procedural and substantive criteria for recruitment and promotion of civil servants are therefore indispensable.

The French instrument of *concours*, in Italy, the *concorso* (Article 97, paragraph 4 of the Italian Constitution),[63] can be regarded as a procedural device that ensures that the

58 Huber (2023), pp. 287 f.

59 See German Federal Constitutional Court, decision of 22 March 2018, 2 BvR 780/16.

60 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

61 See *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

62 German Federal Constitutional Court, judgment of 14 February 2012, 2 BvL 4/10; decision of 17 November 2015, 2 BvL 19/09; decision of 7 June 2016, 2 BvL 3, 4, 5, 6/12; decision of 16 October 2018, 2 BvL 2/17; decision of 4 May 2020, 2 BvL 4/18.

63 See *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

best applicants are chosen.[64] In Germany, Article 33, paragraph 2 GG requires selection according to the criteria of aptitude (*Eignung*), capacity (*Befähigung*), and professional performance (*fachliche Leistung*). This "Leistungsgrundsatz" is, with a few exceptions only, recognized throughout the European legal space as further examples from Denmark,[65] Poland,[66] and the Ukraine[67] demonstrate.

These standards can only be regarded as efficient however, if they are subject to effective judicial control.[68] If this is not the case, as in Hungary, it opens broad possibilities of discretion for politicians and gives way to office patronage and corruption.[69]

2.2. Parliaments and Ombudsmen

Parliaments can be an efficient institutional device to ensure the independence of the civil service as long as they are not dominated by an illiberal majority and as long as they make specific efforts to supervise and monitor civil service's functioning and development. In this regard, the Parliament of Bavaria (*Landtag*) established a special committee on the civil service decades ago. Its task is to supervise the regulation of civil servants, and their remuneration and recruiting circumstances in order to select bright and spirited candidates.[70] This has proved to be quite an effective instrument and has helped to maintain the generally acknowledged quality of the Bavarian civil service.

Ombudsmen may also be trustees of the independence of the civil service, as the examples of Sweden[71] and Ukraine[72] show.

VI. Conclusion

Although it seems self-evident that a resilient civil service with loyal and independent members is an important and suitable instrument against the dismantling of the rule of law and democratic backsliding, this insight is fading. This has been the case in Austria,[73] Denmark,[74]

64 Critical with regard to Spain, see *The Civil Service in Spain: The Deficit of Organisation in Public Employment and the Principle of Democracy* by R. García Macho in this volume, who considers the strict selection process (which may last several years) to be inefficient and discriminatory.

65 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume.

66 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume with regard to the Law on Civil Service from 1998.

67 See *The Civil Service in Ukraine: Transformation in Times of War* by N. Rozmaritsyna in this volume.

68 In Germany, the most important tool is the *beamtenrechtliche Konkurrentenklage*. See Huber (1991), pp. 26 f., pp. 431 f.

69 See *The Civil Service in Hungary: Differentiation and Privatisation Trends* by P. Láncos in this volume.

70 See § 23 of Rules of Procedure for the Bavarian State Parliament of 14 August 2009 (*Geschäftsordnung für den Bayerischen Landtag*, GeschO-LT): Committee on the Civil Service (*Ausschuss für Fragen des öffentlichen Dienstes*).

71 See *The Civil Service in Sweden: Duality and Non-Specific Status of Civil Servants* by P. Herzfeld Olsson and E. Sjödin in this volume.

72 See *The Civil Service in Ukraine: Transformation in Times of War* by N. Rozmaritsyna in this volume.

73 See *The Civil Service in Austria: Tradition, Reforms and the Impact of European Law* by B. Cargnelli-Weichselbaum in this volume.

74 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume.

and Sweden the latter almost completely abolishing the special status for civil servants.[75] Even in France, known for its prestigious civil service, recent reforms of the public administration encourage greater use of ordinary contract staff.

The most convincing path for developing the civil service has been taken in Switzerland where the special status is restricted to officials who exercise sovereign powers directly at federal and canton level.[76] This rational approach is not only compatible with Article 45, paragraph 4 of Treaty on the Functioning of the European Union but is probably also what the founders of the German constitution had in mind when drafting Article 33, paragraphs 4 and 5 GG.[77] It also appears plausible in the present context: assurances against democratic backsliding are particularly needed in areas where civil servants are entitled to exercise sovereign powers. If they fail and give way to superiors or politicians promoting illiberal democracy, the rule of law and democracy are at stake. Therefore, securing their independence and resilience is also a device against democratic backsliding.

Bibliography

Bickel A.M. (1962), *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis: Bobbs-Merrill.

Biernat S., Dąbek D. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Polen', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 477–560.

Breyer S. (2010), *America's Supreme Court: Making Democracy Work*, Oxford: Oxford University Press.

Caponi R. (2014), 'Judicial Independence in Italy – The Role of the Consiglio Superiore della Magistratura', in Hess B. (ed), *Judicial Reforms in Luxembourg and Europe*, Baden-Baden: Nomos, 135–146.

Craig P. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Großbritannien', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 315–370.

De Pretis D. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Italien', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 371–434.

Efstratiou P.-M. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Griechenland', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 227–314.

Ferri G. (2021), 'Crisi del Consiglio Superiore della Magistratura e prospettive di cambiamento della composizione e del sistema elettorale', 2 *Rivista Trimestrale di Scienza dell'Amministrazione*, 1–22.

Gonod P. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Frankreich', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 159–226.

Gosh E. (2010), 'Deliberative Democracy and the Counter-majoritarian Difficulty: Considering Constitutional Juries', 30 *Oxford Journal of Legal Studies*, 327–359.

Holoubek M. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Österreich', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 435–476.

Huber P.M. (1991), *Konkurrenzschutz im Verwaltungsrecht. Schutzanspruch und Rechtsschutz bei Lenkungs- und Verteilungsentscheidungen der öffentlichen Verwaltung*, Tübingen: Mohr Siebeck.

75 See *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfeld Olsson and E. Sjödin in this volume.

76 See *The Civil Service in Switzerland: Between Flexibility and Tradition* by F. Bellanger in this volume.

77 Huber (1996), p. 444; Huber (2015), pp. 127 f.

Huber P.M. (1996), 'Das Berufsbeamtentum im Umbruch – Grundsätzliche Überlegungen unter besonderer Berücksichtigung der neuen Länder', 29 *Die Verwaltung*, 437–463.
Huber P.M. (2014), *Verfassungsstaat und Finanzkrise*, Baden-Baden: Nomos.
Huber P.M. (2015), 'Die Zukunft des Berufsbeamtentums. Zwischen europarechtlich induzierter Erosion und nationaler Sinnsuche', in Jochum H., Elicker M., Lampert S., Roberto B. (eds), *Freiheit, Gleichheit, Eigentum – Öffentliche Finanzen und Abgaben. Festschrift für Rudolf Wendt zum 70. Geburtstag*, Berlin: Duncker & Humblot, 127–138.
Huber P.M. (2021), 'Verfassungsgerichtsbarkeit und Politik im europäischen Rechtsraum', in von Bogdandy A., Grabenwarter C., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. VII, Heidelberg: C.F. Müller, 709–764.
Huber P.M. (2023), 'Why also the ECJ Needs to Be Controlled', in Gromek-Broc K. (ed), *Public Law in a Troubled Era: A Tribute to Professor Patrick Birkinshaw*, Alphen aan den Rijn: Wolters Kluwer, 275–292.
Huber P.M. (2024), 'The Principle of a State Governed by the Rule of Law (*Rechtsstaat*)', in Herdegen M., Masing J., Poscher R., Gärditz K.F. (eds), *Constitutional Law in Germany*, München: C.H. Beck, 289–326.
Kahl W. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Deutschland', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 77–158.
Loewenstein K. (1937), 'Militant Democracy and Fundamental Rights I', 31(3) *The American Political Science Review*, 417–432.
Loughlin M. (2022), *Against Constitutionalism*, Cambridge, MA: Harvard University Press.
Marcusson L. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Schweden', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 631–670.
Mir O. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Spanien', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 723–802.
Pereira da Silva V., Salgado de Matos A. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Portugal', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 561–630.
Schindler B. (2021), 'Regierung, Verwaltung und Verwaltungsgerichtsbarkeit', in von Bogdandy A., Huber P.M., Marcusson L. (eds), *Handbuch Ius Publicum Europaeum*, vol. IX, Heidelberg: C.F. Müller, 587–631.
Sommermann K.P. (2024), in Huber P.M., Voßkuhle A. (eds), *Grundgesetz*, vol. II, München: C.H. Beck.
Szente Z. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Ungarn', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum*, vol. V, Heidelberg: C.F. Müller, 803–860.

24 The Recruitment of Civil Servants

Bridging Democratic Requirements and Efficiency

Pascale Gonod *

I. Introduction

There is no single civil service model that is common to the Member States of the European Union (EU), nor – *a fortiori* – to other European countries such as Switzerland and the United Kingdom (UK). Career and employment approaches exist side by side (e.g. France mainly the former, UK mainly the latter), although the two models may influence the conditions of recruitment, and some convergence exists. Nonetheless, in the realm of recruitment, as in any other areas involving the comparison of legal systems, the intricate nature of comparison calls for decisions and consensus on the focal points of the comparison.[1] Against this backdrop, before proceeding with an analysis of civil service recruitment requirements, an explanation of the fundamental terminology in necessary.

1. Civil Service, Public Service, and Public Employment

The personal scope of the civil service varies from one system to another. This perimeter itself depends on our conception of the civil service in its relationship to public services, the notion of public employment itself going, as it does, beyond the opposing legal regimes applicable to those who occupy these jobs. The civil service can be broadly conceived as the set of employees available to governments to ensure the efficient and continuous operation of public services.[2] First of all, this approach has the advantage of making it possible to exclude, in application of the principle of the separation of powers, all employees of the legislative and judicial branches. However, the problem with this is that officials in the administrative departments of parliamentary assemblies may benefit from a specific legal employment regime. In France, the staff of the National Assembly are civil servants, but they are not subject to the statutory provisions of the rest of the civil service and have their own autonomous status.

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1 The elements of comparison that follow are based on national studies cited in this publication, as well as on documents available online from the Organisation for Economic Co-operation and Development (OECD, www.oecd.org/employment/pem/) and official government websites. Unless otherwise indicated, the State mentioned here should refer to these sources and the references therein. I would like to thank colleagues who provided additional information, especially Mr. Ioannis Michalis for the Greek system, which is not covered in this volume. Any errors – inevitable as they may be – in this presentation are solely my responsibility.

2 Krzywoń (2022), pp. 32 f.

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On the other hand, when it comes to the judiciary, the legal panorama is very diverse. Apart from the fact that it is necessary to distinguish between those who act as judges and other staff (court clerks, etc.), it is also necessary to consider differences in the status of judges. In France, not only does the jurisdictional structure of the State (dual jurisdiction) lead to a differentiation between judicial magistrates (subject to an autonomous statute) and administrative judges (subject to the General Civil Service Code,[3] and to the application of the Code of Administrative Justice),[4] but in each jurisdictional order, there are differences in legal status (particularly between "professional" judges and magistrates). While Greece has opted for a common recruitment system for access to the various courts, magistrates form a separate group of public officials. Germany also has its own law on the status of judges,[5] as does Belgium.[6] In all democratic States, judges have a statute that guarantees their essential independence[7] and it has become one of the common European requirements implied by Article 6, paragraph 1, of the European Convention on Human Rights (ECHR), especially the requisite of the "tribunal established by law".[8] The armed forces are another category. Over centuries, the categories "civil" and "military" have referred to servants employed in a personal relationship to the rulers. The traditional term civil service has always indicated all other non-military positions. Since the nature of military duties places soldiers in a specific situation, they are subject to legal regimes, especially recruitment requirements, that are distinct from public officials exercising civilian functions, despite the fact that they are performing a public service, that of defence.

The modern democratic State is based on a service obligation with due regard to the common good. Recruitment procedures must take into account the increasing professionalisation of public services with pensionable positions for life. The reform of status relations is, therefore, necessarily accompanied by the need to require proof of qualification for career positions when recruiting.

This is true in particular for statutory civil servants. The civil service can be conceived more narrowly once it is accepted that there is no duplicity regarding the civil service and the public service, in other words a public service can be provided by agents who are not recognised as civil servants. The cases of teachers and carers are exemplary in this respect: they are subject to the civil service statute (France in both cases), while elsewhere, they are excluded from the scope of the civil service (Italy). Another element comes into play here, that of the legal regime applicable to employees. Without being recognised as civil servants, they may be subject to a legal regime based on either public or private (labour) law.

3 General Civil Service Code of 1 March 2022 (*Code général de la fonction publique*); www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000044416551/2022-03-01.

4 Code of Administrative Justice of 31 December 2000 (*Code de justice administrative*); www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070933.

5 German Judiciary Act of 8 September 1961 (*Deutsches Richtergesetz*), last amended by Act of 25 June 2021 (BGBl. 2021 I, p. 2154); www.gesetze-im-internet.de/drig/.

6 Law of 18 July 1991 modifying the rules of the Judiciary Code concerning the judges' education and recruitment (*Loi modifiant les règles du Code judiciaire relatives à la formation et au recrutement des magistrats*), Moniteur belge of 26 July 1991, no. 143, p. 16500.

7 On this matter, see the French Senate's "Comparative Legislative Study" No. 164 (2005–2006) – June 2006 – *Recruitment and Initial Training of Judicial Officers*, available at www.senat.fr/lc/lc164/lc164.html.

8 See ECtHR (GC), judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, 26374/18, paras. 244–252 and ECtHR, judgment of 3 February 2022, *Advance Pharma sp. z o.o. v. Poland*, 1469/20, paras. 294–302.

So, even if they are subject to labour law, the requirements of the public service authorise derogations from its application.

If it is accepted that a public service is an activity undertaken directly or indirectly by the public authorities with the aim of satisfying a need in the general interest, and subject at least in part to a public law regime,[9] then the scope of the public service in each legal area must be taken into account. The same activity may exist in one place as a public service and in another as a private activity (e.g. transport and healthcare). In addition, employees acting to carry out the same public service activity may be subject to different legal regimes: those who are civil servants coexist with those who are contractual employees (and among the latter, the legal regime applicable may fall under public law or private law). As a result, the same public service activity (social insurance in France) sees different staff working side by side, although the existence of the public service may have an impact on their legal situation since its principles (equality, neutrality, continuity, adaptability, etc.) dominate.

In career systems, civil servants hold their function, which gives them the right to exercise different public tasks during their career. In contrast, the employment model is characterised by precisely classified positions that correspond to strictly defined functions: civil servants are recruited to occupy a specific post on the basis of their qualifications. In these two systems, public employment can be defined as the position occupied by an agent, which corresponds to different public tasks to be carried out. The career system and the employment system, permanence and security on the one hand and precariousness on the other, are ideal types since there are actually many gradations, over and above standard models.

If not a concept, public employment is therefore at least an interesting term to consider, in that it does not imply any presupposition as to the link that exists between the person who occupies the post and the administration – contractual, statutory by means of a unilateral act, and so on – or even the formal qualities attributed to officials, such as civil servants and employees (Germany and Spain), administrators, and assistants (European Union). In the same way, this expression makes it possible to dissociate what is commonly referred to as the senior civil service, which has no legal value but generally designates posts at the hinge of the administrative and political spheres (France), and which we may be tempted to consider the civil service of ministerial leadership (Germany). However, in terms of recruitment, senior civil service positions have certain specific characteristics.

Consequently, the structure of the civil service (induced by career or employment models) does not seem to have any automatic impact on the nature of the legal link between the employee and the administration (status/contract, etc.), and seems to be completely indifferent to the method of recruitment for public employment.

2. Public Services and Public Administration

As regards the levels of administration of public service activities and with regard to the territory, it is appropriate to consider the form of the States (unitary, federal, regional, etc.) and the various territorial administrative entities of local government in each of them. The so-called specialised public services should also be taken into account (because they have a special remit – universities, hospitals, etc.), in other words, the public bodies in charge of a public service (in the form of establishments, agencies, independent authorities, etc.).

9 *Conseil d'Etat*, decision of 28 June 1963, *Sieur Narcy* (Rec., p. 401).

The study of the civil service is closely linked, on the one hand, to the requirements of good administration set out by the Council of Europe and, on the other, to the idea of transformation. It is widely known that so-called administrative (or State) reforms, or public policies grouped under the idea of New Public Management (NPM), provide an opportunity to examine the civil service when, more importantly, the civil service is not the lever for implementing these policies. As a result, the civil service is at the very heart of the public service, but to analyse it we need to consider the size of the workforce and the population of each State.[10] Over the last three decades, however, most European countries (Italy, France, Spain, the United Kingdom, Greece, etc.) have been undergoing a process of transformation for theoretical reasons linked to changes in the way governments see their role, and for more pragmatic reasons linked to the need to adapt to a variety of challenges (climate change, pandemics, armed conflicts, migration, new technologies, etc.).

Faced with the difficulties arising from the disparity of situations and designations, and in order to address the issue of recruitment to the civil service in Europe, two main positions can be adopted: the first consists of making choices in order to ensure a cross-sectional view of legal systems on identical subjects. The second consists of refusing to make such categorical choices, and by assuming a certain fragility of the comparisons made, accepting to face up to the variety, without failing to point it out. This is the approach preferred here, using the French legal system – the one most familiar to the author – as a reference. Although the civil servant, in the strict sense of the term, is given priority, it is still essential to take the broader notion of public employment into account.

This study focuses exclusively on the national framework of civil service recruitment models, leaving aside the analysis of international law. However, it is essential to note that the right of equal access to public service is firmly established in international instruments, such as Article 21, paragraph 2 of the Universal Declaration of Human Rights (UDHR) and Article 25 (c) of the International Covenant on Civil and Political Rights (ICCPR). Moreover, while the ECHR system does not explicitly provide for the right of access to public service employment, the European Court of Human Rights (ECtHR) has confirmed in its case law that individuals appointed as civil servants can lodge complaints if their dismissal or refusal of further promotion violates their rights under the Convention.[11] National authorities are obliged to ensure that access to public service employment is not hindered on grounds protected by the Convention, in accordance with Article 1 ECHR. Additionally, the Council of Europe's soft law offers valuable principles regarding equal and merit-based access to public service employment.[12]

10 An idea of variation can be obtained comparing Sweden (population 9.1 million and nearly 1.5 million civil servants; see *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfeld Olsson and E. Sjödin in this volume) and Spain (population 44 million and 2.7 million public servants, see *Boletín Estadístico del Personal al Servicio de las Administraciones Públicas*, Ministerio de Hacienda y Función Pública, January 2022, p. 7).

11 See *Right of Access to the Public Service in the European Convention of Human Rights: A Missed Opportunity?* by D. Toda Castán in this volume.

12 See Recommendation of 24 February 2000, no. R(2000)6 of the Committee of Ministers to Member States on the status of public officials in Europe.

II. Recruitment as a Combination of Two Requirements

The principles concerning civil service recruitment are the implementation of two common requirements that the European States share.

First, a democratic requirement. From the positive perspective, it postulates equal access to public posts and implies consideration of merit as the basis for recruitment. In a negative sense, it entails the refusal of favours as a method for gaining access to public office, in its various forms. Just as the spoils system once prevailed in Ireland, the United Kingdom also witnessed a patronage system predominantly influenced by wealth and family ties until the 19th century, where aristocrats held sway over public positions. These jobs were then granted as a political favour. In 1853, faced with the shortcomings of amateurism in the performance of public duties, which was attributed to this practice, recommendations were made to provide the public service with efficient agents.[13] The establishment of this diagnosis and the search for remedies spread throughout Europe, roughly concomitant with the permanence of the administration and consequently of public employment, although in some cases, this may have been achieved earlier, for example, as early as the 16th century in Sweden, 1737 in Prussia (where a preliminary examination was required for the recruitment of judges) and under the *Ancien Régime* in France (in a very fragmented manner).[14] It should also be noted that the end of amateurism corresponded to the profound social changes witnessed from the beginning of the 19th century, which further justified awareness of the need for an efficient and professional civil service.

Second, there is a need for efficiency, a tool for the professionalisation of the civil service, and even more, for its professionalism. This means recruiting on the basis of skills and adapting staff to the tasks they perform. It is on this consideration that the career system, which is the most widespread, is strongly challenged by the employment system.

III. The Democratic Requirement

The democratic requirement is expressed in the meritocracy model, which remains a shared value in European countries. It postulates equal access to public posts, although the way it is implemented varies from country to country. The principle of equal access to public employment makes a major contribution to the democratic legitimacy of administrative action.

1. The Principle of Equal Access to Public Employment

The principle of equality may find expression in different normative degrees and at various stages in different legal systems. It nevertheless stands as a common legal tenet across all Member States of the EU and countries that have ratified the ECHR. Consequently, it is intended to serve as a collective legal value shared among these entities.[15] So, although it is not logically expressed at the constitutional level in the UK, it nonetheless exists in the

13 Macaulay report on the Indian Civil Service, followed by the Northcote and Trevelyan report on the Organisation of a Permanent Civil Service in 1853; see Blick (2023).

14 See *Governing and Administering: The European Origins and Traditions of the Civil Service* by S. Fisch in this volume.

15 On various aspects of the principle of equality in the civil service, see *EU Non-discrimination Law and Its Potential Impact on the Civil Service of the Member States* by J. Mulder, and *Gender Equality in the Civil Service* by S. Korac, in this volume.

body of law.[16] Likewise, if the Swiss constitution of 18 April 1999 makes no mention of the civil service, it is because in the Swiss federal administration, the employment system is traditionally dominant (subject to ordinary law, staff no longer have the status of civil servants).[17] Hence, in the framework of an employment-oriented civil service system, the requirement, typically of a legislative nature, to publicise job openings seems to be the fundamental prerequisite for ensuring equal access to public employment opportunities.

Equal access to public employment, which has as its corollary the principle of non-discrimination, is most frequently enshrined in the constitution of States, and therefore has a constitutional basis. In France, Article 6 of the Declaration of the Rights of Man and of the Citizen[18] of 26 August 1789 states that the law is the expression of the general will. All citizens have the right to participate personally, or through their representatives, in its formation. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, are equally eligible for all public dignities, positions and jobs, according to their ability, and without any distinction other than that of their virtues and talents. Similarly, in Spain, the constitution of 27 December 1978 provides that citizens "have the right of equal access to public functions and offices, subject to the conditions required by law" (Article 23, paragraph 2), and specifies that the law shall regulate the status of civil servants, entry into the civil service in accordance with the principles of merit and ability, the special features of the exercise of their right to union membership, the system of incompatibilities, and guarantees regarding impartiality in the exercise of their duties (Article 103, paragraph 3).[19] Going even further, the Italian constitution of 22 December 1947 sets competitive examinations as a means of ensuring equal access for all citizens.[20] Its Article 97, paragraph 4 stipulates that "employment in public administration is accessed through competitive examinations, except in the cases established by law". More recent constitutions share the same approach. In Poland, for example, Article 60 of the constitution of 2 April 1997 states that "Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality".[21]

The constitutional status of equal access to public employment can also be seen in the affirmation of the principle of non-discrimination. In Hungary, this follows from the combination of Articles 23, paragraph 8 ("Every Hungarian citizen shall have the right to hold a public office corresponding to his or her aptitude, qualifications and expertise") and 15 (principle of equality and non-discrimination) of the constitution of 25 April 2011.[22]

16 See the Civil Service management code, which outlines civil servants' terms and conditions of service for government departments and agencies; www.gov.uk/government/publications/civil-servants-terms-and-conditions.

17 Federal Constitution of the Swiss Confederation of 18 April 1999; www.fedlex.admin.ch/eli/cc/1999/404/en.

18 Declaration of the Rights of Man and of the Citizen of 26 August 1789 (*Déclaration des Droits de l'Homme et du Citoyen*), www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen.

19 Spanish constitution of 27 December 1978 (*Constitución española*); www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf.

20 Italian constitution of 22 December 1947 (*Costituzione della Repubblica Italiana*); www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

21 Constitution of the Republic of Poland of 2 April 1997 (*Konstytucja Rzeczypospolitej Polskiej*); www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

22 The Fundamental Law of Hungary of 25 April 2011 (*Magyarország alaptörvénye*); www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178.

In Germany, the Basic Law of 23 May 1949 is more explicit and firmer in this respect.[23] Article 33, for example, is largely devoted to the civil service. It states that every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements (Article 33, paragraph 2). Neither the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed (Article 33, paragraph 3). The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law (Article 33, paragraph 4). The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service (Article 33, paragraph 5).

Case law plays an important role in the constitutional affirmation of this principle when, as has long been the case in Greece, the principle of equal access to public employment is not explicitly enshrined in the constitution. Indeed, this value is consistently affirmed by the Greek Council of State on the basis of the provisions of the constitution of 11 June 1975 that guarantee equality before the law (Article 4, paragraph 2) and reserve eligibility for public service for Greek citizens (Article 4, paragraph 4).[24] Moreover, the judges consider that the principle of meritocracy is in line with Article 5, paragraph 1 of the constitution, which enshrines the free development of the personality, which is understood to imply that access to public posts should be based on criteria relating to the merits and skills of candidates. The constitutional amendment of 2021 confirmed the aforementioned case law, since Article 103, paragraph 7 of the constitution now stipulates that

> the recruitment of personnel in the public administration and the public sector in the broad sense, as described each time by the law, [. . .] shall take place either by competitive entry examination or by selection on the basis of predefined and objective criteria, and shall be subject to the control of an independent authority, as specified by law.

The principle of equal access does not prevent legislation from imposing conditions on applications for access to the civil service, which may relate to the nature of the duties to be performed or to legal capacity. In the latter respect, and specifically in the context of the EU, the question of nationality in access to public employment is raised.

2. A Legal Condition for Equal Access: The Question of Nationality

Despite the absence of any identity between citizenship and nationality, which the Greek constitution takes care to specify, for example, by stipulating that “only Greek citizens shall be eligible for public service” (Article 4, paragraph 4), the nationality requirement for access to public posts is affirmed in most European countries. It is, moreover, a long-standing rule in these countries, being traditional in the sense that it appears necessary in view of the idea that foreigners cannot be admitted to public office on the grounds that such admission

23 German Basic Law of 23 May 1949 (*Grundgesetz für die Bundesrepublik Deutschland*), last amended by Act of 19 December 2022 (BGBl. I 2022, p. 2478); www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

24 Constitution of Greece of 11 June 1975 (*Syntagma tis Elladas*); www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf.

requires observance of the laws of the State, which cannot be presumed of a foreigner. This conviction has, however, been undermined, particularly by the construction of the EU.

Initially, the Treaty of Rome did not expressly require the civil service of each Member State to be open to all EU nationals. On the contrary, former Article 48 (currently Article 45, paragraph 4 of the Treaty on the Functioning of the European Union, TFEU)[25] excluded "employment in the public service" from the scope of the principle of freedom of movement for workers. However, as early as 1980, the CJEU interpreted this provision strictly. In its judgment of 17 December 1980, *Commission of the European Communities v. Kingdom of Belgium*,[26] it ruled that positions in the public administration that could be reserved for nationals were those characteristic of the specific activities of the public administration insofar as it is vested with the exercise of public authority and responsibility for safeguarding the general interests of the State.[27] The extent to which these principles, which have been reiterated by EU bodies, have been taken into account by national legislation varies and reflects a possible reluctance to accept their generality. In fact, many national legislations, while affirming the nationality requirement, have recognised derogations based on the nature of the duties performed, as is the case in France and Italy, for example, for research staff and university lecturers. Similarly, Article 4 of the Greek Civil Service Code[28] provides that citizens of non-EU countries may be appointed to the civil service if a special law authorises it (as in the case of research professors and hospital doctors).

On the other hand, since 1988, the Netherlands has opened access to the civil service without any nationality requirements, which means that nationals of EU Member States, as well as non-EU citizens, can apply for public posts. Only a few jobs, the list of which is determined by law, require Dutch nationality.[29]

Furthermore, most countries are still struggling to comply with European requirements. Greece is using the same method as the Netherlands: while Greek law initially interpreted the exception in Article 45, paragraph 4 TFEU broadly, meaning that a number of management posts that were not related to the so-called sovereignty positions could not in fact be filled by non-nationals, a Law of 5 March 2022 finally opens up this possibility,[30] and provides for the adoption of a decree (and not a law as in the Netherlands) listing the posts reserved for nationals. France followed the same path, but earlier. Condemned in 1986 by the CJEU for failing to fulfil its obligations by requiring French nationality for nursing posts in public hospitals,[31] France adopted the Law of 26 July 1991.[32] This stipulated that, in principle, EU nationals were not allowed to work in the civil service, except in the case of derogations provided for in special statutes. In other words, without reversing the

25 Article 45 of the Treaty on the Functioning of the European Union (TFEU), OJ C 326.

26 CJEU, judgment of 17 December 1980, *Commission of the European Communities v. Kingdom of Belgium*, C-149/79.

27 See also CJEU (GC), judgment of 24 May 2011, *Commission v. Belgium*, C-47/08 and CJEU, judgment of 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española*, C-405/01.

28 Law no. 2683/1999 of 5 February 1999, Regulations of Public Civil Administrative Servants and Employees of Legal Persons of Public Law, *Official Gazette of the Hellenic Republic*, A 19 of 9 February 1999.

29 De Becker (2011), p. 958.

30 Law no. 4903/2022 of 5 March 2022, Standard proposals for infrastructure projects and other urgent provisions, *Official Gazette of the Hellenic Republic*, A 46 of 5 March 2022.

31 CJEU, judgment of 3 June 1986, *Commission v. France*, C-307/84.

32 Law no. 91–715 containing various provisions relating to the civil service of 26 July 1991 (*Loi n° 91–715 portant diverses dispositions relatives à la fonction publique*), JORF of 27 July 1991; www.legifrance.gouv.fr/loda/id/JORFTEXT000000355009.

principle, France still fell short of European requirements; this was later corrected by the Law of 26 July 2005.[33] The latter provided that nationals of Member States of the EU or another State party to the Agreement on the European Economic Area other than France shall have access, under the conditions laid down in the general statute, to employment in the public service. However, they shall not have access to posts whose duties are either inseparable from the exercise of sovereignty or involve direct or indirect participation in the exercise of the prerogatives of public authority of the State or other public bodies. Since this text excludes European nationals from access to the civil service during their career,[34] and following another CJEU judgment in 2003,[35] the French legislature adopted the Law of 3 August 2009 on mobility and career paths in the civil service.[36] Article 26 of this legislation additionally opens internal competitions to staff from EU Member States. A similar movement, reflecting a reluctance to comply with European constraints, can be observed in Germany, Italy, and Spain.

While the legislation of some Member States (e.g. France) takes a generic approach to determining which jobs are covered by Article 45, paragraph 4 TFEU, many list jobs that impose the nationality requirement (like Italy) or on the contrary, waive it in select cases (former member United Kingdom).[37] The fact remains that there is widespread reluctance, even resistance, to removing the nationality requirement. As already mentioned, this is the case of Greece, joined by Denmark and Belgium.

In practice, the nationality requirement applies to civil servants ("No one can be a civil servant without French nationality", "only Greek men and women are appointed as civil servants"), so contract employees are not subject to it. The quantitative proportion of nationals holding public posts is, therefore, likely to vary according to the relationship between the State and those who serve it. Selection for access to employment for statutory or contractual employees is mainly based on merit. However, the procedures for this selection on merit vary, particularly in the name of efficiency.

IV. The Need for Efficiency

The recruitment procedures reflect the quest for an efficient administration, which requires the staff in charge of implementing its action to have sufficient professionalism.

33 Law no. 2005–841 on the development of personal services and various measures to promote social cohesion of 26 July 2005 (*Loi n° 2005–841 relative au développement des services à la personne et portant diverses mesures en faveur de la cohésion sociale*), JORF of 27 July 2005; www.legifrance.gouv.fr/loda/id/JORFTEXT000000632799.

34 The French Council of State, consulted for an opinion, considers that it "must be regarded as inseparable from the exercise of sovereignty or as directly or indirectly participating in the exercise of public authority prerogatives of the State or other public entities: a) on one hand, the exercise of functions traditionally qualified as sovereign; b) on the other hand, the participation, primarily within a public entity, in the drafting of legal acts, the control of their application, the sanctioning of their violation, the implementation of measures involving possible recourse to the use of coercion, and finally the exercise of guardianship." See *Conseil d'Etat*, Opinion of 31 January 2002, no. 366–313.

35 CJEU, judgment of 3 September 2003, *Burbaud*, C-285/01.

36 Law no. 2009–972 on mobility and career paths in the civil service of 3 August 2009 (*Loi n° 2009–972 relative à la mobilité et aux parcours professionnels dans la fonction publique*), JORF of 5 August 2009; www.legifrance.gouv.fr/loda/id/JORFTEXT000020954520.

37 Civil Service Nationality Rules, see www.gov.uk/government/publications/nationality-rules/civil-service-nationality-rules-html.

Article 97 of the Italian constitution of 1947 affirms the principle that civil servants be recruited by competitive examination: “Employment in public administration is accessed through competitive examinations, except in the cases established by law.” Italy and Greece (since 2021) seem to be the only countries in which competitive examinations are expressly enshrined in the respective constitutions. In most cases, this approach is typically outlined at the legislative level. The fact remains that some States, while practising selection, do not make it a technique that is either exclusive or a matter of principle. The diversity of selection methods can also be seen in the recruitment of contractual staff. While the decision to give preference to contractual staff is often justified by the search for greater efficiency (adapting a member of staff to the job profile), the nature of the legal link between the member of staff and the public service does not influence the recruitment method. Which authority or authorities are responsible for recruitment? On the basis of what criteria? The national solutions concerning State civil service, although not identical, are based on the same meritocratic concerns, which are a prerequisite for the efficiency of the services.

1. Centralisation and Specialisation of Recruitment

Recruitment procedures may fall within the remit of more or less centralised and specialised authorities. First, they may be at the ministerial or inter-ministerial level, i.e. they may be more or less specialised. In this respect, solutions are not static over time, which is why significant developments can be reported in some countries. In addition, the advertising of vacancies is itself more or less centralised and is certainly so where there is an inter-ministerial body responsible for advertising (Ireland, the United Kingdom, Greece, etc.), or even a ministry dedicated to the civil service (France).

Following the recommendations of the Northcote and Trevelyan report of 1853, a body independent of the ministries, the Civil Service Commission, was set up in the United Kingdom in 1855. Comprising three civil service commissioners, it examined applications and issued certificates of aptitude. From 1870, it organised competitions open to all, based on the principle of merit. The form of the competition became clearer around 1910. The United Kingdom, therefore, adopted an exclusive centralised recruitment system at a very early stage, a principle that satisfied the government if the continued existence of the Civil Service Commission was anything to go by. Based on this model, Ireland set up the Office of the Civil Service and Local Appointments Commissioners, a three-person committee responsible for setting standards for entry to the civil service. Under the Public Service Management (Recruitment and Appointments) Act 2004,[38] which governs recruitment procedures, this office was replaced by two separate bodies, the Commission for Public Service Interviews (CSPA) and the Public Interview Service (PAS), the central recruitment agency for public service.

Greece borrows in part from the UK’s centralised system, as it also uses an independent administrative authority to recruit civil servants.[39] The High Council for Personnel Selection (ΑΣΕΠ – ASEP) was created by a 1994 Law and enshrined in Article 103,

38 Public Service Management (Recruitment and Appointments) Act no. 33 of 2004, 2004 c. 18; www.irishstatutebook.ie/eli/2004/act/33/enacted/en/print.html.

39 Article 13 of the Civil Service Code states that vacant positions are filled by or under the control of an independent administrative authority (see Law no. 2190/1994 on establishment of an independent authority for the selection of staff and regulation of administrative matters of 3 March 1994, *Official Gazette of the Hellenic Republic*, 28 of 3 March 1994).

paragraph 7 of the constitution when the constitution was revised in 2001. Currently governed by a Law of 15 January 2021,[40] Article 2 of the Law lists the categories of civil servants who are not covered by the scheme. For example, parliamentary staff, members of the armed forces, police officers, judges, hospital doctors, teachers-researchers, trust officers and students at the National School of Public Administration and Local Government (ESDDA), for whom specific recruitment procedures are in place, are not covered by the authority's remit. Military personnel and police officers have access to training schools via competitive examinations. For magistrates, the National School of Magistrates is responsible for recruiting and training magistrates for all levels of jurisdiction (judicial, administrative, financial). Lecturers are recruited by their peers on the principle of co-option. In Belgium, federal staff recruitment is also centralised and carried out by a Federal Administration Selection Office (SELOR). Staff recruitment in the Greek public administration and public sector is therefore based on a mainly mixed system, which on the one hand, combines selection according to objective, predefined criteria, subject to the control of an independent authority, and on the other hand, selection based on competitive examinations envisaged by special laws.

In France, recruitment of ministry staff has been centralised since 1945. The country experienced a break with this system in the aftermath of the Second World War. With the adoption of a General Civil Service Code,[41] there was a move towards centralised, inter-ministerial recruitment, which led to the abolition of various competitive examinations, the creation of a single civil service body of civil administrators, and the introduction of a competitive examination for admission to a training school, the *Ecole nationale d'administration* (ENA) and a competitive examination for admission to the *Instituts régionaux d'administration* (IRA). Although there are exceptions to this process, ENA and IRA provide inter-ministerial recruitment under the supervision of a ministry responsible for the civil service, and the permanent Civil Service Directorate reporting to the head of government. The recent abolition of ENA and its replacement by the *Institut national du service public* (INSP) under the Order of 2 June 2021[42] does not call into question the principle of centralised recruitment, and it may even be considered in this respect to strengthen it. First, success in the competitive entrance examination for this institute gives access to the body of State administrators, and it is only after years of service in this capacity that employees can aspire to access the "major bodies" of the State. In other words, direct access to these major bodies (*Cour des Comptes*, *Conseil d'Etat*, *Inspection des Finances*, etc.) has been abolished and recruitment is based on selection from among candidates who can demonstrate that they have served a significant period of time in the body of State administrators or in a comparable body. Certain bodies, such as prefects and ambassadors, are then abolished and replaced by a job function adapted to the professions in question.

40 Law No. 4765/2021 on modernisation of recruitment procedures through the Supreme Council for Civil Personnel Selection of 15 January 2021 (*Official Gazette of the Hellenic Republic*, A 6 of 15 January 2021), which replaces the 1994 Law.

41 General Civil Service Code of 1 March 2022 (n. 3), see also *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant.

42 Order on reforming the senior management of the State civil service of 2 June 2021 (*Ordonnance portant réforme de l'encadrement supérieur de la fonction publique de l'Etat n° 2021–702*), JORF of 3 June 2021; www.legifrance.gouv.fr/jorf/id/JORFTEXT000043590607.

The Spanish model is similar to the French system in that recruitment is based on selection and training by the *Instituto Nacional de Administración Pública* for State civil servants and by the *Instituto de Estudios de Administración Local* for local civil servants.

As in France under the Third Republic, recruitment in Germany and Italy is mainly carried out at ministerial level, based on the specific needs of each department. In Germany, recruitment is based on a selection of candidates who apply for advertised posts based on "their aptitudes, qualifications and professional abilities" (§ 9 of the Federal Civil Service Act[43] reiterating Article 33 of the Basic Law), which include passing State examinations. Nor is recruitment centralised in Denmark, where it is carried out at ministry and administrative level, or in Italy, where it is part of the policy of contractualisation of public employment that has been in place since 1993.[44] In fact, in all the countries where it is used, contractualisation seems to encourage fragmentation of recruitment levels through greater specialisation.

It is remarkable that in recent decades most European countries have sought greater flexibility in recruitment in the name of improving the performance of public services.[45] In Ireland, the Public Service Management Act 2004 introduced a new recruitment framework to enable departments to recruit qualified staff quickly, and authorised departments and agencies to recruit staff directly on contract. The direct use of contract staff has also been facilitated in France, in particular by the 2019 Law on transformation of the civil service.[46] The characteristics of the career system, the principle of which remains, also seem to be strongly challenged by the facilities or flexibility offered by the employment system.

2. The Characteristics of Merit-based Selection

The way vacancies for public office are advertised differs between countries where the career or the employment system prevails. In the latter case, the recruitment of civil servants differs little from that of private sector employees. Selection procedures are left to the discretion of the head of department, and at most the candidate's file may be subject to specific procedures, such as a background check. In the first case, and in countries where competitive tendering is the preferred method, laws and regulations stipulate the exact form and content of advertising. Not only is the competition advertised in official publications (such as the official gazette, ministerial bulletins, etc.), but the announcement must also include various details: the number of vacancies, the posts concerned, the qualifications required, details of the practical organisation of the competition (date, venue, provisional timetable for the tests, etc.).

Competitive procedures in a career system often set an educational admission condition, as in the German model. The Federal Civil Service Act is based on the amended Law

43 Federal Civil Service Act of 5 February 2009 (*Bundesbeamtengesetz*, BBG), last amended by law of 17 July 2023 (BGBl. 2023 I No. 190); www.gesetze-im-internet.de/bbg_2009/.

44 Legislative decree of 3 February 1993, no. 29 (*Razionalizzazione dell'organizzazione delle amministrazioni pubbliche e revisione della disciplina in materia di pubblico impiego, a norma dell'articolo 2 della legge 23 ottobre 1992, n. 421*), GU of 6 February 1993, no. 30.

45 See OECD, *Public Employment and Management 2021: The Future of the Public Service*, available at: www.oecd-ilibrary.org/governance/public-employment-and-management-2021_938f0d65-en.

46 Law on the transformation of the civil service of 6 August 2019 (*Loi de transformation de la fonction publique n° 2019–828*), JORF of 7 August 2019; www.legifrance.gouv.fr/jorf/id/JORFTEXT000038889182. See also *The Civil Service in France: Evolution and Permanence of the Career System* by D. Capitant.

on Federal Civil Servants of 1953,[47] which enshrines the career principle. As regards the *Länder* and local communities, the corresponding rules are enshrined in the Law on the Status of Civil Servants of 2008.[48] Civil servants are recruited by the various authorities under their own competence for their staff. The law requires specific qualifications for each career path.

As in many other countries, there is a distinction between four career classes, namely sub-clerical service, clerical service, executive service and administrative service.[49] These service classes correspond to the career categories D, C, B and A. Access to them depends on the level of education. Applicants for administrative service positions must have a university education with a master's degree or a first State examination in law. A bachelor's degree is recognised as an educational qualification for entering the executive service.

These educational qualifications are considered prerequisites for recruitment into the preparatory service. The second State examination, which qualifies to exercise the office of judge, is the standard prerequisite for law students. It also includes qualifications to be employed as an administrative official, which explains the dominance of lawyers in higher administrative positions in Germany. In practice, recruitment to the administrative service is also taking place in areas with an increasing shortage of specialists. There are, therefore, exceptions to the basic requirement of a master's degree. In exceptional cases, a bachelor's degree is also accepted.

In other words, the originality of the German selection system lies in the fact that it involves a necessarily limited number of candidates, those who can demonstrate recognised "ability" after highly selective examinations based on merit. However, the German example also shows that the design of access requirements can shape the character of the administration in the long term. The "lawyer monopoly" is controversial because the labour market in Germany is changing in structure. The proportion of lawyers will foreseeably decline in future.

Recruitment by mutual agreement is more common in countries with an employment system, or in career systems, as an exception to competition, when public posts are filled by candidates whose merit is freely assessed by the head of the department. Open recruitment is used in the Netherlands, Sweden and Denmark. In Sweden, a call for applications is published, and each local authority, ministry or agency is free to recruit its own staff and define the skills required for the posts to be filled. Only judges and diplomats are recruited by competitive examination. Under Danish law, staff are recruited on the basis of their qualifications and professional experience, a *curriculum vitae*, a letter of motivation and an interview. There are no age or training conditions limiting access to public jobs.

Most countries operate a merit-based selection system based on the principle of competitive examination. This is particularly the case in Italy, Spain, Greece and France. Traditionally organised according to the career principle, since the first statute in 1908,[50]

47 Cf. *supra* n. 43.

48 Law governing the Status of Civil Servants in the *Länder* of 17 June 2008 (*Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz – BeamtStG)*), last amended by Law of 31 May 2023 (BGBl. 2023 I, p. 140); www.gesetze-im-internet.de/beamtstg/BJNR101000008.html.

49 Cf. Ordinance on the careers of federal civil servants of 12 February 2009 (*Verordnung über die Laufbahnen der Bundesbeamtinnen und Bundesbeamten* (*Bundeslaufbahnverordnung – BLV)*), last amended by Regulation of 27 January 2023 (BGBl. 2023 I, no. 30); www.gesetze-im-internet.de/blv_2009/.

50 Royal Decree of 22 November 1908, no. 693 (*Testo unico delle leggi sullo stato degl'impiegati civili*), GU of 15 December 1908, no. 292.

the Italian civil service remains attached to selection by competition. Since the most recent reforms, the principle of access to civil service jobs, subject to the civil servants' statute issued by Legislative Decree no. 165/2001,[51] has been maintained,[52] but recruitment with a view to concluding a contract is also preceded by a competitive selection process for employees subject to a legal regime governed by employment law.[53] In Spain, and in line with the career system (career in the administration, grouping into corps and recruitment by competition) enshrined in the Basic Statute of the Public Employee of 2007,[54] recruitment of civil servants and permanent contract staff is in principle by competition, whether based on tests (*oposición*), qualifications (*concurso*) or mixed (combining qualifications and tests). In Greece, there are also two types of competitive examinations: test-based and portfolio-based.[55] Article L320-1 of the French General Civil Service Code states that "civil servants are recruited by competition" and sets out the different types of competition: based on tests, qualifications or mixed. The EU adopted a career system inspired by the French model and recruits its staff through competitive examinations (without national quotas but on "as wide a geographical basis as possible"), after which candidates are not appointed to a post, as is the case in France, but placed on a list of suitable candidates.

Competitive examinations, like other types of merit-based selection, warrant three comments. First, competitive examinations are either designed to fill specific jobs directly or to give access to a training school, after which the candidate is appointed to a civil service post. Second, competition remains a principle, which means that the law contemplates exceptions.[56] Finally, from a quantitative point of view, this technique may appear out of step with the real situation of recruitment to public positions. In France, for example, recent reforms, including the Law of 6 August 2019 on the transformation of the civil service,[57] make greater use of contract staff to fill public posts. This circumstance does not, however, have the automatic effect of facilitating recruitment without competitive examination, since its principle is confirmed by the General Civil Service Code; the same is true in Italian law, since it is understood that contractual employees subject to private law benefit from collective agreements that have specific features, including recruitment by competitive examination.

When the selection of candidates for a public post is based on tests, the nature of these tests makes it possible to determine the profile expected by the government from its employees. In this respect, we can highlight the difference in the expectations of the administration with regard to its servants by contrasting the British and French systems. Initially, in the United Kingdom, the selection was based on a written test of general knowledge and a free conversation with the jury, different from an oral examination. After

51 Legislative Decree of 30 March 2001, no. 165 (*Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche*), GU of 9 May 2001, no. 112.

52 Namely, magistrates, military personnel, police officers, diplomats, the prefectural corps, academics, and certain control agency staff.

53 Cavallo Perin and Gagliardi (2012), p. 443.

54 Law no. 7/2007, Basic Statute of the Public Employee of 12 April 2007 (*Ley n° 7/2007 Estatuto Básico del Empleado Público*); last amended by Royal Legislative Decree no. 5/2015 of 30 October 2015, BOE of 31 October 2015.

55 Article 7, para. 1 of Law No. 4765/2021 on modernisation of recruitment procedures through the Supreme Council for Civil Personnel Selection of 15 January 2021 (n. 40).

56 In the French case, Article L320-1 of the General Civil Service Code of 1 March 2022 (n. 3).

57 Law on the transformation of the civil service of 6 August 2019 (n. 46).

the Second World War, this second test was replaced by two series of tests, one on intelligence and the other on personality, taken before two different juries. Following the Fulton Commission of 1968, which criticised the elitist nature of the recruitment system (known as the "Oxbridge" system), a review led to recruitment on the basis of a portfolio, followed by an interview and specific examinations by the Civil Service Commission, which is independent of the ministries. Although the selection process is based on skills, it does not call for special knowledge in specific fields, such as law or economics, and aims to recruit a generalist civil servant trained in the classical humanities. This situation did not escape criticism, with certain scholars indicating that an absence of legal influence in the style and technique of administration was noticeable throughout central government. The civil service, with its non-legal character and autonomous internal management, tended to develop attitudes that are clearly different from those of lawyers.[58] France, on the other hand, valued the legal training of civil servants to open up skills until the Second World War, which is why general (ENA and IRA) and specialised public service training schools (police school, public health school, etc.) were created at that time. The fact remains that the disadvantages observed in Great Britain have also become apparent in France, with the "Sciences-Po Paris/ENA" system largely resembling the "Oxbridge" system. The organisation of internal (reserved for staff with a number of years' experience in the public service) and external competitive examinations (also known as "student" examinations, as they are open to candidates with a diploma attesting a certain level of education) ensures greater social diversity in recruitment; the introduction of a "third competitive examination", open to people with proven commitment to the community (associations, trade unions, etc.), helps correct social inequalities and include a variety of experience.

In general, specialised competitive examinations include tests tailored to the nature of the duties to be performed by future employees. For example, the Greek law of 2021 contemplates two types of test: a test of knowledge in subjects related to the posts to be filled, and a test of intellectual ability and professional efficiency. These are supplemented by practical or oral tests, depending on the needs of the service and the nature of the posts advertised.

The only way to grasp the commonality of expectations regarding the qualities and skills required to enter the service of the public authorities, and the role of the *grandes écoles* in recruitment in those countries familiar with them, is by comparative sociological study, which has yet to be carried out.

There is recurrent criticism of the operational validity of the competitive recruitment procedure. Besides the cumbersome, costly, formalistic way it is organised, this recruitment technique is being questioned because it prevents the employer from choosing the candidate who seems best suited for the post. Matching the profile to the post is a prerequisite for modern human resource management, which cannot be reconciled with a career-based civil service.

Recruitment is a highly complex issue for everybody concerned, not least for young graduates. Those employed in the public service have often gone through several selection procedures. A selection decision, which defines the requirements for employment, is made in the first stage with the initial application. In the second stage, those who will be recruited into a career or post in the administration are selected from the applicants admitted. In the third stage, after some years of employment, a selection decision is made

58 Wade and Forsyth (2000), p. 56.

for applications for a promotion post. In all cases, decisions are made in competition with other applicants.

The extent to which a rejected applicant can defend himself or herself in court is a hotly debated question in civil service law. The rule is that in the competition between candidates, selection decisions are based on the merit principle. The phenomenon known as the "spoils system" is unfortunately still present in the form of office patronage.

There are, however, many challenges. Decisions regarding promotion, which are made on a very individual basis in Human Resources (HR) practice, contrast with the processing of large numbers of applications in the context of external advertisement. Here automated procedures are increasingly being used. Technological development is leading to the use of intelligent systems that make recruitment suggestions based on experience (e.g. Artificial Intelligence). The legal question that arises is how individual decisions springing from a complex algorithmic decision-making system can be justified. The right to an explanation includes the need to provide the necessary information for a decision to be challenged.

3. *The Senior Civil Service*

While there is no legal concept of a senior civil service, the expression is usually used to describe jobs at the interface between the political and administrative spheres, and management jobs. These are the so-called political posts or so-called senior jobs, which generally include prefects, ambassadors, directors of central administration, as well as assistants to heads of State or government and ministers. The introduction of a form of recommendation as a means of recruitment to these posts is undoubtedly what unites them.

This is the case in Spain, where senior civil servants have been subject to special *directivo* status since 2007,[59] in Italy (legislative decree of 1993),[60] in Greece, by virtue of a constitutional provision relating to "posts of trust",[61] and in Germany with "political civil servants". In the United Kingdom, since 1996, the senior civil service has been made up of civil servants who although employed by different ministries, form a coherent whole: they are recruited by a specialised agency (the Recruitment and Assessment Services Agency) and are subject to common assessment mechanisms and a single pay scale. In France, the General Civil Service Code recognises the existence of jobs left to the discretion of the government; and management jobs (Articles L341-1 ff.). The recognition of this specificity in no way implies a common legal regime in the different States, since access to these posts is not necessarily reserved for civil servants. There may in fact be open or closed recruitment systems.

The closed system corresponds to legal situations where management positions are reserved for members of the civil service only. This is the case in Germany, where political civil servants are chosen on political criteria to occupy the most senior posts in the administration (secretaries-general of ministries, department heads, etc.), but generally come from the civil service and are made available to the government. The same is true in

59 The latter increases their accountability and establishes a system for evaluating their results; see Article 13, para. 3 of the Basic Statute of the Public Employee (n. 54).

60 Cassese (2002), pp. 677 f.

61 Article 103, para. 5, of the Greek constitution provides that high civil servants holding posts outside the civil service hierarchy, persons directly appointed on ambassadorial rank, employees of the Presidency of the Republic and the offices of the Prime Minister, Ministers and Undersecretaries may be exempted by law from permanent tenure.

the UK. Where exceptions to the rule have been made, there have been strong reactions because the principle of neutrality of the Civil Service means that political appointments are prohibited. The solution is similar in Ireland, where senior civil servants are recruited by a special committee (Top Level Appointments Committee, TLAC) from among holders of certain grades.

Without being analogous to a simple employment system, most countries have an open system, which allows recruitment from the world of business or politics, and therefore does not reserve jobs for civil servants alone. In France, the law provides that senior posts for which appointments are left to the Government's decision "are essentially revocable, whether they concern civil servants or contract agents", just as "management posts in the State are not necessarily filled by civil servants" and that access to these posts does not lead to tenure. Italy, which favoured a closed system for a long time, recently adopted the following solution: the employment relationship, normally of indefinite duration, must be distinguished from a management position, which is attributed to a unilateral act and is temporary in nature. In short, there is a divide between the acquisition of managerial status and the allocation of managerial functions.[62] In Greece, staff appointed to positions of trust do not benefit from career guarantees and can be dismissed at any time. They are mainly staff in the office of the President of the Republic, the Prime Minister's office and ministerial offices. In principle, ambassadors are career diplomats and appointments from outside this corps are still fairly rare. In the EU civil service, senior posts are also exempt from recruitment by competitive examination.

V. Conclusion

There is tension between the requirements placed on the recruitment of civil servants in democratic societies. The examination and competition system, which is based on competence and reinforced by training, makes it possible to achieve equality in law, but does not rule out all social favouritism, which is what positive discrimination policies, in particular, are trying to correct. Furthermore, in situations where there is room for forms of recommendation – as in the case of the senior civil service – the technical qualification criteria used for recruitment are never absent. As a product of national histories,[63] the various legal forms of recruitment nevertheless manage to maintain a balance between the principle of equality, which is part of a form of "administrative citizenship" at the heart of the legitimacy of administrative action on one hand, and on the other, if not the professionalisation of the civil service, at least its necessary professionalism.

This observation calls for two comments, which go beyond the strict study of civil servant recruitment. First, a certain flexibility in recruitment procedures is emerging, borrowed from the two systems of the classic opposition between the career system and the employment system, an opposition we understand no longer conceals numerous intermediate mechanisms, born of the inventiveness of national legal systems. There is no doubt that this situation calls for a rethink of the models and other conceptions of the civil service, based on civil service "professions" for example. A number of countries are currently considering these issues, opening the way to the structure of the civil service organisation, which goes beyond the single approach of the civil service via recruitment of its staff.

62 Pensabene Lionti (2021), pp. 989 and 998.
63 Dreyfus (2012), p. 327.

Secondly, certain practices involving the outsourcing of skills, such as the use of private consultancies, appear to be undermining the professionalism of public servants. By ignoring the resources of the civil service and seeking them outside, we are surreptitiously creating a need that could justify the impoverishment of the civil service itself through its servants. But above all, this practice reveals a temptation, sometimes consummated, to imitate private enterprise, which can be assumed to affect public service models. Indeed,

> the sum total of observations on national civil service laws also shows that they are all grappling with the globalisation and individualisation of economic and social relations, and that they are all turning, with varying degrees of fervour, to entrepreneurial and accounting-type solutions for managing their staff.[64]

Bibliography

Blick A. (2023), ‘Report on the Indian Civil Service (The “Macaulay” Report)’, in Blick A. (ed), *Documents on the Nineteenth Century United Kingdom Constitution*, London, New York: Routledge, 34–37.

Cassese S. (2002), ‘Le nouveau régime de la haute fonction publique en Italie: une modification constitutionnelle’, 104(4) *Revue française d’administration publique*, 677–688.

Cavallo Perin R., Gagliardi B. (2012), ‘Le recrutement dans les administrations publiques et le principe du concours dans le système juridique italien’, 142(2) *Revue française d’administration publique*, 443–454.

De Becker A. (2011), ‘The Legal Status of Public Employees or Public Servants: Comparing the Regulatory Frameworks in the United Kingdom, France, Belgium, and the Netherlands’, 32(4) *Comparative Labor Law & Policy Journal*, 949–989.

Dreyfus F. (2012), ‘La double genèse franco-britannique du recrutement au mérite: les concours et l’open competition’, 142(2) *Revue française d’administration publique*, 327–337.

Krzywoń A. (2022), ‘The Notion of Civil Service in Europe: Establishing an Analytical Framework for Comparative Study’, 91 *FÖV Discussion Paper*, 1–48; https://dopus.uni-speyer.de/frontdoor/deliver/index/docId/5606/file/DP-091.pdf.

Pensabene Lionti G. (2021), ‘Il conferimento degli incarichi dirigenziali e il trattamento economico’, in Boscati A. (ed), *Il lavoro pubblico – Dalla contrattualizzazione al governo Draghi*, Sant’Arcangelo di Romagna: Maggioli Editore, 989–1014.

Stelkens U., Andrijauskaitė A., Marique Y. (2020), ‘Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration – Overall Assessment’, in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness*, Oxford: Oxford University, 755–820.

Taillefait A. (2019), *Droit de la fonction publique*, 8th edition, Paris: Dalloz.

Wade W., Forsyth C. (2000), *Administrative Law*, 8th edition, Oxford: Oxford University Press.

64 Taillefait (2019), p. 48.

25 The Disciplinary Responsibility of Civil Servants

European Minimum Standards

Antonio Bueno Armijo

I. Introduction: A Common Trend, an Unfinished Journey

In the last decades, the regulation of the disciplinary responsibility of civil servants in most European legal orders has consistently evolved in one and the same direction. Initially, national legal orders granted a wide margin of appreciation to public authorities to exercise their disciplinary powers over their civil servants. The disciplinary measures adopted under those powers were frequently beyond the reach of any judicial review and, as a result, the public authorities showed little or no respect for civil servants' rights of defence. In fact, even the very existence of those rights was denied in some cases.[1] This was not exactly a case of arbitrariness on the part of the public authorities, but the result of an approach based on a sincere belief in the special nature of disciplinary responsibility.[2]

As a matter of fact, no single European legal order has ever abandoned this belief.[3] However, most of them have gradually accepted that this "special nature" cannot justify an almost complete sphere of immunity from legal control.[4] Therefore, in the first stage, judicial review of disciplinary measures imposed on civil servants was finally recognised and, subsequently, a vast array of substantive and procedural rights was progressively granted

1 In the classical view of Foucault (1975), disciplinary proceedings in a broad sense (including civil servants, but also inmates, conscripts, or students) arose in the *Ancien Régime* as a kind of "under-criminality" (*infra-pénalité*) and defined a space with its own rules beyond the common law and the judicial review.

2 E.g. in the case of France, the denial of the application of the principles *nullum crimen sine lege* and *nulla poena sine lege* to the civil servants' disciplinary responsibility was widely accepted and justified on the idea of *institution* and their "special relationship of obligation", as shown by Dellis (1997), pp. 237–240 and pp. 244–246 or Petit (2014), pp. 1043–1044. A very similar view existed within the Spanish legal order, Carretero-Pérez and Carretero-Sánchez (1995), pp. 92–93; Marina-Jalvo (1999), pp. 84–87. This approach was consistent with the idea that disciplinary proceedings "typically lack any criminal flavour", Kidd (1987), p. 867.

3 Accordingly, even in those legal systems where the application of the principle *nullum crimen sine lege* to the disciplinary responsibility of civil servants is now accepted, this principle is still subject to a more lenient interpretation. As a result, "violations of 'discipline' are not defined in a strict manner like criminal offences are, but, for the most part, by general clauses and expressions", Miklau (2003), pp. 793–794; Rogall (2003), pp. 934–935; Bombois and Déom (2007), p. 33; Bueno-Armijo (2018), p. 252. Somehow disenchanted, Petit (2014), p. 1041, quotes Di Lampedusa's *The Leopard* and wonders if everything changed just to ensure that everything remained the same.

4 Among many other examples, this evolution in the specific case of the Dutch military officers can be exhibited as paradigmatic, given that the initial lack of guarantees around the disciplinary measures in this domain was at the origin of the key ECtHR case, judgment of the 8 of June 1976, *Engel and others v. the Netherlands*, 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, paras. 81–82; Boiten et al. (2003), pp. 1088 and 1099.

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with regard to them.[5] The role played by the European Court of Human Rights (ECtHR) in this evolution proved to be instrumental,[6] but it certainly was not a leading role. Many European legal orders are well ahead in the acknowledgment of the far-reaching rights granted to civil servants to protect them from the public authorities' disciplinary powers.[7]

There exists, in fact, a complex debate on the type and extent of these substantive and procedural rights. A growing number of European legal orders consider that these rights must be rather the same as those granted to citizens facing punitive administrative sanctions that are criminal in nature, rendering applicable, therefore, Articles 6 and 7 of the European Convention on Human Rights (ECHR). This approach has been accepted by the ECtHR. But it also accepts the opposite approach: European legal orders are also allowed to distinguish between disciplinary and criminal measures and to restrict the application of Articles 6 and 7 ECHR solely to the latter. Only a few especially serious disciplinary measures (in practice, those implying a severe deprivation of liberty) necessarily have to be considered administrative sanctions that are criminal in nature.

As one might expect, the legal regime applicable to disciplinary measures varies and is completely dependent on the approach adopted. And so does the level of protection enjoyed by civil servants regarding the disciplinary powers of their corresponding public administrations. This situation stands in the way of formulating a common explanation of the disciplinary responsibility of civil servants that would be suitable for every European legal system. Nevertheless, in this chapter, we will try to: establish a concept of disciplinary responsibility of civil servants (Section II), analyse its main elements (Section III), determine when disciplinary measures can be considered "criminal in nature" within the meaning of Articles 6 and 7 ECHR (Section IV), and establish some common and minimum standards protecting civil servants (Section V).

The existence of significant differences among European legal orders renders difficult any attempt to achieve a uniform exposition of the disciplinary responsibility regime of civil servants in Europe. That is why in this chapter we will largely focus on the case law of the ECtHR pertaining to civil servants' disciplinary responsibility. On the one hand, this approach will provide us with a common legal framework, shared by every member of the Council of Europe.[8] On the other hand, however, this common framework only contains the lowest level of rights and guarantees. Hence, it must be kept in mind that many European legal orders offer a higher level of protection, and this seems to be the trend currently being consolidated.[9]

5 In several countries (e.g. Germany, Italy, Poland, Spain), many of those substantive and procedural rights were established by the Constitutional Courts to bring disciplinary regimes into line with their national constitutional requirements, Chiavario (2003), p. 721; Quattrocolo (2003), p. 1002.

6 Chiavario (2003), p. 713; Miklau (2003), p. 794; Pralus-Dupuy (2003), p. 898.

7 As stated by Rogall (2003), p. 948, this makes the protection provided by the ECtHR "superfluous to the extent that national legislation *per se* contains the required procedural standards in disciplinary matters".

8 In fact, the case law developed by the ECtHR on the right to effective judicial protection in the framework of a disciplinary procedure against a civil servant has also been received and applied by the CJEU, see judgment of 9 September 2010, *Andreasen v. Commission*, T-17/08, paras. 141–142; Oberdorff (2014), p. 299.

9 As an exception, it has been noted that in former European socialist countries (e.g., Slovenia), civil servants' position in the disciplinary proceeding experienced a transitory episode of weakness. Indeed, "under socialism (. . .) it was the State that protected the working process and the worker with very detailed provisions regulating the field of discipline law. Now, the law provides only for the minimum rights of the defendant in disciplinary proceedings because it is considered that it is the employer's right to sanction any violations of the labour contract", Sugman (2003), p. 1064; Chiavario (2003), p. 712.

II. The Concept of the Disciplinary Responsibility of Civil Servants

One of the basic features of the rule of law states that the public powers have full responsibility for their actions, and this applies above all to the executive power. This includes not only the government, but the public administration, its officers, and agents. Therefore, the responsibility of civil servants is crucial for the ideas of democracy, civil rights, or rule of law itself.

Civil servants' responsibility typically takes three different forms: civil, criminal, and disciplinary. The three of them compose the so-called responsibility triad (*Verantwortungstrias*).[10]

In the first place, civil liability is a kind of responsibility that is compensatory in nature: civil servants are liable for damages that they may cause in the exercise of their duties and they are expected to restore the situation and make those damages disappear.[11] However, the extent of this civil liability can vary. Civil servants are usually liable for damages directly caused to their employers, but they may not be liable for damages caused to citizens unless intentionality or gross negligence are involved.

In the second place, with regard to civil servants' criminal liability, national criminal codes and laws usually include crimes that can only be committed by civil servants or public officials, not by regular citizens (e.g. torture). They may also include some other crimes that can be committed by any individual but establishing harsher punishments for civil servants committing them.[12]

Finally, national legislation on civil servants usually allows public bodies to impose disciplinary measures in response to misconduct on the part of their employees that affects their professional duties.

These three types of responsibilities share a common feature: they all appear in response to misconduct or infringements. Also, the three of them are usually compatible and not mutually exclusive. Thus, the very same misconduct, committed by the same civil servant, can give rise to the three types of responsibility. Furthermore, it is possible to follow criminal, civil and disciplinary proceedings against the same civil servant on the same facts at the same time, provided that each of these proceedings is aimed at a different objective and has a different legal basis.[13] Consequently, the exoneration of the criminal responsibility of a civil servant in a given case does not prevent the existence of civil or disciplinary responsibilities of that civil servant for the same facts, resulting from a less strict understanding of

10 Along with these well-known forms of *responsibility* (*responsabilité*), relevant efforts have been made to develop specific models of *accountability* (*responsabilisation*). However, the attained results remain insufficient so far. A revealing comparative approach (Germany, UK, Italy, Poland) is presented in Garbar (2016).

11 Ciani (2015), p. 331.

12 Froment (2001), pp. 556–559; Ciani (2015), pp. 335–336; Echevarría (2019), pp. 20–24; Rebollo-Puig (2019), pp. 155–156; Trayter-Jiménez (2020), pp. 359–360. In the case of torture, the very existence of such a criminal offence is a mandatory requirement in order to fulfil the obligations stemming from the full protection of the fundamental right enshrined in Article 3, para. 1 ECHR. See, ECtHR, judgment of 7 of April 2015, *Cestaro v. Italy*, 6884/11.

13 Pralus-Dupuy (2003), p. 919; Klip and Van der Wilt (2002), p. 1109; Sugman (2003), p. 1075; Sykiotou (2003), p. 995; Szumiło-Kulczyka and Waltoś (2003), p. 1058. Nevertheless, mandatory suspension of disciplinary proceedings while criminal proceedings on the same facts are ongoing may also be established by law, see Du Jardin (2003), p. 812; Boiten et al. (2003), p. 1097; Miklau (2003), p. 794; Quattrocolo (2003), p. 1023.

the burden of the proof.[14] Likewise, the discharge of a civil servant in criminal proceedings because the offences were subject to a time bar does not prevent the adoption of a disciplinary measure in response to the same facts.[15]

However, the independence between the three types of civil servants' responsibility is not absolute. Decisions establishing disciplinary or civil responsibilities cannot contain statements imputing criminal liability to a civil servant unless criminal proceedings against the same person have previously ended with a conviction. Otherwise, there would be a violation of the presumption of innocence (Article 6, paragraph 2 ECHR).[16]

Nevertheless, while the independence and compatibility of the three types of responsibility is quite clear, doubts regarding their respective legal natures remain. As stated previously, the civil responsibility of civil servants is indisputably a kind of economic responsibility that is compensatory in nature. It is not aimed to punish, but to restore the damages caused by civil servants. As for the criminal responsibility of civil servants, it is indisputably a kind of responsibility that is punitive in nature, being aimed at punishing them and seeking retribution. Therefore, doubts actually focus on the legal nature of the disciplinary responsibility of civil servants.

In some national legal orders, the disciplinary responsibility of civil servants is seen as a core part of the administrative sanctioning powers: once it has been accepted that the public administration (and not just the judiciary) can impose punitive sanctions, a differentiation is introduced between punitive administrative sanctions that can be imposed on any citizen (e.g. tax or traffic fines) and punitive administrative sanctions that can only be imposed on specific groups of citizens that have a special relationship, involving specific duties and obligations, with the public administration (e.g. civil servants, inmates, students in public facilities, etc.).[17] From the point of view of these legal orders, the key element of the disciplinary sanctioning powers is the existence of a "special relationship of obligation" with the relevant authorities.[18] According to this view, infringements punished with punitive administrative sanctions (including disciplinary sanctions) must be considered "criminal charges" and "criminal offences" within the meaning of Article 6, paragraph 1 and Article 7 ECHR. However, this is not a general understanding in every European national legal order (as yet). Some of them (still) refuse to accept that disciplinary measures imposed on civil

14 See ECtHR, judgment of 13 April 2021, *Istrate v. Romania*, 44546/13, para. 60. As stated in ECtHR, judgment of 27 November 2018, *Urat v. Turkey*, 53561/09 and 13952/11, para. 53, "the Convention does not preclude that an act may give rise to both criminal and disciplinary proceedings, or that two sets of proceedings may be pursued in parallel. (. . .) [E]ven exoneration from criminal responsibility does not, as such, preclude the establishment of civil or other forms of liability arising out of the same facts on the basis of a less strict burden of proof". See, also, ECtHR, judgment of 8 January 2009, *Patsouris v. Greece*, 44062/05, para. 39, and ECtHR, judgment of 8 January 2009, *Panou v. Greece*, 44058/05, para. 36.

15 ECtHR, decision of 13 September 2007, *Moullet v. France*, 27521/04.

16 In fact, an extreme emphasis on the autonomy of criminal and disciplinary fields certainly would affect the criminal *res judicata*, see Chiavario (2003), p. 746 and ECtHR, *Urat v. Turkey* (n. 14), para. 53. It is possible, however, to dismiss a civil servant when his conduct involves an infringement of his professional duties, even if the criminal charges against him for the same behaviour were dropped because that conduct was deemed not to amount to a criminal offence liable to public prosecution, see ECtHR, judgment of 15 July 2010, *Šikić v. Croatia*, 9143/08, para. 55.

17 Miklau (2003), p. 794; Petit (2014), p. 1041; Sykiotou (2003), p. 963; Bueno-Armijo (2018), p. 241; Trayter-Jiménez (2020), p. 352.

18 Marina-Jalvo (1999), pp. 100 and 104 and ECtHR, judgment of 22 May 1990, *Weber v. Switzerland*, 11034/84, para. 32.

servants are punitive in nature and, therefore, they reject the application of the fundamental rights enshrined in Article 6, paragraph 1 in its criminal limb and Article 7 ECHR for this reason (though they may eventually apply them on different grounds).[19]

According to the ECtHR, it is possible to accept that disciplinary measures are "punitive and deterrent in nature rather than compensatory",[20] and it is also possible to assert that "punitive character (. . .) is the customary distinguishing feature of criminal penalties".[21] But, even so, and fully respecting "the traditions of the Contracting Parties", the ECtHR stated in *Engel and others v. the Netherlands* that "the Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line".[22] Almost 50 years later, and old as it may seem, this statement remains unchanged.[23]

Of course, the main question underlying this situation, as asked in ECtHR, *Engel and others v. the Netherlands* (para. 80), is still the same:

> Does Article 6 (. . .) cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification?

As a matter of fact, the ECtHR will require considering the matter criminal in nature "if the penalty is sufficiently substantial".[24] Thus, only in very specific cases, bound to the degree of severity of the penalty that the person concerned risks incurring, will the ECtHR consider that disciplinary measures are necessarily criminal in nature.

III. Key Elements of the Disciplinary Responsibility of Civil Servants

Despite the existence of significant differences, the national systems of disciplinary responsibility seem to share some basic traits.

1. Disciplinary Responsibility Is Constrained to a Specific Group of People

First and foremost, the disciplinary responsibility of civil servants is a type of responsibility not imposed on the generality of the citizens, but on a very specific group of them, namely civil servants.

19 Rogall (2003), p. 930, considers that "formal and substantive disciplinary law (. . .) are not by themselves criminal law or criminal procedure law. They are, rather, a field of law by themselves." The Polish Constitutional Court has also expressed the view that the disciplinary liability is a "*sui generis* branch of repressive law, showing nevertheless strong similarities to the penal law", see Szumiło-Kulczyka and Waltoś (2003), p. 1047. The debate is far from being closed, as shown by Rincón-Córdoba (2018), pp. 39–73.

20 ECtHR, decision of 24 November 1998, *Brown v. United Kingdom*, 38644/97, para. 1.

21 ECtHR, judgment of 21 February 1984, *Öztürk v. Germany*, 85444/79, para. 3.

22 ECtHR, *Engel and others v. the Netherlands* (n. 4), para. 81–82.

23 Among the most recent, see ECtHR, judgment of 22 December 2020, *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*, 68273/14 and 68271/14, para. 76.

24 ECtHR, *Brown v. United Kingdom* (n. 20), para. 1.

This feature of "specificity", i.e. the fact that it only affects a very specific group of citizens, partially explains that the same terms ("disciplinary responsibility") apply to other specific groups,[25] even if they have little in common with civil servants and their particular legal regime: members of the liberal professions (doctors, lawyers),[26] students of public and private institutions,[27] inmates,[28] users of some public services (transportation, hospitals, juvenile residential facilities),[29] sportsmen and sportswomen,[30] public notaries,[31] private-sector employees,[32] or even members of national Assemblies.[33] This is because, from a legal point of view, "disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct".[34]

Every civil servant is subject to disciplinary responsibility under a public administration. However, civil servants are sometimes subject to different legal regimes within the same public administration: some employees are subject to private/labour law, whereas some others are subject to public/administrative law, and this difference in their general legal regime may affect their disciplinary responsibilities.[35] According to the ECtHR, civil servants subject to administrative law and public employees subject to labour law are in a different legal position. There is a "special bond of trust and loyalty between [civil servants] and the State in the performance of their functions",[36] which is less tight in the case of public employees subject to labour law. Thus, the duty of loyalty, reserve and discretion of employees in private-law employment relationships cannot be as pronounced as the obligation of loyalty and reserve owed by civil servants to their employers.[37] Nevertheless, this differentiation does not eliminate the possibility of imposing disciplinary sanctions on civil servants subject to labour law in certain circumstances.[38]

2. *Disciplinary Measures Have a Harmful Content*

Measures adopted on disciplinary grounds always entail negative decisions, affecting the rights, interests and privileges of the civil servants. Their content may differ from one legal

25 For a thorough analysis of this idea, Chiavario (2003), pp. 708–709. Also, Rogall (2003), p. 926; Boiten et al. (2003), p. 1080.

26 ECtHR, judgment of 23 June 1981, *Le Compte, Van Leuwen & De Meyere v. Belgium*, 6878/75 and 7238/75; ECtHR, *Brown v. United Kingdom* (n. 20): "The Court finds that the offences are of a disciplinary nature, applying only to persons of a specific, professional group rather than the general public."

27 ECtHR, judgment of 10 November 2005, *Leyla Şahin v. Turkey*, 44774/98.

28 ECtHR, judgment of 9 October 2003, *Ezeh and Connors v. United Kingdom*, 39665/98 and 40086/98.

29 ECtHR, judgment of 17 July 2012, *Munjaz v. United Kingdom*, 2913/06.

30 ECtHR, judgment of 2 October 2018, *Mutu & Pechstein v. Switzerland*, 40575/10 and 67474/10.

31 ECtHR, judgment of 5 March 2020, *Peleki v. Greece*, 69291/12.

32 ECtHR, judgment of 12 September 2011, *Palomo Sánchez and others v. Spain*, 28955/06, 28957/06, 28959/06 and 28964/06.

33 ECtHR, judgment of 27 April 2021, *Tőkés v. Romania*, 15976/16 and 50461/17.

34 ECtHR, *Weber v. Switzerland* (n. 18), para. 33.

35 In fact, this has been outlined as an especially complex issue in those countries which have embarked on process of "privatization" of the legal regime applicable to their civil servants in recent years, as in the case of Italy, see Apicella (2002), p. 627; Quattrocolo (2003), p. 1000, and Spain, see Trayter-Jiménez (2020), p. 351.

36 ECtHR, judgment of 17 November 2016, *Karapetyan and others v. Armenia*, 59001/08, para. 54.

37 ECtHR judgment of 15 June 2021, *Melike v. Turkey*, 35786/19, para. 48.

38 Accordingly, it is unlikely that civil servants subject to labour law receive a disciplinary sanction unless their behaviour can be qualified as very grave in the circumstances, ECtHR, judgment of 29 February 2000, *Fuentes Bobo v. Spain*, 39293/98, para. 50; ECtHR, judgment of 14 March 2002, *De Diego Nafría v. Spain*, 46833/99, paras. 41–42.

order to another, but they typically include official (written) warnings, official reprimands, fines and financial sanctions (such as a reduction of salary), suspensions without pay, loss of promotion for several years, mandatory transfers (reassignment to a post in a different place), demotions (reassignment to a lower position), dismissal (including discharge from the army), mandatory retirement, or the publication of the disciplinary decision; additionally, military officers and soldiers may also face disciplinary measures involving deprivation of liberty.[39]

Disciplinary measures imposed on civil servants may have, therefore, a deep impact on the lives, reputations, and careers of civil servants,[40] whilst they can entail a substantial modification of the nature of their missions and their level of responsibilities or, what is worse, a severe impact on their means of subsistence.[41]

Interestingly enough, disciplinary measures seem to be bound to affect only the rights and privileges involved in the legal relationship between the civil servant and the public administration (i.e. salary, post, hierarchical position). As indicated, only in the case of soldiers and military officers is it also possible to adopt arrests and detentions, under different conditions of duration and severity, as disciplinary measures. These decisions could entail interference with the freedom of movement and, therefore, they could affect a civil right beyond the employment relationship.

This is perhaps why the ECtHR has stated that full respect of the right to liberty within the meaning of Article 5, paragraph 1 ECHR requires that disciplinary measures adopted in the military, depriving individuals of their liberty, must be imposed or controlled by "a judge or other officer authorised by law to exercise judicial power", with "the requisite guarantees of independence from the executive and the parties".[42] This mandatory intervention of the judiciary involving the imposition of these disciplinary measures is a remarkable exception to the disciplinary powers of the public administration over the rest of its civil servants.

3. Disciplinary Powers Are Exercised by the Public Administration

Disciplinary measures for civil servants are usually imposed by the public administration, not by the judiciary.[43] What is more, for many years, the public administrations of different Member States even denied the possibility of any judicial review of their disciplinary decisions.

39 Du Jardin (2003), p. 810; Szumiło-Kulczyka and Waltoś (2003), p. 1045; Boiten et al. (2003), p. 1091; Miklau (2003), p. 794; Quattrocolo (2003), p. 1002; Rogall (2003), p. 935; Sugman (2003), pp. 1065–1066; Sykiotou (2003), p. 966; Bueno-Armijo (2018), pp. 278–279.

40 ECtHR, decision of 31 January 2023, *Thierry v. France*, 37058/19, para. 34; ECtHR, judgment of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, 55391/13, 57728/13 and 74041/13, para. 201; ECtHR, judgment of 3 November 2022, *Dahan v. France*, 32314/14, para. 56.

41 Notwithstanding their harmful effects, none of these measures, including dismissal, are considered detrimental enough to attain the minimum level of severity which amounts to "degrading treatment" within the meaning of Article 3 ECHR, as stated in ECtHR, decision of 7 November 2000, *Çelikateş and others v. Turkey*, 45824/99.

42 ECtHR, judgment of 29 March 2010, *Medvedyev and others v. France*, 3394/03, paras. 123–124; ECtHR, judgment of 26 April 2011, *Pulatli v. Turkey*, 38665/07, paras. 31 and 39; ECtHR, judgment of 20 March 2012, *Koç and Demir v. Turkey*, 26793/08, para. 40 and ECtHR, judgment of 5 June 2012, *Tengilimoglu and others v. Turkey*, 26938/08, 41039/09, 66328/09 and 66451/09, para. 36.

43 Therefore, disciplinary decisions are administrative acts and, accordingly, disciplinary proceedings are logically structured as administrative procedures and not as criminal proceedings before a court, Sykiotou (2003), p. 964; Rogall (2003), p. 942.

It is worth highlighting, however, that the judiciary does indeed impose disciplinary measures on those special categories of civil servants included in its organisation, such as judges, magistrates, public prosecutors, judiciary police, and other court officials and assistants.[44] Nevertheless, those decisions can rather be seen as an exercise of genuine jurisdictional powers or simple judiciary administration.[45]

But, even if disciplinary measures are imposed by a public administration, the actual body imposing them could vary greatly: some legal systems confer disciplinary powers on the hierarchical superiors of each department, functional area or group of civil servants (decentralised model), while some others confer those powers on specialised independent bodies with jurisdiction over all staff members (centralised model).[46]

4. Disciplinary Measures as a Response to an Infringement of Professional Duties

The disciplinary responsibility of civil servants stems from the possible infringement of the professional duties that they take on, i.e. it punishes their lack of professionalism or professional misconduct.[47] As the name clearly suggests, disciplinary measures are a reaction to "a breach of work discipline".[48] This feature is closely related to the previously mentioned idea that disciplinary responsibility only affects limited groups of citizens, given that "disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct".[49] Therefore, the disciplinary responsibility of civil servants is inextricably linked to codes of conduct or statutes regulating their basic rights, duties, or obligations.[50]

Along with these professional duties deriving from a specific post, different kinds of duties can be imposed on civil servants, aimed at protecting the public interest, and closely related to the constitutional position of the public administration. For instance, "a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded".[51]

Since the duties and obligations of civil servants may change depending on their hierarchical position and their actual posts, the scope and seriousness of their disciplinary responsibility also varies. This does not entail an infringement of the right to equality. As stated in ECtHR, *Engel and others v. the Netherlands* (para. 72), "corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere".

44 Among the most recent, see ECtHR, judgment of 21 February 2023, *Catană v. Moldova*, 43237/13.

45 In the case of France, specifically refusing those natures, see *Cour de cassation* (*Chambre criminelle*), 21 June 2016, 15–84.172.

46 Some legal systems even mix both models and accept that different authorities may exercise their disciplinary powers over the same civil servants, Rincón-Córdoba (2018), pp. 77–99.

47 Rogall (2003), p. 926.

48 ECtHR, *Šikić v. Croatia* (n. 16), para. 55.

49 ECtHR, *Weber v. Switzerland* (n. 18), para. 33. See, also, ECtHR, *Çelikateş and others v. Turkey* (n. 41).

50 Furthermore, some of those texts, frequently enacted under different forms of soft law and full of references to other texts, can be highly mutable and might be subject to renewals even on a yearly basis, see Nocelli (2019), p. 1194.

51 ECtHR, judgment of 26 September 1995, *Vogt v. Germany*, 17851/91, para. 59.

Disciplinary measures are not enforcement measures. They are not intended to force a civil servant "to fulfil a specific and concrete obligation which he has until then failed to satisfy". It must be admitted that perhaps these measures also have on occasions the incidental object or effect of inducing civil servants to comply henceforth with their obligations, but disciplinary measures refer to past behaviours, and they are clearly situated in a punitive and deterrent context.[52]

This is why it is necessary to distinguish between the infringement of professional duties and the inability to carry them out. The inability of a civil servant to perform his or her duties may allow a public administration to terminate the employment contract or the professional relationship.[53] This kind of termination is based on objective reasons that render the dismissal inevitable for not meeting the requirements established by the law (e.g. a medical condition affecting the physical or mental fitness for the post).[54] Therefore, it has no punitive intention and it cannot be considered a punishment. It rather aims to restore the legality of the situation.[55]

The lack of qualifications for the post could be not only subsequent to the appointment, but prior to it. If the appointment authority finds out that the applicant did not possess the personal qualifications required and that he or she performed deceitful actions to hide this fact, the authority could rectify its original error of judgment and cancel the appointment with retrospective effect.[56] Such a decision should not be considered a disciplinary measure either, but a simple restoration of legality.

On the other hand, there are some troublesome cases where the dismissal is decided on the basis of an objective cause that, nevertheless, stems from the previous behaviour of the civil servant. That would be the case of a dismissal adopted on the grounds that the civil servant dismissed has been convicted by a final judgment of a court of committing a crime. In these cases (especially when the crime committed is related to the professional duties of the civil servant), it could be argued that the public administration does not intend to punish the civil servant, but rather to declare that he or she no longer fulfils the conditions required to carry out his or her duties.[57] However, the lines remain blurred.

It is also necessary to distinguish between the infringement of professional duties and the cases of incompetence or unsatisfactory performance. Arguably, both situations could give rise to the adoption of very similar or even the same type of measures towards a

52 ECtHR, *Engel and others v. the Netherlands* (n. 4), para. 69; ECtHR, *Pulatli v. Turkey* (n. 42), para. 30; ECtHR, *Tengilimoglu and others v. Turkey* (n. 42), para. 34; ECtHR, *Koç and Demir v. Turkey* (n. 42), para. 39.

53 The lack of qualifications could also allow the refusal to renew a contract or to give tenure at the end of the probationary period, ECtHR, judgment of 28 August 1986, *Kosiek v. Germany*, 9704/82, para. 38.

54 See, ECtHR, judgment of 21 July 2016, *Miryana Petrova v. Bulgaria*, 57148/08, on the mental fitness of a civil servant, who had suffered from depressive neurosis, for working at the Ministry of Internal Affairs (more precisely, at the National Security Service), with a security clearance allowing access to classified information.

55 In this sense, Dellis (1997), pp. 144–149, distinguishes between *mesures hiérarchiques* and *mesures disciplinaires.* The non-punitive nature of these measures is confirmed by the fact that the public administration can adopt a temporary suspension that can be lifted as soon as the temporary incapacity comes to an end. Nevertheless, there can be ambiguous situations, as pointed out by Marina-Jalvo (2021).

56 ECtHR, judgment of 28 August 1986, *Glasenapp v. Germany*, 9228/80, para. 52.

57 As exemplary stated in ECtHR, decision of 23 August 2011, *Vagenas v. Greece*, 53372/07, para. 1, "it is reasonable not to tolerate a customs officer convicted of smuggling remaining at his post".

civil servant: downgrading, demotion (which could entail a salary reduction), or even dismissal.[58] Nevertheless, they are quite different in nature.

Measures adopted on grounds of incompetence are not deemed to punish civil servants' behaviour. Incompetent behaviour by civil servants does not entail an attack on the confidence link between them and public administration. They simply try to cope with the fact that a civil servant no longer serves his or her purposes.

Differences in their aims explain differences in their legal regime. Infringements usually deserve immediate disciplinary measures, without previous warning. A civil servant who actually breaches his or her professional duties is not given a cautionary warning on the disciplinary consequences that this infringement could entail and then given a second chance. The infringement could (and, in some cases, shall) give rise to a disciplinary measure. On the contrary, incompetence or poor performance typically receives more specific attention: the civil servant concerned would usually be required to improve his or her performance, would be put under special scrutiny or tracking, and would be given several opportunities to progress. Only if he or she fails, would adverse and appropriate measures be taken.

Even though the measures adopted in cases of incompetence are not disciplinary measures, they can only be adopted by fully respecting due process and if strict conditions are met. However, it must be admitted that the lines between disciplinary decisions and measures adopted on grounds of incompetence are also blurred. Indeed, the latter could easily hide genuine disciplinary measures in some cases. For instance, the refusal to renew temporarily hired civil servants because of their inadequate or poor performance could conceal a punishment or a disciplinary measure that would have required a due process if it had been adopted against permanent workers.[59]

5. *Disciplinary Regimes Aim to Protect the Public Administration and the Public Interest*

The purposes of disciplinary responsibility are twofold. On the one hand, civil servants' disciplinary regimes aim to protect the public administration itself, both internally (keeping its good functioning, preserving its hierarchical organisation) and externally (maintaining a good public image).[60] Purely private organisations also try to achieve similar self-protection objectives, which helps to explain why some professional duties imposed on private-sector workers could seem very similar to those imposed on civil servants (e.g. loyalty towards the employer, mutual trust), even if they are different in nature. Indeed, protection of mutual trust is a common element of every labour relation, given that "in order to be fruitful, labour relations must be based on mutual trust".[61]

58 The dismissal of civil servants for bad performance is accepted in 19 Member States of the OECD, including Austria, Belgium, Czech Republic, Finland, Germany, Greece, Italy, Latvia, Portugal, Slovak Republic, Spain or the United Kingdom, but not Denmark, Estonia, France, Hungary, Iceland, Ireland, Lithuania, Luxembourg, Netherlands, Norway, Poland, Slovenia, Sweden, or Switzerland, see OECD (2019), p. 123 and Agus et al. (2021), pp. 1287–1288.

59 See ECtHR, judgment of 27 June 2000, *Frydlender v. France*, 30979/96.

60 This has been specifically stated for Austria, see Miklau (2003), p. 793, and the Netherlands, see Boiten et al. (2003), p. 1080.

61 ECtHR, *Melike v. Turkey* (n. 37), para. 43.

On the other hand, civil servants' disciplinary responsibility regimes also aim to protect public interests and the rights of citizens, which results from a constitutional approach and the identification of the disciplinary responsibility with one of the possible expressions of public liability under the rule of law.[62] This partially explains that civil servants may be obliged to fulfil some duties and subject to certain limits being imposed on their civil rights, which rarely exist in the case of private-sector workers (e.g. duty of discretion, restrictions to engage in political activities to ensure their political neutrality, etc.).[63]

Furthermore, unlike the situation in the private sector, certain actions, such as imposing disciplinary measures or carrying out some form of effective official investigation into possible misconduct, are not optional for the public administration – they are obligations.[64] The decision on whether a disciplinary procedure must be open is not governed by the principle of opportunity, but by the principle of legality.

Both sets of objectives (protection of the public administration and protection of the public interest) are not so distant since the protection of the public administration involves the protection of a public interest. The behaviour of public servants could endanger the proper functioning of the public administration and the provision of public services; therefore, they could affect the public interest. As stated in ECtHR, *Engel and others v. the Netherlands* (para. 98), "disorder in that group [i.e. the civil service] can have repercussions on order in society as a whole".

IV. Disciplinary Measures Versus Administrative Sanctions That Are Criminal in Nature: The *Engel* Criteria

Despite their common features, and as mentioned previously, there are relevant differences in civil servants' disciplinary responsibility systems in different national legal orders. The main difference probably lies in the understanding of the legal nature of the disciplinary measures. As we have already outlined, some legal systems treat disciplinary measures imposed on civil servants as administrative sanctions with a punitive purpose, being criminal in nature. This approach means that disciplinary measures imposed by public administrations on their civil servants draw on a legal regime not entirely identical but equivalent to the legal regime of criminal sanctions imposed by criminal judges. This legal choice entails the application, for instance, of the principle of legality, the principle of fault, the principle of *lex mitior* (retroactivity of the favourable punitive law), the presumption

62 Bueno-Armijo (2018), pp. 242–243. Not only do some disciplinary infractions involve acts that have a considerable impact on the community, but some of them are de facto nothing but criminal infractions or contraventions, Szumiło-Kulczyka and Waltoś (2003), p. 1060.

63 ECtHR, *Vogt v. Germany* (n. 51), paras. 45–61; ECtHR, judgment of 20 May 1999, *Rekvényi v. Hungary*, 25390/94, paras. 41–43; ECtHR, *De Diego Nafría v. Spain* (n. 38), para. 37; ECtHR, judgment of 24 March 2015, *Ismail Sezer v. Turkey*, 36807/07, para. 52.

64 Nocelli (2019), p. 1159. That would be the case, for instance, where an individual makes a credible assertion that he has suffered treatment infringing article 3 ECHR (torture, inhuman or degrading treatment or punishment) at the hands, inter alia, of the police or other similar authorities, ECtHR, judgment of 1 March 2018, *Chatzistavrou v. Greece*, 49582/14, para. 51.

of innocence, the prohibition of self-incrimination, the *ne bis in idem* principle, and a vast array of procedural rights stemming from the due process and the right to a fair trial.[65]

However, many national systems do not share this approach. Furthermore, the ECtHR accepts but does not impose the idea that the disciplinary measures adopted by public administrations on their civil servants are always and, in all cases, administrative sanctions that are criminal in nature. The different nature of disciplinary and criminal responsibilities has plainly and openly been accepted by the ECtHR, even when they both stem from the same facts.[66]

According to its well-established case law, only in very specific cases and under very strict conditions, namely the so-called *Engel* criteria, do disciplinary measures have to be considered criminal in nature.[67] As a result, national public administrations are usually not required to respect the aforementioned principles:

> the Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. (. . .) If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction under Article 6 (. . .) to satisfy itself that the disciplinary does not improperly encroach upon the criminal.[68]

The *Engel* criteria rely on three ideas, "namely the classification of the proceedings under national law, their essential nature and the type and severity of the penalty that the applicant risked incurring".[69] Thus, the first criterion is whether the national legal system considers the measure disciplinary or criminal. The second criterion focuses on the nature of the offence, i.e. whether criminal codes usually protect the same public interest and whether the provision establishing the measure addresses a specific category of people possessing a particular status. Finally, the third criterion relies on the nature and degree of severity of the measure imposed.

The *Engel* criteria were originally established to determine whether disciplinary measures had to be considered criminal in nature, but they eventually became applicable to

65 In the view of the ECtHR, as stated in *Engel and others v. the Netherlands* (n. 4), para. 81, "such a choice, which has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court".

66 ECtHR, *Moullet v. France* (n. 15). See, also, ECtHR, judgment of 17 December 2013, *Nikolova and Vandova v. Bulgaria*, 20688/04, para. 99.

67 Those criteria were first laid down in ECtHR, *Engel and others v. the Netherlands* (n. 4), para. 82, where the Court specified that its scope was limited "to the sphere of military service". However, in ECtHR, *Öztürk v. Germany* (n. 21), para. 348, the Court considered "that the principles set forth in that judgment" were "also relevant, *mutatis mutandis*, in the instant case", and referred to general administrative sanctions (a fine imposed for the contravention of the road traffic regulations).

68 ECtHR, *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* (n. 23), para. 76; ECtHR, judgment of 22 November 2022, *Manfredi v. Italy*, 51531/14, para. 12.

69 ECtHR, *Moullet v. France* (n. 15). Also, ECtHR, *Ezeh and Connors v. United Kingdom* (n. 28), para. 82.

any kind of public decisions (not only disciplinary measures) that could be harmful or lead to detrimental effects on the citizens concerned. If, according to the *Engel* criteria, such decisions were criminal in nature, the citizens would be entitled to the protection offered by Articles 6 and 7 ECHR. Perhaps this unexpected enlargement of their original scope explains why the development of the *Engel* criteria in the case law of the ECtHR has become rather inconsistent.

Generally speaking, the *Engel* criteria have been applied in such a manner that the ECtHR has been able to declare the criminal nature of a huge number of administrative decisions. As a result, many public decisions have fallen within the scope of Article 6, paragraph 1 ECHR in its criminal limb and, therefore, under Articles 6, paragraph 2 and 7 ECHR and Article 2 of the Protocol no. 4, even if their criminal nature is highly doubtful.[70] In these cases, the ECtHR considered that the punitive character of the measures was enough to assert their criminal nature, even if the severity of the penalty was of little importance.[71] Because "as the Court has pointed out on numerous occasions, the relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character".[72]

However, in the case of disciplinary measures, the ECtHR has applied the *Engel* criteria in a very restrictive way. It is not absolutely clear, but it seems that, in the view of the Court, national disciplinary measures are not criminal in nature unless they entail (or could entail, without the guarantee of a hearing) a severe deprivation of liberty.[73] That was at least the approach adopted in ECtHR, *Engel and others v. the Netherlands*, in ECtHR, *Weber v. Switzerland* (para. 34), and in ECtHR, judgment of 14 November 2000, *T. v. Austria*, 27783/95 (para. 67).

Therefore, the Court has considered that the following decisions imposing disciplinary measures on civil servants were not criminal in nature:

- a fine of 350.000 CZK (12.650 EUR), not convertible into a prison term in the event of default;[74]
- an eleven day's arrest within military premises (*consegna di rigore*);[75]
- dismissal from the civil service;[76]
- dismissal from the civil service and a restriction on employment in the civil service and on taking up jobs in the private sector;[77]

70 Among many others debatable decisions, the ECtHR has stated the criminal nature of tax surcharges (ECtHR, judgment of 24 February 1994, *Bendenoun v. France*, 12547/86, para. 47) or the deduction of points from driving licences (ECtHR, judgment of 23 September 1998, *Malige v. France*, 27812/95, para. 40).

71 In ECtHR, judgment of 23 November 2006, *Jussila v. Finland*, 73053/01, para. 38, the Court made clear that "the minor nature of the penalty" does not prevent it from being considered a measure that is criminal in nature.

72 ECtHR, *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* (n. 23), para. 78; ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* (n. 40), para. 122.

73 Kidd (1987), p. 868; Barkhuysen et al. (2018), pp. 535–536.

74 ECtHR, judgment of 23 June 2022, *Grosam v. Czech Republic*, 19750/13, para. 96.

75 ECtHR, *Manfredi v. Italy* (n. 68), para. 17.

76 ECtHR, *Vagenas v. Greece*, (n. 57), para. 1; ECtHR, decision of 5 April 1995, *J. L. v. France*, 17055/90; ECtHR, decision of 8 October 1980, *X. v. the United Kingdom,* 8496/79.

77 ECtHR, decision of 1 July 2003, *Sidabras and Džiautas v. Lithuania*, 55480/00 and 59330/00.

- the termination of the employment contract and the ban of re-entering the civil service;[78]
- discharge from the army;[79]
- the compulsory transferral of an army official to the reserve list;[80]
- a ban on applying for posts in the judicial system or in the civil service.[81]

The ECtHR is very aware of the seriousness of some of these disciplinary measures. Regarding the dismissal, for instance, it acknowledges not only that the civil servant concerned loses his or her livelihood, but also the effect that such a measure has on his or her reputation.[82] However, it firmly accepts that the Member States have the right to choose not to consider those disciplinary measures as criminal in nature and, therefore, to keep them beyond the reach of Article 6, paragraph 1 ECHR in its criminal limb, Articles 6, paragraph 2 and 7 ECHR and Article 2 of the Protocol no. 4.

V. Guarantees Protecting Civil Servants from Disciplinary Measures

The denial of the criminal nature of the disciplinary measures imposed on civil servants does not entail the denial of every legal guarantee protecting them. According to the case law of the ECtHR, this denial simply means a lower, but still relevant, level of protection. The minimum level of protection is established in Article 6, paragraph 1 ECHR, civil limb, which embodies a full set of defence rights and guarantees.

The public authorities imposing disciplinary measures are expected to respect those rights and guarantees within the framework of the administrative disciplinary procedure. The ECtHR approves and endorses that public authorities respect those rights of defence within the administrative disciplinary proceedings, especially when required by relevant domestic legislation. However, if they fail to do so, that will not necessarily mean an infringement of the ECHR as long as the "structural or procedural shortcomings identified in the proceedings (. . .) are remedied in the course of the subsequent control by a judicial body that has full jurisdiction".[83]

Therefore, minimum standards in the exercise of disciplinary powers must be analysed within the framework of the judicial review and the right to a fair trial.

1. Judicial Review and the Right to a Fair Trial (Civil Limb)

The ECtHR has stretched the scope of the right to a fair trial (Article 6, paragraph 1 ECHR) to cover disciplinary measures, but only in its civil limb, and after a convoluted evolution in its case law. As a starting point, and according to Articles 1, 13, and 14 ECHR, civil servants have always enjoyed the right to challenge any disciplinary decision

78 ECtHR, judgment of 15 December 2020, *Pişkin v. Turkey*, 33399/18, para. 107.

79 ECtHR, *Çelikateş and others v. Turkey* (n. 41), where the "essence" of the measure is considered to fall "into the field of disciplinary proceedings in the armed forces".

80 ECtHR, decision of 10 July 1981, *Saraiva de Carvalho v. Portugal*, 9208/80.

81 ECtHR, judgment of 9 February 2021, *Xhoxhaj v. Albania*, 15227/19, para. 245.

82 ECtHR, *Vogt v. Germany* (n. 51), para. 60.

83 ECtHR, *Thierry c. France* (n. 40), para. 26; ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* (n. 40), para. 132; ECtHR, *Dahan v. France* (n. 40), para. 50.

that may affect their fundamental rights as established in the ECHR.[84] Hence, civil servants were entitled to challenge disciplinary decisions before a judicial court (and not just before an administrative tribunal) affecting, for example, their freedom of assembly and association or to form and join trade unions.[85] However, it was unclear whether civil servants also had the right to challenge disciplinary decisions that did not affect their fundamental rights, which led to the development of a convoluted case law.[86]

According to Article 6, paragraph 1 ECHR, everyone is entitled to a fair trial "in the determination of his *civil* rights and obligations". In an early approach to this right, the ECtHR distinguished between civil law and public law rights. According to this approach, public law rights and obligations fell outside the scope of Article 6, paragraph 1 ECHR. That would be, for instance, the case of the duty to pay taxes.[87] Accordingly, governments also argued that the rights stemming from the professional relationship with their civil servants should be considered public law rights and, therefore, that they should be excluded from the scope of Article 6, paragraph 1 ECHR. The ECtHR partially agreed with this approach and reserved its application "where the claims in issue relate to a 'purely economic' right – such as payment of a salary (. . .) or pension (. . .) – or at least an 'essentially economic' one".[88]

However, the economic nature of the right was not always easy to ascertain, for many decisions concerning public servants' careers have a deep economic impact.[89] The Court then changed its approach in *Pellegrin v. France* and proposed a different criterion: Article 6, paragraph 1, ECHR was not applicable when the civil servant directly participated in the exercise of public authority and functions aimed at safeguarding the general interests of the State.[90] Yet, such an imprecise and ambiguous criterion excluded many cases from the application of Article 6, paragraph 1 ECHR (e.g. every decision affecting army officers).[91] As a result, it was eventually abandoned in *Vilho Eskelinen and others v. Finland*, according

84 In some early decisions, the ECtHR confirmed that "as a general rule the guarantees in the Convention extend to civil servants", ECtHR, *Glasenapp v. Germany*, (n. 56) para. 49; ECtHR, *Kosiek v. Germany* (n. 53), para. 35; ECtHR, *Vogt v. Germany* (n. 51), para. 43.

85 In the well-known words by Anicet Le Pors, former Ministry for Civil Service in France (1981–1983), this approach meant that the previous "civil servant-subject" (*fonctionnaire-sujet*) became a "civil servant-citizen" (*fonctionnaire-citoyen*), see Le Pors (2008). See, among many others, ECtHR, *Ismail Sezer v. Turkey* (n. 63), para. 64; ECtHR, judgment of 26 May 2015, *Dogan Altun v. Turkey*, 7152/08, para. 58; ECtHR, judgment of 27 September 2011, *Şişman and others v. Turkey*, 1305/05, para. 41; ECtHR, judgment of 27 March 2007, *Karaçay v. Turkey*, 6615/03, para. 44; ECtHR, judgment of 15 September 2009, *Kaya and Seyhan v. Turkey*, 30946/04, para. 41.

86 Barkhuysen et al. (2018), pp. 518–519.

87 ECtHR, judgment of 12 July 2001, *Ferrazzini v. Italy*, 44759/98, para. 29.

88 ECtHR, judgment of 19 February 1998, *Huber v. France*, 26637/95, para. 36.

89 For instance, a decision sending a teacher on compulsory leave for one month, along with the suspension of the salary, on the ground that his mental state could entail a risk for the well-being of his students, as discussed in ECtHR, *Huber v. France* (n. 88), and its dissenting opinions.

90 ECtHR, judgment of 8 December 1999, *Pellegrin v. France*, 28541/95, para. 66; ECtHR, *Çelikateş and others v. Turkey* (n. 41). Almost immediately, the French *Conseil d'État* followed this approach in several decisions (*arrêts de 23 février 2000, M. L'Hermite Leb. p. 101; 5 juillet 2000 Syndicat Force Ouvrière du personnel du ministère des Affaires étrangères; 18 octobre 2000 Terrail*), see Pralus-Dupuy (2003), p. 900.

91 ECtHR, *Çelikateş and others v. Turkey* (n. 41).

to which there is "a presumption that Article 6 applies" to every ordinary labour dispute between the particular civil servant and the State in question and, in order to exclude

> the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest.[92]

Since *Vilho Eskelinen and others v. Finland* stands firm, the ECtHR consistently considers that civil servants are "entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in the determination of their rights affected by disciplinary decisions. Therefore, almost any disciplinary decision can be challenged before a court, and the court dealing with the case must have jurisdiction to examine all questions of fact and law relevant to the dispute before it.[93] This control by a judicial body includes specifically the control over the facts of the case as well as the ability of the judicial body to ascertain, at the very least, whether the facts on which the contested measure is based have been accurately stated, whether the legal characterisation of the facts is correct and whether the sanction is proportionate.[94] This right could even include the right to challenge a disciplinary measure before a Constitutional Court, without prejudice to the conditions of admissibility that may apply, where those Courts exist.[95]

2. Minimum Rights and Guarantees

So far, the ECtHR has not established a closed list of rights and guarantees that the disciplinary measures imposed on civil servants must respect, but many of them can be found scattered through its case law. Among them, the following can be outlined:

- The right to adversarial proceedings. Civil servants have the right to defend against the accusation of having infringed their professional duties. This right means the right to be informed of the charges, the right to present or comment on all the evidence adduced or observations filed, the right to confrontation with prosecution witnesses, or the right to legal aid and the assistance of counsel.[96]
- The obligation to state reasons. The right to fair administrative proceedings, as protected by Article 6, paragraph 1 ECHR, demands that adequate reasons must be provided in

92 ECtHR, judgment of 19 April 2007, *Vilho Eskelinen and others v. Finland*, 63235/00, para. 62. Also, ECtHR, *Šikić v. Croatia* (n. 16), para. 17; ECtHR, *Dahan v. France* (n. 40), para. 36. As stated by Sanders (2013), p. 806, "the Strasbourg jurisprudence has developed from a principle of inapplicability to partial applicability, to now presumptive applicability"; see also *The Right to a Fair Trial for Civil Servants and the Importance of the State's Interest in Applying Article 6, para. 1 ECHR* by F. Aperio Bella in this volume.

93 ECtHR, *Miryana Petrova v. Bulgaria* (n. 54), para. 37. See, also, ECtHR, judgment of 2 December 2010, *Putter v. Bulgaria*, 38780/02, para. 47 and ECtHR, judgment of 16 April 2013, *Fazliyski v. Bulgaria*, 40908/05, para. 57.

94 ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* (n. 40), para. 203 and ECtHR, *Dahan v. France* (n. 40), paras. 62 and 64.

95 ECtHR, judgment of 12 January 2021, *Albuquerque Fernandes v. Portugal*, 50160/13, para. 67; ECtHR, judgment of 20 January 2015, *Arribas Antón v. Spain*, 16563/11, para. 52.

96 ECtHR, judgment of 11 July 2002, *Göç v. Turkey*, 36590/97, para. 55. See also, ECtHR, judgment of 30 September 2008, *Sima Yilmaz v. Turkey*, 37829/05, para. 34.

disciplinary decisions.[97] However, the extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Domestic decisions cannot be qualified as arbitrary to the point of prejudicing the fairness of proceedings unless no reasons are provided for it or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a "denial of justice".[98]

- The principle of proportionality. The ECtHR has established the need to exercise sufficient control over the proportionality of the disciplinary measure.[99] Therefore, the national court must take fully into consideration not just the seriousness of the offence but also the rest of the relevant elements of the case, such as the personal record of the civil servant or his or her level of responsibility within the hierarchical structure.[100]
- The right to an independent and impartial court. Independence and impartiality, as established by Article 6, paragraph 1 ECHR, only apply to judicial bodies, not to administrative bodies whose decisions are, precisely, subject to judicial bodies.[101] On the other hand, this right openly challenges the possibility of including civil servants among the judges composing the tribunal. According to the case law of the ECtHR, "the participation of lay judges on tribunals is not, as such, contrary to Article 6 [ECHR]: the principles established in the case-law concerning independence and impartiality are to be applied to lay judges as to professional judges."[102] However, insofar as civil servants acting as lay judges are subject to hierarchical discipline and do not enjoy the same constitutional safeguards provided to the other judges, such tribunals cannot be considered independent and impartial within the meaning of article 6 ECHR.[103]
- The right to be tried within a reasonable time. Civil servants also enjoy the right to the reasonableness of the length of disciplinary proceedings within the meaning of Article 6, paragraph 1 ECHR ["In the determination of his civil rights and obligations (. . .) everyone is entitled to a (. . .) hearing within a reasonable time by [a] (. . .) tribunal"], which includes both administrative disciplinary proceedings and its judicial review proceedings.[104] In the view of the Court, the personal interest of a civil servant in securing in the briefest delays the judicial lawfulness of a disciplinary measure increases in proportion to the seriousness of the latter. For instance, in the case of a suspension or a dismissal, "in view of what is at stake for the person concerned, who through dismissal loses his means of subsistence".[105]

97 ECtHR, *Urat v. Turkey* (n. 14), paras. 60–62.
98 ECtHR, *Urat v. Turkey* (n. 14), paras. 67–68.
99 ECtHR, *Thierry c. France* (n. 40), para. 34; ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* (n. 40), para. 201; ECtHR, *Dahan v. France* (n. 40), para. 56.
100 ECtHR, *Dahan v. France* (n. 40), para. 65.
101 ECtHR, judgment of 27 September 2011, *Erciyas v. Turkey*, 10971/05, para. 34. Nevertheless, many national systems care for independence and impartiality of disciplinary organs, Chiavario (2003), p. 717.
102 ECtHR, judgment of 3 July 2012, *Ibrahim Gürkan v. Turkey*, 10987/10, para. 18.
103 ECtHR, judgment of 3 July 2012, *Ibrahim Gürkan v. Turkey*, 10987/10, para. 19; see also ECtHR, decision of 24 March 2020, *Sevinç v. Turkey*, 57878/10, para. 17.
104 ECtHR, judgment of 16 May 2017, *Padlewski v. Austria*, 11553/11, para. 39.
105 ECtHR, *Frydlender v. France* (n. 59), para. 45. See, also, ECtHR, *Moullet v. France* (n. 15).

All these guarantees stem from the right to a fair trial within the meaning of Article 6, paragraph 1 ECHR in its civil limb. But, at the same time, national legal orders can grant additional rights, not required by the aforementioned provision though compatible with it. For example, according to the ECtHR, "in disciplinary matters there is no time bar", however, it can be "provided for by law, on instituting proceedings in respect of acts committed by civil servants".[106]

A final reminder: as stated before, "proceedings relating to disciplinary sanctions do not, in principle, involve 'the determination of a criminal charge', so that Article 6, paragraph 2 does not generally apply to this type of dispute".[107] Consequently, in disciplinary proceedings, civil servants do not usually enjoy the right to the presumption of innocence, the right to be informed of the accusation, the right to remain silent, the right to have enough time to prepare the case, the right to attend the trial, the right to access all the relevant information, and so on. Notwithstanding the foregoing, several national legal systems have gone beyond the minimum standards required by the ECtHR and apply some of these fundamental principles in disciplinary proceedings.[108] In fact, all these rights become directly applicable, albeit frequently nuanced, in those legal orders that consider disciplinary measures criminal in nature within the meaning of Article 6, paragraph 2 ECHR.[109]

VI. Conclusions

National legal orders have different approaches to the disciplinary responsibility of their civil servants and, specifically, different understandings of its legal nature. Nevertheless, we have tried to propose a basic concept of civil servants' disciplinary responsibility with some common, recognisable elements. According to this view, in the first place, disciplinary responsibility applies only to a specific group of people (i.e. civil servants, under different forms), who share some common features and compose a specific social group. Secondly, disciplinary measures always have a harmful content and, interestingly enough, they happen to be almost the same in every legal order. This can be explained by the fact that disciplinary measures are usually bound to affect only the rights and privileges forming the legal relationship between the public administration and its civil servants. Thirdly, disciplinary powers are exercised by the public administration, not by the judiciary. Fourthly,

106 ECtHR, *Moullet v. France* (n. 15), para. 2. French authors traditionally rejected a time bar in disciplinary matters (*imprescriptibilité de l'action disciplinaire*), see Dellis (1997), pp. 293–294. Contrariwise, Article 97 of the Spanish Basic Statute of the Public Servant of 30 October 2015 (*Estatuto básico del Empleado público*); www.boe.es/buscar/act.php?id=BOE-A-2015-11719, establishes a time bar for every disciplinary fault (three years at the most for the most severe infringements). Belgian, Greek, and Polish statutes also emphasise negative prescription as a remedy for the disciplinary authority's inactivity, Chiavario (2003), p. 722.

107 ECtHR, *Moullet v. France* (n. 15), para. 2.

108 In Poland, although the constitution defines the presumption of innocence solely in the context of criminal liability, the jurisprudence of the Constitutional Court extended its applicability to cover all other forms of repressive proceedings, including disciplinary proceedings, Szumiło-Kulczyka and Waltoś (2003), p. 1047. In the case of Germany, it has been stated by Rogall (2003), p. 938, that "rejecting the criminal character of disciplinary measures certainly by no means leads to a reduction in legal protection". But the situation may differ greatly in other countries, see Sugman (2003), p. 1068.

109 E.g. the presumption of innocence, as well as the right to be informed about charges and any changes and to have time and facilities to prepare the defence, must be fully respected in disciplinary proceedings in Austria, see Miklau (2003), p. 795.

disciplinary measures are intended to be a response to an infringement of civil servants' professional duties. And finally, disciplinary regimes aim to protect not only the inner functioning of the public administration or its public image, but also the public interest. This approach is instrumental to the idea that public powers, and especially the executive power and its civil servants, are fully responsible for their actions before the public in a democratic society under the rule of law.

Also, we have tried to determine when disciplinary measures must be considered "criminal in nature" within the meaning of Articles 6 and 7 ECHR. This analysis has been guided by the well-established case law developed by the ECtHR on the so-called *Engel* criteria, according to which this would only happen in very specific cases and under very strict conditions, apparently linked to the adoption of disciplinary measures entailing the deprivation of liberty. When this is the case, public authorities must fully respect the rights enshrined in Articles 6, paragraph 2 and 7 ECHR and in Article 2 of the Protocol no. 4. Nevertheless, several countries have gone beyond this restrictive view and consistently consider that disciplinary measures imposed on their civil servants are always "criminal in nature". Therefore, those civil servants enjoy the rights enshrined in the aforementioned provisions. Additionally, some other countries, despite denying this criminal nature, do also apply many of those rights due to their own constitutional reasoning. This situation suggests that differences in the theoretical framework of the disciplinary responsibility of civil servants may not be decisive regarding the establishment of the level of protection of the latter.

A final remark: due to the harmful effect of disciplinary measures, every civil servant enjoys, in any event, a minimum set of defence rights included in the right to a fair trial, among which are the right to adversarial proceedings, the obligation to state reasons, the principle of proportionality and the right to an independent and impartial court.

Bibliography

Agus D., Argiolas B., Ciccarelli G., Cimino B., D'Alterio E., Giurickovic Dato A., Mattarella B.G., Rivellini G., Screpanti S., Tonetti A. (2021), 'La gestione del personale tra incentivi e disincentivi', 4 *Rivista Trimestrale di Diritto Pubblico*, 1255–1294.

Apicella E.A. (2002), 'Lavoro nelle pubbliche amministrazioni', in *Enciclopedia del Diritto, Aggiornamento VI*, Milan: Giuffré, 602–655.

Barkhuysen T., Van Emmerik M., Jansen O., Fedorova M. (2018), 'Right to a Fair Trial (Article 6)', in Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L. (eds), *Theory and Practice of the European Convention on Human Rights*, Cambridge: Intersentia, 497–654.

Boiten D., Jörg N., Nijboer J.F. (2003), 'The Netherlands, Principles of Criminal Procedure and Their Application in Disciplinary Proceedings', 74(3) *Revue Internationale de Droit Pénal*, 1077–1100.

Bombois T., Déom D. (2007), 'La définition de la sanction administrative', in Andersen R., Déom D., Renders D. (eds), *Les sanctions administratives*, Brussels: Bruylant, 25–142.

Bueno-Armijo A. (2018), 'La responsabilidad de los empleados públicos', in Rebollo Puig M., Vera Jurado D. (eds), *Derecho Administrativo. Tomo IV*, Madrid: Tecnos, 241–288.

Carretero-Pérez A., Carretero-Sánchez A. (1995), *Derecho Administrativo Sancionador*, Madrid: EDERSA.

Chiavario M. (2003), 'Principles of Criminal Procedure and Their Application to Disciplinary Proceedings', 74(3) *Revue Internationale de Droit Pénal*, 707–746.

Ciani G. (2015), 'Responsabilità civile e responsabilità disciplinare', 138(6) *Il Foro Italiano*, 329–338.

Dellis G. (1997), *Droit pénal et droit administratif. L'influence des principes du droit pénal sur le droit administratif répressif*, Paris: LGDJ.

Du Jardin J. (2003), 'Belgique, les principes de procédure pénale et leur application dans les procédures disciplinaires', 74(3) *Revue Internationale de Droit Pénal*, 801–820.

Echevarría M.H. (2019), *Delitos de los funcionarios públicos*, Madrid: Dykinson.
Foucault M. (1975), *Surveiller et punir*, Gallimard: Paris.
Froment J.-C. (2001), 'Remarques sur les enjeux et la portée d'une *criminalisation* du droit administratif', 2 *Revue du Droit Public*, 555–606.
Garbar C. (2016), 'De la responsabilité à la responsabilisation des fonctionnaires. Les expériences allemande, britannique, italienne et polonaise', 68(1) *Revue internationale de droit comparé*, 7–9.
Kidd C.J.K. (1987), 'Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights', 36(4) *The International and Comparative Law Quarterly*, 856–872.
Klip A., Van der Wilt H. (2002), 'The Netherlands *non bis in idem*', 73(3), *Revue Internationale de Droit Pénal*, 1091–1137.
Le Pors A. (2008), 'Les fonctionnaires, citoyens de plein droit', *Le Monde*, 31 January.
Marina-Jalvo B. (1999), *El régimen disciplinario de los funcionarios públicos*, Valladolid: Lex Nova.
Marina-Jalvo B. (2021), 'Suspensión de funciones e incapacidad temporal de los funcionarios públicos. Criterios para la determinación de la prevalencia entre situaciones administrativas y regímenes jurídicos diferentes', 58 *Revista General de Derecho Administrativo*, 1–22.
Miklau R. (2003), 'Austria, Principles of Criminal Procedure and Their Application in Disciplinary Proceedings', 74(3) *Revue Internationale de Droit Pénal*, 793–799.
Nocelli F.M. (2019), 'La contestazione disciplinare tra regole, valori e nuove responsabilità', 6 *Foro Amministrativo*, 1151–1198.
Oberdorff H. (2014), 'La fonction publique de l'Union européenne', in Auby J.-B., Dutheil de la Rochère J. (eds), *Traité de droit administratif européen*, Brussels: Bruylant, 291–307.
Organisation for Economic Co-operation and Development (OECD) (2019), *Government at a Glance 2019*, www.oecd-library.org.
Petit J. (2014), 'Le principe de légalité des infractions et la répression disciplinaire administrative', in *Long cours: Mélanges en l'honneur de Pierre Bon*, Paris: Dalloz, 1041–1053.
Pralus-Dupuy J. (2003), 'France, les principes du procès pénal et leur mise en œuvre dans les procédures disciplinaires', 74(3) *Revue Internationale de Droit Pénal*, 889–923.
Quattrocolo S. (2003), 'Italie, les principes du procès pénal et leur mise en œuvre dans les procédures disciplinaires', 74(3) *Revue Internationale de Droit Pénal*, 999–1027.
Rebollo-Puig M. (2019), 'El control de la Administración por la jurisdicción penal', 115 *Revista Vasca de Administración Pública*, 151–190.
Rincón-Córdoba J. (2018), *La potestad disciplinaria en el Derecho Administrativo*, Lima: Información Jurídica Editores.
Rogall K. (2003), 'Germany, Principles of Criminal Procedure and Their Application in Disciplinary Proceedings', 74(3) *Revue Internationale de Droit Pénal*, 925–958.
Sanders A. (2013), 'Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?', 33(4) *Oxford Journal of Legal Studies*, 791–819.
Sugman K.G. (2003), 'Slovenia, Principles of Criminal Procedure and Their Application in Disciplinary Proceedings', 74(3) *Revue Internationale de Droit Pénal*, 1063–1076.
Sykiotou A.P. (2003), 'Grèce, les principes du procès pénal et leur mise en œuvre dans les procédures disciplinaires', 74(3) *Revue Internationale de Droit Pénal*, 959–998.
Szumiło-Kulczyka D., Waltoś S. (2003), 'Poland, Principles of Criminal Procedure and Their Application in Disciplinary Proceedings in Poland', 74(3) *Revue Internationale de Droit Pénal*, 1041–1061.
Trayter-Jiménez J.M. (2020), 'La responsabilidad administrativa y penal de los empleados públicos: una visión actual', 213 *Revista de Administración Pública*, 345–372.

26 The Basic Principles of Civil Servants' Remuneration

A Legal and Human Resource Management Analysis from a European Perspective

Valentina Franca and Ana Arzenšek

I. Introduction

In the field of public administration and governance, the remuneration of civil servants occupies a central position and has a major impact on the efficiency, effectiveness, and equity of government services. Civil servants form the backbone of a nation's administrative apparatus. They are entrusted with the important task of implementing public policy, maintaining law and order, and providing essential services to citizens. The remuneration structures and policies that apply to these individuals play an important role not only in their motivation and job satisfaction but also in the overall quality and integrity of public service delivery.

Public employee remuneration is an issue that transcends geographic boundaries, encompassing various levels of government – from local to federal – and diverse sectors such as healthcare, education, law enforcement, and many others. In this chapter, we focus on the narrower meaning of the term civil servants, i.e. those employed in public administration. As countries differ in the organisation of the public sector, there are also different approaches to regulating the remuneration of civil servants. At the European level, there is neither a uniform salary structure for civil servants nor a uniform approach to remuneration. What most countries in the European Union (EU) have in common is rigorous regulation. Civil servants only receive what is set by law (laws, regulations, decrees) or in collective agreements, i.e. with limited or no discretion for additional remuneration incentives. It is also common that until recently they held on to seniority rewards, which basically meant automatic promotion after certain years of service. In some countries these are not small numbers; in Poland, for example, the mandatory seniority premium goes up to 20%.[1] However, various economic, social, and demographic factors have led to changes in this realm, including pressure from comparison with private sector management practices.

Performance-related pay (PRP) was introduced against the backdrop of economic and budget deficits faced by the Organisation for Economic Co-operation and Development (OECD) member countries since the mid-1970s.[2] This shift is called New Public Management (NPM), which has resulted in significant changes in the organisation and management of the public sector to enhance performance. Within NPM, performance management is widely recognised as a crucial element of effective public administration. However, the transition to PRP is one of the most difficult for a public employer. PRP,

1 Albinowska and Magda (2023).
2 OECD (2005).

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which links certain employee benefits to their performance, is regarded as a highly effective process in human resource (HR) management.[3] Its results are being manifested in promotions, remuneration, career development, assessing training needs, and job terminations. At the same time, PRP is beneficial to organisations as it stimulates employers to communicate organisational values, mission, and objectives with an employee in a way that organisational strategy is operationalised into one's work objectives and performance criteria.

The European Commission's Report on Excellence in Public Administration for Competitiveness in EU Member States and the World Bank identified performance management as crucial to improving the performance of civil servants.[4] Thus, attempts to incorporate performance objectives and indicators into EU members' public institutions' HR management have been made.[5] In line with this, PRP systems have been widely adopted by public administration in the last 30 years,[6] and consequently the salaries become less uniform and predictable,[7] with the aim of aligning compensation with performance. It can improve employee drive, productivity, and overall performance. Yet, there are different opinions on the positive outcomes of the PRP system, there are supporters and critics; generally, it can be assumed that it is a strong weapon, but it must be used carefully.[8]

Despite an extensive body of literature on the subject of remuneration, only a limited number of studies delve explicitly into the complexities of compensating civil servants. One of the most comprehensive is a 2007 OECD study, but its findings are no longer entirely relevant today. First, the economic crisis of 2008 triggered an urgent need to change the old traditional models of remuneration in the public sector, but not all changes have produced the desired results. Freezing or cutting salaries and wages has affected the government's ability to attract and retain staff. The OECD[9] also acknowledges that measures that were intended to be short-term have had long-term effects.

Second, the COVID-19 pandemic, along with other socio-economic changes, has challenged the attractiveness of public sector employment, as even though it offered a relatively secure job with lower pay, the traditional working hours and limited flexibility were not so enticing. Many have left the public sector and have not returned, leaving a large gap in public sector employment. In addition, the current labour shortage is a major challenge for virtually all Member States, as it is becoming increasingly difficult to attract workers to the public sector. A fact also recognised by the European Public Administration Network Strategy for 2022–2025.[10] In addition, there are new challenges, such as climate change and the just transition, the introduction of artificial intelligence and the like. All this will also have a strong impact on public sector employment in the coming years.

The present chapter examines public sector employee remuneration, taking a closer look at the complex interplay of legal and HR factors that shape this issue. Our aim is to provide a nuanced understanding that goes beyond simplistic views of "overpaid" or "underpaid" civil servants. Based on the literature review and analysis, we offer insights and recommendations to improve efficiency, fairness, and accountability in relation to PRP,

3 Foley et al. (2014).
4 Pitlik et al. (2012); Schnell (2021).
5 OECD (2023).
6 Demmke (2007); Roberts (2010); OECD (2005); OECD (2012).
7 Pollit (2009).
8 Ruffini et al. (2020).
9 OECD (2012).
10 EUPAN (2022).

its benefits, drawbacks, and global implementation. In doing so, we also address human resource and legal challenges, and hope that our contribution will be a valuable resource for policymakers, academics and practitioners grappling with the complexities of fair and sustainable public sector remuneration.

The structure of the present chapter is as follows. First, the rationale for moving from seniority pay to performance-related pay is presented, followed by the issues of performance appraisal of civil servants in the EU. In the last part of this chapter, we present some reflections and conclusions.

II. Rationale: From Seniority to PRP

Salaries in the public sector are typically regulated through a combination of legislative, executive, and collective bargaining processes.[11] The exact mechanisms and approaches can vary from one European country to another, from a very centralised approach, as in the Central Eastern European countries,[12] to a more decentralised one. An example of this is Sweden, where, in addition to ministries, some public sector bodies such as autonomous agencies and public companies have some autonomy in determining the salaries of their employees within the framework set by the government. Furthermore, in some countries, like Belgium and Germany, salary scales at local, regional, and federal levels are not equivalent.[13] In Germany, the remuneration structure reflects the differences in the range of tasks of the federal and regional governments, leading to salary differences of up to 10%.[14] There are differences between the regions themselves with a north-south divide. The situation is similar in Poland, where civil servants with similar characteristics (education, age, and occupation) experience a significant regional wage penalty, ranging from –11% to –29%.[15] Some bonuses can be even subjected to decentralised negotiation, like in Denmark.

The basic salary of civil servants in Europe, as well as in the EU administration, is usually linked to the salary scale for the specific job performance, based on education, working experience and responsibilities. In some countries, like Belgium and Italy, each scale has a range of salary levels (grades), with incremental steps representing increases in salary. In contrast, in other countries, like Slovenia, the scales are not split into levels (grades), meaning the public employee can be promoted just for an entire scale.

The remuneration of civil servants has long been based on the principle of seniority, i.e. civil servants are paid according to their years of service. Basically, each year of service often corresponds to a salary increase. Automatic promotion in various forms, on a smaller or larger scale, still exists in most Member States. In Germany, PRP has not been significantly included in the traditional remuneration system, which still relies on seniority as an important factor for promotion and remuneration.[16] Rewarding seniority can also be seen as an obstacle to raising the attractiveness of the public sector. To illustrate, in Poland, the authors suggest lowering the automatic seniority premium, increasing the basic wage, and

11 OECD (2012); Staňová Mikkelsen et al. (2017).

12 Masso et al. (2015).

13 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume; see also *The Civil Service in Belgium: Between Fragmentation and Common Principles* by Y. Marique and E. Slautsky in this volume.

14 Reichard and Schröter (2021).

15 Albinowska and Magda (2023).

16 Reichard and Schröter (2021).

better valuing scarce skills to encourage high-productivity workers to stay in the public sector.[17]

It must be admitted that this traditional approach has its merits, as it rewards loyalty and commitment to the civil service. It also helps to reward employees for shaping their careers and for specific skills that may not be as useful outside the public sector. The main problem with such a system is primarily its automaticity, as it applies to everyone equally, regardless of their performance and contributions. Also, it does not facilitate flexibility as it bases the salary on post rather than on skills.[18] This is not helped either by rigid remuneration systems and other hierarchical and formalised factors that serve to reduce the potential risk of excessive political influence, corruption, misconduct, the pursuit of private interests and government instability in Member States.[19]

As governments representing the employer in the public sector seek to improve the efficiency, productivity and accountability of civil servants, there is growing interest in moving from seniority-based to PRP systems. This was confirmed by the report produced under the Spanish Presidency in 2010, which stated that virtually all EU countries have some kind of PRP system. Similarly, the OECD[20] notes that pay policies for civil servants in most countries consist of three main components: basic salary, remuneration linked to the nature or duties of a post, and PRP elements. The change has been welcomed by public opinion and, to some extent, by the professional community. On the other hand, there is a widespread belief that civil servants are overpaid,[21] underemployed, and unaccountable. Therefore, any change aimed at possible higher salaries is permanent in the critical eyes of taxpayers and always costly, regardless of the actual figures and possible impact. It should be noted that salaries are usually the largest budget item in EU public sector organisations, so governments are also struggling – when it comes to convincing public opinion – to defend the performance of their employees.

Government policies and priorities do indeed exert a significant influence on the remuneration of civil servants. This influence is increasingly evident, especially in the face of looming labour shortages. Consequently, some countries place great emphasis on offering competitive salaries to attract and retain highly skilled professionals. Without question, competition for talent with the private sector is intensifying. A partial solution, for example in Malta, is to offer allowances instead of salary increases, which would lead to more competitive remuneration packages without disturbing the official salary relativities within the structure.[22] It is even more critical for the younger generation, which faces a larger wage gap due to seniority compared to the private sector. In Poland, for example, the wage gap between the private and public sectors is 3%, while for the younger generation, it is 8%.[23]

17 Albinowska and Magda (2023).
18 OECD (2012).
19 Demmke and Moilanen (2012).
20 OECD (2005).
21 A question that is not limited to the European Union. For example, a study by Keefe (2012) found that in the United States, public employees, both state and local government, are not overpaid, but even slightly underpaid.
22 Polidano (2021).
23 Albinowska and Magda (2023).

One of the strongest arguments that governments can use is that many civil servants are in favour of linking their pay to their performance.[24] There is a growing trend of decentralising the remuneration system and empowering line management to assess coworker performance and locate pay rewards.[25] Here it is assumed that differentiation of civil servants based on performance will be established, which is good for the motivation of both high and low performers. In this way, it is possible to attract and retain talented workers, as in the private sector. In some places such differentiations are already occurring, for example the city of Berlin has responded to staff losses with significant differences in the salary schemes for certain groups of civil servants.[26]

Fitzpatrick[27] sheds light on another advantage of PRP in the civil service, namely its capacity to encourage those in the highest positions on the salary range and with scarce options for promotion to stay productive. Theoretically, performance-related pay may also reduce inflexible wage disparities between comparable occupational groups across public sector organisations and consequently increase civil servants' perception of fairness. Additionally, public service institutions might benefit from the PRP scheme in a way that it symbolises and promotes organisation culture, objectives, and strategy. PRP, in theory, acts as an extrinsic motivator by providing additional pay or other extrinsic rewards. At the same time, it can also increase intrinsic motivation through the provision of feedback, recognition of effort, and in the satisfaction gained from achieving organisational goals. In this way, PRP might help civil servants stay more focused, flexible, and user oriented.

The transition from the traditional seniority system to PRP requires legal changes. Without going into the diversity of national systems, the criteria for rewarding PRP should be laid down in law. However, a recent survey[28] shows that only 19 out of 30 countries have formalised the criteria for granting the PRP component. Another legal obstacle arises from the far-reaching legal regulation, which leaves little room for discretion. In many countries, this restriction makes it almost impossible to adequately recognise the ad hoc public employee achievements. While the concern to maintain financial stability is valid, it is important to consider alternatives, especially as Member States face staff shortages. The growing trend to decentralise the remuneration system and empower line management to evaluate staff performance and determine rewards[29] needs to be considered.

III. The Performance Appraisal of Civil Servants in the EU

One of the most important parts of PRP is measuring civil servants' performance. PRP success depends on the performance appraisal design, the instrument used, the organisation, as well as raters' competencies and motivation. Staroňová[30] made a comprehensive overview of the design of the instrument utilised in performance appraisal among EU public administration institutions. Individual performance appraisal is mandatory in all EU countries, except in Austria, where organisational performance is measured

24 Marsden and French (1998).
25 Fitzpatrick (2007).
26 Siegel and Proeller (2021).
27 Fitzpatrick (2007).
28 Staňová Mikkelsen et al. (2017).
29 Fitzpatrick (2007).
30 Staroňová (2017).

instead.[31] In all EU countries, performance is measured as a multidimensional construct, mainly as a set of competencies, assessed in terms of past behaviours and work results. However, in EU Member States, there is no uniform model for measuring employee performance. In this respect, Scandinavian countries such as Denmark and Sweden are the most advanced, where there is a strong tendency to decentralise the remuneration system and shift remuneration decisions to line management.[32] The emphasis is on a closer link between individual performance and the remuneration awarded, as opposed to merit based on seniority.

According to Staroňová,[33] the immediate supervisor oversees performance appraisal in most EU Member States. His/her role is to provide evaluation of his/her immediate subordinates. Yet, this traditional source of feedback has begun to be combined with other sources of information, e.g. 360-degree feedback, 180-degree feedback, self-evaluation, or peer evaluation. In most EU members, employees are also involved in the appraisal system. One of the biggest differences among EU members is whether there is available/mandatory training for raters on how to perform an appraisal. Even in countries where training is available/mandatory, there is a big discrepancy in how many days/hours are dedicated to the development of rating skills. Differences among EU countries also exist in terms of the de/centralisation of performance standards and criteria as well as in procedural aspects.

Big differences among EU members regarding feedback provision exist as well.[34] While some form of feedback is provided in many countries, the type of feedback depends on the country and can be in the form of an interview, a fixed template employee report, or an unstructured employee report. Furthermore, there is no common rating framework among EU members.

In addition, differences exist regarding accountability measures if a public employee disagrees with performance appraisal. Appeal procedures exist in most EU members. However, only a few countries assess the skills of appraisers in performance appraisals. Likewise, it is uncommon to systematically track the effectiveness of the entire performance appraisal procedure.[35] It can be concluded that performance appraisal remains a demanding challenge in many EU countries.

IV. Performance Outcomes and the Employee-Related Outcomes of PRP

The results of studies measuring outcomes of PRP in civil service are mixed and generally less promising than expected. Hence, a need for reconsidering classic performance appraisals in the light of contextual factors has arisen. In this realm, the social context of performance appraisal in civil service has been considered. For example, civil servants' motivation,[36] millennials and their motivation to work in public service,[37] attitudes and

31 Gabmayer and Ramic (2022).

32 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume; see also *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfeld Olsson and E. Sjödin in this volume.

33 Staroňová (2017).

34 Demmke (2007).

35 Staroňová (2017).

36 Ganhão et al. (2021).

37 Ng et al. (2016).

perception of fairness in the performance appraisal system,[38] as well as effects of managing performance in private and public sectors,[39] have been studied.

1. PRP and Civil Servants' Values

The idea behind performance management is a prospective increase in work motivation among civil servants. However, there is an ongoing debate on the constituents of "true" motivation among civil servants. It is argued that the rationale behind this is not comparable to the motivation of private sector employees.[40] While in the private sector a direct link exists between external motivation and increased work performance, civil servants might be more motivated by intrinsic factors, such as high task significance or alignment with public values.[41] Other factors include job security, work-life balance, good civil service organisation (sector) reputation, and meaningful work.[42] These civil servants' values may outweigh the financial benefits of PRP. However, in line with Ketelaar et al.[43] different HRM tools can socially construe motivation, so performance appraisal has been continually introduced as an HR developmental tool in EU public service institutions.

According to the study made by researchers from the London School of Economics and Political Science, Centre for Economic Performance,[44] many civil servants appreciated the opportunity to discuss their work with their supervisors within the PRP process, however, they felt that the link to compensation was harmful. For example, the study of school leaders[45] highlighted several unique characteristics of primary and secondary education that are relevant to the design of PRP systems. These include a strong sense of the value of public service, a keen awareness that the success of schools depends on all teachers, practical reservations about implementing performance pay, and the view that evaluative performance targets are more appropriate for schools than simple statistical indicators.

Likewise, Demmke's study[46] regarding satisfaction with PRP in the civil service showed lower levels of satisfaction with performance appraisals among managers, and general concerns about creating a new bureaucratic obligation. While civil servants generally supported the idea of PRP being integrated into their work, many were not satisfied with the way it has been introduced and managed. Even more, an OECD study found that the managers who conducted the appraisals felt that performance-based pay did not improve their employees' motivation.[47]

38 Dolidze et al. (2019); Kim (2016).
39 Hvidman et al. (2013).
40 Hvidman and Calmar Andersen (2013).
41 Ruffini et al. (2020).
42 Ganhão et al. (2021).
43 Ketelaar et al. (2007).
44 Marsden and French (1998).
45 Marsden and French (1998).
46 Demmke (2007).
47 Cardona (2007).

2. Generational Work Values and PRP in the Civil Service

Work values are goals that people strive to accomplish in their work and that influence their work-related decisions and behaviours. According to Acheampong,[48] a link exists between generational work values and reward types effective in recruiting and retaining different generations of workers. Since there is a growing number of Baby Boom civil servants transferring to retirement, a question arises as to the extent to which PRP in the civil service is aligned with the values of predominant generations in the current workforce: Generation X (born between 1961 and 1981), Millennials or Gen Y (born between 1982 and 2000), and Generation Z (born between 1995 and 2015). If PRP does not reflect the majority of civil servants' work values, it is going to be considered ineffective.[49]

Generation X civil servants are currently entering senior positions and will shortly replace the Baby Boomer generation leaders. They are described as well-educated, self-reliant, and money conscious. They value good pay, work-life balance, and recognition.[50] While PRP might be considered a plus by Gen X, they tend to appreciate good relationships in the workplace and opportunities for career development more. Due to their "do-it-yourself" mentality and individualism, their organisational loyalty is limited.

The Millennial or Generation Y generation was described as attention-seeking, materialistic, self-absorbed, and entitled, but also as idealistic, socially responsible, and collaborative.[51] They are also generally less interested in pursuing careers in the public sector. Consistent with this, Henstra and McGowan's[52] study shows that millennials prioritise extrinsic rewards, such as a stable salary and job security, which makes a strong case for PRP being integrated into the civil service to attract (but not necessarily to also retain). On top of that, they also value lifestyle incentives, such as a healthy work-life balance. In comparison to Generations X and Z, the Millennial generation is less likely to uphold values characteristic of the civil service (i.e. the motivation to help people and to make a difference in the world).[53]

The most recent entrants to the civil service labour force belong to Generation Z, and they were described as creative and highly independent, overdependent on technology, thinking globally, and with a deep interest in social justice and environmental issues.[54] Like Millennials, members of Generation Z find extrinsic rewards attractive and find a good fit with organisations offering substantial extrinsic rewards. In terms of employee retention, however, all indications are that extrinsic rewards – apart from opportunities for promotion – are rather secondary for Generation Z.[55] Generation Z is interested in public sector careers and is motivated by public service or prosocial values such as social responsibility and willingness to serve others.

To conclude, while PRP might be beneficial for attracting members of Generation X, Millennials, and Generation Z, there is no concluding support for the claim that PRP might act as a means for retaining their members, as they generally show limited organisational

48 Acheampong (2021).
49 Acheampong (2020).
50 Acheampong (2020).
51 Ng et al. (2016); Acheampong (2020).
52 Henstra and McGowan (2016).
53 Henstra and McGowan (2016).
54 Acheampong (2020).
55 Acheampong (2020).

commitment and loyalty. At the same time, research by Ganhão et al.[56] concluded that members of different generations do not differ significantly from each other in what they desire from their work, so it is important to see cross-generational divisions also as guilty of promoting age stereotypes and other flawed assumptions.

3. Performance Outcomes and Employee-Related Outcomes of PRP in the Civil Service

In their metanalytical study, George and van der Wal[57] found positive links between PRP and employee factors, as well as between PRP and performance outcomes. Even more importantly, they found that PRP had a lower impact on performance indicators than on employee-related outcomes like job satisfaction or work motivation. These findings suggest that PRP might carry some advantages for civil servants' motivation, while expectations regarding better performance outcomes are tenuous.

Research also shows that if not performed carefully, PRP can have the opposite effect on civil servants' motivation and work ethos.[58] For example, Marsden and French[59] as well as Ruffini et al.[60] found that many civil servants reported PRP lowering their motivation and morale. OECD research[61] reports on the ambivalent effects of PRP on civil servants' motivation: while it seems to motivate a minority of employees, the vast majority do not find PRP motivating. Moreover, civil servants tend to compare their base salary with the one in the labour market, additional pay increases are a secondary incentive for most state employees, especially those who do not hold management positions. Job content and prospects for career advancement have been shown to be the strongest incentives for civil servants.

To conclude, PRP schemes aimed to attract private sector executives to the public sector, but their implementation has caused issues and pressure for salary alignment within organisations. There is no clear evidence that proves PRP improves motivation or performance in the civil service. PRP aims to ease labour market pressures in the private sector, not incentivise exceptional performance.

4. Contextual Factors of PRP in the Civil Service

George and van der Wal[62] showed that when considering the effects of PRP, context also counts. More specifically, they found that PRP seemed to have a bigger effect at the federal than on the local level. It can be speculated that at the local level, there can be tendencies to circumvent the existing objective criteria set and provide subjective assessments to members who are "in the group" while ignoring the achievements of "out-of-the-group" members. Moreover, it is important to note that the national government typically has greater control over budgetary decisions, while local management is limited to areas such as establishing performance metrics and allocating a limited amount of available funds. This could potentially impact the effectiveness of PRP due to insufficient funds. For

56 Ganhão et al. (2021).
57 George and van der Wal (2023).
58 Ruffini et al. (2020).
59 Marsden and French (1998).
60 Ruffini et al. (2020).
61 OECD (2023).
62 George and van der Wal (2023).

instance, the OECD has reported that PRP bonuses for civil servants are typically less than 10% of their base salary, with executive bonuses often being higher, at around 20% of the base salary. Most countries limit PRP in one way or another. Limits can be on an individual basis, such as the highest achievable percentage a public employee can reach in a year (for example, Slovenia, Germany). Another possibility is that limits are set for the amount found for PRP (maximum allowable amount for PRP) or for a certain percentage of civil servants (a quota system). Different combinations are also possible. An example of a quota system is Portugal, where only 5% of employees can achieve “Excellent Performance” and 20% “Relevant Performance”. Although the aim of such a limit is understandable from a budgetary point of view, it tends to limit the pace of the employee’s career and remuneration progression, and thus also affects motivation.[63]

Additionally, a study conducted by George and van der Wal found that the outcomes of PRP tend to be more positive in Asia as compared to Europe or the US, possibly due to the differing preconceptions regarding rewards and financial incentives.[64] Furthermore, Cardoba[65] has reported on the challenges faced by certain Eastern European countries in establishing new civil service systems, including political blame placed on civil servants and a lack of trust between elected officials and officials. This distrust is particularly pronounced in Eastern European nations, potentially due to the ongoing shift from communist to non-communist ideologies among officials and politicians alike.

V. Critical Points in Successful PRP Implementation

It is likely that the aspirations and expectations regarding the effects of PRP in the public sector will not only be maintained but also strengthened. This is not only a professional but also a political issue, because the public rightly demands quality public services, which can only be provided by qualified and motivated civil servants. In this section, we bring some critical points regarding successful PRP implementation to discussion and provide ideas on how to tackle them.

Unlike many PRP systems in use in the public service, successful PRPs need to address how to tackle the issue of underperformers. As Fitzpatrick[66] illustrates, the range of rewards provided for excellent work compared to expected (or “normal”) work activity is often too narrow, and they might not be recognised by those who deliver above-average results. Additionally, successful implementations of PRP schemes for underperformers are rare. In cases where underachievers receive no performance bonus as a punishment, there is no differentiation between underachievers and those who deliver average work productivity. In this scenario, average performers are those who are in fact punished. Moreover, if the system is poorly designed, it can lead to litigation, which can call into question the effectiveness of the system.

The fact is that no performance review process can be entirely objective since it always includes a subjective evaluation component is another significant issue with PRP. This can cause subjectivity and arbitrariness in employee evaluation.[67] The standards for how well

63 Madureira et al. (2021).
64 George and van der Wal (2023).
65 Cardona (2007).
66 Fitzpatrick (2007).
67 Cardoba (2007).

these aims are reached in relation to the objectives of the business can be subjective, even though both the management and the employee can discuss performance targets and the behaviours that will be measured. Or, as Foley et al.[68] emphasise, performance appraisal measures that rely on the manager's subjectivity may be viewed as unjust and result in a decline in commitment and motivation. In this situation, both an employee's self-assessment and a manager's appraisal might be used to inform a choice on compensation. PRP may also be used to impose a degree of political control over the civil service. It is nearly impossible to prevent the appearance of favouritism in such systems, even when they are honestly run. There is also the question of how to measure performance in cases where tangible results are not expected, when performance targets change with government policy, or when it is difficult to assess the contributions of individual members. It is now clear that measuring performance in PRP schemes is crucial. The concept of performance can be quite complicated, as it is difficult to find appropriate quantitative measures.

From this, it also becomes clear that most implemented annual performance interviews are not applicable today and more frequent performance feedback is needed. Ideally, a day-to-day ongoing communication routine is established. Additionally, performance appraisal in the civil service requires a high degree of maturity and expertise on the part of middle managers. Thus, a change in leadership style and extensive managerial training in leadership skills might be needed to establish new routines and work relationships.

One of the biggest hurdles in developing and managing PRP is the belief that "one size fits all". Unlike classical HRM textbooks on pay schemes and reward systems that provide similar tips and conclusions on "successful" performance management schemes, it has become clear that every organisation is a distinct social system and the development of PRP should reflect its history, culture, strategy, and HR specifics (the Italian case illustrates this well).[69] This is also why civil servants should be able to participate in the process of development of PRP according to its organisation-specific purpose. It is better if the purpose behind PRP is developmental (such as career planning and development) rather than fiscal (e.g. to increase or decrease the pay bill) or disciplinary.

All employees also need to receive full information about the PRP design, protocols, and measures. Besides ensuring clear, accurate, and timely communication of the scheme's aims and criteria, a direct link between work and reward should be established. To increase the perception of fairness and equity, the predetermined criteria and process need to be followed consistently, and channels for appeal need to be easily available. Additionally, there is a need for extensive managerial training on performance evaluations as well as periodic feedback available on how well raters performed PRP. Especially in countries where the PRP system has only recently been introduced, such as in the Central Eastern region, they are confronted with the fact that the supervisor often exercises sole discretionary power over variable pay.[70] This not only defeats the purpose of PRP, but also leads to numerous legal disputes that do not contribute to the quality of public services. However, these types of debates are not limited to this region, as in Germany there have also been cases concerning the objectivity of criteria and complaints about the remuneration of certain groups.[71]

68 Foley et al. (2014).
69 Ruffini et al. (2020).
70 Masso et al. (2015).
71 Keller (2020).

Finally, establishing a PRP scheme and integrating it into an organisation is a demanding change process. In general, people do not like changes. So, to achieve the desired results from PRP, it needs to be well-thought-out and carefully introduced by considering the concerns of stakeholders. Developing a wide circle of supporters within public service organisations will also make PRP more acceptable for sceptics.

VI. Conclusions

Despite its shortcomings, PRP has remained popular for over two decades. This paradox results from the fact that, despite widespread agreement regarding the drawbacks of PRP, its policies are still widely implemented in several OECD member countries.[72] However, since the costs of such action are a deterrent, the fact that organisations do not withdraw PRP is not always a very strong indication of the success of these policies. PRP's ability to facilitate other organisational reforms, however, appears to be one of the primary reasons it is still so widely used in the public sector.[73]

PRP is an important element of public sector employment, but it is only one facet. Striking the right balance between financial and non-financial incentives and fostering a positive work environment are crucial. This approach offers a practical way to address recent labour market challenges and increase the attractiveness of public sector employment.[74] Nevertheless, well-designed PRP systems that are tailored to the challenges of today's labour market and consistent with national administrative culture are crucial.[75] Clearly, national culture has a significant impact on the structure of the public service, and the most appropriate locus of control depends on the unique organisational structure in each state. The focus should be on improving staff dynamics, flexibility, efficiency, fairness, transparency, communication, and financial sustainability to adapt to the new challenges in the public service. It is important to note that there is no single best practice model that fits all.

National diversity is observed also in relation to trade unions, as in some countries consultation with trade unions is compulsory, while in others it is voluntary. Therefore, it would be useful to analyse the approaches to collective bargaining in the public sector and their impact on the successful implementation of PRP.

A consideration for the future is whether the equal pay rule will still work. There are undeniable tendencies and, in some cases, even implementations (e.g. in Germany) to pay extra for specific and deficit professions, such as IT experts. The public sector should follow these tendencies and reward scarce skills that are highly valued in the economy,[76] and furthermore PRP should be considered. Another important aspect for future discussions is the uniformity of wages, regardless of the place of work. It is obvious that the cost of living differs between big cities and rural areas. This also applies to the recognition of working from home, an issue that is not limited to the public sector. Equally important is the effort to reduce the wage gap between older and younger workers.

72 Fitzpatrick (2007); OECD (2023); Staroňová (2017).

73 Cardona (2007).

74 Keller (2020).

75 See *The Civil Service in Transition – The Ongoing Transformation of Administrative Culture* by A. Ritz and K.S. Weißmüller in this volume.

76 Albinowska and Magda (2023).

When we delve into these subtleties, it becomes clear that the remuneration of civil servants is not just an administrative matter, but has far-reaching social, economic, and political implications. It is about attracting and retaining talent, ensuring fairness, and managing public finances wisely. Policies and practices in this area have a direct impact on the quality of public services and thus on the well-being of our societies.

Bibliography

Acheampong, N.A.A. (2021), 'Reward Preferences of the Youngest Generation: Attracting, Recruiting, and Retaining Generation Z into Public Sector Organizations', 53(2) *Compensation & Benefits Review*, 75–97. https://doi.org/10.1177/0886368720954803.

Albinowska M., Magda I. (2023), 'Is There Room for Improvement in Wage Setting in Poland's Public Administration?', 2 *Policy Paper*, Instytut Badan Strukturalnych, https://ibs.org.pl/wp-content/uploads/2023/07/Policy_Paper_Public_Administration_EN.pdf.

Cardona F. (2007), 'Performance Related Pay in the Public Service in OECD and EU Member States', *SIGMA Support for Improvement in Governance and Management*, 1–6, www.sigmaweb.org/publications/38690351.pdf.

Demmke C. (2007), *Performance Assessment in the Public Services of the EU Member States: Procedure for Performance Appraisal, for Employee Interviews and Target Agreements: Study for the 48th Meeting of the Directors-General of the Public Service of the Member States of the European Union*, Luxembourg: European Institute of Public Administration.

Demmke C., Moilanen T. (2012), *The Future of Public Employment in Central Public Administration: Restructuring in Times of Government Transformation and the Impact on Status Development*, Maastricht, Berlin-, Helsinki: European Institute of Public Administration.

Dolidze N., Kuprashvili T., Burduli E., Dalakishvili T., Nozadze N., Shapharidze S. (2019), *Attitudes and Perceptions of Civil Servants on Performance Appraisal System*, Tbilisi: UNDP.

European Public Administration Network (2022), *European Public Administration Network (EUPAN) Strategy Paper: July 2022–June 2025*, www.eupan.eu/wp-content/uploads/2023/01/EUPAN-strategy-paper-2022-2025.pdf.

Fitzpatrick S. (2007), 'Overview on Civil Service Salary Systems in EU Member States and Some Reform Trends', *SIGMA Support for Improvement in Governance and Management*, 1–8, www.sigmaweb.org/publications/38656029.pdf.

Foley B., Tsang T., Ray K. (2014), 'Does Performance-Related Pay Work in the Public Sector?', https://blogs.lse.ac.uk/politicsandpolicy/does-performance-related-pay-work-in-the-public-sector/.

Gabmayer R., Ramic M. (2022), *The Austrian Federal Civil Service 2022: Facts and Figures*, Vienna: Federal Ministry for Arts, Culture, the Civil Service and Sport.

Ganhão T., Fernandes C., Santos T. (2021), *Public Employee Motivation in EU Central and Federal Public Administrations*, Lisbon: EUPAN.

George B., van der Wal Z. (2023), 'Does Performance-Related-Pay Work? Recommendations for Practice Based on a Meta-Analysis', 6(3) *Policy Design and Practice*, 299–312.

Henstra D., McGowan R. (2016), 'Millennial and Public Service: An Exploratory Analysis of Graduate Student Career Motivations and Expectations', 40(3) *Public Administration Quarterly*, 78–104.

Hvidman U., Calmar Andersen S.C. (2013), 'Impact of Performance Management in Public and Private Organizations', 24(1) *Journal of Public Administration Research and Theory*, 35–58.

Keefe J. (2012), 'Are Public Employees Overpaid?', 37(1) *Labor Studies Journal*, 104–126.

Keller B. (2020), 'Employment Relations Without Collective Bargaining and Strikes: The Unusual Case of Civil Servants in Germany', 5(1–2) *Industrial Relations Journal*, 110–133.

Ketelaar A., Manning N., Turkish E. (2007), 'Performance-Based Arrangements for Senior Civil Servants OECD and Other Country Experiences', *OECD Working Papers on Public Governance No. 5*, www.oecd-ilibrary.org/performance-based-arrangements-for-senior-civil-servants-oecd-and-other-country-experiences_5l4kxxxqf5d7.pdf?itemId=%2Fcontent%2Fpaper%2F160726630750&mimeType=pdf.

Kim J. (2016), 'Impact of Performance Appraisal Justice on the Effectiveness of Pay-for-Performance Systems After Civil Service Reform', 45(2) *Public Personnel Management*, 148–170.

Levy P.E., Williams J.R. (2004), 'The Social Context of Performance Appraisal: A Review and Framework for the Future', 30(6) *Journal of Management*, 881–905.
Madureira Grima C., Rando B., Ferraz D. (2021), 'The Public Administration Performance Appraisal Integrated System (SIADAP) and the Portuguese Civil Servants Perceptions', 44(4) *International Journal of Public Administration*, 300–310.
Marsden D., French S. (1998), *What a Performance: Performance Related Pay in the Public Services*, London: London School of Economics and Political Science, Centre for Economic Performance.
Masso M., Osila L., Järvalt J. (2015), *Working Conditions and Industrial Relations in the Central Public Administration: In Depth Case studies of – Czech Republic, Slovakia, Romania, and Estonia*, Praxis Center for Policy Studies, www.praxis.ee/wp-content/uploads/2015/06/Overview-report.pdf.
Ministry of the Presidency of Spain (2010), *Public Employment in European Union Member States*, Madrid: Ministry of the Presidency, Technical Secretariat-General.
Ng E.S.W., Gossett C.W., Winter R. (2016), 'Millennials and Public Service Renewal: Introduction on Millennials and Public Service Motivation (PSM)', 40(3) *Public Administration Quarterly*, 412–428.
OECD (2005), *Performance-Related Pay Policies for Government Employee*s, Paris: OECD Publishing.
OECD (2012), *Public Sector Compensation in Time of Austerity*, https://read.oecd-ilibrary.org/governance/public-sector-compensation-in-times-of-austerity_9789264177758-en#page3.
OECD (2023), '*Performance-Related Pay for Government Employees: Executive Summary*', www.oecd.org/governance/pem/35117916.pdf.
Pitlik H., Hölzl W., Brandtner C., Heinemann F., Misch F., Yeter M., Steurs G., Gagnage S., Kristof M. (2012), 'Excellence in Public Administration for Competitiveness in EU Member States', 59376 *WIFO Studies.*
Polidano C. (2021), *Public Administration in Malta: An Overview*, www.researchgate.net/profile/Charles-Polidano/publication/351287646_Public_Administration_in_Malta_An_Overview/links/6090698892851c490fb5189f/Public-Administration-in-Malta-An-Overview.pdf.
Pollitt C. (2009), 'Bureaucracies Remember, Post-Bureaucratic Organizations Forget?', 87(2) *Public Administration*, 198–218.
Reichard C., Schröter E. (2021), 'Civil Service and Public Employment', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany*, Cham: Palgrave Macmillan, 205–224.
Robbins S.P., Judge T.A. (2013), *Organizational Behavior*, 15th edition, New York: Prentice Hall.
Roberts A. (2010), *The Logic of Discipline: Global Capitalism and the Architecture of Government*, New York: Oxford University Press.
Ruffini R., Modarelli G., Sferazzo R., Turry M. (2020), 'Is Merit Pay Changing Ethos in Public Administration?', 7 *Cogent Business & Management*, 1–15.
Schnell S., Miheş D., Sobjak A., van Acker W. (2021), *Performance Management in the Public Administration – Seven Success Factors*, Washington, DC: World Bank.
Siegel J., Proeller I. (2021), 'Human Resource Management in German Public Administration', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany*, Cham: Palgrave Macmillan, 375–392.
Staňová Mikkelsen L., Števove K., Dlesková A. (2017), *Remuneration and Benefits in Central Government Civil Service in the EU Members States and European Commission*, Bratislava: Government office of Slovakia.
Staroňová K. (2017), *Performance Appraisal in the EU Member States and the European Commission*, Bratislava: Government Office of Slovakia.

27 Civil Service Retirement Pension Regimes

Christoph Hauschild

I. Introduction

In everybody's working life, a crucial part of the financial employment package is entitlement to a retirement pension. With changes of jobs, several entitlements may accumulate until a retirement pension is due at the end of the career. Since these pension entitlements may be granted by different pension providers, the pension rights earned must be well-documented. Such documentation reflects the individual's working biography. It becomes obvious that even details like the weekly working hours or childcare have an impact on the level of pension benefits earned. Except for investment-market-based pension funds, which depend on stock market trends, the benefits of non-private pension schemes are mostly calculated on the basis of salaries earned. From a systematic point of view, old-age insurance is therefore a wage replacement benefit. In the case of civil servants, salary and pension are traditionally regarded as a unit.

For a number of reasons and compared with the past, the public is increasingly interested in financial provision for old age. Legislative changes concerning for example the pension age and early retirement may cause changes in pension benefits. Tools for calculating future pension benefits are a flexible way to create transparency as regards earnings-related pensions and are increasingly used to respond to questions about individual pension benefits. Such calculators also make it possible to provide a projection of career options and their effects on future pension benefits.

Besides such initiatives aimed at making retirement regimes more responsive to their beneficiaries, the majority of policymakers are concerned with the future of general or national pension retirement schemes under current financial and demographic conditions. At the same time, they have to deal with a highly complex system. Even experts agree that understanding pension laws is a demanding task for everybody concerned: policymakers, administrative officers, and pensioners. Pension provisions even differ in terms of their legal grounds. Some pensions are granted on the basis of contracts. Most retirement and benefit provisions, however, must be based on legislation. This is also the case at all levels of government in Germany. With regard to federal civil servants (including federal judges), the following laws form the legal basis: the Act on Pensions for Federal Civil Servants and Judges[1] governs the entitlement to a pension as part of a federal service relationship;

1 Act on pensions for federal civil servants and judges of 24 August 1976 (*Gesetz über die Versorgung der Beamten und Richter des Bundes (Beamtenversorgungsgesetz – BeamtVG)*) in the version of 24 February 2010 (BGBl. 2010 I, p. 150), last amended by Act of 22 November 2021 (BGBl. 2021 I, p. 4906); www.gesetze-im-internet.de/beamtvg/BJNR024850976.html.

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the Act on Federal Civil Servants[2] sets the retirement age; the Federal Remuneration Act[3] includes the general salary scale which also applies to pensions.[4] And each of the 16 German federal States has its own laws on retirement pensions. However, a civil servant who leaves a post in one federal State to take up a post in another federal State or in the federal administration does not lose earned retirement pension rights. An interstate agreement[5] envisages financial compensation for the transfer of pension entitlements to the new public employer who will later pay the pension.

In many countries, sub-national and local governments run their own public service retirement pension schemes. In Germany, famous for having a long tradition of decentralised governance, regular exchange between all governments is permanently in place. This exchange uses the same institutional framework as for usual interaction between the Federation and the federal States.[6] Part of this framework is that a permanent intergovernmental working group of ministerial officials is mandated to share information on practical cases and to deal with issues in the administration of retirement pension rights. At management level and at different levels of government, highly specialised administrative machinery oversees implementing these pension rights. Not surprisingly, digitalisation is a current priority project. In the framework of the new federal personnel administration system, digital procedures are in the process of being introduced in this particular area of human resource management. The same is happening at regional State level. Insofar civil service law is as well illustrative of the German style of federalism and policymaking across the tiers of government.

In contrast to practical issues, growing government expenditure on pensions is a major policy concern at national, European, and international levels. According to Eurostat, social protection is the largest area of general government expenditure in all European Union Member States. By far the most significant category in the "old age" chapter relates to pension payments (11.3% of GDP in 2020). One has to add pension payments for survivors, which amounted to 1.6% of GDP in 2020.[7] These figures represent the EU 27 average. There are large differences between Member States. Pension benefits as a share of government expenditure range from 3.9% of GDP in Ireland to 15.7% of GDP in Greece. Among the larger Member States, the share in France is above average (14.1% of GDP) whereas Germany's share is below average at 10.3% of GDP.

The German figures include the general old-age security system (or social security insurance pension scheme, henceforth "general system") as well as civil service retirement pensions. With regard to the federal civil service, pension expenditure was 0.19% of GDP in

2 Federal Civil Service Act of 5 February 2009 (*Bundesbeamtengesetz (BBG)*) (BGBl.2009 I, p. 160), last amended by Act of 28 June 2021 (BGBl. 2021 I, p. 2250); www.gesetze-im-internet.de/bbg_2009/BBG.html.

3 Federal remuneration act of 23 May 1975 (*Bundesbesoldungsgesetz*) in the version of 19 June 2009 (BGBl. 2009 I, p. 1434) last amended by Act of 20 August 2019 (BGBl. 2019 I, p. 3932); www.gesetze-im-internet.de/bbesg/.

4 In Germany's Federal Government, the Federal Ministry of the Interior and Community (*Bundesministerium des Innern und für Heimat/BMI*) is responsible for federal civil service provisions; Hollah (2021), p. 87.

5 Interstate Agreement on pension burden sharing in the Event of a Cross Federal and Cross State Change of Employer of 05 September (*Versorgungslastenteilungs-Staatsvertrag über die Verteilung von Versorgungslasten bei bund- und länderübergreifenden Dienstherrnwechsel* 2010 (BGBl. 2010 I, p. 1290, 1404).

6 Behnke and Kropp (2021), p 35.

7 Eurostat (2020).

2018.[8] Current discussion on the future of the special civil service retirement system is mostly based on economic figures but is also driven by social policy objectives in a soul-searching debate which includes the popular allegation that civil service employment rules are based on privilege.[9]

The ongoing debate requires policymakers to justify the legitimacy of the current provisions. The objectives for maintaining a pension system for civil servants alongside the general system, as defined in following chapter, are similar across national public administrations:

- to ensure that the professional civil service continues to exist in its present form;
- to make civil service careers attractive to young graduates;
- to apply the concept of extended pension earnings based on active salary scales;
- to retire older civil servants in a publicly acceptable way.

II. Historical Background

Research on civil service retirement pensions is fragmented, but often part of the different branches of public administration research, such as legal, economic, and social studies. However, public administration projects dealing with the history of civil service pensions in Europe could define common historical ground and help foster better understanding of how the modern professional civil service developed differently in the different countries.[10] A more trans-European perspective could spring from recognising the importance of the provision of pensions for State-building in Europe. Existing research confirms that the history of modern States is closely linked to the emergence of a professional civil service with a life-long employment relationship.[11] Pension retirement regimes made this link work by securing the non-active part of the service time.[12] The underlying processes did not develop simultaneously everywhere in Europe, but in a range of decades at the end of the 18th and in the first half of the 19th century. The following very brief look at the national history of the civil service in Germany and France examines one important feature in the context of civil service retirement pensions, namely a leading principle: the legal standards for setting the level of civil service pension benefits. Over centuries, the specific social and financial implications of this concept have shaped the scope and level of retirement provisions.

In some countries, for example, France and Germany, the common feature of the financial civil service law (salaries and pensions) is the “alimentation principle”.[13] However, in spite of identical wording, the respective national perspectives, shaped by education and language capacities, have not been addressed in a comparative approach. It is therefore not surprising that the question arises as to whether from a historical point of view, it was by chance or otherwise that remuneration and retirement pensions are considered to have a *caractère alimentaire* in both countries.

8 BMI (2020), p. 71; Fethke and Zähle (2020), p. 625.
9 Reichard and Schröter (2021), p. 217.
10 Thuillier (2001), p. 175.
11 Bull (2009), p. 788.
12 In France, civil service retirement pay is called *salaire d’inactivité*.
13 Autexier (1994), p. 276.

In countries where the civil service is governed by the principle of alimentation or a similar principle, the retirement pension is not considered a social security pension, but an obligation of the State to provide sufficient and appropriate payment.[14] By contrast, when the civil service retirement regime is regarded as a special system of social security,[15] it might seem logical to completely integrate it into the general system. What at first seems to be an academic dispute over concepts and legal terms turns out to have much wider ramifications. From the perspective of the individual civil servant, such reform could have far-reaching practical implications, including lower income levels.

Much has been written about the alimentation principle,[16] but it is unknown when and where the term was first used. In Germany, it seemingly first appears in the *Ansbacher Memoire* of 1796 as a concept for determining financial benefits for civil servants in the Kingdom of Bavaria. However, the author, *le Duc Montgelas*,[17] did not explicitly use the term *alimentation*. His guiding principle was the right of the civil servant to be granted an appropriate salary and compensation for his survivors.[18] The *Memoire* was published in French, the lingua franca of the time, but does not refer to France as a model. The *Memoire* inspired the first civil service law that came into force in German-speaking countries in the Kingdom of Bavaria in 1805. This regional law is said to mark the beginning of the modern civil service.[19] The implementation of lifelong employment was path-breaking. In the first half of the 19th century, special civil service pension regimes existed in almost all German States, in France, and in Great Britain. National systems for workers started in the second half of the 19th century as industrialisation developed.[20]

In France, the historical narrative starts with *Colbert*.[21] During his time as minister of the royal navy, he created the first pension scheme in 1673 through the *Édit de Nancy*. It was set up for the benefit of sailors and funded by deductions from pay together with a subsidy from the State budget. It provided a guarantee against poverty in old age as a result of permanent invalidity.[22] Invalidity benefits for sailors were paid on the basis of what was called the half-pay system. In France, the long-term impact of the *Édit* on the original French concept of retirement was the earnings-related approach and later extension of the half-pay system to survivors.[23]

14 Thuillier (2001), p. 178. See also the country profile for Belgium in: European Commission (2021b), p. 6: “pensions are considered a form of deferred compensation”; and the country profile for Germany pp. 53–54. For the legal background, see Merten (1994), p. 226.

15 Körtek (2010), p. 66.

16 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume.

17 Fisch (2021), p. 47.

18 “Jedes Individuum, das seine Zeit dem Dienst am Staat verschreibt, hat einen berechtigten Anspruch auf angemessene Entlohnung während seines Lebens, entsprechend dem gesellschaftlichen Rang, den es einnimmt, und nach seinem Tod auf eine angemessene Entschädigung für seine Frau und Kinder.” Translation: “Every individual who dedicates his time to the service of the State has a legitimate claim to adequate remuneration during his life, according to the social rank he occupies, and after his death to adequate compensation for his wife and children.” Source of the German version: Haus der bayerischen Geschichte, www.hdbg.de.

19 Summer and Rometsch (1981), p. 13; Bull (2004), p. 329.

20 Rothenbacher (2001), p. 175.

21 Dubarry et al. (2022).

22 Garrouste (1994), p. 61.

23 See table in Claisse and Meininger (1994), pp. 122–123.

The historical and comparative perspective underscores the fact that pension systems may be based on two alternative approaches with direct consequences for the level of benefits. In documents of organisations like the Organisation for Economic Co-operation and Development (OECD) or the European Commission, this is referred to as "dualism" in pension systems, with the general system on one side and the special civil service system on the other. From a historical point of view, both have common roots. Retirement provision which originated earlier in the armed forces – in particular in the navy[24] – was created to protect military personnel[25] against poverty.[26] The initial (navy) pension plan was actually a disability plan, and the general systems also originated as disability plans. The special civil service pension schemes which also evolved from the early military provision were more ambitious. These schemes were – and still are – intended to safeguard an existing standard of living with benefits far above poor relief.[27] The pattern is that the special civil service schemes were somewhat more generous due to their early reference to the alimentation principle.[28]

Generous pension schemes also played a part in encouraging lifelong employment. Although the OECD has been critical of duality, it nevertheless recognises that the special pension systems have historically contributed to the attractiveness of the public sector.[29]

III. Institutional Arrangements

For the OECD, the dualism of a general system and a separate civil service system has long been an issue. The aspect of effectiveness plays an important role for the OECD, an organisation devoted to economic issues. During the 1990s, Support for Improvement in Governance and Management in Central and Eastern European Countries (SIGMA), a joint initiative with the European Union's Phare Programme, responded to the apparent need for consultancy concerning the reform of civil service pension schemes.[30] A decade later, in 2007, the OECD published a working paper with the title "Public Sector Pensions and the Challenge of an Ageing Public Service". Every two years, "Pensions at a Glance" gives an update on recent pension reforms.[31] Within the OECD, these activities fall into the internal organisational structure of different divisions with diverse priorities on the issue: the Social Policy Division and the Insurance, Private Pensions and Financial Markets Divisions. The overarching focus of OECD publications is on national general systems.

With regard to dualism, in the following table, the OECD identified four categories of integration into the general system.[32] According to this table, published in a special chapter on civil service pensions in the 2016 OECD pensions outlook report, the majority of European OECD countries are fully integrated, in particular the central and eastern European countries. It would be interesting to know whether this development can be

24 See establishment of the U.S. Navy Pension Plan before 1800: Clark et al. (2003) p. 43.

25 Today, in Germany, the Special Retirement Pension Act for the armed forces follows the civil service scheme. However, the principle of alimentation does not apply to military personnel.

26 Wunder (2001); Zähle (2019), p. 42.

27 See also European Commission (2021a).

28 Palacios and Whitehouse (2006), p. 17; OECD (2007), p. 4.

29 OECD (2016); Palacios and Whitehouse (2006), p. 15.

30 OECD (1997).

31 OECD (2019).

32 OECD (2007).

Table 27.1 Integration into the general system (OECD countries)

Fully integrated	*Separate but similar benefits*	*Fully integrated with top-up*	*Entirely separate*
Czech Republic	Finland	Australia	Belgium
Estonia	Luxembourg	Austria	France
Greece	Netherlands	Canada	Germany
Hungary	Sweden	Denmark	Korea
Israel		Iceland	
Italy		Ireland	
Latvia		Mexico	
New Zealand		Norway	
Poland		United Kingdom	
Portugal		United States	
Slovak R.			
Slovenia			
Spain			
Switzerland			
Turkey			

Source: OECD 2016 Pensions Outlook

attributed directly to SIGMA activities in the 1990s. On the other hand, while reform initiatives within fully integrated schemes are likely to be covered by an OECD working programme, Germany's civil service retirement provisions are not part of the regular reporting system, which mainly focuses on the general system. This can be attributed to the OECD classification of Germany: with Belgium and France, Germany belongs to the group of countries that preserve the historical concept of civil service pensions.

A number of organisations and experts share the view that Germany is a special case. A comparative study concluded that German pension retirement provisions are unique in Europe.[33] In reality, however, its institutional independence as a special system leaves policymakers substantial room for manoeuvre to share joint objectives with the general system. For more than 20 years, there has been a political agreement, at least at the federal level, that reforms in the general system are applied to the civil service pensions in a way that is compatible with the special system and that produces the same effect (*systemgerecht und wirkungsgleich*).[34] This approach has established a process of harmonising civil service pension terms and conditions with those of the general scheme without striving for institutional integration. Examples of recent reforms in the general system which have been applied to the civil service retirement pension system are the increase in the retirement age and the recognition of non-active service years, such as for childcare.

Incidentally, this discussion completely ignores the fact that the allocation to the respective OECD categories does not take into account that in many countries, there are special systems for teachers, police officers, and judges. Moreover, in any case the institutional integration of a special system into the general system faces a number of obstacles. One major obstacle is that a period of transition must be envisaged. Germany is currently undergoing such a process at the federal level: in the past, the federal enterprises Federal

33 Köhler (2010), p. 280.
34 Voßkuhle (2013), p. 74.

Table 27.2 The three-pillar system (Germany)

Pension systems	*Employment categories*		
	General working population		**Civil service**
	Private sector employees	Public sector non-civil servants (= contractual staff)	Statutory civil servants Career soldiers Judges
First pillar: Basic protection/ mandatory (legal exceptions)/poverty alleviation or relief	German statutory pension insurance (*Deutsche Rentenversicherung*; federal law)		Special laws: cover the functions of the first and second pillars: • Federal pension laws: civil servants, professional military personnel and judges • State pension laws: mainly teachers and police officers, • Local community staff (majority non-civil servants)
Second pillar: Supplementary protection/ income maintenance	Occupational pension insurance plans	Supplementary pension scheme	
Third pillar: Private old age pension topping up/ replacement gap	Pension plans are one's own responsibility (including government grants. Private pension plan in Germany is the so-called *Riester*-pension)		

Railways and German Post employed large numbers of civil servants; even the train drivers were employed as civil servants. After these enterprises were privatised in the early 1990s, staff with civil servant status could retain that status and their retirement regime. In 2050, more than 55 years after privatisation, around 40% of all pensioners and survivors at the federal level will still be former civil servants of the privatised enterprises.[35] Thus the transition to a new system can take as long as 80 to 100 years if one includes survivors. Also, in economic terms, integration into the general system is presumably not necessarily the most effective solution for future challenges.

The three-pillar or three-tier model is widely used to represent current institutional arrangements. It serves to structure concepts and to communicate reforms in an international context. In practice, it is a useful way to classify the various retirement pension systems.[36] Although this model does not fit every pension system exactly, it describes the dualism between the general and special retirement schemes in a systematic way. In the aforementioned table, the three-pillar model is applied to the various forms of old-age provision in Germany.

The three-pillar model provides systematic grouping and can be applied in a national or comparative context. A fundamental aspect in the context of this study is that civil service retirement pensions cover the first and second pillar.

35 BMI (2020), p. 84.
36 Färber et al. (2011), p. 15.

IV. Challenges

Today, it is commonplace that all pension systems are affected by population ageing. All face this challenge, whether based on statutory regimes or investment funds in the stock market. For many countries, population ageing has led to an ongoing process of reforming and altering retirement regimes.[37] Governments and parliaments have appointed high-ranking reform commissions. Numerous reports have been written. For example, in Germany, the Commission on a Reliable Intergenerational Contract (*Kommission verlässlicher Generationenvertrag*) produced a detailed report in collaboration with the Federal Ministry of Labour and Social Affairs.[38] The report was published in 2020.

Preventing poverty in old age is a major concern. A German study based on data from the Socio-Economic Panel shows that 30% of workers are very worried about having enough income in old age because they will only receive a first-pillar pension in the general system. By contrast, only 3.8% of civil servants experience anxiety on this account. Those enrolled in an occupational pension scheme (second pillar) are also less likely to be concerned about their pension coverage.[39] Empirical findings suggest focusing on the segments of the population facing high risk of poverty in old age. Applying these findings to the three-pillar system it is suggested to concentrate on the first pillar by fostering adequate retirement pension benefits. In practice, one finds step-by-step policy approaches. Following this concept, the German Commission on a Reliable Intergenerational Contract opposed major reform and recommended maintaining the reform course underway since 2001. To be compatible with its special system, this would mean modifying the civil service pension law. One of the measures in 2001 was increasing the retirement age; the commission did not propose any further increase.[40]

But future changes in population structure, such as the growing proportion of elderly people, are expected to require additional reforms. In the case of retirement pensions, the demographic challenge is twofold: on one hand, the growing number of pensioners receiving benefits is putting pressure on the system's financial stability; on the other, employers will be eager to keep their working conditions attractive, which includes adequate provision for retirement.

Pensions represent a significant proportion of government expenditure. Given the growing size of the elderly population, demographic projections can help to identify pressures on public finances. Eurostat points out that the overall picture may be different when the data are broken down to Member State level. The projected changes in the structure of the population vary considerably between EU Member States, both in terms of when the population peaks and the size of the increase or decrease. The direct link between the size of the elderly population and the number of pensioners is increasingly highlighted in policy debates.

Looking ahead to 2100, Eurostat estimates that, as in 2022, Germany will remain the EU Member State with the largest population, followed by France and Italy. A closer analysis shows that the EU Member States with the largest populations in 2100 will be Germany (84.1 million inhabitants), France (68.0 million), Italy (50.2 million), Spain (45.1 million), and Poland (29.5 million), the same order as in 2022.

37 European Commission (2010), p. 3.

38 Kommission/BMAS (2020).

39 Schüler (2022), p. 33.

40 The standard retirement age in Germany rose gradually from 65 to 67 years between 2012 and 2031.

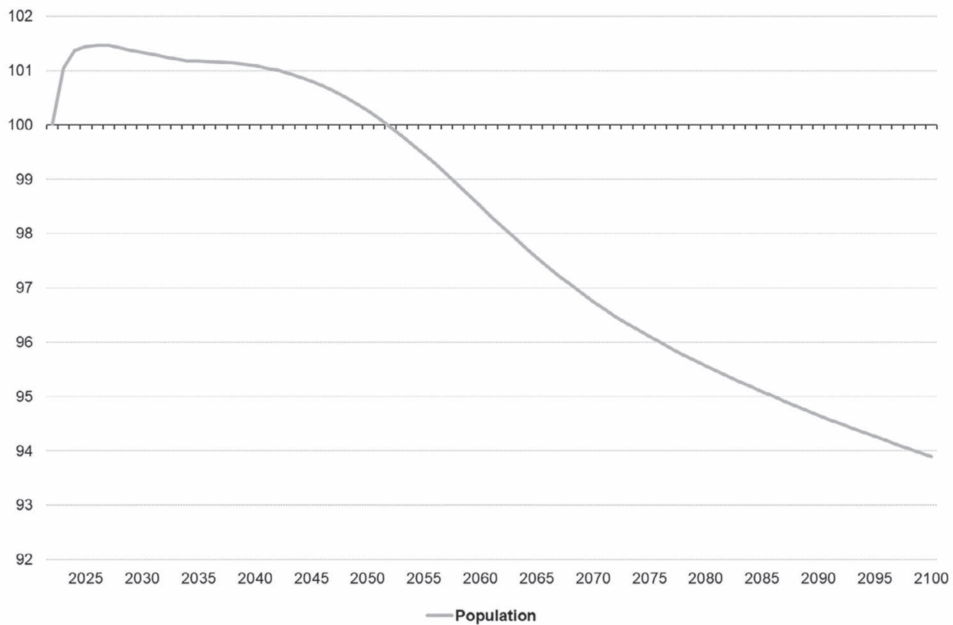

Figure 27.1 Demographic change (Eurostat)

Source: Eurostat, https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=497115; data extracted 21 August 2024; planned article update July 2025

The population of Luxembourg, Malta, and Sweden is expected to increase by more than 25%. The largest population losses by 2100 are projected for several eastern and southern EU Member States, the largest being in Latvia, where the population is expected to fall by 37.8% between 2022 and 2100.

The European Commission's Green Paper towards adequate, sustainable and safe European pension systems refers to the demographic trend in a general way, without making a distinction between Member States and regions,[41] whereas a distinction should be made not only between the Member States but also between the retirement systems themselves. The Green Paper discusses several aspects including reform initiatives. However, in spite of the regular reports on pensions, it is still important to improve EU pension statistics. The European Commission suggests that data on pension systems available from the different national and EU-level sources could be streamlined to increase their comparability and save substantially on costs.[42] Such an exercise would require classifying retirement pension regimes, because of the duality mentioned previously. The data could be collected using the three-pillar system as a framework for further research.

41 European Commission (2010), p. 3.
42 European Commission (2010), p. 16.

V. Retirement Age

Civil servant pension regimes are closed systems. Only civil servants are, in principle, eligible to receive pension benefits.[43] To simplify matters, one can say that entitlement to a pension depends on the following conditions:

- retirement age – reaching a certain age, including early and late retirement;
- invalidity – disability pension not age related;
- survivor – widow or descendant as successors of a pensioner.

In most cases, these three conditions are an integral part of a uniform statutory scheme or retirement pension act. Major exceptions may concern invalidity rules being regulated in a specific law. The age-related retirement rules fall into the following categories based on certain age limits:

- normal retirement age;
- early retirement age;
- late retirement age.

The normal retirement age is also known as the standard or statutory retirement age. Procedures for actually changing one's status from active to non-active civil servant vary: retirement may occur automatically at retirement age or on request, with an application to receive pension benefits. The different options for retirement, including an automatic procedure and with some flexibility for early and late retirement, are also part of EU staff regulations.[44]

On average, in the EU Member States, the normal retirement age is 63 to 65 years.[45] In some countries, the retirement age is gradually rising, for example to 67 years in Germany. The retirement age is flexible in Norway, Sweden, and Finland: a person can start receiving pension benefits in a certain age range.

The data on retirement ages collected by the Finnish Centre for Pensions confirms the trend that retirement at age 65 years is common in the EU Member States. However, this data does not include specific age thresholds that exist in the civil service, as in the case of police. The research concludes[46] that many countries have decided to raise the retirement

43 An exemption to this rule is statutory pension equalisation on divorce. The spouse who is not a civil servant is entitled to a pension of his/her own; this applies only to federal civil servants.

44 "Article 52: Without prejudice to the provisions of Article 50, an official shall be retired: (a) either automatically on the last day of the month in which he reaches the age of 66, or (b) at his own request on the last day of the month in respect of which the request was submitted where he has reached pensionable age or where he is between 58 and pensionable age and satisfies the requirements for immediate payment of a pension in accordance with Article 9 of Annex VIII. (. . .) However, an official may at his own request, and where the appointing authority considers it justified in the interests of the service, carry on working until the age of 67, or exceptionally, until the age of 70, in which case he shall be retired automatically on the last day of the month in which he reaches that age. Where the appointing authority decides to authorise an official to remain in service beyond the age of 66, that authorisation shall be granted for a maximum duration of one year. It may be renewed at the official's request."

45 European Commission (2010) p. 30.

46 See the website of the Finnish Centre for Pensions: International comparisons – retirement ages in different countries; www.etk.fi/en/work-and-pensions-abroad/international-comparisons/retirement-ages/.

age to 67 years. Most of these changes are scheduled to take place between 2020 and 2030. Retirement age is increasingly being linked to life expectancy. Besides Finland, this mechanism is also available in Cyprus, Denmark, Estonia, Greece, Italy, the Netherlands, Portugal, and Slovakia. Also, in the UK, after decision-based increases, the retirement age will change automatically on the basis of life expectancy. In some countries, retirement ages are different for men and women, lower in the latter case. As retirement ages rise, they will tend become the same for men and women.

The question remains as to how the statutory increase in retirement age is reflected in the statistics. In the regular pension report of the German Federal Government,[47] the figures currently available are compared with the past. Between 2015 and 2018, the average age of civil servants at the time of retirement only increased from 62 to 62.5 years. The number of early retirements due to invalidity or voluntarily remained stable. Only a slight increase in late retirements from 1.1% (2014) to 4% (2018) was observed. It will take a few more years before the demographic challenge is reflected in these statistics due to the time lapse in data availability.

VI. Retirement Rights and Benefits

Most retirement pension schemes include a vesting period, which is the minimum time in employment needed to become entitled to pension benefits. The length of the vesting period varies greatly between pension plans and ranges from three to fifteen years.[48] In defined-benefit schemes, pensions earned are calculated on the basis of a general accrual rate and a maximum pension replacement rate. In the case of federal civil servants in Germany, the accrual rate for each pensionable year is 1.79375% with a maximum replacement rate of 71.75% of the final salary. This adds up to 40 years of service needed in order to receive the maximum replacement rate. In international comparison, accrual rates and maximum pension replacement rates vary considerably. According to a table published in the Palacios/Whitehouse study, the replacement rate averages slightly more than 75% and ranges from 50% to 100%.[49] In terms of non-discriminatory policy objectives, it should be noted that the replacement rate for female civil servants is in general lower than that for male civil servants. In Germany's federal administration, the average replacement rate of male civil servants who retired in 2018 was 68.4%, while that of female civil servants was 57.9%.[50] For this reason, child-care allowances were increased.

Many countries allow early retirement. However, civil servants who decide to retire early must accept cuts in their earned benefits. In Germany, civil servants may retire early when they reach the age of 63. In this case, a pension reduction of 3.6% is imposed for each year the civil servant leaves before the normal retirement age. The application of reduction coefficients varies in the same way as national schemes differ from each other.

If the pension refers to the final earnings, the minimum length of time in which the civil servant was in service at this salary level has to be legally fixed. In Germany, the minimum period is two years since the Federal Constitutional Court decided that a minimum

47 BMI (2020), p. 36.

48 Disability pensions do not require a vesting period.

49 Palacios and Whitehouse (2006), p. 16. The figures date from 2004.

50 BMI (2020), pp. 38–39.

period of three years did not comply with the traditional principles of the civil service.[51] In France, the minimum period necessary is six months.[52] Pension benefits have to be adjusted once the primary pay level is fixed. One of the basics in the design of pension systems is that these primary benefits have to be adjusted in a progressive way. Some countries link the adjustment to the adjustment of civil service remuneration, while other countries prefer indexation procedures based on the development of prices.

A good example of combining the two indices is the method used to adjust the yearly salaries and pensions of EU officials. After experiencing frequent strikes in the early 1960s, in 1968, the European Council adopted a regulation to calculate adjustments by an automatic method relying on the development of civil service salaries in the Member States and of consumer prices in Brussels. It was handled strictly as a statistical exercise by the European Commission. In its judgment of 19 November 2013, *Commission v. Council*, C-63/12, the Court of Justice of the European Union (CJEU) clarified that the European institutions are obliged to decide the adjustment of remuneration and pensions each year, either by a "mathematical" adjustment according to staff regulations or by setting aside the "mathematical" calculation under the exception clause. According to this clause, the European Parliament and the Council have a wide margin of discretion in the case of a serious and sudden deterioration in the economic and social situation within the Union.

With a different objective, the German Federal Constitutional Court too has established a method for controlling the implementation of the alimentation principle.[53] The method is intended to serve as an instrument for a standardised review of the minimum remuneration and pension level. In several cases, the Court found that certain pay provisions did not comply with the constitutionally affordable level of the pay scale in question. However, with regard to the minimum level of pensions, there have not yet been any cases. One reason might be that the civil service pension law does envisage, according to the alimentation principle, an appropriate minimum pension.

Entitlement to a civil service retirement pension requires an existing service relationship. Mobility, including a permanent change of post anywhere in the civil service, has always been compatible with the civil service regime, due to the logic of unitarian civil servant status throughout the system. However, outward mobility had a lasting negative impact on pension rights.[54] Civil servants who quit the service lost their right to retirement benefits. The first specific pension entitlement for outward mobility was introduced in 2011 at the State level by lawmakers worried about the attractiveness of civil service employment; such entitlement followed at the federal level in 2013. Parallel to the legislative activities, the European Court of Justice was asked for a preliminary ruling concerning the right of free movement in the case of a German teacher who had left his post for employment in Austria. The CJEU, in the judgment of 13 July 2016, Joachim Pöpperl v. Land Nordrhein-Westfalen, C-187/15, overturned the German law on retrospective insurance in the general old-age pension insurance scheme concerning civil servants who leave their post voluntarily. According to the Federal Administrative Court in this particular case,[55] the former teacher had earned a virtual pension entitlement of about 1,946

51 German Federal Constitutional Court, decision of 20 March 2007, 2Bvl 11/04, paras. 1–92.

52 Kaufmann (2010), p. 81.

53 See Fethke and Zähle (2020), p. 630.

54 Hauschild (1991), p. 103.

55 German Federal Administrative Court, judgment of 4 May 2022, 2C 3.21.

EUR based on about 20 years of service, while for the same service period the retrospective insurance in the general system remained at a lower value of about 992 EUR. These figures are not representative, but they give an indication of how the differing purposes of the pension schemes result in different levels of earned benefits.

From the European perspective, the case focused more on the issue of free movement and less on the organisation of pension systems. In national practice, courts and legislators regarded a loss of retirement entitlements as a “logical” consequence of leaving the civil service: if a civil servant terminates the civil service relationship, this ends the employer’s obligation to provide financial support and to provide for the civil servant’s welfare associated with this relationship. In a subsidiary way, the first-pillar pension steps in to at least safeguard against the risk of low income but cancels pension entitlements earned as a civil servant.

The CJEU’s ruling on national civil service legislation helped break down barriers to greater mobility caused by a traditional understanding of the service relationship.[56] Moreover, the CJEU did not intend to call the special civil service pension system and its attractiveness into question.

VII. Financing

Bearing in mind demographic change on the one hand, and acquired pension entitlements on the other, financing pensions is an all-important task. Pension expenditures are part of staff expenditures and are paid on the basis of budget regulations.[57] The State’s pension obligation is a promise of future pension benefits to civil servants. Civil service pensions are paid by designated government agencies as they fall due.[58] The State’s right to collect taxes is normally adequate security. In pay-as-you-go systems, no funding takes place, and no capital reserves exist. Pension funds are an alternative to pay-as-you-go financing. In this case, the State allocates financial contributions to these funds for future pension payments. In both alternatives, the option of a financial contribution by civil servants exists. In this case, benefits are covered at least in part with revenue contributed by civil servants.

When pension systems began to be established in the 19th century, various ways to finance pensions were in place.[59] The problem was that early pension laws were enacted with no idea of the future financial burden on the State budget. The alternatives of raising contributions or not, having a separate scheme for financing widows’ pensions or operating funds as the Protestant Church did, were all thought to achieve credible, stable, secure pension systems. The Bavarian–Austrian system was ultimately accepted and widely adopted by defining old-age and survivor’s pensions as an additional part of remuneration and was thus completely financed by the State. In the mid-19th century, Prussia and France, too, gave up their contribution-based systems. Today Germany and France have returned to the concept of obliging civil servants to contribute financially to their future pension benefits.

In Germany, the pay-as-you-go system was combined with a buffer fund that started in 1999. Capital will accumulate at the federal level until 2024 through a salary adjustment

56 Eichel and Vallée (2019), p. 161.

57 See, for example, the federal budgetary list for pension expenditure in 2018, BMI (2020), p. 66.

58 Färber et al. (2011), p. 31.

59 Wunder (2001), p. 36.

(0.2% reduction). Starting in 2032, the pension capital is to be used over a period of 15 years to cover part of the estimated pension benefits. A second instrument for allocating resources to a federal pension fund came into force in 2007. For every newly appointed federal civil servant, the employer is obliged to pay a monthly contribution to the federal pension fund. The contribution rate is around 30% of the gross salary. Both funds are managed in a passive investment method by the *Deutsche Bundesbank*; 30% of the capital is invested in special green funds[60] on the stock market. Beginning in 2030, the funds are to be used to help pay pension expenditures. The buffer fund will be used up, while the pension fund will continue to exist indefinitely.

As in defined-benefit systems, there is no link between pension benefits and fund performance in capital markets. Defined-contribution funds are almost without exception found in the third pillar.

VIII. Conclusion

In conclusion, the main discussion of pensions concerns the general system. All countries face the challenge of designing pension policies that are both financially and socially sustainable. The OECD has observed that the pace of pension reforms is speeding up.[61] The pace is often set by the general system and by those responsible for deciding its policy. In this context, the challenge is to preserve the attractiveness of civil servant retirement provisions. Mobility and flexibility are catchwords in this debate. It would be helpful if international and European studies acknowledged the added value of duality by sharing national expertise aimed at preserving the concept of old-age income adequacy as a specific feature of the civil service. In a number of countries, there is a high level of fragmentation in the system of civil service retirement pensions. Police officers, teachers, firefighters, local government officials, career military personnel and judges are all under different schemes. Germany again seems to be the exception rather than the rule with its decentralised but unified scheme for all career sectors in the civil service.

On the question of the extent to which European legal norms exist for civil service pensions, the conclusion is that the process of transforming national rules is linked to the jurisprudence of the European Court of Justice. In fact, the court's rulings have sometimes required the amendment of national legislation, as in the *Pöpperl* case. To what extent they could lead to a more European perspective is, however, difficult to say. It is one thing to agree on reconsidering the working life question from a mainly technical perspective, as in the European Commission's pension adequacy report. The report concludes that in the decades to come, pensionable ages and effective retirement ages are both set to continue rising, while opportunities for early retirement shrink.[62] A completely different matter is the public perception of such sensitive topics.

60 Press release 5 May 2021 S&P Dow Jones Indices: "S&P DJI is collaborating with the German government to launch the S&P ESG Eurozone 60 Bund–SV Index, a customized index which incorporates the minimum standards for EU Climate Transition Benchmarks as described in Regulation (EU) 2019/2089 and aligned with the landmark Paris Agreement. This unique index collaboration comes at a time when the German government is moving to implement its Climate Action Plan to tackle climate change and achieve net-zero emissions."

61 Queisser (2015), p. 28.

62 European Commission (2021a), pp. 15–16.

A critical factor for the success of European policies is that any European perspective must be compatible with national experience, which is sometimes linked to widespread behavioural norms. Empirical data confirms that workers in many countries prefer early retirement to working longer. Again, taking Germany as an example, about a quarter of federal civil servants leave the service before reaching the normal retirement age despite reductions in their individual pension rights. At the same time, those pension laws include the option to work longer. However, in 2018 only 1.8% of federal civil servants were allowed to continue working past the normal retirement age.[63] One important reason is that staff management decided to use its discretionary powers to follow a restrictive approval policy. It would therefore be very interesting to discuss best practices in a transnational setting.

In this article, a great variety of national pension systems are cited. Most are well-documented in reports published by the OECD or the European Commission. These reports show that despite the different institutional arrangements, transnational exchange on the need to cope with the demographic challenge could be helpful for all actors concerned.

Bibliography

Autexier C. (1994), 'Das Recht des öffentlichen Dienstes in Frankreich', in Magiera S., Siedentopf H. (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot, 235–315.

Behnke N., Kropp S. (2021), 'Administrative Federalism', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany*, Birmingham: Palgrave, 35–41.

Bull H.P. (2004), 'Positionen, Interessen und Argumente im Streit um das öffentliche Dienstrecht', 37 *Die Verwaltung*, 327–352.

Bull H.P. (2009), 'Über den Beitrag der öffentlichen Verwaltung zur Nationenbildung: Das Beispiel Deutschland', 62 *Die Öffentliche Verwaltung*, 786–793.

Bundesministerium des Innern/BMI (2020), *Siebter Versorgungsbericht der Bundesregierung – Bericht für die 19. Legislaturperiode*, Parliamentary Document: Bundestagsdrucksache 19/18270, www.bmi.bund.de.

Claisse A., Meininger M.-C. (1994), *Fonctions publiques en Europe*, Paris: Montchrestien.

Clark R.L., Craig L.A.J., Wilson W. (2003), *A History of Public Sector Pensions in the United States*, Philadelphia: University of Pennsylvania Press.

Dubarry J.J., Peny J.J., Hervier J.-F. (2022), *Colbert, père de la Sécurité sociale de la Marine*, www.biusante.parisdescartes.fr.

Eichel B., Vallée T. (2019), 'Öffentlicher Dienst und Rechtsetzung auf EU-Ebene – Bericht zum Workshop der Forschungsstelle öffentlicher Dienst und des BMI', 67 *Zeitschrift für Beamtenrecht*, 160–162.

European Commission (2010), *Green Paper Towards Adequate, Sustainable and Safe European Pension Systems*, COM (2010) 365.

European Commission (2021a), *2021 Pension Adequacy Report: Current and Future Income Adequacy in Old Age in the EU*, vol. I, Brussels: Publications office Directorate-General for Employment, Social Affairs and Inclusion, https://data.europa.eu/doi/10.2767/013455.

European Commission (2021b), *2021 Pension Adequacy Report: Current and Future Income Adequacy in Old Age in the EU. Country Profiles*, vol. II, Brussels: Publications Office Directorate-General for Employment, Social Affairs and Inclusion, https://data.europa.eu/doi/10.2767/013455.

Eurostat (2020), *General Government Expenditure by Function in 2020*, www.ec.europa.eu.

Färber G., Funke M., Walther S. (2011), *Nachhaltige Finanzierung der Beamtenversorgung*, Berlin: Edition Sigma.

63 BMI (2020), p. 30.

Fethke S., Zähle K. (2020), 'Der Siebte Versorgungsbericht der Bundesregierung – zur Zukunftsfähigkeit der Beamtenversorgung des Bundes', 34 *Zeitschrift für Tarifrecht*, 625–632.

Fisch S. (2021), 'Verwaltung im langen 19. Jahrhundert', in Kahl W., Ludwigs M. (eds), *Handbuch des Verwaltungsrechts*, Band I, Heidelberg: C.F. Müller, 41–87.

Garrouste M. (1994), 'The Funding of Pension Schemes', in Plantey A. (ed), *The Pensions of International Civil Servants*, Brussels: International Institute of Administrative Sciences, 61–122.

Hauschild C. (1991), 'Die Modernisierung des öffentlichen Dienstes im internationalen Vergleich', 82 *Verwaltungsarchiv*, 81–109.

Hollah A. (2021), 'Damit Deutschland funktioniert', in Hollah A. (ed), *Zur Geschichte der Dienstrechtspolitik im Innenministerium – Von der Weimarer Republik bis heute*, Baden-Baden: Nomos, 87–94.

Kaufmann O. (2010), 'Die Alterssicherung der Beamten in Frankreich', in Becker U., Köhler P.A., Körtek Y. (eds), *Die Alterssicherung von Beamten und ihre Reformen im Rechtsvergleich*, Baden-Baden: Nomos, 67–87.

Köhler P.A. (2010), 'Die Alterssicherung der Beamten im Rechtsvergleich', in Becker U., Köhler P.A., Körtek Y. (eds), *Die Alterssicherung von Beamten und ihre Reformen im Rechtsvergleich*, Baden-Baden: Nomos, 261–280.

Kommission/BMAS (2020), Bericht 'Verlässlicher Generationenvertrag', www.bmas.de.

Körtek Y. (2010), 'Die Beamtenversorgung in der Bundesrepublik Deutschland', in Becker U., Köhler P.A., Körtek Y. (eds), *Die Alterssicherung von Beamten und ihre Reformen im Rechtsvergleich*, Baden-Baden: Nomos, 45–66.

Merten D. (1994), 'Finanzielle und soziale Absicherung der Beschäftigten im öffentlichen Dienst der EG-Mitgliedstaaten', in Magiera S., Siedentopf H. (eds), *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft*, Berlin: Duncker & Humblot, 181–233.

OECD (1997), *Civil Service Pension Schemes 'SIGMA Papers No. 10'*, Paris: OECD Publishing.

OECD (2007), *Public Sector Pensions and the Challenge of an Ageing Public Sector, 'OECD Working Papers on Public Governance'*, Paris: OECD Publishing.

OECD (2016), *Pensions Outlook. Civil Service Pensions: Towards a Unified System with the Private Sector?*, Paris: OECD Publishing.

OECD (2019), *Pensions at a Glance 2019: OECD and G20 Indicators*, Paris: OECD Publishing, https://doi.org/10.1787/b6d3dcfc-en.

Palacios R., Whitehouse E. (2006), 'Civil-Service Pension Schemes Around the World', *SP Discussion Paper no. 0602*, World Bank, https://mpra.ub.uni-muenchen.de/14796.

Queisser M. (2015), 'Rentenreformen – die internationale Perspektive', 95 *Wirtschaftsdienst –Sonderheft 2015 Zukunftsfähigkeit des Rentensystems*, 28–33.

Reichard C., Schröter E. (2021), 'Civil Service and Public Employment', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany,* Birmingham: Palgrave, 205–223.

Rothenbacher F. (2001), 'Die Altersversorgung im öffentlichen Dienst in Großbritannien, Frankreich und Deutschland seit dem Zweiten Weltkrieg', in Wunder B. (ed), *Jahrbuch für europäische Verwaltungsgeschichte – Pensionssysteme im öffentlichen Dienst in Westeuropa (19./20. Jh.)*, Baden-Baden: Nomos, 127–152.

Schüler R.M. (2022), 'Sorgen um die Altersversorgung in Deutschland', *IW-Trends*, 21–39.

Summer R., Rometsch G. (1981), 'Alimentationsprinzip gestern und heute', 29 *Zeitschrift für Beamtenrecht*, 1–13.

Thuillier G. (2001), 'Pour une histoire européenne des retraits des fonctionnaires', in Wunder B. (ed), *Jahrbuch für europäische Verwaltungsgeschichte – Pensionssysteme im öffentlichen Dienst in Westeuropa (19./20. Jh.)*, Baden-Baden: Nomos, 175–182.

Voßkuhle A. (2013), 'Personal', in Hoffmann-Riem W., Schmidt-Aßmann E., Voßkuhle A. (eds), *Grundlagen des Verwaltungsrechts, Band III*, München: C.H. Beck, 1–89.

Wunder B. (2001), 'Die Entwicklung der Altersversorgung in Deutschland', in Wunder B. (ed), *Jahrbuch für europäische Verwaltungsgeschichte – Pensionssysteme im öffentlichen Dienst in Westeuropa (19./20. Jh.)*, Baden-Baden: Nomos, 1–53.

Zähle K. (2019), 'Verhältnis von Beamtenversorgung und gesetzlicher Rentenversicherung', 27 *Neue Zeitschrift für Sozialrecht*, 41–45.

28 Administrative Law and Bureaucratic Autonomy in a Comparative European Perspective

Daniel Carelli and B. Guy Peters

I. Introduction

The study of administrative law has in most countries become separated from the study of public administration in political science, as well as within public administration itself as a discipline. Administrative law is assumed to be just something for lawyers, and to be of little relevance for understanding how public bureaucracies function as part of the political systems within which they are embedded. Although we come from the perspective of political science, what we are interested in when studying the bureaucracy, or the civil service, or any other synonymous term, is the interaction between politics, bureaucracy, and the citizen involvement. This, as far as we understand it, actually corresponds well with the study of administrative law. Our chapter will therefore be an attempt to integrate the political study of administration with the legal one, and thereby contribute to understanding European civil services.

We also come to this chapter with an interest in the historical and ideational backgrounds of contemporary administrative systems. We assume that those contemporary bureaucracies have been influenced by administrative traditions.[1] While every administrative system is *sui generis*, we will be arguing that there are four underlying administrative traditions in Western Europe. These traditions have also influenced administration in other parts of the world, such as the United States, Canada, the Antipodes, India,[2] and many countries in Africa.

The basic argument of the chapter is that administrative traditions manifest themselves in administrative law, as well as in the organisational structures and the behaviours of individual administrators. The field of administrative traditions has developed into a branch of a larger so-called historical turn in political science,[3] based upon the perhaps obvious idea that that history is important for understanding many underlying motivations in the current public sector. In the specific case of administrative traditions, the argument is that the observed patterns of structure and performance of contemporary public administration are shaped, at least in part, by the history of these organisations. Further, there are several broad "families" of administrative systems that have many aspects of their administrative systems in common.

1 Peters (2022).
2 Baribanti (1966).
3 Tilly (2006).

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Indeed, administrative law provides an extremely useful window into how administrative systems function because it contains clear statements of principle about how fundamental issues in administering law should be dealt with. And given that all administrative law systems must deal with the same questions, such as rule-making and adjudication, administrative law provides directly comparable "data".[4] Administrative law may also make some more fundamental statements about governing, given that it defines how the State will deal with its citizens, and how the political and the administrative components of governing will interact.

We are attempting to demonstrate the utility of looking at an aspect of administration that many public administration scholars would consider arcane. We believe that although administrative law is embedded in the broader legal system and its approach to law,[5] there are still political and managerial elements that help define the way in which administrative law functions, and its impact on the delivery of public services. Administrative law is about administration, and therefore it is shaped by the perceived needs of political systems to make and implement laws, and thereby to govern.[6] Administrative law constrains public management, but it also defines opportunities for public officials to exercise their legitimate authority.

In addition, the bureaucratic organisation and its inherent roles and functions in the political system is bound to both transformation and persistence. For instance, the COVID-19 pandemic forced bureaucrats to manage an unusually large-scale issue – one which strengthened or nuanced relationships among bureaucrats, politicians, and citizens. At the same time, constitutional and administrative law serves the public with predictable bureaucratic action, which is essential to the legality principle and democratic governance. Thus, the study of administrative law in the perspective of tradition illuminates the dichotomy between institutional change and the stability and of good governance more broadly.

The final general point we want to emphasise about administrative law and its connection to administrative traditions is the utility of this approach for comparison.[7] First, as noted earlier, administrative law must deal with very similar questions in all countries, and the answers to those questions tend to be less ambiguous than they are for many other aspects of governing.[8] The use of traditions as a focus for the comparison is useful because it forces us to identify some general patterns within "families of nations"[9] rather than having to confront dozens of individual cases and to treat each as *sui generis*. There are differences within the traditions,[10] but those are generally outweighed by the similarities.

II. Bureaucratic Autonomy and Administrative Law

We will illustrate our argument for the importance of administrative law in comparative public administration by focusing on the concept of bureaucratic autonomy. The fundamental question in studying bureaucratic autonomy is to what extent are organisations

4 Bertelli and Cece (2020).
5 See Damaška (1986).
6 de Burca and Scott (2006).
7 Peters (2022); Rose-Ackerman et al. (2017).
8 Less ambiguous, but not totally unambiguous. At times ambiguity can be useful as when governments cannot condone some activities but may not want to criminalise them because of the difficulties of enforcement.
9 Castles (1993).
10 Heyen (1989); Sager et al. (2018).

within the public bureaucracy, and individual civil servants within those organisations, capable of making their own decisions and exercising their own discretion?[11] Public law attempts to define the goals of public action and to place legal constraints on the behaviour of administrators. The autonomy exercised by civil servants is always "bounded autonomy", with the bounds coming from law as well as political constraints. Inevitably, however, there is discretion available to the administrative actors involved.[12] The question is how much discretion, and who can use it?

Bureaucratic autonomy is important for understanding how bureaucracies function, but this concept is both under-conceptualised and often misunderstood in the mainstream literature in public administration. At the most basic level, autonomy can be understood by the definition offered by Martino Maggetti,[13] namely that it refers to the ability to translate one's own preferences (those of the bureaucrat) into authoritative actions, without external constraints. A significant proportion of the scholarly literature, inspired by game theoretic assumptions, has thus investigated how bureaucracies are autonomous to politicians.[14] Some research has also investigated the extent to which organisations, and especially street-level bureaucrats,[15] are independent from stakeholder and citizens.[16]

The results of these analyses largely show that knowledge asymmetries and moral hazard between bureaucrats and politicians will lead to suboptimal equilibria of political control, and consequently to oversized budgets and "shirking" bureaucrats.[17] That is, public bureaucrats may be able to use the resources at their control to advance their own and their organisation's interest rather than the public interest. These results are based on the assumption that bureaucrats and their leaders in organisations are primarily self-interested, with self-interest being defined in terms of the expansion of the organisation, the size of budgets, and leisure for the individual civil servant.

However, such a perspective presupposes an unorthodox principal-agent relationship, which is not necessarily always the actual case. It further assumes that a narrow, economic conception of self-interest is sufficient to understand bureaucratic behaviour. Bureaucracies are also driven by other forces than budget maximisation, such as trust, professional norms, loyalty, and public-sector motivation, and they are not necessarily in perpetual opposition to the political level.[18]

The principal-agent framework is certainly important for the micro-analysis of rationales for bureaucrats and politicians but is limited in explaining all forms and degrees of autonomy. Autonomy is not a dichotomous concept. There are degrees of autonomy, and these vary across time, as well as across policy areas, and forms of governance. They may also differ by level within the bureaucratic institution. The institution as a whole may be tightly controlled by political actors, but organisations within the institution may be

11 See Carpenter (2002); Peters (2022).
12 Evans and Hupe (2020).
13 Maggetti (2007).
14 Moe (1990); Calvert et al. (1989).
15 The lowest echelon of the public administration, in direct contact with citizens. See Lipsky (1980).
16 Brodkin (2011).
17 Brehm and Gates (1997); Moe (1984); Whitford (2002); Niskanen (1975).
18 Pierre and Peters (2017); Carpenter and Krause (2015); Sobol (2016); Brehm and Gates (2015); Perry and Hondeghem (2008).

able to exercise substantial autonomy, in part because there is such a focus on the overall institution.[19]

Several different forms and sources of autonomy can be gathered from the literature. The most basic form of autonomy is the mission or description found in formalised steering documents. Formal instructions to government agencies, yearly budget allocations, and constitutional rights to steer bureaucratic activity are all used, however, to reduce autonomy. Although mission statements coming from political organisations are important, we need to remember that in the New Public Management (NPM) world of administration, organisations may construct their own mission statements[20] and use those statements as a means of gaining greater autonomy.

In addition, countries have established control mechanisms due to path-dependent administrative traditions. The Napoleonic and German traditions have relatively strong traditions to control bureaucratic activity by law, while the Anglo-American and Scandinavian models strive for more autonomy, largely through the use of managerial controls.[21] The "environmental-institutional" context thus shapes the basic function of the bureaucracy in formalised and institutionalised practices.[22]

Thirdly, informal autonomy is the outcome of imperfect formal control at the political level. The scarcity of resources will complicate the task of politicians to monitor all day-to-day activities in the bureaucracy, and bureaucracies might acquire knowledge that they do not necessarily need to report to their parent ministry.[23] However, bounded rationality, changing external circumstances, and knowledge asymmetries between the ministry and agency will make autonomy not only the result of deliberate design.[24]

This informal and largely unplanned version of autonomy appears most clearly in the American administrative system. Although there are numerous controls from both the executive and legislative branches built into the system, agencies are often able to play off the two political branches against one another and carve out a sphere of autonomy.[25] Further, the connections of stakeholders with the public sector come primarily through the agencies rather than the departmental level, giving the agencies more opportunities to gain freedom from political controls. This pattern may be less relevant for European countries, but the formal autonomy of agencies in many countries may be magnified through informal means such as information hoarding.

Fourthly, the civil service consists of individuals, and the full staff is both heterogeneous and employed at several different levels of hierarchy and responsibility. In consequence, the degree of autonomy, as well as autonomy from *whom*, is dependent on such conditions. There is some tendency to talk about "The Bureaucracy" as a single thing, while it is in fact a highly differentiated and variable structure, even within a single country.[26] The variations within a single public sector are perhaps even greater when differences across countries are considered.

19 Likewise, if a large number of controls are placed on the organisations, then the institution as a whole may enjoy greater freedom.
20 Goodsell (2013).
21 Peters (2022); Pollitt and Bouckaert (2004).
22 Maggetti and Verhoest (2014), p. 248; Yesilkagit and Van Thiel (2008).
23 Maggetti (2007); Majone (1997).
24 Bach and Ruffing (2013), p. 716.
25 Parker and Parker (2018).
26 See Seidman and Gilmour (1986).

1. Sources of Autonomy

Several other forms and sources of autonomy are important for understanding the full power of the concept of autonomy in the light of how public administration functions. We cannot do full justice to each of these explanations, but should mention them to round out the discussion.[27] Briefly stated, these explanations include, among other things, organisational autonomy, meaning that specific organisations of the public sector are designed to have less political control and thus more autonomy than others, and that whole organisations cannot be steered and controlled easily by their political masters.[28] This autonomy is most apparent for regulatory organisations, such as those regulating industries, public utilities, the environment, and so on, that are designed to be able to make choices based more on professional criteria than on political considerations.

In addition to organisational autonomy, the form and degree of autonomy is assumed to vary considerably across policy areas. The degree of complexity of a policy issue will require more expertise in policymaking, which is primarily found in the public bureaucracy rather than in political structures. Therefore, autonomy and complexity should correlate.[29] Likewise, the political saliency creates more ministerial control and thus less bureaucratic autonomy.[30] This political saliency may be especially important for agencies that may usually be thought to be at odds with the politics of the minister. Right-wing governments may attempt to exert more control over environmental agencies, while the left may be expected to attempt to control defence more tightly.

Time is also important for explaining bureaucratic autonomy. Short-termism in politics is related to saliency;[31] politicians will delegate tasks and significant autonomy when a policy issue requires long-term goals or has a strong need for specific expertise.[32] Democratic governments tend to have great difficulties in processing long-term problems – democratic myopia – and therefore relatively autonomous bureaucratic organisations may be better suited for dealing with long-term issues than are political organisations.[33]

Delegating decisions to agencies with substantial autonomy may also be a means of blame avoidance,[34] although despite their best efforts blame may still attach to the political leaders.[35] Even when policies are made and implemented by autonomous agencies or public corporations, the public will still look at the political leaders in office at the time and assign blame to those politicians.

Furthermore, two fundamental sources of the creation – and most probably the sustaining of – bureaucratic autonomy refer to reputation and trust. First, by ensuring a good provision of public service over a significant period of time, politicians face fewer incentives to monitor and control every minute action within its operative area. Such a good reputation also advances the relationship between clients and bureaucrats and can boost its operative autonomy. Therefore, time and good service provision can improve

27 See Maggetti and Verhoest (2014).
28 Verhoest et al. (2004).
29 Bawn (1995); Gailmard and Patty (2007); Callander (2008).
30 Pollitt et al. (2004); Page (2012).
31 Garrì (2010).
32 Verhoest et al. (2010).
33 MacKenzie (2020); MacAskill (2022).
34 Hood (2013).
35 Monetary policy decisions are delegated to central banks, but presidents and prime ministers still tend to bear the blame for inflation and unemployment.

informal relationships and fundamentally shape the latitude and forms for administrative action. Bad reputation will, on the contrary, complicate such administrative autonomy and instead lead to more informal control than what is formally designed in the legal framework.[36]

Second, a "united" bureaucracy with strong interpersonal trust will allow more independence at lower levels in the bureaucratic hierarchy, just as trust between senior managers and ministry staff can facilitate budgetary processes. Trust between specialised agencies within the public sector can also be favourable in instances where issues require cross-sectoral policymaking. Trust-based cross-sectoral horizontal coordination can be fruitful for exchanging information and indeed influencing agendas. The total expertise in such bureaucratic networks can bring comparable advantages to decision-makers, and therefore influence their space for manoeuvre partly based on such high levels of collective knowledge.

Lastly, there is a difference among issues that become slow and fast-burning crises and those that occur in "everyday politics".[37] When confronted with issues of the burning sort, governments will usually be at the front seat, even though the current COVID-19 pandemic tells us that the autonomy-control dichotomy in public management played out rather differently across administrative traditions.[38] The role of bureaucracies in crises may also vary across time, with political leaders intervening initially but then finding that managing a long-term crisis, and not resolving it, may make them appear incompetent

2. Autonomy from Whom?

As we consider administrative autonomy we should consider the autonomy of bureaucratic organisations from their nominal political masters, the public, and from the regular courts. These three dimensions of autonomy will not necessarily vary together, and may very likely change in exactly opposite directions. As the administrative agencies are given great latitude to make independent decisions without as much control of politicians, they may find themselves more subject to scrutiny by citizens (and by the media). This last point, however, presupposes an informed public, both regarding political rights and knowledge concerning the specific issue or question. Therefore, legal knowledge and transparency measures are likely to be important for the tension between autonomy and control when the political dependence is low.

Furthermore, we are not necessarily talking about autonomy from the general public, and the involvement of the general media. The most important aspects of control, or attempted control, over agencies may be through the stakeholders of the policies being implemented. The clients of the programs have demands for services, and have ideas about how to make the programme work better. The opportunities for stakeholders to exercise more control are being expanded through the institutionalisation of collaboration in policymaking and implementation.[39] The danger, not just for bureaucratic autonomy but also for the general public, is that the "public interest" becomes defined narrowly as the interest of those stakeholders.

36 Carpenter (2002).
37 Seabrooke and Tsingou (2019).
38 Toshkov et al. (2022).
39 Peters et al. (2022).

III. Dimensions of Administrative Law With Administrative Traditions

As we discuss these several administrative traditions later, one question stands out perhaps more than others. If this is administrative law, which is dominant – law or administration? For example, somewhat paradoxically the French administrative system is generally understood to be legalistic, but administrative law is influenced by administrators, trained very much like administrators in other *grand corps* of the State.[40] In contrast, American administrative law and courts, operating in a system that is usually deemed managerial,[41] are actually dominated more by legal concerns, and by the ever-present possibility of administrative actions being appealed into the regular court system.[42] Similar patterns are found in Sweden, where the public administration enjoys high levels of autonomy and managerial values, but where administrative law to a very large extent structures those values. The relative strength of law and management is crucial in defining administrative traditions, but the relationship of those two variables is also complex and nuanced.

This difference in the importance of law and management also raises the question of how administrative adjudication is practised. In some systems, administrative law judges are located within the same agencies whose decisions they are examining. This can be especially important in the social services organisations where thousands, if not millions, of cases must be adjudicated each year. While administrative law judges may be well-trained to apply the law fairly, their affiliation with the organisation may create the appearance of bias, even if there is no such bias.

As we compare the administrative law systems within four major administrative traditions, there are several key points of comparison. While we acknowledge that administrative law contains even more variation than can be captured through these variables, we believe the variables identified here are essential for understanding variations in bureaucratic autonomy. Also, although we are using these variables to characterise whole traditions, they can also be important for explaining differences among countries within traditions. We will now turn to introduce these variables.

1. Basic Legal System

The first variable refers to the basic *legal system* within which administrative law functions.[43] Common and civil law systems operate by fundamentally different logics and will likely influence the way in which administrative law shapes bureaucratic autonomy. For example, the codification of civil law may allow less space for autonomous action by bureaucracies than does common law. In addition, we argue that studying the evolution of the legal system will help us understand the basic function of the specific legal system.[44] The form of administrative law is also in itself a point of comparison. For example, even in common law countries the administrative law may be codified, and shaped by a single procedural statute. Other issues include what are the main characteristics of the law, and how does it manage

40 Bell and Lichere (2022), pp. 85–86.

41 That said, another characterisation of the policymaking system is "adversarial legalism" Kagan (2001).

42 See Mashaw (2012). For example, the recent ruling by the Supreme Court, limiting the rule-making power of the Environmental Protection Agency (*West Virginia et al., v. Environmental Protection Agency et al.*) may alter significantly the capacity of agencies to act autonomously in writing new regulations.

43 Head (2011).

44 Duve (2017).

secondary legislation? Is administrative law extensive or narrow in its style and substance? To what extent does it delegate tasks and procedures to public authorities? What are the rights of individuals within this body of law?

2. Rule-making

The second point of comparison regards rule-making processes in the context of administrative law. *Rule-making power* refers to the capacity of public authorities to amend, repeal, or create administrative regulations. These regulations are also referred to as secondary legislation. A common explanation for why the political government would grant, through law, public authorities extensive rule-making powers is that the bureaucracy has a relative advantage in expertise on technically or socially complex issues. The rule-making power is either formal or informal, where the former implies formal judicial hearing for public consultation over proposed rules. These hearings may utilise rules of evidence and sworn testimony when making their decisions.

Informal rule-making lacks the court-like trappings of formal rule-making but may still have formalised procedures.[45] The most important variations in informal rule-making are in the extent to which the public is aware of, and involved in, the process of rule-making. Furthermore, increasingly collaborative forms of rule-making demand that stakeholders participate in the process, and use this as a means of marshalling the expertise that is held by those stakeholders when making regulations. Means of informal rule-making may also differ in the extent to which other institutions within the public sector are willing to defer to the expertise of the public administrators involved, or want to impose other checks on the autonomy of the agencies.

In all these cases of rule-making, the actions of the administrative actors are bound by law. They cannot make rules without some specific piece of primary legislation that empowers them to do so. Further, the courts may decide later if the administrators' interpretation of their latitude in making rules was appropriate. Again, it is important to understand bureaucratic autonomy as operating within boundaries.

3. Judicial Review

Judicial review is a third central concept for understanding differences among patterns of administrative law. This term refers to the process of judicial scrutiny of administrative action, as well as the scrutiny exercised by higher courts over the decisions of lower courts. Some mechanism of courts having powers to invalidate administrative rules or actions is an essential component for checks and balances in the separation of powers. This is especially important for administrative decisions in democracies, given the unelected nature of the bureaucracy.[46]

Nevertheless, this fundamental feature is manifested differently in different administrative traditions. Most notable perhaps is the dichotomy between *ex ante* versus *ex post* judicial review. The former signifies legal reviews by a reviewing agency that is independent from the agency currently making a specific regulation, and where the review process precedes the adoption of the new regulation. *Ex post* review, on the other hand, implies

45 Custos (2006).

46 The judiciary is also unelected, but tends to have greater legitimacy among citizens than does the bureaucracy.

review after the new regulation is adopted.[47] We believe these distinctions provide different "spaces for manoeuvre" for public agencies, and hence are important for the degrees and forms of bureaucratic autonomy.

In addition to judicial review per se, there may be other reviews of secondary legislation that impose controls over the autonomy of the bureaucracy. An increasing number of countries utilise regulatory reviews based on cost-benefit analysis, or other modes of economic analysis.[48] These reviews are often more connected to the political priorities of political leaders, but they still constitute an *ex ante* check on the decision-making of agencies, and hence a check on their autonomy.

4. Liability

The issue of liability is related to the issue of judicial review of administrative actions. The exercise of public power by the public bureaucracy and its officials must be correct, professional, and lawful. It is therefore essential for the administrative law to describe the ways and the extent to which liability can affect the organisation or the individual bureaucrat. Wrongful conduct by individuals can inter alia be punished by disciplinary or financial liability,[49] which we believe shape bureaucratic autonomy in distinct ways.

Both judicial review and liability are related to an important underlying theme in the discussion of bureaucratic autonomy, namely the accountability of the public bureaucracy. Being shielded from electoral accountability, the bureaucracy must be held accountable through other means. There are numerous forms of political accountability, such as the budget process and direct political controls, that limit autonomy, but the courts (and more often the threat of going to court) provide a major means of ensuring that the bureaucracy does not exercise excessive autonomy.

5. Administrative Courts

The fifth and final dimension to be considered here is the nature of administrative courts. In addition to general courts, many States have specialised administrative courts to impose judicial review over public authorities. These can be specialised in issues related to, e.g. taxation, labour, or environmental licenses, or they can be more generally responsible for reviewing administrative behaviour. The specialised courts provide some significant advantages for governing, albeit also with some challenges.[50] A number of differences in powers are found among administrative courts, and these differences define to some extent the power of the bureaucracy *vis-à-vis* both political controllers and against the public.

We should also differentiate true administrative courts from adjudication that takes place within the agencies themselves. The latter forms of "trying cases" may involve civil servants playing specific roles rather than formal judges. The civil servants may or may not have specialised judicial training, and the formality of these proceedings, e.g. rules of evidence, may differ markedly. The adjudication within the administration itself is largely confined to Anglo-American countries, with the others requiring more judicial independence.

47 Asimow et al. (2020).
48 Livermore (2014).
49 Chaba (2020).
50 Psygkas (2017).

One important difference among courts is their ability to command the exercise of ministerial duties, or those duties for which there is intended to be no discretion. In some cases, the courts are confined to judging actions already taken, rather than having the power to make an agency perform a mandatory act. That power to compel obviously lessens the autonomy of agencies, given that inaction (shirking) can be a very powerful weapon for a bureaucracy.[51]

In addition to the points about administrative courts, we should ask how autonomous they are in relation to the general courts. Is there a clear line of appeal out of the administrative courts to the regular court system, or are any appeals confined within the administrative courts? In addition, are the civil servants in these administrative courts trained separately from other civil servants, or are they merely regular civil servants who have responsibilities as adjudicators?

IV. Empirical Illustrations

We are focusing on four major traditions that exist within the consolidated democracies of Europe, North America, and the Antipodes. These four traditions do contain some internal variance, but we argue that there are some common attributes that define the way public administration is practised in these countries and that has persisted over a significant period of time. There are also hybrids among these four basic traditions, but given space constraints we will focus only on the four more or less "pure" types. Finally, we are aware that there are other traditions in the rest of the world, but for this book in particular will concentrate on the European cases, and examples from the remainder of the world that are directly derivative from the four traditions we discuss here.

1. The Napoleonic Tradition

The Napoleonic tradition is perhaps the clearest of the four traditions.[52] Although it did have closely related antecedents,[53] the model for administration was developed during the reign of Napoleon Bonaparte in France and then adopted by other countries in Southern Europe.[54] Unlike the other traditions discussed here, the Napoleonic tradition was developed more or less purposefully, and therefore is somewhat more integrated than the others.

The Napoleonic tradition was developed in order to manage a centralised, powerful State. Public administrators were to be central actors in governing France, and were trained to have the skills necessary for managing a developmental State. Much of that training was in law, but it increasingly came to include management and other aspects of contemporary governance. In this model of governing, control was to be centralised in Paris, and public administrators (the *prefets*) were to exercise control over the remainder of the territory. Likewise, other administrative corps were to regulate inside government, especially the

51 Brehm and Gates (1997).

52 Ongaro (2010).

53 Dreyfus (2013).

54 This model was also transplanted to former colonies in Africa, and adopted by some countries in Latin America. It also influenced other countries within Europe that are not strictly operating within that tradition. See also *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

finances of the public sector. Public administration, like the remainder of public life, was to be governed by codified law.

While the administrative tradition was associated with a strong, centralised State, it also provided for controls over the exercise of that power. Some of these controls are *ex ante*, such as the review of legislation and administrative regulations by the *Conseil d' Etat*. In addition, administrative law provided checks on the powers of individual administrators that included personal liability in some instances. Further, as the State in France has continued to change there has been greater decentralisation, with intermediate levels of government and even the communes having more self-government.[55]

These characteristics of the French State are mirrored, although always with local variations in the other countries using this tradition. All the countries in this tradition tend to have highly legalistic administration, and to have a powerful, entrenched public bureaucracy. Perhaps the greatest difference to the centralised French model has been the more extreme decentralisation in Spain and to some extent Italy. Likewise, the political histories of these other Napoleonic States have led to a closer connection between politics and administration, and perhaps therefore less dominance of administrative law, than in France. But the fundamental institutions and approaches of the Napoleonic system show through.

2. The German Tradition

The German administrative tradition is perhaps most recognisable from its strong reliance on the concept of *Rechtsstaat*.[56] It refers to a set of fundamental legal principles – more administrative than constitutional in nature – that regulates the action in the bureaucracy and protects against the executive power.

More generally, the emergence of the German State administration occurred in several stages from the Middle Ages and onwards. Especially in the aftermath of the Thirty Years' War, there was a strong general desire for stability and order, which led to the development of more formalised systems of law enforcement. This, combined with more general societal developments, spurred a gradual formation over the following century into the *Policeyrech*, which laid a foundation for an unrestricted lordly administrative authority (*ius eminens*). The introduction of exclusive legal protection against territorial lords provided the basic separation of public and private law in German legal culture.[57]

Many of the autonomous States within the German Confederation in the 19th century, e.g. Rhine, Prussia, and Bavaria, installed a Napoleonic bureaucratic structure of centralisation through departments and respective ministers, as well as a system of prefects and specialised agencies for welfare activities and provincial government. However, a decentralised self-administration remained intact in Germany despite strong administrative influences from France. Germany developed as a "total" concept in juxtaposition to this federal structure, inter alia in the Imperial Constitution (*Paulskirchenverfassung*) of 1849, which, although it never realised in its full form, laid the foundation for several centralised administrative courts in the various States.

The principles of *Rechtsstaat*, for instance the "lawfulness of the administration" (*Gesetzmäßigkeit der Verwaltung*), underscore the supremacy of the law and its restrictions

55 Schmidt (1990).

56 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume.

57 Bogdandy and Huber (2017).

on administrative action that may violate individual freedom. It serves as a core control mechanism within the administration. Administrative law (*Verwaltungsrecht*) and the German Administrative Act (*Verwaltungsakt*) emerged in this context, partly in correspondence to the French *act administratif*. These two administrative acts share some similarities in their basic role to regulate the actions of government authorities and thus protect the rights of individuals, but are also highly different in terms of, among other things, the formal requirements for making decisions. The German Administrative Act is also subject to review by administrative courts. In addition, it is different, however, as it underlines *forms* and *substances* of administrative action.[58]

The scope of the present contribution does not allow for a detailed exposition of the German public administration,[59] but two features that deserve mention are the hierarchically structured direct administration (*unmittelbare Staatsverwaltung*), which possesses the formal power of responsible authorities to inter alia maintain public infrastructure or more broadly provide social welfare services, and the indirect administration (*mittelbare Staatsverwaltung*), which refers to the delegation of powers to other (regional or local) entities.[60] Related to these, the bureaucracy has lost much rule-making authority compared to many other EU Member States during the 20th century, and there exists today a comprehensive *ex post* judicial control over administrative action. Furthermore, the proportionality of administrative legal action is always subject to judicial review. Albeit not explicitly stated in the constitution, it is determined by three aspects: suitability, necessity, and balance.[61]

Judges were long clustered together with the wider notion of the public bureaucracy and recruited in a similar manner. Administrative courts were therefore not directly part of the judicial system but rather the administrative. Such a distinction persisted until the 1960 statute *Verwaltungsgerichtsordnung* was enacted to make the administrative court system independent from the administration,[62] which blurred the lines between civil law and public law, but also shaped opportunities and obstacles for administrative autonomy in the wider civil service.

3. The Scandinavian Tradition

The codified, civil law tradition in which Sweden is embedded is most explicitly described in the constitution (*Grundlag*), in which the Instrument of Government (*Regeringsformen*) steers the basic configuration of the bureaucracy.[63] It stresses, most fundamentally, the equality of law, and that public officials shall not make decisions without regulated authority. In addition, it underlines values of objectivity, impartiality, independence, and human rights.[64]

Judicial review over administrative action followed the procedure of the general courts before 1971. Procedural rules for administrative regulations were heterogenous across

58 Becker (2017); Nolte (1994).
59 See Kuhlmann et al. (2021) for a thorough account.
60 Sommermann (2021), p. 24.
61 Sommermann (2021), p. 21.
62 Künnecke (2007), p. 36.
63 See *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfeld-Olsson and E. Sjödin in this volume.
64 Herlitz (1964); Marcusson (2018); Kumlien (2019).

substantive areas, and citizens could send complaints against administrative decisions through an internal appeal in the public bureaucracy. After 1971, however, a homogenous procedural code (*Förvaltningsprocesslagen*) for the public courts and a general law for public agencies (*Förvaltningslagen*) were enacted.

The administrative courts, which exist on three levels (*Länsrätter, Kammarrätter*, and *Regeringsrätten*), have an extensive jurisdiction to review both the legality and suitability of administrative actions, which makes them somewhat of an outlier in a European comparative perspective. The tradition of merging the administrative courts as part of the administration rather than the court system provides hints into this peculiarity.[65]

There exists no sharp legal distinction between personal liability for civil servants and for other employees in the Swedish system. All are responsible for their actions according to penal law, even if this responsibility is restricted to cases about the exercise of public power, and there are also special disciplinary punishments for State employees.[66]

A definable feature of the Swedish, and more broadly the Scandinavian, administrative tradition is its strong emphasis on openness and transparency. The Administrative Procedures Act from 1986 (first enacted in 1971), guarantees and protects correct and efficient handling of administrative matters. It is rather concise, but shall be applied by all public agencies, with certain exemptions, and by the courts.

Regarding openness, the Freedom of Press Act (*Tryckfrihetsordningen*) from 1766 – which provides citizens with extensive rights to monitor the public bureaucracy, and installed the Parliamentary Ombudsman (*Justitieombudsmannen*) – fundamentally constituted a rather controlled bureaucracy. Paradoxically, the Swedish bureaucracy is often described as possessing exceptional degrees of autonomy. For instance, Chapter 11, Section 7, of the constitution states that the public agency's exercise of public power is made independently according to laws and ordinances. The combination of bureaucratic control and autonomy constitutes a rather unique arrangement and is often subject to controversy in matters of responsibility.[67]

4. The Anglo-American Tradition

The last of the traditions we will discuss is the most distinct from the others, and has perhaps the greatest internal variance. Unlike the others, the civil servant has long been considered to be a manager or an implementor, rather than a lawyer, and relatively few civil servants have formal legal training. This lack of a legal emphasis is in part a function of working in a common law system without fully codified law. Law is not irrelevant by any means, but the principal duties of the civil servant are to get things done, with those "things" being defined by their political masters as well as by the law.

The political and administrative systems of influenced by the Anglo-American tradition also tend to be more decentralised than in the other systems. Some parts of these countries – Scotland in the United Kingdom and Quebec in Canada for example – using different legal systems for at least some parts of their jurisprudence. There are also more concerted attempts to separate politics and administration in these systems, with limited movement

65 Ahlbäck Öberg and Wockelberg (2015).
66 Ehn (2015).
67 Hall (2015).

Table 28.1 Legal variables in four administrative traditions.

Variables	*Napoleonic*	*German*	*Scandinavian*	*Anglo-American*
Basic legal system	Civil	Civil	Mixed	Common
Rule-making	Significant, Formal and Informal	Limited, formal	Extensive, Informal	Extensive, Formal and Informal
Review of actions	Ex Ante	Ex Post	Ex Post	Ex Post
Personal liability	Yes	No	No	No

between civil service and political careers, and, except for the United States, having a limited number of patronage appointments in government.

In terms of administrative law, there are marked differences among the countries, with the United States being distinctive in having a comprehensive law governing secondary legislation and administrative adjudication – the Administrative Procedures Act of 1946. The United Kingdom and other countries have a more diffuse set of rules governing procedures, and have not codified administrative law to the extent of the United States. Further, the long presence of judicial review has meant that administrative law cases in the United States are appealed into the regular court system more often than in other Anglo-based systems. These appeals can occur if there is substantive constitutional question involved, such as the denial of due process.

As well as the bulk of administrative law cases that are heard in the agencies, there are specialised courts in many of these countries dealing with matters such as taxation, labour law, and international trade.[68] In addition, the United Kingdom has developed an administrative court to handle a variety of technical matters in administrative law, although there are relatively few appeals of individual citizens. In addition, cases in which a government agency or administrator is alleged to be operating *ultra vires*, or unfairly, are appealed within the regular court system.

We can summarise the differences in administrative law among these four traditions by using the variables in administrative law mentioned previously. Table 28.1 shows the variables and the values they take on within those four sets of countries. As already mentioned, there may be internal differences within a tradition, especially the Anglo-American tradition. Still, this table provides a useful means of demonstrating the differences between the manner in which civil services are controlled by administrative law, and can use discretion within the legal frameworks.

V. Conclusion

As well as being a discussion of the utility of administrative law as a means of comparing administrative systems, this chapter is also something of a research agenda. We have asserted the importance of administrative law for bureaucratic autonomy, and given some examples of how that relationship functions in four settings. There is still, however, a great deal to be done to explicate the linkages among these variables, and to detail the characteristics of national legal systems that produce particular types of bureaucratic patterns. But we believe that we have brought administrative law back directly into the study of

68 Ford (2017).

comparative public administration, and have shown that this is not some arcane study for lawyers, but a central component of the functioning of the public sector.

While the empirical illustrations only briefly introduce the four legal-administrative 'traditions' and how it relates to administrative autonomy, they do demonstrate that distinct legal arrangements, strengthened through path-dependent mechanisms, continue to fundamentally influence bureaucratic behaviour. Also, as argued in the introduction, we maintain that the legal sources of autonomy comprise only one aspect of the concept; informal factors such as trust and reputation can create significant latitude for action for the bureaucratic organisation as a whole or the individual bureaucrat, and thus be integrated in the study of administrative autonomy and bureaucratic politics.

Moreover, administrative autonomy is expected to result in various consequences. For instance, while each country's distinct sources, forms, and degrees of autonomy are interesting for bureaucratic politics per se, the very composition of different administrative solutions in transnational collaborative settings yields intriguing questions of contemporary governance. If path dependency and legal traditions continue to influence behaviour, how does that stand in relation to such developments? One obvious example is the growing function of domestic bureaucrats to partake in networked forms of governance in the EU,[69] a development that still requires a great deal of substantiation from scholars of public administration, law, and political science.

For administrative law to be an avenue for comparison that will be able to bear the fruit that we believe is possible, we and other scholars will have to do several things. The first is to engage in a more extensive dialogue with administrative lawyers. This discussion should be useful for both sets of participants. In addition, we may have to provide more precise measures of some of the attributes of administrative law that we have discussed. These need not be suitable for full-fledged quantitative analysis, but should enable us to make more precise statements about the degree to which individual cases are exemplars of a particular tradition.

Bibliography

Ahlbäck Öberg S., Wockelberg H. (2015), 'The Public Sector and the Courts', in Pierre J. (ed), *Oxford Handbook of Swedish Politics*, Oxford: Oxford University Press, 130–148.

Asimow M., Hola G.B., Cirotteau M., Dotan Y., Perroud T. (2020), 'Between the Agency and the Court: Ex Ante Review of Regulations', 68(2) *The American Journal of Comparative Law*, 332–375.

Bach T., Ruffing E. (2013), 'Networking for Autonomy? National Agencies in European Networks', 91(3) *Public Administration*, 712–726.

Baribanti R. (1966), *Asian Bureaucratic Systems Emergent from the British Imperial Tradition*, Durham, NC: Duke University Press.

Bawn K. (1995), 'Political Control Versus Expertise: Congressional Choices About Administrative Procedures', 89(1) *The American Political Science Review*, 62–73.

Becker F. (2017), 'The Development of German Administrative Law', 24(2) *George Mason Law Review*, 453–476.

Bell J., Lichere F. (2022), *Contemporary French Administrative Law*, Cambridge: Cambridge University Press.

Bertelli A.M., Cece F. (2020), 'Comparative Administrative Law and Public Administration', in Cane G., Ip E.C., Hofmann H.C.H., Lindseth P. (eds), *Oxford Handbook of Comparative Administrative Law*, Oxford: Oxford University Press, 173–193.

69 Mastenbroek and Sindbjerg Martinsen (2018).

Bogdandy A.V., Huber P.M. (2017), 'Evolution and Gestalt of the German State', in Huber P.M., Bogdandy A., Cassese S. (eds), *The Administrative State*, Oxford: Oxford University Press, 196–236.

Brehm J., Gates S. (1997), *Working, Shirking and Sabotage: Bureaucratic Response to a Democratic Public*, Ann Arbor: University of Michigan Press.

Brehm J., Gates S. (2015), 'Bureaucratic Politics Arising From, Not Defined by, a Principal-Agency Dyad', 25(1) *Journal of Public Administration Research and Theory*, 27–42.

Brodkin E.Z. (2011), 'Policy Work: Street-Level Organizations under New Public Management', 21 *Journal of Public Administration Research and Theory*, 253–277.

Bruff H.H. (1991), 'Specialized Courts in Administrative Law', 43(3) *Administrative Law Review*, 329–366.

Callander S. (2008), 'A Theory of Policy Expertise', 3(2) *Quarterly Journal of Political Science*, 123–140.

Calvert R.L., McCubbins M.D., Weingast B.R. (1989), 'A Theory of Political Control and Agency Discretion', 33(3) *American Journal of Political Science*, 558–661.

Carpenter D.P. (2002), *The Forging of Bureaucratic Autonomy*, Princeton, NJ: Princeton University Press.

Carpenter D.P., Krause G.A. (2015), 'Transactional Authority and Bureaucratic Politics', 25(1) *Journal of Public Administration Research and Theory*, 5–25.

Castles F.G. (1993), *Families of Nations: Patterns of Public Policies in Western Democracies*, London: Dartmouth.

Chaba D. (2020), 'Public Officials' Liability: A Case Study on Poland', 86(1) *International Review of Administrative Sciences*, 169–182.

Custos D. (2006), 'The Rulemaking Power of Independent Regulatory Agencies', 54(1) *The American Journal of Comparative Law*, 615–639.

Damaška M.R. (1986), *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven: Yale University Press.

De Burca G., Scott J. (2006), *Law and New Governance in the EU and the US*, Oxford, Portland: Hart.

Dreyfus F. (2013), 'Far Beyond the Napoleonic Model: Richness of the French Administrative History', in Eymeri-Douzans J.M., Bouckaert G. (eds), *La France et ses Administrations: Un etat des savoirs*, Brussels: Bruylant, 47–57.

Duve T. (2017), 'Legal Traditions: A Dialogue between Comparative Law and Comparative Legal History', 6(1) *Comparative Legal History*, 15–33.

Ehn P. (2015), 'The Public Servant', in Pierre J. (ed), *Oxford Handbook of Swedish Politics*, Oxford: Oxford University Press, 332–346.

Evans T., Hupe P. (2020), *Discretion and the Quest for Controlled Freedom*, London: Macmillan.

Ford C. (2017), 'Remedies in Canadian Administrative Law: A Roadmap Through a Parallel Legal Universe', in Flood C.M., Sassin L. (eds), *Administrative Law in Context*, Toronto: Emond, 43–85.

Gailmard S., Patty J.W. (2007), 'Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise', 51(4) *American Journal of Political Science*, 873–889.

Garrì I. (2010), 'Political Short-Termism: A Possible Explanation', 145(1–2) *Public Choice*, 197–211.

Goodsell C.T. (2013), *Mission Mystique*, Washington, DC: CQ Press.

Hall P. (2015), 'The Swedish Administrative Model', in Pierre J. (ed), *Oxford Handbook of Swedish Politics*, Oxford: Oxford University Press, 299–314.

Head J.W. (2011), *Great Legal Traditions: Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective*, Durham: Carolina Academic Press.

Herlitz N. (1964), *Grunddragen av det Svenska statsskickets historia*, 6th edition, Stockholm: Norstedts.

Heyen E.V. (1989), *Yearbook of European Administrative Law*, Vol. 1, Baden-Baden: Nomos Verlag.

Hood C. (2013), *The Blame Game: Spin, Bureaucracy and Self-preservation in Government*, Princeton, NJ: Princeton University Press.

Kagan R.A. (2001), *Adversarial Legalism: The American Way of Law*, Cambridge, MA: Harvard University Press.

Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds) (2021), *Public Administration in Germany*, Cham: Springer.

Kumlien M. (2019), *Professorpolitik och samhällsförändring: en rättshistorisk undersökning av den svenska förvaltningsrättens uppkomst*, Stockholm: Institutet för rättshistorisk forskning.

Künnecke M. (2007), *Tradition and Change in Administrative Law: An Anglo-German Comparison*, Berlin, Heidelberg: Springer-Verlag.

Lipsky M. (1980), *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundation.

Livermore M.A. (2014), 'Cost-Benefit Analysis and Agency Independence', 81 *University of Chicago Law Review*, 609–688.

MacAskill W. (2022), *What Do We Owe the Future?*, New York: Basic Books.

MacKenzie M.K. (2020), *Future Publics: Democratic Deliberation and Future-Regarding Public Action*, Oxford: Oxford University Press.

Maggetti M. (2007), 'De Facto Independence After Delegation: A Fuzzy-Set Analysis', 1(4) *Regulation & Governance*, 271–294.

Maggetti M., Verhoest K. (2014), 'Unexplored Aspects of Bureaucratic Autonomy: A State of the Field and Ways Forward', 80 *International Review of Administrative Sciences*, 239–252.

Majone G. (1997), 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance', 17 *Journal of Public Policy*, 139–167.

Marcusson L. (2018), 'Verwaltungsgerichtsbarkeit in Schweden', in Bogdandy A.V., Huber P.M., Marcusson L., Guttner M., Behrent C. (eds), *Handbuch Ius Publicum Europaeum Baod VIII. Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren*, Munich: C.F. Muller, 543–600.

Mashaw J.L. (2012), *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law*, New Haven, CT: Yale University Press.

Mastenbroek E., Sindbjerg Martinsen D. (2018), 'Filling the Gap in the European Administrative Space: The Role of Administrative Networks in EU Implementation and Enforcement', 25(3) *Journal of European Public Policy*, 422–435.

Moe T.M. (1984), 'The New Economics of Organization', 28(4) *American Journal of Political Science*, 739–777.

Moe T.M. (1990), 'The Politics of Structural Choice: Toward a Theory of Public Bureaucracy', Williamson O.E. (ed), *Organization Theory: From Chester Barnard to the Present and Beyond*, New York: Oxford University Press, 116–153.

Niskanen W.A. (1975), 'Bureaucrats and Politicians', 18(3) *Journal of Law and Economics*, 617–643.

Nolte G. (1994), 'General Principles of German and European Administrative Law – A Comparison in Historical Perspective', 57(2) *Modern Law Review*, 191–212.

Ongaro E. (2010), 'The Napoleonic Administrative Tradition and Public Management Reform in France, Greece, Italy, Portugal and Spain', in Painter M., Peters B.G. (eds), *Tradition and Public Administration*, London: Macmillan, 174–190.

Page E.C. (2012), *Policy Without Politicians: Bureaucratic Influence in Comparative Perspective*, Oxford: Oxford University Press.

Parker G.R., Parker S.L. (2018), *Contractual Politics and the Institutionalization of Bureaucratic Influence*, Albany: State University of New York Press.

Perry J.L., Hondeghem A. (2008), 'Building Theory and Empirical Evidence About Public Service Motivation', 11 *International Public Management Journal*, 3–12.

Peters B.G. (2022), *Administrative Traditions: Understanding the Roots of Contemporary Administrative Behavior*, Oxford: Oxford University Press.

Peters B.G., Pierre J, Sørensen E, Torfing J. (2022), *A Research Agenda for Governance*, Cheltenham: Edward Elgar.

Pierre J., Peters B.G. (2017), 'The Shirking Bureaucrat: A Theory in Search of Evidence?', 45(2) *Policy & Politics*, 157–172.

Pollitt C., Bouckaert G. (2004), *Public Management Reform: A Comparative Analysis*, 2nd edition, New York: Oxford University Press.

Pollitt C., Tablot C., Caufield J., Smullen A. (2004), *Agencies: How Governments Do Things Through Semi-Autonomous Organizations*, New York: Palgrave Macmillan.

Psygkas A. (2017), 'The "Double Helix" of Process and Substance Review Before the United Kingdom Competition Appels Tribunal', in Rose-Ackerman S., Lindseth P.L., Emerson B. (eds), *Comparative Administrative Law*, 2nd edition, Cheltenham: Edward Elgar, 422–477.

Rose-Ackerman S., Lindseth P.L., Emerson B. (2017), *Comparative Administrative Law*, 2nd edition, Cheltenham: Edward Elgar.

Sager F., Rosser C., Mavrot C., Hurni P.Y. (2018), *A Transatlantic History of Public Administration*, Cheltenham: Edward Elgar.

Schmidt V. (1990), *Democratizing France: The Political and Administrative History of Decentralization*, Cambridge: Cambridge University Press.

Seabrooke L., Tsingou E. (2019), 'Europe's Fast and Slow Burning Crises', 26(3) *Journal of European Public Policy*, 468–481.

Seidman H.B., Gilmour R.S. (1986), *Politics, Position and Power: From the Positive to the Regulatory State*, New York: Oxford University Press.

Sobol M. (2016), 'Principal-Agent Analysis and Pathological Delegation: The (Almost) Untold Story', 29 *Governance: An International Journal of Policy, Administration, and Institutions*, 335–350.

Sommermann K.-P. (2021), 'Constitutional State and Public Administration', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany*, Cham: Springer, 17–34.

Tilly C. (2006), 'How and Why History Matters', in Tilly C., Goodin R.E. (eds), *Oxford Handbook of Contextual Political Analysis*, Oxford: Oxford University Press, 417–437.

Toshkov D., Carroll B., Yesilkagit K. (2022), 'Government Capacity, Societal Trust or Party Preferences: What Accounts for the Variety of National Policy Responses to the COVID-19 Pandemic in Europe?', 29(7) *Journal of European Public Policy*, 1009–1028.

Verhoest K., Peters B.G., Bouckaert G., Verschuere B. (2004), 'The Study of Organisational Autonomy: A Conceptual Review', 24(2) *Public Administration and Development*, 101–118.

Verhoest K., Roness P., Verschuere B., Rubecksen K., MacCarthaigh M. (2010), *Autonomy and Control of State Agencies: Comparing States and Agencies*, Basingstoke: Palgrave Macmillan.

Whitford A.B. (2002), 'Decentralization and Political Control of the Bureaucracy', 14(2) *Journal of Theoretical Politics*, 167–193.

Yesilkagit K., Thiel S. Van. (2008), 'Political Influence and Bureaucratic Autonomy', 8(2) *Public Organization Review*, 137–153.

Part V

Gender Equality and Non-discrimination in the Civil Service

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29 EU Non-discrimination Law and Its Potential Impact on the Civil Service of the Member States

Jule Mulder

I. Introduction

EU non-discrimination law is one of the best developed areas of European Union (EU) social law. It covers all areas of work, including public employment, social security, access to goods and services, education, and housing. Indeed, it has been argued that the relative inactivity of the Member States in these areas enabled the EU institutions to explore the EU's social profile and advance individual rights and protections within the context of a free-market paradigm. Consequently, EU non-discrimination law as interpreted by the Court of Justice of the European Union (CJEU) has had a significant impact on the laws of all EU Member States, whether they are more closely aligned with the common or civil law tradition. That is true even if the principles of non-discrimination law are usually associated with common law and the CJEU has taken inspiration from common law jurisdictions, most notably when developing the concept of indirect discrimination that was first recognised as disparate impact by the United States (US) Supreme Court.[1] Nevertheless, Member States' struggles with the concept of non-discrimination clearly vary, with some embracing it much more willingly than others.[2] Indeed, it has been demonstrated that the 2000 equality directives concerned with discrimination based on race or ethnic origin, religion or belief, disability, age, and sexual orientation are heavily influenced by Anglo-Dutch thinking,[3] and that the United Kingdom (UK) Equality Act 2010 inter alia implementing the EU equality directives does not face the same political challenges within the UK political legal discourse as other EU employment legislation. The liberal thinking underpinning EU non-discrimination law, preventing it from being prescriptive or protecting minimum rights, may fit very well within a very pragmatic and liberal legal system that favours low degrees of regulation and contractual freedom.[4]

Whether EU non-discrimination law and the national legislation implementing the equality directives have Europeanised the public sector in terms of access to work and working conditions very much depends on the perspective adopted to consider the issue. While the EU equality directives must be implemented within all Member States, and have expanded the scope of protection within private and public employment, the degree to which they have impacted the national sphere depends on the broader national context and the alternative

1 CJEU, judgment of 31 March 1981 *Jenkins v. Kingsgate*, C-196/80; US Supreme Court, judgment of 8 March 1971, *Griggs v. Duke Power Company*, 401 US 424.

2 Havelková and Möschel (2019).

3 Geddes and Guiraudon (2004).

4 For reference to differences in legal heritage in relation to freedom of contract, see Micklitz (2015).

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or additional provisions that achieve similar outcomes. While general employment law may provide similar, although not identical, protection,[5] an analysis of the public sector adds the additional layer of the role of the national constitutions. Indeed, while constitutional equality principles should be distinct from horizontally applicable EU non-discrimination law, there is little doubt that there is some overlap in terms of effect, if it comes to employment within the public sector. This was apparent from its inception. The original equal pay provision for men and women (Article 119 of the European Economic Community, EEC; now Article 157 of the Treaty on the Functioning of the European Union, TFEU), was included in the treaty to avoid the distortion of competition due to significant variation of the gender pay gap within the Member States (between 7% in France and 40% in Italy) and constituted a German-France compromise regarding the level of harmonisation within employment law.[6] As such, it allowed France to protect one of its core principles of constitutional relevance while keeping harmonisation to a minimum.[7] The role of national constitutional requirements and the Member States being signatories to the International Labour Organization (ILO) Convention 100 on equal pay also significantly influenced the CJEU's reading of Article 119 EEC within the context of human rights protection.[8]

To explore the scope of potential EU impact on national level, this chapter will discuss several controversial areas of law covered by EU non-discrimination law and the national responses to that challenge, with primary focus on sex, age, and religious discrimination. As such, it will not conduct a one-to-one comparison but rather trace the EU interventions that are particularly relevant within the civil service and national judicial responses to the CJEU's interpretation of EU non-discrimination law in the light of national approaches, focusing on France, Germany, the Netherlands, and the UK. After briefly summarising the EU legal framework and the national implementation of the equality directives, it will consider the role EU non-discrimination law plays within the civil service, the scope of positive actions, and the relationship between religious discrimination and neutrality requirements within the public service.

II. EU Non-discrimination Law

Current EU non-discrimination law has a broad material and personal scope, expressed in the equality directives and Article 157 TFEU on equal pay for men and women. In the sphere of employment, EU directives protect from discrimination based on sex, race and ethnic origin, religion and belief, sexual orientation, disability, and age.[9] In terms of

5 Such as the German general equal treatment principle in employment or the Dutch principle of a good employer.

6 van der Vleuten (2007).

7 The preamble to the French constitution of 1946, confirmed by that of the constitution of 1958, states in general terms the principle that "the law shall guarantee women equal rights with men in all spheres". Subsequent legislation required collective agreements to provide detailed rules on "equal pay for equal work". The German Federal Labour Court also considered the constitutional equality clause directly effective on parties to collective agreements (*Bundesarbeitsgericht*, judgment of 15 January 1955, 1 AZR 305/54), even if the de facto effect of this was limited.

8 CJEU, judgment of 8 April 1976, *Defrenne v. SABENA*, C-43/75.

9 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22 (Race Directive); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16 (Framework Directive); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/23 (Recast Directive).

material scope, the directives identify four aspects of employment: (1) access to employment, to self-employment or to occupation, including promotion; (2) access to all types and to all levels of vocational training; (3) employment and working conditions, including dismissals and pay; and (4) membership of, or involvement in, workers or employers organisations and professional bodies. The public sector is explicitly covered. The directives apply to "all persons, as regards both the public and private sectors, including public bodies".[10]

Indeed, many of the national disputes reaching the CJEU originate from the public service, as they are concerned with rules on access, promotion and pay that are regulated by law or include a sufficiently large number of privately employed workers whose contracts are governed by collective agreements. However, it has been suggested that the Member States have a bigger margin of discretion than private employers within the context of the objective justification, taking into account legitimate considerations of social policy[11] not only "real needs of the employer".[12]

The distinction between equal pay and equal treatment, as upheld by the old sex equality directives, is less relevant today, as the current directives include pay under the scope of working conditions. However, Article 157 TFEU still remains relevant within pay disputes and several countries have specific rules concerned with equal pay between men and women.[13] It should be noted that the notion of pay is quite broad, and includes direct and indirect entitlements, whether immediate or future, as long as the worker receives them, albeit indirectly, in respect of this employment from their employer.[14] This includes one-off benefits, severance grants and all other payments that are received because of the employment, even if not directly paid out by the employer. However, it is not sufficient that a working condition has pecuniary consequences for it to fall under the scope of Article 157 TFEU.[15]

The directives identify four types of discrimination: direct discrimination, indirect discrimination, harassment,[16] and victimisation.[17] While the distinction between direct and indirect discrimination is not always clear, both are defined consistently within the directives. Accordingly, direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds listed previously. Indirect discrimination occurs

> where an apparently neutral provision, criterion or practice would put persons [with a certain protected characteristic] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[18]

The "particular disadvantage" can be demonstrated by reference to statistical evidence or a qualitative assessment of the "apparently neutral norm". The CJEU has rejected the need

10 Article 3, para. 1 Framework Directive, Article 3, para. 1 Race Directive, Article 14, para. 1 Recast Directive.
11 CJEU, judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97.
12 CJEU, judgment of 13 May 1986, *Bilka v. Weber von Hartz*, 170/84, para. 30–31.
13 For example, UK Equality Act 2010; www.legislation.gov.uk/ukpga/2010/15/contents, Part 5, Chapter 3.
14 CJEU, judgment of 9 December 2004, *Holzek*, C-19/02; CJEU, *Seymour-Smith and Perez* (n. 11).
15 CJEU, judgment of 30 March 2000, *JämO*, C-236/98, para. 59; CJEU, judgment of 19 March 2002, *Lommers*, C-476/99, para. 28.
16 Article 2, paras. 2 and 3 Framework Directive, Article 2, para. (2) Race Directive, Article 2 Recast Directive.
17 Article 11 Framework Directive; Article 9 Race Directive; Article 24 Recast Directive.
18 Article 2, para. 2(b) Framework Directive; Article 2, para. 2(b) Race Directive; Article 2, para. 1(b) Recast Directive.

to provide concrete statistical data if the claimant has limited or no access to the data and statistical facts.[19]

Thus, direct discrimination is generally concerned with disadvantages directly linked to the protected characteristics while indirect discrimination is concerned with the disproportional disadvantages of the protected group. However, direct discrimination does not only include discrimination that is directly based on the protected characteristic itself but also the unfavourable treatment is intrinsically linked to it. Accordingly, pregnancy discrimination constitutes sex discrimination although not all women are or ever will be pregnant, because only women (meaning only those with female reproductive organs) can be pregnant;[20] transgender discrimination is sex discrimination because it is "based, essentially if not exclusively, on the sex of the person concerned";[21] and differential treatment based on a gendered retirement age can amount to direct sex discrimination.[22] Outside the scope of sex, the Court has also considered the beneficial treatment of opposite-sex marriage in comparison to (same-sex) civil union to constitute direct sexuality discrimination, although not all heterosexual couples are actually married.[23] It is thus clear that direct discrimination can occur even if not all the members of the protected group are disadvantaged (in the case of pregnancy discrimination) or not the entire presumably privileged group is advantaged (in the case of beneficial treatment of marriage that benefits some heterosexual couples), as long as the intrinsic link exists. Within the context of religious discrimination, the Court however refused to consider neutrality requirements to be addressed under the scope of direct discrimination, despite the fact that they are directly aimed at banning any religious expression (such as headscarves) at the workplace.[24] It also failed to recognise that the beneficial treatment of those who completed military service due to conscription amounts to direct sex discrimination, although only men could be conscripted.[25] Even the recognition of pregnancy related discrimination under the scope of direct sex discrimination is somewhat limited, as the CJEU has refused to recognise all pregnancy related illnesses, namely those occurring after the birth of the child, to be subsumed,[26] although it remains true that only those with female reproductive organs can have pregnancy related illnesses. As such, the difference between the extrinsic link and a disproportional or "particular disadvantage" as recognised under indirect discrimination is sometimes difficult to draw. This allows national courts significant leeway in their own understanding and application of the law.

III. National Implementation

The equality directives must be implemented in national law, and it is generally accepted that all Member States have done so, many adopting legal definitions that are very similarly worded to the directives, while the scope of justification is at times broader, and the number

19 CJEU, judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18.

20 CJEU, judgment of 8 November 1990, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, C-177/88.

21 CJEU, judgment of 30 April 1996, *P v. S and Cornwall County Council*, C-13/94, para. 21.

22 CJEU, judgment of 17 May 1990, *Barber v. Guardian Royal Exchange Assurance Group*, C-262/88; CJEU, judgment of 18 November 2010, *Kleist*, C-356/09.

23 CJEU, judgment of 1 April 2008, *Maruko*, C-267/06.

24 CJEU, judgment of 14 March 2017, *Achbita v. G4S Secure Solutions*, C-157/15; Mulder (2022).

25 CJEU, judgment of 7 December 2000, *Schnorbus*, C-79/99.

26 CJEU, judgment of 8 September 2005, *McKenna*, C-191/03.

of protected characteristics vary.[27] Minor differences in the wording do not necessarily lead to incompatibility. For example, the Dutch choice to refer to direct and indirect distinction (*direct en indirect onderscheid*)[28] rather than discrimination, in order to avoid creating a sense of severity of unfairness or harm that has to be reached in order for it to be covered by the law, may have concerned the Commission, but, if anything, it provides a broader scope of protection than the directives.[29] Similarly, the Dutch treatment of the objective justification as an exception rather than part of the definition within the scope of indirect discrimination, does not lead to a substantively different analysis and, if anything, encourages the Dutch courts and quasi-judicial bodies to apply the objective justification strictly, as required by EU law. The German General Equal Treatment Act's (*Allgemeine Gleichbehandlungsgesetz*) reference to sexual identity (*sexuellen Identität*)[30] rather than sexual orientation may have sparked a debate in Germany about the precise scope of the protected characteristic,[31] but it is not obvious how the difference in terminology makes the implementation incompatible with the directives, especially considering the indirect effect of the latter.

Definitions that significantly depart from the directives' definitions in terms of style and scope, may look more different on paper than in practice. The UK Equality Act 2010 is an example in this regard. It provides a rather detailed definition of direct and indirect discrimination in line with the common law tradition, which a civil lawyer would find rather confusing and possibly incompatible with EU law. However, national courts have used their interpretive powers to give effect to the equality directives via the indirect effect of EU law. Indeed, this confirms a common finding within comparative law concerned with the limited role of written rules, as judges can demonstrate a significant degree of creativity in ignoring their literal meaning, depending on whether or not they conceive the paradigm shift as a legitimate or social breakthrough.[32] For example, following *Coleman*,[33] subsuming discrimination by association under the scope of direct discrimination, the UK Employment Appeal Tribunal (EAT) had no problem recognising the discrimination an employed mother suffered because of her disabled son, even though the Disability Discrimination Act 1995 (DDA)[34] at the time explicitly required the disadvantaged person to have the disability.[35] Similarly, the definition of indirect discrimination in section 19, paragraph (2)(b) of the UK Equality Act 2010 required that the claimant has the characteristic of the group that suffers the particular disadvantage, not just that the claimant suffers the disadvantage. As such, it seems at odds with the CJEU's finding in *CHEZ* that the "particular disadvantage" should be assessed on an objective basis, irrespective of the individual claimant's personal characteristics. The case concerned measures in certain neighbourhoods that were deemed to create a particular disadvantage for the Roma population

27 Chopin and Germaine (2022); Mulder (2021).

28 Article 1, para. 1 of the General Equal Treatment Act of 2 March 1994 (*Algemene wet gelijke behandeling*) as amended, Stb. 1994, 230; https://wetten.overheid.nl/BWBR0006502/2015-07-01.

29 Mulder (2017), pp. 108–109.

30 Article 1 General Equal Treatment Act of 14 August 2006 (*Allgemeines Gleichbehandlungsgesetz*) as amended, BGBl. I p. 1897; www.gesetze-im-internet.de/agg/BJNR189710006.html.

31 Mulder (2022), pp. 16–17.

32 Sacco (1991), pp. 344–345.

33 CJEU, judgment of 17 July 2008, *Coleman*, C-303/06.

34 Section 3A(1) of the DDA 1995, as amended by the 2003 Regulations, www.legislation.gov.uk/ukpga/1995/50/contents.

35 EAT, judgment of 30 October 2009, *Attridge Law LLP v. Coleman*, UKEAT 0071_09_3010, Appeal No. UKEAT/0071/09.

primarily living there. The claimant was not Roma but lived in the same neighbourhood and thus suffered alongside or was associated with the disadvantaged group.[36] In 2024, Article 19A was introduced and now ensures that those who suffer alongside the disadvantaged group also enjoy protection. While it has been accepted that claimants in cases of indirect religious discrimination do not need to satisfy the requirement,[37] it the change expands the protection to all other protected characteristics. With reference to EU law, the UK Supreme Court already confirmed in 2017 that it was not necessary for claimants who suffer a particular disadvantage to demonstrate the reason why they suffer that disadvantage,[38] although the UK definition of indirect discrimination requires that the measure places the individual complainant, as well as the group to which they belong, at a disadvantage.

As such, the successful implementation of EU non-discrimination law within the Member States is less determined by the precise wording of the legislation implementing the directives, but turns on the meaning, scope, and relevance of the legislation within the national legal discourse and its application on the national level. Indeed, here we can identify significant weaknesses across many Member States, with concepts being poorly understood and unwillingness to engage with their larger implications.[39] It is here that we can also identify significant differences between the Member States, even in the context of reoccurring issues and parallel developments.

IV. Non-discrimination Law within the Civil Service

Prima facie there is limited reason to believe that the experience of discrimination within the civil service is significantly different from discrimination within private employment. After all, civil servants are equally exposed to systemic and structural inequality. In terms of gender equality, female civil servants may equally struggle to compete because of the double burden of work and the responsibility to provide unpaid care, and due to stereotypes and unconscious biases. Traditional requirements related to nationality, age or physical ability may also have impeded access to the civil service for some protected groups and potentially continue to create invisible barriers. Moreover, the relative security of civil service positions makes this institution an attractive employer for women, as it enables them to take longer periods of parental leave or enter part-time arrangements. As in private employment, these decisions can then carry significant disadvantages in terms of promotion opportunities, and pay and pension rights, some of which amount to (indirect) discrimination. However, the civil service and other public employment is also unique, since its employment structures are often guided by overreaching social policy considerations that are less pronounced within private employment. This creates specific difficulties within the context of non-discrimination law.

1. Part-time Work

In countries with high rates of part-time employment, a significant section of such employment falls within the civil service and other public employment. Disputes concerning

36 CJEU, judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14.

37 EAT, judgment of 5 December 2013, *Mba v. Mayor and Burgesses of the London Borough of Merton*, UKEAT/332/12SM.

38 UK Supreme Court, judgment of 5 April 2017, *Essop and others v. Home Office*, UKSC 2015/0161.

39 Mulder (2021).

employees' entitlement to equal treatment in terms of early (part-time) retirement, pro-rata pay, and pensions, have led to battles fought out in front of the CJEU, even if national constitutional requirements also imposed duties of equal treatment. As such, EU non-discrimination law has had significant impact on the equal treatment of part-time workers within the public service.

The interaction between EU and constitutional law can be exemplified with reference to *Sievers & Schrage*, as its impact is not limited to civil servants. The case concerned a dispute on the exclusion of part-time workers from occupational pensions provided by a collective agreement between the German Federal Post (*Deutsche Bundespost*) and the relevant trade union. It was clear that these pensions fell within the context of pay, and that the exclusion of part-time workers constituted indirect sex discrimination. Given that the constitutional equality clause must be read in accordance with EU equality law, the national court assumed that these obligations had been in effect in Germany since 1955, when the German Federal Labour Court (*Bundesarbeitsgericht*) ruled that the constitutional equality clause was directly effective on parties to collective agreements.[40] It then wondered whether such retroactive application would distort competition, since the CJEU had held in *Defrenne II*[41] that the binding force of the equal pay principle upon private parties had only been effective as of 1974. The CJEU rejected this, clearly stating that the aim to eliminate distortions of competition was secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.[42]

Another area of dispute is whether part-time workers have access to a part-time early retirement scheme. In *Steinicke* it was established that the German law on public servants only allowed part-time workers to access such a scheme if they had worked full-time for a total of at least three of the five previous years. At the time 90% of part-time workers in the public sector were female. In this situation, the CJEU had no problem recognising a prima facie case of indirect sex discrimination. It then proceeded to comment on possible justifications, such as encouraging recruitment and cost neutrality. While recognising the discretion left to the Member States, it rejected them both. Accordingly, general assumption related to recruitment and a pure focus on cost reduction as not sufficient to the particular disadvantage. While financial considerations can underlie social policy considerations, cost alone cannot justify discrimination.[43] Indeed, national courts were thus obliged to use all the means at their disposal, by applying the provisions on part-time retirement for the benefit of the class placed at a disadvantage.

The question then remains what the inclusion of part-time workers in such a scheme should look like in terms of pay. Following the CJEU reasoning, the Dutch Equal Treatment Commission (*Commissie gelijke behandeling*)[44] did accept *pro-rata-temporis* reductions with regards to pay. Accordingly, an early retirement scheme did not constitute a disadvantage if it paid out 75% of the overall income even if it had the effect that most female pensioners would be below the breadline.[45] As such, the equal treatment of part-time workers within civil servants has improved the position of many female workers, but

40 *Bundesarbeitsgericht*, judgment of 15 January 1955, 1 AZR 305/54.

41 CJEU, *Defrenne v. SABENA* (n. 8).

42 CJEU, judgment of 10 February 2000, *Sievers & Schrage*, C-270/97, para. 57.

43 CJEU, judgment of 11 September 2003, *Steinicke*, C-77/02, paras. 64–73; CJEU, judgment of 20 March 2003, *Kutz-Bauer*, C-187/00.

44 Former quasi-judicial body dealing with the application of the General Equal Treatment Act.

45 *Commissie gelijke behandeling*, judgment of 1 January 2005, 190–194.

it does not address the socio-economic inequalities that oblige many women to take on part-time positions or the resulting financial disadvantages.

2. *Public Versus Private Employment*

The privatisation of large sectors that traditionally formed part of the civil service and the uncertainty of the changing status of teachers, with some being civil servants and others being employed under a contract of private law in some countries, means that workers produce equal or equal value work under very different working conditions. If the civil service is indeed getting more diverse, these changing hiring practices may indeed constitute a "particular disadvantage" within the meaning of indirect discrimination, if it can be shown that certain protected groups are more likely to be hired under less beneficial conditions. The problem is then one of comparison. In *Lawrence* and *Allonby*, the CJEU held that differential treatment can only be challenged if it originates from the same source, most commonly from the same employer.[46] Otherwise, no single entity can put an end to the discrimination because no discrimination has been committed. This is even true when it was the council's decision to "out-source" specific public functions and services. Moreover, the CJEU has at times rejected the comparability of different types of workers because of the different contractual arrangements. For example, in *Wipple* the Court refused to compare a zero-hour worker with regular full and part-time workers.[47] The case was heavily criticised in the literature because it introduced a comparability requirement within the context of indirect discrimination law that contradicts the concept itself. After all, indirect discrimination law recognises that apparently neutral measures can disadvantage certain groups precisely because they are in a different situation.[48] It is thus suggested that the comparability of contractual arrangements may only matter within the context of the objective justification, not as a prerequisite.

Thus, comparison of workers that are hired under rather different conditions should be possible. This was at issue in a French assessment considering whether the different numbers of men and women hired under fixed and permanent contracts indicated indirect discrimination during the recruitment process. The decision essentially turned on the question of the right pool of comparators. The Court considered private and public contracts separately. There was no significant gender imbalance between permanent and fixed contracts under employment law. As such, the Court of Cassation denied any indirect sex discrimination. However, a joined consideration of all public and private contracts presented a very different picture, as more women were hired under fixed contracts than men.[49] The question then remains of how the assessment would have been different if the prima facie "particular disadvantage" had been accepted and the focus had turned to the objective justification. I submit that this would have required a more careful evaluation of the existence of the different contractual arrangements. Certainly, the privatisation of companies can justify a change of hiring practices. Thus, if it simply is true that all younger

46 CJEU, judgment of 17 September 2002, *Lawrence and Others*, C-320/00 concerning council workers; CJEU, judgment of 13 January 2004 *Allonby*, C-256/01 concerning part-time teachers. Recently confirmed in the CJEU, judgment of 3 June 2021, *Tesco Stores*, C-624/19.

47 CJEU, judgment of 12 October 2004, *Wippel*, C-313/02.

48 Schiek (2007), p. 323 (among many).

49 Court of Cassation, judgment of 14 October 2014, 13–16936, discussed by Mercat-Bruns (2020); Mulder (2021), p. 58.

more diverse recruits are hired under private contracts because the company is privatised, then this can be justified by reasons that are not related to the protected characteristic. However, if public servants are still being hired and there is a serious discrepancy between those being able to access more beneficial employment contracts, the reasons for this need to be interrogated.

3. *Age Limits*

Many national legal orders foresee that age limits for public servants will come under pressure following the Framework Directive's prohibition of age discrimination. However, "age" can be distinguished from other protected characteristics, as both direct and indirect discrimination can be justified. This is made explicit in Article 6, allowing for the justification of "legitimate employment policy, labour market and vocational training objectives". As such, the justifications related to age discrimination go far beyond the scope of genuine occupational requirements within the meaning of Article 4, which may allow different treatment based on the protected characteristics. Indeed, the CJEU has confirmed that Member States "enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it".[50] Nevertheless, the exception should be interpreted narrowly.[51] Moreover, Article 3, paragraph 3 explicitly allows for the exclusion of the armed forces from the scope of disability and age discrimination and many Member States have taken advantage of this opportunity, either by explicitly excluding the armed forces from the scope of the legislation implementing the directives or by retaining age and capability requirements in the relevant regulation.[52]

The CJEU case law on age discrimination has been quite extensive. In several cases, the CJEU has dismissed cases of age discrimination that related to different pay due to different degrees of seniority or different reductions in pay grades (for example concerning judges that were organised in different categories and posts),[53] because they were not in comparable situations. Grade classifications that are solely dependent on the age of the civil servants at the time of recruitment, not their experience, constitute age discrimination that cannot be justified. However, when the *Land* Berlin modified its law on civil servants' pay to abolish such age discrimination but introduced a transitional system that perpetuated such a discriminatory situation, the Court considered the aim to preserve acquired rights to be legitimate and accepted that all alternative measures to achieve the same aim would have produced highly complex administrative burdens and were deemed unrealistic and undesirable.[54] On the other hand, while budgetary or administrative consideration may influence social policy legislation, cost alone cannot justify indefinitely prolonging age discrimination.[55]

50 CJEU, judgment of 16 October 2007, *Palacios de la Villa*, C-411/05, para. 68; CJEU, judgment of 12 October 2010, *Rosenbladt*, C-45/09, para. 41.

51 CJEU, judgment of 5 March 2009, *Age Concern England*, C-388/07; Liu and O'Cinneide (2019), p. 62.

52 Chopin and Germaine (2022), pp. 76–77.

53 CJEU, judgment of 14 February 2019, *Horgan and Keegan*, C-154/18; judgment of 7 February 2019, *Escribano Vindel*, C-49/18.

54 CJEU, judgment of 19 June 2014, *Specht and Others*, C-501/12.

55 CJEU, judgment of 11 November 2014, *Schmitzer*, C-530/13; judgment of 28 January 2015, ÖBB, C-417/13; Liu and O'Cinneide (2019), p. 64.

More generally, much of the CJEU case law is concerned with maximum age requirements and compulsory retirement ages. While many Member States have abolished a compulsory retirement age within the private sector, a large majority still recognise them for some or all categories of civil servants, although the precise age limits vary significantly between Member States.[56] The CJEU has accepted labour policies that terminate employment automatically,[57] general compulsory retirement ages,[58] and compulsory retirement ages for civil servants (for example prosecutors[59] or university professors)[60] if limits “cannot be regarded unreasonable”,[61] and even if it produces extreme economic hardship for the prospective pensioners.[62] Intergenerational fairness and balanced age structures seems to be a most prominent drivers for the CJEU’s willingness to accept these policies, while the de facto benefit to younger workers is unclear.[63] However, when Hungary introduced a new compulsory retirement age for judges that (also) raised significant concerns regarding the independence of the judiciary, the CJEU challenged the assumption that it was necessary to ensure standardised age limits and a balanced age structure. Indeed, the Court lamented the lack of transitional periods that made it impossible for judges to adjust to the new arrangement and highlighted that the measures would not ensure age diversity in the long term.[64] Nevertheless, Member States seem to retain significant discretion regarding the retirement age of civil servants, especially if they are long standing policies that are generally accepted and common within the Member States. Indeed, this can be demonstrated by reference to *Olympiako Athlitiko Kentro Athinon* concerned with saving measures introduced by the Greek government following the economic crisis and the conditions imposed by the debtors reconfirms this.[65] The case concerned national legislation that placed employees in the public sector under a (disadvantageous) labour reserve system if they eligible to a full pension (i.e. 58 years old and 35 years of service). While the national legalisation aimed at reducing public expenditure (i.e. EUR 300 million in 2012) the court accepted that it was not a simply cost argument but included broader budgetary consideration legitimate within the context of the economic crisis and aimed at restructuring. The court then also accepted that legislation was appropriate and necessary, referring to the broad national discretion to balance different interests within the labour market. It also stressed that the legislation only affected those who are eligible to a full pension and thus did not “appear to prejudice unreasonably the legitimate interests of the workers affected”[66] within the context of an economic crisis. Within the public service, maximum age requirements used to be common too. Such regulations fall within the scope of access to employment within the public sectors (Article 3, paragraph 1(a) Framework Directive). Article 6 explicitly refers to “the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of

56 Chopin and Germaine (2022), pp. 74–75.
57 CJEU, judgment of 5 July 2012, *Hörnfeldt*, C-141/11.
58 CJEU, *Age Concern England* (n. 51).
59 CJEU, judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10.
60 CJEU, judgment of 18 November 2010, *Georgiev*, C-250/09.
61 CJEU, *Palacios de la Villa* (n. 50).
62 CJEU, *Rosenbladt* (n. 50).
63 Schlachter (2011), p. 295; in more detail ter Haar (2020).
64 CJEU, judgment of 6 November 2012, *Commission v. Hungary*, C-286/12.
65 CJEU, judgment of 15 April 2021, *Olympiako Athlitiko Kentro Athinon*, C-511/19.
66 CJEU, judgment of 15 April 2021, *Olympiako Athlitiko Kentro Athinon*, C-511/19, para. 49.

employment before retirement". Moreover, maximum age requirements that are linked to ability and performance such as physical fitness may also constitute a genuine occupational requirement. If they are necessary to ensure public health or security Article 2, paragraph 5 can be invoked too. As such, maximum age requirements cannot be generally accepted, since they depend on the specific position in question.

The CJEU has considered such requirements in terms of access to the police and fire brigades. A satisfactory "age pyramid" can be necessary in these professions to ensure that younger workers can perform the most physically demanding tasks. In that line of reasoning, age limits are only permissible if they are typically related to workers' aptitude. In *Vital Pérez*, the CJEU rejected the aptitude argument because the physical requirements were not particularly high and included administrative duties, and the Court rejected a justification related to training requirements because no concrete evidence was provided.[67] The necessity was also questioned, as individual aptitude tests could achieve the same aim.[68] Similar but more substantiated arguments were accepted in *Wolf*[69] and *Salaberria Sorondo*.[70] The CJEU accepted that a majority of younger recruits were required, because they were able to meet the exceptionally high physical requirements. As such, age was viewed as a genuine occupational requirement.[71] Given the Court's case law on age limits justified with reference to decline in performance or physical capability, the age limits will also have to be applied consistently and be in line with national or international regulations.[72]

Beyond that, the Court still needs to explore the precise scope for age limits related to training and reasonable periods of employment. This seems very relevant within the public sector, as the special structural features of public-law employment related to lifetime employments and remuneration principles may further justify maximum recruitment ages.[73]

V. Substantial Constitutional Rights

All EU Member States have constitutional equality principles or a specific prohibition of discrimination. In this regard the UK is an exception, since it is now a former EU Member State, and it does not have a written constitution.[74] Some Member States additionally impose specific duties on the State to ensure substantive or de facto equality, most commonly between men and women, and special protection for mothers and motherhood. For example, the German Basic Law (*Grundgesetz*, GG) imposes a duty to "promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist" (Article 3, paragraph 2 GG). Similar obligations exist in

67 CJEU, judgment of 13 November 2014, *Vital Pérez*, C-416/13.
68 Liu and O'Cinneide (2019), p. 66.
69 CJEU, judgment of 12 January 2010, *Wolf*, C-229/08.
70 CJEU, judgment of 15 November 2016, *Salaberria Sorondo*, C-258/15.
71 ter Haar (2020).
72 CJEU, judgment of 12 January 2010, *Petersen*, C-341/08, concerned with dentists; CJEU, judgment of 13 September 2011, *Prigge and Others*, C-447/09, concerned with pilots.
73 As held by the German *Bundesverfassungsgericht*, judgment of 21 April 2015, 2 BvR 1322/12. See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume.
74 Chopin and Germaine (2022), p. 10.

other Member States, such as Austria, France, Finland, and Italy.[75] Moreover, Article 6, paragraph 4 GG entitles mothers to the protection and care of the community. Such duties also exist in other Member States.[76] Other Member States' constitutions are more focused on non-discrimination than equality.

The UK's traditional approach towards equality and non-discrimination developed within the context of the rule of law. For Dicey all that mattered was the equal application of the law (i.e. equality before the law) without any scope for a substantive evaluation of its content.[77] However, there has been some evidence that courts may review unreasonable or irrational behaviour.[78] Still falling short of a constitutional duty to ensure equality, the Equality Act 2010 now imposes an obligation on public bodies to have "due regard" of the equality duty.[79] This has led to a series of cases challenging the activities of local government, some of them successfully challenging the limited access to benefits that further heighten inequalities between protected groups.[80] However, having *due regard* is procedural rather than substantive, and does not provide minimum protection or impose a duty to ensure equality. As such, the concept of non-discrimination within the Equality Act remains key. More generally, the Human Rights Act 1998 gives effect to the European Convention of Human Rights (ECHR) within the domestic context. As such, it is possible to invoke Article 14 ECHR, to challenge arbitrary differential treatment of different groups with similar or equal needs, albeit often with limited success, given the broad scope of possible justifications.[81] However, this can only be done within the UK's constitutional limits respecting the sovereignty of Parliament.

Either way, constitutional non-discrimination, equality principles and other substantive constitutional rights should be distinct from horizontal EU non-discrimination law. On the one hand, constitutional principles of non-discrimination law as also expressed in Article 14 ECHR or Article 21 Charter of Fundamental Rights of the European Union (CFR) are often open-ended, and as such allow for some justification of direct discrimination. While it is true that differential treatment based on the most common protected characteristics, such as sex, race, religion, and disability, is specifically suspect and thus heightens the justification requirements, it is not a closed list of protected characteristics that only allows justification of direct discrimination within the limits explicitly recognised within the law. In EU law this includes special protection related to pregnancy and maternity, occupational requirements, and rights of religious institutions. Equality principles, on the other hand, are more focused on substantive equality and thus go beyond the principle of non-discrimination. Indeed, if taken seriously, they can be used to challenge legal regimes that do not recognise the needs of disadvantaged groups and encourage asymmetrical actions to foster equality.[82]

Nevertheless, these constitutional principles remain important if we consider the impact of EU non-discrimination law on the civil service. Most obviously, while constitutional

75 Schiek (2021), p. 667.
76 For an overview see Suk (2018).
77 Dicey (1985), p. 114; see for discussion Jowell (1994), p. 4.
78 McColgan (2001), p. 215.
79 Section 149 Equality Act 2010.
80 High Court, judgment of 19 May 2011, *R (W) v. Birmingham CC*, CO/1765/2011.
81 High Court, judgment of 14 June 2018, *TP, AR v. Secretary of State for Work and Pensions*, CO/5828/2017.
82 Schiek (2021).

principles rarely apply directly to private employment contracts,[83] constitutional principles do apply here since many public employment relationships are governed by law, not contract or collective agreement. Simultaneously, the EU directives have direct vertical effect within public employment.[84] Constitutional principles can have an impact on the understanding of EU non-discrimination law on the national level and determine their scope. Here we do not only need to consider the meaning of the national constitutional scope of equality and non-discrimination principles, but also other rights related to the protected characteristics, such as the right to religious freedom, the protection of motherhood and families, and the right to liberty or personal autonomy.

1. *Positive Actions to Promote Gender Equality and EU Non-discrimination Law*

Positive actions have been a continued focus of the CJEU. While one may consider them as asymmetric actions to ensure substantive equality, the Court has viewed them as an exception to the non-discrimination law concept and thus interpreted their scope narrowly. This puts the EU non-discrimination law principle somewhat at odds with constitutional systems that impose duties to promote substantive equality. Indeed, the first cases on quotas reaching the CJEU originated from Germany, where States chose to introduce quotas as tie break rules, to promote gender balances within the civil service and counterbalance structural and systemic discrimination within the promotion procedures. Accordingly, women could receive preferential treatment compared to equally qualified men if they were under-represented. In *Kalanke* the CJEU viewed this as automatic, absolute, and unconditional preferential treatment of women contrary to the individual right laid down in the equality directives, as it went beyond ensuring equal opportunities.[85] Subsequently, *Marshall*[86] and *Badeck*[87] confirmed that tie-break rules can comply with EU requirements, if they have saving clauses and allow for individual assessment that may shift towards favour of the equally qualified male applicant. Outside the scope of quotas, the need for individual assessment that potentially sways in favour of the male applicant has been confirmed too.[88] In addition, the Court noted that access to education or services could indeed be limited, as long as there were alternative (private) facilities available.[89] This approach was retained as the Court rejected the possibility of preferential treatment in the case of sufficient qualification. Instead, it insisted on equal or essentially equal qualification.[90] It is doubtful that this sufficiently recognises the systemic inequality that makes is difficult for disadvantaged groups to achieve equal qualification and for merit to be recognised in an equal manner.

However, the domestic responses to the CJEU case law are often surprising. While it has been suggested that positive actions within the civil services, including conditional tie-break rules create a significant administrative burden that makes them rather unattractive,

83 However, there are some exceptions, see for example Waaldijk (2004), p. 342.

84 CJEU, judgment of 2 August 1993, *Marshall v. Southampton and South West Hampshire Area Health Authority*, C-271/91.

85 CJEU, judgment of 17 October 1995, *Kalanke v. Freie Hansestadt Bremen,* C-450/93, paras. 16, 19, 21.

86 CJEU, judgment of 11 November 1987, *Marschall v. Land Nordrhein-Westfalen*, C-409/95.

87 CJEU, judgment of 28 March 2000, *Badeck and Others*, C-158/97.

88 CJEU, *Lommers* (n. 15).

89 CJEU, *Badeck and Others* (n. 87) concerned with training; CJEU, *Lommers* (n. 15) concerned with access to the Ministry's own nursery.

90 CJEU, judgment of 6 July 2000, *Abrahamsson and Anderson*, C-407/98.

they do still exist. Indeed, some States have amended their equality laws and acts on the civil service in recent years, especially by introducing gender quotas with the requirement of *substantially* equal qualification only.[91] The German Women Lawyers' Association (*Deutscher Juristinnenbund*) considers the change to enable a more realist evaluation of merits, without being overly formalistic, and considers this to fall within the meaning of "essentially equal qualification" as required by the CJEU.[92]

The specific domestic responses following CJEU judgments may also surprise the casual reader of CJEU case law. For example, while the *Kalanke* judgment suggests that the male claimant should have been promoted over the younger female applicant without a dependent partner and children, the State instead assessed both applicants' qualifications via extensive interviews. This resulted in the female applicant being deemed better qualified for the position. This demonstrates how presumably objective assessment procedures based on merits often perpetuate systemic disadvantages.[93] Having blocked the opportunity for strict unjustified preferential treatment, the CJEU judgment thus encourages the revaluation of the way merit is assessed.

The focus on equal opportunities also means that compensatory measures cannot be accepted. This has created significant clashes with the French rules on access to the civil service and pay that recognise structural inequality within work life, albeit often with a rather broad brush excluding all men. In *Griesmar*, the CJEU challenged certain credits for the calculation of retirement pension that were granted to female civil servants that could demonstrate that they had brought up their children, simply by assessing that this excluded men that were in the same situation.[94] Measures providing benefits to mothers and reducing the pension gap overall were thus deemed contrary to non-discrimination law because they were based on national trends and statistical burdens and not the individual circumstances of each civil servant.[95] They could not be justified as positive actions because an increased pension in no way improves civil servants' opportunities during their working life.

The Court thus continues to approach positive actions as a narrow exception to the non-discrimination principle rather than as part and parcel of substantive equality. On the one hand, gendered preferential treatment is understandably suspicious within a non-discrimination law framework. Provisions that only benefit mothers but not fathers disadvantage men that have taken up typically female gender roles related to childcare. As such, they are based on stereotypes and are likely to reinforce the traditional gender division of labour. On the other hand, these stereotypes do describe a statistical reality, as mothers are much more likely to carry out most childcare responsibilities or suffer disadvantages because of their motherhood regardless. It is thus difficult to see how a national legislator can recognise and compensate for them without being caught by the EU non-discrimination law. The French re-evaluation of the credits system following *Griesmar* certainly faced further criticism. In *Leone*, the CJEU assessed the credit system that granted extra credit to those civil servants that took at least two months of childcare leave. While it recognised different

91 North Rhine-Westphalia, Mecklenburg Pomerania and Lower Saxony.

92 Deutscher Juristinnenbund (2016).

93 Schiek (2021), pp. 684–685.

94 CJEU, judgment of 29 November 2001, *Griesmar*, C-366/99.

95 Similar arguments were made in the CJEU judgment of 30 September 2004, *Briheche*, C-319/03 regarding rules granting access to the civil service beyond a certain age to widows, and only widows.

types of leave, including parental and adoption leave, which could thus benefit fathers, it also included maternity leave that is compulsory and thus, by definition, benefitted all birth mothers. As such, the CJEU assessed that the rules were "liable to be met by a much lower proportion of male civil servants than female civil servants, with the result that it places a much higher number of workers of one sex at a disadvantage as compared to workers of the other sex".[96] Whether such indirect sex discrimination could be justified was doubted, with reference to *Griesmar*, assessing that there was no scope for a justification if the actual aim was discriminatory, namely to provide additional pension credits to female civil servants with children. This seems to challenge any kind of compensatory measures for mothers outside the scope of maternity and pregnancy, even if broadened to other care givers.

However, the French courts' response to the *Leone* judgment steers in a different direction. The CJEU strongly suggested that there was no justification because the rules simply constituted preferential treatment in disguise and maternity leave was already accompanied by the maintenance of acquired pension and promotion rights. However, the French Council of State agreed with the French Government that the scheme reflected a legitimate aim. It assessed that women with children still progressed more slowly within their career and received lower pensions even if they retained their pension and promotion rights during maternity leave. To demonstrate that, the court referred to statistical evidence and further highlighted that it was a temporary measure, as it only applied to children born before 2004.[97] As such, the French courts' approach seems much more guided by the experience of group disadvantages that are well documented than the individual circumstances of civil servants. The judgment also recognises past commitments. As such, it is important to note that past choices that carry specific disadvantages are made in a specific set of circumstances and cannot be changed retroactively. Reducing the pension entitlements afterwards seems unfair in those circumstances and ignores the specific structural inequality of the time.

2. *Religious Convictions and Neutrality Requirements*

The protection from religious discrimination within the public service and its relationship with religious freedom is a contentious issue. Religious convictions and practices may interfere with various obligations of civil servants. The discussion will focus on dress codes that impose strict rules of neutrality and State officials' refusal to perform or support same-sex marriages because they conflict with their beliefs.

2.1. *Dress Codes*

In the controversial judgments[98] in *Achbita*[99] and *WABE*,[100] the CJEU essentially accepted neutrality requirements within dress-codes to be justified indirect religious discrimination if they are imposed consistently, only do what is necessary to preserve the neutral image, and do not single out certain religious signs or expressions. Neutrality

96 CJEU, judgment of 17 July 2014, *Leone*, C-173/13, para. 51.

97 Council of State, judgment of 27 March 2015, Quintanel, no. 372426; discuss in Mercat-Bruns (2021), p. 24.

98 Howard (2020) with references therein; Mulder (2022).

99 CJEU, *G4S Secure Solutions v. Achbita* (n. 24).

100 CJEU, judgment of 15 July 2021, *WABE*, C-804/18 and C-341/19.

itself is viewed as legitimate in principle and covered by Art 16 CFR. While the Court in *WABE* and *SCRL* accepted that a mere desire of neutrality is not sufficient if it does not relate to a genuine need of the employer,[101] it should not be difficult to demonstrate such a need within the context of the civil service. Indeed, in *WABE* the CJEU deemed the parents' interest in religious neutrality within the context of a private nursery to be sufficient. As such, the CJEU approach is rather deferential towards the interests of neutrality.

National approaches towards religious neutrality differ significantly and some rely on the CJEU more directly than others. While some impose strict neutrality due to the separation of State and church, others approach religious expression of civil servants within the context of competing constitutional interests. The UK, on the other hand, does not limit the wearing of religious symbols in a similar general manner. For example, police officers may wear religious clothing, unless it poses a safety risk. Since early fears that the French concept of *laïcité* would be imposed on all the Member States[102] did not materialise, due to the directive only providing minimum protection, it is unlikely that the Member States will have to adjust their approach to the religious expression of civil servants. Indeed, in *WABE* the CJEU explicitly referred to a margin of discretion that was granted to the Member States within the context of the objective justification, as EU law did not determine the precise balance between religious freedom and other constitutional rights. This language is very uncommon within the context of EU non-discrimination law and suggests a flexibility within religious discrimination that does not exist within the context of the other protected characteristics.

The German Federal Constitutional Court has considered dress-codes several times. In such cases, the Court balances different constitutional interests, such as State neutrality and the individuals' right of freedom of religion. Accordingly, civil servants may not wear any religious signs, including signs that are not per se religious proclamations but signs of religious practice, if there is a real need for neutrality. Accordingly, teachers are allowed to wear headscarves unless this poses a concrete danger (*konkreten Gefahr*) to the peace of the school.[103] Along these lines, the German Federal Labour Court held that religious freedom has to be balanced with the economic interests of private businesses. However, a headscarf ban could only be justified if the employer can indeed demonstrate a real risk.[104] In its judgment on the judiciary,[105] the Federal Constitutional Court (*Bundesverfassungsgericht*) accepted the neutrality requirement without an exploration of the real risk a headscarf would pose. Instead, the court assessed that the judiciary needs to demonstrate "a clearly defined distance" of the public officials. Its functioning requires social confidence in the judiciary, which is maintained by strict formalisation provisions. As such, the State may take measures to ensure the neutrality of the judiciary from the "point of view of an objective third party". This reasoning can easily be transferred to other civil servants wearing uniform.[106] Accordingly, the German constitutional protection is somewhat more nuanced than the CJEU approach. On the one hand, it does uphold neutrality requirements within

101 CJEU, judgment of 13 October 2022, *L.F. v. SCRL*, C-344/20, para. 40; CJEU, *WABE* (n. 100), para. 64.

102 Cloots (2018), p. 589.

103 *Bundesverfassungsgericht*, judgment of 27 January 2015, 1 BvR 471/10.

104 *Bundesarbeitsgericht*, judgment of 10 October 2002, 2 AZR 472/01.

105 *Bundesverfassungsgericht*, judgment of 14. January 2020, 2 BvR 1333/17.

106 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C. D. Classen in this volume.

certain State functions, but at the same time it considers the real risk religious expression poses to the legitimate interests of neutrality. As such, German constitutional protection seems to be more robust than EU law on religious discrimination. Such a development was not expected.

A focus on discrimination alone can certainly allow a somewhat different approach, as it invites a strict test of objective justification. In a 2017 case, the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*)[107] assessed a dress-code issued by the police that did not allow the wearing of headscarves.[108] Following the CJEU case law, the institute assessed the dress-code under the scope of indirect discrimination, as it was aimed at neutrality in all aspects, not just specific religions. It then considered the objective justification. It accepted the appearance of neutrality and objectivity and the creation of a safe and inclusive work environment as legitimate aims. However, it doubted that a strict dress-code was necessary to achieve these aims. Specifically, it considered that a strict application of the dress code was only relevant when police officers engage with the public. While the claimant at times did have some visual contact with citizens via a video link, she was not in the same room with them. As such, her headscarf could not create an unsafe work environment. Moreover, her work was purely administrative, which reduced the need of neutrality in the view of the Institute. This led to the conclusion that the strict application of the dress code was not necessary. It was further supported by the fact that the claimant had been allowed to work as a police officer in civilian clothes wearing her headscarf. The focus was thus on the discrimination itself that then imposes a strict test of objective justification. While the CJEU is referenced directly, the Institute seems to be much more willing to question the legitimacy of the measures, especially their necessity, even if the aim is deemed legitimate.

2.2. Legal Duties

However, the aforementioned conclusions must be distinguished from cases where the accommodation of religious conviction impedes on the rights of others.[109] This has been explored in several cases concerned with the duty to perform same-sex marriages. Within the early case law, the Institute's predecessor, the Dutch Equal Treatment Commission, did not consider a duty to fulfil the task to be necessary, focusing on religious discrimination and the practical implications only. Accordingly, the council was able to ensure access to same-sex marriages, without imposing the duty on all civil servants.[110] However subsequent opinions redefined the issue and considered broader constitutional implications, namely the duty of equality. Such a duty could not be upheld unless all civil servants that were tasked with marriage performances indeed performed all marriages.[111] As such, it did accept that it was necessary for each individual civil servant to fulfil their legal duties. While individual civil servants may not be able to complete every task because of their religious belief (for example, working on Sunday, wearing a specific uniform), religious freedom is limited if it impinges on the rights of others. Such a constitutionalised perspective was

107 Quasi-judicial body that has replaced the Dutch Equal Treatment Commission.

108 *College voor de Rechten van de Mens*, judgment of 20 November 2017, 135.

109 Loenen (2019), p. 233.

110 *Commissie gelijke behandelingI,* judgment of 1 January 2002, 25; judgment of 1 January 2002, 26.

111 *Commissie gelijke* behandeling, judgment of 15 April 2008, 40.

further developed by the courts.[112] With reference to *Eweida and Others*,[113] the courts held that the requirement did not disproportionally limit the right to religious freedom, focusing on the balance of competing human rights and the protection of religious minorities within Dutch legal culture. The relevance of religious discrimination under the Dutch Equal Treatment Act (*Algemene wet gelijke behandeling*) and the EU legal requirements were completely neglected. Instead, the ECHR influence is evident.

The UK Court of Appeal's decision in *Ladele* prima facie suggests a similar conclusion.[114] However, it developed its reasoning primarily within the non-discrimination law paradigm. Ms Ladele objected to performing same-sex civil partnerships as she considered herself unable to reconcile this with her Orthodox Christian faith. The question was whether the requirement to do so indirectly discriminated against her on religious grounds. In the context of justification, the Employment Tribunal focused on the need to provide an efficient service, while the higher courts deemed the more principled policy aim of "promotion equality and dignity for all" policy as more important. This mattered for the assessment. Individual registrars can be easily accommodated if the policy simply focuses on the efficiency of the service. However, if it aims at preventing employees from engaging in discriminatory behaviour, the measure necessarily excludes any accommodation of individuals' beliefs if such beliefs make unjustifiable distinctions. The only question that remains may then be whether the council is indeed allowed to implement such a policy. In that regard, the court assessed that the Equality Act 2010 itself, prohibiting discrimination based on sexual orientation in all sectors with only a narrow exception for religious organisations, indicated that such a policy was legitimate. Accordingly, the conclusion is not based on constitutional concepts of equality, but on competing rights of groups with protected characteristics and the legislative compromise between these groups.[115]

VI. Conclusion

This chapter has explored the EU legal framework prohibiting discrimination on grounds of sex, race and ethnicity, religion or belief, age, disability, and sexual orientation, its impact on the Member States and its specific relevance within the civil service in comparison to private employment. Rather than providing a one-to-one comparison of the EU directives and implemented law, the chapter explored how different national courts respond to challenges to the national approaches posed by the CJEU through its interpretation of EU non-discrimination law and alternative national legal discourses that may overshadow the impact of EU law. This focus was guided by the hypothesis that we can only start understanding the impact of the EU legal development if we engage in the courts' responses to CJEU case law. Indeed, most Member States have implemented the directives faithfully, including EU conforming definitions of direct and indirect discrimination. However, their meaning on the national level still depends on the broader legal context and constitutional

112 *Rechtbank Den Haag*, judgment of 23 October 2013, SGR AWB 12/9354 AW; *Centrale Raad van Beroep*, judgment of 29 February 2016, 13/6413 AW.

113 ECtHR, judgment of 15 January 2013, *Eweida and Others v. United Kingdom*, 48420/10, 36516/10, 51671/10, 59842/10.

114 Court of Appeal, judgment of 15 December 2009, *Ladele v. London Borough of Islington*, A2/2009/0518.

115 See further, Mulder (2019).

understanding that may push national approaches towards different directions than that of the CJEU.

After discussing specific aspects of EU non-discrimination law that are particularly relevant within the civil service, the analysis focused on national approaches towards positive actions addressing gender inequality within the civil service and respect for religious civil servants. As such, the analysis demonstrated how national constitutional frameworks often prevail. EU non-discrimination law certainly harmonised the national legal frameworks on discrimination. However, there are still significant differences regarding its meaning as the concept interacts with constitutional principles, international legal obligations, and national cultural contexts. The role of constitutional requirements within the public sector are than potentially able to undermine or support the consistent and stringent application and implementation of EU non-discrimination law, as it evolves within constitutional paradigms that are different and potentially incompatible with the concepts developed under the scope of EU non-discrimination law or vice versa.

Bibliography

Chopin I., Germaine C. (2022), *A Comparative Analysis of Non-Discrimination Law in Europe 2021*, Luxemburg: European Union.

Cloots E. (2018), 'Safe Harbour or Open Sea for Corporate Headscarf Ban? Achbita and Bougnaoui', 55 *Common Market Law Review*, 589–624.

Deutscher Juristinnenbund (2016), *Press Release 2016–22*, www.djb.de/presse/stellungnahmen/detail/pm16-22.

Dicey A.V. (1985), *Introduction to the Study of the Law of the Constitution*, Indianapolis: Liberty/Classics.

Geddes A., Guiraudon V. (2004), 'Britain, France, and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm', 27(2) *West European Politics*, 334–353.

Havelková B., Möschel M. (2019), *Anti-Discrimination Law in Civil Law Jurisdictions*, Oxford: Oxford University Press.

Howard E. (2020), 'Headscarves Return to the CJEU: Unfinished Business', 27 *Maastricht Journal*, 10–28.

Jowell J.L. (1994), 'Is Equality a Constitutional Principle?', 47 *Current Legal Problems*, 1–18.

Liu K., O'Cinneide C. (2019), *The Ongoing Evolution of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*, Luxembourg: European Union.

Loenen T. (2019), 'The Impact of Anti-Discrimination Law in the Netherlands', in Havelková B., Möschel M. (eds), *Anti-Discrimination Law in Civil Law Jurisdictions*, Oxford: Oxford University Press, 233–243.

McColgan A. (2001), 'Discrimination Law and the Human Rights Act 1998', in Campbell T., Ewing K.D., Tomkins A. (eds), *Sceptical Essays on Human Rights*, Oxford: Oxford University Press, 215–242.

Mercat-Bruns M. (2020), *Questionnaire on Indirect Sex Discrimination in Employment*, European Equality Law Network, on file with author.

Mercat-Bruns M. (2021), *Country Report Gender Equality France 2021*, Luxembourg: European Union.

Micklitz H.-W. (2015), 'On the Intellectual History of Freedom of Contract and Regulation', 4(1) *Penn State Journal of Law and International Affairs*, 1–32.

Mulder J. (2017), *EU Non-Discrimination Law in the Courts*, Oxford: Hart Publishing.

Mulder J. (2019), 'Cultural Narratives and the Application of Non-Discrimination Law', in Havelková B., Möschel M. (eds), *Anti-Discrimination Law in Civil Law Jurisdictions*, Oxford: Oxford University Press, 31–55.

Mulder J. (2021), *Indirect Sex Discrimination in Employment*, Luxembourg: European Union.

Mulder J. (2022), 'Religious Neutrality Policies at the Workplace', 59 *Common Market Law Review*, 1501–1522.

Mulder J. (2022), *Country Report Gender Equality Germany*, Luxembourg: European Union.
Sacco R. (1991), 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)', 39 *American Journal of Comparative Law*, 343–401.
Schiek D. (2007), 'Indirect Discrimination', in Schiek D., Waddington L., Bell M. (eds), *Non-Discrimination Law*, Oxford: Hart Publishing, 323–375.
Schiek D. (2021), 'Article 23: Equality between Women and Men', in Peers S., Hervey T.K., Kenner J., Ward A. (eds), *The EU Charter of Fundamental Rights*, Oxford: Hart Publishing, 667–692.
Schlachter M. (2011), 'Mandatory Retirement and Age Discrimination under EU Law', 27 *International Journal of Comparative Labour Law*, 287–299.
Suk J. (2018), 'Gender Equality and the Protection of Motherhood in Global Constitutionalism', 12(1) *Law & Ethics of Human Rights*, 151–180.
ter Haar B. (2020), 'Is the CJEU Discriminating in Age Discrimination Cases?', *Erasmus Law Review*, www.erasmuslawreview.nl/tijdschrift/ELR/2020/1/ELR-D-20-00001.
van der Vleuten A. (2007), *The Price of Gender Equality*, Hampshire: Ashgate.
Waaldijk K. (2004), 'Netherlands', in Waaldijk K., Bonini-Baraldi M. (eds), *Combating Sexual Orientation Discrimination in Employment*, Leiden, 341–375, https://scholarlypublications.universiteitleiden.nl/handle/1887/12587.

30 Gender Equality in the Civil Service

Sanja Korac

I. Introduction

The representation of women in government has been a long-standing concern in working groups, policy briefs, and thematic reports by international organisations, such as the Organisation for Economic Co-operation and Development (OECD), World Bank, and World Economic Forum. Many contributions have looked at the effects of women's representation in public governance of society, e.g. citizen commitment to public policy and perceptions of the legitimacy and effectiveness of public administrations.[1] It has also however been of academic interest. Yet while a seeming majority of scholarly studies and reports focus more generally on women in politics, and more specifically in parliament, insights into female representation in administration exist but are relatively less frequently explored and debated in the literature. The picture is even grainier when it comes to women at different echelons and/or in leadership positions in the civil service.[2] This is noteworthy insofar as senior positions in the civil service have discretion over government decision-making, policy advice, and to a varying extent resources.

Since the civil service is designed as a merit-based system where individuals are selected and promoted on the basis of their skills, knowledge, experience and increasingly performance, it should ideally reflect the broader societal groups that make up a country's society.[3] A civil service characterised by equal representation of women and men may promote core democratic values, inclusive decision-making, equal treatment, and equal opportunities for women and men in society.[4] It may also serve as a role model or benchmark for other sectors and thereby promote gender equality in the workplace more generally. It is therefore crucial to understand the extent to which women are represented in the civil service, the positions they fill, the work conditions that characterise the positions that are mainly filled by women, as well as policies and strategies to attract more women into public employment.

1 Groeneveld et al. (2020), pp. 441–464; Bowling et al. (2006), pp. 823–836.

2 Groeneveld et al. (2020), pp. 441–464; for exceptions, see Mani (1999), pp. 523–534; Omar and Ogenyi (2004), pp. 360–373; Zafarullah (2000), pp. 197–209; Cunningham et al. (1999), pp. 67–78; Choi and Park (2014), pp. 118–139; Lewis (1991), pp. 145–155; Lewis (2018), pp. 51–63.

3 See United Nations Development Programme (UNDP) (2021), pp. 1–181.

4 See OECD (2021), *Policy Framework for Gender-Sensitive Public Governance*, Meeting of the Council at Ministerial Level of 5–6 October 2021, C/MIN(2021)21.

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The present chapter aims to provide a focused overview of gender equality in the civil service, focusing on the aforementioned aspects. The study considers six European countries: Austria, Belgium, Germany, Italy, the Netherlands, and the United Kingdom. As the United Kingdom (UK) embarked on the path to Brexit with the referendum in June 2016 and left the European Union (EU) in January 2021, some data on the United Kingdom refers to periods different from those of the other countries. In line with the aim of the chapter, major areas of female representation are not covered, e.g. gender equality and gender gaps in politics and political representation, gender equality in public employment under private law. However, much of the data and information from secondary sources does not distinguish between the civil service (which is usually public employment under public law, entrusted with core government duties, and mainly active at national level) and government employees operating under private law. Thus, the findings and conclusions in this chapter need to be considered with this limitation in mind.

The next section of the chapter outlines gender equality and related terms and concepts. Section III discusses gender mainstreaming and offers insights into laws on equal treatment, directives on gender equality, institutional mechanisms and tools of gender mainstreaming in the European Union. Section IV provides a brief overview of the role of Human Resource (HR) tools for gender equality in the civil service, including practical examples. Section V is dedicated to the status quo of gender equality in the civil service of the six countries. Concluding remarks are provided in Section VI.

II. Gender Equality

Gender equality is a concept of equal rights, responsibilities and opportunities for all genders. Along these lines, gender equality does not mean striving for uniformity but rather eliminating discrimination based on gender. The focus of this chapter is limited to equality between women and men.[5] As a human right, gender equality has been a central part in international legislation but also international agreements such as the United Nations (UN) Sustainable Development Goals.[6] Although gender equality may exist de jure, it may not exist de facto. Legislation may prohibit gender discrimination and crucial gender equality strategies may be in place, but we can still observe a so-called gender gap. This refers to disparities in access to rights and assets, in the labour market and in outcomes such as health, economic situation, education, and so forth. Today the world gender gap is 32% and no country has completely closed it.[7] The gap is evident in different areas of society: employment, unpaid care work, access to decision-making positions and professions, as well as wages. The latter is the "gender pay gap", the gap in pay, wages, or income between women and men. The gender pay gap stems from the interaction of different factors. Although the complexity of this interaction cannot be captured in this chapter, key factors are briefly described.

5 The author is aware of the existence of further genders as well as the inequalities in society and public administration when it comes to genders beyond or between the two dichotomous biological sexes. However, due to the current design of most statistical databases and the focus of extant literature, the study is limited to two genders, female and male.

6 Transforming our world: the 2030 Agenda for Sustainable Development, adopted by the General Assembly on 25 September 2015 (UN resolution A/RES/70/1), 17th session Agenda items 15 and 116.

7 World Economic Forum (2021), p. 9.

EU countries still show a lower employment participation rate for women (62%) than for men (75%). Nearly a third of employed women work part-time,[8] which has consequences for income, career progress, and pensions. Interestingly, part-time work is more likely to be involuntary for men (due to failure to find full-time work) than voluntary (e.g. personal preferences, reconciliation with care work). Women's unpaid care work may be a reason for their low employment rate and high level of part-time work. There is a clear relationship between childcare and women's employment rates: the participation of mothers in the labour market is around 7% lower than for women without children, while the rate for fathers is around 3.5% higher than for men without children.[9] The employment rate for women generally also decreases as the number of children increases. This issue is often systemic: inadequately designed tax and benefit systems, particularly joint taxation, combined with a shortage of affordable and high-quality childcare facilities can significantly discourage women from entering the workforce full-time.[10] Although EU countries have made progress with parental leave policies and with acceptance of the latter, the majority of parental leave recipients are women. There are however sharp differences between countries. While parental leave is well accepted by fathers in Sweden, men in Finland, France, and Germany avail themselves of parental leave relatively less often. Paternity leave, which is shorter and higher paid than parental leave, is more popular.[11]

The gender pay gap varies across EU countries as well as between full-time and part-time positions,[12] but is visible across all occupations. It is even more consequential considering that some occupations that traditionally tend to be dominated by men are characterised by higher wages. Women still tend to be over-represented in lower-paying sectors, industries, and occupations. This occupational segregation may be a result of differences in knowledge, skills, and abilities that arise from disparities in education and training; differences in care and household responsibilities; discrimination due to organisational tradition and practice; gender-related identity, norms, attitudes, and stereotypes.[13] Women also still have less access to decision-making positions and professions while men hold a disproportionate share of positions in the top echelons of organisations. Although the number of women on boards has increased over the last two decades, not least due to regulations on woman quotas in the boardroom, the increase has been marginal. Women are also under-represented in senior positions in public administration and parliament.[14] Prior to the COVID-19 pandemic, the prevalent model of employment favoured physical presence, which advanced full-time, physically present employees for leadership positions. This glass ceiling particularly prevented women's career progress. Since the pandemic and associated shifts, remote or telework and the home office have become valuable and desirable, which may lower some of the occupational hurdles for women in the near future.

8 Eurostat (2020), Women's employment in the EU, https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20200306-1.

9 ILO (2022): over 2 million mothers left the labour force in 2020 according to new global estimates.

10 See Coelho et al. (2022), pp. 13 f.

11 Van Belle (2016), pp. 7 f.

12 European Institute for Gender Equality (EIGE) (2021), *Gender mainstreaming*, https://eige.europa.eu/gender-mainstreaming/policy-areas/employment.

13 See Hillmert (2015), p. 126; EIGE (2017), *Gender segregation in education, training and the labour market. Review of the implementation of the Beijing Platform for Action in the EU Member States*, https://data.consilium.europa.eu/doc/document/ST-14624-2017-ADD-2/en/pd.

14 EIGE (2021).

III. Gender Mainstreaming

A concept closely connected to gender equality is gender mainstreaming. Gender mainstreaming can be described as a strategy for achieving gender equality by taking a gender-sensitive perspective in the design and implementation of policies, programs, and activities to ensure that the needs and experience of women and men are taken into account.[15] There are different building blocks to gender mainstreaming:

- *Legal frameworks and directives.* Most EU countries include gender mainstreaming references in their national strategies and/or action plans for gender equality. Many European countries have also made gender mainstreaming a legal obligation via separate laws on gender mainstreaming or via resolutions of the Council of Ministers.
- *Institutional mechanisms.* Institutional mechanisms of gender mainstreaming are a precursor to progress towards gender equality. The Organisation for Economic Co-operation and Development (OECD) and EU[16] posit that key government bodies to implement gender mainstreaming should be created and placed at the highest level of government. Public institutions should integrate gender equality perspectives and resources should be invested in training and collaborative approaches. Guidelines, tools, clear roles, expectations, and accountability mechanisms should be provided, and gender statistics should be collected. Coordination mechanisms should be strengthened to ensure policy coherence and effective implementation of initiatives involving relevant non-government stakeholders to promote synergies.
- *Gender mainstreaming tools.* There exist various tools of gender mainstreaming, and they have been applied to a varying extent in European countries. The European Institute for Gender Equality, an EU agency, lists the following tools that may assist governments in pursuing gender mainstreaming: gender analysis, gender audit, gender budgeting, gender impact assessment, gender equality training, gender awareness-raising, gender-responsive evaluation, gender-sensitive monitoring, gender planning, sex-disaggregated data and gender statistics, gender-responsive public procurement, and gender stakeholder consultation.[17]

IV. The Role of HR Tools for Gender Equality in the Civil Service

Laws and regulations regarding the civil service are designed to provide equal opportunities for entering and progressing in the civil service and should therefore also guarantee gender equality. Although the share of women in public sector employment is higher than in private sector employment,[18] as recently as 2011, public administration was nevertheless among the least gender-equal industries (ranking 12th out of 14). Only construction and mining were less diverse.[19] While this may seem paradoxical at a first glance, it is crucial to

15 See Caglar (2013), pp. 337 f.; Walby (2005), pp. 322 f.

16 OECD (2023), *Toolkit for Mainstreaming and Implementing Gender Equality*, www.oecd.org/gender/governance/toolkit/government/institutionalmechanisms/; EIGE (2022), *Gender mainstreaming. Institutions and structures. EU Member States*, https://eige.europa.eu/gender-mainstreaming/institutions-and-structures/eu-member-states.

17 For explanation of the tools, see EIGE (2022).

18 See OECD (2021), p. 106.

19 Oxford Economics (2011), p. 2.

understand that mere presence in an institution or context does not automatically mean equal representation or in this case, gender equality. OECD figures show that few countries achieve gender parity in the top echelons of public administration.[20]

Several factors hamper gender equality in the civil service across the EU. In addition to the more general gender inequality issues in employment outlined previously, a lack of specialist training also hinders women's career progress in public administration (vertical occupational segregation).[21] EU and UN figures[22] also point to horizontal occupational segregation (gender imparity in a particular sector/policy field): women made up almost two-thirds of employees in education and health. Governments have, however, also recognised cultural biases and gender stereotypes as key factors contributing to discriminatory practices in recruitment, promotion, and leave policies. Such discrimination is mainly indirect and often unconscious. For example, a ministerial department advertises a vacancy for a full-time employment arrangement (100%).[23] Lack of flexibility in the extent of employment will make it more difficult for women with childcare responsibilities to apply, discriminating against this particular social group. Admittedly, this likelihood of discrimination only exists due to the general gender gap in unpaid care responsibilities that persists in society today, highlighting the complexity of the issues and factors contributing to gender (in-)equality.

From an employer perspective, gender equality in the civil service may therefore be achieved by purposely designing working conditions that among other things foster equal recruitment of women and men into lower-paid and higher-paid roles, give women and men similar performance scores on average, abolish gender imbalance in promotions, and support part-time employees in their career progress (including the possibility of taking leadership positions part-time).[24] These working conditions may be achieved through HR tools and workplace policies: e.g. a strategy to become a top employer of women; integrating gender equality into the organisation's core values, mission and vision; return-to-work programmes; specific support, training, and awareness for care work; mandatory training on unconscious bias for HR managers; de-biasing of job advertisements and promotion decisions; anonymising applications; standardised job interviews; skills-based approaches to recruitment and selection of personnel; diverse interview panels; mandatory gender-balanced shortlists; flexible working arrangements upon recruitment; making home office equipment available to all employees.

European countries have taken various measures to ensure gender balance in civil service recruitment. Some countries include an equality clause (specific phrasing of the job advertisement that may concern gender equality only or address diversity on the grounds of age, disability, ethnic background, sexual orientation, religion, faith, etc.) in job advertisements to attract female candidates. Some give recommendations on fair and equal treatment in employment to the decentralised recruitment units of each ministry (e.g. Poland). Others implement women's quota targets and mandatory targeted recruiting of women (usually however only via the equality clause in the job advertisement), but in order to keep the civil service merit-based, leave room for hiring the best-suited candidates

20 OECD (2021), p. 106.
21 Cotroneo et al. (2021), p. 9.
22 See Cotroneo et al. (2021), p. 11; UNDP (2021).
23 Cotroneo et al. (2021), p. 19.
24 Behavioural Insights Team (2021), p. 3.

even if this means that the quota is not filled (e.g. the quotas in Austria and Portugal are 50% and 40%, respectively). In other countries, there also exist mandatory guidelines for selection boards to consist of members of both genders (though not for gender parity on selection boards) and explicitly forbid direct and indirect discrimination on the grounds of gender, family responsibilities or vulnerabilities (Malta). The latter however is at least implied in all countries with general equal treatment laws. There are also countries with broader approaches, e.g. some align their HR and particularly recruiting mechanisms with the objective of increasing staff diversity and also highlight the importance of gender-balance in HR planning processes (Estonia), while others design their recruitment and selection systems according to the principal rules of openness, predictability, and traceability (Sweden).[25] However, Sweden is among the most gender-equal countries, which may lead to less emphasis on gender parity and gender equality in civil service HR matters.

Gender-specific shortlists in the civil service only seldomly appear to be implemented in European countries. This, however, is due to the principle of merit in the civil service, where gender-specific shortlists may be counterproductive in light of the broader societal issues of occupational segregation outlined previously. An exception is Portugal, where specific criteria for shortlists exist: the top two candidates must not be of the same sex and only two candidates of the same sex may be in the subsequent ranks. Senior management positions must be reviewed by the Recruitment and Selection Committee for Public Administration (CReSAP), which is obliged to take the gender balance into account when composing candidate lists. Again, there is room to deviate from this rule in favour of merit candidates. However, on the whole, little is known about the HR tools (i.e. recruitment, selection, and promotion practices) in the civil service. Despite the legal guidelines, there is leeway for discretion within administrations, which is why the literature tends to provide more general descriptions or case studies of practices within departments.

V. The Status Quo of Gender Equality in the Civil Service – An Overview of Selected Countries

Now for more detailed insights into gender equality in the civil service of Austria, Belgium, Germany, Italy, the Netherlands, and the United Kingdom. These European countries are a selection with high (Austria: 18.9; Germany: 18.3), moderate (the Netherlands: 14.2; UK: 13.9), and low (Belgium: 5.3; Italy: 4.2) overall gender pay gaps (Figure 30.1). From a gender equality perspective, it may be expected that countries with a low overall gender pay gap have successfully implemented a wider range of mechanisms, tools, and frameworks for gender equality. These countries may also have higher gender equality in their civil service. As the civil service may be a role model, in countries with a low overall gender pay gap, we may expect higher levels of gender parity across civil service and public sector employment and higher gender equality in remuneration aspects or wage groups. Furthermore, more standardised and purposely designed frameworks and tools for personnel management in the civil service may help promote gender equality in the latter.

To explore these possible relationships, this section first takes stock of the legal framework and directives on gender equality in the six countries. It then provides insights into the institutional mechanisms for gender equality, and gender mainstreaming tools that

25 Cotroneo et al. (2021), pp. 49 f.

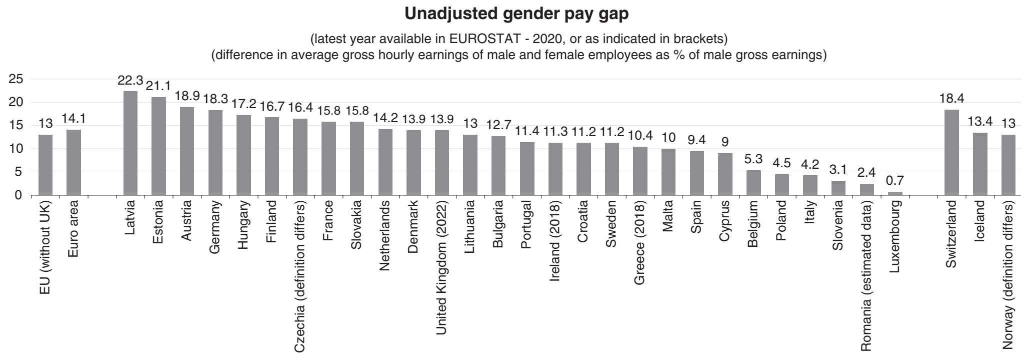

Figure 30.1 Unadjusted gender pay gap in EU countries and the UK

Source: Created by author using Eurostat 2023 online data code: earn_gr_gpgr2ct and UK Office of National Statistics 2022 (licensed under Open Government Licence v3.0): www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/annualsurveyofhoursandearningsashegenderpaygaptables

have been adopted by the countries. This is followed by an overview of HR tools and frameworks used in the civil service.

These aspects are compared across the six countries using scores assigned on the basis of progress or level of implementation of the mechanisms, tools and frameworks. The comparison of gender equality in the civil service and public sector employment is based on gender parity and remuneration figures.

1. *Legal Frameworks and Directives*

All six countries included in this comparison have implemented legal frameworks and directives that ensure gender equality, although their approaches vary. Austria's Federal Constitutional Law[26] guarantees legal equality for all citizens without discrimination based on sex. An amendment since 1998 mandates gender mainstreaming across all levels of government.[27] The 1979 Equal Treatment Act[28] specifically addresses gender equality in the workplace. Gender mainstreaming was first introduced by a 2000 cabinet decision,[29] and in 2011, gender criteria were established for all government departments.[30] Though

26 Article 7 of the Austria's Federal Constitution of 19 December 1945 (*Bundes-Verfassungsgesetz* (B-VG)).

27 Article 7 of the Austria's Federal Constitution as of 15 May 1998.

28 Federal Act on the Equal Treatment of Women and Men in Setting Wages (*Bundesgesetz über die Gleichbehandlung von Frau und Mann bei Festsetzung des Entgelts*) in the version of 23 February 1979 (BGBl. I No. 108/1979), last amended by the Equal Treatment Act (*Gleichbehandlungsgesetz (GlBG)*), in the version of 23 June 2004 (BGBl. I No. 66/2004).

29 Council of Ministers Proposal on the foundation of an inter-ministerial working group on gender mainstreaming (*Vortrag an den Ministerrat: Einrichtung einer Interministeriellen Arbeitsgruppe für Gender Mainstreaming*), GZ 140.240/3-SGIII/1/00.

30 Council of Ministers Proposal on the sustainable implementation of gender mainstreaming (*Vortrag an den Ministerrat: Nachhaltige Umsetzung von Gender Mainstreaming*), 31 August 2011, BKA-F140.240/0058-II/1/2011.

there is no national action plan, there exists an inter-ministerial working group that reports on progress in gender mainstreaming.[31]

Belgium established legal measures to promote gender equality,[32] including pilot projects in federal ministries in the 1980s. The 2007 Gender Mainstreaming Law[33] created a legal framework for gender equality at federal level, with similar measures at regional and local levels. A constitutional provision for gender equality was added in 2002.[34] The Gender Act of 2007 prevents discrimination based on gender, pregnancy or motherhood.[35] Although there is no federal gender equality strategy, a Federal Plan on Gender Mainstreaming exists since 2012, now in its third edition (2020–2024).[36]

Germany prioritises gender equality in its constitution and federal policies, where Article 3, paragraph 2 of the *Grundgesetz*[37] emphasises the State's responsibility to promote equality and eliminate existing disadvantages. Recent federal laws address gender equality in economic sectors. Gender mainstreaming is a guiding principle in all federal ministries: the Joint Rules of Procedure of the Federal Ministries[38] require ministries to promote gender equality in all their normative actions. The federal government has a cross-sectoral equality strategy and action plan[39] and ongoing challenges are monitored by Gender Equality Reports (*Gleichstellungsbericht*).

The Italian constitution[40] enshrines the principle of equality between women and men. The National Code of Equal Opportunities between Women and Men[41] consolidates 11 laws into a single text, introducing the principle of gender mainstreaming. Italy recently adopted its first National Strategy for Gender Mainstreaming and Equality (2021–2026),[42]

31 *Interministerielle Arbeitsgruppe Gender Mainstreaming* (IMAG) (inder-departmental working group gender mainstreaming), www.imag-gmb.at/.

32 Royal Decree on measures to promote equal opportunities between men and women in the private sector (*Arrêté royal du 14 juillet 1987 portant des mesures en vue de la promotion de l'égalité des chances entre les hommes et les femmes dans le secteur privé*), BEL-1987-R-4085.

33 Law on monitoring the implementation of the resolutions of the World Conference on Women held in Beijing in September 1995 and integrating the gender dimension into all federal policies (*Loi visant au contrôle de l'application des résolutions de la conférence mondiale sur les femmes réunie à Pékin en septembre 1995 et intégrant la dimension du genre dans l'ensemble des politiques fédérales*), no. 2007002011 of 12 January 2007.

34 Amendment to Article 10 of the Constitution of Belgium of 7 February 1831 (*Constitution de la Belgique*).

35 Law on combatting the discrimination between women and men (*Loi tendant à lutter contre la discrimination entre les femmes et les hommes*), no. 2009000344 of 10 May 2007.

36 Federal Plan on Gender Mainstreaming of 6 July 2012 (*Plan fédéral Gender Mainstreaming*); https://igvm-iefh.belgium.be/fr/activites/gender_mainstreaming/mise_en_oeuvre_de_la_loi/plan_federal_gender_mainstreaming_et.

37 German constitution of 23 May 1949 (*Grundgesetz für die Bundesrepublik Deutschland*).

38 Joint Rules of Procedure of the Federal Ministries (2000) (*Gemeinsame Geschäftsordnung der Bundesministerien*).

39 Agreement of the Coalition Government of the Federal Republic of Germany (2018), pp. 23–25; https://archiv.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1&type=field_collection_item&id=15997.

40 Article 3 of the Constitution of the Italian Republic of 22 December 1947 (*Costituzione della Repubblica Italiana*), last amended by the Constitutional Law of 7 November 2022 No. 2, GU Serie Generale No. 127 del 15-11-2022.

41 Code of equal opportunities between men and women, No. 246, GU Serie Generale No. 125 of 31 May 2006 – Suppl. Ordinario No. 133 (*Decreto Legislativo 11 aprile 2006, No. 198 – Codice delle pari opportunità tra uomo e donna, a norma dell'articolo 6 della legge 28 novembre 2005*).

42 The National Strategy for Gender Equality (*Strategia Nazionale per la Parità di Genere 2021–2026*); www.pariopportunita.gov.it/media/2051/strategia_parita-_genere.pdf.

promoting a gender perspective in all areas of social and economic life and policy. The strategy includes gender budgeting to assess public policy impacts. Sectoral directives and plans on specific aspects of gender equality complement the national strategy.[43]

Since 1983, the Netherlands have upheld the principle of equality and non-discrimination in their constitution.[44] The country has passed different laws, including the 1980 Equal Treatment Act for Men and Women[45] and the 1994 General Equal Treatment Act,[46] which provide the legal basis against discrimination. The Directorate for Emancipation introduced a national strategy for equality in 2017[47] and the Dutch government is committed to gender mainstreaming in its policy and regulation framework. Current priorities include promoting women's financial independence, senior appointments, eliminating the gender pay gap and addressing harassment and violence against women.[48]

Gender mainstreaming in the UK is fragmented and disconnected from general policy, with little evaluation taking place.[49] England, Scotland, Wales, and Northern Ireland have different instruments in place, although key legislation is found at national level, e.g. the 2010 Equality Act,[50] covering all dimensions of discrimination. Public authorities are required to have "due regard" for eliminating discrimination, but implementation of the Public Sector Equality Duty varies.[51] The Equalities and Human Rights Commission is the independent gender equality body. It recommended that the UK establish equality objectives and publish evidence of action and progress.[52]

43 E.g. Presidency of the Council of Ministers Directive on measures to promote equal opportunities and strengthen the role of the Unique Guarantee Committees in public administrations of 16 July 2019 (*Presidenza de Consiglio dei Ministri Direttiva 2/19 "Misure per promuovere le pari opportunità e rafforzare il ruolo dei Comitati Unici di Garanzia nelle amministrazioni pubbliche"*) reinforced the Unique Guarantee Committees for Equal Opportunities in Public Administrations for Workers' Wellbeing and against Discrimination and fostered gender equality in the public sector; Ministry of Health Plan for the application and diffusion of Gender Medicine of 6 May 2019 (*Ministero della Salute Piano per l'applicazione e la diffusione della Medicina di Genere*).

44 Article 1 of the Constitution for the Kingdom of the Netherlands of 24 August 1815 (*Grondwet voor het Koninkrijk der Nederlanden*).

45 The Equal Treatment Act for Men and Women of 1 March 1980 (*Wet gelijke behandeling van Mannen en Vrouwen*), NLD-1980-L-11830.

46 General Equal Treatment Act of 2 March 1994 (*Algemene Wet Gelijke Behandeling*), NLD-1994-L-44494.

47 Emancipation Policy 2018–2021 Principles in Practice of 29 March 2018, (*Emancipatienota 2018–2021: Principes in praktijk – Emancipatiebeleid*), KST30420270.

48 Ministry of Education, Culture and Science (2018), *Gender & LGBTI Equality Policy Plan 2018–2021: Putting principles into practice*, www.government.nl/documents/reports/2018/06/01/gender–lgbti-equality-policy-plan-2018-2021#:~:text=The%20Policy%20Plan%20contains%20an,gender%20diversity%20and%20equal%20treatment.

49 British Council (2016), Gender Equality and Empowerment of women and girls in the UK, www.britishcouncil.org/research-policy-insight/research-reports/gender-equality-empowerment-women-girls-uk.

50 Equality Act, 2010 c. 15.

51 Government Equalities Office (2013), Review of the Public Sector Equality Duty: Report of the Independent Steering Group, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/237194/Review_of_the_Public_Sector_Equality_Duty_by_the_Independent_Steering_Group.pdf.

52 Equality and Human Rights Commission (EHRC) (2019), p. 13.

2. *Institutional Mechanisms*

Concerning the institutional mechanisms for gender equality, the European Institute for Gender Equality (EIGE) provides a database[53] on officially agreed indicators under the Beijing Platform for Action in four dimensions: commitment to promotion of gender equality (H1), human resources of gender equality bodies (H2), gender mainstreaming efforts in government (H3), and production and dissemination of statistics disaggregated by sex (H4). Data collection varied over the years, which is why some indicators which should appear in Table 30.1 according to the numbering (i.e. H1b, H4b) are not shown.

Overall, Austria has the most points (56.5) and therefore the highest score (see Tables 30.1 and 30.2). UK however shows the highest commitment to promotion of gender equality (H1) (9 points), followed by Italy (8.5 points), Belgium (8 points), and the other three countries with 7.5 points each. The UK also leads with regards to human resources of gender equality bodies (H2) (4 points). Notably, Italy only achieves 1.5 points on this indicator. Gender mainstreaming efforts in government (H3) appear to be strongest in Austria (7.5 points) and weakest in the Netherlands (3.8 points). The other countries have between 5.8 and 6.9 points. Finally, when it comes to the production and dissemination of statistics disaggregated by sex (H4), the Netherlands and Germany have the highest points (5 and 4.2, respectively). Again, Italy scores the lowest with 2.5 points.

Comparing scores across the EU, it turns out that except for the UK, none of the other countries reach the EU-27 average[54] (9.1 points). Conversely, all but one country (Italy) exceeds the EU-27 average on H2 (1.7 points), and all but the Netherlands exceeds the EU-27 average on H3 (5.4 points). These figures suggest that the six countries included in this comparison do not necessarily show a strong commitment to the promotion of gender equality in explicit terms but do so implicitly by mobilising human resources and implementing gender mainstreaming structures, processes, and tools. Interestingly, only three of the six countries show a score on H4 above the EU-27 average (3.4 points).

Regarding the different gender mainstreaming tools, the comparison shows that the six countries tend to implement the same tools, though to different extents or in different ways. Interestingly, seven of the 12 tools have not been implemented at all in any of the six countries (Table 30.3). Austria has implemented gender budgeting, which has been a constitutional requirement since 2009,[55] as well as ex-ante impact assessments of laws, directives, and major programs which must consider the effects on gender equality, inter alia.[56] Although gender equality training is provided by the civil service academy and individual ministries, it is not mandatory.[57] The Austrian Federal Chancellery has published guidelines for gender-sensitive language and a document with examples.[58] While the production and dissemination of sex-disaggregated data and gender statistics is not mandatory, the

53 EIGE (2021), *Gender Statistics Database*, https://eige.europa.eu/gender-statistics/dgs.

54 Data from EIGE (2021), *Gender Statistics Database*, not shown in Table 30.1.

55 Article 13 of the Austria's Federal Constitution of 4 January 2008 (Bundes-Verfassungsgesetz (B-VG)).

56 Bundeskanzleramt (n.d.), *Gender Mainstreaming and Gender Budgeting*, www.bundeskanzleramt.gv.at/agenda/frauen-und-gleichstellung/gender-mainstreaming-und-budgeting.html.

57 Bundeskanzleramt (2012), *Gender Mainstreaming in training and development at federal level*, www.imag-gmb.at/dam/jcr:887f30cd-13ed-4a75-9b50-d7942e3a4e20/erhebungsbericht_gender_mainstreaming_in_der_aus-_und_weiterbildung.pdf.

58 Bundeskanzleramt (n.d.), *Linguist equal treatment: Information and guidelines on gender-sensitive language*, www.bundeskanzleramt.gv.at/agenda/frauen-und-gleichstellung/gleichbehandlung/sprachliche-gleichbehandlung.html.

Table 30.1 Institutional mechanisms for gender equality

Institutional mechanisms for gender equality and gender mainstreaming (Area H of the Beijing Platform for Action) – points	*Austria*	*Belgium*	*Germany*	*Italy*	*Netherlands*	*United Kingdom*
H1. Commitment to promotion of gender equality	**7.5**	**8**	**7.5**	**8.5**	**7.5**	**9**
H1gov. Governmental commitment to promotion of gender equality	6	5	6	5.5	6	9
H1a. Highest responsibility within government	2	1	2	2	2	2
H1c. Position of the governmental body	1	0	1	1	1	2
H1d. Mandate and functions, governmental body	2	3	1.5	1.5	1.5	2
H1e. Accountability of the government	1	1	1.5	1	1.5	1
H1f. Mandate and functions, independent body (max 3, new from 2021)	1.5	3	1.5	3	1.5	–
H2. Human resources of gender equality bodies	**2.5**	**3**	**2.5**	**1.5**	**2**	**4**
H2a. Personnel resources, governmental body	1.5	1.5	2	1.5	1	2
H2b. Personnel resources, independent body	1	1.5	0.5	0	1	2
H3. Gender mainstreaming	**7.5**	**6.9**	**5.8**	**6**	**3.8**	**6.5**
H3gov. Gender mainstreaming, governmental	7.5	6.9	5.8	5	3.3	6.5
H3a. Government commitment to gender mainstreaming	1.5	1	1.5	1	0.5	2
H3b. Gender mainstreaming structures and consultation processes	2	2	1.5	1	0.5	2
H3c. Tools and methods for gender mainstreaming	4	3.9	2.8	3	2.3	2.5
H4. Production and dissemination of statistics disaggregated by sex	**4**	**3**	**4.2**	**2.5**	**5**	**0**
H4a. Government commitment to the production of gender statistics	0	2	1.5	2	1.5	0
H4c. Effectiveness of dissemination efforts	4	1	2.7	0.5	3.5	0
TOTAL points	56.5	53.7	51.8	46.5	45.4	52.5

Source: EIGE Gender Statistics Database 2022, https://eige.europa.eu/gender-statistics/dgs/indicator/genmain_cont_im__instmech_allmain.

Table 30.2 Institutional mechanisms for gender equality – scores

	Score
Austria	3
Belgium	2
Germany	2
Italy	1
Netherlands	1
UK	2

Note: ≥55: 3; ≥50: 2, <50: 1.

Source: The author's own scoring based on the results in Table 30.1.

Table 30.3 Gender Mainstreaming Tools

	Gender analysis	*Gender audit*	*Gender budgeting*	*Gender impact assessment*	*Gender equality training*	*Gender awareness raising*	*Gender-responsive evaluation*	*Gender-sensitive monitoring*	*Gender planning*	*Sex-disaggregated data*	*Gender-responsive public procurement*	*Gender stakeholder consultation*	*Points*	*Score **
Austria	..	..	x	x	(x)	x	..	..	..	(x)	..	..	**4**	**3**
Belgium	..	..	x	x	x	..	..	..	..	x	..	..	**4**	**3**
Germany	..	..	..	(x)	(x)	x	..	..	..	(x)	..	..	**2.5**	**1**
Italy	..	..	(x)	(x)	(x)	..	..	..	..	x	..	..	**2.5**	**1**
Netherlands	..	..	..	(x)	(x)	x	..	..	..	x	..	..	**3**	**2**
UK	..	..	(x)	(x)	(x)	(x)	..	..	..	x	..	..	**3**	**2**

Note: x: 1 point, (x): 0.5 points, ..: no points.

Source: EIGE Gender Mainstreaming country specific information, https://eige.europa.eu/gender-mainstreaming/countries. * Note: >3.5: 3; ≥3: 2, <3: 1. *Source*: The author's own scoring based on the results provided in Table 30.1.

National Statistical Office collects and presents a compilation of data and facts about the situation of women and men in the country.[59]

In Belgium, the Gender Mainstreaming Law[60] mandates gender budgeting insofar as budget allocations of federal ministries and departments must consider a gender perspective in a "gender comment".[61] The same law also mandates ex-ante gender impact assessments for all laws and policies. Along these lines, the Regulatory Impact Assessment (RIA) law (Law of 15 December 2013 and Royal Decree of 21 December 2013)[62] requires a "gender test" for all files submitted to the Council of Ministers. The Gender Mainstreaming Law also guarantees the use and dissemination of gender statistics, and federal agencies must ensure that all statistics they produce are disaggregated by sex. The Belgian Institute for Equality between Women and Men organises gender mainstreaming training and disseminates gender statistics regularly.[63]

Germany has adopted ex-ante impact assessments that (implicitly) include a gender perspective and are legally required under the Joint Rules of Procedure of the Federal Ministries.[64] Gender-sensitive language is used and guidelines have been sent to all ministries on its use in government reports.[65] However, gender equality training is not mandatory and only available to some employees.[66] Although there is no legal obligation for the national statistical office to collect data disaggregated by sex,[67] the German government publishes the Gender Equality Atlas,[68] a comprehensive report that provides an overview of the regional differences in gender equality in Germany based on 41 indicators.[69]

In Italy, gender budgeting has been implemented as an obligation to highlight (i.e. assess) different impacts of policies on women and men, but has only so far been adopted

59 Statistics Austria (n.d.), Gender Statistics, www.statistik.at/en/statistics/population-and-society/gender-statistics.

60 Law on monitoring the implementation of the resolutions of the World Conference on Women held in Beijing in September 1995 and integrating the gender dimension into all federal policies (*Loi visant au contrôle de l'application des résolutions de la conférence mondiale sur les femmes réunie à Pékin en septembre 1995 et intégrant la dimension du genre dans l'ensemble des politiques fédérales*), No. 2007002011 of 12 January 2007.

61 Institute for the equality of women and men (n.d.), Manual for the application of gender budgeting within the Belgian federal administration, p. 29, https://igvm-iefh.belgium.be/sites/default/files/downloads/Manual%20gender%20budgeting.pdf.

62 Both Article 3.2 of the Gender Mainstreaming Law (2007) and the Regulatory Impact Assessment Law (2013) contain various provisions on administrative simplification which introduce the new 'Regulatory Impact Analysis' (RIA), https://igvm-iefh.belgium.be/fr/activites/gender_mainstreaming/mise_en_oeuvre_de_la_loi/test_gender.

63 Institute for the equality of women and men, https://igvm-iefh.belgium.be/en.

64 Article 2 of the Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien*).

65 Federal guidelines on the use of gender-sensitive language in government reports (2005), www.bmfsfj.de/resource/blob/80450/3412003d3b884cf7e7d1e22c329910a3/gm-arbeitshilfe-berichtswesen-data.pdf.

66 EIGE (2022), *Country-Specific Information Germany*, https://eige.europa.eu/countries/germany.

67 There is no obligation in the Federal Statistics Act of 22 January 1987 (*Gesetz über die Statistik für Bundeszwecke Bundesstatistikgesetz – BStatG*), in the version of 20 October 2016 (BGBl. 2016 I, p. 2394), last amended by Act of 20 December 2022 (BGBl. 2022 I, p. 2727).

68 Federal Statistical Office database (n.d.), www-genesis.destatis.de/genesis/online.

69 Interactive application of the Gender Equality Atlas (n.d.), www.bmfsfj.de/bmfsfj/meta/en/equality/equalityatlas.

by some ministries.[70] Gender impact assessment is legally required in the drafting of laws and policies.[71] However, the parliamentary Studies Service endowed with ex-ante gender impact assessments is still being consolidated.[72] The government regularly trains its employees in gender equality, but only some administrations, i.e. the Ministry of Economy and Finance and the Ministry of Justice and Defence, conduct specific training initiatives.[73] Gender statistics in Italy are strong and the national office of statistics is obliged to collect sex-disaggregated data, while gender-disaggregated data is included in all its reports and publications.[74]

Gender budgeting is not widely used in the Netherlands and there is no legal obligation to take a gender perspective in the preparation of ministerial budgets.[75] Although policy-makers are legally required to undertake ex-ante gender impact assessments when drafting laws and policies,[76] they are not required to report the results of such assessments; this makes it difficult to know whether they have been carried out.[77] Gender awareness-raising measures are in place to promote gender equality among government bodies, including training, workshops, and audio-visual resources.[78] The Netherlands has a website dedicated to gender statistics and publishes biennial research on the position of women and men via the Emancipation Monitor.[79]

The UK has generally not implemented gender budgeting or gender impact analysis.[80] Although specific policy measures[81] and the 2018 budget included some gender equality impact assessments, these were limited.[82] The Treasury Select Committee has however recommended inclusion of (in-)equality analysis of individual tax and welfare measures in the future.[83] In contrast, Scotland has implemented gender budgeting in

70 Public Finance and Accounting Law of 31 December 2009 (*Legge di contabilita' e finanza pubblica*), GU n. 303 del 31-12-2009 – Suppl. Ordinario n. 245, 09G0201; and EIGE (2022), *Country-specific information Italy*, https://eige.europa.eu/gender-mainstreaming/countries/italy.

71 Completion of the reform of the budget structure of 14 June 2016 (*Completamento della riforma della struttura del bilancio dello Stato*), GU n. 125 del 30-05-2016, 16G00103.

72 EIGE (2022), *Country-specific information Italy*, https://eige.europa.eu/gender-mainstreaming/countries/italy.

73 The State General Accounting Office (n.d.), Italy's first gender budget, www.rgs.mef.gov.it/_Documenti/VERSIONE-I/Attivit–i/Rendiconto/Bilancio-di-genere/2016/General_overview_gender_budget_2016.ppt and EIGE (2022), *Country-specific information Italy*, https://eige.europa.eu/gender-mainstreaming/countries/italy.

74 Istituto Nazionale di Statistica (ISTAT), www.istat.it/en.

75 OECD (2019), *Budgeting and Public Expenditures in OECD Countries 2019*, p. 219 and EIGE (2022), *Country-specific information Netherlands*, https://eige.europa.eu/countries/netherlands.

76 Effects on gender equality (n.d.), *Effects on gender equality, Knowledge centre for policy and regulations*, www.kcbr.nl/.

77 EIGE (2022), *Country-specific information Netherlands*, https://eige.europa.eu/countries/netherlands.

78 EIGE (2022), *Country-specific information Netherlands*, https://eige.europa.eu/countries/netherlands.

79 Emancipatiemonitor (2020), https://digitaal.scp.nl/emancipatiemonitor2020/.

80 OECD (2019), *Budgeting and Public Expenditures in OECD Countries 2019*, p. 252 and EIGE (2022), *Country-specific information United Kingdom*, https://eige.europa.eu/gender-mainstreaming/countries/united-kingdom.

81 Tax and benefits changes, see UK Parliament (2017), *Estimating the gender impact of tax and benefits changes, Research Briefing*, https://commonslibrary.parliament.uk/research-briefings/sn06758/.

82 UK Parliament (2018), *Budget Gender Impact Analysis*, Volume 634 debated on Thursday 11 January 2018, https://hansard.parliament.uk/Commons/2018-01-11/debates/2FF4A574-C2FB-4D3A-8B1D-60668CDDEA70/BudgetGenderImpactAnalysis.

83 House of Commons (2019), https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/1606/1606.pdf.

the form of mandatory equality budget statements with its annual draft budget since 2009.[84] Gender and equality training and awareness-raising are not embedded in the UK national framework and appear to be rather dependent on individual departments' efforts and objectives.[85] Disaggregated gender statistics are collected by government departments and the National Office of Statistics and used to influence policymaking and decision-making.[86]

3. HR Tools

As already outlined, HR practices and particularly purposeful standardisation of the latter, affect gender equality. Taking a look at recruitment to the civil service, promotion and support of senior civil servants, and efforts to develop a diverse central government workforce, comparison across the six countries shows that the Netherlands and UK have relatively advanced HR tools and frameworks, which among others, may help these countries foster gender equality in the civil service. With regard to proactive recruitment practices, which include (1) dedicated recruitment material, (2) policies to attract more and better candidates with skills in demand, (3) use of methods to determine what attracts skilled employees, (4) adequate pay systems to attract good candidates, and (5) having actions in place to improve the representation of under-represented groups, Austria, Belgium, and Germany achieve a good score (Table 30.4). Italy scores at 0.29 on the index, indicating that little use is made of these proactive recruitment practices (29%).

Taking a closer look at the promotion and support of senior civil servants, which includes the existence and quality of a standard competency framework for senior level public servants, learning opportunities and peer support, Belgium and Italy achieve good scores, while in Austria and Germany, tools to develop leadership capabilities are few and the use of performance and accountability tools for senior civil servants is quite low. This may also be due to the strong career-based system of the civil service and relatively low adoption of New Public Management oriented personnel practices in these two Weberian countries.

Turning to efforts to develop a diverse central government workforce, which includes the availability and use of data to track diversity and inclusion, including pay gaps, and the use of tools to develop a diverse and inclusive workforce (such as remote recruitment processes for entry-level positions, tools to proactively attract under-represented groups, tools to increase the participation of under-represented groups in the recruitment process, and tools to detect and minimise bias throughout the recruitment and selection process), only one country, Italy, achieves a relatively low score.

The best effort towards diversity in the civil service can be identified in the UK (Index score: 0.78). This is supported by the extensive explicit efforts of the UK civil service to increase gender, ethnic and cultural diversity among its ranks, notably visible via government websites and recruitment campaigns. Table 30.5 provides the country scores based on the HR tools figures.

84 Finance and Public Administration Committee (2022), 24th Meeting 2022, Tuesday 27 September 2022, pp. 27 f., www.parliament.scot/~/media/committ/3988.

85 EIGE (2022), *Country-specific information United Kingdom* https://eige.europa.eu/gender-mainstreaming/countries/united-kingdom.

86 Department for Digital, Culture, Media & Sport (2019), *Gender Data Guidance*, 28 May 2019, www.gov.uk/government/publications/gender-database/gender-data.

Table 30.4 HR tools

	Use of proactive recruitment practices (Pilot index)	*Managing the senior level public service (Pilot index)*	*Managing the senior level public service (Pilot index)*		*Development of a diverse central government workforce (Pilot index)*	*Development of a diverse central government workforce (Pilot index)*		
			Use of tools to develop leadership capabilities	*Use of performance and accountability tools*		*Diversity of the workforce*	*Availability of data*	*Use of tools*
Austria	0.49	0.45	0.19	0.26	0.55	0.19	0.2	0.16
Belgium	0.46	0.52	0.26	0.26	0.52	0.18	0.17	0.17
Germany	0.42	0.29	0.12	0.16	0.53	0.23	0.11	0.19
Italy	0.29	0.52	0.14	0.38	0.42	0.18	0.13	0.12
Netherlands	0.66	0.6	0.41	0.19	0.62	0.18	0.15	0.29
United Kingdom	0.66	0.82	0.46	0.36	0.78	0.26	0.2	0.32

Source: OECD Government at a Glance 2021 Data, https://stats.oecd.org/Index.aspx?DataSetCode=GOV_2021

Table 30.5 HR tools – scores

	Use of proactive recruitment practices (*)	*Managing the senior level public service (**)*	*Development of a diverse central government workforce (***)*	*Total Score*
Austria	2	1	2	2
Belgium	2	2	2	2
Germany	2	1	2	2
Italy	1	2	1	1
Netherlands	3	3	3	3
UK	3	3	3	3

Note: (*) ≥0.50: 3, ≥0.40: 2, <0.40: 1; (**) ≥0.60:3, ≥0.50: 2, <0.50: 1; (***) ≥0.60: 3, ≥0.50: 2, < 0.50: 1.
Source: The author's own scoring based on the results provided in Table 30.4.

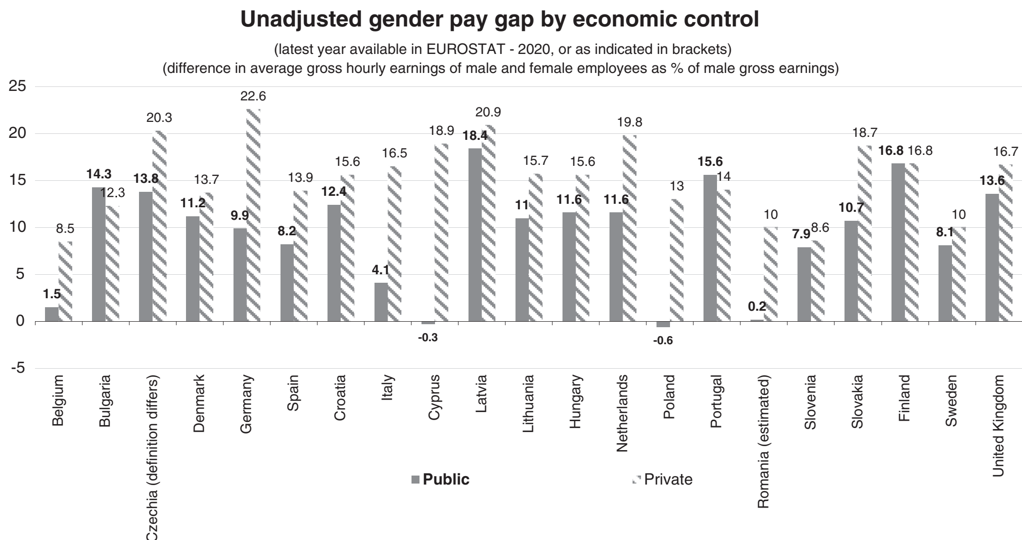

Figure 30.2 Unadjusted gender pay gap in EU countries and the UK by economic control

Source: Created by author using Eurostat 2023 online data code: earn_gr_gpgr2ct and UK Office of National Statistics 2022 (licensed under Open Government Licence v3.0)

4. *Representation of Women*

As the selection of the six countries was based on the gender pay gap, it is worthwhile taking a closer look at the difference in the pay gap between the private and public sectors. Interestingly, the gender pay gap differs considerably between the two sectors, the private sector almost always being less gender equal (see Figure 30.2). The gender pay gap in the public sector in Germany is 9.9% (private sector: 22.6%), in the Netherlands 11.6% (private sector: 19.8%), in the UK 13.6% (private sector: 16.7%), in Belgium 1.5% (private sector: 8.5%), and in Italy 4.1% (private sector: 16.5%). Austria is not included in the Eurostat gender pay gap statistics 2022.

The occasionally wide variation in the gender pay gap by economic control and in the unadjusted gender pay gap arises from the number of persons affected by the gender pay gap in the general economy (including the public sector) versus the number of persons working in the public sector who are therefore affected by the gender pay gap in the latter.

From a gender equality perspective, it is important to understand how many women may be affected by the (lack of) gender parity in the civil service, as well as how it may affect them in an economic sense. Table 30.6 therefore provides a general overview of the share of employment in general government compared to total employment, as well as the number of individuals in the civil service and the average remuneration in each country.[87] Comparing these figures with the general average net earnings across the six countries, it turns out that the remuneration in the civil service is notably higher than the national average. While in the Netherlands and the UK, civil service remuneration ranges around 150% of the national average, it is more than 170% in Italy, more than 180% in Belgium, more than 190% in Austria and strikingly, more than 280% in Germany. Interestingly, Germany is also the only country where the share of women in central government, across echelons and occupational groups, is higher than that of men. At first glance, Germany, therefore, appears to have a gender-equal civil service, which also accounts for female civil servants being substantially better off than female employees overall. However, the figures on gender parity, here gender equality, in ministerial positions as well as in management positions in the central government paint a different picture (Table 30.7).

While Germany shows a highly favourable gender parity in middle management positions in the central government, the gender parity in ministerial positions and in senior management is average.

Furthermore, the share of women in positions (other than management positions) in the central government is relatively high, which suggests that women tend to be relatively worse off economically than men in the civil service, since many female civil servants get "stuck" in lower positions. While the share of women in ministerial positions in Germany has increased in recent years, there is no data on the previous share of women in senior management in central government. While Austria and Belgium show a relatively high share of women in ministerial positions, which has also generally increased over time, Austria only reaches an average position with regard to the share of women in senior management, while Belgium is the country with the lowest share. The UK, in contrast, shows the lowest share of women in ministerial positions (also almost consistently over time), but shows the relatively best gender parity in senior management positions as well as the second-best gender parity in middle management.

The picture is somewhat different for gender parity in the judiciary (Table 30.8). While no data except for the gender parity in supreme courts is available for Germany, four of the six countries show a skew towards a higher share of women as professional judges across courts of first instance as well as appeal courts. Austria shows a higher share of female than male judges in courts of first instance, but a lower female share in appeal courts (46%). The UK, however, shows a relatively high gender gap in both of these court types (31.5% and 35% women, respectively). While no country reaches the threshold of 40% women as judges in supreme courts, it is noteworthy that also here, the UK shows the lowest share (25%).

87 The figures also somewhat mirror the country's type of government (unitary/quasi-unitary, federal) as well as population size, but also the country's per capita GDP.

Table 30.6 Key indicators of size and remuneration in the civil service

	Employment in general government/ total employment	*National civil servants in central public administration*	*Average (net) remuneration of national civil servants in central public administration in €*	*Average annual net earnings (general)*	*Average monthly net earnings (general)*	*Difference in net earnings (general vs. national civil servants in central public administration)*	*Share of women by occupational group in the central government, across echelons (*)*
Austria	16.67%	14,142	3,275	20,335.55	1,694.63	193%	41.76%
Belgium	18.29%	19,784	3,131	20,658.87	1,721.57	182%	35.78%
Germany	10.63%	24,427	4,391	18,579.60	1,548.30	284%	51.69%
Italy	13.21%	121,730	1,953	13,575.98	1,131.33	173%	43.60%
Netherlands	11.71%	139,351	3,087	24,352.74	2,029.40	152%	39.59%
UK	15.98%	430,190	2,435	20,113.00 (**)	1,676.08	145%	48.06%

Source: Eurostat EARN_NT_NET 2021, https://ec.europa.eu/eurostat/en/web/products-datasets/-/EARN_NT_NET; PRC_REM_NR, https://ec.europa.eu/eurostat/databrowser/view/PRC_REM_NR/default/table?lang=de&category=prc.prc_rem; PRC_REM_AVG; https://ec.europa.eu/eurostat/databrowser/view/PRC_REM_AVG/default/table?lang=de&category=prc.prc_avg; OECD 2021, https://stats.oecd.org/Index.aspx?DataSetCode=GOV_2021

(*) Average across senior management, middle management, other positions; see Table 30.7, (**) own calculations based on UK's Office of National Statistics data 2023.

Table 30.7 Gender parity in central government

	Share of women in ministerial positions						*Share of women in senior management*		*Share of women in middle management*	*Share of women in other positions*
	2005	*2012*	*2015*	*2017*	*2019*	*2021*	*2015*	*2020*	*2020*	*2020*
Austria	35.3	46.2	30.8	23.1	38.5	57.14	28.79	30.43	–	53.08
Belgium	21.4	41.7	23.1	23.1	25	57.14	21.14	21.05	33.26	53.04
Germany	42.9	33.3	33.3	33.3	40	40	–	32.47	51.26	71.35
Italy	8.3	16.7	43.8	27.8	27.8	36.36	33.41	34	42.78	54.03
Netherlands	36	33.3	46.7	37.5	35.3	47.06	28	35.03	35.82	47.92
United Kingdom	28.6	17.2	22.7	30.8	21.7	23.81	36.84	42.02	47.62	54.55

Source: OCED Government at a Glance 2021 Data; https://stats.oecd.org/Index.aspx?DataSetCode=GOV_2021

Table 30.8 Gender parity in the judiciary

	Gender equality among professional judges, percentage of women		*Gender equality in courts of first instance, percentage of women*	*Gender equality in appeal courts, percentage of women*	*Gender equality in supreme courts, percentage of women*
	2016	*2018*	*2018*	*2018*	*2018*
Austria	49	51	53	46	32
Belgium	53	56	58	50	30
Germany	–	–	–	–	32
Italy	54	54	57	54	33
Netherlands	58	60	64	50	39
United Kingdom	30.5	33.3	31.5	35	25

Source: OCED Government at a Glance 2021 Data; https://stats.oecd.org/Index.aspx?DataSetCode=GOV_2021

The overall impression that women tend to be under-represented in higher echelons of the civil service is also sustained by EIGE data on the top two-tier positions in government ministries (i.e. for civil servants) in all government functions. Figures for Belgium are generally lower than for Austria, Germany, Italy, and the Netherlands, but also for the UK. However, Belgium shows a notably higher share of women among level 1 administrators (30.8%) than the UK (24.1%), where the difference between level 1 and level 2 administrators is considerable (Figure 30.3).

This evident glass ceiling for women in the civil service accounts not a little for gender gaps in terms of income. Data by the World Bank[88] for Austria, Belgium, and Italy (data for the other three countries is largely unavailable) shows that women are twice as likely as men to work in the public sector. Women also tend to have a more favourable wage ratio in the public than in the private sector (except in Italy). However, women are much more

88 World Bank (2021), https://databank.worldbank.org/source/worldwide-bureaucracy-indicators-(wwbi).

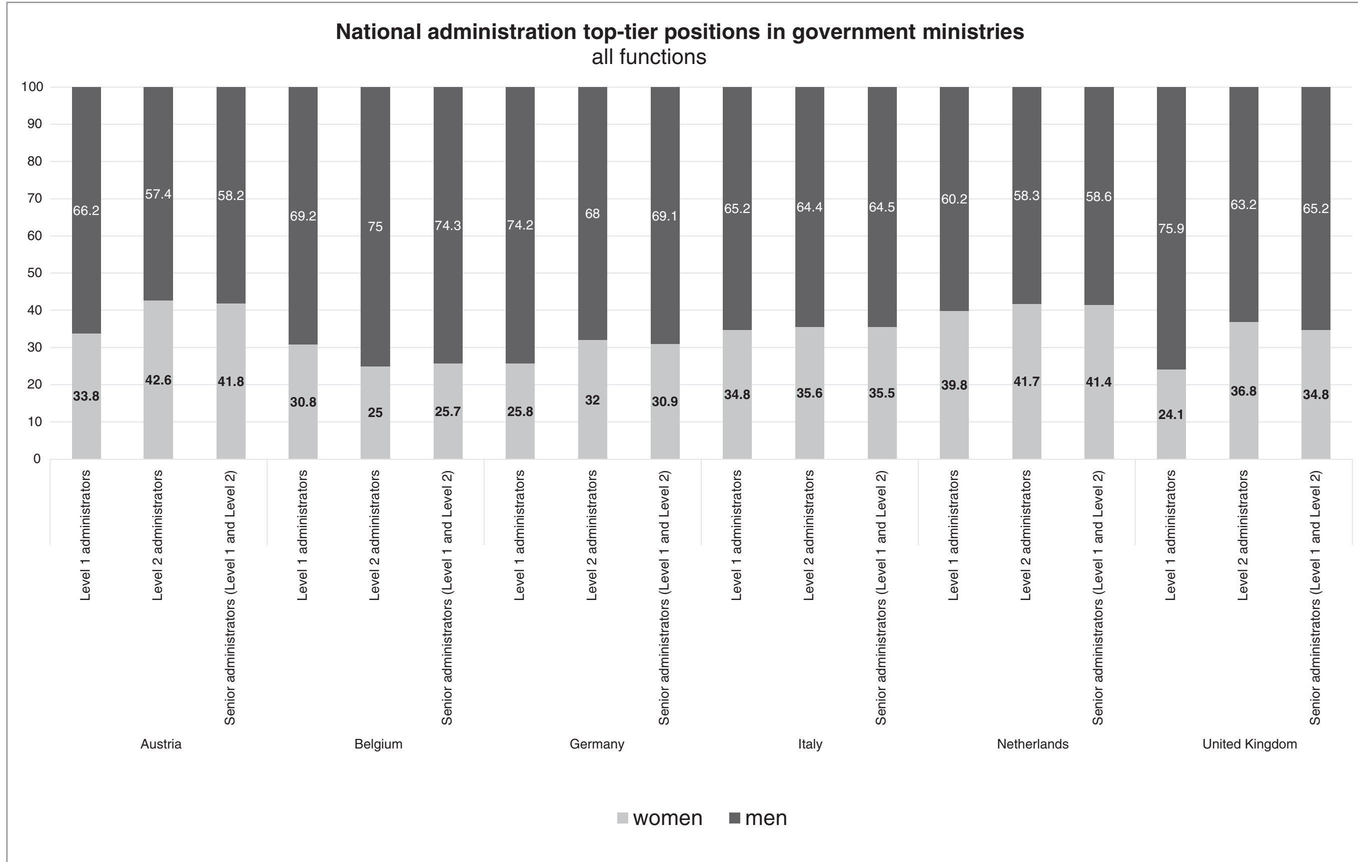

Figure 30.3 Top two tiers of administration – all functions

Source: Created by author using EIGE Gender Statistics Database 2022, https://eige.europa.eu/gender-statistics/dgs/indicator/genmain_cont_im__instmech_allmain

represented than men in the occupational groups of clerks and in elementary occupations. This is true for the private and the public sector. It may also be one of the main reasons why women are relatively highly represented in the low wage group (first quintile in the private and even more sharply in the public sector). At the same time, however, public sector employment also provides lower gender gaps in the upper echelons and higher wage quintiles. Women tend to be more represented in the occupational groups of managers, professionals, and technicians in the public sector than in the private sector in all three countries (Austria, Belgium, Italy). The gender gap in the highest wage group (fifth quintile) is also much narrower in the public than the private sector across all three countries, the difference being the smallest in Italy. Interestingly, in Austria and Belgium, men experience a public sector wage sanction while women experience a public sector wage premium of more than 13% compared to the private sector. This may also be an effect of the relatively rigid and equality-oriented pay schemes in the public sector in these countries.

VI. Summary and Conclusions

The comparison of the six countries in this chapter has shown that all countries have implemented legal frameworks and directives that ensure gender equality in general society and thus also in the civil service. When it comes to institutional mechanisms for gender equality, the countries included in this comparison fare relatively well, but there are nuances between them. This is also true for the repertoire of gender mainstreaming tools implemented. An expectation of this chapter was that countries with a high score in terms of institutional mechanisms for gender equality and more gender mainstreaming tools, implemented to a higher degree, will exert higher gender equality in their civil service. If gender equality is a general priority in a country, it is assumed that the effects of different measures will primarily be visible in the civil service, as the latter will benefit from more general gender equality measures. We also looked at different HR tools implemented in the civil service across the six countries. The argument here was that more standardised and purposefully designed frameworks and tools for personnel management will assist in promoting gender equality in the civil service. With regard to the status quo of gender equality in the civil service of the six countries, the figures on gender parity in employment and also the tentative insights into remuneration (wage groups) are however sobering. While on the whole, the civil service seems to lay a better basis for gender equality than the private sector, there is still a glass ceiling for women in the civil service.

Taking the countries individually, Austria achieved a high score for institutional mechanisms for gender equality and gender mainstreaming tools, and a mid-level score for HR tools. Compared to the other countries, the share of women in ministerial positions in Austria is relatively high, but the share of women in senior management and the judiciary is average, while the average share of women in top tier positions in government ministries is the highest of all six countries. Belgium achieved an average score for institutional mechanisms for gender equality, a high score for gender mainstreaming tools and an average score for HR tools. Compared to the other countries and like Austria, the share of women in ministerial positions is relatively high, but the share of women in senior and middle management is the lowest of all six countries. This is also true for the share of women in top tier government ministry positions, though gender equality in the judiciary is relatively high. Germany achieved an average score for institutional mechanisms for gender equality, but low scores for gender mainstreaming and HR tools. The share of women in ministerial positions is average, similar to that in senior management. However,

Germany has achieved gender parity in middle management. The data on the judiciary is incomplete. The average share of women in top tier positions in government ministries is the highest of the six countries. Italy achieved low scores overall for institutional mechanisms for gender equality, gender mainstreaming tools and HR tools. The share of women in ministerial positions is rather low, that in senior and middle management in central government is average. Gender equality in the judiciary is relatively high. The average share of women in top tier positions in government ministries is the highest of the six countries. The Netherlands scores low on institutional mechanisms for gender equality, average on gender mainstreaming tools and high on HR tools. The share of women in ministerial and senior management positions in central government is average, but relatively low in middle management. The Netherlands have the highest share of female judges of all six countries. The UK scored average on institutional mechanisms for gender equality and gender mainstreaming tools, but high on HR tools. The share of women in ministerial positions is the lowest of the six countries, as is gender equality in the judiciary. However, the share of women in senior and middle management in central government is the highest of the countries compared.

These findings contradict the expectation that countries with a high score on institutional mechanisms for gender equality, gender mainstreaming tools and HR tools will exert higher gender equality in their civil service. Austria and Belgium, two countries that scored relatively highly on these aspects, show relatively low gender parity in civil service management positions. On the other hand, Italy scored low on institutional mechanisms, gender mainstreaming tools and HR tools, but shows average and thus more positive gender parity in senior and middle management than Austria and Belgium. While gender parity in ministerial positions and the judiciary in Austria and Belgium is good, it is not clear to what extent this can be counted as an effect of broader gender equality and gender mainstreaming tools. It is also unclear how Italy can show a good gender parity in management positions when its mechanisms and tools for gender equality in general, and more specifically in the civil service, are less developed. Conversely, the UK, a country that shows scores similar to those of Belgium (with nuances across aspects), shows low shares of women in ministerial positions and the judiciary. However, the UK shows the highest share of women in management positions in central government of all six countries. While the UK figures suggest that HR tools may be effective in supporting gender equality in the civil service, particularly in removing glass ceilings, the figures for the Netherlands do not support this conclusion. The Netherlands score highly on HR tools but show only average gender parity in senior management and low gender parity in middle management in central government. Finally, Germany is somewhat different since it scored low to average on these aspects but shows very good gender parity in middle management in central government.

Summing up, this chapter provides insights into the status quo of gender equality in the civil service in six selected countries. It also shows that gender parity in employment, and indirectly also remuneration (wage groups), may not be the effect of broader institutional mechanisms for gender equality or broader gender mainstreaming tools. Likewise, a relationship between HR tools implemented in the civil service and gender equality in the latter could not be established. Other mechanisms and practices, e.g. profiling or gender bias in recruitment, selection and promotion, but also part-time work and associated hurdles for promotion, may play a role here. However, these mechanisms and practices tend to vary widely between government departments and are therefore only marginally suitable for comparisons across countries. The notable exception seems to be the UK, which

organises its civil service in a central manner and thus provides a high level of standardisation in personnel policies and practices. Finally, the new telework/mobile work possibilities in the civil service may improve gender equality, but the effects will only become visible in the medium term.

Bibliography

Behavioural Insights Team (2021), *How to Improve Gender Equality in the Workplace. Evidence-Based Actions for Employers*, www.bi.team/wp-content/uploads/2021/07/BIT_How_to_improve_gender_equality_report.pdf.

Bowling C.J., Kelleher C.A., Jones J., Wright D.S. (2006), 'Cracked Ceilings, Firmer Floors, and Weakening Walls: Trends and Patterns in Gender Representation among Executives Leading American State Agencies, 1970–2000', 66(6) *Public Administration Review*, 823–836.

Caglar G. (2013), 'Gender Mainstreaming', 9(3) *Politics & Gender*, 336–344.

Choi S., Park C.-O. (2014), 'Glass Ceiling in Korean Civil Service: Analyzing Barriers to Women's Career Advancement in the Korean Government', 43(1) *Public Personnel Management*, 118–139.

Coelho M., Davis A., Klemm A., Buitron C.O. (2022), *Gendered Taxes: The Interaction of Tax Policy with Gender Equality*, Working Paper WP/22/26, International Monetary Fund, www.imf.org/en/Publications/WP/Issues/2022/02/04/Gendered-Taxes-The-Interaction-of-Tax-Policy-with-Gender-Equality-512231.

Cotroneo C., Brown O., Karwot I., Adomavicius L., Velasco E. (2021), *The Gender Gap in the EU's Public Employment and Leadership. Mapping Promising Measures for Gender Equality and Equal Opportunities in the EU-27*, Brussels: European Parliament.

Cunningham R., Lord A., Delaney L. (1999), '"Next Steps" for Equality? The Impact of Organizational Change on Opportunities for Women in the Civil Service', 6(2) *Gender, Work & Organization*, 67–78.

Equality and Human Rights Commission (2019), *Women's Rights and Gender Equality in 2018: Update Report*, www.equalityhumanrights.com/sites/default/files/womens-rights-and-gender-equality-in-2018-summary-update_report-long-version.pdf.

Eurostat (2020), *Women's employment in the EU*, https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20200306-1.

Groeneveld S., Bakker V., Schmidt E. (2020), 'Breaking the Glass Ceiling, But Facing a Glass Cliff? The Role of Organizational Decline in Women's Representation in Leadership Positions in Dutch Civil Service Organizations', 98(2) *Public Administration*, 441–464.

Hillmert S. (2015), 'Gender Segregation in Occupational Expectations and in the Labour Market: International Variation and the Role of Education and Training Systems', in Imdorf C., Hegna K., Reisel L. (eds), *Gender Segregation in Vocational Education (Comparative Social Research*, vol. 31, Bingley: Emerald Group Publishing Limited, 123–148.

Lewis G.B. (1991), 'Turnover and the Quiet Crisis in the Federal Civil Service', 51(2) *Public Administration Review*, 145–155.

Lewis G.B. (2018), 'Progress Toward Racial and Sexual Equality in the Federal Civil Service?', in Broadnax W.D. (ed), *Diversity and Affirmative Action in Public Service*, New York: Routledge, 51–63.

Mani B.G. (1999), 'Challenges and Opportunities for Women to Advance in the Federal Civil Service: Veterans' Preference and Promotions', 59(6) *Public Administration Review*, 523–534.

OECD (2019), *Budgeting and Public Expenditures in OECD Countries 2019*, Paris: OECD Publishing.

OECD (2021), *Government at a Glance 2021*, Paris: OECD Publishing.

Omar O., Ogenyi V. (2004), 'A Qualitative Evaluation of Women as Managers in the Nigerian Civil Service', 17(4) *International Journal of Public Sector Management*, 360–373.

Oxford Economics (2011), *The Global Diversity Report. An Annual Guide to Measure Global Employee Diversity*, Oxford: Oxford Economics.

UNDP (2021), *Gender Equality in Public Administration*, www.undp.org/sites/g/files/zskgke326/files/2021-12/UNDP-UPitt-2021-Gender-Equality-in-Public-Administration-Executive-Summary-EN2.pdf

Van Belle J. (2016), *Paternity and Parental Leave Policies Across the European Union*, Santa Monica and Cambridge: RAND Corporation.

Walby S. (2005), 'Gender Mainstreaming: Productive Tensions in Theory and Practice', 12(3) *Social Politics: International Studies in Gender, State & Society*, 321–343.

World Economic Forum (2021), *Global Gender Gap Report 2021. Insight Report March 2021*, www.weforum.org/reports/global-gender-gap-report-2021/?DAG=3&gclid=CjwKCAjw5_GmBhBIEiwA5QSMxEywlPaDDiC-peiNJlTjvqe5y0Wm_iJTU_0_cm5miRHpGmAV198KL-RoC4kAQAvD_BwE.

Zafarullah H. (2000), 'Through the Brick Wall, and the Glass Ceiling: Women in the Civil Service in Bangladesh', 7(3) *Gender, Work & Organization*, 197–209.

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Part VI

The Civil Service in the Digital Age

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31 The Internet and Digital Technologies as Essential Tools for the Civil Service

*Annette Guckelberger**

I. Introduction

Computers have been used by public authorities in Europe for some time now. However, internet and its further development have led to significant changes in the organisation of relations between public administrations and private-law subjects (citizens and business) as well as users within the public sector.[1] Since the 1990s, the consequences of the use of Information and Communication Technologies (ICT) by public administrations have mostly been discussed under the heading of "eGovernment".[2] In the early 1990s, the main focus was on the possibilities created by the internet for providing information to private individuals and legal entities and for electronic communication.[3] The focus was probably initially more on shifting existing administrative processes from paper to electronic form.[4] In the meantime, however, there appears to have been widespread agreement that ICT offers a variety of opportunities for better and faster completion of administrative tasks and that it can be an instrument to modernise public administration.[5] In recent times, the focus has moved to (partial) automation of administrative processes[6] and the use of artificial intelligence (AI).[7]

Digitalisation of the public administration is an ongoing process for many reasons.[8] In particular, there is the desire to improve public administrative services and boost cost-effectiveness and efficiency, improve quality and utility for citizens and business and in some cases transparency.[9] Certain electronic practices that are now common in the private sector can also reasonably be expected in relationships with public administrations.[10] It

* The author would like to thank Dr. James A. Turner for his valuable support with the translation. The text reflects the legal status as of July 2023.

1 See also Glaser (2015), p. 263.
2 On German approaches to definition, see Guckelberger (2019), paras. 16 ff.; on the numerous paraphrases with different emphasis, see Andermatt (2022), pp. 93 f.
3 Cossalter (2022), paras. 8 ff.
4 Mayrhofer and Parycek (2022), p. 14.
5 Guckelberger (2019), paras. 18 ff.
6 Braun Binder (2020), p. 28.
7 Marsch and Fölsch Schroh (2022), pp. 443 f.
8 Distel (2022), p. 54.
9 Galetta (2023); Marsch and Fölsch Schroh (2022), pp. 447 and 453.
10 Saarland Parliament LT-Drucks. 16/1806, p. 153.

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is also hoped that technologies, such as AI, will make a breakthrough in public administration.[11] For some time now, most countries in Europe have had their own national eGovernment strategies, which show differences and similarities.[12] These are probably due partly to the fact that the European Union sets soft-law guidelines for digitalisation, as well as issuing hard-law instruments, since it has a special interest in promoting cooperation.

The digitalisation of public administration has technological, administrative and legal components.[13] Because digitalisation is associated with innovations and readjustments in many areas, the literature usually only focuses on the national setting. In contrast, comparative international and European Union studies provide an overview of the digitalisation of public administration in each country. In the context of the European Commission's initiative for stronger interoperability in the public sector, Digital Public Administration Factsheets have been published annually by the European Commission since 2014, providing information on the current status of the digital transition. Comparison of the factsheets of the different countries shows parallels and differences in the digitalisation of the public sector.[14] Although the coronavirus pandemic drove digitalisation of public administration across the Union, especially through the performance of administrative tasks from home, and altered the manner of working,[15] differences in the degree of digitalisation are evident between countries.[16] These comparative studies allow countries to more accurately assess their progress in digitalising public administration.[17] Lower-performing countries can learn from leading States and find areas for improvement by exchanging ideas with them and examining their strategies. Because better-performing countries according to comparative studies can present themselves in a good light, such studies create incentives for defending top positions or catching up.

Since digitalisation of public administration poses similar challenges to all countries in Europe, it makes sense to take a closer look at some of them. Germany, Switzerland, Austria, and France are discussed here. Although the United Kingdom is viewed as having an important type of administrative law,[18] it is not considered. This is because there is no factsheet for the United Kingdom (UK) in 2022 as a result of Brexit. It should be mentioned, however, that use of a flawed algorithm during the coronavirus pandemic caused outrage there because good students from low-performing schools were discriminated in university admission procedures.[19] Instead of the UK, the analysis will include Estonia, which has long been the European leader in digital public services.

Best eGovernment practices in one country often cannot be compared or transferred one-to-one to another country because of different initial conditions.[20] Depending on whether a country is small or large, or has a younger or older population structure, the dig-

11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "2030 digital compass: the European way for the digital decade", COM(2021) 118 final, p. 13.

12 Poelmans (2019), p. 167; on Germany see Marsch and Fölsch Schroh (2022), pp. 451 f.

13 Pleger and Mertes (2022), p. 3.

14 With regard to comparative law in general, see Ruffert (2017), p. 168.

15 Andermatt (2022), p. 97.

16 European Court of Auditors (2022), p. 42; Braun Binder (2021), p. 5.

17 With regard to comparative law, see Sommermann (2021), section 52, para. 31.

18 Groß (2021), pp. 544 and 547.

19 Taylor (2020).

20 Distel et Al. (2020), p. 6.

ital transition of public administrations may be simpler or more complex. It can also make a significant difference whether a country is a federal or unitary State, or whether – as in the case of Germany for example – it attaches great importance to data protection.[21] Different organisational and legal frameworks as well as diverging assessments of the importance of digitalisation of the public sector, including the financial resources earmarked for it, have produced a rather heterogeneous eGovernment landscape in Europe.[22] European Union law, however, has a standardising effect on the Member States.

II. Supranational Level

The Union level provides major impetus for the digitalisation of public administrations because it contributes to the success of the Single Market.[23] As the European Union (EU) does not have general legislative competence for digitalisation, it often drives this issue forward through policy initiatives, soft law instruments and support programmes so as to achieve the desired results in agreement with the Member States.[24] According to the 2030 Digital Compass, the EU's objective is

> to ensure that democratic life and public services online will be fully accessible for everyone, including persons with disabilities, and benefit from a best-in-class digital environment providing for easy-to-use, efficient and personalised services and tools with high security and privacy standards. (. . .) Government as a Platform, as a new way of building digital public services, will provide a holistic and easy access to public services with a seamless interplay of advanced capabilities, such as data processing, AI and virtual reality.[25]

Furthermore, the Berlin Declaration on Digital Society and Value-Based Digital Government of 8 December 2020, representing the highest level of commitment of Member States, aims for "value-based digital transformation by addressing and ultimately strengthening digital participation and digital inclusion in our societies",[26] involving inter alia a paradigm shift from electronic Government to mobile Government.[27]

For some time now, a key impetus for the electronisation or digitalisation of administrative procedures has come from European legislation, such as Directive 2006/123/EC on services in the internal market. Article 6, paragraph 1 of this Directive provides that Member States must enable providers to complete a host of procedures and formalities through points of single contact, where the information listed in Article 7, paragraph 1 is easily accessible to providers and recipients. Article 8, paragraph 1 obliges Member States to ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through

21 Distel et Al. (2020), p. 18; Marsch and Fölsch Schroh (2022), p. 448.
22 Zefferer (2015).
23 Guckelberger (2019), para. 171.
24 Guckelberger (2019).
25 Communication from the Commission (n. 11), p. 13.
26 Berlin Declaration on Digital Society and Value-based Digital Government of 2020, https://digital-strategy.ec.europa.eu/en/news/berlin-declaration-digital-society-and-value-based-digital-government.
27 Berlin Declaration on Digital Society and Value-based Digital Government of 2020, https://digital-strategy.ec.europa.eu/en/news/berlin-declaration-digital-society-and-value-based-digital-government.

the relevant point of single contact and with the relevant competent authorities. Union law has set out the legal framework for electronic public procurement (see Article 22, paragraph 1, sentence 1 of Directive 2014/24/EU on public procurement;[28] Implementing Regulation (EU) 2019/1780 establishing standard forms for the publication of notices in the field of public procurement (eForms),[29] Directive 2014/55/EU on electronic invoicing in public procurement).[30] Directive (EU) 2016/2102 contains requirements relating to accessibility of the websites and mobile applications of public-sector bodies.[31] According to Article 2, paragraph 1 Regulation (EU) 2018/1724,[32] the Commission and Member States will establish a single digital gateway. The gateway is intended to enable access to the information listed in Article 2, paragraph 2. Article 14 lays down arrangements for the introduction of a technical system for cross-border automated exchange of evidence and application of the “once only” principle. In the intervening period, the EU Commission developed the single point of entry, for which Member States have to digitise 21 procedures to make them accessible via the “Your Europe” portal no later than December 2023.[33] Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market,[34] the General Data Protection Regulation (hereinafter GDPR) 2016/679/EU,[35] Article 22 of which regulates automated individual decision-making, including profiling, and Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union[36] are also of general importance. This also applies to Regulation (EU) 2022/868 (Data Governance Act),[37] Article 1, paragraph 1(a), which lays down conditions for the reuse, within the Union, of certain categories of data held by public-sector bodies.

In January 2023, the European Declaration on Digital Rights and Principles for the Digital Society, which was agreed upon by the European Parliament, the Council and the Commission, was published in the Official Journal of the European Union.[38] On the

28 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, OJ L 94/65.

29 Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 (eForms), OJ L 272/7.

30 Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, OJ L 133/1.

31 Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, OJ L 327/1.

32 Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) 1024/2012, OJ L 295/1.

33 European Court of Auditors (2022), p. 31.

34 Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257/73.

35 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119/1.

36 Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194/1.

37 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), OJ L 152/1.

38 Official Journal of the European Union, 23 January 2023, C 23, pp. 1 f.

horizon is the enactment of an EU Artificial Intelligence Act. The proposal submitted by the Commission adopts a risk-based approach, distinguishing uses of AI that create unacceptable risk, high risk, and low or minimal risk.[39] The Commission has also submitted a proposal for a Regulation amending Regulation (EU) No. 910/2014 on a framework for European Digital Identity.[40] Under Article 6(a)(1), all persons are to have secure, trusted, and seamless access to cross-border public and private services through the issue of European Digital Identity Wallets by Member States.

Summing up, it can be said that the European Union is very active when it comes to the digitalisation of public administration and spells out sector-specific as well as cross-sectoral requirements. Although it only specifies eGovernment solutions for its own area of competence due to its limited competencies, there is hope that Member States will also adopt these solutions in their area of responsibility for reasons of utility and cost efficiency.[41] According to a special report issued by the European Court of Auditors, the Member States it surveyed were grateful for the Commission's support in connection with certain digitisation projects.[42] In order to better promote digitisation, however, it recommended that the Commission strengthen the implementation framework to encourage Member States to complete the provision of eGovernment services and develop a comprehensive strategy to effectively promote eGovernment.[43]

III. Germany

Germany usually only ranks somewhere in the middle of the field in comparative eGovernment studies.[44] In the Digital Economy and Society Index (DESI) 2022, it ranked eighteenth in the category of digital public services. Only 55% of internet users access e-government services. It was among the five worst-performing EU countries in the category of pre-filled forms. While it is close to the EU average for digital public services for businesses, it was slightly above average for such services for citizens.[45] When the guiding principle of eGovernment emerged, the hope was especially that of its own accord, the public administration would push ahead with its digitalisation. With effect from 1 January 2003, Section 3a on electronic communication was inserted in the Administrative Procedure Act (APA).[46] Electronic communication is now permissible provided the recipient establishes access (paragraph 1). Where legal provisions stipulate that a document be in written form, electronic communication of an electronic document is now also permitted if it bears a qualified electronic signature (paragraph 2). Section 71e of the APA, which came into force at the end of 2008 to transpose the European Services Directive, stipulates that if requested, procedures dealt with by

39 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending certain Union Legislative Acts, COM(2021) 206 final, p. 15.

40 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 910/2014 as regards establishing a framework for a European Digital Identity, COM(2021) 281 final.

41 Guckelberger (2019), para. 230.

42 European Court of Auditors (2022), pp. 5 and 35.

43 European Court of Auditors (2022), p. 5.

44 Marsch and Fölsch Schroh (2022), p. 450.

45 DESI 2022 Germany, p. 15, available at https://digital-strategy.ec.europa.eu/en/policies/desi-germany.

46 Marsch and Fölsch Schroh (2022), p. 447.

a single authority must be handled electronically. Because, contrary to expectations, public administrations had seldom prepared electronic access, the federal government enacted a law to promote electronic government (E-Government Act of the Federation, EGovG)[47] in 2013. It applies to federal authorities (Section 1, paragraph 1 EGovG) and to the administrative activities of authorities of the *Länder*, local authorities and local authority associations when implementing federal law (Section 1, paragraph 2 EGovG), but only insofar as the following provisions do not relate to federal authorities. By way of deviation from the voluntary principle laid down in Section 3a, paragraph 1 of the APA, Section 2, paragraph 1 of the EGovG Bund stipulates: every authority shall be obliged to open up a point of access for the transfer of electronic documents, including such documents provided with a qualified electronic signature. In addition, the possibilities for replacing the written form with De-Mail, which is rarely used, and the use of electronic forms with an electronic proof of identity according to Section 18 of the Identity Cards Act, Section 12 of the Act on a Card with an Electronic Identification Function for Citizens of the European Union and the European Economic Area, and Section 78, paragraph 5 of the Residence Act, have meanwhile been extended. Although the eID function is now activated by default, in line with eGovernment Monitor 2022, only 10% of ID card holders actually use it.[48]

The E-Government Acts of the Federation and the *Länder* contain important building blocks for electronic administrative action. For example, the E-Government Act of the Federation contains statutory arrangements relating to: electronic means of payment (Section 4), required documentation (Section 5), electronic record-keeping (Section 6), access to files (Section 8), optimisation of administrative procedures and information on the status of progress (Section 9), requirements pertaining to the provision of data, authorisation to issue statutory instruments (Section 12), and electronic forms (Section 13). Some of the E-Government Acts of the *Länder* are modelled on the E-Government Act of the Federation, whereas others deviate from it. While the Federal authorities were supposed to have implemented electronic record-keeping by 1 January 2020, public authorities in the Saarland do not have to implement such an obligation until 1 January 2025 at the latest (Section 5, paragraph 1, sentence 1 E-Government Act SL). Most E-Government Acts contain only objective-legal obligations. The Bavarian Digital Act (BayDiG), on the other hand, extends the right to communicate digitally with public authorities via the Internet (Article 12, paragraph 1, sentence 1 BayDiG) to everyone.[49] As well, Article 20 BayDiG contains a very progressive arrangement, laying down the principle of digital first, according to which appropriate administrative procedures or separable parts of such should generally be carried out digitally. Administrative services that are processed via an organisational account, which is available inter alia to legal entities as well as natural persons who are occupationally or economically active, can also only be offered digitally. However, exceptions are possible in cases of hardship.

47 Act on the Promotion of Electronic Administration of 25 July 2013 (*Gesetz zur Förderung der elektronischen Verwaltung (E-Government-Gesetz – EGovG)*), (BGBl. I p. 2749), www.gesetze-im-internet.de/egovg/BJNR274910013.html.

48 eGovernment Monitor 2022, pp. 8 and 22, available at https://initiatived21.de/uploads/03_Studien-Publikationen/eGovernment-MONITOR/2022/egovernment_monitor_22.pdf.

49 Law on Digitalisation in the Free State of Bavaria of 22 July 2022 (*Gesetz über die Digitalisierung im Freistaat Bayern (Bayerisches Digitalgesetz – BayDiG)*), GVBl. p. 374, www.gesetze-bayern.de/Content/Document/BayDiG.

With effect from January 2017, Federal lawmakers inserted regulations on the fully automated issuance of administrative acts into the Fiscal Code of Germany, Book 10 of the Social Code and the APA.[50] However, Section 35a of the APA is based a different regulatory structure because digitalisation in the fiscal and social administrations is more advanced: an administrative act may be issued entirely by automatic means, provided this is permitted by law and the administration has no discretionary power.[51] The latter restriction is based on the consideration that such decisions are generally highly dependent on the situation and the individual case, and at present only human officials can make evaluative decisions.[52] The need for a specific legal basis for fully automated administrative acts takes into account Article 22, paragraph 2(b) GDPR in the processing of personal data.[53] Since Section 24, paragraph 1(3), APA[54] is not sufficient in and of itself to lay down suitable measures to safeguard the data subject's rights, freedoms, and legitimate interests, this deficit can be compensated in the context of a legal order.[55] The hitherto rather rare legal orders for fully automated administrative acts include internet-based vehicle registration (Section 6g, paragraph 2(1) Road Traffic Act; Sections 15a ff. Vehicle Registration Ordinance)[56] and public broadcasting fee notices (Section 10a Public Broadcasting Fee State Treaty). Probably in view of criticism of the design of Section 35a Federal Administrative Procedures Act,[57] Bavaria has refrained from including a comparable provision in its APA. Instead, Article 5, paragraph 2, sentence 1 BayDiG stipulates that in the case of fully automated administrative procedures, the expediency, objectivity and efficiency of the IT systems used must be regularly reviewed.

Due to the "prohibition of mixed administration", Article 91c on information technology systems was inserted in the Basic Law of the Federal Republic of Germany (GG – the German constitution) in 2009.[58] According to subsection 1, the Federation and the *Länder* may cooperate in planning, constructing and operating information technology systems needed to discharge their responsibilities. Since the eGovernment landscape in Germany has remained very heterogeneous despite the possibilities for cooperation created,[59] subsection 5 was added in 2017[60] and envisages that comprehensive access by means of information technology to the administrative services of the Federation and the *Länder* be regulated by a federal law with the consent of the Bundesrat. At almost the same time, the Federation adopted the Act for the Improvement of Online Access to Administration Services (Online Access Act, *Onlinezugangsgesetz*, OZG) on the basis

50 Marsch and Fölsch Schroh (2022), pp. 447 and 469.

51 Marsch and Fölsch Schroh (2022), p. 463.

52 Braun Binder (2019), chapter 12, paras. 12 ff.; Guckelberger (2022), p. 318; Marsch and Fölsch Schroh (2022), pp. 465 f.

53 Marsch and Fölsch Schroh (2022), p. 467.

54 "If the authority uses automatic devices to issue automatic administrative acts, it must take into account factual information of the person concerned that is significant for the individual case and that would not be determined in the automatic procedure", Marsch and Fölsch Schroh (2022), p. 466.

55 Hornung (2022), section 35a, para. 18.

56 Marsch and Fölsch Schroh (2022), pp. 467 f.

57 Marsch and Fölsch Schroh (2022), pp. 465 f.; Stegmüller (2018) p. 355.

58 Marsch and Fölsch Schroh (2022), pp. 459 f.

59 Marsch and Fölsch Schroh (2022), p. 461 "patchwork of digital offers".

60 Marsch and Fölsch Schroh (2022).

of said exclusive legislative competence of the Federation.[61] Section 1, paragraph 2 OZG obliges the federal, State and local levels of government to "link" their administrative portals "in a portal network".[62]

By the end of 2022, around 575 administrative services were also to be made accessible to users online via each of the portals without barriers or media discontinuity (Section 1, paragraph 1, Section 3, paragraph 1 OZG). To implement the once-only principle, the Register Modernisation Act introduces a unique, trans-sectoral identification number in the German administration for a whole host of registers.[63] An arrangement governing the data (protection) cockpit was also included in the OZG (Section 10 OZG).

Despite considerable effort, Germany did not achieve its goal of making 575 administrative services accessible via the portal network by the end of 2022. According to the Federal Ministry of the Interior and Community, as of that date, only 33 services could be accessed via the portal network throughout Germany.[64] This sobering finding can be explained by Germany's complex federal structure and differences in the IT landscape, but also by the different levels of digitalisation at federal, *Länder*, and local levels.[65] In addition, new structures and forms of cooperation first had to be established and there was not always enough staff available for digitalisation.[66] On 23 May 2023, the Federal Government therefore agreed on "cornerstones for a modern and future-oriented administration". According to these cornerstones, all processes are to be reviewed in terms of their necessity and potential for automation, while a user-friendly digital proof of identity is to be established, the once-only principle is to be implemented and the digital readiness of laws and regulations is to be pushed forward.[67] Moreover, the Federal Government presented a draft bill to amend the Online Access Act and other regulations governing digitalisation of the administration.[68] Among other things, removal of the previous OZG implementation deadline and provision of citizen accounts and online mailboxes by the federal government instead of the *Länder* are envisaged. According to the planned Section 1a (1) OZG, administrative services for the implementation of federal laws in economic matters that exclusively affect legal entities and authorities will only be offered electronically five years after their enactment at the latest (exception: legitimate interest of the user). Introduction of a new provision laying down

61 Act for the Improvement of Online Access to Administration Services of 17 August 2017 (*Gesetz zur Verbesserung des Onlinezugangs zu Verwaltungsleistungen (Onlinezugangsgesetz – OZG)*), BGBl. I p. 3122, 3138, www.gesetze-im-internet.de/ozg/BJNR313800017.html.

62 Jahresbericht 2018 des nationalen Normenkontrollrats, p. 36, available at www.normenkontrollrat.bund.de/Webs/NKR/SharedDocs/Downloads/DE/Jahresberichte/2018-Jahresbericht.pdf?__blob=publicationFile&v=2; Marsch and Fölsch Schroh (2022), p. 461.

63 Digital Public Administration factsheet 2022 Germany, p. 20, available at https://joinup.ec.europa.eu/sites/default/files/inline-files/DPA_Factsheets_2022_Germany_vFinal_1.pdf; see also the Act on the Introduction and Use of an Identification Number in Public Administration and on the Amendment of Other Acts of 28 March 2021 (*Gesetz zur Einführung und Verwendung einer Identifikationsnummer in der öffentlichen Verwaltung und zur Änderung weiterer Gesetze (Registermodernisierungsgesetz – RegMoG)*), BGBl. I p. 591; 2023 I Nr. 230, Nr. 293, www.gesetze-im-internet.de/regmog/BJNR059100021.html.

64 Kretschmer (2022).

65 Normenkontrollrat, BT-Drucks. 20/5495, p. 33; see also Marsch and Fölsch Schroh (2022), p. 450.

66 See also Normenkontrollrat, BT-Drucks. 20/5495, p. 33.

67 Bundesministerium des Innern und für Heimat, *Eckpunkte für eine moderne und zukunftsgerichtete Verwaltung* of 23 May 2023, p. 1.

68 BR-Drucks. 226/23.

the principles of electronic processing via administrative portals, as well as replacement of the written form, is being contemplated, but it is limited to legal acts of the European Union, regarding which the German Federal Government has legislative power, and to the implementation of federal law. In future, this is to take precedence over Section 3a APA. A general clause laying down the once-only principle as well as complete electronic processing of essential administrative services (end-to-end digitisation) is to be included in the Federation's E-Government Act.

In Germany, with its legalistic administrative tradition,[69] increasingly detailed legal regulations are being enacted to promote the digital transition of public administration.[70] In the early days, the main goal was to remove legal obstacles to electronic administration, such as written form requirements, whereas now there is an increasing desire to actively shape the digital transition through legal requirements.[71] As a result, the legal situation is becoming increasingly complex. Deadlines for the executive for certain digitalisation projects can raise the pressure by virtue of the legal supremacy. As the Online Access Act shows, however, there are ultimately no guarantees that goals set will actually be achieved.[72] When a deadline is approaching, there is a danger of quick solutions to demonstrate success, at the expense of user-friendliness. Because there is currently a strong focus on online access to public administrations, too little attention is paid to digitalisation of the underlying process steps.[73]

Due to the different distribution of competencies for legislation and implementation of laws in Germany, digitalisation of public administrations is a complex matter. This results in discussions about the constitutional consistency of some federal regulations, which like the question of the compatibility of uniform identification numbers with fundamental rights, initially complicate implementation. For digitalisation to be successful, coordination and cooperation are required between the different State levels. The focal point of the public administrative services to be digitalised lies in the domain of responsibility of the *Länder* and municipalities. Since digitalisation is cost-intensive at first, some of these bodies are not able to cope with the task on their own due to financial constraints.[74] In some cases, public officials are not open to digitalisation or the administration lacks the necessary IT staff.[75] According to DESI, Germany is also one of the weakest Member States when it comes to broadband cover, there being a gap between urban and rural areas.[76] The right to "fast" internet, which has existed since June 2022, is criticised for specifying excessively low bandwidths.[77] As long as there are considerable deficits here or in the conversion of public administrations to e-files, digital-first, and digital-only regulations will encounter difficulties.

69 Hill (2014), pp. 181 f.
70 Guckelberger (2019), paras. 707 ff.
71 Britz and Eifert (2022), section 26, para. 13.
72 Stelkens (2021), section 6, paras. 31 ff.
73 Menhard (2022).
74 *Botschaft zum Bundesgesetz über den Einsatz elektronischer Mittel zur Erfüllung von Behördenaufgaben*, 4 March 2022, BBl 2022 804, p. 22, available at www.fedlex.admin.ch/eli/fga/2022/804/de; see also Digital Public Administration factsheet 2022 Germany, p. 16.
75 Marsch and Fölsch Schroh (2022), p. 450.
76 DESI 2022 Germany, p. 9.
77 Tagesschau (2022).

IV. Switzerland

As a member of the European Free Trade Association (EFTA), Switzerland has signed the Tallinn Declaration on EGovernment. Although it is not a European Union Member State, factsheets on its eGovernment performance are nevertheless compiled. In contrast to the early days, it is now generally agreed that the Confederation, cantons, and municipalities need to cooperate to ensure effective implementation of eGovernment.[78] This is because under the Swiss federal constitution, the Confederation has no general competence to impose binding requirements on the cantons with regard to eGovernment.[79] As far back as 2005, the Swiss Federal Supreme Court decided that electronic communication with administrative authorities required specific legal foundations in order to lay down statutory arrangements to govern its conditions and prevent abuses.[80] As in Germany, an increasing body of eGovernment legislation is being established.

The public-law framework agreement on Digital Public Services Switzerland (DPSS) came into force on 1 January 2022. The organisation DPSS is set up and managed on an equal footing by the Confederation and the cantons.[81] Its purpose is to ensure effective strategic steering and direction of federal, cantonal, and communal digitalisation activities.[82] DPSS has the objective of promoting the digital transformation of public administrations in Switzerland as a political platform with standard development and it issues recommendations. Its tasks include spelling out a common vision, strategic control, priorities and areas of action, identifying necessary basic services, promoting standardisation, harmonisation, common legal and political foundations and underlying conditions for digital public administration, supporting the interested public authorities in the area of digitalisation, strengthening networking, cooperation and knowledge exchange, setting up and monitoring a contact point on the topic of digital administration, promoting a cultural shift towards digital administration and collaborating with the data protection authorities. The DPSS does not, however, provide any ICT services itself. It must fulfil its tasks in a four-year strategy cycle and one-year implementation planning.

In 2005, individual statutory arrangements on electronic administration were included in the Federal Act on Administrative Procedures (APA). Thus, according to Article 21(a), when a submission is sent to a government authority electronically, the submission must bear the qualified electronic signature of the party or its representative (Federal Act of 18 March 2016 on Electronic Signatures).[83] Article 34, paragraph 1bis states that if a party gives its consent, notification of a ruling may be provided by electronic means. Consent is also required for inspection of electronic files (Article 26, paragraph 1bis). The Federal Act on Electronic Identification Services (eID Act), approved by the Parliament, was rejected

78 Glaser (2015), p. 296.

79 *Botschaft zum Bundesgesetz über den Einsatz elektronischer Mittel zur Erfüllung von Behördenaufgaben* (n. 74).

80 BGE, judgment of 30 August 2005, 1P.254/2005, para. 2.3.; see also BGE, judgment of 20 February 2016, 142 V 152, 156.

81 *Botschaft zum Bundesgesetz über den Einsatz elektronischer Mittel zur Erfüllung von Behördenaufgaben* (n. 74).

82 Digital Public Administration factsheet 2022 Switzerland, p. 10, available at https://joinup.ec.europa.eu/sites/default/files/inlinefiles/DPA%20Factsheets%202022%20Switzerland%20vFinal_0.pdf.

83 Federal Act on Electronic Signatures of 18 March 2016 (*Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur und anderer Anwendungen digitaler Zertifikate (Bundesgesetz über die elektronische Signatur, ZertES)*), www.fedlex.admin.ch/eli/cc/2016/752/de.

in a popular vote on 7 March 2021 because private companies were involved in the development of these services.[84] It is therefore expected that a legal basis in the direction of self-sovereign identities will now be developed.[85] Overall, the use of digital identity in the Swiss population is significantly greater than in Germany, around 63% across all procedures.[86]

In the meantime, the Federal Council has submitted a draft law on the use of electronic means for fulfilling public authority tasks, which according to Article 2, paragraph 1, will apply to the central federal administration. This law is intended to create the necessary possible legal foundations in the existing constitutional framework[87] for cooperation between authorities of different communities and with third parties in the use of electronic means to support the fulfilment of public authority tasks, as well as for the expansion and further development of use of such means (Article 1). Among the principles for the use of electronic means in the federal administration, Article 3 envisages "digital first", coordination between the Confederation and the cantons, the principle of sustainability, accessibility of services for the entire population and consideration of risks for data protection and information security as well as for the security and availability of data and services. Article 4 authorises the Confederation to sign agreements on cooperation in the area of eGovernment with other Swiss communities and organisations, including the creation of joint organisations with their own legal personality, as well as with other States. Article 5 relates to the participation of the Confederation in organisations active in the area of eGovernment, and Article 7 sets out the framework conditions for the provision of financial assistance by the Confederation in the technical and organisational implementation of cooperation. Article 8 allows the Confederation to delegate tasks in the area of administrative support activities, such as procurement, to organisations under either public or private law. Article 9 obliges the federal authorities to disclose the source code of software whenever this is possible and reasonable, provided that the rights of third parties are respected. Other provisions relate to Open Government Data (Article 10), the provision and use of ICT resources by federal authorities (Article 11), standards (Article 12), interfaces (Article 13), and an interoperability platform (Article 14).

Efforts are also being made at canton level to push digital administration. In March 2023, the Digital Administration Act (DVG) came into force in the canton of Bern. Article 5, paragraph 1 DVG provides for digital primacy comparable to the digital first principle, according to which the authorities should act, inform and communicate digitally, unless they cannot effectively fulfil their task in this manner. In Article 8, paragraph 1(a) DVG legal persons and (b) natural persons who deal with public authorities in the course of their professional activities or (c) apply for or receive State contributions are obliged to communicate digitally with the authorities. The latter are also obliged to communicate digitally with these persons and with each other. To promote digitalisation, Article 9 DVG foresees information for users and the public, training and sensitisation of administrative staff, and creation of incentives for voluntary digital communication with the authorities, for example through priority treatment of such applications or reduction

84 Digital Public Administration factsheet 2022 Switzerland, p. 20.

85 eGovernment Monitor 2022, p. 25.

86 eGovernment Monitor 2022, p. 25.

87 *Botschaft zum Bundesgesetz über den Einsatz elektronischer Mittel zur Erfüllung von Behördenaufgaben* (n. 74).

of fees. Under Article 12, paragraph 1 DVG, personal data is only collected and kept once between authorities, to the extent possible.

Possibly inspired by Article 22 GDPR, Switzerland has included a provision on automated individual decisions in the revised Data Protection Act (DPA), which will come into force on 1 September 2023. Under Article 21, paragraph 1 DPA, the controller informs the data subject of a decision based solely on automated processing if such has legal effects on the subject or affects the subject significantly. Subsection 2 confers data subjects the right, on request, to state their position or to request review of the decision by a natural person. However, according to Article 21, paragraph 4(2) DPA does not apply if the data subject does not need to be heard under Article 30, paragraph 2 APA or under another federal act. The first clause provides that the automated individual decision by a federal body must, however, be designated as such. This exception to subsection 2 is explained by the fact that subsection 4 refers to decisions rendered by federal bodies against which data subjects can generally take legal action.[88] Fully automated decisions by the authorities are therefore increasingly to be expected also in Switzerland. Overall, the trust and confidence of the Swiss population in the State is high when it comes to digital transformation. This may also be due to the fact that Switzerland is a direct democracy, and voters therefore have sufficient opportunities to influence the legal framework of digitalisation.[89]

V. Austria

Austria performed significantly better in the area eGovernment than Germany and Switzerland right from the start. In DESI 2022, it ranked twelfth in digital public services. The development and expansion of eGovernment has been one of the main priorities of the Austrian federal government from the outset. The information portal help.gov.at was set up as far back as 1997,[90] and was subsequently expanded and renamed oesterreich.gov.at in 2019. A range of government services can be accessed by users at the internet address and via app, partly with and partly without registration.[91] The law also envisages establishment and operation of a Business Service Portal, defining certain requirements for it, for the operation of a citizen service portal and for the establishment of a once-only platform (Section 1). This platform is intended to help prevent administrative burdens on citizens and businesses beyond what is necessary; it also simplifies the underlying technical conditions for exchange of information between government authorities (Section 1, paragraph 3).

Austria was one of the first EU Member States to adopt comprehensive legislation on eGovernment.[92] The Federal Act on Provisions Facilitating Electronic Communications with Public Bodies (EGovernment Act, EGovG) came into force on 1 March 2004 and

88 eGovernment Monitor 2022, p. 39.

89 Communication on the Federal Act on the Total Revision of the Federal Act on Data Protection and the Amendment of Other Data Protection Ordinances of 15 September 2017 (*Botschaft zum Bundesgesetz über die Totalrevision des Bundesgesetzes über den Datenschutz und die Änderung weiterer Erlasse zum Datenschutz*), BBl 2017 6941, p. 7059, available at: www.fedlex.admin.ch/eli/fga/2017/2057/de.

90 Braun Binder (2021), pp. 3 and 11.

91 Wikipedia, oesterreich.gv.at.

92 Digital Public Administration factsheet 2022 Austria, p. 19, available at https://joinup.ec.europa.eu/sites/default/files/inline-files/DPA_Factsheets_2022_Austria_vFinal_1.pdf.

has since been amended several times.[93] The aim is to facilitate electronic communication with public bodies, while observing the principle of freedom to choose between different means of communication when making submissions to such bodies (Section 1, paragraph 1(2) EGovG). According to Section 1a, paragraph 1, sentence 1 EGovG, everyone (with some exceptions) has the right to communicate electronically with courts and administrative bodies in matters involving federal legislation. According to Section 25, paragraph 1 EGovG, the courts and administrative bodies established by federal legislation were required to create the technical and organisational requirements for electronic communication with the parties involved (defined in Section 1a) by 1 January 2020 at the latest. Under Section 1b EGovG, companies defined in Section 3, No. 20 of the federal act regarding federal statistics shall participate in electronic delivery, unless this is unacceptable because the company does not have the necessary technical requirements or any internet connection. Very early on, EGovernment Act set out arrangements for unique identification and the eID function. ID-Austria is currently the major further development of the mobile phone signature and Citizen Card. The continuing upward trend in identification options provided by the authorities, which are used by 64% of the population, suggests a high level of acceptance of ID-Austria.[94] According to Section 4a, paragraph 1, sentence 1 EGovG, the competent authority is to automatically register the eID function for citizens from age 14 years and over on application for a travel document, unless the data subject expressly objects to registration. Compared to the German register modernisation with its link to the identification number, the Austrian solution is claimed to be significantly more data-protection-friendly. The so-called source PIN (Section 6, paragraph 1 EGovG), which is only available to a single central office, is not linked to any other personal data, whereas sector-specific personal identifiers are derived from it.[95] Sections 14 ff. EGovG regulate the use of the eID function in the private sector and abroad. Section 17, paragraph 2 EGovG states that if authorities must determine the accuracy of personal data contained in an electronic register of a public-sector controller, they themselves, with the proviso of technical possibilities, must undertake acquisition of the data via electronic communications to this extent. However, the data subject must consent to this or the acquisition through official channels must be authorised by statute. Sections 19 ff. EGovG contain provisions on special aspects relating to the keeping of electronic records. With few exceptions, based on the ELAK concept, paper files have been replaced by electronic files in federal ministries. On the basis of a framework agreement, these are also used at the provincial and municipal levels.

According to Article 13, paragraph 2 of the General Administrative Procedures Act,[96] this "is relevant to eGovernment in that it regulates the ways in which public authorities and citizens can communicate with each other, such as the transmission of applications by

93 Enactment of an E-Government Act and amendment of the General Administrative Procedure Act 1991, the Service of Documents Act, the Fees Act 1957, the Registration Act 1991 and the Associations Act 2002 of 27 February 2004 (*Erlassung eines E-Government-Gesetzes sowie Änderung des Allgemeinen Verwaltungsverfahrensgesetzes 1991, des Zustellgesetzes, des Gebührengesetzes 1957, des Meldegesetzes 1991 und des Vereinsgesetzes 2002*), BGBl. I Nr. 10/2004, www.ris.bka.gv.at/eli/bgbl/I/2004/10.

94 eGovernment Monitor 2022, p. 24.

95 Sorge et Al. (2020), pp. 24 f.

96 General Administrative Procedure Act of 1 January 1991 (*Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG*), BGBl. Nr. 51/1991, www.ris.bka.gv.at/Dokumente/Erv/ERV_1991_51/ERV_1991_51.pdf.

email or Web forms".[97] Pursuant to Section 17, paragraph 1(2) APA, to the extent that the authority processes the files of the case electronically, the parties may be granted the right to inspect the files in any technically feasible manner on request. Provisions on electronic service are also set out in Sections 28 ff. of the Service of Documents Act.

In the first phase of digitalisation, the focus was mainly on electronic mapping of existing processes. Increasingly, however, the focus has been on optimising administrative processes, as exemplified by the family allowance which does not require any application.[98] So far, no general provision on automated decisions has been included in the APA. Besides the requirements laid down in Article 22 GDPR, special constitutional requirements emanating from the constitutional concept of a notice also apply. For reasons relating to legal protection, the Constitutional Court requires that the specified authority actually initiate issue of an automation-assisted decision and that the authority have an actual influence on the automation-assisted process.[99] Constitutional law thus places limits on the use of AI. For some time now, a debate has been raging over the AMS algorithm that classifies unemployed persons as having low, medium, and high chances of placement in the allocation of support measures.

Austria's good performance in comparative studies is explained by its pragmatic approach. Under the Austrian constitution, federalism is characterised by a tendency towards centralisation.[100] Under Article 11, paragraph 2 Federal Constitutional Law (B-VG), insofar as "a need for the issue of uniform regulations is considered to exist, the administrative procedure [. . .] is prescribed by federal law".

VI. France

In DESI 2022, France ranked fifteenth in digital public services.[101] Various new bodies have been set up to promote digitalisation of the public administration. The Interministerial Digital Directorate (DINUM) plays a key role in this effort.[102] France has set itself the objective of digitalising 250 of the most common public administrative services by 2022. According to DESI 2022, it has achieved 88% of this target, this success being partly due to use of the open-source dematerialisation platform "démarches-simplifiées (simplified steps)".[103]

As France is a unitary State, the State is in principle exclusively responsible for legislation.[104] For various reasons, general administrative law was codified late in France.[105] Today, the essential eGovernment regulations for relations between the public administration and the rest of society are laid down in a single code, the Code on the Relationship between Users and the Administration (*Code des relations entre le public et l'administration*,

97 Digital Public Administration factsheet 2022 Austria, p. 19.
98 Mayrhofer and Parycek (2022), pp. 14 f.
99 VfSlg. 11.590/1987 at 8.2.6.
100 Schmidt (2021), p. 37.
101 DESI 2022 France, p. 16, available at https://digital-strategy.ec.europa.eu/en/policies/desi-france.
102 Digital Public Administration factsheet 2022 France, p. 31, available at https://joinup.ec.europa.eu/sites/default/files/inline-files/DPA_Factsheets_2022_France_vFinal_0.pdf.
103 DESI 2022 France, p. 16.
104 Vilain (2015), section 3, paras. 80 ff.
105 Sommermann (2011), p. 195.

CRPA).[106] This contains inter alia provisions governing electronic forms on the public website "service-public.fr" (Article D. 113 CRPA) and on electronic communication between users and the public administration. According to a decision by the Conseil d'État, it follows from Article L. 112–8, L. 112–9 and L. 112–10 CRPA, that there is a right, but not an obligation, to communicate electronically with the public administration.[107] In order to promote electronic communication, Article L. 123–1 envisages a "right to error" for the first error in transmission to the public authorities. The digital identity federator called France Connect+, which relies on pre-existing accounts widely used by French citizens, such as health insurance and tax administration accounts, or the electronic identification, authentication, and trust services node (e-IDAS), introduced in 2021 with the intention of making electronic communication interoperable cross-border by the end of 2022, can be used for identification purposes in transactions with the public administration.[108]

Under Article L. 112–14 CRPA, the public administration may reply electronically if (1) a request for information is made to it by this means or (2) another request is sent to it electronically, unless the person concerned has expressly rejected an electronic reply. All the procedures using France Connect+ make it possible to apply the once-only principle (OOP). Further manifestations of OOP can be found in Article L. 113–12 CRPA and in the rules applicable to exchange of information between public administrations (Article L. 114–8, Article L. 114–9).[109]

Increasingly, algorithm-based decisions are also being made in France, for example in the areas of granting social assistance, allowances, taxes and levies, sometimes even through AI.[110] Under Article L. 311-1-3, data subjects must be informed, and pursuant to Article R. 311-3-1-2, certain information must be provided in an understandable form on request. Article 47 Law Number 78–17 on Informatics and Liberties must also be observed. The source code comes under official documents in Article L. 300–2 CRPA in the book on access to information.[111]

In France as well, various regulations relating to or having an impact on digital public administration are contained in specific sets of rules. For example, a decree on electronic exchanges between users and administrative authorities and public services envisages establishment of a public service, for which the State is responsible and provides users with storage space.[112] France's Factsheet 2022 highlights enactment of a law on reduction of the environmental footprint of the digital sector (Law to reduce the environmental footprint of digital technology in France),[113] which aims to raise awareness among digital actors of sustainability factors in digitalisation.[114]

106 Digital Public Administration factsheet 2022 France, p. 23; see also www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000031366350/2024-02-10.

107 Conseil d´État, decision of 27 November 2019, 422516.

108 DESI 2022 France, p. 16.

109 DESI 2022 France.

110 Roth (2022), pp. 254 f.; see also DESI 2022 France, p. 17.

111 Duy and de Schotten (2021) p. 35; see also Conseil Constitutionnel, decision of 28 May 2020, 2020–843 QPC, recital 17.

112 Cossalter (2022), para. 59.

113 Law to reduce the environmental footprint of digital technology in France of 15 November 2021 (*Loi n° 2021–1485 du 15 novembre 2021 visant à réduire l'empreinte environnementale du numérique en France*), JORF of 16 November 2021, www.legifrance.gouv.fr/jorf/id/JORFTEXT000044327272.

114 Digital Public Administration factsheet 2022 France, pp. 10 and 28.

In contrast to other countries, France has not enacted an EGovernment Act, and has instead laid down central provisions governing digital administration in the CRPA. France's ranking in comparative studies is explained by the digital divide and the rather poor relationship of citizens with the public administration.[115]

VII. Estonia

Estonia has long been a frontrunner in digital public services and was the best performing country in DESI 2022.[116] 99% of public administrative services are offered online and used by over 90% of citizens and businesses.[117] Many of the forms used are pre-compiled. Because of its progress in digitalisation, Estonia has also dubbed itself "e-Estonia" and was apparently the first country ever to introduce e-residency for foreigners so that they can use its eGovernment and e-services.[118]

After achieving independence from the Soviet Union in 1991, the government had a unique opportunity to rebuild and refocus Estonia.[119] The first national IT strategy, adopted as far back as 1994, received support across political parties.[120] Moreover, with a population of around 1.3 million, the country has long had an IT-savvy population that tends to be open to data processing and have a high level of acceptance of digitalisation because of the economic boom associated with it.[121]

Among other things, early implementation of the integration platform X-Road, renamed X-tee in 2018, has contributed significantly to Estonia's eGovernment success.[122] It enables fast and secure data exchange between public-sector IT systems.[123] In 2003, Estonia launched its eGovernment portal and has since continued to develop it.[124] Mandatory introduction of the Estonian electronic ID card and implementation of electronic signatures early on promoted rapid attainment of high user numbers for eGovernment services.[125]

In the early days, Estonia mainly promoted digitalisation informally, but recently coordination has tended to be more systematic.[126] There is a whole series of legal regulations on e-administration. The Public Information Act is particularly noteworthy.[127] It contains provisions on the Estonian information gateway (Section 32^1) and the State information system (Section 43^2). Under Section 43^3, subsection 1, this involves a database, established by an act or legislation issued on the basis of an act. It is prohibited to establish different databases for collection of the same data (Section 43^3 (2)). Prior to establishment or modi-

115 Dupuis (2022).
116 DESI 2022 Estonia, p. 16, available at https://digital-strategy.ec.europa.eu/en/policies/desi-estonia.
117 DESI 2022 Estonia, p. 16.
118 DESI 2022 Estonia, p. 16; Särav and Kerikmäe (2016), pp. 57 f.
119 Kattel and Mergel (2018), p. 4.
120 Kattel and Mergel (2018), p. 2.
121 BT-Drucks. 20/3651, pp. 53 f.
122 Kerikmäe and Pärn-Lee (2021), p. 562.
123 Kerikmäe and Pärn-Lee (2021), p. 562.
124 Digital Public Administration factsheet 2022 Estonia, p. 29, available at https://joinup.ec.europa.eu/sites/default/files/inline-files/DPA_Factsheets_2022_Estonia_vFinal_0.pdf.
125 Kerikmäe and Pärn-Lee (2021), p. 562.
126 Digital Public Administration factsheet 2022 Estonia, p. 14.
127 Public Information Act of 15 November 2000 (*Avaliku teabe seadus*), www.riigiteataja.ee/en/eli/514112013001/consolide.

fication of a database, the technical documentation has to be approved by the Estonian Information System's Authority, the Data Protection Inspectorate and Statistics Estonia, for which subsection 4 Public Information Act specifies exceptions. Under Section 43^6 (1), basic data is the unique data collected in a database of the State information system and created in the performance of the public duties of the administrator of the database. While there are few provisions governing electronic administration in the Administrative Procedures Act, very detailed principles for managing services and governing information have been drawn up. For example, in Section 2 of this act, a distinction is made between direct public services, proactive services and event services. Chapter 2 regulates the responsibility for management and development of services, while Chapter 3 concerns the management of services. Section 9 deals with the provision of direct public services.

Estonia is praised in DESI 2022 for its investment in digital public services.[128] Estonian public institutions are increasingly switching from legacy IT systems to a new government cloud solution.[129] In June 2021, more than 100 AI-based tools were in use, according to the factsheet.[130] There is currently a strong focus on the development and implementation of Bürokratt, an interoperable network of AI applications that gives people access to public services through virtual assistants and voice interaction.[131] As the public sector is more progressive than the private sector when it comes to digitalisation, the aim is to use it to advance AI technology as a whole.[132] Fully automated administrative decisions based on the processing of personal data require a legal basis as a result of Article 22, paragraph 2(b) GDPR. Such foundations can be found, for example, in Section 46^2 of the Taxation Act. Enactment of a general standard for such administrative decisions is now being explored, as is the standardisation of legal requirements for the use of AI in public administration.[133] This also emphasises Estonia's high motivation to remain a pioneer in eGovernment.

VIII. Conclusion

Considerable progress has been made in the digital transition of public administrations in Europe. While the state of affairs in some countries such as Estonia can be described as full digitalisation, other countries are only gradually making their way.[134] Countries such as Denmark and Spain, with high eGovernment user numbers, often grant individuals a right to communicate electronically or even make it mandatory for them to use electronic government mail.[135] Joint agreements, but also EU legal requirements, are instruments for advancing the digitalisation of public administrations as evenly as possible within Europe. Increasing progress in the digitalisation of public administrations makes it possible to serve larger user groups; at the same time, it offers the possibility of organisational and/or procedural redesign, thus also influencing the outcome of administrative decisions.[136] Fully

128 DESI 2022 Estonia, p. 17.
129 DESI 2022 Estonia.
130 Digital Public Administration factsheet 2022 Estonia, p. 15; see also Ebers and Tupay (2023), pp. 17 and 30 ff.
131 DESI 2022 Estonia, p. 16; see also Pilving and Mikiver (2020), pp. 47 f.
132 Kerikmäe and Pärn-Lee (2021), pp. 563 f.
133 Ebers and Tupay (2023), p. 87.
134 General information on full digitalisation Heckmann and Paschke (2021), chapter 5, paras. 962 ff.
135 On Spain, see Müller (2019), pp. 164 f.; on Denmark, see Sommer (2019), pp. 102 and 104.
136 Heckmann and Paschke (2021), chapter 5, para. 962.

automated administrative decisions should only be used if their legality is ensured and there are no legal obstacles. The flawed algorithm used in the UK to calculate final school scores, which influenced admission to institutes of higher learning, and the dispute over the Austrian algorithm concerning support for the unemployed have demonstrated that trust and confidence in public administrations may otherwise suffer. Since it is often difficult to attract IT specialists to public administration due to competition from the private sector, ways to change this and possibly boost the attractiveness of the public sector for well-trained specialists need to be found. As the examples of France and Switzerland show, sustainability is also a significant factor in digitalisation of public services.

Bibliography

Andermatt K.C. (2022), 'Kritik der Digitalen Verwaltung', in Pleger L.E., Mertes A. (eds), *Digitale Transformation der öffentlichen Verwaltung in der Schweiz*, Wiesbaden: Springer Gabler Verlag, 89–115.

Bégon-Tavera H. (2021), *La Transformation numérique des administrations*, La Documentation Française.

Braun Binder N. (2019), 'Vollautomatisierte Verwaltungsverfahren, vollautomatisiert erlassene Verwaltungsakte und elektronische Aktenführung', in Seckelmann M. (ed), *Digitalisierte Verwaltung*, 2nd edition, Berlin: Erich Schmidt Verlag, 311–326.

Braun Binder N. (2020), 'Automatisierte Entscheidungen: Perspektive Datenschutzrecht und öffentliche Verwaltung', 1 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht*, 27–34.

Braun Binder N. (2021), 'Digitalisierung in der Verwaltung', in Braun Binder N., Bußjäger P., Eller M. (eds), *Auswirkungen der Digitalisierung auf die Erlassung und Zuordnung behördlicher Entscheidungen*, Wien: New Academic Press Verlag, 3–18.

Britz G., Eifert M. (2022), 'Digitale Transformation der Verwaltung', in Voßkuhle A., Eifert M., Möllers C. (eds), *Grundlagen des Verwaltungsrechts* Bd. I, 3rd edition, München: C. H. Beck Verlag, 1888–1984.

Bundesministerium des Innern und für Heimat (2023), *Eckpunkte für eine moderne und zukunftsgerichtete Verwaltung*, 23 May, www.bmi.bund.de/SharedDocs/gesetzgebungsverfahren/DE/Downloads/kabinettsfassung/eckpunkte-ozg.html.

Cossalter P. (2022), 'Données publiques et administration numérique', in *Procédures administratives électroniques*, Généralités, fascicule 109–22, Jurisclasseur administratif.

Distel B. (2022), 'Digitalwüste Deutschland?', 10–11 *Aus Politik und Zeitgeschichte*, 49–54.

Distel B., Hofmann S., Madsen C.O. (2020), *Nationale E-Government-Strategien: Deutschland und Dänemark im Vergleich*, Berlin: Nationales E-Government Kompetenzzentrum e.V.

Dupuis M. (2022), *Transforming Public Action – eGovernment in France*, www.internetjustsociety.org/cosmonaut/egovernment-in-france.

Ebers M., Krõõt Tupay P. (2023), *Artificial Intelligence and Machine Learning Powered Public Service Delivery in Estonia – Opportunities and Legal Challenges*, Heidelberg: Springer Verlag.

European Court of Auditors (2022), Special Report, 24 *e-Government Actions Targeting Businesses*, www.eca.europa.eu/Lists/ECADocuments/SR22_24/SR_e-Government_EN.pdf.

Galetta D.-U. (2023), 'Digital Transition of Public Administration in Italy and the Right to a Good Administration: Problems and Prospects also in the Perspective of the Implementation of Italy's Recovery and Resilience Plan', in Gromek-Broc K. (ed), *Public Law in a Troubled Era: A Tribute to Professor Patrick Birkinshaw*, The Netherlands: Kluwer Law International.

Glaser A. (2015), 'Der elektronisch handelnde Staat, E-Legislation, E-Government, E-Justice', 134 *Zeitschrift für Schweizerisches Recht*, 259–333.

Groß T. (2021), 'Grundelemente eines handlungsformbezogenen Verwaltungsvergleichs in Europa', 146 *Archiv des öffentlichen Rechts*, 543–594.

Guckelberger A. (2019), *Öffentliche Verwaltung im Zeitalter der Digitalisierung*, Baden-Baden: Nomos Verlag.

Guckelberger A. (2022), 'Administration in the Age ‚4.0', in Frenz W. (ed), *Handbook Industry 4.0*, Heidelberg: Springer Verlag, 303–330.

Heckmann D., Paschke A. (2021), *jurisPK-Internetrecht*, 7th edition, Saarbrücken: juris GmbH.

Hill H. (2014), 'Legalistische Verwaltungskultur–Diskussionsbeitrag in Thesen', in König K., Kropp S., Kuhlmann S., Reichard C., Sommermann K.-P., Ziekow J. (eds), *Grundmuster der Verwaltungskultur*, Baden-Baden: Nomos Verlag, 181–190.

Hornung G. (2022), 'Section 35a', in Schoch F., Schneider J.P. (eds), *Verwaltungsrecht VwVfG Kommentar*, Bd. III, 3rd edition, München: C. H. Beck Verlag.

Kattel R., Mergel I. (2018), 'Estonia's Digital Transformation: Mission Mystique and the Hiding Hand', 9 *UCL Institute for Innovation and Public Purpose Working Paper Series*, 1–19.

Kerikmäe T., Pärn-Lee E. (2021), 'Legal Dilemmas of Estonian Artificial Intelligence Strategy: In Between of e-Society and Global Race', 36 *AI & Society*, 561–572.

Kretschmer C. (2022), *Warum der "Behörden-Booster" klemmt*, www.tagesschau.de/inland/innenpolitik/online-zugangsgesetz-101.html.

Marsch N., Fölsch Schroh S.M. (2022), 'Artificial Intelligence Accountability of Public Administration', in Schmidt-Kessel M. (ed), *German National Reports on the 21st International Congress of Comparative Law*, Tübingen: Mohr Siebeck Verlag, 443–483.

Mayrhofer M., Parycek P. (2022), 'Digitalisierung des Rechts', in *21. Österreichischer Juristentag Bd. IV/1*, Wien: MANZ'sche Verlags und Universitätsbuchhandlung.

Menhard E. (2022), *Onlinezugangsgesetz: Ohne Schnittstellen ist kein digitaler Staat zu machen*, https://netzpolitik.org/2022/onlinezugangsgesetz-ohne-schnittstellen-ist-kein-digitaler-staat-zu-machen/.

Müller T. (2019), *Die Europäisierung der Verwaltungsverfahrensgesetze in Deutschland und Spanien*, Tübingen: Mohr Siebeck Verlag.

Nguyên Duy P., de Schotten K. (2021), 'Informationsfreiheitsrechte in der französischen Verwaltungsrechtsprechung', *Neue Zeitschrift für Verwaltungsrecht*, 33–39.

Pilving I., Mikiver M. (2020), 'A Kratt as an Administrative Body: Algorithmic Decisions and Principles of Administrative Law', 29 *Juridica International*, 47–61.

Pleger L.E., Mertes A. (2022), 'Einführung: Digitale Transformation in der öffentlichen Verwaltung in der Schweiz – Stand, Entwicklungslinien und Praxisbeispiele', in Pleger L.E., Mertes A. (eds), *Digitale Transformation der öffentlichen Verwaltung in der Schweiz*, Wiesbaden: Springer Gabler Verlag, 1–13.

Poelmans M. (2019), 'Von elektronischer Verwaltung zu gemeinschaftlicher Governance', in Schünemann W.J., Kneuer M. (eds), *E-Government und Netzpolitik im europäischen Vergleich*, 2nd edition, Baden-Baden: Nomos Verlag, 167–184.

Roth C.L. (2022), 'Les actes numérique d'organisation du service public, Le cas français', in Cluzel-Métayer L., Prébissy-Schnall C., Sée A. (eds), *La transformation numérique du service public: une nouvelle crise?*, Le Kremlin-Bicêtre: les Éditions Mare&Martin, 251–267.

Ruffert M. (2017), 'Rechtsvergleichung als Perspektivenerweiterung – Neuorientierung(en) für Verwaltungsrecht und Verwaltungsrechtswissenschaft', in Burgi M. (ed), *Zur Lage der Verwaltungsrechtswissenschaft, Beiheft 12 Die Verwaltung*, Berlin: Duncker&Humblot Verlag, 165–176.

Särav S., Kerikmäe T. (2016), 'E-Residency: A Cyberdream Embodied in a Digital Identity Card?', in Kerikmäe T., Rull A. (eds), *The Future of Law and eTechnologies*, Heidelberg: Springer Verlag, 57–79.

Schmidt C. (2021), *Das modernisierte Besteuerungsverfahren in Deutschland im Vergleich zu Österreich*, Berlin: Duncker&Humblot Verlag.

Sommer I., Skak-Nørskov L. (2019), 'Was können wir von Dänemark lernen? Eine Reise zum Europa- und Weltmeister', in Lühr H.-H., Jabkowski R., Smentek S. (eds), *Handbuch Digitale Verwaltung*, Wiesbaden: Kommunal- und Schul-Verlag, 102–110.

Sommermann K.P. (2011), 'Das Verwaltungsverfahrensgesetz im europäischen Kontext', in Hill H., Sommermann K.-P., Stelkens U., Ziekow J. (eds), *35 Jahre Verwaltungsverfahrensgesetz*, Berlin: Duncker&Humblot Verlag, 191–212.

Sommermann K.-P. (2021), 'Die Bedeutung der Rechtsvergleichung im europäischen Verwaltungsrecht', in Kahl W., Ludwigs M. (eds), *Handbuch des Verwaltungsrechts*, Bd. II, Heidelberg: C. F. Müller Verlag, 857–895.

Sorge C., von Lucke J., Spiecker gen. Döhmann I. (2020), *Registermodernisierung*, Berlin: Friedrich-Naumann-Stiftung für die Freiheit.

Stegmüller M. (2018), 'Vollautomatische Verwaltungsakte – eine kritische Sicht auf die neuen § 24 I 3 und § 35a VwVfG', *Neue Zeitschrift für Verwaltungsrecht*, 353–358.

Stelkens U. (2021), 'Verwaltung im wiedervereinigten Deutschland', in Kahl W., Ludwigs M. (eds), *Handbuch des Verwaltungsrechts*, Bd. I, Heidelberg: C. F. Müller Verlag, 195–237.

Tagesschau (2022), *Recht auf schnelles Internet beschlossen*, www.tagesschau.de/wirtschaft/technologie/schnelles-internet-deutschland-gesetz-101.html.

Taylor P. (2020), *Ofqual and the Algorithm*, www.lrb.co.uk/the-paper/v42/n17/paul-taylor/short-cuts.

Vilain Y. (2015), 'Verfassungsprinzipien', in Marsch N., Vilain Y., Wedel M. (eds), *Französisches und Deutsches Verfassungsrecht*, Heidelberg: Springer Verlag, 45–120.

Zefferer T. (2015), *E-Government-Dienste in Europa – ein Vergleich von sieben Ländern*, www.vodafone-institut.de/de/publikationen/e-government-dienste-in-europa-ein-vergleich-von-sieben-la%cc%88ndern/.

32 The Civil Service and Artificial Intelligence

Stephanie Schiedermair

I. Artificial Intelligence in Europe – Visions and State of the Art

Artificial Intelligence (AI)[1] triggers great hopes and at the same time the worst fears.[2] Positive visions of smart cities and smart governments highlight the possibilities offered by AI.[3] On the other hand, scenarios emerge of AI leading step by step to an all-inclusive surveillance or even further to the takeover by machines that was once considered a matter for science fiction only.[4] In reality, the use of AI has already partly become a component of everyday life and partly still at an experimental stage moving with different speeds in different countries worldwide[5] and within Europe. In Europe, the United Kingdom (UK), France, and Germany represent highly active AI regions.[6] The UK government set up an Office for AI to implement the national AI strategy.[7] Estonia has become a leader in Europe for the digitisation of the civil service. The project e-Estonia enables citizens to vote, apply for a loan, file their taxes, and complete other administrative tasks by transfer of digital information.[8] Now the country is promoting the use of AI in the civil service with an AI task force initiated by the government.[9]

The experimental use of AI in a variety of different fields evokes a need for strategic and political decisions which is why countries throughout the world develop AI strategies.[10] In the worldwide competition for a leading position in AI research and application, the

1 The term is intended to indicate the complex development of computer systems able to perform tasks that normally require human intelligence, e.g. visual perception, speech recognition, translation and decision-making. For a critical review of the term see Tzimas (2020), pp. 533 and 539 ff.; Herberger (2018), pp. 2825 and 2826 ff.

2 Russell et al. (2015), p. 105. Machine learning has become the most successful type of AI, see Alpaydin (2016).

3 Etscheid et al. (2020).

4 Cohen et al. (2022). The warning of the famous theoretical physicist and cosmologist Stephen Hawking points in the same direction, Cellan-Jones (2014). The scepticism is shared by the open-source non-profit organisation OpenAI LP founded by Elon Musk, https://openai.com.

5 The US, China, and Europe are in the race for maximum AI-related research output, Savage (2020).

6 See European Commission, The European AI Landscape, Workshop Report, https://ec.europa.eu/jrc/communities/sites/jrccties/files/reportontheeuropeanailandscapeworkshop.pdf.

7 The Office for Artificial Intelligence is part of the Department for Digital, Culture, Media & Sport on one hand and of the Department for Business, Energy & Industrial Strategy on the other, see www.gov.uk/government/organisations/office-for-artificial-intelligence.

8 See https://e-estonia.com.

9 Petrone (2022).

10 Berryhill et al. (2020), pp. 72 f., 140 f.; Galindo et al. (2021).

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European Union aims to promote an AI "made in Europe".[11] The idea behind this is a concept of "ethical AI" combining a legal framework for the common market with the requirements of European values enshrined in Article 2 of the Treaty on European Union (TEU).[12] In this way, the European Union (EU) aims to differ from countries like China that use AI technology to comprehensively monitor and control their citizens, e.g. by using face recognition to identify those who take part in demonstrations.[13] This effort is flanked by the activities of the Council of Europe, which has installed a Committee on Artificial Intelligence (CAI) to promote applications of AI based on human rights, the rule of law and democracy.[14]

For the public administration sector, the EU encourages the use of AI as part of the "ethical AI" concept. The European Parliament set up a Special Committee on Artificial Intelligence in the Digital Age which adopted the Artificial Intelligence in a Digital Age (AIDA) Report on 22 March 2022.[15] In this report, the Parliament advocates for the use of AI and asks the EU to take a leading role in the worldwide technological and political race accompanying its use. Meanwhile, the European Commission promotes a digital strategy to develop common European standards anchored in common European goals.[16] Within this framework, the Commission proposed the Artificial Intelligence Act (AI Act) in 2021 and the Council adopted its common position ("general approach") on the AI Act in December 2022.[17] The AI Act uses a tiered, risk-based approach which tries to find a balance by dividing AI technology into three categories:[18] (1) applications and systems associated with unacceptable risk, such as government-run social scoring, are banned; (2) so-called high-risk applications, e.g. CV-scanning tools that rank job applicants, must meet specific legal requirements; (3) all other applications are left largely unregulated by the AI Act, but not necessarily unregulated by other instruments, such as the Digital Services Act,[19] the Digital Markets Act,[20] and the Data Governance Act.[21] For now, the AI Act and

11 See Access Now, *Mapping Regulatory Proposals for Artificial Intelligence in Europe*, www.accessnow.org/cms/assets/uploads/2018/11/mapping_regulatory_proposals_for_AI_in_EU.pdf.

12 Da Costa and Moniz Pereira (2022).

13 Chinese technology is spreading worldwide, for example to Iran, where the government is suppressing protests after the death of 22-year-old Mahsa Amini, see Khorrami (2022).

14 Council of Europe and Artificial Intelligence, www.coe.int/en/web/artificial-intelligence/home.

15 European Parliament Committees: Special Committee on Artificial Intelligence in the Digital Age, www.europarl.europa.eu/committees/en/aida/home/highlights.

16 European Commission, *A European Approach to Artificial Intelligence*, https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence. The strategy is flanked by other important initiatives, e.g. the Cybersecurity Strategy of the European Commission, https://digital-strategy.ec.europa.eu/en/policies/cybersecurity-strategy.

17 European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021), 206 final. Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts – General approach. An overview of the AI Act is provided by Bomhard and Merkle (2021), p. 257.

18 COM (2021), 206 final, https://artificialintelligenceact.eu.

19 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277/1.

20 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020), 842 final.

21 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724, OJ L 152/1.

the surrounding data regulation provide an appropriate first framework for the experimental status of AI applications. The legislation can and should be accompanied and supported by guidelines for administrations.[22] It remains to be seen how regulations will have to be adapted as AI applications develop.

II. Artificial Intelligence – Chances and Challenges

The expectations for AI are high. For global economies, AI is considered a major commercial opportunity.[23] New applications and new business areas are opening up and traditional applications are being reshaped. Regarding the civil service, lower information technology costs and an enormously improved capacity to process data are expected to take the development of e-government[24] into a new dimension. The use of AI is expected to increase the efficiency and effectiveness of administrative processes and optimise the relationship between the resources used and the results targeted.[25] The advantages of AI for the public sector are in principle the same as for the private sector and lie in the accuracy and efficiency that machine-learning algorithms usually[26] provide.[27]

AI applications are considered to be highly reliable, fast and permanently available. They therefore offer the chance to free administrative staff from mechanical tasks so that they can focus on other assignments. AI shall help to optimise the workflow, e.g. by editing incoming emails, accounting travel expenses, providing IT-helpdesks, translating documents and preparing interview transcripts.[28] The idea is to achieve full capacity utilisation of employees through work that best suits their skills and knowledge.[29] The hopes linked to the use of AI are a more efficient civil service with improved internal and external communications. Improved communication between different units within the civil service will increase administrative output, while interaction of the civil service with citizens via chatbots and other tools is expected to be easier and more comfortable. It remains to be seen whether these expectations are well-founded.

What is certain is a shift in the assignments of civil servants, which makes it necessary to prepare civil servants for the upcoming changes.[30] At a global level, the United Nations (UN) Broadband Commission's Working Group on AI Capacity Building – a commission under UN Educational, Scientific and Cultural Organization (UNESCO) – has therefore started a Digital Transformation and Artificial Intelligence Competency Framework

22 A wide portfolio of guidelines or policy recommendations is being proposed by scientists, see for example Berryhill et al. (2020), pp. 89 f.; Fuster (2020), pp. 67 f. For the German administration, see the self-commitment guidelines for the use of AI in the official practice of labour and social administration, www.bmas.de/DE/Service/Publikationen/Broschueren/a862-leitlinien-ki-einsatz-behoerdliche-praxis-arbeits-sozialverwaltung.html.

23 See for example UK government, https://gcs.civilservice.gov.uk/blog/introduction-to-data-automation-and-artificial-intelligence/.

24 Evans and Yen (2006), p. 207; Malodia et al. (2021); Wirtz (2022), pp. 5 f.

25 Djeffal (2018), p. 10.

26 Accuracy and efficiency are generally accepted as advantages of AI. On closer inspection, accuracy varies greatly depending on the method and area of application. Especially when used *en masse*, even small error rates can have far-reaching consequences. Regarding efficiency, AI has its costs which must be weighed case by case against the costs of a non-AI application.

27 Coglianese and Ben-Dor (2021), pp. 791 and 827 ff.

28 Etscheid et al. (2020), pp. 29 f.

29 Etscheid et al. (2020), p. 28.

30 Engstrom et al. (2020), p. 73. On the training of civil servants in general, see *Digital Competencies in the Civil Service* by M. Secklmann and D. Catakli in this volume.

for Civil Servants.[31] The framework's target is to support administrations worldwide in helping their staff to use AI applications. For this purpose, the Working Group organises global and regional multi-stakeholder consultations.[32] At the European level, further training in AI is provided for administrations, e.g. by the European Institute on Public Administration[33] or the EU-funded master's programme "Master in Artificial Intelligence for Public Services".[34] In Germany, there is increasing training on AI applications for public service employees.[35]

Right now, States are experimenting with AI applications for the civil service,[36] which makes it impossible to provide a final overview, although certain fields typical of these applications can be identified.[37] The Front-Office for contact with citizens and the Back-Office for cooperation within the civil service are two typical settings for the use of AI that could improve administrative communication with citizens and within administrations. Decision support systems are being tested and as a final step, decision systems are being discussed.

From a legal perspective, AI applications pose many challenges. Being a cross-sectional matter, AI law touches a wide range of legal issues.[38] It is therefore especially important to consider each concrete application in detail since the law only provides solutions for specific cases and not for abstract scenarios. Generally speaking, the challenges of AI applications in the context of the civil service focus on the requirements of democracy and the rule of law (Section III), data protection and privacy issues (Section IV), and the problem of discrimination (Section V). The question of accountability is another crucial consideration for AI applications.[39] In the context of the use of AI applications by the civil service, the question of accountability is now discussed from a democracy and rule of law perspective.

III. Democracy and Rule of Law

Democracy and the rule of law belong to the fundamental values the EU is based upon according to Article 2 TEU.[40] Both values are closely related to the respect for human rights which is enshrined in the norm as well.[41] In this way, the rights of the EU Charter of Fundamental Rights (CFR) and those of the European Convention on Human Rights

31 UNESCO, www.unesco.org/en/digital-competency-framework.

32 UNESCO workshop for civil servants in Africa (2022), www.unesco.org/en/articles/what-are-digital-competencies-civil-servants-africa?.

33 Www.eipa.eu/eu-digital-learning/ai-eu-law-definition-and-developments/.

34 https://digital-skills-jobs.europa.eu/en/opportunities/training/master-artificial-intelligence-public-services-ai4gov.

35 IT Advanced Training in North Rhine-Westphalia, https://it-fortbildung.nrw.de/seminarprogramm/kunstliche-intelligenz-entstehung-auswirkung-und-anwendung-fur-die-offentliche-verwaltung-web-2023-div-wbkiverw-000; the E-Campus offer on https://egov-campus.org/courses/kiverwaltung_uzl_2021-1, and the Bitkom Academy's advanced training https://bitkom-akademie.de/zertifikatslehrgang/egovernment-ki-grundlagen-oeffentlicher-dienst.

36 Coglianese (2021), pp. 106 f. with a focus on the US.

37 Von Lucke and Etscheid (2020), para. 27 ff.

38 Ben-Israel et al. (2021), pp. 9 f. and 14 f.

39 Nye et al. (2021), pp. 29 f.

40 See *The Particular Status of the Civil Service* by C. Haguenau-Moizard in this volume.

41 Whether human rights are seen as a fundamental part of the rule of law or a value in itself, as implied by Article 2 TEU, is unimportant for the following reflections.

(ECHR) also become a benchmark for AI applications in the EU.[42] For human rights, the development and the use of AI applications pose many challenges ranging from effective remedies (Article 47 CFR; Articles 6 and 13 ECHR) over issues of privacy and data protection (Articles 7 and 8 CFR; Article 8 ECHR) to challenges concerning equality and non-discrimination (Articles 20 and 21 CFR; Article 14 ECHR, protocol 12 ECHR).[43] Moreover, challenges for social and economic rights can emerge, for example when AI systems are used to monitor and track workers or assess and predict worker potential and performance in hiring and firing situations.[44] If AI systems are used to detect and oppose the formation of workers' unions, this can influence workers' rights to decent pay and to organise. The use of AI systems in social welfare administration, e.g. in the context of education or housing allocation, can challenge the right to social security guaranteed by Article 12 of the European Social Charter (ESC). In the medical sector, Articles 11 and 13 ESC are to be taken into consideration, which guarantee everyone the right to benefit from measures that enable the enjoyment of the highest possible standard of health attainable and that anyone without adequate resources has the right to social and medical assistance. If a patient's access to healthcare is determined by an analysis of his or her personal data, such as healthcare records or lifestyle data, those social rights must be considered in addition to the right to privacy and personal data protection.

For democratic institutions and processes, AI applications can have major impacts. Like digitisation,[45] AI applications are proving to be a double-edged sword for democracy. On the one hand, easy access to information and lower barriers for participation enhance an open democratic discourse which is at the heart of democracies.[46] In some cases, the use of AI can be desirable from a citizen's view, for example if the citizen is afraid of encountering prejudices in a civil servant an algorithm might not have.[47] From this perspective, even a "right to AI" is being discussed in relation to the right to good administration of Article 41 CFR.[48] On the other hand, a serious threat for democracies is posed by the concentration of power in private platforms and their role in the public sphere. These platforms are not committed to the public interest but follow their own economic and possibly political agendas. The path of regulating big platforms that has been taken with the *Google Spain* judgment of the Court of Justice of the European Union (CJEU)[49] and since then has been followed by national jurisdiction and legislation, therefore leads in the right direction. AI tools also extend the possibilities for deception that have the power to destabilise the democratic debate, for example through intentionally caused shit storms, hate speech,

42 According to Article 52, para. 3 CFR, the meaning and scope of the rights of the Charter are the same as those laid down by the ECHR insofar as the CFR contains rights which correspond to rights guaranteed by the ECHR. This is not to say that the CFR may not provide more extensive protection, yet this can be difficult in multipolar fundamental rights relationships.

43 For further details see Ben-Israel et al. (2021), pp. 9 f.; Tzimas (2020), p. 533.

44 Ben-Israel et al. (2021), pp. 11 f.

45 For the civil service and digitisation see *The Internet and Digital Technologies as Essential Tools for the Civil Service* by A. Guckelberger in this volume.

46 This open discourse is something democracies depend upon but in the end cannot guarantee themselves, as the former German Federal Constitutional Judge Ernst-Wolfgang Böckenförde points out, see Böckenförde (1967), p. 75.

47 Coglianese and Ben-Dor (2021), pp. 791 and 827 ff.

48 Djeffal (2020), p. 277, para. 16.

49 CJEU, judgment of 13 May 2014, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C131/12; Schiedermair (2015), p. 284.

and fake news[50] triggered by social bots, deepfakes, political targeting, and other systematic methods of influencing public opinion.[51] The most serious threat is the direct attack on democratic elections.[52]

Concerning the civil service, democracy calls above all for administrative transparency[53] and accountability.[54] The civil service is not supposed to be a secret sphere, but an open process stemming from parliamentary decisions – the open government movement with its call for transparency, participation, and cooperation clearly reflects this.[55] The call for transparency is a consequence of the fear to lose control over self-learning AI technologies. AI applications could increase the power of the civil service, implying less power for the parliamentary legislator and an imbalance in the separation of powers. It is not yet clear whether or not this fear is well-founded. It is clear that the algorithm in this respect resembles a human decision, which is never fully transparent either, but like the algorithm, which is considered a black box,[56] must be legally reviewable.[57] Although the algorithm at the heart of AI applications is not transparent itself, methods to achieve at least some algorithmic transparency have evolved. Typically, they comprise the disclosure of AI systems used by the government, impact assessments and procurement rules.[58] The disclosure of AI systems can be managed through AI websites that identify and document AI systems used by governments, such as the joint model AI register of the cities of Helsinki and Amsterdam.[59] It can also be part of the justification for an administrative decision.

Another factor for transparency is the impact assessment of AI applications, especially at the ongoing experimental stage. Often impact assessment is carried out by guidelines in a framework of "ethical AI".[60] The impact assessment is also used as a tool to control whether AI applications comply with the legal regulations in force. For transparency issues, an important decision is whether AI applications are developed within the government, with the help of contractors or in the form of cooperation, e.g. through public-private partnerships. For the development of AI applications, private tech companies have become important players; this further increases the already risen importance of private actors for the administration.[61] In this context, private trade secret claims can provide an obstacle

50 Schiedermair (2022), pp. 181 f.
51 Brkan (2019), p. 66.
52 Steiger (2022), p. 165.
53 The transparency of data processing is also a fundamental principle of the GDPR, see Article 5, para. 1(b).
54 Coglianese and Lehr (2017), pp. 1147 and 1205 ff.
55 For a detailed analysis of open government, see von Lucke and Gollasch (2022), pp. 4 f. For the practical application of open government in Germany, www.bmi.bund.de/DE/themen/moderne-verwaltung/open-government/open-government-node.html.
56 Black-box character depends on the method and perspective. Decision trees are comparatively transparent, while the connection between input and output in Deep Learning can be incomprehensible even for developers. In many cases a system will remain incomprehensible even with complete disclosure for laypersons. The learning algorithms as such are usually comprehensible for developers, but not necessarily the resulting models, e.g. Carabantes (2020), p. 309. For reproach of the algorithm as a black box, see Pasquale (2015). This accusation is countered by computer science with the movement of explainable AI, e.g. Gohel et al. (2021).
57 Coglianese (2021), pp. 104 and 108 ff.; Wischmeyer (2020), p. 75, para. 6.
58 Nye et al. (2021), pp. 29 f.
59 AI Register https://ai.hel.fi/en/get-to-know-ai-register/.
60 Nye et al. (2021), pp. 33 f.
61 Hoffmann-Riem (2020), p. 1, para. 21 ff.

for public transparency requirements.[62] On the other hand, secrecy is not a value in itself for the public administration, but there must be a legal reason for it, e.g. the protection of individual rights as in data protection constellations.[63] The conflict between secrecy and transparency and the resulting necessary legal balancing is not new for public administrations, but is coming into focus with AI applications.

It is also important to bear in mind that administrations are committed to the public interest, whereas private companies have their own business interests. The question of control is therefore a decisive issue. Democratic accountability requires that decisions remain within the control of administrations and are not delegated to a private company or to the algorithm itself.[64] This touches on the difficult demarcation line between the mere preparation of a decision and the decision itself. In some cases, it is difficult to judge whether the preparation of a decision already implies its result. This is not a new question, as it also arises in scenarios where external expertise is involved. Nevertheless, the question of control over the algorithm is fundamental for legislators and for the administrations themselves.

The question of control is not only a requirement of the principle of democracy, but also of the rule of law. In international law, the rule of law has become a constant matter of debate.[65] As one of the most sparkling fundamental principles, it is difficult to deduce coherent State practice for the rule of law, but there is an emerging tendency to accept non-arbitrariness, predictability, consistency, accountability, human rights, and transparency as core elements of the rule of law.[66] Regarding the EU, with its more homogeneous legal systems, the rule of law represents regional customary international law with concrete legal principles deriving from it. By naming the rule of law as a central European value, Article 2 TEU can rely on a more consensual understanding of the rule of law in the legal systems of the Member States, despite serious disagreements as shown by the rule of law conflict within the EU.

The legality of the administration is one of the central elements of the rule of law and therefore an important benchmark for administrations in all EU countries.[67] The administrations' commitment to the legislator presupposes that the administration is in full control. Only that way they can guarantee the predictability of administrative decisions and provide legal certainty for citizens, which is also required by the rule of law principle.[68] Law enforcement is the central task of the administration and AI applications can provide support in terms of efficiency and accuracy on one hand, and obstacles, such as problems of data protection and discrimination, on the other.[69] In this classical constellation with the State on one side and the citizen on the other, citizens' rights come into focus. AI

62 See the interesting study by Moore (2017). See also the case of a teacher in the US who was dismissed because the algorithm of a private company hired by the school to rate the teacher´s performance rated him poorly, Coglianese and Ben-Dor (2021), pp. 791 and 832 ff.

63 For further details, see Wischmeyer (2020), p. 75, para. 20 ff.

64 Coglianese and Lehr (2017), pp. 1147 and 1177 ff.

65 Fitschen (2008), p. 347.

66 Arajärvi (2021), p. 173.

67 The legal basis is in Article 2 TEU and in the constitutions of the Member States, e.g. in Article 20, para. 3 of the German Basic Law.

68 Hermstrüwer (2020), p. 199, para. 60 ff.

69 Examples of AI applications used for law enforcement in the US administration can be found in Engstrom et al. (2020), pp. 22 f., 30 f. For examples from Australia, the US, Sweden and China, see Zalnieriute et al. (2019), pp. 425 and 435 ff.

applications have the power to greatly enhance citizens' rights, for example by lowering the barriers to access to information, thus supporting the right of access to documents regulated by Article 42 CFR and national regulations.[70] AI may also provide support for the right to a hearing envisaged by Article 41, paragraph 2 CFR and considered a general right in EU Member States.[71] This can either be by alleviating civil servants of duties so they can focus on citizens' hearings, or by standardised AI hearing processes which will deliver quicker results but decrease or even totally lack human interaction.[72]

In this context, the question arises whether the right to a hearing necessarily entails the "right to a human decision".[73] If we take the right to a human decision as a basis, AI applications can be used to prepare a decision and to conduct a hearing, but not for the final decision. The right to a human decision is not a generally recognised right, but it is implied in Article 22 General Data Protection Regulation (GDPR), which states a right of the data subject "not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her".[74] The question of the usefulness of such a right is strongly connected to the fundamental question of trust – what is more trustworthy: an algorithm or a human being?[75] The legal order in Europe is centered around human dignity enshrined in Article 1 CFR[76] as a fundamental decision which might be seen as a pro for the merits of a human decision. On the other hand, it is well-known that human decisions can be arbitrary, which casts doubt on the superiority of a human decision over that of a carefully designed algorithm.[77] In the end, Article 1 CFR will not provide an obstacle for automated decisions in general, but for a totally automised administration. Another aspect closely linked to the right to a human decision is the general concern that contact between administrations and citizens will lack empathy and therefore erode trust in public administrations.[78] This "human aspect" is to be taken into consideration but represents just another aspect of the

70 See for example the German Freedom of Information Act of 5 September 2005 (*Informationsfreiheitsgesetz*), BGBl. I p. 2722, amended 19 June 2020, BGBl. I p. 1328.

71 In Germany, the right to a hearing is part of the right to effective legal protection under Article 19, para. 4 of the German Basic Law. As the administrative hearing usually provides a necessary step before entering judicial review, the right to a hearing is also an element of the right to an effective judicial remedy (Article 47 CFR). As the hearing necessarily precedes the judicial decision, it is also closely connected to the right to a fair trial enshrined in Article 6 ECHR.

72 German legislation currently envisages possible exemption from the hearing requirement when administrative decisions are issued with the help of automatic devices (§ 28, para. 2, no. 4 VwVfG), probably due to the fact that automated hearings are not practicable in some cases, Guckelberger (2021), pp. 566 and 573.

73 As for the idea of a "right to a human decision" in US law, see Huq (2020), pp. 611 and 624 ff.

74 A similar approach is taken by Article 11, para. 1 EU Law Enforcement Directive which prohibits "a decision based solely on automated processing (. . .) unless authorised by Union or Member State law to which the controller is subject and which provides appropriate safeguards for the rights and freedoms of the data subject, at least the right to obtain human intervention on the part of the controller". Article 14 AI Act also requires *human oversight* over AI systems that are ranked high-risk in the AI Act. For the implications of the proposed AI Act, Bomhard and Merkle (2021), p. 257.

75 In the end this question leads to positive or sceptical views of human beings and therefore to profound philosophical and ethical questions.

76 The same is the case for Article 1, para. 1 German Basic Law.

77 Huq therefore argues that a right to a well-calibrated machine-decision is a better option in some cases, Huq (2020), pp. 611, 686 ff. One argument in favour of a human decision is the fact that automated decisions are supposed to cover many cases in a short time and can therefore lead to a structural mass discrimination, whereas the discriminative human decision is limited to the case decided, Orwat (2019), pp. 21 f.

78 Coglianese (2021), pp. 104, 113 ff.

fundamental question of who or whom to trust more. It should not be used to block AI applications as practical solutions but should rather serve as a supportive argument against a scenario where AI applications widely replace human interaction.

IV. Data Protection and Privacy

A specific element of the rule of law principle that comes into focus with AI applications is data protection (Article 8 CFR,[79] Article 8 ECHR) and protection of privacy (Article 7 CFR, Article 8 ECHR).[80] AI applications in general depend on an enormous volume of data and in the case of Real-Time Machine Learning, the algorithm is constantly improving the more data supplied to it. Thus, traditional data protection law, which aims to minimise the data used, constitutes a fundamental legal obstacle for AI applications.[81] Indeed, it seems like trying to square the circle, to combine AI applications with the fundamental decisions of current European data protection law, such as the principle of purpose limitation (Article 5, paragraph 1(b) GDPR), the principles of data minimisation (Article 5, paragraph 1(c) GDPR) and storage limitation (Article 5, paragraph 1(e) GDPR) or individual rights, such as the right to be forgotten (Article 17 GDPR) and the right to data portability (Article 20 GDPR), which could hardly be enforced under the circumstances of AI applications. However, as the civil service is bound by the existing law, the principles of the GDPR apply. It will be a delicate task to not let the advantages of AI applications slip away while preserving the values of data protection and privacy that belong to European fundamental rights and are therefore protected by Article 2 TEU.[82] The AI Act does not show a way out of this dilemma but offers only rough guidance for the general legal classification of AI applications.[83]

A look at the case law shows different approaches. The European Court of Human Rights (ECtHR), with the open wording of Article 8 ECHR ("right to private life") as a basis, seems rather open to shifting away from the "prohibition principle" that has been fundamental for EU and national data protection law. For the CJEU, with the explicit data protection regulation in Article 8 CFR and its differentiated data protection case law, this might pose a greater challenge.[84] In any case, legal approaches at the EU and national levels will be needed to bridge the gap between existing EU data protection law and AI applications. As "responsible AI" is supposed to become a European trademark that distinguishes AI applications made in Europe from other approaches, this challenge will have to be taken up.

79 Article 8 CFR provides the first explicit regulation of a right to data protection in a legally binding international document. The right to data protection and the right to privacy belong to the rights guaranteed by the CFR and the ECHR. According to Article 52, para. 3 CFR, the meaning and scope of those rights in the CFR are the same as those in the ECHR with a possibility for Union law to provide more extensive protection. However, the latter can prove difficult to judge in multipolar fundamental rights relationships.

80 For data protection and the civil service in general, see *Public Administrations and Data Protection: An Unstoppable Europeanization through Fundamental Rights* by M. González Pascual in this volume.

81 See the profound study of Sartor (2020), pp. 35 ff; also Kesa and Kerikmäe (2020), pp. 68 and 70 ff.; Marsch (2020), p. 33, para. 6 ff.

82 Or in the words of Marsch (2020), "to open a door for AI, without leaving the citizen unprotected", para. 3.

83 The AI Act is directed to providers of AI applications, whereas the GDPR concerns user responsibility. In other aspects, both regulations go in the same direction, for example in their call for transparency. For a further analysis of the relationship of the AI Act and the GDPR see Vale (2022).

84 Marsch (2020), p. 33, para. 19 ff.

In Germany, the Federal Constitutional Court just ruled in a case concerning the US software for analysing data, which was used in Hessen, inter alia, to clear up a series of explosive attacks on ATMs.[85] The Court ruled that processing of stored personal data by an automated application for data analysis or evaluation interferes with the citizen's right to informational self-determination (Article 2, paragraph 1 in conjunction with Article 1, paragraph 1 of the Basic Law).[86] Stressing that the principles of purpose limitation and change of purpose and the principle of proportionality apply, the Court obliged the legislator to stipulate the basis essential for limiting the type and scope of data and the processing methods. If the automated data analysis or evaluation enables severe encroachment on informational self-determination, this can only be justified to protect weighty legal interests threatened in a manner which is at least sufficiently concrete. In principle, the legislature may divide the enactment of the necessary regulations on the type and scope of data that can be processed and on the permissible data processing methods between itself and the administration. However, the legislator must stipulate the basis essential for limiting the type and scope of data and the processing methods. Insofar as it authorises the administration to regulate organisational and technical details, the legislator must ensure that the administration defines the specifications and criteria that are decisive for the implementation of automated data analysis or evaluation in individual cases in an abstract general form, documents them reliably and publishes them in a manner to be determined in more detail by the legislature. This also ensures the constitutionally required control, which can be carried out by data protection commissioners. As a result, the Constitutional Court declared the laws of Hamburg and Hessen to be partly unconstitutional. The ruling shows that predictive policing is subject to German data protection principles. This puts future AI applications in this field under the strict control of the German data protection regime and a permanent fundamental rights review by the Federal Constitutional Court.

V. Discrimination

Another important aspect of the rule of law principle that poses challenges for AI applications is the highly developed EU anti-discrimination law.[87] Based on Article 21 CFR, Article 14 ECHR and Article 18 TFEU, EU secondary law provides protection against all sorts of discrimination.[88] Although AI is not discriminatory itself, the data used for the algorithm may be, and in this case the algorithm will massively reinforce the discriminatory effect.[89] For the civil service, algorithms likely to discriminate occur especially in situations where scarce resources must be distributed; this is particularly the case with supervision tasks and the allocation of social benefits. Control of restaurant hygiene

85 Rath (2022).

86 German Federal Constitutional Court, judgment of 16 February 2023, 1 BvR 1547/19, 1 BvR 2634/20, www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2023/bvg23-018.html.

87 For a general overview of AI and EU anti-discrimination law not limited to the civil service see Xenidis and Senden (2020). For anti-discrimination law concerning the civil service, see *EU Non-Discrimination Law and its Potential Impact on the Civil Service of the Member States* by J. Mulder in this volume.

88 Concerning gender-based discrimination see Lütz (2022), pp. 33 and 46 ff.; also *Gender Equality in the Civil Service* by S. Korac in this volume.

89 Mayson (2018), pp. 2218 and 2221 ff.

based on visitors' comments, control of families to prevent child abuse and the categorising of unemployed persons fall in this sphere.[90] But also the recruitment of civil service employees done by an algorithm can be a source of discrimination.[91] A major challenge in solving these problems is the detection of discrimination as a first necessary step. With AI applications, discrimination will usually be indirect.[92] It will normally not be possible to prove the discrimination through a black box algorithm, which underlines the earlier call for transparency procedures. In legal proceedings, a change from the principle of causality to the principle of correlation is an option.[93] In conclusion, the EU's legal anti-discrimination requirements are in place, but it will be a challenge to implement them in AI applications in practice.

The most vividly debated example of an AI application tending to conflict with anti-discrimination law is predictive policing. The phenomenon comprises the application of particularly quantitative analytical techniques to identify likely targets for police intervention and prevent crimes by statistical predictions.[94] This can lead to an over-presence of the police in a certain area in relation to the actual crime rate ("over-policing") and, on the other hand, to under-presence in other areas ("under-policing").[95] In the US, predictive policing has been practised since 2011. Scientists and analysts of the Santa Cruz Police Department developed the software PredPol to "stop crime before it begins".[96] European States have been more reluctant to take up the technique, but have now developed their own software such as Precops, which is used in Germany, Austria, and Switzerland to evaluate the likelihood of burglaries in certain areas in a given time span.[97] The reason for this reluctance lies in a scientifically substantiated scepticism about the effectiveness of the technique, as well as concern about human rights violations, especially discrimination.[98] In practice, the concerns have not led to a ban on predictive policing, but have raised awareness of the need for "algorithm fairness"[99] and have led to some systems being classified as high-risk systems by the draft AI Act.[100] As a result, predictive policing has not become a mass phenomenon in Europe and the US,[101] but is only applied by some police stations and is observed critically by the judiciary.

90 For a wide range of examples in both the private and public sectors, Orwat (2019), pp. 30 f.

91 For the recruitment process, see *The Recruitment of Civil Servants: Bridging Democratic Requirements and Efficiency* by P. Gonod in this volume.

92 Discrimination can appear in different forms: direct or indirect discrimination, taste-based or statistical discrimination, Orwat (2019), p. 25.

93 Tischbirek (2020), p. 103, para. 21 ff.

94 Perry et al. (2013), pp. 1 f. For different definitions of predictive policing see Mugari and Obioha (2021), pp. 3 f.

95 European Union Agency for Fundamental Rights (2022), pp. 31 f.; Orwat (2019), pp. 45 f.

96 For the development and use of predictive policing in the US, see Mugari and Obioha (2021), pp. 5 f.

97 European Union Agency for Fundamental Rights (2022), p. 35. For an overview of predictive policing in Germany, the Netherlands, and Great Britain, see Mugari and Obioha (2021), pp. 7 f.

98 For more details on the challenges of predictive policing, see Castets-Renard (2021), pp. 3 f.; Mugari and Obioha (2021), pp. 8 f.

99 For the legal and ethical background of "algorithm fairness", see Pastaltzidis et al. (2022), pp. 2304 f.

100 Annex III, No. 6 AI Act.

101 Coglianese and Ben-Dor (2021), pp. 791 and 820 f.

VI. Conclusion

The use and the development of AI are in a state of transition. The question who to trust more, human beings or the algorithm, is not answered yet and probably will never be. Mixed feelings about the use of AI lead to contradictory calls such as a "right to AI" on the one hand and a "right to a human decision" on the other. It will be essential to preserve European values under the conditions of AI without closing our eyes to new developments and thus letting opportunities for innovation escape. To this end, the legal framework must be carefully checked for what to keep and what to adapt. Within the EU multilevel governance system, this fundamental review must take place on different levels and by different actors: the legislator, the judiciary, and the administration itself. With the AI Act, the EU is marching forward in the sphere of legislation, and national legislation is sure to join in. In any case, concerted efforts by all actors will be essential, because as Stephen Hawking put it, AI will either be the best or the worst thing for humanity.[102]

Bibliography

Alpaydin E. (2016), *Machine Learning: The New AI*, Cambridge, MA: MIT Press.

Arajärvi N. (2021), 'The Core Requirements of the International Rule of Law in the Practice of States', 13 *Hague Journal Rule Law*, 173–193.

Ben-Israel I., Jorge Cerdio J., Ema A., Friedman L., Ienca M., Mantelero A., Matania E., Muller C., Shiroyama H., Vayena E. (2021), *A Legal Framework for AI Systems*, Strasbourg: Council of Europe.

Berryhill J., Heang K., Clogher R., McBride K. (2020), *Hello, World, Artificial Intelligence and Its Use in the Public Sector*, OECD Working Papers on Public Governance No. 36, Paris: OECD Publishing.

Böckenförde E.-W. (1967), 'Die Entstehung des Staates als Vorgang der Säkularisation', in *Säkularisation und Utopie: Ebracher Studien. Ernst Forsthoff zum 65. Geburstag*, Stuttgart: Kohlhammer, 75–94.

Bomhard D., Merkle M. (2021), 'Regulation of Artificial Intelligence: The EU Commission's Proposal of an AI Act', 10 *Journal of European Consumer and Market Law*, 257–261.

Brkan M. (2019), 'Artificial Intelligence and Democracy: The Impact of Disinformation, Social Bots and Political Targeting', 2 *Delphi*, 66–71.

Carabantes M. (2020), 'Black-Box Artificial Intelligence: An Epistemological and Critical Analysis', 35 *AI & Society*, 309–317.

Castets-Renard C. (2021), 'Human Rights and Algorithmic Impact Assessment for Predictive Policing, Constitutional Challenges in the Algorithmic Society', in Micklitz H.-W., Pollicino O., Reichman A., Simoncini A., Sartor G., De Gregorio G. (eds), *Constitutional Challenges in the Algorithmic Society*, Cambridge: Cambridge University Press, 93–110.

Cellan-Jones R. (2014), 'Stephan Hawking Warns Artificial Intelligence Could end mankind, *BBC*, 2 December, www.bbc.com/news/technology-30290540.

Coglianese C. (2021), 'Administrative Law in the Automated State', 150 *Daedalus*, 104–120.

Coglianese C., Ben-Dor L. (2021), 'AI in Adjudication and Administration', 86 *Brooklyn Law Review*, 791–838.

Coglianese C., Lehr D. (2017), 'Regulating by Robot: Administrative Decision Making in the Machine-Learning Era', 105 *The Georgetown Law Journal*, 1147–1223.

Cohen M., Hutter M., Osborne M. (2022), 'Advanced Artificial Agents Intervene in the Provision of Reward', 43 *AI Magazine*, 282–293.

Da Costa A., Moniz Pereira L. (2022), 'European Union Fosters Ethical AI in the Public Administration', in De Paz Santana J., de la Iglesia D., López Rivero A. (eds), *New Trends in Disruptive Technologies, Tech Ethics and Artificial Intelligence, Disruptive Technologies Tech Ethics*

102 See Hern (2016).

and Artificial Intelligence, Advances in Intelligent Systems and Computing, Cham: Springer, 103–113.

Djeffal C. (2018), 'Künstliche Intelligenz in der Öffentlichen Verwaltung', *Reports of the NEGZ (Nationales E-Government Kompetenzzentrum e.V.) No. 3*, www.hiig.de/wp-content/uploads/2019/03/NEGZ-Kurzstudie-3-KuenstlIntelligenz-20181113-digital.pdf.

Djeffal C. (2020), 'Artificial Intelligence and Public Governance: Normative Guidelines for Artificial Intelligence in Government and Public Administration', in Wischmeyer T., Rademacher T. (eds), *Regulating Artificial Intelligence*, Cham: Springer, 277–293.

Engstrom D., Ho D., Sharkey C., Cuéllar M.-F. (2020), *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, www.acus.gov/sites/default/files/documents/Government%20by%20Algorithm.pdf.

Etscheid J., von Lucke J., Stroh F. (2020), 'Künstliche Intelligenz in der öffentlichen Verwaltung, Anwendungsfelder und Szenarien', in Bauer W., Riedel O., Braun S. (eds), *Frauenhofer IAO*, https://publica-rest.fraunhofer.de/server/api/core/bitstreams/d3d9f520-1fd4-4516-98d6-a3370c134155/content.

European Union Agency for Fundamental Rights (ed) (2022), *Bias in Algorithms – Artificial Intelligence and Discrimination*, Luxemburg: Publications Office of the European Union.

Evans D., Yen D. (2006), 'E- Government: Evolving Relationship of Citizens and Government, Domestic, and International Development', 23(2) *Government Information Quarterly*, 207–235.

Fitschen T. (2008), 'Inventing the Rule of Law for the United Nations', 12 *Max Planck Yearbook of United Nations Law*, 347–380.

Fuster G. (2020), *Artificial Intelligence and Law Enforcement, Impact on Fundamental Rights*, www.europarl.europa.eu/RegData/etudes/STUD/2020/656295/IPOL_STU(2020)656295_EN.pdf.

Galindo L., Perset K., Sheeka F. (2021), 'An Overview of National AI Strategies and Policies', *Going Digital Toolkit Note No. 14*, https://goingdigital.oecd.org/data/notes/No14_ToolkitNote_AIStrategies.pdf.

Gohel P., Singh P., Mohanty M. (2021), *Explainable AI: Current Status and Future Directions*, https://doi.org/10.48550/arXiv.2107.07045.

Guckelberger A. (2021), 'Automatisierte Verwaltungsentscheidungen: Stand und Perspektiven', 13 *Die öffentliche Verwaltung*, 566–577.

Herberger M. (2018), '"Künstliche Intelligenz" und Recht', *Neue Juristische Wochenzeitschrift*, 2825–2829.

Hermstrüwer Y. (2020), 'Artificial Intelligence and Administrative Decisions Under Uncertainty', in Wischmeyer T., Rademacher T. (eds), *Regulating Artificial Intelligence*, Cham: Springer, 199–223.

Hern A. (2016), 'Stephen Hawking: AI Will Be "Either Best or Worst Thing" for Humanity', *The Guardian*, 19 October, www.theguardian.com/science/2016/oct/19/stephen-hawking-ai-best-or-worst-thing-for-humanity-cambridge.

Hoffmann-Riem W. (2020), 'Artificial Intelligence as a Challenge for Law and Regulation', in Wischmeyer T., Rademacher T. (eds), *Regulating Artificial Intelligence*, Cham: Springer, 1–29.

Huq A. (2020), 'A Right to a Human Decision', 106 *Virginia Law Review*, 611–688.

Kesa A., Kerikmäe T. (2020), 'Artificial Intelligence and the GDPR: Inevitable Nemeses?', 10 *TalTech Journal of European Studies*, 68–90.

Khorrami N. (2022), 'How China Boosts Iran's Digital Crackdown', *The Diplomat*, 27 October, https://thediplomat.com/2022/10/how-china-boosts-irans-digital-crackdown/.

Lütz F. (2022), 'Gender Equality and Artificial Intelligence in Europe. Addressing Direct and Indirect Impacts of Algorithms on Gender-Based Discrimination', 23 *ERA Forum*, 33–52.

Malodia S., Dhir A., Mishra M., Bhatti Z. (2021), 'Future of e-Government: An Integrated Conceptual Framework', 173 *Technological Forecasting and Social Change*, Article 121102.

Marsch N. (2020), 'Artificial Intelligence and the Fundamental Right to Data Protection: Opening the Door for Technological Innovation and Innovative Protection', in Wischmeyer T., Rademacher T. (eds), *Regulating Artificial Intelligence*, Cham: Springer, 33–52.

Mayson S. (2018), 'Bias In, Bias Out', 128 *Yale Law Journal*, 2218–2300.

Moore T. (2017), *Trade Secrets and Algorithms as Barriers to Social Justice*, Washington, DC: Center for Democracy and Technology, https://cdt.org/wp-content/uploads/2017/08/2017-07-31-Trade-Secret-Algorithms-as-Barriers-to-Social-Justice.pdf.

Mugari I., Obioha E. (2021), 'Predictive Policing and Crime Control in The United States of America and Europe: Trends in a Decade of Research and the Future of Predictive Policing', 10(234) *Social Sciences*, 1–14.

Nye T., Chochla E., Lindsay S. (2021), *Regulating AI: Critical Issues and Choices*, Toronto: Law Commission of Ontario, www.lco-cdo.org/wp-content/uploads/2021/04/LCO-Regulating-AI-Critical-Issues-and-Choices-Toronto-April-2021-1.pdf.

Orwat C. (2019), *Risks of Discrimination through the Use of Algorithms, A Study Compiled with a Grant from the Federal Anti-Discrimination Agency*, Berlin: Federal Anti-Discrimination Agency.

Pasquale F. (2015), *The Black Box Society – The Secret Algorithms That Control Money and Information*, Cambridge, MA: Harvard University Press.

Pastaltzidis I., Dimitriou N., Quezada-Tavárez K., Aidinlis S., Marquenie T., Gurzawska A., Tzovaras D. (2022), *Data Augmentation for Fairness-Aware Machine Learning, Preventing Algorithmic Bias in Law Enforcement Systems*, https://dl.acm.org/doi/pdf/10.1145/3531146.3534644.

Perry W., McInnis B., Price C., Smith S., Hollywood J. (2013), *Predictive Policing – The Role of Crime Forecasting in Law Enforcement Operations*, Santa Monica: RAND Corporation.

Petrone J. (2022), 'Data as an Enabler: Estonia's AI Task Force Pushes for Widespread Artificial Intelligence Uptake', *e-Estonia*, 23 February, https://e-estonia.com/data-as-an-enabler-estonias-ai-task-force-pushes-for-widespread-artificial-intelligence-uptake/.

Rath C. (2022), 'Alle Puzzelteile einer Gefahr zusammenbringen', *Legal Tribune Online*, 20 December, www.lto.de/recht/hintergruende/h/bverfg-1bv154719-1bvr263420-automatisierte-datenauswertung-polizei-hessen-hamburg-muendliche-verhandlung/.

Russell S., Dewey D., Tegmark M. (2015), 'Research Priorities for Robust and Beneficial Artificial Intelligence', 36(4) *AI Magazine*, 105–114.

Sartor G. (2020), *The Impact of the General Data Protection Regulation (GDPR) on Artificial Intelligence*, Brussels: European Union.

Savage N. (2020), 'The Race to the Top Among the World's Leaders in Artificial Intelligence', *Nature*, 9 December, www.nature.com/articles/d41586-020-03409-8.

Schiedermair S. (2015), 'The Right to Be Forgotten in the Light of the Google Spain Judgment of the European Court of Justice', in Lind A.-S., Reichel J., Österdahl I. (eds), *Information and Law in Transition*, Stockholm: Liber, 284–299.

Schiedermair S. (2022), 'Das Phänomen der *Fake News* im Spiegel der Judikatur des EGMR', in Cole M., Schiedermair S., Wagner E. (eds), *Die Entfaltung von Freiheit im Rahmen des Rechts*, Heidelberg: C.F. Müller, 181–196.

Steiger D. (2022), 'Protecting Democratic Elections Against Online Influence via "Fake News" and Hate Speech', in Schiedermair S., Schwarz A., Steiger D. (eds), *Theory and Practice of the European Convention on Human Rights*, Baden-Baden: Nomos, 165–214.

Tischbirek A. (2020), 'Artificial Intelligence and Discrimination: Discriminating Against Discriminatory Systems', in Wischmeyer T., Rademacher T. (eds), *Regulating Artificial Intelligence*, Cham: Springer, 103–121.

Tzimas T. (2020), 'Artificial Intelligence and Human Rights: Their Role in the Evolution of AI', *Zeitschrift für ausländisches öffentliches Recht*, 533–556.

Vale S. (2022), 'GDPR and the AI Act Interplay: Lessons from FPF's ADM Case-Law Report', *Future of Privacy Forum*, 3 November, https://fpf.org/blog/gdpr-and-the-ai-act-interplay-lessons-from-fpfs-adm-case-law-report/.

von Lucke J., Etscheid J. (2020), 'How Artificial Intelligence Approaches Could Change Public Administration and Justice', *Jusletter IT*, 21 December.

von Lucke J., Gollasch K. (2022), *Open Government*, Wiesbaden: Springer Gabler.

Wirtz B. (2022), *E-Government, Strategie – Organisation – Technologie*, Berlin: Springer.

Wischmeyer T. (2020), 'Artificial Intelligence and Transparency: Opening the Black Box', in Wischmeyer T., Rademacher T. (eds), *Regulating Artificial Intelligence*, Cham: Springer, 75–101.

Xenidis R., Senden L. (2020), 'EU Non-Discrimination Law in the Era of Artificial Intelligence: Mapping the Challenges of Algorithmic Discrimination', in Bernitz U., Groussot X., Paju J., de Vries S. (eds), *General Principles of EU Law and the EU Digital Order*, Alphen aan den Rijn: Wolters Kluwer, para. 7.

Zalnieriute M., Bennett Moses L., Williams G. (2019), 'The Rule of Law and Automation of Government Decision-Making', 82 *Modern Law Review*, 425–455.

33 Public Administrations and Data Protection

An Unstoppable Europeanisation through Fundamental Rights

Maribel González Pascual

I. Introduction

Private and public entities have an undeniable interest in data, placing faith in is ability to inform decision-making and render it more efficient. Furthermore, the technological development has facilitated a dramatic increase in the volume of personal data in recent decades. Finally, data are at the forefront of technologies that are being increasingly implemented by private and public entities, such as, inter alia, cloud computing, big data, blockchain, and artificial intelligence. In this framework, data protection law has evolved, becoming particularly dynamic, complex, and future-oriented to deal with unpredictable and unavoidable technological development.

The increasing complexity of data protection is essential, otherwise legislation and judicial findings could only have a marginal effect on data procession practices. In this regard, the COVID-19 outbreak illustrated the challenges of data protection: data became essential to deal with the pandemic (big data and tracking technology were used to monitor the pandemic), but the proportionate use of data-driven technology was questionable.[1]

Data protection is also first and foremost European data protection, since national data protection regimes are subject to an increasing European Union (EU) influence – an influence that will necessarily grow. On the one hand, the EU is passing new legislation pertaining to data protection or that will have an impact on data protection,[2] while on the other hand, the Charter of Fundamental Rights of the EU (CFR), which enshrines data protection, is a powerful tool to reduce the diversity among national laws on data.

This complexity and Europeanisation are also clear traits of data processing by the civil service.[3] As a matter of fact, the processing of personal data by the public administration

1 Zwitter and Gstrein (2020).

2 Clear examples are the Data Governance Act (Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724, *OJ L 152/1, the Digital Services Act (*Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC*, OJ L 277/1, the Digital Markets Act* (Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265/1, and the Proposal for an Artificial intelligence Regulation (Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence and amending certain union legislative acts, COM/2021/206 final).

3 The chapter limits its analysis to the processing of data by the civil service, which is defined as “employment in the State’s executive power, implies a set of special duties and responsibilities, and requires a regular basis”, see Krzywoń (2022), p. 10. Therefore, the chapter will not pay attention to the rules applicable to personal data processed by the public administration, but not by the civil service on a regular basis (such as, inter alia, the personal data concerning public health or criminal activities).

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implies risks that are different from the risks arising out of a processing carried out by any other data controller, as a result of the volume of the data subjects affected, the extent of the data collected, the impossibility to oppose to the processing in many cases, and the inherent asymmetry existing between the public administrations and the citizens whose data are being processed.[4] Still, EU data protection law has being particularly deferential with the national data protection regimes in the field of public administration. In fact, the EU legislation on data protection foresees generous exemptions for the public sector that can be enshrined by domestic law.[5] However, the interplay between different pieces of legislation on data or in areas impacting upon the processing of data, the influence of the CFR, the case law of the Court of Justice of the European Union (CJEU), and the guidance provided by the European Data Protection Board, will reduce the room for national diversity.

In line with the goal of this volume, this chapter will analyse whether the Europeanisation of data protection is also taking place with regard to civil service tasks.[6] With this goal in mind, the chapter will first deal with the consolidation of data protection as a fundamental right at the EU level. Secondly, it will deal with the room for national diversity on data protection in processing activities carried out by public administrations, by focusing on the EU General Data Protection Regulation (GDPR).[7] Finally, the chapter will inquire briefly whether the European legal scheme on data protection is adequate for the evolution of data processing.

II. Shaping Data Protection as a Fundamental Right at the EU Level

1. The Interplay Between the Council of Europe and the EU

In 1970, the Land of Hesse was the first federal State in Europe to adopt a legal act on governmental records, which also established the term data protection. In 1973, Sweden introduced a Data Act on a nationwide scale to protect the personal information of citizens from undue invasions by both public and private entities. Later, several States recognised the fundamental right to data protection as a standalone right within their national constitutions in the mid-1970s.[8] All in all, the most influential national tradition on the right to personal protection in Europe was the case law of the German Federal Constitutional Court,[9] the judgment on the Census Act being a leading case on the matter in Europe.[10]

However, even though a significant number of Member States explicitly or implicitly recognise the right to data protection in domestic constitutional law, these constitutional

4 Agencia Española de Protección de Datos, *Technologies and Data Protection in Public Administrations*, November 2020, available at Technologies and Data Protection in Public Administrations (aepd.es).

5 Lynskey (2015), pp. 20–21.

6 On the privacy rights of the civil servants in Europe see *Protection of Privacy in Civil Service Employment* by M. Otto in this volume.

7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC *OJ L 119/1*.

8 Vogiatzoglou and Valcke (2022), p. 14.

9 On the German case law, see Schlink (1986).

10 German Federal Constitutional Court, judgment of 15 December 1983, *Volkzählungsgesetz* – 1 BvR 209/83, paras. 1–215.

traditions are neither uniform nor conceptually coherent. As a matter of fact, the approach to data protection in the Member States has been encapsulated in five categories: (1) considered primarily as serving other existing rights and not explicitly provided for in the constitution, (2) connected to a sui generis right, recognised explicitly in the constitution or in a norm with constitutional status, (3) guaranteed by a specific mandate to legislate on personal data protection, (4) not referred to explicitly in the constitution but where the Constitutional Court establishes the existence of a similar sui generis right, and (5) not clearly linked to fundamental rights.[11] Still, the recognition of data protection at the European level has the potential to ensure a baseline of protection, harmonising to a large extent the domestic legal provisions on data.

At the European level, it was the Council of Europe that took the lead on data protection. In 1981 the Council of Europe adopted a separate Convention on Data Protection (ETS no. 108).[12] The European Convention on Human Rights (ECHR) does not explicitly enshrine data protection as a standalone right, but the European Court on Human Rights made a skilful use of Article 8 ECHR to consider issues raised by modern technology. Already in the 1980s it was asserted on several occasions that data protection is an issue that falls within the scope of Article 8 ECHR, and since the mid-1980s reference to the data protection framework and the acknowledgment in one way or another of its principles has been explicit.[13]

It must be highlighted that the Convention on Data Protection encouraged the blocking of international data protection in the recipient nation. This Convention is a treaty that requires signatory nations to establish domestic data protection legislation that gives effect to its principles. In addition, this treaty permits, but does not require, signatory nations to restrict transborder flows of personal data to nations that "do not provide an equivalent protection" (Article 12 of the Convention on Data Protection).

These elements of the Convention on Data Protection proved to be decisive in fostering a more decisive policy on data protection at both the EU and the national level.[14] If data protection was to be protected at the national level in a very different way, the access to personal data in Europe would have been fragmented and, in turn, it would have harmed the service industry and the IT sector. Unsurprisingly, the economic motive was decisive for passing the 1995 Data Protection Directive.[15] Not only was the Convention on Data Protection a harmonising factor, but it was also very influential in the adoption of the Data Protection Directive, which reproduced and drew heavily from its content.[16] The Convention on Data Protection was the first treaty to recognise the concerns related to automated processing, even before it became evident that the Internet would be a major source of new challenges to the protection of personal data. As a consequence, this

11 Lynskey (2022), p. 357.

12 Council of Europe, Convention for the protection of individuals with regard to automatic processing of personal data, 28 January 1981, ETS No. 108.

13 For instance, see ECtHR, judgment of 6 September 1978, *Klass v. Germany*, 5029/71, and judgment of 26 March 1987, *Leander v. Sweden*, 9248/81. On this case law De Hert and Gutwirth (2009), pp. 14–26.

14 Schwartz (2021), p. 111.

15 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data *OJ L 281/31.*

16 Porcedda (2023), p. 108.

Convention, which was subsequently modernised in 2018,[17] remains to this day the bedrock for Union secondary data protection law and is an indirect source for Article 8 CFR.

At the EU level, the principal instrument of data protection until May 2018 was the Data Protection Directive. It emerged from the need to harmonise national data protection laws to ensure the free flow of data among the Member States, and a shared level of protection of the rights. In fact, the Data Protection Directive highlighted the nature of the protection of personal data for the proper functioning of the Single Market and, consequently, as an instrument to guarantee the fundamental freedoms.[18] Nevertheless, the Treaty of Lisbon was a turning point for data protection within the EU.

2. The Treaty of Lisbon: Fragmented and Multilayered Data Protection

The Treaty of Lisbon introduced an explicit legal basis for data protection legislation in Article 16 of the Treaty on the Functioning of the EU (TFEU), and Article 8 of the CFR elevated data protection to a distinct right within the EU legal order. The enshrinement of data protection in the CFR, given the binding nature of the CFR, contributed to a change of paradigm in the Union. In fact, following the entry into force of the CFR, the CJEU has demonstrated a particular willingness to rely upon the CFR right to data protection. Therefore, the CFR has become a judicial tool for addressing the threats of digital technologies and striking a fairer balance between concerns focused on economic and fundamental rights.

This reliance led to the first annulment of specific provisions of a legislative instrument incompatible with the CFR[19] and subsequently the first declaration that an entire Directive was void ab initio for the same reason.[20] Furthermore, the Court of Justice has clearly established, in a case concerning data protection, that "for the purpose of interpreting the Charter, account must be taken of the corresponding rights of the ECHR only as the minimum threshold of protection".[21] Therefore, the EU is enhancing the right to data protection by going beyond the standards provided by the ECHR and enforcing Article 8 CFR.

In a nutshell, at the EU level, data protection has shifted from a mere negative liberty (privacy) to a positive right (data protection) to face the threats coming from the exercise of powers through the processing of personal data.[22] The right to data protection stemming from Article 8 CFR aims to prevent control over personal data from being curtailed by information-driven asymmetries. In this framework, Article 8 CFR enshrines key data protection principles, such as fairness, purpose specification, lawfulness, and the rights of access and to a rectification. The CFR reveals a dialogue between the right to data protection and underlying values such as transparency, control, and power mitigation.[23]

17 Amending Protocol to the Convention for the Protection of Individuals with regard to the Processing of Personal Data, adopted by the Committee of Ministers at its 128th Session in Elsinore on 18 May 2018.

18 Recital 3, Data Protection Directive 95/46/EC.

19 CJEU (GC), judgment of 9 November 2010, *Volker und Markus Schecke*, C92/09 and C93/09, paras. 89–94.

20 CJEU (GC), judgment of 14 April 2014, *Digital Rights Ireland*, C293/12 and C594/12, para. 71.

21 CJEU (GC), judgment of 20 September 2022, *SpaceNet,* C793/19 and C794/19, para. 125.

22 De Gregorio (2022), p. 224.

23 Naudts et al. (2022), p. 535.

This based-rights approach is reflected in the GDPR. Adopted in April 2016 and applicable from May 2018, the GDPR is the centrepiece of the EU framework for the protection of personal data. While retaining the conceptual framework of the Data Protection Directive that it replaced, the GDPR represents a major shift in the way that data protection is regulated in EU law. In addition, the GDPR has become the baseline of data privacy laws around the globe.[24] The main changes from the 1995 Directive are (1) the scope of personal data, (2) consent, (3) privacy by design and privacy by default, (4) data protection impact assessments, (5) accountability (data controller, data processor, and the appointment of a Data Protection Officer), (6) breach notification, (7) judicial redress and compensation for data subjects, (8) data portability, (9) international transfers, and (10) safeguards for transfers and inadequate jurisdictions.[25]

The GDPR brings with it a new paradigm. Before the GDPR, data protection was mostly ex-post; it established a standard of protection and redress in the event of violations of the right. From the GDPR onwards, the protection is mostly ex-ante: the risk of violation of the right must be minimised by the controller, who is burdened with a proactive responsibility.[26]

Thus, the GDPR is a comprehensive framework for data protection that widens the scope of the right, increases the duties of the controllers, processors, and producers of data, requiring of them proactive action to safeguard and strengthen the rights of data subjects. In addition, the GDPR embraces a new paradigm in data protection by fostering the risk-based approach, which shifts the data protection towards the substantive protection of fundamental rights, providing a flexible safety net in a fast-moving field.

From the point of view of the civil service, the GDPR has not only increased the duties of the public managers in charge of personal data protection throughout Europe, but also their approach to personal data; from a passive stance to a proactive one. In other words, the public administrations must apply the principles of proactive responsibility,[27] along with the other principles regarding processing activities contained in Article 5 GDPR.[28] The GDPR requires the public sector' attention with regard to demonstrating accountability. In this regard, a Data Protection Officer must be appointed where a public body or authority carries out the processing, who should have a good understanding of the processing operations carried out, as well as knowledge of the information systems, and data security and data protection needs of the controller (Articles 37–39 GDPR). Furthermore, the Data Protection Officer should also have a sound knowledge of the administrative rules and procedures of the organisation.[29]

The public sector bodies also need to provide evidence of implementation of data protection by design and data protection by default,[30] and use Data Protection Impact Assessments when using new technologies, or if processing presents a high risk to the

24 Not only the United Kingdom remained tied to the GDPR upon Brexit, but most countries with data privacy regimes have enacted similar statutes. On the global impact of EU privacy law, see Schwartz (2019).

25 Taal (2022), p. 5.

26 Lucas Murillo de la Cueva (2020), p. 42.

27 A proactive responsibility that requires flexibility and adaptive capacity in an ever-changing scenario, Martínez Martínez (2019), p. 340.

28 Article 5 GDPR lays down the key principles providing the basis for the protection of personal data: lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality, and accountability.

29 Working Party Article 29, *Guidelines on Data Protection Officers* (WP 246 rev. 01, 13 December 2016).

30 Privacy by design refers to socio-technical articulation of all the relevant rights and obligations of the Regulation, whereas privacy by default targets the data minimisation principle. Hildebrandt (2012), p. 52.

rights of individuals. From the point of view of individual rights, the right to access is enhanced and the right to erasure is enshrined in the GDPR. The public sector, however, has some room for manoeuvre: if holding the data is deemed to be in the public interest or for public health purposes, the request can be refused. In addition, the GDPR foresees the right to portability, along with the compulsory notification of security breaches. In a nutshell, the GDPR implies further obligations for the public entities throughout the EU regarding data protection. This enhancement of the duties of public bodies regarding data protection inevitably involves a higher Europeanisation of data protection.

Notwithstanding, the expected harmonisation of data protection has been given greater nuance by the so-called opening clauses of the GDPR. The EU Commission fostered the approval of a Regulation on data protection because several Member States had not properly implemented the Data protection directive. The use of a regulation rather than a directive to ensure a greater harmonisation was a major objective,[31] but it was watered down by including many opening clauses that allow derogation under Union or Member State law. It is quite telling that the GDPR has been characterised as a Directive in "Regulation clothing".[32]

Nonetheless, the latitude for divergence of national provisions from the GDPR varies: some provisions only allow Member States to maintain or introduce more specific provisions, other provisions allow more room for discretion if Member States set out a higher standard, and a few provisions give Member States complete autonomy concerning national legislation.[33] Be that as it may, these provisions[34] pave the way for a differentiated reception and application of the GDPR in the legal orders of the Member States.

III. EU Data Protection Applicable to the Public Sector: A Nuanced National Diversity

The GDPR contains several provisions that allow a wider margin of manoeuvre to data processing carried out by public authorities – a margin that is to be decided by domestic laws. In this regard, Articles 6, 23, and 86 GDPR are worth mentioning. On the one hand, Articles 6 and 23 GDPR determine the scope of the exemptions of the public authorities concerning data protection, which, in turn, shape the rights of the data subjects. On the

31 The replacement of the Directive on Data Protection with the GPRD mirrored the fragmented European data protection framework that was in place before the Treaty of Lisbon. In fact, the processing of data protection for law enforcement purposes is regulated by the so-called Law Enforcement Directive (Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, *OJ L 119/89*). However, the Lisbon Treaty abolished the three- pillar structure that had led to the approval of Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, *OJ L 350/60.*

32 Lynskey (2022), p. 367.

33 Wagner and Benecke (2016), pp. 353–354.

34 A list of the "opening clauses" of the GDPR can be found in Annex I of the Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament and the Council Data protection rules as a pillar of citizens empowerment and EUs approach to digital transition – two years of application of the General Data Protection Regulation SWD/2020/115 final.

other hand, Article 86 GDPR refers to the balance between the right of public access to official documents and data protection.

The GDPR gives more leeway to public administrations as data controllers than to the private sector. In this regard, Article 6, paragraph 1 GDPR names six grounds for making the processing of personal data lawful. In the private sector, consent plays a particularly salient role (Article 6, paragraph 1(a)), whereas the processing by public authorities is covered by Article 6, paragraph 1(e) GDPR, authorising Article 6, paragraph 2 GPDR that Member States lay down more specific rules for the processing "necessary for the performance of a task carried out in the public interest" or [necessary] "in the exercise of official authority vested in the controller". In addition, Article 23, paragraphs 1(e) and (h) GDPR authorises Member States to restrict by law the application of the data subject's rights[35] for, inter alia, "important objectives of general public interest" and "even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g)".

Therefore, Member States may establish different requirements when it comes to processing by public authorities, and more importantly the processing by public authorities can constrain several rights enshrined in the GDPR in a different way depending on the domestic laws. In this framework, 14 Member States provide restrictions on data protection for the purposes of public administration based on Article 23 GDPR.[36] This fragmentation has been criticised because it can be detrimental to the achievement of data protection harmonisation throughout the EU.[37] Furthermore, the obligations and rights that can be restricted are at the core of the fundamental data protection.

The restrictions in their domestic laws differ as to which rights may be restricted, which types of processing for which restrictions may be provided for, which conditions (if any) must be met to apply the restrictions, and even which safeguards are implemented when the restrictions are applied. In fact, several scholars have pointed out that the interplay between Articles 6 and 23 GDPR has been used to introduce particularly favourable provisions for data processing by public entities and make an extensive use of the restriction of rights and ancillary principles of data protection (such as the purpose limitation principle or the right of information of the data subject).[38]

Obviously, these domestic provisions must be in line with the CFR (and the ECHR). Therefore, any restriction shall be provided for in a legislative measure, concern a limited number of rights and/or obligations which are specifically listed in Article 23 GDPR, respect the essence of the right, be necessary and proportionate in a democratic society, and safeguard one of the grounds set out in Article 23, paragraph 1 GDPR. This is a

35 The restrictions to rights concern the right to transparent information (Article 12 GDPR), the right to information (Articles 13 and 14 GDPR), the right of access (Article 15 GDPR), the right to erasure (Article 17 GDPR), the right to restriction of processing (Article 18 GDPR), the notification obligation regarding rectification or erasure of personal data or restriction of processing (Article 19 GDPR), right to data portability (Article 20 GDPR), right to object (Article 21 GDPR), and right not to be subject to an automated individual decision-making (Article 22 GDPR).

36 Austria, Belgium, Czech Republic, Germany, Denmark, Estonia, Greece, Ireland, Latvia, Portugal, The Netherlands, Cyprus and Sweden. See the *Report on the implementation of specific provisions of Regulation (EU) 2016/679 Final report Authors: TIPIK Legal Directorate – General for Justice and Consumers Unit C.3 Data Protection*, available at 1609930170392.pdf (dataguidance.com).

37 European Parliament Resolution of 25 March 2021 on the Commission evaluation report on the implementation of the General Data Protection Regulation two years after its application (2020/2717(RSP)) *OJ C 494, recital 23.*

38 MacLaughlin (2018), p. 233–234; Mitrou (2020), pp. 110–111 and Zanfir-Fortuna (2020), pp. 421–422.

test that must be carried out before the legislator decides to provide for a restriction.[39] Furthermore, the "legislative measure adopted on that basis must, in particular, comply with the specific requirements set out in Article 23, paragraph 2 of GDPR".[40]

In this regard, the fragmentation has been countered by CJEU, which has curbed the differentiation of data protection at the national level by ensuring that the open provisions of the GDPR are interpreted in a consistent manner. The CJEU has emphasised the relevance of the principle of proportionality, particularly the principle of minimisation of data, also when the data controller is a public administration.[41] Furthermore, it has interpreted the notion of personal data by extending its boundaries also to information apparently falling outside this definition,[42] and has extended the obligations of the public authorities concerning data protection.[43]

Therefore, in the field of data protection, the increasing role of the CFR is evident. The impact of EU data protection on public access to national official documents is a telling example. The EU has no general competence to set rules on public access to official documents containing national information, except specific areas such as environmental information.[44] In fact, Article 42 CFR recognises a right of access to documents at the EU level. In this regard, Article 86 GDPR only acknowledges the relevance of public access to official documents without offering further guidance. Therefore, the national legislation on transparency shows a wide variety of approaches: a balance between transparency and data protection ranging from a plain privacy exception to detailed rules to be applied in case of conflict.[45] However, the increasing case law on data protection is impinging upon the competence of Member States with regard to access to official documents. As a matter of fact, the CJEU has clearly stated access to public documents "must nevertheless be reconciled with the fundamental right to respect for private life and to the protection of personal data, as Article 86 [GDPR] indeed expressly requires".[46] The CJEU has explicitly stated that Article 86 GDPR requires striking a balance between transparency and data protection, even though the Advocate General defined Article 86 GDPR as a provision "rather declaratory in nature, which is more akin to a recital than a prescriptive provision of a legal text".[47]

39 EDP, *Guidelines 10/20 on the restriction under Article 23 GDPR*, Version 2.0, 13 October 2021, p. 12.

40 CJEU (GC), judgment of 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18, para. 209.

41 CJEU (CG), judgment of 22 June 2021, *Latvijas Republikas Saeima*, C- 439/19, para. 98; CJEU, judgment of 24 February 2022, *SS SIA*, C-175/20, paras. 78–79.

42 In the case Breyer, for instance, the CJEU determined that dynamic IP addresses shall be considered personal data when the data subject might be identified with additional data which the internet service provider (the German administration) has about that person. CJEU, judgment of 19 October 2016, *Breyer,* C582/14, para. 49.

43 It is noteworthy that the CJEU has even suggested that the judiciary must consider the interest of any data subject whose data might be relevant in a civil case. CJEU, judgment of 2 March 2023, *Norra Stockholm*, C-268/21, para. 54.

44 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

45 Kranenborg (2020), p. 1215.

46 CJEU, *Latvijas Republikas Saeima* (n. 41), para. 120.

47 Opinion of Advocate General Szpunar of 17 December 2020, *Latvijas Republikas Saeima*, C439/19, point 68.

Thus, the balance between EU data protection and the national margin of manoeuvre is being shaped by the CJEU on a case-by-case basis. The CJEU is harmonising the main rules on data protection, regardless of the opening clauses of the GDPR. Nonetheless, this harmonisation is softened in fields particularly sensitive for the national administrations (and constituencies). In this regard, the CJEU has been more deferent towards the national margin of manoeuvre when the interference on data protection seeks to tackle corruption in the public sector. In this case,

> the weighing of the interference on data protection [. . .] involves taking into consideration, inter alia, the fact and the extent of the phenomenon of corruption within the public service of the Member State concerned, so that the result of the weighing up to be carried out of those objectives, on the one hand, and a data subject's rights to respect for private life and to the protection of personal data, on the other, is not necessarily the same for all the Member States.[48]

This complicated balance is in line with the flexible and dynamic nature of data protection. Data protection currently relies on the proactive responsibility of the controller, which is also the rule if the controller is a public entity. This approach revolves around a risk-based approach built upon the responsibility of the data controller, which must establish safeguards and limitations based on the risks for data subjects. In a nutshell, the GDPR has not introduced mere obligations to comply with, but a flexible risk-based approach which leads to different margins of responsibility depending on the context.[49]

Therefore, it is necessary to leave a certain margin of manoeuvre to the public administrations when they are the data controllers. On the same token, however, the CJEU is shaping, through abundant case law, guidelines and rules to determine when the data protection right has been violated. A case in point is the right to be forgotten; the CJEU entrusted search engines to delist online content on the motion of the individual concerned. However, both the CJEU[50] and the European Data Protection Board[51] have identified criteria according to which platforms shall assess the request of the data subject.

Fundamental rights are the parameters on which the risk-based approached is grounded. Hence, the growing harmonisation of fundamental rights at the EU level inevitably leads to a deeper Europeanisation of data protection. Obviously, the centripetal force of European data protection also depends on the role that national courts (and administrations) assign to the CFR.

The explicit legal basis for EU data protection (Article 16 TFEU), the paradox of the GDPR – detailed but with opening clauses, and the nature of a data protection – a right that circumvents the national boundaries and requires constant evolution to be effective, have triggered abundant case law that fleshes out Article 8 CFR, and the secondary law dealing with data protection. Probably, it was not by chance that the case law of the German Federal Constitutional Court regarding the CFR shifted in a case concerning the

48 CJEU (GC), judgment of 1 August 2022, *OT*, C184/20, para. 110.

49 De Gregorio (2022), p. 107.

50 CJEU (GC) judgment of 13 May 2014, *Google Spain*, C131/12; CJEU (GC), judgment of 24 September 2019, *GC and Others*, C136/17 and CJEU (CG), judgment of 8 December 2022, *TU, RE, Google*, C-460/20.

51 EDPB, *Guidelines 5/2019 on the criteria of the Right to be forgotten in the search engines cases under GDPR*, 2 December 2019.

right to be forgotten.[52] However, on the same token, the reframing of data protection by connecting the rights-based and the risk-based approaches brings with it protection tailor-made to each specific processing operation, but this leads to a style of data protection that is individualised and uneven.[53]

Thus, EU law shapes data protection at the national level, but the paradigm fosters a certain margin of decision to the controllers. This margin of decision is wider when it comes to public administrations, given the opening clauses of the GDPR. Hence, the general framework, the main principles, and guidelines, along with numerous specific obligations on data protection, are shared among Member States, but they also share a flexible and future-oriented approach. An approach that is gaining traction in data protection. Data protection is a dynamic kind of protection, which follows data in all its movements and flows depending on the context in which the data is to be processed. This is the outcome of an evolutionary development of the privacy concept, from the right to be left alone up to the right "to keep control over one's information and determine how one's privacy is to be built up".[54]

IV. A Glimpse of the Challenges Ahead: Big Data and Open Data

Public administrations use information and communications technologies or Information and Communication Technologies (ICTs), which, in turn, rely on personal data processing activities. Thus, the civil service must be aware of the risks that new technologies involve for data protection while relying on the technology to improve both the services that they provide and their internal functioning. Law and technology must shape each other.

Hence, new technologies relying on data constitute a potential source for innovation that should be tapped while ensuring compliance with flexible and efficient data protection rules. This is a twin target that the EU wants to achieve in the business and the public sectors.[55] With this goal in mind, the EU incentivises the availability, reuse, and interchange of data generated by the public sector,[56] invests in the digital transformation of the economy, including the digitalisation of the public administrations,[57] and tries to put forward a coordinated and comprehensive approach to fast-evolving technologies such as artificial intelligence.[58]

Still, the rapid evolution of the technology is putting into question key elements of personal data protection. In fact, the differentiation of personal data versus anonymous data is debatable,[59] because technological developments, particularly the emergence of big data, have meant that anonymised data can become personal data again. Big data does not only

52 Wendel (2022), p. 186.
53 Gellert (2020), p. 244.
54 Rodotà (2009), p. 80.
55 EU Commission, *"A European strategy for data". Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM(2020) 66 final.
56 Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the reuse of public sector information (recast) PE/28/2019/REV/1 *OJ L 172/56*, the so-called Open Data Directive.
57 See *The Internet and Digital Technologies as Essential Tools for the Civil Service* by A. Guckelberger in this volume.
58 Proposal for an Artificial Intelligence Regulation.
59 Schwartz and Solove (2011), pp. 1817–1818.

refer to the so-called four Vs[60] but also to the way data is collected, stored, used, and even analysed.[61] Big data implies new risks since it allows for extensive profiling and manipulation, and can even lead to discrimination. Furthermore, the knowledge gathered through big data is contentious, since the selection and analysis of data influence the outcome.[62]

Public administrations release a great deal of data as an exercise of transparency, but also to foster the reuse of the data stored by them. Public administrations also analyse big datasets to extract information and apply it to different sectors.[63] Still, Article 6, paragraph 4 GDPR does not require a legal basis for a further processing when Article 23 GDPR is applicable,[64] which is not being homogeneously applied through Europe, as already explained. Then, the limits of civil service in the field of big data may also differ. Furthermore, dig data allows better decisions in a multitude of sectors, such as security, traffic and public transport, healthcare, energy policies, and planning of public decisions.[65] In this framework, it has been questioned whether the GPDR is compatible with big data practices, given that the evolution of technologies might undermine some of the key measures that the GPDR features, such as, inter alia, the purpose limitation or the data minimisation.[66]

Consideration should also be given to the increasing difficulty in reconciling data sharing and data protection within the EU. The European Data Strategy aims at transforming the EU into a leading data-driven society, and the Open Data Directive and the proposal for a Data Governance Act are clear steps towards opening up data. The tension between the free flow of data and personal data protection is increasing because the line between personal data and non-personal data is blurring. The open data initiatives, particularly relevant for public administrations, emphasise this tension with the rise of big data and artificial intelligence.

The CJEU has sided with personal data protection against free movement of data,[67] but the evolution of the technology, and the EU legislation in the pipeline, might diminish the protection afforded by the CJEU and impair the balance between data protection and open data aims. The Commission, however, has not embarked on a comprehensive overhaul of data protection at the EU level, although it has put forward a proposal to increase the coordination between independent national data protection authorities in cross-border cases.[68]

60 Volume of data, variety of sources, velocity with which the analysis of data can be unfold, and veracity of data which could be achieved through the analytical process. See *"Of Data and Men" – Fundamental rights and freedoms in a world of massive data* (Report by Rouvroy), T-PD-BUR(2015)09Rev, 2016, pp. 5–10, available at Des données et des Hommes (coe.int).

61 Zarsky (2017), p. 999.

62 Oostveen (2016), p. 303.

63 Agencia Protección de Datos (2020).

64 Kotschy (2020), p. 343.

65 Rouvroy (2015), p. 18.

66 Zarsky (2017), p. 1004.

67 This trend is clear in cases such: CJEU (GC), judgment of 16 July 2020, *Shrems II*, C-318/11, CJEU (GC), judgment of 1 October 2019, *Planet49*, C-673/16 and CJEU (GC), judgment of 29 July 2019, *Fashion ID*, C-40/17.

68 Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, COM (2023) 348 final 2023/0202 (COD).

Nonetheless, the European Strategy for Data, and the unpredictable and unstoppable evolution of technology will necessitate a rethinking of the European Data Protection scheme that will involve the Civil Service. A rethinking that will stimulate the enhancement of coordination and reduce the fragmentation in data protection in Europe.

V. Concluding Remarks

Data protection is European data protection. This trend is not only obvious but unstoppable, since only a transnational data protection scheme will be effective. In a nutshell, Europeanisation seems inevitable.

This Europeanisation is also taking place in the processing activities carried out by the civil service. Even though the EU had given a generous margin of manoeuvre to domestic laws when the processing of data is carried out by public authorities, the expanding scope of Article 8 CFR, the interplay of several initiatives of the EU on data protection and data-driven technologies, and the increasing need of coordinated action on data protection, are all reducing national diversity. Even the access to public documents is being determined by EU data protection to a certain extent. This scenario is in line with the evolution of data protection; from an economic pragmatism approach to a fundamental rights-based approach. However, data protection must be flexible and future-oriented to keep pace with rapid technological evolution. Data protection relies on a flexible-risk approach which leads to different margins of responsibility depending on the context.

Consequently, Member States share obligations (albeit differing in the specifics on many occasions), but the controllers of data have a certain margin of decision. Harmonisation and flexibility go hand in hand, given that the EU wants to be at the forefront of data-driven technology while being a Union based on fundamental rights.

Bibliography

Agencia Española de Protección de Datos (2020). “Tecnología y protección de datos en las Administraciones Públicas” https://www.aepd.es/guias/guia-tecnologias-admin-digital.pdf

De Gregorio G. (2022), *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society*, Cambridge: Cambridge University Press.

De Hert P., Gutwirth S. (2009), ‘Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalism in Action’, in Gutwirt S., De Hert P., Poullet Y., Terwangne C., Nouwt S. (eds), *Reinventing Data Protection?* Amsterdam: Springer, 3–44.

Gellert R. (2020), *The Risk-Based Approach to Data Protection*, Oxford: Oxford University Press.

Hildebrandt M. (2012), ‘The Dawn of a Critical Transparency Right for the Profiling Era’, *Digital Enlightenment Yearbook 2012*, 41–56.

Kotschy W. (2020), ‘Lawfulness of Processing’, in Kuner Ch., Bygrave L.A., Docksey Ch. (eds), *The EU General Data Protection Regulation*, Oxford: Oxford University Press, 321–344.

Kranenborg H. (2020), ‘Article 86. Processing and Public Access to Public Documents’, in Kuner Ch., Bygrave L.A., Docksey Ch. (eds), *The EU General Data Protection Regulation*, Oxford: Oxford University Press, 1213–1222.

Krzywoń A. (2022), ‘The Notion of Civil Service in Europe: Establishing an Analytical Framework for Comparative Study’, *Discussion Paper 91*, https://dopus.uni-speyer.de/frontdoor/index/index/docId/5606.

Lynskey O. (2015), *The Foundations of EU Data Protection Law*, Oxford: Oxford University Press.

Lynskey O. (2022), ‘Article 8: The Right to Data Protection’, in Bobek M., Adams-Prassl J. (eds), *The CFR of Fundamental Rights in the Member States*, Oxford: Hart.

MacLaughlin S. (2018), ‘Ireland: A Brief Overview of the Implementation of the GDPR’, 4 *European Data Protection Law Review*, 227–234.

Martínez Martínez R. (2019), 'El principio de responsabilidad proactiva y la protección de datos desde el diseño y por defecto', in García Mahamut R., Tomás Mallén B. (eds), *El Reglamento General de Protección de Datos. Un enfoque nacional y comparado*, Valencia: Tirant lo Blanch, 311–342.

Mitrou L. (2020), 'Greece: The New Data Protection Framework', 6 *European Data Protection Law Review*, 107–113.

Murillo de la Cueva P. (2020), 'Encuesta sobre la protección de datos personales', 46 *Teoría y Realidad Constitucional*, 15–118.

Naudts L., Dewitte P., Ausloos J. (2022), 'Meaningful Transparency Through Data Rights: A Multidimensional Analysis', in Kosta E., Leenes R., Kamara I. (eds), *Research Handbook on EU Data Protection Law,* Cheltenham: Edwar Elgar, 530–571.

Oostveen M. (2016), 'Identifiability and the Applicability of Data Protection to Big Data', 6(4) *International Data Privacy Law*, 299–309.

Porcedda M.G. (2023), *Cybersecurity. Privacy and Data Protection in EU Law: A Law, Policy and Technology Analysis*, Oxford: Hart.

Rodota S. (2009), 'Data Protection as a Fundamental Right', in Gutwirt S., De Hert P., Poullet Y., Terwangne C., Nouwt S. (eds), *Reinventing Data Protection*, Amsterdam: Springer, 77–82.

Rouvroy A (2015) "Of data and men. Fundamental Rights and Freedoms in a world of Big Data" Council of Europe, 11 January 2016. T-PD-BUR (2015) 09 Rev https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a6020

Schlink B. (1986), 'Das Recht der informationellen Selbstbestimmung', 25(2) *Der Staat*, 233–250.

Schwartz P. (2019), 'Global Data Privacy Law: The EU Way', 94 *New York Law Review*, 771–818.

Schwartz P. (2021), 'The Data Privacy Law of Brexit: Theories of Preference Change', 22(2) *Theoretical Inquiries in Law*, 111–152.

Schwartz P., Solove D.J. (2011), 'The PII Problem: Privacy and a New Concept of Personally Identifiable Information', 86 *New York Law Review*, 1814–1894.

Taal A. (2022), *The GDPR Challenge*, Boca Raton: CRC.

Vogiatzoglou P., Valcke P. (2022), 'Two Decades of Article 8 CFR: A Critical Exploration of the Fundamental Right to Personal Data Protection in EU Law', in Kosta E., Leenes R., Kamara I. (eds), *Research Handbook on EU Data Protection Law*, Cheltenham: Edwar Elgar, 11–49.

Wagner J., Benecke A. (2016), 'National Legislation within the Framework of the GDPR', 2(3) *European Data Protection Law Review*, 353–361.

Wendel M. (2022), 'Taking Up the European Mandate: The Charter Before German Courts', in Bobek M., Adams-Prassl J. (eds), *The CFR of Fundamental Rights in the Member States*, Oxford: Hart.

Zanfir-Fortuna G. (2020), 'Article 13: Information to Be Provided Where Personal Data Are Collected from the Data Subject', in Kuner Ch., Bygrave L.A., Docksey Ch. (ed), *The EU General Data Protection Regulation*, Oxford: Oxford University Press, 413–433.

Zarsky T.Z. (2017), 'Incompatible: The GDPR in the Age of Big Data', 47 *Seton Hall Law Review*, 995–1020.

Zwitter A., Gstrein O.J. (2020), 'Big Data, Privacy and COVID-19 – Learning from Humanitarian Expertise in Data Protection', 5(4) *International Journal on Humanitarian Action*, 1–7.

34 Digital Competencies in the Civil Service

Margrit Seckelmann and Derya Catakli

I. Introduction: Digital Competencies in the Civil Service

For the last decades in Europe, the civil service has been regarded as a safeguard of stability. It prevents nepotism, ensures a high standard of living and guarantees equal opportunities for all residents. The fulfilment of these principles is secured by legal principles that guarantee the principle of the selection of the best civil servant candidates (such as Article 33, paragraph 2 of the German *Grundgesetz* or Article 97, paragraph 4 of the Italian constitution).

However, the environmental requirements of the public administration are increasingly changing. How can the civil service be continuous in a world that is becoming increasingly volatile, uncertain, complex and ambivalent (VUCA)?[1] To ensure a consistently high level of service, public administration has to undergo a transformation. This task is a complex one: the civil service development has to respond to the fundamental digital transformation process on the outside but cannot give up its legal ties (as e.g. its binding to the related constitution and the associated principle of equality). This endeavour is anything but easy.

However, the civil service cannot avoid transformation because it is not only being subject to an overarching digitalisation[2] but also to demographic change. Therefore, the digitalisation of the civil service can play a twofold role. Firstly, it requires a new definition of needs and competencies. Secondly (and on the other side), information and telecommunications technologies might also help to take over (or at least support) administrative tasks. Information technologies are already being used by administrations. However, the further expansion, especially the use of artificial intelligence, is dependent on the ability of the (human) civil service staff to use and control these technologies. But which competencies are we exactly talking about?

1. What Are Digital Competencies and How Can They Be Measured?

Digital competencies are, generally speaking, skills, attitudes, and knowledge that are needed to navigate the digital space and use digital technologies in a responsible, independent, and confident way. This does not only include competencies regarding the needed digital technology, but also the capacity to use data in a proper way (e.g. guaranteeing

1 See Johansen (2012).
2 Denkhaus (2019).

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privacy and security); and it may also include transformational skills, depending on the context in which digital technologies are used.

An assessment of digital competencies needs, therefore, a strategic approach. The first strategic step would be to define which tasks are to come and which competencies are needed. This step is often guided by competence frameworks. Consecutive steps would include a framework-based assessment of individuals, teams and even organisations and the building up of digital competencies, either through personnel acquisition, education or further individual training. Management must react to a ubiquity of information and data and to "new work" (namely diversified forms of teleworking), and must find new strategies in order to keep the personnel motivated when leading locally distributed teams.[3] Personnel planning in public administration is at the same time faced with the problem that it is not yet possible to predict with sufficient concreteness how exactly the requirement profile of jobs will change.[4]

But: even though the definition of goals it is a managerial task, not only the managerial staff has to build up a specific ("digital") mindset.[5] Every civil servant has to develop competencies to move around in the "digital environment".[6] The required interdisciplinary[7] skills include e.g. the capacity to motivate oneself and to deal with unsafe situations. Skills in the digital environment thus embrace problem-solving abilities, creativity and adaptability.[8]

2. Why Do We Need Digital Competencies in the Civil Service?

Citizens expect two very different things from the civil service: on one hand, it should guarantee stability and should be in conformity with the rule of law principle. On the other hand, it should be adapted to the citizens' living conditions, so that official services should be (ideally) as easy to apply for as e. g. an internet purchase. To be able to offer such a complex level of service, employees in the public sector must either bring the necessary skills to the job or at least receive further appropriate training. But public servants have in their everyday work usually very limited time resources for further education. Thus, appropriate teaching and learning formats should be developed.[9]

The (somewhat *naïve*) hope that all young people would already be familiar with the Microsoft Office package as soon as they leave school has meanwhile been dashed. Moreover, it can be perceived that the basic skills that are taught in school are on the decline (reading, writing, etc.) while the digital skills that the "digital natives" have learned from childhood are very selective (and regard mostly specific social media applications, internet purchases and/or computer games).[10] Not only schools but also educational institutions have to react to this fact and to adopt their curriculum to the digital transformation of administrative tasks. Furthermore, adequate forms of a "training on the job" should be developed or enhanced. This requires a thorough analysis of the required competencies.

3 Misgeld and Wojczak (2019), p. 656.
4 Seckelmann and Humberg (2022), p. 98; Kösters (2019), p. 34.
5 Ogonek et al. (2018), p. 5.
6 Schmeling and Bruns (2021).
7 Mergel et al. (2021), pp. 6–7.
8 Expertenkommission Forschung und Innovation (2021), p. 16.
9 Ogonek et al. (2020), p. 5; Stich and Schwiertz (2021), s. 459.
10 See https://qualifica-digitalis.de/ergebnisse/.

In the next section, thus, we want to present the existing "competency" frameworks that have been developed by various bodies and institutions.

II. Digital Competency Frameworks

As stated previously, digital transformation of the public administration is in full swing, with worldwide efforts to utilise digital technologies for the common good. Therefore, a variety of indexes and rankings can be found that indicate the fruitfulness of national efforts towards digital transformation, among them:

- The Organisation for Economic Co-operation and Development (OECD) Digital Government Index (DGI),[11] which uses indicators in six dimensions (digital by design, government as a platform, data-driven public sector, open by default, user-driven, pro-activeness) to assess 33 countries;
- The European Union (EU) Digital Economy and Society Index (DESI),[12] which monitors digital public services in Member States in one of its four main dimensions (human capital, connectivity, integration of digital technology, digital public services);[13] and
- The United Nations (UN) E-Government development index (EGDI)[14] with the current UN E-Government survey 2022,[15] which uses a system of weighted scores in three dimensions of E-Government, including not only the scope and quality of online services, but also aspects of telecommunication infrastructure and human capital to reflect the overall status of digital government efforts in the Member States.[16]

While the EU DESI and UN EGDI address digital competencies as an important part of digital government approaches, they emphasise their significance mainly as a part of human capital[17] and vulnerable groups[18] on grounds of accessibility and digital participation. The OECD DGI takes digital competence policies for civil servants into account in one of its basic dimensions, "digital by design",[19] pointing out that 79% of the countries have strategies or policies for development of civil servants' digital competencies.[20] In practice, this is often achieved through the usage of digital competence frameworks.

Several digital competence frameworks can be found on supranational, international, and national level. While there is a broader range of frameworks addressing the public or certain sectors as such, fewer frameworks focus on its employees.

11 OECD (2020).
12 European Commission (2022).
13 European Commission (2022), p. 78.
14 UN E-Government Knowledge Base, E-Government Development Index (EGDI), https://publicadministration.un.org/egovkb/en-us/About/Overview/-E-Government-Development-Index.
15 UN Department of Economic and Social Affairs (UN DESA), United Nations E-Government Survey (UN EGS) 2022, https://publicadministration.un.org/egovkb/en-us/.
16 UN Department of Economic and Social Affairs (UN DESA), United Nations E-Government Survey (UN EGS) 2022, https://publicadministration.un.org/egovkb/en-us/; *Methodology*, p. 189.
17 European Commission (2022), pp. 33–35.
18 UN DESA, UN EGS 2022 (footnote n. 15), *Digital Literacy*, pp. 133–134.
19 OECD (2020), p. 25.
20 OECD (2020), p. 29.

1. International and EU Frameworks

A framework that directly addresses the capabilities of civil servants not only concerning digital transformation, but also capacity-building regarding technologies that include artificial intelligence, was developed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) Broadband Commission for Sustainable Development.[21] It points out five complementary attitudes that are needed for an effective digital transformation: trust, creativity, adaptability, curiosity, and experimentation, and focuses on three competency domains: Digital Planning and Design, Data Use and Governance, and Digital Management and Execution, in three proficiency levels (basic, intermediate, and advanced).[22] The framework provides recommendations on competence-building and encourages governments to take a holistic approach through national strategies and action plans, including complementary training programmes.[23]

Another competency framework that has been widely accepted and adopted into further research is the European Commission's Digital Competency Framework for Citizens, currently available in Version 2.2 (DigComp 2.2).[24] This framework differentiates five digital competence areas:

1. information and data literacy,
2. communication and collaboration,
3. digital content creation,
4. safety, and
5. problem solving.

The competence areas contain three to six competencies, e.g. "protecting devices", "protecting personal data and privacy", and "protecting health and well-being" in competence area 4, safety. In total, the framework encompasses 20 digital competencies, which are broken down into eight proficiency levels, from a foundational level ("at basic level and with guidance"), up to a heavily specialised level ("at the most advanced and specialised level").[25] Each competency contains examples of knowledge, skills, and attitudes and outlines examples for use cases.

While the DigComp 2.2 addresses citizens and not the civil service, it has laid the groundwork for research on other frameworks with the purpose of managing competencies in various fields, among them consumers in the digital marketplace and educators,[26] and frameworks for digital competencies on a supranational level.[27] Digital competencies are also addressed in other EU programmes and policies, such as the EU digital skills

21 Broadband Commission (2022).
22 Broadband Commission (2022), pp. 16–21.
23 Broadband Commission (2022), pp. 70–71.
24 Vuorikari et al. (2022).
25 Vuorikari et al. (2022), p. 9.
26 Vuorikari et al. (2022), p. 62.
27 As for the UNESCO, United Nations Children's Fund (UNICEF) and World Bank frameworks based on the DigComp refer to Vuorikari et al. (2022), p. 54.

coalition[28] and Digital Skills & Jobs Platform, which is accessible to EU citizens and includes services such as a self-assessment tool for digital skills.[29]

However, due to the unique traits of national administrative systems, cultures, and regulations, it seems more purposeful to utilise national competence frameworks for civil servants that reflect the specific strategical approaches to digital transformation. The following sections show the status quo of digital competence frameworks in different nations.

2. National Frameworks

Many of the countries that ranked high in the digital government indexes have already launched national strategies, digital competence frameworks or programmes for their public servants, among them Canada,[30] Australia – who also based their framework on the DigComp EU[31] – and Singapore.[32] In Europe, which overall ranks as the global leading region in e-government development,[33] a multitude of national digital competence frameworks can be found.

Austria has set up her own national digital competence framework, DigComp AT, based on the DigComp framework of the European Union.[34] First developed in 2018, it took all updates of the DigComp into account, expanding the framework to adapt it to national requirements and needs. As of 2023, the DigComp AT is available in version 2.3. The overall structure corresponds to the DigComp (EU) 2.2 with an additional competence area (0.) for "principles, access and digital understanding". This competence area is composed of four digital competencies: 0.1 understanding digital concepts; 0.2 operating digital devices; 0.3 knowledge, usage, and provision of inclusive accessibility; and 0.4, engaging with digital means and developing critical judgment skills.[35] Several of the DigComp (EU) 2.2 competence areas and competencies were also expanded, e.g. area 3 (digital content creation), which received an additional competence 3.5, legally compliant production publication of content and objects.[36]

Since 2018, the further development of the national digital competence framework is coordinated by the non-profit association "fit4internet" which brings together a variety of stakeholders from the private and public sector and provides a joint platform with the Austrian Ministry of Finances (BMF) to launch actions to improve skills and raise the level of digital competencies. Measures include not only self-assessment tools and tests, but also formal certifications for users.[37]

28 European Commission, *Shaping Europe's Digital Future. Digital skills and jobs coalition*, https://digital-strategy.ec.europa.eu/en/policies/digital-skills-coalition.

29 EU, *Digital Skills & Jobs Platform*, https://digital-skills-jobs.europa.eu/en.

30 Government of Canada, *Data Competency Framework*, www.csps-efpc.gc.ca/tools/jobaids/data-competency-framework-eng.aspx.

31 Department of Employment and Workplace Relations, *Australian Digital Capability Framework*, www.dewr.gov.au/skills-and-training/resources/australian-digital-capability-framework.

32 GovTech Singapore, The Digital Academy, with customised programmes for public servants in different professions and roles, www.thedigitalacademy.tech.gov.sg/.

33 UN DESA, UN EGS 2022 (footnote n. 15), pp. xxiv-xxv, with European countries ranking between 1 and 58 out of 193 and none below average.

34 Fit4internet, *Das Kompetenzmodell verstehen*, www.fit4internet.at/view/verstehen-das-modell.

35 Nárosy et al. (2022), p. 8.

36 Nárosy et al. (2022), p. 62.

37 Nárosy et al. (2022), p. 44.

Like the DigComp EU, DigComp AT primarily addresses citizens and the workforce, but aims for adaptability in a variety of contexts.[38] While the E-Government Strategy for Austria makes no note of the role of digital competencies for civil servants,[39] the Strategy for digital competencies in Austria aims to establish a national reference framework based on the DigComp AT 2.3, listing digital competencies in the public sector as one of its eight main objectives.[40] In conclusion, Austria is taking a holistic approach on digital competencies, harmonising digital competence frameworks for citizens, business purposes and civil servants, and setting up strategic measures to harmonise efforts in building up digital competencies. This unified understanding of digital competencies across sectors holds potential for great synergistic effects, but the practical impact remains to be seen.

Another European country that based their national competence framework on the DigComp EU is Italy. In 2021, the National Recovery and Resilience Plan (*Piano Nazionale di Ripresa e Resilienza*)[41] identified digitisation and innovation as one of the three main strategic axes and emphasised the role of digital skills in strategic efforts towards digital transformation of the public administration,[42] with special regard to boosting basic digital competencies of non-Information and Communication Technologies (ICT) professional public servants.

These digital competencies are found in the Syllabus "Competenze digitali per la pubblica amministrazione (PA)" (digital competencies for public administration).[43] It is based on the DigComp EU version 2.1 and condensed into a briefer version. The Syllabus contains 11 competencies in five competence areas: (1) data, information, and Information Technologies (IT) documents; (2) communication and sharing; (3) security; (4) online services; and (5) digital transformation. In lieu of the DigComp EU's eight profession levels, the competencies are broken down into three levels of mastery: basic, intermediate, and advanced.[44] This can be explained by the fact that the DigComp EU has a broader scope (digital competencies for all EU citizens in a variety of circumstances), whereas the Syllabus is meant to provide only necessary basic digital competencies for non-ICT professionals in the Italian public administration. With this theoretical groundwork, the Italian government developed an online platform which provides civil servants with trainings in the format of online courses that directly correspond to the competencies displayed in the Syllabus.[45]

38 E.g. Small and Medium Enterprises (SMEs), educational institutions, data-driven business fields: Nárosy et al. (2022), pp. 46–49.

39 Bundesministerium für Finanzen, *E-Government-Strategie Österreich*, May 2023, www.digitalaustria.gv.at/dam/jcr:25902ce4-1087-4aa6-8b87-864770bfbc68/E-GovernmentStrategieOesterreich2023-bf.pdf.

40 Bundesmininsterium für Finanzen, *Strategie digitale Kompetenzen Österreich. Gemeinsam in die Zukunft*, June 2023, www.digitalaustria.gv.at/dam/jcr:e84a42c3-f2e7-4642-9ca0-76d7e8c61216/Strategie-Digitale-Kompetenzen-Oesterreich-PDF-UA-1.pdf.

41 Ministero dell'Economia e delle Finanze, *Il Piano Nazionale di Ripresa e Resilienza*, www.mef.gov.it/focus/Il-Piano-Nazionale-di-Ripresa-e-Resilienza-PNRR/.

42 Governo Italiano, *Italia Domani*, www.italiadomani.gov.it/content/sogei-ng/it/en/home.html, and Strategic Plan of the Mission regarding "Digitalisation, innovation, competitiveness, culture and tourism", www.italiadomani.gov.it/content/sogei-ng/it/en/il-piano/missioni-pnrr/digitalizzazione-e-innovazione.html.

43 Governo Italiano, *Syllabus*, www.competenzedigitali.gov.it.

44 Governo Italiano, *Syllabus*, www.competenzedigitali.gov.it, p. 16.

45 Dipartimento della Funzione Pubblica, *Syllabus. Nuove competenze per le Pubbliche Amministrazioni*, www.syllabus.gov.it/syllabus/.

While we can see both countries achieve high ranks on a global scale,[46] compared to other European countries, both Austria[47] and Italy[48] are very close to the average. Another European Country which reaches overall top scores in E-Government rankings,[49] the United Kingdom of Great Britain and Ireland (UK), has a clear approach to digital government, with set tasks and responsibilities. Through the Cabinet office, the Government digital service (GDS)[50] was established as a unit tasked with providing digital government services, maintaining the "front door", and building platforms for accessible digital services, while the Central Digital and Data Office (CDDO)[51] is entrusted with the digital transformation of the UK government. The UK Government Transformation Strategy (by the GDS)[52] and Roadmap for Digital and Data (by the CDDO)[53] both put a heavy emphasis on the significance of digital competencies for civil servants, the latter with set quantifiable goals and a monitoring system to keep track of the progress.[54]

Utilisation of competence frameworks in staff acquisition is an established mode of practice in UK: the Civil Service Competency Framework,[55] which came into effect in 2012, defined 10 key competencies for civil servants through three clusters (Strategic, People, and Performance) and already pointed out the importance of digital approaches. In 2018, the Success Profile Framework was introduced.[56] It consists of five elements that can be assessed in the process of staff acquisition: behaviours, strengths, ability, experience, and technical. Each job description includes a success profile, i.e. the specific composition of each element within a role, and entails specific assessment methods, e. g. interviews, tests or assessment centres.

Since 2017, the Digital, data and technology (DDaT) capability framework was introduced, which defines roles in government and the respective skills needed to fulfil them, through six job families: data job family, IT operations job family, product and delivery job family, quality assurance testing (QAT) job family, technical job family, and user-centred

46 With Austria on rank 20 and Italy on rank 37 out of 193, UN EGDI (footnote n. 14), p. 72.

47 Rank 12 out of 28 in the European Commission (2022), p. 66; rank 20 out of 33 in the OECD (2020), p. 54.

48 Rank 20 out of 28 in the European Commission (2022), p. 66; rank 15 out of 33 in the OECD (2020), p. 54.

49 Rank 2 out of 33 in the UN EGDI (footnote n. 14), p. 72; OECD (2020): 2 out of 193, only surpassed by South Korea.

50 See www.gov.uk/government/organisations/government-digital-service.

51 See www.gov.uk/government/organisations/central-digital-and-data-office.

52 Government Digital Service, *Government Transformation Strategy 2017 to 2020*, www.gov.uk/government/publications/government-transformation-strategy-2017-to-2020 with subsequent updates for 2021–2024: https://gds.blog.gov.uk/2022/12/20/government-digital-service-updates-on-our-2021-2024-strategy/.

53 Central Digital & Data Office, *Transforming for a digital future: 2022 to 2025 roadmap for digital and data*, June 2022, www.gov.uk/government/publications/roadmap-for-digital-and-data-2022-to-2025/transforming-for-a-digital-future-2022-to-2025-roadmap-for-digital-and-data.

54 Central Digital & Data Office, *Transforming for a digital future: 2022 to 2025 roadmap for digital and data*, June 2022, www.gov.uk/government/publications/roadmap-for-digital-and-data-2022-to-2025/transforming-for-a-digital-future-2022-to-2025-roadmap-for-digital-and-data; Mission Five: Digital skills at scale.

55 Civil Service Human Resources, *Civil Service Competency Framework 2012–2017*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/436073/cscf_fulla4potrait_2013-2017_v2d.pdf.

56 Cabinet Office, *Success Profiles*, www.gov.uk/government/publications/success-profiles.

design job family.[57] Each job family contains three to twelve jobs with accessible job descriptions, detailing which skills are needed for each job and on which skill level (1–4).[58] This leads to a high transparency and clear-cut expectations on both the civil service and (designated) civil servant side.

In addition to the competence-based approach on civil service jobs, UK also uses a single gateway to the civil service: candidates can apply in the Civil Service Fast Stream, which offers 15 different schemes to choose a government profession from, among them also the DDaT fast stream.[59] Applicants can choose four schemes and are then assessed on which scheme fits best, regardless of their subject, as long as they fulfil the requested degree level (i.e. post-graduate degree in any subject). This ensures that civil servants are chosen, trained and employed according to their individual strengths and not formal paper situations.

3. Germany

When it comes to Germany, a specific problem can be observed: despite its relatively high gross national product, Germany's digital service level is usually ranking low in international comparative studies.[60] This cannot only be traced back to the fact that the German federal system allows for manifold digital solutions that do not form an overarching system so far (despite several initiatives such as the German Online Access Act (*Onlinezugangsgesetz*, OZG)[61] and a federal Digital Strategy which is meant to be continuously updated and adapted).[62] Furthermore, an overarching strategy which clear pathways into digital transformation of the civil service has not been formulated.

Therefore, some research projects have been started to explore the field of digital competencies of the Public Sector in Germany. In the following subsections, we want to present some of them.

3.1. Qualifica Digitalis

The Qualifica Digitalis project was initiated by the German IT Planning Council (*IT-Planungsrat*).[63] The IT Planning Council is the political steering committee of the federal, State and local governments for information technology and e-government.[64] It consists out of representatives from the federal and State (*Länder*) governments, usually

57 Central Digital and Data Office, *Digital, Data and Technology Capability Framework*, www.gov.uk/government/collections/digital-data-and-technology-profession-capability-framework.

58 Central Digital and Data Office, *Guidance. Skill levels for digital, data and technology roles*, www.gov.uk/guidance/skill-levels-for-digital-data-and-technology-roles.

59 Civil Service Fast Stream, www.faststream.gov.uk/.

60 UN EGDI (footnote n. 14), p. 72: rank 22 out of 193; European Commission (2022), p. 66: rank 19 out of 28 with particularly low ranks (bottom 5) in areas 5.1, e-Government users and 5.2, pre-filled forms; OECD (2020), p. 54: rank 26 out of 33.

61 Online Access Act of 14 August 2017 (*Gesetz zur Verbesserung des Onlinezugangs zu Verwaltungsleistungen – Onlinezugangsgesetz*), BGBl. I S. 3122, 3138 amended as of 19 July 2024, BGBl. I Nr. 245, www.gesetze-im-internet.de/ozg/BJNR313800017.html.

62 *Digitalstrategie Deutschland,* https://digitalstrategie-deutschland.de/.

63 Further information: www.it-planungsrat.de/en/.

64 IT-Planungsrat, www.bmi.bund.de/DE/themen/it-und-digitalpolitik/it-des-bundes/it-planungsrat/it-planungsrat-node.html (in German language).

on the rank of State secretaries (Chief Informational Officers). In the course of its thirty-second session in June 2020, the *IT-Planungsrat* initiated the Qualifica Digitalis project and has commissioned the State of Bremen with the implementation[65] with academic partners (the German Research Institute for Public Administration (FÖV), the Fraunhofer Institute for Open Communication Systems (FOKUS) and the Institute for Information Management Bremen (ifib)). The consortium aimed at analysing the current changes in competence requirements and qualification developments, comparing them with the current situation and use this to derive qualification strategies and, thus, developing digital competencies for the public administration across departments and federal States and to provide the administration with concrete recommendations for the qualification of public administration employees. Digital literacy in the public sector was analysed through a broad literature review and categories were deduced inductively. These categories have been summarised in a meta-study, which can be used as a first step towards identifying digital competencies needs in public administration. The meta-study is based on a broad understanding of the term "digital competencies": it refers to all competencies "that are directly or indirectly related to the use of information and communication technologies or media".[66]

These digital competencies are divided into nine main categories with further sub-categories:

1. personal professional competence in the digitalised professional environment;
2. designing and changing organisations and processes;
3. searching, processing, and storing digital information;
4. communicating and collaborating in digital environments;
5. producing and presenting digital content;
6. staying safe and secure in the digital environment;
7. problem-solving and taking action in the digital environment
8. analysing and reflecting on digital media;
9. data literacy.[67]

The categories have a varying number of subcategories. For instance, category 1 ("Personal professional action skills") contains 13 subcategories such as "Digital literacy" and "Innovation skills". And main category 8 ("Analysing and reflecting on digital media") embraces two subcategories ("Analysing and evaluating media" and "Reflecting and understanding media in the digital world").[68]

At first glance, the categories seem rather abstract, but they offer an immeasurable advantage for cross-cutting application in administration: with the help of these categories, competencies can be used as a template, like a pattern, for any activity and tailored to it as an activity-specific competence profile. Following this model, digital competencies can be specified and defined through categories.

The meta-study was based on further studies of the IT Planning Council, namely the different "personas" (or roles) by the "eGovernment Competence" working group of the

65 See www.it-planungsrat.de/beschluss/beschluss-2020-37.
66 Schmeling and Bruns (2021).
67 Schmeling and Bruns (2021), p. 20.
68 Schmeling and Bruns (2021), pp. 20; 49–50.

IT Planning Council.[69] This group identified in its final report 19 "administrative roles". The roles are associated with specific tasks and can be assigned to four upper categories: "Designer", "IT Coordinator", "IT Services", and "IT-Specialist". The individual competencies can be assigned to the following four clusters:

- technical competencies;
- professional competencies with four sub-groups (socio-technical, organisational, managerial, political-administrative) and foreign language competencies;
- social competencies; and
- personality traits.

The advantage of defining competencies through role models is that competence profiles can be closely linked to the actual activities of a position or office and are not exhausted in generalities.

3.2. Digital Competence Framework for Public Personnel

Another competence framework was developed in a dissertation on "Public administration in the digital age. The role of digital competencies in the recruitment of personnel in the higher civil service", which has been written at the German University for Administrative Sciences and contains a self-developed competency framework.[70] The dissertation is located at the interface between digital law and human resources management and bases its digital competence framework on the concept of digital competencies as self-organising dispositions that enable people to solve problems in a digital context. A somewhat narrower understanding of the term is presented here: only specifically digital competencies taken into account, i.e. competencies that are expressed exclusively in the context of the use of digital technologies and applications. This excludes competencies that are generally important but not exclusively required in the digital context, such as a willingness to change. The reason for this is that a broader understanding of "digital competencies" makes the term seem limitless and is therefore not suitable for empirical studies; purely digital competencies are more meaningful in the context of more comprehensive studies. As such, the framework is adaptable to all civil servants, regardless of location or government agency.

As has been shown, the systematic identification of competencies by means of clusters is suitable, as it allows individual competencies to be made more concrete according to needs, despite the abstract framework. Clustering is carried out via classic types of competence: digital competencies can be identified in the form of professional, methodological, social, and personal competencies.[71]

Professional digital competencies are such competencies that are either acquired in a subject-specific educational process or used in a subject-specific context and expressed in digital contexts of action. They may be *transdisciplinary competencies* that emerge exclusively in digital contexts (e.g. technological literacy) or competencies that emerge from the interaction of subject disciplines and digital contexts (e.g. in the interaction of law and digital contexts: competencies in digital application of law).

69 Becker et al. (2016).
70 Catakli (2022).
71 Catakli (2022), pp. 67–69.

Methodological digital competencies are used in a targeted, planned approach to problems through the use of different digital methods and tools, for example in research of information.

Social digital competencies enable people to interact with other people or groups of people and are used to shape social relationships in a digital context, for example when working digitally through online collaboration processes.

Personal digital competencies enable reflexive, self-organised action and creative development of the self in the digital context, e.g. responsible and conscientious handling of one's own data in online applications.

In total, 34 digital competencies are identified in the four clusters and subsequently depicted in four proficiency levels, with base definitions and additional examples for civil servants.

3.3. Other Examples

Other attempts to build up a competence framework can be found when it comes to more complex digital technologies. Firstly, the "Handout for Digital Management", developed by the Algo.Rules project in collaboration between the Bertelsmann Foundation and iRights.Lab, should be mentioned here.[72] It defines roles according to three phases in the design of algorithmic assistance systems: in planning (1), decision-makers, planners, and coordinators are involved; in development (2), project sponsors, developers, and technical implementers; and in use (3), finally, implementers, users, stakeholders, supporters, and evaluators. In this approach, competencies are also to be taught in a role-specific way, with the design of competence development explicitly assigned to the coordinators. This approach lays the groundwork for subsequent competence frameworks that are developed in the reframe[Tech] project,[73] e.g. a framework for AI-related competencies in the public sector.[74]

Secondly, the "Digital Ethical Competence Framework" of the D21 deals with specific, digital ethical competencies and visualises examples for the formation of competence profiles. The individual competencies are divided into three competence levels and thus clearly outlined for different roles.[75]

4. Interim Result

The task to put the Civil service in a position to deal with digitalisation is a strategic one. Within competence management approaches, usually the first step is to build a framework that sets the goalposts. But the "digital mindset" cannot be prescribed "top-down". Thus, a clear commitment to a digital transformation of the Public Sector has to go hand-in-hand with individual training concepts. In this regard, frameworks can be used to assess the competencies of the existing staff, to highlight possible competence gaps and to set up training agreements.

72 Fetic and Puntschuh (2020).

73 Bertelsmann Stiftung, Reframe[Tech], *Kompetenzaufbau im öffentlichen Sektor und in der Zivilgesellschaft vorantreiben*, www.reframetech.de/category/kompetenzen/.

74 Catakli and Puntschuh (2023).

75 Lorenz and Klingel (2022).

Countries with high scores in e-government rankings have more detailed, comprehensive competence frameworks. Even though setting up a competence frameworks and related strategies and monitoring might bring further administrative load during a transitional period, the advantages will outweigh the disadvantages in the end.

III. Building Digital Competencies in the German Civil Service

There are several ways to build digital competencies in government: new digitally competent staff can be recruited, future administrators can be trained, and existing administrators can be trained and upskilled.

1. Personnel Acquisition

1.1. Civil Service and Personnel Law

The foundations of civil service law reflect an essential starting point of classical bureaucracy: the civil service and its traditional principles. In particular, the principle of merit and the associated selection of the best according to Article 33 (2) of the Basic Law[76] must be emphasised. The principle of merit means the eligibility to public office is based solely on three aspects:

- aptitude, i.e. personal, mental, and physical characteristics related to the ability to perform;
- qualifications, i.e. essentially the person's skills, knowledge, abilities, and other qualities such as experience; and finally
- professional achievements, i.e. a proven track record in the administration.

This is the basis of the principle of best selection: the person who best combines the aforementioned aspects should be appointed to a public office. Competences, including digital competencies, can (generally spoken) be taken into account under the aspects of suitability and aptitude. In administrative practice, however, they will not be able to outweigh other aspects, not least because qualifications and related formal requirements such as minimum grades are regularly set as a concretisation of the merit principle.

This aspect leads to another principle of the civil service, which can be described as the biggest stumbling block on the way to flexible consideration of digital competencies in the civil service: the career principle. The civil service is structured according to this principle: the career of civil servants is determined on the basis of uniform formal requirements. These consist almost exclusively of formal qualifications.

For example, general regulations on federal civil servants are found in the Federal Civil Service Act (*Bundesbeamtengesetz*, BBG),[77] while civil service careers are concretised in the

76 Basic Law of the Federal Republic of Germany of 23 May 1949, BGBl. III No. 100–1; www.gesetze-im-internet.de/englisch_gg/.

77 Federal Civil Service Act of 5 February 2009 (*Bundesbeamtengesetz*, BBG), BGBl. 2009 I, p. 160; www.gesetze-im-internet.de/bbg_2009/BJNR016010009.html.

Federal Career Ordinance (*Bundeslaufbahnverordnung*, BLV).[78] Civil servants are assigned to a career group in the civil service depending on their previous training and the associated professional qualification (Article 6, Paragraph 1 BLV).[79] The prior training to be fulfilled in each case is defined as a minimum requirement in Article 17 BBG and laid down in Articles 18 to 22 BLV: completed apprenticeship for the basic service, subject-specific apprenticeship or additional work experience for the middle service, bachelor's degree for the upper service, and master's degree for the senior service. Special regulations on these requirements are contained in Articles 23 to 27 BLV. The standardised exceptions lead to a rather low degree of flexibility in the rigid requirements of career law: if, for example, a post is to be filled by a person who is particularly capable but who does not meet the formal requirements of Article 17, paragraphs 3 to 5 BBG (e.g. a university degree), this is permissible under Article 27 BLV – but only if the civil servant has proved his or her worth in two assignments over a period of service of at least 20 years, has held the last post in the previous career for at least five years, can show top marks and has passed a selection procedure.

Despite the fact that information technology courses can easily lead to higher positions in the private sector, the public sector does not offer senior positions if the need for a post-graduate degree is not fulfilled. This is an obstacle that cannot be overcome, even if digital skills are given special consideration.

However, this is not a plea to abolish the career principle altogether; rather, the first step should be to raise awareness of the problem and to make digital competencies an issue – not just for IT staff, but for all civil servants.

1.2. Structures and Strategies

So why is it so difficult to come up with one-size-fits-all solutions and why is it not possible to define a universal catalogue of digital skills that administrative staff should have? The main reason is that there is no such thing as "administration" in the strict sense of the word, and that not only the needs and framework conditions, but also the structures of digital government at the federal, State, and local levels can vary considerably. As a result, it is not possible to make uniform overarching rules for competence building.

Such rules cannot be derived from existing strategies at federal and State level. Digitisation strategies and, to some extent, e-government strategies can be identified at all levels, but no trendsetting, closely linked strategies for digital competence in the public sector can be identified.

In the following, thus, we will therefore first show how digital competencies can in principle be systematically recorded.

2. Formal Training

As explained at the beginning, competencies can be demonstrated through qualifications. Digital competencies, which are usually not part of traditional educational pathways outside of specific subjects (like IT), need to be measured in a different way.

78 Regulation on the Careers of Federal Civil Servants of 12 February 2009 (*Verordnung über die Laufbahnen der Bundesbeamtinnen und Bundesbeamten – Bundeslaufbahnverordnung*), BGBl. 2009 I, p. 284; www.gesetze-im-internet.de/blv_2009/BJNR028400009.html.

79 The civil service in Germany is organised in four career groups (professional tracks): basic, middle, upper, and senior service. Access to a career group is determined by its minimum education requirements.

Generally speaking, competencies can be measured using instruments based on three components: self-assessment, third-party assessment, and certification, for example in the form of certificates of participation. A wide variety of methods can be used, such as quantitative and qualitative measurements, biographical methods and simulations. Depending on the chosen method, interviews may be conducted, or people close to the individual, such as colleagues and team members, may be asked to provide an assessment. Different results are possible. For example, it can only be examined whether a characteristic is present or not (nominal scales) or in what form it is present (e.g. ordinal or interval scales).

In the field of digital competencies in administration, it will be of little use to measure only the presence of these competencies. It is therefore advisable to choose an approach that distinguishes between different levels of competence or skills, so that they can be measured on an appropriate scale. Common procedures already used in public administration at the recruitment stage, such as interviews and assessment centres, could also be used to measure digital competencies through the use of competency models.

The measured competencies can finally be combined in a third step to form a competence balance. Competence assessments can be carried out for individuals, but also for larger numbers of people (e.g. units, departments or whole organisations). A well-known example that measures the competencies of a large number of people on a broad basis is the OECD's Programme for International Student Assessment (PISA) study. In this study, the competencies of individual students are measured and not only scored individually, but also combined and compared in scores for the participating countries.[80]

For individuals, visualisation in the form of competence profiles is a good option. For competence profiles in the field of digital ethics, the competence framework of the D21 initiative by Lorenz and Klingel provides not only examples of self-assessments by employees, but also further possibilities of use: target definitions for further training measures, the composition of interdisciplinary teams and the definition of an ideal-typical composition of competence profiles for assessment teams.[81] This approach can also be used to assess digital competencies in public administration: visualisation of existing competencies of individual administrative employees, competence profiles for individual roles, positions or offices, target agreements for further training measures, competence profiles for administrative units and much more.

3. *Building Up Digital Competencies in Existing Staff*

3.1. *Recruitment*

The seemingly easiest way to build digital competencies in the administration is to recruit new staff. However, there are several hurdles to overcome: for example, people with excellent digital skills may be recruited only to a limited extent, or not in the intended career group, if they do not meet the formal requirements for certain positions. To give an example, IT professionals with only a bachelor's degree cannot be recruited into the senior civil service. Experience gained in the private sector can only be considered up to a limited span and cannot overcome the formal requirements for classification in posts. Additional incentives are somewhat rare: for pay scale employees at federal level, a skilled worker allowance of up to 1,000 EUR per month can be granted in cases where there is a

80 OECD, *Programme for International Students Assessment – PISA*, www.oecd.org/pisa/.
81 Lorenz and Klingel (2022).

significant shortage of applicants, or an above-tariff step can be assigned to a higher step in the relevant salary group.[82] However, these incentives are subject to very restrictive conditions: the scope of application in terms of personnel is opened only to employees in information technology, activities of an engineering nature and employees with a medical licence. The preceding provisions do not apply to administrative staff who have excellent digital skills and come from a discipline not mentioned. Furthermore, the Civil Service Act (*Bundesbeamtengesetz*, BBG)[83] offers marginal opportunities to provide additional incentives to enter the civil service.

Nonetheless, the existing scope for taking digital competencies into account in the selection of candidates is also hardly used. If digital skills were to be developed across the whole spectrum of public administration and not just in the technical IT area, it would be reasonable to assume that they would already be given some weight in the advertising of vacancies, since job advertisements set out the binding requirements profile for the entire application process. Currently, however, there is no significant evidence of this. Empirical studies of job advertisements show that digital competencies make up only a fraction of the requirements profile. An analysis of job advertisements in the senior civil service at federal and State level shows that their share varies greatly depending on the orientation of the department, the career path and the management responsibility, but on average they account for only about 8% of the job requirements.[84] Overall, it is difficult to avoid the impression that, outside of IT-related activities, there is a lack of awareness of the importance of digital competencies for the ability of public administrations to operate in the digital age, as well as a lack of awareness of the content of digital skills needed in different areas of public administration.

There may well be reservations about declaring digital competencies – even basic competencies at entry level – as being a mandatory part of job profiles as long as they are not taught in all formal education pathways, especially outside of IT education and training. After all, administrations should not be looking for the proverbial "wonder worker" when they are already suffering from significant staff shortages without including digital competencies in the job profile. However, neglecting digital skills in recruitment is also disadvantageous from the point of view of competent candidates, who have no legal right to have their enhanced skill set recognised if it is not included in the job profile. It may be helpful to include digital competencies in the job profile as an option rather than a requirement ("The following competencies would be desirable").[85]

In summary, administrations can be advised to apply effective competence management measures from the first step of personnel acquisition, to define the necessary digital competencies, to include them in the requirement profiles of job advertisements, to test the digital competencies addressed in the subsequent application process, in order to lastly obtain a clear, objectively comparable picture of the competence profiles of applicants (competence balancing).

82 Granted through a circular of the German Ministry of the Interior of 13 December 2018, D5-31002/4#25, www.bmi.bund.de/RundschreibenDB/DE/2020/RdSchr_20201218.pdf.

83 Federal Civil Service Act (footnote n. 77).

84 Catakli (2022), p. 217 f.

85 Catakli (2022), p. 300.

3.2. Education

The administration has limited control over formal education (traditional schooling, apprenticeships, and university courses). It regularly relies on administrative staff to acquire qualifications and digital competencies outside the administration. However, the number of study programmes that explicitly teach digital skills in the field of administration is limited.

A direct connection between administration and tertiary education institutions exists in the case of administrative universities, which train the next generation of administrators for the federal, State and local governments, especially for the upper and senior civil service, and provide study programmes in various administration-related fields (e.g. administrative law, political science, public management) from an undergraduate to postgraduate level. However, an analysis of the module handbooks of the existing study programmes, including the regulatory requirements, concludes that digital competencies do not constitute a significant part of the study content outside of administrative informatics and cannot be described as a compulsory component of the training at the respective administrative universities.[86]

In order to determine the extent to which young administrators have been taught digital competencies in formal training or during their studies, assessment of competencies is also a suitable method. It would be conceivable, for example, to anchor the measurement of competencies as part of the professional examination, once the digital competencies required in different professions have been identified. If the competence assessment for the respective position shows that digital competencies have not been sufficiently acquired, this can be counteracted by further education and training measures.

4. Training Programs

In the past few years, German training institutions have increasingly started to offer programmes and individual training courses for the vocational development of digital competencies, while also a number of more comprehensive training programs have emerged with specific learning content for digital administration, which are presented next.

4.1. eGov Campus[87]

The eGov-Campus is an open online learning platform initiated by the Rhine-Main University of Applied Sciences together with institutions such as FITKO, the German University of Administrative Sciences Speyer, the University of Münster and the Hasso-Plattner-Institute at the University of Potsdam. In cooperation with a large number of alliances, administrative colleges, universities and other research institutions, the eGov Campus offers free digital learning opportunities (MOOCs) at university level on topics related to digitised administration. Interested parties can access the learning content after registration without formal access restrictions. The academic design of the courses allows the students of the participating universities to set their own priorities in their studies through a free choice of courses and to have them credited to their degree programmes. The courses can also be used by administrative staff for further training.

86 Hemker and Müller-Török (2022).
87 eGov-Campus, *Die Lernplattform für E-Government. Erfolg durch Bildung*, https://egov-campus.org/.

The only obstacle that could be mentioned here is the orientation of the learning content towards master level, which at least raises the question of whether the training platform is geared particularly towards senior civil servants and thus excludes middle or upper civil servants, or civil servants who do not have digital skills at a beginner level. There are, however, other, lower threshold offers aimed at this group.

4.2. KommunalCampus[88]

The KommunalCampus was initiated in cooperation with the Hessian Ministry for Digital Strategy and Development, the Rhine-Neckar Metropolitan Region and the Bergstrasse County and acts as an intermediary between training providers and administrative staff. Learning content is presented in an individualised form, based on a skills assessment. This starts with basic skills, for example in the freely available "Digi-Check" module, which begins with an explanation of the term "digitisation".

*4.3. Federal Digital Academy (*Digitalakademie Bund*)*[89]

The Federal Digital Academy is part of the Federal Academy of Public Administration (BAköV), the central training institution of the Federal Government under the supervision of the Federal Ministry of the Interior and Home Affairs. In addition to other training events for employees of the federal administration, the Digital Academy offers "Learning Journeys", which are freely available on the Internet.[90] These are a collection of short learning videos that deal not only with digital topics in the narrower sense, but also with topic clusters such as New Work. The Learning Journeys start with basic topics and are constantly being expanded, so that a comprehensive portfolio of "learning nuggets" for targeted self-study training can be expected.

The offer is certainly also helpful for the development of digital competencies beyond the target group of administrative staff at federal level, as the learning journeys provide content for a starting point in building competencies in administrations. However, the learning journeys have the disadvantage that there's no offer for proof of participation, certificates or the like, which could be seen as an additional incentive for self-directed further training. As mentioned previously, digital competencies that are attained through nonformal training do not fulfil the requirements to be recognised as qualifications under German personnel law.

4.4. School of Government and Technology

The School of Government and Technology (SGT) is a non-profit platform initiated by the start-up Themis in Berlin.[91] It offers digital content grouped by topics and competencies, including videos and interactive elements (knowledge scoreboard, quizzes, cheat

88 KommunalCampus, *Digitalisierung lernen. Bedarfsorientierte Weiterbildung für digitale Kompetenzen in kommunalen Verwaltungen*, www.kommunalcampus.net/.

89 Bundesministerium des Innern und für Heimat, *Digitalakademie Bund*, www.digitalakademie.bund.de/DE/Home/home_node.html.

90 Overview: www.digitalakademie.bund.de/DE/Lernreisen/Lernreisen_node.html.

91 School of Government & Technology, *Die Weiterbildungsplattform für die digitale Zukunft von Staat und Verwaltung*, https://govtechschool.de/.

sheets, etc.). The platform is accessible free of charge to administrative staff with the appropriate email address.

But still it is unclear to what extent the digital skills acquired in the SGT programme will be recognised in the administration. However, it is foreseeable that the offer will be further developed in the near future, not least through cooperation between the SGT and the Federal Digital Academy.[92] In this respect, it remains to be seen how competencies will develop through these online training institutions.

IV. Conclusions

This chapter outlined the significance of digital competencies for civil servants. While the public sector is gearing towards digital transformation by utilising technology to achieve a better, more effective and efficient work mode, it also has to keep in mind that technology is not the only factor in the equation. If digital competencies are not built up in the public sector, its leaders will either not be able to put technology into operation or will have to rely on buying expertise from outside. The latter can be a viable option for a limited time span but is not recommended in the long term as it creates dependencies and login effects and is not sustainable.

In this article, thus, we aimed at outlining different frameworks, showing the national efforts in building digital competencies. In comparing the specific (national) approaches, we could find out a correlation between apposite competence frameworks for civil servants and a high level of digital transformation (e.g. in the UK). Germany, on the other hand, still emphasises formal requirements (such as exams and formal qualifications) and seeks for an overarching concept regarding competence-based approaches. Some initiatives (such as the Qualifica Digitalis project of the IT Steering Council) are going in the right direction but have to be enhanced and transformed into an integrated concept. At least in Germany, the Civil service is (due to a relatively strict legal framework) still not able to "remunerate" those applicants and servants who are digitally competent, but not formally trained. The example of Austria, on the other hand, shows that an overarching framework can boost endeavours. The last remark should be a guideline for further education. With clear, well-defined, and transparent objectives, the public sector motivation could be further enhanced: competence building needs a strategic concept and more recognition by the political leaders as it has today.

Bibliography

Becker J., Greger V., Heger O., Jahn K., Krcmar H., Müller H., Niehaves B., Ogonek N., Räckers M., Schuppan T., Zepic R. (2016), E-*Government-Kompetenz. Studie im Auftrag des IT-Planungsrats*, www.it-planungsrat.de/fileadmin/beschluesse/2016/Beschluss2016-46_30_Anlage1_E_Government_Kompetenz.pdf.

Broadband Commission (2022), *Artificial Intelligence and Digital Transformation: Competencies for Civil Servants*, www.broadbandcommission.org/wp-content/uploads/2022/09/Artificial-Intelligence-and-Digital-Transformation-Competencies-for-Civil-Servants.pdf.

Catakli D. (2022), *Verwaltung im digitalen Zeitalter. Die Rolle digitaler Kompetenzen in der Personalakquise des höheren Dienstes*, Cham: Springer.

92 Digitalakademie Bund, *Die School of Government & Technology und die Digitalakademie Bund kooperieren*, www.digitalakademie.bund.de/SharedDocs/04_Aktuelles/Meldungen/AusDemNetzwerk/20_Kooperation_SGT/20_Kooperation_SGT.html.

Catakli D., Puntschuh M. (2023), *Orientierung im Kompetenzdschungel. Was die Verwaltung wirklich für den Umgang mit KI braucht*, www.bertelsmann-stiftung.de/de/publikationen/publikation/did/orientierung-im-kompetenzdschungel.

Denkhaus W. (2019), 'Vom E-Government zur Digitalisierung', in Seckelmann M. (ed) *Digitalisierte Verwaltung. Vernetztes E-Government*, Berlin: ESV, 51–78.

European Commission (2022), *Digital Economy and Society Index (DESI) 2022*, https://digital-strategy.ec.europa.eu/en/policies/desi-digital-public-services.

Expertenkommission Forschung und Innovation (2021), *Gutachten zu Forschung, Innovation und technologischer Leistungsfähigkeit*, Berlin: EFI.

Fetic L., Puntschuh M. (2020), *Algo.Rules. Handreichung für die digitale Verwaltung. Algorithmische Assistenzsysteme gemeinwohlorientiert gestalten*, https://algorules.org/fileadmin/files/alg/Handreichung_fuer_die_digitale_Verwaltung_Algo.Rules_12_2020.pdf.

Hemker T., Müller-Török R. (2022), *(Zu) Wenig Digital-Kompetenzen in der Ausbildung für die öffentliche Verwaltung*, www.hsbund.de/SharedDocs/Downloads/2_Zentralbereich/20_Referat_W/Publikationen/40_TR_angewandte_Informatik/Band_01.pdf.

Johansen R. (2012), *Leaders Make the Future. Ten New Leadership Skills for an Uncertain World*, 2nd edition, San Francisco: Berrett-Koehler.

Kösters W. (2019), 'Das Personaldilemma im öffentlichen Dienst – Die Zukunft ist nicht mehr die Verlängerung der Vergangenheit', in Schmid A. (ed), *eGovernment und Digitalisierung: Grundlagen, Konzepte und Anwendungsfälle*, Wiesbaden: Springer, 31–40.

Lorenz A., Klingel A. (2022), *Ein digitalethischer Kompetenzrahmen aus der Praxis und für die Praxis, Initiative D21*, https://initiatived21.de/uploads/03_Studien-Publikationen/Denkimpulse-Ethik/16-Digitalethische-Kompetenzen/D21_Denkimpuls_Digitalethische_Kompetenzen.pdf.

Mergel I, Brahimi A., Hecht S. (2021), *Kompetenzen für die Anwendung der Arbeitsweisen und Methoden der OZG-Digitalisierungslabore*, Open Public Administration Commons Working Papers, Universität Konstanz: OPAS-Plattform No. 002020, www.polver.uni-konstanz.de/mergel/.

Misgeld M., Wojczak M. (2019), 'Führung in der Netzwerkverwaltung', in Seckelmann M. (ed), *Digitalisierte Verwaltung – Vernetztes E-Government*, Berlin: ESV, 635–656.

Nárosy T., Schmölz A., Proinger J., Domany-Funtan U. (2022), 'Digitales Kompetenzmodell für Österreich: DigComp 2.3 AT (2022)', 60(4) *Medienimpulse*, 1–103.

OECD (2020), *Digital Government Index: 2019 Results*, OECD Public Governance Policy Papers No. 03, Paris: OECD Publishing, https://doi.org/10.1787/4de9f5bb-en.

Ogonek N., Distel B., Ben Rehouma M., Hofmann S., Räckers M. (2018), 'Digitalisierungsverständnis von Führungskräften', 2 *Berichte des NEGZ*, https://negz.org/publikation/digitalisierungs verstaendnis-von-fuehrungskraeften/.

Ogonek N., Distel B., Hofmann S. (2020), 'Kompetenzvermittlung im öffentlichen Sektor neu gedacht', 11 *Berichte des NEGZichte des NEGZ*, https://negz.org/publikation/kompetenzvermittlung-im-oeffentlichen-sektor-neu-gedacht/.

Schmeling J., Bruns L. (2021), *Kompetenzen, Perspektiven und Lernmethoden im öffentlichen Sektor (= Qualifica Digitalis Metastudie)*, Berlin: Fraunhofer FOKUS, https://qualifica-digitalis.de/ergebnisse/.

Seckelmann M., Humberg M. (2022), 'Dienstrechtliche Rahmenbedingungen der digitalen Transformation, Part 1', *Verwaltungsarchiv*, 97–141.

Stich R., Schwiertz F. (2021), 'Digitale Transformation: Der Wandel der Arbeitswelt und der Führung in der digitalen Verwaltung', in Seckelmann M., Brunzel M. (eds), *Handbuch Onlinezugangsgesetz. Potenziale – Synergien – Herausforderungen*, Cham: Springer, 441–462.

Vuorikari R., Kluzer S., Punie Y. (2022), *DigComp 2.2: The Digital Competence Framework for Citizens*, Luxembourg: Publications Office of the European Union, https://publications.jrc.ec.europa.eu/repository/handle/JRC128415.

Part VII

The Role of Ethics in the Civil Service, Administrative Culture and the Fight against Corruption

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35 Ethical Standards for the Civil Service in Europe

Substitutes for or Complements of Legal Rules?

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I. Introduction

How can an idea, a value, as elusive as ethics, be established as a standard? And yet, at a time when ethics are presented everywhere as a model, how could they not be the object of standardisation and even normalisation? Furthermore, while the virtues attached to ethics are so highly valued, the media are increasingly reporting unethical behaviour. These paradoxes and tensions make any coherent overall vision difficult. Therefore, we must first specify the framework of the study.

Ethics are everywhere: above all in the medical field, in public governance, and increasingly, in the civil service. Codes of conduct, ethical charters, and structures like anti-corruption agencies have been developing over the last few decades in an overwhelming majority of States. Reflections on professional ethics began in the United States in the first half of the 20th century. They then spread to Anglophone countries. Therefore, it is not surprising that the United Kingdom (UK) was the first European country to initiate a reflection on the subject: by setting professional standards in the 1970s, and then intensively from 1996 onwards. At the same time, international organisations have also begun to reflect on ethics. The studies of the Organization for Economic Co-operation and Development (OECD) have been a driving force in the dissemination of the concept. In particular, the Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service, adopted in 1998,[1] had a real impact in European countries that were initially less influenced by Anglo-American culture.

The concept of ethics applicable to public service was clarified and defined at that time. Two complementary approaches were implemented. In the UK, the Nolan Commission drew up a list of seven principles to determine ethics (1996): selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. The OECD focused instead on a definition of ethics, perceived as a "norm that translates characteristic ideals or ethos into everyday practice".[2] These definitions already cover a wide range of expected behaviours of public servants, but this perception needs to be broadened further. For instance, other

1 OECD, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, OECD/LEGAL/0298, adopted on 23 April 1998, abrogated on 26 January 2017, replaced by the *Recommendation of the Council on Public Integrity*, OECD/LEGAL/0435 on 26 January 2017.

2 OECD, *Trust in Government. Ethics Measures in OECD Countries*, 2000, p. 21.

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European States did not use the term "ethics". *Ab initio*, the semantic approach already reveals the diversity of the administrative traditions of the different systems.

In particular, the reference to ethics was not traditionally used in Germany and France. Since the middle of the 20th century, these two States have had a civil service system codified in a legal statute (subsequently modified several times), which contains a list of duties incumbent on the civil servant and is related to a civil servant's ethics. The idea of norms of conduct goes back a long time, at least to the time of the reign of Friedrich Wilhelm I in 1722 for Germany,[3] and the 14th century for France.[4] In both countries, the statute of civil servants imposes precise duties. Neutrality, the respect for professional secrecy, or the fact that civil servants must behave in an exemplary manner both in the service and also outside it, are expressly listed in the German law on federal civil servants.[5] A provision of the law on administrative procedure also provides for the exclusion of the non-impartial civil servant (Paragraph 20 of the Federal Law of Administrative Procedure, VwVfG).[6] In France, the 1983 statute of the civil servants, now codified in Articles L121-1 and following the General civil service code (*Code général de la fonction publique*, CGFP),[7] also contains a number of duties: dignity, impartiality, integrity, probity, neutrality. However, in neither of these countries were such obligations traditionally linked to ethics. In Germany, this term was introduced into the scientific literature by Karl-Peter Sommermann in 1998.[8] In France, the notion of deontology (*déontologie*) immediately replaced that of ethics. The word "ethics" is therefore never used in the texts applicable to the French civil service, but there are many references to the word *déontologie*, according to the concept coined by Bentham in 1834 in his *Déontologie ou science de la morale*.[9] Since the end of the 1990s, the deontology of public servants has been the subject of increasing scientific and political interest and is now also part of the normative process. Deontology is seen as the science of professional duties and is differentiated from ethics by most authors, but the terms of differentiation are under debate.[10] In summary, in France, ethics tends to be perceived as individual and optional, a matter of appreciation and sanction of the conscience, and the moral order of each person. In contrast, deontology is a theory of duties; it is legally binding and applies in the professional field. However, given the diversity of approaches from one author to another and from one State to another, it is necessary, within the framework of our analysis, to go beyond this semantic variation – although it is already instructive. We

3 "We are also assured that a clever, industrious and unstable man, who next to God values nothing higher than his king's grace and serves him out of love and more for honour than for remuneration, who in his actions and deeds seeks only and solely his king's service and interest and has a disregard for all intrigues and affects, can and will soon make himself skillful in order to serve us with great benefit", cited in German by Seifert (2009).

4 In an ordinance of 23 March 1303, Philip the Fair, King of France, laid down principles that today would be considered a code of ethics, requiring public officials to be honest and impartial and to evaluate the effectiveness of their missions, cited by Vigouroux (2012), p. 2.

5 Federal Civil Service Act of 5 February 2009 (*Bundesbeamtengesetz (BBG)*), BGBl. 2009 I, p. 160, last amended by Act of 28 June 2021, BGBl. 2021 I, p. 2250.

6 Federal Law of Administrative Procedure of 25 May 1976 (*Verwaltungsverfahrensgesetz (VwVfG)*), in the version of 23 January 2003, BGBl. 2003 I, p. 102, last amended by the Act of 25 June 2021 BGBl. 2021 I, p. 2154.

7 General civil service code in the version of 1 March 2022 (*Code général de la fonction publique (CGFP)*), JORF n. 0283, 5 December 2021; www.legifrance.gouv.fr/jorf/jo/2021/12/05/0283.

8 Sommermann (1998), pp. 290–305.

9 Bentham (1834), pp. 29 f.

10 For seminal work: Vigouroux (1995), with numerous references to foreign examples in both editions; for specific works: Jean-Pierre (1999); Moret-Bailly and Truchet (2016); Aubin (2017).

postulate a functional equivalence between French deontology and ethics, as aimed at by the other European States and supranational organisations.[11]

In all European countries, ethical standards in the civil service involve the public employer, the civil servant, and the citizen. Depending on the perspective and the point of view adopted, ethical standards respond to different expectations and considerations.

The main object of reflection on ethical standards lies in the trust that the citizen places in the State (or public authority). The direct beneficiary of ethical standards appears to be the citizen, at first glance, even if it is probably more a question of safeguarding the State and social peace, as well as legitimising public authority.[12] In this sense, the promotion of ethical standards is often presented as a response to the loss of trust in the State and public institutions, and consequently, in civil servants. This view is widespread in legislation and scientific research. Therefore, the establishment of ethical standards seems imperative. Without questioning this perception, we must nevertheless express doubt. Are civil servants objectively less virtuous than in the past, or is it only the subjective perception of the administration – entailing that less trust is placed in civil servants than before? And finally, can the introduction of ethical standards remedy this supposed distrust? To be completely honest, the methodological tools for answering these questions are not those of lawyers. A monolithic answer is not possible. For example, a sociological study conducted in France a few years ago proved that the population's preconceptions were more positive in terms of trust in the police than in the tax authorities. But as soon as citizens deal with these services, the assessment is reversed, and the tax administration is considered to treat citizens more fairly than the police.[13] The recent COVID-19 crisis also showed that the population had a high regard for teachers and health workers at that time, but with variations over time and from State to State. The aim of the study will therefore not be to assess the trust maintained or regained thanks to ethical standards, nor to find out how ethical standards are perceived by citizens.[14]

The civil servant is the recipient of ethical standards. The State and public authorities are abstract legal entities. Consequently, the civil servant personifies, in the eyes of the citizens, this abstraction and, at the same time, embodies the values of public authority: virtuous, helpful and honest behaviour strengthens the trust placed in the public authority, while dishonest behaviour undermines this trust. There is a risk of confusion and difficulty, here, with the scope of the analysis being focused on civil servants, but in reality, the difference between them and public leaders (especially politicians) is not always clear: citizens do not always distinguish between the two categories (both serve the public). The functions are sometimes difficult to distinguish too, especially in the senior civil service. It is noted, too, that a number of high-profile cases regularly make the headlines and highlight ethical failings, but in many cases elected officials are involved (like Prime Minister Boris Johnson's behaviour during the COVID-19 crisis), as are senior civil servants on occasion, rather than rank-and-file administrative staff. This explains why many rules apply to civil servants, senior civil servants (those

11 On the diversity of meanings of ethics, see also Behnke (2006).

12 Sommermann (2003), p. 84.

13 Spire (2020), pp. 37–55.

14 One could however argue that the mere fact of insisting on this (alleged) distrust is not insignificant and serves ideological purposes, such as the criticism of the civil service as made by the proponents of New Public Management.

in positions of higher authority who are on the borderline between administrative and political functions), and elected officials. However, the present analysis is limited to civil servants. As we know, there are different conceptions of the civil service in Europe and different statuses for civil servants (private or public employees; lifetime employment, fixed term, or indefinite). The civil servant will therefore be defined as a person employed by a public entity, under public or private law, but with permanent employment, or at least with stable employment.

And finally, the public employer may be the State or a public authority, or even other legal persons under public law. The relationship between the civil servant and his employer is also very different in Europe. In the United Kingdom, for example, civil servants report to a ministry, and, under the principle of ministerial responsibility, each minister is accountable to Parliament for the civil servants under his authority. Thus, in the event of unethical behaviour, the minister can be questioned before Parliament, must be held accountable for the management of his staff, and can be forced to resign, if necessary. In contrast, the civil servant is completely independent of the government of the day in France and Germany. One of the central rules of German law is that the civil servant is subject to the principle of legality under Article 20, paragraph 3 of the German constitution (*Grundgesetz*).[15] This means that he must only follow the law and not the political power or the government in power. But, in all these cases, the ethical rules are top-down and imposed by the employer on the civil servant. The opposite hypothesis could also be formulated: why cannot ethical standards be imposed bottom-up or in both directions? Much has been done to set ethical standards in the relationship between the public authority and civil servants. Perhaps the next step could be to reflect on a possible lack of ethics in the relationship between the public authority and civil servants. As an example, the lack of financial resources, staff shortages, and the loss of meaning in their work for some civil servants all could be perceived as ethical shortcomings on the part of the public entity. Moreover, in certain States, one could argue that it is hardly acceptable to ask civil servants to comply with ethical standards while their employer does not. However, this reversal of perspective is merely suggested, without being explored further.

After these clarifications, we must come to the central aspect of the subject, which is the legal application of ethical standards in the civil service. The analyses will principally focus on France, Germany, and the United Kingdom. These three systems are representative of the different legal traditions in Europe. A broader spectrum would have been interesting, but a “reality principle” must also be considered. Indeed, the respect of methodological requirements – and that of always situating an institution in its legal environment – and the difficulty of accessing sources have prevented us from focusing on States other than the three mentioned previously, but we occasionally refer to them.

The aim is to analyse how ethical standards manifest themselves in the different civil services and the repercussions for each legal system. However, the discourse on ethical standards and their implementation has gained importance. Ethical standards have been adopted in the civil services, despite the diversity of the models in Europe. It is therefore necessary to highlight the phenomenon of the diffusion of ethical standards, both in their manifestation and in their repercussions. In a substantive approach, there is great

15 German constitution of 23 May 1949 (*Grundgesetz für die Bundesrepublik Deutschland*), last amended by Act of 19 December 2022 (BGBl. I 2022, p. 2478).

convergence: these ethical standards exist, develop, and complete the pre-existing legal rules (Section II). However, the normative approach brings out the specificities of each legal system, which do not disappear entirely. Indeed, in a normative approach, ethical standards intervene in a variety of ways in the hierarchy of norms (Section III).

II. Ethical Standards: General Complements of Legal Rules on a Substantive Approach

The focus on the substantive approach shows that ethical standards are increasingly common and used. It is, therefore, necessary to first measure the extent of this phenomenon, by illustrating it concretely (Subsection II.1). Second, the effects and usefulness of such an incursion into the various legal systems must be discussed (Subsection II.2).

1. The Implementation of Ethical Standards in the Civil Service

Rules have been introduced to encourage the reinforcement of ethical behaviour in the civil service. Without going back to ancient times, it is necessary to underline the measures taken since the 1990s, which are part of the political will to promote ethics (or deontology), whether to prevent (1.1) or repress (1.2) breaches.

1.1. Prevention

The main purpose of determining ethical standards is to prevent the violation of behavioural standards. Many instruments are established, for three convergent and complementary objectives: civil servants must be aware of the existence of these rules and comply with them. In addition, they are required to take several steps, for example, in the form of a declaration, so that *ex-ante* control can be exercised.

First, the civil servant must know that these ethical standards exist. For this reason, codes of conduct (see III.1.1) or administrative guides have been drawn up, which determine the behaviour expected of the civil servant. Such guides are either drawn up unilaterally by the employing public authority (in most cases and contrary to the codes of ethics of other professions, notably the liberal professions), or are drafted by associating representatives of the employing public authority, citizens, and representatives of the profession.[16] These codes generally list the values that public servants must respect, including selflessness, integrity, impartiality, and openness. A complementary approach is the application of these codes and, more generally, of ethical standards through the practice of ethics training courses offered to civil servants, so that they develop, through concrete exercises, their sensitivity to the subject. The practice is widespread in many States.[17] The importance of ethics training, for example, was strongly emphasised in the UK by the Committee on Standards in Public Life in 2014;[18] courses are currently offered regularly by the Leadership College

16 In France, a significant number of codes of conduct have been drawn up exclusively by the public employer, but there are also exceptions. For example, the compendium of ethical obligations of magistrates was drawn up by an association of litigants and members of the judiciary.

17 For an overview of the situation, see OECD, *Ethics Training for Public Officials*, March 2013.

18 Committee on Standards in Public Life, *Ethical Standards for Providers of Public Services*, June 2014.

for Government.[19] Similarly, in France, the National School of Magistrates includes in its curriculum training in ethics and professional conduct for magistrates.[20] In Germany, there is also anti-corruption training to sensitise civil servants to the prevention of corruption.[21]

Once the standards are known, the civil servant must demonstrate their commitment to them. With oath-taking, he makes the most solemn commitment possible. While the oath has existed for a long time, in a general way, for all civil servants in Germany (Paragraph 64 of *Bundesbeamtengesetz*, BBG),[22] it is required only for certain professions in France. For example, it has been mandatory for magistrates since 1958 and, increasingly in recent years, for law enforcement officers or police officers.[23] However, these historical oaths do not contain any explicit reference to ethical standards, but at best commit the civil servant to a certain duty of behaviour, for example, morality. Occasionally, there is a more precise reference to ethical standards. Thus, since 2022, in French higher education, at the time of the defence of the PhD thesis, the doctor takes an oath of scientific integrity.[24]

Finally, in the interests of transparency, anti-corruption, and possible future controls, civil servant must make declarations of interest or assets. These practices are common in most European States, but their scope and coverage vary. As a rule, only civil servants with senior or special functions are affected by such declarations; in some States, such declarations are made public, in others not; they sometimes concern only the civil servant's individual interests and assets, sometimes they are extended to a large family circle.

In the UK, the Governance Code on Public Appointments of 2016 sets out the process and principles that should underpin all public appointments made to bodies listed in the Public Appointments Order in Council:[25] candidates for certain posts must declare potential conflicts of interest in their application and are subject to prior control by an Advisory Assessment Panel. Lobbying activities are also regulated:[26] any person carrying out such an activity must be registered, while new employment of civil servants is controlled for two years after having left service under the Business Appointment Rules for Civil Servants

19 See: The Committee on Standards in Public Life (Chair, Lord Evans of Weardale), *Leading in Practice: Managing Ethical Boundaries*, January 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1130992/CSPL_Leading_in_Practice.pdf. In addition, for a summary of courses, programs, events and other activities available for each grade of the civil service and for public sector leaders, see "Training for leaders in the Civil Service and public sector" on the Government website www.gov.uk/guidance/training-for-leaders-in-the-civil-service-and-public-sector.

20 Perreux (2018), p. 267.

21 Behnke (2006), p. 255.

22 *Bundesbeamtengesetz* (BBG) of 5 February 2009 (Federal Civil Service Act), BGBl. 2009 I, p. 160, last amended by the Act of 28 June 2021 (BGBl. 2021 I, p. 2250).

23 Colin (2021), p. 127.

24 Law No. 2020–1674 of 24 December 2020 introduces the oath into Article L. 612–7 of the Education Code (*Code de l'éducation*). The Decree of 26 August 2022 amending the Decree of 25 May 2016 establishing the national framework for training and the procedures leading to the award of the national doctoral diploma determines the content of the oath in its Article 19 bis: "In the presence of my peers. With the completion of my doctorate in [research field], in my quest for knowledge, I have carried out demanding research, demonstrated intellectual rigour, ethical reflection, and respect for the principles of research integrity. As I pursue my professional career, whatever my chosen field, I pledge, to the greatest of my ability, to continue to maintain integrity in my relationship to knowledge, in my methods and in my results."

25 Cabinet Office, *Governance Code on Public Appointments* of 16 December 2016.

26 See *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act*, 2014 c. 4.

(2016).[27] Similarly, in France, Article L. 122–2 CGFP provides that the appointment of a public official to a post whose hierarchical level or nature of duties justifies it being conditional on the prior transmission by the person concerned of a complete, accurate, and sincere declaration of his interests to the appointing authority or the hierarchical authority. In case of doubt, the latter transmits the declaration of interests of the person concerned to the High Authority for the Transparency of Public Life (*Haute autorité de transparence pour la vie publique* – HATVP, see Section III.2). The civil servant may also be required to declare his assets. While some Scandinavian countries, such as Finland, are very transparent in publishing tax information,[28] other countries are more measured. For example, in France, senior civil servants must declare their financial situation to the HATVP at the beginning and end of their term of office. The HATVP carries out a control (and of the absence of abnormal personal gain during their function) but does not publish this declaration.[29] Finally, in France, following the example of the rules in force in the UK, there is a control on leaving the public sector for the private sector (*pantouflage*) and on returning to the public sector after a period in the private sector (*rétropantouflage*), also conducted by the HATVP.

All these measures should, in principle, promote the ethical behaviour of public servants. But this is not always sufficient. Repressive rules are therefore also put in place to repress unethical behaviour, although the preventive and repressive characters are sometimes intertwined, as the existence of repressive measures can also be considered to have the effect of dissuading the civil servant from breaking the rules.

1.2. Repression

For there to be repression, the violation of the rules must be known. The most frequent case is that of a clear violation, which may come to the attention of the public authority through a superior, a colleague, or a citizen who has dealt with the civil servant. In this case, procedures are provided for a sanction. More complex is the situation in which the unethical behaviour is not revealed by the public authority, but often against the public authority, in the sense that a citizen or a civil servant has knowledge of unethical behaviour, but its revelation could cause him harm. In this case, whistle-blowing procedures have been in place for several years in most national civil service laws to protect the civil servants who report unethical behaviour of which they are aware.[30]

Once the violation has been established, two main and complementary sanctions exist in most European countries: disciplinary and/or criminal sanctions. Disciplinary proceedings have long existed in the statutes of the written law of civil services and are not specific to the violation of an ethical standard. Thus, in France, the disciplinary power belongs to

27 These rules are listed in the *Civil service management code* of 9 November 2016. See also Abderemane et al. (2019), p. 336 f.

28 Davis and Piotrowski (2016), p. 373.

29 The publication of the asset situation is reserved for certain political functions and applies, for example, to the President of the Republic and government ministers, but not to civil servants (for a list of persons subject to the declaration, see www.hatvp.fr/wordpress/wp-content/uploads/2022/10/Obligations-declaratives-des-responsables-publics_octobre2022.pdf).

30 See *The Development of a Legal Framework on Whistleblowing by Public Employees in the European Union* by P. Provenzano in this volume. In France, since 2016, legal rules have been enacted to protect civil servants who blow the whistle, which are now codified in Articles L135-1 ff. CGFP.

the appointing authority (Article L532-1 CGFP). The appointing authority has the power to prosecute the civil servant if he has violated a service obligation, even if this does not fall under criminal law (for inappropriate off-duty behaviour, for example). Germany has gone further, by providing for a principle of legality of disciplinary proceedings, whereas the principle of opportunity prevails in France, so proceedings are optional there, whereas they are compulsory in Germany. In the UK, finally, the Civil Service Code of 1996 contains all the obligations incumbent on civil servants and the rules applicable in the event of violations of these obligations.[31] Thus, if a civil servant believes that he is being asked to act in violation of the code of ethics, he must refer the matter to his superiors and, if he does not receive a response, may refer the matter to the Civil Service Commission. The Civil Service Management Code of 2016,[32] also issued under the authority of Part 1 of the Constitutional Reform and Governance Act of 2010,[33] sets out the sanctions that would be applied to a civil servant who engages in unethical behaviour. These provisions detail not only the conduct of civil servants but also the rules applicable in disciplinary matters, if necessary.

Criminal sanctions have been added to disciplinary sanctions in several States since the 1990s, with the result that the tools of repression have greatly increased, particularly in the fight against corruption.[34] The French Penal Code now contains a set of provisions and sanctions concerning "offences against the public administration committed by persons exercising a public function" (Articles 432–1 to 432–17 of the Penal Code).[35] Breaches of the duty of probity and corruption are sanctioned. Germany has gone even further in this respect and has been proactively fighting corruption for some 30 years.[36] Paragraph 71 BBG prohibits civil servants from receiving rewards, gifts, and other advantages, and the Penal Code provides for sanctions in Paragraphs 331 ff. in the case of "Offences committed in office" (*Straftaten im Amt*). Both active and passive bribery are punishable. And if, in addition, the civil servant is subject to professional secrecy, he is released from it in the case of corruption (Paragraph 67 II BBG). In the UK, finally, the Bribery Act 2010[37]

31 Publication of the UK Government, last update 16 March 2015.

32 See 4.5, *Civil Service Management Code* of 9 November 2016, Dismissal, Discipline and Grievance: Rules and Code of Practice.

33 2010 c. 25; www.legislation.gov.uk/ukpga/2010/25/contents.

34 See *Common European Anti-Corruption-Standards for Civil Servants* by A. Weber in this volume. About the fight against corruption in the Baltic States, see Palidauskaite et al. (2010).

35 *Code Pénal* (French Criminal Code) in the version of 4 February 2023, www.legifrance.gouv.fr/codes/id/LEGITEXT000006070719.

36 Several legal rules have been enacted since 1997 in Germany to combat corruption. A decisive impulse was given by the Anti-Corruption Act of 13 August 1997 (*Gesetz zur Bekämpfung der Korruption*), BGBl. 1997 I, p. 2038. Other provisions have since been added to and strengthened. See, according to their common abbreviation, the Anti-Corruption directive adopted on 17 June 1998 (*Anti-Korruptions-Richtlinie – Richtlinie der Bundesregierung zur Korruptionsprävention in der Bundesverwaltung*), BAnz Nr. 127, S. 9665, amended on 30 June 2004 (O 4 634 140–15/1; www.verwaltungsvorschriften-im-internet.de/bsvwvbund_30072004_O4634140151.htm); Public Procurement Law Amendment Act adopted on 26 August 1998 (*Vergaberechtsänderungsgesetz*), BGBl. 1998 I, p. 2512, which promotes transparency in the award of public contracts; Freedom of Information Act of 5 September 2005 (*Informationsfreiheitsgesetz*), BGBl. 2005 I, p. 2722, last amended by Act of 19 June 2020 (BGBl. 2020 I, p. 1328) which establishes a principle of right of access to information; Anti-Corruption Act of 20 November 2015 (*Gesetz zur Bekämpfung der Korruption*), BGBl. 2015 I, p. 2025; as well as all the codes enacted by the *Länder*, see Seifert (2009), p. 133; see also Behnke (2006).

37 The Bribery Act of 8 April 2010, www.legislation.gov.uk/ukpga/2010/23/contents.

contributes to the fight against corruption (both public and private), but it is not integrated into the Civil Service Code.

In conclusion, the distribution of preventive and repressive rules seems to differ from one system to another. Thus, in the UK, the emphasis is mainly on prevention and very little on repression, whereas in Germany the measures taken are mainly focused on the repression of corruption: the German codes of conduct (*Verhaltenscodex*) are in this sense very different from the English Code.[38] Thus, under the guise of extending ethical standards, cultural differences reappear through the juxtaposition of ethical standards seen primarily as individual moral rules and of rules that are subject to legal sanction, if necessary.

2. *The Functions of Ethical Standards in the Civil Service*

The expression "ethical standards" is doubly relevant to the tradition of common law countries. The notion of "standards" is of Anglo-Saxon origin, the law being an instrument for regulating society, based on experience. Standards are the result of a pragmatic approach and allow the law to be adapted to the evolution of society. The term "ethics" comes from the same countries. However, since then, ethical standards have been successful well beyond their geographical area of origin. This diffusion is due, in our opinion, to the fact that movements are common to many Western States, most of which are confronted with new expectations and a redefinition of their role, in particular the conception of the civil service and the role of its staff. In the face of these developments, ethical norms are useful because of the functions assigned to them. From the perspective of each national law, the function of conviction is essential (2.1). From a European perspective, the function of unification must be discussed (2.2).

2.1. *A Persuasive Function for the National Legal Systems*

The reference to ethical standards in the different civil service systems has one main purpose: to persuade or convince. Convincing the civil servant of the importance of adopting virtuous behaviour, but above all convincing the citizens that there is a commitment on the part of the public employer and the civil servants themselves to preserve the image of the public authority. At a time of relativism and loss of common values in society, ethical standards create or recreate this foundation of values, and public authorities are aware of its importance. This can be seen, for example, in the titles of the Codes of Conduct or legal rules that have been adopted to promote good behaviour, many of which, in recent times, have expressly referred to ethics or deontology. In this sense, there is necessarily an element of communication, which gives rise to criticism. These criticisms are mainly expressed in the scientific literature, particularly on the French and German sides (but not only), which is not surprising, given the "cultural revolution" that the two civil service systems have undergone in recent decades. At least three sets of criticisms can be identified which resurface beyond the virtues attributed to ethical standards.

The first criticism concerns the over-communication of ethical standards. It is true that, in most countries, ethical standards have progressed following scandals. The establishment of the Nolan Commission in 1994 in Great Britain followed the "Cash-for-questions affair" under the government of John Major. The creation of the High Authority for

38 Seifert (2009), p. 122.

Transparency in Public Life in France in 2013 was a reaction to a lack of probity on the part of Budget Minister Jérôme Cahuzac. The fight against corruption in Germany stems from the discovery of corruption cases in 1987 by the Frankfurt city administration[39] and the subsequent sensitisation of politicians, legislators, and public opinion on the subject. In the model of green-washing, for the public authority ethical standards can be used as a stake of communication, sometimes leading to "ethical-washing" (the model of "green-washing"), especially when governments must face high-profile scandals. Finally, under the guise of conviction, a marketing aspect would be developed, which is quite paradoxical: the civil service must display positive values to increase the population's confidence (as civil servants embody the State) but must develop a kind of brand image (like a private company).

The second criticism concerns the fact that underneath the choice of a positively connoted term lies a "masked power" for public authority. Through ethical norms, morality and especially administrative morality re-emerge, but without using this obsolete term. The control of the public authority over its staff is increasing, notably through its disciplinary power. Ethical standards thus lead to the determination of good behaviour on the part of staff, which also extends to their private life, as soon as the behaviour reflects on the service and the reputation of the public authority. Such a power of the employer obviously facilitates the respect of ethical standards by public servants but presents risks due to the indeterminacy of the concepts. In some States, extremist governments that come to power may hijack this idea of morality to excessively punish staff whose behaviour is not deemed to conform to the new values.

Finally, the criticisms are mainly and fundamentally about the paradigm shift that is taking place in the civil service. The rise of ethical standards has been made possible in most European countries by the development of ideas stemming from the New Public Management approach.[40] It has led to the questioning of the principles of the closed systems of civil service, and those of the employment of the civil servant for life by the public authority, and of a civil servant guided only by the satisfaction of the public interest and the citizens. Employment for life, in accordance with a statute, gives way to the benefit of private law contracts for a fixed or indefinite period. Mobility between the private and public sectors is encouraged, which increases the risk of conflicts of interest. New values, coming from the private sector, are seeping into the civil service: the achievement of results, citizen satisfaction,[41] the leadership and accountability of civil servants – this increases autonomy, but also the risk of unethical behaviour. In this context, the invocation of ethics is both imperative but also masks a new logic and a new ideology that may not be entirely virtuous for citizens. To put it another way, the reduction of values specific to the civil service leads to a transfer of demands and expectations towards the civil servant.

All this leads to paradoxes. Ethical standards are developing under the influence of the New Public Management approach, and yet there is a reaffirmation of the specificity of the civil service, especially as ethics are more strongly imposed on certain public servants (judges, police officers). Another problem is that ethical standards may be in contradiction with public interests: should the official, for example, give priority to the scrupulous

39 Sommermann (1998), p. 290.

40 About the influence of these principles in Central and Eastern European countries, see Palidauskaite and Lawton (2004), p. 402.

41 Bertok (2002), § 14.

control of the legality of a decision, which is costly and time-consuming, or to the efficiency of his/her action? Sometimes, the situation even borders on "hypocrisy": the public employer tolerates that the civil servant goes back and forth between the private and the public sector, either by alternating between two different jobs or by performing another function (within a framework) next to the civil servant's main mission – notably because civil servants are sometimes poorly paid – but from an ethical point of view, he supervises the changes of assignment.[42] Thus, by adopting the values of management (the client, profitability),[43] the civil service loses its specificity. The introduction of ethical standards aims to mask this new reality and/or to give new legitimacy to the civil service.[44] This movement contributes to the unifying function performed by ethical standards.

2.2. A Unifying Function in a Perspective Comparative

Ethical standards have a unifying function not only in national law[45] but also, and above all, in a comparative perspective. The opposition between the two main models of public service (the career system or closed model versus the employment system or open model), is well known, but the hypothesis of a partial overcoming of the opposition between the different civil service models is reliable. Ethical standards tend to harmonise civil services in Europe: in all the legal systems, this growing attention leads to imposing similar behaviours on a civil servant. As a result, the two main models are coming closer together. One advantage of ethical standards is that they are applied despite the heterogeneity of the regimes applicable to civil servants. Because of their relatively broad definition, ethical standards can be received and adapted easily in each State.

International organisations have also adopted ethical standards and promoted their dissemination in different States by imitation, borrowing, or even by issuing binding rules to the Member States. In addition, the numerous examples of good practices from Member States that can be found in the reports of these international institutions are sources of inspiration for the adoption of new rules.

First and foremost, the work of the OECD has played a key role in promoting ethical standards since the 1990s.[46] It also makes recommendations to promote public integrity and fight against corruption, for example, by recommendations concerning the management of conflicts of interest in the public service[47] or public integrity.[48] Also, in 2021, the

42 Bodiguel (2002), § 34.

43 See Piron (2002), § 22.

44 The function of safeguarding and legitimising the civil service through the introduction of ethical standards was particularly visible in the former Eastern European countries during the abrupt transition from a bureaucratic and socialist system to a neoliberal system.

45 This unifying function is also exercised within each national law. Civil servants are subject to different regimes (lifetime employment, contractual employment) and the rules applicable to them are sometimes specific to functions (law enforcement agencies, magistrates, but also with variations according to the ministries in which the functions are performed or according to the employing local authority). The application of the same ethical standards to all thus provide a certain uniformity, at least.

46 OECD, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, OECD/LEGAL/0298, adopted on 23 April 1998, abrogated on 26 January 2017, replaced by the Recommendation of the Council on Public Integrity, OECD/LEGAL/0435 on 26 January 2017.

47 OECD, *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service,* 2003.

48 OECD, *Recommendation of the Council on Public Integrity*, 2017.

OECD set out a framework for action on good public governance, with a strong emphasis on public integrity.[49]

The Council of Europe is working along the same lines. In 2000, Recommendation No. R (2000) ten of the Committee of Ministers to Member States on codes of conduct for public officials was adopted. In 2001, the European Code of Police Ethics was published.[50] The Guidelines on Public Ethics were adopted on 11 March 2020 by the Committee of Ministers. They are intended to help the Member States of the Council of Europe to establish an effective public ethics framework and to promote a culture of ethics. None of these institutions has fixed their recommendations once and for all, but are renewing and adapting them as expectations regarding ethics increase.

Finally, the European Union has adopted a similar approach, thus giving concrete expression to the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union.[51] All officials must respect these ethical standards, those of the European Commission and the European Parliament,[52] to give just a few examples.

Civil servants are, therefore, gradually being bound by a kind of common law in Europe. Just as the principles of the New Public Management approach have spread to all European States, ethical standards are spreading at the same time, giving rise to a new European administrative culture. However, there is no uniformity or general convergence. Indeed, national traditions persist. If this has been observed on the margins of the material approach, it is even truer in the normative approach.

III. Ethical Standards: Variable Substitutes to Legal Rules on a Normative Approach

In a normative approach, ethical standards highlight specificities, which are very instructive with regard to the relationship of each system to the sources of law and to the form the rules must take to play their coercive role. Each system undergoes an inflexion of its tradition through the transformation of its normative content without entirely renouncing its specificities (Subsection 1). Among these rules, particular attention must be paid to the structures that are sometimes set up to govern these ethical rules. Indeed, these structures participate in the normative framework in two ways: they enact rules directly and/or are set up to control their respect (Subsection 2).

1. The Transformation of Normative Content

Ethical standards are not systematically imposed in the same way in the different European civil service systems. Overall, ethical standards can be set at all levels of the hierarchy

49 OECD, *Policy Framework on Sound Public Governance. Baseline Features of Governments that Work Well*, 2021.

50 *Recommendation Rec(2001)10 of the Committee of Ministers to Member States on the European Code of Police Ethics,* adopted by the Committee of Ministers on 19 September 2001.

51 See Cini (2010) or on the website on the European Commission “Ethics and Good Administration”; https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/ethics-and-good-administration_en.

52 *Guide to the Obligations of Officials and Other Servants of the European Parliament (Code of Conduct),* Official Journal C 097, 05/04/2000 P. 0001–0012.

of norms: in national constitutions, in general or specific legal rules, or even, without being exhaustive, in soft law, the value of which itself varies from one State to another. At least two factors explain this variability. According to the opposition, which has not completely disappeared, between States attached to hard law and those attached to soft law, the sources mobilised are not the same. Moreover, a distinction must be made between States in which there is a specific status for civil servants or not. Despite this, there is a proliferation of soft law in all States (1.1), which is sometimes subsequently incorporated into hard law (1.2). Substitution thus operates in two ways: either States use flexible law rather than legal rules, or legal rules are replaced by new ones that incorporate these standards.

1.1. The Proliferation of Soft Law

The proliferation of soft law can be explained by cumulative factors: ethical standards come from Anglophone countries in which recourse to soft law is common. It is therefore not surprising that the UK frequently used this instrument. Moreover, the content is linked to the container, or rather, the substantive accompanying the normative, thus the recourse to non-legal codes of conduct seems an opportune solution. There is also an ideological argument: the non-binding form is perceived as more modern and therefore better accepted by all since encouragement is (supposedly) preferred to coercion. Finally, the practical advantages are undeniable: the flexibility allowed by using soft law. It is easier for a ministry or an administration to have a code of conduct adopted at the end of a reduced formalism than a law which requires a heavier parliamentary procedure.

For all these reasons, codes of conduct for civil servants have proliferated since the mid-1990s: 1995 in Ireland,[53] 1996 in the UK,[54] 1997 in Italy,[55] 1999 in Estonia, 2000 in Bulgaria, 2001 in Latvia and the Czech Republic, 2002 in North Macedonia and Poland,[56] and 2007 in Spain.[57] In Germany, there are numerous administrative measures or collective agreements, often at the local level, but there is no major text with symbolic value. In France, codes of ethics have long been specific to each profession. Apart from the early code of ethics for the national police in 1986,[58] it was not until 2007 that a code of ethics for magistrates was drawn up.[59] The most general code of conduct that currently exists is

53 See Ethics in Public Office Act, 1995.

54 See Civil Service code. The statutory basis for the management of the Civil Service is set out in Part 1 of the Constitutional Reform and Governance Act 2010 (see *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume).

55 See Article 54-bis General Rules Governing the Work of Public Officials No. 165 of 30 March 2001 (*Testo unico sul Pubblico Impiego (TUPI)*), applying to contract and statutory civil servants.

56 Palidauskaite and Lawton (2004). While there are no formal codes of conduct in Denmark, Sweden and Finland, there are transparency measures for the behaviour of civil servants.

57 The status of civil servants has been clarified in Spain by the Basic Statute of the Public Employee 7/2007 of 12 April 2007 (*Estatuto Basico del Empleado Pùblico*), BOE-A-2007-7788; www.boe.es/eli/es/l/2007/04/12/7/con. A Code of Conduct (*Código de Conducta)* is codified in Article 52 of the Statute, while Articles 53 and 54 list the ethical principles (*principios éticos*) and the principles of conduct (*principios de conducta*) respectively.

58 Now codified in Articles R. 434–2 of the Internal Security Code (*Code de la sécurité intérieure*, www.legifrance.gouv.fr/codes/id/LEGITEXT000025503132).

59 Organic law on the recruitment, training and accountability of magistrates of 6 March 2007 (*Loi organique No. 2007–287 du 5 mars 2007 relative au recrutement, à la formation et à la responsabilité des magistrats*), JORF 6 of March 2007, which entrusted the *Conseil supérieur de la magistrature* with the task of preparing such a compendium, which has since been regularly updated and is available online.

an ethical guide developed for use by public officials and deontological referents, published by the HATVP in 2019.[60] It is rather a "meta-code" that gives instructions on how ethics can be strengthened within each service (e.g. through the adoption of specific charters).

Thus, beyond a common designation, the diversity makes any generalisation difficult: a diversity of context in which the codes are adopted (on a codification or a general reform of the civil service or independently); a diversity of content and of the sanctions that apply to them; and even the inherent value of each code varies. In Germany, for example, these codes are measures of the "internal law" (*Innenrecht*) of the administration and have no value for citizens, and do not establish any subjective right for them. At best, they have an interpretative value, which helps to concretise the duties of the civil servant – the violation of which is sanctioned.[61] On the other hand, in France, litigation before the administrative courts has been deemed admissible against the charter of ethics of the administrative jurisdiction,[62] which means that it is an administrative act and not a simple organisational measure.

This flexibility seems to be inherent in the definition of a code of conduct given by the OECD:

> In the public service, a code of conduct can be either a legal document or purely administrative statement prescribing the expected levels and quality of performance of the employees it covers. It outlines the ethical principles applying to either the public service generally or to a particular department or agency specifically.[63]

In this sense, the adoption of a code of conduct is reminiscent of a "label" that would demonstrate the commitment of the public authority and its staff to respect ethical standards.[64]

1.2. The Incorporation of Soft Law into Hard Law

Ethical standards are not only governed by soft law. In addition to the obligations of civil servants provided for in the legislative statutes in France and Germany that could come under the heading of ethics, there is the case where ethical standards are included in legal rules. Such an approach is not insignificant. It can be considered a sign of the legislator's commitment to the promotion of ethics. It testifies above all to the fact that soft law is still considered a secondary source in certain States. It also testifies to the fact that it must therefore be raised to the stage of legislation, to be taken seriously by civil servants, but also by citizens, and even by the judge – particularly, in States which, like Germany, consider that administrative circulars do not constitute enforceable rights for citizens. For example, in the UK, the introduction of ethics and codes of ethics in the police force had a virtuous effect. Conversely, in France, the implementation of standards was not that

60 Ethics guide. A manual for public officials and compliance officers (*Guide déontologique. Manuel à l'usage des responsables publics et des référents déontologues*), www.hatvp.fr/wordpress/wp-content/uploads/2020/05/HATVP_guidedeontoWEB.pdf.

61 Seifert (2009), p. 127.

62 Conseil d'État, décision of 19 July 2017, 411070: the litigation was admissible (but later rejected on the merits).

63 OECD, *Ethics in the Public Service. Current Issues and Practice*, 1996, cited by Seifert (2009), p. 117.

64 See too Hine (2005), p. 153.

successful: we observe a lack of engagement of civil servants, probably because, culturally, soft law receives a lower degree of attention.

The French example is a typical illustration of the phenomenon of the transformation of soft law into hard law in the field of ethics. The obligations of civil servants were indeed provided for since 1983 in the statute of the civil service,[65] without any reference to ethics (obligation to provide service, neutrality, impartiality, loyalty to the administration, probity, and disinterestedness, among other things). Then, in 2016, the law on ethics and the rights and obligations of civil servants was promulgated[66] and the word "deontology" entered the modified 1983 statute. Indeed, the legislator is proceeding to a change of title: formerly "obligations" and from now on, these obligations are gathered, still in chapter IV, under the terms "Of obligations and deontology (with some redundancy)". The French Civil Service Code (CGFP), promulgated in 2021, takes a step backward in this respect by referring only to "obligations" (Title II, Articles L121-1 ff. CGFP) and nowhere to deontology, but, in substance, we note that many provisions refer to components of deontology.

2. *The Setting Up of Ad Hoc Structures*

The implementation of ethical standards has also been achieved by the creation of specific structures. These structures can be used to monitor the respect of ethical principles by civil servants, to advise civil servants or their superiors in case of doubt, or even to create new ethical standards. While traditionally, in several civil service systems, the relationship was mainly bilateral and hierarchical between the civil servant and his superior or employer, new structures are thus created, being third parties to the relationship. Depending on the country, these structures are widespread, have more or less important powers, and are either part of the classic administration or have a separate place. Their degree of institutionalisation thus varies.

Ethics advisers are often appointed, particularly on the model of the Ombudsmen.[67] For example, in Germany, Ombudsperson Against Corruption (*Ombudsperson gegen Korruption*) and Anti-Corruption Officer (*Antikorruptionsbeauftragter*) have been set up with the main aim of fighting corruption. Their task is

> to identify, at regular intervals and from time to time, the areas of work that are particularly susceptible to corruption. For this purpose, the performance of risk analyses must be checked. Depending on the results of the risk analysis, it must be examined how the organisational structure, process, and/or personnel allocation is to be changed.[68]

65 Law on the rights and obligations of civil servants No. 83-634 of 13 July 1983 (*Loi portant droits et obligations des fonctionnaires*), JORF of 14 July 1983, www.legifrance.gouv.fr/loda/id/JORFTEXT000000504704.

66 Law on deontology and the rights and obligations of civil servants No. 2016–483 of 20 April 2016 (*Loi relative à la déontologie et aux droits et obligations des fonctionnaires*), JORF of 21 April 2016, www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000027721584/.

67 For the Baltic countries, see Palidauskaite et al. (2010), Latvia and Lithuania also have anticorruption agencies.

68 See *Bundesministerium des Innern und für Heimat* (BMI, 2018), *Regelungen zur Integrität* (Federal Ministry of the Interior, 2008, Rules on integrity), www.bundesregierung.de/breg-de/service/publikationen/regelungen-zur-integritaet-1124498.

In other systems, ethics advisers are created, for example, the ethics adviser at the level of the Council of Europe or the *référents déontologues* in France.[69] The latter were created in 2016[70] and are responsible, under Article L.124-2 CGFP, for providing civil servants with "all advice useful for the respect of ethical obligations and principles"; they also have the task of fighting against conflicts of interest. Although they do not in principle replace the superior of the civil servant, the risk of competition on certain points is not completely excluded.[71]

Commissions or agencies are set up to also promote good behaviour and to control the adherence to ethical standards. Some have general competence. In the UK, for example, the Civil Service Commission is responsible for regulating employment. It regulates recruitment into the civil service, ensuring that appointments are made on merit after fair and open competition. It also hears complaints under the Civil Service Code. It is independent of the government and the civil service. Other structures are specific to the idea of civil service ethics. France has taken this logic of institutionalising an ad hoc agency outside the traditional administrative structure very far. After having set up multiple structures, the trend has been to unify them (achieved in 2020) around an independent administrative agency: the High Authority for Transparency in Public Life (HATVP). Originally, the HATVP was created to control the assets of political leaders (ministers and senior civil servants with positions of political significance). Now, it has a broad mission: it "assesses compliance with the ethical principles inherent in the exercise of a public function" (Article L.124-9 CGFP). To avoid conflicts of interest, it monitors certain civil servants and contractual staff who leave the administration to work in the private sector (*pantouflage*) and those who have worked in the private sector over the last three years and wish to return or join the civil service (*rétropantouflage*). For the most exposed positions (the most political, the highest in the hierarchy), the control is mandatory, performed directly by the HATVP, and is prior to the appointment. The HATVP issues an opinion on these appointments. Finally, it has the power of self-referral and to impose sanctions in the event of non-compliance with its opinions.

The choice of an ad hoc structure, external to the traditional administrative hierarchy, is significant: it reflects a certain independence and therefore the impartiality of this authority, but also a specialisation of skills. In a similar vein, the establishment of mediators or referents makes it possible, for the civil servant, to clearly identify the person to contact in case of doubt about behaviour, which should encourage virtuous behaviour, through a pedagogical effect. All these elements are supposed to encourage citizens' confidence when it comes to controlling the administration. A nuance could be added, however, as this creates a weakening of the direct hierarchical relationship between the civil servant and his superior, as it existed in closed civil service systems (and where the risks of conflicts of interest were much more limited in the context of lifetime employment in the service of the public authority). But this also corresponds to the weakening of the specificities of the public service, as promoted by the New Public Management approach.

69 Demontrond (2020), p. 298.

70 Law on deontology and the rights and obligations of civil servants (n. 66).

71 The role of the deontologist referents has been further strengthened following the Law on the transformation of the civil service No. 2019–828 of 6 August 2019 (*Loi de transformation de la function publique*), JORF of 7 August 2019, www.legifrance.gouv.fr/jorf/id/JORFTEXT000038889182. For example, the deontologist referent can collect the alert in case of conflict of interest; he can also be referred to by the hierarchical authority if it has a doubt about a conflict of interest of a civil servant.

IV. Concluding Remarks

Thus, the study of ethical standards in the European civil service through the intersection of substantive and normative approaches shows how the idea of ethics has progressively imposed itself in all national civil service laws in connection with the influence of the New Public Management approach. The analysis highlights the circulation of ideas and concepts in Europe, but this is still a complex issue because general convergence has its limits, as national traditions persist. Without constituting a movement of resistance, they demonstrate the capacity of States to integrate new ideas and norms, to respond to a certain acculturation or transculturation, without totally renouncing that which makes up their deep identity.

Bibliography

Abderemane K., Claeys A., Langelier E., Marique Y., Perroud T. (2019), *Manuel de droit comparé des administrations européennes*, Bruxelles: Bruylant.

Aubin E. (2017), *La déontologie dans la fonction publique*, 2nd edition, Paris: Gualino.

Behnke N. (2006), 'Ethik-Maßnahmen für die öffentliche Verwaltung – Modeerscheinung oder Mauerblümchen', in Bogumil J., Jann W., Nullmeier F. (eds), *Politische Vierteljahresschrift, PVS-Sonderheft 37, Politik und Verwaltung*, Wiesbaden: VS Verlag für Sozialwissenschaften, 250–274.

Bentham J. (1834), *Déontologie ou science de la morale*, Paris: Charpentier.

Bertok J. (2002), 'Des défis à la prévention. Pour un environnement en faveur de l'éthique', 4(1) *Éthique de l'administration et du service public*.

Bodiguel J.-L. (2002), 'Pourquoi a-t-on tant besoin d'éthique?', 4(1) *Éthique de l'administration et du service public*.

Cini M. (2010), 'Éthique et réforme administrative de la Commission européenne', 133 *Revue française d'administration publique*, 45–60.

Colin F. (2021), 'Le serment professionnel dans la fonction publique', 3 *L'Actualité juridique. Fonctions publiques (AJFP)*, 127–132.

Davis H., Piotrowski S.J. (2016), 'Ethics and Standards of Conduct', in Bovair T., Loeffler E. (eds), *Public Management and Governance*, 3rd edition, London: Routledge, 361–375.

Demontrond N. (2020), 'La montée en puissance des référents déontologues', *L'Actualité juridique. Fonctions publiques (AJFP)*, 298–303.

Gaudemet Y. (2021), 'La déontologie un pouvoir masqué', 4 *Revue du droit public*, 895–906.

Hine D. (2005), 'Codes of Conduct for Public Officials in Europe: Common Label, Divergent Purposes', 8(2) *International Public Management Journal*, 153–174.

Jean-Pierre D. (1999), *L'éthique du fonctionnaire civil – Son contrôle dans les jurisprudences administrative et constitutionnelle françaises*, Paris: L.G.D.J.

Moret-Bailly J., Truchet D. (2016), *Droit des déontologies*, 1st edition, Paris: Presses Universitaires de France (P.U.F.).

Palidauskaite J., Lawton A. (2004), 'Codes of Conducts for Public Servants in Central and East European Countries: Comparative Perspectives', in Jenie G., McLaughlin K., Mike K., Osborne S.P. (eds), *Challenges of Public Management Reforms: Theoretical Perspectives and Recommendations*, Budapest University of Economic Sciences and Public Administration, 397–421.

Palidauskaite J., Pevkur A., Reinholde I. (2010), 'A Comparative Approach to Civil Service Ethics in Estonia, Latvia and Lithuania', 41(1) *Journal of Baltic Studies*, 45–71.

Perreux E. (2018), 'Enseigner l'éthique et la déontologie aux futurs magistrats', 2(2) *Les Cahiers de la Justice*, Paris: Dalloz, 267–274.

Piron F. (2002), 'Les défis éthiques de la modernisation de l'administration publique', 4(1) *Éthique de l'administration et du service public*.

Seifert O. (2009), 'Codes of Conduct', in Hill H. (eds), *Verwaltungsmodernisierung im europäischen Vergleich*, Baden-Baden: Nomos, 113–138.

Sommermann K.-P. (1998), 'Brauchen wir eine Ethik des öffentlichen Dienstes?', 89 *VerwArch*, 290–305.

Sommermann K.-P. (2003), 'Ethisierung des öffentlichen Diskurses und Verstaatlichung der Ethik', 89(1) *Archiv für Rechts- und Sozialphilosopie/Archives for Philosophy of Law and Social Philosophy*, 75–86.

Spire A. (2020), ‘La confiance dans l’État: une relation pratique et symbolique’, in Senik C. (eds), *Crises de confiance?*, Paris: La Découverture, 37–55.
Vigouroux C. (1995), *Déontologie des fonctions publiques*, 1st edition, Paris: Dalloz.
Vigouroux C. (2012), *Déontologie des fonctions publiques*, 2nd edition, Paris: Dalloz.

36 The Civil Service in Transition – The Ongoing Transformation of Administrative Culture

Adrian Ritz and Kristina S. Weißmüller

I. Administrative Culture

Administrative culture is the amalgamation of "the values, convictions, attitudes and patterns of behaviour which are characteristic of a given administrative system".[1] Organisational cultures emerge from a learning process that occurs in social and collaborative problem-solving processes at the group level (e.g. an administrative unit). This process entails the integration of new group members and the evolution of the group as a whole to adapt to challenges posed by the external environment. New group members are taught that there is a specific and correct way to perceive, think and feel in relation to these problems.[2] This socio-cognitive and idiosyncratic process of passing on basic assumptions, values and norms to new group members is called socialisation and it builds the foundations of administrative culture.[3] Consequently, administrative cultures characterise a distinctive type of institution that at its most basic level concerns the general characteristics of public agents (i.e. their shared values, attitudes, and beliefs) on federal, state, and local levels.[4] Understanding the emergence and change of administrative cultures is essential for understanding variations in the effectiveness of public administration over time and for identifying future directions for reform, because "administrative culture is produced by a combination of historical, structural and contemporaneous political factors that shape not only internal rules and customs, but also the predisposition to reform".[5]

This chapter builds on earlier work by Ritz and Thom, and it equates public administration with the civil service, i.e. the corpus of individual and corporate agents engaged in providing civil services to citizens and relevant stakeholders in the institutional context of public bureaucracies.[6] This means we understand the civil service as the broad governmental domain occupied by public institutions charged with administration at the federal, state, and municipal level, purposely excluding organisations that are not core administration, such as public enterprises, educational institutions and public organisations that provide healthcare.[7] With this perspective, we follow the so-called core perspective on publicness, which recognises that public organisations differ from non-public organisations in their

1 Sommermann (2013), p. 5.
2 Schein (2010).
3 van Maanen and Schein (1979).
4 Henderson (2004).
5 Anechiarico (1998), p. 17.
6 Ritz (2019); Ritz and Thom (2019). For a further developed version of this article, see Ritz et al. (2025).
7 Fletcher et al. (2020).

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essential principles and logic, e.g. their value frames, objectives, management styles, the personnel they attract and their institutional logics.[8] Since individuals operate within the limits of these distinct logics, they translate and shape a distinct administrative culture that differs from the organisational cultures prevalent in for-profit organisations.

Comparing the emergence and change in administrative culture across temporal and spatial boundaries of different jurisdictions can help explain divergence and variety in policy outcomes but also leads to a more nuanced understanding of how different administrative cultures create a dissimilar civil service workforce by dynamic processes of employee attraction, selection and attrition.[9] From this functionalist perspective,[10] understanding the emergence and change of administrative culture can help solve practical challenges of public management and public administration performance outcomes, because civil service reforms essentially rely on cultural change.[11]

To understand the potential for change, administrative culture must be understood holistically. While administrative culture has been compared to “the ‘software’ that infuses the ‘hardware’ of legal, organisational, economic, financial and sociological aspects of an administrative system”,[12] we argue that the two components cannot be separated without losing their essential meaning, because administrative culture entails tangible and intangible principles inseparable from politico-social regimes and organisational logics. For instance, tangible principles may be codified into laws and regulations that define employment regimes, namely the relationship between individuals working in civil service organisations and the state, but this tangible “hard” fact will affect individuals’ behaviour within these employment regimes and eventually feed back into the “soft” factors of administrative culture through processes of social learning. Intangible principles concern implicit givens, such as behavioural norms, as well as narratives and patterns that frame administrative behaviour, e.g. the implicit paradigms that determine the appropriateness of behaviour in administrative context, or idiosyncratic values and motives that govern behaviour and are internalised by new organisational members by social learning.[13]

II. Administrative Culture Codified: Archetypes of Public Personnel Systems

Administrative cultures develop over time. Their dynamics originate from the obligation of public administrations to respond to societal changes, technological innovation, and political and stakeholders’ demands in order to remain effective and legitimate.[14] Thus administrative cultures translate directly into public management arrangements,[15] which are particularly salient in public personnel systems.

Public personnel systems are the “hard” properties of administrative cultures and fulfil central tasks in society. By defining the mutual rights and obligations between the state and private individuals employed by it, they function as the rule-of-law framework for the employment of private individuals by state institutions. Public personnel systems therefore

8 Nabatchi (2018); Pesch (2008); Weißmüller (2019), p. 8.
9 MacCarthaigh and Saarniit (2019); Ritz and Thom (2019); Seidemann and Weißmüller (2024).
10 Schedler and Proeller (2007).
11 MacCarthaigh and Saarniit (2019).
12 MacCarthaigh and Saarniit (2019), p. 2.
13 Schachter (2002); Simon (1997); Weißmüller et al. (2023).
14 Schachter (2002).
15 Schedler and Proeller (2007).

warrant the implementation of fundamental public values enshrined in the professional ethos of the civil service. Consequently, they also influence citizens' trust in public institutions and their perceived legitimacy to a considerable degree.[16] Two distinct archetypes of public personnel systems have evolved – the career-based system and the position-based system – and are described in the following two sections. They mark the two starting points that we argue will give rise to a new common European culture, which will incorporate features of both archetypes.

While personnel systems in public organisations have many characteristics, they are commonly described in quantitative or qualitative terms. Quantitatively, the civil service workforce is typically presented as the share of employees working in the civil service in relation to total national employment (e.g. in 2019: the Netherlands 12%, Germany 11%, and Switzerland 10% versus Denmark 28%, Norway 31%, and Sweden 29%)[17] or in relation to the different levels of public government (e.g. central level of government in 2019: Belgium 14%, Germany 11%, and Switzerland 7% versus Greece 77%, Ireland 91%, and Turkey 93%). As illustrated, these numbers vary considerably across European countries and beyond, highlighting the importance of the civil service and the impact of the various administrative traditions associated with each jurisdiction.[18]

Public personnel systems define the ratio of (tenured) civil servants to temporarily employed staff, effectively marking the flexibility, accessibility, attractiveness, and power dynamics of the personnel systems of the various jurisdictions. Different personnel systems can, therefore, lead to stark structural differences, even between close neighbouring countries. For instance, while the share of tenured civil servants, i.e. employees with lifetime tenure and guaranteed career-based employment, is about 49.8% in Austria and 37.4% in Germany in 2021, the Swiss administrative tradition has embraced public sector reforms more openly, and today no longer offers positions as civil servants in the strict sense.[19]

Qualitatively, civil service personnel systems are strongly influenced by the institutional frameworks of their jurisdictions, particularly with regard to the degree of flexibility of employment conditions to allow for diverse workforce access and mobility workforce across sectoral boundaries.

These factors relate to specific characteristics of a personnel system and are the result of specific personnel practices to attract and recruit personnel[20] as well as personnel motivation and promotion processes.[21] Over time, the differences led to dissimilar civil service cultures and two personnel system archetypes in relation to the different roles attributed to the state as an employer in the aftermath of World War II.[22]

1. Career-based Systems

Career-based public personnel systems are based on a unilateral and authoritarian relationship between the state and the employee. Employees (i.e. civil servants) are obliged to serve the state and the interests of society neutrally and without pursuing their own

16 Ritz (2019).
17 OECD (2021), p. 101.
18 OECD (2021), p. 103.
19 Bundesministerium für Kunst, Kultur, öffentlicher Dienst und Sport (2022), p. 69; Statistisches Bundesamt (Destatis) (2023), p. 57.
20 Weske et al. (2020).
21 Ritz et al. (2017).
22 Demmke et al. (2007); OECD (2021).

personal interests. The employment relationship relies on a design enacted unilaterally by the state, in which the employee has very limited rights of co-determination with regard to the specific design of this relationship. This stands in contrast with private employment law and regulations, which are based on bilateral individual or collective employment contracts between the employer (e.g. a state agency) and the employee or collective agents representing parts of the (prospective) workforce, e.g. collective bargaining parties or unions.

Civil servants bear the central responsibility of executing authority functions on behalf of the state. To warrant the neutral and selfless execution of these tasks, civil servants are supposed to be attracted by and embrace public values and must be trustworthy.[23] Their employment relationship is fundamentally based on the principles of loyalty, trust and stability, which also explains why career-based systems are typically long-term oriented, providing a predictable and structured employment relationship that endures from initial job training until retirement.

Since this archetype is based on a special service and loyalty relationship anchored in public rather than private law, employment relationships in a career-based system have particular substantive and procedural aspects, which include a high degree of formality and tend to be rather hierarchical, centralist decision-making structures. For the employee, these aspects include duties, such as the duty to serve, the duty to comply with rules and instructions and the duty of diligence, but also privileges and securities, such as entitlement to a wage increase, wage bonuses and privileges, professional training, and protection against dismissal (i.e. tenure).

As a result, the configuration of these duties and rights creates closed career-based employment systems, which are characterised by lifelong careers, distinctive hiring criteria and procedures, comparatively generous retirement regulations, and promotion and salary increase practices tied to the seniority principle, which are only partially combined with performance-based merit assessment. Given the high degree of job training specialisation, long-term orientation and the gravity of civil service duties (sometimes sworn in by oath), career-based personnel systems lead to a civil service with little permeability between the workforces of the public and private sectors, a uniform civil servant ethos and an emphasis on the rule of law and public value. The formalised and secure employment status of civil servants in career-based systems often also brings elevated social status.

2. *Position-based Systems*

The second archetype of civil service employment systems is position-based, which means that unlike the career-based system described in the previous section, talents are not sourced for a lifelong career but apply for a specific job. This employment system does not differentiate between public and private law as the fundamental legal basis of the employment relationship, neither in terms of content nor associated procedures. Position-based systems are therefore designed to be permeable and open to inter-sectoral transfer of personnel and expertise, allowing each new position to be filled competitively. This system allows performance-based appraisal and promotion procedures, while the focus on public values is less pronounced. It also recognises the advantages of sourcing diverse qualifications, encouraging employee mobility and embracing the motivational aspects

23 Ritz et al. (2023).

of achievement-based gratification to encourage efficiency and effectiveness. Despite the common legal basis, public and private sector employment relationships still differ, because in many cases public organisations strive to design their employment relationships and conditions so as to set good examples for the private sector. As a result, employment conditions, such as job security, working time regulations, social security and retirement pay conditions, as well as relationships with social and welfare partners and unions, are often generously compared with private sector conditions.

Career-based systems are more status-oriented, and due to their lifelong tenure shape administrative culture through their consistency, diligence and long-term planning. In contrast, position-based systems foster exchange of ideas and innovation, because personnel fluctuation and change across organisational and sectoral boundaries is much more common. Matching the distribution of the rule of law tradition, the continental European civil services of Germany, France, Austria, and Belgium can be classified as career-based personnel systems, while anglophone countries (Great Britain and Malta), the northern European countries (e.g. the Netherlands, Denmark, Estonia, Finland, and Sweden) and Switzerland use position-based systems.

III. Prior Waves of Cultural Change: Civil Service in Transition

In recent decades, the civil service in Europe has undergone significant changes which have led to a reduction in the number of civil servants compared with public employees. In the 1970s and 1980s, personnel management in the private sector evolved into human resources management, a field which integrated insights from psychology and sociology with business management. In contrast, personnel management in the public sector has long remained dominated by a scholarly legal perspective, which focuses on the employment-related status of personnel (e.g. the German *Personalstandswesen*), concentrating on the exact classification of personnel in rigidly structured systems, long-term employment and control of dutiful task performance.

However, these formerly stark differences between the public and private sector perspectives on personnel management have decreased in recent years due to the advent of strategic personnel management at the general management level of administration, paired with higher degrees of discretion on the operational and procedural levels of personnel management in the separate branches, institutions and organisations of the civil service. Calling into question formally central aspects of civil service personnel systems, this transition led to several waves of reform and kick-started the ongoing transformation of administrative culture in Europe, illustrating Anechiarico's conclusion that "[a]dministrative culture is both the sum of historical and political factors and an indicator of the contemporary interaction of political [and societal] forces".[24]

1. Transformations Linked to New Public Management

The growing relevance of strategic personnel management in public administration is related to major social and economic changes that raised the need for systematic change. Despite important international and contextual differences, most jurisdictions faced similar pressures regarding public personnel management in recent decades. In the 1990s, advocates of New

24 Anechiarico (1998), p. 29.

Public Management (NPM) promoted change in administrative cultures by adapting competition and efficiency criteria, typical of private sector management styles, to public personnel management in order to stimulate the motivation and performance of civil servants (e.g. through pay-for-performance) and to increase Human resources (HR) managers' flexibility in hiring, promoting and dismissing employees by decentralising decision-making processes from the central administration to local agencies.[25] After years of continuous reform, particularly in classic Weberian bureaucracies, which shifted from traditional jurisprudent HR administration to modernised strategic HR management, NPM was challenged for its unintended side effects on the civil service due to the introduction of New Public Governance (NPG). The NPG principles emphasise the role of public service motivation and personnel integrity in public personnel management and emphasise the interdependency of organisations and agents and collective co-production in providing civil services and creating public value.[26] This evolution of public motivational practices led to a shift from the red tape-ridden and rule-abiding bureaucrat to public managers, motivated to contribute creatively and interactively to the prosocial benefit of citizens and society.

However, the NPM and NPG-related reforms have to be understood in their wider context, since they are the consequential outcome of fundamental societal and cultural changes. Today, European societies are less hierarchical, and social differences are more centrally and critically discussed, resulting in a decline in the status of sovereign authority and a shift in relationships between the state, civil service employees, businesses, and society. At the same time, demographic changes exacerbated labour market competition between public and private sector organisations, so that public employers realised the need to offer their staff modern working conditions and benefits. Only attractive conditions will help buffer future quantitative and qualitative workforce shortages,[27] and public HR managers need to recognise the dynamic social and economic developments that promote work and workforce diversity and mobility of various kinds (e.g. temporal, geographical, cultural or functional) and demand new competences in an increasingly digitalised work environment.

2. *Transformations Linked to Fiscal Austerity and Crises*

The long-term public sector reform processes initiated in the 1990s accelerated in the wake of the global financial crisis of 2007–2008.[28] This crisis led to global reform initiatives supported by international organisations, e.g. the European Union, the European Central Bank and the International Monetary Fund. The challenges related to aggravated national fiscal austerity resulted in dramatic cuts in public employment job security and salaries in many countries, e.g. Greece, Spain, and Italy, disrupting traditional and long-established patterns of civil service. In these times of crisis, societal demand and political pressure to implement strict spending cuts have become a driving force of modernisation in European civil services. Yet the stressor of financial austerity has not resulted in a total convergence of public and private sector employment regimes and practices. The civil service has not been eroded, as some experts had predicted, but has maintained distinctive features over the past decades.[29] On the contrary, many jurisdictions have proceeded to expand the unilateral principles of

25 Kellough (2017); Sommermann (2013).
26 Boruvka and Perry (2020).
27 Ritz et al. (2023).
28 Bach and Bordogna (2013).
29 Raadschelders et al. (2015).

civil service as a sovereign and loyalty-based employment relationship, pushing towards more pronounced centralised decision-making with less peripheral discretion. These steps were needed to implement the necessary harmonisation between public and private sector labour regulations in some jurisdictions that needed to streamline and reduce their public workforce quickly and uniformly as a form of ad hoc crisis governance, without eliminating system-specific differences entirely. Moreover, the importance and power of the social partners towards the state diminished in this period, because modernising reforms were pushed through by state agents themselves, rather than leaving initiatives to market forces.[30]

While the austerity related to the financial crisis has had similar effects in all countries and regions, the specific type and severity of reform measures implemented in each jurisdiction were contingent on the status quo of their respective civil service systems.[31] Particularly, system-specific differences in public governance and personnel management principles and logic had a large impact on the degree to which the following typical reform measures were implemented to modernise civil service personnel systems in recent years.[32]

Hiring freezes and workforce downsizing. In the aftermath of the 2007–2008 financial crisis, but also due to the unprecedented disruptions caused by the global COVID-19 pandemic, many European countries imposed far-reaching hiring freezes (e.g. Austria, France, Greece, Ireland, Italy, Portugal, and Spain) and planned downsizing measures to reduce their civil service workforce (e.g. by 23% in the United Kingdom's central civil service, 20% in Greece, 15% in the Netherlands, 12% in Ireland, 6% in Germany), although not all planned downsizing targets were fully implemented.[33]

Pay cuts and suspension of wage rises. In the wake of the financial crisis, many jurisdictions stopped wage rises (e.g. Great Britain, France, Spain, Italy, Luxembourg) or implemented pay cuts, some of which were complemented by (partially) drastic pension cuts (e.g. by 25% in Romania, 15% in Greece, 15% in Ireland, 10% in Bulgaria, 5% in Spain, 2.5% in Germany).[34]

Decentralisation and individualisation. Following calls for reform by NPM, many jurisdictions redirected the power to determine employment conditions from centralised to decentralised units of the civil service, increasing the discretion and decision-making authority of direct superiors. However, some of these decentralisation measures put additional strain on HR management and were temporarily or partially revoked in the aftermath of the crises, reverting to more centralisation in strategic HR planning.[35]

Approximation to employment conditions under private law. Like the pragmatisation freeze in Austria, many jurisdictions reformed the special legal position of civil servants and their associated duties and privileges, either reducing the extent of these special employment conditions or eliminating the legal status of civil servant positions entirely, replacing civil servants with contractually employed personnel. In addition to the reduction of civil servant positions and privileges, protection against dismissal and principles of unconditional long-term tenure were relaxed by cutting the red tape-ridden and often complicated HR processes of promotion and dismissal. This reform step resulted in leaner procedures but often also severely reduced the previously guaranteed benefits associated with civil service employment, e.g.

30 Bach and Bordogna (2013).

31 Lodge and Hood (2012).

32 Bach and Bordogna (2013); Brewer and Kellough (2016); Demmke and Moilanen (2010); Lægreid and Wise (2015); Lodge and Hood (2012); van der Meer et al. (2015).

33 Ritz (2019), p. 180.

34 Ritz (2019), p. 180.

35 Demmke (2020).

reducing the state's care obligations and tenure, and reducing the duration and amount of severance payments, pensions and other social security contributions.

Increasing efficiency with performance-related salary components. Many jurisdictions introduced performance-related salary components to increase the efficiency of administrative action and to facilitate outcome monitoring and control. This reform instrument, however, is limited as in many essential civil service tasks performance assessments are hard to quantify consistently enough so that the pay-for-performance component is only small, and consequently can only function as a limited motivational incentive. However, meta-analytical research by Weibel, Rost, and Osterloh illustrated that pay-for-performance in the civil service may come with hidden costs;[36] its effect is task-dependent, i.e. increasing performance for uninteresting tasks and reducing performance for interesting tasks, which creates a motivational dilemma, particularly for intrinsically motivated staff. Furthermore, in practice, implementation was often characterised by enculturated practices from classic bureaucratic and legal traditions so that in these reformed systems, lack of performance mostly did not lead to equivalent negative consequences, which limits the motivational and nudging effectiveness of these incentives. In practice, more and more European States are moving toward a hybrid system of performance assessment.[37]

Overall, these reforms have led to a convergence of public and private personnel systems and HR management practices, which have reduced the impact of idiosyncratic problems related to traditional civil service systems. The reforms have been criticised for their severity, since reducing civil servants' benefits and privileges was assumed to reduce the capacity of public organisations to signal employer attractiveness. Losing this competitive advantage may have negative long-term effects, arguably eroding the ability of the civil service to attract future talent; some experts even prophesied a total collapse of the civil service. However, the history of civil service reform has shown that public administration has a remarkable capacity to initiate and achieve cultural transformation, dynamically and through self-motivation. Past reforms illustrate that performance can be improved if public personnel systems are equipped with sufficient flexibility and discretion without losing the fundamental public values of their workforces. To achieve integral transformation and administrative renewability, reform initiatives should proceed with a sense of contextual, institutional, and organisational fit.

The many steps of reform discussed previously, some gradual, some rapid, have led to substantial changes in the fundamental culture of the civil service but also in its performance. Based on a survey conducted among more than 7,000 top and middle public managers from 20 European countries, Hammerschmid et al. conclude that the various steps of reform aimed at making European civil service HR management more flexible have led to significant positive outcomes in all four dimensions of performance (cost reduction and efficiency gains; service quality; policy coherence and coordination; equal access to services).[38] The transformation from a traditional to a reformed civil service personnel system was therefore successful in allowing dynamic adaptation to changing environmental, social, and political demands. At the heart of this modernisation lies the fundamental transformation of the employment relationship between the individual engaged and the state as employer. Table 36.1 summarises the most central elements of change from a

36 Weibel et al. (2010).

37 Demmke et al. (2007).

38 Hammerschmid et al. (2019).

Table 36.1 Characteristics of administrative cultures based on public personnel systems

Components		*Career-based personnel systems*	*Position-based personnel systems*	*Transformed personnel system*
"Cultural Hardware" (tangible)	*Employer role and interests*	• Unilateral dominance of the state • Duty to serve and comply • High job security • Obligations regarding employee interests and well-being	• Contract-based employment • Focus on strategy, finances and performance • Concern for organisational interests and performance	• Contract-based employment • Co-creating public value in inter-organisational and inter-sectoral collaboration networks • Innovative ideation and legitimacy
	Employment practices	• Standardisation and homogeneity • Full-time employment • Privileged, equal treatment • Centralisation of decision-making	• Individualisation • Flexibility • Differential treatment • Decentralisation of decision-making	• Teamwork • Special, temporal and structural flexibility • Differential treatment with individual arrangements
	Role of unions	• Highly involved, impactful labour unions	• Less influence of labour unions • Higher managerial discretion to implement strategic personnel management	• Strong labour unions • Bottom-up agency of external agents, e.g. NGOs, civic society
"Cultural Software" (intangible)	*Employer-employee relationship*	• Loyalty-based long-term orientation • Paternalistic and hierarchical relationship	• Evaluation based on qualification and performance • Mutual contract termination options • Individual responsibility	• Agile, digital and dynamic relationships • Value-based and cause-related attraction and retention • Mutual contract termination options
	Employee participation	• Bottom-up culture • High degree of employee participation	• Increasingly top-down culture • Situational employee participation • Delegation of responsibility	• Bottom-up culture • Dynamic participation across hierarchy levels and teams
	Core values	• Neutrality, accuracy and diligence • Expertise and qualification • Public value orientation	• Performance orientation • Efficiency and effectiveness • Flexibility and agility	• Inclusivity and representation • Public value and outcome orientation • Openness, flexibility and agility

Note: Original table adapted and extended based on Ritz and Thom (2019), p. 444.

career-based public personnel system (left) to the modernised position-based systems that are the status quo of many jurisdictions after decades of reform (middle column). However, modernisation and cultural evolution must not stop at this point to overcome the increasing pressure of financial scarcity, problems of institutional rigidity and the demotivating effects of bureaucracy bashing. The civil service needs an administrative culture fit for the 21st century if it is to attract talent, maintain legitimacy and serve the people effectively. The following section summarises five impulses for further renewal and reform. The right column of Table 36.1 shows how these global impulses may elicit further evolution of administrative culture in the near future, transforming public personnel systems.

IV. Creating a European Administrative Culture for the 21st Century

The transformation of administrative culture is evident in public administrations all over Europe. While systematic changes were often initiated by political, fiscal, and societal demand for modernisation, the next big task for the civil service is to embrace and complete its transformation by designing a working environment fit for attracting bright and motivated talent into the civil service to solve the great societal challenges of the 21st century. Particularly in the context of career-based personnel systems in Western Europe (e.g. Germany, France, and Austria), modernisation has stalled, and many traditional, non-competitive and outdated elements of civil service personnel systems remain, including legal employment regulation and slack administrative practices. Having responded to external pressure, the European civil services now need to focus on their own internal agency to shape a contemporary administrative culture for the 21st century.

1. Legitimate Civil Service

The civil service needs initiatives from members of its organisations and institutions and to take agency back from politics and the media to transform its work environment proactively instead of reactively. A civil service is essential for reliable legitimate professional public services in a democratic state and deserves the trust of the general public. However, Europe's public bureaucracies must work actively at maintaining this trust. Trust depends on both institutional factors, e.g. political control, accountability and transparency, and on the outcomes of administrative behaviour. It also depends on organisational factors, such as responsiveness, measured flexibility, discretion and consideration for citizens' needs and situational circumstances. Civil service systems increase their legitimacy and, consequently, their attractiveness as employers by demonstrating their ability to respond dynamically, purposefully and with creative agility to a changing societal context and citizens' demands. They need to overcome the stereotypical, hierarchical, rigid and red tape-ridden procedures of the traditional systems. This also entails the integrative involvement of labour unions and cooperation with personnel representatives in essential processes of organisational change, for instance organisational or procedural restructuring. It entails achieving context-sensitive, holistic, sustainable personnel management.[39]

Traditionally, there is strong institutional socialisation in public administrations. This promotes workforce homogeneity in the organisation of bureaucracies, particularly regarding procurement and personnel sourcing and workforce composition. Excessive

39 Ritz and Thom (2019); Ross and Savage (2013).

homogeneity has undesired consequences, for instance, ideological partisanship, "group think" and conservative ideation that inhibit reform and innovation.[40] Overcoming the so-called jurisprudent monopoly in leadership positions of public management will help mobilise reform capacities and break adverse and self-preserving cycles of cultural perpetuation in favour of more diversity and representation in administration.

2. *Pragmatic Civil Service*

Administrators are charged with conducting bureaucratic tasks diligently, reliably and comprehensibly in order to solve citizens' issues through practical implementation of public policies. This means that the civil service basically links politics and society, bridging targeted political outcomes and practical implementation to achieve a certain objective. Leadership and management are therefore at the core of public administration. Empirical research shows that administrative performance outcomes are significantly influenced by good managerial behaviour. For example, based on their comprehensive research of schools in the State of Texas, Meier and O'Toole conclude that management matters.[41] The study shows that about 20% of output can ultimately be attributed to the quality of leadership. Boyne reaches similar conclusions based on a meta-analysis of studies in administrative science.[42] In a different context, O'Toole points out the importance of management in partnership networks,[43] where managerial professionalism and competence are essential for achieving successful inter-organisational and inter-sectoral partnerships.[44] Network and alliance management competencies will, therefore, become increasingly important in the civil service. Alliance management competence is the central ability to configure and manage alliances together with network partners through joint and mutually beneficial and fair collaboration and sustainable coordination.[45] Alliance management competence will only benefit civil service provision in connection with a functioning monitoring and control system, managing the organisation's often multidimensional alliance and partnership portfolio actively to develop coordination and learning processes.[46]

Related to this, the civil service will profit from attracting entrepreneurial employees who want to change and improve the system and do not shy away from questioning the status quo. Talent with entrepreneurial spirit is intrinsically motivated and thrives in organisations that embrace organisational learning – also by risking innovation and learning from mistakes – in order to break outdated routines and hierarchies and to find co-creative solutions in teams and wider dynamic networks.[47] Entrepreneurial bureaucrats show public leadership, which means that they go beyond the classic strengths and behaviours of general leadership theory, such as the ability to initiate and implement organisational change; they have a specific understanding of the values, goals and demands of the civil service institutional environment and administrative behaviour. These include a thorough understanding of institutions, a strong preference for serving the common good, public

40 Seidemann and Weißmüller (2024).
41 Meier and O'Toole (2002).
42 Boyne (2003).
43 O'Toole (2001).
44 Weißmüller et al. (2023).
45 Hoffmann (2006).
46 Weißmüller and Künzler (2021).
47 Fischer and Weißmüller (2024).

integrity, a propensity to find creative solutions, goal-oriented pragmatism and effective communication.[48] With these capabilities and traits, entrepreneurial bureaucrats will become increasingly important for the ongoing transformation and effective management of the civil service of the future.

3. *Innovative Civil Service*

Public administrations are organised like monopolies – both externally (jurisdiction) and internally (departmental responsibility) – creating so-called silo structures often characterised by distinct organisational structures, only linked by red tape and with few bridges to span the cultural trenches between them. They promote administrative cultures that inhibit performance by creating a punitive error culture, which in turn inhibits innovative ideation and progressive service solutions.[49] Prior research suggests that fostering an organisational culture that embraces errors and mistakes as opportunities to learn and grow is a particularly difficult challenge for the civil service. Public bureaucracies often have a punitive, risk-averse, zero-error culture that prevents their members from responding proactively to errors[50] and discourages employees from reporting and correcting their errors, damaging organisational performance and reducing public value creation.[51]

Changing work ethics and attitudes requires daily leadership and well-designed and targeted leader-follower communication skills. Transformational public leadership has the potential to change administrative culture in a positive and motivating way but demands a rich set of leadership capabilities and willingness to overcome resistance to change on the part of a workforce that has often self-selected into and has been socialised in a rigid and homogeneous framework with very particular sectoral logics, values, and practices.[52] Resistance has many causes and is rarely unfounded, particularly in career-based systems. Whether due to lack of motivation, capability, or information, factors and motives that inhibit change need to be identified and addressed in a targeted manner in order to find viable solutions and blaze the path to institutional transformation.[53]

Unconditional tenure, as typical in career-based systems, may discourage employees from embracing organisational transformation and procedural innovation to meet changing societal demands on civil service provision. This is why structural changes, including dismissals, may be required to achieve successful civil service reforms. Essentially, structural and cultural changes in organisations break up workforce homogeneity and allow more diverse ideas, motives, and new types of employees. Old habits die hard, and bringing about cultural change at the institutional level by attempting to change employees' individual attitudes often proves futile, especially if all "givens", i.e. the contexts, processes, and institutional logic, remain the same. Structural changes can accelerate these transformation processes and overcome enculturated (and outdated) modes of conduct, types of leadership and organisation. Top-down strategic incentives with clearly formulated targets

48 Ritz (2019); Vogel and Werkmeister (2021).
49 Fischer and Weißmüller (2024).
50 Chen and Bozeman (2012); Weißmüller (2022).
51 Crosby et al. (2017); Fischer and Weißmüller (2024).
52 Ritz et al. (2014); Seidemann and Weißmüller (2024).
53 Ritz (2019).

for organisational development and characteristics are particularly important when initiating change to overcome the "iron cage" of traditional modes and logic of administration.[54]

Another way to implement structural change is by making employment regulations more flexible because it facilitates collaboration, innovative ideation and a more diverse and proactive administrative culture.[55] While classic Weberian bureaucracy assumes that public personnel management systems transform recruited talent into rule-abiding bureaucrats who fulfil their duty neutrally and efficiently,[56] recent public management scholarship recognises that modern societies are increasingly diverse and that bureaucratic representation of this diversity is essential for sustaining institutional legitimacy, procedural justice, citizen trust and organisational performance.[57] Research on group decision-making shows that public workforce composition has a decisive effect on organisational outcomes. Different perspectives allow more efficient use of information, increase creativity and deliberative quality, and contribute to finding better solutions.[58] When encouraging the sourcing of diversified talent, flexibility in recruitment structures should still aim for homogeneity with regard to intangible aspects, such as high public service motivation, shared moral identity and value congruence aimed at the betterment of society.[59]

The de-standardisation of personnel regulations also entails forgoing traditionally rigid and linear career development principles in favour of more leadership and performance-oriented succession planning. The resulting competition for talent between candidates from both inside and outside the civil service is crucial for cultural change because higher staff permeability between the (previously separated) public and private labour markets will lead to more excellency-based promotion for administrative staff across and beyond bureaucracies, increase employer attractiveness and strengthen civil service reputation and employer attractiveness.

4. Digital-Era Civil Service

Digital-era governance changes fundamental premises and practices of administrative work and will also reshape the culture of civil service in Europe.[60] On the one hand, algorithm-based technological advances allow the intelligent linking of data from a variety of sources to enhance decision-making in all aspects of government, including HR management.[61] These developments are the result of the prolific dissemination of information technologies, characterised by digitisation (in essence: conversion, capture, and storage of data or information), automation (algorithm-based processing of information) and interconnectivity (dynamic networks making information available across time and space). As technologies develop and change, demands on employees change and do so increasingly rapidly. Due to political pressures for cost-efficiency and citizen demand for interconnected service accessibility – beyond in-person office hours but across temporal, local and technological distances – any administrative process with potential for automation will be affected and

54 Ashworth et al. (2009).
55 Dudau and McAllister (2010).
56 Weißmüller et al. (2022).
57 Hong (2021); Li et al. (2018); Meier (2019).
58 Ritz (2019).
59 Ritz et al. (2020); Seidemann and Weißmüller (2024).
60 Margetts and Dunleavy (2013).
61 Maasland and Weißmüller (2022).

will significantly change bureaucratic office work, particularly for medium-skilled employees charged with performing routine tasks. Such job profiles are likely to be significantly altered or even replaced, affecting senior public sector employees more severely. The digital transformation favours highly skilled, tech-savvy individuals, whereas low-skill employment that requires interaction may be reduced or ousted in the long run, changing task structures and the demand for blue-collar vis-à-vis white-collar jobs. This is a looming challenge for civil services across Europe because middle-aged middle-qualified personnel make up the majority of staff in public administrations. Digitisation creates opportunities to implement the principles of new work and to increase employer attractiveness for a younger audience of talent with a more diverse skillset by offering more flexible work environments.[62] This flexibility pertains not only to spatial (e.g. mobile workplaces) and temporal (e.g. work schedules) aspects but also addresses and questions the fundamental principles of work in calling for structural (e.g. holacracy) and contractual flexibility (e.g. allowing self-employment and dynamic, individual contracts). Consequently, new work has significant implications for civil service culture, disrupting the traditional administrative culture set on risk-aversion, rule abidance, strict hierarchy, and presentism.[63]

Besides challenging the practices and rules of administrative work, civil service culture will profit from forgoing narrow training, selection and promotion practices, leading to civil-service-specific career tracks that lack cross-sectoral – or in extreme cases even cross-organisational – transferability in favour of implementing modernised training strategies that allow trained employees to exploit their skills between occupational fields, organisations, and sectors. Career paths leading to a competence and skill set idiosyncratic to civil service occupations can be detrimental for both employers and employees, because the former are forced to rely on a dwindling workforce with little choice and high care obligations, while the latter will find changing occupation to be virtually impossible due to exceedingly low labour market demand. Civil service HR management will therefore face the dual challenge of mastering the transition to a civil service workforce ready for the digital era of public administration: preserving the psychological contract with its current workforce while creating motivating incentive structures for the new generation of digital-era bureaucrats.

5. Value-based Civil Service

Administrative culture legitimises administrative behaviour and the civil service's position in society on the basis of values prioritised by society.[64] As job loss is becoming increasingly common in public administrations, the implicit contract between employer and employee is beginning to change as well. In the past, the relationship between employer and employee involved loyalty in exchange for job security, in addition to the conditions in the formal employment contract. The civil service is often subject to bureaucracy bashing in the mass media and ridiculed with anecdotal stereotypes of inefficiency, slackness, and red tape. This leads to negative stereotypes about employment in the civil service.[65] Public personnel management therefore needs to develop effective strategies to attract and retain

62 Ritz and Sinelli (2018).
63 Ritz and Knies (2024).
64 Peters (2021).
65 Bankins and Waterhouse (2019); Weißmüller (2022).

talent despite this reputational damage and needs to embrace an organisational culture of transparency that allows learning from mistakes and communicates the civil service's transformation and identity clearly to the general public.[66]

Yet research shows that employers' assumptions about the employment preferences and values of (future) employees may not always be realistic. With a workforce ageing faster than the total labour force, the challenge facing public organisations is how to attract and retain talent in public service careers.[67] It is, therefore, of key importance for public organisations to increase employer attractiveness. Studies conducted in Austria by Korac, Lindemeier, and Saliterer, and in Germany by Ritz and Waldner show that public service motivation (PSM)-related motives, such as helping others, job security, but also explicitly an organisation's value for society are decisive factors for the attractiveness of the civil service to young future employees.[68] Unfortunately, public administration is not always the employer of choice of highly qualified, career and innovation-oriented talent.[69] Public administration tends to attract "middle-aged" and less career-motivated persons. The former are job seekers who know from their work experience precisely what they are looking for and who may also be bound locally by personal obligations (e.g. family or care obligations). The latter do not aspire to an international career and tend to prefer predictable working conditions and stable career prospects in a single organisation that offers plannable low-risk career advancement through targeted job changes.[70]

Nevertheless, public administrations must attract future employees from younger generations if the relative over-ageing of the public workforce in the coming years is to be contained rather than boosted.[71] Although human resource consulting firms warn that the new generations of the 1990s, 2000s, and beyond are completely different from prior generations, research shows that younger generations do not differ fundamentally from others regarding their basic work values, such as altruism versus selfishness, job satisfaction, and commitment.[72] However, some dissimilarities exist: different generations experience dissimilar contexts while growing up, which affect their competencies, skills, work values, and expectations about the employer-employee relationships they will encounter in the workforce. When seeking to attract and retain talent, public personnel management must acknowledge that younger generations may have very different expectations and demands regarding, for example, communication and leadership styles, flexibility of work tasks and functions, opportunities to collaborate and for personal growth or knowledge-sharing across organisational and hierarchical boundaries. The civil service cannot ignore the principles of new work that have become common in many segments of the private sector labour market, without running the risk of failing to attract and motivate the most talented candidates.

The civil service must therefore reform its strategies for signalling employer attractiveness. One way to increase employer attractiveness is to harmonise hiring and working conditions with the private sector. This includes temporal and local flexibility but also prospects regarding salary increases and interesting career opportunities in specific

66 Fischer and Weißmüller (2024).
67 Äijälä (2001); Leisink and Steijn (2008).
68 Korac et al. (2020); Ritz et al. (2023); Ritz and Waldner (2011).
69 Korac et al. (2020); Ritz and Waldner (2011).
70 Ritz (2019).
71 Colley (2014).
72 Costanza et al. (2012); Roberts et al. (2010).

managerial and professional functions for which demand is high. Another way is to understand that personnel appreciation is a key motivator. Public personnel systems must allow individualisation and flexibilisation of work arrangements, permitting work-life balance, differential merit-based treatment and focus on individual employees with their particular and unique sets of competences. While fiscal austerity sets limits to salary increases in many European jurisdictions, offering inspiring and creative work environments, team work, co-creation and most importantly cause-related work content based on strong values will attract highly motivated talent into the civil service, particularly persons with a strong work ethos and high public service motivation.[73] Addressing service and cause-related (rather than sector-oriented) motives in specific recruitment tools should help spread this message and signal the many attractive opportunities in a transformed civil service.

V. Conclusions

While the concept of administrative culture has been criticised as vague,[74] it is a useful and holistic concept to describe systematic variations in the fundamental principles and structural design of public administrations worldwide.[75] Civil services in Europe are in transition and have converged in many aspects towards private sector working conditions and regulations. However, NPM-related reforms and modernisation stimulated by crises and societal change have not led to the predicted disintegration of the civil service and the core values and logic that govern civil servants' administrative behaviour. Particularly in career-based personnel systems (e.g. those of Germany, France, and Austria), many traditional elements of an administrative culture firmly nested in the principles of Weberian bureaucracy remain and will have to undergo further steps of reform in order to adapt to future challenges of public personnel management. Essentially, transformation is already underway but there are four central aspects that still need to be addressed.

First, working environments, conditions and employer–employee relationships must meet the expectations of contemporary citizens, political agents and future talent by becoming more flexible, more digital, more agile, and more meaningful. In this context, conceiving administrative culture holistically, both with regard to tangible and intangible aspects, will be particularly useful to find innovative ideas for reform in practice.

Second, the principles of attraction, retention, and promotion must be re-evaluated in favour of differential treatment and inter-organisational and inter-sectoral transmissibility. The principle of competitive performance must be prioritised both in personnel selection and for succession planning. This is supported by relaxing traditional principles of civil service-specific career paths leading to very narrow and incompatible competence sets and instead training for transferable and highly sought competencies. This will also increase civil service employer attractiveness in both the public and the private workforce labour markets.

Third, the cultural change towards a more open, responsive, and adaptable administration should be promoted through a greater exchange of knowledge and competencies across institutional boundaries within the administration and especially with agents outside

73 Ritz and Waldner (2011).

74 Schröter (2007).

75 Painter and Peters (2010).

the administration, particularly in civil society, without shying away from criticism and unconventional ideas. Innovation springs from co-creation and co-destruction.

Finally, public administrations should capitalise more on their essential purpose, which is serving society. Besides redesigning and opening up training and continuous education paths to become more attractive, strategic HR management should aim to signal that civil service employment can be a source of fulfilment and purpose, particularly for highly prosocial and high-PSM candidates. Combining this value-based concept of self with a more pragmatic and more open approach to solving societies' challenges through agile collaboration across organisational and sectoral boundaries will rejuvenate the often conservative and rigid image of public bureaucracies.

Implementing these changes and creating a new culture from within will be the central challenge for public management in the coming years. The civil service offers attractive employment opportunities but not to the same extent for all target groups of (future) talent. Administrative cultures in transition and societal change have transformed the civil service and the central goal for the coming decade will be to attract and retain more of the service-oriented and entrepreneurial bureaucrats for public administrative work. These new types of bureaucrats will use their newly found discretion to overcome the resistant, red-taped slack of the past and to further modernise and evolve the civil service ethos and culture. With these prospects, the civil service will be well-prepared to master future challenges.

Bibliography

Äijälä K. (2001), *Public Sector – An employer of Choice?*, Paris: OECD.

Anechiarico F. (1998), 'Administrative Culture and Civil Society: A Comparative Perspective', 30(1) *Administration & Society*, 13–34.

Ashworth R., Boyne G.A., Delbridge R. (2009), 'Escape from the Iron Cage? Organizational Change and Isomorphic Pressures in the Public Sector', 19(1) *Journal of Public Administration Research and Theory*, 165–187.

Bach S., Bordogna L. (2013), 'Reframing Public Service Employment Relations: The Impact of Economic Crisis and the New EU Economic Governance', 19(4) *European Journal of Industrial Relations*, 279–294.

Bankins S., Waterhouse J. (2019), 'Organizational Identity, Image, and Reputation: Examining the Influence on Perceptions of Employer Attractiveness in Public Sector Organizations', 42(3) *International Journal of Public Administration*, 218–229.

Boruvka E., Perry J.L. (2020), 'Understanding Evolving Public Motivational Practices: An Institutional Analysis', 33(3) *Governance*, 565–584.

Boyne G.A. (2003), 'Sources of Public Service Improvement: A Critical Review and Research Agenda', 13(3) *Journal of Public Administration Research and Theory*, 367–394.

Brewer G.A., Kellough J.E. (2016), 'Administrative Values and Public Personnel Management: Reflections on Civil Service Reform', 45(2) *Public Personnel Management*, 171–189.

Bundesministerium für Kunst, Kultur, öffentlicher Dienst und Sport (2022), *Personalbericht: Das Personal des Bundes 2022 – Daten und Fakten*, https://oeffentlicherdienst.gv.at/wp-content/uploads/2023/01/Das-Personal-des-Bundes-2022.pdf.

Chen C.-A., Bozeman B. (2012), 'Organizational Risk Aversion: Comparing the Public and Non-Profit Sectors', 14(3) *Public Management Review*, 377–402.

Colley L. (2014), 'Understanding Ageing Public Sector Workforces: Demographic Challenge or a Consequence of Public Employment Policy Design?', 16(7) *Public Management Review*, 1030–1052.

Costanza D.P., Badger J.M., Fraser R.L., Severt J.B., Gade P.A. (2012), 'Generational Differences in Work-Related Attitudes: A Meta-analysis', 27(4) *Journal of Business and Psychology*, 375–394.

Crosby B.C., Hart P., Torfing J. (2017), 'Public Value Creation through Collaborative Innovation', 19(5) *Public Management Review*, 655–669.

Demmke C. (2020), 'Governance Reforms, Individualization of Human Resource Management (HRM), and Impact on Workplace Behavior – A Black Box?', 22(3) *Public Integrity*, 268–279.

Demmke C., Hammerschmid G., Meyer R. (2007), *The Impact of Individual Assessments on Organisational Performance in the Public Services of EU Member States*, Survey commissioned by the Portuguese EU-Presidency.

Demmke C., Moilanen T. (2010), *Civil Services in the EU of 27: Reform Outcomes and the Future of the Civil Service*, Frankfurt am Main: Peter Lang Verlag.

Dudau A.I., McAllister L. (2010), 'Developing Collaborative Capabilities by Fostering Diversity in Organizations', 12(3) *Public Management Review*, 385–402.

Fischer C., Weißmüller K.S. (2024), 'What Determines Civil Servants' Error Response? Evidence From a Conjoint Experiment', 0(0) *The American Review of Public Administration*, 1–24, https://doi.org/10.1177/02750740241267941

Fletcher L., Bailey C., Alfes K., Madden A. (2020), 'Mind the Context Gap: A Critical Review of Engagement within the Public Sector and an Agenda for Future Research', 31(1) *The International Journal of Human Resource Management*, 6–46.

Hammerschmid G., van de Walle S., Andrews R., Mostafa A.M.S. (2019), 'New Public Management Reforms in Europe and Their Effects: Findings from a 20-Country Top Executive Survey', 85(3) *International Review of Administrative Sciences*, 399–418.

Henderson K.M. (2004), 'Characterizing American Public Administration: The Concept of Administrative Culture', 17(3) *International Journal of Public Sector Management*, 234–250.

Hoffmann W.H. (2006), 'Allianzmanagementkompetenz – Entwicklung und Institutionalisierung einer strategischen Ressource', in Hoffmann W.H. (ed), *Management von Netzwerkorganisationen*, Wiesbaden: Gabler, 251–307.

Hong S. (2021), 'Representative Bureaucracy and Hierarchy: Interactions among Leadership, Middle-Level, and Street-Level Bureaucracy', 23(9) *Public Management Review*, 1317–1338.

Kellough J.E. (2017), 'Public Personnel Management: A Cornerstone of Effective Government, in Riccucci N.M. (ed), *Public Personnel Management: Current Concerns, Future Challenges*, 6th edition, New York: Routledge, 1–11.

Korac S., Lindenmeier J., Saliterer I. (2020), 'Attractiveness of Public Sector Employment at the Pre-Entry Level – A Hierarchical Model Approach and Analysis of Gender Effects', 22(2) *Public Management Review*, 206–233.

Lægreid P., Wise L.R. (2015), 'Transitions in Civil Service Systems: Robustness and Flexibility in Human Resource Management', in van der Meer F.M., Raadschelders J.C.N., Toonen T.A.J. (eds), *Comparative Civil Service Systems in the 21st Century*, London: Palgrave Macmillan, 203–222.

Leisink P., Steijn B. (2008), 'Recruitment, Attraction, and Selection', in Perry J.L., Hondeghem A. (eds), *Motivation in Public Management: The Call of Public Service*, New York: Oxford University Press, 118–135.

Li J., Li A., Chattopadhyay P., George E., Gupta V. (2018), 'Team Emotion Diversity and Performance: The Moderating Role of Social Class Homogeneity', 22(2) *Group Dynamics: Theory, Research, and Practice*, 76–92.

Lodge M., Hood C. (2012), 'Into an Age of Multiple Austerities? Public Management and Public Service Bargains Across OECD Countries', 25(1) *Governance*, 79–101.

Maasland C., Weißmüller K.S. (2022), 'Blame the Machine? Insights from an Experiment on Algorithm Aversion and Blame Avoidance in Computer-Aided Human Resource Management', 13(779028) *Frontiers in Psychology – Organizational Psychology*, 1–14.

MacCarthaigh M., Saarniit L. (2019), 'Administrative Culture', in MacCarthaigh M., Saarniit L. (eds), *Oxford Research Encyclopedia of Politics*, Oxford: Oxford University Press.

Margetts H., Dunleavy P. (2013), 'The Second Wave of Digital-Era Governance: A Quasi-Paradigm for Government on the Web', 371(1987) *Philosophical Transactions. Series A, Mathematical, Physical, and Engineering Sciences*, 20120382.

Meier K.J. (2019), 'Theoretical Frontiers in Representative Bureaucracy: New Directions for Research', 2(1) *Perspectives on Public Management and Governance*, 39–56.

Meier K.J., O'Toole L.J. (2002), 'Public Management and Organizational Performance: The Effect of Managerial Quality', 21(4) *Journal of Policy Analysis and Management*, 629–643.

Nabatchi T. (2018), 'Public Values Frames in Administration and Governance', 1(1) *Perspectives on Public Management and Governance*, 59–72.

OECD (2021), *Government at a Glance 2021*, Paris: OECD Publishing.

O'Toole L.J. (2001), 'Different Public Managements? Implications of Structural Context in Hierarchies and Networks', in Brudney J.L., O'Toole L.J., Rainey H.G. (eds), *Advancing Public Management: New Developments in Theory, Methods, and Practice*, Washington, DC: Georgetown University Press, 14–32.

Painter M., Peters B.G. (2010), 'Administrative Traditions in Comparative Perspective: Families, Groups and Hybrids', in Painter M., Peters B.G. (eds), *Tradition and Public Administration*, London: Palgrave Macmillan, 19–30.

Pesch U. (2008), 'The Publicness of Public Administration', 40(2) *Administration & Society*, 170–193.

Peters B.G. (2021), *Administrative Traditions: Understanding the Roots of Contemporary Administrative Behavior*, 1st edition, Oxford: Oxford University Press.

Raadschelders J.C.N., Toonen T.A.J., van der Meer F.M. (2015), 'Civil Service Systems and the Challenges of the 21st Century', in van der Meer F.M., Raadschelders J.C.N., Toonen T.A.J. (eds), *Comparative Civil Service Systems in the 21st Century*, London: Palgrave Macmillan, 1–14.

Ritz A. (2019), 'Öffentliche Personalsysteme im Wandel – weitere Reformschritte sind notwendig', 12(1–2019) *dms – der moderne staat – Zeitschrift für Public Policy, Recht und Management*, 176–189.

Ritz A., Brewer G.A., Neumann O. (2016), 'Public Service Motivation: A Systematic Literature Review and Outlook', 76(3) *Public Administration Review*, 414–426.

Ritz A., Giauque D., Varone F., Anderfuhren-Biget S. (2014), 'From Leadership to Citizenship Behavior in Public Organizations: When Values Matter', 34(2) *Review of Public Personnel Administration*, 128–152.

Ritz A., Knies E. (2024), 'Human Resource Management in Public Service Organisations', in Bovaird T., Löffler E. (eds), *Public Management and Governance*, 4th edition, London: Routledge, 129–140.

Ritz A., Neumann O., Vandenabeele W. (2017), 'Motivation in the Public Sector', in Klassen T.R., Cepiku D., Lah T.J. (eds), *The Routledge Handbook of Global Public Policy and Administration*, Abingdon, New York: Routledge, 346–359.

Ritz A., Ripoll G., Micacchi L. (2025), 'Flexibilization of Work and the Future of Public Sector Employment' in Bouckaert G., Hondeghem A., Steen T., Van de Walle S. (eds), *Futures for the Public Sector*, Leuven: Leuven University Press.

Ritz A., Schott C., Nitzl C., Alfes K. (2020), 'Public Service Motivation and Prosocial Motivation: Two Sides of the Same Coin?', 22(7) *Public Management Review*, 974–998.

Ritz A., Sinelli P. (2018), 'Talent Management – Überblick und konzeptionelle Grundlagen', in Ritz A., Thom N. (eds), *Talent Management*, Wiesbaden: Springer Fachmedien Wiesbaden, 3–31.

Ritz A., Thom N. (2019), *Public Management*, Wiesbaden: Springer Fachmedien Wiesbaden.

Ritz A., Waldner C. (2011), 'Competing for Future Leaders: A Study of Attractiveness of Public Sector Organizations to Potential Job Applicants', 31(3) *Review of Public Personnel Administration*, 291–316.

Ritz A., Weißmüller K.S., Meynhardt T. (2023), 'Public Value at Cross Points: A Comparative Study on Employer Attractiveness of Public, Private, and Nonprofit Organizations', 43(3) *Review of Public Personnel Administration*, 528–556.

Roberts B.W., Edmonds G., Grijalva E. (2010), 'It Is Developmental Me, Not Generation Me: Developmental Changes Are More Important Than Generational Changes in Narcissism – Commentary on Trzesniewski & Donnellan (2010)', 5(1) *Perspectives on Psychological Science*, 97–102.

Ross S., Savage L. (eds) (2013), *Public Sector Unions in the Age of Austerity*, Black Point, Nova Scotia: Fernwood Publishing.

Schachter H.L. (2002), 'Administrative Culture and Metaphor Change', 12(1) *International Review of Sociology*, 89–92.

Schedler K., Proeller I. (2007), 'Public Management as a Cultural Phenomenon. Revitalizing Societal Culture in International Public Management Research', in Schedler K., Proeller I. (eds), *Cultural Aspects of Public Management Reform (Research in Public Policy Analysis and Management, Vol. 16)*, Bingley: Emerald Group Publishing Limited, 3–28.

Schein E.H. (2010), *Organizational Culture and Leadership*, 4th edition, San Francisco: Jossey-Bass.

Schröter E. (2007), 'Chapter 12 Deconstructing Administrative Culture: Exploring the Relationship Between Cultural Patterns and Public Sector Change in the UK and Germany', in Schedler K.,

Proeller I. (eds), *Cultural Aspects of Public Management Reform (Research in Public Policy Analysis and Management, Vol. 16)*, Bingley: Emerald Group Publishing Limited, 299–322.

Seidemann I., Weißmüller K.S. (2024), 'Conceptual Foundations of Workforce Homogeneity in the Public Sector. Insights from a Systematic Review on Causes, Consequences, and Blind Spots', 26(2) *Public Management Review*, 334–356.

Simon H.A. (1997), *Administrative Behavior. A Study of Decision-Making Processes in Administrative Organizations*, 4th edition, New York: Free Press.

Sommermann K.-P. (2013), *Towards a Common European Administrative Culture?*, The Jean Monnet Center for International and Regional Economic Law & Justice, 28/13 Jean Monnet Working Paper.

Statistisches Bundesamt (Destatis) (2023), *Finanzen und Steuern: Personal des öffentlichen Dienstes*, Fachserie 14, Reihe 6, www.destatis.de/DE/Themen/Staat/Oeffentlicher-Dienst/Publikationen/Downloads-Oeffentlicher-Dienst/personal-oeffentlicher-dienst-2140600217004.pdf?__blob=publicationFile.

van der Meer F.M., Steen T., Wille A. (2015), 'Civil Service Systems in Western Europe: A Comparative Analysis', in van der Meer F.M., Raadschelders J.C.N., Toonen T.A.J. (eds), *Comparative Civil Service Systems in the 21st Century*, London: Palgrave Macmillan, 38–56.

van Maanen J.E., Schein E.H. (1979), 'Toward a Theory of Organizational Socialization', in Staw B.M. (ed), *Research in Organizational Behavior*, Greenwich, CT: JAI Press, 209–264.

Vogel R., Werkmeister L. (2021), 'What Is Public about Public Leadership? Exploring Implicit Public Leadership Theories', 31(1) *Journal of Public Administration Research and Theory*, 166–183.

Weibel A., Rost K., Osterloh M. (2010), 'Pay for Performance in the Public Sector – Benefits and (Hidden) Costs', 20(2) *Journal of Public Administration Research and Theory*, 387–412.

Weißmüller K.S. (2019), *Risk in Public Private Partnerships: Behavioral Experiments on Risk Preference, Risk Perception, and Risk Participation*, Doctoral dissertation, https://ediss.sub.uni-hamburg.de/handle/ediss/8556.

Weißmüller K.S. (2022), 'Publicness and Micro-Level Risk Behaviour: Experimental Evidence on Stereotypical Discounting Behaviour', 24(4) *Public Management Review*, 601–630.

Weißmüller K.S., Bouwman R., Vogel R. (2023), 'Satisficing or Maximizing in Public–Private Partnerships? A Laboratory Experiment on Strategic Bargaining', 25(7) *Public Management Review*, 1282–1308.

Weißmüller K.S., De Waele L., van Witteloostuijn A. (2022), 'Public Service Motivation and Prosocial Rule-Breaking: An International Vignettes Study in Belgium, Germany, and the Netherlands', 42(2) *Review of Public Personnel Administration*, 258–286.

Weißmüller K.S., Künzler P. (2021), 'Thema: Netzwerke als hybride Organisationsform', in Ritz A., Blankart C.R., Jacobs C.D., Lienhard A., Radulescu D., Sager F. (eds), *Praxisfälle Public Management*, Wiesbaden: Springer Fachmedien Wiesbaden, 441–449.

Weske U., Ritz A., Schott C., Neumann O. (2020), 'Attracting Future Civil Servants with Public Values? An Experimental Study on Employer Branding', 23(5) *International Public Management Journal*, 677–695.

37 Common European Anti-corruption Standards for Civil Servants

Albrecht Weber

I. Introduction

Anti-corruption policy is an essential element of a state based on the rule of law. It not only covers the relationship between private persons and private entities or enterprises but is mainly directed against the state administration and its public officials or – in a narrower sense – civil servants.

Public administration in the three branches of statehood (the executive, legislative, and judiciary) must respect and safeguard the impartiality and objectivity of the state in its external acts concerning the citizen or private entities. This is all the more necessary if it concerns the activity of the public servant in the governmental or executive administration, where neutrality, impartiality and objectivity are necessary premises of a fair and neutral administration. Hence it comes as no surprise that anti-corruption policies play an important part in European and national legislation. In order to comply with the general aim and framework of this book, we cannot deal with the complexity of corruption in the civil service from the perspective of the political sciences of government.[1] A holistic view of corruption as a historical, economic, political, psychological, and criminological phenomenon would require a broad focus from different scientific disciplines and would have to include acts of corruption in the legislative (e.g. bribery of members of parliament and granting of advantages) as well as the judiciary (e.g. bribery of judges and promises of advantages), without which corruption cannot be understood.[2]

Neither we can extend the ambit to a comparative analysis of corruption in international organisations nor institutions or countries outside the Council of Europe (CoE). But even here we will mainly focus on some relevant countries which have been the subject of the national chapters in this book.

In order to better delimit the subject of our comparative approach we will first focus on the personal scope of the persons involved; then circumscribe the notion of corruption as it is used in this chapter; describe the impact of international law measures on national anti-corruption policies as well as the impact of the European agenda (CoE; EU), insofar as these influence national anti-corruption policies, directly or indirectly, and contribute to general common standards of administrative or criminal anti-corruption law; and

1 See more at Johnston (2005); Rose-Ackerman and Palifka (2016); Rothstein (2011); Sampford et al. (2006); Claussen and Ostendorf (2002).

2 For a comprehensive view, see Graeff and Grieger (2012), p. 207; Borkenstein (2015), p. 18.

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lastly, compare the main instruments of existing disciplinary regimes and the criminal law regimes.

II. Public Service, Civil Service

We will use the somewhat broader term "public service" here, since "corruption" in particular goes beyond the classic area of sovereign-executive administration and not only covers the areas of the legislature and judiciary but reaches far into the private-social sphere. It is no coincidence that the European Union is also concerned with the phenomenon of corruption in the private sector and is one of the few international organisations to have initiated the setting of standards in this area.[3] However, corruption in the social-private sphere ("private-to-private corruption") is excluded for thematic reasons, insofar as it is not directly related to the relationship between private and public administration. Such an investigation would go beyond the scope of this contribution, which aims to deal with the fight against corruption in Europe in the public administration. Nor does it deal with corruption in legislation and the judiciary, as they are each subject to special rules of business, service and criminal law, which would fall beyond the scope of a brief comparative analysis of about ten European countries. In the present framework of the search for common basic standards in the fight against corruption in the civil service, the focus should be on acts or omissions by public officials that violate legal or ethical rules for their own benefit (or that of a third party). The narrower term of "civil service" in the executive branch would also have to be understood broadly here, to encompass not only the ministerial administration, but also independent authorities at central, regional and local levels.[4] If the administration acts in a private-sector form (private-sector administration), the corruption and transactions of functionaries, which are equivalent to those of public officials if they were carried out in a sovereign manner, must be included for a holistic view.

III. What Is "Corruption" in Public Administration?

There is agreement that there is no uniform concept of corruption for the various subdisciplines addressed,[5] and such a concept probably cannot exist. In the present context, it is not so much a question of the frequently used term "political corruption", which, as a term related to the common good, is also subject to changing perceptions and is understood as a violation of established rules for obtaining private advantages.[6] Of the theories represented in political science, namely "public office-centred", "public market-centred", and "public interest-centred", the first should suffice for our analysis; and the definition used by Nye,[7] of corruption as "behaviour which deviates from the formal duties of a public role because of private regarding (personal, close family, private clique) pecuniary

3 Wolf (2014), p. 115; Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192.

4 See *Defining the Civil Service: Towards a Better Understanding of the Nature of Civil Service Systems in Europe* by A. Krzywoń in this volume; see also the wide notion of public officials in the "Model Code of Conduct for Public Officials" (Articles 1 and 2) in CoE, Recommendation R(2000)10 of 11 May 2000 of the Committee of Ministers to Member States on codes of conduct for public officials.

5 Borkenstein (2015), p. 18.

6 Wolf (2014), pp. 16 f.

7 Nye (1967); quoted at Wolf (2014), p. 18.

or status gains; or violates rules against the exercise of certain types of private regarding influence", should suffice for our definition, if one limits the function of the "public role" in the sense described previously to "public officials". Corruption is also described more vividly in the definition of the World Bank: "the abuse of public office for private gain",[8] or in that of Transparency International: "abuse of entrusted power for private benefit or advantage".[9] In the latter case, a broader, functional concept of corruption would then underlie and sanction actions outside of "public office" and in the social sphere.

It is not the place here to go into the potential vulnerability of administrative models that have been described in research on administrative science;[10] none of the models described there, whether the legal rule with the rational-bureaucratic organisation of rule, traditional rule, charismatic rule, or the "normative images of administration" (autonomous administration, hierarchical administration, cooperative administration, responsive administration) are secured against corruption per se;[11] it is better not to orient oneself to a specific model, but rather to pay attention to the inherent weaknesses in each case and to examine anti-corruption measures on a case-by-case basis. On the other hand, it seems to make sense to identify the main causes that could provide the basic principles for a systemic fight against corruption in public administration. But even here, apart from the general uncertainty about a convincing explanation of corruption, which could be generalised,[12] only additional elements are recognisable, which have an effect on the overall social as well as individual level.[13] On the overall national, regional as well as local level, some key components are the framework conditions for the recruitment and promotion of civil servants, organisational structures (individual decision-makers or teamwork), discretionary powers, normative regulatory density, and political influence of the parties. Weakly developed control mechanisms as well as psychological factors (e.g. influence; money, too low esteem) are additional clues.[14]

In the following, the focus will be on the granting and acceptance of advantages, as well as bribery and corruption in the public service, which violates criminal and civil service law norms, but can also include the abuse of an official activity in order to obtain financial or other advantages for oneself or third parties.[15] The Oxford English Dictionary defines corruption as "perversion or destruction of integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, especially in a state, public corporation etc.", whereby the term "corrupt" is further specified adjectivally as well as verbally, and in any case is not limited to duties in the public service.[16]

Other aspects such as "hospitality", corruption towards foreign public officials, and the protection of whistle-blowers, must be dealt with separately.

8 World Bank (2020), *Anticorruption Fact Sheet* of 19 February 2020, www.worldbank.org/en/news/factsheet/2020/02/19/anticorruption-fact-sheet.

9 Transparency International (2013), *Annual Report 2013*, p. 3, www.transparency.org/files/content/ourorganisation/2013_TI-S_ImplementationReport_EN.PDF.

10 Detailed in Wolf (2014), p. 74.

11 For detailed evidence, see Wolf (2014), p. 71.

12 Wolf quotes here Dölling (2007), p. 31: "A generally accepted differentiated and empirically based theory to explain corruptive behaviour does not exist"; see Dölling (2007), p. 28.

13 Wolf (2014), p. 28.

14 On this in more detail Wolf (2014), p. 28; on the earlier situation in Germany, see Arnim (2007), especially pp. 59, 81, 151 and 177; Borkenstein (2015), p. 30.

15 Borkenstein (2015), p. 19.

16 See more at Nicholls et al. (2006), p. 2.

IV. International Instruments Relating to the Anti-Corruption Policies of Public Officials

International treaties or soft law practices that have an influence on national standard-setting and thus influence the Common European Standards can only be briefly outlined here.[17]

Within the United Nations, the Convention against Corruption, which was negotiated in 2000–2003, is the central legal instrument.[18] The Convention does not define corruption, but obliges states to take legal measures to prevent or combat it, including

> bribery, embezzlement, misappropriation or other diversion of property of public officials, trading in influence, abuse of functions, illicit enrichment, bribery and embezzlement in the private sector money laundering, concealment of property obtained as a result of those offences, and obstruction of justice.[19]

The aim is, among other things, "to promote integrity, accountability and proper management of public affairs and public property".[20] Article 7 contains a detailed obligation of states to take measures for the "public Sector" concerning "recruitment, hiring, retention, promotion and retirement of civil servants and where appropriate other non-elected public officials". The Convention thus explicitly includes "public officials" in the broader sense in its personal scope of application; this becomes particularly clear when the Convention calls on states to enact "codes of conduct for public officials" which "shall promote, inter alia, integrity, honesty and responsibility (. . .) in accordance with the fundamental principles of its legal system".[21] The Convention even includes anti-corruption measures in the private sector, but it has weaknesses due to the lack of obligations regarding party financing and a monitoring system.[22]

Furthermore, in the international context, the Organisation for Economic Co-operation and Development (OECD) the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 should be mentioned, as it led, under pressure from the USA, to the "soft law" of the earlier recommendation becoming a binding regulation under international law.[23]

V. The European Agenda

1. The Council of Europe

Already in 1997, the Council of Ministers of the CoE adopted 20 "guiding principles for the fight against corruption",[24] which deal with the prevention, investigation, prosecution,

17 See, in particular, the contributions in Wolf and Schmidt-Pfister (2010), pp. 25, 47, and 69; Jakobi (2010), p. 87.
18 United Nations Convention against Corruption of 31 October 2003, United Nation Treaty Series, vol. 2349, p. 91.
19 United Nations Convention against Corruption of 31 October 2003, United Nation Treaty Series, vol. 2349, Articles 13 to 31.
20 United Nations Convention against Corruption of 31 October 2003, United Nation Treaty Series, vol. 2349, Article 1(c) and Article 5, para. 1.
21 United Nations Convention against Corruption of 31 October 2003, United Nation Treaty Series, vol. 2349, Article 8, para. 1.
22 Jakobi (2010), p. 88.
23 OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997; for more details, see Jakobi (2010), p. 93.
24 Resolution (97)24 of the Council of Europe (Committee of Ministers) of 6 November 1997 on the Twenty Guiding Principles for the Fight against Corruption.

and judicial sentencing of corruption offences, accountability and control mechanisms. The core of the CoE's corruption agenda is certainly the Criminal Law Convention on Corruption[25] and the Civil Law Convention on Corruption.[26] The Criminal Law Convention of 1999 assumes a broad personal scope of the term "public official", which includes the terms "official", "officer", "mayor", "minister", or "judge", in accordance with the respective national law.[27] The Convention essentially deals with the punishment of bribery, both "active" and "passive bribery of domestic public officials" (Article 2, paragraph 3), and "bribery of foreign public officials" (Article 5); it also prescribes the criminalisation of "trading in influence", which should largely correspond to the domestic acceptance or promise of advantage (without demanding or inducing an unlawful act).[28] The broad scope of application is illustrated by state obligations regarding active and passive bribery in the private sector of members of parliamentary assemblies, as well as bribery of judges and officials of international courts, which fall beyond the scope of the present work. However, it is critical to note that the Convention offers numerous possibilities for opting out.[29] The Civil Law Convention of the same year is the only convention so far to contain a definition of the scope of application (Article 2), which is directed at a "bribe or any other undue advantage or prospect", which "distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof" and thus covers both bribery and the acceptance of advantages in the public and private sectors. This Convention thus standardises obligations for damage, liability, state responsibility, negligence, accounts and audits and contains – as already in the Criminal Law Convention – above all a monitoring mechanism for the Group of States against Corruption (GRECO), which monitors the implementation of the Convention (Article 14), to which non-members (such as the EU or USA) can also belong;[30] the monitoring system is considered to be relatively effective.[31]

Furthermore, the Committee of Ministers issued a number of soft law instruments of which Recommendation (2000/10) on codes of conducts for public officials[32] and the "Guidelines on public ethics"[33] are the most relevant in our context.

The Recommendation on the "codes of conduct" aims for standards of integrity and conduct to be observed by public officials (Article 4) and requires the latter to act in a politically neutral manner, to serve loyally the constitutional, local, and regional authorities, to be honest, impartial and efficient, and to perform the duties with skill, fairness, and understanding with sole regard to the public interest and circumstances of the case (Article 5). The code intends to regulate conflicts of private interests with the public position; the official should not take advantage of his or her position for private interests and

25 Criminal Law Convention on Corruption, ETS no. 173 of 27 January 1999; ratified by 47 countries.

26 Civil Law Convention on Corruption, ETS no. 174 of 4 September 1999; ratified by 35 countries.

27 Article 1: "use of terms"; this also speaks in favour of a further definition in the present context.

28 Article 12: "offence (. . .) when committed intentionally, the promising, giving or offering, directly or indirectly, of any advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person".

29 Wolf (2014), p. 110.

30 See more at Jakobi (2010), p. 98.

31 Wolf (2014), p. 110.

32 Recommendation R (2000)10 of the Committee of Ministers to Member States on codes of conduct for public officials.

33 Guidelines of the Committee of Ministers of the Council of Europe on public ethics, adopted by the Committee of Ministers on 11 March 2020, at the 1370th meeting of the Ministers' Deputies, European Committee on Democracy and Governance (CDDG), CM(2020)27-addfinal.

should make the conflict transparent (Articles 8, 13, 14–15); the public official should report if it is felt that he or she is being required to act in a way that is unlawful, improper or unethical (Article 12), not impair the confidence of the public by political activities contrary to his or her general tasks (Article 16); it circumscribes the conditions for accepting gifts (Article 18) and reacting to improper offers (Article 19); the official should not be susceptible to the influence of others (Article 20), and not misuse his or her official position or disclose information held by public authorities (Article 21, 22). Further rules concern public and official resources, integrity checking, and supervisory accountability (Articles 32–28), which are complementary relevant elements for a proper administration. The "Guidelines of the Committee of Ministers on public ethics"[34] provide for a comprehensive and effective framework on public ethics, where the most relevant principles in our context are legality, honesty, objectivity, accountability, transparency, and respect.[35] It focuses on the practical implementation of ethical standards and contains standards also referring to the behaviour of public officials in the field of corruption.[36]

2. The European Union

The fight against corruption has played an increasingly important role in the EU since the mid-1990s, which is also linked to the fight against organised crime, money laundering and the principle of good governance.

The best known is certainly the Convention on the Protection of the European Communities' Financial Interests of 1995 based on Part III of the Treaty on European Union (TEU),[37] which was supplemented by two protocols of 1996 and 1997. It mainly concerns the protection of the Union's financial interests against fraud, passive corruption, money laundering, the criminal liability of legal persons, and confiscation.[38] As an intergovernmental agreement, it does not have a direct effect on national law, but it does contain sanction potential through implementation in state law, such as exclusion from receiving public benefits or aids or judicial supervision,[39] and can thus also influence the Common Standard.

More important in our context is the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the

34 Guidelines of the Committee of Ministers of the Council of Europe on public ethics, adopted by the Committee of Ministers on 11 March 2020, at the 1370th meeting of the Ministers' Deputies, European Committee on Democracy and Governance (CDDG), CM(2020)27-addfinal.

35 Guidelines of the Committee of Ministers of the Council of Europe on public ethics, adopted by the Committee of Ministers on 11 March 2020, at the 1370th meeting of the Ministers' Deputies, European Committee on Democracy and Governance (CDDG), CM(2020)27-addfinal, Section D: "The principles of public ethics".

36 Guidelines of the Committee of Ministers of the Council of Europe on public ethics, adopted by the Committee of Ministers on 11 March 2020, at the 1370th meeting of the Ministers' Deputies, European Committee on Democracy and Governance (CDDG), CM(2020)27-addfinal, Section E: "A public ethics framework"; Section F: "Components"; and Section G: "Addressing shortcomings".

37 In force since 17 October 2002; originally based on Article K.3 (Title VI TEU according to the Maastricht Treaty), OJ C 316 of 27 November 1995, p. 49.

38 Articles 1 to 5 of the Second Protocol drawn up on the basis of Article K 3 of the TEU to the Convention on the protection of the European Communities' financial interests, OJ C 221 of 19 July 1997, p. 12.

39 Articles 1 to 5 of the Second Protocol drawn up on the basis of Article K 3 of the TEU to the Convention on the protection of the European Communities' financial interests, OJ C 221 of 19 July 1997, Article 4.

European Union adopted by the Council on 26 May 1997.[40] It includes both "national officials" and "community officials" as its personal scope of application; the former term is noticeably narrower than in the CoE Convention, as it only includes "officials" or "public officers";[41] however, it is broader than the term "civil servant", which incidentally – as far as can be seen – does not appear in any of the Union's legal acts. The agreement aims, among other things, to combat active and passive corruption, to ensure effective criminal prosecution and enforce the criminal liability of company directors.[42]

Since 2021 the EU budget contains a general regime of conditionality for breaches of the rule of law (Regulation 2020/2092).[43] On the basis of Article 223, paragraph 1 TEU, the EU (Commission and Council) can react to the breaches of the rule of law of governmental entities which include the principles and values contained in Article 2 TEU.[44] This is the case for example if the proper functioning of the authorities carrying out financial control, monitoring and audit, as well as effective and transparent financial management and accountability, is threatened; and if the prevention and sanctioning of fraud and corruption relating to the implementation of the budget or effective judicial review by independent courts is endangered (Article 4, paragraphs 2(b), 2(c), and 2(e)). The Regulation enables a suspension or termination of payments of legal commitments of the budget and stipulates detailed rules concerning appropriate measures, proportionality and information for the benefit of recipients (Article 5); it regulates the procedure if the Commission finds reasonable grounds for concluding that the conditions of the adoption of measures have been fulfilled; it comprises inter alia written notification to the Member State concerned, taking into account the relevant facts from official sources, dialogue with the respective Member State on the information received, and proposing remedial measures by an implementing decision to the Council if the Member State failed to propose adequate measures; the Council can approve or amend the decision with a qualified majority (Article 6, paragraphs 1–11).

The Commission activated this mechanism for the first time against Hungary in November 2022.[45] While the Commission principally agreed to the Recovery and Resilience Plan proposed by Hungary, the Commission upheld its initial proposal that all measures were not yet fulfilled, especially relating to the setting up of an independent Integrity Authority and Anti-Corruption Task Force, public procurement, rules of conflict of interests, audit and control requirements and measures relating to judicial independence (National Judicial Council, Supreme Court, Constitutional Court). The proposal

40 Convention drawn up on the basis of Article K.3 of the TEU on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 of 25 June 1997, p. 2.

41 Convention drawn up on the basis of Article K.3 of the TEU on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 of 25 June 1997, Article 1(c).

42 Convention drawn up on the basis of Article K.3 of the TEU on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 of 25 June 1997, Articles 2 to 7.

43 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 4331.

44 Principles of legality, legal certainty, prohibition of arbitrariness, effective judicial protection, separation of powers and non-discrimination and equality before the law.

45 European Commission, Press release of 30 November 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273.

of cutting 65% of the budgetary commitments was reduced to 55% by the Council of Ministers.[46]

According to the Anti-Corruption Report published by the EU Commission for the one and only time in 2014, the EU Commission integrated the anti-corruption policy of the Member States into the "rule of law reports" adopted since 2020. They regularly include – alongside the judiciary, media pluralism, and the separation of powers/transparency of legislation – as a second pillar the measures of the anti-corruption policy of all Member States in a holistic approach, which includes the "old members".[47]

VI. Anti-corruption Policy Instruments

In the following sections we will compare the most relevant policy instruments, mainly concerning the criminal sanctions for corrupt practices, look briefly at the codes of conduct regarding ethical standards concerning the misuse of public power, and lastly select some disciplinary regimes for civil servants, as far as they are identifiable. A survey on disciplinary sanctions concerning the three "categories" of civil servants, public officials in a wider sense, and contract employees would by far exceed the scope of this chapter.

1. Sanctions in Criminal Law

1.1. Granting and Taking Bribes in the Public Sector ("Active and Passive Bribery")

As far as can be ascertained, all Member States of the CoE sanction in one form or another the "active" and "passive bribery" of public officials.

The German Criminal Code (*Strafgesetzbuch*, StGB)[48] e.g. contains a special section (§§ 331–338 StGB) on acts of bribery comprising several components. Bribery is committed by anyone who tries to corrupt a public official: the notion of public official is broad and comprises (1) civil servants and judges, (2) a person who otherwise carries out public official functions, or (3) has been appointed to serve with public authority or another agency, or has been commissioned to perform public administrative services regardless of the organisational form.[49] This would seem to correspond with the wide functional notion of the public official outlined previously.

The main distinction in German Law, to be found in other jurisdictions as well, is between offering or taking a bribe defined as offering, promising, granting a benefit to a public official, for the discharge of a (legal) duty (*Vorteilsannahme*: §§ 333, 331 StGB), and offering or taking a bribe defined as an incentive to perform an act in violation of one's official duty (*Bestechung*: § 334 StGB; i.e. illegally). The sanctions in the first case may amount to as much as three years imprisonment or a fine; in the latter case from three months up to five years.

46 Council of the EU, Press release of 12 December 2022, www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/.

47 See e.g. European Commission (2020).

48 The German Criminal Code in the version promulgated on 13 November 1998 (BGBl. I p. 3322), as last amended by Article 4 of the Act of 4 December 2022 (BGBl. I p. 2146).

49 For the following quotations see the general overview at www.globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world/. For Germany see Lohner and Behr (2017).

The distinction can frequently – but not always – be found in Austria[50] (also sanctioning "forbidden intervention");[51] Belgium (active and passive bribery including a "lawful" or an "unfair act" or a "crime and misdemeanour" including so-called influence peddling);[52] France (active and passive bribery);[53] Italy[54] (including extortion of a public official punishing the public official who, abusing his or her powers, forces someone to give or promise money or other benefits unduly to him or her, or a third party[55] and after the last reform "unlawful inducement to give or promise money or other benefits");[56] Spain (*cohecho*);[57] Switzerland (active and passive bribery);[58] Poland;[59] and Hungary (active and passive bribery only if an illegal act is performed or promised).[60] Turkey apparently sanctions only active and passive bribery as "unlawful" acts (Turkish Criminal Code), but also the Law on Ethics Board for Public Officials and the "Ethics regulations" may apply;[61] in the Ukraine the sanctions concern – since a reform in 2014 – the provision of proposition of "unlawful benefits" and comprises active and passive granting or taking.[62]

Companies in Germany as such are not (yet) criminally liable but representatives may be sanctionable if they commit a criminal or administrative offense and the company fails to fulfil a duty or makes profits in an illegal manner.[63] In Spain company liability was introduced in 2010;[64] while in Hungary legal entities are also bound by the norms sanctioning individuals.[65]

2. Corruption of Foreign Public Officials

There are two modes for sanctioning the corruption of foreign public officials: either the criminal law norm also (tacitly) covers the corruption of foreign public officials, or it expressly states criminal liability. Both types can be found in CoE countries. Countries

50 Granting of benefits: §§ 305 and 307a StGB; active/passive bribery: §§ 304 and 307 StGB; see Krakow and Götz (2017).
51 See § 308 StGB; see also Krakow and Götz (2017).
52 Lohner and Behr (2017).
53 Lasry et al. (2017).
54 Articles 318 and 319 of the Italian Criminal Code of 19 October 1930 (*Codice Penale*); see Giovannelli et al. (2017).
55 If the private party is forced by the official see Article 317 of the Italian Criminal Code (n. 54).
56 Article 319 of the Italian Criminal Code (n. 54).
57 Articles 419 to 427 of the Spanish Criminal Code of 23 November 1995 (*Código Penal*).
58 Berni and Monnier (2017).
59 Articles 228 to 230a of the Polish Criminal Code of 6 June 1997 (*Kodeks karny*); see Nozykowski and Krzymowski (2017).
60 Article 293, 298 and 300 of the Hungarian Criminal Code of 25 June 2012 (*évi C. törvény a Büntető Törvénykönyvről*).
61 Article 252 of the Turkish Criminal Code of 26 September 2004 (*Türk Ceza Kanunu*); see Aydin et al. (2017).
62 Chapter XIV-1 of the Criminal Code of Ukraine of 5 April 2001 (*Кримінальний кодекс України*); see Siusel and Marchuk (2017).
63 See § 30 of the Act on Regulatory Offences of 24 May 1968 (*Gesetz über Ordnungswidrigkeiten*) in the version of 19 February 1987 (BGBl. 1987 I, p. 602), last amended by law of 5 October 2021 (BGBl. 2021 I, p. 4607); see Lohner and Behr (2017).
64 Jimenéz-Gusi et al. (2017).
65 Hegymegi-Barakonyi and Puskas (2017).

which belong to the first type are e.g. Austria, Netherlands,[66] Spain,[67] and Poland;[68] while to the second type belong e.g. Belgium,[69] Czech Republic,[70] France (which sanctions the active and passive corruption of foreign public officials and of international organisations and extends the prosecutor's flexibility to offences committed by French nationals abroad and non-nationals inside the territory),[71] the UK (Bribery Act),[72] Germany (where special laws on corruption against EU officials and of international organisations have been enacted),[73] Italy,[74] Hungary,[75] Switzerland,[76] Turkey,[77] and Ukraine.[78]

3. *Facilitation Payments*

Facilitation payments ("bribe payments") for petty officials in order to induce them to perform a lawful duty they would otherwise decline to perform,[79] are clearly covered in Common law by the notion of bribery.[80] There are different approaches to facilitation payments in accordance with the administrative-cultural context; e.g. in Austria they are illegal and not covered by the "exceptionary rule" of "low value or customary in a certain place";[81] in Germany there is still no specific penalisation to date, but facilitation payments may contravene specific duties of the statutes of civil servants.[82]

4. *Hospitality and Gifts*

Hospitality and gifts from a private person or a representative of an enterprise to a public official are a very sensitive issue, since they are on the borderline between friendliness, amity and inducement for a favour or benefit for the "influencer". There are principally three modalities for handling these issues:

66 Article 177 of the Penal Code of the Netherlands of 3 March 1881 (*Wetboek van Strafrecht*).
67 Article 477 of the Spanish Criminal Code (n. 57).
68 Article 228 of the Polish Criminal Code (n. 60).
69 Article 250 of the Criminal Code of the Kingdom of Belgium of 8 June 1867 (*Code Pénal*).
70 Article 331 et seq. of the Criminal Code of the Czech Republic of 29 November 1961 (*Trestní zákon*).
71 Articles 435–1, 435–3, 435–6-2 of the French Criminal Code (*Code Pénal*).
72 Nicholls et al. (2006).
73 Law on the Protocol of 27 September 1996 to the Convention on the Protection of the European Communities' Financial Interests (EU Bribery Act) of 10 September 1998 (*Gesetz zu dem Protokoll vom 27. September 1996 zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, EU-Bestechungsgesetz*, BGBl. 1998 II, p. 2340) and Law on Combating International Bribery of 10 September 1998 (*Gesetz zur Bekämpfung internationaler Bestechung – IntBestG,* BGBl. 1998 II, p. 2327).
74 Article 322 of the Italian Criminal Code (n. 54).
75 Article 293, para. 3 and Article 294, para. 4 of the Hungarian Criminal Code (n. 61).
76 Article 322 of the Swiss Code of Criminal Procedure of 5 October 2007 (*Code de procédure pénale suisse*).
77 Article 252 of the Turkish Criminal Code (n. 62).
78 Chapter XVII of the Criminal Code of Ukraine (n. 63).
79 See the definition at Nicholls et al. (2006).
80 Nicholls et al. (2006).
81 Krakow and Götz (2017). There is certainly a connection with the delict of embezzlement.
82 § 42 Law governing the Status of Civil Servants in the Länder – Civil Servants Status Act of 17 June 2008 (*Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern, Beamtenstatusgesetz – BeamtStG,* BGBl. 2008 I, p. 1010), last amended by Act of 28 June 2021 (BGBl. 2021 I, p. 2250).

1. A state may expressly sanction hospitality benefits or gifts under the notion of bribery or offering or granting benefits in its Criminal Code; e.g. in Austria if it leads to "undue influence" exempting low expenses.[83]
2. States may not expressly sanction these acts but case law may concretise the notion of hospitality or gifts, e.g. in Spain or Hungary, case law condemns such acts if they are "not socially acceptable" and the "hospitality offered or received could affect the judgment of the receiver" (Spain) or it "may presumably affect the acts of the receiver" (Hungary); there is evidently a wide scope of discretion of the part of the actors and a wide margin of appreciation on the side of the courts.
3. A third and apparently increasingly popular model is the sanctioning by either a code of conduct and/or statutory disciplinary regimes established by the legislator, or executive by-laws or self-binding rules.

Examples of disciplinary regimes are found for example in Germany, where the courts had developed, in the absence of a criminal sanctions, strict interpretations of criminal law until the BeamtStG expressly regulated principles of task performance; accountability and sanctions for hospitalities and gifts;[84] Poland (Act on the restrictions on Public Officials Conducting Business; Code of Ethics of Civil Servants prohibiting from accepting financial or personal benefits),[85] Switzerland (Federal Ordinance on the Personnel of the Confederation),[86] or in the UK where, based on a Constitutional Reform of the Government Act, the Civil Service Management Code of 1996 described the role of the civil service, "with integrity, honesty, impartiality and objectivity" being concretized in principles such as the following: "A civil servant must not take part in any political or public activity and civil servants must not misuse their official position or information [. . .] to further their private interests or those of others."[87] The role and function of code of conducts will not be discussed here, but note that ethical rules (soft law) may also influence the behaviour of officials if the administrative environment is not "corrupt" and binding codes of conducts – like the one of the UK – explicitly provide rules and duties for the public official or civil servant.

5. Whistle-blowing

The protection of the whistle-blower is an eminent means of detecting the corrupt practices of public officials and must be balanced against the public interest of security or *ordre public*. In the UK the protection is contained in the Public Interest Disclosure Act of 1998, which protects those who raise concerns about "malpractice, including corruption, in their place of work and seek to give every incentive to employers and organisations to address the problem";[88] in the UK it covers all employees – whether in the public, private

83 See Krakow and Götz (2017); § 305 StGB.
84 See §§ 34, 36, 42 and 47 BeamtStG (n. 83).
85 Nozykowski and Krzymowski (2017).
86 Article 93 of the Federal Ordinance on the Personnel of the Confederation of 3 July 2001 (*Ordonnance sur le personnel de la Confédération*).
87 Nicholls et al. (2006), see the Civil Service Management Code, last updated 9 November 2016, www.gov.uk/government/publications/civil-servants-terms-and-conditions.
88 Nicholls et al. (2006).

or voluntary sectors; it is primarily directed to the employer's attention and public disclosure is only allowed if other solutions fail.[89]

As the regulation of whistle-blowing either by criminal law or code of ethics is rather fragmented, in 2019 the EU issued the "Whistle-blower Directive" to be implemented into national law by 17 December 2021.[90]

The personal scope comprises persons working in the public and private sector (Article 4); the material scope covers inter alia public procurement, financial services products, transport safety; protection of the environment and nuclear safety; food and animal health, public health; consumer protection; protection of personal data et al. The procedure follows in principle the procedure stipulated in the UK Act, firstly by an internal report (Articles 7–9), and secondly by an obligation to establish external reporting channels (Articles 10–14); it further regulates "public disclosure" details (Articles 15–19). At the end of 2021, the Directive had only been transposed by five Member States (Denmark, Sweden, Portugal, Malta, and Lithuania); in 16 countries, the legislation was delayed.[91]

VII. Disciplinary Regimes and Codes of Ethics

In the previous section we covered the relevance of norms of ethical behaviour applicable to public officials in various countries. As this overlaps to a great extent with the chapter on ethical standards for the civil service,[92] the author refrains from going into further details.

However, it might be interesting to mention briefly the debate in the UK surrounding the Committee of Standards in Public Life, which proposed a Civil Service Code, published under the authority of the Civil Service Order in Council 1995, and which was formally incorporated in the aforementioned Civil Servant Management Code of 1996.[93] Civil servants must comply with the ethical standards of particular professions and must not misuse their official position or information acquired in the course of their duties to further their private interests or those of others, and they should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgment or integrity.[94]

In Germany, the aforementioned BeamtStG regulates the basic duties. Section 33, paragraph 1 states emphatically: "Public officials serve the whole nation, not a party." The obligation to be bound by the orders of their superiors, the personal liability for the lawfulness of their professional acts, the obligation of confidentiality – with immanent exceptions – are all laid down in the statute, which contains, as was mentioned previously, the express prohibition on the public official proposing, accepting promises or any gifts or benefits; and any exceptions need the approval of the public employer (Section 42 BeamtStG).[95]

89 Nicholls et al. (2006).

90 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305/17.

91 For the implementation, see EU Whistleblowing Monitor, www.whistleblowingmonitor.eu.

92 See *Ethical Standards for the Civil Service in Europe: Substitutes for or Complements of Legal Rules?* by A. Jacquemet-Gauché in this volume.

93 For more details see Nicholls et al. (2006).

94 Civil Service Management Code (n. 88), chapter 4.1.8, annex A.

95 See n. 83.

VIII. Rankings and Monitoring Mechanisms

The amelioration of the normative side of anti-corruption policies (ACP) is but one side of a more effective fight against corruption in public administration. The continuous and strict supervision of ACP by independent national institutions or agencies is as important as improved legislative interventions. The Report of Transparency International 2021 notes among its four main proposals under the second title, "Restore and strengthen institutional checks on power", the following: "Public oversight bodies such as anti-corruption agencies and supreme audit institutions need to be independent, well-resourced and empowered to detect and sanction wrongdoing. Parliaments and the courts should also be vigilant in preventing executive overreach."[96]

Western Europe and the European Union reached an average score of 66/100 (out of 100 points); among the top ten worldwide are Denmark, Finland, New Zealand, Norway, Singapore, Sweden, Switzerland, Netherlands, Luxemburg, and Germany, in the lower half of the EU countries (with under 50/100) are Croatia, Greece, Romania, and Bulgaria.[97] A number of countries which strive for EU membership, (e.g. Serbia, Turkey, Ukraine, Moldova, Montenegro) are also under 50/100 points.[98]

The methodological approach of Transparency International, which is correlated with a statistical assessment of the Joint Research Centre of the EU Commission in 2017[99] cannot be evaluated here, but the selection of the 13 most reputable sources (e.g. Freedom House, World Bank, World Economic Forum Executive Opinion Survey, Bertelsmann Stiftung)[100] gives an assurance for a solid evaluative basis.

In the EU we can further rely on the Rule of Law Reports issued by the EU Commission. It would go beyond the scope of this chapter to document all the specific details of deficits in ACP of the respective countries.

Perhaps the most surprising result of the Rule of Law Reports 2021/2022 is the fact that the excellent score of Denmark and the Scandinavian countries is not due to specific supervisory institutions or audit agencies but can largely be attributed to an administrative culture of transparency, accessibility of information, and the respect for the rule of law. Denmark for example has no dedicated ACP or agency but established an Anti-Corruption Forum for coordinating authorities; the low degree of formalisation of anti-corruption rules on ethics, and the low number of regulations to prevent corruption, should be underlined.[101] Those other countries which rank at the top or in the middle of the Consumer Price Index (CPI) generally have the institutional and legal settings "broadly in place" (Austria, Germany, Luxemburg, Belgium, Czechia, Estonia, Latvia, Spain, Ireland, Slovenia, France, Italy, Poland). In France, new anti-corruption institutions have been put in place, like the High Authority for the Transparency of Public Life and the

96 Transparency International (2021), *Corruption Perceptions Index 2021*, p. 5. https://images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf.

97 *Corruption Perceptions Index 2021*, p. 2.

98 *Corruption Perceptions Index 2021*, p. 4; 2/3 of 180 countries are under 50/100 points; the average score in 2021 was 43/100.

99 Alvarez Diaz et al. (2018).

100 Alvarez Diaz et al. (2018), p. 7.

101 See European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Denmark, pp. 7 f., https://commission.europa.eu/system/files/2022-07/14_1_193981_coun_chap_denmark_en.pdf.

French Anti-Corruption Agency.[102] In Italy, an anti-corruption law adopted in 2019 has strengthened the role of the Anti-Corruption Authority in fostering "a corruption prevention culture", and the capacity to detect, investigate and prosecute has been assessed to be very effective, although criminal proceedings are often too lengthy, especially at the appeal level.[103] Lithuania has installed a Special Investigation Service combining policy coordination and preventive competences with investigative powers.[104] In Ireland the Government has committed itself to introducing new anti-corruption and anti-fraud structures and to amending the Criminal Offences Act 2018.[105] Although Poland has an institutional framework in place, structural weaknesses have been identified and main concerns focus on the independence of the main institutions, especially the subordination of the Anti-Corruption Bureau to the executive, and the independence of the judiciary.[106] In Slovenia an autonomous and independent Anti-Corruption Agency exists (Commission for the Prevention of Corruption).[107] Those countries which rank in the perception scheme as highly corrupt are Hungary, Romania, and Bulgaria. In Hungary, deficient control mechanisms and tight interconnections between politics and certain national businesses are conducive to corruption.[108] In Romania the path to reforms has been reopened after the noxious politics of 2017–2019 and a new Anti-Corruption Strategy for 2017–2025 is of high priority; the National Anti-Corruption Directorate has achieved better results; the implementation of Constitutional Court decisions is deficient.[109] In Bulgaria, in response to the Rule of Law Report 2020 a new anti-corruption strategy for the period of 2021–2027 has been approved and an Anti-Corruption Commission has been created; however, doubts on the effectiveness of combating corruption in public administration continue.[110]

102 The law on transparency, the fight against corruption and the modernisation of economic life of 9 December 2016 (*Loi n° 2016–1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique Loi Sapin II*), extended the competence of the High Authority for the Transparency of Public Life and will be in charge of the "revolving doors" practices; see European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in France, pp. 10 f., https://commission.europa.eu/system/files/2022-07/25_1_194023_coun_chap_france_en.pdf.

103 European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Italy, pp. 13 f., https://commission.europa.eu/system/files/2022-07/29_1_194038_coun_chap_italy_en.pdf.

104 European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Lithuania, pp. 9 f., https://commission.europa.eu/system/files/2022-07/35_1_193984_coun_chap_lithuania_en.pdf.

105 European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Ireland, pp. 8 f., https://commission.europa.eu/system/files/2022-07/20_1_194011_coun_chap_ireland_en.pdf.

106 European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Poland, pp. 12 f., https://commission.europa.eu/system/files/2022-07/48_1_194008_coun_chap_poland_en.pdf.

107 European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Slovenia, pp. 9 f., https://commission.europa.eu/system/files/2022-07/54_1_194035_coun_chap_slovenia_en.pdf.

108 European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Hungary, pp. 1 and 10 ff., https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf.

109 European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Romania, pp. 12 f., https://commission.europa.eu/system/files/2022-07/52_1_194026_coun_chap_romania_en.pdf.

110 European Commission, 2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Bulgaria, pp. 1 and 13 ff., https://commission.europa.eu/system/files/2022-07/10_1_193975_coun_chap_bulgaria_en.pdf.

IX. Concluding Remarks

This chapter has illustrated the growing impact of international and supranational law on the anti-corruption policies of Member States. The record of intergovernmental cooperation and supervision within CoE countries is impressive; also the influence of the European Union is remarkable, not only with regard to protecting its own financial assets but also the supervision of anti-corruption policies. As of 2022, the new "conditionality mechanism for breaches of law" integrated into in the EU Budget is a very relevant element of the rule of law. The nexus between a high level of corruption in authoritarian regimes lacking democratic control, freedom of information and expression, freedom of assembly, and judicial protection, has been highlighted repeatedly by Transparency International when explaining the annual CPI, and is also mirrored in some EU countries. This requires a holistic view of anti-corruption as an important element of the implementation of the rule of law, also taking into account the independence of the judiciary, protection of fundamental rights, media pluralism, and a legislative process respecting opposition parties and minorities. Normative comparison of criminal, ethical or disciplinary standards of anti-corruption policies in the public service is one basis for further research in the whole political, economic, and cultural context.

Bibliography

Alvarez Diaz M., Saisana M., Montalto V., Tacao Moura C. (2018), *Corruption Perceptions Index 2017 Statistical Assessment*, Publications Office of the European Union: Luxembourg.

Arnim H.H. von (ed) (2007), *Korruption und Korruptionsbekämpfung. Beiträge auf der 8. Speyerer Demokratietagung vom 27. und 28. Oktober 2005 an der Deutschen Hochschule für Verwaltungswissenschaften Speyer*, Berlin: Duncker & Humblot.

Aydin B., Kokenek S., Serez G. (2017), *Anti-Corruption in Turkey*, www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-turkey.

Berni M., Monnier P. (2017), *Anti-Corruption in Switzerland*, www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-switzerland.

Borkenstein H.-J. (2015), *Korruptionsprävention in der öffentlichen Verwaltung durch Information*, Baden-Baden: Nomos.

Claussen H.R., Ostendorf H. (2002), *Korruption im öffentlichen Dienst: Ein Überblick*, 2nd edition, Berlin, Bonn, München: Heymann.

Dehareng E. (2017), *Anti-Corruption in Belgium*, www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-belgium.

Dölling D. (2007), *Handbuch der Korruptionsprävention: für Wirtschaftsunternehmen und öffentliche Verwaltung*, München: C. H. Beck.

European Commission (2020), *Rule of Law Report: The Rule of Law Situation in the European Union*, 30 September, COM(2020) 580 final, https://commission.europa.eu/publications/2020-rule-law-report-communication-and-country-chapters_en.

European Commission (2022), *Rule of Law Report. Communication and Country Reports of 13 July 2022*, SWD (2022)504 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1658828718680&uri=CELEX%3A52022DC0500.

Giovannelli A., Cursano R., Mancuso E.M. (2017), *Anti-Corruption in Italy*, www.globalcompliancenews.com/anti-corruption/anti-corruption-in-italy.

Graeff P., Grieger J. (eds) (2012), *Was ist Korruption? Begriffe, Grundlagen und Perspektiven gesellschaftlicher Korruptionsforschung*, Baden-Baden: Nomos.

Hegymegi-Barakonyi Z., Puskas J. (2017), *Anti-Corruption in Hungary*, www.globalcompliancenews.com/anti-corruption/anti-corruption-in-hungary-2.

Jakobi A. (2010), 'In Pluribus Unum? The Global Anti-Corruption Agenda and Its Different International Regimes', in Wolf S., Schmidt-Pfister D. (eds), *International Anti-Corruption Regimes in Europe: Between Corruption, Integration, and Culture*, Baden-Baden: Nomos, 87–100.

Jimenéz-Gusi R., Pastor C., Pol D. (2017), *Anti-Corruption in Spain*, www.globalcompliancenews.com/anti-corruption/anti-corruption-in-spain.

Johnston M. (2005), *Syndromes of Corruption: Wealth, Power, and Democracy*, New York: Cambridge University Press.

Krakow G., Götz E. (2017), *Anti-Corruption in Austria*, www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-austria.

Lasry E., Koski S., Guyot-Rechard C. (2017), *Anti-Corruption in France*, www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-france.

Lohner A., Behr N. (2017), *Anti-Corruption in Germany*, www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-germany.

Nicholls C., Daniel T., Polaine M., Hatchard J. (2006), *Corruption and Misuse of Public Office*, Oxford: Oxford University Press.

Nozykowski R., Krzymowski W. (2017), *Anti-Corruption in Poland*, www.globalcompliancenews.com/anti-corruption/anti-corruption-in-poland.

Nye J.S. (1967), 'Corruption and Political Development: A Cost-Benefit Analysis', 61(2) *American Political Science Review*, 417–427.

Rose-Ackerman S., Palifka B. (2016), *Corruption and Government: Causes, Consequences and Reform*, 2nd edition, New York: Cambridge University Press.

Rothstein B. (2011), *The Quality of Government: Corruption, Social Trust, and Inequality in International Perspective*, Chicago: University of Chicago Press.

Sampford C., Shacklock A., Connors C., Galtung F. (2006), *Measuring Corruption*, London: Routledge.

Siusel I., Marchuk M. (2017), *Anti-Corruption in Ukraine*, www.globalcompliancenews.com/anti-corruption/anti-corruption-in-ukraine.

Transparency International (2013), *Annual Report 2013*, www.transparency.org/files/content/ourorganisation/2013_TI-S_ImplementationReport_EN.PDF.

Transparency International (2021), *Corruption Perceptions Index 2021*, https://images.transparencycdn.org/images/CPI2021_Report_EN-web.pdf.

Wolf S. (2014), *Korruption, Antikorruptionspolitik und öffentliche Verwaltung: Einführung und europapolitische Bezüge*, Wiesbaden: Springer VS.

Wolf S., Schmidt-Pfister D. (2010), *International Anti-Corruption Regimes in Europe: Between Corruption, Integration, and Culture*, Baden-Baden: Nomos.

World Bank (2020), *Anticorruption Fact Sheet of 19 February 2020*, www.worldbank.org/en/news/factsheet/2020/02/19/anticorruption-fact-sheet.

38 Europeanisation and the Impact of Deliberative and Participatory Democracy on the Civil Service

*Birgit Peters**

I. Introduction

Deliberative and participatory procedures are part and parcel of European public administration. They should now also form the backbone of European administrative practice, nationally and supranationally. This is to a great extent due to the influence of European law. Today, the European treaties and secondary Union law contain many references to deliberative and participatory administrative procedures and democracy. Though criticised as highly technocratic,[1] European administrative rule-making has often been described as deliberative,[2] and since ratification of the Aarhus Convention by the European Union, European environmental law has become a laboratory of participatory democracy at European and national level.[3] In the legislative domain, there appears to be increasing consensus that modern public administration should build on participatory and deliberative administrative procedures. Today, such procedures strongly influence national administrative practice in Europe.[4]

Despite the obvious impact of European law, many administrators, national and European, are still hesitant or even fail to embrace the democratic potential of deliberative and participatory procedures. Except for France,[5] the overwhelming majority of the country reports in the first part of this book do not highlight deliberative or participatory administrative structures or practice. A similar result transpires from the administrative science literature. This literature confirms that despite existing regulations, the success of deliberative and/or participatory procedures in practice depends vitally on civil service attitudes, administrative structures, management approaches and hierarchies.[6] In implementing deliberative and participatory democracy, administrative tradition and attitudes must appreciate and provide flexibility for the bottom-up approach of participation and deliberation. Deliberative and participatory procedures are successful where civil servants identify with the aim of participation, where they appreciate input from citizens, and where administrative structures promote

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1 Shapiro (2005), p. 348.

2 Joerges and Neyer (1997), pp. 273 f.

3 Lippert (2013), p. 207; Schlacke (2017), pp. 905 f.

4 Kubicek (2014), p. 440.

5 See *Recruitment of Civil Servants and Internal Structure of the Civil Service* by P. Gonod in this volume.

6 Sommermann (2014), p. 606; Bogumil (1999), p. 9.

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organisation of participation and deliberation procedures, as well as financial support.[7] The legal framework therefore plays a determinant role in shaping administrative practice, yet it is not the sole contributing factor.[8]

The present chapter offers some tentative suggestions about how European law may achieve deliberative and participatory potential in the civil service. Some suggestions have already been made. For example, Sommermann argued that emphasis on broader European values, like the rule of law or the right to good administration, could offer a legal framework to facilitate the transformation of administrative practices and traditions.[9] In times where common European values have increasingly come under threat, I contend that the focus should be on clearly defined, individual participatory rights, as well as on rules for organising participation and deliberation, so that civil servants can have a clear view of the necessary scope and depth of participation and deliberation.

This chapter is organised as follows: first I outline the existing state of deliberative and participatory procedures in European administrative law. I then draw on the literature of administrative science to discuss how these procedures help or hamper the implementation of deliberative and participatory democracy in the European civil service. Finally, I outline where and how an additional focus on procedures and individual participatory rights may deepen the evolution of a deliberative and participatory administrative tradition. This is followed by conclusions.

II. Deliberative and Participatory Procedures in European Administrative Law

Deliberative and participative approaches to European administration have been promoted in primary Union law since about the early 1970s, to compensate for the perceived legitimacy deficit of the EU.[10] Today, deliberative and participatory practices and standards are aspects of European democracy and administration,[11] which has the European citizen at its centre.

In this context, participatory procedures can be broadly defined as administrative practices and procedures which are geared to individual citizens taking part in decision-making in matters concerning European law and policies at European and national levels.[12] In turn, deliberative or discursive standards and procedures allow rational discourse on political matters upon a common, informed factual basis.[13] Deliberative practices are a special case of participatory procedures. While participatory decision-making may involve individuals in all possible ways, deliberative or discursive procedures aim at a qualified exchange of arguments and views.[14] As Eriksen explains: “Only deliberation can

7 Migchelbrink and van de Walle (2022), p. 11.
8 Kubicek (2014), p. 454.
9 Sommermann (2014), p. 617.
10 European Commission (2001), p. 7. For the literature, see: Eriksen and Fossum (2000).
11 Schwarze (2005), pp. 99 f.
12 Peters (2020), p. 47; Sartori (1984), p. 97: “Partizipation ‘hat keinen eindeutigen Gehalt als den, dass man, persönlich mitmacht’”.
13 Habermas (1998b), p. 364.
14 Eriksen and Fossum (2000), p. 44.

get political results right, as it entails the act of justifying the results to the people who are bound by them."[15]

Deliberation and participation are commonly understood to contribute to the legitimacy or democratic legitimation of administrative decision-making,[16] as they generate acceptance of the decision[17] or provide procedures for the discourse.[18] Of course, this understanding depends on the practices being perceived as legitimate output for the democratic legitimation and/or legitimacy of EU administrative decisions. This is still disputed.[19] In the next section, I outline how this understanding can be supported by primary and secondary Union law.

1. Legal Foundations of Participatory European Administration in Primary and Secondary Union Law

Several provisions of primary and secondary Union law show deliberative and participatory approaches to EU law and EU administration. Since the debate on the Constitutional Treaty,[20] participatory approaches, still controversial, side-line the concept of representative democracy on which the Union is built. They embody the concept of the informed European citizen that has dominated discussion about the legitimacy of the EU and European law in general.[21]

The concept of the informed European citizen is reflected in various provisions of the Treaty of the European Union (TEU), above all those on democratic principles in Articles 9 to 11 TEU. The concept emerges first and foremost from Article 10, paragraph 3 TEU, which reminds the Union to conclude decisions openly and as close as possible to its citizenry. A further example is Article 296, paragraph 2 of the Treaty of the Functioning of the European Union (TFEU), which requires the Union to provide reasons in its decisions. Article 11 TEU is probably the major commitment of the Union to participatory democracy. In addition to the provisions of transparency and dialogue with civil society,[22] it highlights the direct participation of EU citizens in the legislative decisions of the Union. Article 15, paragraph 3 TFEU adds that citizens have access to documents held by all Union institutions, bodies and agencies. Article 11, paragraph 4 TEU states that every citizen shall have the possibility to participate in the political life of the Union. The provision triggered the adoption of the European citizens' initiative in Regulation

15 Eriksen and Fossum (2000), p. 47.

16 In this sense, the term democratic legitimation describes the immediate legitimation of supranational and State decision-making, which is generated by the individual vote. Legitimacy, on the other hand is generated in additional procedures which lead to individual acceptance of supranational and State decision-making. See Peters (2020), p. 145.

17 Pateman (1970), p. 105.

18 Dryzek (2001), p. 657; Eriksen and Fossum (2000), p. 49.

19 This is still disputed, see the spectrum of views summarised in Achenbach (2014), p. 300 f.; Bogdandy and Bast (2009), pp. 47 f.

20 Bogdandy (2007), pp. 33, 39.

21 Magiera (1987), p. 231.

22 Consolidated Version of the Treaty on European Union (TEU) of 7 June 2016, OJ C 202/1, Article 11, para. 2 TEU. Article 11, para. 2 and Article 15, para. 3 are both justiciable provisions and the Court has interpreted them in a "constitutional and wide democratic perspective", Curtin and Läini-Sandberg (2016), p. 6.

(EU) 211/2011,[23] which allows a minimum of seven EU citizens from seven different Member States of the Union to launch an initiative.[24]

Several other articles of the TEU and TFEU offer evidence of the decision to build the Union not only on Member State and European parliament representatives but on the dual citizenry of Union citizens as citizens of their national States.[25] Article 4, paragraph 2 TEU recognises the constitutional identity of the Member States, and thus a variety of approaches to democratic representation. A similar idea is found in Article 5, paragraph 3 TEU on the subsidiarity principle, which envisages the devolution of decisions to Member States (except in areas of exclusive competence) and the primary competence of Member States and their regional and local entities to administer matters in their primary sphere of competence. The subsidiarity principle is often associated with civil society involvement since it emphasises allocation of decisions to the level closest to the individual citizen.[26] The TEU does not exclude this understanding. The Lisbon Subsidiarity Protocol establishes a consultation process for national parliaments, which can object if they deem that the Union has exceeded its competences in matters of subsidiarity bestowed by the European treaties.[27] The preceding demonstrates the importance of participation and transparency as central elements of European democracy.

Participatory democratic procedures are also proffered by the Charter of Fundamental Rights (CFR), in particular Articles 41 and 47. These rights bring existing provisions into effect, provisions that concern information and the participation of individual citizens in European administration and national administrative procedures concerned with or instigated by European law. Article 41 CFR states the right to good administration. The right is spelled out by various justiciable guarantees, such as the right of access to justice, the right to a fair administrative hearing, and the right to personally challenge administrative decisions.[28] The provision also envisages the right of access to documents (Article 41 II(b)) and the right to a reasoned decision (Article 41 II(c)). The European Ombudsman has developed a European Code of Good Administrative Behaviour, which can be regarded as a collection of best practices and further interpretations of the rights mentioned in Article 41 CFR.[29]

One of the major provisions putting individual participatory rights and participatory democracy at Union and Member State level into practice is Article 47 CFR. The provision guarantees individual rights to an effective legal remedy and a competent, impartial

23 Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65/1.

24 Article 3, para. 2 of Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65/1.

25 Habermas (1998a), pp. 14, 151; Kohler-Koch and Quittkat (2013), p. 12.

26 Kohler-Koch and Quittkat (2013), p. 190.

27 Within six weeks of production of a legislative draft, national parliaments may produce a reasoned statement on why they think the draft does not comply with the principles of subsidiarity. If the reasoned statements amount to one-third of the two votes allocated to each national parliament, or to one-quarter of the votes in the case of a draft legislative act, then the EU legislation needs to be "reviewed". Protocol (no. 2) on the Application of the Principles of Subsidiarity and Proportionality (Lisbon, 13 December 2007) in: Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union of 30 March 2010, OJ C 83, 30 March 2010, pp. 206–209, Articles 6 and 7, para. 2. On this compare: Schütze (2009), pp. 526, 530 ff.

28 European Ombudsman (2002), Introduction, p. 6.

29 European Ombudsman (2002), Introduction, p. 6.

tribunal. The rights apply as general principles to the administrative activities of Union Member States.[30] They are central to implementation of the rule of law in administrative procedures in Europe. The Court of Justice of the European Union (CJEU) increasingly employs Article 47 CFR to lend support to procedural rights to participation contained in various instruments of primary and secondary Union law.[31]

Regarding the specific field of environmental law highlighted here, the Charter's reference to a healthy environment, Article 37 CFR, is also relevant. The provision is commonly held to be of a merely programmatic nature, codifying the obligation of Union institutions in order to guide their policies in environmental matters.[32] However, in July 2022, the United Nations General Assembly recognised the right to a clean, healthy and sustainable environment, and highlighted its importance for sustainable development.[33] In the near future, this development may give the hitherto programmatic Article 37 CFR substantive and procedural force.

Finally, in the area of environmental law, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, i.e. the Aarhus Convention (AC),[34] ratified by the EU in 2001, is a key to participatory environmental democracy. Its preamble states that implementation of the provisions of the convention is a central element for "strengthening democracy in the region".[35] This particular objective of participatory democracy has also been underscored by the findings of the Aarhus Convention Committee, the central organ of the AC responsible for its application and interpretation.[36] Participatory democracy in the sense of the AC covers input-legitimacy, like democratic legitimation of actual administrative decisions, as well as output-legitimacy, like the rule of law and transparency.[37] Apart from environmental democracy and transparency, the AC aims to protect the environment and honour the individual right to a clean and healthy environment.[38] Ensuring institutional input and output legitimacy is central to the convention. Articles 4, 6 and 9 AC define individual

30 CJEU, judgment of 15 May 1986, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, C-222/84.

31 This is very obvious in the area of European environmental law and application of the Aarhus Convention, UNTS, Vol. 2161, no. 37770, p. 447. Compare the judgments implementing the provision of Article 9, para. 3 of the Aarhus Convention: CJEU, judgment of 11 April 2013, *The Queen, David Edvards and Lilian Pallikaropoulos v. Environmental Agency and others*, C-260/11, para. 33; CJEU, judgment of 20 December 2017, *Protect Natur- Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*, C-664/15, para. 45; CJEU, judgment of 15 March 2018, *North East Pylon Pressure Campaign Ltd. and Maura Sheehy v. An Bord Peanála*, C-470/16 para. 54; CJEU, judgment of 21 January 2021, *Stitching Vaarkens in Nood et al.*, C-826/18.

32 Notices from European Union Institutions and Bodies on Explanations Relating to the Charter of Fundamental Rights of 14 December 2007, OJ C 303/35; Jarass (2013), Article 37 at 3; Rest (2006), Article 37 at 17; Nowak (2006), p. 1410 f., § 60 at 15; Schmittmann (2006), pp. 123 f.; Jarass (2011), p. 564.

33 United Nations General Assembly, The human right to a clean, healthy and sustainable environment, 26 July 2022, A/76/L.75, Preamble.

34 The Aarhus Convention (1998), 447.

35 The Aarhus Convention (1998), Preamble.

36 ACCC, 20 April 2004, Armenia, ACCC/C/2004/08, para 38; ACCC, 28 April 2009, Slovakia, ACCC/C/2009/41, para 64 ff.

37 Peters (2020), p. 216.

38 Peters (2020).

rights to information, participation and justice in environmental matters, which secure legitimacy for environmental decision-making at Union and Member State level.

Last but not least, various directives and regulations at secondary Union law level implement primary standards concerning Union and Member State administration close to citizens, transparency, and participation. Regarding general Union law, the directive concerning right of access to documents[39] is a key to achieving these objectives. The core directives and regulations implementing the Aarhus Convention are examples at the level of environmental law.[40] They transpose the rights to information, participation and access to justice into secondary Union law, thereby implementing participatory democracy as a central element in EU environmental law.

2. Foundations and Instances of Deliberative Democracy in European Administrative Law

We have so far discussed the implementation of participatory democracy at the level of Union law. We now elaborate on deliberative democracy as part of European administration. This particular type of democratic interaction, which concentrates on an exchange of opinions in a free and open process[41] to create more rational and fairer decisions, is not mentioned by primary or secondary Union law. The concept is however supported by the participatory provisions of primary Union law.[42] Deliberative administrative processes may also be supported by the customary practice of Union organs and Member States or apply as a common constitutional tradition of Member States.[43]

It has often been argued that interactions between European Commission technocrats and Member States in the comitology procedure could be described as deliberative supranationalism.[44] The comitology procedure concerns the secondary rule-making competence of the Commission. The manner of exercise of this competence was summarised in a comitology decision of the Council.[45] The Commission was required to involve

39 Regulation 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

40 Directive (EU) 2011/92 of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26/1; Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197/30; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41/26; Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264/13; Directive (EU) 2010/75 of the European Parliament and of the Council on Industrial Emissions (Integrated Pollution Prevention and Control) of 24 November 2010, OJ L 334/17; Directive 2001/1/EC of the European Parliament and of the Council of 22 January 2001 amending Council Directive 70/220/EEC concerning measures to be taken against air pollution by emissions from motor vehicles, OJ L 35/34.

41 Habermas (1998b), pp. 138 f.

42 See Section II.1.

43 For the French case, see *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

44 Joerges and Neyer (1997); Eriksen and Fossum (2000), pp. 42 f., citing J.H.H. Weiler, in particular.

45 Council Decision 2006/512/EC, 22 July 2006, OJ 2006, L 200, 11; consolidated edition OJ 2006, no. C 255, 4.

various committees (French: *comité*) in the lawmaking procedure, in which representatives of national States could take part.[46] Hence, the name of the procedure. Irrespective of the actual procedure in place, authors commonly regarded comitology procedures as deliberative due to exchange on matters subject to future regulation between State members of the corresponding committee and the Commission.[47]

After the adoption of the Lisbon Treaty, the comitology procedure was succeeded by delegation of secondary rule-making as described in Articles 290 and 291 (TFEU). These articles now tie the adoption of delegated legislation to regular lawmaking procedure involving Council and Parliament. The Parliament can either refute the delegation of legislative power to the Commission or veto the resulting legislation.[48] Pursuant to Article 291, paragraph 3 TFEU, the Parliament is called upon to pass legislation in the form of regulations that define the basis and principles on which the execution of binding EU law is harmonised at Member State level. By providing vertical structures of interaction between the EU and Member States,[49] Article 291 TFEU acknowledges the federal and *Verbund* structures of European administration,[50] yet without particular emphasis on deliberative procedures. Rather, Article 291, paragraph 3 TFEU allows participation of Member States and the Parliament in the proposal phase of the delegated legislation, thus embodying representative decision-making. The changes have narrowed the field of application for genuinely deliberative procedures in EU administrative law.

If deliberative decision-making is understood more broadly, allowing joint reflection and discussion between the public and the administration, without requiring a joint information basis or decision-making on an equal footing,[51] deliberative decision-making may also be held to be reflected in other concepts of European law. For example, environmental impact assessment, a procedure required by Directive (EU) 2011/92, can mirror deliberative decision-making.[52] Yet the procedures codified in that directive only implement a light version of deliberative discourse.[53] They mostly allow the public to provide input into administrative decision-making. The provisions of Directive 2001/42/EC do not ensure the kind of discourse initially envisaged as a legitimising element for democratic decision-making.[54]

III. Contribution of Deliberative and Participatory Procedures to National and European Administrative Traditions

1. Introduction

Although European law explicitly relies on European citizens to implement participatory administrative decision-making, the actual impact of these procedures on European administrative practice may differ greatly. This is partly due to different views on how

46 Schroeder (2019), para. 7, 35, 123.
47 For example: Schlacke (1998).
48 Article 290, para. 2(a) and 2(b) TFEU.
49 Grabitz et al. (2017), Article 291 Rn. 10.
50 Grabitz et al. (2017), Article 291 Rn. 9.
51 See Section II.1.
52 Craik (2007), pp. 281 f.
53 Peters (2020), p. 185.
54 Peters (2020).

deliberation or participation may enhance administrative practice or interaction of administrations with the public. Let us now outline the different perspectives on deliberative and participatory administrative procedures and offer an overview of this specific contribution to national administrative traditions and decision-making processes identified by the literature.

2. Perspectives on Deliberation and Participation in Administrative Science

Administrative science offers three major perspectives on how interactions between civil servants and the public can be viewed and evaluated: the instrumental view focuses on the benefits and outcomes of deliberation and participation for administrative decision-making.[55] A managerial perspective centres on the processes that steer civil servant behaviour and performance in relation to their interactions with the public.[56] Finally, the governance perspective looks at overall interactions between civil servants and the public, and their effects, as well as at the broader principles governing these processes.[57] Other views and perspectives include discourse- or cooperation-oriented perspectives.[58]

These perspectives are all ways of viewing how civil servants interact with the public in practice and they are the basis of approaches for reforming, organising and devising processes for the civil service analysed in the national reports in the first part of this book.[59] However, they also display different viewpoints on the utility and effect of deliberative and participatory administrative procedures for administrative decision-making: an instrumental perspective mostly focuses on output. It takes a result-oriented perspective on participation, geared to normative outcomes.[60] The managerial view concentrates on how deliberative and participatory procedures contribute to efficient administrative decision-making, and how deliberative and participatory procedures enhance administrative decision-making from an organisational perspective. This includes citizens as "customers" of the administration.[61] Finally, governance-oriented views not only focus on the administration but include the perspective of citizens as recipients and addressees of administrative decisions.[62]

3. Contribution to the Legitimacy of Administrative Decision-Making

Participatory and deliberative administrative practices are usually perceived to foster the legitimacy of administrative decision-making. Nabatchi, for example, outlines that "deliberative democracy has instrumental benefits for both individuals and public governance that may help ameliorate the citizenship and democratic deficits, and do so within the networked environment of modern public administration".[63] It offers "inclusive, institutional

55 Eckerd and Heidelberg (2019), p. 143. Compare: Moynihan (2003), p. 175; King et al. (1998), pp. 317 f.

56 Eckerd and Heidelberg (2019), pp. 133 f.; Arnaboldi et al. (2015), pp. 1 f.; Hood (1991), pp. 3 f.

57 Blomgren Bingham et al. (2005), pp. 547 f.; Katsamunska (2016), pp. 133 f.

58 Blijleven and van Hulst (2022), pp. 615 f.; Tuurnas (2015), pp. 585 f.; Yang and Pandey (2011), pp. 880 f.

59 See *Introduction: Civil Service Challenges in a Dynamic Multi-Level System and Volatile Environment* by K.-P. Sommermann in this volume.

60 Moynihan (2003), p. 180.

61 Bogumil (1999), p. 9.

62 Lens (2007), pp. 382 f.

63 Nabatchi (2010), pp. 376, 377, 387.

designs that are sensitive to the value plurality inherent in complex policy issues, which in turn can help resolve conflict and build capacity for effective public action",[64] which provide "a way to rediscover the role of the public in shaping societal affairs".[65]

4. *Changes in Civil Service Views on the Public, on Communication and on Collaboration (Policies) with the Public*

Deliberative and participatory procedures may also change the civil service's communication and collaboration with the public. Smith finds that deliberative and participatory procedures provide a "healthy check on the careerist dimension of professionalism by introducing another perspective"[66] and are an "effective vehicle for improving the communication process essential to successful planning".[67] Others highlight that these procedures increase commitment to implementing the results of the joint effort,[68] partnerships between social groups and greater legitimacy for public policies and authoritative decisions.[69] Finally, the authors underline that deliberative and participatory practices provide some healthy empowerment in government and citizenship skills.[70]

However, these benefits depend on the perspective on participatory administration actually taken. Vigoda points out that perspectives may change according to managerial or governance-oriented cooperative approaches. If the former approach to administration is taken, the effect of citizen participation is responsiveness to administrative decision-making. If a cooperative approach is taken, citizens become partners in administration.[71] A deliberative view of administrative procedures also shapes views on the resulting interaction between citizens and administrators: in such cases the citizen-administration interaction can be regarded as discourse.[72] In any case, successful interaction between administration and citizens requires members of the public service to have an open and active view of citizens and to recognize that citizens have limited time and resources to engage with the civil service.[73]

5. *Changes in Administrative Tradition*

A further effect of deliberative and participatory administrative decision-making is its contribution to changes in administrative tradition. Citizen participation and deliberative procedures are commonly associated with collaborative, communicative, and coordinated decision-making.[74] Internalisation of deliberative and participatory practices into national administration results in flatter hierarchies, inclusive practices,[75] greater effort, more

64 Nabatchi (2010), p. 377.
65 Nabatchi (2010).
66 Smith (1971), p. 662.
67 Smith (1971).
68 Smith (1971).
69 Kovač (2018), p. 233.
70 Migchelbrink and van de Walle (2022), p. 3.
71 Vigoda (2002), p. 534.
72 Fox and Miller (1996).
73 Bogumil (1999), p. 7.
74 Kovač (2018), p. 233.
75 Nalbandian (1999), p. 193.

innovative practices[76] and a focus on process skills.[77] Deliberative and participatory decision-making also help "community building",[78] i.e. the building of structures that facilitate the interaction of civil society and of under-represented communities[79] with the civil service.[80] Administrative processes change from "mere administration", merging governance with social processes.[81] Hence, participatory and deliberative administrative procedures and approaches are often associated with horizontal decision-making and certain modern approaches to public administration, such as new public management or responsive government. Authors researching civil service interaction with the public emphasise managerial competence of civil servants, their facilitative role[82] and their capacity to respond to the needs of citizen users.[83] Deliberative and participatory processes provide ample opportunity to exercise individual judgment[84] and more active engagement in the process of administrative change and reforms.[85] As a result, the citizen is increasingly regarded as a customer, client, as well as a co-creator of the local environment, co-producer of local services and political initiator.[86]

Concerning national procedures that demonstrate these effects, France may be a case in point. In France, several administrative reforms have promoted the concept of participatory administration since the mid-1980s. "Development of a participatory culture is now an integral part of the work of civil servants in most public authorities. This involved defining principles, guidelines and a methodology specific to the public authority."[87] As a consequence, however, the French public administration has had to take on a number of reporting and quantification activities. Participation has been bureaucratised.[88] Reporting duties have become an integral part of administrative work.[89] Civil service members feel they spend too much time reporting participative procedures and their positive impact.[90] In the next section, we look more closely at these costs of participatory procedures.

6. *The Costs of Deliberative and Participatory Administration*

Implementing deliberative and participatory decision-making has its costs. It may lead to frequent changes in what is actually and commonly perceived as participation and participatory practice.[91] These changes create confusion about what really counts as participatory

76 Smith (1971), p. 662.
77 Nalbandian (1999), p. 193.
78 Nalbandian (1999), 189; Bogumil (1999), pp. 8 f.
79 Bogumil (1999), p. 8.
80 Bogumil (1999), p. 8.
81 Kovač (2018), p. 229.
82 Nalbandian (1999), p. 194; Bogumil (1999), p. 7.
83 Gourgues et al. (2021), p. 3.
84 Smith (1971), p. 662.
85 Vigoda (2002), p. 535.
86 Bogumil (1999), p. 9.
87 Gourgues et al. (2021), p. 11.
88 Gourgues et al. (2021), p. 13.
89 Gourgues et al. (2021), p. 9.
90 Gourgues et al. (2021), pp. 9, 13.
91 Gourgues et al. (2021), p. 7.

practice.[92] Frequent modifications also require administrative reorganisation and create frustration,[93] not only for the civil servants involved. While the public may perceive participation as bottom-up decision-making, civil servants may still regard their decisions as discretionary and top-down.[94]

More generally, the realities of participation may create opposition to it within administrations. Nabatchi outlines that deliberative and participatory administrative procedures may be perceived as "mitigating the effects of the bureaucratic ethos, which are to pursue efficiency, efficacy, expertise, loyalty and accountability",[95] making them a burden on administrations. Expectations that democracies include citizens increasingly directly can therefore collide with views that only more technocratic top-down decision-making can deal effectively with increasing social crises and emergencies.[96]

Migchelbrink and van de Walle found that citizens' reactions were decisive in the value judgments of administrators about participation. If citizen input in participatory procedures was perceived as poor, administrators were not in favour of participation.[97] Eckerd and Heidelberg highlight that participation often engenders antagonisms; participants tend not to be representative of the citizens affected by the decisions, leading to so-called participation bias. For example, participants in administrative procedures tend to be older, wealthy, more educated and beneficiaries of the status quo.[98] This provokes reactions in civil servants engaged in participatory processes. The study also shows that there is a big gap between what is portrayed as the outcome of participation (i.e. partnership, cooperation) and what participation actually is in practice (the public in need of education, the public as a source of information, lack of co-decision-making but rather decision-making entirely at the discretion of the administration, appeasement of anticipated opposition).[99] However, Eckerd and Heidelberg analyse and describe participation mostly from an instrumental perspective, which focuses on participation as a benefit for institutional decision-making.[100] The views of civil servants on participation may change if a managerial or cooperative view is taken.[101] In France, the prevailing self-perception of civil servants at local level is that of "participatory democracy activists".[102] However, French civil servants agree that they are in a difficult position, having to "win over colleagues and even elected representatives".[103] While administrators shape spaces in which the public may participate,[104] if expectations and realities about participation differ greatly, it may lead to devaluation of the contribution of participation to administrative decision-making. Participatory administration may end up as "tokenism or symbolic representation to weaken community opposition".[105]

92 Gourgues et al. (2021), p. 11.
93 Gourgues et al. (2021), p. 7.
94 Butzlaff (2022), p. 2.
95 Nabatchi (2010), pp. 381 f.
96 Butzlaff (2022), pp. 2, 9.
97 Migchelbrink and van de Walle (2022), pp. 11 f.
98 Eckerd and Heidelberg (2019), p. 135.
99 Eckerd and Heidelberg (2019), p. 141.
100 Eckerd and Heidelberg (2019), p. 143. Compare Moynihan (2003), p. 175.
101 See Section III.2.
102 Gourgues et al. (2021), p. 7.
103 Gourgues et al. (2021), p. 7.
104 Eckerd and Heidelberg (2019), p. 143. Butzlaff (2022), p. 9.
105 Smith (1971), p. 663; see Arnstein (1969), p. 217.

7. *Preliminary Conclusion*

Although the implementation of deliberative and participatory administrative practices may have many advantages and may foster cooperative and citizen-oriented decision-making, their potential may not emerge and promises about a deliberative and participatory civil service may not be fulfilled. The participatory turn, therefore, remains a huge challenge for administrations.[106] The civil service only seems able to implement deliberative and cooperative procedures to the degree that it can identify with them and see their actual benefits. Moreover, administrative structures must appreciate and implement managerial or governance-oriented cooperative approaches to profit from the advantages of participatory and deliberative administration. An instrumental view of participation and deliberation does not seem to support deliberative and participatory approaches. As King et al. and Migchelbrink and van de Walle conclude: "Without real changes in how bureaucracies function, there will be little movement toward authentic participation and greater cynicism on the part of administrators and citizens."[107]

The contribution of law and the normative framework of deliberation and participation must address these insights. The legal framework for deliberative and participatory administrative decision-making must shape attitudes of the civil service towards participation, practices, managerial approaches and styles,[108] professional identities,[109] as well as actual content.[110] The rules on deliberation and participation must also address the hierarchies and traditions of administrations themselves.

IV. Contributions of EU Law to the Formation of a Deliberative and Participatory European Administrative Tradition

Let us now reflect on how European law can promote the changes in attitude and management style of civil servants and public administrators at the Member State level necessary to launch deliberative and participatory procedures on the ground. On the one hand, it is argued that recognising a right of public participation may also promote a change of attitudes in the administration. If citizens have an individual and clearly defined right to be included in administrative decision-making, this ensures that their contribution to those decisions will no longer be ignored. On the other hand, it is argued that European law, with its central ordering and organising function, can organise the procedures of participation so as to promote managerial and cooperative governance-oriented management styles.

1. *The Role of Individual Rights in Changing Civil Service Attitudes and Approaches Towards Deliberation and Participation*

Individual rights to participation equip individuals with a right to be included in administrative decision-making processes in the decision-making and implementation stages. Granting individuals a right to take part in administrative procedures can have a healthy effect on administrative tradition. If individuals become a regular part of the procedure,

106 Moynihan (2003); Nabatchi (2010).
107 King et al. (1998), p. 317; Migchelbrink and van de Walle (2022), p. 13.
108 Migchelbrink and van de Walle (2022), p. 12.
109 Gourgues et al. (2021), p. 2; Nalbandian (1999).
110 Behagel and Turnhout (2011), p. 297.

their contribution cannot be ignored by the civil service, especially if the right to participate is directly applicable and there is a corresponding duty of the civil service to interact with the public, irrespective of the quality of its contributions. Decision-making procedures and implementation monitoring must also include at least a minimum of participatory structures to ensure interaction with citizens. Finally, granting individuals a right to take part in decision-making puts them on a par with civil servants. Hence the structures presuppose cooperative, democratic, and, where applicable, deliberative decision-making.

Rights-based deliberation and participation will usually have an effect on administrative decision-making. If including the public becomes a regular and necessary part of administrative decision-making, administrative processes and procedures will need to respond to this necessity, becoming more open and accessible to citizens through internet portals, information points and new inclusion procedures.

Ultimately, providing individuals with rights to participate may foster the democratic legitimation of administrative decision-making.[111] Participatory procedures also generate acceptance of administrative decisions.[112] Most importantly, as individuals are granted a right to be recognised in, and contribute to, administrative decision-making, their contribution becomes a *sine qua non* element of that decision: in the absence of the necessary citizen participation, the decision is unlawful and may be subject to judicial review. In becoming a necessary element of administrative decision-making in representative democracies, rights-based participation offers an additional path for legitimising administrative decision-making. The next section illustrates how this happened in European environmental law since accession of the EU and Member States to the Aarhus Convention.

2. *The Impact of the Aarhus Convention as a Case in Point*

European law, in particular European environmental law, especially the AC, provides a distinct canon of participatory rights structuring and influencing environmental decision-making at national and European levels. Other fields of European law are less pronounced concerning the organisation of participatory structures. European environmental law has therefore sometimes been termed the forerunner or motor of modern administrative procedures.[113]

Specifically, the AC envisages three core environmental rights: information, participation, and access to justice. Article 4 AC defines the right of access to information held by the public service about projects relevant to the environment. The AC requires the public to be informed about participation procedures relevant to environmental projects.[114] Concerning the participation of the public in environmental decision-making, Article 6, paragraph 7 AC describes the right of the public to be heard in consultations on environmental projects.[115] The public can be heard by written statements or in a public hearing.[116]

111 In this sense, the term democratic legitimation describes the immediate legitimation of supranational and State decision-making, which is generated by the individual vote. Legitimacy, on the other hand is generated in additional procedures which lead to individual acceptance for supranational and State decision-making. Peters (2020), p. 145.

112 Pateman (1970), p. 105.

113 Lippert (2013), pp. 207 f.

114 Article 6 II, para. 8(b) AC.

115 Article 6 I(a) AC and Article 6 I(b) AC.

116 Article 6 VII AC.

Thus, the article gives the general public a right to comment on the specific project, at a time when project options are still open.[117] Article 6, paragraph 8 AC then establishes that the administration should take those comments into account. Article 6, paragraph 9 AC foresees a right to be informed about the final decision made and about further changes made after the closure of the consultation process.[118] Finally, concerning the implementation of participatory procedures, Article 9, paragraph 2 AC establishes a right of access to justice in cases where the rights enshrined in Article 6 AC have been denied. Even more broadly, Article 9, paragraph 3 AC then grants individuals and environmental interest organisations a right of access to justice in cases where national rules concerning the protection of the environment have been violated. In the context of the EU, this provision has already been interpreted to include a right of access to justice where environmental rules of primary and secondary Union law have been violated.[119]

According to the preamble of the AC, the rights delineated contribute to the right to a clean and healthy environment in broader Europe. The provisions guarantee individual environmental rights and thus the procedural and substantive elements of the right to a clean and healthy environment.[120] Except for Article 9, paragraph 3 AC, which was commonly considered not to refer to a directly applicable individual right,[121] the rights guaranteed by the AC are immediately applicable and do not require further implementation at the Member State level. Hence, the AC provides a broad range of provisions that make it necessary to include individuals in environmental decision-making and to equip individuals with ways to enforce their inclusion in those procedures.

Considering the broad jurisprudence that has evolved concerning the implementation of these provisions in European environmental law,[122] it is safe to conclude that formulating participation as a right of the public has increased interaction of the civil service with the public and has effectively involved the public in environmental procedures. Individuals and environmental NGOs have realised the scope offered by the AC for influencing environmental decision-making, and they use it eagerly. Especially the broad access to justice, guaranteed in Article 9 of the AC, ensures that individuals and environmental-interest organisations are involved in national environmental decision-making. The CJEU found that access to justice must be effective in areas of law subject to European environmental law.[123] Accordingly, the guarantees of Article 6 of the European Convention of Human Rights (ECHR) and of Article 9, paragraph 3 AC are to be interpreted jointly with the guarantee of Article 47 CFR such that affected environmental-interest organisations have access to the courts in cases of violation of national and European environmental

117 Article 6 IV AC.

118 Article 6, para. 9 AC.

119 ACCC, Denmark, 01 February 2018; ACCCC/C/2006/18, UN ECE/MP.PP/2008/5/Add. 4, Rn. 27.

120 See Peters (2018), p. 1.

121 Peters (2020), p. 288.

122 CJEU judgment of 8 March 2011, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, C-240/09, para. 50; CJEU, *Protect, Natur-, Arten- und Landschaftsschutz Umweltorganisation gegen Bezirkshauptmannschaft Gmünd* (n. 31), para. 45; CJEU, *North East Pylon Pressure Campaign Ltd und Maura Sheehy gegen an Bord Peanála u.a.* (n. 31), para. 53.

123 CJEU, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (n. 122), para. 50.

provisions.[124] This has made Article 9, paragraph 3 AC immediately effective and applicable via Article 47 CFR.[125]

Generally, incorporation of the provisions of the AC into national laws has had the effect of making administrative decision-making more transparent and oriented towards including citizens, at least in environmental cases. In Germany, implementation of the AC led to codification of detailed participation rights for environmental-interest organisations.[126] In France, it led to participatory decision-making procedures that spread far beyond environmental law and that have become part and parcel of general administrative decision-making.[127] The *débat public* is now a regular instrument used in administrative decision-making for administrative decisions of national interest.[128] It is therefore an additional deliberative element in the otherwise representative concept of democracy.

3. Continued Importance of Procedures and Rules Organising Participation and Management Styles in the Civil Service

Despite the rights-based approach of the AC, administrative science research on participation has shown that participation and deliberation still need clear rules if civil servants are to identify with them and apply them to their best possible effect. Participatory rules, therefore, need to govern participation and deliberation itself, and steer the civil service in its interactions with the public.

The AC provides a clear framework for the participation of the public in administrative decision-making. Its provisions require that the public be informed about the basis of environmental decisions and how they are reached, as well as the final decision. Article 6, paragraph 7 AC recognises the right of the public to take part in decision-making processes by way of written statements or oral hearings or both. The provision leaves a margin of appreciation regarding how States implement actual involvement of the public, but it still outlines the overall framework and shape that public participation must take in environmental decision-making. The same is true for the access to justice provisions in Article 9, paragraphs 2 and 3 AC, which provide the public with broad access to justice if their participatory rights are not upheld at national level.[129]

Insights from participation research that participation can take different forms and therefore lead to different forms of involvement of the public in (administrative) decision-making[130] show that the level of civil society involvement required by the AC is still modest. It is clear that submitting written statements or attending oral hearings will not put the public on an equal footing with the civil service. Although the AC requires the civil service

124 CJEU, *Protect, Natur-, Arten- und Landschaftsschutz Umweltorganisation gegen Bezirkshauptmannschaft Gmünd* (n. 31), para. 45; CJEU, *North East Pylon Pressure Campaign Ltd und Maura Sheehy gegen an Bord Peanála u.a.* (n. 31), para. 53.

125 Peters (2020), p. 288.

126 Peters (2020), p. 337.

127 See *The Recruitment of Civil Servants: Bridging Democratic Requirements and Efficiency* by P. Gonod in this volume; see Peters (2020), pp. 317 f.

128 Peters (2020), p. 321.

129 See Section IV.2.

130 Renn (2005), p. 227; Arnstein (1969).

to take the public's contribution into account, the final decision about the environmental plan or project remains with the civil service. The public is not in control of the decision, nor is decision-making delegated to representatives of the public.[131]

The AC's rules are even less ambitious with regard to other forms of environmental decision-making, such as plans, programmes and legislative action. The rules leave national administrations with a great margin of appreciation to determine the appropriate participatory procedures. Article 7, paragraph 2 AC defines the participatory procedures codified in Article 6, paragraph 7 AC, which do not apply to environmental decisions in the form of plans and programmes. Even looser rules exist for environmental legislation. Here, the AC states that parties "shall strive to promote" public participation "at an appropriate stage".[132]

A large margin of appreciation without clear benchmarks for the common core of deliberative and participatory administrative processes cannot provide the necessary clarity and framework for implementing cooperative, governance-oriented participatory procedures that ensure greater involvement of the civil service. Also, the discussions on the rules of the Water Framework Directive[133] demonstrate that clear rules are needed to ensure a participatory approach. The directive provides for "active participation" of the public in procedures towards the adoption of water management plans.[134] Here the European Commission foresaw that Member States be provided with information about best practices of what could be perceived as active participation.[135] However, the guide developed by the Commission left the Member States with options to choose from a large range of practices. Member States were left without a minimum standard of what was required to conduct "active participation".[136]

So even European environmental law, which is considered a testing ground for participation at the forefront of participatory and deliberative administrative decision-making, could still benefit from more ambitious, clearer and more definite rules concerning the processes in question. The AC does not envisage control of environmental decision-making by members of the public.[137] Regarding cases regulated or otherwise by the AC, European (environmental) rules could envisage more modern forms of interaction between the civil service and the public. For example, European and national laws could more clearly define forms of decision-making requiring greater or less involvement of the public. European law does not contain experimental participatory laws or rotational evaluation of participatory procedures, two tools for ascertaining procedures that could help foster civil service engagement with the public. Finally, in many cases, European law does not define clear minimum procedures that define the basic level of interaction of citizens with the civil service. This leaves civil servants at European and national level with the ultimate decision about what constitutes a participatory or deliberative procedure.

131 Compare Arnstein (1969), pp. 222 f.

132 Article 8 I AC.

133 Consolidated text: Directive (EU) 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327/1 (Water Framework Directive).

134 Article 14, para. 1 of Water Framework Directive.

135 European Commission (2003), pp. 48, 50 ff.

136 Peters (2020), p. 102.

137 Arnstein (1969), p. 223.

V. Conclusion

Despite the participatory and deliberative framework guiding European administration and the European civil service, studies show that members of the civil service can and do ignore the contribution of the public to decision-making processes. Either administrative law does not provide clear rules on how to deal with the public, or civil servants neither appreciate nor identify with the contribution of the public. It is therefore argued that granting the public a right to partake in administrative decision-making could provide a clearer and more inviting framework for the civil service to engage with the public, and an opportunity for the public to be recognised as partners in the decision-making process. European law provides such a rights-based approach to participatory and deliberative administrative decision-making, but still lacks clear and definite procedures organising deliberation and participation and ensuring civil service engagement with the public. Further research is needed to determine what additional legal premises are needed to organise deliberation and participation in the best and most effective way, and to ensure engagement of the civil service with the public.

Bibliography

Achenbach J.v. (2014), *Demokratische Gesetzgebung in der Europäischen Union*, Berlin: Springer.

Arnaboldi M., Lapsley I., Steccolini I. (2015), 'Performance Management in the Public Sector: The Ultimate Challenge', 31(1) *Financial Accountability & Management*, 1–22.

Arnstein R.S. (1969), 'A Ladder of Citizen Participation', 35(4) *Journal of the American Planning Association*, 216–224.

Behagel J., Turnhout E. (2011), 'Democratic Legitimacy in the Implementation of the Water Framework Directive in the Netherlands: Towards Participatory and Deliberative Norms?', 13(3) *Journal of Environmental Policy & Planning*, 297–316.

Blijleven W., van Hulst M. (2022), 'Encounters with the Organisation: How Local Civil Servants Experience and Handle Tensions in Public Engagement', 48(3) *Local Government Studies*, 615–639.

Blomgren Bingham L., Nabatchi T., O'Leary R. (2005), 'The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government', 65(5) *Public Administration Review*, 547–558.

Bogumil J. (1999), 'Auf dem Weg zur Bürgerkommune? Der Bürger als Auftraggeber, Mitgestalter und Kunde', in Kubicek H., Braczyk H.-J., Klumpp D. (eds), *Multimedia @ Verwaltung. Jahrbuch Telekommunikation und Gesellschaft*, Heidelberg: Hüthig, 51–61.

Butzlaff F. (2022), 'Consenting Participation? How Demands for Citizen Participation and Expert-Led Decision-Making Are Reconciled in Local Democracy', 21(2) *Political Studies Review*, 340–356.

Craik N. (2006), 'Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment', 10 *International Law and Justice Working Papers – Global Administrative Law Series*, https://iilj.org/wp-content/uploads/2016/08/Craik-Deliberation-and-Legitimacy-in-Transnational-Environmental-Governance-2006-2.pdf.

Craik N. (2007), 'Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments', 38(2) *Victoria University of Wellington Law Review*, 381–402.

Curtin D., Päivi L.-S. (2016), *Openness, Transparency and the Right to Access to Documents in the EU*, Policy Department for Citizens' Rights and Constitutional Affairs, www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf.

Dryzek J.S. (2001), 'Legitimacy and Economy in Deliberative Democracy', 29(5) *Political Theory*, 651–669.

Eckerd A., Heidelberg R.L. (2019), 'Administering Public Participation', 50(2) *The American Review of Public Administration*, 133–147.

Eriksen E.O., Fossum J.E. (eds) (2000), *Democracy in the European Union: Integration through Deliberation?*, London: Routledge.

European Commission (2001), *European Governance: A White Paper*, COM (2001) 428, https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_10.

European Commission (2003), *Common Implementation Strategy for the Water Framework Directive*, Luxembourg: Office for Official Publications of the European Communities, https://circabc.europa.eu/sd/a/4de11d70-5ce1-48f7-994d-65017a862218/Guidance%20No%2011%20-%20Planning%20Process%20(WG%202.9).pdf

European Ombudsman (2002), *European Code of Good Administrative Behaviour*, www.ombudsman.europa.eu/en/publication/en/3510.

Fox C.J., Miller H.T. (1996), *Postmodern Public Administration: Towards Discourse*, Thousand Oaks, CA: Sage Publications.

Gourgues G., Mazeaud A., Nonjon M. (2021), 'From the Participatory Turn of Administrations to the Bureaucratisation of Participatory Democracy: Study Based on the French Case', 88(4) *International Review of Administrative Sciences*, 1141–1158.

Grabitz E., Hilf M., Nettesheim M. (eds) (2017), *Das Recht der Europäischen Union*, Munich: C.H. Beck.

Habermas J. (1998a), *Die postnationale Konstellation: Politische Essays*, Frankfurt am Main: Suhrkamp Verlag.

Habermas J. (1998b), *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main: Suhrkamp Verlag.

Hood C. (1991), 'A Public Management for All Seasons?', 69(1) *Public Administration*, 3–19.

Jarass H. (2011), 'Der neue Grundsatz des Umweltschutzes im primären EU-Recht', 12 *Zeitschrift für Umweltrecht*, 563–565.

Joerges C., Neyer J. (1997), 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', 3(3) *European Law Journal*, 273–299.

Katsamunska P. (2016), 'The Concept of Governance and Public Governance Theories', 2 *Economic Alternatives*, 133–141.

King C.S., Feltey K.M., Susel B.O. (1998), 'The Question of Participation: Toward Authentic Public Participation in Public Administration', 58(4) *Public Administration Review*, 317–326.

Kohler-Koch B., Quittkat C. (eds) (2013), *De-Mystification of Participatory Democracy*, Oxford: Oxford University Press.

Kohler-Koch B., Rittberger B. (eds) (2007), *Debating the Democratic Legitimacy of the European Union*, Lanham: Rowman & Littlefield.

Kovač P. (2018), 'Potentials of Administrative Procedures as a Participatory Tool within Governance Models in Central and Eastern Europe', 9(4) *DANUBE: Law, Economics and Social Issues Review*, 227–244.

Kubicek H. (2014), 'Verwaltungstransparenz und Verwaltungskultur: Erfahrungsgestützte Annäherung an ein diffuses Verhältnis am Beispiel der Freien Hansestadt Bremen', in König K., Kropp S., Kuhlmann S., Reichard C., Sommermann K.-P., Ziekow J. (eds), *Grundmuster der Verwaltungskultur*, Baden-Baden: Nomos, 433–466.

Lens V. (2007), 'Administrative Justice in Public Welfare Bureaucracies: When Citizens (Don't) Complain', 39(3) *Administration and Society*, 382–408.

Lippert A. (2013), 'Die Bedeutung der Öffentlichkeitsbeteiligung bei großen Infrastrukturvorhaben', 4 *Zeitschrift für Umweltrecht*, 203–211.

Magiera S. (1987), 'Die europäische Gemeinschaft auf dem Weg zu einem Europa der Bürger', 40 *Die Öffentliche Verwaltung*, 221–231.

Migchelbrink K., van de Walle S. (2022), 'A Systematic Review of the Literature on Determinants of Public Managers' Attitudes Toward Public Participation', 48(1) *Local Government Studies*, 1–22.

Moynihan D.P. (2003), 'Normative and Instrumental Perspectives on Public Participation: Citizen Summits in Washington, D.C.', 33(2) *The American Review of Public Administration*, 164–188.

Nabatchi T. (2010), 'Addressing the Citizenship and Democratic Deficits: The Potential of Deliberative Democracy for Public Administration', 40(4) *The American Review of Public Administration*, 376–399.

Nalbandian J. (1999), 'Facilitating Community, Enabling Democracy: New Roles for Local Government Managers', 59(3) *Public Administration Review*, 187–197.

Nowak M. (2006), in Heselhaus S., Nowak M. (eds), *Handbuch der Europäischen Grundrechte*, München: Beck, § 60, 1410–1449.

Pateman C. (1970), *Participation and Democratic Theory*, Cambridge: Cambridge University Press.

Peters B. (2018), 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention', 30(1) *Journal of Environmental Law*, 1–27.

Peters B. (2020), *Legitimation durch Öffentlichkeitsbeteiligung*?, Tübingen: Mohr Siebeck.

Renn O. (2005), 'Partizipation, ein schillernder Begriff', 14(3) *GAIA – Ecological Perspectives for Science and Society*, 227–228.

Rest, A. (2006), in Tettinger P. and Stern K (eds), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechtecharta*, München: Beck, Art. 37, 611–622.

Sartori G. (1984), 'Selbstzerstörung der Demokratie?', in Guggenberger B., Offe C. (eds), *An den Grenzen der Mehrheitsdemokratie: Politik und Soziologie der Mehrheitsregel*, Wiesbaden: VS Verlag für Sozialwissenschaften, 83–107.

Schlacke S. (1998), *Risikoentscheidungen im europäischen Lebensmittelrecht: eine Untersuchung am Beispiel des gemeinschaftlichen Zusatzstoffrechts unter besonderer Berücksichtigung des europäischen Ausschusswesens ("Komitologie")*, Baden-Baden: Nomos.

Schlacke S. (2017), 'Die Novelle des UmwRG 2017', 13 *Neue Zeitschrift für Verwaltungsrecht*, 905–912.

Schmittmann, G. (2006), *Rechte und Grundsätze in der Grundrechte-Charta*, Alphen aan den Rijn: Wolters Kluwer.

Schroeder W. (2019), *Grundkurs Europarecht*, 6th edition, München: C.H. Beck.

Schütze R. (2009), 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism', 68(3) *Cambridge Law Journal*, 525–536.

Schwarze J. (2005), *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, Baden-Baden: Nomos.

Shapiro M. (2005), '"Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?', 68 *Law and Contemporary Problems*, 341–356.

Smith M.P. (1971), 'Alienation and Bureaucracy: The Role of Participatory Administration', 31(6) *Public Administration Review*, 658–664.

Sommermann K.-P. (2014), 'Towards a Common European Administrative Culture?', in König K., Kropp S., Kuhlmann S., Reichard C., Sommermann K.-P., Ziekow J. (eds), *Grundmuster der Verwaltungskultur*, Baden-Baden: Nomos, 605–628.

Tuurnas S. (2015), 'Learning to Co-produce? The Perspective of Public Service Professionals', 28(7) *International Journal of Public Sector Management*, 585–598.

Vigoda E. (2002), 'From Responsiveness to Collaboration: Governance, Citizens, and the Next Generation of Public Administration', 62(5) *Public Administration Review*, 527–540.

von Bogdandy A. (2007), 'A Disputed Idea Becomes Law: Remarks on European Democracy as a Legal Principle', in Kohler-Koch B., Rittberger B. (eds), *Debating the Democratic Legitimacy of the European Union,* Lanham: Rowman & Littlefield Publishers, 33–44.

von Bogdandy A., Bast J. (eds) (2009), *Principles of European Constitutional Law*, 2nd edition, Oxford: Hart Publishing and Munich: C.H. Beck.

Yang K., Pandey S.K. (2011), 'Further Dissecting the Black Box of Citizen Participation: When Does Citizen Involvement Lead to Good Outcomes?', 71(6) *Public Administration Review*, 880–892.

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Part VIII

Rights and Freedoms of Civil Servants

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39 Right of Access to the Public Service in the European Convention of Human Rights

A Missed Opportunity?

Daniel Toda Castán

I. The Right of Access to Public Service in the ECHR Drafting Process

The first thing that is striking when delving into the drafting history of the European Convention on Human Rights (ECHR) is the fact that the right of access to public service was absent from the discussion from the very beginning.[1] Neither the European Movement[2] nor the Consultative Assembly, in the draft Convention that it submitted to the Committee of Ministers (Recommendation 38),[3] included the right of access to public service.

The reasons for this early rejection appear to be related to the perceptions of the essentials. The drafters of the European Movement had intended to address "the minimum essential, rather than the maximum desirable".[4] The Consultative Assembly's Committee on Legal and Administrative Questions held the same views: "The Committee unanimously agreed that for the moment, only those essential rights and freedoms could be guaranteed which are, today, defined and accepted after long usage, by democratic regimes."[5] Discussions at the Committee of Minister's level do not seem to have contemplated any major changes to the substantive rights proposed by the Assembly.[6]

In the late fifties, the Council of Europe Member States started to discuss Protocol No. 4.[7] This time, according to the *Travaux Préparatoires*, there were discussions expressly on a right of access to public service. In the published volume of the *Travaux*, a document from the Directorate of Human Rights summarises the discussion.[8]

1 This chapter will use preferentially the term "public service" instead of "civil service", in contrast to other chapters in the volume. The term "public service" is deemed more adequate in the international context covered in this chapter, as it is more comprehensive. It is also the term used by the International Covenant on Civil and Political Rights, which will be examined here. However, the European Court of Human Rights uses the term "civil service" frequently, and this terminology will be respected when citing the Court's decisions. For the definitions and terminology issues, see *Defining the Civil Service: Towards a Better Understanding of the Nature of Civil Service Systems in Europe* by A. Krzywoń in this volume.
2 The European Movement's Draft is cited here following Bates (2010), p. 56.
3 See Article 2 of the Draft as cited by Bates (2010), p. 64.
4 See Bates (2010), p. 56.
5 Bates (2010), p. 65.
6 Bates (2010), pp. 79, 80, 83, 92 and 94.
7 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto done in Strasbourg on 16 September 1963, European Treaty Series No. 46.
8 Council of Europe (1976), document No. 38, Memorandum by the Directorate of Human Rights (DH/Exp (60) 21) of 4 November 1960, pp. 272–277.

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The first draft included the following Article 6: “Every national of a High Contracting Party shall have the right, without any of the distinctions mentioned in Article 14 of the Convention, of access on general terms of equality to public service in his country.”[9] However, it was already in the discussions at the Sub-Committee level that the clause was deleted. Several delegates expressed that such a right could hardly be considered fundamental, and that it was unclear what purpose it served.[10]

When the Assembly passed its Recommendation 234 (1960) with a draft Protocol, the right of access to public service was not discussed anymore.[11]

According to the European Court of Human Rights (ECtHR) judgments in the *Kosiek* and *Glasenapp* cases, the initial version of Protocol No. 7[12] did include a provision similar to Article 25 (c) of the International Covenant on Civil and Political Rights (ICCPR). However, it was deleted.[13] The Explanatory Report of the Protocol[14] does not mention any proposal to include the right of access to public service. However, it does explain that the Committee of Experts on Human Rights strived to retain only those rights that were sufficiently specific to be granted within the control system established by the Convention.[15]

From the Explanatory Report, it becomes evident that Protocol No. 7 was the consequence of the adoption of the ICCPR. The Committee of Ministers tasked the Committee of Experts on Human Rights to study the problems that may arise from the coexistence of the Convention and the ICCPR.[16] With regard to Article 25 (c) ICCPR, the experts observed that there was no corresponding provision in the European Convention.[17]

A Sub-Committee of the Parliamentary Assembly worked on the basis of this report in the following years to make suggestions about expanding the civil and political rights included in the European Convention.[18] However, in two Parliamentary Assembly of the Council of Europe (PACE) Recommendations cited by the Explanatory Report, the Assembly did not make any mention of the right of access to public service.

The overall impression from this overview is that the right of access to public service did not gain particular prominence in the discussions on Protocol No. 7, and thus it is no surprise that it did not make it to the Protocol’s final draft.

9 Doc. AS/Jur XII (10) 3 of 10 November 1958, p. 15.

10 Doc. AS/Jur XII PV 2 of 5 January 1959, pp. 2 and 7.

11 Doc. AS/Jur XII PV 2 of 5 January 1959, p. 276.

12 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms done in Strasbourg on 22 November 1984, European Treaty Series No. 117.

13 See ECtHR, judgment of 28 August 1986, *Kosiek v. Germany*, 9704/82, para. 34, and ECtHR, judgment of 28 August 1986, *Glasenapp v. Germany*, 9228/80, para. 48.

14 Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984.

15 Explanatory Report (n. 14), Introduction, para. 3.

16 Explanatory Report (n. 14), Introduction, para. 1.

17 Report of the Committee of Experts on Human Rights to the Committee of Ministers “Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights: Differences as regards the Rights Guaranteed”, Doc. H (70) 7, p. 54.

18 Explanatory Report (n. 14), Introduction, para. 3.

II. What Did the ECHR Miss? Article 25 (c) ICCPR as a Yardstick

This Section will summarise the meaning of Article 25 (c) of the International Covenant on Civil and Political Rights as it has been developed by the Human Rights Committee (HRC). Article 25 (c) provides that every citizen shall "have access, on general terms of equality, to public service in his country". This provision applies to all States parties to the European Convention on Human Rights, as they have all ratified the ICCPR.

The first legal source to determine what this right exactly means is the Human Rights Committee's General Comment No. 25 (GC 25), dedicated to Article 25 of the Covenant. This General Comment devotes very little attention to section (c), though. It does not define what "public service" is or how it is to be understood, and it only provides certain elements of what that right aims to protect and what it requires in terms of procedure. Thus, Article 25 (c) protects, first, access without discrimination: "on general terms of equality". To ensure this, "the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable". However, "affirmative action measures may be taken to ensure that there is equal access to public service for all citizens". Secondly, to protect persons holding public service positions from political interference or pressure, access to employment in public service should rest on equal opportunity and merit. Public service positions should entail secure tenure for their holders.[19]

In order to find out more about what Article 25 (c) ICCPR protects, it is necessary to turn now to the case law of the Human Rights Committee. According to the research conducted for this chapter into the United Nations jurisprudence database,[20] and into the summary of the Committee's sessions,[21] the Committee has decided on the merits of 25 individual communications dealing with Article 25 (c).[22] These cases have given the Committee the opportunity to dig deeper into the provision, despite the fact that its decisions (called "views") are never excessively doctrinal. The gist of the Committee's elaboration of Article 25 (c) can be presented as follows.

As far as the scope of the right is concerned, the right encompasses access to employment in public service as well as permanence in public service. This was stated already in GC 25. However, the right "does not entitle every citizen to obtain guaranteed employment in the public service", according to the Committee's findings on Communication 552/1993.[23] So far, the Committee has been prepared to accept just one communication on denial of access to public service.

As mentioned, Article 25 (c) encompasses access and protection from arbitrary dismissal from public service.[24] When arbitrary dismissal occurs, failing to re-admit the unfairly dismissed public servant can amount to a violation of Article 25 (c).[25] In addition, when

19 HRC, General Comment No. 25, CCPR/C/21/Rev.1/Add. 7, 27 August 1996, para. 23.

20 See https://juris.ohchr.org/.

21 Session documents available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR. The last session considered was the 135th.

22 Not all of them were relevant to this research. The Committee has dealt with very heterogeneous issues under Article 25 (c).

23 HRC, views of 14 July 1997, *Kall v. Poland*, 552/1993, para. 13.2.

24 HRC, views of 24 July 2008, *Bandaranayake v. Sri Lanka*, 1376/2005, para. 7.1.

25 See HRC, views of 22 July 2002, *Chira Vargas-Machuca v. Peru*, 906/2000, para. 7.4; HRC, views of 9 July 2002, *Nyekuma Kopita Toro Gedumbe v. Democratic Republic of Congo*, 641/1995, para. 5.2, and HRC, views of 12 July 1996, *Aduayom, Diasso and Dobou v. Togo*, 422/1990, 423/1990 and 424/1990, para. 7.6.

reinstatement has taken place, but it has been incomplete because salary arrears have not been paid,[26] or the applicant was not restored in his career,[27] the Committee has also declared a violation of Article 25 (c).

Regarding the limitations on the right, the Committee has stated that the different rights set forth in the three sections of Article 25 are not absolute, and states may attach conditions to limit them. Limitations in access to public service must remain "objective and reasonable", but as long as that is the case, the Committee is prepared to afford the States "certain liberty to determine cases of ineligibility, since these are linked to the particular historical and political characteristics of each State".[28]

The right of access to public service stipulated in Article 25 (c) ICCPR imposes an obligation of non-discrimination on the States, which is closely related to the acceptability of the limitations just mentioned.[29] However, the Committee has not elaborated a doctrine on what can be considered objective and reasonable grounds for refusing access to employment in public service, and it has acted very much on a case-by-case basis. A height requirement for applicants to become firefighters was considered indirectly discriminatory, because it excluded most women, while it included most men, and this disproportionate impact on women could not find any justification.[30] On the contrary, the Committee was satisfied that collective dismissals based on age were not discriminatory if the applicants had not been singled out and dismissals were part of a governmental restructuring plan. However, the Committee did state that distinctions based on age could amount to discrimination if not based on objective or reasonable criteria.[31]

Procedural requirements play a significant role in the Committee's case law. As already expressed in GC 25, appointment, promotion, suspension and dismissal must be subjected to objective and reasonable criteria and procedures. A procedure is not objective and reasonable if it does not respect procedural fairness.[32] Again, the Committee has not defined, in general terms, what procedural fairness is or requires, and has acted on a case-by-case basis. Proceedings leading to dismissal which curtail defence opportunities, which do not provide reasons in the final decision effecting the dismissal, and which do not reveal the reasons for starting the procedure, are unfair.[33] Massive dismissals based on grounds such as the immorality or inability of the servants dismissed, effected against established procedures and safeguards, and without remedies, are not in line with the fairness requirements

26 HRC, *Aduayom, Diasso and Dobou v. Togo* (n. 25), paras. 7.6 and 9.

27 HRC, views of 26 July 2001, *Mazou v. Cameroon*, 630/1995, para. 8.4.

28 HRC, views of 18 October 2021, *Baranovs v. Latvia*, 3021/2017, para. 8.4.

29 HRC, views of 25 March 2008, *de Jorge Asensi v. Spain*, 1413/2005, para. 7.5: "The Committee considers that the right of access to public service in general terms of equality is closely linked to the prohibition of discrimination." See also HRC, views of 31 July 2003, *Busyo, Wongodi, Matubuka et al. v. Democratic Republic of the Congo*, 933/2000, para. 5.2, in which the Committee states that Article 25 (c) "implies that the State has a duty to ensure that it does not discriminate against anyone", and that this principle applies to persons employed in the public service and to those who have been dismissed.

30 HRC, views of 13 March 2020, *Genero v. Italy*, 2979/2017, paras. 7.4 to 7.6. The height requirement was 165 cm. Height averages in Italy are 161 cm. for women and 175 cm. for men.

31 HRC, views of 27 March 2006, *Hinostroza Solís v. Peru*, 1016/2001, paras. 6.3 and 6.4. Four Committee members who took the view that the communication revealed a discriminatory practice.

32 For example, HRC, views of 24 July 2019, *Jagminas v. Lithuania*, 2670/2015, para. 8.2; HRC, *Bandaranayake v. Sri Lanka* (n. 24), para. 7.1.

33 HRC, *Bandaranayake v. Sri Lanka* (n. 24), para. 7.2.

of Article 25 (c),[34] just like dismissals that do not follow legal procedure and violate domestic laws.[35]

Finally, from the Committee's case law, it appears that the State has certain duties towards its public servants. One of these duties is respect for their political opinions and activities:

> The rights enshrined in Article 25 should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticise the Government and to publish material with political content.[36]

The other duty could be named a duty of care. It appears to be implicit in one of the earliest decisions of the Committee, in which a Colombian teacher was subjected to threats and physical violence which compelled him to leave the country. The Committee declared that the harassment and threats suffered had made his continuation in public service impossible. Thus, it declared a violation of Article 25 (c).[37]

In sum, Article 25 (c) ICCPR establishes a right of access which is not unrestricted, but admits certain limitations as long as they are reasonable and non-discriminatory. It has been interpreted as protecting public servants against arbitrary dismissal and gives them a right to be reinstated, including all benefits and career degrees if they are ever the victims of arbitrary dismissal. Any procedure concerning a public servant's employment needs to be fair and objective. Procedural guarantees allowing for adequate defence have to be in place, and they need to be complied with in practice. Finally, States have certain duties towards their public servants, such as protecting them from threats to their life and integrity, and respecting their political freedoms. This is what the ECHR drafters missed as they decided to leave a right of access to employment in public service out of the Convention and its Protocols. However, this is only a minimalistic estimate. The Human Rights Committee has dealt, in its history, with far fewer cases than the European Court of Human Rights. Thus, there are reasons to believe that the Court's case law on that right would be much richer than the Committee's, had the Convention included a provision similar to Article 25 (c) ICCPR.

However, the European Court has not remained silent on the different aspects of the right of access to employment in public service developed by the Human Rights Committee. The following Section will compare both bodies' case law and will expose the ways in which the European Court has tried to fill the gap.

III. (Not Always) Making the Most of the ECHR: The Right of Access to Public Service in the Case Law of the ECtHR

This Section will compare the case law of the European Court of Human Rights and the Human Rights Committee to try to find out to what extent the European Court has been

34 HRC, *Busyo, Wongodi, Matubuka et al. v. Democratic Republic of the Congo* (n. 29), para. 5.2. In the case, 315 judges and prosecutors had been dismissed by a Presidential Decree.

35 HRC, *Nyekuma Kopita Toro Gedumbe v. Democratic Republic of Congo* (n. 25), para. 5.2.

36 HRC, *Aduayom, Diasso and Dobou v. Togo* (n. 25), para. 7.5.

37 HRC, views of 12 July 1990, *Delgado Páez v. Colombia*, 195/1985, paras. 5.6 and 5.9.

able to protect the right of access to public service in the absence of a specific Convention provision. The inquiry will address cases on access to public service positions and cases on dismissal. These two are the most salient aspects of the jurisprudence of the Court and the Committee. Additionally, the chapter will comment on one case related to career issues.

1. Access to Public Service Positions

State legislation sometimes imposes direct or indirect bars on access to public service positions that affect certain persons or groups of persons. The case law of the Committee and the Court have addressed these issues in mostly diverging ways due to the different issues brought before them. Only one issue straddles the case law of both bodies: bars on access to public service positions for employees of previous authoritarian regimes.

The HRC has dealt with one case involving an employee from a previous authoritarian regime.[38] The Committee did not find any violation, first, because it observed that the applicant had not been singled out for retrospective reclassification as a member of the political police and for subsequent dismissal. These had been the result of a comprehensive reorganisation seeking to restore democracy and the rule of law. As regards his non-employment in one of the new Ministries, the Committee approached the question exclusively from the point of view of discrimination based on political opinions, and could not find any evidence of such discrimination.[39]

Within the case law of the European Court of Human Rights, the *Niadin*[40] judgment presents a certain resemblance. In this case, the applicant was prevented from joining the civil service in Romania under the Act on Civil Servants because he had been considered a collaborator of the political police under the previous regime. The Court did not declare a violation, but it showed its readiness to examine claims of undue restrictions on access to employment in public service. The Court reiterated that the Convention does not grant a freedom to choose a profession, or a right to access to a particular profession.[41] However, it did admit that

> restrictions on access to functions serving the public interest could entail consequences for the enjoyment of the right to respect for "private life" under Article 8 ECHR because it prevents the complainant from exercising a profession corresponding to their professional qualifications.[42]

In the case of the applicant, the Court considered that a total and definitive prohibition on access to public service positions had obvious consequences for the way in which he created his social identity and established relations with his peers.[43] Having considered that

38 HRC, *Kall v. Poland* (n. 23).

39 HRC, *Kall v. Poland* (n. 23), paras. 13.3, 13.4 and 13.6.

40 ECtHR, judgment of 21 October 2014, *Niadin v. Romania*, 38162/07.

41 Para. 31. As will be shown later, this jurisprudential stance stems from the well-known cases of *Kosiek* and *Glasenapp*.

42 Para. 32. The author's own translation from French.

43 See para. 34. The Court applies here an understanding of Article 8 that encompasses professional life in as much as it relates to people's social relations as is now accepted as part of the case law, see Pätzold (2015), p. 258. This understanding was laid out in the judgment of 16 December 1992, *Niemietz v. Germany*, 13710/88, para. 29. Another case in which this understanding of Article 8 is thoroughly elaborated upon is *Denisov v. Ukraine* (GC), judgment of 25 September 2018, 76639/11. This interpretation can be seen as an example of the Court's "integrated approach" towards social and economic rights. On this approach, see Mantouvalou (2013). On the right to private life as applied to holders of public service positions in general, see *The Protection of Privacy in Civil Service Employment* by M. Otto in this volume.

the facts fell within the ambit of Article 8, the Court could take the next step: it checked whether the applicant was being subjected to discrimination contrary to Article 14 ECHR. In fact, the applicant was being treated differently from persons who had not served for the security police before. The Court considered that this difference pursued a legitimate aim and was not disproportionate, given that "civil servants (. . .) exercise a part of State sovereignty" and that States have a legitimate interest in ensuring their employees' loyalty towards their constitutional values. In addition, the applicant was not prevented from working in the private sector, or in public sector positions not involving the exercise of State prerogatives.[44]

The HRC and the ECtHR came to the same conclusions in their respective decisions, albeit following very different reasoning. It does not appear that one or the other was ready to provide a higher level of protection. Nevertheless, the most interesting point is that the European Court found a way, through Article 8 and Article 14, to engage with the merits of the issue regardless of the absence of a right of access to public service in the Convention. As stated earlier, non-discrimination is a very salient aspect of Article 25 (c) ICCPR, and Article 14 ECHR is, precisely, the anti-discrimination clause. Of course, the boldest part of the reasoning is that on the applicability of Article 8 ECHR to professional issues, and it constitutes a magnificent example of how the Court has found ways to expand the scope of the Convention.

Some years before the *Niadin* judgment, the European Court had declared violations in the cases of *Sidabras and Džiautas v. Lithuania*[45] and *Rainys and Gasparavicius v. Lithuania*[46] as former KGB agents were banned from accessing public service in that country. However, the decisive reason for this was that the ban extended to the private sector as well. The Court found that

> restrictions on a person's opportunity to find employment with a private company for reasons of lack of loyalty to the State cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service.[47]

Thus, it appears that the Court and the Committee generally agree on the fact that restricting access to public service positions for individuals who have served in a previous authoritarian regime is a legitimate and proportionate measure to take. The European Court has filled in the gap with a combination of Article 8 and Article 14 ECHR, and the standards appear similar to the HRC standards for Article 25 (c) ICCPR.

Similarities between the case law of both bodies end here, though. The following paragraphs will continue to show how the European Court has managed to deal with public service access complaints without a right established in the Convention.

The Court has undergone an evolution in this respect. The first cases that come to mind when talking about access to public service and the ECtHR are those of *Kosiek v. Germany* and *Glasenapp v. Germany*, in which probationary civil servants were refused final appointments due to their political views and activities.[48] These were not deemed in line with

44 ECtHR, *Niadin v. Romania* (n. 40), paras. 49, 51, 54 and 55.

45 ECtHR, judgment of 27 July 2004, *Sidabras and Džiautas v. Lithuania*, 55480/00 and 59330/00.

46 ECtHR, judgment of 7 April 2005, *Rainys and Gasparavicius v. Lithuania*, 70665/01 and 74345/01.

47 ECtHR, *Rainys and Gasparavicius v. Lithuania* (n. 46), para. 36; *Sidabras and Džiautas v. Lithuania* (n. 45), paras. 57 and 58.

48 See ECtHR, *Kosiek v. Germany* (n. 13) and *Glasenapp v. Germany* (n. 13).

the Federal Republic's fundamental constitutional values. The Court considered that the core issue of the complaints was access to employment in the civil service as opposed to freedom of expression because the political opinions and attitudes of both candidates had been examined as qualifications to enter civil service.[49] Recalling that a right of access to civil service positions had been consciously left out of the Convention[50] the Court declared, by 16 votes to one, that there had been no violation of Article 10. The Court did state, though, that the Convention could extend, "in other respects", to civil servants.[51] This explains that the Court was prepared to examine the applications under Article 10 ECHR rather than declaring them inadmissible upfront. However, even in recent times, whenever the Court has perceived that a case concerned access to civil service positions, it has continued to reject complaints at the admissibility stage. That was the fate of the *Grimmark v. Sweden* application, in which a nurse was not admitted to employment as a midwife because she had announced that she was not prepared to assist in abortions for conscience and religion-related reasons.[52] The Court recalled that the Convention "does not guarantee a right to be promoted or to occupy a post in the civil service", and determined that the applicant "had no right to obtain any of the vacant posts" she had applied to.[53] However, the Court did examine the admissibility of the case under Articles 9 and 10 on their own and in conjunction with Article 14 ECHR, but concluded that it was manifestly ill-founded.[54]

In spite of this, the Article 8 ECHR track appears to be an established one now. Two Bulgarian cases displaying a very paradoxical situation attest to this. In these two cases, the applicants' access to employment in public (and private) sectors was barred due to the fact that they were already civil servants. They had been suspended due to criminal investigations against them. During the time of the suspension, they were not allowed to resign from their posts and they were not dismissed, despite the fact that they requested dismissal several times. Consequently, they were unable to take up any other employment in public or private sector, as that would have been incompatible with their civil servant status, and they had no income. One of them was finally dismissed when the protracted criminal proceedings against him finished with his conviction.[55] The other one was successful in parallel litigation against the legal provisions at the base of his situation. He was reintegrated into his post and retired some months later.[56]

In both cases, the Court recalled that neither the Convention nor any of its Protocols guaranteed a right of access to employment in public service or to choose a profession. At the same time, it recalled the Lithuanian cases on former KGB agents, and the principle that the right to respect for private life could be affected by a ban on access to certain

49 ECtHR, *Kosiek v. Germany* (n. 13), para. 39; ECtHR, *Glasenapp v. Germany* (n. 13), para. 53.

50 ECtHR, *Kosiek v. Germany* (n. 13), para. 34; ECtHR, *Glasenapp v. Germany* (n. 13), para. 48.

51 ECtHR, *Kosiek v. Germany* (n. 13), para. 35; ECtHR, *Glasenapp v. Germany* (n. 13), para. 49.

52 See ECtHR, decision of 11 February 2020, *Grimmark v. Sweden*, 43726/17. In the *Emel Boyraz* case, the Court also reiterated "that the right of recruitment to the civil service was deliberately omitted from the Convention. Consequently, the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention." See ECtHR, judgment of 2 December 2014, *Emel Boyraz v. Turkey*, 61960/08, para. 41.

53 ECtHR, *Grimmark v. Sweden* (n. 52), para. 22.

54 ECtHR, *Grimmark v. Sweden* (n. 52), paras. 28, 37 and 45.

55 This was the judgment of 24 July 2012, *DMT and DKI v. Bulgaria*, 29476/06.

56 This was the judgment of 16 November 2006, *Karov v. Bulgaria*, 45964/99.

professions. In these two Bulgarian cases, the applicants had been prevented from developing relationships with the outside world in professional environments. This represented an interference with the right to respect for their private lives,[57] which derived from their status as civil servants.[58] Admitting that the restriction could be justified by the prevention of conflicts of interest,[59] the Court found a violation in the case of *DMT and DKI*, as it deemed the restriction to be an excessive burden.[60] In the other case, which the Court had decided upon six years earlier, the Court found no violation of Article 8 ECHR. The Court considered that the restriction was due to criminal proceedings, which invariably have an impact on private life and are compatible with Article 8 as long as they do not go beyond what is unavoidable. In this case, the Court considered that any aggravation of the applicant's situation due to the protractedness of criminal proceedings had been duly taken into account, as the Court declared a violation of Article 6, paragraph 1 ECHR.[61] In spite of the different outcomes, both cases reinforce the Court's (limited) bypass of the obliteration of the right of access to public service in the Convention through Article 8.

Two further cases show revealing aspects of the Court's practice under Article 8 ECHR. The case of *Yilmaz v. Turkey* displays certain inconsistencies on the part of the Court. In this case, a religious culture teacher had passed a competitive examination that gave access to teaching posts abroad. However, he was refused access to the post due to a security inquiry undertaken into his private life. For example, the competent authorities took into account the fact that he practised a separation between men and women in his household, and that his wife conformed to the Islamic dress code in everyday life. The ECtHR examined his complaint under Article 8 of the Convention, as it appeared that the reasons for his non-appointment were exclusively related to his private life.[62] The Court did not accept that such considerations could be relevant for any public interest requirements or needs of the educational services.[63] Even assuming that the non-appointment had had a legal basis and had pursued a legitimate aim,[64] the Court found it was not necessary in a democratic society and declared a violation of Article 8 ECHR.[65] The interesting feature about this case is that neither the respondent State nor the Court ever mentioned the principle, repeated in many other cases, that the Convention does not confer a right of access to employment in civil service, despite the fact that the application clearly involved someone trying to access a public post.[66]

A second case is illustrative of the goods protected by Article 8 ECHR in cases concerning access to public service positions or to professions more generally. Article 8 seems to protect not only the ability to establish relations with other persons in professional environments, but also, to a certain extent, the personal choices made by everyone concerning their professional path. This dimension became more apparent in the *Bigaeva* case. The

57 ECtHR, *DMT and DKI v. Bulgaria* (n. 55), para. 102; ECtHR, *Karov v. Bulgaria* (n. 56), paras. 85–88.
58 ECtHR, *DMT and DKI v. Bulgaria* (n. 55), para. 113.
59 ECtHR, *DMT and DKI v. Bulgaria* (n. 55).
60 ECtHR, *DMT and DKI v. Bulgaria* (n. 55).
61 ECtHR, *Karov v. Bulgaria* (n. 56), para. 88.
62 ECtHR, judgment of 4 June 2019, *Yilmaz v. Turkey*, 36607/06, para. 41.
63 ECtHR, judgment of 4 June 2019, *Yilmaz v. Turkey*, 36607/06, para. 47.
64 ECtHR, judgment of 4 June 2019, *Yilmaz v. Turkey*, 36607/06, para. 48.
65 ECtHR, judgment of 4 June 2019, *Yilmaz v. Turkey*, 36607/06, para. 49.
66 The Court makes this clear when it finds that the application concerns an employment dispute between an individual and the respondent State, para. 36.

applicant was a Russian national who had completed law studies in Greece as well as a compulsory 18-month internship organised by the Bar, which was a prerequisite to joining the Bar after having passed the admission exam. However, she was prevented from sitting the exam and joining the Bar due to the fact that she was a foreign national.[67] The Court considered that the applicant's choice to complete the internship, with the objective of sitting the admission exam later on, "was closely related to personal decisions taken in the passage of time and having repercussions on her personal and private life". Thus, preventing her from participating in the exam constituted an interference with her right to respect for her private life.[68] The Court declared a violation of Article 8 because the conduct of the Greek authorities had lacked coherence and respect for the personal and professional life of the applicant.[69] She had been led to dedicate 18 months of her life to complete the internship, leaving other choices behind, only to find out that she would not be able to obtain her objective of sitting the exam.[70] In this case, when assessing the impact of the restriction on the applicant's private life, the Court seems to focus more on her professional and personal choices than on her ability to establish relations with the outside world in a professional environment. This rationale could perfectly apply to cases concerning access to public service positions.[71] Thus, in this context, Article 8 ECHR seems to protect both the ability to establish relations in a professional environment and the personal choices involved in the design of one's own professional life.

This brief review of the case law has shown that, as far as access to public service positions is concerned, the European Court of Human Rights has been prepared to fill the Convention's gap with Article 8, sometimes in combination with Article 14, and sometimes on its own, at least to a certain extent, and to protect personal goods and values linked to people's professional life. However, a last case before the Human Rights Committee shows that the gap is not completely closed.

The case of *Genero* dealt with indirect discrimination based on gender and was related to a height requirement to enter the professional firefighter corps. The HRC considered that applying the same requirement to men and women impacted disproportionately on the chances of the latter to access the posts, as it left out most women but allowed most men in, and found no justification for it.[72] This very same complaint had been rejected earlier by a single judge at the European Court of Human Rights.[73] Because the single-judge decisions are not published and do not express inadmissibility grounds,[74] it is not possible to know whether the application was formally flawed. However, at first sight, it becomes

67 ECtHR, judgment of 28 May 2009, *Bigaeva v. Greece*, 26713/05. She eventually sat the exam as she obtained provisional measures from a court in this sense. However, when that same court decided on the merits of her application, it found that she had not been entitled to sit the exam.

68 ECtHR, judgment of 28 May 2009, *Bigaeva v. Greece*, 26713/05, para. 25.

69 ECtHR, judgment of 28 May 2009, *Bigaeva v. Greece*, 26713/05, para. 35.

70 ECtHR, judgment of 28 May 2009, *Bigaeva v. Greece*, 26713/05, para. 33.

71 For example, in the hypothetical case of a German Law graduate who was refused access to legal professions in the civil service after having trained for years to pass the second State examination, or a Spanish graduate who had spent the usual three to four years preparing the exam for the diplomatic service or top civil servant positions.

72 HRC, *Genero v. Italy* (n. 30), paras. 7.4 to 7.7.

73 HRC, *Genero v. Italy* (n. 30), para. 2.6. A similar situation had happened previously in Communication 2155/2012, filed by the former President of the Republic of Lithuania and applicant to the ECtHR Rolandas Paksas (judgment of 6 May 2011, 34932/04).

74 HRC, *Genero v. Italy* (n. 30), para. 6.2.

apparent that the European Court refused to deal with this complaint, which could have been adjudicated on the basis of Articles 8 and 14 ECHR. Thus, this case shows that, in spite of the Court's ability to open alternative paths for public service-related complaints, a gap remains in the Convention system that could likely be filled in with an explicit right of access to public service positions.

2. *Dismissals From Public Service*

The case law of the Human Rights Committee contemplates protection against arbitrary dismissal as part of Article 25 (c) ICCPR. In this aspect, there are many more points of overlap between its case law and that of the European Court of Human Rights, which means that the European Court has been able to close the gap in this respect, in the absence of an explicit right of access to public service positions in the Convention.

2.1. Dismissals Following Unfair Procedures

The Human Rights Committee found a violation of Article 25 (c) in the case of the automatic dismissal of a border guard following his placement under operational surveillance. The Committee considered that this procedure was not fair, because dismissal operated automatically and irrespective of the results of that operational surveillance.[75] The Committee reiterated that dismissal procedures need to respect procedural fairness and to rest on objective and reasonable criteria.

For the European Court of Human Rights, it has not been difficult to deal with cases of procedurally unfair dismissals from public service. It has done so under Article 6 ECHR and, again, under Article 8 ECHR.[76]

Article 8 ECHR has provided standards for both the private-life related reasons due to which it is legitimate to dismiss a public servant, and for the procedure to be followed.

A very well-known case is that of *Lustig-Prean and Beckett v. United Kingdom*. In this case, two members of the armed forces were discharged due to their homosexuality, which became known to their managers once they had entered the Army. In fact, they were not dismissed for failing to disclose their sexual orientation as they were recruited.[77] The Court found, first, that the investigations carried out and leading to their dismissals had been triggered solely on grounds of their sexual orientation. The investigations had constituted especially grave interferences with the applicants' rights to respect for private life, as they had been "of an exceptionally intrusive character".[78] The Court also underlined the blanket character of the rules commanding the automatic dismissal of any homosexual

75 See HRC, *Jagminas v. Lithuania*, para. 8.3 (n. 32).

76 Case law on Article 6 ECHR is discussed in *The Right to a Fair Trial for Civil Servants and the Importance of the State's Interest in Applying Article 6, Paragraph 1 ECHR* by F. Aperio Bella in this volume. Consequently, only three Article 8 cases will be discussed here.

77 ECtHR, judgment of 27 September 1999, *Lustig-Prean and Beckett v. United Kingdom*, 31417/96 and 32377/96, para. 64. Other cases dealing with the same issue were *Smith and Grady v. United Kingdom*, judgment of 27 September 1999, 33985/96 and 33986/96; *Perkins and R. v. United Kingdom*, judgment of 22 October 2002, 43208/98 and 44875/98, and *Beck, Copp and Bazeley v. United Kingdom*, judgment of 22 October 2002, 48535/99, 48536/99 and 48537/99.

78 ECtHR, *Lustig-Prean and Beckett v. United Kingdom* (n. 77), paras. 64, 83 and 84.

member of the armed forces, irrespective of their record of conduct.[79] In this respect, the case bears a certain resemblance to Communication 2670/2015 before the Human Rights Committee. In that case, the Committee found unfairness in the fact that subjection to operational surveillance entailed automatic dismissal, without awaiting the results of the surveillance. In the *Lustig-Prean and Beckett* case, the European Court declared a violation of Article 8 ECHR, thus showing that it could provide protection in a situation very similar to another one that found relief under Article 25 (c) ICCPR. In addition, the European Court found that the applicants' discharge had had "a profound effect on their careers and prospects", given "the unique nature of the armed forces" and the difficulties in transferring military qualifications and experience to civilian life.[80] Again, it was this biographical aspect of Article 8 ECHR which led to the finding of a violation, rather than the relational aspect of private life. The Court found that the respondent State had not provided convincing or weighty reasons to justify the discharge, which was a direct consequence of the applicants' homosexuality, and declared a violation.[81]

The second relevant case concerns the dismissal of a judge. The applicant was subjected to a disciplinary investigation for mixed reasons. Some of them regarded her private life (having moved out of her mother's home as an unmarried woman, wearing a mini-skirt and too much make-up during working hours), some of them referred to her performance (skipping working hours and absenteeism), and others to her impartiality, with sexist overtones (entertaining close relationships with certain men, especially with a lawyer, and not being impartial in the cases brought by that lawyer before her). The results of the investigation, however, did not support the allegations of performance and impartiality. The inspection report was never communicated to her. The High Council of the Judiciary removed her from her functions, accepting the allegations not supported by the investigation report, and affirming that she had damaged the honour and dignity of her profession, and lost all dignity or personal consideration. She only received the operative part of the decision. Her appeal before the same Council was unsuccessful, and she never got to know the reasoning. It was not possible to hold a judicial review of the case.[82]

The reasons why the Court declared a violation of Article 8 ECHR were twofold. On the one hand, the applicant was subjected to an investigation into her private life, and her removal was due to private life reasons, as the investigation could not confirm the allegations on the professional aspects.[83] The Court considered it disproportionate.[84] On the other hand, she did not enjoy enough safeguards or minimum guarantees.[85] Thus, she did not enjoy the protection from arbitrariness afforded by Article 8 ECHR.[86]

In another case against Turkey, the Court used Article 8 ECHR to protect a civil servant who was dismissed on grounds of sex. The applicant had passed an examination to become a security officer. After obtaining her appointment in court, which initially had been refused to her for being a woman and not having completed military service, she was

79 ECtHR, *Lustig-Prean and Beckett v. United Kingdom* (n. 77), para. 86.
80 ECtHR, *Lustig-Prean and Beckett v. United Kingdom* (n. 77), para. 85.
81 ECtHR, *Lustig-Prean and Beckett v. United Kingdom* (n. 77), paras. 98, 99 and 105.
82 ECtHR, judgment of 19 October 2010, *Özpinar v. Turkey*, 20999/04.
83 ECtHR, *Özpinar v. Turkey*, (n. 82), paras. 47, 48, 74 and 77.
84 ECtHR, *Özpinar v. Turkey*, (n. 82), para. 79.
85 ECtHR, *Özpinar v. Turkey*, (n. 82), para. 77.
86 ECtHR, *Özpinar v. Turkey*, (n. 82), para. 79.

dismissed by consequence of a second judgment. The reason was that posts like hers were reserved for men.[87]

The difference between appointment refusal and dismissal became relevant in this case. The respondent State tried to argue that the case was about appointment refusal,[88] and the Court reiterated that a right of recruitment to civil service was deliberately omitted from the Convention, so that appointment refusals could not provide a basis for a complaint under the Convention.[89] However, the Court considered that this was a case of dismissal, as the applicant had started to exercise her functions.[90] The Court would not have needed this reasoning if the Convention had included a right of access to public service positions like Article 25 (c) ICCPR. Nevertheless, the Court was able to fill the gap again. The Court considered that the applicant's dismissal had been based on her sex, a notion protected by the concept of private life. This dismissal affected the applicant's inner circle (her family), her relationships with the outside world and her ability to practise a profession corresponding to her qualifications. Thus, the Court protected all of the aspects of private life that have been mentioned earlier.[91] Once the applicability of Article 8 had been established, the Court analysed the application from a discrimination perspective (Article 14 ECHR) and found a violation of both Articles in conjunction, as it was not shown that excluding women from the applicant's post pursued any legitimate aim.[92]

It is possible to conclude that the European Court has been able to cover unfair dismissals under Article 8 in a very similar way to the Human Rights Committee under Article 25. However, it needed more convoluted reasoning to be able to apply the Convention. In addition, it has dealt with dismissals prompted by private-life-related reasons and investigations into public servants' private life. The HRC has not dealt with such matters in decisions on the merits.

2.2. Dismissal for Political Reasons

Both the HRC and the ECtHR have dealt with cases involving the dismissal of public servants due to their political activities, and both have provided protection under the relevant provisions of their respective treaties.[93] However, the differences in the context cannot be overlooked. To be precise, the cases before the HRC concerned factual rather than formal dismissals, but they will be dealt with here because the political motivation of the State action undertaken against them appears to be more relevant.

In the joint Communications 422/1990, 423/1990 and 424/1990, the applicants, a civil servant and two professors at a State-controlled university, were arrested for possessing and reading materials critical to the Government of Togo and materials for the creation of a new political party. They were charged with the offence of *lèse majesté* and

87 ECtHR, *Emel Boyraz v. Turkey* (n. 52).
88 ECtHR, *Emel Boyraz v. Turkey* (n. 52), para. 38.
89 ECtHR, *Emel Boyraz v. Turkey* (n. 52), para. 41.
90 ECtHR, *Emel Boyraz v. Turkey* (n. 52), para. 42.
91 ECtHR, *Emel Boyraz v. Turkey* (n. 52), para. 44.
92 ECtHR, *Emel Boyraz v. Turkey* (n. 52), para. 56. In view of this case, it is even more striking that the Court declared inadmissible the application of Ms. Genero, who was eventually successful before the Human Rights Committee.
93 See *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

taken to prison. Some months later, they were discharged and released. However, when they applied for reinstatement to their previous positions, they were not admitted back until approximately five years later, when an amnesty law came into force. In addition, they were not compensated for those years they had to wait. The Human Rights Committee held that the applicants' right to freedom of expression (Article 19 ICCPR) had been breached,[94] and that an issue also arose under Article 25 (c) with regard to their prolonged non-reinstatement and the absence of compensation, and concluded that these constituted a violation of that provision.[95]

The most similar case at the European Court of Human Rights is *Karapetyan and Others v. Armenia*. In this case, high-ranking officials of the Foreign Affairs Ministry had signed a statement with their names and positions issued by other colleagues expressing support for demonstrators who protested because they thought that the presidential election had been rigged. The authors of the letter shared the opinion that there had been fraud. They were dismissed by the Ministry of the Interior. The Court found this to be in conformity with Article 10 ECHR.[96]

The second case at the European Court of Human Rights to be commented on here is the well-known *Vogt* case. The case presented significant similarities with the *Kosiek* and *Glasenapp* cases, because it also concerned a civil servant in Germany who lost her appointment because of her political activities on behalf of the Communist Party. She was suspended during the investigation phase of the disciplinary proceedings opened against her (which lasted for over four years) and then dismissed. She was reinstated after the *Land* she had been employed in repealed its decree on the employment of extremists in the civil service in 1991. A narrow majority of 10 judges to 9 found violations of Articles 10 and 11 ECHR.[97]

In a third judgment on point, the ECtHR had to deal again with scope issues. In *Godenau v. Germany*, the applicant, a trained teacher without civil servant status, complained about having been included in a list of teachers deemed unsuitable for being appointed to teaching posts in the public schools of one German *Land*. This was due to her involvement with an extremist right-wing party and to her record of statements, lectures and written pieces in which she expressed certain political views and even suggested Holocaust denial.[98] The authorities considered that she did not display the required loyalty to the constitution. Germany argued that the case was inadmissible because it concerned recruitment to the civil service, but the Court disagreed. The applicant did not complain about the refusal to employ her (which was a likely, but not necessary consequence of her inclusion in the list), but about being included in that list due to her political activities and opinions.[99] Thus, it examined the case on the merits and concluded there had been no violation of Article 10.[100]

94 HRC, *Aduayom, Diasso and Dobou v. Togo* (n. 25), para. 7.4.
95 HRC, *Aduayom, Diasso and Dobou v. Togo* (n. 25), para. 7.6.
96 ECtHR, judgment of 17 November 2016, *Karapetyan and Others v. Armenia*, 59001/08, para. 62.
97 ECtHR (GC), judgment of 26 September 1995, *Vogt v. Germany*, 17851/91, paras. 61 and 68.
98 ECtHR, judgment of 29 November 2022, *Godenau v. Germany*, 80450/17, paras. 25 and 56.
99 ECtHR, judgment of 29 November 2022, *Godenau v. Germany*, 80450/17, paras. 31–35. The Court refers to its previous judgment of 30 June 2020, *Cimperšek v. Slovenia*, 58512/16.
100 ECtHR, *Godenau v. Germany* (n. 98), para. 61.

Taking a look at the reasoning of these four cases, it appears that the Human Rights Committee makes the most uncompromising defence of public servants' political rights. As noted earlier, the Committee applies the principle that

> access to public service in general terms of equality encompasses a duty, for the State, to ensure that there is no discrimination on the ground of political opinion or expression. This applies a fortiori to those who hold positions in the public service. The rights enshrined in Article 25 should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticize the Government and to publish material with political content.[101]

This appears to warrant the finding of a violation in the case without further considerations, which can be very well due to the very blatant character of the violations suffered by the applicants.

The European Court has been more nuanced. In the three cases, it repeated the principle laid down in *Kosiek* and *Glasenapp* according to which civil servants qualify for protection under Article 10 ECHR.[102] However, in all cases, it found countervailing values that could justify the restriction of freedom of expression. In the *Vogt* and *Godenau* cases, it appears to be the defence of democracy;[103] in *Karapetyan*, the Court referred to the political neutrality of civil servants.[104] In all cases, the Court points out that a State is entitled to require civil servants' loyalty to its constitutional values.[105] While in *Karapetyan* the Court held the dismissal of the applicants to be proportionate and based on sufficient and relevant grounds, and very much took into account the State's instable political context,[106] in *Vogt* it came to the opposite result. This was due to the "absolute nature" of the loyalty duty, which applied equally to every civil servant, regardless of function and rank (the applicant was a secondary schoolteacher), and did not allow for distinctions between private life and service. In addition, the measure seemed particularly harsh in the applicant's individual situation. The Court concluded that the State had not justified convincingly the need for her dismissal, which had been disproportionate.[107]

It becomes apparent that the difference between the *Vogt* and the *Karapetyan* case is the function of the civil servants concerned. While a teacher must be free to carry out political activities and express political opinions that may not be in the interest of the State,[108] high-ranking officials' and diplomats' freedom of expression can be restricted.[109] In contrast, in the *Godenau* judgment, the Court underlined the relevance of teachers' functions and was ready to accept the restrictions to Article 10 imposed on the applicant. However, it

101 HRC, *Aduayom, Diasso and Dobou v. Togo* (n. 25), para. 7.5.

102 ECtHR, *Karapetyan v. Armenia* (n. 96), paras. 47 and 58; *Vogt v. Germany* (n. 97), para. 43; *Godenau v. Germany* (n. 98), para. 35.

103 ECtHR, *Vogt v. Germany* (n. 97), para. 51; *Godenau v. Germany* (n. 98), para. 52.

104 ECtHR, *Karapetyan v. Armenia* (n. 96), paras. 48 and 49. However, the Court also points out that the loyalty of civil servants can be "a particularly important element in societies which are in the process of building up the institutions of a pluralistic democracy" (para. 50).

105 ECtHR, *Karapetyan v. Armenia* (n. 96), para. 49; *Vogt v. Germany* (n. 97), para. 59; *Godenau v. Germany* (n. 98), para. 52.

106 ECtHR, *Karapetyan v. Armenia* (n. 96), paras. 57, 59–61.

107 ECtHR, *Vogt v. Germany* (n. 97), paras. 59–61.

108 The applicant in *Vogt* had held organic positions, addressed party congresses and run for public office.

109 ECtHR, *Karapetyan v. Armenia* (n. 96), para. 59.

also took into account that the applicant was not employed by the State at the time she was included in the list, that the consequences for her were milder than in *Vogt*, and that she could benefit from a thorough judicial review.[110] Nevertheless, for the purposes of this research it becomes clear that the European Court can use Article 10 ECHR to fill in the gap left by the drafters of the Convention with respect to the right of access to employment in public service.

3. Career, Promotion and Demotion Issues

This Section will only deal with one ECtHR case, in which the Court made a new inroad to protect civil servants' rights falling under the scope of Article 25 (c) ICCPR. In the case, a female diplomat's posting abroad was terminated, and she was recalled to the capital, following problems in the consular section which she had headed. Those problems had been attributed to her absence due to pregnancy and birth. Her posting was terminated when she announced her second pregnancy, with the argument that she was not suited for consular service.[111] The applicant invoked Article 1 of Protocol No. 12 to the Convention. This Protocol expands the Convention's non-discrimination clause to "any right set forth by law" of the States parties, and to any action undertaken by its public authorities.[112] The Court considered that the applicant's pregnancy had been the reason behind the termination of her posting, and that this amounted to different treatment based on sex.[113] However, the Court concluded that she had not suffered discrimination, because domestic law did not prevent the termination of posts and allowed the employer to arrange the activity of pregnant employees with the only prohibition of redundancy, which had not been the case.[114] There had been no breach of domestic equal opportunity laws, and she had suffered no long-term setbacks in her career. In fact, after returning to active service, she had been promoted.[115] Beyond its implications for gender equality, this case brought to the surface the possibility of using Protocol No. 12 in public service employment disputes. Its advantage *vis-à-vis* Article 14 ECHR is that its scope is not limited to the enjoyment of ECHR rights, but encompasses rights granted by domestic law and any action by public authorities. Thus, it could perfectly serve to cover issues of access to public service positions, dismissal, career or remuneration, as long as domestic law recognises rights in these respects, and provided that the applicant can prove a discrimination case. Its downside is that States need to ratify Protocol No. 12 first, and only 20 States have done so.[116]

IV. Concluding Remarks

This limited overview has shown how the European Court of Human Rights has used different Convention provisions to protect elements of the right of access to employment in public service as defined by the Human Rights Committee. This right encompasses more

110 ECtHR, *Godenau v. Germany* (n. 98), paras. 54–59.

111 See ECtHR, judgment of 20 October 2020, *Napotnik v. Romania*, 33139/13.

112 ECtHR, *Napotnik v. Romania*, (n. 111), para. 55.

113 ECtHR, *Napotnik v. Romania*, (n. 111), paras. 76 and 77.

114 ECtHR, *Napotnik v. Romania*, (n. 111), paras. 81 and 82.

115 ECtHR, *Napotnik v. Romania*, (n. 111), para. 84.

116 See the Council of Europe's Treaty Office at www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177.

than just the strict access consideration to public service positions. The European Court of Human Rights has mobilised Articles 6, 8, 10, and 14 ECHR to protect not only that aspect of the right, but also the others: the right not to be arbitrarily dismissed and some career-related interests. It has thus prevented arbitrariness and unfairness in public servants' relations with their employers. The Court has apparently not renounced the principle that the Convention does not enshrine a right of access to employment in public service as such,[117] but it has found ways to protect public servants and persons who wished to obtain positions in public service. At the very least, it has considered their applications.[118]

The most relevant Convention provision is Article 8 ECHR, an Article whose meaning the Court has very much expanded throughout its history. However, Article 1 of Protocol No. 12 could play an increasingly relevant role, as it aims to provide relief for discrimination suffered in the enjoyment of any right recognised by domestic law, or rooted in any action undertaken by a public authority. This includes access to positions and permanence in public service, career rights or economic and pension rights of the servants.

Nevertheless, certain gaps remain, and they can become very salient, as shown by the *Genero* case, which a single judge declared inadmissible at the European Court of Human Rights, but was successful before the Human Rights Committee. In addition, the Court has sometimes had to find tortuous argumentative ways in order to bring complaints under the purview of the Convention, and its conclusions on what constitutes refusal of access to employment in public service as opposed to dismissal are not uncontroversial. The Convention framers consciously left a right of access to public service outside of the Convention. They did not miss the opportunity to include it, rather they rejected it upfront. However, the European Court, as with many other issues present in European societies, has been able to partially mitigate the consequences of that choice.

Bibliography

Bates E. (2010), *The Evolution of the European Convention on Human Rights*, New York: Oxford University Press.

Council of Europe (1976), *Collected Edition of the "Travaux Préparatoires" of Protocol No. 4 to the Convention Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto*, Strasbourg: Council of Europe.

Mantouvalou V. (2013), 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', 13 *Human Rights Law Review*, 529–555.

Pätzold J. (2015), 'Art. 8 Recht auf Achtung des Privat- und Familienlebens', in Karpenstein U., Mayer F. (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, 2nd edition, Munich: C.H. Beck, 252–285.

117 The case of *Yilmaz v. Turkey* (n. 62) could represent the first attempt on this principle, though.

118 Admittedly, this research has not looked systematically into cases declared inadmissible. A survey of those applications could reveal the cases in which the Court is not prepared to consider applications on the right of access to employment in public service.

40 The Protection of Privacy in Civil Service Employment

Marta Otto

I. Introduction

For many years, the status of civil servants in Europe was closely linked to the authority of the State. As a result, almost all European Union Member States designed their public organisations in a specific manner, in the belief that the distinct organisational features would induce a certain ethos on the part of civil servants. In many countries, civil servants were thus working in hierarchical institutions with very specific ethical obligations and recruitment procedures. Within this structure, civil servants were perceived as a different category of employees, subject to higher substantive and moral requirements and burdened with additional duties. This perception had its bearing on the scope of acceptable intrusions into their private life.

At present, despite the ongoing process of reform of the civil service across Europe, largely directed towards its privatisation,[1] the broadly understood morale of public employees still seems to be more closely scrutinised than that of private employees. Civil servants, especially those who occupy high-level positions, are deemed to wield a portion of the State's sovereign power, which implies a special/double bond of trust and loyalty (towards the public authority and citizens). It is thus generally legitimate for States to impose a certain duty of restraint on them and to require them to behave in a manner worthy of public office, even when they are not performing their duties. In most cases, these constraints are imposed by statutory rules which are binding on civil servants and which they, unlike private sector employees, have not been able to negotiate (*vide* the duty of dignified behaviour).[2]

1 See *Civil Service in Transition: Privatisation or Alignment of Employment Conditions?* by C. Fraenkel-Haeberle in this volume.

2 The principle of dignified behaviour consists, among other things, of avoiding undesirable behaviour that has a negative impact on the image of the State, the civil service and the office. For instance, in Belgium, Article 5, para. 2 of the Royal Decree of 22 December 2000 regarding the selection and career of State civile service agents (*Arrêté royal du 22 décembre 2000 concernant la sélection et la carrière des agents de l'Etat*), Moniteur belge, 2001-01-09, no. 6, pp. 438–442, states that: "les agents évitent, en dehors de l'exercice de leur fonction, tout comportement qui pourrait ébranler la confiance du public dans leur service"; in Estonia, para. 51(4) of Civil Service Act (*Avaliku teenistuse seadus*) 13.06.2012 RT I, 06 July 2012, provides that: "an official shall behave respectably both in the service and outside the service, including refrain from actions which would discredit him or her as an official or harm the image of the authority". In Poland Article 76, para. 1(7) of the Civil Service Act (*Ustawa z dnia 21 listopada 2008 r. o służbie cywilnej*), Dz.U. 2008 no. 227 poz. 1505, states that: "A member of the civil service corps is obliged to in particular: behave with dignity in the service and outside it." See also § 14 of Order no. 70 of the Prime Minister of 6 October 2011 on guidelines for observance of the principles of civil service and on the ethics of the civil service corps (*Zarządzenie Nr 70 Prezesa Rady Ministrów z dnia 6 października 2011 r. w sprawie wytycznych w zakresie przestrzegania zasad służby cywilnej oraz w sprawie zasad etyki korpusu służby cywilnej*; M.P. 2011 no. 93 poz. 953).

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At the same time, the duties of the civil service staff are mostly contained in the category of general clauses (in the vast majority of the EU Member States these are also incorporated into written, formal codes of ethics)[3] whose assessment is entrusted to a law-abiding entity or the body applying the law. In order to ensure that these requirements are actually met, the authority may also possibly seek, collect and disclose upon request certain personal information about the persons it is about to employ or has employed.[4] All this may involve more or less extensive interference in the privacy (including informational privacy) of civil servants.

This chapter is devoted to examining the permissible scope of interference in the privacy of civil servants because of their special status as persons employed by the public authority. In the European multilevel system of human rights protection, the central axis of privacy protection in employment is constituted by the European Convention on Human Rights (ECHR) and the jurisprudential activity of the European Court of Human Rights (ECtHR). The latter, by linking privacy protection to anti-discrimination, has led to a significant expansion of the material scope of the right to privacy and, consequently, to the identification of the social dimension of a right which nowadays in essence rests upon "the right to establish and develop relationships with other human beings" and, as such, firmly interlocks with "the right to work".[5] The purpose of this chapter is therefore to elucidate the standards for protecting the privacy of civil servants through the prism of the jurisprudence of the ECtHR, which should make it possible to grasp the potential influence of these interpretations also on the national component of the multilevel system concerning the protection of the privacy of the civil service in Europe.

II. The Protection of Privacy in Employment Under Article 8 ECHR and Its Applicability to Civil Servants

Article 8 ECHR has been described as "one of the most open-ended provisions of the Convention".[6] Indeed, the Strasbourg Court has never given a clear and precise definition of "private life". For the ECtHR, Article 8 guarantees "private life" in the broad sense of the term that is not susceptible to exhaustive definition.[7] The notion of privacy is therefore not limited to an "inner circle" in which the individual may live his own personal life as he chooses,[8] but rather embraces multiple aspects of the person's physical and psychological integrity and social identity, as well as the right to personal development (whether in terms of personality or of personal autonomy), and the right to establish and develop relationships with other human beings and the outside world.[9]

The relevant concept does not exclude, in principle, activities of a professional nature since, in the opinion of the ECtHR, it is in the course of their working lives that the

3 See generally: Moilanen (2006), enumerating private time misconduct (e.g., drunk driving etc.) as a marginal problem within EU Member States.

4 See *Public Administrations and Data Protection: An Unstoppable Europeanisation through Fundamental Rights* by M. González Pascual in this volume.

5 Otto (2016), pp. 73–87.

6 Ovey and White (2002), p. 217.

7 See e.g. ECtHR, judgment of 16 December 1992, *Niemietz v. Germany*, Series A no. 251-B, para. 29; ECtHR, *Pretty v. United Kingdom*, judgment of 29 April 2002, 2346/02, ECHR 2002-III, para. 61.

8 See e.g. ECtHR (GC), judgment of 25 September 2018, *Denisov v. Ukraine*, 76639/11, para. 96.

9 See e.g. ECtHR (GC), judgment of 5 September 2017, *Bărbulescu v. Romania*, 61496/08, para. 70, with further references therein.

majority of people have a significant opportunity to develop relationships with the outside world.[10] Therefore, restrictions imposed on access to a profession,[11] as well as dismissal from office[12] have been found to affect "private life". Notably, while no general right to employment, nor a right of access to the public service positions,[13] or a right to choose a particular profession, can be derived from Article 8, the Strasbourg Court considers that the relevant protection of the ECHR extends to civil servants as a general rule.[14]

Within the public employment-related scenarios involving Article 8, the Court has already dealt with various types of cases involving, inter alia: monitoring of telephone and Internet usage,[15] searches of offices,[16] opening of personal files stored on a professional computer,[17] video surveillance,[18] surveillance of employee's home for security reasons,[19] discharge from military service on account of sexual orientation,[20] removal from administrative functions in the judiciary,[21] and transfers between posts in the public service.[22] The Strasbourg Court has also examined a large number of cases related to the process of lustration,[23] which, depending upon the country, consisted in public exposure, partial disenfranchisement and restrictions on public and private sector employment for individuals associated with the former totalitarian regimes.[24] More recently, in *Denisov v. Ukraine*,

10 See e.g. ECtHR, judgment of 9 January 2013, *Oleksandr Volkov v. Ukraine*, 21722/11, para. 165; and *Bărbulescu* (n. 9), para. 71.

11 See e.g. ECtHR, judgment of 28 May 2009, *Bigaeva v. Greece*, 26713/05, para. 22–25; ECtHR, judgment of 27 June 2017, *Jankauskas v. Lithuania (no. 2)*, 50446/09, para. 56 and ECtHR, judgment of 27 June 2017, *Lekavičienė v. Lithuania*, 48427/09, para. 36 (concerning restrictions on registration with the Bar Association as a result of a criminal conviction).

12 See e.g. ECtHR, *Oleksandr Volkov v. Ukraine* (n. 10); ECtHR, judgment of 19 October 2010, *Özpınar v. Turkey*, 20999/04, paras. 43–48.

13 See *Right of Access to the Civil Service in the European Convention of Human Rights: A Missed Opportunity?* by D. Toda Castán in this volume.

14 See e.g. ECtHR, judgments of 28 August 1986, *Glasenapp and Kosiek v. Germany*, Series A nos. 104, p. 26, para. 49 and 35; ECtHR, judgment of 26 September 1995, *Vogt v. Germany*, 17851/91, para. 43.

15 See e.g. ECtHR, judgment of 25 June 1997, *Halford v. UK*, 20605/92, para. 49; ECtHR, judgment of 3 April 2007, *Copland v. United Kingdom*, 62617/00, ECHR 2007-I, para. 45.

16 ECtHR, judgment of 26 July 2007, *Peev v. Bulgaria*, 64209/01.

17 ECtHR, judgment of 22 February 2018, *Libert v. France*, 588/13 concerning dismissal of an SNCF (French national railway company) employee after the seizure of his work computer had revealed the storage of pornographic files and forged certificates drawn up for third persons).

18 ECtHR, judgment of 18 November 2017, *Antović and Mirković v. Montenegro*, 70838/13 concerning an invasion of privacy complaint by two professors at the University of Montenegro's School of Mathematics after video surveillance had been installed in areas where they taught.

19 ECtHR, judgment of 31 May 2005, *Antunes Rocha v. Portugal*, 64330/01.

20 See e.g. ECtHR, judgment of 27 September 1999, *Lustig-Prean and Beckett v. UK*, 31417/96, 32377/96; ECtHR, judgment of 27 September 1999, *Smith and Grady v. UK*, 33985/96, 33986/96.

21 See e.g. ECtHR, *Oleksandr Volkov v. Ukraine* (n. 10); ECtHR, judgment of 14 October 2021, *Samsin v. Ukraine*, 38977/19.

22 See ECtHR, judgment of 2 February 2016, *Sodan v. Turkey*, 18650/05.

23 "'Lustration' applies to the screening of persons seeking to occupy (or actually occupying) certain public positions for evidence of involvement with the communist regime (mainly with the secret security apparatus," Sadurski (2014), pp. 331–332.

24 See e.g. ECtHR, judgment of 14 February 2006, *Turek v. Slovakia*, 57986/00, para. 110; ECtHR, judgment of 3 September 2015, *Sõro v. Estonia*, 22588/08, para. 56; ECtHR, judgment of 27 July 2004, *Sidabras and Džiautas, v. Lithuania*, 55480/00, 59330/00, para. 49 and 50; ECtHR, judgment of 21 October 2014, *Naidin v. Romania*, 38162/07, paras. 29–36.

concerning removal from the position of president of a court, the ECtHR, having confirmed that employment-related disputes were not *per se* excluded from the scope of "private life" within the meaning of Article 8 of the Convention, set out the principles for assessing whether employment-related disputes fall within the scope of "private life" under Article 8.[25]

Interestingly enough, according to the ECtHR, there are some typical aspects of private life which may be affected by dismissal, demotion, non-admission to a profession, or other similarly unfavourable measures. These aspects include (1) the applicant's "inner circle", (2) the applicant's opportunity to establish and develop relationships with others, and (3) the applicant's social and professional reputation. A private-life issue usually arises in such disputes either because of the underlying reasons for the impugned measure (the so-called reason-based approach) or because of the consequences for private life (the so-called consequence-based approach).[26]

Notably, the aforementioned division does not preclude cases in which the Court may find it appropriate to employ both approaches in combination, examining whether there is a private-life issue in the underpinning reasons for the impugned measure and, in addition, analysing the consequences of the measure.[27]

III. The Scope of Permissible Restrictions on Civil Servants' Right to Privacy

Unlike in Article 11 ECHR, there is no special clause in Article 8 ECHR that would allow the public authority to establish "legitimate restrictions" on the protection of the private life of civil servants or certain categories of them. Interference with the privacy of civil servants is therefore generally examined from the perspective of the State's negative obligations[28] in accordance with the three-limb merits test under Article 8, paragraph 2. In principle, such interference is admissible if it is in accordance with the law, seeks to achieve one of the legitimate objectives listed in Article 8, paragraph 2 (the protection of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others), and is "necessary in a democratic society" to achieve the aim pursued.

It is well established in the case law that the term "in accordance with the law" implies that there must be a measure of legal protection in domestic law against arbitrary interferences by the public authorities with the rights safeguarded by Article 8, paragraph 1. This expression not only involves compliance with domestic law, but also relates to the quality of that law, requiring that it should be accessible to the person concerned and foreseeable as to its effects. In other words, in order to fulfil the requirement of foreseeability, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances and conditions in which the authorities are empowered to resort to any such measures.[29] Notably, in the opinion of the ECtHR, this is particularly pertinent in the

25 ECtHR, *Denisov v. Ukraine* (n. 8).
26 ECtHR, *Denisov v. Ukraine* (n. 8), para. 115.
27 See ECtHR (GC), judgment of 12 June 2014, *Fernández Martínez v. Spain*, 56030/07.
28 ECtHR, *Libert v. France* (n. 17), para 41.
29 ECtHR, *Copland v. United Kingdom* (n. 15), paras. 45–46.

area of broadly understood surveillance at and outside the workplace.[30] For instance, in *Antunes Rocha v. Portugal*, a case concerning the surveillance of the home of an administrative assistant for the National Council for Emergency Civil Planning (CNPCE) for security reasons, the ECtHR found a violation of Article 8, as the legislation permitting such surveillance was "too vague" ("did not alert those concerned to the fact that they might be subject to certain measures, such as surveillance of their home or tests of knowledge") and "did not contain any control mechanisms or provide any safeguards for individuals".[31]

The notion of necessity in turn implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. Accordingly, in the opinion of the ECtHR, Article 8, paragraph 2 imposes upon national authorities and courts the obligation to balance fairly the rights or freedoms concerned in the employment dispute.[32] Whilst, in ruling on the "necessity" of an interference "in a democratic society", the Strasbourg Court must have regard to the margin of appreciation afforded to the States, it does not, however, confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. In exercising its supervisory jurisdiction, the ECtHR considers the impugned decisions in the light of the case as a whole, and determines whether the reasons adduced to justify the interference at issue are relevant and sufficient. It also attaches great importance to examining whether domestic law and practice afforded adequate and effective safeguards against any abuse and arbitrariness.

Notably, when carrying out a concrete review, the ECtHR clearly differentiates between the infringements taking place during access to employment in the civil service and those occurring during the performance of public duties. A particular strand of Strasbourg jurisprudence addresses unfair dismissal related to the broadly understood private life of civil servants.

1. *Interference With Right to Privacy During Access to Public Service Employment*

Neither the ECHR nor any of its Protocols sets forth any right of "equal access to public service positions".[33] Consequently, the European Court of Human Rights makes a clear distinction between the public and private sectors in the area of access to employment. The Court reiterated on several occasions that the requirement of an employee's loyalty to the State constitutes an inherent condition of employment with State authorities responsible for protecting and securing the general interest. Thus, in principle, the authority may establish selection criteria and exercise discretion in choosing public officeholders. In the process of selecting candidates for public office, the authority may then inquire into certain aspects of the candidate's private life, in order to ascertain whether the candidate is suitable for the office/position for which he or she is applying.[34]

30 See ECtHR, *Halford v. United Kingdom* (n. 15), para. 44; ECtHR, *Copland v. United Kingdom* (n. 15), para. 48; *Peev v. Bulgaria* (n. 16), para. 44; ECtHR, judgment of 15 April 2014, *Radu v. Moldova*, 50073/07, paras. 29–32. In all four cases lodged by civil servants, the ECtHR found that there had been a lack of provisions aimed at protecting employees against interferences with their rights to respect for private life and correspondence.

31 ECtHR, *Antunes Rocha v. Portugal* (n. 19), paras. 74–77.

32 ECtHR, decision of 22 November 2001, *Knauth v. Germany*, 41111/98, inadmissible.

33 Cf. Article 21, para. 2 of the Universal Declaration of Human Rights of 10 December 1948; Article 25 of the International Covenant on Civil and Political Rights of 16 December 1966.

34 See also ECtHR, judgment of 26 March 1987, *Leander v. Sweden*, 9248/81, para. 59.

The ECtHR has accepted in some cases that the authority may thus rely on information about the political activity (understood in a very broad sense) of a candidate for public office in order to deny him or her access to a post. In general, the use of information about a person's political and/or private background can be considered an interference with private life,[35] yet as to whether such interference is permissible, the Court's case law is rather nuanced (i.e. the whole context of each case is considered).[36]

For instance, in the *Yilmaz v. Turkey* case, the claimant was refused an appointment to a teaching post abroad on the grounds of security investigation results concerning his private life (his behaviour at home and his wife's clothing style). Nonetheless, neither the Ministry of Education as an employer nor the local courts provided any grounds or explanations that could justify the refusal of the claimant's appointment in terms of the public interest or specific public needs and features of educational and teaching services. Accordingly, the ECtHR found a violation of Article 8 of ECHR, explaining that while "such interference had been in accordance with the law and had pursued one of the legitimate aims referred to in Article 8, (. . .) in any event it had not been necessary in a democratic society". Thus, the ECtHR concluded that the use of security investigation results in the claimant's private life was not necessary for the obligations of a teaching position abroad. Such an interference constituted a violation of the right to respect for private life and was not in compliance with the democratic values of the society, despite its legitimate aims (such as public safety).[37]

At the same time, in a number of cases the Court has found that lustration measures engaged the applicants' right to respect for their private life, as they affected their reputation and/or professional prospects. For instance, in *Bester v. Germany*, concerning an application lodged by a former German Democratic Republic (GDR) civil servant who had been integrated into the civil service of the Federal Republic of Germany after German reunification, but dismissed upon discovery of his past collaboration with the GDR Ministry of State Security, the Court found that the interference at issue was not disproportionate to the legitimate aim pursued. In the opinion of the ECtHR, it appeared legitimate to carry out a posteriori checks on the conduct of persons who, after reunification, were integrated into the civil service, and whose members are the guarantors of the constitution and democracy. It also seemed legitimate to exclude, after examining each individual case, those who did not meet these criteria, in particular because of their collaboration with the GDR's Ministry of State Security and, above all, because they had lied to their new employer in this regard.[38]

In a similar vein, the ECtHR upheld for instance the prohibition imposed by the Romanian administration on a former informant of the Communist Party's political police to re-enter the civil service in the new State as proportionate to the legitimate objective pursued by the State to ensure the integrity of the judicial office and public trust in the justice system. This measure was justified, in the opinion of the Court, insofar as the Romanian State did not prohibit the person concerned from finding employment in the private sector, including in companies with strategic interests for the Romanian State.[39]

35 ECtHR, judgment of 16 February 2000, *Amann v. Switzerland*, 27798/95, paras. 65–67.

36 ECtHR, judgment of 4 May 2000, *Rotaru v. Romania*, 28341/95, para. 46.

37 ECtHR, judgment of 04 June 2019, *Yilmaz v. Turkey*, 36607/06.

38 ECtHR, judgment of 22 November 2001, *Bester v. Germany*, 42358/98.

39 ECtHR, *Naidin v. Romania* (n. 24), paras. 54–55. Compare with ECtHR, judgment of 7 April 2009, *Žičkus v. Lithuania*, 26652/02, para. 31, as regards restrictions on a person's opportunity to find employment in the private sector.

Likewise in *Sidabras and Džiautas* and *Rainys and Gasparavičius*, concerning an unconditional statutory ban on former employees of former Soviet security services on employment in various branches of the private sector, the Court found such a ban with regard to the private sector to be a disproportionate and thus discriminatory measure, despite the legitimacy of the aims pursued by the State in imposing that ban.[40] Thus, in general, as Toda Castán aptly observes,

> as far as access to civil service is concerned, the European Court of Human Rights has been prepared to fill the Convention's gap with Article 8 (. . .) at least to a certain extent, and to protect personal goods and values linked to people's professional life.[41]

2. *Interference With Right to Privacy During the Performance of Public Duties*

The European Court of Human Rights has issued several judgments on the right to privacy of civil servants, clarifying the limits and scope of this right in the context of performance of public duties. In essence, the ultimate scope of the protection of the right to privacy of civil servants, as the ECtHR case law clearly implies, is derivative on the one hand of the "reasonable expectations of privacy" test and, on the other hand, the existence of apparently "more relevant" legitimate interests of the State acting as employer.

2.1. Reasonable Expectations of Privacy

Determination of the permissible scope of interference with the privacy of civil servants under Article 8 ECHR is often reliant upon the establishment of the employee's reasonable expectation of privacy. The reasonableness of these expectations, pursuant to the established line of judicial decisions, depends, amongst other things, on whether the employee was informed about the fact that an interference with his right to privacy was possible; the presence of specific indications of the possibility of such interference; or the (permanent) nature and the impact of the interference.[42]

For instance, in *Halford v. UK* the ECtHR held that the applicant (at the relevant time the highest-ranking female police officer in the United Kingdom), who claimed that the interception of telephone calls made from the workplace violated her right to respect for private life, had a reasonable expectation of privacy with respect to calls made from her work telephone. In order to establish the expectation of privacy, the ECtHR gave weight to the fact that the applicant was not warned about the possibility that her calls might be intercepted; one of the telephones in her office was specifically designated for her private use; and she had been given the assurance that she could use her office telephones for the purposes of her sex-discrimination case.[43]

40 ECtHR, *Sidabras and Džiautas v. Lithuania* (n. 24), para. 58–61; ECtHR, judgment of 7 April 2005, *Rainys and Gasparavičius v. Lithuania*, 70665/01, 74345/01, para. 36–37.

41 *Right of Access to the Civil Service in the European Convention of Human Rights: A Missed Opportunity?* by D. Toda Castán in this volume.

42 Hendrickx and Van Bever (2013), p. 189.

43 ECtHR, *Halford v. United Kingdom* (n. 15), para. 47. Following a refusal to promote her, Ms. Halford started proceedings in the Industrial Tribunal, claiming that she had been discriminated against on the ground of gender. Ms. Halford alleged that certain members of the police intercepted her telephone calls made from her office for the purposes of obtaining information to use against her in the proceedings.

In a similar case, *Copland v. UK*, brought about a decade later by an employee of Carmarthenshire College (a statutory body administered by the State), the ECtHR applied analogous reasoning to monitoring of the applicant's phone calls, e-mails and internet usage undertaken to ascertain whether she was making excessive use of College facilities for personal purposes. In the opinion of the ECtHR the applicant had a reasonable expectation as to the privacy of calls made from work telephone, as well as in relation to use of e-mail and the internet because she had not been warned about the possibility of this use being monitored.[44] Importantly, there were no provisions at the relevant time, either in general domestic law or in the governing instruments of the College, regulating the circumstances in which employers could monitor employees' use of telephone, e-mail and internet.[45]

In *Peev v. Bulgaria*, in turn, the ECtHR applied the test of a reasonable expectation of privacy in a case involving unauthorised searches undertaken by an employer in the office of an expert at the Criminology Studies Council of the Supreme Cassation Prosecutor's Office, after publications of a letter criticising the Chief Prosecutor in a daily newspaper. In the ECtHR's opinion, the applicant had a reasonable expectation of privacy, if not in respect to the entirety of his office, then at least in respect to his desk and his filing cabinets, where a great number of personal belongings were stored. The ECtHR presumed that the privacy of a workplace desk was implicit in habitual employer-employee relations. As the employer did not adopt any regulation or policy discouraging employees from storing personal papers and effects in their desks or filing cabinets, there were no arguments to demonstrate that the applicant's expectation was unwarranted or unreasonable. The fact that he was employed by a public authority and that his office was located on government premises does not of itself alter this conclusion.[46]

Finally, in *Pay v. UK*, concerning the application by a probation officer who was dismissed for being engaged with the activities of a bondage, domination and sadomasochism (BDSM) community, the ECtHR stated that when people knowingly participate in activities which may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor. The ECtHR, in contrast to the British courts, found that conduct occurring outside a purely private place could still fall within the protection of Article 8 as "private life". This conclusion was due to the fact that the performances in question took place in a nightclub which was likely to be frequented only by like-minded people and that the published photographs were anonymised. Ultimately, however, having relied on the duty of loyalty, reserve and discretion that employees in principle owe to their employer, as well as the sensitive nature of the applicant's work with sex offenders, the Court found that the national authorities did not exceed the margin of appreciation available to them "in adopting a cautious approach as regards the extent to which public knowledge of the applicant's sexual activities could impair his ability effectively to carry out his duties".[47] The case provides, however, a strong defence of civil servants' right to enjoy their private life without an employer being able to freely restrict activities outside work and working time.

44 ECtHR, *Copland v. the United Kingdom* (n. 15), para. 42.

45 ECtHR, *Copland v. the United Kingdom* (n. 15), para. 48.

46 ECtHR, *Peev v. Bulgaria* (n. 16), para. 43.

47 ECtHR, decision of 16 September 2008, *Pay v. UK*, 32792/05, inadmissible.

2.2. Proportionality of the Legitimate Interests Pursued

While delineating the permissible scope of interference with the privacy of civil servants, the ECtHR is generally of the opinion that insofar as the proceedings relate to the applicant's conduct in the performance of his duties, they cannot be regarded as unjustified interference with his right to respect for private life within the meaning of Article 8 of the Convention. For the Strasbourg Court, since it is legitimate to subject members of the civil service, by virtue of their status, to an obligation of reserve under Article 10 of the Convention or of discretion in the public expression of their religious beliefs under Article 9, the same principles apply *mutatis mutandis* to Article 8 of the Convention.

For instance, according to the ECtHR, the obligation of restraint generally imposed on civil servants may have implications for their dress code (prohibition of extravagant or unrestrained dress). In *Kara v. UK*, a transvestite male employed as a Careers Adviser in the Directorate of Education in Hackney Council was instructed not to wear women's clothes. The European Commission of Human Rights, having determined that the constraints imposed on the employee's choice of mode of dress constituted interference with his right to private life, found, however, that it was necessary in a democratic society for the aim of protecting the rights of others (herein employer). As the Commission explained:

> employers may require their employees to conform to certain dress requirements which are reasonably related to the type of work being undertaken, e.g. uniforms. This may also involve requiring employees, who come into contact with the public or other organisations to conform to a dress code which may reasonably be regarded as enhancing the employer's public image and facilitating its external contacts.[48]

Likewise, the ethical duties of a senior official representing the State may impinge on his or her private life where the official's conduct – even if in private – damages the image or reputation of the institution he or she represents[49] As a general rule, however, insofar as the proceedings in question concern the civil servants' conduct in their private life, it is generally for the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the individual's fundamental right to respect for his private life and the legitimate interest of a democratic State in ensuring that its public service serves the purposes set out in Article 8, paragraph 2.

Interestingly enough, some cases tend to depart from far-reaching limitations on the privacy rights of civil servants, and, as Mantouvalou aptly observes, imply that "the test of proportionality will be satisfied only if the civil servant's behaviour has a direct impact or a high likelihood of such impact on the performance of contractual duties".[50] For example, in the case of *Laloyaux v. Belgium*, the ECtHR held that the authority had referred to the private life of a civil servant (the problem of alcoholism and the complainant's social relations) only insofar as they had a negative impact on the applicant's service, so that he had not suffered a disproportionate interference with his right to respect for his private and family life. In *Lustig-Prean and Beckett v. UK*, in turn, concerning the discharge of members of the Royal Airforce on the grounds of their homosexuality, the Court held that the Government failed to provide convincing and weighty reasons justifying the absolute and

48 ECtHR, decision of 22 October 1998, *Kara v. UK*, 36528/97.
49 ECtHR, *Özpınar v. Turkey* (n. 12), para. 71.
50 Mantouvalou (2008), p. 931.

general character of the policy against homosexuals in the armed forces, which in practice results in immediate dismissal irrespective of the individual's conduct or service record.[51]

Article 8 ECHR is also not necessarily violated by a measure entailing the suspension of the exercise of a public function during the course of criminal proceedings, possibly for several years. In *D.M.T. and D.K.I. v. Bulgaria*, concerning the suspension of a civil servant for more than six years while criminal proceedings against him were ongoing, and the ban on his engaging in any other gainful employment in the public and private sectors (except in teaching and research), the Court found that the impugned measure was a normal and unavoidable consequence of the criminal proceedings against the applicant, even if the duration of the proceedings was excessive. However, the case raised the issue of the necessity and proportionality of the effects of the suspension, in particular the restriction on his seeking other employment. While in normal circumstances such a restriction could be justified by the concern to prevent conflicts of interests in the civil service, the application of this blanket ban for more than six years in respect of a civil servant who had been suspended had caused him to bear an excessive burden. Seeing that the authorities had not provided any satisfactory explanations for their refusal to dismiss him, an outcome which would have allowed him to seek other employment, and given that the Court was not persuaded that this would have obstructed the criminal proceedings, the restriction in question could not be regarded as necessary and proportionate to the legitimate aim pursued, or as the normal and inevitable consequence of the proceedings. Accordingly, the authorities had not struck a fair balance between respect for D.M.T.'s private life and the interests of society, thus breaching Article 8.[52]

3. Unfair Dismissal

The possibility to claim the violation of the right to respect for private life in the event of unfair dismissal is one of the most significant contributions of the ECtHR that clearly confirms the social value of the right to privacy under the ECHR. Following *Denisov v. Ukraine*, employment-related disputes will generally engage Article 8, either when factors relating to private life are regarded as qualifying criteria for the function in question and when the impugned measure is based on reasons encroaching upon the individual's freedom of choice in the sphere of private life (*reason-based approach*), or when the loss of employment impacts on private life (*consequence-based approach*).

In the area of the civil service, where measures taken by State authorities were contested, the Court following the reason-based approach has found, for example, that investigations by the military police into the applicants' homosexuality and their consequent administrative discharge on the sole ground of their sexual orientation directly interfered with their right to respect for private life.[53] In the opinion of the ECtHR, when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8, paragraph 2 of the Convention.[54] In a similar vein, in *Özpınar v. Turkey*, proceedings for the applicant's dismissal as a judge fell under Article 8 of the Convention because they concerned not only her professional performance but also targeted aspects of

51 ECtHR, *Lustig-Prean and Beckett v. UK* (n. 20), para. 86.
52 ECtHR, judgment of 24 July 2012, *D.M.T. and D.K.I. v. Bulgaria*, 29476/06, paras.111–115.
53 See ECtHR, *Smith and Grady* (n. 20), para. 71.
54 ECtHR, *Lustig-Prean and Beckett v. United Kingdom* (n. 20), para. 82.

her private life (in particular her close private relationships, the clothes and make-up she wore, and the fact that she lived separately from her mother).[55] In the *Sodan v. Turkey* case, in turn, the applicant's transfer to a less important post within the public service raised an issue under "private life" as it amounted to a disguised penalty and had been prompted by reasons relating to the applicant's religious beliefs and his wife's clothing.[56] In *Mile Novaković v. Croatia*, concerning a dismissal of a person of Serbian ethnic origin from his post at a secondary school for failing to use the standard Croatian language when teaching (nota bene after 29 years of service), the ECtHR found that the crucial reason for the applicant's dismissal was closely related to his ethnic origin and his age and had therefore been sufficiently linked to his private life.[57] The Court went on to find a violation of Article 8, as the measure in question had not been proportionate to the legitimate aim pursued, in part because no alternatives to dismissal had ever been contemplated.[58]

Notably, when the reasons for imposing a measure affecting an individual's professional life are not linked to the individual's privacy, an issue under Article 8 may still arise insofar as the impugned measure has or may have serious negative effects on the individual's private life. Accordingly, in *Oleksandr Volkov v. Ukraine*, having relied upon the consequence-based approach, the Court found that the dismissal of a judge on the grounds of a violation of his professional duties amounting to a breach of the judicial oath affected a wide range of his professional and other relationships. The dismissal also had a negative impact on the applicant's "inner circle" in view of his loss of earnings, and it also affected his reputation.[59] The consequence-based approach was likewise applied in *Ballıktaş Bingöllü v. Turkey* to the prospective employment context i.e. the consequences of a decision for the applicant's employment prospects in the civil service, and more specifically on her chances of obtaining a post as a research assistant in a public university.[60]

However, the relevant findings cannot be read as presuming that dismissal cases "automatically" generate an issue in the sphere of private life. As a rule, if the consequence-based approach is at stake, the Court will only accept that Article 8 is applicable where these consequences are very serious and affect the applicant's private life to a very significant degree.[61] The ECtHR has established criteria for assessing the severity or seriousness of alleged violations in different regulatory contexts.

In essence, an applicant's suffering is to be assessed by comparing his or her life before and after the measure in question. In determining the seriousness of the consequences in employment-related cases, it is however generally appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. This analysis in principle covers both the material and the non-material impact of the alleged measure.

For instance, in *Polyakh and Others v. Ukraine*, concerning dismissal from the civil service, the ban on occupying positions in the civil service for ten years and the publication of applicants' names in the publicly accessible online Lustration Register, the Court considered that the combination of these measures had very serious consequences for the applicants' capacity to establish and develop relationships with others, and for their social

55 ECtHR, *Özpınar v. Turkey* (n. 12), paras. 43 and 47.

56 ECtHR, *Sodan* v. *Turkey* (n. 22), para. 59.

57 ECtHR, judgment of 17 December 2020, *Mile Novaković v. Croatia*, 73544/14, paras. 48–49.

58 ECtHR, judgment of 17 December 2020, *Mile Novaković v. Croatia*, 73544/14, paras. 57–70.

59 See ECtHR, *Oleksandr Volkov v. Ukraine* (n. 10), para. 166.

60 ECtHR, judgment of 22 June 2021, *Ballıktaş Bingöllü v. Turkey*, 76730/12, paras. 55–62.

61 See ECtHR, *Denisov v. Ukraine* (n. 8), para. 116.

and professional reputations, and thus had affected them to a very significant degree.[62] In a similar vein, in *Xhoxhaj v. Albania* the Court found that the dismissal of a judge through a vetting procedure interfered with her right to respect for her private life because the loss of remuneration had serious consequences for her inner circle and her dismissal stigmatised her in the eyes of society.[63] In *Denisov v. Ukraine*, the Court ultimately held that dismissal could hardly be regarded as a violation of Article 8 of the ECHR. Mr. Denisov was dismissed from his role as president of the Kyiv Administrative Court of Appeal for a managerial inefficiency but continued to serve as a regular judge for the same Court. The grounds for the dismissal had nothing to do with his private life, and the dismissal itself did not affect it (the lower salary and loss of the prestigious position cannot be considered such).

In contrast to dismissals of private employees, applications submitted by civil servants concerning unfair dismissals are generally considered in a more in-depth manner, as the ECtHR revises the grounds but also the procedure of dismissal in light of a fair balance between the State's full compliance with its negative obligations under Article 8, paragraph 2, its interests as an employer, and the employee's privacy rights under the ECHR. As a rule, pursuant to the established line of judicial decisions, the imposition of such a measure requires consideration of solid evidence relating to the individual's ethics, integrity and professional competence.[64] For the Strasbourg Court, the absence of an appropriate scale of sanctions for disciplinary offences, as well as the lack of a procedural framework which offers guarantees against arbitrariness, may be inconsistent with the principle of proportionality.[65] In the opinion of the Strasbourg Court:

> the civil servant must have in particular the possibility of having the measure in question reviewed by an independent and impartial body, empowered to consider all relevant questions of fact and law, in order to rule on the legality of the measure and to sanction any abuse by the authorities. Before this supervisory body, the person concerned must have the benefit of an adversarial procedure in order to be able to present his or her point of view and refute the arguments of the authorities.[66]

Thus, in *Oleksandr Volkov v. Ukraine*, having recognised that applicable domestic law itself failed to satisfy the requirements of foreseeability and provision of appropriate protection against arbitrariness, the ECtHR required the State to ensure the reinstatement of its unfairly dismissed employee.[67]

IV. Concluding Remarks

The analysis presented in this chapter clearly confirms the potentially significant implications of the Strasbourg jurisprudence for the evolving standard of protection of privacy rights for civil servants in Europe. The key implication of the ECtHR's jurisprudence seems to be the acknowledgement that civil servants are entitled to a reasonable expectation of privacy, despite their special status. While it is recognised that the nature of their employment and the public interest in maintaining transparency and accountability in

62 ECtHR, judgment of 17 October 2019, *Polyakh and Others v. Ukraine*, 58812/15, paras. 207–211.
63 ECtHR, judgment of 9 February 2021, *Xhoxhaj v. Albania*, 15227/19, para. 363.
64 ECtHR, judgment of 9 February 2021, *Xhoxhaj v. Albania*, 15227/19, para. 403.
65 See ECtHR, *Oleksandr Volkov v. Ukraine* (n. 10), para. 182.
66 ECtHR, *Özpinar v. Turkey* (n. 12), para. 78.
67 ECtHR, *Oleksandr Volkov v. Ukraine* (n. 10), para. 208.

public administration may reduce their expectation of privacy (especially at the stage of recruitment for public office), this does not mean that they are completely devoid of privacy rights, just because they work for a public authority or at an office located on government premises. Thus, the States should generally refrain from imposing far-reaching limitations on the privacy rights of civil servants, unless they can prove that the relevant conduct has a direct impact, or will have a high likelihood of such impact, on the performance of their duties or the image or reputation of the institution he or she represents. In any case, the introduction of a disciplinary measure should generally take place within a procedure which offers guarantees against arbitrariness and following an appropriate scale of sanctions for disciplinary offences that would pay due regard to service record.

Notably, some of the judgments examined in this chapter already induced certain changes in the national labour law, enhancing the level of protection of the right to respect for private life in the civil service. For instance, in response to the ECtHR judgments concerning dismissal from military service on account of sexual orientation, the British government lifted the ban on Lesbian, Gay, Bisexual (LGB) military personnel at the beginning of 2000.[68] In Ukraine, in the aftermath of the *Oleksandr Volkov v. Ukraine* case, impressive measures to improve the legal framework for judicial discipline were introduced.[69] Finally, the *Özpinar v. Turkey* judgment had a significant impact on the procedural rights of public employees: Turkey has amended certain provisions of the constitution, providing for the judicial review of decisions issued in disciplinary proceedings.[70]

It is rather self-evident, therefore, that the ECtHR's jurisprudence should serve as important benchmark for national legislators for the further development of relevant regulations and policies, which instead of operating in general clauses should be more foreseeable as to their impact on civil servants' reasonable expectations of privacy.

Bibliography

Hendrickx F., Van Bever A. (2013), 'Article 8 ECHR: Judicial Patterns of Employment Privacy Protection', in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, Oxford, Portland: Hart Publishing, 183–207.

Kavey M. (2013), 'The Public Faces of Privacy: Rewriting Lustig-Prean and Beckett v. United Kingdom', in Brems E. (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, Cambridge: Cambridge University Press, 293–326.

Otto M. (2016), *The Right to Privacy in Employment: A Comparative Analysis*, Oxford: Hart Publishing.

Ovey C., White R. (2002), *Jacobs & White: European Convention on Human Rights*, Oxford: Oxford University Press.

Mantouvalou V. (2008), 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces', 71(6) *Modern Law Review*, 912–939.

Moilanen T., Salminen A. (2006), *Comparative Study on the Public-service Ethics of the EU Member States, A Report from the Human Resources Working Group*, EUPAN.

Sadurski W. (2014), *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 2nd edition, Cham: Springer.

68 Kavey (2013), p. 297.

69 See https://ehrac.org.uk/en_gb/resources/volkov-v-ukraine/.

70 See the *Action report of Turkey (updated as of 4 April 2017) for Arzu Özpınar v. Turkey (20999/04). The judgment of 19 October 2010, final on 19 January 2011*, available at http://hudoc.exec.coe.int/eng?i=DHDD(2017)73E.

41 Freedom of Religion or Belief in the Civil Service

How to Stay Loyal to the State while Remaining True to Oneself?

Wojciech Brzozowski

I. Introduction

In today's Europe, we like to think that public administration has little to do with religion. There is quite a lot of truth in this popular belief. Public administration has become a neutral provider of public services, an uninvolved steward of public goods, or a religiously sterile transmitter of government policies, whereas the satisfaction of spiritual needs has fallen to religious communities and faith-based organisations. The domains of religion and public administration seem to have decoupled long ago – or perhaps it would be more accurate to say that public administration has expanded over time into areas formerly exploited by religion, such as education, healthcare, welfare, or housing.[1] This model is sometimes challenged by those who call attention to how much religion can contribute to social and political debates and argue for a "post-secular public administration", inspired by the Habermasian "post-secular turn".[2] Such a scenario, nevertheless, is a matter of the future. Today's public administration in Europe, or more generally in the Western world, remains less and less engaged with the world of spiritual values.

And yet religion can be of great importance to public administration. This is primarily because religion and spirituality can have a significant impact on organisational performance, ethical behaviour patterns, decision-making, and the personal spiritual health of employees.[3] Exploring the impact of religion on the functioning of the civil service in this respect may be exciting, but it leaves little room for legal analysis: matters such as professional ethics or the spiritual well-being of employees obviously need to be looked at through a different lens. But the role of religion is also relevant on another level: the one regarding the religious expression of civil servants. The civil service is composed of people who have their own beliefs and many of them are guided, to varying degrees, by religious mores. These may contribute to strengthening the organisational culture, but they may just as well undermine the core tenets of modern public administration. And sometimes the religious expression of civil servants becomes such a troublesome issue that it needs to be regulated – and restricted – by law.

That is what this chapter is about: the restrictions placed on the freedom of religion or beliefs of civil servants. As a matter of principle, modern States expect civil servants to exercise some restraint in sharing their views on the ideals of the good life and bearing witness

1 Cunningham (2005), pp. 943–944.
2 van Putten et al. (2019).
3 King (2007), p. 103.

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to religious faith in their official capacity. Nevertheless, these restrictions cannot be pushed too far, since any civil servant, while acting on behalf of the State, is still just a human, with their own beliefs and spiritual needs.

The chapter begins by mapping the territory: defining the liminal conditions for regulating the religious expression of civil servants. In the European legal space, these conditions are determined, most generally, by the principles of pluralism and neutrality, but also by the diversity of national traditions and the Strasbourg doctrine of the margin of appreciation. The subsequent sections discuss the most important fields of conflict that arise on the grounds of freedom of religion or belief for civil servants: restrictions imposed on religious symbols and clothing, the prohibition of proselytism in the workplace, and the accommodation of conscientious objection to professional duties. The final section briefly concludes the chapter.

One caveat must be made before proceeding any further. This chapter does not offer an exhaustive overview of the arrangements in place in the various European jurisdictions. Nor is it a complete set of recommendations that could resolve every potential conflict in the European legal space – from Lisbon to Tallinn, Reykjavik to Nicosia. What it aims at, instead, is an attempt to identify the most common conflicts between the manifestations of religion of civil servants and the basic principles of public administration, and the ways in which the law can deal with these conflicts. Particularly helpful in this respect is the case law of the European Court of Human Rights, which remains the principal, even if often imperfect, standard setter for the protection of human rights in Europe.

II. Mapping the Territory

Europe has many faces, but the most prominent of these is the face of diversity: in a continent marked by a multiplicity of cultures, languages, and religions, ensuring their peaceful coexistence is a true challenge. Of all these factors, religion is of particular importance, as it is both an element of group identity and a source of imperatives of ultimate concern for an individual. Thus, the acknowledgement of religious and ideological pluralism must be the starting point for the design of the guiding principles for public administration.

This is how the Parliamentary Assembly of the Council of Europe (PACE) understands it. In its soft law, PACE has made the transition from endorsing tolerance to embracing pluralism, which it now sees as an indelible part of the European project.[4] The Assembly notes that it is democracy that provides the best framework for the exercise of freedom of religion or belief and religious pluralism. Religion, as long as it does not attempt to take the place of democracy or grab political power, can be a valid partner of a democratic society.[5] Pluralism is a particularly valuable asset. It is no coincidence that in the very first case in which the bodies of the European Convention on Human Rights (ECHR) found a violation of its Article 9, it was recalled that pluralism is "indissociable from a democratic society" and that it has been "dearly won over the centuries".[6]

4 Gozdecka (2016), pp. 13–14.

5 PACE Recommendation 1396 (1999), *Religion and democracy*, 27 January 1999, paras. 4–5, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16672&lang=en, last accessed 10 October 2022. This declaration resonates interestingly with the suggestion that instead of the "religionisation" of public policy on the one hand and 'religion blindness' on the other, another path should be taken, that of a 'religion attentive' approach, which engages with religious communities and involves religious actors in the policymaking process: Lindsay (2017), pp. 271–272.

6 ECtHR, judgment of 25 May 1993, *Kokkinakis v. Greece*, 14307/88, para. 31. This phrase was to reemerge many times in the subsequent Strasbourg case law.

In the guidelines coming from the Council of Europe, a benevolent attitude towards religion is clearly mixed with distrust. While Member States of the Council of Europe are encouraged to establish a meaningful conversation with religion, there is a clear reminder that the partner in this conversation has a history of political ambitions that are incompatible with the rule of law in a constitutional democracy, for such a democracy can only be pluralistic. It may appear that PACE juxtaposes, more or less openly, religious values to European values, the latter derived from the European Convention on Human Rights. In defending pluralist democracy, the Assembly encourages the Member States to place Europe's common values at the heart of their reflection and to base administrative reforms on commonly shared ethical principles.[7] This implies that secular public administration also possesses a strong axiological foundation, even if this axiology does not have a strictly religious provenance.

The natural response of the State to the diversity of views, needs, and conceptions of the good life is neutrality in religious affairs.[8] In the case of the civil service, religious neutrality has a special role to play. It goes hand in hand with political neutrality, which is considered an integral part of the constitutional characteristics of the civil service, for political neutrality safeguards the objectivity, rationality, and professionalism of the State service in dealing with the affairs of its citizens.[9] The same is true of religious neutrality. It is an imperative when dealing with a plethora of beliefs that are all too often mutually exclusive, but it also safeguards the individual's right to be treated without religious prejudice and coercion. Just like political neutrality, neutrality in religious affairs finds its justification in what it protects: the underlying values of equality, liberty, and moral autonomy. It is thus a tool, not an end in itself.[10]

The existing body of literature concerning the State's religious neutrality is so vast that any discussion of this concept can only be cursory and will certainly not do justice to the many meanings of neutrality. As put succinctly by Stijn Smet, neutrality in religious matters can be used as a shield or as a sword. The courts may understand neutrality as a prohibition of favouritism or prejudice and consequently use it to protect religion from discrimination and coercion; but they may also reach for neutrality whenever they wish to reject religious claims that extend beyond the strictly private sphere. In the former case, neutrality serves as a means of deterring the State from undue interference and standing up for freedom of religion or belief, whereas in the latter case it is harnessed in the service of justifying State action at the expense of religious freedom, as in the example of burqa bans in European States.[11] The shield-or-sword distinction is certainly very informative on a conceptual level, yet in real life the two facets of neutrality sometimes blend together to the point where it might be difficult to separate one from the other. This is particularly evident in the case of the religious rights of civil servants, who enjoy their own religious rights but also exercise public authority on behalf of the State. Imposing restrictions on their religious expression may be a sword from their perspective, but it acts as a shield for the citizen, who expects the State to deal with their affairs in an impersonal and professional fashion.

7 PACE Recommendation 1617 (2003), *Civil service reform in Europe*, 8 September 2003, para. 3, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17135&lang=en, last accessed 10 October 2022.

8 ECtHR, judgment of 26 November 2015, *Ebrahimian v. France*, 64846/11, para. 67.

9 See *Defining the Civil Service: Towards a Better Understanding of the Nature of Civil Service Systems in Europe* by A. Krzywoń in this volume.

10 See e.g. Hunter-Henin (2022), pp. 3–4.

11 Smet (2022), pp. 6–7.

This twofold approach to the principle of neutrality, as reflected in the shield-or-sword dilemma, reveals the core of the contention, which is, even if this is not always realised, the State's approach to the value of religion. Neutrality is a natural ally of religion as long as expressions of religiosity are considered indifferent or even beneficial to community life.[12] On the other hand, it becomes a natural opponent of religion when religion is seen as a destructive force, a source of social conflict that must be kept under control, like the fifth element that has to be tamed in the name of social harmony.[13] Admittedly, these divergent approaches to religion are not only explained by the personal convictions and individual experiences of policymakers, but also have much to do with the Janus face of religion. For religions have in the past been a source of wisdom and a driving force for cooperation, but also a source of hatred and rivalry, and those benefiting from State support have often displayed their destructive power in the most spectacular of ways. When seeking the right approach to religion in public service, it would be helpful to see both sides of the coin. This, however, requires a degree of maturity and openness to other people's truths, a gift that certainly not everyone is blessed with, and in current times of political polarisation, such an approach is becoming a particularly scarce commodity.

In the case law of the European Court of Human Rights, religious neutrality – or, as the Court tends to call it, "the State's duty of neutrality and impartiality" – is embedded in freedom of religion or belief.[14] It is a requirement under Article 9 of the Convention, and therefore any failure to comply with the State's treatment of religion implies a violation of this article. That being so, Europe remains home to a wide range of arrangements in State-church relations. While the institutional architecture in some national traditions may provide for a strict separation between the State and the religious domain, in other jurisdictions the interconnectedness of these spheres, albeit to varying degrees, will be most normal.[15] States are also naturally prone to resist any encroachment into areas closely linked to their history and tradition, relations with institutional religion being one such area. This is particularly relevant to the issues discussed in this chapter. If religious leaders are recognised as public officers and carry out some public functions, the expectation that they will maintain religious neutrality is usually mitigated by some concession to tradition. And such a concession need not be incompatible per se with the spirit of neutrality, for the way this principle is implemented must allow for variations and local adaptations.

In Strasbourg, this is primarily facilitated by the doctrine of the margin of appreciation, which in practice means deferring to the interpretations advanced by the States – quite a natural attitude for an international human rights court, whose role is merely subsidiary.[16] One of the most succinct yet apt definitions of the margin of appreciation was provided

12 In the latter case, the State can only be considered neutral on condition that it equally positively values the practice of secular morals. Otherwise, religion would be placed above non-religious beliefs, thus calling into question the very meaning of neutrality.

13 Martínez-Torrón (2019), p. 165.

14 See e.g. ECtHR, judgment of 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, 45701/99; ECtHR, judgment of 15 January 2013, *Eweida and Others v. the United Kingdom*, 48420/10, 59842/10, 51671/10, 36516/10; ECtHR (GC), judgment of 26 April 2016, *İzzettin Doğan and Others v. Turkey*, 62649/10; ECtHR, judgment of 8 June 2021, *Ancient Baltic religious association Romuva v. Lithuania*, 48329/19.

15 See e.g. Madeley (2015).

16 Some examples of the deference to national interpretations of the State's duty of neutrality can be found in Smet (2022), pp. 8–14.

by Steven Greer, who identified it as "the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations".[17] The need to apply a margin of appreciation to freedom of religion or belief stems from the observation that a uniform conception of the role of religion in society cannot be found in Europe.[18] But the margin of appreciation is not unlimited: while the European Court of Human Rights must take into account the great diversity between Member States with regard to their traditions and culture, this cannot absolve them from the obligation to respect rights and freedoms, including freedom of religion or belief.[19] Needless to say, balancing between intervention and non-intervention can prove very difficult in practice.

The margin of appreciation doctrine, which allows for a degree of State discretion in how human rights protections are implemented, especially where there is no common approach in Europe, was developed by the Court many decades ago.[20] While its ambiguous impact on the effectiveness of the protection afforded by the Court has long been recognised, especially given the inconsistency of the criteria applied or the amount of unnecessary application,[21] eventually the margin of appreciation was openly acknowledged in the preamble to the Convention. Protocol no. 15 to the Convention, in force with effect from August 2022, confirmed that the Contracting Parties

> have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

This new/old tool will probably render the handling of cases easier, but finding European common ground in many areas will pose a growing challenge. The case of religious freedom of civil servants is likely to be affected by this trend. This is because domestic institutional arrangements are, as a matter of principle, exempt from Strasbourg oversight, and freedom of religion or belief happens to be one of those rights whose implementation is particularly entwined with national traditions.

III. Religious Symbols and Clothing

Garments with religious meaning, declaring devotion to gods, were known in early tribal cultures, but even today they remain an important element of individual and group identities. To wear them visibly and with due reverence can be required by religion. This religious duty often conflicts with the requirements of secularism and neutrality in the public service, especially when a person of faith is expected to refrain from manifesting their religious affiliation in the workplace because of their professional role. The reasons for addressing such restrictions to public officials are twofold. First, the State has an interest in keeping up the appearance of impartiality and non-affiliation to any religious institution,

17 Greer (2010), p. 2.

18 See e.g. ECtHR, judgment of 20 September 1994, *Otto-Preminger-Institut v. Austria*, 13470/87, para. 50; ECtHR (GC), judgment of 10 November 2005, *Leyla Şahin v. Turkey*, 44774/98, para. 190.

19 ECtHR (GC), judgment of 18 March 2011, *Lautsi and Others v. Italy*, 30814/06, para. 68.

20 See e.g. Feingold (1977); O'Donnell (1982).

21 See e.g. Brauch (2005); Kratochvíl (2011); Spielmann (2012).

which enhances credibility in a diverse society. Second, citizens, too, have the right to expect that public affairs, including their individual case, will be handled in an impersonal way, by the letter of the law and not according to the dictates of (any) religion.[22]

This type of conflict is by no means limited to countries with a tradition of secularism. Neutrality may also be required of civil servants in jurisdictions with an established church, even if some of them are somewhat more open to the religious expression of their employees. To understand the purpose of this requirement in States with an established church, it may be helpful to realise that religious symbols and attire may also be displayed by people belonging to minority religions: not only the State religion, which enjoys public support, but also less popular spiritual traditions.[23]

Restrictions imposed on the manifestation of religion by religious symbols and clothing are often criticised,[24] but they appear to have strong foothold in the Strasbourg case law. The European Court of Human Rights concedes that the States can legitimately invoke the principles of secularism and neutrality in order to justify restrictions on the wearing of religious symbols by its employees. Admittedly, these principles are nowhere to be found in the wording of the Convention, but the Court has been of the view that they are merely a means of protection of the rights and freedoms of others, which is one of the legitimate aims specified in the limitation clause designed for the right to freedom of religion or belief.[25] What is protected here is the right of a user of public services to equal treatment, with no distinction based on religion or belief. This last aim was perhaps best spelled out in the case involving a contracted employee of the hospital civil service whose contract was not renewed after the complaints from the patients who did not like the fact that she was wearing a headscarf.[26]

Let's play devil's advocate for a moment. Should the rights of the user really be at the core of the issue? Or, to put it another way, do these rights necessarily require the restraint of an employee's religious expression in the public sector?[27] The mere wearing of a religious symbol or following a religious dress code need not automatically affect the content of an individual decision, especially in matters about which religions have little or nothing to say. If diversity and pluralism are to be sustained, no one can be prevented from expressing their views on religious matters, whether in the private or public sphere. After all, the Convention does not protect the right to be shielded from the mere sight of religious expression, as this is the cost of living in a pluralistic society. And besides, there can be a plethora of reasons to distrust a civil servant: their physical appearance, the tone

22 It is worth noting that a very similar conflict arises between the civil servant's freedom of expression and the user's right to have their service delivered in a neutral and professional manner. See *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

23 Perhaps this is why so many cases concerning the display of religious affiliation by civil servants involve the Islamic headscarf. The German and French experiences are particularly interesting, see e.g. Elver (2012), pp. 129–152; Taylor (2017); Nilsson (2018).

24 Human Rights Watch, *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany*, www.hrw.org/report/2009/02/26/discrimination-name-neutrality/headscarf-bans-teachers-and-civil-servants-germany, last accessed 20 October 2022.

25 See Art. 9, para. 2 ECHR: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

26 ECtHR, *Ebrahimian v. France* (n. 8), para. 53.

27 Drawing on *Ebrahimian*, see Garahan (2016), p. 353.

of their voice, the signs of support for a football team that the user dislikes. Why single out religion, then? And finally, is it really a conflict of rights? Or maybe religious rights are being trumped by abstract principles of secularism and neutrality, drifting further and further away from their original purpose of protecting rights?[28]

These are not easy questions. The European Court of Human Rights has opted for deference to domestic restrictions motivated by neutrality policies. But this was not the only possible choice: instead, the Court could have developed the opposite argument and argued that in a diverse and pluralistic society it is necessary to tolerate manifestations of religion by religious symbols, as long as these symbols remain essentially passive,[29] i.e. on the condition that they do not have a clear impact on the possibility for a user of a public service to exercise their rights. On this track, it could have been considered that the idea of *living together* presupposes that public services can be provided by a range of characters, religious or non-religious. Interestingly, the Court arrived at a very different conclusion, using the principle of *living together* not to legitimise religious symbols, but to uphold the French blanket ban on wearing a full-face veil in public places. In the eyes of the Court, the choice to wear such a veil, motivated by religious beliefs, had to yield to the demands of social communication.[30]

If there is any sphere in which the focus on the rights of the user becomes apparent, it is public education. And this is for a reason, since a teacher is indeed a very particular provider of a very particular public service. A good teacher should be able to foster in the child the ability of critical thinking and to develop a mindset of openness to others. This is both a mission and a challenge, because children, especially at an early stage of life, tend to accept uncritically whatever the teacher says.[31] Children may also be unable to distinguish between the teacher's personal beliefs and the objective and pluralistic knowledge that is being imparted. For that reason, the European Court of Human Rights did not object to the restrictions affecting the teacher who had decided to wear a headscarf while teaching.[32] The reasoning in the case was twofold. First, it was assumed that the applicant should have reckoned with the restrictions on her religious expression, as she had accepted an appointment as a civil servant in the public education service, thereby condoning that her subsequent conduct could be attributed to the State.[33] Second, the Court found that the wearing of an Islamic headscarf was difficult to reconcile with the message of tolerance and non-discrimination, which should be communicated to children by their teachers. In

28 Drawing on *Ebrahimian*, see McCrea (2016); Adrian (2017), pp. 180–183.

29 This rather vague term was used in the judgment concerning the display of a crucifix in Italian schools: ECtHR, *Lautsi and Others v. Italy* (n. 19), para. 72.

30 ECtHR (GC), judgment of 1 July 2014, *S.A.S. v. France*, 43835/11, paras. 152–153. From today's perspective, after the experience of mandatory covering of faces during the COVID-19 pandemic, one can reasonably doubt whether the concept of *living together*, as applied by the Strasbourg Court, ever had any other purpose than the rubber-stamping of burqa bans; for further discussion, see Pearson (2021).

31 The role of schoolteachers as figures of authority to their pupils was also highlighted by the Strasbourg Court in cases which concerned freedom of expression: ECtHR (GC), judgment of 26 September 1995, *Vogt v. Germany*, 17851/91, para. 60; ECtHR, judgment of 29 November 2022, *Godenau v. Germany*, 80450/17, para. 53.

32 ECtHR, decision of 15 February 2001, *Dahlab v. Switzerland*, 42393/98; see also ECtHR, judgment of 17 June 2008, *Karaduman and Others v. Turkey*, 8810/03.

33 This was stated as clearly as possible: "As a civil servant, she represented the State; on that account, her conduct should not suggest that the State identified itself with one religion rather than another," ECtHR, *Dahlab v. Switzerland* (n. 32).

passing, it might be noted that the latter finding, which relates to the content of the belief and involves a fair degree of value judgment, is somewhat more difficult to defend and only concerns one religious tradition.

The aim of shielding a user of a public service from undesired exposure to manifestations of religious symbols becomes much less obvious when a higher education institution is involved. While the protection of a child from religious indoctrination seems justifiable, at least at first sight,[34] university students are expected to possess advanced critical thinking skills and the ability to resist religious pressure. The European Court of Human Rights, nevertheless, willingly accepted restrictions affecting university professors, the emphasis being placed on the argument of voluntariness. In a case against Turkey, the Court argued that the applicant had assumed her status of a public servant out of her free will and could not have been unaware of the ban on wearing a head covering while performing her teaching duties. The status of a civil servant and the assumed voluntary acquiescence to the restrictions were seemingly the key to the case, as the aim of the ban had been to preserve the principle of secularism and that of a neutral public service,[35] whereas the possible confusion of young minds did not play a role in this respect.[36]

All this paints a rather restrictive attitude of the European Court of Human Rights towards the wearing of religious symbols by civil servants. It takes more inspiration from the French tradition of distrust of religion than from the German tradition of open neutrality. With a pinch of irony, Eva Brems perceptively concluded that the European Court of Human Rights seems to be looking at Europe through the windows of its host country.[37]

But perhaps this image can be softened with the addition of two caveats. First of all, this is really only about symbols and clothing, not about beliefs. As long as a civil servant's beliefs do not contravene the law and remain their private affair, even if known to their superiors or colleagues, State interference is illegitimate. Also, the views of the civil servant's loved ones should be irrelevant to the State.[38] Indeed, the State's commitment to neutrality and secularism cannot go so far as to interfere with the very conscience of the employee and his family.

And even more importantly, the Court does not *order* any State to establish a ban on the wearing of religious symbols and clothing in the civil service. Such bans may be justified before the Court, but are on no account required by the Convention. European States are basically at liberty to offer more accommodation to religious needs, in particular by developing their domestic regulations in a way that strikes a fair balance between

34 In the context of *Dahlab*, it was asked how the decision of one Muslim teacher in a primary school in Geneva, where Muslims are a religious minority, could be suspected of having an unacceptable influence on students: Ahdar and Leigh (2013), p. 294.

35 ECtHR, decision of 24 January 2006, *Kurtulmuş v. Turkey*, 65500/01.

36 Let us not forget, however, that the deference of the Court to the Turkish restrictions on religious attire in higher education institutions was not limited to professors, but extended to similar requirements concerning students. In a high-profile case decided by the Grand Chamber, the ban on headscarves and long beards affecting students at Istanbul University was challenged before the Court, but no violation of the right to religious expression was found: ECtHR (GC), *Leyla Şahin v. Turkey* (n. 18). Since the outcome of the examination was the same for a professor and a student, it might be that in fact the professor's status of a civil servant was not the decisive factor.

37 Brems (2015).

38 The European Court of Human Rights found a violation of the right to privacy of a prefecture employee who had been transferred to another department because of his religious beliefs and the fact that his wife had been wearing an Islamic veil; ECtHR, judgment of 2 February 2016, *Sodan v. Turkey*, 18650/05.

competing interests differently. A good example is the judgment of the German Federal Constitutional Court which prioritised the freedom of religion or belief of a teacher over the principle of neutrality by deciding that a blanket ban on teachers wearing a headscarf was incompatible with the Basic Law. In the judgment, bans on this form of religious expression were allowed only if it was established that the headscarf actually posed a risk to peaceful coexistence at school.[39] In a similar vein, there is considerable openness in the United Kingdom Civil Service's official policy towards its employees: civil servants are not prevented from wearing religious symbols or clothing as long as it does not directly interfere with their ability to carry out their professional duties.[40] So maybe the need for respect for national traditions and history, a claim to which the Court likes to pay lip service, is indeed the only possible solution?

IV. Proselytism and Power

The right to proselytise, or to engage in religious persuasion, is often considered one of the core elements of freedom of religion or belief. The fact that the first violation of this freedom found by the European Court of Human Rights concerned precisely the punishment for proselytism is meaningful, as the case of *Kokkinakis v. Greece* was about fundamentals: the understanding of religious freedom. The Court's stance does not leave much room for doubt: the right to religious manifestation is not limited to the circle of immediate believers, but it necessarily includes "the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'the freedom to change [one's] religion or belief' (. . .) would be likely to remain a dead letter".[41] The need to bear witness to those outside the community may be absent from some religious traditions, but remains commonly widespread among those religions that seek to expand and broaden membership. In some cases, missionary activity amounts to the most important task of the faithful, who are willing to share the good news with the world at every opportunity.

Not all good news is welcome. Uninvited preaching may be an inconvenience, but as long as one can close the door to it, delete an email, or cross the street to avoid an unwanted encounter, such missionary fervour does not pose a threat to individual freedom. It is simply one of many offers that one can accept or reject, without suffering the consequences of so choosing; what is important is to be able to make this decision consciously and of one's own free will. Also, from the point of view of many religions, the free will factor is essential since forced conversion is neither authentic nor long-lasting. As the Doctrinal Note on some aspects of Evangelization of the Roman Catholic Church concludes, conversion to the faith should be achieved by the power of God's message and not through "coercion or tactics unworthy of the Gospel".[42]

39 German Federal Constitutional Court, judgment of 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10.

40 See www.gov.uk/government/publications/faith-and-belief-toolkit/the-civil-service-faith-and-belief-toolkit, last accessed 27 October 2022. The guidance contained in this toolkit is in some respects similar to the context-sensitive approach to bans on religious symbols for civil servants which has been convincingly advocated by Levrau and Loobuyck (2020), pp. 330–333.

41 ECtHR, *Kokkinakis v. Greece* (n. 6), para. 31.

42 Congregation for the Doctrine of the Faith, *Doctrinal note on some aspects of Evangelization*, 3 December 2007, para. 8, www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20071203_nota-evangelizzazione_en.html, last accessed 24 October 2022.

But when religious persuasion meets power, matters become more complicated. This is why the European Court of Human Rights has made a distinction between proper and improper proselytism, only the former enjoying the protection afforded by the Convention. Improper proselytism includes bribing, exerting undue pressure, or even using violence against those who are intended to be recruited into the community of the faithful. This kind of persuasion – which essentially has more to do with violence and manipulation than with persuasion as such – is incompatible with the right to freedom of religion or belief.[43] Of course, it could be argued that this distinction is rather blurry, as the concept of manipulation itself is notoriously vague and confusing. After all, there is no shortage of those who claim that every religion is fundamentally about manipulation. Besides, the same case involving allegations of proselytising can be framed in different ways, sometimes leading to different interpretative results.[44] The law should not be expected to provide a detailed algorithm in this respect, but guidelines can help.[45]

In the civil service, the dangers which result from attempts at converting others are readily apparent. As Paul Bickley rightly put it, "Those that combine a strong missional motivation with the purpose of providing public services are in risky territory."[46] This is for similar reasons as those discussed in the previous section: when representing the State, a person should avoid any signs that indicate identification with a particular religion or belief. But with proselytising, there is something else: the danger of abuse of power. This danger is essentially twofold. First, it is a risk of those seeking public services, who might feel that the delivery of the service is conditional on the adoption of certain beliefs, or that if they do not share those beliefs, they will be at a disadvantage. The likelihood of discrimination against some categories of users should be seriously considered.[47] Second, it is also a concern for those employed in the civil service who are vulnerable to proselytising on the part of their superiors and may feel pressured to adopt certain views or precepts of a religious faith they do not share.

A good example of the first scenario can be found in the Strasbourg case of a Russian judge who was dismissed from office, after several complaints from private persons, on the ground that her conduct had damaged her reputation as a judge and had impaired the impartiality of the judiciary.[48] The applicant was a member of one of Evangelical churches. Not only did she publicly make religious comments concerning the morality of parties and pray during the court hearings over which she presided, but she also went as far as to promise a favourable outcome of the proceedings to the parties if they joined her religious group. The European Court of Human Rights declared her application as inadmissible. It rejected the view that she had been punished for her views and pointed to specific requirements for judicial office which had been compromised by the applicant. In the judgment, a

43 ECtHR, *Kokkinakis v. Greece* (n. 6), para. 48. This was the first judgment in which this distinction was explained, although the Court had already made references to 'misplaced proselytism' before *Kokkinakis* (ECtHR, judgment of 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 5095/71, 5920/72, 5926/72, para. 54).

44 See e.g. Scharffs (2017).

45 Tad Stahnke suggested that the framework used to draw the line between proper and improper proselytism should involve the examination of four factors, i.e. the attributes of the source, the attributes of the target, the location of the impugned action, and the nature of that action: Stahnke (2015), pp. 404–411.

46 Bickley (2015), p. 53.

47 This is why pro-secular organisations in the United Kingdom have recently protested against the idea of inviting faith groups to run certain community services: Manson (2022).

48 ECtHR, decision of 8 February 2001, *Pitkevich v. Russia*, 47936/99.

specific reference was made to an earlier case in which a violation of Article 10 ECHR had been found because "a civil servant had been dismissed on the ground of the mere membership of a communist party, with no account being taken of the context of her breaching the statutory requirements of loyalty". The case of the Russian judge was clearly different, since the basis for dismissal was not the applicant's views or their expression in public, but rather her conduct in the courtroom. What might have been acceptable for a party or a witness standing before the court,[49] was hardly acceptable for a judge. This case is a good illustration of the dangers of the religious commitment of a person who has the power to decide an individual case on behalf of the State, and uses this opportunity to impose their personal beliefs to the parties to the proceedings.

An example of the second scenario can be found in a Greek case in which the European Court of Human Rights was again called upon to assess the ban on proselytism.[50] Unlike in *Kokkinakis*, the assessment was not straightforward. The applicants were officers in the Greek air force and also members of the Pentecostal community. They had been punished for proselytising a number of people, some of them serving in their units. While the Court was ready to admit that the punishment for spreading the message to the civilians was incompatible with the Convention, a different yardstick had to be applied to the pressure exerted on the airmen serving in the units commanded by the applicants. The airmen testified that they had felt obliged to take part in religious discussions as they had been initiated by their superiors, and one of them had even been granted leave of absence on the condition that he visit a Pentecostal church. In the Court's words:

> what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.[51]

And even though civil servants are not soldiers, yet it is not difficult to draw a lesson from this case: in the workplace, religious persuasion must be clearly distinguished from religious pressure or coercion.

Just as with religious symbols and clothing, the examples taken from the case law serve to expound the basic premise: the ideal of restraint. If in doubt, stay silent! But this does not mean that the civil servants are expected to abandon or betray their sincerely held beliefs; they might simply need to hold their tongue while on duty. This logic was perhaps best captured in the Standards of Conduct in the International Civil Service drafted by the International Civil Service Advisory Board as early as in 1954:

> While their personal views remain inviolate, international civil servants do not have the freedom of private persons to take sides or to express their convictions publicly on controversial matters (. . .). This can mean that, in certain situations, personal views should be expressed only with tact and discretion.[52]

49 ECtHR, judgment of 5 December 2017, *Hamidović v. Bosnia and Herzegovina*, 57792/15; ECtHR, judgment of 18 September 2018, *Lachiri v. Belgium*, 3413/09.

50 ECtHR, judgment of 24 February 1998, *Larissis and Others v. Greece*, 23372/94.

51 ECtHR, judgment of 24 February 1998, *Larissis and Others v. Greece*, 23372/94, para. 51.

52 See https://icsc.un.org/Resources/General/Publications/standardsE.pdf, last accessed 27 October 2022, guideline n. 9.

This is easier said than done. Setting the right threshold of "tact and discretion" in individual cases seems to be quite a challenge.

V. Conscientious Objection at the Crossroads

Of all the restrictions affecting the freedom of religion or belief of civil servants, the right to conscientious objection seems to be the most intensively debated one. The reasons are of a more general nature, for even the very existence of the right to be granted an exemption from generally applicable laws on grounds of conscience has been subject to controversy.[53] Or, to be more precise, it may remain a matter of controversy for scholars with a more theoretical disposition, but in the European case law the protection afforded to conscientious objection seems to be rather established.

The path that led to the recognition of conscientious objection as a right under the Convention was a twisty and bumpy one. The turning point on that journey was the open acknowledgement by the European Court of Human Rights that the Convention affords protection to religiously motivated objection to military service.[54] This decision ignited the hopes of those who expected the Court to be more generally accommodating of the claims of people who wish to evade duties they deem morally unacceptable. It is no surprise that this group also includes persons who are bound by ties of special loyalty to the State: civil servants.

This type of conflict between the professional duties of a civil servant and their freedom of religion or belief is far more severe than those already discussed. The restrictions on religious symbols or clothing and missionary endeavours only apply to the workplace, thus allowing the employee to pursue their needs beyond working hours. Removing a crucifix or headscarf in the workplace, or refraining from spreading the good news in the office, does not necessarily mean denying one's faith and acting contrary to one's beliefs. But things are quite the opposite with conscientious objection. Civil servants who are expected to implement public policy in their own actions must perform an act that they, in the very depths of their conscience, consider sinful or immoral. From the civil servant's perspective, what is involved is not a temporary abstention from manifesting religion, but an active complicity in wrongdoing. This moral discomfort may not be compensated or relieved by self-fulfilment in private life.

But of course, this is not the only perspective to consider. As in the situations discussed earlier in this chapter, there is usually someone on the other side of the counter: a user of public services who has the right to demand that their service be provided in accordance with the law, in a professional manner, and without any personal prejudice on the part of the person implementing the public policy. The user should not risk facing behaviour which communicates their moral inferiority in the eyes of the public servant.[55] Clearly, the stakes are high on both sides.

In practice, the most controversial issues are the assistance provided to same-sex couples, the access to abortion, and more recently, also access to physician-assisted suicide.[56]

53 See e.g. Zucca (2018).

54 ECtHR (GC), judgment of 7 July 2011, *Bayatyan v. Armenia*, 23459/03. This decision was not easy, for reasons that need not be discussed here; see Decker and Fresa (2001); Yiannaros (2016).

55 On the concept of expressive harm resulting from conscientious objection, see e.g. Smet (2016), pp. 131–135.

56 In this regard, a new wave of conscientious objections coming from healthcare professionals can be expected as a result of planned or already adopted legislation on euthanasia in countries such as Germany, Italy, or Spain. Such objections are motivated, as in the case of abortion, by the belief in the sanctity of human life. As for the critical reception of the Spanish Organic Law for the Regulation of Euthanasia of 2021, see in particular Navarro-Valls et al. (2022).

These latter two issues primarily concern the conscientious objection of healthcare professionals such as doctors, nurses, or midwives, and will not be considered further in the chapter. In contrast, officiating at same-sex marriages by civil registrars or state-appointed celebrants touches on the heart of the right to conscientious objection in the civil service.

Same-sex unions are rejected by a number of religious groups, including many of those affiliated to the Christian tradition, who often consider modern reinterpretations of the concept of marriage to be incompatible with Biblical teaching. Those who firmly believe that marriage is a lifelong union between one man and one woman, as ordained by God, do not welcome a change to this definition by an earthly legislator.[57] But this attitude can conflict with the duties of the civil registrar who is entrusted, in jurisdictions where marriage equality has been accepted, with the legal task of officiating at the ceremony leading to the solemnisation of the marriage of a same-sex couple. Opposition to this task occurs particularly where the requirement to preside over such ceremonies had not been known at the time the civil registrar was employed, but was introduced at a later date.

How to handle such a clash of rights? It may be useful to see the possible solutions as a continuum: from granting absolute priority to same-sex couples and denying accommodation to civil servants, on the one hand, to granting civil servants an unlimited right to opt-out on religious grounds at the expense of the right to marry, on the other. Opting for one of the extreme points on this axis may satisfy one of the parties, but will inevitably mean disappointment and anger for the other. Luckily, there is a multiplicity of solutions to consider between these extreme points.

Among them, notably, there is a *single-entry point* system, where couples do not approach (potentially dissenting) marriage commissioners directly, but through a central office. In this way, there is no contact between the parties to a potential conflict and the State appoints people who are not principally opposed to the idea of same-sex unions. Such a mechanism, first invented in Canada and described as "accommodation behind the scenes", has been applied in the Netherlands.[58] This solution is not flawless, for it can be argued that in this way the State, even if indirectly and in part, supports or at least tolerates views that should not be tolerated.[59] Besides, such a system is hardly practicable in countries where a large percentage of civil servants object.[60] But in other cases, the pragmatic gain is clear: "Same-sex couples may obtain a state-sanctioned ceremony without enduring rejection or embarrassment, while devout marriage commissioners can retain their jobs and avert a violation of their conscience."[61] Worthy of consideration is the idea used in Italy, where, admittedly, "conscientious impediments" are not considered sufficient grounds for refusal, but the law allows delegation, thus allowing recalcitrant civil servants to relieve themselves from a troublesome obligation.[62] The law can also distinguish between newly employed civil servants, who should not complain about the labour tasks they have voluntarily accepted, including officiating at same-sex weddings, and the 'old'

57 See e.g. www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html, last accessed 24 October 2022.

58 MacDougall et al. (2012), p. 140.

59 Nehushtan and Coyle (2019), pp. 114–116. Conscientious objection to officiate at same-sex marriages is sometimes compared to historically raised objections to mixed-race marriages, and consequently dismissed: Smet (2019), pp. 301–304. But some argue that there is a difference between these two instances of conscientious objection: McCrudden (2018), p. 458.

60 Brems and Smet (2017).

61 Ahdar (2014), p. 305.

62 Saporiti (2017), pp. 608–609.

officers who could not have anticipated such a fundamental change to the terms of their employment.[63] Yet another idea might be to separate the conduct of the solemn ceremony and the purely administrative duties of making an entry in the register, the latter not even requiring face-to-face contact with the couples.[64] But this will not satisfy every conscience either.

One such case reached the Strasbourg Court. Lilian Ladele, a civil registrar at Islington London Borough Council, had not been reconciled to the idea of same-sex relationships even before marriage equality was introduced, when only civil partnerships were possible in UK law. She initially tried to avoid officiating at ceremonies for same-sex couples by arrangement with her fellow officers, but soon, following complaints from her colleagues, this attitude became known to her superiors, who threatened her with disciplinary action. Ms Ladele portrayed herself as a victim of discrimination, but lost both before the national courts and the European Court of Human Rights, where she complained under Article 14 taken in conjunction with Article 9 of the Convention (discrimination on religious grounds).[65] The reasons given by the Court are disappointing: the body of the decision does not provide an in-depth justification as to why the Court did not find a violation, but simply resorts to the doctrine of the margin of appreciation.[66]

However, the same judgment, in which three other cases were jointly examined,[67] laid down the conditions for the accommodation of conscientious objection in areas other than military service. The Court stated that in order to count as a manifestation of religion, the act under consideration must be "intimately linked to the religion or belief"; furthermore, "the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case".[68] Practice to this day suggests that the threshold has been set very high by the Court.[69]

Future developments in the area of conscientious objection by civil servants remain largely unknown. The prevailing trend seems to be to accommodate the right of LGBT people to obtain State recognition of their relationship, rather than tolerate the religious beliefs of those who object to presiding over the ceremony.[70] But this conflict should not be expected to fade away anytime soon.

63 Hill (2018), pp. 372–373.

64 MacDougall et al. (2012), p. 162; interestingly, the ceremonial side can sometimes be as important as the legal recognition itself, especially in a secular society like that of the Netherlands, which expects marriage registrars to play the role of secular priests: Derks (2017), pp. 221–222.

65 This seemed to be an obvious choice. Before the case was decided, it had been speculated that the reliance on the doctrine of indirect discrimination would provide best protection for the applicant: Hambler (2012), pp. 178–181.

66 ECtHR, *Eweida and Others v. the United Kingdom* (n. 14), para. 106.

67 One of them was very similar to the case of Ms Ladele, as it involved principled opposition to same-sex unions. The applicant, Gary McFarlane, was a relationship counsellor who refused to provide services to gay couples. The two remaining cases concerned the display of religious symbols in the workplace.

68 ECtHR, *Eweida and Others v. the United Kingdom* (n. 14), para. 82.

69 See notably ECtHR, decision of 11 February 2020, *Grimmark v. Sweden*, 43726/17; ECtHR, decision of 11 February 2020, *Steen v. Sweden*, 62309/17.

70 This is illustrated by the case of the Netherlands, where the conscientious objection of civil registrars was initially honoured, but after a few years this practice was abandoned: Smet (2016), p. 116.

VI. Concluding Remarks

Today's public sector may have less and less to do with religion, but it is still composed of all sorts of people: from the religiously indifferent to the religiously devout. The issue of accommodating the religious beliefs of civil servants will stay with us for a long time to come, even if steady advances in secularisation may gradually remove it from the spotlight.

In an attempt to outline the limits on the religious expression of civil servants, the State can essentially opt for one of two directions. The first is marked by a distrust of religion and a reluctance to make exceptions to secular policies. It can be symbolised by a document recently adopted in France, *La charte de la laïcité dans les services publics*,[71] which emphatically declares that the principle of secularism prevents civil servants from manifesting any religious beliefs while at work, and that any breach of these rules may incur disciplinary charges. Strict rules are also addressed to the users of the public service, who have the right to express their religious convictions only as long as this expression respects the neutrality of the public service, and should refrain from any form of proselytising. The second direction has been set by the British Civil Service and their faith and belief toolkit,[72] which aims to make the Civil Service the most inclusive employer in the United Kingdom and celebrate the common shared values while not ignoring the differences.

None of these directions is perfect and none of them would be universally accepted across Europe – but neither could any of them be dismissed as entirely incompatible with human rights of civil servants or with the user's right to good administration. Which one to choose, then? It may not be good academic manners to end a chapter without a clear conclusion, but perhaps this one time it will be better to leave it here.

Bibliography

Adrian M. (2017), 'The Principled Slope: Religious Freedom and the European Court of Human Rights', 45 *Religion, State & Society*, 174–185.

Ahdar R. (2014), 'Solemnisation of Same-sex Marriage and Religious Freedom', 16 *Ecclesiastical Law Journal*, 283–305.

Ahdar R., Leigh I. (2013), *Religious Freedom in the Liberal State*, Oxford: Oxford University Press.

Bickley P. (2015), *The Problem of Proselytism*, London: Theos.

Brauch J.J. (2005), 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', 11 *Columbia Journal of European Law*, 113–150.

Brems E. (2015), '*Ebrahimian v France*: Headscarf ban upheld for entire public sector', *Strasbourg Observers*, 27 November, https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector.

Brems E., Smet S. (2017), 'Can Marriage Officers Refuse to Marry Same-Sex Couples?', *OUPblog*, 9 October, https://blog.oup.com/2017/10/marriage-officers-same-sex-couples.

Cunningham R. (2005), 'Religion and Public Administration – The Unacknowledged Common (and Competitive) Ground', 28 *International Journal of Public Administration*, 943–955.

Decker D.C., Fresa L. (2001), 'The Status of Conscientious Objection under Article 4 of the European Convention on Human Rights', 33 *New York University Journal of International Law and Politics*, 379–418.

71 See www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2022/12/charte_de_la_laicite-.pdf, last accessed 27 October 2022.

72 See www.gov.uk/government/publications/faith-and-belief-toolkit/the-civil-service-faith-and-belief-toolkit, last accessed 27 October 2022.

Derks M. (2017), 'Conscientious Objectors and the Marrying Kind: Rights and Rites in Dutch Public Discourse on Marriage Registrars with Conscientious Objections against Conducting Same-Sex Weddings', 23 *Theology & Sexuality*, 209–228.

Elver H. (2012), *The Headscarf Controversy: Secularism and Freedom of Religion*, Oxford: Oxford University Press.

Feingold C.S. (1977), 'Doctrine of Margin of Appreciation and the European Convention on Human Rights', 53 *Notre Dame Law Review*, 90–106.

Garahan S. (2016), 'A Right to Discriminate? Widening the Scope for Interference with Religious Rights in *Ebrahimian v France*', 6 *Oxford Journal of Law and Religion*, 352–358.

Gozdecka D.A. (2016), *Rights, Religious Pluralism and the Recognition of Difference: Off the Scales of Justice*, Abingdon, New York: Routledge.

Greer S. (2010), 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation', 3 *UCL Human Rights Review*, 1–14.

Hambler A. (2012), 'Recognising a Right to "Conscientiously Object" for Registrars Whose Religious Beliefs Are Incompatible with Their Duty to Conduct Same-Sex Civil Partnerships', 7 *Religion & Human Rights*, 157–181.

Hill M. (2018), 'Freedom of Religion and the Rise of Secularism: Struggles in the British Workplace', in Ahdar R. (ed), *Research Handbook on Law and Religion*, Cheltenham, Northampton: Edward Elgar Publishing, 357–377.

Hunter-Henin M. (2022), 'Religious Neutrality at Europe's Highest Courts: Shifting Strategies', 11 *Oxford Journal of Law and Religion*, 23–46.

King S.M. (2007), 'Religion, Spirituality, and the Workplace: Challenges for Public Administration', 67 *Public Administration Review*, 103–114.

Kratochvíl J. (2011), 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', 29 *Netherlands Quarterly of Human Rights*, 324–357.

Levrau F., Loobuyck P. (2020), 'With or Without Religious Symbols? Why Political Liberalism Is Inconclusive in the Case of Civil Servants', 26 *Res Publica*, 319–335.

Lindsay J. (2017), 'Challenging the Secularist Assumption: Religion, Public Policy and Civil Service Culture', 64 *Social Compass*, 262–274.

MacDougall B., Bonthuys E., Norrie K., van den Brink M. (2012), 'Conscientious Objection to Creating Same-Sex Unions: An International Analysis', 1 *Canadian Journal of Human Rights*, 127–164.

Madeley J.T.S. (2015), 'Constitutional Models and the Protection of Religious Freedom', in Ferrari S. (ed), *Routledge Handbook of Law and Religion*, London, New York: Routledge, 209–226.

Manson M. (2022), 'Encouraging Evangelism in Public Services Will Promote Division, Not Divinity', *National Secular Society*, 31 May, www.secularism.org.uk/opinion/2022/05/encouraging-evangelism-in-public-services-will-promote-division-not-divinity.

Martínez-Torrón J. (2019), 'State Neutrality and Religious Plurality in Europe', in Durham W.C. Jr., Thayer D.D. (eds), *Religion, Pluralism, and Reconciling Difference*, Abingdon, New York: Routledge, 159–176.

McCrea R. (2016), 'Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights', 79 *Modern Law Review*, 678–705.

McCrudden Ch. (2018), 'Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights', in Mancini S., Rosenfeld M. (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, Cambridge: Cambridge University Press, 414–462.

Navarro-Valls R., Martínez-Torrón J., Valero Estarellas M.J. (2022), *Eutanasia y objeción de conciencia*, Madrid: Ediciones Palabra.

Nehushtan Y., Coyle S. (2019), 'The Difference between Illegitimate Conscience and Misguided Conscience: Equality Laws, Abortion Laws and Religious Symbols', in Adenitire J. (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State*, Cambridge, New York: Hart Publishing, 111–134.

Nilsson P.-E. (2018), *Unveiling the French Republic: National Identity, Secularism, and Islam in Contemporary France*, Leiden, Boston: Brill.

O'Donnell T.A. (1982), 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', 4 *Human Rights Quarterly*, 474–496.

Pearson M. (2021), 'What Happened to "Vivre Ensemble?": Developments after *SAS v France*', 10 *Oxford Journal of Law and Religion*, 185–205.

Saporiti M. (2017), 'Public Officers and Same-sex Civil Unions in Italy: An Unsolved Principled Question?', 6 *Oxford Journal of Law and Religion*, 604–609.

Scharffs B.G. (2017), '*Kokkinakis* and the Narratives of Proper and Improper Proselytizing', 12 *Religion & Human Rights*, 99–111.

Smet S. (2016), 'Conscientious Objection to Same-sex Marriages: Beyond the Limits of Toleration', 11 *Religion & Human Rights*, 114–139.

Smet S. (2019), 'Conscientious Objection under the European Convention on Human Rights: The Ugly Duckling of a Flightless Jurisprudence', in Temperman J., Gunn T.J., Evans M. (eds), *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years Since Kokkinakis*, Leiden, Boston: Brill, 282–306.

Smet S. (2022), 'The Impossibility of Neutrality? How Courts Engage with the Neutrality Argument', 11 *Oxford Journal of Law and Religion*, 47–73.

Spielmann D. (2012), 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', 14 *Cambridge Yearbook of European Legal Studies*, 381–418.

Stahnke T. (2015), 'Proselytism', in Ferrari S. (ed), *Routledge Handbook of Law and Religion*, London, New York: Routledge, 395–413.

Taylor G. (2017), 'Teachers' Religious Headscarves in German Constitutional Law', 6 *Oxford Journal of Law and Religion*, 93–111.

van Putten R., Overeem P., van Steden R. (2019), 'Where Public Theology and Public Administration Meet: Reflections on Jürgen Habermas' Post-Secular Turn', 13 *International Journal of Public Theology*, 5–24.

Yiannaros A.C. (2016), 'From *Grandrath* to *Bayatyan*: The Development of European Jurisprudence on Conscientious Objection to Military Service', 9 *Inter-American and European Human Rights Journal*, 428–455.

Zucca L. (2018), 'Is There a Right to Conscientious Objection?', in Mancini S., Rosenfeld M. (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, Cambridge: Cambridge University Press, 127–148.

42 Freedom of Expression of Civil Servants

Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate

Adam Krzywoń

I. Introduction

Freedom of expression stands as one of the cornerstones of modern democratic societies. It has a twofold character, serving both individual autonomy and the collective pursuit of an open and informed society. The robust protection of this right is a fundamental prerequisite for the proper functioning of democratic systems. However, within the expansive realm of freedom of expression, a complex network of protection unfolds, shaped by numerous factors that include the status of the speaker and addressee, the forum in which the exchange takes place, and the message conveyed. In particular, the status of the speaker is important since the unique role and position of a person within the legal system may be decisive in determining the scope of protected expressive activities.

This complexity of free speech guarantees is clearly exemplified in the context of civil servants' freedom of expression. This special group occupies a dual role in democratic societies, acting as both citizens and representatives of the State. On the one hand, like all citizens, they must enjoy the right to free speech, as the principles of democratic society require that no one remains a silent bystander in the public discourse. Civil servants, being in close proximity to the inner workings of government and playing an integral role in enforcing its policies, serve as important sources of information. Their ability to engage in a debate in matters of public interest and report irregularities is crucial to the functioning of the checks and balances within a democratic system.[1]

On the other hand, the protection of public interest and the political sensitivity surrounding many public services prompt governments to maintain a vigilant eye on the behaviour of officials, both on-duty and off-duty. Consequently, the autonomy of civil servants is often curtailed, and they find themselves subject to stricter accountability measures and disciplinary regimes. In the language of the European Convention of Human Rights (ECHR or the Convention), civil servants bear particular "duties and responsibilities" regarding their freedom of expression, which arise from their functions.[2] At the same time, civil servants

1 On the complex interrelations between democracy and free speech, see Bhagwat and Weinstein (2021), pp. 85 f. and O'Connell (2020), pp. 84 f.

2 Article 10 ECHR reads as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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frequently find themselves in a vulnerable position within the employment hierarchy and operate in the context of power inequality that is manifest in the employer's authority to terminate the employment relationship.[3] Thus, the need for special protection of their voice arises from the inherent imbalance between the civil servant and their employer.[4]

Against this backdrop, striking a fair balance between safeguarding the fundamental principles of democracy, which include free speech and transparency of governance, as well as the need to maintain the efficiency and integrity of public services and to ensure a politically neutral public administration, is a crucial challenge with regard to civil servants' freedom of expression. This chapter, employing the method of doctrinal research,[5] delves into these multifaceted dimensions of the freedom of expression as it applies to civil servants and aims to show how their expressive activities are affected by duties and responsibilities intrinsic to these positions.

Article 10 ECHR and the relevant case law of the European Court of Human Rights (ECtHR or the Court) constitute the analytical core of this chapter. This framework draws from the Court's balancing approach,[6] grounded on the fundamental principle that the adjudication of civil servants' freedom of expression claims requires careful consideration of competing rights and public interests. Moreover, the analysis within this chapter is contextual in nature, acknowledging that the limits of the right to freedom of expression are not uniform but vary according to the specific context in which this right is exercised.[7] Also, some references are made to the American doctrine of the First Amendment, which tends to adopt a more categorical approach, establishing relatively inflexible rules that govern the freedom of expression.[8] Nonetheless, both systems – European and American – share a fundamental objective: preserving and protecting the free marketplace of ideas within the democratic framework.

This chapter is structured as follows. First, it explores the significance and the extent of the freedom of expression within (public) employment. Second, the focus shifts towards the duties and responsibilities of civil servants, encompassing concepts such as loyalty, reserve, discretion, and the obligation of political neutrality. Third, the chapter adopts a functional perspective, analysing civil servants' freedom of expression in the context of their unique positions and functions within the legal system. Fourth, it examines how factors like place (forum), content, and participation in debates on matters of public interest influence the guarantees of free speech afforded to civil servants. Finally, the chapter focuses on the issues of legitimate aims of interference with civil servants' freedom of expression, general measures, and individual sanctions.

II. Freedom of Expression in the Workplace

The guarantees of civil servants' freedom of expression and the extent to which the provisions of Article 10 ECHR apply to employee-employer relations have been the subject of various doubts that concern two interrelated issues. Firstly, there was uncertainty as to whether the right to freedom of expression extends to employment in public administration, particularly those relations governed by private (labour) law. Secondly, a similar question arose as to whether an employer's decision to dismiss or initiate disciplinary

3 Bogg and Estlund (2014), p. 154.
4 Mantouvalou (2014), p. 225.
5 Cf. Egan (2018), pp. 24 f.
6 Cf. Smet (2017), pp. 38 f.
7 Voorhoof and Humblet (2013), pp. 246–247.
8 Stone (2011), pp. 410 f.; see also Tsesis (2020), pp. 3 f.

proceedings against an employee – who, according to the employer, exceeds the permissible scope of the freedom of expression – could be viewed as an act invoking State responsibility for potential infringements of Article 10 ECHR. It is worth noting that in the US, a similar debate was held, and the doubts surrounding the freedom of expression of government employees were particularly pronounced.[9]

The ECtHR has consistently argued that Article 10 ECHR extends to the professional sphere in a broader sense ("the workplace in general").[10] Currently, there is no doubt that this provision is binding in employment relations governed by public law, as well as in those regulated by private (labour) law.[11] Thus, regarding the applicability of Article 10 ECHR to civil servants, the model of employment – career or contractual system – is irrelevant. Moreover, the ECtHR claims that State responsibility could always be invoked if the alleged violation stemmed from public authorities' failure to ensure that individuals enjoy the rights enshrined in Article 10 ECHR.[12] While in some cases there may be room for debate regarding whether an employer's decision could be equated with acts of public authorities, there is no doubt that a court's subsequent endorsement of such a decision would always entail State accountability for potential infringements.[13]

Concerning the specific status of civil servants, the Convention makes no distinction between the functions of a State as a holder of public power and its responsibilities as an employer. The ECHR's guarantees are always binding upon the "State as an employer".[14] Consequently, civil servants do not fall outside the scope of the Convention since it stipulates that "everyone within jurisdiction" of the Contracting Parties must enjoy the rights and freedoms "without discrimination on any ground" (Article 1 and Article 14 ECHR).[15]

Based on these foundations, the ECtHR has emphasised that the right to freedom of expression extends "in particular" to the broad category of civil servants.[16] Their status as public officials does not negatively affect the entitlement to free speech and implies even stronger protection than in the case of employees in the private sector. In particular, public authorities are obliged to ensure that all civil servants can engage in domestic debates in matters of public interest (see Section V.2).[17] This does not mean, however, that this

9 Estlund (2021), pp. 413 and 429–430.

10 ECtHR, judgment of 26 February 2009, *Koudechkina v. Russia*, 29492/05, para. 85; ECtHR, judgment of 16 July 2009, *Wojtas-Kaleta v. Poland*, 20436/02, para. 42; ECtHR, judgment of 21 July 2011, *Heinisch v. Germany*, 28274/08, para. 44; ECtHR, judgment of 21 October 2014, *Matúz v. Hungary*, 73571/10, para. 26; ECtHR, judgment of 17 September 2015, *Langner v. Germany*, 14464/11, para. 39; ECtHR, judgment of 5 November 2019, *Herbai v. Hungary*, 11608/15, para. 36.

11 ECtHR, judgment of 29 February 2000, *Fuentes Bobo v. Spain*, 39293/98, paras. 37–38; see also Voorhoof and Humblet (2013), pp. 237 and 242; Vickers (2002), pp. 63 f.

12 ECtHR (GC), judgment of 12 September 2011, *Palomo Sánchez and others v. Spain*, 28955/06, 28957/06, 28959/06, 28964/06, para. 60; ECtHR, judgment of 13 January 2015, *Rubins v. Latvia*, 79040/12, para. 44.

13 ECtHR, decision of 18 January 2000, *Predota v. Austria*, 28962/95; see also Collins (2022), pp. 15 f.

14 ECtHR (GC), judgment of 11 November 2008, *Demir and Baykara v. Turkey*, 34503/97, paras. 107–109; see also ECtHR, judgment of 6 February 1976, *Swedish Engine Drivers' Union v. Sweden*, 5614/72, para. 37.

15 ECtHR (GC), judgment of 26 September 1995, *Vogt v. Germany*, 17851/91, para. 43; see also Krenc (2005), p. 214.

16 ECtHR (GC), judgment of 12 February 2008, *Guja v. Moldova*, 14277/04, para. 52; ECtHR, judgment of 13 November 2008, *Kayasu v. Turkey*, 64119/00, 76292/01, para. 77; ECtHR, decision of 20 September 2010, *Balenović v. Croatia*, 28369/07; ECtHR, *Langner v. Germany* (n. 10), para. 39.

17 ECtHR, judgment of 17 November 2016, *Karapetyan and others v. Armenia*, 59001/08, para. 58.

protection of civil servants' freedom of expression is not subject to any restrictions, since it is legitimate to impose certain formalities, conditions or penalties on public employees because of their status, i.e. their duties and responsibilities.

Another issue which affected the applicability of the ECHR's standards to civil servants is the lack of the right to access to public employment. The latter has sparked many theoretical and practical debates in Europe and the US, which could be illustrated by the statement that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman".[18] This problem highlights the tension that arises when considering the balance between an individual's right to express political views and the discretion of public authorities in determining suitability for specific positions within the civil service.

The right of access to employment in the public service was deliberately excluded from the European human rights protection system, as evident from the drafting history of Protocols Nos. 4 and 7.[19] Consequently, the mere refusal to appoint someone as a public servant cannot in itself form the basis for a complaint under the ECHR.[20] This does not mean, however, that a person appointed as a civil servant cannot complain about being dismissed or refused for further promotion if that violates one of their rights. As mentioned previously, public officials do not fall outside of the Convention system, and while the Contracting Parties did not wish to commit themselves to recognising a right of access to public employment, they are nonetheless bound not to impede that access on grounds protected by the Convention, by virtue of Article 1 ECHR.

Nonetheless, in the early case law, the ECtHR was rather reluctant to address the dismissed civil servants' allegations of the violation of freedom of expression because of the ideological content of their speech.[21] The Court argued that it was the issue of access to the civil service positions that lay at the heart of these complaints. In the first leading cases, the Court agreed that the German public authorities had taken account of a civil servant's expressions merely to determine whether they had proved themselves during the probationary period and possessed one of the necessary personal qualifications for the post in question.[22] As a consequence, the ECtHR concluded there had been no interference with the exercise of freedom of expression.

In the mid-1990s, a shift in stance could be observed as the Court started to pay more attention to the circumstances of each case by considering the scope of the measures

18 Supreme Judicial Court of Massachusetts, *McAuliffe v. Mayor of New Bedford* (1892); see Estlund (2021), pp. 413–414.

19 See *Right of Access to the Public Service in the European Convention of Human Rights: A Missed Opportunity?* by D. Toda Castán in this volume. See also ECtHR, judgment of 28 August 1986, *Kosiek v. Germany*, 9704/82, para. 34. In this context it should be noted that international law provides the protection of the freedom of expression and the right of access to employment in public service, see Articles 19 and 25 of the International Covenant on Civil and Political Rights of 16 December 1966. The restrictions of the freedom of expression (Article 19) can therefore interfere with the provisions of Article 25 since the latter should be read to encompass the freedom to debate public affairs and to criticise the government. Moreover, the equal access to employment in the public service implies the prohibition of discrimination on the ground of political opinion or expression or belief. The latter applies *a fortiori* to those who hold positions in the public service; see Taylor (2020), p. 695.

20 ECtHR judgment of 30 June 2020, *Cimperšek v. Slovenia*, 58512/16, para. 56.

21 Van Steenbergen (2022), p. 286.

22 ECtHR, judgment of 28 August 1986, *Glasenapp v. Germany*, 9228/80, paras. 50 and 53; ECtHR, *Kosiek v. Germany* (n. 19), para. 39; see also Voorhoof and Humblet (2013), pp. 251–252.

taken by the employer in the context of the facts and the relevant legislation.[23] In some cases, even the simple fact that the applicant did not complain about the refusal of appointment or promotion but about the interference in the freedom of expression,[24] or that the employer had expressly informed the official that the refusal of promotion was due to their opinions,[25] was sufficient to examine the merits of the case. Consequently, according to the current approach, the denial to appoint a civil servant because of their previous statements is a measure essentially related to the exercise of freedom of expression and not to the access to public service employment, even if that exercise was qualified by public authorities as proof of the applicant not being a suitable candidate for the position.[26] Interestingly, in assessing whether a complaint pertained to freedom of expression or the right to access public service employment, the Court drew parallels with its case law on applying the concept of “private life” in employment-related situations under Article 8 ECHR.[27] Complaints concerning the exercise of professional functions have been found to fall within the ambit of “private life” when factors relating to private life were regarded as qualifying criteria for the function in question, and when the impugned measure was based on reasons encroaching upon the individual’s freedom of choice in the sphere of private life.[28] Hence, a similar line of reasoning should be employed to determine whether there is an interference with the freedom of expression of civil servants.

III. Duties and Responsibilities

Generally, the diversity in the level of protection afforded to freedom of expression within the European system is a consequence of several interconnected factors, encompassing the status of the speaker, the form and content of the expression, and the forum in which it is conveyed. As mentioned before, the ECtHR considers all these to be components of the balancing approach.

Within the realm of all employment relations, in order to balance all the competing interests, the Court must bear in mind that the exercise of freedom of expression is accompanied by significant “duties and responsibilities” (Article 10, paragraph 2 ECHR). The latter delineates the boundaries of legal and ethical conduct and plays a critical role in assessing whether an employee should be protected against interference within a given context. Moreover, duties and responsibilities assume particular significance when applying the proportionality test and examining the necessity of any potential restriction.[29]

However, it is worth noting that the reference to duties and responsibilities does not allow for implied limitations of the freedom of expression.[30] The particular role of the

23 ECtHR, *Vogt v. Germany* (n. 15); see also ECtHR, judgment of 20 November 2012, *Harabin v. Slovakia*, 58688/11, paras. 151–153.

24 ECtHR, judgment of 20 October 2009, *Lombardi Vallauri v. Italy*, 39128/05, para. 38; ECtHR, judgment of 29 November 2022, *Godenau v. Germany*, 80450/17, para. 34.

25 ECtHR, decision of 24 November 2005, *Otto v. Germany*, 27574/02.

26 ECtHR, *Cimperšek v. Slovenia* (n. 20), paras. 54–59.

27 See *The Protection of Privacy in Civil Service Employment* by M. Otto in this volume.

28 ECtHR, *Cimperšek v. Slovenia* (n. 20), paras. 56–57.

29 ECtHR, decision of 6 April 2000, *Altin v. Turkey*, 39822/98; ECtHR, *Kayasu v. Turkey* (n. 16), paras. 89 and 107.

30 Van Steenbergen (2022), p. 286 and Merrigan (2019), p. 693. See also Wragg (2015), p. 22, who claims that there is little room for implied limitations in Article 10 ECHR. These limitations exist when speakers have some demonstrable, special societal obligations, due to the nature of their positions.

duties and responsibilities is to highlight the obligations that are incumbent on the speakers by reason of their situation.[31] Thus, the Court links duties and responsibilities to the institutionalised roles that certain persons perform in society, especially their functions, with a view to identifying the specific duties and responsibilities for that particular profession.[32]

In this section, the examination of duties and responsibilities that are inherent to the status of civil servants, such as the duty of loyalty, reserve, discretion, and political neutrality, is followed by an analysis of how these obligations can be influenced by legal traditions and historical factors. Additionally, the extent of the margin of appreciation afforded to national authorities in determining the scope of such duties and responsibilities should also be considered.

1. Duties and Responsibilities – A Crucial Element of (Public) Employment

Duties and responsibilities are inherent in all employment relationships – both private and public – irrespective of the specific field or sector. These obligations are grounded in the principles of mutual trust, loyalty, and good faith between employer and employees, and their existence fosters an environment of peace and tranquillity within the workplace.[33] All employees are expected to conduct themselves in a manner that upholds the values and objectives of their organisation, which contributes to the overall functioning and harmonious working atmosphere. Therefore, the need for effective workplace operations legitimises the employers to ensure that employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.[34] The existence of duties and responsibilities in the workplace does not imply, however, the requirement of absolute loyalty towards the employer to the point of subjecting the employee to the employer's interests (see Section III.2). Nonetheless, the fundamental consequence of these obligations is that certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of employment relations.[35]

The duties and responsibilities of civil servants are notably more pronounced than those of ordinary employees since the ECtHR recognises their pivotal role within the realm of public employment.[36] Consequently, when addressing the freedom of expression of civil servants, the significance of the duties and responsibilities mentioned in Article 10, paragraph 2 ECHR assumes particular importance.[37] Upon entering the civil service, officials should be fully aware of the duties and responsibilities that come with the position, including the restrictions on their freedom of expression, due to obligations of loyalty, reserve,

31 ECtHR, judgment of 7 December 1976, *Handyside v. the United Kingdom*, 5493/72, para. 49.

32 Van Steenbergen (2022), p. 286 and Stone (2011), p. 410.

33 ECtHR, judgment of 16 February 2021, *Gawlik v. Liechtenstein*, 23922/19, para. 71; ECtHR, judgment of 15 June 2021, *Melike v. Turkey*, 35786/19, para. 46; see also ECtHR, judgment of 6 July 2021, *Norman v. the United Kingdom*, 41387/17, para. 88, where the Court stated that good faith cannot be assumed when a civil servant knowingly engaged in a course of conduct contrary to the requirements of public office and when the scope and scale of unlawful conduct was significant.

34 Norton (2009), p. 115.

35 ECtHR, *Herbai v. Hungary* (n. 10), para. 38; ECtHR, *Rubins v. Latvia* (n. 12), para. 73; ECtHR, *Palomo Sánchez and others v. Spain* (n. 12), para. 76.

36 ECtHR, *Vogt v. Germany* (n. 15), paras. 53–59.

37 ECtHR, judgment of 2 September 1998, *Ahmed and others v. the United Kingdom*, 22954/93, para. 56; ECtHR, judgment of 14 March 2002, *De Diego Nafría v. Spain*, 46833/99, para. 37; ECtHR, *Kayasu v. Turkey* (n. 16), para. 89.

and discretion.[38] Similarly, they should be cognisant of the legal safeguards in place to counteract verbal attacks against them that may undermine the exercise of their public functions (see Section III.5).

2. The Duty of Loyalty, Reserve and Discretion

The most characteristic obligation of civil servants is the duty of loyalty, reserve and discretion. The latter plays a vital role in the relationship between civil servants and their employers and is much more pronounced than in private-sector employment.[39] In general, loyalty, reserve and discretion prevent civil servants from excessive public criticism of their employer and government policies, entail moderation as far as the content and form of their expression are concerned, and limit the possibility of dissemination of confidential information that a public servant learned during the course of their work. In particular, it encompasses the expectation that civil servants will exercise sound judgment and prudence in their public statements and actions, avoiding behaviour that might compromise the employer's position.

Two aspects of civil servants' obligation of loyalty should be distinguished.[40] First of all, they owe loyalty to their superiors, as hierarchical obedience plays a fundamental role in the integrity and proper functioning of public administration. Consequently, they should avoid such expressive activities that may undermine the authority of public institutions.[41] In other words, civil servants must refrain from any statements that may be detrimental to the respect due to their superiors and the public institution they work for.[42] Therefore, a civil servant's critical public expression of opinion is allowed when it is moderate, i.e. when it does not include unfounded personal criticism or insults and contributes to the public debate.[43]

The second aspect encompasses loyalty to the constitutional system and the rule of law. Civil servants are expected to demonstrate allegiance not only to the incumbent government and its policies but also to the constitution and other legal and ethical norms.[44] They are not legitimised to invoke their freedom of expression to justify expressive activities that are hostile to the fundamental values of the liberal and democratic State. As emphasised

38 European Commission of Human Rights (ECmHR), decision of 13 June 1992, *Haseldine v. the United Kingdom*, 18957/91; ECtHR, judgment of 9 October 2012, *Szima v. Hungary*, 29723/11, para. 32.

39 The ECtHR emphasises that civil servants are bound by heightened duties of loyalty, discretion and moderation towards their institution; see ECtHR, judgment of 19 February 2009, *Marchenko v. Ukraine*, 4063/04, para. 45; ECtHR, judgment of 26 February 2009, *Kudeshkina v. Russia*, 29492/05, para. 85; ECtHR, *Vogt v. Germany* (n. 15), para. 53; ECtHR, *Ahmed and others v. the United Kingdom* (n. 37), para. 55; ECtHR, *De Diego Nafría v. Spain* (n. 37), para. 37; ECtHR, *Guja v. Moldova* (n. 16), para. 70; ECtHR, decision of 15 November 2016, *Simić v. Bosnia and Herzegovina*, 75255/10; ECtHR, judgment of 09 January 2018, *Catalan v. Romania*, 13003/04, para. 56.

40 Van Steenbergen (2022), pp. 292–293.

41 ECtHR, *Catalan v. Romania* (n. 39), para. 54.

42 Cf. CJEU, judgment of 6 March 2001, *Bernard Connolly v. European Commission*, C-274/99 P, para. 128.

43 Voorhoof and Humblet (2013), p. 260; see also ECmHR, decision of 3 May 1988, *Morissens v. Belgium*, 11389/85, where the ECmHR emphasised that moderation was a widespread feature of the regulations of the civil service of Council of Europe (CoE) Member States, and was also required by the staff regulations of CoE and other international organisations.

44 ECtHR, *Vogt v. Germany* (n. 15), para. 59. On the ethical obligations of civil servants, see *Ethical Standards for the Civil Service in Europe: Substitutes for or Complements of Legal Rules?* by A. Jacquemet-Gauché in this volume.

in the scholarship, public officials serve the State and administration, but also a free and democratic society which may have legitimate expectations towards civil servants.[45]

Furthermore, as agents of the State, civil servants frequently have access to sensitive information that the government may need to keep confidential or secret for legitimate reasons,[46] such as those associated with national security, public safety, diplomacy, or protection of individual privacy. Public officials should therefore exercise caution and restraint in their public expressions, refraining from divulging confidential information they have acquired during their work. Disclosure of such information could potentially harm the interests of the State, undermine public confidence in government institutions, or cause irreparable damage to individuals. The duty of discretion has a durable impact on the exercise of the freedom of expression as it imposes an obligation on civil servants to maintain confidentiality even after they have left their positions or retired from service.

It is important to note that loyalty, reserve and discretion are not absolute since, in the light of Article 10 ECHR, civil servants are protected against unreasonable demands of their employer.[47] Against this backdrop, civil servants cannot be required to sacrifice their personal beliefs or opinions to fulfil their professional duties. They still enjoy the right of freedom of expression that extends to the opinions that dissent from those held by the superior or employing institution.[48] In a democratic society founded on respect for fundamental rights, the fact that a civil servant publicly expresses a point of view different from that of the employing institution cannot, in itself, be regarded as liable to prejudice the public interest.[49]

Moreover, if an employer fails to address an unlawful practice despite being made aware of it by an employee, the latter may no longer be required to show qualified loyalty, reserve and discretion.[50] Instead, the employee's obligation shifts toward protecting the public interest and adhering to ethical standards. A civil servant is therefore legitimised to signal illegal conduct or wrongdoing in the workplace and should enjoy a certain level of protection (see Section V.3).

3. *The Duty of Political Neutrality*

Another fundamental principle that impacts civil servants' exercise of the freedom of expression is the duty of political neutrality. It requires civil servants to refrain from publicly expressing political opinions that may undermine their work's professionalism, impartiality and effectiveness. There is no doubt that the decision-making process in public administration should be based on expertise and objective criteria rather than political affiliations and personal opinions. However, political neutrality does not preclude civil servants from having and holding political convictions, and any effort to coerce the holding or not holding of any opinion is prohibited.[51] Similarly, it does not prevent civil servants from

45 Merrigan (2019), p. 706.

46 ECtHR, *Guja v. Moldova* (n. 16), para. 71.

47 ECmHR, decision of 6 September 1989, *Rommelfanger v. Germany*, 12242/86; ECtHR, *Predota v. Austria* (n. 13); ECtHR, judgment of 28 March 2017, *Marunić v. Croatia*, 51706/11, para. 52.

48 CJEU, *Bernard Connolly v. European Commission* (n. 42), para. 43.

49 CJEU, judgment of 13 December 2001, *European Commission v. Michael Cwik*, C-340/00 P, para. 57.

50 ECtHR, *Heinisch v. Germany* (n. 10), para. 73.

51 Voorhoof and Humblet (2013), pp. 249–250.

participating in political parties, associations, or peaceful assemblies,[52] as long as it does not compromise their ability to perform their duties.

The principle of political neutrality is closely linked to the preservation of public trust in government institutions. Members of the public have the right to expect that their interactions with the government will be conducted by politically neutral officials who are "detached from the political fray".[53] This ensures that public services are provided in a fair and impartial manner, free from political bias. The degree of political neutrality required may vary depending on the position and functions of a civil servant within the administrative structure (see Section IV.1). A functions-based approach recognises that certain roles, such as those performed by teachers, members of the armed forces and police, diplomats, and trade union members, require a higher level of political neutrality (see Section IV.2). This is intended to depoliticise these services and contribute to consolidating and maintaining a pluralistic society.[54]

4. *Duties and Responsibilities in Cultural and Historical Context*

The duties and responsibilities and the degree of loyalty expected from civil servants are influenced by the political and administrative culture and the historical development of a country's constitutional framework. These factors shape the guarantees of freedom of expression within the civil service on the national level.

There are various visions of a democratic order, ranging from a libertarian democracy that strongly protects even anti-democratic speech, unless it poses an imminent threat of political violence, to a militant democracy that adopts restrictive measures deemed necessary to protect democracy itself from both violent and non-violent subversion through democratic means.[55] The ECtHR acknowledges that militant democracy and the restrictions on freedom of expression it implies for the civil servants could serve as a legitimate aim under Article 10, paragraph 2 ECHR, particularly for the purpose of preventing disorder and protecting the rights of others.[56] Furthermore, the Court accepts that historical experience holds significant importance in determining the possible boundaries of speech within the national civil service (margin of appreciation).[57] Similarly, the Court observed that a State's determination to prevent a repetition of instances of abuse of public authority within the previous political system and to maintain a politically neutral civil service might justify restrictions on the expressive activities of officials.[58] The same applies to the process of democracy consolidation – national authorities may consider it necessary to establish legal safeguards to achieve this aim by restricting the freedom of civil servants to engage in political activities and express political opinions.[59]

52 See *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

53 ECtHR, *Ahmed and others v. the United Kingdom* (n. 37), para. 53.

54 ECtHR (GC), judgment of 20 May 1999, *Rekvényi v. Hungary*, 25390/94, para. 41; ECtHR, *Otto v. Germany* (n. 25).

55 Müller (2012), pp. 1253 f.; see also Bhagwat and Weinstein (2021), p. 104.

56 ECtHR, *Godenau v. Germany* (n. 24), para. 52.

57 E.g. Germany's experience under the Weimar Republic and during the Nazi regime from 1933 to 1945, see ECtHR, *Vogt v. Germany* (n. 15), para. 59.

58 ECtHR, *Vogt v. Germany* (n. 15), para. 51; ECtHR, *Rekvényi v. Hungary* (n. 54), para. 41; ECtHR, decision of 22 November 2001, *Volkmer v. Germany*, 39799/98; ECtHR, decision of 29 May 2007, *Kern v. Germany*, 26870/04; ECtHR, judgment of 21 October 2014, *Naidin v. Romania*, 38162/07, para. 59.

59 ECtHR, *Karapetyan and others v. Armenia* (n. 17), para. 49.

However, it is important to emphasise that the Court accepts the militant vision of democracy, albeit not automatically. Every time a State intends to rely on the principle of a "democracy capable of defending itself" in order to justify interference, public authorities must carefully evaluate the scope and consequences of the measure to ensure that a balance is achieved.[60] Therefore, the focus is on the proportionality of the measures and whether interference with the freedom of expression is necessary for the protection of legitimate interests (see Section VI.1). As a consequence, absolute measures of loyalty to the constitutional principles for all civil servants, regardless to their function and rank, have been subject to criticism.[61] Strengthening democracy at the expense of freedom of expression may be justified only in exceptional circumstances since in some cases such measures may logically appear counterproductive.[62]

5. *The Duty to Accept Criticism and the Protection Against Verbal Attacks*

The legal position of civil servants, including their duties and responsibilities, has implications for the extent to which their actions can be scrutinised and criticised by other members of society. While civil servants, like politicians,[63] are subject to broader limits of acceptable criticism compared to private individuals, it cannot be assumed that they willingly subject themselves to public scrutiny in the same manner as politicians.[64] Therefore, these two categories should not necessarily be treated on an equal footing when it comes to criticism of their actions.[65]

Against this backdrop, civil servants should enjoy public confidence in an environment free from undue disturbance to effectively fulfil their duties.[66] Striking a fair balance between the free speech restrictions imposed on other members of society and the protection of civil servants is essential to maintaining an effective and accountable public administration. Thus, civil servants should be shielded from private persons' offensive, abusive, and defamatory attacks that aim to hinder the performance of their tasks and undermine public trust,[67] as well as from unfounded denunciations.[68]

60 ECtHR (GC), judgment of 16 March 2006, *Ždanoka v. Latvia*, 58278/00, para. 100.

61 See ECtHR, *Vogt v. Germany* (n. 15), para. 59, where the Court noted that the absolute nature of the duty of loyalty as construed by the German courts is striking since it does not allow for distinctions between service and private life.

62 See Joint Dissenting Opinion of Judges Spielmann, Pekkanen and Van Dijk to ECtHR, *Ahmed and others v. the United Kingdom* (n. 37).

63 In some cases, it is difficult to determine the status of the person in question since there are actors who combine the exercise of the role of public officials and politicians in their activities; see Bezemek (2021), p. 404.

64 ECtHR, judgment of 29 March 2001, *Thoma v. Luxembourg*, 38432/97, para. 47; ECtHR, judgment of 21 March 2002, *Nikula v. Finland*, 31611/96, para. 48; ECtHR (GC), judgment of 17 December 2004, *Pedersen and Baadsgaard v. Denmark*, 49017/99, para. 80; ECtHR, judgment of 7 November 2006, *Mamère v. France*, 12697/03, para. 27; ECtHR, judgment of 14 October 2008, *Dyundin v. Russia*, 37406/03, para. 26; ECtHR, judgment of 19 January 2016, *Aurelian Oprea v. Romania*, 12138/08, para. 73; ECtHR, judgment of 16 January 2018, *Čeferin v. Slovenia*, 40975/08, para. 56.

65 ECtHR, judgment of 11 March 2003, *Lešník v. Slovakia*, 35640/97, para. 178; ECtHR, judgment of 5 November 2020, *Balaskas v. Greece*, 73087/17, para. 48; ECtHR, judgment of 18 October 2022, *Stancu and others v. Romania*, 22953/16, para. 116; see also Smet (2010), p. 205.

66 ECtHR, judgment of 20 June 2017, *Ali Çetin v. Turkey*, 30905/09, para. 37.

67 ECtHR (GC), judgment of 21 January 1999, *Janowski v. Poland*, 25716/94, para. 33; ECtHR, judgment of 21 December 2004, *Busuioc v. Moldova*, 61513/00, para. 60; see also Đajić (2021), pp. 814 f.

68 ECtHR, judgment of 9 December 2021, *Wojczuk v. Poland*, 52969/13, para. 96.

IV. Duties and Responsibilities – The Functional Perspective

When determining the detailed scope of duties and responsibilities of civil servants and the corresponding restrictions on their freedom of expression, it is essential to adopt a functional perspective. This involves considering two key factors: (1) the particular position of the civil servant, including their rank, and (2) the functions of civil servants, particularly if their role involves communicating and informing society about government affairs.

This section discusses the consequences of the aforementioned functional approach. Furthermore, it focuses on the specific categories of civil servants who exercise critical functions in a democratic society, such as teachers, members of the armed forces and police, diplomats, and trade union members, since their free speech guarantees require more detailed examination. Additionally, it takes a closer look at the civil service positions that use speech as a tool to exercise professional activities.

1. The Particular Position and Functions of Civil Servants

The particular position and functions of civil servants have direct implications on the permissible scope of their freedom of expression. Undoubtedly, individual duties and responsibilities may vary according to the nature of the tasks performed and a civil servant's place in the hierarchy.[69] Consequently, the protection provided in Article 10 ECHR may differ since, for each position or function, various activities may be considered irreconcilable with the specific profile of the public employee. In order to illustrate these implications, we may refer to a case before ECtHR that concerned an official working as a supervisor in probation-period projects with sexual offenders. After sexual content was divulged online (photographs of the supervisor engaged in sadomasochistic performances), he was dismissed from the service. The Court emphasised that even though his activities were not contrary to the criminal law, the fact that the sexual content was in the public domain was incompatible with his position. Thus, national authorities enjoyed a margin in adopting a cautious approach as regards the extent to which public knowledge of the official's sexual activities could impair his ability to effectively carry out his duties.[70]

In particular, it should be noted that certain civil servants belong to a group with a special position. This concerns high-ranking officials who exercise public power and bear the responsibility for safeguarding the interests of the State. Consequently, they enjoy freedom of expression in accordance with the duties and responsibilities that this right carries with it in the specific circumstances of their position or rank. The same applies to civil servants who occupy a sensitive post.[71] Compared to other public officials, their freedom of expression may also be subject to stricter limitations, particularly when it comes to information obtained during their official duties or directly related to their roles.

Furthermore, certain categories of civil servants hold representative functions that involve interactions with external stakeholders on behalf of their institution.[72] Conversely, civil servants who do not represent the institution externally possess a limited influence on their employer's image or reputation, and their activities and opinions have minimal impact on the public. As a result, the freedom of expression for the latter group tends

69 CJEU, *Bernard Connolly v. European Commission* (n. 42), paras. 44–45.
70 ECtHR, decision of 16 September 2008, *Pay v. the United Kingdom*, 32792/05.
71 ECmHR, *Haseldine v. the United Kingdom* (n. 38).
72 ECtHR, *Melike v. Turkey* (n. 33), para. 51.

to be broader due to the lower potential for their statements or actions to significantly affect public perception or the institution's standing. Additionally, some civil servants enjoy a privileged position in access to the media. In exercising their freedom of expression, they should show restraint so as not to create a situation of imbalance when speaking publicly about ordinary citizens who have more limited access to these channels of communication.[73]

Finally, in some cases, the form of employment may be significant.[74] This concerns, in particular, employees who do not hold the status of a State official and instead operate under the general regime of employment law. In such cases, the duty of loyalty, reserve and discretion cannot be as stringent as the duty required for those employed under public law.[75] The same principle applies to employees of State-owned entities where the State holds the sole or dominant stockholder status.[76]

2. Civil Servants With Critical Functions in a Democratic Society

In a democratic society, certain individuals hold critical positions that require them to carry out specific tasks in the public interest. These civil servants, including teachers, members of the armed forces and police, diplomats, and trade union members, play a vital role in delivering high-quality public services. While they undoubtedly enjoy the protection provided in Article 10 ECHR, their unique functions also imply certain restrictions. Therefore, the scope of their freedom of expression must be carefully considered by referring to the balancing approach to ensure that their right to free speech is protected without compromising the interests of the communities they serve.

The first group that requires a closer look is that of teachers. From a public policy perspective, their role in society is of paramount importance. As noted by the ECtHR, they are responsible for educating children about the values of freedom, democracy and human rights.[77] Teachers play a unique role in shaping the minds of future generations, and therefore their ability to express themselves freely is essential to ensuring that they can effectively convey these important principles to their students. On the other hand, teachers are figures of authority for pupils and have special duties and responsibilities, including the obligation of loyalty to the constitution, which, to a certain extent, also applies to their activities outside school.[78] They should be careful when disseminating controversial or unpopular

73 ECtHR, judgment of 7 December 2010, *Poyraz v. Turkey*, 15966/06, para. 78.

74 ECtHR, *Karapetyan and others v. Armenia* (n. 17), para. 54; on privatisation processes within the civil service, see *Civil Service in Transition: Privitisation or Alignment of Employment Conditions?* by C. Fraenkel-Haeberle in this volume.

75 ECtHR, *Melike v. Turkey* (n. 33), para. 48; ECtHR, *Heinisch v. Germany* (n. 10), para. 64; ECtHR, *Catalan v. Romania* (n. 39), para. 56.

76 ECtHR, *Balenović v. Croatia* (n. 16); ECtHR, *Fuentes Bobo v. Spain* (n. 11); ECtHR, *Wojtas-Kaleta v. Poland* (n. 10), para. 42.

77 ECtHR, *Godenau v. Germany* (n. 24), para. 54. In the context of educational objectives such as tolerance, anti-racism and democracy, teachers have to observe certain restrictions of their freedom of expression. Consequently, a dismissal of a teacher who propagates racist ideas may not be considered to be a violation of Article 10 ECHR, see ECtHR, decision of 18 May 2004, *Jacques Seurot v. France*, 57383/00; the same applies to the dismissal of a university lecturer because of Holocaust denial, ECtHR, decision of 7 June 2011, *Gollnisch v. France*, 48135/08.

78 ECtHR, *Vogt v. Germany* (n. 15), para. 60; ECtHR, *Godenau v. Germany* (n. 24), para. 53; ECtHR, decision of 7 July 2020, *Mahi v. Belgium*, 57462/19, para. 32.

opinions and are not allowed to take advantage of their position to indoctrinate or exert improper influence on the pupils.[79]

Secondly, the freedom of expression of members of the armed forces and police is a limited right, given the hierarchical structure and need for discipline within these organisations.[80] The proper functioning of the armed forces and police requires adherence to strict rules and regulations, which may restrict the ability of individuals to express their views and opinions. Servicepersons hold positions of power and responsibility, they are invested with coercive powers to regulate the conduct of citizens, and their actions and words can significantly impact the general public. Therefore, according to the ECtHR, it is reasonable to expect that they maintain a higher level of political neutrality in the course of their duties.[81] Expressing political opinions or making public statements that could be perceived as undermining the discipline and authority of the organisation can compromise the effectiveness of the armed forces and police. In particular, high-ranking officers have a heightened responsibility to uphold the standards of their institution and ensure that their behaviour aligns with the expectations of the public.

The third group is that of diplomats. As representatives of their respective States, they enjoy a unique relationship built on trust and loyalty.[82] Consequently, their ability to exercise free speech may be limited by the duty of moderation and the expectation of political neutrality. In light of Article 10, paragraph 2 ECHR, it is legitimate to maintain a politically neutral diplomatic corps, as this helps to ensure that foreign policy decisions are made in the best public interest rather than being influenced by individual opinions. Thus, diplomats are expected to carry out their duties with discretion and restraint, avoiding any actions or statements that might jeopardise their country's interests or damage its reputation. Limitations on their freedom of expression are inherent in their functions and necessary to maintain the integrity and efficacy of the diplomatic service.[83]

Finally, those civil servants who combine their professional and trade union roles constitute the last group.[84] On the one hand, trade union members must be able to express their demands to the employer to improve working conditions.[85] This implies that national authorities should ensure that disproportionate restrictions or formalities do not discourage trade union representatives from seeking to express and defend their members' concerns.[86] Actions and statements aimed at furthering the interests of the employees require a particularly high level of protection,[87] and the same applies when trade union members act as whistle-blowers and report irregularities.[88] On the other hand, it is also important to distinguish between an "employee expression" and a "trade union expression" in respect

79 ECtHR, *Vogt v. Germany* (n. 15), para. 60, see also *Freedom of Religion or Belief in the Civil Service: How to Stay Loyal to the State While Remaining True to Oneself?* by W. Brzozowski in this volume.

80 ECtHR, *Szima v. Hungary* (n. 38), paras. 25 and 32; ECtHR, judgment of 2 October 2014, *Matelly v. France*, 10609/10, para, 67; ECtHR, judgment of 2 October 2014, *Adefdromil v. France*, 32191/09, para. 47.

81 ECtHR, *Rekvényi v. Hungary* (n. 54), para. 41; ECtHR, *Otto v. Germany* (n. 25).

82 ECtHR, *Karapetyan and others v. Armenia* (n. 17), para. 50.

83 ECmHR, *Haseldine v. the United Kingdom* (n. 38).

84 Cf. Mahoney (2012), pp. 269–271.

85 ECtHR, *Palomo Sánchez and others v. Spain* (n. 12), para. 56.

86 ECtHR, *Wojtas-Kaleta v. Poland* (n. 10), para. 45; ECtHR, judgment of 6 October 2011, *Vellutini and Michel v. France*, 32820/09, para. 32.

87 ECtHR, judgment of 6 June 2022, *Straume v. Latvia*, 59402/14, para. 102.

88 ECtHR (GC), judgment of 25 November 1999, *Nilsen and Johnsen v. Norway*, 23118/93, para. 44.

of professional and employment-related matters. Statements made outside the scope of trade union-related activities must be considered from the general perspective of freedom of expression.[89]

3. Speech as a Tool to Exercise Professional Duties

From the functional perspective, it is important to note that public administration jobs can be performed in a purely administrative manner, but certain positions in the civil service require employees to speak or represent the institution publicly. In certain legal systems, primarily in the US, this "speech-that-is-the-job" function may have far-reaching consequences for the freedom of expression.[90] In the European human rights system, the question arises as to the appropriate level of protection under Article 10 ECHR when a civil servant makes public statements on behalf of the employing institution, and as to whether their personal opinions can undermine the institution's mission and contradict the government's message.

There is no doubt that when making a public statement on behalf of the public institution, a civil servant should have sufficient authorisation from the employer and express the institutional point of view even if they personally disagree with that opinion. This is the general consequence of the duty of loyalty inherent in these positions. Delivering a clear government message is in the public interest as the government should inform the public but also explain, persuade and justify its policies.[91] Consequently, confusing personal opinions, particularly of a political character, with official statements could negatively impact public debate and the right of the public to receive information under Article 10 ECHR. Restricting the exercise of freedom of expression of this category of civil servants may therefore be necessary in a democratic society since the public may associate a civil servant's expression with the government, potentially undermining the latter's ability to convey its views. The decisive factor is the existence of a genuine risk of the public mistaking the civil servant's opinions for official government policies.[92] Nonetheless, unlike in the US, the freedom of expression of civil servants who use speech as a tool to exercise professional duties is not suppressed.[93] From the Convention standpoint, these kinds of expressive activities are subject to a contextual analysis and balancing approach.

V. Place (Forum), Content and Debate in Matters of Public Interest

The forum in which civil servants' speech is made public is important to consider when balancing their freedom of expression with the protection of legitimate aims enumerated in Article 10, paragraph 2 ECHR. Speech can occur in various settings, such as

89 ECtHR, *Szima v. Hungary* (n. 38), para. 28.

90 Norton (2008), pp. 111–112.

91 See the judgment of the US Supreme Court, *Garcetti v. Ceballos*, 547 U.S. 410, where the US Supreme Court established the government speech doctrine. It stated that when employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the constitution does not insulate their communications from employer discipline; see Norton (2008), pp. 102–103 and 106; Estlund (2021), p. 417.

92 CJEU, *European Commission v. Michael Cwik* (n. 49).

93 Norton (2009), pp. 20 f.; Norton and Citron (2010), pp. 904–919.

work-related meetings, social media,[94] or personal conversations among co-workers. Each forum has unique characteristics that must be taken into account when applying the balancing approach. Additionally, civil servants can express their opinions on work-related or unrelated issues and matters of public interest. The latter requires careful consideration, as civil servants' participation in a public debate may be subject to closer scrutiny. Also, whistle-blowers play an essential role in an open and transparent democracy,[95] and sanctions for civil servants disclosing public interest information can violate the freedom of expression.

1. Speech in and Outside the Workplace – Work-related and Unrelated Issues

The distinction between on-duty and off-duty civil servants' speech concerning work-related and unrelated issues is crucial to determine constitutional protection in US law.[96] In the European human rights system, it has also played an important role in the Court's balancing approach, albeit not being so categorical as in the American doctrine.

It should be noted at the outset that the clear demarcation between activities conducted within and outside the workplace can be difficult due to instances where employees engage in non-work-related activities, even during working hours. This blurring is further intensified by modern technologies, which enable employees to carry out work-related tasks from home. Furthermore, the distinction between employees' professional and personal lives is becoming less defined as a result of their growing online presence, with individuals frequently sharing details about themselves and their undertakings on the Internet, leading to heightened visibility and exposure.

In the workplace, civil servants' speech may be subject to stricter scrutiny exercised by the employer in light of their duties and responsibilities. As mentioned previously, civil servants' commitments are based on loyalty and mutual trust, and their existence promotes a calm and peaceful work atmosphere (see Section III.1). When it comes to expressing opinions related to work issues, including criticism of working conditions, supervisors and co-workers, it is natural that employees communicate their views to their employer in order to shape the labour relationship. Thus, the employee's utterances are integral to interactions between these two parties. However, the employee should not overstep the boundaries of free speech as it may provoke the employer's reaction to what they consider professional misconduct. The ECtHR analysed this kind of situation, emphasising that unfounded allegations made by a civil servant regarding a superior during a work-related meeting can damage the employer's reputation and destroy mutual trust. The Court took

94 Traditional media are no longer the gatekeepers between civil servants and the public. Public officials are able to bypass them and communicate directly with the public using social media. Undoubtedly, the user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression, see ECtHR, judgment of 1 December 2015, *Cengiz and others v. Turkey*, 48226/10 and 14027/11, para. 52; ECtHR (GC), judgment of 16 June 2015, *Delfi AS v. Estonia*, 64569/09, para. 110; see also Voorhoof and Humblet (2013), pp. 243–247; Mantouvalou (2019), pp. 101 f.; Mangan (2017), pp. 357 f.; Abel (2022), pp. 1206 f.; Paré and Smith (2023), pp. 2304–2325.

95 Cf. Recommendation of 30 April 2014 CM/Rec(2014)7 of the Committee of Ministers to Member States on the protection of whistle-blowers and CoE Parliamentary Assembly Resolution (no. 2300) of 1 October 2019, *Improving the protection of whistle-blowers all over Europe*. On the protection of whistleblowers in EU law, see *The Development of a Legal Framework on Whistle-blowing by Public Employees in the European Union* by P. Provenzano in this volume.

96 Papandrea (2011), pp. 2121–2139.

into account that not everyone present at the meeting was a staff member and that there had been a risk that the employee's allegations would be made known to a wider public.[97] The same applies when a civil servant's remarks did not constitute an instantaneous and ill-considered reaction but were written, published quite lucidly, and displayed publicly on the working premises.[98] Conversely, different criteria should be applied when the criticism took place during a meeting with a limited number of participants, without any reporting in the media, and was expressed orally and spontaneously.[99]

With regard to civil servants' political statements in the workplace and in the course of professional activities, they should be analysed through the prism of the duty of political neutrality (see Section III.3). Consequently, this kind of expressive activity is protected by the freedom of expression, as long as the civil servant does not compromise the ability to professionally, impartially and effectively perform their duties, and undermine public confidence, otherwise the public employer should be given more leeway to restrict the employee's speech.[100] Restricting political speech in the workplace helps maintain the civil service's neutrality and protects civil servants from being coerced to express certain political opinions by their superiors.[101]

Civil servants' speech generally enjoys stronger protection outside the workplace under Articles 8 and 10 ECHR, which means that the imposition of a duty to act in a certain way or to refrain from engaging in certain conduct in a person's private time can be detrimental to their freedoms.[102] However, due to the fact that civil servants' duties and responsibilities are also binding outside the workplace, they must refrain from expressive activities that adversely affect the integrity of the civil service.[103] Thus, the imposition of sanctions, including dismissal, may be deemed legitimate when there exists a clear and substantial reason for the employer to believe that the employee's extramural conduct might have a detrimental effect on the organisation's operations or interests.[104] It is especially the case of high-ranking officials who exercise public power and safeguard the interests of the State. Their speech, even outside the workplace, may be associated by the public with the agency they work for and disrupt its proper functioning. The same applies to civil servants holding critical roles in a democratic society, such as teachers, members of the armed forces and police, diplomats, and trade union members (see Section IV.2). These individuals may be subject to certain limitations on their speech outside the workplace, as their positions require them to always maintain a level of impartiality and neutrality.[105] Additionally, civil servants who disclose information gained through their professional activities outside of the workplace may also face restrictions on their speech, as this information may be confidential or sensitive in nature.

97 ECtHR, *Langner v. Germany* (n. 10), para. 51.

98 ECtHR, *Palomo Sánchez and others v. Spain* (n. 12), para. 73.

99 ECtHR, judgment of 20 April 2006, *Raichinov v. Bulgaria*, 47579/99, paras. 48–51; ECtHR, *Fuentes Bobo v. Spain* (n. 11), paras. 47–48.

100 Papandrea (2011), p. 2168.

101 See the US Supreme Court, *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973).

102 Mantouvalou (2008), pp. 916 and 926; see also CJEU, judgment of 9 September 2003, *Jaeger*, C-151/02, para. 94.

103 ECtHR, *Kern v. Germany* (n. 58).

104 Sanders (2014), p. 352; Mantouvalou (2008), pp. 912 f.

105 ECtHR, *Vogt v. Germany* (n. 15), para. 60; ECtHR, *Godenau v. Germany* (n. 24), para. 53.

2. *Debate in Matters of Public Interest*

In principle, there is little scope under Article 10 ECHR for restrictions on debate regarding questions of public interest.[106] The ECtHR has established a narrow margin of appreciation for national authorities to interfere in such debates, recognising the collective importance of freedom of expression in a democratic society. Civil servants, as actors in civil society, have a valuable contribution to make to these debates. Consequently, their statements can benefit from a high level of protection if they relate to matters of public interest. This is because civil servants are familiar with State policies and the operations of their public employers, and also possess knowledge and expertise that can inform and enrich public discussions.[107] Moreover, civil servants' participation in public debates can raise concerns about the effective functioning of public administration or draw attention to the transparent, fair, and effective allocation of State resources or budgets. Bearing in mind the scale of public employment, restrictions on their right to participate in a public debate could have a detrimental effect on free and robust discussion of public issues.

However, even civil servants' right to comment on public issues is not absolute and requires striking a fair balance between the interest of the civil servant, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[108] In a relationship of public employment, certain restrictions on the guarantees provided in Article 10 ECHR can be justified with regard to speech of public interest.[109]

The balancing approach requires, first of all, answering the question of whether a civil servant's utterance serves to demonstrate a dysfunction of the democratic regime, which relates to an important question of public interest.[110] This is the case regarding matters that affect the well-being of citizens or the life of the community, or which are capable of giving rise to considerable controversy concerning an important social issue or involving a problem that the public would be interested in being informed about.[111] However, the debate in matters of public interest does not have to encompass all segments of society or the entire State apparatus. In certain cases, the focus of general interest and its extent could be confined to specific institutions or agencies, provided that the discourse in question is not solely of a private nature. What matters is that the debate transcends private interests and assumes a broader societal relevance.[112]

Secondly, in order to grant more intense protection, it is necessary to examine the motives behind the civil servant's public statement. The ECtHR usually considers factors such as personal reasons, grievance, antagonism, or expectation of personal advantage.[113] If the statement constitutes a gratuitous personal attack aimed at damaging the employer's

106 ECtHR, judgment of 25 November 1996, *Wingrove v. the United Kingdom*, para. 58; ECtHR (GC), judgment of 8 July 1999, *Sürek and Özdemir v. Turkey*, 23927/94 and 24277/94, para. 60; ECtHR, *Aurelian Oprea v. Romania* (n. 64), paras. 64–65.

107 Gray (2021), p. 11, see also Mahoney (2012), p. 263.

108 See Estlund (2021), p. 416; see also the US Supreme Court, *Pickering v. Board of Education*, 391 U.S. 563 (1968).

109 ECtHR, *Nilsen and Johnsen v. Norway* (n. 88), para. 47.

110 ECtHR, *Kayasu v. Turkey* (n. 16), para. 101.

111 ECtHR, *Balaskas v. Greece* (n. 65), para. 44.

112 ECtHR, *Palomo Sánchez and others v. Spain* (n. 12), para. 72.

113 ECtHR, *Predota v. Austria* (n. 13).

reputation or is deemed to be motivated by the aforementioned interests rather than a genuine desire to contribute to a public debate, then it may be subject to more far-reaching restrictions under Article 10, paragraph 2 ECHR.[114]

3. Whistle-blowing

Civil servants bear an obligation of discretion when it comes to the information they learn in the course of their work. As a general rule, this means they cannot disseminate what their employer may need to keep confidential or secret for legitimate reasons. However, there are situations where a civil servant – being the only person, or part of a small category of persons – becomes aware of in-house information, including secret information, that reveals illegal conduct or wrongdoing in the workplace.[115] Thus, they are in the best position to act in the public interest by disclosing information about government misconduct.[116] In such cases, the civil servant could be legitimised to signal the wrongdoing through whistle-blowing, which involves informing the appropriate authorities or the public at large.[117] Whistle-blowing is therefore viewed as a form of expression that attracts protection under Article 10 ECHR, and the appropriate safeguards must take into account the characteristics of the working relationship: on the one hand, the civil servant's duty of loyalty, reserve and discretion, and the obligation to comply with a statutory duty of secrecy; on the other, the position of economic vulnerability vis-à-vis the public institution on which they depend for employment and the risk of suffering retaliation from the latter.[118] Furthermore, it is important to note that whistle-blowing protection should be derived not only from the individual rights provided in Article 10 ECHR but also from the society's interest in accessing the information the whistle-blower discloses ("the right to receive information"). As indicated in the legal scholarship, placing greater emphasis on this watchdog function better reflects the underlying purpose of protecting whistle-blowers' free speech.[119]

The ECtHR has established specific criteria to evaluate the legitimacy of civil servants' whistle-blowing actions. When determining whether an interference (e.g. dismissal or other disciplinary sanction) was necessary in a democratic society, the Court refers to these criteria, which include assessing the public interest involved in the disclosed information, the accuracy of the information, any potential damage suffered by the public authority (employer) as a result of the disclosure, the motive behind the reporting employee's actions, and whether the information was made public as a last resort after disclosing it to

114 ECtHR, *De Diego Nafría v. Spain* (n. 37), para. 40; ECtHR, *Palomo Sánchez and others v. Spain* (n. 12), para. 76.

115 ECtHR, *Marchenko v. Ukraine* (n. 39), para. 46; ECtHR, *Guja v. Moldova* (n. 16), para. 72.

116 ECtHR, *Guja v. Moldova* (n. 16), para. 72, ECtHR, *Marchenko v. Ukraine* (n. 39), para. 46; ECtHR, *Heinisch v. Germany* (n. 10), para. 63; ECtHR, *Aurelian Oprea v. Romania* (n. 64), para. 59.

117 ECtHR, *Guja v. Moldova* (n. 16), para. 72. When determining whether a restriction to a civil servant whistle-blower's free speech was necessary in a democratic society, the ECtHR weighs the quasi-public watchdog function of whistle-blowers against their duties and responsibilities as a civil servant; see ECtHR, *Heinisch v. Germany* (n. 10), paras. 62–70.

118 ECtHR (GC), judgment of 11 May 2021, *Halet v. Luxembourg*, 21884/18, para. 119.

119 Kagiaros (2021), pp. 1 f.

a superior or competent body. The severity of any sanctions imposed on the whistle-blower is also taken into account.[120]

Against this backdrop, it is necessary to emphasise the obligation to use first the internal reporting channels as strictly related to civil servants' duty of loyalty, reserve and discretion.[121] They must exercise diligence when publicly disclosing information and carefully verify its accuracy and reliability.[122] In principle, they should use more discreet means of remedying the wrongdoing before proceeding to public disclosure of information. The latter should be pursued as a last resort, following attempts to report the issue internally, unless internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower.[123] Thus, in some cases, the ECtHR took the view that a whistle-blowing situation was not at issue where an applicant had failed to report the matter to the superiors despite being aware of the existence of internal channels for disclosure and had not provided convincing explanations on this point.[124]

VI. Interference – Legitimate Aims, General Measures and Sanctions

In the previous sections, we have established that State interference with civil servants' free speech is permitted in certain situations, and some manifestations of the freedom of expression that may be legitimate in other contexts are not legitimate in that of public employment. This section now turns to the issue of the legitimate aim of interference and the distinction between general measures of interference and individual responsibility (sanctions).

1. Legitimate Aims

The provisions of Article 10, paragraph 2 ECHR enumerate legitimate aims that may be pursued by interference with freedom of expression, including national security, territorial integrity, public safety, prevention of disorder or crime, protection of health and morals, protection of the reputation or rights of others, prevention of disclosure of confident information and maintenance of the authority and impartiality of the judiciary. Some of these legitimate aims received more attention in the ECtHR's case law regarding civil servants' freedom of expression.

First of all, the legitimate aim of the prevention of disorder plays an important role in establishing restrictions on civil servants' free speech. This aim may justify interference

120 ECtHR, *Guja v. Moldova* (n. 16), paras. 69–79; ECtHR, *Heinisch v. Germany* (n. 10), para. 70; ECtHR, *Halet v. Luxembourg* (n. 118), para. 85; ECtHR, judgment of 8 January 2013, *Bucur and Toma v. Romania*, 40238/02, paras. 92–93.

121 Where no issue of loyalty, reserve or discretion arises, the Court does not verify whether there existed any alternative channels or other effective means for the applicants to remedy the alleged wrongdoing, see ECtHR (GC), judgment of 27 June 2017, *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina*, 17224/11, para. 80; ECtHR, *Halet v. Luxembourg* (n. 118), para. 117.

122 ECtHR (GC), judgment of 20 May 1999, *Bladet Tromsø and Stensaas v. Norway*, 21980/93, para. 65; ECtHR, *Heinisch v. Germany* (n. 10), para. 67.

123 ECtHR, *Heinisch v. Germany* (n. 10), para. 34; ECtHR, *Marchenko v. Ukraine* (n. 39), para. 46.

124 ECtHR, decision of 12 October 2010, *Bathellier v. France*, 49001/07; ECtHR, decision of 22 November 2011, *Stanciulescu v. Romania (no. 2)*, 14621/06.

with the political activities of civil servants.[125] The ECtHR approved the existence of this aim in the context of the armed forces[126] and the requirements of a politically neutral army.[127] Furthermore, the Court emphasised that maintaining order in schools and avoiding unnecessary tensions may be a reason for interfering with teachers' freedom of expression.[128]

Secondly, the Court often agreed that the interference in civil servants' freedom of expression had served "the protection of the reputation or rights of others".[129] This was the case of a dismissed public official whose comments and accusations were considered to be clearly offensive and slanderous to his supervisor, and detrimental to the good name and image of the public institution he worked for.[130] The same arguments – concerning the reputation of the public employer and the supervisor – were used by the Court in a case regarding defamatory statements made by the employee of a public hospital.[131]

More problematic were cases when the ECtHR indicated an aim not explicitly listed in Article 10, paragraph 2 ECHR. A case involving national restrictions on senior local government officers' political activity exemplifies this. The Court suggested that protecting effective democracy justifies limiting Article 10 ECHR rights if there is a threat to the stability of the constitutional or political order. It also noted that national authorities were legitimised to ensure that the effectiveness of the system of local political democracy was not diminished through the corrosion of the political neutrality of certain categories of officers.[132] In another instance, the ECtHR concluded that "ensuring proper public institution functioning" is a legitimate aim for interfering with an individual civil servant's freedom of expression, a stance criticised by two judges in a dissenting opinion.[133]

These cases highlight a systemic issue with the legitimate aim test. In general, the latter has not played a significant role in the Court's review of justifications for restrictions on the freedom of expression. The Court has not always clearly indicated the ground upon which a limitation has been accepted.[134] Often, the ECtHR bypassed discussing the legitimate aim, directly addressing whether the interference was necessary in a democratic society.[135] The Court acknowledged its practice of being succinct in verifying legitimate aims within Articles 8 to 11 of the Convention.[136] It also noted that national authorities usually have a relatively easy task in persuading the Court about interference pursuing a legitimate aim, despite applicants arguing otherwise.[137]

125 ECtHR, *Karapetyan and others v. Armenia* (n. 17), para. 43.
126 ECtHR, *Szima v. Hungary* (n. 38), para. 24.
127 ECtHR, decision of 13 February 2007, *Erdel v. Germany*, 30067/04.
128 ECtHR, *Mahi v. Belgium* (n. 78).
129 See Kozlowski (2006), pp. 133 f.; see also ECtHR, *Palomo Sánchez and others v. Spain* (n. 12), para. 68.
130 ECtHR, *De Diego Nafría v. Spain* (n. 37), paras. 35–36.
131 ECtHR, *Gawlik v. Liechtenstein* (n. 33).
132 ECtHR, *Ahmed and others v. the United Kingdom* (n. 37), paras. 52–54.
133 ECtHR, *Wojczuk v. Poland* (n. 68), para. 77 and Dissenting Opinion of Judges Felici and Ktistakis.
134 Gerards (2019), pp. 220–221; Arnardóttir (2017), p. 30.
135 Schabas (2015), p. 471; Greer et al. (2018), p. 177.
136 ECtHR (GC), judgment of 1 July 2014, *S.A.S. v. France*, 43835/11, para. 114.
137 ECtHR, judgment of 28 November 2017, *Merabishvili v. Georgia*, 72508/13, para. 298 with many references, see also the Dissenting Opinion of Judge Sajó in ECtHR (GC), judgment of 27 August 2015, *Parrillo v. Italy*, 46470/11.

2. General Measures and Individual Sanctions

Interference with the freedom of expression can involve the use of general measures, encompassing statutory regulations addressed to broader groups of civil servants. The ECtHR acknowledges the viability of these instruments, such as general norms limiting specific categories of local government officials' engagement in political activities.[138] Another instance is forbidding the armed forces, police, and security service members from political party membership and political involvement.[139]

Nonetheless, the configuration of these measures must avoid undermining the core of the protected right. This entails considering the functions and roles of the relevant civil servants, along with the specific circumstances of each case.[140] To adhere to Article 10, paragraph 2 ECHR requirements and ensure proportionality, these general measures should not be excessive. They must allow civil servants to undertake at least some activities that enable them to express their opinions and preferences.[141]

Other typical forms of interference with the freedom of expression are individual sanctions. They are an important aspect of maintaining order in the workplace and are often used to address breaches of the duty of loyalty, reserve and discretion. Therefore, any abuse of the freedom of expression afforded to civil servants is always regarded as a reprehensible fact capable of justifying a wide range of disciplinary measures.[142] However, the use of individual sanctions must be carefully considered in order to avoid violating civil servants' rights.[143] Public employers generally enjoy a certain discretion in determining the appropriate sanction for an employee's verbal misconduct, but it should be exercised in a way that is proportionate. As indicated in the scholarship, the proper response is not necessarily to punish the expression but rather to consider whether it is possible to neutralise or otherwise diminish the harm caused by it while preserving the rights at stake.[144]

In specific scenarios, termination of employment could be deemed an appropriate measure, although public employers should always consider less intrusive disciplinary sanctions before resorting to dismissal, such as reprimand,[145] punitive transfer,[146] demotion, loss of promotion opportunities, and reductions in or deductions from wage or pension. Dismissing a civil servant due to freedom of expression abuses, being a severe sanction, should be a measure of last resort.[147] This course of action might be applicable particularly

138 ECtHR, *Ahmed and others v. the United Kingdom* (n. 37), paras. 52–54.

139 ECtHR, *Rekvényi v. Hungary* (n. 54), paras. 34–37.

140 ECtHR, *Karapetyan and others v. Armenia* (n. 17), para. 48; ECtHR, judgment of 24 March 2015, *Küçükbalaban and Kutlu v. Turkey*, 29764/09, 36297/09, paras. 22–25; ECtHR, judgment of 22 September 2015, *Dedecan and Ok v. Turkey*, 22685/09, 39472/09, para. 38.

141 ECtHR, *Rekvényi v. Hungary* (n. 54), para. 49.

142 In its case law, the Court has emphasised the homogeneity of European legal systems concerning the disciplinary powers of employers providing for penalties in cases of abuse of the right to freedom of expression by employees. Disciplinary authority is one of the essential prerogatives of the employer, whether private or public. In this connection, employers have a broad discretion to impose the sanction that they consider the best adapted to the accusations against the employee; the scale of possible sanctions encompasses the power to dismiss a person who has seriously compromised the interests of the company or the public service, see ECtHR, *Palomo Sánchez and others v. Spain* (n. 12), paras. 29–31 and 75.

143 ECmHR, *Haseldine v. the United Kingdom* (n. 38).

144 Wragg (2015), p. 18.

145 ECtHR, *Wojtas-Kaleta v. Poland* (n. 10), paras. 44 and 48.

146 ECtHR, *Mahi v. Belgium* (n. 78).

147 ECtHR, *Rubins v. Latvia* (n. 12), para. 92; ECtHR, *Volkmer v. Germany* (n. 58).

when the employee's expressive activities have compromised the trust and confidentiality required to effectively perform their duties[148] or irreparably damaged the trust relationship between employer and employees.[149] The same applies when the expression has severely impaired the civil servant's ability to perform their job.

However, dismissal can have severe consequences for the civil servant affected, including damage to their reputation, loss of livelihood, and difficulty in finding future employment.[150] Additionally, public employers should consider factors such as seniority and age when considering disciplinary dismissal, as this sanction may disproportionately impact older employees or those near retirement.[151] Also, it is important to note that dismissal can have negative repercussions not only on the individual civil servant and their career but may also have a serious chilling effect on other public employees and discourage them from reporting any shortcomings or wrongdoing in the workplace.[152]

In the context of applying individual sanctions to civil servants who abuse their freedom of expression, it is essential to uphold the principles of due process. The decision-making regarding responsibility, including dismissal, must be accompanied by deliberation and justification. The reasoning of the decision imposing the sanction has to include arguments capable of properly balancing the civil servant's right to freedom of expression against their duties and responsibilities.[153] Furthermore, in the light of Article 6 ECHR, the individual concerned has the right to challenge the decision in court and have it subjected to adequate judicial review.[154]

VII. Concluding Remarks

In conclusion, the analysis of the civil servants' freedom of expression has shed light on the intricate balance that must be struck between individual rights and the public interest, as exemplified in the case law of the ECtHR. In one of the judgments, the Court offers an excellent illustration of the essence of this balancing approach, stating that

> mindful of the importance of freedom of expression on matters of general interest, of the duties and responsibilities of civil servants, (. . .), and having weighed up the various interests at stake, the Court concluded that the interference with the applicant's right to freedom of expression, namely the penalty imposed (. . .), which resulted in his definitive removal from the post (. . .), was disproportionate to any legitimate aim pursued.[155]

This chapter has explored multifaceted dimensions of freedom of expression within the civil service. From the explicit duties of loyalty, reserve, and discretion to the broader

148 ECtHR, *Pay v. the United Kingdom* (n. 70).

149 ECtHR, *Catalan v. Romania* (n. 39), para. 70.

150 ECtHR, *Vogt v. Germany* (n. 15), para. 60.

151 ECtHR, *Fuentes Bobo v. Spain* (n. 11), para. 49.

152 ECtHR, *Heinisch v. Germany* (n. 10), para. 91; ECtHR, *Guja v. Moldova* (n. 16), para. 95.

153 ECtHR, judgment of 6 June 2023, *Sarısu Pehlivan v. Turkey*, 63029/19, para. 49.

154 ECtHR, judgment of 27 June 2006, *Saygılı and Seyman v. Turkey*, 51041/99, paras. 24–25; ECtHR, *Godenau v. Germany* (n. 24), para. 59; ECtHR, *Lombardi Vallauri v. Italy* (n. 24), paras. 46 and 54–55; see also Van Drooghenbroeck (2013), pp. 161 f. and *The Right to a Fair Trial for Civil Servants and the Importance of the State's Interest in Applying Article 6, Paragraph 1 ECHR* by F. Aperio Bella in this volume.

155 ECtHR, *Kayasu v. Turkey* (n. 16), para. 107.

political neutrality expected of civil servants, the complex network of responsibilities intertwines with the right to freely express opinions. Recognising the nuanced nature of civil service roles, the chapter has delved into the functional perspective, revealing that the limits of the civil servants' freedom of expression must be contextualised based on an individual's position and functions. Furthermore, this study has highlighted how the dynamic interplay between different forums, content and debates further shapes the guarantees surrounding civil servants' free speech.

Bibliography

Abel J. (2022), 'Cop-"Like": The First Amendment, Criminal Procedure, and the Regulation of Police Social Media Speech', 74(6) *Stanford Law Review*, 1199–1282.

Arnardóttir O.M. (2017), 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance', 15(1) *International Journal of Constitutional Law*, 9–35.

Bezemek C. (2021), 'Insult of Public Officials', in Stone A., Schauer F. (eds), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press, 389–409.

Bhagwat A., Weinstein J. (2021), 'Freedom of Expression and Democracy', in Stone A., Schauer F. (eds), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press, 82–105.

Bogg A., Estlund C. (2014), 'Freedom of Association and the Right to Contest: Getting Back to Basics', in Bogg A., Novitz T. (eds), *Voices at Work: Continuity and Change in the Common Law World*, Oxford: Oxford University Press, 141–162.

Collins P. (2022), *Putting Human Rights to Work: Labour Law, the ECHR, and the Employment Relation*, Oxford: Oxford University Press.

Đajić S.V. (2021), 'Freedom of Expression, Strong Language and Public Servants', 55(3) *Zbornik radova Pravnog fakulteta*, 803–827.

Egan S. (2018), 'The Doctrinal Approach in International Human Rights Law Scholarship', in McConnell L., Smith R. (eds), *Research Methods in Human Rights*, London, New York: Routledge, 24–41.

Estlund C. (2021), 'Freedom of Expression in the Workplace', in Stone A., Schauer F. (eds), *The Oxford Handbook of Freedom of Speech*, Oxford: Oxford University Press, 410–430.

Gerards J. (2019), *General Principles of the European Convention on Human Rights*, Cambridge: Cambridge University Press.

Gray A.D. (2021), 'Public Servants and the Implied Freedom of Political Communication', 49(1) *Federal Law Review*, 3–39.

Greer S., Gerards J., Slowe R. (2018), *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges*, Cambridge: Cambridge University Press.

Høedt-Rasmussen I., Voorhoof D. (2018), 'Whistleblowing for Sustainable Democracy', 36(3) *Netherlands Quarterly of Human Rights*, 3–6.

Kagiaros D. (2021), 'Reassessing the Framework for the Protection of Civil Servant Whistleblowers in the European Court of Human Rights', 39(3) *Netherlands Quarterly of Human Rights*, 1–21.

Kozlowski D. (2006), '"For the Protection of the Reputation or Rights of Others": The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)', 11(1) *Communication Law and Policy*, 133–178.

Krenc F. (2005), 'Le fonctionnaire et la Convention européenne des droits de l'homme – Eléments de synthèse', 65(3–4) *Annales de Droit de Louvain: Revue Trimestrielle*, 213–258.

Mahoney P. (2012), 'Free Speech of Civil Servants and Other Public Employees', in Casadevall J., Myjer E., O'Boyle M., Austin A. (eds), *Freedom of Expression: Essays in Honour of Nicolas Bratza*, Oisterwijk: Wolf Legal Publishers, 257–276.

Mangan D. (2017), 'Online Speech and the Workplace: Public Right, Private Regulation', 39(2) *Comparative Labor Law & Policy Journal*, 357–387.

Mantouvalou V. (2008), 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces', 71(6) *Modern Law Review*, 912–939.

Mantouvalou V. (2014), 'Democratic Theory and Voices at Work', in Bogg A., Novitz T. (eds), *Voices at Work: Continuity and Change in the Common Law World*, Oxford: Oxford University Press, 214–231.
Mantouvalou V. (2019), "'I Lost My Job Over a Facebook Post – Was That Fair?" Discipline and Dismissal for Social Media Activity', 35(1) *International Journal of Comparative Labour Law and Industrial Relations*, 101–125.
Merrigan M. (2019), 'Claiming the Convention's "Duties and Responsibilities" in the Face of Illiberalism', in Lemmens K., Parmentier S., Reyntjens L. (eds), *Human Rights with a Human Touch: Liber Amicorum Paul Lemmens*, Antwerpen: Intersentia, 693–713.
Müller J.-W. (2012), 'Militant Democracy', in Rosenfeld M., Sajó A. (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 1253–1269.
Norton H. (2008), 'Government Workers and Government Speech', 7 *First Amendment Law Review*, 101–117.
Norton H. (2009), 'Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression', 59(1) *Duke Law Journal*, 1–68.
Norton H., Citron D.K. (2010), 'Government Speech 2.0', 87(4) *Denver University Law Review*, 899–943.
O'Connell R. (2020), *Law, Democracy and the European Court of Human Rights*, Cambridge: Cambridge University Press.
Papandrea M.-R. (2011), 'The Free Speech Rights of "Off-Duty" Government Employees', 2010(6) *Brigham Young University Law Review*, 2117–2174.
Paré D.J., Smith C. (2023), 'Free to Express Yourself Online While Off-Duty? Tracing Jurisdictional Expressions of Shifting Workplace Boundaries in Canada', 26(11) *Information, Communication & Society*, 2304–2325.
Sanders A. (2014), 'The Law of Unfair Dismissal and Behaviour Outside Work', 34(2) *Legal Studies*, 328–352.
Schabas W.A. (2015), *The European Convention on Human Rights. A Commentary*, Oxford: Oxford University Press.
Smet S. (2010), 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict', 26(1) *American University International Law Review*, 183–236.
Smet S. (2017), 'Conflicts between Human Rights and the ECtHR: Towards a Structured Balancing Test', in Smet S., Brems E. (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?*, Oxford: Oxford University Press, 38–57.
Stone A. (2011), 'The Comparative Constitutional Law of Freedom of Expression', in Ginsburg T., Dixon R. (eds), *Comparative Constitutional Law*, Cheltenham, Northampton: Edward Elgar, 406–421.
Taylor P.M. (2020), *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge: Cambridge University Press.
Tsesis A. (2020), *Free Speech in the Balance*, Cambridge: Cambridge University Press.
Van Drooghenbroeck S. (2013), 'Labour Law Litigation and Fair Trial under Article 6 ECHR', in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention of Human Rights and the Employment Relation*, Oxford, Portland: Hart Publishing, 159–182.
Van Steenbergen J. (2022), 'The Freedom of Expression of the Judiciary as a Special Case of State Personnel: A European Human Rights Perspective', in Czech P., Heschl L., Lukas K., Nowak M., Oberleitner G. (eds), *European Yearbook on Human Rights 2022*, Antwerpen: Intersentia, 283–308.
Vickers L. (2002), *Freedom of Speech and Employment*, Oxford: Oxford University Press.
Voorhoof D., Humblet P. (2013), 'The Right to Freedom of Expression in the Workplace under Article 10 ECHR', in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention of Human Rights and the Employment Relation*, Oxford, Portland: Hart Publishing, 237–286.
Wragg P. (2015), 'Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle', 44(1) *Industrial Law Journal*, 1–28.

43 The Development of a Legal Framework on Whistle-blowing by Public Employees in the European Union

Paolo Provenzano

I. Introduction

The term "whistle-blowing" refers to "an act of a man or woman who, believing that the public interest overrides the interest of the organisation he serves, blows the whistle that the organisation is involved in corrupt, illegal, fraudulent or harmful activity".[1] Whistle-blowing is crucial in the public sector, where it can bring to light episodes of wrongdoing and prevent administrative action from straying beyond the bounds of legality.

According to a widespread belief, the whistle-blower is an American invention dating back to the False Claims Act of 1863.[2] On closer examination, however, something very similar existed for more than five centuries in Europe. In 1310, the so-called *bocche di leone* (lion's mouths) were introduced in the Republic of Venice. They were cavities in various parts of the lagoon city where people could post complaints. In 1542, complaints only began to be considered admissible if they were signed by the complainant and were, therefore, not anonymous.[3]

So while it is true that in Europe the regulation of whistle-blowing has its roots in the distant past, it is also true that it had long fallen into disuse. The reason for this presumably goes back to the years of totalitarian regimes, when fear of being reported by a neighbour or colleague for unorthodoxy was widespread.[4] The idea that whistle-blowers are informers dates back to this period, but there has been an apparent turnaround at the European

1 Nader et al. (1972), p. vii.

2 On 2 March 1863, the Congress passed the *False Claims Act*, better known as the *Lincoln Law*, during the Civil War to combat fraud perpetrated by companies selling supplies to the Union Army and was strongly advocated by then-President Abraham Lincoln. That framework contained so-called *qui tam* provisions, which allowed private individuals to sue, on behalf of the government, companies and individuals who were defrauding the government. *Qui tam* is an abbreviation of a Latin phrase: "qui tam pro domino rege quam pro se ipso in hac parte sequitur."

3 On this point, see Muzzelli (2020).

4 Deckert and Sweeney (2016), p. 127, state that "whistleblowing is met with considerable reticence in France. Actually, such systems recall occupation time during World War Two. In France the word 'whistleblowing' is carefully used to prevent confusion with those times." This aspect is also highlighted by German doctrine, which has observed that "Traditionally whistleblowing evokes negative connotations in Germany and expressions like *Denunzinat* (denouncer), *Petzer* (squealer) and *Spitzel* (snitcher) are ready at hand. Many commentators explain this appraisal with the bad historical experiences of informing the state of non-compliant behaviour of friends, neighbours, and colleagues with prevailing ideology in order to bolster a totalitarian system first under the National-Socialist regime and later in the German Democratic Republic," Krause (2016), p. 157.

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level in the last 20 years. Indeed, in Europe and elsewhere, the regulation of whistle-blowing is now ubiquitous.[5]

Here, without any claim to completeness, I highlight some different models of the regulation of whistle-blowing by public employees current in European countries.[6] I also highlight the choices made by the European Union (EU) legislator with Directive (EU) 2019/1937,[7] which, although the deadline for transposition has passed, has not yet been transposed by eight Member States[8] against whom the Commission recently initiated infringement proceedings.[9] Therefore, a brief consideration of the Directive to indicate some of its distinctive features is worthwhile.

II. Directive (EU) 2019/1937: A Brief Overview

Directive (EU) 2019/1937[10] complements other earlier sectoral regulations[11] and refers to certain specific matters indicated in Article 2.[12] For these matters, the Directive establishes a unified discipline applicable in both the private and public sectors. Indeed, the Directive makes no distinction regarding the public or private nature of the organisation in which the whistle-blower operates. This differentiates the approach of the European legislator from that of some individual nations.

The Directive was adopted to harmonise Member States' "fragmented and heterogeneous" whistle-blowing laws. On the one hand, it aims to strengthen the principles of transparency and accountability (Recital 2), and on the other, to allow whistle-blowers to exercise their freedom of expression without restriction (Recital 31).

Under the latter aspect, the Directive implements principles derived from Article 11 of the Charter of Fundamental Rights of the European Union ("Freedom of expression and information") and Article 10 of the European Convention on Human Rights (ECHR) ("Freedom of expression"), in line with the case law of the European Court of Human Rights (ECtHR) on whistle-blowing. We refer in particular (but not only)[13] to the decision of the Strasbourg Court in the famous case *Heinisch v. Germany*.[14] Called to rule on the legality of a dismissal ordered as a result of the complainant's allegation of misconduct, the

5 Thüsing and Forst (2016), p. 3.

6 Turksen (2020), p. 112.

7 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305/17.

8 These Member States are Czechia, Germany, Estonia, Spain, Italy, Luxembourg, Hungary, and Poland. See https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32019L1937.

9 See European Commission, Press release of 15 February 2023.

10 For a commentary on Directive (EU) 2019/1937, see Della Bella (2019); van Waeyenberge and Davies (2020) and Andreis (2019).

11 These are the regulations mentioned in Recitals 20 and 68 to 99 of Directive (EU) 2019/1937.

12 These are the regulations on: public procurement, services, products and financial markets and the prevention of money laundering and terrorist financing, product safety and compliance, transport safety, environmental protection, radiation protection and nuclear safety, food and feed safety and animal health and welfare, public health, consumer protection, and privacy and personal data protection and network and information system security.

13 ECtHR (GC), judgment of 21 July 2011, *Heinisch v. Germany*, 28274/08. On this decision see Thüsing and Forst (2016), p. 15.

14 ECtHR, *Heinisch v. Germany* (n. 14). On the jurisprudence of the ECtHR concerning whistle-blowing in civil service, see *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywon in this volume.

Court pointed out the necessity "to strike a fair balance between the need to protect the employer's reputation and rights on the one hand and the need to protect the applicant's right to freedom of expression on the other".[15] The Court, therefore, held that "the public interest disclosure deriving from criminal acts and freedom of expression could not be held hostage to the employer's interest".[16]

Based on the approach adopted by the Directive, defined as "human rights-oriented",[17] whistle-blowers reporting misconduct first and foremost exercise their fundamental rights. This broadening of fundamental rights inevitably affects the scope of application of the whistle-blower directive, extending it to include subjects who would not be protected under most national laws.

The Directive contemplates two channels through which whistle-blowers can convey their reports, drawing a distinction between "internal" and "external reporting" (Article 5).[18] Internal reporting, which should be the rule (Article 7), is addressed directly to the government office where the reported conduct took place. In this regard, the Directive provides government offices with a channel for receiving internal reports. The channel must enable both written and oral reports and guarantee the confidentiality of the reporter and any third parties named in the report.

In addition to internal reporting channels, the Directive also requires the implementation of external reporting channels (Article 10), which must be managed by administrations entrusted with the task of receiving and handling the reports they receive. These channels must also guarantee the confidentiality of the reporter and the information acquired.

Finally, the Directive envisages – and to my knowledge, this is an absolute novelty – that in some instances, the whistle-blower may also benefit from the guarantees granted to them in the case of "public disclosures". These are the cases expressly provided for in Article 15, where the report has not been acknowledged through the internal or external

15 See also ECtHR, judgment of 30 September 2010, *Balenović v. Coratia*, 28369/07.

16 Turksen (2020), p. 56.

17 See Parisi (2020), p. 7, who points out that whistle-blowing has also evolved over time into a human rights-oriented instrument. In particular, the author notes that "in the human rights-oriented approach what is relevant is the protection of a fundamental right of the person", p. 18. And again, "this emerges very well from the judgment of the European Court of Human Rights in *Voskuil v. The Netherlands*, of 22 November 2007, where it is stated that the protection provided for the whistleblower responds to the need to give fullness to the citizen's right to receive information about improper methods in the exercise of public authority", from which it follows that "the reputation of the public body (. . .) is not a pre-eminent value, indeed it yields with respect to the effective protection of the right to information", *Voskuil v. The Netherlands*. It follows that "the very notion of whistleblower changes (. . .) if it is a matter of protecting the person in the exercise of a fundamental right", p. 18. In such an eventuality, "the connection with the work environment becomes recessive, or at any rate less qualifying, which is instead reputed to be an indispensable prerequisite when whistleblowing is an exclusively governance tool", p. 18. In light of the preceding, as other doctrine has pointed out, "the whistleblower can be looked upon [also] as a functional tool to guarantee the exercise of certain fundamental rights of the individual in a democratic State and, in particular, the right to freedom of expression, as well as the right of the community to be informed about news of public interest", Della Bella (2020), p. 158.

18 In Recital 33 it is pointed out that "Reporting persons normally feel more at ease reporting internally, unless they have reasons to report externally. Empirical studies show that the majority of whistleblowers tend to report internally, within the organization in which they work. Internal reporting is also the best way to get information to the persons who can contribute to the early and effective resolution of risks to the public interest. At the same time, the reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case."

channels by the deadline set by the Directive or where the whistle-blower considers that "the violation may constitute an imminent or manifest danger to the public interest, as in the case of emergency situations or risk of irreversible damage", or "in the case of external reporting, there is a risk of retaliation or there is little prospect that the violation will be effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the violator or involved in the violation".[19]

III. Whistle-blowing as a Governance Tool

The regulation of whistle-blowing was undoubtedly originally devised only as a governance tool, namely a tool aimed at bringing to light episodes of malfeasance or violations of the law occurring in a public body, with the primary purpose of preventing and suppressing conduct that slows down and hinders administrative tasks and harms the function and image of public bodies. Such is the function of whistle-blowing recognised by the relevant international Conventions and national legislation. Such regulations (national and supranational) configure the whistle-blower as a "natural ally of employers in deterring and exposing (risks of) illegal and irregular conduct".[20]

The direct consequence of this approach is that there must necessarily be a connection between the activity being reported and the whistle-blower's occupational context, where the whistle-blower learns or encounters the facts he/she reports. Facts that must, consequently, be connected and traceable to that work context.

This is confirmed by the definition of whistle-blowers in the 2014 Recommendations of the Committee of Ministers of the Council of Europe on the Protection of Whistleblowers.[21] According to this definition, whistle-blowers are those who whistle-blow "in the context of their work-based relationship".[22] Against such a backdrop, it is therefore not surprising that provisions on whistle-blowing are, as a rule, summarised in regulatory acts governing the public employment relationship, for example, in Austria, France,[23] Germany, Italy, and Poland.[24]

It follows that the perimeter of the scope of application of the regulation/law/directive in question depends on the type of employment relationship. Except for the isolated example of Slovenia, where the whistle-blowing law applies irrespective of whistle-blower qualification,[25] three different approaches are essentially found at the European level.

According to a common initial approach, the guarantees discussed here only apply to civil servants, namely persons having a subordinate employment relationship (permanent or fixed term) with public administrations. For example, this restrictive approach is

19 Article 15 of Directive (EU) 2019/1937.

20 See Parisi (2020), p. 7.

21 Council of Europe (2014), prepared by the European Committee on Legal Co-operation (CDCJ). See Thüsing and Forst (2016), p. 3.

22 Council of Europe (2014).

23 See Rebeyrol (2012), p. 32.

24 See Thüsing and Forst (2016), p. 3.

25 See Pečeк (2016), p. 265, where it is noted that "any person may report to the Commission for the Prevention of Corruption". In this respect, the Slovenian law is similar to those of Singapore and the United States, see Thüsing and Forst (2016), p. 15.

found in Austrian, Croatian, Estonian, German and (subject to some conditions) Italian legislation.[26]

A second approach tends to broaden the range of protectable subjects, making all whistle-blowers who work for public administrations eligible for protection, whether or not they are formally employees. In British legislation, for example, the term "workers" is used to identify those who are protected.[27] This term includes not only all civil servants, but also individuals (consultants, freelancers, interns, etc.) who work for a public body in various capacities.

Midway between these two approaches, a third expressly considers workers and contractors of companies that supply goods or services to public administrations to be public employees. An example can be found in the 2017 post-reform Italian legislation[28] and the Maltese legislation, "Protection of Whistleblowers Act",[29] where Article 2 expressly classifies "contractors or sub-contractors who perform work or supply a service" as public employees.[30] The rationale is apparently the need to increase surveillance by including those operating in a sector, such as public contracts, where malfeasance traditionally lurks.

With Directive (EU) 2019/1937 on the protection of whistle-blowers, the European legislator opted for the second approach. Article 4, entitled "Personal scope", provides that the guarantees established to protect the reporter apply to "reporting persons working in the private or public sector who acquired information on breaches in a work-related context". The same provision also makes it clear that besides "civil servants", this category includes "persons having self-employed status", "persons belonging to the administrative, management or supervisory body", "volunteers and paid or unpaid trainees", and "any person working under the supervision and direction of contractors, subcontractors and suppliers".

This broad and inclusive wording of the EU legislator on this point essentially traces the Irish legislation[31] and is entirely in keeping with the Directive's objective of protecting more types of whistle-blowers to "enhance enforcement of Union law and policies" in the relevant areas.[32]

While the more restrictive approach was only aimed at protecting employees, the Directive extends protection to trainees, who had no protection in the event of whistle-blowing, even though they are objectively vulnerable. If anything, this would call for a surplus of protection to prevent retaliation and, above all, support to mitigate their precarious employment relationship, which is a factor that can dissuade them from filing a complaint.

The provisions of Article 4 extend the protection of the whistle-blower to before the start of the employment relationship and to after its termination, and are entirely consistent

26 See Thüsing and Forst (2016), p. 15.

27 See Part IV A of the Employment Rights Act of 1996.

28 Provisions for the protection of those who report crimes or irregularities of which they have become aware in the context of a public or private employment relationship of 30 November 2017, no. 179 (*Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato*), *Gazzetta Ufficiale*, 14 December 2017, no. 291.

29 *Protection of Whistleblowers Act*, 15 September 2013, Chapter 527 of the Laws of Malta, https://legislation.mt/eli/cap/527/eng/pdf.

30 In this regard, see again Fabri (2016), p. 189, who derives from this provision the need to apply the discipline in question also to freelancers performing services for the government.

31 We refer to the *Protected Disclosure Act 2014* of 8 July 2014. On this point, see Turksen (2020), p. 55.

32 See Article 1 of the Directive (EU) 2019/1937.

with the declared intention to extend whistle-blower protection as far as possible. In particular, paragraphs 3 and 2 of Article 4 extend the guarantees in question to violations of which the reporter became aware at the selection stage when he was technically not yet working for the public administration,[33] and on the other hand, to violations of which the reporter, no longer working for the public administration, became aware before the employment relationship ceased.[34]

Finally, the Directive also very appropriately provides that the safeguards envisaged for the whistle-blower also apply to natural and legal persons close to the whistle-blower who may suffer retaliation as a result of the whistle-blowing, e.g. members of the reporter's workgroup or companies related to the reporter or where the reporter works.[35] In the latter respect, the EU framework is far more protective than those of most Member States, where, except for Belgium,[36] there does not seem to be any such provision.

There is no doubt that the extension of the subjective scope of the whistle-blower Directive by the European legislator depends on the fact that the EU espouses a human-rights-oriented approach. Indeed, if whistle-blowers are considered to exercise a fundamental right of their own, then it is clearly necessary also to include those who work with but are not employed by public administrations.

IV. Reward Model v. Guarantee Model

In regulating whistle-blowing, it is customary to distinguish two models: the reward model, which provides economic incentives for whistle-blowers, and the guarantee model, which provides guarantees designed to prevent whistle-blowers from suffering negative consequences from their actions.

The reward model, which is quite clearly conceived to incentivise reporting, is typical of the US law, which, as early as 1863, recognised a reward for reporting misconduct. Under the law currently in force, the reward can, in some cases, amount to between 10% and 30% of the amount recovered as a result of the report;[37] e.g. in 2012, a whistle-blower was awarded 104 million USD.[38]

From a cost-benefit perspective, the advantages that derive from the reward model are undisputed and indisputable. Recognition of rewards and incentives undoubtedly entices reporting even by those who are not "moved by moral urgency".[39] Nonetheless, the reward

33 The aforementioned Article 4, para. 3 stipulates: "This Directive shall also apply to reporting persons whose work-based relationship is yet to begin in cases where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations."

34 Article 4, para. 2 stipulates: "This Directive shall also apply to reporting persons where they report or publicly disclose information on breaches acquired in a work-based relationship which has since ended."

35 Article 4, para. 4 provides: "The measures for the protection of reporting persons set out in Chapter VI shall also apply, where relevant, to: a) facilitators; b) third persons who are connected with reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of reporting persons; and c) legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context."

36 Which is pointed out, critically, by Thüsing and Forst (2016), p. 15.

37 The reward system is recommended in the "G20 Anti-Corruption Action Plan. Protection of Whistleblowers. Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation" of 2011, where the use of "incentives to Encourage Reporting" is promoted.

38 See Thüsing and Forst (2016), p. 27.

39 See Novaro (2019), p. 754.

system has not taken root on the European continent,[40] where it is only recognised at the national level in Belgium and Slovakia, and at the EU level in Regulation (EU) 2014/596 on market abuse[41] and in the so-called New Prospectus Regulation (EU) 2017/1129.[42]

There appear to be essentially two reasons why most European jurisdictions have not committed to the reward model. The first reason is linked to the idea that it is at odds with the principles of loyalty, fairness and service to the common good that should inspire the actions of those who work in public administrations, and indeed all citizens. These principles indicate that it is correct to report malfeasance irrespective of any form of reward or incentive.[43] The fear that rewards may foster opportunistic and instrumental conduct may have been another reason for preferring the guarantee model. In other words, a recurrence of the use of reports for personal gain, as in the Nazi-Fascist and communist dictatorships, is feared.[44]

In any case, there was some hesitation in deciding not to embrace the reward system. For example, on this point, the authors of the Italian anti-corruption law[45] disregarded the specific recommendations of the Commission for the Study and Development of Proposals on Transparency and Prevention of Corruption in Public Administration, established by decree of the Minister of Public Function of 23 December 2011. The Commission considered that "by analogy with regimes in force in other countries (. . .), it is necessary to introduce a reward system that incentivises reporting as well as protecting public employees who report wrongdoing".[46] Another unsuccessful attempt to introduce a reward system was made in 2015.[47] Since contemporary administrative law is greatly concerned with efficiency, the reward system is likely to spread throughout Europe as well.

The EU legislator adopted the approach of most Member States in this respect. It has not provided any financial incentive in favour of whistle-blowers. However, the Directive does not prohibit the introduction of any such incentives, leaving room for Member States to act on this point. Indeed, Article 25 of the Directive provides that "Member States may introduce or retain provisions more favourable to the rights of reporting persons than those set out in this Directive".

40 On this point, see Zorzetto (2020), p. 459.

41 Article 32, para. 4 of the Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance, OJ L 173/14. See Fleisher and Schmolke (2012), p. 250.

42 Article 41, para. 3 of the Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/ECText with EEA relevance, OJ L 168/17.

43 This approach is criticised by Zorzetto (2020), pp. 487–488.

44 See Thüsing and Forst (2016), p. 27 who note that it is widespread in Europe that incentives "do have the potential to encourage people to act solely for personal gain. Thus, they are able to create an atmosphere of mistrust, surveillance and denunciation that evokes memories of some of the gloomiest periods in European history."

45 Provisions for the prevention and repression of corruption and illegality in public administration of 6 November 2012, no. 190 (*Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione*), *Gazzetta Ufficiale*, 13 November 2012, no. 265.

46 We refer to the *Report of the Commission for the Study and Development of Proposals on Transparency and Prevention of Corruption in Public Administration, 78*; it can be consulted at http://trasparenza.formez.it/sites/all/files/Rapporto_corruzioneDEF_ottobre%202012.pdf.

47 We refer to Bill AC 3365, presented on 15 October 2015 with the first signatory Hon. Francesca Businarolo.

V. Guarantees for Reporters

Turning to the main features of the guarantee model, the first guarantee is prohibiting disclosure of the names of whistle-blowers. This guarantee is recognised, for example, by Irish, French and Italian legislation.[48] The latter is similar to the Maltese framework,[49] in some ways overprotecting reporter confidentiality. Since the 2017 reform,[50] it has established that the whistle-blower's identity can only be disclosed with the express consent of the reporter. In the absence of such consent, the report cannot be used in legal proceedings where knowledge of the reporter's identity is necessary to defend the accused party.

The approach taken by the EU legislator seems much more balanced. While providing that "Member States shall ensure that the identity of the reporting person is not disclosed (. . .) without the explicit consent of that person",[51] it also states that there is an obligation to keep "any other information from which the identity of the reporting person may be directly or indirectly deduced" confidential.[52] The law states that it is possible to disclose the identity of the whistle-blower, even without his consent, only "where this is a necessary and proportionate obligation imposed by Union or national law in the context of investigations by national authorities or judicial proceedings", as well as in order to "safeguard the rights of defence of the person concerned".[53]

In most European legal systems,[54] whistle-blowers are also protected from discriminatory and retaliatory measures resulting from complaints, including dismissal. The need to protect whistle-blowers from retaliatory conduct by public administrations is demonstrated empirically by the case law on retaliatory acts, even before whistle-blowing became the focus of debate. For example, in Germany, the courts have dealt with dismissals of employees who reported real or alleged illegal conduct by their colleagues or superiors.[55] Regarding the forms of protection for whistle-blowers, the EU legislator has followed the course of national systems. In fact, Article 19 of Directive (EU) 2019/1937 requires Member States to take the necessary measures to prohibit any form of retaliation against whistle-blowers. The article lists types of conduct that are deemed to be prohibited, for example, "dismissal", "demotion or withholding promotion", and "failure to convert a temporary employment contract into a permanent one".

This, of course, does not mean that every prejudicial measure taken against a whistle-blower as a result of a complaint is necessarily to be considered a reaction to it, as this would encourage opportunistic behaviour. Reporting could be used instrumentally to erect a shield to protect reporters from any measures that are taken against them, however unexceptionable, by public administrations as a result of their reports.

To prevent the person who suffers detrimental measures as a result of whistle-blowing from having to shoulder the additional burden of providing proof that is difficult to verify (i.e. proving that the measure was taken as a result of the report), several European systems[56]

48 For other examples, see Turksen (2020), pp. 54–111.
49 Turksen (2020), p. 89.
50 See footnote no. 17. On this reform, see Cantone (2020), p. 187.
51 Article 16 of the Directive (EU) 2019/1937.
52 Cantone (2020).
53 Cantone (2020).
54 See Thüsing and Forst (2016), p. 27 and Turksen (2020), pp. 54–111.
55 See Krause (2016), p. 156.
56 See Thüsin and Forst (2016), p. 25.

reverse the burden of proof, making the public employer responsible for demonstrating that the punitive measures are motivated by reasons unrelated to the report itself and that, as such, they cannot be regarded as measures of a retaliatory nature. Directive (EU) 2019/1937 envisages this guarantee in Article 21(5):

> it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.

Protecting whistle-blowers against retaliatory conduct is sometimes accompanied by measures to punish those who engage in it. In the European landscape, we find systems that contemplate criminal sanctions (e.g. Ireland)[57] and those that foresee administrative sanctions (e.g. Italy).[58] On this point, Directive (EU)2019/1937 leaves ample space for action by Member States, which are free to opt for criminal or administrative sanctions, provided the sanctions are "effective, proportionate and dissuasive".[59]

VI. Anonymous Reporting: *Quid Iuris*?

In the Republic of Venice of 1542, it was decided to admit only signed reports and to reject anonymous reports. However, this did not decide the issue of whether or not anonymous reports are admissible, which is still debated today. On the one hand, there are those who believe that anonymous reports should be admissible, the ultimate purpose being to bring to light episodes of malfeasance, i.e. knowledge of the reporter's name is of secondary importance to the outcome. On the other hand, others like myself believe that whistle-blowers must necessarily put themselves on the line.[60] In favour of the latter position is the fact that it is more complicated to ascertain whether anonymous reports are well-founded, and, above all, in some cases, they can also limit the accused party's right of defence.

In the legal systems of most European States, there is no express prohibition on anonymous reports.[61] However, silence on this point cannot be taken to mean that anonymous reports are generally admissible, but rather that they are ineffective, at least in the majority of countries where whistle-blower law only applies in the case of reports emanating from individuals working for the government. In these countries, the author's anonymity makes it impossible to check the author's status, which is decisive for applying the law.

On this point, Directive (EU) 2019/1937 leaves ample space for Member States to act. Indeed, Article 6 indicates that "this Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches". The very fact that there continue to be anonymous reports, even with the guarantees mentioned previously,

57 See Turksen (2020), p. 57.

58 See Article 54-bis, para. 6 of the Legislative Decree 165/2001, General rules on the organisation of employment in public administrations of 30 March 2001 (*Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche*), *Gazzetta Ufficiale*, 9 May 2001, no. 106. The aforementioned Article 54-bis gives the National Anticorruption Authority (ANAC) the power to apply administrative sanctions from 10,000 to 50,000 EUR to managers who take the retaliatory measures.

59 Article 23 of the Directive (EU) 2019/1937.

60 See Galetta and Provenzano (2020), p. 298.

61 See Thüsing and Forst (2016), p. 17.

can only mean either that the guarantees are not known or that they are not perceived to be effective. This should make legislators consider whether and how to intervene to overcome or dispel perceptions of this kind which could impede the application of the law.

VII. Guarantees Also for Those Reported

The feeling one gets from the various provisions on whistle-blowing, and sometimes even from the literature, is that besides the (legitimate) rights of the whistle-blower, it is also important to protect the equally fundamental rights of the persons reported. In an evolving system, subjects accused of misconduct must always be in a position to fully defend themselves. For example, reported persons must have full access to the report that concerns them and the documents attached to it. Access to the file is linked to the right of defence, which implies "equality in the level of information of the parties".[62]

This aspect seems obvious, but in reality, it is not. For instance, the Italian regulations state that the "report is exempt from access"[63] by third parties and the reported person. Therefore, it is intended to correct this flaw.

Directive (EU) 2019/1937 very appropriately provides that "the persons concerned fully enjoy (. . .) the rights of defence, including the right to be heard and the right to access their file".[64] The Directive reconciles the latter right with the right of confidentiality of the whistle-blower, providing that it is still necessary to erase "any (. . .) information from which the identity of the reporting person may be directly or indirectly deduced".[65]

The Directive itself then provides further guarantees for the reported person. Indeed, Recital 32 and Article 6 state that whistle-blowers should have reasonable grounds to believe that what they report is true in order to enjoy the protection afforded by the Directive. As stated in the Recital, this is "an essential safeguard against malicious and frivolous or abusive reporting", which harms the person reported. In order to benefit from the provision, it is therefore essential that whistle-blowers be in good faith. In this respect, the Directive is in line with the provisions of various Member States,[66] according to which whistle-blowers are subject to the so-called good faith requirement.[67]

VIII. Final Remarks

Although the deadline for the transposition of Directive (EU) 2019/1937 expired on 17 December 2021, eight states have not yet transposed it. Transposition of the Directive is an excellent opportunity to rethink and correct some of the critical aspects of national laws, also with reference to complaints concerning violations of domestic regulations. The concept of transposition is intended to avoid two parallel regimes, one relating to violations of EU law and the other concerning violations of national law[68] since there are many intersections between national and EU law. Two parallel regimes could slow down an instrument such as reporting, which needs to be flexible and unimpeded by distinctions;

62 See Galetta (2019), p. 178. See also Galetta (2005).
63 Article 54-bis of the Legislative Decree no. 165/2001.
64 Article 22, para. 1 of the Directive (EU) 2019/1937.
65 Article 16, para. 1, last sentence of the Directive (EU) 2019/1937.
66 We refer to Austria, Germany, France, Malta, the Netherlands, Poland, Italy, Romania and Slovenia.
67 Thüsing and Forst (2016), p. 19.
68 Ragués (2020), p. 134, seems to be of the same opinion.

it is often unclear to the reporter and to the administrative authority receiving a report whether national or EU legislation is allegedly violated.

Lastly, bringing national laws into line with the standards set by EU law could overcome the problem of undervaluation of the rights of those reported. Indeed, it is paradoxical that an institution such as whistle-blowing, which was created in pursuit of good administration, could be devised in such a way as to disregard the right to good administration (Article 41 EU Charter of Fundamental Rights), which includes the right of defence and of full access to documents.

Bibliography

Andreis E. (2019), 'Towards a Common Minimum Standards for Whistleblower Protection Across the EU', 4(2) *European Papers*, 575–589.

Cantone R. (2020), 'Il dipendente pubblico che segnala illeciti; un primo bilancio sulla riforma del 2017', in Della Bella A., Zorzetto S. (eds), *Whistleblowing e prevenzione dell'illegalità*, Milano: Giuffré, 187–210.

Council of Europe (2014), *Protection of Whistleblowers. Legal Instrument. Recommendation CM/Rec(2014)7 and Explanatory Memorandum*, Strasbourg: Council of Europe, https://rm.coe.int/16807096c7.

Deckert K., Sweeney M. (2016), 'Whistleblowing: National Report for France', in Thüsing G., Forst G. (eds), *Whistleblowing – A Comparative Study*, Heidelberg: Springer, 125–154.

Della Bella A. (2019), 'La direttiva europea sul whistleblowing: come cambia la tutela per chi segnala illeciti nel contesto lavorativo', *Sistemapenale.it*, www.sistemapenale.it/it/scheda/direttiva-europea-whistleblowing-come-cambia-tutela-per-chi-segnala-illeciti-nel-contesto-lavorativo.

Della Bella A. (2020), 'Il whistleblowing nell'ordinamento italiano: quadro attuale e prospettive per il prossimo futuro', in Della Bella A., Zorzetto S. (eds), *Whistleblowing e prevenzione dell'illegalità*, Milano: Giuffré, 157–186.

Fabri D. (2016), 'The Whistleblowing Dilemma in Malta. Continues: A Personal View and Analysis', in Thüsing G., Forst G. (eds), *Whistleblowing – A Comparative Study*, Heidelberg: Springer, 187–202.

Fleisher H., Schmolke K.U. (2012), 'Financial Incentives for Whistleblowers in European Capital Markets Law? Legal Policy Considerations on the Reform of the Market Abuse Regime', 9(5) *European Company Law*, 250–259.

Galetta D.-U. (2005), 'Il diritto ad una buona amministrazione europea come fonte di essenziali garanzie procedimentali nei confronti della pubblica amministrazione', 15(3–4) *Rivista Italiana di Diritto Pubblico Comunitario*, 819–857.

Galetta D.-U. (2019), 'Il diritto ad una buona amministrazione nei procedimenti amministrativi oggi (anche alla luce delle discussioni sull'ambito di applicazione dell'art. 41 della Carta dei diritti UE)', 29(2) *Rivista Italiana di Diritto Pubblico Comunitario*, 165–200.

Galetta D.-U., Provenzano P. (2020), 'La disciplina italiana del whistleblowing come strumento di prevenzione della corruzione e dell'illegalità nella pubblica amministrazione: luci e (soprattutto) ombre', in Della Bella A., Zorzetto S. (eds), *Whistleblowing e prevenzione dell'illegalità*, Milano: Giuffré, 285–310.

Krause R. (2016), 'Duty to Loyalty, Fundamental Rights, and Public Policy: German Whistleblowing Law Between Conflicting Values', in Thüsing G., Forst G. (eds), *Whistleblowing – A Comparative Study*, Heidelberg: Springer, 155–179.

Muzzelli M.P. (2020), *Riferire all'autorità. Denuncia e delazione tra Medioevo ed Età Moderna*, Roma: Viella.

Nader R., Petkas P.J., Blackewell K. (eds) (1972), *Whistle Blowing: The Report of the Conference on Professional Responsibility*, New York: Grossman.

Novaro P. (2019), 'Principali criticità della disciplina italiana in materia di whistleblowing alla luce della nuova direttiva europea: limitato campo di applicazione e scarsi incentivi', 29(5) *Rivista Italiana di Diritto Pubblico Comunitario*, 737–760.

Parisi N. (2020), 'La funzione del whistleblowing nel diritto internazionale ed europeo', in Della Bella A., Zorzetto S. (eds), *Whistleblowing e prevenzione dell'illegalità*, Milano: Giuffré, 3–40.

Peček D.S. (2016), 'Protection of Persons Reporting Corruption and Other Whistleblowers in the Republic of Slovenia', in Thüsing G., Forst G. (eds), *Whistleblowing – A Comparative Study*, Heidelberg: Springer, 263–277.

Ragués R. (2020), 'Los denunciantes en el ordenamiento jurídico español: una visión panorámica antes y después de la directiva 2019/1937', in Della Bella A., Zorzetto S. (eds), *Whistleblowing e prevenzione dell'illegalità*, Milano: Giuffré, 133–156.

Rebeyrol V. (2012), 'La réception du "whistle-blowing" par le droit Français', 24 *La Semaine Juridique – Èdition générale*, 32–50.

Thüsing G., Forst G. (2016), 'Whistleblowing Around the World: A Comparative Analysis of Whistleblowing in 23 Countries', in Thüsing G., Forst G. (eds), *Whistleblowing – A Comparative Study*, Heidelberg: Springer, 3–30.

Turksen U. (2020), 'Whistle-Blower Protection in the EU: Critical Analysis of Challenges and Future Prospects', in Della Bella A., Zorzetto S. (eds), *Whistleblowing e prevenzione dell'illegalità*, Milano: Giuffré, 41–124.

Van Waeyenberge A., Davies Z. (2020), 'The Whistleblower Protection Directive (2019/1937): A Satisfactory But Incomplete System', 12(1) *European Journal of Risk Regulation*, 236–244.

Zorzetto S. (2020), 'Costi e benefici del whistleblowing: questioni di *policy* e premiali', in Della Bella A., Zorzetto S. (eds), *Whistleblowing e prevenzione dell'illegalità*, Milano: Giuffré, 457–491.

44 The Right to Join Trade Unions and Political Parties

Constanze Janda

I. Introduction

Although members of the civil service work for the executive power, be it government or public administrations, and therefore, to some extent, represent the State, they are human beings with their own opinions, values and beliefs. It is impossible to separate a civil servant's or public employee's "public person" from his or her "private person". They, therefore, enjoy the same human rights as everyone else. Being a member of a trade union or a political party is one way of expressing one's personality. In a human rights context, this affects freedom of thought (Article 9 of the European Convention on Human Rights, ECHR, and Article 10, paragraph 1 of the Charter of Fundamental Rights of the European Union, CFR), freedom of expression (Article 10 ECHR and Article 11, paragraph 2 CFR) and freedom of association (Article 11 ECHR and Article 12 CFR). However, civil servants and public sector employees have a specific function which is closely related to the rule of law. As they link the citizen and the State, they must at all times ensure that their actions are in line with the law. They have to find a balance between their individual freedoms and the functioning of the public service.

This chapter discusses the human rights implications of being a member of a trade union or a political party. Based on a review of the jurisprudence of the European Court of Human Rights (ECtHR), I reflect on the possible limitations of these rights and freedoms for persons working in the public service. The analysis focuses on Council of Europe (CoE) law,[1] for the EU does not have the competence to regulate, among other things, the right of association (Article 153, paragraph 5 of the Treaty on the Functioning of the European Union, TFEU). Agreements concluded by way of social dialogue (Article 155 TFEU) are also limited to matters covered by EU competencies.[2] Moreover, the CFR addresses EU institutions, but Member States only when they are implementing Union law (Article 51 CFR). Hence, the scope of application of Articles 12 and 28 CFR remains limited.

1 The European Union (EU) has not yet acceded to the ECHR, but is bound to do so, see Article 6, para. 2 of the Treaty on European Union.

2 Basically, EU law comprises a framework agreement of informing and consulting public service employees and civil servants and some agreements referring to their working conditions. It does not cover any further collective labour law matters related to persons working in the public service, see De Becker (2021), pp. 204 f.

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II. The Right to Join Trade Unions

According to Article 11, paragraph 1 ECHR, everyone has the right to freedom of association with others. The Convention explicitly mentions the right to form and join trade unions for the protection of one's interests. Article 12 CFR is identical in wording. Article 28 CFR also guarantees the right to collective bargaining for workers and employers and their respective organisations.[3] Further collective labour rights are guaranteed by the revised European Social Charter (ESC rev.) as well as by several conventions of the International Labour Organisation (ILO), for example, Article 5 ESC rev. ("right to organise"), Article 6 ESC rev. ("right to bargain collectively"), ILO Convention no. 87 (Co87)[4] ("freedom of association and protection of the right to organise") and ILO Convention no. 98 (Co98)[5] ("right to organise and collective bargaining").[6] They apply to "workers and employers, without distinction whatsoever".[7] The ECtHR has always underlined that the ECHR is not the sole framework for the interpretation of the rights and freedoms protected therein. This means that other rules, be they in national or in international law, have to be taken into account, and the Convention rights have to be interpreted in the light of these provisions and how they evolve.[8] Hence, the Court calls for dynamic interpretation that reflects overall legal developments and common legal values applicable to the contracting States, including, among others, the conventions of the ILO.[9] Despite the divergence in the protection of trade union rights in national law, the ECtHR thus aims at harmonising the level of protection.

1. Preliminary Remarks

Contract law is based on the assumption that the contracting parties are of equal standing. In employment contracts, however, one can observe a certain power imbalance as employees depend on the post in order to earn their living. This leads to a structural disadvantage towards their employers, making them reluctant to criticise their working conditions or to advocate for their improvement. This unequal power relation does not apply exclusively to the private sector but affects public service employees as well. It also concerns civil servants, even though they do not have a contractual but a public law relationship with their employer. Collective labour law offers a remedy for this. Trade unions make it possible to represent one's social and economic interests without the individual having to deal with the employer alone, and thus offer a degree of protection against repression in the employment relationship.[10] Besides, collective agreements promote solidarity among workers.[11] Trade unions have a

3 For details see Pietrogiovanni (2021), pp. 73 f.

4 ILO, Freedom of Association and Protection of the Right to Organise Convention (no. 87), 1948, www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:312232,en:NO.

5 ILO, Right to Organise and Collective Bargaining Convention (no. 98), 1949, www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO.

6 For details, see Ales (2021), pp. 29 f.

7 Article 2 Co87. However, Article 9, para. 1 Co87 states that national law shall determine the extent to which the convention applies to members of the armed forces and the police. Article 5, para. 1 Co98 is identical in wording.

8 ECtHR, judgment of 12 November 2008, *Demir and Baykara v. Turkey*, 34503/97, paras. 67 ff.

9 ECtHR, *Demir and Baykara v. Turkey* (n. 8), paras. 87 and 100 and ECtHR, judgment of 5 July 2022, *Association of Civil Servants and Union for Collective Bargaining v. Germany*, 815/18, 3278/18, 12380/18, 12693/18, 14883/18..

10 Arabadjieva (2022), p. 13.

11 Porta and Sachs (2021), pp. 56 f.

mandate, together with employers' representatives, to agree on the working conditions that shall apply to a specific group of working persons. In addition to collective bargaining, trade unions play an important role in supporting and counselling, and depending on national law, may also be involved in representing employees in labour court proceedings.

Trade unions are also involved in the social dialogue at legislation. In the European Union, Article 152 TFEU recognises and promotes the role of the social partners, but also recognises the diversity of Member State national laws. Article 154 TFEU obliges the Commission to promote consultation of the social partners at the Union level. Similar rules may exist at the national level. According to Article 155 TFEU, the social dialogue at the EU level may lead to agreements to be implemented by Council decisions. Hence, the social partners have considerable influence on agenda-setting and lawmaking, for they may substitute the regular legislative procedures.[12]

Trade unions are committed to improving working conditions, which touch occupational as well as social concerns. This means that also members of the public service have a vital interest in joining these associations in order to influence and shape trade union agendas and action, thus taking part in collective action and having their own impact on the development of the conditions and circumstances in which they work.[13] Recognition of this right, which depends on political and societal attitudes, has an immediate effect on the number and content of collective agreements and, therefore, on the balance of power between workers and employers.[14]

2. Personal Scope of Application

In Article 11, paragraph 1 ECHR, the right to form and join trade unions is guaranteed to "everyone" who is in employment. No distinction is made between public or private sector employees. The employment relationship is the decisive criterion.[15]

However, the right of association is not limited to employees but covers civil servants as well. This is not only derived from Article 1 ECHR, according to which the convention applies to "everyone within the jurisdiction" of the contracting States. Article 11, paragraph 2 ECHR contains specified restrictions for certain members of the public service and thus shows that also civil servants and members of the armed forces, in general, are covered by the convention rights.[16] The ECtHR likewise underlines that the convention does not distinguish between the State as holder of public power and the State as employer.[17] Trade unions themselves, defined as voluntary associations of working persons,[18] can also invoke freedom of association.[19]

12 Porta and Sachs (2021), p. 64.

13 Arabadjieva (2022), p. 13; see ECtHR, judgment of 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania*, 2330/09, para. 130.

14 Arabadjieva (2022), p. 2; Ales (2021), p. 27.

15 Harris et al. (2023), p. 722; ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania* (n. 13), para. 147; ECtHR, judgment of 16 June 2015, *Manole and Romanian Farmers Direct v. Romania*, 46551/06, para. 62.

16 ECtHR, judgment of 8 June 1976, *Engel and others v. Netherlands*, 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para. 54; ECtHR, judgment of 6 February 1976, *Swedish Engine Drivers' Union v. Sweden*, 5614/72, para. 37; ECtHR, judgment of 28 August 1986, *Kosiek v. Germany*, 9704/82, para. 35; ECtHR, judgment 28 August 1986, *Glasenapp v. Germany*, 9228/80, para. 49; ECtHR, judgment 29 June 1995, *Vogt v. Germany*, 17851/91, para. 43; ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 96; see Fornasier (2019), para. 4.114.

17 ECtHR, *Swedish Engine Drivers' Union v. Sweden* (n. 16), para. 37; ECtHR, judgment 21 February 2006, *Tüm Haber Sen and Çinar v. Turkey*, 28602/95, para. 29; see White and Ovey (2020), p. 469.

18 Schubert (2022), Article 10, para. 11.

19 ECtHR, judgment of 7 December 2021, *Yakut Republican Trade-Union Federation v. Russia*, 9582/09, para. 30; Grabenwarter (2014), Article 11, para. 10; Fornasier (2019), para. 4.114.

3. Material Scope of Application

Freedom of association includes the right to form or join trade unions "for the protection of [one's] interest". This does not form a specific right but is a specific aspect of this fundamental freedom.[20] Engagement in associations like trade unions serves the pursuit of common interests and, therefore, goes beyond merely sharing company with others.[21]

Article 11 ECHR offers protection against any arbitrary State action against trade unions and their members.[22] Members have the right to freely engage in any legal activity and may also express their support and display information on demonstrations or other events organised by a trade union in their office.[23] This may also oblige employers to grant time off work for trade union representatives if it is necessary for such representatives to fulfil their tasks, e.g. by taking part in meetings.[24] Regarding individual members of the public service, freedom of association must be distinguished from freedom of expression. Trade unions may serve as a mediator for criticising the employer. However, even if an employee or civil servant is a member of a trade union, criticism – but not defamation – of the employer is covered by Article 10 ECHR rather than by Article 11 ECHR. Hence, a dismissal based on this may violate the employee's freedom of expression, unless the dismissal is not based on trade union membership as such.[25] Although this is not explicitly expressed in the wording of Article 11 ECHR, freedom of association includes a negative dimension, which is part of individual freedom of choice, i.e. the right not to join a trade union.[26] This also relates to the inadmissibility of "closed-shop agreements" that establish membership in a trade union as a necessary condition for obtaining an employment contract.[27]

Contracting States are obliged to permit and enable trade unions to protect the interests of their members.[28] The *ratione materiae* mainly covers occupational interests.[29] Yet, referring to the human rights origins of the ECHR and the historical roots of workers' associations, trade unions are mandated to protect the civil, economic and social rights of their members as well.[30] As regards officials of the European Union, the Court of Justice of the European Union (CJEU) has emphasised the right of trade unions to protect the

20 ECtHR, judgment of 27 October 1975, *National Union of Belgian Police v. Belgium*, 4464/70, para. 38; ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania* (n. 13), para. 135; ECtHR, *Manole and Romanian Farmers Direct v. Romania* (n. 15), para. 57; ECtHR, judgment of 27 April 2010, *Vörður Ólafsson v. Iceland*, 20161/06, para. 45; see Harris et al. (2023), p. 722.

21 White and Ovey (2020), p. 461; Harris et al. (2023), p. 704.

22 Grabenwarter (2014), Article 11, paras. 10 and 11.

23 ECtHR, judgment of 27 September 2011, *Şişman and Others v. Turkey*, 1305/05, paras. 21 ff.

24 CJEU, judgment of 18 January 1990, *Maurissen and European Public Service Union*, C-193/87 and C-194/87, para. 5.

25 Fornasier (2019), para. 4.97, see also *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

26 ECtHR, judgment of 30 June 1993, *Sigurður A. Sigurjónsson v. Iceland*, 16130/19, para. 16; ECtHR, judgment of 11 January 2006, *Sørensen and Rasmussen v. Denmark*, 52562/99 and 52620/99, paras. 59 ff.; ECtHR, *Vörður Ólafsson v. Iceland* (n. 20), para. 45; Grabenwarter (2014), Article 11, para. 11; Schabas (2017), p. 502; Fornasier (2019), para. 4.112; European Commission of Human Rights (1985), p. 18; Schubert (2022), Article 10, para. 16.

27 ECtHR, judgment of 13 August 1981, *Young, James and Webster v. the United Kingdom*, 7601/76 and 7806/77, para. 51; ECtHR, 1.2006, *Sørensen and Rasmussen v. Denmark* (n. 28), paras. 59 ff.

28 ECtHR, *National Union of Belgian Police v. Belgium* (n. 20), para. 38; ECtHR, *Swedish Engine Drivers' Union v. Sweden* (n. 18), para. 39; ECtHR, *Tüm Haber Sen and Çinar v. Turkey* (n. 17), para. 28; ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania* (n. 13), para. 134.

29 Grabenwarter (2014), Article 11, para. 10; Schabas (2017), p. 506.

30 European Commission of Human Rights (1985), p. 19.

interest of their members as employees.[31] It thus made clear that trade unions and membership in trade unions do not offer a general political mandate but are limited to questions arising from labour conditions.

How this objective is achieved is at the discretion of the contracting States;[32] they may establish consultation and information procedures, collective bargaining,[33] or other activities.[34] Considering the multitude of options, trade unions cannot claim specific means for protecting their members' interests or specific rules that would govern the exercise of their rights.[35] They do not have a right to conclude collective agreements either.[36] Instead, the constituent elements of trade unions' freedom of association have to be interpreted and developed to reflect progress in international law and public values.[37] Article 11 ECHR does not impose any concrete State obligation apart from not hindering trade union action and ensuring that trade unions are heard.[38]

Beyond this negative dimension, Article 11 ECHR aims at positive measures to ensure the effective enjoyment[39] of this right.[40] Contracting States are also obliged to promote the Convention rights by hindering interference by third parties, e.g. dismissals of employees for trade union membership[41] or adverse working conditions for trade union members.[42] The employee, however, has the burden of proof for any professional disadvantages linked to union membership.[43]

4. Justifications for Restricting the Right to Join Trade Unions

According to Article 11, paragraph 2 ECHR, no restriction shall be placed on the exercise of these rights other than those:

- prescribed by law and
- necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or the protection of the rights and freedoms of others.

31 CJEU, judgment of 8 October 1974, *General Union of Personnel of European Organizations v. Commission*, C-18/74; CJEU, *Maurissen and European Public Service Union* (n. 24).
32 ECtHR, *Association of Civil Servants and Union for Collective Bargaining v. Germany* (n. 9), para 54. See Gerards (2019), pp. 168 f.
33 ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 153. In its former jurisprudence, the Court had denied a right to collective bargaining, ECtHR, *Swedish Engine Drivers' Union v. Sweden* (n. 16), para. 34.
34 ECtHR, *National Union of Belgian Police v. Belgium* (n. 20), para. 39; ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania* (n. 13), para. 135; cf. ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 145. As for EU officials see CJEU, *Maurissen and European Public Service Union* (n. 24), para. 1.
35 ECtHR, *National Union of Belgian Police v. Belgium* (n. 20), para. 38; ECtHR, *Swedish Engine Drivers' Union v. Sweden* (n. 16), para. 39; ECtHR, *Tüm Haber Sen and Çinar v. Turkey* (n. 17), para. 28; ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania* (n. 13), para. 134.
36 ECtHR, *Association of Civil Servants and Union for Collective Bargaining v. Germany* (n. 9), para 59.
37 European Court of Human Rights (2022), para. 240; see Fornasier (2019), para. 4.118.
38 ECtHR, *Tüm Haber Sen and Çinar v. Turkey* (n. 17), para. 28.
39 Gerards (2019), p. 119.
40 ECtHR, judgment of 2 July 2002, *Wilson v. United Kingdom*, 30668/96, para. 41; Arabadjieva (2022), p. 5; Grabenwarter (2014), Article 11, para. 35; Harris et al. (2023), p. 723.
41 ECtHR, judgment of 4 April 2017, *Tek Gıda İş Sendikası v. Turkey*, 35009/05, para. 48.
42 ECtHR, *Wilson v. United Kingdom* (n. 40), para. 41; as for EU officials see CJEU, judgment of 15 December 1982, *Cowood*, C-60/82, para. 12.
43 CJEU, *Cowood* (n. 42), para. 12.

4.1. Lawful Restrictions

First of all, restrictions must be imposed by law. This shall make State measures foreseeable. Norms must be formulated with precision to enable citizens to anticipate the consequences of their actions.[44] They must stem from national legislation, be it written, unwritten or law interpreted and applied by the courts.[45] If authorities have a margin of discretion in applying the rules, their scope and the prerequisites for their exercise have to be clear from the law itself. Vague and imprecise rules do not meet these conditions.[46]

4.2. Legitimate Aims

Article 11, paragraph 2 ECHR defines an exhaustive list of legitimate aims. Restrictions of the right to form and join trade unions must be necessary for reasons of national security or public safety, prevention of disorder or crime, protection of health or morals and protection of the rights and freedoms of others. Only aims explicitly mentioned are legal.[47]

The categories must be interpreted in a rather restrictive manner.[48] They aim at preventing threats to the State as such and to democracy.[49] The ECtHR accepted the annulment of a collective agreement in a period when the legislator was about to adapt national law to international labour standards. Striving for coherence between law and practice has been considered a legitimate aim for preventing disorder.[50] Restrictions are also conceivable to protect the functioning of the public service, not only in the name of prevention of disorder but also protection of the rights and freedoms of others, i.e. "customers" of the public service. The Court has also accepted restrictions aimed at reducing the number of unions negotiating collective agreements if the restrictions safeguard the functioning of the collective bargaining system and facilitate an "overall compromise",[51] e.g. by preventing one trade union from negotiating the interests of its members to the detriment of other employees.

4.3. Necessary in a Democratic Society

A legitimate end does not justify the means. Article 11, paragraph 2 ECHR requires any restrictions of freedom of association in a democratic society to be necessary. In this regard, the ECtHR demands that any interference be dictated by a "pressing social need".[52] This requires producing convincing and compelling reasons for judging freedom of association to be a threat to vital public interests, for which the State has the burden of proof.[53] Any interference must be proportionate to the legitimate purpose.[54] This precondition seeks

44 ECtHR, judgment of 20 May 1999, *Rekvényi v. Hungary*, 25390/94, para. 34; ECtHR, judgment of 26 October 2000, *Hasan and Chaush v. Bulgaria*, 30985/96, para. 84; ECtHR, judgment of 2 August 2001, *N.F. v. Italy*, 37119/97, para. 29.
45 Schabas (2017), p. 501; Gerards (2019), pp. 200 f.; White and Ovey (2020), p. 313.
46 Grabenwarter (2014), Article 11, para. 24; Schabas (2017), p. 510; Gerards (2019), p. 205.
47 White and Ovey (2020), p. 311.
48 ECtHR, judgment of 10 July 1998, *Sidiropoulos and others v. Greece*, 26695/95, para. 38; Schabas (2017), p. 512.
49 White and Ovey (2020), p. 317.
50 ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 161.
51 ECtHR, *Association of Civil Servants and Union for Collective Bargaining v. Germany* (n. 10), para. 68.
52 ECtHR, *Tüm Haber Sen and Çinar v. Turkey* (n. 17), paras. 35 ff.; Schabas (2017), pp. 514 and 516.
53 ECtHR, *Tüm Haber Sen and Çinar v. Turkey* (n. 17), para. 40.
54 ECtHR (2022), para. 154 ff.

a balance between the individual rights of members of the public service or the rights of trade unions and the interests of society as a whole. It includes pondering whether there are other effective but less intrusive measures to achieve the legitimate aim.[55] In order to safeguard the effective enjoyment and efficient protection of fundamental rights and freedoms, contracting States have a limited margin of appreciation regarding whether an aim is legitimate and whether restrictions are necessary.[56] However, due to the delicate balance between the interests of labour and employers and national particularities in collective labour law, the standards for exercising the margin of discretion cannot entirely be harmonised.[57] Yet the contracting States' margin cannot go beyond the wording of the convention. Article 11, paragraph 2 ECHR demands restrictions to be "necessary", which is stricter than just being "desirable" or "useful". This is explained by the fact that democracy is not limited to majority rule but has to safeguard minority rights in order to prevent abuse of the prevailing opinion.[58]

Membership of trade unions is a precondition for the exercise of collective labour rights, especially the right to collective bargaining and the right to strike.[59] Collective agreements usually only bind members of the contracting parties. Hence, employees and civil servants whose access to and engagement in trade unions is restricted, would not be able to enjoy collectively negotiated advantages. Even in countries that envisage the general applicability of collective agreements (*Allgemeinverbindlicherklärung*), it may be in the employee's vital interest to be part of the negotiating partners so as to influence the contents of the agreements.

In this light, restrictions are "necessary" in the interest of national security or public safety, when trade unions recall violence or discrimination. The "functioning of the public service" is much more difficult to assess. It is not evident that public service members involved in consultation or public bargaining with the employer they represent in public will, in any case, cause public disorder or violate the rights of their customers. They certainly have a greater duty of loyalty to their employer than private employees.[60] Collective bargaining is not an expression of opposition between employer and employees, but rather a collective mechanism to improve working conditions. So even if we cannot separate the private from the public person, we have to distinguish between the performance of professional tasks and the pursuit of one's personal interest as an employee or civil servant.

4.4. Specified Restrictions (Article 11, paragraph 2 ECHR)

The scope of permissible restrictions to the right to form and join trade unions for public service members can be found in the convention itself. Article 11, paragraph 2 ECHR envisages lawful restrictions for members of the armed forces, the police or the administration of the State concerned. This allows national law provisions affecting the whole public sector. Although public employees may face harsher restrictions than others,[61] Article 11,

55 Schabas (2017), p. 513.

56 ECtHR, *Demir and Baykara v. Turkey* (n. 8), paras. 119 and 149.

57 Grabenwarter (2014), Article 11, para. 28; Fornasier (2019), para. 4.132.

58 Schabas (2017), p. 514.

59 For details see *The Right to Strike in the Civil Service* by G. Buchholtz in this volume.

60 ECtHR, judgment of 25 September 2012, *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, 11828/08, para. 57; see White and Ovey (2020), p. 474.

61 Grabenwarter (2014), Article 11, para. 31.

paragraph 2 ECHR only affects the exercise of their freedom of association, without completely impairing this right.[62] Any interference has to be "lawful", i.e. prescribed by national law, foreseeable, legitimate and proportional.[63] Unlike the ECHR, Article 9, paragraph 1, Co87, Article 5, paragraph 1 Co98 and Article 5, paragraph 3 ESC rev. limit lawful restrictions to members of the armed forces and police. Yet contracting States have the duty to generally also respect the freedom of association of persons they employ, be it on a public or private law basis.[64] In order to avoid contradictions to this principle, the term "public administration" has to be interpreted narrowly[65] to avoid creating loopholes in human rights protection for persons working in the public sector.

It is, therefore, necessary to distinguish between persons under a strong duty of loyalty, like members of the police or armed forces, and others.[66] The ECtHR determined that persons working in the public service cannot be treated as members of the "public administration" if they are not involved in administration as such. In such cases, Article 11, paragraph 2 does not apply.[67] The distinction between public administration and other types of public service is not as simple as that between civil servants and employees, which is based on merely formal status. A functional approach that considers the nature of their duties and obligations, e.g. the exercise of power conferred by law or the task of safeguarding the general interest of the State.[68] The scope of exceptions is limited to specific cases. Beyond the police and armed forces, it includes judges, prosecutors, tax officials, diplomats, and persons directly involved in executing, implementing or enforcing legal acts.[69]

Yet on the question of the personal scope of the exception clause, it is well to bear in mind that it does not constitute a ban on the right of association. Hence dissolving a trade union because it was founded by civil servants violates Article 11 ECHR.[70] The same applies to restrictions regarding collective agreements between civil servant unions and public administrations.[71] Regarding proportionality, a distinction has to be made between sanctions that directly relate to being a member of a union and sanctions related to other conduct, e.g. publishing one's point of view in the press.[72] In order to find a balance between individual freedom of association and interest in the functioning of the public service, engagement in trade unions could be restricted to the aforementioned groups so as not to impact the loyalty and impartiality expectations of their employers. This could especially be the case for controversial issues that touch on sovereign political decisions.

62 ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania* (n. 13), para. 145; Schabas (2017), p. 522; Fornasier (2019), para. 4.136; see European Commission of Human Rights (1985), p. 20.

63 Schubert (2022), Article 10, para. 77; White and Ovey (2020), p. 310.

64 ECtHR, *Swedish Engine Drivers' Union v. Sweden* (n. 16), para 37; ECtHR, judgment of 6 February 1976, *Schmidt and Dahlström v. Sweden*, 5589/72, para. 33; ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 109; ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania* (n. 13), paras. 141 ff.

65 ECtHR, judgment of 2 August 2001, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy,* 35972, *para. 30;* ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 97; Schabas (2017), pp. 522 f.; Fornasier (2019), para. 4.138; Schubert (2022), Article 10, para. 77.

66 White and Ovey (2020), p. 474.

67 ECtHR, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* (n. 65), para. 31; ECtHR, *Tüm Haber Sen and Çinar v. Turkey* (n. 17), paras. 35 ff.; ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 97.

68 Grabenwarter (2014), Article 11, para. 32; Schabas (2017), p. 523; Schubert (2022), Article 10, para. 79.

69 Fornasier (2019), para. 4.138; Schubert (2022), Article 10, para. 79.

70 ECtHR, *Tüm Haber Sen and Çinar v. Turkey* (n. 17), para. 32.

71 ECtHR, *Demir and Baykara v. Turkey* (n. 8).

72 ECtHR, *Engel and others v. Netherlands* (n. 16), para. 107.

Yet while direct conflict over core working conditions persists, joining and actively engaging in trade unions is an individual freedom recognised to civil servants and public service employees. The line between criticising labour conditions and opposing political decisions may sometimes be difficult to draw. However, restrictions to fundamental rights and freedoms have to be limited in order to be effective.

III. The Right to Join Political Parties

The right to join political parties is another aspect of freedom of association as protected in Article 11 ECHR. This fundamental right applies to everyone in the jurisdiction of a contracting State and, therefore, also includes those mentioned in Article 11, paragraph 2 ECHR: members of the armed forces, the police, and public administrations.[73]

1. Preliminary Remarks

Political parties play a crucial role in the "proper functioning of democracy"; they provide a forum for articulating political opinions and offer room for pluralism in society.[74] This is reflected by Article 12, paragraph 2 CFR, which states that political parties at the Union level contribute to expressing the political will of the citizens of the Union, thus underpinning their importance in ensuring representation in a democratic State.[75] Hence, the freedom to join a political party is closely linked to freedom of expression as guaranteed in Article 10 ECHR and Article 11 CFR because parties not only offer a framework for active participation in political discussions,[76] but membership also gives clear expression to an individual's political attitudes. In cases where the right to join political parties is in dispute, the ECtHR, therefore, often refers to Article 10 ECHR. However, the material scope of freedom of expression goes beyond that of Article 11 ECHR – associations must "not pursue policy goals that are contrary to the values of pluralist democracy and in breach of the rights and freedoms guaranteed by the Convention"[77] while at the same time individual opinions have to be accepted as long as they do not call for violence or cross the line to hate speech.

Membership in a political party may have critical implications for civil servants and public sector employees. Conflicts of loyalty may arise if they join parties that oppose the political aims of the State they represent in public. As with the right to join a trade union, a balance has to be struck between the individual's fundamental freedoms and interest in the functioning of the public service.

73 ECtHR, *Engel and others v. Netherlands* (n. 16), para. 54; ECtHR, *Swedish Engine Drivers' Union v. Sweden* (n. 18), para. 37; ECtHR, *Kosiek v. Germany* (n. 16), para. 35; ECtHR, *Glasenapp v. Germany*, (n. 16), para. 49; ECtHR, *Vogt v. Germany* (n. 16), para. 43; ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 96; see Fornasier (2019), para. 4.114.

74 ECtHR, judgment of 30 January 1998, *United Communist Party of Turkey v. Turkey*, 19392/92, para. 25; ECtHR, judgment of 8 December 1999, *Freedom and Democracy Party [ÖZDEP] v. Turkey*, 23885/94, para. 37; ECtHR, judgment of 12 April 2011, *Republican Party of Russia v. Russia*, 12976/07, para. 78; Schabas (2017), p. 503.

75 Grabenwarter (2014), Article 11, para. 3.

76 Grabenwarter (2014), Article 11, para. 2; Schabas (2017), p. 499; Harris et al. (2023), p. 610.

77 Europan Court of Human Rights (2022), para. 119, referring to ECtHR, judgment of 10 July 2018, *Fondation Zehra and others v. Turkey*, 51595/07, para. 55; see also ECtHR, *Freedom and Democracy Party [ÖZDEP] v. Turkey* (n. 74), para. 40; White and Ovey (2020), pp. 429 f.

2. Material Scope of Application

Article 11, paragraph 1 ECHR protects the right to association. It explicitly mentions trade unions, but not political parties. However, regarding the constitutional structures of a State, parties are covered as well, irrespective of the status that national law might confer on them.[78] This not only applies to parties whose views are favourably received, but also to those with offending or disturbing views.[79] Even parties criticising the existing legal order of a State follow a legitimate aim as long as they contribute to the public discourse and respect the democratic framework.[80] The *ratione materiae* covers membership and active engagement in parties, including the right to stand for elections and to make donations.

Freedom of association includes a negative dimension, which protects the right or otherwise to join a political party; this is an essential element of individual autonomy.[81] Accessing public service positions must therefore not be conditional on membership in a party representing the political majorities of the government. Any prerequisite ignoring this negative dimension would not only contravene freedom of association but also conflict with the right to non-discrimination as safeguarded in Article 14 ECHR.

Yet, in its earlier case law, the ECtHR decided that freedom of expression did not include the right to employment in public service. The Court, therefore, approved the rejection of probationary civil servants who had not been appointed to the German civil service on account of their political convictions, one of them sympathising with a communist party,[82] the other being an active member of a radical right-wing party.[83] The ECtHR argued that political attitudes may indicate a lack of qualification to work as a civil servant, who is expected to "uphold the free democratic constitutional system at all times".[84] In a later case, the ECtHR changed its opinion. It considered the dismissal of a civil servant because of her communist party membership to be a violation of freedom of expression and freedom of association.[85] The reasoning is, therefore, no longer limited to mere access to public service employment – indeed, this right is not foreseen by the ECHR[86]– but includes the personal autonomy of persons working in the public sector.

3. Justifications for Restricting the Right to Join Political Parties

Restrictions of the right to join political parties follow the principles outlined in Section II.3 for trade unions: they have to be prescribed by national law, pursue a legitimate aim and be necessary and proportionate. Due to the specific role of political parties in democratic and

78 Grabenwarter (2014), Article 11, para. 9; White and Ovey (2020), p. 464; Harris et al. (2023), p. 704.

79 ECtHR, judgment of 7 December 1976, *Handyside v. United Kingdom*, 5493/72, para. 49; ECtHR, judgment of 23 September 1994, *Jersild v. Denmark*, 15890/89, para. 37; ECtHR, *Freedom and Democratic Party [ÖZDEP] v. Turkey* (n. 74), para. 37; ECtHR, judgment of 6 December 2012, *Redfearn v. United Kingdom*, 47335/06, para. 56.

80 ECtHR, *United Communist Party of Turkey v. Turkey* (n. 74), para. 57; ECtHR, *Fredom and Democracy Party [ÖZDEP] v. Turkey* (n. 74), para. 41.

81 Schabas (2017), p. 502.

82 ECtHR, *Glasenapp v. Germany* (n. 16).

83 ECtHR, *Kosiek v. Germany* (n. 16).

84 ECtHR, *Kosiek v. Germany* (n. 16), para. 33; ECtHR, *Glasenapp v. Germany* (n. 16), para. 47.

85 ECtHR, *Vogt v. Germany* (n. 16).

86 Fornasier (2019), para. 4.98. Equal access to public service is guaranteed by Article 21, para. 2 Universal Declaration of Human Rights and Article 25 International Convention on Civil and Political Rights.

pluralist societies, these conditions must be applied more strictly than for other associations; the ECtHR requires "convincing and compelling reasons".[87]

3.1. Legitimate Aims

Article 11, paragraph 2 ECHR envisages restrictions that are necessary for reasons of national security or public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others. Nevertheless, a strict interpretation of these criteria does not entail a "free pass" for extremist parties. The contracting State's margin of appreciation is broader in respect of "national security" than in other matters.[88] Though even parties seeking to overthrow the political system of their State enjoy freedom of association, States have the right to "prevent a political or social grouping from concentrating its efforts on achieving an aim which is to undermine the foundations of pluralist democracy".[89] Parties that incite violence or aim to destroy democracy may be, therefore, sanctioned. The ECtHR has accepted the dissolution of political parties that have links to terrorist organisations, aim to establish Sharia law, use violence or cause public unrest.[90] Consequently, it is also possible to restrict public service employees and civil servants membership in such parties.

The ECtHR also agreed that it was legitimate to prevent disorder that could arise if members of the police force did not act in a politically neutral manner. In this respect, the Court acknowledged the historical experiences of Hungary with a totalitarian system.[91] The need to act neutrally in public administration is to protect the rights and freedoms of others, i.e. the "customers" of the public service who have a right to "good administration". Nevertheless, it is questionable to what extent it is justified to invoke the former political situation of a State to impose restrictions on fundamental rights.[92]

3.2. Necessary in a Democratic Society

Following such legitimate aims has to be necessary by virtue of "pressing social needs".[93] This requires an assessment of proportionality. Regarding occupational bans (*Berufsverbote*), the ECtHR recognises the importance of the duty of political loyalty, since the public service has to observe the constitution and protect democratic values. At the same time, freedom of expression itself is a fundamental value of "plural, tolerant and broadminded democratic societies".[94] The Court recalls that dismissals or occupational bans are severe sanctions that have an impact on the individual's reputation and livelihood. In order for a restriction to be proportionate, it is necessary to assess the professional behaviour of the employee or civil

87 ECtHR, *United Communist Party of Turkey v. Turkey* (n. 74), para. 46; Grabenwarter (2014), Article 11, para. 29; Schabas (2017), pp. 503 f. and 521.

88 Grabenwarter (2014), Article 11, para. 32.

89 ECtHR, *Fondation Zehra and others v. Turkey* (n. 77), para. 56; ECtHR, judgment of 2 September 1998, *Ahmed and Others v. the United Kingdom*, 22954/93, paras. 53 and 63; ECtHR, judgment of 13 February 2003, *Refah Partisi and others v. Turkey*, 41340/98, 41342/98, 41343/98 and 41344/98, para. 103.

90 European Court of Human Rights (2022), para. 171.

91 ECtHR, *Rekvényi v. Hungary* (n. 44), para. 41.

92 ECtHR, judgment of 10 April 2012, *Strzelecki v. Poland*, 26648/03, para. 45.

93 ECtHR, *Engel and others v. Netherlands* (n. 16), paras. 54 and 100; ECtHR, *Vogt v. Germany* (n. 16), para. 52; ECtHR, *Rekvényi v. Hungary* (n. 44), para. 42.

94 ECtHR, *Vogt v. Germany* (n. 16), paras. 51 ff.

servant. If the party is legal and provided the public servant does not exert inappropriate influence on clients or colleagues or express anti-constitutional views outside his or her working hours, sanctions are inappropriate and violate Articles 10 and 11 ECHR.[95]

Therefore, mere membership in a political party may not automatically lead to the assumption that civil servants or employees in the public service do not exercise their function and duties neutrally. It is indispensable to observe their professional conduct and to intervene only in the event of a breach of official duties.

3.3. Specified Restrictions (Article 11, paragraph 2 ECHR)

Article 11, paragraph 2 ECHR, which allows lawful restriction of freedom of association for members of the armed forces, the police or the public administrations, applies to membership in political parties as well. This exception must be interpreted narrowly so that their freedom of association is not impaired as such; hence restrictions have to be limited to particular circumstances.[96] As outlined in Section II.2, it covers specific groups of public servants who exercise public power.

While the ECtHR has approved restrictions on party membership for police officials[97] and "employees in uniform",[98] it is not appropriate in a democratic society to ban them from any political activity. It also has to be understood that "non-membership" of a political party does not automatically mean neutral behaviour of civil servants or public service employees. Even if they do not join a party, they may agree with a party's political values, support candidates or donate. So, contrary to the ECtHR's view, there is no guarantee that a ban on membership in political parties leads to a civil servant being "completely detached from the political dispute".[99]

The main aim of Article 11, paragraph 2 ECHR is to prevent conflicts between an individual's values and opinions and the functioning of the public service, especially the principle of equal treatment. Mere party membership is rather formal and does not automatically affect professional performance as such. However, requiring a declaration of membership in associations intended to inform the public about possible conflict of interest does not violate Article 11 or Article 14 ECHR as long as it applies to a broad range of associations and provided sanctions are strictly limited to professional conduct, but not to the membership as such.[100]

A fair balance has to be struck for other forms of political engagement as well. In the United Kingdom, certain civil servants in local governments were not allowed to stand for election, hold office in a political party or actively engage in party political debates. The ECtHR held that restrictions of Articles 10 and 11 ECHR cannot be limited to situations of threat to the stability of the constitutional order, for this would infringe the functioning of the public service and thus the public interest in the case of assistants of

95 ECtHR, *Vogt v. Germany* (n. 16), paras. 60 and 68; ECtHR, judgment of 22 November 2001, *Volkmer v. Germany*, 39799/98, paras. 45 ff.

96 ECtHR, *Demir and Baykara v. Turkey* (n. 8), para. 97; ECtHR, *Volkmer v. Germany* (n. 95), para. 47; Grabenwarter (2014), Article 11, para. 32.

97 ECtHR, *Rekvényi v. Hungary* (n. 44), para. 61.

98 ECtHR, *Strzelecki v. Poland* (n. 92), paras. 45 and 51 concerning police, armed forces, border police or municipal guards.

99 ECtHR, *Strzelecki v. Poland* (n. 92), para. 56.

100 ECtHR, judgment of 3 June 2008, *Siveri and Chiellini v. Italy*, 13148/04.

council members in the loyal exercise of their tasks and mandates. However, the principle of proportionality makes it necessary to “distinguish by the sensitivity of their duties” and to hinder the abuse of key positions.[101] Hence restrictions must not silence any political discourse, but “only in those types of activity, which on account of their visibility, would be likely to link a politically restricted post-holder in the eyes of the public or council members with a particular party political line”.[102] Since the civil servants concerned still had the right to join and participate in political parties, their freedom of association was not considered to have been violated.

IV. Conclusions

Freedom of association is a fundamental freedom that also applies to members of the public service. Trade union membership allows them to self-regulate the employment relationship.[103]

Membership of political parties is one way of participating in the democratic discourse. However, these rights and freedoms may conflict with the functioning of the public service. It has to be ensured that civil servants and public service employees act neutrally and give their “customers” equal treatment. Restrictions to freedom of association need to find a fair balance between these concerns. Even if Article 11, paragraph 2 ECHR allows the right of association to be limited for members of the police, the armed forces and the public administrations, their rights may not be completely curbed. One option to address potential conflicts of interest is to establish a code of conduct.[104] For example, the United Nations (UN) require members of the international civil service to align their work with UN general standards, such as non-discrimination, human dignity and fundamental rights (no. 3). Though (ethical) standards differ from country to country, all international civil servants have the right to be a member of a political party, but its views have to be consistent with the oath of service of the United Nations system (no. 49). However, in order to maintain independence and impartiality, civil servants may not engage in political activity like standing for or holding (national or local) political office; they may not accept or solicit funds, write articles or make public speeches or statements to the press. However, they are free to participate in local community or civic activities, provided this is consistent with the oath of service in the United Nations system (no. 48).[105]

Persons working in the public service enjoy human rights just like any other human being. Whether restrictions are indispensable for the exercise of their duties is a question that must, therefore, always be asked. Membership in trade unions or political parties can also be an expression of social plurality and diversity. The threshold is crossed when democratic values are no longer shared. The prohibition of membership in associations does not make political opinion disappear, as membership is only a visible expression of thought. Instead of curtailing fundamental rights from the outset, the best approach is to rate individual behaviour.

101 ECtHR, *Ahmed and others v. United Kingdom* (n. 89), paras. 53 and 62.

102 ECtHR, *Ahmed and others v. United Kingdom* (n. 89), para. 63.

103 Ales (2021), p. 27.

104 See *Ethical Standards for the Civil Service in Europe: Substitutes for or Complements of Legal Rules?* By A. Jacquemet-Gauché in this volume.

105 United Nations International Civil Service Commission (2013).

Bibliography

Ales E. (2021), 'EU Collective Labour Law: If Any, How?', in Haar B., Kun A. (eds), *EU Collective Labour Law*, Cheltenham: Edward Elgar, 26–55.

Arabadjieva K. (2022), 'Worker Empowerment, Collective Labour Rights and Article 11 of the European Convention on Human Rights', 22(1) *Human Rights Law Review*, 1–30.

De Becker A. (2021), 'Collective Bargaining in the Public Sector: Different Models in a Distinct International Framework', in Haar B., Kun A. (eds), *EU Collective Labour Law*, Cheltenham: Edward Elgar, 292–309.

European Commission of Human Rights (1985), *Preparatory Works*, www.coe.int/en/web/human-rights-convention/preparatory-works.

European Court of Human Rights (2022), *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Freedom of Association*, www.echr.coe.int/documents/guide_art_11_eng.pdf.

Fornasier M. (2019), 'Europäische Menschenrechtskonvention', in Preis U., Sagan A. (eds), *Europäisches Arbeitsrecht*, Cologne: Verlag Dr. Otto Schmidt, 153–200.

Gerards J. (2019), *General Principles of the European Convention on Human Rights*, Cambridge: Cambridge University Press.

Grabenwarter C. (2014), *European Convention on Human Rights: ECHR*, Oxford, Baden-Baden, Basel: Beck-Hart.

Harris D., O'Boyle M., Bates E., Buckley C. (2023), *Law of the European Convention on Human Rights*, Oxford: Oxford University Press.

Pietrogiovanni V. (2021), 'Collective Bargaining: (Not Just) a Fundamental Right', in Haar B., Kun A. (eds), *EU Collective Labour Law*, Cheltenham: Edward Elgar, 73–87.

Porta J., Sachs T. (2021), 'Conceptual Issues on Representation and Solidarity', in Haar B., Kun A. (ed), *EU Collective Labour Law*, Cheltenham: Edward Elgar, 56–72.

Schabas W. (2017), *The European Convention on Human Rights*, Oxford: Oxford University Press.

Schubert C. (2022), 'Europäische Menschenrechtskonvention', in Franzen M., Gallner I., Oetker H. (eds), *Kommentar zum europäischen Arbeitsrecht*, Munich: Verlag C.H. Beck, 411–506.

United Nations International Civil Service Commission (2013), *Standards of Conduct for the International Civil Service*, https://icsc.un.org/Resources/General/Publications/standardsE.pdf.

White R., Ovey C. (2020), *The European Convention on Human Rights*, Oxford: Oxford University Press.

45 The Right to Strike in the Civil Service

Gabriele Buchholtz

I. Introduction

The right to strike has always been a controversial issue in political and legal debates. It becomes even more delicate when the focus is on the civil service – a field that has been shaped by national legal traditions and follows its own logic and idiosyncrasies. The subject is sensitive: because strikes in the public sector do not merely represent a claim on the profits of a firm, but instead a claim on tax revenues, there is often a high degree of public interest and inflammation of popular sentiment. Therefore, public sector strikes in Europe are frequently accompanied by legal challenges and adjudication. As such, with high public interest and a preponderance of jurisprudence, there is substantial academic interest in the public sector strike as a phenomenon in Europe.

Because the legal views on civil service strikes across Europe are diverse, we must first do some groundwork that allows us to understand the heterogeneity of the legal landscape. Firstly, each country derives its regulations on strikes from a complex network of constitutional law, regulations, or judicial and/or trade union requirements. Secondly, civil service law is just as variegated, starting from the very definition of the term "civil service".[1] Lastly, these national laws, regulations, agreements and customs on the right to strike and the civil service also interface with European law, particularly through the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Through various decisions, such as in the cases *Viking*[2] and *Laval*,[3] the CJEU has left a strong European footprint in the legal strike domain of the Member States. For the purposes of this contribution, the ECtHR cases *Demir and Baykara*[4] and *Enerji Yapi-Yol Sen*,[5] which deal with the right to strike in the civil service sector, are of particular importance. In these decisions, the ECtHR derived a very far-reaching right to strike from the right to freedom of assembly in Article 11 of the European Charter of Human Rights (ECHR). Both decisions have attracted special attention throughout Europe. In its judgment on the constitutionality of the German ban on strike action for civil servants

1 See Krzywoń (2022) and *Defining the Civil Service: Towards a Better Understanding of the Nature of Civil Service Systems in Europe* by A. Krzywoń in this volume.

2 CJEU, judgment of 11 December 2007, *International Transport Workers' Federation and others v. Viking Line ABP and others*, C-438/05.

3 CJEU, judgment of 18 December 2007, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and others*, C-341/05.

4 ECtHR, judgment of 12 November 2008, *Demir and Baykara v. Turkey*, 34503/97.

5 ECtHR, judgment of 21 April 2009, *Enerji Yapi-Yol Sen v. Turkey*, 68959/01.

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(*Beamte*), the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) engaged with the ECtHR jurisprudence in detail.[6] However, with its decision in *Humpert*[7] of 14 December 2023, the Strasbourg court ruled that the ban on strikes for civil servants in Germany does not violate the right to freedom of assembly in Article 11 of the ECHR. The decision thus marks the temporary end of the inter-court dialogue between the ECtHR and the German Federal Constitutional Court in this matter.[8]

This contribution will analyse the right to strike in the civil service sector in Europe from a comparative law perspective, also taking into account the impact of the ECHR and the ECtHR. The structure of this article is determined by the objective of the investigation: after giving a brief overview of the legal strike landscape in Europe, light will be shed on the jurisdiction of the ECtHR and its recent decisions on the right to strike in the civil service sector. After that, emphasis will be placed on the national jurisdictions in detail. The German, French and Spanish legal orders prove to be particularly suitable for the purposes of this comparative law study: while the right to strike is constitutionally enshrined in these three countries, there are some essential differences that make a legal comparison very worthwhile. Finally, future developments in the field of civil service strikes in Europe will be outlined.

II. An Overview of the Right to Strike in Europe

As already mentioned, the right to strike is a complex matter, and the legal landscape in Europe is very heterogeneous. One of the main reasons is certainly that the European States do not have a completely congruent understanding of the term “strike”, and none of the States has yet attempted to comprehensively define a “strike” in legal terms.[9] This, of course, makes it difficult to work out parallels and differences between the individual legal regimes. Although there are similarities in the Romance language and Scandinavian countries, the differences still predominate and make systematisation challenging.[10] A legal comparison is also difficult in other respects: only in some European countries is the right to collective action or the right to strike constitutionally guaranteed. This applies to France, Greece, Italy, Portugal, Sweden, Spain, and Turkey.[11] However, at least freedom of association is guaranteed in Article 78 of the constitution of Denmark, Article 40 of the constitution of Ireland, Article 26 of the Luxembourg constitution, and Article 9, paragraph 3, of the German Basic Law (*Grundgesetz*, GG). In Iceland, freedom of association is also enshrined in Article 74 of the constitution, but the right to strike is derived from Law no. 80/1938. In Ireland, Article 40 enshrines the freedom of association. In the Netherlands, freedom of assembly and demonstration is expressly anchored in Article 9 of

6 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12.

7 ECtHR, judgment of 14 December 2023, *Humpert and others v. Germany*, 59433/18, 59477/18, 59481/18 and 59494/18.

8 Batura (2023).

9 Löwisch and Rieble (2017), Grundlagen para. 247; Rebhahn (2010), p. 62.

10 Rebhahn (2001), pp. 763 f.

11 See Preamble, paragraph 7, of the Constitution of the French Republic of 27 October 1946; Article 23 of the Greek Constitution of 7 June 1975; Article 57 of the Constitution of the Italian Republic of 22 December 1947; Article 40 of the Constitution of Portuguese Republic of 2 April 1976; Chapter 2, Article 14 of the Instrument of Government of Sweden of 28 February 1974; Article 28, para. 2 of the Constitution of Spain of 6 December 1978; Article 54 of the Turkish Constitution of 7 November 1982.

the constitution. The same applies to Belgium, where freedom of association is anchored in Article 27, and apart from that, Article 6, no. 4 of the European Social Charter (ESC)[12] is otherwise applied. The situation is similar in Austria, where the ECHR (including the freedom of association and the right to strike in Article 11 ECHR) has constitutional status.[13]

However, strikes are only regulated in more or less detail by law in Greece,[14] Great Britain,[15] Italy,[16] Ireland,[17] Luxembourg,[18] Portugal,[19] Spain,[20] Sweden,[21] and Turkey.[22] The rest of the European States largely leave strikes to be regulated by the judiciary rather

12 Article 6, no. 4 ESC provides: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties recognise: the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

13 Bohr (1992), pp. 40 f.; Buergenthal and Thürer (2010), p. 371; Rebhahn (2001), p. 768; Warneck (2008), pp. 7 f.

14 Article 23, para. 2, of the Greek constitution of 7 June 1975 reads: "Strike is a right that legally constituted trade unions may exercise to protect the economic and general labour interests of working people. Law enforcement officials and members of the security forces are prohibited from striking in any form. The right to strike is subject to special restrictions of the law regulating this right in the case of civil servants and employees of municipal administration and public bodies as well as employees of any type of public or non-profit enterprise whose operation is fundamental to the satisfaction of basic needs of society is. However, these restrictions cannot go so far as to abolish the right to strike or to prevent its lawful exercise."

15 The right to strike is not explicitly recognised by law in Great Britain. However, the courts largely assume that the right to strike is recognised as customary law. Nevertheless, the contours of this right to strike are very blurred. Under certain conditions, strikes are "immune" to civil sanctions. Indirectly, Great Britain has protected the right to strike under separate statutes since the *Trade Disputes Act* of 21 December 1906; *Edw. 7 c. 47*, 1906, https://app.vlex.com/#vid/808295497. In addition, Part V (Sec. 219–246) of the *Trade Union and Labour Relations (Consolidation) Act* of 16 July 1992, *Eliz. 2, c. 52*; www.legislation.gov.uk/ukpga/1992/52/pdfs/ukpga_19920052_en.pdf contains more detailed provisions on limiting tort liability in the event of strikes.

16 See Regulation on the right to strike of 12 June 1990 (*Regolamentazione diritto di sciopero*), *Gazz. Uff.,* 14 June 1990; www.di-elle.it/leggi-voce-menu/128-l-146-90-regolamentazione-diritto-di-sciopero.

17 Article 40.6.1.iii of the Irish constitution of 1 July 1937 grants freedom of association and the right to form trade unions. The *Industrial Relations Act* of 1 February 1990, *IRL-1990-L-20901*; www.gov.ie/en/publication/d5bd8c-constitution-of-ireland/ contains non-statutory regulations on strikes. As in Great Britain, strikes are generally illegal, see Rebhahn (2001), p. 768 footnote n. 51.

18 Although the right to strike is not expressly guaranteed by law in Luxembourg, its exercise is regulated by ordinary law.

19 Article 57 of the Portuguese constitution of 2 April 1976 grants the right to strike. Simple legal regulations can be found in *Lei da Greve from 1977*.

20 In Spain, Article 28, para. 2, of the Spanish constitution of 6 December 1978 states: "The right of workers to strike in defense of their interests is recognised. The law regulating the exercise of this right will provide the necessary guarantees to ensure the services essential to the community"; see also Royal Decree on Labour Relations of 4 March (*Real Decreto-ley sobre relaciones de trabajo*); www.boe.es/buscar/act.php?id=BOE-A-1977-6061. See also Spanish Constitutional Court, judgment of 8 April 1981, BOE-T-1981-9433.

21 In Sweden, Article 14 of the Instrument of Government of Sweden of 28 February 1974 states: "An association of workers as well as employers and an association of employers have the right to take industrial action, unless the law or contract provides otherwise"; simple legal regulations: Sections 41 ff. of the Codetermination Act of 10 June 1976 (*Lag om medbestämmande i arbetslivet*), *SFS* 976, 580; www.government.se/contentassets/bea67b6c1de2488cb454f9acd4064961/sfs-1976_580-employment-co-determination-in-the-workplace-act-sfs-2021_1114.pdf; for more details see Rebhahn (2001), p. 768.

22 More detailed specifications for the strike are set out in Article 54 of the Turkish constitution of 7 November 1982.

than the legislature.[23] In France, for instance, the current constitution only refers to the preamble of the 1946 constitution, which mentions the right to strike; apart from that, the right to strike is mainly based on case law. Denmark and Sweden stand out: these States have not passed any legal regulations on strikes and leave it entirely to the social partners to organise freedom of association.

III. An Overview of the Right to Strike in the Civil Service in Europe

With this basic understanding of the different concepts of the right to strike, we will now sharpen our focus on the right to strike in the civil service. A legal comparison in this field of law is a challenging and complex undertaking; it could in fact include a legal comparison of the entire civil service law in each State to create a well-grounded understanding of the unique systematics and underlying rationale. While that would obviously exceed the scope of this book, let alone this chapter, this contribution will attempt to facilitate a basic understanding of the respective civil service law and form legal categories in order to identify similarities and differences in how European States guarantee and apply the right to strike in this sector.

Most importantly, a differentiation between status-based strike bans and function-based strike bans must be made in order to understand this legal matter. Only the Federal Republic of Germany, Denmark, and Turkey have a general, status-based ban on strikes for all civil servants, regardless of their specific tasks and activities. In the Netherlands and Sweden, in contrast, civil servants' strikes are recognised by case law. The majority of European countries, however, take a differentiated approach: the permissibility of a strike depends on the specific function performed by the person employed in the civil service. Activities that are particularly essential to the functioning of the civil service are excluded from the right to strike, while in all other respects strikes are permitted. This approach applies to all members of the civil service, regardless of their status (civil servant or employee in the public service). Thus, instead of a status-based differentiation, a differentiation based on the respective function is made for strikes in the entire civil service. In France, for example, civil servants working in "sensitive" areas – such as prison guards, military officers, police officers, prefects and judges – are legally excluded from the right to strike.[24] However, a more in-depth legal comparison must be limited to individual legal systems in order to draw meaningful conclusions (see Section V).

23 This applies to Belgium, Denmark, Germany, France, Greece, Ireland, Italy, Luxembourg and the Netherlands; for more details, see Rebhahn (2001), p. 768; Warneck (2008), p. 7.

24 Similarly, Article 23, para. 2, of the Greek constitution provides that "strikes of any nature whatsoever are prohibited in the case of judicial functionaries and those serving in the security corps. The right to strike shall be subject to the specific limitations of the law regulating this right in the case of public servants and employees of local government agencies and of public law legal persons as well as in the case of the employees of all types of enterprises of a public nature or of public benefit, the operation of which is of vital importance in serving the basic needs of the society as a whole. These limitations may not be carried to the point of abolishing the right to strike or hindering the lawful exercise thereof." According to the Luxembourg legal opinion, certain groups of civil servants are also exempt from the right to strike – namely members of the diplomatic service, judges, public prosecutors, administrative boards, heads of public educational institutions and police officers. Similar restrictions also exist in Spain. In Sweden, however, the restrictions on official strikes are less extensive. Persons exercising sovereignty are only prevented from holding a support strike. Finally, reference should be made to Austrian law, where due to the constitutional status of Article 11 ECHR, there is also a ban on civil servants' strikes, which is grounded in function-based criteria.

IV. The Impact of the ECHR on the Right to Strike in Europe

Before starting a comparative analysis of the right to strike in the civil service, it is important to determine what influence is exerted at the European level.[25] Over the past decades, an increasing influence of European law on the legal orders of European countries can be observed. This applies also to the field of labour law, which is said to have socially "integrative" potential for Europe due to its social[26] dimension.[27] This influence also affects the field of strike law. In particular, the decisions of the CJEU in the *Viking* and *Laval* cases have attracted considerable attention in the Member States.[28] In these cases, the CJEU had to deal with the question of whether fundamental freedoms under the Treaty on the Functioning of the European Union (TFEU) should take precedence over the right to strike. In the specific cases, the Luxembourg judges decided in favour of the fundamental freedoms.

Most important, however, is the impact of the ECtHR; the Strasbourg Court has distinguished itself as a driving force in the area of labour law by declaring the ECHR to be a "living instrument".[29] Due to this development, it is not surprising that national labour law, including the right to strike, has been subject to an ever-increasing influence from Strasbourg. The starting point is the freedom of assembly guaranteed in Article 11 ECHR, which provides:

> (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

For the purpose of this contribution, the legal cases *Demir and Baykara*[30] and *Enerji Yapi-Yol Sen*[31] are of special importance.[32] In these decisions, the ECtHR dealt with the right to strike in the civil service sector. Thereby, the court deduced a very far-reaching

25 For more details see Buchholtz (2023).

26 Mantouvalou (2013), pp. 530 f.; Novitz (2008), pp. 540 f.

27 Kingreen (2010), p. 361.

28 CJEU, *International Transport Workers' Federation and others v. Viking Line ABP and others* (n. 2); CJEU, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and others* (n. 3).

29 See for example ECtHR, *Demir and Baykara v. Turkey* (n. 4), para. 146.

30 ECtHR, *Demir and Baykara v. Turkey* (n. 4).

31 ECtHR, *Enerji Yapi-Yol Sen v. Turkey* (n. 5).

32 Of course, the ECtHR has dealt with strikes in the public sector before. In the *Pellegrin* case, the ECtHR already distinguished between employees and fonctionnaires (i.e. civil servants), see: ECtHR, judgment of 8 December 1999, *Pellegrin v. France*, 28541/95. Nevertheless, the decisions *Demir and Baykara* as well as *Enerji Yapi-Yol Sen* are particularly important for the purpose of this contribution, because the ECtHR clearly stated here for the first time that civil servants fully benefit from Article 11 of the ECHR.

right to strike from Article 11 ECHR.[33] These decisions have been recognised in the literature as constituting a "paradigm shift" and landmark decisions.[34] It is therefore important to take a brief look at the case law development of the ECtHR on Article 11 ECHR and, especially, at the decisions in *Demir and Baykara* as well as *Enerji Yapi Yol-Sen*.

The judgment *Demir and Baykara* is based on the following facts: the two Turkish applicants were civil servants and members of a union. This union signed a collective agreement with the city council. Since the city council did not comply with its obligations under this collective agreement, the union brought a successful action at the District Court. However, the Court of Cassation subsequently quashed the decision, because – according to their reasoning – civil servants may set up a trade union, under Turkish law, but are not allowed to conclude collective agreements. Finally, the two complainants brought an action before the ECtHR alleging a violation of Article 11 ECHR. In its decision of 12 November 2008, the Grand Chamber of the ECtHR unanimously found a violation of Article 11 ECHR. The Court referred to the "living instrument doctrine" and emphasised that the Convention must be interpreted in the light of present-day conditions and the developments in international law, so as to reflect the increasingly high human rights standards. With regard to international standards, the court recognised, for the first time, that the right to collective bargaining was an essential element of the right to freedom of association in Article 11 ECHR.[35]

The judgment *Enerji Yapi-Yol Sen* is based on facts similar to those in *Demir and Baykara*: a circular was published by the Prime Minister banning public sector employees from a strike organised by the trade union. Despite the strike ban, members of the union went on strike. As a result, they were disciplined. In its application to the ECtHR the trade union alleged a breach of Article 11 ECHR by the Turkish authorities. On 21 April 2009, the ECtHR held that there had been a violation of Article 11 ECHR. The Court stated that not only the right to collective bargaining but also the right to strike was an essential part of the provisions in Article 11 ECHR.[36] Moreover, the Court acknowledged that the right to strike was not totally guaranteed and could be subject to certain conditions and restrictions. However, the circular in this case, which had been written in general terms without providing exceptions, deprived all civil servants of the right to strike. Thus, it constituted a violation of Article 11 ECHR. That is to say, a general strike ban is not in conformity with the provisions of Article 11 ECHR if no balancing of conflicting interests has been carried out by public authorities. Civil servants cannot, in principle, be deprived of the exercise of the right to strike simply due to their formal status. Restrictions are only conceivable for members of the "administration of the State" (Article 11, paragraph 2 ECHR), for example those who exercise sovereign powers.[37]

33 The Court took the view: "The grant of a right to strike represents without any doubt one of the most important of these means, but there are others," see ECtHR, judgment of 6 February 1976, *Schmidt and Dahlström v. Sweden*, 5589/72, para. 36. See also ECtHR, judgment of 27 October 1975, *National Union of Belgian Police v. Belgium*, 4464/70, para. 39; ECtHR, decision of 10 January 2002, *Unison v. the United Kingdom*, 53574/99; Fütterer (2011), p. 511; Jacobs (2013), § 12 pp. 310 f.; Lindner (2011), p. 307; Seifert (2009), p. 357; Mantouvalou (2013), pp. 532 f.; critical Novitz (2003), p. 238.

34 Fütterer (2011), p. 511; similarly Lörcher (2009), p. 229; Lörcher (2018), p. 117 Rn. 41; Lörcher (2013), § 1 p. 3. In the international context, see the discussion at Ewing and Hendy (2010), p. 47.

35 ECtHR, *Demir and Baykara v. Turkey* (n. 4), para. 157.

36 ECtHR, *Enerji Yapi-Yol Sen v. Turkey* (n. 5), para. 24.

37 ECtHR, *Enerji Yapi-Yol Sen v. Turkey* (n. 5), para. 32.

However, the ECtHR has significantly altered its stance on the right to strike, as demonstrated in the recent *Humpert* case on the right to strike of German civil servants.[38] The Strasbourg Court evaluated the German strike ban's compliance with the Convention and concluded that it was justified under Article 11, paragraph 2 ECHR. This is surprising, both in terms of outcome and reasoning, considering the broad interpretation of Article 11 ECHR introduced by the ECtHR in *Demir and Baykara* and *Enerji Yapi-Yol Sen*. In *Humpert*, the Strasbourg Court emphasised the need for a proportionality assessment "in ascertaining whether restrictions on union freedoms have complied with Article 11".[39] The ECtHR also pointed out that "a complete ban on the right to strike in respect of certain categories of such workers requires solid evidence from the State to justify the necessity of those restrictions".[40] It should be noted at this point that the ECtHR had previously stated in *Enerji Yapi-Yol Sen* that the strike ban "cannot extend to civil servants in general".[41] With the *Humpert* decision, the ECtHR is now focusing more clearly on the proportionality test which required the

> assessment of all the circumstances of the case [. . .], considering the totality of the measures taken by the respondent State to secure trade-union freedom, any alternative means – or rights – granted to trade unions to make their voice heard and to protect their members' occupational interests, and the rights granted to union members to defend their interests.[42]

For the purpose of the proportionality test, the Court developed a set of criteria, e.g. the extent of the restriction on the right to strike and the measures for civil servants to protect their occupational interests as well as other rights and privileges.[43] In the end the Court concluded that

> while the right to strike is an important element of trade-union freedom, strike action is not the only means by which trade unions and their members can protect the relevant occupational interests and Contracting States are in principle free to decide what measures they wish to take in order to ensure compliance with Article 11 as long as they thereby ensure that trade-union freedom does not become devoid of substance as a result of any restrictions imposed.

Measured against these principles, the ECtHR decided that in Germany

> a variety of different institutional safeguards have been put in place to enable civil servants and their unions to defend occupational interests [. . .]. The Court considers that these measures, in their totality, enable civil servants' trade unions and civil servants themselves to effectively defend the relevant occupational interests.[44]

38 ECtHR, *Humpert and others v. Germany* (n. 7).
39 ECtHR, *Humpert and others v. Germany* (n. 7), para. 102.
40 ECtHR, *Humpert and others v. Germany* (n. 7), para. 107.
41 ECtHR, *Enerji Yapi-Yol Sen v. Turkey* (n. 5), para. 24.
42 ECtHR, *Humpert and others v. Germany* (n. 7), para. 109.
43 ECtHR, *Humpert and others v. Germany* (n. 7), para. 122.
44 ECtHR, *Humpert and others v. Germany* (n. 7), para. 144.

Therefore, the ban on strikes for German civil servants was justified and in compliance with conventions. Since the *Humpert* decision, it is now clear that the primary concern of the ECtHR is not whether the ban on strikes by civil servants is status-based or function-based. The central criterion is proportionality, which must regard all aspects of the case, including the conditions of civil service law and the privileges enjoyed by civil servants.

V. Comparative Analysis: The Right to Strike in the Civil Service in Germany, Spain, and France

In the following, the fundamentals of civil service law and the right to strike for civil servants in Germany, France, and Spain will be examined. In each country, the constitution enshrines a right to strike, but the legal implementation is very different. Moreover, these three jurisdictions have wildly divergent cultures and practices of striking. To put it concisely, France, on the one hand, is considered the world champion in strikes, even in the civil service, and Spanish civil servants are almost as eager to strike as the French; Germany, on the other hand, bans civil service strikes. This is reason enough to take a closer look at the differences and parallels between these three legal systems. To maintain the appropriate scope for this handbook, this contribution will focus only on the essential differences and parallels between civil servants' status and their legal right to strike. Questions of procedural law or the consequences of an unlawful strike will not be discussed.

1. Germany

The constitutional anchor for the right to strike in Germany is the freedom of assembly granted in Article 9, paragraph 3 GG, which guarantees the right "to form associations to protect and promote working and economic conditions". The right to strike is not explicitly mentioned in the constitution, but it is part of the constitutional guarantee of the freedom of association. It is mostly shaped by case law of the Federal Labour Court (*Bundesarbeitsgericht*, BAG), rather than being clearly legislatively circumscribed – in fact, a comprehensive legal definition of a "strike" does not exist. Instead, courts have defined key features of strikes as a cessation of work that is planned and concerted, conducted by a large number of workers, and which aims to achieve a specific objective. The defining characteristics of the strike are thus, on the one hand, the "collective appearance" and, on the other hand, "the withholding of work owed for the purpose of exerting pressure".

All workers enjoy the right to strike, including public sector employees. However, this does not apply to those who have been formally appointed as a civil servant: civil servants are excluded from the right to strike simply because of their formal status. The constitutional starting point for this strike ban is Article 33, paragraph 5 GG. It stipulates that the law governing the civil service is to be regulated and developed further, taking into account the core structural principles of the professional civil service (*hergebrachte Grundsätze des Berufsbeamtentums*). Article 33, paragraph 5 GG is "directly applicable law and contains a regulatory duty of the legislature and a guarantee of the career civil service system as an institution".[45] As an institution, the career civil service system is based on

45 German Federal Constitutional Court, judgment of 6 March 2007, 2 BvR 556/04, para. 41; German Federal Constitutional Court, decision of 19 September 2007, 2 BvF 3/02, para. 45.

expertise, professional performance, and the loyal exercise of one's duties. It is intended to ensure a stable administrative system.[46] The strike ban for civil servants is, according to the BVerfG, derived from these core structural principles in Article 33, paragraph 5 GG, namely from the duty of loyalty, the principle of lifetime employment and the principle of "alimentation". Especially with regard to the duty of loyalty, the BVerfG justifies the ban on strike as follows:

> The civil servants' duty of loyalty is one of the traditional principles of the career civil service system and part of the core of the institutional guarantee under Article 33, paragraph 5 GG. This duty of loyalty bears special importance even in a modern administrative State whose professional and efficient exercise of functions depends upon an intact, loyal, dutiful staff of civil servants who are deeply committed to the State and its constitutional order. Civil servants are bound to serve the common good and thus to exercise their duty in a disinterested manner and they must set aside their own interests when carrying out the duties entrusted to them. Engaging in activities of industrial disputes and the use of economic pressure to assert one's own interests, in particular measures of collective industrial disputes within the meaning of Article 9, paragraph 3 GG, like the right to strike, are not compatible with the civil servants' duty of loyalty.[47]

Because the civil service status goes hand in hand with numerous privileges (compared to public employees), civil servants are required to demonstrate loyalty towards the State. The right to strike is not compatible with this obligation, according to the BVerfG. In 2018, the BVerfG expressly confirmed this legal view.[48] The strike ban for civil servants has constitutional status as "a traditional principle" laid down in Article 33, paragraph 5 GG.[49] It is "fundamental".[50]

> A right to strike, even for some groups of civil servants only, would fundamentally reshape the understanding and regulations of the civil service. [. . .] [I]t would require fundamental changes to these principles, which are essential to the functioning of the civil service.[51]

In their decision from 2018,[52] the judges in Karlsruhe also had to answer the question of whether the ban on civil servant strikes was compatible with the ECHR and the case law of the ECtHR. The judges explained: "The ban on strike action for civil servants in Germany is in accordance with (. . .) the guarantees of the European Convention on Human Rights." Furthermore, the Court briefly summarised: "[A] conflict between German law and the European Convention on Human Rights can presently not be

46 German Federal Constitutional Court, decision of 17 October 1957, 1 BvL 1/57, para. 31; German Federal Constitutional Court, decision of 19 September 2007, 2 BvF 3/02, paras. 45 and 46.

47 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12, para. 121.

48 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12.

49 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12, para. 143 ff.

50 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12, para. 152.

51 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12, para. 153.

52 Critical Buchholtz (2023); Jacobs and Payandeh (2020).

established."[53] If there was a conflict between national law and the provisions of Article 11 ECHR, the BVerfG added, it can be resolved. At this point, the Court introduced a new line of argumentation[54] and stated that

> special importance must be attached to the specific context of the decision by the European Court of Human Rights when interpreting the Basic Law. Where it is methodologically untenable or incompatible with the Basic Law to include values of the European Convention on Human Rights, the Constitution's openness to international law is limited.[55]

This line of argumentation is remarkable because the judges in Karlsruhe thereby clarified the boundaries of the principle of the constitution's "openness to international law" and drew them even closer. However, this approach needs to be criticised. Human rights standards apply regardless of the context and guarantee an inviolable minimum standard.[56] The context does not allow for relativisations of the minimum standard.[57]

Which options would have been available to the BVerfG instead?[58] One might easily argue that the wording of Article 33, paragraph 5 GG is open to a new interpretation in accordance with Article 11 ECHR. Such a new interpretation would not touch, let alone change, the identity/core of the constitution. The consequence would have been a right to strike for some groups of civil servants who do not exercise sovereign powers – teachers for example. In passing, it is worth mentioning that teachers in Germany can be employed as civil servants or as non-civil servants. So why should German law differentiate when it comes to the right to strike? It is difficult to justify why people working in the same classroom are allowed to strike while others are not.[59]

With the *Humpert* decision, the ECtHR has clarified that the German status-related strike ban is in conformity with Article 11 ECHR. Thus, the inter-court dialogue

53 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12, para. 163. However, not all of the lower courts in the previous proceedings have seen it that way: encouraged by the decisions from Strasbourg, several teachers from all over the country went on strike and took legal action against the disciplinary measures before the German administrative courts. At first instance, the courts took quite different positions. The Administrative Court of Düsseldorf (judgment of 15 December 2010, 31 K 3904/10.O) waived the fines of the plaintiffs by paying attention to the judgments of the ECtHR, especially *Demir and Baykara* and *Enerji Yapi-Yol Sen*. The administrative court of Kassel (judgment of 27 July 2011, 28 K 1208/10.KS.D) even found the two plaintiffs to be right in light of the decisions from Strasbourg. In contrast, the Osnabrück Administrative Court (judgment of 19 August 2011, 9 A 1/11) and the Bremen Administrative Court (judgment of 3 July 2012, D K 20/11) adhered to the traditional ban on civil servants' strikes. However, the decisions of second instance were more uniform. The Higher Administrative Court of Münster (judgment of 7 March 2012, 3d A 317/11.O) regarded the judgments of the ECtHR just like the Higher Administrative Court of Lüneburg (judgment of 12 June 2012, 20 BD 7/11) as no real threat to the German civil service strike ban. Finally, in 2014, the Federal Administrative Court in Leipzig confirmed the ban on strike action for civil servants (judgment of 2 January 2013, 2 C 1/13). Nevertheless, the Court admitted that the ban was contrary to the provisions of Article 11 ECHR.

54 See also Buchholtz (2023); Jacobs and Payandeh (2020), pp. 231 f.

55 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12, para. 126.

56 Heuschmid (2018), p. 69.

57 See Buchholtz (2023), pp. 279 f.; Jacobs and Payandeh (2020), p. 232.

58 Buchholtz (2023), p. 280.

59 Buchholtz (2023).

between Karlsruhe and Strasbourg regarding the civil servants' strike has come to a preliminary end.[60]

2. *France*

In France, Article 4 of Title 1 of the General Statute for civil servants provides that "a civil servant is in a statutory and regulatory position *vis-à-vis* the administration".[61] Civil servants are subject to the rights and duties set out in this statute and supplementary regulations. The status of a civil servant is held by all people who are permanently employed by the State, specifically in three branches: the civil service (*la fonction publique d'État*) in ministries, schools and prefectures; local authorities (*la fonction publique territoriale*) in regions, departments, municipalities; and the entire healthcare system (*la fonction publique hospitalière*). Civil-servant status is, like in Germany, granted to persons appointed to a permanent post and established within a grade. The civil servant is appointed by a unilateral administrative order. Furthermore, as under German law, civil servants are in a unilateral relationship with the State and not, like employees, in a contractual relationship with their employer. Therefore, for the right to strike in the public sector in France, the qualification as a civil servant, employee or worker is just as irrelevant as the assignment of the employment contract to public or private law. The sole decisive factor is participation in a "civil service".

Similar to Germany, the strike in France is not legally defined but is generally understood as a collective action which serves to assert or achieve professional claims. The right to strike is enshrined in the Preamble of the 1946 Constitution, which still has constitutional status today. The Preamble provides in paragraph 7: "The right to strike shall be exercised within the framework of the laws governing it." In principle, this right is granted to everyone. Unlike in Germany, however, there is no general exclusion of civil servants from the right to strike. However, before the 1946 Constitution, civil servants did not enjoy the right to strike. Civil servants were refused this right, as being irreconcilable with the nature of the functions discharged by the civil service. These functions should work without interruption. Hence, it was deemed inconceivable that a person appointed to ensure their unimpeded operation was allowed to interrupt them by going on a strike.[62]

In addition to the constitutional anchor, Article 10 of Law no. 83–634,[63] which regulates the rights and duties of civil servants, refers to the general legal provisions on the right to strike. Moreover, Article 521–2 to Article 521–6 regulate the conduct of strikes in the public sector. In 1950, the Council of State (*Conseil d'Etat*) recognised that administrative authorities cannot regulate the right to strike but allowed them to organise "minimum services" on a case-by-case basis in order to guarantee the uninterrupted functioning of public services (principle of continuity of public services).[64] With regard to strikes in healthcare, for example, a minimum service must be guaranteed, and in preschools and

60 Batura (2023).

61 See *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

62 For the history of the strike in the civil service in France, see Mankiewicz (1955), p. 89.

63 Law on the rights and obligations of civil servants of 13 July 1983 (*Loi portant droits et obligations des fonctionnaires*), www.legifrance.gouv.fr/loda/id/JORFTEXT000000504704.

64 Revue de Droit public 66 (1950), 702 ff.

elementary schools, teachers must ensure the supervision and care of children who come despite the strike.

However, there are some civil servants in France who are completely excluded from the right to strike due to their specific functions.[65] These are active officers of the *police nationale*, judges and military personnel, employees of the interior ministry, and officials of the decentralised services of the prison administration (such as prison guards). These are staff in a position of authority which is incompatible with striking due to the nature of the functions discharged. Incidentally, this list of exclusions is very similar to Article 11, paragraph 2 ECHR, which also excludes groups with special functions *vis-à-vis* the State from the right to strike.

In conclusion, it can be stated that the French and German right to strike and their civil service laws are similar in certain respects. What is important, however, is that in Germany the ban on civil service strikes is based on the formal status as a civil servant whereas in France, the strike ban is based on the function performed. The French solution thus corresponds more closely to the prevailing attitude of the EU Member States.

3. Spain

The right to strike in Spain has, like in Germany and France, constitutional status and is explicitly guaranteed in the 1978 Constitution. Article 28, paragraph 2 provides: "The right of workers to strike in defence of their interests is recognised. The law regulating the exercise of this right shall establish the guarantees necessary to ensure the maintenance of essential community services."[66] Both the exercise and the legal implementation of the right to strike are among the most important guarantees in Spanish law because of their fundamental status. As in Germany and France, a "strike" is not legally defined, but is generally understood to be a collective stoppage of work directly related to the occupational interests of workers.

Unlike in Germany and France, there are quite detailed legal regulations on the right to strike in Spain, above all, the Royal Decree on Labour Relations, which contains 26 provisions on strikes, lockouts and arbitration, some of which have been declared unconstitutional.[67] The law grants civil servants the unrestricted right to strike but, as in France, requires a minimum level of essential services to be maintained during a strike. That is already clear from the wording of the constitution ("The law regulating the exercise of this right shall establish the guarantees necessary to ensure the maintenance of essential community services"). However, these essential services are not regulated in detail by law. In the absence of clear regulations, the power to define such services rests with the governmental or executive bodies. In particular, they must define what services are "essential"

65 See DC 79–105, Revue de Droit public 95 (1979), 1735 ff.: "Considérant (. . .) que ces limitations peuvent aller jusqu'à l'interdiction du droit de grève aux agents dont la présence est indispensable pour assurer le fonctionnement des éléments du service dont l´interruption pourrait atteinte aux besoins essentiels du pays."

66 Translation by the Agencia Estatal Boletín Oficial del Estado. See also *The Civil Service in Spain: The Deficit of Organisation in Public Employment and the Principle of Democracy* by R. García Macho in this volume.

67 Royal Decree on Labour Relations of 4 March 1977 (*Real Decreto-ley sobre relaciones de trabajo*, www.boe.es/buscar/act.php?id=BOE-A-1977-6061. See also Spanish Constitutional Court, judgment of 8 April 1981, BOE-T-1981-9433.

and must be maintained, and to what extent. Although negotiations on this are possible and even desirable, decision-making power ultimately rests with the administration alone. Administrative practice is quite generous in determining both what constitutes an essential service and the scope of the emergency service that must always be maintained, particularly in the area of transport. Furthermore, there is a general obligation to give prior notice of five days, according to Article 26 of the Royal Decree on Labour Relations; this period is extended to ten days in certain areas of the civil service, according to Article 4 of the Royal Decree on Labour Relations.

Moreover, like in France, some civil servants are completely excluded from the right to strike due to their specific function: the right to strike is not accorded to judges, magistrates, public prosecutors, or members of the police and military forces. A right to strike is deemed irreconcilable with the nature of the functions discharged. Again, this list of exclusions is very similar to Article 11, paragraph 2 ECHR, which also excludes groups with special functions *vis-à-vis* the State from the right to strike.

In conclusion, it can be stated that the French and the Spanish right to strike are very similar because of their function-based approach. In the German approach, however, the strike ban in the civil service sector is based on the formal status of a civil servant only. The French and the Spanish solutions thus correspond more closely to the prevailing attitude of the EU Member States. Otherwise, however, Spanish law differs from German and French law because it is legally regulated in quite substantial detail in the Royal Decree on Labour Relations.

VI. Conclusion

The right to strike traditionally falls within the national legal domain and is, therefore, quite resistant to change. Politicians usually find it difficult to implement reforms in this area, not least because the topic is naturally very unpopular with decision-makers, who usually belong to the civil service themselves. The existing right to strike for civil servants is role- or function-based in most European legal systems, with strike bans limited to a narrow set of civil servants who provide critical State functions, as in France and Spain. Germany is an exception, as its right to strike is status-based, and completely bans strikes, including civil servants in non-critical State functions (such as public universities or teachers in schools). However, in its *Humpert* decision, the ECtHR affirmed the conformity of the German strike ban with the Convention. The Strasbourg Court carried out an extensive proportionality test, taking into account, in particular, the fact that German civil servants enjoy numerous privileges. What essence can be derived from this decision? The Court aimed to consider national peculiarities appropriately. The right to strike for civil servants is a domain of national law that follows its own rationalities. Evaluating the civil servants' right to strike is a complex matter that can only be done adequately if the national civil service law is considered as a whole. This contribution hopefully helped to classify the complex matter better.

Bibliography

Batura J. (2023), 'A European Dialogue on Strike Action: The Strike Ban for German Civil Servants between Karlsruhe and Strasbourg', *VerfBlog*, 20 December, https://verfassungsblog.de/a-european-dialogue-on-strike-action/.

Bohr M. (1992), *Rechtliche Regelungen des Streikes und wirtschaftliche Auswirkungen in der Bundesrepublik Deutschland, Österreich, Belgien, Frankreich und Italien: eine rechtsvergleichende*

Untersuchung im Hinblick auf die Frage nach der wirtschaftlichen Zweckmäßigkeit einer expliziten positivrechtlichen Gewährleistung des Streikrechtes, Berlin: Duncker & Humblot.

Buchholtz G. (2023), 'The Impact of the European Convention on Human Rights on German Labour Law: A Special Focus on Collective Labour Law', in Fornasier M., Stanzione M.G. (eds), *The European Convention on Human Rights and Its Impact on Private Law: A Comparative Perspective*, Cambridge: Intersentia, 273–281.

Buergenthal T., Thürer D. (2010), *Menschenrechte*: *Ideale, Instrumente, Institutionen*, Baden-Baden: Nomos.

Ewing K.D., Hendy J. (2010), 'The Dramatic Implications of Demir and Baykara', 39 *Industrial Law Journal Oxford*, 2–51.

Fütterer P. (2011), 'Das Koalitions- und Streikrecht im EU-Recht nach dem Wandel der Rechtsprechung des EGMR zur Koalitionsfreiheit gemäß Art. 11 EMRK (Demir und Baykara und andere)', 4 *Europäische Zeitschrift für Arbeitsrecht*, 505–520.

Heuschmid J. (2018), 'Aktuelle Rechtsprechung des EGMR im Bereich des Arbeitsrechts', 3 *Neue Zeitschrift für Arbeitsrecht – Beilage*, 68–76.

Jacobs A. (2013), 'Article 11 ECHR: The Right to Bargain Collectively under Article 11 ECHR', in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, Oxford: Hart Publishing, 309–332.

Jacobs M., Payandeh M. (2020), 'The Ban on Strike Action by Career Civil Servants under the German Basic Law: How the Federal Constitutional Court Constitutionally Immunized the German Legal Order Against the European Convention on Human Rights', 21 *German Law Journal*, 223–239.

Kingreen T. (2010), 'Grundrechtsverbund oder Grundrechtsunion?', 3 *Europarecht*, 338–364.

Krzywoń A. (2022), 'The Notion of Civil Service in Europe: Establishing an Analytical Framework for Comparative Study', *Speyer: Deutsches Forschungsinstitut für öffentliche Verwaltung, Discussion Paper* 91, https://dopus.uni-speyer.de/frontdoor/index/index/searchtype/authorsearch/author/Krzywon%2C+Adam/start/20/rows/10/docId/5606.

Lindner J.F. (2011), 'Dürfen Beamte doch streiken?', 8 *Die Öffentliche Verwaltung*, 305–309.

Lörcher K. (2009), 'Das Menschenrecht auf Kollektivverhandlung und Streik – auch für Beamte – Zu den EGMR-Urteilen v. 12.11.2008, Demir und Baykara, und 21.04.2009, Enerji Yapi-Yol Sen', *Arbeit und Recht*, 229–242.

Lörcher K. (2013), 'The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgment, Its Methodology and Follow-up', in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, Oxford: Hart Publishing, 3–46.

Lörcher K. (2018), 'Meilenstein der Menschenrechtsentwicklung', in Däubler W. (ed), *Arbeitskampfrecht*, vol. 4, Baden-Baden: Nomos, 100–152.

Löwisch M., Rieble V. (2017), *Tarifvertragsgesetz Kommentar*, München: Verlag Franz Vahlen.

Mankiewicz R.H. (1955), 'The Right to Strike of Civil Servants and Employees in the Public Services, under the French Constitution of 1946', 4 *The American Journal of Comparative Law*, 89–96.

Mantouvalou V. (2013), 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', 13 *Human Rights Law Review*, 529–555.

Novitz T. (2003), *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, Oxford: Oxford University Press.

Novitz T. (2008), 'A Human Rights Analysis of the Viking and Laval Judgments', 10 *Cambridge Yearbook of European Legal Studies*, 541–561.

Rebhahn R. (2001), 'Das Kollektive Arbeitsrecht im Rechtsvergleich', 14 *Neue Zeitschrift für Arbeitsrecht*, 763–774.

Rebhahn R. (2010), 'Die Zukunft der Kollektivautonomie in Europa – Tarifautonomie im Rechtsvergleich', 1 *Europäische Zeitschrift für Arbeitsrecht*, 62–87.

Seifert A. (2009), 'Recht auf Kollektivverhandlungen und Streikrecht für Beamte – Anmerkungen zur neuen Rechtsprechung des EGMR zur Vereinigungsfreiheit', 4 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 357–377.

Warneck W. (2008), *Streikregeln in der EU27 und darüber hinaus: ein vergleichender Überblick*, Brüssel: ETUI-REHS aisbl Brüssel.

46 The Right to a Fair Trial for Civil Servants and the Importance of the State's Interest in Applying Article 6, Paragraph 1 ECHR

Flaminia Aperio Bella

I. Introduction

Intense Europeanisation of public administration is a commonly accepted and widely observed fact.[1] The increasing convergence of European public administrations depends on the need to implement and develop common policies and on the multilayered character of European Union (EU) governance: multilevel governance leads to multilevel administration. As a rule, public administrations of Member States acting in EU fields of competence and implementing EU law act as "indirect" administrations of the EU (see Article 291, paragraph 1 of the Treaty on the Functioning of the European Union, TFEU). In recent decades, a complex polycentric decisional framework has been built, in which different national and EU public administrations interact through shared and interrelated policy rather separation (depending on the "composite" nature of procedures).[2] All these factors promote the rapprochement of Member State public administrations and, ultimately, of the civil service.

Against this backdrop, EU law and the case law of the Court of Justice of the European Union (CJEU) are a vital source of convergence in the civil service. Yet the European Court of Human Rights (ECtHR) is an equally strong driver of convergence as far as the Europeanisation of the civil service is concerned. Although the European Convention on Human Rights (ECHR) does not envisage any right of access to justice for civil servants,[3] the ECtHR has had many chances to deal with this matter and has interpreted the provisions of the Convention in the context of Article 6, paragraph 1 (right to a fair

1 Eminent scholars describe the increasing integration of law systems of Member States of the (past) European Community ("Europeanisation") as a major evolutionary factor of national administrative systems, see Schmidt-Aßmann (1997), p. 27. The term is developing in two different but somehow overlapping forms: in a narrower sense, it describes the administrative law that regulates the direct and indirect execution of EU law, and in a broader sense, it deals with the process of harmonisation of the legal standard of administrative action between national laws of Member States and the EU: "Europeanization of administrative law", see Schwarze (2012), p. 290, see also Torricelli (2015), p. 247 and Bobek (2017), p. 634.

2 Regarding the concept of composite procedure and its different classifications, see Franchini (1993); Chiti (1997); della Cananea (2004), pp. 307 f.; della Cananea-Gnes (2004); Jansen et al. (2011); Antoniazzi (2007), pp. 640 f.; Hofmann (2009), pp. 136 f.; Eckes and Mendes (2011), pp. 651 f.; Eliantonio (2014), pp. 116 f. More recently Aperio Bella (2020), pp. 205 f.

3 See *Right of Access to the Public Service in the European Convention of Human Rights: A Missed Opportunity?* by D. Toda Castán in this volume.

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trial).[4] The right of access to justice of public servants in particular (including judges) has seen intense hermeneutical activity in the Court's case law.

As I will show, in its most recent case law, the ECtHR seems to further increase the procedural protection of domestic public servants by extending it to cases in which the dispute between civil servants and the government could be considered civil in nature, thereby falling within the scope of Article 6, paragraph 1. This hermeneutical evolution sees a waning of the importance of the State's interest and the need to pursue other institutional goals.

The aim of this chapter is therefore twofold. It begins with some preliminary notions about the right to a fair trial and the multifaceted character of Article 6, paragraph 1 ECHR in the light of ECtHR case law. It then delves into the case law concerning public servants (including judges) to collocate it in the broader body of ECtHR jurisprudence, building on the case law to extract two precepts: (1) a clear trend extending the scope of application of Article 6, paragraph 1, ECHR to the public service; (2) a more recent and less clear trend, as a consequence of precept 1, further extending the scope of application of Article 6, paragraph 1, ECHR through the case law concerning the status and career of embassy employees and judges. The in-depth overview in these sections provides the conceptual substrate to link strengthening of the right of domestic civil servants to challenge measures that affect their status or career to a waning of the importance of the State's interest as an obstacle to their access to court.

II. The Right to a Fair Trial: A "Living" Notion Stemming from Article 6, Paragraph 1, ECHR

The right to a fair trial is, in some ways, an intuitive concept, but when it comes to defining it, the literature reveals serious difficulties. It is common also to consider philosophical concepts associated with the category of justice, if only because of the adjective "fair" before the word "trial".[5]

Although several aspects are still controversial, jurists generally agree on the basic features of a fair trial. According to doctrine, the right to a fair trial generally includes many basic fundamental rights: the right of access to a court and consequently to be heard by a competent, independent and impartial tribunal; the right to "equality of arms"; the right to a public hearing; the right to be heard within a reasonable time, the right of counsel, and so on. These rights are listed in almost all international conventions[6] and national legislations.[7]

4 Agenzia dell'Unione europea per i diritti fondamentali e Consiglio d'Europa (2016); Zagrebelsky et al. (2016); Schabas (2015); Shelton (2014); Bartole et al. (2012), pp. 172 f.; Bartole et al. (2001); Zrvandyan (2016); Garcìa Roca and Santolaya (2012). Regarding application of Article 6, para. 1 ECHR to administrative law, see Harris (1975), pp. 157 f.; Greco (2000), pp. 25 f.; Eveillard (2010), pp. 531 f.; Allena (2012); Aperio Bella (2017), pp. 238 and 245; focusing on administrative court procedure see Mirate (2007) and Carbone (2020).

5 Leanza and Pridal (2014), pp. 3 f.

6 See, for example, Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention of Human Rights.

7 See, for example, the Sixth Amendment of the United States constitution and Article 111 of the Italian constitution (as amended by Constitutional Law No. 2/99).

Article 6 ECHR foresees the right to a fair trial. The aforementioned rights, included in the right to a fair trial, have been the subject of a wide-ranging interpretation by the ECtHR and its case law, expanding and defining more specifically the rights worthy of protection under the general category of right to a fair trial.

The ECHR, as of today, ratified by 46 States, has proven to be one of the most effective international instruments for the protection of human rights, particularly thanks to the activity of its judicial body. It has been noted that even if the ECHR was not *per se* exceptional and innovative regarding the inclusion of the right to a fair trial, its "enforcement machinery" gives it an exceptional character, allowing it to be used as the main reference.

Article 6, paragraph 1 ECHR, on which it is worth focusing for our purposes, is a multifaceted provision and the article most often invoked in proceedings before the ECtHR.[8] The ECtHR has taken an "expansive" approach to the matter: "The right to a fair trial holds such a prominent place in a democratic society that there can be no justification for interpreting Article 6, paragraph 1 of the Convention restrictively."[9] The right of "access to a court" is an important example of this approach.

Although Article 6 ECHR does not explicitly envisage the right of "access to a court", it is widely accepted that it stems directly from paragraph 1, which grants everyone a "fair and public hearing (. . .) before an impartial tribunal established by law". The Court noted that the right of access is only one aspect of the broader "right to a court" embodied in Article 6, paragraph 1.[10]

The right of access to a court applies to both civil and criminal proceedings.[11] Thus, Article 6 ECHR embodies the right to institute proceedings before courts in civil matters. To this are added the guarantees laid down by Article 6, paragraph 1 as regards the organisation and composition of the court and the conduct of the proceedings. All these aspects make up the right to a fair trial.

From this perspective, the Court has reasoned that any contracting State may simply exclude certain classes of civil rights from its jurisdiction, removing certain actions from courts and tribunals (leaving them, for example, under the authority of government organs). It does not mean that limitations of the right of access to a court are *per se* inconsistent with Article 6, paragraph 1, but any attempt to limit the right of access to a court must be tailored so as to relate to a legitimate aim and must bear a "reasonable relationship of proportionality" with the aim to be achieved.[12] In other words, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the essence of the right is impaired.

The "living" nature[13] and the "interprétation globalisante"[14] of the Convention given by the ECtHR implies that the Convention provisions must be interpreted in the light of present-day conditions, taking the evolving norms of national and international

8 See Council of Europe, European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)*, www.echr.coe.int/documents/d/echr/guide_Art_6_eng. See also Van Drooghenbroeck (2013), p. 159.

9 ECtHR, judgment of 23 October 1990, *Moreira de Azevedo v. Portugal*, 11296/84, para. 66.

10 ECtHR, judgment of 10 July 1998, *Tinnelly & Sons Ltd and Others v. United Kingdom*, 20390/92 and 21322/92, para. 72.

11 ECtHR, judgment of 27 February 1980, *Deweer v. Belgium*, 6903/75, para. 49.

12 ECtHR, judgment of 28 May 1985, *Ashingdane v. the United Kingdom*, 8225/78, paras. 89–96.

13 On the interpretation of the ECHR, see among others Letsas (2007); Letsas (2004); Sudre (1998).

14 Stelkens (2022).

law into account.[15] One vivid example of the "living" and "evolutionary" nature of Article 6, paragraph 1, emerges with regard to its application to civil servants.

III. Disputes Concerning Access to Justice by Civil Servants: From the "Purely Pecuniary Nature" (*rectius* Absence of "Discretionary Powers") Criterion to *Pellegrin*'s "Functional Criterion"

The protection of civil servants cannot be limited to substantive issues. Questions concerning the procedural protection of civil servants, such as their right to judicial protection, are just as important.

In identifying a civil right for the purpose of application of Article 6 in cases concerning the employment of civil servants, the ECtHR used to adopt a restrictive interpretation. In the early case law on alleged violation of other provisions of the ECHR (mainly Article 10), it tended to exclude interference with the exercise of the rights envisaged by the Convention for civil servants, claiming its violation in connection with their dismissal, arguing that recruitment to the civil service is a matter "deliberately omitted from the Convention"[16] and connecting the *rationale* for such different treatment to the specific status of civil servants.[17]

The general rule that disputes relating to civil servants' recruitment, careers and termination of service were outside the scope of Article 6, paragraph 1 was limited and clarified in cases regarding purely pecuniary rights arising in law after termination of service.[18] In merely pecuniary disputes, where the State does not use "discretionary powers", the Court argued that the State could be compared to any employer who is a party to an employment contract governed by private law, hence the "civil" nature of the claim according to Article 6, paragraph 1 ECHR.[19] However, the Court also specified that a dispute cannot be deemed civil if the issue of the award of a pecuniary right depends on a prior finding that the initiation, termination or management of the career of the civil servant was unlawful.[20]

In subsequent judgments, the "purely economic" criterion becomes "essentially economic",[21] and the border between disputes on Article 6, paragraph 1 and other disputes is increasingly linked to questioning domestic authorities' discretionary powers.[22]

Aware of the fuzziness of a criterion so dependent on domestic rules, in the *Pellegrin* case of 1999, the Grand Chamber sought to put an end to the uncertainty embedded in the case law and to afford equal treatment to public servants performing equivalent or similar duties, irrespective of the domestic system of employment, and in particular the nature

15 ECtHR (GC), judgment of 12 November 2008, *Demir and Bayakara v. Turkey*, 34503/97, paras. 65–68.

16 ECtHR, judgment of 28 August 1986, *Kosiek v. Germany*, 9704/82, paras. 34–35, see also Krzywoń (2022), p. 13.

17 ECtHR, judgment of 26 March 1987, *Leander v. Sweden*, 9248/81, paras. 76–84.

18 Van Drooghenbroeck (2013), p. 161.

19 ECtHR, judgment of 26 November 1992, *Francesco Lombardo v. Italy*, 11519/85, para. 17 and ECtHR, judgment of 24 August 1993, *Massa v. Italy*, 14399/8, para. 26.

20 ECtHR, judgment of 17 March 1997, *Neigel v. France*, 18725/91, para. 44.

21 ECtHR, judgment of 2 September 1997, *Nicodemo v. Italy*, 25839/94, para. 18.

22 ECtHR, decision of 24 August 1998, *Benkessiouer v. France*, 26106/95, paras. 29–30; ECtHR, judgment of 29 July 1998, *Le Calvez v. France*, 25554/94, para. 58 and ECtHR, judgment of 9 June 1998, *Cazenave de la Roche v. France*, 25549/94, para. 43.

of the legal relation between the official and the administrative authority.[23] The Court set forth a "functional criterion" based on the nature of civil servants' duties and responsibilities: Article 6, paragraph 1, ECHR should only be inapplicable in disputes raised by public servants whose duties typify the specific activities of the public service, insofar as they were representing the public authority responsible for protecting the general interests of the State or other public authorities.[24] From this perspective, "participation in the exercise of powers conferred by public law" becomes the new test. The Court introduced the new test, in the meantime emphasising the need to apply a "restrictive interpretation" of it in order to allow the guarantees provided by the Convention to touch most civil servants. In this scenario, no category of civil servant seems to be excluded *a priori* from the scope of application of Article 6, paragraph 1, whether armed forces or the police (expressly cited by the Court as an example of public servants representing "public authority"): the test needs to be applied case by case with regard to the nature of the duties and responsibilities appertaining to the applicant's post.[25] In the same perspective, the Grand Chamber included all disputes concerning pensions in the ambit of Article 6, paragraph 1, arguing that on retirement, employees break the special bond between themselves and the authorities and "the employee can no longer wield a portion of the State's sovereign power".[26]

IV. The "Presumption of Applicability" of Article 6, Paragraph 1: Overruling of the *Vilho Eskelinen* Case

The criterion set forth by the ECtHR in the *Pellegrin* case was used in subsequent cases in a "swinging" manner. A rather faithful application of the *Pellegrin* criterion and of the "restrictive" logic embedded therein is a case regarding the denial to renew a fixed-term contract signed between the applicant – appointed to a French overseas economic development office and in charge of promoting the export of domestic wine, beer and spirits – and the Economic Development Department of the French Ministry for Economic Affairs. The Court affirmed the "civil" nature of the right involved,[27] rejecting the Government's

23 ECtHR (GC), judgment of 8 December 1999, *Pellegrin v. France*, 28541/95, paras. 60–65.

24 ECtHR, *Pellegrin v. France* (n. 23), para. 66.

25 It is worth quoting the whole reasoning of the Court: "The Court therefore rules that the only disputes excluded from the scope of article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police. In practice, the Court will ascertain, in each case, whether the applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities." In French version "Par conséquent, la Cour décide que sont seuls soustraits au champ d'application de l'article 6 § 1 de la Convention les litiges des agents publics dont l'emploi est caractéristique des activités spécifiques de l'administration publique dans la mesure où celle-ci agit comme détentrice de la puissance publique chargée de la sauvegarde des intérêts généraux de l'Etat ou des autres collectivités publiques. Un exemple manifeste de telles activités est constitué par les forces armées et la police. En pratique, la Cour examinera, dans chaque cas, si l'emploi du requérant implique – compte tenu de la nature des fonctions et des responsabilités qu'il comporte – une participation directe ou indirecte à l'exercice de la puissance publique et aux fonctions visant à sauvegarder les intérêts généraux de l'Etat ou des autres collectivités publiques."

26 ECtHR, *Pellegrin v. France* (n. 23), para. 67.

27 ECtHR, judgment of 27 June 2000, *Frydlender v. France*, 30979/96, paras. 27–41.

interpretation that the activities of economic development office staff entail the exercise of powers conferred by public law. It also clarified that the fact that staff of overseas economic development offices were under the ambassador's authority was not conclusive because the same applies to all State officials working abroad. Delving into the nature of the duties of the applicant and his responsibilities, the Court considered the concrete features of the job (to facilitate and stimulate exports of certain categories of product and to advise and assist official and semi-official bodies and individual exporters or importers) and concluded that the applicant was not carrying out any task which could be said to entail, either directly or indirectly, duties designed to safeguard the general interests of the State.[28]

In subsequent cases, the Court used a different approach, excluding claims from members of the armed forces and police from the scope of Article 6, paragraph 1 without carrying out an in-depth test of the applicant's concrete exercise of powers conferred by public law. A first example was the dismissal of a claim on a disciplinary proceeding of a member of the National Fire Service of Poland employed as a teacher whose principal duties were to lecture and conduct scientific research.[29] Since the applicant was involved in research dealing with information considered confidential or secret, the Court deemed that these tasks bestowed considerable responsibility in the sphere of national defence and recognised at least indirect participation of the applicant in the performance of duties designed to safeguard the general interests of the State.

In even more evident discontinuity with the case law, the Court declared Article 6, paragraph 1 inapplicable in the case of an active officer (third-rank captain) of the Russian navy, even though the dispute was related to non-enforcement of a court judgment regarding travel expenses in his favour.[30] In a rather hasty motivation, the Court deemed that the applicant "wielded a portion of the State's sovereign power" according to a reasonable construal in the light of the *Pellegrin* judgment.

Another example was the case of a lawyer serving in the police: the applicability of Article 6, paragraph 1 was excluded due to the nature of the functions and responsibilities of the police service as a whole, without any apparent consideration of the individual role of the applicant in the organisation.[31]

The question of interpretation appeared again in 2006 in a case before the Grand Chamber, which came back to a restrictive approach based on an attentive analysis of the applicant's post, the nature of his duties and the associated responsibilities.[32]

One year later, in the *Vilho Eskelinen* case, the Grand Chamber concluded that the criterion adopted in the *Pellegrin* case "must be further developed" in order to avoid "anomalous results".[33] This overruling stemmed from a pragmatic consideration: "The functional criterion, as applied in practice, has not simplified analysis of the applicability of article 6 in

28 ECtHR, judgment of 27 June 2000, *Frydlender v. France*, 30979/96, paras. 38–39.

29 ECtHR, decision of 11 July 2000, *Kępka v. Poland*, 31439/96, 35123/97.

30 ECtHR, judgment of 27 July 2006, *Kanayev v. Russia*, 43726/02, paras. 16–20.

31 ECtHR, decision of 1 February 2005, *Verešová v. Slovakia*, 70497/01.

32 Dealing with the case of a civil servant in the employ of the State education service who had been appointed by the Director of Education as accountant of a school and was responsible, in that capacity, for the accounts of a secondary school and of those of a center attached to it that had no separate legal personality, the Court concluded that neither the nature of the duties carried out by the applicant, nor the responsibilities attached to them, support the view that he participated "in the exercise of powers conferred by public law"; ECtHR (GC), judgment of 12 April 2006, *Martinie v. France*, 58675/00, para. 30.

33 ECtHR (GC), judgment of 19 April 2007, *Vilho Eskelinen and others v. Finland*, 63235/00, para. 51.

proceedings to which a civil servant is party, nor has it led to greater certainty in this area as intended."[34] The Court focused its reasoning on the need to develop its case law on the fact that "ascertaining the nature and status of the applicant's functions has not been an easy task".[35] On the other hand, giving a quite narrow interpretation of its own precedent to justify the overruling,[36] the Court pointed out that *Pellegrin* should be understood against the background of the Court's previous case law and as "constituting a first step away from the previous principle of inapplicability of article 6 to the civil service, towards partial applicability".[37] In order to overcome the difficulties in ascertaining the features of the post in question and to be consistent with the "restrictive" approach inaugurated by the *Pellegrin* doctrine, the Court effectively inverted the burden of proof: the principle is now that it will be presumed, in effect, that Article 6, paragraph 1, applies. For a rebuttal of the presumption of applicability, two conditions need to be met:

> it will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights is justified on objective grounds in the State's interest.[38]

Accordingly, the State cannot rely on an applicant's status as a civil servant to exclude him/her from the protection afforded by Article 6 ECHR unless two conditions are fulfilled.

The outcome of this is that the so-called *Eskelinen* test considerably raises the bar for excluding civil servants from access to a court. This new doctrine, significantly described as a "happy ending" to the previous uncertainty,[39] left no room for interpretations that give decisive relevance to the mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law (including the sector of the armed forces and police, but as we see *infra*, also the judiciary) and that in principle there can be no justification for exclusion of disputes relating to salaries, allowances or similar entitlements from the guarantees of Article 6.[40]

1. Concrete Application of the **Eskelinen** *Test*

The aim of the *Eskelinen* test is to determine whether the right in question is civil in nature for the purposes of Article 6, paragraph 1 ECHR. In principle, the *Eskelinen* test

34 ECtHR *Vilho Eskelinen and others v. Finland* (n. 33), para. 55.

35 ECtHR *Vilho Eskelinen and others v. Finland* (n. 33), para. 52.

36 The Grand Chamber emphasised that *Pellegrin* was "categorical in its wording" excluding from Article 6 armed forces and the police "irrespective of the nature" of the post belonging to the said category. To be perfectly precise, the *Pellegrin* case does not seem to exclude the whole category of police and the armed force from the scope of Article 6. As noted previously, *Pellegrin* expressly mentioned the police and armed force as a manifest example of activities belonging to the exercise of public authority, specifying, however, the need "in each case" to ascertain whether the applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers. Nevertheless, it is a fact that – as also noted previously – the subsequent case law applied in a narrow sense the functional criterion, deeming the employees of the armed forces and the police always wielding "a portion of the State's sovereign power".

37 ECtHR, *Vilho Eskelinen and others v. Finland* (n. 33), para. 57.

38 ECtHR, *Vilho Eskelinen and others v. Finland* (n. 33), para. 62.

39 Cruz Vilaça (2014), p. 197.

40 ECtHR, *Vilho Eskelinen and others v. Finland* (n. 33), para. 62.

established a presumption that Article 6, paragraph 1 ECHR applies in disputes between civil servants and the State. As mentioned before, this presumption can be rebutted: the contracting party can deny the applicability of Article 6, paragraph 1 ECHR if it fulfils both *Eskelinen* conditions, meaning that the domestic legislation expressly excludes access to a court for the post or category of staff in question and that this exclusion was justified on objective grounds in the State's interest. The *Eskelinen* test has been applied to many types of disputes concerning civil servants, including those relating to recruitment or appointment,[41] career or promotion,[42] transfers, termination of service[43] and disciplinary proceedings.[44]

Pronouncing on the removal of a State-employed bailiff from office in disciplinary proceedings, the Court emphasised that disputes about "salaries, allowances or similar entitlements" were only non-exhaustive examples of "ordinary labour disputes" to which Article 6 should, in principle, apply under the *Eskelinen* test.[45] In other disputes, the Court held that the presumption of applicability of Article 6 in the *Eskelinen* judgment also applied to cases of dismissal.[46]

Regarding the concrete application of the *Eskelinen* test, there are not so many cases in which the Court has found both of its conditions to be fulfilled. In fact, in most cases the first condition is not fulfilled because the domestic legal framework does not exclude, at least not expressly, access to a court for the civil servant in question.[47] To use the words of the Court, as the two conditions stipulated in the *Eskelinen* judgment are cumulative, when the first is not met, there is no need to consider the second to determine whether Article 6 is applicable.[48]

It is worth noting that the few cases where the Court has been required to examine the second condition of applicability of Article 6, paragraph 1 of the *Eskelinen* test concerned an army officer[49] and two high-ranking civil servants,[50] all hierarchically attached to the

41 ECtHR, judgment of 26 July 2011, *Juričić v. Croatia*, 58222/09.

42 ECtHR, judgment of 12 October 2021, *Bara and Kola v. Albania*, 43391/18 and 17766/19.

43 ECtHR, judgment of 5 February 2009, *Olujić v. Croatia*, 22330/05.

44 ECtHR, judgment of 16 July 2009, *Bayer v. Germany*, 8453/04; see *The Disciplinary Responsibility of Civil Servants: European Minimum Standards* by A. Bueno Armijo in this volume.

45 ECtHR, *Bayer v. Germany* (n. 44), para. 38.

46 ECtHR, judgment of 19 April 2021, *Pişkin v. Turkey*, 33399/18.

47 See, among many others: ECtHR, judgment of 2 November 2021, *Buzoianu v. Romania*, 44595/15, para. 39; judgment of 20 October 2015, *Saghatelyan v. Armenia*, 7984/06, para. 33. In a judgment of 2022 concerning a judge, the Court "refined" the first condition of the *Vilho Eskelinen* test, stating that "the first condition can be regarded as fulfilled where, even without an express provision to this effect, it has been clearly shown that domestic law excludes access to a court for the type of dispute concerned", ECtHR (GC), judgment of 15 March 2022, *Grzęda v. Poland*, 43572/18, para. 292. In short, this condition is satisfied, firstly, "where domestic law contains an explicit exclusion of access to a court. Secondly, the same condition may also be satisfied where the exclusion in question is of an implicit nature, in particular where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation" (paras. 288–292).

48 See, among the most recent, ECtHR, *Grzęda v. Poland* (n. 47), para. 291.

49 ECtHR, decision of 11 September 2007, *Suküt v. Turkey*, 59773/00, regarding the early retirement of an army officer on disciplinary grounds.

50 ECtHR, decision of 18 November 2014, *Spūlis and Vaškevičs v. Latvia*, 2631/10 and 12253/10, regarding two applicants: the first had been responsible for intelligence and counterintelligence, while the second held one of the highest posts in the State Revenue Service and was in charge of the Customs Criminal Investigation Department.

executive branch of the State. The Court thus held that questioning the "special bond of trust and loyalty" between the applicants and the State was appropriate, deeming the exclusion of the mentioned disputes from the guarantees of Article 6 to be reasonably justified.

Two strands of case law where the Court significantly focused only (or mainly) on the second condition of the test to affirm violation of Article 6, paragraph 1 ECHR will be analysed in the following sections.

The reasoning of the Court is peculiar if one considers that the second condition presupposes that access to a court is excluded for the post or category of staff in question. It is, therefore, unexpected the choice of the Court to focus on whether an exclusion is justified in cases where it is not certain (or not ascertained) that there is an exclusion at all.

2. *The* **Eskelinen** *Test and Embassy Employees: The Rule of State Immunity and Its Erosion*

In cases regarding embassy employees, the ECtHR case law traces a particular path in respect to concrete application of the *Eskelinen* test. To better understand this strand of case law it is worth focusing on the immunities enjoyed – at least in principle – by civil servants. As a general legal concept, immunity protects one from court proceedings. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on national courts' power to determine the right.[51]

State immunity is a concept in international law that has developed from the principle *par in parem non habet imperium*, by virtue of which one State cannot be subject to the jurisdiction of another.[52] When this concept concerns civil servants, it leads to their protection from court proceedings for official acts performed on behalf of the State. This immunity is regarded as an extension of State immunity, which primarily serves to ensure that a State is not indirectly impleaded by a proceeding against its officials. Although we are witnessing an evolution in international and comparative law towards limiting State immunity in respect of employment-related disputes, cases concerning the recruitment of staff in embassies were, for many years, an exception.

In this scenario, the ECtHR had many occasions to clarify that the doctrine of foreign State immunity is generally accepted by the community of nations and that measures which reflect generally recognised rules of public international law on State immunity taken by a Member State, do not automatically constitute a disproportionate restriction on the right of access to court.[53] Still, in cases where the application of the principle of State immunity from jurisdiction restricted the exercise of the right of access to a court, the ECtHR has been requested to ascertain whether the circumstances of the case justified such restriction, pursuing a legitimate aim and being proportionate to it.

51 Immunity from jurisdiction may be enjoyed, for instance, by International Organisations as an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments (see ECtHR, judgment of 18 February 1999, *Waite and Kennedy v. Germany*, 26083/94 and ECtHR, judgment of 2 December 1997, *Beer and Regan v. Germany*, 28934/95; about this case law see, extensively, Van Drooghenbroeck (2013), pp. 166–169).

52 ECtHR (GC), judgment of 21 November 2001, *Fogarty v. the United Kingdom*, 37112/97, para. 34.

53 *Ex multis*, ECtHR, *Fogarty v. the United Kingdom* (n. 52), para. 36 and ECtHR (GC), judgment of 29 June 2011, *Sabeh El Leil v. France*, 34869/05, para. 49.

In a case of 2010,[54] the Grand Chamber affirmatively resolved the question of whether *Vilho Eskelinen* case law, regarding disputes between a State and a national civil servant, can be applied to disputes between an employee of an embassy and a foreign State.[55] It ruled that the *Eskelinen* test can be applied *mutatis mutandis* to the case of dismissal of a "secretary and switchboard operator" working at the embassy of the Republic of Poland in Vilnius. In its reasoning, the Court side-stepped analysis of the fact that the law expressly excluded the right of access to a court (first *Eskelinen* condition),[56] focusing on the second condition. The particular circumstances of the case (the dismissal originally arose from a complaint of sexual harassment involving a member of the embassy's diplomatic staff, filed successfully by the applicant before the Lithuanian Equal Opportunities Ombudsman) allowed the Court to state that the secretarial and switchboard-related duties of the applicant could hardly give rise to "objective grounds [for exclusion] in the State's interest" as contemplated by the second *Eskelinen* condition. The Court then focused on the erosion of the concept of absolute State immunity and, considering said circumstances of the applicant's dismissal and ensuing proceedings, concluded that the dispute could hardly be regarded as undermining Poland's security interests.[57]

The same perspective guided a subsequent judgment on a case regarding the termination of an applicant's employment as an accountant in the Kuwaiti embassy in Paris.[58] Before the judges, the applicant claimed that he had been deprived of his right of access to a court on account of the jurisdictional immunity invoked by his employer and upheld by the domestic courts. The Court confirmed its precedent of 2010, stating that the two-tiered test set forth by *Eskelinen* case law was not met with regard to the second condition (justification for exclusion of the post or category of staff in question from the protection embodied in Article 6 on objective grounds in the State's interest).[59] The Court added that neither the domestic courts nor the government had shown how the duties of the applicant "could objectively have been linked to the sovereign interests of the State of Kuwait", concluding that the French courts had impaired the very essence of the applicant's right of access to a court "by upholding an objection based on State immunity and dismissing the applicant's claim without giving relevant and sufficient reasons".[60]

To complete the picture, it is worth mentioning a case where violation of the principle of access to Court was upheld, mainly due to non-fulfilment of the first condition of the

54 ECtHR (GC), judgment of 23 March 2010, *Cudak v. Lithuania*, 15869/02.

55 It is worth noting that the dispute concerned a Lithuanian national employed in the Polish embassy, who due to an employment contract with the Polish State, could not be regarded as a civil servant of Lithuania before the Lithuanian courts. Nevertheless, the Court deemed applicable *mutatis mutandis* its *Vilho Eskelinen* case law regarding the State and its civil servants, see ECtHR, *Cudak v. Lithuania* (n. 54), para. 43.

56 In substance, the Court decided that none of the exceptions regarding exclusion of immunity, as considered by the International Law Commission's 1991 Draft Articles and the 2004 Convention, were applicable in the case: "she did not perform any particular functions closely related to the exercise of governmental authority. In addition, she was not a diplomatic agent or consular officer, nor was she a national of the employer State. Lastly, the subject matter of the dispute was linked to the applicant's dismissal," see ECtHR, *Cudak v. Lithuania* (n. 54), para. 69 and Van Drooghenbroeck (2013), p. 173.

57 Van Drooghenbroeck (2013), para. 72.

58 ECtHR, *Sabeh El Leil v. France* (n. 53).

59 ECtHR, *Sabeh El Leil v. France* (n. 53), paras. 37–39.

60 ECtHR, *Sabeh El Leil v. France* (n. 53), paras. 62 and 67.

Eskelinen test.[61] The case regarded a claim for salary payments arising from the applicant's employment contract with the United States embassy in Vienna. The Court repeated that two conditions had to be met for the respondent State to be able to rely on an applicant's status as a civil servant in order to exclude him or her from the protection embodied in Article 6 ECHR: firstly, the national law must expressly exclude access to a court for the post or category of staff in question; secondly, the exclusion must be justified on objective grounds in the State's interest. The Court held that the first condition was not fulfilled because Austrian civil courts had jurisdiction over the claim in question. It is worth emphasising that according to the previous statement, although the Court deemed it "not necessary to examine whether the second condition was fulfilled",[62] "in any case, it had not been suggested that the nature of her post as a photographer was such as to justify excluding her from access to court".[63] The Court therefore concluded that Article 6, paragraph 1 ECHR applied to the proceedings at issue.

3. The **Eskelinen** *Test Tailored to Cases of Access to Justice by Judges*

In cases regarding judges, the evolution of ECtHR case law took another path to that of concrete application of the *Eskelinen* test. The criteria set forth in the case law mentioned previously have also been applied in disputes regarding judges.[64] In the words of the Court: "Although the judiciary is not part of the ordinary civil service, it is considered part of typical public service."[65] Furthermore, since the subject matter of the case is closely related to the question of judicial independence, ECtHR case law raised the bar even higher to exclude judges from access to a court.

To better understand this evolution, it is worth noting that in the less recent (albeit rather limited) case law, the Court saw no problem in regarding the specific position of domestic justice as an essential expression of sovereignty. By its very nature, the office of the magistrate was deemed to involve the exercise of prerogatives that are inherent to State sovereignty and is therefore directly related to the exercise of public power, thereby fulfilling the second *Eskelinen* condition.[66]

Since 2021, the Court has changed its approach. In two decisions published the same day, both related to Turkish judges,[67] the Court verified the conditions for the applicability of Article 6, paragraph 1 and paid specific regard to the importance of safeguarding the autonomy and independence of the judiciary for the preservation of the rule of law.

The Court's reasoning on the application of the *Eskelinen* test is worthy of detailed analysis. The Court first had to ascertain whether access to a court had expressly been

61 ECtHR, judgment of 19 November 2012, *Wallishauser v. Austria*, 156/04.

62 ECtHR, *Wallishauser v. Austria* (n. 61), para. 46.

63 ECtHR, *Wallishauser v. Austria* (n. 61), para. 46.

64 To quote some examples, see ECtHR, judgment of 20 November 2012, *Harabin v. Slovakia*, 58688/11 and ECtHR (GC), judgment of 23 June 2016, *Baka v. Hungary*, 20261/12.

65 ECtHR (GC), judgment of 23 June 2016, *Baka v. Hungary*, 20261/12, para. 104. See also ECtHR (GC), judgment of 25 September 2018, *Denisov v. Ukraine*, where the Court gave a detailed summary of the case law and relevant principles concerning the application of Article 6 to ordinary labour disputes involving judges (see paras. 46–49 and paras. 52–55).

66 ECtHR, judgment of 11 December 2007, *Apay v. Turkey*, 3964/05 and ECtHR, judgment of 19 October 2010, *Özpinar v. Turkey*, 20999/04.

67 ECtHR, judgment of 9 March 2021, *Bilgen v. Turkey*, 1571/07 and ECtHR, judgment of 9 March 2021, *Eminağaoğlu v. Turkey*, 76521/12.

excluded in this case, and if so, whether this exclusion was justified. The Court concluded that the first of the *Eskelinen* conditions had been met. The Turkish constitution states very clearly that decisions issued by the body in charge of reviewing matters concerning the organisation of the judiciary, judges' and prosecutors' careers, and disciplinary proceedings (which was not *per se* a "tribunal" according to Article 6, paragraph 1) cannot be reviewed by any other body. The next question was whether this exclusion could be justified on objective grounds in the State's interest. The Court noted that the aforementioned line of case, which concerns civil servants hierarchically attached to the executive branch of the State, cannot be transposed to a member of the judiciary. In the words of the Court: "The special bond of trust and loyalty required from civil servants and the independence of the judiciary cannot easily be reconciled."[68] To be clearer, when referring to the special trust and loyalty required of judges, "it is loyalty to the rule of law and democracy and not to holders of State power".[69] For these reasons, the Court did not consider it justified to exclude members of the judiciary from the protection of Article 6 of the Convention in matters concerning the conditions of their employment on the basis of their special bond of loyalty and trust to the State.

As an outcome of this approach, one can conclude that the second *Eskelinen* criterion is never met when the dispute is about the conditions of "employment" of a judge. To quote the concurring opinion of Judge Pavli: "There exists a presumption that the second *Eskelinen* criterion does not apply and cannot apply to disputes about the employment condition of judges and prosecutors, who should benefit from the right of access to a court in such circumstances."[70]

Remarkably, in subsequent case law, the Court considered it unnecessary to give a conclusive opinion on the fact that the law expressly excluded a right of access to a court (first *Eskelinen* condition), since in any event the second condition was not met.[71]

The need to safeguard judiciary independence becomes even clearer in the case of 2022, regarding Poland and the premature termination *ex lege*, after legislative reform, of former members of the Polish National Council of the Judiciary, with no possibility of the members to challenge this measure.[72] As far as the first *Eskelinen* condition was concerned, the Court again held that the question could be left open since, in any case, the second condition had not been met.[73] Delving into the second condition, the Grand Chamber offered many considerations on the rule of law, the importance of judicial independence, the special role of the judges in society and the importance of protecting their right of access to court. As a result, the second condition was not met and the civil part of Article 6, paragraph 1 was understood to apply. Summing up, without explicitly overruling the two-tier test set forth in the *Eskelinen* case, the Court side-stepped one of the two conditions in this dispute on the judiciary.[74]

68 ECtHR, *Bilgen v. Turkey* (n. 67), para. 79.

69 ECtHR, *Bilgen v. Turkey* (n. 67), para. 79.

70 ECtHR, judgments of 20 July 2021, *Loquifer v. Belgium*, 79089/13, 13805/14 and 54534/14, concurring opinion of Judge Pavli.

71 ECtHR, judgment of 29 September 2021, *Broda and Bojara v. Poland*, 26691/18 and 27367/18, paras. 61–67; ECtHR, judgment of 22 July 2021, *Gumenyuk v. Ukraine*, 11423/19.

72 ECtHR, *Grzęda v. Poland* (n. 47).

73 ECtHR, *Grzęda v. Poland* (n. 47), para. 294.

74 The same approach can be found in ECtHR, judgment of 7 April 2022, *Gloveli v. Georgia*, 18952/18 and ECtHR, judgment of 16 June 2022, *Żurek v. Poland*, 39650/18.

VI. Concluding Remarks

Looking at the evolution of ECtHR case law on the applicability of Article 6, paragraph 1 ECHR in disputes concerning civil servants, one can see a clear trend towards an increasingly broad understanding of what type of disputes are deemed to be civil in nature.[75] By broadening the applicability of Article 6, paragraph 1 ECHR, the Court has extended its reach over those areas. This evolution reflects the more general tendency of the ECtHR to have an "expansive" approach to the interpretation of Article 6, paragraph 1 ECHR, according to the well-established principle that "the right to a fair trial holds such a prominent place in a democratic society that there can be no justification for interpreting Article 6 paragraph 1 of the Convention restrictively".[76]

The steps of this evolution were analysed previously and can be summarised as follows. In the initial phase, only disputes regarding purely pecuniary rights arising in law after termination of service fell within the scope of Article 6, paragraph 1 ECHR. The *rationale* for this first exception to the general rule of inapplicability of Article 6, paragraph 1 to recruitment, careers and termination of service of civil servants was connected to the absence of "discretionary power" of the State: after termination of service, the State can be compared to any employer who is party to a contract of employment governed by private law.[77] The criterion then evolved from "purely economic" to "essentially economic",[78] increasingly focused on examining the discretionary powers of the domestic authorities.

In 1999, in the *Pellegrin* case, the ECtHR Grand Chamber wanted to resolve the uncertainty embedded in the prior case law, so dependent on domestic rules, and set forth a "functional criterion" based on the nature of the civil servant's duties and responsibilities: "participation in the exercise of powers conferred by public law" became the new test. The Court introduced this new test, in the meantime emphasising the need for a "restrictive interpretation" in order to extend the guarantees provided by the Convention to the majority of civil servants.

Subsequent case law applied the *Pellegrin* functional criterion in a "swinging" manner, frustrating the "restrictive" logic embedded therein. The functional criterion, as applied in practice, did not simplify the analysis of the applicability of Article 6 in proceedings having a civil servant as a party, nor did it provide a greater degree of certainty in this area. A new pronouncement of the Grand Chamber came eight years later. In 2007, the *Vilho Eskelinen* doctrine inverted the burden of proof to overcome the difficulty of ascertaining the features of civil service posts and to be consistent with the "restrictive" approach inaugurated by the *Pellegrin* case. This case law reversed the rule which is now that in principle, Article 6, paragraph 1 ECHR applies in disputes between civil servants and the State. The presumption can be rebutted, and the Contracting Party can deny the applicability of Article 6, paragraph 1 ECHR if it meets both *Eskelinen* conditions, meaning that the domestic legislation expressly excludes access to a court for the post or category of staff in question and that this exclusion is justified on objective grounds in the State's interest. In the words of the Court, the two conditions stipulated in the *Eskelinen* judgment are "cumulative". This implies that where the first is not met, there is no need to consider the second in order to declare Article 6 applicable.

75 Van Drooghenbroeck (2013), p. 173.
76 ECtHR, *Moreira de Azevedo v. Portugal* (n. 9), para. 66.
77 ECtHR, *Francesco Lombardo v. Italy* (n. 19), para. 17.
78 ECtHR, *Nicodemo v. Italy* (n. 21), para. 18.

With the strand of case law regarding embassy employees and (more clearly) judges, the Court has now taken a flexible approach to the two conditions of the *Eskelinen* test. It took a softer approach to the first, side-stepping analysis of whether domestic law expressly excludes right of access to a court and focusing on the second condition. In the field of disputes regarding judges, the evolution took place expressly:

> The Court left open the question whether the first condition of the *Eskelinen* test is met, taking account of the opposing views of the parties on that issue, and since in any event, it concludes that the second condition has not been met.[79]

In this context, the case law overshadows a kind of presumption of inapplicability of the second *Eskelinen* condition to disputes about the employment condition of judges and prosecutors, who should therefore benefit from the right of access to a court in such circumstances.

The question is where these evolutions may stem from. The answer is different for each sector. For embassy employees, the hermeneutical evolution described involves a waning importance of the State's interest. The fact that the applicant works as an embassy employee (or is under the ambassador's authority) is no longer conclusive. It is up to the State to demonstrate that the subject matter of the dispute is linked to the exercise of State power or that it concerns the special bond of trust and loyalty between the civil servant and the State. If the State fails to comply with this quite heavy burden of proof, the Court can directly ascertain the absence of "objective grounds in the State's interest" justifying the exclusion of the embassy employee from the procedural guarantees embedded in Article 6 ECHR. Ultimately, in this strand of case law, the Court abandoned any *a priori* approach, leaving no room for automatic "immunity" from the application of Article 6.

In cases regarding judges, the more recent case law deploys an opposite approach to reach the same goal: it extends the scope of application of guarantees embedded in Article 6 ECHR by recognising the prominent place of access to justice in a democratic society. In order to do so, the Court introduced a mechanism of automatic applicability of Article 6 through a kind of presumption of inapplicability of the second *Eskelinen* criterion to disputes concerning the employment conditions of judges and prosecutors. The reasons for this hermeneutical solution are more complicated and closely related to the current context, where legislative reforms and measures adopted in a number of countries are hampering the independence of the judiciary and threatening the essence of the rule of law.[80] This particular context of democratic decay alerts the attention of the Court to the protection of judges against measures that may affect their status or career and may threaten their independence and autonomy.[81]

Concerning the question of the applicability of this approach to non-judicial actors, the answer is not clear.[82] One can certainly imagine other actors in the public-law sphere who are not under a bond of trust and loyalty to the State, for example, non-judicial members of judicial councils (as in the *Loquifer* case) and ombudsmen or high-ranking members of independent administrative agencies.

79 ECtHR, *Grzęda v. Poland* (n. 47), para. 344.
80 Leloup (2023), p. 24.
81 ECtHR, *Bilgen v. Turkey* (n. 68), para. 58.
82 Leloup (2023), pp. 51 f.

The "living" and "evolutionary" nature of Article 6, paragraph 1 emerges clearly with regard to its application to civil servants. The need to interpret Convention provisions in the light of present-day conditions, taking the evolving norms of national and international law into account, brought a real paradigm shift in the relation between Article 6, paragraph 1 and disputes concerning civil servants. The rule that in principle, Article 6, paragraph 1 ECHR applies in disputes between civil servants and the State, giving them access to justice, helps dismantle the aura of privilege surrounding the State as an employer.

Bibliography

Agenzia dell'Unione europea per i diritti fondamentali e Consiglio d'Europa (2016), *Manuale di diritto europeo in materia di accesso alla giustizia*, Luxembourg.

Allena M. (2012), *Art. 6 CEDU. Procedimento e processo amministrativo*, Napoli: Editoriale scientifica.

Antoniazzi S. (2007), 'Procedimenti amministrativi comunitari composti e principio del contraddittorio', *Rivista italiana diritto pubblico comunitario*, 641–736.

Aperio Bella F. (2017), *Tra procedimento e processo. Contributo allo studio delle tutele nei confronti della pubblica amministrazione*, Napoli: Editoriale scientifica.

Aperio Bella F. (2020), 'Composite Procedures and Procedural Guarantees: The "Borelli Doctrine" in the Light of Model Rules', in della Cananea G., Conticelli M. (eds), *Rule of Law and Administrative Due Process in Europe. Trends and Challenges*, Napoli: Editoriale scientifica, 205–228.

Bartole S., Conforti B., Raimondi G. (2001), *Commentario alla Convenzione Europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Torino: Cedam.

Bartole S., De Sena P., Zagrebelsky V. (2012), *Commentario breve alla Convenzione Europea dei Diritti dell'Uomo*, Torino: Cedam.

Bobek M. (2017), 'Europeanization of Public Law', in von Bogdandy A., Huber P.H., Cassese S. (eds), *The Max Plank Handbooks in European Public Law: The Administrative State*, Oxford: Oxford University Press, 631–674.

Carbone A. (ed) (2020), *L'applicazione dell'art. 6 CEDU nel processo amministrativo nei paesi europei*, Napoli: Jovene.

Chiti M.P. (1997), 'I procedimenti composti nel diritto comunitario e nel diritto interno', in Ufficio Studi e Documentazione del Consiglio di Stato (eds), *Attività amministrativa e tutela degli interessati. L'influenza del diritto comunitario*, Torino: Giappichelli, 55–69.

da Cruz Vilaça J.L. (2014), *EU Law and Integration: Twenty Years of Judicial Application of EU Law*, Oxford, Portland: Hart Publishing, 181–202

della Cananea G. (2004), 'I procedimenti amministrativi composti dell'Unione europea', in Bignami F., Cassese S. (eds), *Il procedimento amministrativo nel diritto europeo*, Milano: Giuffrè, 307–334.

della Cananea G., Gnes M. (2004), *I procedimenti amministrativi dell'Unione europea. Un'indagine*, Torino: Giappichelli.

Eckes C., Mendes J. (2011), 'The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?', 11 *European Law Review*, 651–670.

Eliantonio M. (2014), 'Judicial Review in an Integrated Administration: The Case of the Habitats Directive', 23 *European Energy and Environmental Law Review*, 116–126.

Eveillard G. (2010), 'Les exigences applicables à la procédure administrative non contentieuse au regard de l'article 6 de la Convention européenne des droits de l'homme', *Actualité Juridique Droit Administratif*, 531–539.

Franchini C. (1993), *Amministrazione italiana e amministrazione comunitaria*, Padova: Cedam.

García Roca J., Santolaya P. (eds) (2012), *Europe of Rights: A Compendium on the European Convention of Human Rights*, Leiden: Martinus Nijhoff Publishing.

Greco G. (2000), 'La Convenzione europea dei diritti dell'uomo e il diritto amministrativo in Italia', 10(1) *Rivista Italiana di diritto pubblico comparato*, 25–41.

Harris D.J. (1975), 'The Application of Article 6(1) of the European Convention on Human Rights to Administrative Law', 47(1) *British Yearbook of International Law*, 157–200.

Hofmann H.C.H. (2009), 'Composite Procedures in EU Administrative Law', in Hofmann H.C.H., Türk A. (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Cheltenham-Northampton: Edward Elgar, 136–167.
Jansen O., Scöndorf-Haubold B. (eds) (2011), *The European Composite Administration*, Cambridge: Intersentia.
Krzywoń A. (2022), 'The Notion of Civil Service in Europe: Establishing an Analytical Framework for Comparative Study', 91 *FÖV Discussion Paper*, https://dopus.uni-speyer.de/frontdoor/index/index/docId/5606.
Leanza P., Pridal O. (2014), *The Right to a Fair Trial. Article 6 of the European Convention of Human Rights*, Alphen aan den Rijn: Kluwer Law International.
Leloup M. (2023), 'Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR', 4 *European Convention on Human Rights Law Review*, 23–57.
Letsas G. (2004), 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15(2) *European Journal of International Law*, 279–305.
Letsas G. (2007), *A Theory of Interpretation of the European Convention on Human Rights*, Oxford: Oxford University Press.
Mirate S. (2007), *Giustizia amministrativa e Convenzione europea dei diritti dell'uomo. L'"altro" diritto europeo in Italia, Francia e Inghilterra*, Napoli: Jovene.
Schabas W.A. (2015), *The European Convention on Human Rights. A Commentary*, Oxford: Oxford University Press.
Schmidt-Aßmann E. (1997), 'Recenti sviluppi del diritto amministrativo generale in Germania', 1 *Diritto pubblico*, 27–57.
Schwarze J. (2012), 'European Administrative Law in the Light of the Treaty of Lisbon', 18(2) *European Public Law*, 285–304.
Shelton D. (2014), 'Sources of Article 47 Rights', in Peers S., Harvey T., Kenner J., Ward A. (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Portland: Bloomsbury Publishing.
Stelkens U. (2022), 'Vers la reconnaissance de principes généraux paneuropéens de bonne administration dans l'Europe des 47?', in Auby J.-B., Dutheil de la Rochère J. (eds), *Traité de droit administratif européen*, 3rd edition, Bruxelles: Bruylant, 667–698.
Sudre F. (1998), *L'interprétation de la Convention européenne des droits de l'homme*, Bruxelles: Bruylant.
Torricelli S. (2015), 'L'europeizzazione del diritto amministrativo italiano', in Marchetti B., De Lucia L. (eds), *L'amministrazione europea e le sue regole*, Bologna: Il Mulino, 247–272.
Van Drooghenbroeck S. (2013), 'Labour Law Litigation and Fair Trial under Article 6 ECHR', in Dorssemont F., Lörcher K., Schömann I. (eds), *The European Convention on Human Rights and the Employment Relation*, Oxford, Portland: Hart Publishing, 159–182.
Zagrebelsky V., Chenal R., Tomasi L. (2016), *Manuale dei diritti fondamentali in Europa*, Bologna: Il Mulino.
Zrvandyan A. (2016), *Casebook on European Fair Trial Standards in Administrative Justice*, Strasbourg: Council of Europe Publishing.

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Part IX

The Transformation of the Civil Service Under the Influence of a New Conceptualisation of Public Administration

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47 Do Public Management Concepts Have an Impact on Civil Service Regimes?

Jacques Ziller

I. What Do We Understand by Civil Service Regimes and Public Management Concepts?

One of the most commonly cited quotations of the famous philosopher Ludwig Wittgenstein (1889–1951) is probably "the meaning of a word is its use in the language".[1] The quotation most certainly applies to both expressions used in the title of this chapter.

As far as civil service regimes or public sector employment regimes are concerned, I can only refer the reader to the different chapters of Part IV of this book: "In Search of Common European Standards: Public Sector Employment Regimes". I will, however, group the topics that are presented by those chapters in two groups: (1) the issues relating to the legal status of public employees – including liability, which form a coherent group due to the focus on applicable law; and (2) those relating to recruitment, training, and development, as well as pay and benefits systems, which are usually considered as the typical functions of human resource management.

However, when it comes to public management concepts, a confrontation with the blurred meaning of "public management" is, in my view, indispensable before we try to analyse whether such concepts have had an impact, and if so, in what form and to what extent.

As I already wrote more than 20 years ago,

> Academic lawyers dealing with public administration, and their practising colleagues in public administration, rarely take the time to really talk to organisational theorists interested in public management and public managers in order to understand the two groups' definitions of concepts, methods and roles. (. . .) On the legal side, confusion is increased because only one word – "law" – is used to indicate an academic discipline that has some pretension of being a science, the profession of law professors and practising lawyers as different as advocates, judges or legal counsellors in public administration or in business administration, and also the content of constitutions, statute law and other legal sources (such as the case law originated by courts or other public authorities). There is also confusion on the public management side: some academics and practitioners see a big difference between public administration and public management,

1 Wittgenstein (1953a), point 43: *Man kann für eine große Klasse von Fällen der Benützung des Wortes "Bedeutung" – wenn auch nicht für alle Fälle seiner Benützung – dieses Wort so erklären: Die Bedeutung eines Wortes ist sein Gebrauch in der Sprache*. For an English translation: Wittgenstein (1953b), point 43. The full quotation is: "For a *large* class of cases – though not for all – in which we employ the word 'meaning' it can be explained thus: the meaning of a word is its use in the language."

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> others consider that the difference lies not in the object, but in the approach used by those who study or practice. The introduction of reforms under the "New Public Management" label has introduced confusion between an ideological spill-over of the Thatcher era and the application of organisational theory to the study of public administration, a trend that is as old at least as the fame of Herbert Simon's publications after World War II.[2] Even more than others, lawyers tend to identify "public management" with "New Public Management". This makes discussions more difficult and seems to be a particular threat to specialists in administrative and constitutional law.[3]

It is also worthwhile mentioning a book entitled *La nouvelle gestion publique*,[4] which was published in 1975 by Michel Massenet, who was then Director-General for Administration and Civil service at the French Prime Minister's office, which would have to be translated in English as "The New Public Management". Massenet advocated the *rationalisation des choix budgétaires* (RCB), which was a French adaptation of the Planning Programming Budgeting System (PPBS) developed in the USA by Robert McNamara when he was Defence Secretary in the Kennedy administration in the early 1960s,[5] i.e. long before it became fashionable to talk about New Public Management (NPM). As a matter of fact, the first in-depth study of the Thatcher reforms, which I read, was not entitled New Public Management but "Improving Public Management".[6]

In the Introduction of the present book, the editors state:

> We observe the privatisation of infrastructure and public employment. Often these trends are linked to the transition from centralised to decentralised governance of working conditions. Statutory governance is being replaced by contractual and managerial instruments. This paradigm shift implies that working in the Civil Service is no longer necessarily synonymous with stability of employment and other privileges.[7]

Without rejecting the idea that there is a paradigm shift in many European countries when it comes to public sector employment regimes, I think it is indispensable to put this idea into perspective and not to fall into the trap suggested by the label "New Public Management", which is not used by our editors but is clearly central to the quoted statement.

1. Civil Servant Versus Provider of Public Services?

Interestingly, the authors of a book entitled "Public Sector Employment Regimes. Transformations of the State as an Employer" – to which the editors of our book refer – state:

> we have discussed the shift from the traditional paradigm of the public employee as a civil servant to an emerging paradigm of the public employee as a provider of public services. In this vein, our core research question is: To what extent have European countries preserved a distinct status of public employees? The theoretical perspective

2 Simon (1947).
3 Ziller (2001).
4 Massenet (1975).
5 See Van Nispen and De Jong (2017).
6 Metcalfe and Richards (1987).
7 See *Introduction* by K.-P. Sommermann, A. Krzywoń and C. Fraenkel-Haeberle in this volume.

> (. . .) suggests that the expected variation in reforms of public employment regimes, triggered by cost concerns and New Public Management ideology, is moderated by the institutional and cultural framework on the one hand and mediated by the extent of devolution of the State's responsibility for normative goods to private service providers on the other hand.[8]

As a French public lawyer educated with constant reference to the notions of *puissance publique* and *service public* as the bases of administrative law, I can only challenge the first affirmation, i.e. the opposition of a "traditional paradigm of the civil servant" versus an "emerging paradigm of provider of public services". If there has been such a shift of paradigm, it happened a century ago or maybe more, with the emergence and development of the Welfare State after World War I, which led to the twofold government tasks we still observe today. In the 21st century in European countries, there still is a very significant number of public employees whose tasks are to participate upstream and downstream in policymaking and writing bills and regulations, at central State level, in the regional and local branches of the State administration, and in the administrations of regional and local authorities. There is another very significant number of public employees whose function is the delivery of services; sometimes services that are typically public, such as delivering social benefits, authenticated documents or licenses; sometimes services that are also delivered by private actors, such as health or education services. The issue that is to my mind still not well conceptualised in legal and administrative science terms is what kind of legal regime of public sector employees is more appropriate for this division of tasks: a regime that distinguishes between employees participating in public making and those providing services, or a one-size-fits-all solution with marginal adaptations. Practice shows that there are great variations from country to country, which are sometimes ignored by scholarship and political discourse.

One illustration of the complexity of regimes is provided by that of France, which has three different statuses of *fonctionnaires*. The status of the State civil service (*function publique d'État*) applies primarily to employees participating upstream and downstream in policymaking in ministries and in their regional and local branches, as well as in *établissements publics* (legally autonomous organisations), but also to those who provide services, such as teachers, who represent more than half of the State civil service. The status of so-called territorial civil service (*function publique territoriale*) applies to employees of substate government: *régions*, *départements* and *communes* and their *établissements publics*. The status of the hospital civil service (*function publique hospitalière*) applies to the medical and paramedical staff of public hospitals and their administrative staff. The summary that I have just made is misleading, however, because the general rules that are embedded in the statuses are complemented in detail by the rules of the specific *corps* – of which there are more than two hundred – which correspond to different professions: at the general status level the impression is that of a one-size-fits-all solution, whereas at the level of the *corps'* status we have quite differentiated solutions. This typical French generalised system of *corps* has an equivalent only in Spain, as far as I know, with the *cuerpos*. In other countries there are indeed specific statuses for the military, the police forces and judges, as well as for medical and education staff if they are public employees, but not many more.

8 Gottschall et al. (2015), p. 50.

At any rate, the distinction between the two types of public employees, which I sketched out previously, is not new and was central long before the reforms of the 1980s. In his discussion of the excellent book of 1959 by Brian Chapman "The Profession of Government – The Public Service in Europe",[9] a book that is unfortunately too often ignored, Nevil Johnson, another a great expert in comparative public law, wrote more than 65 years ago: "There is a difference between the profession of government and the public service, and although both terms appear in the title page of this book the difference is often blurred in the course of the analysis."[10] In my view, the same observation applies to much of the scholarship and practitioners' discourse from the last 30 or 40 years. Johnson went on to specify that " 'the public service' is a broad term, difficult to define precisely, but covering a large and varied body of people employed by the central government or in State-controlled agencies". As a comparison between the country specific chapters in our book make clear, the issue pointed out by Johnson is even broader, as public employment includes in many countries not only central government but also local and regional government employees, schoolteachers and university professors, the medical and paramedical profession, judges and law clerks, police and army officials, and so on.

2. *New Public Management or Public Management Versus Administration?*

A central problem is therefore what we mean by public management concepts. Are we referring to NPM, and if so, as an ideology or a scholarly topic, or as public policies that have been implemented? Or are we referring to public management as opposed to private management?

As far as I am concerned, I still stick to what I said 20 years ago at the annual conference of the European Group of Public Administration (EGPA) in Oeiras (Portugal), where I was invited to deliver the keynote speech in the general session entitled "(Public) Law: Motive, Tool or Impediment for Modernization?"[11] I tried to address some clichés, confusion, and misunderstandings in relation to administration and public management. As a matter of fact, since the mid-1980s, both academics – in particular, political scientists, organisation theorists and sociologists, but also lawyers – and practitioners responsible for the management of administrative and political units have contributed to making discussion of the modernisation of government and the improvement of management quite fuzzy. There are strictly linguistic problems: while the words management in English – in the sense of managerial activity, not leaders of an organisation – and *gestion-gestione* in French or Italian have the same meaning, the use of the word "management" in languages other than English has become fashionable since the 1980s and, what is worse, this is often justified by a supposed difference in meaning. For those who indulge in such usage, the word "management" is supposed to cover different practices – more modern, more flexible, better adapted to problem-solving – than practices covered by the words *gestion-gestione*. However, in English there is only one word for management: a hotel manager or the CEO of a big and successful multinational are both managers. This fashion is one of the reasons for the widespread use of the expression "New Public Management" since the second half of the 1980s throughout Europe and beyond.

9 Chapman (1959).
10 Johnson (1959), p. 293.
11 See Ziller (2005).

The label NPM does not come from politics, but from scholarship. Its invention is usually attributed to Christopher Hood, who wrote in an Encyclopaedia entry on the topic that "Despite the label, many of the doctrines commonly associated with New Public Management are not new", referring even to Jeremy Bentham (1748–1832). In the same Encyclopaedia entry, Hood also correctly observed:

> In spite of the scale and growth of the New Public Management 'industry', or perhaps because of it, the term New Public Management has probably outlived its analytic usefulness. (. . .) Nevertheless, in spite of its oft-proclaimed death, the term refuses to lie down and continues to be widely used by practitioners and academics alike.[12]

As I explained in more detail two decades ago,[13] NPM is not a reform *per se*, nor a doctrine of public administration. The label is applied to a series of diverse reforms, mostly micro-reforms in the area of designations, modes of operation, behaviour in public service, and even the regulatory framework. The ambiguity is immense. For some, the term NPM encompasses all the micro-reforms of public management, as introduced in particular in the United Kingdom in the 1980s and 1990s, whatever the underlying philosophy – whether dealing with the budget deficit, or "rolling back the State". For others, NPM covers all the micro-reforms inspired by business administration practices. For others, in turn, NPM concerns reforms whose philosophy is necessarily a caricature of neo-liberalism. Even if it can be established beyond doubt that a country is or is not following the supposed trends of NPM, this hardly allows any conclusion to be drawn about the reality of the reforms, let alone comparing them with those taking place in another country or international organisation. The most obvious case of this kind of misunderstanding is illustrated by the fact that New Zealand has been for decades presented as the torchbearer of NPM, without taking into account its insularity in the middle of the Pacific, the respective size of the territory and the population, or the absence of an old and deep-rooted tradition of government in the country, which made it particularly difficult to compare with other countries.

In the same period, in the 1980s, heated debate also developed between academics and practitioners about a supposed difference between public administration as influenced by legal scholarship, and public management as inspired by the needs of running an organisation. That discussion is still ongoing amongst others involved in education and training. True, in Europe the scholarly discipline of public administration was first developed in the 19th century, especially by lawyers. Max Weber (1864–1920) was a famous sociologist, but he was also a lawyer. It was not until the second half of the 20th century, following the analyses of the economist Herbert Simon (1916–2001) in particular, that sociology and organisation theory started to put substantial emphasis on the study of public administration. There followed a growing tendency to refer to public management rather than public administration and battles between disciplines followed, especially in United States American universities, over the use of these two expressions. This supposed opposition between the old public administration and the new public management does not take into account that the term administration continues to be properly applied as a synonym of management in the private sector. We still refer to business administration, and the diploma awarded by management schools is still called an MBA, i.e. Master in Business

12 Hood (2001).
13 Ziller (2003).

Administration, not a Master in Business Management (MBM). The opposition between public management and public administration appears even more suspect to me when it invades practice, and indeed policy.

The Organization for Economic Co-operation and Development (OECD), which has done substantial work on promoting the modernisation of government, also often referred to NPM. Amongst others, a book with the title "Modernising Government – The Way Forward" contains an entire chapter dedicated to "Organising and Motivating Public Servants: Modernising Public Employment",[14] the conclusion of which is worthwhile quoting:

> Over the past two decades, the majority of OECD member countries' public employment has changed significantly. The scope and pace of change has varied greatly, with some countries strongly embracing New Public Management doctrines while other countries adopted a slower pace of reform. There is evidence to suggest that these reforms have been generally successful in managing people better, sharpening the focus on government performance, providing better quality public services, and creating a managerial culture. Nevertheless, this chapter concludes that the early reformers did underestimate the complexity of introducing private sector style HRM arrangements to the public service in spite of the fact that staying with traditional public employment arrangements was not a viable option for most countries. It turned out that the most important issue was not whether traditional public service arrangements were good or bad as a system but that wider changes in the government sector and in the labour market required an adaptation of the management of the civil service.

Almost 20 years later, these conclusions are, in my view, still valid, and they need to be borne in mind when examining more detailed issues of civil service regimes in European countries.

The next sections of this chapter reflect my personal knowledge, and maybe even more my opinions, on the supposed and real impact of the supposed public management concepts on the elements of the civil service regimes studied in this book. When looking at the changes regarding the legal status of the civil service – those relating to the typical functions of human resource management; those relating to pay and benefits systems – it appears that there are some similarities between different European countries. Whether those similarities may be qualified as a common trend remains to my mind questionable. Furthermore, while there is no doubt that reformers have often been inspired by so-called best practices from specific countries, the choices made are mainly due to endogenous factors.

II. Did Public Management Concepts Have an Impact on the Legal Status of Public Employees?

The comparison of public service reforms is perhaps the most often attempted – and yet the most difficult – exercise in comparative analysis of government reform. The frequent focus on the regulatory framework leads to important trompe l'oeil effects, especially if accompanied by labels such as privatisation.

14 OECD (2005).

The history of the reform of the Italian civil service law in the last decades – as explained in the chapters of this book on "The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours"[15] and on "Civil Service in Transition: Privatisation or Alignment of Employment Conditions?"[16] is paradigmatic. At first sight, from a legal perspective, there seems to have been a major reform in Italy in 1993, and a more important than the one that seems to have taken place in the United Kingdom (UK) about ten years earlier. In the UK, there was a shift from a very homogeneous and relatively monolithic career civil service to a multitude of more or less comparable open systems, whose culture seems to have changed considerably: however, due to the fact that regulating the civil service falls beyond the competence of Parliament and pertains to the Cabinet, due to the royal prerogative, there is no need for Acts of Parliament or even legally binding orders, and everything can be changed again quickly if need be, or if changes have to be made in the spirit of the times.

Many of the other chapters of this book refer to NPM as at least one of the factors that have led to the so-called privatisation of civil service law. However, I submit that such privatisation has hardly anything to do with public management concepts and is rather a kind of publicity stunt – negative or positive, or marketing through labels, and this is for several reasons.

1. Absence of Chronological Correlation

As statisticians and specialists in torts and criminal law well know, correlation does not necessarily imply causation. But at any rate if there is a correlation, the causal event has to take place in a previous time, or at the same time as the damage occurs. If there was an influence of NPM concepts on the privatisation of civil service law, the minimum correlation should be that the relevant changes took place at the moment when those concepts were first developed in the United Kingdom or the United States or in the following years, but not before. Looking at the different cases where so-called privatisation of civil service law has occurred in Europe, it appears that the timing is different not only from one country to another, but also with regard to the context in which the reforms took place.

From a formal legal perspective, the privatisation of the Italian public employment regime was initiated by a legislative decree (*Decreto Legislativo*) adopted on 3 February 1993 by the cabinet led by Giuliano Amato. It seemed to be nothing short of a revolution.[17] Since 1908, civil servants in Italy had been employed under public law, governed by acts of parliament and regulations, with the employment of individual civil servants being regulated by administrative acts, not by contract. Thus, Italy had a general codified civil service law long before Germany (1937) or France (1941–1946). In 1923, the entire matter of employment relationships under public law was also placed under the exclusive jurisdiction of the administrative courts. The 1993 decree based on a parliamentary authorisation of December 1992 abolished this law, and labour law became in princi-

15 See *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

16 See *Civil Service in Transition: Privatisation or Alignment of Employment Conditions?* By C. Fraenkel-Haeberle in this volume.

17 See, amongst others, the special issue which the *Revue Française d'Administration Publique*, in 1993, devoted to Italy, which was coordinated by Sabino Cassese, who was *Ministro per la funzione pubblica* in the Cabinet of Carlo Azeglio Ciampi from June 1993 to May 1994 – Ciampi was the successor of Giuliano Amato.

ple applicable to the employment relationships of public administration employees, with the exception of e.g. the armed forces, judges, university professors and the police. That reform is usually referred to in Italy as the Amato Decree, because although the Minister of Finance Piero Barucci had a delegation for the civil service, it was Amato who was the initiator of the reform. Amato had been a member of the Italian Socialist Party since 1956, and even though he was convinced that a balanced budget was indispensable for Italy's economic health, he was certainly not specially convinced by the ideas of Margaret Thatcher and Ronald Reagan. About 17 years ago, I qualified the reform in Italy as "an upheaval of the legal situation without an upheaval of employment relations".[18]

However, as I added at the time, the assessment of the reform of the Italian public employment law would vary considerably in accordance with the perspective of the observer. From a French point of view, the reform of 1993 seemed indeed revolutionary and almost incomprehensible, since in France the *statut général de la fonction publique* of 1946, although amended several times, has remained untouched in its principles and is regarded as an indispensable guarantee by both civil service workers and trade unions.[19] From a British perspective, this reform would be seen as astonishing for the opposite reasons: why was there so much ado about a reform that was much smaller in content than the changes that have been quietly implemented by the British government in the 1980s? In the cited publication, I concluded that from a German point of view the reform would be considered either as a highly familiar legal formalism, as enviable flexibility, or as an illustration of the well-known saying of Giuseppe Tommasi di Lampedusa in his masterpiece novel *Il Gattopardo*: "change everything so that nothing changes".

More importantly, I also pointed out that from a Danish point of view one would not see anything particularly new in the reform, the only remarkable thing would be that what was initiated in Denmark in 1962 and took more than seven years, ending with the Act of Parliament of 1969, was done overnight in Italy.

2. *Absence of Correlation Between NPM Concepts and the Public or Private Law Character of Its Legal Regime*

The Danish constitution specifically provides in Section 27 that "Rules governing the appointment of civil servants shall be laid down by statute" in subsection 1, and that "Rules governing the dismissal, transfer, and pensioning of civil servants shall be laid down by statute".[20] As a consequence, what is important is the scope of application of the statute. Before 1962, the statute covered most of public employment, while according to the OECD in 2018, only 4.4% of central administration employees had the status of a *tjenestemaend* (civil servant in the formal sense).[21] Clearly, if the reform started in 1962, this has nothing to do with NPM.

We must also note that there is only a limited correlation between public or private law regimes and competent courts, as demonstrated by the Italian case. With the 1993 civil service reform, disputes arising from employment relationships under private law

18 Ziller (2006).

19 See *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

20 See *The Civil Service in Denmark: From a Public to a Private Law Employment Regime* by M. Søsted Hemme in this volume.

21 OECD (2019).

have become subject to civil courts, whereby the procedural particularities for labour law litigation must be observed, but with the very important exception of disputes regarding competitive examinations, which according to Article 97 of the constitution, are mandatory for access to public employment, which remain in the realm of administrative courts.

Generally speaking, it may be the case that the courts which are competent to provide legal protection under labour law have less power than the administrative courts when it comes to annulling wrongful dismissals, as in France, for example, but this was not the case either in the Netherlands or Italy, until recent reforms of labour law which have made dismissal easier in the private sector. Obviously, reforms of labour law applicable to the private sector cannot be due to public management concepts. For Denmark, let us recall that there is in any case only one type of court, which handles both private law and public law disputes, so nothing changed under that profile with the change of scope of the civil servants' statute.

In Portugal, a radical reform was undertaken in 2006, which has been presented as a typical application of NPM concepts.[22] The *Programa de Reestruturação da Administração Central do Estado* (PRACE) indeed led, in four years, to the virtual abolition of the status of State civil servants, except for civil servants performing sovereign functions. This reform also led to a major restructuring of the number of administrative entities of State administration, which dropped from 518 to 331, as well as to staff reductions. In addition, careers have been frozen, salaries above 1,000 EUR frozen, and retirement reformed to increase the retirement age and the length of contribution. Five years later, Teresa Ganhao, Director of the International Relations Department at the Directorate General of Public Administration and Employment (part of the Ministry of Finance), admitted that the reforms had been carried out far too quickly.[23] The fact that NPM has been referred to in Portuguese scholarship and grey literature does not confirm, however, that NPM concepts were clearly involved in the change from public law to private law for a very extensive section of public employees. In that case, the reference to NPM seems to me to be a typical label, whereas the reforms have simply been pragmatic attempts to deal with the financial crisis and sovereign debt. By Law No 75/2014, the Portuguese legislature had temporarily reduced, as from October 2014, the remuneration of a series of office-holders and employees performing duties in the public sector across the board, without any link to the way managerial functions were accomplished. Typically, whereas judges kept their public law status, salary reductions in the public sector also applied to them, as is illustrated by the famous Court of Justice of the European Union (CJEU) judgment in the *Juízes Portugueses* case of 2018.[24] In the case of Italy, where there have not been general salary-reduction measures, the government preferred not to apply them to judges for fear of criticisms regarding encroachments on their independence but did not hesitate to

22 Rocha and Araujo (2007).

23 Fargeot-Boll (2012).

24 CJEU (GC), judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16. In accordance with administrative "salary management" measures adopted on the basis of that law, the remuneration of judges was also reduced. It is worthwhile remembering that the Court ruled in para. 11 that Article 19, para. 1 TEU "must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas (Court of Auditors, Portugal)."

apply them to university professors although they are employed under a public law status, just as judges are.

3. *Absence of Correlation Between Public Law, the Career System, Possibilities of Dismissal, or Recruitment Systems*

If there are NPM concepts pertaining to civil servants' regimes, the most obvious of these, which is to be found both in grey literature and in scholarship, is that so-called career systems are ill-adapted to the management of government services. In the words of the OECD in 2005:

> Career-based systems tend to promote collective values at entry in specific sub-groups of the civil service (e.g., the notion of "corps" in France), with relatively weaker cross-hierarchical and cross "corps" values. The downside is a weaker emphasis on individual performance and accountability. More position-based systems tend to have weaker cross-government values at entry than career-based systems but tend to be less deferential and may create stronger links across levels of hierarchy and status.[25]

I am afraid the example given by that quote is questionable. The remark on the French *corps* is probably applicable to some of the so-called *grand corps*[26] such as the *Conseil d'Etat* (State Council, which is both the supreme administrative court and legal advisory body to Government) or the *Cour des Comptes* (Court of Auditors), as well as some *corps* of engineers, such as the *Ponts et chaussées* (bridges and roads) or Mines, of and the *Inspection des Finances* (Finance inspectorate) – the latter, by the way, has been abolished by the 2022–23 reform of the organisation of higher civil service – a good number of their members hold key positions on limited term in the State administration.[27] But the remark does not apply to the broader *corps* of generalists such as the *corps des administrateurs civils* established by the reform of 1945 that not only established the *Ecole Nationale d'Administration* (ENA)[28] – which, by the way, has been abolished by the 2022 reform of the organisation of higher civil service. Furthermore, only a few scholars, let alone authors of grey literature, seem to understand that the French civil service structure is a mix of career and positions systems, due to the distinction between *grade* (level in the hierarchy of the corps) and *emploi* (position):[29] while career progression is organised in the framework of the *corps* for the purpose of salary and pensions, the progression in terms of hierarchical status is linked to the positions held and therefore varies greatly due to the fact that there are numerous possibilities of secondment to positions in government organisations.

In any case, the quoted 2005 publication of the OECD rightly underlines that

> The career-based system is under pressure in developed economies because it runs against trends in the wider job market, and because it is seen as less able to deliver specialised skills and flexibility than the position-based approach. But there is little evidence

25 OECD (2005).
26 See Kessler (1986).
27 Pochard (2023).
28 Boise (1969).
29 Ziller (1993).

> that OECD countries with a career-based system wish to abandon it altogether. The challenge for career-based systems is how to have a civil service that is responsive to the needs and specialised skill demands of contemporary society. The challenge for position-based systems is how to ensure that the collective interest is served.[30]

Even more important to this section, and contrary to what we commonly assume, there is no necessary correspondence between a public law regime of employment and career systems or, vice versa, between a private employment regime and position systems. In the UK, the traditional career system established with the implementation of the Northcote Trevelyan report of 1854[31] was replaced by a position system in the 1980s and 90s, without any change in the legal situation of civil servants. If we take the case of the Netherlands, by way of contrast, there has been a public law regime for civil servants for a century, embedded in acts of Parliament and decrees on the basis of traditional constitutional principles. The fact that the scope of that public law regime changed radically with the Act of 9 March 2017 on the "normalisation" of the status of civil servants should not hide that the principle of tenure applied until recently to all public employees in typical positions system, but not a career system. Theoretically, it was possible under Dutch civil service law for a civil servant to remain in the same position for life without making any progress on their career path. Moreover, in most countries where public employees are regulated by labour law contracts and collective agreements, those instruments, and especially the collective agreements, contain a number of provisions that organise careers in a general way, be it for public employment or private employment.

In the same way, we tend to assume that a public law regime implies tenure for life. Comparative law shows that this is not the case. In Sweden, for instance, where civil service law is regulated by law on the basis of constitutional principles, civil servants are traditionally hired for a fixed term, even if their contracts are extended in the majority of cases. Until the reforms of the labour market in recent years, the legal position of private employees was such, in countries like France, the Netherlands or Italy, that, after having initially concluded a fixed-term employment contract, they enjoyed and still very often enjoy the right to an indefinite contract, which can only be denied to them for professional misconduct.

The differences between indefinite contracts in labour law and public law guarantees of lifetime employment are thus limited to three features. First, a possible difference in the powers of the courts which are competent to provide legal protection under labour law, and those of the administrative courts, if there are any – we have seen that this does not apply to Denmark. Second, it is true that the government does not become insolvent, and therefore it is easier for a civil servant to find a new job after a reorganisation than would be the case with a private employee. Third, in most European countries trade unions have greater power in the public sector than in the private sector, usually because trade unions have much lower membership in the private sector. As a matter of fact, the real power of workers lies in their ability to inflict great damage on society: this is clearly the case in the public transport sector, even where employees are subject to labour law, but it is also the case with individuals who derive their living from heavy means of transport, such as truck drivers or farmers.

30 OECD (2005).
31 Lowe (2011).

Also, we tend to assume in certain countries, such as France, Italy or Spain, that a public law regime implies recruitment by competitive examination, whereas a private law regime implies contracting by mutual agreement. However, in France, typically, while an increasing number of posts in public employment are filled by contract without competitive examination, most of those contracts are under a specific public law regime, where, amongst others, administrative courts are competent. The opposite is the case in Germany, where civil servants under public law (*Beamte*) are recruited by mutual agreement, even though on the employer's side, personnel representatives play an important role.

In Italy, the privatisation of the civil service law of 1993 has generally been regarded as a well-founded, generally successful and probably inevitable reform. The constitutional anchoring of the selection procedure, the *concorso* (competitive examination), has remained untouched. In countries such as France, Italy, Spain, and Belgium, such a constitutional anchoring is seen as a sign that the principles concerning the selection of public servants do form a core element of civil service law, either because it is seen as a direct consequence of the principle of equal access to the civil service or because it is seen as a guarantee of an efficient civil service by avoiding party political interference in recruitment. However, the principle of competitive recruitment has never been embedded in UK law, whereas it applied for more than a century since with the implementation of the Northcote Trevelyan report of 1854,[32] and in Germany it has never been inferred from the principle of equal access enshrined in Article 33 of the Basic Law that civil service selection must be based on such competitive examinations.

4. *Absence of Correlation Between Private Law and Collective Agreements With Unions or Discipline of the Right to Strike*

In some countries, such as Germany, civil servants under the public law (*Beamte*) regime traditionally have neither the right to strike,[33] nor the formal right to belong to a union, in contrast to employees under private and labour law. However, this is not so in most other countries. Furthermore, in Germany, the absence of a formal right to belong to a union has been compensated by the right of association. The same was true for Belgium, Denmark and Portugal three decades ago, and could thus be considered as one of the reasons behind the shifts from a public law to a labour law regime. From a strictly legal point of view, one might argue that bilateral negotiation of employment conditions is incompatible with the unilateral character of a public law appointment; however, in Germany, the employment conditions of university professors are subject to individual negotiation at the moment of their appointment even though they are formally civil servants. As far as collective negotiations are concerned, they have occurred regularly in most European countries for a very long time, both at the level of central government and at the level of agencies or local authorities, usually in view of the preparation of the budget. Whether the outcome of negotiations was legally binding is another issue, which is not necessarily linked to the public or private nature of the legal regime.

The Italian case is paradigmatic. With the Amato reform of 1993, disputes regarding employment relationships under public law, e.g. for the armed forces, judges, university professors and the police, remained subject to the administrative courts, while those

32 Lowe (2011).

33 See *The Right to Strike in the Civil Service* by G. Buchholtz in this volume.

regarding employees under private law were transferred to civil courts. There are a number of differences in court procedure, especially as adjudication on contracts – which applies to civil courts – is different from adjudication on single case decisions, which applies to administrative courts. However, this upheaval was by no means a reform inspired by New Public Management, for example, to eliminate principles such as those of the career system. Rather, it was a simplification undertaken with the full support of the unions. While there had been regular negotiations between government and trade unions since the 1980s, for salary increases as well as other aspects of public service employment relations, there was no legal basis for the enforcement of negotiation results as long as a public service employment relationship existed; the government had to transform the content of the agreements into bills to be submitted to Parliament or in government decrees. For a long time, paradoxically, public sector employees were therefore better protected than those of the private sector. Meanwhile, however, labour law had developed considerably, and private workers had had legally defined rights since 1970, which were called the *Statuto dei lavoratori* (Statute of Workers) and were concretised by collective agreements customary in the sector. Therefore, in 1993, privatisation was by no means seen as a loss from the point of view of public sector employees; on the contrary, putting public sector workers on the same footing as those in the private sector was seen as beneficial, as private workers were considered to be better protected. In order to take the pressure of the unions away from State government and the regional and local authorities during negotiations – after all, the unions can also be seen as representatives of millions of voters – an independent agency was even set up, the *Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*. It has a monopoly on negotiations and is considered the representative of all public administrations. As a matter of fact, there was a complementary reason which Giuliano Amato explained to me shortly after I published the aforementioned analysis: almost every year, when the budget was discussed, individual members of Parliament proposed very specialised amendments in order to meet claims in their constituencies. The Agency, being independent, would not be submitted to that kind of pressure. Whether the change from public to private law has fundamentally changed the content of employment relationships remains to be proven. Overall, however, it was assumed that the form of employment relationships in the public sector was improving because it allowed the trade unions to get more involved. The latter has shown a greater willingness to make changes, as can be seen, for example, in the opening hours of individual authorities and public institutions, such as the State museums, or in the organisation of the right to strike.

This being said, the most important formal guarantee of independence under public employment law remained untouched: the *concorso* (competitive examination) prescribed in Article 97, paragraph 3, of the Italian constitution. As an exception to the jurisdiction of the civil courts, the administrative courts remain entrusted with the judicial review of these selection procedures. It has, however, to be stressed that competitive examinations are organised in very different ways as far as both content and procedure are concerned, as I will explain later. If there has been an impact of public management concepts on recruitment, I submit that it has been far more in terms of substance than legal form.

5. *Absence of Correlation Between Public or Private Law and the Personal Liability of Employees*

It is sometimes suggested that a public law regime impedes the personal responsibility of civil servants. I submit that this kind of assertion is based on confusion between two

very different issues. The first and, in my view, foremost issue, is the protection of victims from damage caused by public employees when exercising their functions. A standard view derived from a bad understanding of the work of Albert Venn Dicey (1835–1922) is that in systems of administrative law, such as the one that had been established in France for more than a century by the time he was writing,[34] civil servants would be protected from being sued in court, whereas in British common law, they could be sued. However, it was traditionally more expensive to take legal action in English common law courts than in French administrative courts; more importantly, the public employer usually has the financial resources to compensate damages to individuals, whereas a single civil servant does not. And in most European countries there are well-established procedures by which the public employer can claim compensation from the employee who caused the damage, even by withholding the corresponding sums from wages, something that is usually ignored by public opinion.

It has to be added that in most – if not all – European legal systems, there is in civil law vicarious liability for employers due to the torts caused by their employees, so there is hardly any difference between administrative law of torts and the civil law of torts from that point of view. In the UK, the principle "The King can do no wrong" prevented actions for liability from being brought against the Crown (i.e. the State) until 1947. Clearly, jurists do not speak the same language as social scientists or the man in the street when they speak of responsibility, accountability, and liability. One question is what happens in tort law if damage has been caused; the other is how public employees can be prompted to feel responsible and be held accountable for the way they accomplish their work.

In other words, from the perspective of organisational theory, as Les Metcalfe most interestingly pointed out

> The question of accountability is all the more pertinent because public management is not part of a business that serves clients but is instead a process that deals with subjects. Thus, New Public Management's attempts to emulate business-like management strategies are not always appropriate. Does a professional organisation with a predominantly professional client relationship (such as welfare services) have an accountability system that is appropriate to that sort of organisation? Contingency theory makes a significant claim about this issue. For public management to work properly, it says, the legal framework has to match the type of accountability system to the type of organisation. A correspondence between the type of accountability and the type of organisational system is needed; thus, bureaucracy requires a system of accountability from above. If this correspondence is not established, it becomes very unclear what sorts of objectives the organisation should be pursuing. This leads to organisational anomie in which nobody knows which rules or accountability systems are to be applied.[35]

Metcalfe recently commented to me that he always had a feeling that NPM advocates do not know the difference between a customer and a client. The former implies a market exchange relationship with a supplier, and the latter a professional relationship. The former assumes the ability of the self-interested customer to define their own wants (revealed

34 Dicey (1915).
35 Metcalfe (2001).

preferences), and the latter requires the professional to diagnose needs and act in the interests of the client. These are different ways of defining productivity.

III. Did Public Management Concepts Have an Impact on Recruitment, Training and Development, Pay and Benefits?

If it is not possible to demonstrate the impact of public management concepts on the legal status of public employees, this does not mean that there are no common trends in Europe regarding changes in public employment regimes. Indeed, at first sight there are similarities in the way recruitment, training, and development, pay and benefits have evolved in recent decades. The question remains: to what extent can this be attributed to public management concepts?

True, there are common trends in the field of remuneration and development, i.e. the increase in remunerations on the basis of merit rather than seniority. However, such developments are not due to NPM as such. In France, typically, an important part of remuneration has been, in principle, based on merit since the early 1950s. The main part of the salary is based on a grid that is common to all civil servants, with progression based on seniority; the precise correspondence between the rank in a *corps* and the corresponding salary in the grid is established by the specific status of the *corps*; a non-negligible part of the remuneration consists, however, in a bonus which takes into account specific elements of the position occupied by the civil servant – such as difficulties or dangers in work – and the way functions are fulfilled. What happened over time, however, is that in most cases there has been a levelling of bonuses due to the pressure of unions; furthermore, it is well known that bonuses tend to be higher in the ministry in charge of the budget, as its employees have more leverage due to their precise knowledge of the budget details.

In the same way, career development has for a very long time been supposed to be based on the assessment of the single employee by the head of service; but there has been a recurrent tendency to level assessment marks, also often due to the pressure of unions. In France, as in many other countries, assessment techniques have been changed from time to time, becoming ever more sophisticated, with the indication that they were inspired by techniques employed in the private sector. What is often forgotten in the case of France, Italy and may other European countries, is that those sophisticated techniques are mainly employed, if they are indeed employed at all, in rather big enterprises, while the industrial, commercial, and service business landscape is to a large extent made up of small enterprises, where personal relations are far more important than formalised systems of grading.

I submit that an important part of common trends in the field of public employment are in fact mainly due to two main causes, i.e. the EU law on the one side, and budgetary problems on the other. The fact that the renewed search for budgetary balance triggered NPM reforms does not mean that the reduction in public expenses is due to NPM concepts. As far as EU law is concerned, even though there are a number of scholars and politicians who express their belief that European integration is closely linked to neoliberalism – a belief which, by the way, I do not share – and if NPM is often related to neoliberalism, I will show that EU law's influence on public employment regimes is not a result of neoliberal policies.

First, EU law has a clear influence on the recruitment and development of public employees, as well as on social benefits, but this is simply the result of freedom of movement of labourers and the prohibition of discrimination on grounds of nationality, and especially of the wording of Article 45 of the Treaty on the Functioning of the European

Union (TFUE), which has remained unchanged since the Common Market Treaty of Rome.

According to Article 45 TFEU, "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." However, Article 45, paragraph 4 TFEU states that "the provisions of this Article shall not apply to employment in the public service". This is an exception to the general rule of free movement of workers and must therefore be interpreted restrictively; the CJEU therefore formulated its own criteria for the concept of "employment in the public service" to be applied in all Member States. In its judgment of 1980 in *Commission v. Belgium*[36] the Court held that Article 45, paragraph 4 TFEU covers

> posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts, in fact, presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.

As a result, slowly but surely, most EU Member States have restricted the number of positions where a criterion of recruitment was the citizenship of the State concerned; those reforms often had as a consequence a review of existing positions and careers in the public sector, but there has been no harmonisation of civil service regimes.[37] In a certain number of Member States, there have been partial reforms of the recruitment system due to that jurisprudence. In Germany, the traditional procedure for recruitment after two *Staatsexamen* has been complemented by a specific procedure for European citizens who have completed their university education in other Member States – also if they are German citizens. In France, there has been an adaptation of competitive examinations, primarily in the health sector. As a consequence of the prohibition of discrimination based upon nationality embedded in Article 18 TFEU, previous experience in equivalent public services in other Member States also has to be taken into account in career progression and the level of remuneration. It would obviously be a mistake to see a link between those numerous adjustments of civil service regimes and the concepts of NPM.

Furthermore, EU law clearly has an impact on the working conditions and working time of public employees, which is due to the general development of harmonisation in the field of employment. In order to take into account the variety of definitions and scope of public employment while consolidating the common labour market, the European legislator took care to define the scope of Directive 2003/88 on working time[38] in the same way as in Directive 89/391 on the safety and health of workers at work:

> 1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.). 2. This Directive shall not be applicable where characteristics peculiar to certain specific

36 CJEU, judgment of 26 May 1982, *Commission v. Belgium,* C-149/79, para. 10.

37 See European Commission (2010), which is based upon Ziller (2010).

38 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Article 1, para. 3.

> public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.[39]

Again, it would be totally wrong to see a link between the harmonisation resulting from those directives and the abundant case law on their application and NPM concepts.

Second, there are common developments in the way candidates for civil service posts are being assessed, as well as in their training. This is not due to EU law, even though it is to some extent due to European integration, and, to a certain extent, to globalisation. Typically, there is a common trend to add specific training on European and International institutions, as well as on negotiating techniques – for a long time, such training was only seen as important for the diplomatic service. In many countries, without changing the legal nature of the selection, i.e. appointment based upon competitive examination or over-the-counter contract, there has been a shift – which started, as far as I know, in the United Kingdom – from written or oral testing of knowledge to the assessment of skills. In a number of countries, there is still a belief that the *concours*, *concorso*, or *oposición* is necessarily based upon the assessment of the knowledge, which is not the case; quite the contrary, in the same countries, a large part of the assessment is traditionally based upon previous education, publications, and sometimes experience. The same occurs in countries which use direct selection for over-the-counter contracts. True, there is an important difference whenever judicial review of the selection process is available – such as in Belgium, France, Italy, or Spain, for instance, because this very often leads to an extreme formalisation of the process and the need to give detailed reasons for the selection made. However, if this is not the case – usually in countries which do not practice competitive examination – selection seems much more flexible, as happens in private sector employment. The impact of European integration is subtle and not very easy to grasp without a detailed analysis. In short, as EU law demands that negative decisions be reasoned and liable to judicial review,[40] there should be a trend towards more formalisation of selection procedures. But this depends upon the legal culture: typically, referrals for a preliminary ruling come mostly from countries or candidates whose legal culture includes the idea that judicial review is possible in that case, whereas in other countries, the mere idea of going to court is usually considered alien.

A last point is worth being made: to my mind, there has indeed been an impact of NPM concepts on civil servants' mobility, and thus on the type of careers in the civil service. The UK used to stand out as the country with the best mobility between ministries, and that was considered as an advantage because it facilitated Interministerial coordination and also because new ideas could more easily be spread, and routine be overcome. With the agencification that resulted from the Next Steps report of 1987,[41] mobility was reduced, slowly but surely, because recruitment is in many cases operated by an agency for its own needs, whereas before, it was operated by the Civil Service Commission for the entire Crown service, with the exception of specialists. The caricature of generalist civil servants of the

39 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, Article 2.

40 CJEU (GC), judgment of 27 February 2018, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, C-222/86.

41 Panchamia and Thomas (2014).

"Yes Minister"[42] type led to attempts to replace them with "managers"; whether this is on the whole beneficial remains to be seen.

IV. Concluding Remarks

Analysing public employment regimes and the changes they are undergoing requires an interdisciplinary approach. Legal scholarship cannot do without sociologists, historians and fiscal economy specialists who help understand the ingredients of each country's path dependency. A specific effort needs to be made to bring together constitutional and administrative lawyers with specialists in organisational theory and practice in public organisations.

Bibliography

Boise W.B. (1969), 'The French National School of Administration and the Education of Career Executives', 30 *Public Personnel Review*, 31–35.

Cassese S. (ed) (1993), 'L'administration française aujourd'hui', 67 *Revue française d'administration publique*.

Chapman B. (1959), *The Profession of Government – The Public Service in Europe*, London: Unwin University Books.

Dicey A.V. (1915), *Introduction to the Study of the Law of the Constitution*, 8th edition, London: McMillan.

European Commission (2010), *Commission Staff Working Document – Free Movement of Workers in the Public Sector*, SEC(2010) 1609 final, Brussels: European Commission.

Fargeot-Boll C. (2012), 'Quel avenir pour l'administration portugaise?', 44 *IGDPE Actualité de la veille en gestion publique*.

Gottschall K., Kittel B., Briken K., Heuer J-O., Hils S., Streb S., Tepe M. (2015), *Public Sector Employment Regimes. Transformations of the State as an Employer*, London: Palgrave Macmillan.

Hood Ch. (2001), 'Public Management, New', in Smelser N.J., Baltes P.B. (eds), *International Encyclopedia of Social & Behavioral Sciences*, Oxford: Pergamon, 12553–12556.

Johnson N. (1959), 'The Profession of Government', 37 *Public Administration*, 293–298.

Kessler M.-Ch. (1986), *Les grands corps de l'Etat*, Paris: PUF.

Lowe R. (2011), *The Official History of the British Civil Service: Reforming the Civil Service, Volume I: The Fulton Years, 1966–81*, London: Routledge.

Lynn J., Jay A. (1984), *The Complete Yes Minister: The Diaries of a Cabinet Minister*, London: HarperCollins.

Massenet M. (1975), *La nouvelle gestion publique: pour un Etat sans bureaucratie*, Suresnes: Editions Hommes et Techniques.

Metcalfe L. (2001), '"Law, Conservatism and Innovation: A Management Perspective", in George A., Machado P., Ziller J. (eds), *Law and Public Management: Starting to Talk*', 12 *EUI Working Paper Law*, 6–10.

Metcalfe L., Richards S. (1987), *Improving Public Management*, London: Sage.

OECD (2005), *Modernising Government: The Way Forward*, Paris: OECD Publishing, https://doi.org/10.1787/9789264010505-en.

OECD (2019), *Government at a Glance 2019 Country Fact Sheet*, Paris: OECD Publishing, www.oecd.org/gov/gov-at-a-glance-2019-denmark.pdf.

Panchamia N., Thomas P. (2014), *The Next Steps Initiative*, London: Institute for Government, www.instituteforgovernment.org.uk/sites/default/files/case%20study%20next%20steps.pdf.

Pochard M. (2023), 'La fin de l'ENA et la réforme de la haute fonction publique', 181 *Commentaire*, 93–100.

42 Lynn (1984).

Rocha J., Esteves de Araujo J. (2007), 'Administrative Reform in Portugal: Problems and Prospects', 73 *International Review of Administrative Sciences*, 645–660.
Simon H. (1947), *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization*, New York: Macmillan.
Van Nispen F., De Jong M. (2017), 'Evidence-Based Budgetary Policy: Speaking Truth to Power?', 2 EUI *Working Paper SPS*, 1–28.
Wittgenstein L. (1953a), *Philosophische Untersuchungen*, Frankfurt am Main: Suhrkamp Verlag.
Wittgenstein L. (1953b), *Philosophical Investigations*, Oxford: Blackwell.
Ziller J. (1993), *Administrations comparées – Les systèmes politico-administratifs de l'Europe des Douze*, Paris: Montchrestien.
Ziller J. (2001), '"Introduction", in George A., Machado P., Ziller J. (eds), *Law and Public Management: Starting to Talk*', 12 *EUI Working Paper Law*, 4–5.
Ziller J. (2003), 'Vrais et faux changements dans les administrations en Europe', 1–2 *Revue française d'administration publique*, 67–79.
Ziller J. (2005), 'Public Law: A Tool for Modern Management, Not an Impediment to Reform', 71 *International Review of Administrative Sciences*, 267–277.
Ziller J. (2006), 'Das öffentliche Dienstrecht aus der Perspektive der vergleichenden Verwaltungswissenschaft', *Die öffentliche Verwaltung*, 233–241.
Ziller J. (2010), *Free Movement of European Union Citizens and Employment in the Public Sector – Current Issues and State of Play*, Brussels: European Commission, www.bollettinoadapt.it/old/files/document/10069eu_rep_14_12_10.pdf.

48 Leading Trends in the Development of the Civil Service in Europe

Jean-Bernard Auby

I. Introduction

The aim of this chapter is to analyse some of the main trends in the contemporary evolution of European civil service systems, namely reforms of a certain magnitude that have sought to modify major orientations in recent decades.

Is this a difficult project? Yes and no. Yes, because civil service systems are very much linked to the histories of the different European States, developing, establishing and inflecting in the distant past as well as in modern times, with notable differences between them. No, insofar as public services have long been the subject of comparative legal or social science studies, not to mention recurrent comparative reports by international and European bodies: some references are given at the end of this chapter. There are also the contributions of the previous chapters of this volume, to which I refer here and there.

Summarising the evolution of diverse civil service systems proves challenging, yet a discernible impression emerges, which I address again in the conclusions. States are currently seeking to reorganise their civil services, in the same way that they are trying to regain their powers of economic and social intervention in a context of repeated crises – financial, then COVID-19, now the latent climate crisis – which make this reinforcement necessary. Civil service systems are trying to find their place after several decades under the influence of New Public Management and the major political changes in Eastern Europe, in a largely transformed economic and political context.

Here, I attempt to identify the main corresponding developments from three points of view: the impetus that led the European States to reform their civil services (Section II), the direction they took (Section III), and the impact their reforms have had or not had on civil service styles in Europe (Section IV).

II. Impetus for Development

Administrative reforms are always the product of the legal and political contexts which make them possible, or which led to their being proposed before failing because they encountered insurmountable obstacles. They are also the product of reformist motivations, currents of ideas that see the existing public service system as unsatisfactory and suggest changes in one direction or another. This analysis concerns recent developments in European public services.

However, most of the reforms made in the last few decades were based on a specific set of concerns, that of public management, which flourished in the 1970s during the New

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Public Management period. All civil service systems were then driven by a concern to be more efficient through greater flexibility, decentralisation and performance-orientation, even when efficiency was not their only concern.[1] As Christoph Demmke puts it, the key words were: "decentralisation of Human Resources (HR) responsibilities and responsibilisation of managers, greater flexibility in recruitment and career development policies, a stronger focus on individual and organisational performance management and a general de-bureaucratisation".[2]

1. Legal and Political Context

Among the various aspects of public action, the civil service is always particularly sensitive to the wider context, simply because it is one of the most visible and ready prey for politicians and citizens. Without oversimplifying, it can be argued that civil service reforms undertaken in recent decades have been driven by four sets of contextual elements: political changes, evolution of laws, structural reforms, and crises.

1. Firstly, there are, of course, the political changes. In general, strong political changes naturally generate transformations in State apparatuses to fit new courses, especially in the political and legal status of their bureaucracies. This is what happened in the democratisation of the Southern European authoritarian and Eastern European socialist regimes.[3] This volume contains descriptions of such processes in Spain and Poland. In the first case, Ricardo García Macho outlines the consequences of Spain's two dictatorial periods last century.[4] Concerning Poland, Dawid Sześciło highlights the importance of the civil service statute of 1998, passed by the coalition of parties arising from the socialist era democratic opposition.[5] Beyond these cases of genuine revolution, lesser political changes sometimes give rise to a desire to reform the public service. The recent regression of the rule of law and the move towards 'illiberal' democracy in Hungary and Poland have been accompanied by reforms that have tended to bring the civil service back under government control.[6]
2. The impetus for civil service reforms may come from developments in the legal context itself, which may, of course, accompany political developments. From this point of view, it is clear that European law plays a major role in certain circumstances. The European Union (EU) lacks the competence to regulate national civil services, over which it has no direct power. However, some of its principles have played an important part at the time of accession of States, through the *acquis communautaire* or subsequently. This has certainly been the case for freedom of movement and gender equality, not to mention the development of a European "composite administration", which continuously

1 van der Meer et al. (2015).

2 Demmke (2010).

3 Beblavy (2002); Verheijen (2002).

4 See *The Civil Service in Spain: The Deficit of Organisation in Public Employment and the Principle of Democracy* by R. García Macho in this volume.

5 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

6 *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

strengthened relations between national administrations in terms of practical cooperation, imitation, and benchmarking.[7]

Has the European Convention on Human Rights played a role in the evolution of national civil services? Not a significant one. Of course, the European Court of Human Rights had opportunities to apply Article 6 of the Convention to civil service litigation[8] and Article 9 and the freedom of religion principle to issues concerning the wearing of Islamic veils in the workplace.[9] It can be said that the European Convention has so far intervened more as a limit to national solutions rather than as an impetus for reform.

3. Civil service reforms sometimes owe much to another kind of change in the legal context, namely structural reforms in the State apparatus. Thus, changes in the territorial system of States, privatisation movements and the creation of independent agencies necessarily have consequences for the civil service and sometimes oblige legislators to adapt the law applicable to it, thus becoming civil service reforming factors. This was the case in France when decentralising reforms of some amplitude were made in the 1980s: this had to be accompanied by profound modification of the law applicable to employment by local government. The transformation took several directions. It legally unified the local civil service statuses, where different pieces of legislation previously applied to the various local government level staff. This made it easier for civil servants to migrate from one local institution to another, provided most local civil servants with stronger guarantees of stability and so forth.[10]
4. Another type of impetus for civil service reform sometimes comes from the difficulties faced by State apparatuses in the face of crises. Thus, the global financial crisis of 2008 acted as an incentive for States to stiffen their internal management and often to reduce the number of staff.[11] The COVID-19 crisis also raised questions across Europe about the efficiency of State bureaucracy and how to improve that efficiency.[12] Questions emerged, for example, about the role played by scientific bodies and the balance that had to be struck between them, traditional civil servants and decision-makers.[13] The recent crises obviously led to some return to stronger intervention by States in economic and social affairs. This per se implies a kind of reinforcement of administrations as to the number and quality of staff and the powers entrusted to some of their top managers.

2. The Most Frequent Motivations

Naturally, the promoters of civil service reforms always are or claim to be, driven by the desire to make the public apparatus more efficient. But beyond this constant general

7 Auby and de la Rochère (2022), pp. 905 f.

8 ECtHR, judgment of 19 April 2007, *Vilho Eskelinen & Others v. Finland*, 63235/00; see also *The Right to a Fair Trial for Civil Servants and the Importance of the State's Interest in Applying Article 6, Paragraph 1 ECHR* by F. Aperio Bella in this volume.

9 ECtHR, judgment of 26 November 2015, *Ebrahimian v. France*, 64846/11; see also *Freedom of Religion or Belief in the Civil Service: How to Stay Loyal to the State While Remaining True to Oneself?* by W. Brzozowski in this volume.

10 Taillefait (2022), pp. 681 f.

11 van der Meer et al. (2015).

12 Bergeron et al. (2020).

13 See *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume.

objective, what the promoters of recent European civil service reforms have been looking for essentially revolves around the following concerns.

1. The most consistent concern expressed by contemporary public service reformers is to make the civil service more flexible, more adaptable to a changing world. In a sense, administrations are always criticised for being too bureaucratic, and by way of consequence, the reforms targeted are always characterised by some anti-bureaucratic stance. It is with this objective in mind that certain reforms of recent decades have tended to replace closed civil service systems, organised according to a career mechanism, with open systems, centred on contracts as the normal relation between the State and its personnel. A reform made in Italy in 1993 is emblematic. It was decided that State employees would thenceforth be recruited through contracts, except for magistrates, military personnel, diplomats, university professors and a few other categories. In this volume, Elena Buoso describes this reform, which radically transformed the whole Italian civil service.[14]
2. Fundamentally, civil service legitimacy is rooted in technocracy: through their aptitude to solve certain problems inherent to human community life, administrations acquire consensus in spite of their cost and complex functioning. A recurring motivation in civil service reforms is, therefore, the will to adapt civil servants' profile to practical developments in public action that require new expertise and new professional qualities.

   Two striking concerns currently beset government human resource policies: adapting civil servants to the digitalisation of public action and making them capable of conducting policies called for by climate change. These different challenges both call for new technical expertise and changes in the manner of understanding certain issues. Addressing them requires new recruitment and training efforts. The former is facilitated or otherwise by the quantity of resources allocated for the national school and university systems. The latter may require a change in mindset more than new knowledge. This conviction inspired the French government in its recent adoption of a training programme on climate change for several thousand top civil servants.
3. A common concern in civil service reforms is to concentrate management around the machinery of government better. Such policies may be driven by the desire to ensure better political control of the civil service. This was the sense of the reform carried out in Poland after the 2015 elections and the victory of the right-wing coalition led by PiS, as explained by Dawid Sześciło in this volume.[15]

   Reform may also be guided by the desire to allow more unrestrained movement of civil servants within the public administration and a mix of expertise. This was the main thrust of the reform initiated in France in 2021.[16] It tended to break with the traditional segmentation of senior civil service, divided into a large number of corps: bodies or communities of civil servants having the same legal status. It strived to bring most senior civil servants together in a single less specialised corps, through which movement would be easier.[17]

14 See *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

15 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

16 Auby (2021).

17 See *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

4. The driving force behind contemporary civil service reforms also often lies in increasing recognition of certain contemporary values, which the civil service is being led to take into account to an ever-greater extent, in some cases under pressure from international or European bodies. This is true, first of all, for gender equality. Following a trend encouraged by EU law, European civil services have been prompted to increase parity in the recruitment of civil servants and in career development. In this respect, Italy offers the example of an amendment to the constitution in 2003 imposing specific measures toward equal opportunities for women and men.[18]

   The same applies to the values of neutrality, transparency and impartiality. Promoting these values includes impersonal requirements concerning administrative decisions and procedures, as well as regulations concerning the personal behaviour of civil servants. The latter traditionally focus on corruption but currently concentrate on conflicts of interest, which have led all European countries to adopt or strengthen their legislation on conflicts of interest in the civil service.[19]

III. Orientation of Main Recent Developments

Having examined the reasons that have led European countries to transform their civil service systems recently, we now need to describe the main directions these developments have taken. We distinguish the substance of these developments from the methods that have governed the reforms.

1. The Substance

1. An obviously frequent lever of civil service reforms concerns the mechanisms of recruitment and initial training: trying to attract skilled and reliable candidates. Let us consider the poles of possible developments. In European traditions,[20] some civil services recruit by formal competition procedures: rigorous procedures aimed at putting applicants on an equal footing, formal examinations in front of a jury, and the like. Others use more flexible, individualised processes aimed more at getting to know the candidate's personality, determination and adaptability. This divide is generally rooted in national traditions; transitions from one to the other are not frequent but have indeed happened in the period we are considering. One example is the already-mentioned reform made in Poland after the 2015 elections. A revision of the Civil Service Law abolished compulsory open competition for top civil servant positions and enabled heads of institutions to freely appoint and dismiss.[21]
2. From a legal point of view, there is an important distinction between systems that recruit public servants by specific procedures under public law, and others that do so by private law instruments, i.e. contracts. The second method is considered more likely to ensure flexibility. One example of a move from one system to the other was the already mentioned Italian reform of 1993, the purpose of which was to move most civil

18 See *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

19 See *Common European Anti-Corruption-Standards for Civil Servants* by A. Weber in this volume; Auby et al. (2014).

20 See for example Plantey (1956).

21 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

servants from non-contractual to contractual positions. In practice, most civil service systems have a mixed nature in relation to the divide. The German system is typical, being divided into two parts: 38% of civil servants in the strict sense have public law status and 62% are employed under private law, as described in Claus Dieter Classen's contribution in this volume.[22] In this case, the balance between the two solutions remains rather constant, but may be different, as in the case of the French system. Recruitment was traditionally under public law and non-contractual, though recent reforms broadened possible recourse to contracts which may be under private or public law.[23]

3. In some European countries, the initial training of civil servants, at least senior ones, takes place in specialised schools that transmit the necessary knowledge for public management and a common corporate spirit. In the others, future civil servants are drawn from the ordinary university system and learn mostly on the job. The French example of the *Ecole Nationale d'Administration* (ENA)[24] clearly shows that the first type of training may reproduce bureaucratic knowledge far removed from reality and create a senior civil service caste that exercises excessive power in the State apparatus. This dual concern inspired the French reform of 2021, which abolished ENA and replaced it with the *Institut National du Service Public*, which is meant to be less elitist and to give future top civil servants skills better adapted to the current constraints of public action.[25]
4. In terms of career development, there are also several options between which European systems sometimes navigate. A fundamental divide is between career civil services, where civil servants are, in principle, recruited for life and progress in a "natural" way throughout their career, and employment civil services, where civil servants are usually recruited by contract for a specific job or group of jobs and progress in the hierarchy by procedures defined on recruitment. Contractualisation of the civil service may lead to a transition from the first system to the second, which was the aim of the Italian reform of 1993. If contractualised civil servants were essentially placed under labour law, they were also endowed with special collective agreements, negotiated with their trade unions.[26] A similar situation prevails today in the Netherlands, where a contractualisation reform was enacted in 2017.[27] Collective agreements limit the individualising trend of contractualisation through some general rules on the evolution of careers.
5. From a human resource management perspective, another key question is the extent to which management is concentrated in the central State, and in whose hands. Sometimes the head of the executive power, the president or prime minister, plays a central role; sometimes staff management is left to ministers. The question can be extended to how personnel is managed/organised in other public institutions: in various autonomous agencies, public enterprises or local government. In recent decades, oscillations between concentration and management autonomy can be observed here and there in the civil services of European countries, but in the long run, a trend of decentralising human resource responsibilities from centralised staff organisations to departments and

22 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C. D. Classen in this volume.

23 Taillefait (2022), p. 479.

24 On its Polish equivalent, see *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

25 Auby (2021); Taillefait (2022), p. 206.

26 See *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso in this volume.

27 See *The Civil Service in the Netherlands: Normalisation of the Legal Status* by A. De Becker in this volume.

agencies seems to prevail. This is a New Public Management stance which has been adopted in most European countries.[28]

6. A question of great importance is the degree of politicisation of the civil service, especially the senior civil service.[29] Worded differently, it refers to the extent to which the recruitment of civil servants and their career are determined by their political proximity to the politicians they are going to work with.

   In some systems, of which the United Kingdom is the archetype, there is a tradition of absolute neutrality of senior civil servants, who must serve all governments in the same way, whatever their political leanings. In other systems, it is accepted that the highest civil servants must be politically close to the government and are sometimes chosen by political parties, like the general secretaries of Spanish ministries.[30] The first option may now be giving way to the second. Strikingly, the British tradition of civil service neutrality is increasingly counterbalanced today by a multiplication of political advisers to government members. These advisers are in no way sworn to neutrality like top civil servants.[31] This case reflects a more general evolution highlighted by an Organisation for Economic Co-operation and Development (OECD) survey.[32]
7. Regarding the values that civil servants must observe and how compliance is enforced, evolution is already evident. In most, if not all, European civil services, there have already been reforms concerning corruption and conflicts of interest through formal legislation or regulation and soft-law instruments.[33] The most recent developments concern the protection of whistle-blowers. Examples are the United Kingdom reforms of 1998 and the Italian reforms of 2017, mentioned previously.[34]
8. Another different but important question is the end-of-career situation of civil servants, especially their pension schemes.[35] Apart from whether the pension system is centralised or decentralised, which is essentially a financial choice, the main issue is the extent to which the civil service pension system differs from that of workers in the private sector.[36] The ongoing debate in France on this issue shows how politically tense it can be. Efforts have been made to narrow the remaining significant differences.

2. The Method

Two interesting questions arise here: one concerns the legal instruments of the reform, the other who is making the reforms.

1. The type of norms on which reforms are based may be constitutional amendments, amendments to laws, or simple internal measures, such as guidelines.[37] Systems that

28 van der Meer et al. (2015). See also *Do Public Management Concepts Have an Impact on Civil Service Regimes?* by J. Ziller in this volume.

29 Hojnacki (1996); Rouban (2012).

30 And the other "altos cargos de la Administracion del Estado": see, for example, Fernández Farreres (2016), pp. 389 f.

31 See *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume.

32 OECD (2007).

33 Auby et al. (2014).

34 See *The Civil Service UK Style: Facing Up to Change?* by P. Leyland; *The Civil Service in Italy: A Flood of Legislative Reforms and a Few Safe Harbours* by E. Buoso and *The Development of a Legal Framework on Whistle-blowing by Public Employees in the EU* by P. Provenzano in this volume.

35 OECD (1997).

36 See *Civil Service Retirement Pension Regimes* by C. Hauschild in this volume.

37 See *Ethical Standards for the Civil Service in Europe: Substitutes for or Complements of Legal Rules?* by A. Jacquemet-Gauché in this volume.

acknowledge soft law instruments as the most efficient for inducing ethical behaviour of civil servants are especially interesting. Examples may be drawn from the United Kingdom, where a Code of Conduct is relied on, despite the fact that the rules are now envisaged by the Constitutional Reform and Governance Act 2010.[38]

2. For the second (who is making the reforms), the solutions diverge. Reforms are sometimes made at the highest level of government, and at other times, they are placed in the hands of a particular minister. In a paper on civil service reform in Central Europe,[39] Miroslav Beblavy shows that several solutions were adopted, special agencies, interior ministries and labour ministries being the most frequent.

IV. Influence on European Civil Service Models

The last question to address is the extent to which recent reforms to the European civil services have affected the map of their theoretical models. Like all social science types, public service models are debated and in practice tend to oversimplify. Nevertheless, certain criteria or keys, are generally recognised as identifying the main characteristics of such systems: values, the open or closed nature of the system, and its degree of neutrality.

1. Values

The values underlying European civil service systems converged dramatically at the end of the Southern dictatorships and the communist period. Today it can be suggested that European civil services do not differ substantially in terms of values because at least since the end of the communist era, the values on which they are based are relatively constant, being derived from a largely common heritage of fundamental rights and principles related to democracy and the rule of law, combined with some commonly accepted principles of public management.

There are, however, some secondary differentiations, and sometimes national orientations show differences on issues that are not of negligible importance. This is illustrated, for example, by the restrictive conception of the right to strike retained by German and Danish law.[40] One can also mention the decision of the French legislator in 2004 to ban civil servants from wearing any sign of religious affiliation: the particularly strict conception of secularism of the French tradition was expressed on this question after a long and difficult discussion.[41]

2. Closed and Open Systems

As already suggested, a strategic divide is traditionally based on the fact that a civil service system may be closed or open, i.e. is more of a career system or more of an employment system. In the first case, working for the State is considered a particular professional activity, which can only be performed by people who have a lasting and even life-long guarantee of employment. In the second case, the civil service is seen as a job like any other, which does not have to be guaranteed in the long term, but for which the most suitable people are recruited at a given time for a given period.

38 See *The Civil Service UK Style: Facing Up to Change?* by P. Leyland in this volume.
39 Beblavy (2002).
40 See *The Right to Strike in the Civil Service* by G. Buchholtz in this volume.
41 Taillefait (2022), pp. 395 f.

The career system is certainly dominant in Europe:[42] it has even been chosen as the key orientation for the EU civil service.[43] However, this must be qualified, as the most frequent situation is actually a mixed one. In the United Kingdom, for example, the career system only applies to the core of the State civil service, i.e. to civil servants. In Germany, it applies only to civil servants in the strict sense, who are only half the civil service, the rest being workers and employees under an employment regime. In Poland, it applies to less than 6% of the civil service.[44]

Are the European civil service systems converging to one of these models? The answer is nuanced, as some systems remain firmly attached to one of the two. However, in recent decades, a general search for flexibility has led some systems to move squarely towards the open model, e.g. those of Italy and the Netherlands, while others, though remaining attached to the closed model, have opened to a large degree of contractualisation, as in the case of France. So even if there is no general convergence, a dominant orientation is discernible.

3. Neutrality

Another important distinction, already touched on here, is between civil services based on a principle of strict political neutrality and those in which it is natural for public officials to have the same political orientations as those who govern at any given time. The former is traditionally referred to as the merit system and the latter as the spoil system, a term used extensively to describe much-debated practices in the history of the United States.[45]

The traditionally dominant conception in the European States was that civil servants must serve the State irrespective of their political preferences and stay away from concrete political activity. The actual situation has often been more complex. This is also shown here by the French case, in which civil servants are all theoretically committed to political neutrality, but where there is nevertheless a series of senior posts “at the discretion of the government”. This means that the government can freely appoint civil servants to them, including people with whom it has politically close ties and whom it can freely set aside in the event of a subsequent disagreement.[46] As we mentioned, the British system is slowly evolving towards a more mixed character.

V. Conclusion

Have the recent developments summarised here changed anything in this picture? The answer seems essentially negative. Since the demise of the authoritarian and socialist regimes and the advent of the New Public Management ideology, few large-scale reforms have affected the European civil servant systems, at least the main ones. The most notable reforms have been contractualisation, which affected the Italian and the Dutch systems. Their real impact should not, however, be overestimated since the resulting transformations

42 Except in Scandinavian countries: van der Meer et al. (2015).

43 Auby and de la Rochère (2022), pp. 229 f.

44 See *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Sześciło in this volume.

45 Chavanon (1950–1951), pp. 28 f.; Hojnacki (1996); Rouban (2012).

46 Taillefait (2022), pp. 531 f.

turned out to be less than anticipated. In fact, the map of civil service models in Europe seems to be quite stable.

This conclusion must, however, be qualified. Since the reforms were timid, European civil services have been challenged and even criticised as not acting sufficiently effectively in the face of recent crises, especially the health crisis. Faced with other challenges, notably the digitisation of public action and the climate emergency, European States often appear preoccupied with strengthening their public functions, updating their expertise and improving the handling of concrete issues. This does not in itself imply major legal revolutions, but it necessarily leads States to be more rigorous in recruiting and training their personnel.

Our European civil service organisations, like our administrative systems as a whole, are therefore constantly being reformed without losing their fundamental characteristics. They are constantly challenged and partially reformed. However, in recent years, they seem to have been challenged and reformed in a new manner. While tensions were previously centred on typical open managerial concerns, the advent of the various crises and the prospect of others, especially climate, seem to have stimulated a desire of governments to concentrate staff management so as to strengthen their States.

Bibliography

Auby J.-B. (2021), 'Réflexions sur la réforme de l'encadrement supérieur de l'État', 12 *Droit administratif*, 13–17.

Auby J.-B., Breen E., Perroud T. (eds) (2014), *Corruption and Conflicts of Interest: A Comparative Law Approach*, Cheltenham: Edward Elgar.

Auby J.-B., de la Rochère J.D. (eds) (2022), *Traité de droit administratif européen*, 3rd edition, Bruxelles: Bruylant.

Beblavy M. (2002), 'Management of Civil Service Reform in Central Europe', in Peteri G. (ed), *Mastering Decentralization & Public Administration Reforms in Central and Eastern Europe*, Budapest: LGI, 57–71.

Bergeron H., Borraz O., Castel P., Dedieu F. (2020), *COVID-19: une crise organisationnelle*, Paris: Presses de Sciences Po.

Chavanon C. (1950–1951), *Les fonctionnaires et la fonction publique*, Paris: Les Cours de Droit.

Demmke C. (2010), 'Civil services in the EU of 27 – Reform Outcomes and the Future of the Civil Service', 2 *EIPA Scope*, 5–11.

Fernández Farreres G. (2016), *Sistema de Derecho Administrativo*, Vol. I, Madrid: Civitas.

Hojnacki W.P. (1996), 'Politicization as a Civil Service Dilemma', in Bekke H.A.G.M., Perry J.L., Toonen T.A.J. (eds), *Civil Service Systems in Comparative Perspective*, Bloomington: Indiana University Press, 137–165.

Meer F.M. van der, Raadschelders J.C.N., Toonen T.A.J. (eds) (2015), *Comparative Civil Service Systems in the 21st Century*, 2nd edition, Basingstoke: Palgrave Macmillan.

OECD (1997), 'Civil Service Pension Schemes', 10 *SIGMA Papers*, Paris: OECD Publishing.

OECD (2007), *Political Advisors and Civil Servants in European Countries*, 38 SIGMA Papers, Paris: OECD Publishing.

Plantey A. (1956), *Traité pratique de la fonction publique*, Paris: Librairie Générale de Droit et de Jurisprudence.

Rouban L. (2012), 'Politicization of the Civil Service', in Peters B. Guy, Pierre J. (eds), *The SAGE Handbook of Public Administration*, 2nd edition, London, Thousand Oaks, New Delhi, Singapore: SAGE Publications Ltd, 380–391.

Taillefait A. (2022), *Droit de la fonction publique*, 9th edition, Paris: Dalloz.

Verheijen T. (2002), 'The European Union and Public Administration Development in Central and Eastern Europe', in Baker R. (ed), *Transitions from Authoritarianism: The Role of Bureaucracy*, Westport: Praeger Publishers, 245–272.

49 Political Influence and the Transformation of Civil Service Systems*

Jolanta Itrich-Drabarek, Stanisław Mazur, and Katarzyna Baran

I. The Evolution of the Idea of the Division between Politics and Administration – An Outline

Public administration – in its classical definition – is governed by the common welfare, serving each political grouping in power with equal force and limiting its activity to executing decisions made by politicians. Theoretical grounds for such apoliticism were laid in a report by Northcote-Trevelyan[1] (about the activity of the British administration), as well as the works of W. Wilson,[2] J.F. Goodnow[3] (the analysis of the 19th-century American administration), and M. Weber[4] (the analysis of bureaucracy).

The first attempts to introduce an apolitical national administration date back to the late 19th century in the United States of America (USA). It was a reaction to the existing spoils system, which meant that a thorough replacement of the national civil service took place with each change of president. The distinction proposed by W. Wilson and J.F. Goodnow was designed to protect American offices from exploitation by politicians who regarded them as their political spoils.[5]

The conviction that the rule of apolitical civil service should be respected was upheld for decades. Its associations with impartiality and objectivism led to its increasing social acceptance. It was mainly thanks to politicians and civil servants, guided by their own values and interests that the concept came to be supported.

In the 1980s, the indicators of the development of bureaucratic systems were as follows:

- faster growth of intermediate (office) staff in comparison with direct executive personnel;
- a rise in the number of decision-making entities in the management system, centralisation of decision-making, and a higher number of control units;
- more standards regulating the systems' behaviour towards its surroundings and within the bureaucratic system;
- the development of personal and cultural bureaucratic behaviour as variables of the modernisation and professionalisation processes;

* This chapter was developed as part of a programme at the Cracow University of Economics to promote the publication activities of employees.

1 Northcote and Trevelyan (1854).
2 Wilson (1887).
3 Goodnow (1900).
4 Weber (1978).
5 Wilson (1887).

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- gradual autonomation of bureaucracy as a result of diminishing external control;
- conflicts between the bureaucratic and political systems.[6]

In the 1990s, a reaction of the political system to negative phenomena within public administration itself and its environment could be seen. As a result, intense reforms in the civil service took place and new Information and Communications Technology (ITC)[7] was introduced to assist. In the first decade of the 21st century, these trends deepened and, at the same time, standards of public administration activity were harmonised (particularly in the European Union, EU).

Thus, D. Carelli and B. G. Peters rightly suggest that "the bureaucratic organisation and its inherent roles and functions in the political system is bound to both transformation and persistence".[8]

Many researchers point out that due to the scope and level of complexity of public affairs and the inertness of administration, often under pressure from different interest groups, current governance systems are overwhelmed. The problems that civil services face in various countries are similar and different at the same time. Undoubtedly, in the 15 countries of the so-called "old" EU, the evolution towards greater specialisation and less dependency on political powers becomes more of a problem, as a result of which politicians have less control over civil servants. At the same time, there are very few examples of breaches of the employment stability rules for civil servants.

II. Does Political Neutrality (Apoliticism) Still Make Sense in Europe?

Apoliticism and political neutrality are relatively easy to define in theoretical terms, in practice, however, their interpretation can be rather vague. There are currently some mechanisms which protect civil servants from excess political interference and politicians from the omnipotence of bureaucracy. Statutory provisions in democratic European countries draw a clear line between political and administrative power. In practice, politicians more often cross the line than civil servants. There is a lot of literature about the impact of bureaucracy on politics, much less, however, about the influence of politics on administration.

The relationship between politics and administration was never as clear and straightforward as that presented in the classical descriptions of the distinction between the two, or as assumed in the apolitical model of administration formulated by W. Wilson. Their interrelations are much more complicated, overlap one another, and change rather dynamically. Therefore, the linear logic of this model reflects real interactions between politicians and civil servants only to a limited degree. It seems that a precise division between politics and administration has never really been possible, and the rules have hardly ever been followed.[9]

The existence of an apolitical public administration was, to an extent, legitimate in a situation where the subject of its activity was uncomplicated and purely administrative.

6 Jabłoński (1999), p. 75.

7 For more details, see *The Internet and Digital Technologies as Essential Tools for the Civil Service* by A. Guckelberger, *The Civil Service and Artificial Intelligence* by S. Schiedermair and *Digital Competencies in the Civil Service* by M. Seckelmann and D. Catakli in this volume.

8 See *Administrative Law and Bureaucratic Autonomy in a Comparative European Perspective* by D. Carelli and B.G. Peters in this volume.

9 Hughes (1994).

The changes occurring in public administration itself, as well as in its scope, lead to its engagement in political matters.[10] Thus, the existence of apolitical national administration becomes more controversial and, at the same time, less suitable (at least in its classical understanding).

The dichotomic doctrine was extremely useful when describing the reality of 19th-century administration; with time, however, bureaucracy started to interfere with political decisions and activity, thus significantly eroding the concept. N. Long, in his famous article "Power and Administration", stated that attempts at resolving administrative problems without referring to power structures and politics are doomed to failure.[11]

Classical political analysis assumes that civil servants bring specialist knowledge and technical proficiency to the management of public affairs. The representation and advocacy of interests, as well as promoting social values, either through ideologised strategies or expressed in particular policies or public programmes, remains in the domain of politicians. Civil servants see public activity through its instrumentally understood effectiveness and efficiency, while their political supervisors assess it in terms of its social validation and public response:

> In this interpretation of the division of labor, politicians are passionate, partisan, idealistic even ideological; bureaucrats are, by contrast, prudent, centrist, practical, pragmatic. Politicians seek publicity, raise innovative issues, and are energizing to the policy system, whereas bureaucrats prefer the back room, manage incremental adjustments, and provide policy equilibrium.[12]

The logic behind the different perspectives on engagement in public affairs by civil servants and their political superiors was well captured by H.A. Simon,[13] who recommended studying the attitudes and choices within the public sphere through the analysis of their rationale. He pointed out two main types of presumption: factual and evaluative. In the context of establishing and executing policies and public programmes, according to H.A. Simon, factual presumptions of complementarity between politics and administration is, due to its simplicity, an intellectually elegant concept, although its vertical and static nature limits the possibilities of exploring the phenomenon. This is determined by two factors. Firstly, it implicitly assumes determined hierarchical relations – civil servants prepare proposals, while politicians assess them and make decisions. Secondly, the values, interests and resources contributed by both of these worlds to public policymaking are defined in an excessively static manner. In reality, these relationships are dynamic and vertical, and the attitudes, decision-making, and activity of both politicians and civil servants are determined by facts and evaluative presumptions alike.

Undoubtedly, political neutrality, along with "incorruptibility and professionalism became the foundation of civil service in all European Union countries".[14] It is debatable, however, whether it is just a desired ideal or a reality. Despite many reforms, societies of

10 Political activity is understood as having an impact on strategic decisions on public affairs constitutionally reserved for political nominees.
11 Long (1949), p. 226.
12 Aberbach et al. (1981), p. 9.
13 Simon (1947), pp. 269–270.
14 Grosse (2001), p. 86.

different countries with active civil services still regard them as an executive force, a supposedly politically neutral means of implementing governmental decisions. However, critics of the civil service point out that the classic model of public administration was created in a "world that doesn't exist".[15]

The governing process involves interactions between politicians, i.e. those who took office as a result of political procedures and are first and foremost obliged to represent the views of their electorate; thus, their role is to enact the interpreted will and needs of society, and they are held accountable for the tasks which fall under the competence of their office. The role of civil servants is different – their world consists of practical actions which enable the government to function. Politicians concluded that the duties of civil servants should be respected and decided to take a tolerant approach to the way in which they implement governmental decisions.

Politicians have a range of resources at their disposal when competing for influence over the shaping of collective life, which they use to limit the importance of senior officials. This is manifested by, e.g. bureaucratic policies and the processes of autonomation of public administration. The key sources of influence for political supervisors in this competition are:

- force of law (they hold democratically legitimate political power and can claim the backing of society),
- control over the allocation of public resources,
- prerogatives to control the public administration units (in legal, financial and organisational terms),
- social legitimacy,
- aggregation of social interests.[16]

The force of law gives political nominees power. The key resources of the political masters of public administration are based on this power, and they make up the arsenal for exerting influence on high officials. The rule of law and the hierarchical nature of the governing system are the reasons for its formal precedence. The rule of law makes it possible for the political supervisors of public administration to transform the hierarchical structure into a dominant one. For the same reason, they have prerogatives over the allocation of public resources and control over public administration units.

Democratically elected politicians are mandated to direct public affairs by their sovereigns (the people). This is a source of significant power. The mandate is integrally linked to responsiveness, strategic imagination and political leadership.[17] In a democracy, these features are more important than the technical ability to rule – or are at least equally important. They make it possible to delineate strategic national goals in a democratically legitimised way, mobilise the necessary resources to achieve these goals, and respect the rule of responsiveness and democratic deliberation.

15 Rosenbloom and Dolan (2004), p. 17.

16 Peters (1999).

17 These attributes are not appendant to all politicians and in the given context they relate to politicians as a class.

Political nominees have an important skill of aggregating social interests in a more efficient way than civil servants. This is because public administration addresses this issue selectively:

- first, the administration prefers highly organised means of contact and advocacy of social interests,
- secondly, the administration – in contrast to its constitutional mission – is oriented towards representing only the interests of its clientele (vocational representation),
- thirdly, the administration is interested in representing the interests of these social environments, which enables it to achieve or block the aims that it regards as important. The aggregation of social preferences by the administration does not exceed the functional sectors and their clientele.[18]

Using the resources at their disposal, politicians can play a decisive role in the process of decision-making on the allocation of financial and human resources, mobilise public opinion, make use of a wide spectrum of mechanisms for the control and surveillance of public administration, including counter-bureaucracy, political analytics, expert and consulting teams, political staffing of administrative positions, reorganisation, explanatory proceedings, and evaluation.

The success of political nominees when competing with civil servants over the course of public affairs also depends on the degree of homogeneity within the political system in place and the support it gives to the political supervisors of public administration. In political systems with a high degree of consolidation of the political parties in government (or party coalition), it is easier for the political supervisors to lead and control public administration.

According to B.G. Peters, in response to the times when people were expected to be politically engaged in Western Europe, at the end of the 20th century, the renaissance of political patronage mechanisms could be observed. This is due to the fact that the idea of politically neutral civil service is relatively new in comparison with a model of the State in which loyalty to politicians is the most sought-after trait.[19]

State politicians should be aware of the necessity for long-term investment in the civil service staff in order to lead public affairs in a professional, reliable, politically neutral, and impartial manner. Unfortunately, as a result of their actions, in some countries, such as Poland, Slovakia or Hungary, public administration is characterised by instability, staff turnover, and the lack of necessary motivational systems. In other European countries, such as the United Kingdom, Ireland, Sweden, or Germany, the rule of political neutrality of the civil service and its stability, regardless of changes in national politics, lie at the heart of the administrative system.

In European solutions, particular attention is paid to the division between political and administrative structures in different ministries. It is worth pointing out that the status of persons whose legitimation is political in nature and who perform tasks linked to governmental politics changes. There is a tendency to define a separate status for politicians employed in governmental administration.[20] Theoretically, it is believed that strategic

18 Aberbach et al. (1981), pp. 10–11.
19 Itrich-Drabarek (2003).
20 Rydlewski (2001), p. 31.

decisions are reserved for politicians, while their execution is the job of civil servants. Based on observations of political cabinets in France, Poland, and some other countries, it seems that, in practice, the differences between the two parties with regard to the decision-making mechanism are diminishing – politicians are succumbing to the process of bureaucratisation and civil servants are becoming politicised.

Administrative power is partially responsible for the affairs of a given ministry, and for the vital national functions on the whole – for instance, security or the social and economic order. Hence C. Demmke concludes that the centralisation of management on issues regarding national defence and multilayered management on the level of local administration can be observed.[21] According to Max Weber, the power of civil servants is based on specialist and professional knowledge. Political leaders worry about the actual implementation of their ideological programmes and therefore often and happily restrict the civil servants' role to the technical management of the public sector.

So, how should political neutrality be defined in these circumstances? Neutrality can be described as readiness to actively and scrupulously implement the programmes and political plans of supervisors "regardless of personal views of the civil servant and the assessment of those who represent them".[22] When analysing the aforementioned interpretations of political neutrality, some contradictions, as well as mutual exclusions and creeping chaos, can clearly be seen. Political neutrality should therefore be succinctly described as members of the civil service refraining from acting to the detriment of political masters.

A neutral civil servant does not publicly manifest their views and political leanings, does not create a bad atmosphere at work due to their political convictions, does not discriminate against nor favour any subordinates, colleagues or citizens for political reasons, does not let politics influence recruitment, selection, and promotion procedures in civil services, and is not under the influence of trade, local government or other social organisations. A neutral civil servant loyally and reliably implements the strategy and programmes of a democratically elected government regardless of their own political views and convictions. Currently, among European countries, the relationships between administrative and political power differ from each other.

The success of a stable, not politically engaged administration depends on the conviction of all political parties that the national administration will be loyal to the government in power, regardless of its policies and views (R. Mountfield). In Poland, Czechia, and Turkey, among other countries, some civil servants are forbidden to belong to any political party. In Ireland, the employees of the public sector are not allowed to get involved in political activities. In Bulgaria, civil servants are mandated to be politically neutral and cannot take part in public political debate (write articles, give interviews), unless it is required of them as part of their duties.

The idea of a civil service as a politically neutral body, devoting itself to the execution of decisions, which it does not take, is an idea of a service in which strategic decisions are separated from those of the executive. The separation of civil service from politics takes place when political positions are explicitly designated, publicly known and clearly distinguished from civil service positions, i.e. staffed exclusively on a competitive basis. A technical solution that serves to maintain the independence of civil service from politics involves

21 See *Civil Service Adaptation and Reform in the Context of European Governance, (De-) Europeanisation, and National Competition* by C. Demmke in this volume.

22 Bogucka and Pietrzykowski (2009), p. 230.

appointments of civil servants, provision of stable employment, and legally guaranteeing their career paths.

The division between political and administrative positions and the deeply ingrained exclusion of political leanings and prejudices from administrative activities – not so much legally, but culturally and by custom – is the real implementation of political neutrality of the civil service. The separation of politics and administration is based on the division of the public sphere into two parts, which

> however closely interrelated are of a different nature and underpinned by a different hidden logic as well as justified by different sources. Politics relies on public trust expressed in free political elections and is verified after each political term. Administration is based on the merits and the professional competencies of the employees of the civil service, verified by open competition for civil service positions, and compliant with regulations established by law.[23]

The question of confidence in civil servants seems to be the key factor in understanding the concept of political neutrality. Political neutrality is supposed to build society's trust in the State, which does not mean (contrary to the concerns of some public opinion groups and the scientific community) that administration is a closed system to which politics has no access. A. Krzywoń refers to it and points out that "the political neutrality rule is closely related to maintaining confidence in governmental institutions. Citizens have the right to expect that their interactions with the government will be conducted by politically neutral civil servants, who are detached from political disputes".[24]

Democratic rule does not require politics to impact each administrative action. Politicised attitudes to administration might be favourable for the party currently in power, but they are often contrary to the public interest.

In many countries, the requirement that civil servants maintain political neutrality limits their civil rights, such as the right to stand in an election (Poland, the United Kingdom), the right to hold representative functions in parliament (Poland, the United Kingdom, while in France and Germany it is limited to the highest positions in the civil service), and the right to hold positions in internal party organs (the United Kingdom, France, Germany, Poland, Estonia). In some countries, civil servants can belong to political parties, and lower-ranking civil servants can take part in political campaigns and run for parliament. In Belgium, civil servants can belong to political parties; in Cyprus, they can express their political views both publicly and privately, while in Latvia, they are obliged to remain politically neutral. In Malta the political neutrality rule is mainly applied to higher civil servants in order to make it possible for civil servants to remain in office regardless of the government's political identity. In Germany, any criticism of the country and its government is allowed when fulfilling one's duties of "loyalty, restraint, moderation, as well as a dignified and trustworthy behaviour".[25] In German law, there is a category of political civil servants chosen according to party criteria but recruited from civil servants.[26] They are not allowed

23 OECD (1999), p. 21.

24 See *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

25 Śledzińska (2005), pp. 7–9.

26 Herbut (1999), pp. 49–50.

to hold any functions within the political parties. The situation is similar in France, where civil servants are also not officially forbidden to belong to political parties. However, there are limitations for high-ranking civil servants, who are not allowed to reveal their status or use the knowledge obtained through their work for political purposes.[27] In the French model of civil service, the differences between civil servants and politicians are diminishing. C. Demmke points out that

> this has led governments in some countries to effectively instrumentalise the national civil services for political reasons and to de-Europeanise them. For the first time, national administrations have rejected the implementation of EU law, judgments by the CJEU, and even the duty to pay financial sanctions for non-compliance with EU law. This form of de-Europeanisation and politicisation of national civil services would have been unthinkable decades ago.[28]

Political neutrality also has a different meaning in Central and Eastern Europe. It does not seem to be caused by the renaissance of political patronage so much as the fact that the idea of political neutrality has never taken hold in these countries. Legal solutions did not seem to sufficiently solve the problem, as it is down to organisational, traditional and customary values. Treating the civil service as a "spoils system" is socially acceptable and considered to be the pattern of political behaviour in this region.[29]

Since the countries of Central and Eastern Europe joined the EU in 2004, another phenomenon can be observed, as in many cases, instead of building a professional and politically neutral civil service it is politicised or subjected to party nomenclature. Party nomenclature, a term used mainly in the Soviet public administration model, involved the supervision of public administration by the communist party and meant that a number of positions had to be staffed with the approval of relevant sections of the communist party. The nomenclature rule was applied at different intervals through two rules, used jointly, although in different proportions, and described in Western Sovietology as redness (idealism) and expertness (competence). In the case of lower-ranking civil servants, positions could be staffed by non-party members, but always with the approval of local party units. Before 1989, this basically meant that the party apparatus became one with the state apparatus, while since 1989, it has evolved into staffing the highest positions in public administration with people designated and backed up by the political party that currently holds power. Such people, employed as a result of political interventions, are usually not driven by public interest and do not have to prove their knowledge, qualifications or skills, but need to express allegiance to the party which assigned them to do the job.[30]

Therefore, 21st-century public opinion in Central and Eastern European countries still perceives the model of division between the political and administrative apparatus in democratic countries as an ideal. These countries are only just rebuilding democratic values

27 Herbut (1999), p. 45.

28 See *Civil Service Adaptation and Reform in the Context of European Governance, (De-) Europeanisation, and National Competition* by C. Demmke in this volume.

29 Itrich-Drabarek (2013).

30 Długosz and Itrich-Drabarek (2019).

and the relations between political powers and administration can be described as "too politicised" or "not politicised enough", depending on one's point of view.

III. Political Worker of the Civil Service or Political Administrator?

The separation of the civil service from politics takes place when political positions are precisely designated, publicly known and clearly distinguished from civil service positions, i.e. staffed only as a result of open competition. Technically, separating the civil service and politics involves appointing civil servants and ensuring stable employment with career development guarantees. From an ethical point of view, it involves members of the civil service following certain values and rules.

On an organisational level, the job of civil servants is not only to perform tasks commissioned by politicians in office, but also those of executive, advisory, controlling, and implementing character. Civil servants complete tasks because developing the strategy of governmental administration is reserved for politicians. However, depending on the quality of the available personnel (education and professional experience levels), the relationship between politicians and civil servants (often based on personal traits of different politicians and the political programme of the party in power), civil servants and executive employees of governmental administration in the Polish civil service also hold advisory functions to political leadership.[31] As it became more common for the legislature to delegate a wider range of authority for preparing projects and lawmaking, it naturally broadened the scope of the civil servants' discretionary power. This practice led to the fading of the separation between politics and administration. It was caused, among other things, by a new level of uncertainty, which "includes not knowing the goals, while the traditional uncertainty involved not knowing the means to achieve them".[32] In the face of such uncertainty, the division into those who set the tasks and those who execute them becomes unclear and fluid.[33]

The role of legislation in administration – derived from the classical doctrine of democratic rule of law – has evolved significantly. In fact, it relates more to its historical description than to the current reality of the governing process. Depicting the developing asymmetry in the relations between legislative assemblies and executive powers as well as the growing significance of the latter, A. Heywood points out: "Political systems can function without constitution, assemblies, judiciary, even without political parties, but they can not survive without an executive power, which formulates governmental policies and ensures their implementation."[34]

In these circumstances, "The problematic relationship between those two institutions is perhaps the distinctive puzzle of the contemporary state, reflecting as it does the clash between the dual and conflicting imperatives of technical effectiveness and democratic responsiveness."[35]

This notion is backed up by reports from studies devoted to this phenomenon. The results suggest that the distinction between the role of a politician and a civil servant is, in

31 Itrich-Drabarek (2010), Chapter III.
32 Bauman (2006), p. 94.
33 Izdebski (2006).
34 Heywood (2006), p. 411.
35 Aberbach et al. (1981), p. 3.

reality, fading.[36] Frequently, these complex and imprecise relationships are described with hybrid language, such as "political civil servant",[37] or "political administrator",[38] used to refer to civil servants who have the qualifications usually attributed to both bureaucrats and politicians.

Public administration has become more important as a significant element of managing public affairs. It has more information, competencies, time and technology at its disposal than other actors in the process, without which effective solutions regarding community life cannot be proposed. The increase in its significance is simultaneously accompanied by limitations of the impact that political institutions have on directing public policies and on the way they are introduced. It would be unjustified to say that senior civil servants have absolute power and nothing happens without their consent. However, as a group equipped with such essential resources for governing, they have significant potential for obstruction in a pluralised system of governance.[39]

It has been noticed that the technical competencies of civil servants predispose them to not only the role of public policy executives, but also to the role of co-author. It has been pointed out that the concept of an "administrative state" is not only the result of their activity in the sphere of making political decisions, but also a derivative of their discretionary powers linked to implementation of policy. Civil servants, particularly those of high status, equipped with the power to interpret legal standards in a direct and tangible manner, have an influence on citizens and their communities.[40]

The phenomenon of the hybridisation of executive power is on the rise. In its essence, it is a process in which distinctions between goals and means in the governing practice become indiscernible. Treating public policies as a conflation of goals and the means of achieving them implies that division between the two spheres becomes, in reality, impossible. Therefore, it is politicians and civil servants, who are, in reality, equally responsible for shaping and implementing particular public policies (politics does not only involve ideas and the manner of their implementation, but also the implementation process itself). The fluidity of these roles, combined with the complex problems of the real world, requires flexibility, a relatively wide margin of discretion, interpellation and functionality – which lie at the core of discretionary power.

It would be unjustified to say that civil servants can act in an absolutely autonomous manner. Nonetheless, they often have full authority, at least in the sphere of shaping public policies.[41] The traditional distinction between the world of politics and that of administration loses its hierarchical and static nature. Usually, their relationship becomes interaction-oriented and dominated by consensus rather than the orthodox perspective of maximum gain.

The control of the political leadership over the civil service means that political centres take a range of actions towards administration. The most important control tool was granting parliament the right to control executive powers, including the right to obtain comprehensive information on the activity of the executive power, as "secrecy" is the biggest

36 Chapman (1959); Aberbach et al. (1981); Campbell (1988).
37 Mayntz and Derlien (1989), pp. 384–404.
38 Coleman and Atkinson (1985).
39 Etzioni-Halevy (1983).
40 Appleby (1949), p. 7.
41 Krauser and Meier (2003).

weapon the civil service has against society. Moreover, parliament is an important source of selecting and training political leaders, as the essence of political leadership is, according to the definition of M. Weber, "fight as well as coalition and endorsement building". Since M. Weber created his theory, a number of events have taken place, which, if they did not directly overthrow, at least significantly challenged his stance on the matter. According to E.C. Page and B.G. Peters, since the 1960s, the role of parliaments in lawmaking has been diminishing, and has been replaced with governmental legislative activity and the growing significance of downstream acts. Subsequently, e.g. in France 82% of legislative proposals came from the government, and the index was similar in the United Kingdom and Germany, where it amounted to 78%. The percentage of governmental amendments to parliamentary regulatory proposals was equally high.

What is more, very often, governmental politicians hide behind what are ostensibly parliamentary actions. This is due to the fact that the rule of party discipline is applied in parliaments, which can formally lead to parliaments being subordinate to governments, including in their oversight function. In France, parliamentary activity is further limited by a constitutional provision stating that non-governmental proposals cannot increase spending or reduce government income. In Germany, it has been observed that even though parliamentary commissions are very active, their amendments are more technical.[42] In France, the civil service corps and territorial representative institutions often provide staffing support for parliament. In the United Kingdom or Germany, such arrangements do not exist.

When it comes to the control of parliamentary committees over the government, their inefficacy in Europe can be demonstrated by evidence that their statements and reports do not attract any interest from the media nor influence public opinion.[43] The governing party does not change its policies due to the work of such committees.[44] What is more, according to pessimists, crucial decisions are made in closed circles with the use of bureaucratic mechanisms ("bureaucratic politics"), which are not subject to democratic processes or control. What democracy really means, according to J.A. Schumpeter, is that people have the possibility to accept or refuse to accept those who are to govern.[45]

Equally as important as the right to control legislation is the parliamentary right to determine the structure of public spending by the executive power. However, as research shows, the budget is more a product of bidding within the executive power than the effect of parliamentary deliberations. In the same way, as with legislation, European national parliaments play a limited role in budgeting, unlike the USA's Congress. In Europe, parliamentary debates do not significantly impact decisions about the distribution of budgetary expenditure.

Politicians can gain some autonomy from the administration by creating their own sources of information. The highest number of so-called counter-administration institutions

42 It is different in the USA. Firstly, the American president does not officially hold the right of legislative initiative, and the proposals of the USA's Congress are usually successful. The American parliament is an example of an "active" legislative body, unlike the increasingly passive parliaments of European democracies.

43 Page (1992), pp. 5–7.

44 In the USA, due to the limited coherence of political parties, parliamentary committees' hearings play a much more significant role than in Europe and can be much more efficient in exerting parliamentary control than their European equivalents.

45 Schumpeter (1995), p. 355.

exists in the USA, i.e. those directly serving the President or committees of Congress (e.g. Congressional Budget Office). In Europe, they function as ministerial cabinets (in France) or extended or dedicated sections of the Prime Minister's (Chancellor's) office (in Germany). In Poland, there are both political cabinets and experts commissioned by the Chancellery of the Prime Minister, which are outside the civil service structures. The governments of other countries try to create analytical centres dealing with various social issues with the help of their own political organisations.

Another way to control the civil service is by staffing the key positions in public administration with people of unquestionable political loyalty, e.g. in the Scandinavian and Central European countries, in the United Kingdom, and even in Germany. Parties fight not only for policy goals but, most of all, for patronage over offices.

> Parties take limitations in the number of offices that fall to them worse than activities that counteract their material goals (. . .) some parties (. . .) are merely groups of hunters for posts, which change their material programme according to the chances of gaining votes.[46]

Despite many attempts to deny the truthfulness of the statement about the apolitical character of public administration, it turns out to be unusually resilient. It could not be changed even after referring to the results of empirical studies, which showed that many politicians, similarly to many high-ranking civil servants, do not see any real divisions between politics and administration.[47] This idea is restated very often in many different circumstances and various political systems. The concept of neutral administration is so ingrained in social consciousness that even during the drift towards populism Polish society emphasised the necessity to maintain political neutrality.[48]

This leads to the phenomenon of delegating authority for lawmaking and its interpretation to the public administration organs and thus, in the majority of cases, to high-ranking public officials. Despite many reservations (expressed in the works of A. Tocqueville,[49] M. Weber,[50] and R. Michels),[51] politicians in all political systems have to delegate lawmaking and the authority to interpret laws to high-ranking civil servants. The modern State could not exist without delegating.[52] This inevitability, according to many researchers, leads to an increase in civil service control over society. As M. Weber pointed out:

> Under normal conditions, the power of fully developed bureaucracy is always vast and dominating. Regardless of whether the "master" that it serves is the "people", equipped with the weapons of "legislative initiative", "referendums" and relieving civil servants of their duties, the trained civil servant, who undertakes the task of administration, always remains in a position of an "amateur" opposed by "specialists."[53]

46 Weber (1978), p. 1044.
47 Aberbach et al. (1981).
48 Itrich-Drabarek et al. (2022).
49 Tocqueville (1996).
50 Weber (1946).
51 Michels (1915).
52 Lupia (2001).
53 Weber (1978).

Increased activity of the State leads to a weakening of the traditional role of parliaments. The broader the range of issues that require (more or less justified) state intervention means that the State is overwhelmed by a number of problems which require legislative regulation:

> Legislative bodies pride themselves on statistics proving their vitality and vigour, which makes it possible to establish more and more new laws, increase their number, change and amend them. Thus, we are dealing with a momentum, which transformed legislative bodies into huge manufactories of law, working in accordance with the requirements of an era that respects the rules of efficiency.[54]

The number and character of new laws mean that parliaments indicate solutions to given problems which are as general as possible, leaving the detailed decisions to the discretion of civil servants.[55] In real life, how decisions are executed matters more than what their original content is, as set by the legislature. Researchers who study the phenomenon of legislators delegating lawmaking power and its interpretation by the public administration suggest that legislators are more likely to delegate power when:

- the preferences of the legislative and executive powers are similar,
- the level of uncertainty is high,
- they are not able to obtain information from outside of the bureaucracy.[56]

The point is not so much that the lawmaking power and its interpretation as such is delegated; rather it is the fact that there is an antinomy in delegating. The goals of a civil servant are not identical to the goals of the organisation, for the implementation of which they receive a prerogative. Such discrepancies can lead to the formation of sets of goals and interests that are autonomous or competitive with regard to the organisation.

Due to the dynamic changeability and unpredictability of social life and the problems and dangers resulting from this state of affairs, the process of creating and implementing public policies, more often than not, requires forgoing the a priori and deterministic approach in favour of a contextual and incremental approach. In practice, it means that those responsible for implementing the policies need to be equipped with broad competencies, not only to perform the necessary operational activities, but also to review the assumptions of the programme, including lawmaking, with the exclusion of the legislature.

Lawmaking assemblies have provided a counterbalance to the strengthening of political executive power since the late 19th century. In the 20th century, their importance in governing systems started to decline. J. Habermas mentions a “marginalised law-maker”, who lost the ability to create general norms.[57] T. Lowi presented a vivid picture of the changes in lawmaking and its interpretation using the USA as an example, perceiving it as the twilight of the rule of law.[58]

54 Filipowicz (2006), p. 206.
55 Peters (1999).
56 Epstein and O’Halloran (1999).
57 Stępień (2008), p. 8.
58 Lowi (1969).

F. Longchamp[59] regarded the phenomenon of delegating lawmaking to executive powers with equal disapproval, pointing out that:

> already in the second half of the 19th century a particular phenomenon occurred in constitutional countries involving the use of sources of legal authority in favour of power [. . .] and the limitation of constitutional freedoms by the following series of actions: laws, regulations, circular letters, administrative decisions (. . .). This phenomenon eviscerated all hopes associated with the system of parliamentary origins of law. The mechanism of sources of law also included another terrible weakness, which nobody was aware of before 1914. This was the delegation of the law-making power, which made it possible to pass the legislative function, in part or as a whole, onto the organs of executive power.

These days, this process has taken on a new dimension, i.e. more and more often, as previously mentioned, political supervisors of public administration delegate lawmaking to senior civil servants, a meaningful example of which is broadening the range and form of their discretionary power.

There is a paradox to delegating power to senior civil servants, as the main reasons to equip them with the autonomy to shape public policies, including creating legal norms, are their competencies and experience. The same traits, which are the basic source of civil service power, can be used against those who equipped them with that autonomy.[60] The impact of the negative consequences of delegating lawmaking is linked to the fact that it involves a transfer of power.[61]

The researchers who study the phenomenon of legislatures delegating lawmaking to the executive usually express polarised opinions on the matter. Those who support it treat it as an expression of a rational attitude, stemming from an objective necessity, while its opponents, on the other hand, describe it as the abdication of the legislature.

Researchers of the public choice theory, particularly those who perform their analyses within the framework of the principal-agent theory, pay a lot of attention to the phenomenon of delegating lawmaking to the executive power (including the parts shaped by high-ranking civil servants). They are not so much interested in the phenomenon of delegating lawmaking itself, as in its adverse effects. The agent (e.g. a senior civil servant) can reinterpret the goals set by the principal in a way that results in outcomes different to those that were intended.

Many researchers claim that delegating is socially harmful and implies the abdication of legislators,[62] or that it favours particular interest groups. Others suggest that delegating lawmaking allows politicians to maximise gains rather than to achieve social goals.[63] M. Fiorina, in turn, asserts that delegating lawmaking authority to public agencies gives politicians a reason to blame civil servants for the failure of public policies.[64]

59 Longchamp (1973), p. 103.
60 Huber and Shipan (2002).
61 Lupia (2001).
62 Lowi (1969).
63 Epstein and O'Halloran (1999).
64 Fiorina (1989), p. 47.

A. Haywood presents a rather gloomy, albeit reliable, assessment of the importance of contemporary legislative bodies, as he states that their assumption of a monopoly on lawmaking is unjustified. He also points out their limited proactive powers, i.e. initiating the legislative procedure, and the growing problem of legislative projects initiated by those elements of the executive that have the resources to prepare them. He also makes an interesting observation that the erosion of parliaments as lawmaking assemblies is accompanied by their increasing importance as communication tools in political systems.[65]

Despite a great deal of criticism about delegating authority and lawmaking to the executive, which is mostly justified, it is hard to disagree with the opinion that without equipping it with the prerogatives of formulating regulations which translate legal norms into the language of public policies and programmes, the implementation of many public projects and provision of a particular set of public services is extremely difficult, if not impossible.[66] It seems that reflection on the phenomenon of delegating lawmaking authority by contemporary legislative bodies should lead towards finding institutionalised solutions which strengthen the ability of the legislature and citizens to effectively control the way in which the lawmaking authority is delegated.

The capacity for civil service offices to form alliances with interest groups also contributes to their political power:

> Public bureaucracies sometimes form alliances with big interest groups in order to maximise their political influence on politicians, who want to influence or dismantle them. Such bureaucratic strategies are considered to be highly effective and seen as a source of bureaucratic power.[67]

This is mainly due to the high political costs of questioning activities for which public institutions have obtained the backing of influential social groups.[68]

IV. The Civil Service in Times of Populist Drift

One of the main factors that contributed to the rise of populism in European countries is, first of all, the rapid Europeanisation process, which caused anxiety or at least uncertainty in the face of the changing order of things. What is more, in the Central and Eastern European countries, another factor inspiring populist behaviour took the form of system transformation (which also resulted in uncertainty, fear of change, lack of legitimacy for democratic rule-of-law institutions and a phenomenon called “transformation fatigue”). The concerns and resentments were further exacerbated by the insufficient legitimisation of democratic rule-of-law institutions, which resulted from low or insufficient agency in the relations between individuals and public institutions. In those European countries where populists have gained power, the need to change public tasks, the decision-making processes in the State, and the structure of administration is particularly necessary.[69]

65 Heywood (2006), p. 407.
66 Lupia (2003), pp. 33 f.
67 Rothstein (2007), p. 213.
68 It is important to note, though, that it is equally common, particularly for strong, organised interest groups, to “intercept” public organisations.
69 Itrich-Drabarek and Kisiel (2020).

The discussion about civil services in contemporary states suggests that views on that matter have become radicalised. Its opponents claim that "it is not necessary to have a professional civil service which puts itself above society through its structure, rules and imperatives".[70] Critics of such populist approaches say, on the other hand, that the idea of the civil service is still valid and socially viable, while the changes it undergoes prove that the administrative structure is attempting to adjust to the expectations of democratic societies of taxpayers, who are increasingly conscious of their rights. Such a direction of reform makes the civil service an important part of public life and a significant player in the public sphere.

The evolution of civil services indicates that, more often than not, this institution is becoming dependent on political concepts and changes in the political sphere. Populists treat the civil service not as an individual/corporate contribution to the common welfare, but as a "silent" apparatus which does the will of a mythical "sovereign", which means that, in practice, it follows the orders of the governing party and/or interest groups. Excessive political interference in the practices of civil services generates a range of problems, and the undesirable relationships between politicians and the civil service have an impact not only on the quality of and respect for civil servants but also lower the performance of the civil service corps and negatively affects its social reputation.[71]

In comparison with the private sector, the civil service is not an attractive employer, mainly due to salary levels, but not exclusively (also because of its many dysfunctions). During a populist drift, its staffing problems – linked to the necessity of dealing with a rising number of issues in many offices, low wages, staff fluctuation, losing many experienced workers and declining professionalism – tend to be on the rise. Its partisanship leads to a high turnover, mainly in higher positions. A drop in the number of candidates for vacancies in departments can also be seen. Strategic goals, implementation systems and financial frameworks are replaced with ad-hoc, short-term aims, strongly marked by political/party characteristics. In the recruitment process for vacancies in civil services, openness and transparency standards are often violated. Positive incentives to work in the civil service, which promote it as an attractive workplace, are superficial or do not exist at all. Undoubtedly, during a drift towards populism the civil service work ethic and sense of mission are in decline.

During a populist drift, the civil service's accountability becomes dispersed and reduced. The party and state apparatus become one and as a result a party nomenclature is created, which is accountable to party leadership for its actions rather than to the law or to society. Multilayered and multi-entity governing networks under the influence of political patronage affect the control and responsibility mechanisms in administration, therefore it is difficult to unequivocally identify those solely responsible for executing tasks. Additionally, it is observed that "experts" are employed from outside the civil service, and advisory or expert bodies are marginalised, which raises the question of the civil service's effectiveness. Assuming, as M. Bovens does, that the concept of accountability is close in meaning to responsiveness and the sense of responsibility, it can be clearly stated that during a populist drift the activity of public administration is not transparent, honest and just in its character, nor does the superior body get a clear explanation of this activity from the subordinate.[72]

70 Bossaert and Demmke (2003).
71 Itrich-Drabarek (2020), pp. 92–112.
72 Bovens (2007), pp. 447 f.

If we assume that responsiveness and the sense of responsibility are of a moral nature, when a populist drift comes to an end, e.g. as it did in Poland in 2023, it means that the citizens decided that the populist government was not acting in their interest. Personal responsibility, in turn, is rarely factual (e.g. in Poland, the Head of the Civil Service did not actively monitor its functioning, did not prepare and present to the Council of Ministers the key documents of the civil service, nor were civil servants punished for misconduct). Thus, during a populist drift, the criteria for accountability with internal controls are reevaluated – the level of control is low and its likely aim is personal staffing and "handling" of the party interests, or groups of interests that are the subject of the populist policy.

Under populist rule, the absence of accountability of public administration is intensified by limited access to information about its activities. Government websites are not easy-to-read and of limited informational value, different means of communication and civil dialogue, which would enable accountability, are missing.[73] Protections for whistle-blowers in the civil service are lacking[74] (e.g. in December 2023 the Polish government continued to delay the implementation of the EU directive on protecting people who report abuses of power in their workplaces, while Hungary is the only Member State which has not even initiated the transposition of the directive).

Problems with the functioning of public administration, including the civil service, intensify during times of crises, e.g. during the COVID-19 pandemic. Politicians should plan to act on a large scale, i.e. involving the whole public sector (not only parts of the administration) and their plans should be multifaceted (not only involving laying people off) and pro-quality (staff cuts cannot be a goal in itself). However, the populist government did not cope sufficiently well with the new challenge of handling the coronavirus epidemic. The civil service should provide efficient support while dealing with an epidemic, but it is equally important that it maintains the fundamental functions of the State. Its role would be to monitor needs in the face of an epidemic and build an efficient system of tools to tackle it, which does not relieve it of its duty to maintain the functions of the State in many other areas. Instead, what happened was highly alarming – only some of the health system elements were dealing with the epidemic, whereas fully coordinated actions in terms of drug and equipment deliveries were missing. The State "forgot" about social welfare homes, orphanages (and other groups whose situation was worse than average, e.g. the homeless). The education sector was not prepared for remote learning and introduced it in a chaotic and unprofessional manner.[75]

In the face of these issues, the Polish government tried to introduce pay and staff cuts in the civil service sector. Unlike many other governments, which applied a "duty of care" approach, which involves protecting workers during crises, the Polish government acted in a contrary manner towards the civil service. During the pandemic crisis there were no attempts to move public workers to other sectors which required a staffing boost, as was done in Denmark during the financial crisis of 2008; austerity measures based on analysis

73 The lack of consultations at the stage of governmental works, particularly if it comes to the proposed law, is reflected in the Law Barometer 2023 by Grant Thornton Polska, https://grantthornton.pl/publikacja/barometr-prawa-edycja-10/. The analysts estimated that in 2022 almost half of the governmental proposals were not consulted, and even when such consultations did take place, the government did not consider it appropriate to address the remarks.

74 On the protection of whistle-blowers in the civil service, see *Development of a Legal Framework on Whistle-blowing by Public Employees in the European Union* by P. Provenzano in this volume.

75 Itrich-Drabarek (2022).

of the State's structures, functions, and spending were not introduced (like Canada and Finland did after 2008); and there was no freezing of recruitment or wage-cuts for the highest earning civil servants (after 2008 pay cuts of 5% for senior civil servants were introduced in Portugal and Italy). During that time in Poland, the extra pay benefits and promotion schemes were not frozen, and training funds were not limited (except for continued education). These would certainly have been milder, more targeted and equally effective (in terms of costs) measures in comparison to redundancies or general pay cuts. This does not mean, however, that it should be acceptable to apply such populist measures as those that were adopted in Bulgaria, where the General Sanitary Inspector, A. Kunczew, was not remunerated during the pandemic.

Researchers studying the associations between automatic staff cuts and the confidence of civil servants in political leaders analysed attempts to lay off administration workers in times of crises and point out that in the countries which belong to the European Public Administration Network the savings are merely apparent and most negatively impact the satisfaction, confidence and commitment levels of public sector employees. At the same time, redundancies are in fifth place (out of 14) when it comes to the staffing policies that are most vulnerable to irregularities.[76] As a result, such a practice demotivates employees (including future potential candidates) and discourages them from applying for civil service positions.

To sum up, during populist drifts States are more susceptible to breaching and circumventing the existing regulations with regards to the functioning of the civil service, there are more irregularities and cases of abuse of power compared to the way public affairs were managed previously, and as a result of political decisions the confidence in the civil service drops.

V. Conclusions

Administrative and political worldviews change – their rules and mechanisms are transforming. New patterns of interactions are formed and their reconfiguring process is advancing. It is an incremental process, taking place in an environment which respects different, often contradictory, logical systems, and the results are unknown. It leads to the modification of the institutional order, which manifests itself in an institutional amalgamation of politics and administration.

Changes induced by the institutional amalgamation result in the breach of classical axiological rules and existing democratic rule-of-law regulations, and thus inspire questions about its character and consequences. In order to understand this process it is necessary to learn about the values, preferences and interests of its main actors and about the patterns of their interactions emerging from the evolutionary reconfiguration of the dominant institutional order.

There are three main sources of this amalgamation. The first one consists of state interventionism, the bureaucratisation of social reality, and an associated phenomenon of "institutional inflation", which, on the level of the social system, creates acceptance of the existence of an "administrative state".

The second source is the emergent character of meta-institutions and intra-institutions and their dual dependence on both the social system and the social actors who are rooted

76 Demmke and Moilanen (2011), p. 93.

in it, and are at the same time capable of influencing it. The social system exerts pressure on institutions so that they are in agreement with the values, attitudes and preferences that are dominant in it. Therefore, if there is an acceptance of the existence of an "administrative state" on the social system level, the institutions need to accommodate that pressure (at least partially). A parallel phenomenon occurs in the relationship between social actors and institutions. In this case, institutions, and therefore also the institutional order, evolve in response to the pressures exerted by important social actors. If the force of social actors' impact on institutions is negligible or the institutions are consolidated enough for the modifications to be unsatisfactory in the actors' opinions, it is possible for them to develop informal institutions. These could either complement or replace formal institutions.

The character and resources of social actors is the third source. Their social relevance depends on the (normative) compliance of their character and resources with the dominant values of the social system and institutional order, and their ability to perform functions with crucial importance for the duration and propagation of the social system and institutional order.[77]

The strong position of social actors makes it possible for them to influence the social system and institutional order. As a result, the latter can be transformed. Usually, the transformation is incremental and fragmented, rarely broad and rapid. New interaction patterns undergo institutionalisation and one of the significant sources for this process is the conviction that the "reconstruction of institutions can save social actors the trouble of constantly engaging in the same fight".[78]

This is how we should perceive the process of senior civil servants becoming increasingly important in the governing system of a democratic state, which leads to the phenomenon of institutional amalgamation. In this process, an evolutionary and mutual adaptation of senior civil servants and their political supervisors occurs. Their relationship takes a more subtle form than is depicted in the world of theoretical constructs. While studying these relationships, it is not always easy to decide who is the master and who is the servant. Furthermore, it seems that studying these relationships from such research perspectives is not only empirically doubtful, but also cognitively limited. This is because we are dealing with "shifting from a social order of a mechanistic nature towards a complex structure based on organic rules".[79]

Depending on the situational context, this coexistence is dominated by elements of hierarchical, network, or market power. They always occur simultaneously, although with differing intensities. The phenomenon of mutual adaptation will intensify. It is important to note that the interactions between high-ranking civil servants and their political supervisors are dominated by uncertainty, resource exchange, and the need for compromise. They lead to haggling and mutual adjustments, which often result in irrational solutions. In other words, the administrative system is designed to protect the structure of political trade-offs in order to maintain the interests of important social actors rather than to achieve goals set for the organisations that constitute them.[80]

77 Hypothetically, it can be assumed that a situation in which a social actor does not share the axiological rules dominating in the social system and institutional order, and does not perform functions which are important to it, is also possible. Should they have the potential to destroy them, their impact on the social system and institutional order will be significant.

78 Thelen and Steinmo (1992), p. 9.

79 Maffesoli (2008), p. X.

80 Moe (1990).

The phenomena of the bureaucratisation and depoliticisation of politics are important factors intensifying the coexistence process. They are caused by the following premises:

- the political process itself is becoming increasingly rational and bureaucratic,[81]
- politics is no longer the domain of gentlemen – it is not inspired by passion and social status, but has become an occupation and a way of earning a living, and as such, acquires bureaucratic characteristics,
- controlling exceedingly complex public undertakings leads to the amalgamation of political and administrative competencies,
- in a modern State, it is difficult to distinguish between political and administrative roles, as they overlap one another.[82]

This leads to a shift from monocentrism based on homogeneously understood rationality to polycentrism rooted in heterogeneous rationality, from a vertically integrated governing system and rigid governing geometry towards a horizontal one. It becomes less clear which processes and institutions make decisions, which of them are permanent and which are merely ephemeral.

The aforementioned observations seem to justify the hypothesis that the institutional changes within the sphere of the discretionary powers of senior civil servants lead to an amalgamation of politics and administration and their specific coexistence. Incremental transformations of the social system, institutional order and public administration are the source of this process. The institutional changes are of an intentional, negotiable and evolutionary nature. They are based on targeted and instrumental rationality, as well as on being effective, which stems from shared norms and preferences of social actors regarding the system of government, understood as a situation in which the achievement of normative values and the implementation of preferences by the actors are not possible without the integration of various resources belonging to each of them. Their integration is based on the premise that these resources complement one another and, thus, only their combined use makes it possible for the actors to achieve the goals that are important for them and are, at the same time, socially acceptable.

The changes occurring in the shaping of public affairs are not reflected in the systemic solutions. As a consequence, a growing inconsistency can be observed resulting from the fact that the practical activity of public administration grows increasingly divergent from the classical canons officially in force. One of the practical repercussions of this situation is the frequently mentioned accusation of the "blurred" responsibility for decisions and actions in the area of public affairs, as well as the lack of transparency of the mechanisms behind their management.

In contemporary Europe, a new division in the development of the civil service apparatus has evolved – alongside the class of civil servants, "directing" politicians have appeared.[83]

Civil servants are separated into two categories – political and specialist. In an ideal model, political civil servants should be replaced with a change of government and specialists should remain in their positions, thus ensuring the continuity and durability of the

81 The activities of politicians are highly regulated by rules and procedures which determine how most of their tasks are performed.

82 Raadschelders (2003), p. 304.

83 Weber (1978), pp. 1034–1036.

system as a whole. It is, however, difficult to imagine these days that civil servants would merely execute political decisions in a neutral manner (as in the classical model of the civil servant's decision-making). In practice, they are highly engaged in different state activities. In a democratic world, the influence of political parties on public administration is structurally and procedurally defined partially due to the legally embedded position and role of the civil service. As a result, political parties cannot make radical structural and personal changes in the civil service upon taking over power.

Some researchers analyse the activity of public administration (including the civil service) from the perspective of politics (and gravitate towards the view that it belongs to the group of institutions regarded as part of the state structure). In the countries that joined the European Union after 2004, the most controversial issue is the protection of civil servants' independence of political interference – proven by regularly adopted and often amended regulations about the civil service, their multiple revisions, and numerous attempts at "circumventing" regulations by political civil servants when they are not happy with their content.

The aforementioned phenomena imply a number of doctrinal and practical problems. The classical rule of the administration's apoliticism and its role in the political system need to be thought over and redefined. The interactions between senior civil servants and their political supervisors can not be viewed in a dialectical and antagonistic manner. Instead, they should be seen as a social phenomenon in the context of interactive relations. As M. Maffesoli rightly points out:

> the passive divisive logic, which dominates all fields, can no longer be applied. (. . .) In fact, these entities and many concrete situations merge with one another, creating the everyday life, which more often than not slips away from the simplified taxonomy that a certain type of positivist reductionism got us accustomed to.[84]

In line with B.G. Peters and D. Carelli, it is worth remembering that in the systems with excessive political intervention, and such systems exist in the Central and Eastern European countries (Poland, Slovakia, Hungary), bureaucracy is not autonomous from politics but is dominated by politicians, which includes an extreme form of party nomenclature.[85]

Public administration should remain outside the rules of "petty politics", but it should not be separate from the policy sphere (of systematic management of particular set of public tasks conducted according to a clearly designed and developed plan) in which politicians are bound to cooperate with specialist civil servants.[86] Political leaders, worried about the way their ideological programme is implemented by civil servants, are keen to limit their role to the technical management of the public sector. In contemporary European countries the roles of politicians and civil servants are often mixed up or even switched during decision-making.

Bibliography

Aberbach J.D., Putnam R.D., Rockman B.A. (1981), *Bureaucrats and Politicians in Western Democracies*, Boston: Harvard University Press.

84 Maffesoli (2008), p. 39.

85 See *Administrative Law and Bureaucratic Autonomy in a Comparative European Perspective* by D. Carelli and B.G. Peters in this volume.

86 Izdebski (2006), p. 213.

Appleby P.H. (1949), *Policy and Administration*, Tuscaloosa: University of Alabama Press.
Bauman Z. (2006), *Płynna nowoczesność*, Kraków: Wydawnictwo Literackie.
Bogucka I., Pietrzykowski T. (2009), *Etyka w administracji publicznej*, Warszawa: LexisNexis.
Bossaert D., Demmke C. (2003), *Służba cywilna w państwach akcesyjnych. Tendencje i wpływ procesów integracyjnych*, Łódź: Instytut Europejski.
Bovens M. (2007), 'Analysing and Assessing Accountability: A Conceptual Framework', 13(4) *European Law Journal*, 447–468.
Campbell J.L. (1988), 'The Political Roles of Senior Government Official in Advanced Democracies', 18 *British Journal of Political Science*, 243–272.
Chapman B. (1959), *The Profession of Government*, London: Allen and Unwin.
Coleman W., Atkinson M. (1985), 'Bureaucrats and Politicians in Canada', 18(1) *Comparative Political Studies*, 58–80.
Demmke C., Moilanen T. (2011), *Effectiveness of Good Governance and Ethics in Central Administration*, Maastricht: EUPAN.
Długosz D., Itrich-Drabarek J. (2019), 'Personnel nomenclature in administration', in Itrich-Drabarek J. (ed), *Encyclopedia of Public Administration*, Warszawa: Dom Wydawniczy ELIPSA, 200–201.
Epstein D., O'Halloran S. (1999), *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*, Cambridge: Cambridge University Press.
Etzioni-Halevy E. (1983), *Bureaucracy and Democracy. A Political Dilemma*, Boston: Routledge&Kegan Paul.
Filipowicz S. (2006), *Demokracja. O władzy iluzji w królestwie rozumu*, Warszawa: Wydawnictwo Akademickie i Profesjonalne.
Fiorina M. (1989), *Congress: Keystone of the Washington Establishment*, New Haven: Yale University Press.
Goodnow F.J. (1900), *Politics and Administration: A Study in Government*, New York: Russell and Russell.
Grosse G.T. (2001), 'Służba cywilna w Polsce i możliwości jej rozwoju', 2 *Służba Cywilna*, 84–97.
Herbut R. (1999), 'Administracja publiczna – modele, funkcja, struktura', in Ferens A., Macek I. (eds), *Administracja i polityka. Wprowadzenie*, Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 30–40.
Heywood A. (2006), *Politologia*, Warszawa: Wydawnictwo Naukowe PWN.
Huber J.D., Shipan C.R. (2002), *Deliberate Discretion: The Institutional Foundations of Bureaucratic Autonomy, The Institutional Foundations of Bureaucracy Autonomy*, Cambridge: Cambridge University Press.
Hughes O.E. (1994), *Public Management and Administration: An Introduction*, London: Macmillan Press.
Itrich-Drabarek J. (2003), 'Rola służby cywilnej w państwach Unii Europejskiej', in Mołdawa T., Wojtaszczyk K., Małecki M. (eds), *Europeizacja administracji publicznej*, Warszawa: Aspra JR.
Itrich-Drabarek J. (2010), *Uwarunkowania, standardy i kierunki zmian służby cywilnej w Polsce na tle europejskim*, Warszawa.
Itrich-Drabarek J. (2013), *The Civil Service in Central and Eastern Europe/Służba cywilna w Europie-Środkowo-Wschodniej* (bilingual edition), Warszawa: Elipsa.
Itrich-Drabarek J. (2020), 'The Evolution of the Polish Civil Service Since 1989', 57 *Studia Politologiczne*, 92–112.
Itrich-Drabarek J. (2022), *Contemporary States and the Pandemic*, London: Routledge.
Itrich-Drabarek J., Kisiel P. (2020), 'Populism in the Visegrád Group Countries', in Mazur S. (ed), *Public Administration in Central Europe: Ideas as Causes of Reforms*, London: Routledge.
Itrich-Drabarek J., Mroczka K., Mider D. (2022), *Civil Service in the Awareness of Poles in 2022 Analysis of the Results of Quantitative Research on the Image of the Civil Service in the Centenary of Its Exist*, Warszawa.
Izdebski H. (2006), *Introduction to Public Administration and Administrative Law*, Warszawa: LIBER.
Jabłoński A.W. (1999), 'Tendencje przeobrażeń administracji publicznej na Zachodzie', in Ferens A., Macek I. (eds), *Administracja i polityka. Wprowadzenie*, Wroclaw: Wydawnictwo Uniwersytetu Wrocławskiego, 67–88.
Krauser G.A., Meier K.J. (eds) (2003), *Politics, Policy, and Organization. Frontiers in the Scientific Study of Bureaucracy*, Ann Arbor: The University of Michigan Press.

Kudrycka B. (1998), *Neutralność polityczna urzędników*, Warszawa: Wydawnictwo Sejmowe.
Long N. (1949), 'Power and Administration', 9(4) *Public Administrative Review*, 257–264.
Longchamp F. (1973), 'O źródłach prawa administracyjnego. Problemy poznawcze', in W. Jaśkiewicz (ed), *Studia z zakresu prawa administracyjnego ku czci Prof. Dra Mariana Zimermana*, Warszawa, Poznań: Państwowe Wydawnictwo Naukowe, 95–104.
Lowi T. (1969), *The End of Liberalism, Ideology, Policy and the Crisis of Public Authority*, New York: Norton & Company Inc.
Lupia A. (2001), 'Delegation of Power: Agency Theory', in Smelser N.J., Baltes P.B. (eds), *International Encyclopedia of the Social and Behavioral Sciences*, Oxford: Elsevier Science Limited, 3375–3377.
Lupia A. (2003), 'Delegation and Its Perils', in Ström K., Müller W.C., Bergman T. (eds), *Delegation and Accountability in Parliamentary Democracies*, Oxford: Oxford University Press, 33–54.
Maffesoli M. (2008), *Czas plemion. Schyłek indywidualizm w społeczeństwach ponowoczesnych*, Warszawa: Wydawnictwo Naukowe PWN.
Mayntz R., Derlien H.-U. (1989), 'Party Patronage and Politicization of the West German Administrative Elite 1970–1987 – Toward Hybridization?', 2 *Governance*, 384–404.
Michels R. (1915), *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, Glencoe: Free Press.
Moe R.C. (1990), 'Traditional Organizational Principles and the Managerial Presidency: From Phoenix to Ashes', 50 *Public Administration Review*, 135–146.
Northcote S.H., Trevelyan Ch.E. (1854), *Report about British Civil Service*, London, www.civilservant.org.uk/library/1854_Northcote_Trevelyan_Report.pdf.
OECD (1999), *European Principles for Public Administration*, 27 SIGMA Papers, Paris: OECD Publishing, https://doi.org/10.1787/5kml60zwdr7h-en.
Page E.C. (1992), *Political Authority and Bureaucratic Power. A Comparative Analysis*, University of Tennessee Press.
Peters B.G. (1999), *Administracja publiczna w systemie politycznym*, Warszawa: Wydawnictwo Naukowe Scholar.
Raadschelders C.N. (2003), *Government: A Public Administration Perspective*, London: Routledge.
Rosenbloom D.H., Dolan J. (2004), *Representative Bureaucracy. Classic Readings and Continuing Controversies*, New York: Routledge.
Rothstein B. (2007), 'Political Legitimacy for Public Administration', in Peters B.G., Pierre J. (eds), *Handbook of Public Administration*, London: Sage Publications, 213–222.
Rydlewski G. (2001), *Służba cywilna w Polsce na tle innych rozwiązań ustrojowych*, Warszawa: Scholar.
Schumpeter J.A. (1995), *Kapitalizm, socjalizm, demokracja*, Warszawa: PWN.
Simon H.A. (1947), *Administrative Behavior: A Study of Decision-making Processes in Administrative Organizations*, New York: Macmillan.
Śledzińska A.M. (2005), 'Konstytucyjne prawo wolności słowa i stowarzyszeń urzędników służby cywilnej', 11 *Służba Cywilna*.
Stępień M. (2008), *Responsywna administracja publiczna*, Toruń: Wydawnictwo Adam Marszałek.
Thelen K., Steinmo S. (1992), 'Historical Institutionalism in Comparative Politics', in Steinmo S., Thelen K., Longstreth F. (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis*, New York: Cambridge University Press, 1–32.
Tocqueville A. (1996), *O demokracji w Ameryce*, Warszawa: Społeczny Instytut Wydawniczy Znak, Fundacja im. Stefana Batorego.
Weber M. (1946), *Essays in Sociology*, New York: Oxford University Press.
Weber M. (1978), *Economy and Society: An Outline of Interpretive Sociology*, Berkeley: University of California Press.
Wilson W. (1887), 'The Study of Administration', 2(2) *Political Science Quarterly*, 197–222.

50 Civil Service Adaptation and Reform in the Context of European Governance, (De-) Europeanisation, and National Competition

Christoph Demmke

I. Introduction

Despite all the governance reforms and innovations during the last decades, in all the European Union (EU) countries, civil services continue to be a vital part of the systems of national and EU governance. To date, neither the EU nor the national governments have completely privatised the delivery of public tasks, no public administration works like a private company, and no civil service system has been totally aligned to private sector practices. As history also shows, countries may survive for longer periods of time without a government, but not without civil services.[1] Thus, civil services seem to be highly robust and resilient structures. Also, the EU integration process and all the EU reforms that promoted the liberalisation (of services of general interest), marketisation trends, regulatory reforms and benchmarking never had a decisive influence on the legitimacy of the national civil services. To this day, EU Member States are eager to preserve the sovereignty of their national civil services.

Still, the national civil services have nonetheless been subjected to many EU-influenced changes. Recent EU studies even discuss the need to "give renewed priority to European public goods" – new policies and initiatives in fields like defence, military procurement, foreign policy, European digitalisation, foreign economic integration, and so on, whose value to the EU countries may be higher when conducted at the EU level rather than at the national level.[2]

The aim of this chapter is study how EU influence changes in the context of changing governance styles, and how the civil services adapt to these EU governance changes.

Whereas in the past the impact of the EU on the national civil services focused on top-down regulatory change, and on the management of EU funds and EU programs, today European governance has become much more differentiated and flexible, and it covers a variety of governance styles and instruments. Parallel to this, national Europeanisation strategies and policies have also taken on many new features. In some countries, these Europeanisation strategies are shifting between Europeanisation, de-Europeanisation and re-Europeanisation. The adopted strategy depends on the policy or instrument at stake, and whether countries believe that new EU policies or instruments are beneficial or not. We will return to this utilitarian logic in later.

1 Demmke (2018), p. 1671.
2 Fuest and Pisani-Ferry (2019).

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Moreover, the international context, as well as conditions and mechanisms for civil service change and adaptation, have fundamentally changed. As such, preparing and managing EU affairs takes place in a highly volatile and changing governance context. Since the beginning of the financial crisis in 2008, the EU finds itself in a process of constant crisis management. The COVID-19 pandemic, the climate crisis and the Russia-Ukraine war have created a completely new political landscape in Europe. This has resulted in changed attitudes towards the EU and the perception that there is a need for a closer EU integration process. Kelemen and McNamara claimed that the imbalance between the EU's strong regulatory and distributive authority and weak capacity in traditional State tasks reflects its peaceful origins: the EU lacks military and police forces, as well as fiscal autonomy and direct enforcement powers, because it never had to confront a serious military threat.[3] Therefore, the war in Ukraine poses the question of whether the emergence of such a threat changes the relationship in the allocation of core State powers.[4]

EU governance is also influenced by global governance and meta-governance.[5] The massive change in world politics also influences the incentive and rewards structures of EU membership and utilitarian considerations of the added value of EU membership.[6] It also changes national attitudes towards the EU and the "logic of appropriateness".[7]

In the following sections, we will focus on the relationship between the changing EU governance and the adaptation of national civil services. Compared to discussions about European governance, or about national governance reforms, this topic has rarely been subject of intense discussions. For the most part, scholars either focus on the development of EU governance, or on the development of national civil service reforms.

From a methodological point of view, we start with the widely accepted theoretical assumptions that governance is changing, and that governance styles are becoming ever more flexible. Today, governance styles adapt to different policies and situations. Take as an example the categorisation of Pierre and Peters[8] who differentiate between *étatiste* governance, networking governance, multiform and meta-governance, multilevel governance, collaborative governance, informal governance and good governance. All these different governance styles overlap with each other and are applied differently in different policy areas. For example, traditional top-down and *étatiste* styles of government are still much more common in defence policies, whereas multilevel governance is applied in the field of managing (EU funds). In turn, forms of collaborative governance (for example co-production) are applied in specific public policies (such as social policy, environmental policy) and primarily on the local level.

As we will see, the theory of differentiated and flexible governance is very well-suited for explaining the constantly changing relationship between the EU integration process and the adaptation of the national civil services.

Parallel to these challenges, the concept of European governance (which formerly focused on the classical "Community method", the top-down adoption of regulations, directives and decisions and distributive policies) has also changed since the publication

3 Kelemen and McNamara (2022).
4 Genschel (2022).
5 Pierre and Peters (2021).
6 European Court of Auditors (2020).
7 March and Olsen (1989).
8 Pierre and Peters (2021).

of the White Paper on European Governance in 2001.[9] Today, the term (European) governance is expanding to include many different forms of multilevel governance styles in different EU policies.

The task of the national civil services is to manage the development of these different EU governance styles that are developing in parallel. How do these trends relate to each other?

II. The Concept of Change – How Does Civil Service Adaptation Happen, and Why?[10]

Before we enter a discussion on flexible EU governance and the impact on the adaptation of national civil services, it is important to clarify the concept of change and adaption (of civil services).

Christensen and Laegreid distinguish three sets of explanatory factors to understand the development of reform processes – environmental, cultural and polity: "In a dynamic interaction, these factors explain why reform initiatives and implementations differ around the globe."[11] The strongest impetus for change is usually said to come from social, economic, organisational and technological developments, and such trends are often depicted as "universal" for all countries belonging to the Organisation for Economic Co-operation and Development (OECD), thus suggesting a preference for "universal" solutions. However, reforms are not being introduced as a result of one clearly identifiable common pressure and "of a few elite persons coming along with a bright idea. Neither the person nor the ideas appear out of a vacuum."[12] Also, Olsen[13] rejects the idea that a rational actor-centred frame is sufficient to explain the logics of reform processes. According to Olsen, neither actor-centred frames nor society-centred frames suffice to explain reform processes. "Institutions are simultaneously creating order and change. They are not static and do not always favour continuity over breaks with the past. Change is a constant feature of institutions."[14] However, change is always imperfect, uncertain, and leads to undesired and unexpected outcomes.[15]

Moreover, designing, formulating, deciding upon and implementing civil service reform tends to be characterised by negotiations amongst several political, administrative and societal actors. Depending on the issue at stake, there are "multiple combinations of actors, and these combinations depend on the context and the policy area, as well as the phase, goals, financing, implementation and functions of service delivery".[16] Thus, the design and implementation of reforms, and the associated decision-making, depend on many macro- and micropolitics variables, such as leadership, communication, teamwork, skills, perception of organisational justice, organisational culture, qualifications, age, function, ranking, experience, personal situation, and so on. Civil service reform is also not entirely rational, intentional, deterministic (caused by external forces and laws) or random (governed by the laws

9 European Commission, *European Governance – A White Paper*, 2001/C 287/01, OJ EC C 287.

10 Parts of this chapter refer to my earlier research and earlier publications about the legitimacy of civil services and the change of civil services. See Demmke (2016); Demmke (2018), and Demmke (2019).

11 Christensen and Laegreid (2016), p. 39.

12 Pollitt and Bouckaert (2011), p. 34.

13 Olsen (2016), p. 11.

14 Olsen (2016), p. 17.

15 Olsen (2016), p. 19.

16 de Vries (2016), p. 37.

of chance). Because of the grand importance of tradition (path-dependency), the conflicting nature of change processes and conflicting reform objectives, it is rare that civil service reform is solely based on simple rational, top-down strategies and ideas which are invented by political leaders. Instead, it is also determined by institutional structures, values, culture, symbols and processes. Therefore, it is easy to overstate that countries do not follow the same reform paths. Take only the case of demographic developments as a reform pressure, which is a considerable change factor in some countries (for example Japan), whereas this is not the case in other countries (for example France and Ireland).

It is equally possible that even powerful reform pressures are not necessarily translated into the same reform priorities. The latter depends on the internal forces at work: conflicts, interests, history, institutions, legal requirements, pressures, norms, values, political systems, resources, demography, and other factors.[17]

These considerations may support assertions that national civil service reforms are not as rational as is often suggested. Instead, they are always confronted with a historical context and institution-based, fragmented, situational and pragmatic reality.[18] Overall, institutional differences – notably the levels of budgetary resources, social legitimacy, work systems, labour markets, education and training systems, work organisation and the collective organisation of employers and employees – mediate the impact of converging processes.[19] Therefore, there is not only one bureaucracy but a plurality of bureaucratic systems.[20]

For the purpose of our discussion, it is important to note that, as regards the national civil services, current trends towards flexible (European) governance are also confronted with a changing governance (and organisational) reality at the national level. Today, it is much more difficult to define the national civil services as one State-centric administrative model. For example, defining the German civil service as a career model and the Dutch civil service as a privatised or aligned model does not correspond to the much more complex reality. In reality, national organisational and civil service systems show increasing within-group variation and between-group variation that are not considered by State-centric models. They combine various elements of flexible, innovative and high-performance work systems with established Taylorist, rule-bound, and traditional bureaucratic models. In almost all countries, public organisations differ from traditional Taylorist models to high-involvement or high-job autonomy models with low hierarchies and enhanced levels of job autonomy. Next, organisational and Human Resources (HR) reforms vary from sector to sector, agency to agency, policy to policy, and are influenced by various HR strategies and innovations.[21] The COVID-19 crisis has also supported more flexible work arrangements in all types of public and private organisations, called "new ways of working".

> Parallel to these developments, in all countries, new evidence from a growing number of disciplines such as organisational theory, organisational behavior, organisational justice, strategic management, ethics, leadership and Human Resource Management (HRM) (including engagement and motivation theories) have been incorporated into new structures, processes and policies.[22]

17 Pollitt and Bouckaert (2011).
18 Demmke (2022), p. 69.
19 Demmke (2022), p. 69.
20 Bonazzi (2014).
21 Demmke (2022), p. 67.
22 Demmke (2022), p. 67.

Different organisation can be associated with various work systems and work styles and can look different in different sectors and for different categories of staff.[23] Thus, it seems the characteristics of each policy, issue or problem – and its associated policy style – are more important for explaining cross-country variation policy adoption and implementation than State-centred and uniform administrative traditions.[24]

Consequently, one could re-phrase this challenge as: flexible EU governance meets the enhanced differentiation of national civil services!

Take the case of civil service status:[25] international comparisons show that the percentage of civil servants varies enormously (currently between more than 90% in Croatia and 0.5% of the total public workforce in Sweden). Overall, the percentage of civil service employment is higher at the central level than at the regional and local levels. Often, civil servants work in the central ministries, in the police, tax administration, judicial services and as judges. In most cases diplomats and soldiers have a specific and often also special status. In more countries, teachers, professors and health professionals are excluded from having a specific status. Overall, civil service jobs can range from street sweeping to the exploration of outer space. This fragmented (legal) situation has led to a situation in which countries employ public employees and/or civil servants in many different sectors, functions, jobs, areas, and so on. Overall, the distinction between the two legal regimes has become blurred during the last decades. As a consequence, more countries employ public employees and civil servants in the same posts, align working conditions amongst two (or more) groups, and restructure public employment, which often leads to a shift from public law to labour law employment.[26] Finally, cost-saving measures force countries to employ public employees under labour law rather than as civil servants. Moreover, especially in times of budgetary constraints, fixed-term contracts are used to substitute civil servants who are temporarily absent, e.g. in cases of sick leave, maternity leave or parental leave. During the financial crisis (2008–2013), many countries recruited fixed-term workers who replaced more expensive civil servants.[27] Overall these trends caused ever more inconsistencies as to the employment of public employees in civil service employment positions (and even in those cases where national civil service laws reserve specific functions only for civil servants). Therefore, in more and more cases, public employees carry out the same tasks of civil servants, in the same positions and sometimes even in the same offices. In practice, however, it is difficult to legitimise the different treatment of different employment groups in the same positions and jobs. Although many countries employ civil servants and other public employees, this distinction is becoming less decisive for deciding which tasks are carried out by whom.[28] The conviction is growing that public employees can exercise important State tasks just as well or as badly as civil servants under public law. Today, global consensus exists only regarding the need for a specific public status for judges.[29]

23 Demmke (2022), p. 67.
24 Biesbroek et al. (2018).
25 Demmke and Moilanen (2013), pp. 21–67.
26 Demmke and Moilanen (2013); also Demmke (2019).
27 Demmke (2016), p. 181.
28 Demmke and Moilanen (2010), p. 192.
29 Demmke (2019). See also *Defining the Civil Service: Towards a Better Understanding of the Nature of Civil Service Systems in Europe* by A. Krzywoń in this volume.

In this context, it is easy to imagine if EU secondary law (take, for example, the so-called Whistle-blower Directive)[30] does not apply to civil servants (because civil servants would not be considered as workers in national law under Article 4 (a) of the directive). The result would be a legal patchwork. In some countries, the directive would be applicable to almost all public employees (like in Croatia), in others only to a few (Poland) and, again, in others to approximately 30% of all public employees in different sectors, organisations and offices. This (partly) imaginary case shows the importance of other factors that have an impact on "Europeanisation" outcomes.

Thus, we can conclude that Europeanisation as an EU-driven or EU-oriented change of the political, economic, and administrative systems is confronted with trends towards differentiation, de-standardisation and individualisation in the national civil services.[31]

Thus, adaptation and change are the result of "complexity". For our discussion, it is important to note that external factors like the EU integration process are only one indicator, albeit important, if we want to understand the nature of national reform processes. In the following sections, we will examine this factor step by step.

III. The Relationship Between the EU Integration Process and National Civil Service Reforms

It can be stated that national civil service reform is influenced by the EU integration process and vice versa. Countries need to adapt national civil service policies to different EU governance styles and EU requirements. However, before we enter a discussion on how different governance styles influence the national civil services, it is important to define the relationship between the EU and the national civil services. This relationship can be discussed in many different ways. Answers to the question of how EU governance influences the national civil services differ according to four grand narratives.

The first narrative. Civil service systems are considered as institutional configurations that are most influenced by national history and tradition. According to Peters, administrative traditions are historically developed and relatively stable features of public bureaucracies. While these traditions gradually change over time in different contexts and for various reasons, they provide relatively stable features.[32] Thus, historical traditions and cultures have a considerable impact on the modernisation paths of the national civil services. As a consequence, they also have critical implications for the concept of mutual learning and the possibility to "import" so-called best practices. Thus, the civil service is the section of the politico-administrative system of the Member States of the EU, "which has been most influenced by the respective national traditions and histories and which for a long time was least affected by European integration".[33] As a result, the European dimension of civil services is considered to be very limited. Therefore, the typical rationality of national bureaucracies in reacting to EU requirements may be persistence-driven, meaning that

30 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, p. 17; see also *The Development of a Legal Framework on Whistle-blowing by Public Employees in the European Union* by P. Provenzano in this volume.

31 Demmke (2020).

32 Painter and Peters (2010), pp. 3–6. See also *The Civil Service in Transition – The Ongoing Transformation of Administrative Culture* by A. Ritz and K.S. Weißmüller in this volume.

33 Bossaert et al. (2001), p. 3.

bureaucracies attempt to meet the policy obligations while minimising their institutional adaptation cost. National bureaucracies remain widely autonomous in finding appropriate ways towards policy compliance.[34]

The second narrative. National civil services are changing (reluctantly) in specific political, legal and constitutional contexts, caused- and influenced by utilitarian considerations, conflicting logics, pressures, sanctions, path-dependency and institutional isomorphism. As regards the relationship between limited EU-competences, EU-requirements and the (relative) sovereignty of national civil services, this results in the emergence of increasing "grey areas" where Community and national competence overlap, as do EU and national policies.[35] As a result, national civil services are being influenced by EU-developments but are not converging towards common civil service models. Thus, the blurring of the dividing line between international politics and domestic politics, EU administrative law and national administrative law, or between EU administration and national administration, are giving way to the Europeanisation of administrative law[36] and to the emergence of a new "European Administrative System".[37] However, these developments do not lead to the convergence of administrative systems, or the Emergence of a European Administrative Space, as suggested by the OECD in 1999.[38] Instead, they raise the fascinating question of how change and the EU integration process relate to institutional conservatism. This, again, requires studying the difficult relationship between historical institutionalism and institutional isomorphism. Institutional isomorphism claims that, whatever the differences in labelling public management reforms, the very existence of fashions or models indicates that public institutions are not only a result of rational, financial and technological pressures, but also of changing attitudes, norms, fashions and changing cognitive-cultural patterns.[39] Thus, according to the "isomorphism" logic, countries pursue similar reform paths. In contrast, historical institutionalism posits that change does not come easily, because of legacies of the past. If "the persistence model was to be supported strongly than one could not observe the degree of convergence that has been observed".[40] Take the case of concepts like "exercising national public power" and "safeguarding the national interest", as well as the case law of the Court of Justice as regards the question which positions fall under the exception clause of Article 45 of Treaty on the Functioning of the European Union (TFEU).[41] The legal interpretation provided by the Court of Justice of the European Union (CJEU) has certainly helped to clarify the legal interpretation of Article 45, paragraph 4 TFEU and the definition of which positions exercise public powers. This jurisprudence opened up the free movement principles to employment in the national civil services. It also strongly impacted the national definition of sovereignty. However, most countries still reserve some functions for nationals. Moreover, the legal impact of the opening of Article 45, paragraph 4 TFEU should not be confused with the administrative and practical impact, which was always very limited in practice. A recent study by the French EU Presidency also shows that European or international mobility

34 Knill and Lenschow (2005).
35 Kämmerer (2001); Kämmerer (2004); Alber (2002).
36 Terhechte (2021).
37 Bauer and Trondal (2015).
38 OECD (1998).
39 DiMaggio and Powell (1983).
40 Painter and Peters (2010), p. 235.
41 Ziller (2010).

in the context of public employees' career paths is rarely valued.[42] International mobility is also not used as a necessary condition for obtaining certain positions, or for being promoted or rewarded. Thus, the enormous "legal and political" significance of opening up Article 45, paragraph 4 TFEU is not materialised in practice.

The third narrative. Europeanisation was massive.[43] For a long time, the national civil services were adaptive, eager to implement and apply the EU *acquis communautaire*, and ready for change. In 2010, the British government estimated "that around 50% of United Kingdom (UK) legislation with a significant economic impact originates from EU legislation".[44] Estimates of the proportion of national laws based on EU laws vary widely in other EU Member States, ranging from 6.3% to 84%. Although Europeanisation was driven by utilitarian considerations (incentives, rewards and sanctions), countries believed in the logic of appropriateness[45] and the normative authority of the EU and its legitimacy. In particular, the impact of the EU integration process on those countries that entered the EU in 2004 and 2007 cannot be overstated.

The fourth narrative. Today, the conditions and mechanism of Europeanisation have changed fundamentally. "Europeanisation failure" is discussed very differently. In the context of the rule-of-law crisis, the failure and refusal to obey judgments of the CJEU, as well as popular EU criticism and crises associated with the EU integration process. In the meantime, concepts like negative Europeanisation or de-Europeanisation are being discussed. The logic of this debate also suggests a slow de-coupling of EU requirements and national implementation measures, trends towards EU-regression and (partly) the return of nationalism. Consequently, countries may start to shield their national civil services against EU-influence and engage in utilitarian considerations about the added-value of the EU integration process, costs of membership, and the declining importance of incentives. However, the latter trends will not necessarily lead to disintegration. According to Schimmelfennig,[46] more integration has always been combined with differentiated integration. Differentiated integration has facilitated the expansion of European integration, but it has also been the price to pay for the rapid and massive growth of the EU. As European integration has expanded into additional policies, and as additional European countries have joined the EU, European integration has also become less uniform. Therefore, current trends are towards de-Europeanisation, differentiated integration, disintegration and more integration at the same time. Overall, current trends can also be conceptualised as paradoxical integration trends. Trends towards "de-Europeanisation" are not replacing "Europeanisation" and should not be considered as the opposite of "Europeanisation". For example, de-Europeanisation will not lead to a less EU-related workload, less impact on ministerial departments or agencies, or less EU-related obligations. De-Europeanisation may better correspond with the trends towards different policy paradigms, styles, different ways of doing, and also different beliefs and norms. Hence it needs to be distinguished from dis-integration, which may, however, be a consequence of de-Europeanisation. Thus,

42 French EU Presidency, *European and International Mobility of Public Workers. Survey Among the European Public Administration Network Members (EUPAN)*, Ipsos, March 2022, www.eupan.eu/wp-content/uploads/2022/04/Summary-EUPAN-survey-2022-Mobility.pdf.

43 Woźniakowski et al. (2018), p. 6.

44 House of Commons, *How Much Legislation Comes from Europe?*, Research Paper 10/62, 10 October 2010, p. 1; https://researchbriefings.files.parliament.uk/documents/RP10-62/RP10-62.pdf.

45 March and Olsen (1989), pp. 147–160.

46 Schimmelfennig (2019), p. 24.

while de-Europeanisation is becoming popular, the European Commission is as active as never before in policies and issues that influence national civil services. For a number of years, the European Commission is actively engaging in the EU benchmarking of national civil services, financing national civil service reform projects, and protecting the community financial interests, which requires interfering in national anti-corruption and integrity policies. While the national civil services happily accept technical and financial support from the European Commission, they strongly resist the Commission's attempts to protect EU financial interests or announcements that it plans to interfere in national civil service practices in cases of financial irregularities and corruption.

1. Defining the Impact of Adapting EU Governance on Civil Service Adaptation

1.1. Europeanisation

Overall, EU law and policies have a direct or indirect impact on the reform of the national civil services.

For a long time, the EU focused on the adoption of secondary law directives – for the most part – in the field of anti-discrimination policies, working conditions, working time and the free movement of workers (with implications on the national civil services). Already at this time, directives could take on a highly detailed character (such as the existing anti-discrimination directive), or a very flexible character (like the directive on flexible work contracts). Overall, approaches and instruments were entirely "regulatory". Often, these directives were still adopted in a relatively closed decision-making context that was not very inclusive or transparent, and in cooperation with the national partners and civil servants from central governments and ministries. This "Leviathan" style of governance also corresponded with the principle of separation between the legislative level (at the EU level) and implementation (at the national level). In cases of violations, the EU Commission would ultimately have the right and start an infringement procedure.

In the meantime, EU-governance modes have expanded to include ever new forms of governance styles. For example, classical top-down community methods which lead to the adoption of legally binding instruments are supplemented with informal and voluntary modes of governance, such as the creation of informal civil service networks. Changing governance styles can also be observed as regards the choice and quality of legal instruments: the nature, quality, and substance of EU secondary law have also changed. Take the case of the Water Framework Directive 2000/60/EC,[47] which is, of course, still a regulatory instrument. On the other hand, the text includes provisions for planning and coordination requirements (Articles 3, 6, 8, 11, and 13), the need to involve and inform the public (Article 14), economic instruments and incentives (Article 9), voluntary measures (Articles 9 and 22), informal requirements and broad derogation clauses (Article 4). As such, this instrument itself confirms trends towards flexible governance. It includes almost all the aforementioned governance trends – *étatiste* governance, multilevel governance, informal governance, and so on.

47 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, p. 1.

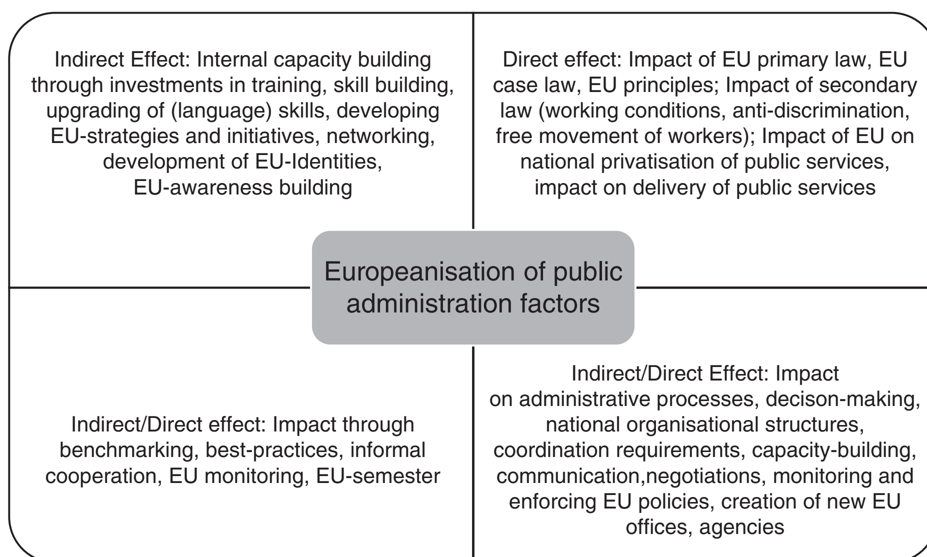

Figure 50.1 Europeanisation of national governance and civil services
Source: The author

The often-bewildering array of emerging forms of EU governance frequently go beyond traditional notions of hierarchical steering and formal coordination. Instead, one can observe ever new changing patterns of administrative dynamics, constellations, configurations and polycentric structures of governance styles and administrative cooperation. Often, it is difficult to define each of these as traditional, collaborative, networking or informal forms of governance.

Of course, forms of administrative *engrenage* always existed in the field of the implementation of EU-Structural funds. However, the various forms of multilevel governance have also changed and include ever more actors. Moreover, the European Commission has become more active than before in monitoring the implementation of structural funds at the regional and local levels. The legitimacy for doing so is evident: protecting the financial interests of the EU.

This European dimension of national governance and national civil services (Figure 50.1) was also discussed under the "label" of Europeanisation. Radaelli[48] defined Europeanisation as follows:

> We define Europeanisation as the emergence and development at the European level of distinct structures of governance, that is, of political, legal, and social institutions associated with political problem-solving that formalise interactions among the actors, and of policy networks specialising in the creation of authoritative European rules.[49] (. . .) Processes of construction, diffusion, and institutionalisation of formal and infor-

48 Radaelli (2003), p. 29.
49 Radaelli (2003), p. 29.

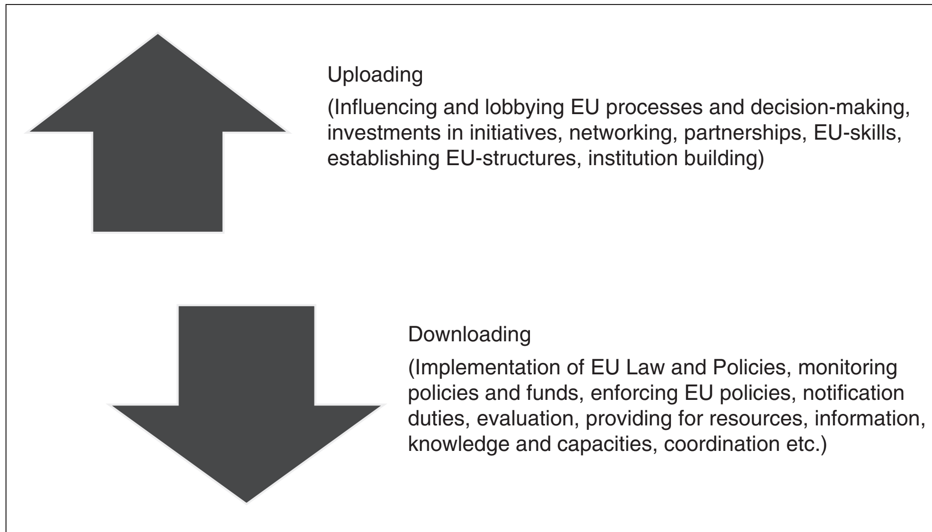

Figure 50.2 Europeanisation as uploading and downloading processes

Source: The author

mal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies.[50]

For a long time, the theory of "Europeanisation" was discussed as a two-way street concept (Figure 50.2): the "uploading" of national policies to the European level and the "downloading" of EU policies to the national level.[51] Whereas the downloading approach concerns the impact of EU policies, legislation and processes on and in the Member States,[52] the bottom-up approach describes the Member States' efforts to influence EU processes and initiatives in line with national interests. In concrete terms, it is mostly about negotiating, lobbying and influencing EU processes from the perspective of the national logic. Thus, European governance is changing towards a new European Administrative System,[53] towards the emergence of various forms of networking governance, agencification of EU policies and new institutions, public-private bodies and actors.[54] Next, in *Verwaltungsrecht der Europäischen Union* (Administrative Law in the European Union), Terhechte[55] illustrates how EU-enforcement and networking duties in primary and secondary law (often, in directives) impact the national enforcement systems. EU

50 Radaelli (2003), p. 30.
51 Börzel and Risse (2012).
52 Risse et al. (2001).
53 Bauer and Trondal (2015).
54 Crouch (2018).
55 Terhechte (2021).

secondary law requires Member States to continuously set up new administrative bodies or change cooperation, coordination or communication patterns amongst various administrative bodies.

Thus, civil services are required to constantly adapt to new and changing EU governance styles at the EU level. This requires active and passive components. Active European capability requires the Member States to influence and lobby the EU decision-making process according to national interests. Passive European capability requires the national civil services to develop skills, competencies and resources in order to manage (positively or critically) EU affairs at the national level.

1.2. Downloading and Adaptation Pressure

The historical roots of the European integration process in the agricultural sector and the dominance of economic integration are still reflected in the high degree of Europeanisation of civil services in these policies.[56] Today, even policy areas which are predominantly subject to exclusive national competencies are affected by development on the EU level and illustrate the interaction and depth and breadth of European influences. For a long time, the most important adaptation pressure (and also cause for shortcomings in the implementation process) was seen in the level of detailedness of European legal instruments. Increasingly, criticism focused on red-tape and the poor quality of EU secondary law. Initiatives and concepts to improve the quality of EU law (often called "Better Regulation" or "Smart Regulation") became popular, encompassed the entire legislative process and included proposals for *ex-ante* and *ex-post* legal impact and cost-benefit assessments, legal evaluations, the European Commission's regulatory fitness and performance programme (REFIT), deregulation, re-regulation, codification measures and new proposals for administrative cooperation between legal experts and stakeholders in the preparatory phase of the legislative process.

Today, adaptation pressure arises less because of the sheer number of detailed rules. Instead, the last years have seen a remarkable expansion in the choice of other instruments at the EU level. Regulatory instruments have increasingly been supplemented by managerial, behavioural, voluntary, procedural- and horizontal instruments, benchmarking studies and country indexes/rankings. Since the adoption of the White Paper on Governance in 2001,[57] rule-making activity has declined sharply. However, this development gave rise to completely new adaptation problems and the focus of the debates shifted from legal challenges to the implementation challenge of new (informal) instruments. In fact, the shift from classical regulatory governance to new forms of informal and multilevel governance, the greater use of financial instruments, and the widening of toolboxes, including enhanced administrative cooperation, greater public participation and the involvement of more actors in decision-making processes, has led to a changing implementation landscape with new type of actors, and new power and motivation structures.

Whether these trends towards new forms of governance and the reorientation in the choice of EU instruments have resulted in less legal and administrative burdens or, conversely, in a mere change in related management and control demands, is still open for

56 However, in the meantime, also other policies such as environmental policy and law are also deeply affected by EU activities in the field.

57 European Commission, *European Governance – A White Paper*, 2001/C 287/01, OJ EC C 287, p. 1.

discussion. It is also unclear whether classical regulatory approaches, or a wider choice of instruments and trends towards new forms of governance, have led to more or less adaptation pressure.

Thus, trends towards new forms of European governance do not necessarily change the overall impact of the EU integration process in the various policies and sectors. As always, EU policies require the national civil services to introduce new procedures, notify EU bodies about implementation measures, inform the public, introduce control or auditing requirements, change laws, regulations or administrative circulars, and introduce new technologies. EU requirements influence the workload of civil servants, time management, skill requirements and communication channels.

All of this should not be dismissed as EU bureaucracy that differs from national bureaucracy. Even highly critical EU Member States and administrations may still be very supportive of certain EU policies, for example as regards the opportunity to receive EU structural, environmental, agricultural or social funds. Today, national governments may either be very critical towards the "EU bureaucracy", if this does not correspond to the national "best fit", but then eagerly support new EU initiatives, as long as they profit from these, and no matter whether this may increase administrative burdens.

In all countries, civil servants at different governmental levels are differently affected by Europeanisation. For example, one of the most detailed empirical studies on the impact of "Europeanisation" on the German administrative system concluded that 53.1% of all units within the federal ministries dealt with EU topics.[58] 29.3% of all personal resources in the ministerial departments were allocated to EU dossiers.[59] By comparison with Norway, as an associated State in the European Economic Area (EEA), Trondal[60] estimates that 7% of Norwegian ministerial officials are reporting regular contacts with the European Commission and 16% with the Norway's delegation to the EU. By contrast, 26% of Norwegian ministries and agencies staff participate in committees in international organisations.[61]

Overall, national central administrations are more involved in policy formulation at the EU level and regional (and agency) employees are more involved in policy implementation. Europeanisation at the local level is characterised by a great diversity amongst towns, cities and independent cities,[62] which also show a considerable variance in local Europe-related activities. A study by Gröbe, Grohs, and Port[63] concludes that

> next to the direct affectedness by Europeanisation, particularly the municipalities' institutional capacity has a major influence on a municipalities' ability to cope with European regulation and opportunity structures. Both turned out to be the most important factors determining the variance observed in our survey. Most important, the professionalisation of Europe-related activities by the establishment of a specialised unit for European affairs seems decisive.[64]

58 Felder et al. (2002), p. 7.
59 Felder et al. (2002), p. 12.
60 Trondal (2023), p. 212.
61 Felder et al. (2002), p. 13.
62 Balme and Le Galés (1997); Verhelst (2017).
63 Gröbe et al. (2022).
64 Gröbe et al. (2022), p. 21.

Moreover, the geographical location also plays a role in whether or not municipalities are being Europeanised. As such, local governments have different – and less effective – opportunity structures than national and regional governments. They lack the possibility to exercise formal and direct influence and mostly rely on "lobbying" local interests on the national route, or via international local networks. Local governments are also differently affected by EU policies and regulations than the national level. According to Gröbe and Grohs, "between 60% and 80% of European policies are implemented at the local level, absorbing more and more local administrative capacities".[65] Of course, the focus of attention concerns the attraction and management of EU funds. However, many EU policies also restrict the local leeway. For example, time consuming notification requirements, monitoring duties, and European regulations on public procurement and State-aid.

De-Europeanisation trends are unlikely to change this logic either. Moreover, there is also no evidence that civil servants who are working in countries that engage in de-Europeanisation have different EU-related workloads than colleagues in other countries. Felder[66] concluded with regard to Germany that 9 out of 15 federal ministries have introduced specific departments for EU affairs and almost all ministries have recruited so-called European Affairs Officers (*Europabeauftragte* (*Bund*) and *Europareferenten* (*Länder*)). It is highly unlikely that a more EU-critical country like Hungary would refuse to develop and introduce these distinct structures of EU-governance only because of a more critical EU-attitude. Thus, Radelli's definition of Europeanisation as a process of construction, diffusion, and institutionalisation of formal and informal rules, and procedures through EU membership is still applicable and "alive".

1.3. Uploading: National Competitions Influencing the EU Institutions and Personnel Policies

As regards the uploading debate, all national civil services find themselves in a constant process of regulatory and policy competition on the EU level. According to Knill and Lenschow,[67] "pressure for institutional adjustment basically emerges from the need to rearrange and redesign national arrangements in order to enhance their effectiveness for achieving certain, politically defined objectives in comparison to the performance of other Member States".[68]

As already mentioned, we claim that this form of Europeanisation by competition has not changed in the times of de-Europeanisation. All countries seek to export their regulatory strategies, political concepts and ideas to the EU level in order to avoid misfits in the later implementation phase. Here, from a national point of view, it is most important to influence the positions of the European Commission as early as possible prior to its task to design proposals. In this phase, the shaping of EU policy initiatives becomes crucial, for example in expert groups which advise the European Commission. Given the fact that hundreds of these expert groups exist in various policy fields, this alone demonstrates the strong impact of the EU on the national civil services, the so-called Europeanisation of

65 Gröbe et al. (2022), p. 5.
66 Felder et al. (2002), p. 22.
67 Knill and Lenschow (2005), p. 123.
68 Knill and Lenschow (2005), p. 123.

national administrations. According to Blomeyer,[69] thousands of national experts were involved in 775 expert groups[70] in various policy areas.

National experts must be familiar with rules of procedures, decision-making specifics, and language regimes, learn about other national interests and priorities, and coordinate positions "at home" – horizontally within the Ministry (or Agency) and vertically with regional and local bodies (and experts). National civil servants also negotiate in later phases of the decision-making process in approximately 150–200 Council of Ministers working groups and hundreds of comitology committees. They also work in various networks, agencies and many ad hoc meetings and conferences at the EU level. Countries that engage in de-Europeanisation strategies may engage with less EU-friendly political attitudes in these hundreds of expert groups and working groups. However, they will not decide to disengage as members of these networks and become inactive, as this will almost automatically translate into losing control, influence and lobbying capacity at the EU level. De-Europeanisation would then result in less incentives, sanctions and lower "EU rewards". Thus, it is important to distinguish between de-Europeanisation as a change of political attitude and de-Europeanisation as a form of disengagement from EU affairs. The latter form is much less likely to happen than the former.

1.4. De-Europeanisation

Our discussion so far may convey the message that it does not matter whether countries engage in Europeanisation or de-Europeanisation, and that ultimately the impact on the national civil services does not differ. However, such a conclusion would be misleading.

According to Gürkan and Tomini, the "Europeanisation perspective might be part of the 'good weather' literature".[71] Overall, Europeanisation literature cannot explain the declining impact of the EU's influence on some Member States or the recent phenomenon of norm contestation in some Member States. Whereas in earlier times, countries interpreted an initial misfit between EU and national requirements as a requirement to "remedy" the misfit and adapt national processes and procedures with the aim of fulfilling the EU requirements. Today, countries increasingly consider whether or not they should remove the misfit at all.

Take the first EU-wide comparative study "Making European Policies Work" on the implementation of 17 directives.[72] In this study, the authors stated: "The application of Community law by and in the Member States is more than a comparison of laws, more than a condition for the smooth functioning of the Common Market, it is the actual foundation of the European Community." This study illustrated that for the effective implementation of EU law, technical, political, material, institutional, socio-cultural and procedural factors are at least as important as the choice of the legal instrument. For example, the "fragmentation of government" was identified as a key cause of implementation deficits.[73]

This Siedentopf and Ziller study[74] found that in the Member States, EU law was applied in the same way as national law, neither more perfectly nor with specific enforcement

69 Blomeyer et al. (2018).
70 Blomeyer et al. (2018), p. 22.
71 Gürkan and Tomini (2021), p. 183.
72 Siedentopf and Ziller (1988).
73 Hauschild (1991).
74 Hauschild (1991), pp. 151–171.

deficits. This illustrated that the national civil services did not perceive EU law and national law as different subjects. Instead, predominantly Europe-friendly administrations and politics acted with a supportive attitude towards Community law. This also corresponded with the understanding that law, and thus whether EU or national law should be implemented in a spirit of neutrality, impartiality and loyalty towards the law. These findings were published only 30 years ago. Today, they read as if they had been published in a different era.

Take a more recent study by the European Court of Auditors[75] which concluded that "political considerations at Member State level contributed in certain cases to EU legal acts not being implemented or applied correctly or on time".[76]

It would seem that States have not only become more critical as regards the European integration process. In fact, changing political attitudes also seem to have translated to changing administrative behaviour that is increasingly critical towards the EU. Thus, de-Europeanisation can be identified as a weakening of the EU as a normative context and as a reference point in domestic settings.[77] Indifference and scepticism[78] towards the EU is growing and translates into concrete actions – de-Europeanisation as the opposite of Europeanisation.

Schimmelfennig and Sedelmaier[79] suggest that willingness to "preparedness" and decisions to engage in (de-)Europeanisation cannot be explained without an understanding of existing incentives and sanctioning structures in the EU integration process. The incentives model suggests that Member States are willing to engage and invest in Europeanisation only if rewards exist that alter the cost-benefit calculations of domestic actors or if credible sanction mechanisms deter countries from deviating from duties and obligations.

For example, during any accession process to the EU, the willingness of candidate countries to prepare and adopt the EU's *acquis communautaire* depends mainly on the credibility of the EU's promise to admit candidates that comply with the membership conditions, and of its threat to exclude noncompliant candidates. In "Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years after Accession",[80] Meyer-Sahling examined the extent to which these countries have continued the reform of the civil service after accession and the extent to which their civil service systems fit the European principles of administration. The conclusion was that while countries were active in adapting the European principles in the accession phase, "only a minority of countries has made progress since gaining full EU membership in 2004".[81] The study also argued that the depth of institutionalisation of European principles varies across domains and countries. Obviously, incentives to apply European principles of public administration were lacking after accession. Thus, incentive structures differ from policy to policy, and across time.

Of course, accession also adds new incentives. These may be easier access to markets, the perspective of free movement of services and persons, the eligibility to absorb new EU funding programs, or simply to gain easier access to sophisticated research programs.

Apart from the research of Meyer-Sahling, sporadic studies have been conducted on whether the current Member States have become less motivated to engage in

75 European Court of Auditors (2018).
76 European Court of Auditors (2018), p. 20.
77 Gürkan and Tomini (2021), p. 187.
78 Gürkan and Tomini (2021), p. 188.
79 Schimmelfennig and Sedelmeier (2018).
80 Meyer-Sahling (2009).
81 Meyer-Sahling (2009), p. 7.

Europeanisation because of the change of incentive structures and because incentives have become less attractive in a widening EU. Take the case of EU environmental policy. Whereas decades ago, the incentive of national environmental ministries to engage in European Environmental policy was clearly to reach a high (-er) level of environmental protection for the EU space (Article 191 TFEU), today national forerunners in the field of EU environmental policy see less added value in new environmental initiatives if ever more compromises and flexibility are needed in an EU-27 context and the quality of EU environmental law deteriorates. However, from a European point of view, differentiation through enlargement has also facilitated the expansion of the European Union and has been the price to pay for some, but a benefit for others.

Contrary to this example, the EU integration process should not only be seen as a trend towards differentiation and the decline of incentives. In fact, cases like the EU recovery stimulus package demonstrate that rewards and incentives do not simply disappear. Other prevailing incentives range from offering better trade opportunities, through access to the internal market, avoiding competitive distortions, to financial and technical assistance, research funding or Erasmus stipends. At the same time, deterrent mechanisms for non-compliance have also changed and range from (potentially) very expensive financial sanctions, lump sums and fines in the field of EU competition law to relatively modest fines for infringements of EU law in the various sectoral policies.

Thus, the readiness to invest in the Europeanisation of national civil services has become a subject of utilitarian cost-benefit assessments and is less subject to normative attitudes regarding the EU integration process. Today, the national civil services accept to "Europeanise" if they perceive the benefits of the reward to be higher than the costs for non-compliance or sanctions. The discussion about "gold-plating" is also illustrative in this context. In contrast to the past, countries are ready to implement EU policy and law on a one-to-one basis, but they have become more reluctant to over-perform and to exceed EU requirements. Overall, this suggests that "investments" in Europeanisation are viewed from a much more pragmatic perspective than in earlier times.

1.5. National Competition on the EU Level

De-Europeanisation should be distinguished from engaging in national competition on the EU level. The latter was always part of the game and has, as such, nothing to do with an anti-EU-agenda. For example, the aforementioned Siedentopf and Ziller study[82] found that the professional preparation of Community law largely determines the success of its application. Since the Member States find themselves in the preparatory phase of decision-making in a kind of regulatory competition, influencing the initiative activities of the European Commission at an early stage and involving the enforcement actors in the preliminary negotiations of a legal act is of fundamental importance for the subsequent success of the implementation.

Today, this principle of the earlier, the better belongs to the golden rules of working and lobbying in Brussels and is widely accepted by all actors in the EU decision-making process.[83] This also means that, in contrast to the situation 30 years ago, countries have learned to "Europeanise" the national administrations. We will come back to this.

82 Siedentopf and Ziller (1988). See also Hauschild (1991).
83 Hardacre and Akse (2015).

From the very beginnings of the EU integration process, civil services also find themselves in a constant and "silent" competition for influential posts in the EU institutions and in different EU bodies. Nationals and national-seconded officials working in the EU institutions, agencies, and EU representations can help to shape, lobby, and implement EU policies that fit with their national, regional, and local interests, and with their regulatory styles, economies, and administrative values. They know the national culture, its system, and its priorities and are useful contact points for national politicians, lobbyists, and government officials on EU matters. They may also give early warnings to the national administrations on significant upcoming initiatives at the EU level.

Therefore, as regards personnel representativeness, the EU Member States have a great interest in being sufficiently represented at the EU level. At the same time, the objective of the European Commission is to reach an adequate level of representation of nationals from the Member States. To this end, the Commission introduced so-called weighting indicators in order to define indicative recruitment targets which should be based on objective criteria, such as the population in each country. These indicators were calculated as Member States' guiding rates and were used until 2003. Afterwards, they were defined as indicative recruitment targets. For example, the resulting guiding rates for the Nordic Countries were 2.7%, for Sweden 2.7%. By comparison, the guiding rates for Malta were 0.6% and for Germany 13.8%.[84] Overall, the European Commission noted significant imbalances for a number of countries, but mainly for Czech and Swedish staff.[85]

The term "imbalance" was defined to describe situations in which the share of nationals of one or more Member States amongst staff would be lower than 80% of the relevant guiding rate, and the so-called situation of a perfect balance. Some EU Member States are also facing a demographic challenge in their representation among the staff of the EU's Institutions, as many senior and long-serving officials will retire over the coming years.

In the European Commission, Member States are either over- or under-represented as regards the various hierarchical levels (and *careers*) in which officials work. The situation is particularly striking in the Administrators (AD) specialist competitions. Overall, no country admits to being overrepresented in "Bruxelles" (with the exception of Belgium) and points to various and very different forms of under-representation, whether as regards the nomination for top positions, such as EU-officials, special advisers, members of cabinet, or geographical imbalances in certain EU-Institutions; or as regards the uneven employment in various decentralised agencies. In fact, countries may be over- and under-represented as regards different categories of staff, in different institutions, different EU bodies, in EU agencies in different countries, as regards the uneven distribution of nominations in top positions, or – even more complicated – as regards the employment of diverse staff groups (gender, age, disability, etc.) and the relation with geographical nominations. Nationals of different countries also face different retirement and departure challenges in the different EU institutions.

Take the case of France, which is facing the problem of being under-represented in the EU-Institutions. At the same time, however, French nationals are highly overrepresented in

84 European Commission, *Report from the Commission to the European Parliament and the Council pursuant to Article 27 of the Staff Regulations of Officials and to Article 12 of the conditions of employment of other servants of the European Union (geographical balance)*, COM (2018) 377 final, 15 June 2018, p. 5.

85 European Commission, *Report from the Commission to the European Parliament and the Council pursuant to Article 27 of the Staff Regulations of Officials and to Article 12 of the conditions of employment of other servants of the European Union (geographical balance)*, COM (2018) 377 final, 15 June 2018, p. 30.

the Court of Justice of the European Union (CJEU). As such, the CJEU is the most "francophone EU institution" because French is not only the working language of the proceedings in the Court, but also, almost exclusively, the language of the court's administration. According to the European Public Service Union (EPSU), there exists a correlation between career prospects and the level of knowledge of French. Finally, the "seat effect" of the various EU agencies accounts for part of the overrepresentation of nationals in the different EU agencies. Other forms of over- and under-representation of nationals may change from one EU Agency to another. For example, in a resolution of 2022, the European Parliament (EP) regrets that Germans are heavily under-represented in the European Supervisory Authorities (ESAs).[86] Overall, Germany is strongly under-represented in almost all EU institutions and as regards all EU-employment categories. However, this is not the case as regards the A 9 (middle management) to A 16 (Directors-General) positions. In this category, Germany is overrepresented, but this representation rate is shifting quickly.

Another complication concerns the fact that the issue of geographical balance is influenced by the subsequent enlargements of the EU. After each enlargement, the issue of newly emerging geographical imbalances of new Member States must be addressed, and new strategies for a new geographical balance must be designed and adopted. Overall, the staff of many Central and Eastern European countries is under-represented in the EU institutions. On the other hand, these countries face much lower retirement and departure challenges than the former EU-15 countries.

Some EU Member States are facing tougher "demographic challenges" in their representation among the staff of the EU Institutions, as many senior and long-serving officials will retire over the coming years.

Overall, in many EU Member States, the reasons for the under-representation may vary and concern: lack of language skills of candidates; lack of test skills of candidates; lack of awareness of who is providing support to succeed in the *concours*; lack of information (e.g. about the timing of concours); lack of scholarships that prepare for EU careers (e.g. the College of Europe in Bruges); lack of motivation to apply/to move to Brussels; misfit between the national administrative culture and EU administrative culture; uneasiness because of additional requirements to combine professional/private life; other reasons (political reasons – lack of financing, lack of political support, lack of identifying and designating responsibilities).

Therefore, from a competency point of view, countries also need to make sure that they do not only focus on achieving "numbers" of nationals, but on preparing candidates with the right skills. Also, here, this requirement applies to "Europeanised" and "de-Europeanised" countries in the same way.

From the national point of view, work within the EU institutions and agencies is ever wider and requires staff with a variety of backgrounds and skill sets. Moreover, the range of workplaces is becoming wider and includes staff working in the EU institutions in Brussels, Luxemburg and Strasbourg, in EU agencies based across the 27 Member States, and in many EU representations at the global level.

All countries should also consider that the recruitment process at the EU level does not fit with national cultures and procedures (the same is true for the administrative system

86 European Parliament, *Resolution, Motion for a European Parliament resolution on the geographical imbalance among the staff of the European Supervisory Authorities and the Single Resolution Board*, B9-0368/2022.

of the EU as such). Only a few countries have *concours* like the EU *concours*. The EU Institutions do not usually recruit to fill individual posts or recruit on the basis of State-like exams. Instead, they hold regular concours to identify pools of potential candidates, who can then be recruited by the Institutions, but only as the need arises. Because the European Selection Office (EPSO) runs different recruitment competitions for general administrators, linguists or general assistants, the Member States must also design their recruitment strategies to target these different types of categories of staff. On 31 January 2023, EPSO[87] decided to drop oral tests from its selection procedures, as part of an important reform of the existing selection process. Future competitions should put greater emphasis on candidates' qualifications and on a set of written tests. The results of this reform remain to be seen. Most crucial is the preparation for sufficient language competencies. As already mentioned, Member States should not only focus on the *concours* because the EU is also employing non-permanent staff in the form of contract agents, temporary agents and national secondees.

In most countries, the Ministries of Foreign Affairs provide strategies, training and support for nationals who apply for roles within the EU through its EU Jobs campaign. This support includes language training, encouragement to apply for EU positions, but most of all, the provision of professional training in order to succeed in the EU concours. So far, no research has been conducted on the successes and failures of national strategies in these competitive recruitment campaigns. Moreover, there are no comparative overviews of national strategies to second national officials or of how these practices are funded. From a comparative point of view, it is only known that countries have set up diverse EU stream programs in order to provide a supply of national candidates who apply for the EU *concours*. Thus, EU stream programs have been set up with a double function: for persons who may be recruited to the EU, or for persons who will be assigned to national posts with a focus on EU policies across the national civil service. However, all of these technical solutions may not be enough. For example, as already mentioned, Sweden is one of the countries with the greatest under-representation of staff in EU institutions. This Swedish "problem" reveals a particular aspect of the theory of representativeness. What to do if the Swedish government wants to be represented adequately in the EU institutions, but there is no desire to be represented amongst the Swedish population, or no enthusiasm for the various EU *concours*. Thus, what if a country wishes to be represented, but the population is "not interested in being represented"?[88] For example, the low number of Nordic staff in the EU Institutions may be explained by the existence of a cultural mismatch and the fact that Nordic staff do not adapt well to life in the (presumed) French-German "bureaucratic" culture of the European Commission. However, this "argument of cultural shock does not convince",[89] since Danes and Fins are not heavily misrepresented. In reality, the Swedish case illustrates another phenomenon. Whereas representativeness is promoted by the EU institutions, some countries do not respond equally to the offer.[90] This is an important finding because the theory of representativeness does not account for patterns suggesting that (as in this case) represented groups do not wish to be represented, or reject representativeness offers.[91]

87 EPSO, *EPSO'S New Competition model – Information note*, 2023 (2023) 2208493 as of 27 March 2023.
88 Gravier and Roth (2020), p. 6.
89 Gravier and Roth (2020), p. 16.
90 Gravier and Roth (2020), p. 17.
91 Gravier and Roth (2020), p. 17.

1.6. Re-Europeanisation: Financial Support and Technical Assistance From the European Commission – New Incentives for the Member States to Support Administrative Reforms

For a long time, the European Commission demonstrated limited interest in national civil service reform. In this respect, requests for introducing administrative and institutional reforms were limited to the accession States in the so-called Copenhagen and Madrid criteria and formulated as an essential condition that all candidate countries must satisfy to become a Member State. Indirectly, civil service reform was only of interest to the European Commission as long as it enabled the national administrations to effectively implement EU laws and policies.

Today, the European Commission shows more interest in all sorts of public administration reforms at the national, regional and local levels, for example, by linking the management of EU funds at the national level with the requirement to protect the financial interests of the EU and the rule of law (the so-called conditionality mechanism). Even more strategically, in 2023, the European Commission published a Communication about Enhancing the European Administrative Space (ComPAct) (COM(2023) 667 final). This Communication acknowledges the great diversity of institutional set-ups and legal traditions and the fact that the EU has no direct competence to regulate national public administrations. Because the communication is not a legally binding instrument, all presented initiatives present a "grey zone" in which EU – and national competences overlap. Still, it has led to a revival of the discourse about Europeanisation of public administration, for example through the proposal to set up an EU Skills agenda.

For a number of years, the European Commission has also shown greater interest in providing financial support for national civil service reforms. In this respect, the Commission is actively referring to (the still relatively new) Article 197 TFEU[92] which invited the EU to support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support.

According to the European Commission, the capacity and resilience of the public administration at central, regional and local levels in the Member States is indeed crucial for the implementation of Union policies, budgets and funds (including the effective implementation and absorption of the so-called recovery packages that are aimed at making the Union climate-neutral, sustainable, and ready for the digital decade.

As such, this paradigmatic shift[93] as regards the need to actively support (and interfere) in national public administration reforms can also be explained because of new insights in the field of good governance which illustrate that "an important trait of well-functioning States are good institutions".[94] From the point of view of the European Commission, the quality of national public administrations and good governance features are important elements and factors for the competitiveness of the European Economy.

92 Article 197 TFEU invites the EU to support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support.

93 Ongaro (2022).

94 Ahlerup et al. (2021), p. 359.

In order to support good and competitive governance, the technical support instruments provide technical support to Member States in a wide range of policy areas, such as green transition, healthcare, governance reform, public administration reform, improvement of financial management, training, social protection, and so on.

Overall, support spreads over a number of programs and policies, such as:

- Toolkits for developing roadmaps for administrative capacity building as regards the implementation of cohesion policy programs;
- In the field of protecting the EU's financial interests, the European Commission provides assistance to managing authorities in order to detect and prevent the fraudulent use of EU funds;
- Directorate-General for Structural Reform Support (DG REFORM) is supporting and financing tailor-made technical support programs for national public administrations wishing to receive support in the field of public administration reform;
- Scoreboards and benchmarking studies about the quality of national public administrations;
- Measures to support public administration modernisation measures under the Recovery and Resilience Facility;
- Training for national officials and experts organised by the Directorate-General for Regional and Urban Policy (DG REGIO) in fields like State aid, public procurement or the prevention of fraud in European Structural and Investment (ESI) funds.

Proposed 2024 flagship (and not co-financed) technical support projects also cover an ever wider range of policies and issues such as reinforcing democracy and the rule of law and the creation of a public administration mobility exchange (PACE). As regards civil service reform, DG REFORM is the Commission's coordinating service for the broad and cross-cutting topic of public administration reform and governance. The DG aims to collect data and enhance the Commission's knowledge on public administrations in the EU Member States and the challenges they face. DG REFORM also offers so-called quality toolboxes for the Member States. For the first time, the European Commission has officially set up a group of experts on public administration and governance.[95]

This type of informal support provided to the Member States, which is mostly financial, technical and data-driven, is continuously increasing. Obviously, many national civil services are eager to receive financial and technical support. However, so far, little research has been conducted on the outcomes of the various EU measures and whether and how they produce significant reform effects and (or) influence policy outcomes as such. A study by Nakrošis, Dan and Goštautaitė[96] concludes that progress in the implementation of the various administrative projects is determined by national factors rather than EU conditionalities and EU funding. Overall, the authors found only a weak link between EU financial support and the success of national projects in the field of administrative reforms. Ongaro[97] even observes a paradigmatic shift in the relationship between

95 Decision of the European Commission of 17 December 2021 setting up the group of experts on public administration and governance, Doc. C(2021) 9535 final.

96 Nakrošis et al. (2022).

97 Ongaro (2022).

the EU and the national civil services. This change will be “a step forward in the process of European integration”.[98]

Previous evaluations in a similar civil service network – the European Public Administration Network (EUPAN) – arrived at critical conclusions about this type of (informal) networking governance.[99] National civil services were only eager to accept EU policies in the field of national civil service reform as long as cooperation costs were contained and national sovereignty was preserved. European governance in the field of civil service was only welcomed as long as it produced an added-value, such as useful information, dialogue opportunities or financial and technical support from the European Commission.

IV. Conclusions

As discussed previously, Pierre and Peters[100] observe the emergence of various types of governance in different public policies and different policy contexts: *étatiste* governance, networking governance, multilevel governance, informal governance, meta-governance, and good governance. This trend towards the development of various types of governance and flexible governance can also be observed at the EU level and in different policy arenas that influence the national civil services.

- *Étatiste* Governance: The case of EU competition law. Direct top-down enforcement styles, inspection rights, and the tough sanctioning powers of the European Commission;
- Networking Governance: Since the EU Commission has no direct enforcement powers, the enforcement of EU environmental law is discussed informally in EU-national implementation networks (e.g. the European Union Network for the Implementation and Enforcement of Environmental Law, IMPEL);
- Multiform Governance: The case of administrative cooperation amongst EU and national agencies ranges from hierarchical to informal styles and forms;
- Multilevel Governance: The Implementation of Structural Funds involves a great number of actors at the EU, national, regional, and local levels in various implementation and monitoring committees;
- Informal Governance: The European Commission is engaged in the benchmarking of the performance of the national civil services;
- Collaborative Governance and Co-Production: Increasingly, the EU is involving citizens and non-governmental organisations (NGOs) through various means, channels, and instruments (information rights, participation rights, initiative rights, direct effect doctrine);
- Good Governance: The Commission has started to threaten Member States that EU funds will be withheld in the event of conflicts of interests and corruption, in order to protect EU financial interests.

Thus, today, national and European governance styles differ from policy to policy and range from hierarchical to highly participatory styles. In each case, the impact and adaptation process on the national civil services is different.

98 Ongaro (2022), p. 1.
99 Demmke (2017), pp. 31–44.
100 Pierre and Peters (2021).

The discussion about the adaptation of the national civil services "is set in a period that has perhaps seen the most significant change of any since the late 19th century".[101] Most countries around the world are facing similar pressures and also seem to be interested in adopting similar management models and instruments. From the first point of view, this suggests that

> a subtler conceptualisation of convergence is needed. First, convergence can take place at different stages or levels – for example, there can be convergence in debate, convergence in reform decisions, convergence in actual practices, or, ultimately, convergence in results. There is no automatic succession from one stage to the next: the momentum of convergence can (and frequently does) stall or dwindle at any point.[102]

Overall, Pollitt concluded that – while there is some convergence as regards the debate and even as regards decisional convergence – there is much less convergence as regards the choice of management instruments and as regards reform results.

However, today it is unrealistic to expect that the EU integration process will result in any form of national civil service convergence. Countries constantly develop different interests and priorities, face different pressures, and focus on different policies; and they may be reform laggards and forerunners at the same time, in different areas and policies, and as regards the use and choice of different instruments. Attitudes towards the EU integration process have become more critical and follow more utilitarian approaches. Overall, adaptation and change depend very much on the changing nature of specific policy or sector-related incentives, rewards, the threat of sanctions, the design of instruments, and the choice of policy styles. In some instances, these changes have led to de-Europeanisation, but not to complete disintegration, because the latter strategy would threaten the likelihood of receiving incentives and rewards, such as EU funding schemes. Still, attitudes towards the EU integration process have become more critical than in the past. This has led governments in some countries to effectively instrumentalise the national civil services for political reasons and to de-Europeanise them. For the first time, national administrations have rejected the implementation of EU law, judgments by the CJEU, and even the duty to pay financial sanctions for non-compliance with EU law. This form of de-Europeanisation and politicisation of national civil services would have been unthinkable decades ago.

However, it would also be too simplistic to conclude that these trends have led to diversity, differentiation, regression or disintegration. Instead, we claim that trends towards flexible governance styles as a consequence of de-standardisation trends within the national civil services, are much more significant developments.

Thus, most countries do not pursue disintegration strategies. As such, Europeanisation continues, but in a context of more utilitarian and critical attitudes towards the EU integration process. Ironically, the European Commission has become more active than ever in the field of (national) public administration reform. Despite the fact that the treaties do not grant the EU legal competencies regarding the Member States' public administration organisations and their related human resources policies, the EU Commission (DG REFORM) is active in supporting Member States in the national reform process

101 Painter and Peters (2010), p. 234.
102 Pollitt (2001), p. 933.

by offering technical assistance and financial support, engaging in governance and civil service benchmarking, and even by supporting enhanced administrative cooperation of the national civil services (through the creation of a new expert network in 2021/2022). This new, dynamic and increasing role of the European Commission in national civil service issues is in stark contrast to the aforementioned de-Europeanisation trends. Another dimension which is becoming increasingly important is to look at the impact of financial support in the field of civil service reform, EU requirements to protect the financial interests of the EU and to fight corruption and conflicts of interests, the impact of EU-wide benchmarking and data-driven rankings, and the increasing importance of policies that oblige national administrations to respect values and principles of good governance. In contrast to the past, the European Commission takes a much more active approach in the support of national reform processes.

Parallel to this, the call for a strong State and the re-investment in classical State capacities has re-appeared in the Member States, for example, in the fight against terrorism and cybercrime, and in the light of security issues, data protection, and so on. Therefore, it is most likely that new governance trends also include the return of imposition and hierarchical styles of governing and the re-emergence of the strong State, or the Leviathan. This may suggest that more countries may also return to more traditional civil service features for some categories of staff, although the legitimacy of classical Weberian civil services has been put into question throughout the last decades. In the future, more countries may want to re-apply some specific bureaucratic features that will remain in place to sustain the principles of protection (and peace), hierarchy, rationality, separation between the public and private sector, and to defend core democratic values like equality, fairness and legal security.

Thus, in the future, both the EU and national governments may want to re-introduce or continue and apply some specific "Leviathan" features in order to sustain the classical principles of government. However, expecting a simple return to classical modes of bureaucratic government is unrealistic. This also stands in sharp contrast with other trends towards internal differentiation, de-standardisation and individualisation, as well as – on the other hand – ongoing Europeanisation trends.

Thus, altogether the preceding picture presents a highly contradictory collection of developments.

Indeed, it may be most realistic to assume that the processes and features of future governance reforms differ in different policies and in different phases of the policy cycle. Thus, it may be better to talk about the emergence of flexible and varying forms of (European) governance in different phases of the public policymaking process and in different policy fields. National civil services will have to adapt to these changes, at both the national and the EU levels. As such, civil service adaptation remains – predominantly – a national challenge within a turbulent European and globalised context.

At the end of our discussions, it is time to return to the concept of change and adaptation. As we have seen, the national civil services are not static, but subject to many changes. Governance reforms and organisational reforms have led to many changes over the last years. The strongest impetus for change is usually held to come from social, economic, organisational and technological developments, rather than from one person or some bright ideas. However, the design, decision-making and implementation of reforms also depend on many macro- and micropolitics variables. Civil service reform is also not entirely voluntarist (caused by human intervention), deterministic (caused by external forces and laws) or random (governed by the laws of chance). It is the result of many forces at work:

conflicts, interests, power, history, institutions, the legal and constitutional context, pressures, norms, values, resources, and many other factors. In this context, Europeanisation is just one – albeit significant – force at work. It is rather a process that should be conceptually separated from Europeanisation as an outcome. From here, we can conclude that "Europeanisation" is (only) one factor that determines the outcomes of civil service reforms.

Flexible (European) governance and Europeanisation remain futile research concepts and should be combined with research about the quality of changing national governance styles and civil services. In the end, the ultimate question is to provide answers as to how all of these reform trends serve democracy, the rule of law, impartial governance and society as such, both at the EU and national levels. So far, however, this is indeed a black box.

Bibliography

Ahlerup P., Baskaran T., Bigsten A. (2021), 'The Quality of Government and Economic Growth', in Bågenholm A., Bauhr M., Grimes M., Rothstein B. (eds), *The Oxford Handbook of the Quality of Government*, Oxford: Oxford University Press, 359–377.

Alber S. (2002), 'Das europäische Recht und seine Auswirkungen auf den öffentlichen Dienst', *Zeitschrift für Beamtenrecht*, 225–244.

Balme R., Le Galés P. (1997), 'Stars and Black Holes: French Regions and Cities in the European Galaxy', in Goldsmith M., Klausen K.K. (eds), *European Integration and Local Government*, Cheltenham: Edward Elgar, 146–171.

Bauer M.W., Trondal J. (eds) (2015), *The Palgrave Handbook of the European Administrative System*, London, New York: Palgrave Macmillan.

Biesbroek R., Lesnikowski A., Ford J.D., Berrang-Ford L., Vink M. (2018), 'Do Administrative Traditions Matter for Climate Change Adaptation Policy? A Comparative Analysis of 32 High-Income Countries', 35(6) *Review of Policy Research*, 881–906.

Blomeyer R., Sanz M., Kubekova V., Beke M. (2018), *Review of Status of the Commission's Register of Expert Groups and Their Composition*, Brussels: PE.

Bonazzi G. (2014), *Geschichte des organisatorischen Denkens*, 2nd edition, Wiesbaden: Springer VS.

Börzel T.A., Risse T. (2012), 'From Europeanisation to Diffusion: Introduction', 35(1) *West European Politics*, 1–19.

Bossaert D., Demmke C., Nomden K., Polet R., Auer A. (2001), *Civil Services in the European of Fifteen: Trends and New Development*, Maastricht: European Institute of Public Administration.

Christensen T., Laegreid P. (2016), 'A Transformative Perspective', in Van de Walle S., Groeneveld S. (eds), *Theory and Practice of Public Sector Reform*, 1st edition, London, New York: Routledge, 27–43.

Crouch G. (2018), 'New Ways of Influence: Horizontal Europeanisation in Southeast Europe', in Matlak M., Schimmelfennig F., Woźniakowski T.P. (eds), *Europenisation Revisited: Central and Eastern Europe in the European Union*, Florence: European University Institute, 38–54.

de Vries M. (2016), *Understanding Public Administration*, 1st edition, Basingstoke: Palgrave.

Demmke C. (2016), *Doing Better with Less? The Future of the Government Workforce*, Berlin: Peter Lang Verlag.

Demmke C. (2017), 'The European Public Administration Network (EUPAN): Which Contribution to the Informal Civil Service Cooperation in the EU?', 161 *Revue Française d'Administration Publique (RFAP)*, 31–44.

Demmke C. (2018), 'Civil Service Reform and Ethics', in Farazmand A. (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance*, Cham: Springer, 1671–1690.

Demmke C. (2019), 'The Legitimacy of Civil Services in the 21st Century', in Peters G.B., Thynne I. (eds), *Oxford Research Encyclopedia of Politics*, Oxford: Oxford University Press,

Demmke C. (2020), 'Governance Reforms, Individualisation of Human Resource Management (HRM), and Impact on Workplace Behavior – A Black Box?', 22(3) *Public Integrity*, 268–279.

Demmke C. (2022), 'Europe-Public Management Systems and Developments', in Schedler K. (ed), *Encyclopedia of Public Management*, Cheltenham: Edward Elgar, 65–70.

Demmke C., Moilanen T. (2010), *Civil Services in the EU of 27*, Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang Verlag.

Demmke C., Moilanen T. (2013), *Governmental Transformation and the Future of Public Employment*, Berlin: Peter Lang Verlag.

DiMaggio P.J., Powell W.W. (1983), 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organisational Fields', 48(2) *American Sociological Review*, 147–160.

European Court of Auditors (2018), *Putting EU Law Into Practice: The European Commission's Oversight Responsibilities Under Article 17(1) of the Treaty on European Union*, Luxemburg: Publications Office.

European Court of Auditors (2020), 'Realising European Added Value', 3 *ECA Journal*, 1–217.

Felder M., Grunow D., Gering T., Wolfswinkler G. (2002), 'Die Auswirkungen der europäischen Integration auf das politisch-administrative System der Bundesrepublik Deutschland. Ergebnisse einer schriftlichen Befragung der Bundes- und Landesministerien im Rahmen des DFG Forschungsprojektes "Bürokratisierung durch Europäisierung?"', University of Bremen, 2 *SVP-Papers.*

Fuest C., Pisani-Ferry J. (2019), *A Primer on Developing European Public Goods*, EconPol Policy Report Vol. 3, Munich: ifo Institute.

Genschel P. (2022), 'Bellicist Integration? The War in Ukraine, the European Union and Core State Powers', 29(12) *Journal of European Public Policy*, 1885–1900.

Gravier M., Roth C. (2020), 'Bureaucratic Representation and the Rejection Hypothesis: A Longitudinal Study of the European Commission's Staff Composition (1980–2013)', 30(1) *Journal of Public Administration Research and Theory*, 4–21.

Gröbe B., Grohs S., Porth J. (2022), 'Local Responses to European Integration: Patterns of Europe-Related Activities of German Local Governments', *Local Government Studies*, 1–23.

Gürkan S., Tomini L. (2021), 'The Limits of the Europeanisation Agenda', in Brack N., Gürkan S. (eds), *Theorising the Crises of the European Union*, Abingdon, New York: Routledge, 183–204.

Hardacre A., Akse E. (eds) (2015), *How the EU Institutions Work and . . . How to Work with the EU Institutions*, 2nd edition, London: John Harper Publishing.

Hauschild C. (1991), 'Die Anwendung von EG-Recht in den Mitgliedstaaten', in Siedentopf H. (ed), 4 *Europäische Integration und nationalstaatliche Verwaltung*, 155–171.

Kämmerer J.A. (2001), 'Europäisierung des öffentlichen Dienstrechts', *Europarecht*, 27–48.

Kämmerer J.A. (2004), 'Das deutsche Berufsbeamtentum im Gravitationsfeld des europäischen Gemeinschaftsrechts', 37(3) *Die Verwaltung*, 353–375.

Kelemen R.D., McNamara K.R. (2022), 'State-Building and the European Union: Markets, War, and Europe's Uneven Political Development', 55(6) *Comparative Political Studies*, 963–991.

Knill C., Lenschow A. (2005), 'Compliance, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions', 43(3) *Journal of Common Market Studies*, 583–604.

March J.G., Olsen J.P. (1989), *Rediscovering Institutions: The Organisational Basis of Politics,* New York: Free Press.

Meyer-Sahling J.-H. (2009), 'Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years After EU Accession', 44 *SIGMA Papers*, Paris: OECD Publishing.

Nakrošis V., Dan S., Goštautaitė R. (2022), 'The Role of EU Funding in EU Member States: Building Administrative Capacity to Advance Administrative Reforms', 36(1) *International Journal of Public Sector Management*, 1–19.

OECD (1998), 'Preparing Public Administrations for the European Administrative Space', 23 *SIGMA Papers*, Paris: OECD Publishing.

Olsen J.P. (2016), 'An Institutional Perspective', in Van de Walle S., Groeneveld S. (eds), *Theory and Practice of Public Sector Reform*, 1st edition, London, New York: Routledge, 9–26.

Ongaro E. (2022), 'The Long and Winding Road Towards the EU Policy of Support to Member States Public Administration Reform: History (2000–2021) and Prospects', *Public Policy and Administration*, 1–24.

Painter M., Peters B.G. (eds) (2010), *Tradition and Public Administration*, Houndmills, Basingstoke, Hampshire, New York: Palgrave Macmillan.

Pierre J., Peters B.G. (2021), *Advanced Introduction into Governance*, Cheltenham: Edward Elgar Publishing Limited.

Pollitt C. (2001), 'Convergence: The Useful Myth?', 79(4) *Public Administration*, 933–947.

Pollitt C., Bouckaert G. (2011), *Public Management Reform*, 2nd edition, Oxford: Oxford University Press.

Radaelli C.M. (2003), 'The Europeanisation of Public Policy', in Featherstone K., Radaelli C.M. (eds), *The Politics of Europeanisation*, Oxford: Oxford University Press, 27–56.

Risse T., Cowles M.G., Caporaso J. (2001), 'Europeanisation and Domestic Change: Introduction', in Cowles M.G., Caporaso J., Risse T. (eds), *Transforming Europe: Europeanisation and Domestic Change*, Ithaca, New York: Cornell University Press, 1–20.

Schimmelfennig F. (2019), 'Differentiation and Self-Determination in European Integration', in Jordana J., Keating M., Marx A., Wouters J. (eds), *Changing Borders in Europe: Exploring the Dynamics of Integration, Differentiation and Self-Determination in the European Union*, London, New York: Routledge, 23–38.

Schimmelfennig F., Sedelmeier U. (2018), 'The Europeanisation of Eastern Europe: The External Incentives Model Revisited', in Matlak M., Schimmelfennig F., Woźniakowski T.P. (eds), *Europenisation Revisited: Central and Eastern Europe in the European Union*, Florence: European University Institute, 19–37.

Siedentopf H., Ziller J. (1988), *Making European Policies Work: The Implementation of Community Legislation in the Member States*, vol. 2, London: Sage Publications.

Terhechte J.P. (ed) (2021), *Verwaltungsrecht der Europäischen Union*, 2nd edition, Baden-Baden: Nomos.

Trondal J. (2023), '"Let's Organise": The Organisational Basis for Stable Public Governance. Public Administration', 101(1) *Public Administration*, 201–220.

Verhelst T. (2017), 'Processes and Patterns of Urban Europeanisation: Evidence from the EUROCITIES Network', 10(1) *Territorio della Ricerca su Insediamenti e Ambiente*, 75–96.

Woźniakowski T.P., Schimmelfennig F., Matlak M. (2018), 'Europeanisation Revisited: An Introduction', in Matlak M., Schimmelfennig F., Woźniakowski T.P. (eds), *Europenisation Revisited: Central and Eastern Europe in the European Union*, Florence: European University Institute, 6–18.

Ziller J. (2010), 'Free Movement of European Union Citizens and Employment in the Public Sector', *Report for the European Commission*, Brussels: European Commission.

51 Transformational Impulses of International Law and Union Law for the Civil Service

Torben Ellerbrok

I. Introduction

International organisations, including the highly integrated European Union (EU), are first and foremost communities of lawmakers. The enforcement of international and European provisions is largely carried out by the national administrations. While the national civil services consequently play a crucial role for international and supranational actors, their specific design has largely remained a national domain so far. This is not to deny that international and Union law generate, as exogenous demands, certain transformational impulses for the civil service. This chapter attempts to conceptualise these impulses and expose their direction of thrust. For this purpose, the relevant actors and vectors are sketched (Section II). After some preliminaries (Section III), the main part (Section IV) presents transformational impulses concerning the staff composition (Subsection IV.1), the attitudes (Subsection IV.2), the expected skills (Subsection IV.3), and the daily work of the civil service (Subsection IV.4). Finally, conclusions are drawn (Section V).

II. Vectors of International Law and Union Law

The question analysed in this chapter is how the legal regimes of international organisations and the EU influence the civil services in Europe. Before examining specific impulses for transformation, it will be useful to gain an overview of where exactly such impulses emanate from in international (Subsection II.1) and Union law (Subsection II.2).

1. International Law

With regard to international law, a challenge arises in particular from the fact that a large number of actors may influence the national civil services, to varying degrees. This article will refer only to the most relevant, namely the United Nations (UN), the International Labour Organization (ILO), the World Bank, the Organisation for Economic Co-operation and Development (OECD), and the Council of Europe. These actors unfold steering effects on the national civil services by opening up space for the conclusion of international treaties (Subsections II.1.1 and II.1.2) or setting soft law themselves (Subsection II.1.3).

1.1. International Human Rights Law

Impacts on the national civil services result from international law which sets certain rule of law and human rights requirements. First and foremost, the European Convention for

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the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantees, also for civil servants,[1] fundamental rights such as the freedom of expression (Article 10 ECHR) and the right to form trade unions (Article 11 ECHR). Of the other legal acts initiated by the Council of Europe, the European Social Charter of 1961 (revised in 1996)[2] contains inter alia a right to equal working conditions without any discrimination on the grounds of sex. A further provision of international human rights law relevant to the civil service is Article 25 (c) of the International Covenant on Civil and Political Rights (ICCPR)[3] of 1966 guaranteeing everyone equal access to public service in their country. Regarding the civil service and its activities, rights such as these often take an individual approach and therefore prove to be rather one-dimensional. They aim at strengthening the legal position of individuals, be they civil servants or third parties, but do not focus on the organisation or effectiveness of the civil service in general.

1.2. Further International Treaty Law

Substantive provisions of international treaty law may also have an impact on the administration, changing and raising the requirements on a properly working civil service. Besides several ILO Conventions,[4] the Aarhus Convention,[5] adopted in the framework of the UN Economic Commission for Europe, serves as an example, granting an extensive right to access to environmental information (Article 4, paragraph 1). This makes the civil service work in a more responsive and transparent way.[6] A similar impetus is provided by the Convention on Access to Official Documents,[7] which entered into force in December 2020. Other relevant conventions of the Council of Europe – which has become one of the most relevant international actors for the European civil services – include the Convention on Mutual Administrative Assistance in Tax Matters,[8] which opens up the opportunity for internationally connected administrative work, and the European Charter of Local Self-Government,[9] which fosters a certain decentralisation of administrative organisation. In

1 Concerning Article 10 ECHR see ECtHR, judgment of 20 May 1999, *Rekvényi v. Hungary*, 25390/94, para. 26; concerning Article 11 ECHR see ECtHR, judgment of 12 November 2008, *Demir and Baykara v. Turkey*, 34503/97, paras. 108, 127. See also *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń and *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

2 Council of Europe, European Social Charter (revised), 3 May 1996.

3 United Nations, International Covenant on Civil and Political Rights, 16 December 1966. See also *Right of Access to the Public Service in the European Convention of Human Rights: A Missed Opportunity?* by D. Toda Castán in this volume.

4 See ILO Convention no. 100, Convention concerning equal remuneration for men and women workers for work of equal value, 29 June 1951; ILO Convention no. 111, Discrimination (employment and occupation) Convention, 25 June 1958.

5 Convention on access to information, public participation in decision-making and access to justice in environmental matters, 25 June 1998. See also *Europeanisation and the Impact of Deliberative and Participatory Democracy on the Civil Service* by B. Peters in this volume.

6 See *infra* Sections IV.3 and IV.4.

7 Council of Europe, Convention on Access to Official Documents, CETS No. 205, 18 June 2009.

8 OECD/Council of Europe, The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Amended by the 2010 Protocol, 27 May 2010.

9 Council of Europe, European Charter of Local Self-Government, CETS No. 122, 15 May 1985.

the ratifying States, the conventions are legally binding[10]; in other States, they have, at the least, the potential to serve as a benchmark.

1.3. Soft Law

Above all, international organisations may initiate transformative processes for the civil services by way of soft law, which provides for standard-setting in administrative matters and may have a certain "comply or explain" effect. The Council of Europe set the starting point publishing an analytical survey in 1975,[11] at a time when common European standards for administration were a "revolutionary idea".[12] The survey was based on questionnaires filled out by the national governments and gathered information about the rights of the individual in the administrative procedure and the individual's remedies against administrative acts. Starting from this, the Council of Ministers of the Council of Europe adopted various recommendations and resolutions in the realm of administrative law which lay down a certain European consensus and affect the national civil service to varying degrees,[13] such as Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities,[14] Recommendation No. R (2000) 6 on the status of public officials in Europe,[15] and Recommendation CM/Rec (2007) 7 on good administration.[16] Despite their non-binding character as soft law, the recommendations provide important impulses. Due to their precise style, they are used both as text templates for lawmaking[17] and as a point of reference for interpretation and further development of the law by judges.[18]

Besides the Council of Europe, other actors have a certain impact on the civil service by means other than legally binding conventions: the World Bank Group accompanies its loans with Country Partnership Frameworks, which provide for a variety of adjustments. Driven by the insight that a well-functioning administration is highly relevant for economic development, these frameworks often concern the civil service. The World Bank strategy for Moldova from 2013 serves as an illustrative example. It included the goal of a "professionalization of the civil service through introduction of State (permanent) secretaries"[19] and the introduction of an electronic procurement system to foster transparency.[20] In

10 In European States, international conventions enjoy supra-legal rank (see Article 55 of the French constitution and Article 91, para. 2, of the Polish constitution) or the rank of an ordinary legal act (see Article 59, para. 2, of the German Basic Law).

11 Council of Europe (1975).

12 Stelkens et al. (2020), para. 31.19.

13 In more detail Sinani (2019), pp. 309 f.; Stelkens and Andrijauskaitė (2020b), paras. 1.62 ff.

14 Council of Europe, Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities, 28 September 1977.

15 Council of Europe, Recommendation No. R (2000) 6 of the Committee of Ministers to Member States on the status of public officials in Europe, 24 February 2000.

16 Council of Europe, Recommendation CM/Rec(2007) 7 of the Committee of Ministers to Member States on good administration, 20 June 2007.

17 Stelkens and Andrijauskaitė (2020b), para. 1.75.

18 Concerning the reception by the ECtHR, CJEU and German courts, see Uerpmann-Wittzack (2013), pp. 942 f.

19 International Bank for Reconstruction and Development et al. (2013), p. 21.

20 International Bank for Reconstruction and Development et al. (2013), p. 36.

2017, the World Bank evaluated the progress.[21] Of even greater relevance for most of the European States is the Organisation for Economic Co-operation and Development (OECD). This organisation has set up two committees, the Public Governance Committee and the Regulatory Policy Committee, and promotes reforms by various means: creating common standards, providing international comparative data, pointing out best practices, giving advice, and so on.[22]

2. Union Law

2.1. Primary Law

Apart from the abstract obligation that Member States must provide a civil service capable of effectively implementing Union law, comprised in the provisions of Article 4, paragraph 3 of the Treaty on European Union (TEU) and Article 291 of the Treaty on the Functioning of the European Union (TFUE), the European Treaties contain no explicit stipulations regarding the national civil services. Nevertheless, primary law has achieved an indirect influence. For example, the freedom of movement for workers in the EU (Article 45, paragraph 1 TFEU) and the autonomous and functional interpretation of the exemption for "employment in the public service" (Article 45, paragraph 4 TFEU)[23] influence the access that EU citizens from other Member States have to positions in the civil service. More far-reaching considerations for the civil service result at best from the general legal principles named by the Court of Justice of the European Union (CJEU) as those to which "constitutional status"[24] is attributed.

2.2. Secondary Law

Even though the EU heavily relies upon the national civil services as a "functional EU administration" (see Article 197, paragraph 1 TFEU),[25] the EU does not provide for a common legal framework. This is explained by the principle of conferral (Article 5, paragraphs 1 and 2 TEU): a competence to govern the Member States' civil services is not conferred upon the EU by the Treaties. Hence, transformational impulses are mostly side effects of other acts. Firstly, requirements concerning the institutional design of the administration, the administrative procedure and/or the form of cooperation may affect the civil service. Secondly, Union law dealing with

21 The World Bank Group pointed out that 13 of 16 Moldovian ministries were managed by non-political State secretaries and this goal has been "mostly achieved", International Bank for Reconstruction and Development et al. (2017), pp. 26, 46. The goal of the introduction of an e-procurement system was "partly achieved", at least "technical specifications, catalogues and guidance notes have been developed" (International Bank for Reconstruction and Development et al. (2017), pp. 27, 44).

22 See – as an example – OECD (2021b). Furthermore, Dimitrakopoulos and Passas (2012), p. 537.

23 CJEU, judgment of 3 June 1986, *European Commission v. France*, 307/84, paras. 11 ff.; judgment of 24 May 2011, *European Commission v. Belgium*, C-47/08, paras. 83 ff.; Kellerbauer and Martin (2019), Article 45 TFEU, para. 96; Tryfonidou (2021), Article 45 TFEU, para. 100.

24 CJEU, judgment of 15 October 2009, *Audiolux v. Groupe Bruxelles Lambert and others*, C-101/08, para. 63; judgment of 29 October 2009, *NCC Construction Danmark v. Skatteministeriet*, C-174/08, para. 42.

25 See Dimitrakopoulos and Passas (2012), p. 537: "largely shaped by national servants" (. . .) "what the EU is and what it does".

working and employment conditions, as far as they are applicable, may awaken a need for adaptation. Finally, and above all, substantive law outlining administrative tasks makes demands on the civil service. The proper implementation of Union law awakens needs for decisiveness, digital skills, foreign language skills, and so on.[26] This requirement of *Europafähigkeit*[27] (Europe-preparedness) is an important impulse to set a transformation in motion.

2.3. Soft Law

The legal point of view tends to underestimate the influence of EU soft law. Examples of the wide range of influence are communications of the European Commission, e.g. dealing with proper enforcement of Union law,[28] and The European Code of Good Administrative Behaviour issued by the European Ombudsman.[29] The latter applies primarily to the EU institutions, but it serves as a point of orientation for the national civil services. Furthermore, the EU uses benchmarking tools and shares best practices. Examples are the European Public Sector Innovation Scoreboard 2013 (EPSIS)[30] and a "Toolbox for Practitioners" pertaining to the "Quality of Public Administration".[31] Those reports may be a stimulus for transformation,[32] which may be deepened and accelerated by a cross-fertilisation between Member States. Therefore, personal exchange gains relevance, for example in the European Public Administration Network (EUPAN)[33] (see also Article 197, paragraph 2 (2) TFEU).

Furthermore, the EU steers the development of national administrations by means of financial incentives. Annually, it publishes Country Specific Recommendations proposing measures for a certain Member State to take within the next 12 to 18 months. These may contain proposals relating to the civil service, such as the "further digitalisation (. . .) of public administration"[34] or the invocation to "safeguard the efficiency of the public administration while ensuring it can attract the right skills".[35] These suggestions gain relevance since the European Structural and Investment Funds (ESI Funds), in particular the European Social Fund, have to take them into account to provide financial support.[36] The

26 See *infra* Section IV. 3.
27 This term is often used in the German scientific community, e.g. Speer (2008), p. 683; Sydow (2004), p. 90.
28 European Commission (2017a).
29 European Ombudsman (2002).
30 European Commission (2013).
31 European Commission (2017b).
32 See Matei (2013), p. 249: "The European environment for developing the Romanian administration will determine its evolution toward a better integration into the European Administrative Space and universal adoption of the best administrative practices."
33 Concerning the impact of EUPAN on a Europeanisation process see Demmke (2015), pp. 457 f.
34 Council of the European Union (2022b).
35 Council of the European Union (2022a).
36 See Article 4, para. 1 of the Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, OJ L 347/320.

same is true for the EU Recovery and Resilience Facility, which will make loans and grants available until 2026.[37]

Finally, the EU's influence is not limited to its Member States. The Copenhagen criteria define the minimum standards which candidate countries are expected to meet. In this way, the EU uses a coercive form of a conditionality mechanism, since the demanded adjustments are prerequisites for accession.[38] Support for Improvement in Governance and Management (SIGMA) is relevant in this regard: a joint initiative of the EU and the OECD serving to support EU candidate countries and EU neighbourhood countries in their reforms of public administrations. For both, SIGMA defines certain Principles of Public Administration, specified by sub-principles.[39] On the one hand, these help to monitor, assess, and support the state of progress.[40] On the other hand, they direct the concerned States towards a certain reform policy, since non-compliance with the principles may jeopardise or delay the accession process.

III. Transformational Impulses: Preliminaries

1. Caveat: Dependence on National Legacies and Established Patterns

In the following section, I will identify specific transformational impulses that arise for the civil services in Europe from international law, but above all from Union law. Obviously, the impacts differ among the European States since the concept of civil service varies considerably from one country to another.[41] The national civil services are embedded in institutional conditions and closely linked to presumptions about the nature and tasks of the State. European States pursue – for traditional reasons – different guiding ideas like the *Rechtsstaatlichkeit* (Germany), transparency (Sweden), or participation of citizens (Switzerland).[42] The civil service is conditioned by these deep-rooted national features and legacies.[43] Numerous explicit legal exceptions for the "administration of the State" (Article 8, paragraph 2 International Covenant on Economic, Social and Cultural Rights, ICESCR, and Article 11, paragraph 2, sentence 2 ECHR) or the "public service" (Article 45, paragraph 4 TFEU) underline that international and European law take this into special account.

If the influence of international and/or Union law on the civil service (law) is therefore considered to be rather low or overrated,[44] this assessment can, nevertheless, hardly ever be made in general due to the differences and the immense difficulties of a large-scale comparative analysis. While in one State an international provision may necessitate significant

37 Cf. Article 18 (4) (b) of the Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57/17.

38 See Camyar (2010), pp. 140 f.

39 For EU candidate countries and potential candidates: SIGMA (2017). For countries neighbouring the EU: SIGMA (2016).

40 SIGMA publishes reports about the public administration's performance, see – for Bosnia and Herzegovina as an example – SIGMA (2022).

41 For a rather brief overview see European Commission (2018), pp. 22 f.

42 Cf. Demmke (2010), p. 110; concerning Switzerland Jaag (2014), chapter 83, paras. 132 ff.

43 Connaughton (2015), p. 199. Highlighting shortcomings of the "legacy argument" Meyer-Sahling (2009), pp. 509 f.

44 Speer (2011), p. 316.

changes, in another State it may correspond to the traditional customs or require only gradual adjustments. Besides national legacies and the legal (constitutional) regime,[45] the likelihood of adaptation due to transformational impulses depends on the willingness and openness of political actors to change,[46] as well as the veto options of administrative actors.[47]

2. *International Law and Union Law: Structural Differences and Commonalities in Content*

A crucial difference must be borne in mind when considering transformational impulses: the EU may impose its ideas on the Member States by the primacy of its legislation, if necessary by way of infringement proceedings and penalty payments. Provisions of international law largely lack a direct effect in national law and a coercive mechanism. Since their impact largely depends on the national willingness to comply and to adapt national administrative law,[48] the ease and cost of implementation play an important role. Notwithstanding this, international law and Union law have an identical substantive thrust in many areas regarding the civil service.

This justifies focusing on the concrete impulses in the following discussion, treating international and Union law jointly. This approach is also supported by the fact that changes are often not monocausal and boundaries are not easy to draw. International and Union law may encourage and accelerate transformation, but at the same time many European countries have identified a “domestic” need for change in the civil service. The recent French act *de transformation de la fonction publique* is an illustration of this.[49]

IV. Transformational Impulses in Detail

Even if international law and Union law tend to pursue the Weberian conception of the civil service,[50] highlighting neutrality and the rule-based conduct of the civil service, rather than a public management approach, the transformational impulses cannot be reduced to a uniform formula. In general, international and Union law do not have a system-building effect for a standard model of the civil service; instead, complex and uneven reform trajectories require differentiation. For the sake of clarity, I will subdivide the impulses, which cannot be presented comprehensively, under the following focuses: staff (Subsection IV.1), attitudes (Subsection IV.2), skills (Subsection IV.3), and work (Subsection IV.4) of the civil service.

45 In Germany, Article 33, para. 5 of the *Grundgesetz* (Basic Law) obliges civil service law to be developed with due regard to the “*hergebrachten Grundsätze des Berufsbeamtentums*” (the traditional principles of the professional civil service). This protection of domestic legacies may restrain innovation.

46 In general, the less consolidated civil service systems in Central and Eastern Europe are less robust against external pressures. For a – compared to Western Europe – larger scope of Europeanisation in the central governments in Estonia, Latvia, Poland, and Slovakia see Meyer-Sahling and van Stolk (2015), pp. 230 f.

47 Knill (2001), p. 85.

48 Likewise, Stelkens and Andrijauskaitė (2020a), para. 0.30.

49 Law on the transformation of the civil service of 6 August 2019; (*Loi n° 2019–828 de transformation de la fonction publique*), JORF of 7 August 2019, www.legifrance.gouv.fr/jorf/id/JORFTEXT000038889182/.

50 For Union law see also Dimitrova (2002), p. 179; Meyer-Sahling (2011), p. 240.

1. Staff of the Civil Service

Firstly, international and Union law provide for a more diverse composition of the staff of the European civil services (Subsection IV.1.1) and foster the alignment of the conditions for different status groups of employees (Subsections IV.1.2 and IV.1.3).

1.1. Towards a Heterogeneous Civil Service

International and Union law make the national civil services more heterogeneous. Provisions like Article 21, paragraph 2 of the Universal Declaration of Human Rights and Article 25 (c) of the ICCPR guarantee equal access to public service. Thus, racial and religious discrimination by domestic recruitment criteria or practices is prohibited.[51] Non-consideration for employment in the national civil service because of an individual political opinion[52] or a gender requirement[53] entails the need for justification.

Comparable effects for the civil services emanate from special discrimination prohibitions in Union law. In particular, an increasing openness can be observed in terms of nationality, gender, and age.

Article 18 TFEU and Article 21 of the Charter of Fundamental Rights of the EU (CFR) prohibit any discrimination between Member States' citizens[54] on grounds of nationality. Consequently, nationality reservations for the civil service are forbidden in general. This idea is reinforced by the European principle of the free movement of workers (Article 45, paragraph 1 TFEU). The exception in paragraph 4 is interpreted narrowly according to the established case law of the CJEU,[55] so that for most of the positions in the civil service free movement is guaranteed as well. The requirements of Union law and the corresponding efforts of the European Commission to open up the civil service[56] have triggered legal change processes. In France, Union law brought about a corresponding opening of the civil servant status in 1991.[57] In Germany, the legislative power took action in 1993.[58] The CJEU necessitated further adjustments, declaring various provisions requiring domestic

51 See – concerning Article 25 ICCPR – Nowak (2005), Article 25 para. 39. Regarding to the impact of the ICCPR in relation to religious discrimination *during* employment in the public sector, most recently in France, see Taillefait (2021), pp. 366 f. See also *Freedom of Religion or Belief in the Civil Service: How to Stay Loyal to the State While Remaining True to Oneself?* by W. Brzozowski in this volume.

52 See UN Human Rights Committee, decision of 14 July 1997, *Kall v. Poland*, 522/1993, CCPR/C/60/D/552/1993.

53 See UN Human Rights Committee, decision of 7 July 2004, *Jacobs v. Belgium*, 943/2000, CCPR/C/81/D/943/2000.

54 The provisions do not apply to non-EU citizens, see CJEU, judgment of 4 June 2009, *Vatsouras and others v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, C-22/08 and others, para. 52.

55 See footnote n. 23.

56 See European Commission (1988).

57 Article 5bis of the Law on the rights and obligations of civil servants of 13 July 1983 (*Loi n° 83–634 portant droits et obligations des fonctionnaires*), inserted by Article 2 of the Law containing various provisions relating to the civil service of 26 July 1991 (*Loi n° 91–715 portant diverses dispositions relatives à la fonction publique*), JORF of 27 July 1991; www.legifrance.gouv.fr/jorf/id/JORFTEXT000000355009. For the further legislative history see Einaudi (2018), p. 622. See also *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

58 § 7, para. 1, no. 1 of the Federal Civil Service Act (*Bundesbeamtengesetz*), inserted by Article 2 of the Tenth Act on the Amendment of Service Regulations of 20 December 1993 (*Zehntes Gesetz zur Änderung dienstrechtlicher Vorschriften*), *Bundesgesetzblatt*, Part I, 1993, pp. 2136 f.; www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl193s2136.pdf.

nationality to be contrary to Union law, e.g. with regard to the German preparatory service for the teaching profession,[59] for employment as a teacher in Luxembourg,[60] and as a notary in Belgium.[61] Moreover, the impulses are also spread by national courts. The Italian *Consiglio di Stato* (State Council) declared a provision as incompatible with Article 45 TFEU which reserved employment as a senior civil servant to Italian nationals.[62] However, in spite of this legal opening of the access to the civil services, the factual consequences have been rather limited in most of the European countries so far.[63]

Various international law provisions advocate for gender equality in the civil service: Article 2 of ILO Convention No. 111[64] obliges the signatory States to oppose any discrimination based on sex with regard to employment. Article 2 of ILO Convention No. 100[65] and Article 4, paragraph 3 of the European Social Charter lay down that the ratifying States acknowledge the principle of equal remuneration for men and women. The OECD tries to promote gender equality through information and education. It offers evidence-based analysis, generates benchmarks, and publishes best practices.[66] In 2015, its Council on Gender Equality in Public Life adopted a recommendation[67] which included the suggestions to "mainstream gender equality in the design, development, implementation and evaluation of relevant public policies and budgets" and to "consider measures to achieve gender balanced representation in decision making positions in public life by encouraging greater participation of women in government at all levels, as well as in parliaments, judiciaries and other public institutions".

However, for most of the European States the influence of EU anti-discrimination law should be stronger with regard to gender equality. According to Union law, no one may be treated worse due to his or her sex. One consequence of this was that the military sector of the armed forces should not be closed *per se* to women.[68] Accordingly, in Austria (1998)[69] and Germany (2000)[70] constitutional provisions were changed, and new provisions were enacted in Italy (1999).[71] Moreover, Article 157, paragraph 1 TFEU stipulates a Union law requirement of equal pay (remuneration and pensions) between men and women. It is significant in this context that the CJEU also considers indirect discrimination based

59 CJEU, judgment of 3 July 1986, *Lawrie-Blum v. Land Baden-Württemberg*, C-66/85, para. 29.

60 CJEU, judgment of 2 July 1996, *European Commission v. Luxembourg*, C-473/93, paras. 46 ff.

61 CJEU, judgment of 24 May 2011, *European Commission v. Belgium*, C-47/08, para. 124.

62 Italian *Consiglio di Stato* (Council of State), judgment of 25 June 2018, no. 9.

63 As well Demmke (2015), p. 451.

64 See footnote n. 4.

65 See footnote n. 4.

66 See – as a recent example – OECD (2022), Figure 27 (Gender equality in senior management positions in central governments, 2015 and 2020) and Box 29 (Examples of practices to promote gender equality in public employment). See also *Gender Equality in the Civil Service* by S. Korac in this volume.

67 OECD (2016).

68 See CJEU, judgment of 11 January 2000, *Kreil v. Germany*, C-285/98, para. 31.

69 See Article 1 of the Act on the Training of Women in the Federal Armed Forces of 10 December 1997 (*Gesetz über die Ausbildung von Frauen im Bundesheer*), *Bundesgesetzblatt für die Republik Österreich*, Part I, 1998, pp. 517 f.; www.ris.bka.gv.at/Dokumente/BgblPdf/1998_30_1/1998_30_1.pdf.

70 See Article 1 of the Act amending the Basic Law, Article 12a (*Gesetz zur Änderung des Grundgesetzes (Artikel 12a)*), *Bundesgesetzblatt*, Part I, 2000, pp. 1755 f.; www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl100s1755.pdf.

71 See Article 1 of the Delegation to the Government for the establishment of women's voluntary military service (*Delega al Governo per l'istituzione del servizio militare volontario femminile*), *Gazetta Ufficiale* of 29 October 1999, no. 255; www.gazzettaufficiale.it/eli/id/1999/10/29/099G0468.

on formally neutral characteristics to be covered by Article 157 TFEU.[72] This extensive interpretation may lead to a need for adaptation in the Member States. So, the CJEU was critical towards a French provision that awards improvements in pension entitlements if a civil servant has made a career break of two months for each of his or her three children. Since the mandatory maternity leave is taken into account, mothers of three children usually fulfil the requirement. Consequently, many more women than men receive the benefit albeit the provision is formulated in neutral terms.[73] Finally, the French *Conseil d'Etat* (State Council) found a questionable justification for such a preference for women in a compensation for career delays.[74] Pointing in the same direction is clause 4 of the Annex to Directive 97/81/EC,[75] which prohibits a less favourable treatment of part-time workers compared to full-time workers.[76] As women often work part-time, this promotes the attractiveness of the civil service for women and can thus work towards gender equality. However, an automatic preferential treatment of women has been ruled inadmissible by the CJEU.[77] The promotion of the under-represented sex can therefore be a criterion, but must not alone lead to compelling results,[78] especially if there are other special reasons for recruitment (e.g. disability) in the person of another equally suitable applicant. All in all, in most European countries a significant "feminisation"[79] of the civil service has taken place in recent decades,[80] which is partly due to the influence of international and Union law.

Articles 1 and 2 of the Directive 2000/78/EC contain a "principle of equal treatment" which prohibits – along with Article 21 CFR – discrimination due to age. Minimum and maximum ages for a civil service engagement are therefore forbidden in principle. A Spanish provision which provided for a maximum age limit of 30 years for the recruitment of police officers was declared incompatible with Union law.[81] However, the European provisions do not necessarily lead to the abolition of age limits, since Union law leaves open the possibility of justifications. Article 6 of the Directive 2000/78/EC refers to legitimate employment policy, labour market, and vocational training objectives. Moreover, the CJEU outlined that the aim of encouraging recruitment of younger applicants[82] and establishing a more balanced age structure[83] may serve as a justification for a certain retirement age. In Germany, the *Bundesverwaltungsgericht* (Federal Administrative Court) declared a maximum recruitment age of 50 years to be compatible with Union

72 See CJEU, judgment of 17 July 2014, *Leone and others v. Garde des Sceaux*, C-173/13, para. 40.

73 See CJEU, *Leone and others v. Garde des Sceaux* (n. 72), para. 98.

74 French *Conseil d'Etat* (State Council), judgment of 27 March 2015, no. 372426. Einaudi (2018), p. 624, names that a *pirouette hautement juridique*.

75 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14/9; last amended by Council Directive 98/23/EC of 7 April 1998, OJ L 131/10.

76 Concerning the applicability on (contractual) public employment see CJEU, judgment of 4 July 2006, *Adeneler and others v. Ellinikos Organismos Galaktos*, C-212/04, paras. 54 ff.; judgment of 13 September 2007, *Del Cerro Alonso v. Osakidetza-Servicio Vasco de Salud*, C-307/05, para. 25.

77 CJEU, judgment of 17 October 1995, *Kalanke v. Freie Hansestadt Bremen*, C-450/93, para. 24.

78 Klaß (2014), pp. 224 f.; Maurer (2002), chapter 9, para. 51.

79 Reichard and Schröter (2021), p. 210.

80 Concerning the present gender equality in public sector employment see OECD (2021a), p. 107. Furthermore, *Gender Equality in the Civil Service* by S. Korac in this volume.

81 CJEU, judgment of 13 November 2014, *Vital Pérez v. Ayuntamiento de Oviedo*, C-416/13, paras. 57 ff.

82 CJEU, judgment of 16 October 2007, *Palacios de la Villa v. Cortefiel Servicios*, C-411/05, paras. 65 ff.; judgment of 21 July 2011, *Fuchs and others v. Land Hessen*, C-159/10 and others, para. 66.

83 CJEU, judgment of 6 November 2012, *European Commission v. Hungary*, C-286/12, para. 62.

law.[84] In France, the *Conseil d'Etat* (State Council) decided that a French provision which ordered a maximum age of 57 years for air traffic controllers was in line with Union law.[85] This was criticised in reviews of the ruling.[86]

The prohibition of age discrimination not only applies to recruitment, but also to the conditions of employment, in particular remuneration. Determining the basic pay on the basis of age discriminates against younger civil servants and is, without prejudice to a justification, contrary to Union law.[87] Regarding automatic salary increases and increases in holiday entitlements, not age, but only length of service (seniority) is a permissible differentiation criterion.[88] This has led to corresponding changes in the Member States, such as in Germany.[89]

1.2. *Towards a Convergence Between Civil Servants and Other Employees in the Public Sector*

Nearly all European States distinguish between civil servants in a narrow sense (*Beamte*, *fonctionnaires*), whose employment relationship is established by a unilateral act of appointment and is in principle for life,[90] and other employees in the civil service whose employment is based on a contract (*Arbeitnehmer/-innen im öffentlichen Dienst*, *Vertragsbedienstete*, *agents contractuels*). International and Union law promote the discernible trend[91] towards converging working conditions[92] between these groups. For example, Council of Europe Recommendation No. R (2000) 10 on codes of conduct for public officials[93] refers only to "all public officials" (Article 1, paragraph 1) without further differentiating between the exact employment relationship. In its surveys, the OECD explicitly does not distinguish according to the type of employment relationship due to the large variety in the arrangements in the OECD countries.[94] These approaches blur the differences.

The same approach can be observed in Union law. Even if Union law provides for a formal bifurcation between "officials" and "other servants" in the EU's own administration (see Article 336 TFEU),[95] it encourages an approximation between the status groups as well. Firstly, this is due to the fact that the EU, in view of the very different arrange-

84 German *Bundesverwaltungsgericht* (Federal Administrative Court), judgment of 20 September 2018, 2 A 9/17, paras. 45 ff.

85 French *Conseil d'Etat* (State Council), judgment of 4 April 2014, no. 362785.

86 Hébrard (2014).

87 CJEU, judgment of 19 June 2014, *Specht and others v. Land Berlin*, C-501/12 and others, para. 52.

88 CJEU, judgment of 3 October 2006, *Cadman v. Health & Safety Executive*, C-17/05, para. 35.

89 In more detail Konrad (2015), chapter 4, paras. 87 ff.

90 For the lifetime principle as key aspect of a civil servant status see – for Austria – Austrian Constitutional Court, judgment of 14 October 2005, G67/05 and others, para. 3.5; – for Germany – German Federal Constitutional Court, judgment of 28 November 2018, 2 BvL 3/15, para. 26.

91 In Austria, at the beginning of the 21st century a *Pragmatisierungsstopp* (suspension of appointments of civil servants, in a narrow sense) was set in force leading to a priority of contractual employment relationship; see Weichselbaum (2004), pp. 25 f. In more detail to the *contractualisation croissante* (increasing share of contractual relationships) in France, Touzeil-Divina (2018), pp. 133 f. See also *Civil Service in Transition: Privatisation or Alignment of Employment Conditions?* by C. Fraenkel-Haeberle in this volume.

92 See European Commission (2018), pp. 22 f.

93 Council of Europe, Recommendation No. R (2000) 10 of the Committee of Ministers to Member States on codes of conduct for public officials, 11 May 2000.

94 See OECD (2021b), p. 13; previously OECD (1997), p. 4.

95 Criticising this inconsistency Schmidt (2018), p. 219.

ments in the Member States,[96] does not employ a corresponding distinction as a criterion of differentiation in its legal acts but applies the same rules for all employees in the civil service.[97] Secondly, the approximation results from equal treatment considerations. For example, the CJEU ruled that the status of a civil servant alone is not sufficient justification to deny additional remuneration to a Spanish teacher employed under a (temporary) public law contract.[98] Even if the formal distinction remains, Union law leads to converging employment ratios and a growing similarity of the status groups.[99]

1.3. Towards a Convergence Between Civil Servants and Employees in the Private Sector

The extent of differentiation between civil servants and employees in the private sector mainly depends on the specific understanding of the State – as a decisive actor in the shaping of social life or, according to a liberal understanding, as a mere facilitator.[100] In the tradition of the vast majority of European States, the civil service is excluded from general labour law since employment with the State entails other necessities and sometimes pursues specific goals.[101] But to an increasing degree, public sector employees are becoming subject to the same or at least a similar legal regime as employees in the private sector.[102] This development, referred to as *normalisering* (normalisation) in the Netherlands,[103] might be traced back to Union law for several reasons. Firstly, the EU initiated the liberalisation of the postal service,[104] the telecommunication sector,[105] and the railway sector.[106] This led to privatisation; consequently, civil servants in these fields have "left" the public sector. But the convergence is going beyond that. As Union law considers the civil service to be a more or less ordinary type of employment,[107] it has led to a partial alignment of

96 Regarding to the great variety of models in Europe see van der Meer et al. (2012), pp. 93 f.

97 Leisner-Egensperger (2018), p. 140.

98 CJEU, judgment of 20 June 2019, *Ustariz Aróstegui v. Departamento de Educación del Gobierno de Navarra*, C-72/18, paras. 44 ff.

99 Demmke (2010), p. 114.

100 Reichard and Schröter (2021), p. 206. In detail on the arguments for and against making a distinction Demmke (2005), pp. 64 f.

101 In more detail Pochard (2011), pp. 133 f.

102 Since 2020, Dutch civil servants have – in general – the same legal position as employees in the private sector. In Italy there are tendencies towards convergence since the reforms in the 1990s, but many aspects remain governed by public law, see Albanese (2022), pp. 697 f. In Austria, the legal regime for the *Vertragsbediensteten* is referred to as a *Mischsystem aus Beamten- und Angestelltenrecht* (mixed system of civil servant and employee law) by Leisner-Egensperger (2018), p. 139. Differentiating with regard to France Fortier (2021), pp. 111 f.

103 See the Normalisation of Legal Status of Civil Servants Act (*Wet normalisering rechtspositie ambtenaren*), *Staatsblad* of 28 March 2017, no. 123, pp. 1 f. See also *The Civil Service in the Netherlands: Normalisation of the Legal Status of Civil Servants* by A. De Becker in this volume.

104 See Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998 L 15/14; last amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008, OJ L 52/3.

105 In particular Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 74/13.

106 See Article 4 of the Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, OJ L 237/25.

107 Taillefait (2022), para. 132.

working conditions in the public and in the private sector.[108] With regard to numerous labour regulations, Union law pursues an egalitarian approach and does not distinguish between the civil service and private employment at all.[109] In areas such as working time,[110] parental leave,[111] transfers of undertakings,[112] or the conclusion of fixed-term contracts,[113] the State has to fulfil the same requirements as a private employer. Even if Union law is aware of the peculiarities and makes corresponding exceptions for the civil service (see Article 45, paragraph 4 TFEU), these have a rather narrow scope of application which applies to a decreasing number of civil servants.[114] It is also worth mentioning that Union law also leads to a certain movement towards convergence in the opposite direction. For example, the prohibition of discrimination contained in most of the European constitutions obliges the State as employer. The aforementioned Directive 2000/78/EC requires comparably strict equal treatment rules also for employment relationships in the private sector.[115] In this context, the assumption of a horizontal effect of the fundamental rights under Article 21, paragraph 1 and Article 31, paragraph 2 CFR against private employers should also be mentioned.[116]

2. *Attitudes of the Civil Service*

International and Union law may influence the attitude and the role perceptions of civil servants.

2.1. Towards a Performance-Oriented Civil Service

In both position-based and career-based systems, recruitment is essentially based on performance.[117] For example, in Germany *Befähigung und Leistung* (qualifications and professional achievements, Article 33, paragraph 2 of the Basic Law), in Spain *mérito y capacidad*

108 De Becker (2016), p. 345. Regarding Council Directive 1999/70/EC also Demmke (2015), p. 455.

109 Also Lambert (2011), pp. 226 f.

110 Articles 3 ff. of the Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299/9. Regarding to the applicability to the military personnel see CJEU, judgment of 15 July 2021, *B. K. v. Slovenia*, C-742/19, paras. 31 ff.

111 Article 5 of the Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188/79.

112 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82/16; last amended by Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015, OJ L 363/1. The applicability to public undertakings is ordered by Article 1, letter c).

113 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175/43. For this directive, see also CJEU, *Adeneler and others v. Ellinikos Organismos Galaktos* (n. 76), paras. 54 ff.

114 De Becker (2011), pp. 957 f.

115 Regarding Belgium, see De Becker (2016), pp. 341 f.

116 Regarding Article 21 CFR, see CJEU, judgment of 11 September 2018, *IR v. JQ*, C-68/17, para. 69; regarding Article 31 CFR, see CJEU, judgment of 6 November 2018, *Stadt Wuppertal v. Bauer*, C-569/16 and others, para. 85.

117 In more detail on the difficulties of measuring performance, see Demmke (2005), pp. 113 f.

(merit and ability, Article 103, paragraph 3 of the constitution) are relevant recruitment criteria. Nevertheless, international and Union law may lead to an even more performance-oriented civil service. The OECD published a report on Skills for a High Performing Civil Service in 2017.[118] In that report, the OECD provides data and ideas to initiate reforms for a "professional, strategic and innovative civil service". Not loyalty or neutrality are the main focus, but performance and efficiency. This orientation becomes even clearer in a study published by the OECD in 2005 entitled "Performance-related Pay Policies for Government Employees", which assesses the strengths and weaknesses of performance-related pay in the public sector.[119] The study highlights critical points, but it also contains concrete recommendations with regard to the modifications necessary for such policies. This may have influenced at least some States to integrate new payment schemes. In a study of 2017, 21 EU Member States,[120] e.g. Bulgaria[121] and Hungary,[122] had (partly) introduced flexible reward schemes, including individual merit pay, to incentivise performance and foster efficiency.

Not only performance-related pay in particular[123] but a performance orientation in general is also supported by the EU. As the SIGMA principles illustrate,[124] the EU expects that a promotion to higher ranks would depend on individual merits and not on political patronage (or nepotism).[125] It points in the same direction, that the national recruitment practice must not depend significantly on considerations of the lifetime and alimentation principle.[126] These are based on a fiscal interest, not on the principle of performance. All this is an expression of a general orientation of the EU towards the principle of efficiency (see Article 298, paragraph 1 TFEU). In this regard, Article 9, no. 11 of Regulation (EU) No. 1303/2013 serves as an example as it defines an "efficient public administration" as one of the objectives financially supported by ESI Funds.

2.2. *Towards a Neutral Civil Service*

Since the administration puts policy decisions into action, a strictly apolitical civil service is an illusion.[127] However, especially in a Weberian model, the image of the administrative staff is typically characterised by extensive duties of political moderation, restraint and neutrality.[128] In line with this approach, the Council of Europe Recommendation No. R (2000) 10 lays down that civil servants should carry out their duties "in accord-

118 OECD (2017).
119 OECD (2005).
120 See Staroňová (2017), p. 55. See also *The Basic Principles of Civil Servants' Remuneration: A Legal and Human Resource Management Analysis from a European Perspective* by V. Franca and A. Arzenšek in this volume.
121 See Zankina (2020), p. 114.
122 See Ványolós and Hajnal (2013), pp. 284 f.
123 See recently the study of the European Commission (2021).
124 SIGMA (2017), p. 44: "Principle 3: The recruitment of public servants is based on merit and equal treatment in all its phases."
125 Also Meyer-Sahling (2011), p. 239.
126 Klaß (2014), p. 232.
127 Levine et al. (1990), p. 103. Furthermore Peters and Pierre (2004), p. 2; Rouban (2012), p. 380.
128 Regarding France, Taillefait (2022), para. 55; regarding Germany, Ullrich (2021), pp. 227 f. See also *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

ance with the law" (Article 4, paragraph 1), and "act in a politically neutral manner" (Article 4, paragraph 2).[129] Especially in the post-socialist countries, which were characterised by a "fusion" of State and party for a long time,[130] this gave a further impetus to reduce the politicisation of civil service activities. The recommendation inspired the Lithuanian (*Valstybės tarnautojų veiklos etikos taisyklių*)[131] and Romanian (*Codul de conduită a funcționarilor publici*)[132] code of conduct for civil servants, and it was explicitly used during the preparations for the Estonian Civil Service Act of 2012 (*Avaliku teenistuse seadus*).[133]

Union law fosters the neutrality of civil servants as well. The civil servants' duty to act impartially is explicitly required for the EU's own administration as part of a "good administration" (Article 41, paragraph 1 CFR);[134] it seems reasonable to apply an equivalent general legal principle to the Member States' civil services.[135] Union law makes some further provisions for enforcement; for example, it required Romania to set up a national integrity agency to fight corruption.[136] Moreover, the SIGMA principles underline the impetus of the EU for a separation between politics and administration in recruitment.[137] These principles led several States in Central and Eastern Europe to further depoliticise their civil service, recently through the enactment of the Civil Service Act in the Czech Republic in 2014.[138] However, on the "bumpy road"[139] to push back political patronage, the extensive efforts were partly offset by regressions, e.g. by a civil service reform in Hungary in 2010 and in Poland in 2015.[140]

2.3. Towards an Assertive Civil Service

The focus on neutrality and impartiality in office is not strictly at odds with international law and Union law working towards an assertive and opinionated civil service. The case law of the European Court of Human Rights (ECtHR) paves the way in this direction. Firstly, the Court encouraged civil servants to enforce their rights through the courts by – in an extensive interpretation of the term "civil rights and obligations" (Article 6 ECHR) – providing

129 See footnote n. 93.

130 See Dimitrova (2002), p. 180; Zankina (2020), p. 115.

131 See Paužaitė-Kulvinskienė and Andrijauskaitė (2020), para. 21.54.

132 Dragos and Chirila (2020), para. 24.53.

133 Ernits and Pähkla (2020), para. 20.42.

134 For the distinction between objective and subjective impartiality see CJEU, judgment of 11 July 2013, *Ziegler v. European Commission*, C-439/11 P, para. 155; judgment of 20 December 2017, *Spain v. European Commission*, C-521/15, para. 91.

135 For the right to good administration as a general principle of EU law, see CJEU, judgment of 17 July 2014, *Y. S. v. Minister voor Immigratie, Integratie en Asiel*, C-141/12, para. 68.

136 Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 354/56. See Selejan-Gutan (2016), pp. 141 f.

137 SIGMA (2017), p. 46: "Principle 4: Direct or indirect political influence on senior managerial positions in the public service is prevented."

138 *Zákon č. 234/2014 Sb., o státní službě* of 1 October 2014 (Act on the civil service); www.zakonyprolidi.cz/cs/2014-234.

139 Meyer-Sahling (2004), p. 71; similar Staroňová and Gadjuschek (2013), p. 124.

140 Mazur and Kopyciński (2020), pp. 283 f. (Hungary) and p. 277 (Poland). See also *The Civil Service in Poland: A Turbulent Path towards Professionalism, Merit-Based Recruitment and Insulation from Politicisation* by D. Szesciło in this volume.

a broad guarantee of legal protection for civil servants.[141] Secondly, it strengthened the civil servants' rights in line with Principle 8 of Recommendation No. R (2000) 6 on the status of public officials in Europe,[142] which reads: "Public officials should, in principle, enjoy the same rights as all citizens." Accordingly, the ECtHR repeatedly acknowledged the civil servants' freedom of association (Article 11 ECHR).[143] Notwithstanding this, the Court has taken different decisions regarding restrictions on political party membership of civil servants, depending on the type of employment, intensity of participation and also considering the distinct[144] historical backgrounds.[145] But above all, it has emphasised in various judgments that members of the civil service can invoke freedom of expression (Article 10, paragraph1 ECHR), be it members of the army,[146] the police,[147] judges,[148] or other senior civil servants.[149] While the Court allows for restrictions (see Article 10, paragraph 2 ECHR) of the freedom of expression, recognising a national margin of appreciation and the specific need for a duty of loyalty and discretion in civil service as a necessity in a democratic society,[150] States are under pressure to justify any such restrictions. In particular, restrictions must satisfy the test of proportionality.[151] As the protection of freedom of expression of civil servants tends to be further reinforced[152] in the long term, this

141 See ECtHR, judgment of 19 April 2007, *Vilho Eskelinen and others v. Finland*, 63235/00, para. 62; judgment of 19 September 2017, *Regner v. Czech Republic*, 35289/11, para. 107: exclusion of civil servants "must be justified on objective grounds in the State's interest". See also *The Right to a Fair Trial for Civil Servants and the Importance of the State's Interest in Applying Article 6, para. 1 ECHR* by F. Aperio Bella in this volume.

142 See footnote n. 15.

143 ECtHR, judgment of 2 August 2001, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, 35972/97, para. 26; judgment of 31 May 2007, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (No. 2)*, 26740/02, para. 53 (both concerning a masonic lodge); judgment of 12 November 2008, *Demir and Baykara v. Turkey*, 34503/97, paras. 108, 127 (concerning a trade union); see also Szymczak (2011), pp. 249 f. and *The Right to Join Trade Unions and Political Parties* by C. Janda in this volume.

144 Especially in the Anglo-Saxon administrative culture, (senior) civil servants must not be member of a party. In Italy, a constitutional provision (Article 98, para.3) allows restrictions for judges, prosecutors, soldiers, and police officers. Since in Germany, as well as in France, a party membership is allowed and rather common, Dyson (1977), pp. 20, 37, referred to (Western) German administration as " 'party-book' administration".

145 Infringement affirmed: ECtHR, judgment of 26 September 1995, *Vogt v. Germany*, 17851/91. Infringement denied: ECtHR, judgment of 2 September 1998, *Ahmed and others v. United Kingdom*, 22954/93, para. 70; *Rekvényi v. Hungary* (n. 1), paras. 58 ff.

146 For a member of the French *Gendarmerie* see ECtHR, judgment of 15 September 2009, *Matelly v. France*, 30330/04.

147 ECtHR, *Rekvényi v. Hungary* (n. 1), para. 26.

148 ECtHR, judgment of 28 October 1999, *Wille v. Liechtenstein*, 28396/95, paras. 41 ff.; judgment of 26 February 2009, *Kudeshkina v. Russia*, 29492/05, paras. 79 ff.; judgment of 26 June 2016, *Baka v. Hungary*, 20261/12, paras. 140 ff.

149 ECtHR, *Ahmed and others v. United Kingdom* (n. 145), para. 41.

150 See ECtHR, judgment of 12 February 2008, *Guja v. Moldova*, 14277/04, para. 70; judgment of 17 September 2015, *Langner v. Germany*, 14464/11, para. 43. See also *Freedom of Expression of Civil Servants: Balancing Duties and Responsibilities with the Requirements of Open and Free Public Debate* by A. Krzywoń in this volume.

151 Denied in ECtHR, *Vogt v. Germany* (n. 145), concerning the dismissal of a teacher who was a member of a communist party. Further reading on the proportionality requirement: Schabas (2015), pp. 474 f.

152 Already Szymczak (2011), p. 248.

may lead to a more generous treatment of expression of opinion and political activities of civil servants in Europe. The strengthening of whistle-blowers' rights[153] points in the same direction.

The right to strike[154] is also relevant for the development towards an assertive civil service. A general right to strike, which can be restricted on certain overriding grounds, is guaranteed by Article 6, paragraph 4 of the European Social Charter and by Article 8, paragraph 1 (d) ICESCR.[155] According to some views, such a right is also found in Article 22, paragraph 1 ICCPR.[156] Nevertheless, Article 11 ECHR is probably the most relevant provision for European States. Focusing on this provision, the ECtHR declared a general and only status-related ban on strikes for civil servants regardless of their activity in the State structure, as it is a long-standing tradition e.g. in Germany, to be an infringement of Article 11 ECHR.[157] Even if the *Bundesverfassungsgericht* (German Federal Constitutional Court) has confirmed the German ban on strikes in a case regarding teachers,[158] scholars often consider the German regulation to be a violation of Article 11 ECHR.[159] International law has thus at least significantly increased the burden of justification. For European States where civil servants enjoy a right to strike, such as Italy,[160] and Switzerland,[161] there are obviously no changes in this regard. Altogether, international and Union law may lead to a certain kind of bottom-up politicisation.

3. Skill Sets of the Civil Service

International and Union law initiate changes concerning the required skill sets of civil servants. Even though impulses in this field can rarely be linked to specific legal adjustments in the European States, national civil services face several new functional requirements.

153 See ECtHR, *Guja v. Moldova* (n. 150); judgment of 27 February 2018, *Guja v. Moldova (no. 2)*, 1085/10. Pleading for a further recognition of the right Kagarios (2021), pp. 220 f. See also Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305/17. Comprehensively on the topic of whistle-blowing, see *The Development of a Legal Framework on Whistle-blowing by Public Employees in the European Union*, by P. Provenzano in this volume.

154 In detail *The Right to Strike in the Civil Service* by G. Buchholtz in this volume.

155 See Saul et al. (2014), pp. 575 f. Regarding this provision, the UN Committee on Economic, Social and Cultural Rights recommended Estonia to review Article 59 of its Civil Service Act containing a ban of strikes, see UN Committee on Economic, Social and Cultural Rights (2019), paras. 26 ff.

156 Nowak (2005), Article 22, paras. 16 ff.; Joseph and Castan (2013), Article 22, paras. 19.27 ff.; disapproving UN Human Rights Committee, decision of 18 July 1986, *J. B. and others v. Canada*, 118/1982, UN Doc Supp. no. 40 (A/41/40), para. 6.4.

157 See ECtHR, judgment of 21 April 2009, *Enerji Yapi-Yol Sen v. Turkey*, 68959/01, paras. 33 ff.

158 German Federal Constitutional Court, judgment of 12 June 2018, 2 BvR 1738/12 and others. See also ECtHR (GC), judgment of 14 December 2023, *Humpert and others v. Germany*, 59433/18, 59477/18, 59481/18 and 59494/18.

159 See Ickenroth (2016), pp. 187 f.; Lauer (2017), p. 269; Schulz (2016), pp. 163 f.; with a different view Scholz (2014), pp. 582 f.

160 See Italian Constitutional Court, judgment of 27 June 1958, 46/1958; judgment of 13 December 1962, 123/1962.

161 See Article 28, para. 3 of the *Bundesverfassung* (Federal Constitution); furthermore Henneberger and Henneberger-Sudjana (2011), p. 121.

3.1. *Towards an Autonomous Civil Service*

In many European countries, a legalistic approach is deeply entrenched, based on an understanding of the civil service as a merely law-executing power. In Germany, this is grounded in a specific emphasis on the *Rechtsstaat*,[162] while in post-socialist States this is a legacy of a centralistic and party-oriented doctrine which minimised the individual autonomy of civil servants.[163] Undoubtedly, the EU emphasises the rule of law (see Article 2 TEU). Nevertheless, Union law leads to a more autonomous civil service since administrative staff are partly removed from a role as *bouche de la loi*. It awakens a need for more self-reliant and more decisive civil servants. This assumption is based on various considerations:

- According to the *Costanzo* doctrine,[164] members of the national administration must not apply national law if overriding European law precludes this. In other words, national administrative staff, irrespective of their previous training, their exact area of responsibility, and their rank, should autonomously disregard national laws. Legal primacy overrides any hierarchical superiority in national law.[165] Admittedly, the exemption from national law is replaced by a stronger influence of Union law, but serving "two masters at once"[166] and deciding who is the decisive one in a certain case may foster autonomy of civil servants.
- In various fields, Union law demands independent administrative bodies. This concerns data protection authorities (Article 52, paragraph 1 of the General Data Protection Regulation),[167] national statistical authorities (Article 10a of the Regulation (EC) No. 1466/97),[168] as well as the national regulatory authorities for the areas of electricity supply (Article 57, paragraph 4 and 5 of the Directive (EU) 2019/944)[169] and electronic communication (Article 8, paragraph 1 of the Directive (EU) 2018/1972).[170] In these fields, hierarchical lines are interrupted and the control of parent ministries is diminished. Such independence of an administrative body is, with the exception of

162 Further reading at König (2014), pp. 19 f.

163 Emphasising a lasting "formalism" or "hyperpositivism" for Bulgaria Paskalev (2020), paras.19.82 ff.; for Hungary Jakab and Hollán (2004), pp. 96 f.; for Poland Mańko (2013), pp. 214 f.

164 CJEU, judgment of 22 June 1989, *Costanzo v. Comune di Milano*, 103/88, para. 31; later on CJEU, judgment of 14 October 2010, *Fuß v. Stadt Halle*, C-243/09, para. 61; judgment of 4 December 2018, *Minister for Justice and Equality and others v. Workplace Relations Commission*, C-378/17, para. 38.

165 Cf. Enqvist and Naarttijärvi (2021), p. 710.

166 Enqvist and Naarttijärvi (2021), p. 708.

167 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119/1, so-called GDPR. See also *Public Administrations and Data Protection: An Unstoppable Europeanisation through Fundamental Rights* by M. González Pascual in this volume.

168 Council Regulation (EC) No. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 209/1; last amended by Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306/12.

169 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158/125.

170 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321/36.

Sweden,[171] new for most European countries.[172] In these areas, civil servants gain elevated policy autonomy.

- The Europeanisation of a policy field awakens a certain need for coordinating policies between the national and the supranational level as well as between the Member States. In some policy fields (e.g. energy regulation, financial market regulation) national agencies are involved in a European network, and decision-making is shifting to European transnational cooperation settings (e.g. the Agency for the Cooperation of European Energy Regulators, ACER, and – for the financial sector – the three European Supervisory Agencies, ESA). This role strengthens an information asymmetry, allows agencies to bypass their national parent ministries, and leads to an increase of (de facto) autonomy.[173]
- Particularly in environmental and public procurement law, Union law sets the focus on procedural requirements, while in substantive terms it merely obliges the pursuit and achievement of a certain goal.[174] Compared to, for example, German law, Union law thus allows greater discretion with regard to decisions on the merits of the case.
- Finally, in the European multilevel system, the allocation of responsibility becomes more diffuse. The distance (also spatial) between the rule-maker and the administrative official grows. This may encourage the civil service to make special use of and extend its scope for decision-making as well.[175]

3.2. Towards a Responsive Civil Service

In the 1970s, the Parliamentary Assembly of the Council of Europe adopted Resolution 77 (31), which recommended the implementation of the right to be heard and the obligation to provide the reasons for an administrative act.[176] In particular, in those States which did not yet have legislation governing the administrative procedure, this provided a clear impetus for the normative anchoring of such rights,[177] e.g. in France (1978 and 1979),[178] Luxembourg (1979),[179] and Belgium (1991).[180] Similar impacts emanate from Union law. Especially, the case law of the CJEU has elevated the right to be heard to a general principle of law. Member State administrations must give citizens ample opportunity to make representations before enforcing Union law and interfering with citizens' rights.[181] The

171 See Wenander (2022), pp. 36 f.

172 In Austria, the *Bundes-Verfassungsgesetz* (Federal constitutional law) had to be amended (Article 20, para. 2, no. 8). Regarding to conflicts in Belgium, France, and the Netherlands De Somer (2017), pp. 224 f. From an Italian perspective Franchini (2018), p. 242.

173 Bach et al. (2015), pp. 285 f.; Ruffing (2015), pp. 1109 f.; moreover Mastenbroek (2018), p. 832.

174 Fehling (2021), chapter 3, para. 62.

175 van den Berg and Toonen (2015), p. 118.

176 Council of Europe, Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, 28 September 1977.

177 Stelkens et al. (2020), para. 31.21.

178 Chevalier (2020), para. 5.41.

179 Stelkens and Andrijauskaitė (2020c), para. 2.10.

180 Marique (2020), para. 4.39.

181 CJEU, judgment of 22 November 2011, *M. M. v. Minister for Justice, Equality and Law Reform and others*, C-277/11, paras. 84 ff.; judgment of 3 July 2014, *Kamino International Logistics and others v. Staatssecretaris van Financiën*, C-129/13 and others, paras. 29 ff.; judgment of 20 December 2017, *Prequ' Italia v. Agenzia delle Dogane e dei Monopoli*, C-276/16, paras. 45 ff.

obligation to state reasons under Union law, which is also made a general principle by the CJEU,[182] is far-reaching as well.

International and Union law pursue further ways to anchor a responsive civil service.[183] The Aarhus Convention (see Articles 6–8) stipulates various needs for public hearings and public participation. According to EU water law, Member States "shall encourage the active involvement of all interested parties".[184] This has certain transformational impacts: the administrative staff has to explain its own intended course of action. It has to consider the statements of citizens, assess them, and, if necessary, adapt its own behaviour. This ultimately leads to higher communicative demands on the civil service. Moreover, international and Union law foster a (self-)perception of the civil service as rather service-oriented, especially in those States where the idea of a subordination to citizens has prevailed.[185]

3.3. Towards a Specialised Civil Service

Although the EU does not lay down any general requirements for the national administrative organisation, in various sectors Union law demands a certain allocation of responsibilities. Union law requires the establishment of specific authorities, often with nationwide competence. For example, Article 57, paragraph 1 of the Directive (EU) 2019/944[186] stipulates that with respect to regulation of the electricity market, each "Member State shall designate a single regulatory authority at national level". This necessarily implies a move away from an "all-responsible" administration (at the local level) and a change to a more specialised, vertically centralised, and horizontally fragmented administration. In consequence, a State does not need "go anywhere"[187] civil servants. There is rather an EU-induced trend towards more specialised civil servants who are experts in a narrow field of administration.

3.4. Towards a Digital Civil Service

International and Union law are pushing for a transformation towards a digital civil service. The OECD is a key driving force in this regard. In 2014, it adopted an OECD Recommendation on Digital Government Strategies,[188] which paves the way from an analogue government via an e-government to a digital government. The essential characteristics of a digital government have been recently worked out in an OECD Digital Government Policy Framework,[189] which provides analysis tools and best practices and thus supports the way for the transition towards the digital maturity of the civil ser-

182 CJEU, judgment of 8 May 2014, *N. v. Minister for Justice, Equality and Law Reform and others*, C-604/12, paras. 49 ff.

183 In detail on the internationalisation and Europeanisation of public participation requirements for the (German) civil service, Peters (2020), pp. 201 f.

184 See Article 14, para. 1 of the Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 237/1; last amended by Commission Directive 2014/101/EU of 30 October 2014, OJ L 311/32.

185 See Sommermann (2014), p. 609.

186 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158/125.

187 Bezes and Lodge (2015), p. 150.

188 OECD (2014).

189 OECD (2020a).

vice. The progress in digitalisation of national administrations is assessed by the OECD Digital Government Index.[190] Such a benchmark may stimulate competition between the European States and opens up the way to learn from and imitate the best digital solutions.

Similarly to the OECD, the EU considers an administration with dossier management in paper format to be anachronistic and slow. Based on cost and efficiency considerations, it promotes handling and sharing information digitally. Hence, the EU not only publishes benchmarks monitoring Member States' digital progress,[191] but also obliges the Member States to introduce a digital infrastructure at numerous points: according to Directive 2014/55/EU[192] the Member States must provide the technological requirements to fulfil a European standard on electronic invoicing in public procurement. Regulation (EU) 2018/1724 aims at introducing a "single digital gateway" and obliges Member States to ensure that a wide range of procedures can be accessed and completed fully online (Article 6, paragraph 1).[193] The EU "Digital Decade Policy Programme 2030" even sets the target of all key public services in the Member States being accessible online by 2030.[194] Furthermore, the EU has introduced various IT networks and digital platforms like Eurodac[195] and Rapid Exchange of Information System (RAPEX)[196] to share information between the Member States.

Another step further is the use of artificial intelligence (AI): in a white paper, the EU recently underlined that it considers it essential that public administrations "rapidly begin to deploy products and services that rely on AI in their activities".[197] If the Member States want to meet the requirements of Union law, they must not only have a corresponding IT infrastructure; above all, they need employees who have sufficient digital skills, which has led to corresponding training activities in the Member States.

3.5. *Towards a Civil Service with International Expertise*

Union law creates an expectation of a certain level of international expertise for civil servants. In particular, it leads to an inevitable confrontation of administrative employees with

190 OECD (2020b). See also *Digital Competencies in the Civil Service* by M. Seckelmann and D. Catakli in this volume.

191 See the chapter concerning "Digital public services" in European Commission (2022), pp. 65 f.

192 Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, OJ L 133/1.

193 Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No. 1024/2012, OJ L 295/1.

194 See Article 4, para. 1, number 4, letter a) of the Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030, OJ L 323/4.

195 Introduced by and based on Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 [. . .], OJ L 180/1.

196 Introduced by and based on Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 2002 11/4; last amended by Regulation (EC) No. 596/2009 of the European Parliament and of the Council of 18 June 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny, OJ L 188/14.

197 European Commission (2020), p. 8. See also Recital 58 of the Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence, OJ L 12.7.2024. In more detail *The Civil Service and Artificial Intelligence* by S. Schiedermair in this volume.

administrative action from other Member States. Firstly, Union law establishes the possibility of "transnational administrative acts" in numerous subject areas, in which the administrative acts of one Member State enjoy legal binding force in another Member State – directly or after corresponding recognition.[198] In some areas (e.g. driving licences)[199] the same applies to international law. Secondly, Union law fosters mechanisms in which cross-border cooperation between authorities and participation in international decision-making forums is necessary. Examples include take charge requests under the Dublin Regulation in asylum law,[200] coordinated assessments for cross-border environmental impacts,[201] and multilateral bodies such as the Body of European Regulators for Electronic Communications (BEREC). Administrative staff must therefore be able to correctly record foreign administrative acts. This sometimes requires language skills. Above all, an awareness of different administrative organisations and cultures in foreign States is necessary.[202] In the past, the EU promoted this through various exchange programmes for civil servants.[203]

4. *Work of the Civil Service*

Finally, international and Union law unfold transformational impulses for the work of the civil service. They point in the direction of a civil service working transparently (Subsection IV.4.1) and based on common values (Subsection IV.4.2).

4.1. Towards an Administrative Culture of Transparency

At first glance, transparency means insight into administrative procedures and a right to access information, in particular official documents.[204] In fact, the concept of transparency goes far beyond this: the "transparency turn"[205] made by international and Union law marks a change towards a new administrative culture.[206] This is characterised by an understanding of administration that is above all democratic and participatory, and committed to the rule of law.

198 In detail Sydow (2004), pp. 138 f.; overview at Ellerbrok (2022), pp. 969 f.

199 See Article 41, para. 2 of the Convention on Road Traffic, done at Vienna on 8 November 1968; last amended on 28 March 2006.

200 Article 21 of the Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31.

201 Article 7 of the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ 2012 L 26/1; last amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, OJ L 124/1.

202 Sydow (2004), p. 90.

203 See e.g. Article 4, letter a) of the Council Decision of 20 June 1991 on the adoption of a programme of Community action on the subject of the vocational training of customs officials (Matthaeus programme), 91/341/EEC, OJ L 187/41; Article 8, letter b) of the Council Decision of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme), 2002/463/EC, OJ L 161/11.

204 Reichel (2021), p. 935.

205 Peters (2015), p. 3.

206 Sommermann (2014), p. 616.

At the international level, UN conventions do not expressly oblige national administrations to a certain degree of transparency. But the freedom of information laid down in Article 19, paragraph 2 ICCPR has been interpreted as embracing a "right of access to information held by public bodies" by the UN Human Rights Committee.[207] The OECD advocates emphatically for an open government policy. Already in 2002, the OECD organised a roundtable on building open government.[208] Recently, the organisation published a report comparing its Member States' efforts in providing government data, thus setting incentives.[209] Just like the OECD, the Council of Europe promotes a more open and transparent administrative culture, as seen already in Recommendation No. R (81) 19 on the access to information held by public authorities.[210] The Convention on Access to Official Documents, which has been ratified by 15 countries so far,[211] is of particular importance. This "Tromsø Convention" sets out a basic guarantee that everyone has the right to access, on request, official documents held by public authorities (Article 2, paragraph 1 of the Convention). Several ratifying States had fulfilled these requirements by national acts before (e.g. Norway),[212] but e.g. in Ukraine[213] the Convention propelled the introduction and/or extension of a comprehensive freedom of information act. Particularly in those States that have not acceded to the Tromsø Convention, the case law of the ECtHR must be taken into account. This aims in the same direction, albeit more cautiously. In the case of *Magyar Helsinki Bizottság v. Hungary*, the ECtHR deduced from the open text findings of Article 8 ECHR a right to access to public documents, at least for the press or organisations playing the role of a social "watchdog", insofar as this is intended to contribute to the public debate and the information is in the public interest.[214]

Last but not least, the transparency initiatives of the EU must be taken into account.[215] These become obvious in environmental matters: pursuant to Article 3, paragraph 1 of the Directive 2003/4/EC,[216] Member States have to ensure that public authorities make environmental information held by or for them available to any applicant upon request. The provision of Article 6, paragraph 2 of the Directive 2011/92/EU[217] obliges the competent national authority to provide comprehensive information at an early stage about a project for which an environmental impact assessment is to be carried out. Ultimately, the EU strengthens an open data culture, e.g. through Directive (EU) 2019/1024 on open

207 UN Human Rights Committee (2011), p. 4.

208 The discussed papers are published in OECD (2003).

209 OECD (2018).

210 Recommendation no. R (81) 19 of the Committee of Ministers to Member States on the access to information held by public authorities, adopted by the Committee of Ministers on 25 November 1981.

211 November 2024.

212 Sand (2020), paras. 8.22 and 8.40.

213 See Sorg and Richter (2021), pp. 294 f.

214 ECtHR, judgment of 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*, 18030/11, paras. 149 ff.

215 Beyond this, transparency is one of the SIGMA principles, see SIGMA (2017), p. 26, Principle 6.

216 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41/26.

217 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ 2012 L 26/1; last amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, OJ L 124/1.

data and the reuse of public sector information.[218] From an overall perspective, the transparency turn has led to a new openness in the European administrations, which mostly had a tradition of a rather arcane administrative culture – with rare exceptions like Finland[219] and Sweden,[220] where the *offentlighetsprincipen* (principle of publicity) is deeply rooted. Furthermore, strengthening the awareness for transparency needs by international and Union law has also promoted the fight against corruption, which persists as a severe problem in several European countries,[221] and fostered trust as a prerequisite for the functioning of public institutions.[222]

4.2. Towards an Administrative Culture Based on Common Values

International and Union law pave the way to an administrative culture based on a common mindset and common values in Europe. These values are laid down in various places: according to Article 3 of the Statute of the Council of Europe, every member must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. Largely consistent values, supplemented by the commitment to democracy, can be found in Article 2, sentence 1 TEU. Even before this provision came into force, the CJEU highlighted the EU's self-conception as a "community based on the rule of law".[223] These values provide a uniform orientation for administrative work in Europe. They serve as meta concepts or *Schleusenbegriffe* (sluice mechanisms)[224] which prepare the common ground for mutual coordination and are used in practice, for example, in the handling and interpretation of regulations.[225] The value orientation is strengthened by corresponding political declarations,[226] a European socialisation and increasing cross-border contacts, where the common values can serve as a basis for discussion and debate. Even if there is no specific awareness of the normative anchoring of these values in the civil service, they are put into practice by the concretising regulations. Moreover, Article 41 CFR and The European Code of Good Administrative Behaviour are becoming increasingly relevant. Although both are directly applicable only for EU employees, they serve as a role model for a "good" and value-based civil service in the Member States.[227]

218 Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the reuse of public sector information, OJ L 172/56.

219 See Erkkilä (2021), pp. 153 f.

220 See Reichel (2021), pp. 937 f. In Sweden, there are even complaints of a step backwards in terms of transparency due to globalisation and Europeanisation, see Österdahl (2015), pp. 94 f.

221 For post-communist countries see Nakrošis (2017), p. 13; Liebert et al. (2013), p. 342.

222 van der Meer et al. (2015), p. 49.

223 CJEU, judgment of 23 April 1986, *Parti écologiste 'Les Verts' v. European Parliament*, 294/83, para. 23. Nowadays, the CJEU refers to a "union based on the rule of law", see CJEU, judgment of 24 June 2019, *European Commission v. Poland*, C-619/18, para. 46.

224 Sommermann (2014), p. 615, adopting the term from Böckenförde (1969), p. 53.

225 Regarding such a *weiche Europäisierung* (soft Europeanisation), see Wolff (2014), p. 7.

226 See the Strasbourg Declaration on the Common values and challenges of European Public Administrations, adopted on 17 March 2022 by the European ministers responsible for public administration, public transformation, and the civil service.

227 Sommermann (2014), p. 621. For the idea of a *culture administrative commune* see as well Sauron (2000), p. 458.

V. Conclusions

Even though most of the civil service systems show a remarkable degree of continuity,[228] and an immense heterogeneity of national civil services and their law persists,[229] this contribution has highlighted that international and Union law entail various transformational impulses. Overall, common tendencies were identified, especially among the EU Member States. International law, in particular "Council of Europe law"[230] and Union law, lead to a more heterogenous, autonomous, responsive civil service based on common values. In detail, transformational impulses are often not implemented in the same way, especially because international organisations and the EU often do not provide precise guidelines in this respect. Nevertheless, certain convergence tendencies of the civil service in Europe can be identified,[231] even if a uniform European model of civil service is beyond reach.[232] Taking everything into account, international and Union law should not be criticised prematurely as interference in the national domain, but rather they offer opportunities for the development of the civil service.[233] In the long run, a European approach will prevail which is aware that civil services are facing identical challenges. And challenges are best overcome together.

Bibliography

Albanese A. (2022), 'Der öffentliche Dienst in Italien: Vom öffentlichen Recht zum Sonderarbeitsrecht', 75 *Die Öffentliche Verwaltung*, 693–701.
Bach T., Ruffing E. (2018), 'The Transformative Effects of Transnational Administrative Coordination in the European Multi-level System', in Ongaro E., van Thiel S. (eds), *The Palgrave Handbook of Public Administration and Management in Europe*, vol. 2, London: Palgrave Macmillan, 747–764.
Bach T., Ruffing E., Yesilkagit K. (2015), 'The Differential Empowering Effects of Europeanization on the Autonomy of National Agencies', 28 *Governance*, 285–304.
Bezes P., Lodge M. (2015), 'Civil Service Reforms, Public Service Bargains and Dynamics of Institutional Change', in van der Meer F.M., Raadschelders J.C.N., Toonen T.A.J. (eds), *Comparative Civil Service Systems in the 21st Century*, 2nd edition, London: Palgrave Macmillan, 136–161.
Böckenförde E.-W. (1969), 'Entstehung und Wandel des Rechtsstaatsbegriffs', in Ehmke H., Schmid C., Scharoun H. (eds), *Festschrift für Adolf Arndt*, Frankfurt am Main: Europäische Verlagsanstalt, 53–76.
Camyar I. (2010), 'Europeanization, Domestic Legacies and Administrative Reforms in Central and Eastern Europe: A Comparative Analysis of Hungary and the Czech Republic', 32 *Journal of European Integration*, 137–155.
Chevalier E. (2020), 'The Impact of Pan-European Principles of Good Administration on the Administrative Law of France', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 154–181.
Connaughton B. (2015), 'Developing a Hybrid Identity? The Europeanisation of Public Servants at the Continent's Far West', in Sager F., Overeem P. (eds), *The European Public Servant. A Shared Administrative Identity?*, Colchester: ECPR Press, 199–217.

228 European Commission (2018), p. 57; Bach and Ruffing (2018), p. 755.
229 Ongaro and van Thiel (2018), p. 6.
230 ECtHR, judgment of 8 July 2010, *Sitaropoulos and Giakoumopoulos v. Greece*, 42202/07, paras. 35, 44.
231 Franchini (2018), p. 247; Krzywoń (2022), p. 19; Overeem and Sager (2015), p. 298; Voßkuhle (2007), p. 201. Critically Dimitrakopoulos and Passas (2012), p. 536: "very little evidence, if at all".
232 Demmke (2015), p. 460; Demmke (2019), p. 381.
233 Concerning EU law, see Mastenbroek (2018), p. 826.

Council of Europe (1975), *The Protection of the Individual in Relation to Acts of Administrative Authorities. An Analytical Survey of the Rights of the Individual in the Administrative Procedure and Its Remedies Against Administrative Acts*, Strasbourg.

Council of the European Union (2022a), *Council Recommendation of 12 July 2022 on the 2022 National Reform Programme of Greece and Delivering a Council Opinion on the 2022 Stability Programme of Greece*, OJ C 334/60.

Council of the European Union (2022b), *Council Recommendation of 12 July 2022 on the 2022 National Reform Programme of Poland and Delivering a Council Opinion on the 2022 Convergence Programme of Poland*, OJ C 334/171.

De Becker A. (2011), 'The Legal Status of Public Employees or Public Servants: Comparing the Regulatory Frameworks in the United Kingdom, France, Belgium, and the Netherlands', 32 *Comparative Labor Law & Policy Journal*, 949–990.

De Becker A. (2016), 'La situation juridique des fonctionnaires et du personnel contractuel dans le secteur public en Belgique: quelle unite dans la diversité?', in Dunand J.-P., Mahon P., Perrenoud S. (eds), *Le droit de la relation de travail à la croisée des chemins: Convergences et divergences entre le droit privé du travail et le droit de la function publique*, Geneva: Schulthess, 327–348.

De Somer S. (2017), *Autonomous Public Bodies and the Law. A European Perspective*, Cheltenham: Edward Elgar.

Demmke C. (2005), *Are Civil Servants Different Because They Are Civil Servants? Who Are the Civil Servants – And How?*, Maastricht: European Institute of Public Administration.

Demmke C. (2010), 'Beamtenrechtsreformen in Europa – Aktuelle Entwicklungen und empirische Erfahrungen', *Zeitschrift für Beamtenrecht*, 109–123.

Demmke C. (2015), 'The Europeanization of Civil Services and Human Resources (HR) Policies', in Bauer M.W., Trondal J. (eds), *The Palgrave Handbook of the European Administrative System*, Basingstoke: Palgrave Macmillan, 449–463.

Demmke C. (2019), 'Reform der öffentlichen Dienste im internationalen Vergleich', in Veit S., Reichard C., Wewer G. (eds), *Handbuch zur Verwaltungsreform*, 5th edition, Wiesbaden: Springer, 373–383.

Dimitrakopoulos D.G., Passas A.G. (2012), 'International Organizations and Domestic Administrative Reform', in Peters B.G., Pierre J. (eds), *The SAGE Handbook of Public Administration*, 2nd edition, Los Angeles: Sage, 532–544.

Dimitrova A. (2002), 'Enlargement, Institution-Building and the EU's Administrative Capacity Requirement', 25 *West European Politics*, 171–190.

Dragos D.C., Chirila C. (2020), 'A Tale of Europeanization. Romanian Administrative Law and its Deference to the Pan-European General Principles of Good Administration', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 621–642.

Dyson K.H.F. (1977), *Party, State, and Bureaucracy in Western Germany*, Beverly Hills: Sage.

Einaudi T. (2018), 'L'intégration du droit de l'Union européenne dans le droit de la function publique: entre résistance, inertie et deference', *Revue de l'Union Européenne*, 620–627.

Ellerbrok T. (2022), 'Transnationaler Verwaltungsakt', *Juristische Arbeitsblätter*, 969–975.

Enqvist L., Naarttijärvi M. (2021), 'Administrative Independence Under EU Law: Stuck Between a Rock and Costanzo?', 27 *European Public Law*, 707–732.

Erkkilä T. (2021), 'Transparency and Nordic Openness in Finland: Ideational Shift, Invented Tradition, and Anders Chydenius', in Marjanen J., Strang J., Hilson M. (eds), *Contesting Nordicness: From Scandinavianism to the Nordic Brand*, Berlin: De Gruyter Oldenbourg, 153–174.

Ernits M., Pähkla K. (2020), 'Europeanization through Constitutionalism: Estonia', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 536–559.

European Commission (1988), *Freedom of Movement of Workers and Access to Employment in the Public Service of the Member States – Commission Action in Respect of the Application of Article 48 (4) of the EEC Treaty*, OJ 1988 C 72/2.

European Commission (2013), *European Public Sector Innovation Scoreboard 2013. A Pilot Exercise*, Luxembourg: Publications Office of the European Union.

European Commission (2017a), *EU Law: Better Results Through Better Application*, OJ 2017 C 18/10.

European Commission (2017b), *Quality of Public Administration – A Toolbox for Practitioners*, Luxembourg: Publications Office of the European Union.

European Commission (2018), *A Comparative Overview of Public Administration Characteristics and Performance in EU28*, Luxembourg: Publications Office of the European Union.

European Commission (2020), *White Paper on Artificial Intelligence – A European Approach to Excellence and Trust*, COM(2020) 65 final.

European Commission (2021), *Pay-for-Performance in the Civil Service of the EU*, Luxembourg: Publications Office of the European Union.

European Commission (2022), *The Digital Economy and Society Index (DESI) 2022. Thematic Chapters*, https://ec.europa.eu/newsroom/dae/redirection/document/88764.

European Ombudsman (2002), *The European Code of Good Administrative Behaviour*, www.ombudsman.europa.eu/en/publication/en/3510.

Fehling M. (2021), 'Die Funktion von Verfahren im Unionsrecht', in Leible S., Terhechte J.P. (eds), *Enzyklopädie Europarecht, Vol. 2: Europäisches Rechtsschutz- und Verfahrensrecht*, 2nd edition, Baden-Baden: Nomos, 79–109.

Fortier C. (2021), 'La loi du 6 août 2019, ou comment développer le statut "en même temps" que le contrat', *Revue du droit public*, 111–120.

Franchini C. (2018), 'L'organizzazione amministrativa dell'Unione Europea', in Chiti M.P. (ed), *Diritto amministrativo europeo*, 2nd edition, Milan: Giuffrè Editore, 223–300.

Hébrard G. (2014), 'La limite d'âge des "aiguilleurs du ciel" passe le cap du Conseil d'Etat sans convaincre', *La Revue de Droits de l'Homme. Actualités Droits-Libertés*, June 2014, https://journals.openedition.org/revdh/846.

Henneberger F., Henneberger-Sudjana S. (2011), 'Arbeitsmarkt und öffentlicher Dienst: Chancen in der Krise – Der Schweizer Weg', in Schrapper L. (ed), *Ausbildung für die öffentliche Verwaltung. Zur Zukunft des öffentlichen Dienstes als Arbeitgeber*, Baden-Baden: Nomos, 117–141.

Ickenroth C. (2016), *Das deutsche Beamtenstreikverbot im Lichte der Europäischen Menschenrechtskonvention*, Berlin: Duncker & Humblot.

International Bank for Reconstruction and Development, International Development Association, International Finance Corporation (2013), 'Country Partnership Strategy for the Republic of Moldova for the Period FY 14–17', Report no. 79701-MD, http://documents1.worldbank.org/curated/en/512231468058129094/pdf/797010CAS0R2010p00OUO0900Box379801B.pdf.

International Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency (2017), 'Country Partnership Framework for the Republic of Moldova for the Period FY18–21', Report no. 115716-MD, http://documents1.worldbank.org/curated/en/604221499282920085/pdf/MOLDOVA-CPF-FY18-21-20170629-final-07052017.pdf.

Jaag T. (2014), 'Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Schweiz', in von Bogdandy A., Cassese S., Huber P.M. (eds), *Handbuch Ius Publicum Europaeum, Vol. V: Verwaltungsrecht in Europa: Grundzüge*, Heidelberg: C. F. Müller, 671–721.

Jakab A., Hollán M. (2004), 'Socialism's Legacy in Contemporary Law and Legal Scholarship: The Case of Hungary', *The Journal of East European Law*, 95–122.

Joseph S., Castan M. (2013), *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, 3rd edition, Oxford: Oxford University Press.

Kagarios D. (2021), 'Reassessing the Framework for the Protection of Civil Servant Whistleblowers in the European Court of Human Rights', 39 *Netherlands Quarterly of Human Rights*, 220–240.

Kellerbauer M., Martin D. (2019), 'Article 45 TFEU', in Kellerbauer M., Klamert M., Tomkin J. (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford: Oxford University Press, 606–633.

Klaß F. (2014), *Die Fortentwicklung des deutschen Beamtenrechts durch das europäische Recht*, Baden-Baden: Nomos.

Knill C. (2001), *The Europeanisation of National Administrations*, Cambridge: Cambridge University Press.

König K. (2014), 'Verwaltungskultur – Typologisch betrachtet', in König K., Kropp S., Kuhlmann S., Reichard C., Sommermann K.-P., Ziekow J. (eds), *Grundmuster der Verwaltungskultur*, Baden-Baden: Nomos, 13–28.

Konrad K. (2015), 'Das Besoldungsrecht im Mehrebenensystem', in Hebeler T., Kersten J., Lindner J.F. (eds), *Handbuch Besoldungsrecht*, Munich: C. H. Beck, 69–90.

Krzywoń A. (2022), 'The Notion of Civil Service in Europe: Establishing an Analytical Framework for Comparative Study', *Speyer: Deutsches Forschungsinstitut für öffentliche Verwaltung, Discussion Paper 91*, https://dopus.uni-speyer.de/frontdoor/index/index/docId/5606.

Lambert C. (2011), 'Concept d'administration publique et jurisprudence de la Cour de justice de l'Union européenne', in Potvin-Solis L. (ed), *Vers un modèle européen de fonction publique?*, Brussels: Bruylant, 223–233.

Lauer R.N. (2017), *Das Recht des Beamten zum Streik. Von den rechtshistorischen Ursprüngen des beamtenrechtlichen Streikverbots bis zu seiner völkerrechtlichen Infragestellung*, Berlin: Duncker & Humblot.

Leisner-Egensperger A. (2018), 'Ruhe im "Beamtenstaat Österreich"? Das öffentliche Dienstrecht im Umbruch. Grundlagen einer Neukonzeption', 26 *Journal für Rechtspolitik*, 134–142.

Levine C.H., Peters B.G., Thompson F.J. (1990), *Public Administration. Challenges, Choices, Consequences*, Glenview: Scott, Foresman and Co.

Liebert S., Condrey S.E., Goncharov D. (2013), 'Conclusion: Public Administration in Former Soviet States – Two Decades of Different Ways', in Liebert S., Condrey S.E., Goncharov D. (eds), *Public Administration in Post-Communist Countries. Former Soviet Union, Central and Eastern Europe, and Mongolia*, Boca Raton: Routledge, 339–354.

Mańko R. (2013), 'Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome', 7 *Pólemos*, 207–233.

Marique Y. (2020), 'Belgian Pluralism and Pragmatism. Shared Principles in a Strained Relationship', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 123–153.

Mastenbroek E. (2018), 'Europeanization of Policies and Administration', in Ongaro E., van Thiel S. (eds), *The Palgrave Handbook of Public Administration and Management in Europe*, vol. 2, London: Palgrave Macmillan, 823–840.

Matei A. (2013), 'Public Administration in Romania: Historical Milestones and Daily Realities', in Liebert S., Condrey S.E., Goncharov D. (eds), *Public Administration in Post-Communist Countries. Former Soviet Union, Central and Eastern Europe, and Mongolia*, Boca Raton: Routledge, 217–250.

Maurer V. (2002), 'Recht des öffentlichen Dienstes, Wehrpflicht-, Zivildienst- und Unterhaltssicherungsrecht, Recht der freien Berufe', in Bergmann J., Kenntner M. (eds), *Deutsches Verwaltungsrecht unter europäischem Einfluss*, Stuttgart: Richard Boorberg, 351–386.

Mazur S., Kopyciński P. (2020), 'A Review of Administrative Reforms in the V4 Countries', in Mazur S. (ed), *Public Administration in Central Europe*, London: Routledge, 270–286.

Meyer-Sahling J.-H. (2004), 'Civil Service Reform in Post-Communist Europe: A Bumpy Road to Depoliticisation', 27 *West European Politics*, 71–103.

Meyer-Sahling J.-H. (2009), 'Varieties of Legacies: A Critical Review of Legacy Explanations of Public Administration Reform in East Central Europe', 75 *International Review of Administrative Sciences*, 509–528.

Meyer-Sahling J.-H. (2011), 'The Durability of EU Civil Service Policy in Central and Eastern Europe after Accession', 24 *Governance*, 231–260.

Meyer-Sahling J.-H., van Stolk C. (2015), 'A Case of Partial Convergence: The Europeanization of Central Government in Central and Eastern Europe', 93 *Public Administration*, 230–247.

Nakrošis V. (2017), 'The Quantitative and Qualitative Analysis of Public Administration Reforms in Post-Communist Countries', 6 *Baltic Journal of Political Science*, 5–26.

Nowak M. (2005), *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2nd edition, Kehl: N. P. Engel.

OECD (1997), *Measuring Public Employment in OECD Countries: Sources, Methods and Results*, Paris: OECD Publications Service.

OECD (2003), *Open Government. Fostering Dialogue with Civil Society*, Paris: OECD Publishing.

OECD (2005), *Performance-related Pay Policies for Government Employees*, Paris: OECD Publishing.

OECD (2014), *Recommendation of the Council on Digital Government Strategies*, Paris: OECD Publishing.

OECD (2016), *2015 OECD Recommendation of the Council on Gender Equality in Public Life*, Paris: OECD Publishing.

OECD (2017), *Skills for a High Performing Civil Service, OECD Public Governance Reviews*, Paris: OECD Publishing.

OECD (2018), *Open Government Data Report: Enhancing Policy Maturity for Sustainable Impact, OECD Digital Government Studies*, Paris: OECD Publishing.
OECD (2020a), 'The OECD Digital Government Policy Framework: Six Dimensions of a Digital Government', OECD Public Governance Policy Papers no. 02.
OECD (2020b), 'Digital Government Index: 2019 Results', OECD Public Governance Policy Papers no. 03.
OECD (2021a). *Government at a Glance*, Paris: OECD Publishing.
OECD (2021b). *Public Employment and Management 2021: The Future of the Public Service*, Paris: OECD Publishing.
OECD (2022), 'Report on the Implementation of the OECD Gender Recommendations', C/MIN(2022)7.
Ongaro E., van Thiel S. (2018), 'Introduction', in Ongaro E., van Thiel S. (eds), *The Palgrave Handbook of Public Administration and Management in Europe*, vol. 1, London: Palgrave Macmillan, 3–10.
Österdahl I. (2015), 'Transparency versus Secrecy in an International Context: A Swedish Dilemma', in Lind A.-S., Reichel J., Österdahl I. (eds), *Information and Law in Transition – Freedom of Speech, the Internet, Privacy and Democracy in the 21st Century*, Stockholm: Liber, 74–99.
Overeem P., Sager F. (2015), 'Conclusions: Common Ground for a Common Future?', in Sager F., Overeem P. (eds), *The European Public Servant. A Shared Administrative Identity?*, Colchester: ECPR Press, 295–302.
Paskalev V. (2020), 'Implementation of the Pan-European General Principles of Good Administration in Bulgaria? It Would Be a Really Good Idea', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 504–535.
Paužaitė-Kulvinskienė J., Andrijauskaitė A. (2020), 'The Pan-European General Principles of Good Administration in Lithuania. A Success Story with Caveats', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 560–582.
Peters A. (2015), 'The Transparency Turn of International Law', 1 *The Chinese Journal of Global Governance*, 3–15.
Peters B. (2020), *Legitimation durch Öffentlichkeitsbeteiligung?*, Tübingen: Mohr Siebeck.
Peters B.G., Pierre J. (2004), 'Politicization of the Civil Service: Concepts, Causes, Consequences', in Peters B.G., Pierre J. (eds), *Politicization of the Civil Service in Comparative Perspective*, Abingdon: Routledge, 1–13.
Pochard M. (2011), 'Droit de la fonction publique et droit commun du travail', in Potvin-Solis L. (ed), *Vers un modèle européen de fonction publique?*, Brussels: Bruylant, 131–141.
Reichard C., Schröter E. (2021), 'Civil Service and Public Employment', in Kuhlmann S., Proeller I., Schimanke D., Ziekow J. (eds), *Public Administration in Germany*, Cham: Palgrave Macmillan, 205–223.
Reichel J. (2021), 'Openness and Transparency', in Cane P., Hofmann H.C.H., Ip E.C., Lindseth P.L. (eds), *Oxford Handbook of Comparative Administrative Law*, Oxford: Oxford University Press, 935–956.
Rouban L. (2012), 'Politicization of the Civil Service', in Peters B.G., Pierre J. (eds), *The SAGE Handbook of Public Administration*, 2nd edition, Los Angeles: SAGE, 380–391.
Ruffing E. (2015), 'Agencies between Two Worlds: Information Asymmetry in Multilevel Policy-making', 22 *Journal of European Public Policy*, 1109–1126.
Sand I.-J. (2020), 'The Council of Europe and Pan-European General Principles of Good Administration. The Influence on the Administrative Law of Norway', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 242–255.
Saul B., Kinley D., Mowbray J. (2014), *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials*, Oxford: Oxford University Press.
Sauron J.-L. (2000), 'Le rôle des états membres dans l'administration de l'Union européen', 95 *Revue française d'administration publique*, 453–463.
Schabas W.A. (2015), *The European Convention on Human Rights. A Commentary*, Oxford: Oxford University Press.
Schmidt T.I. (2018), 'Europäisierung des öffentlichen Dienstrechts', *Zeitschrift für Beamtenrecht*, 218–222.

Scholz R. (2014), 'Öffentlicher Dienst und Daseinsvorsorge: Verfassungsimmanente Schranken des Arbeitskampfes', in Bultmann P.F., Grigoleit K.J., Gusy C., Kersten J., Otto C.-W., Preschel C. (eds), *Allgemeines Verwaltungsrecht. Institute, Kontexte, System. Festschrift für Ulrich Battis zum 70. Geburtstag*, Munich: C. H. Beck, 577–585.
Schulz M. (2016), *Zum Streikrecht vom Beamten. Eine Untersuchung unter besonderer Berücksichtigung der neueren Rechtsprechung des EGMR*, Baden-Baden: Nomos.
Selejan-Gutan B. (2016), *The Constitution of Romania. A Contextual Analysis*, London: Bloomsbury Publishing.
SIGMA (2016), *The Principles of Public Administration: A Framework for ENP Countries*, www.sigmaweb.org/publications/principles-enp-eng.pdf.
SIGMA (2017), *The Principles of Public Administration*, www.sigmaweb.org/publications/Principles-of-Public-Administration-2017-edition-ENG.pdf.
SIGMA (2022), *Monitoring Report – Executive Summary, The Principles of Public Administration, Bosnia and Herzegovina*, www.sigmaweb.org/publications/Monitoring-Report-Executive-Summary-May-2022-Bosnia-and-Herzegovina.pdf.
Sinani B. (2019), 'Overview on the Legal Instruments of the Council of Europe in the Field of Administrative Law', 9 *Juridical Tribune*, 298–316.
Sommermann K.-P. (2014), 'Towards a Common European Administrative Culture?', in König K., Kropp S., Kuhlmann S., Reichard C., Sommermann K.-P., Ziekow J. (eds), *Grundmuster der Verwaltungskultur*, Baden-Baden: Nomos, 605–628.
Sorg S., Richter H. (2021), 'Informationsfreiheit und Open Data in der Ukraine: Kritische Würdigung anlässlich der Tromsø-Konvention – Teil 2', *Wirtschaft und Recht in Osteuropa*, 293–296.
Speer B. (2008), 'Europafähigkeit des öffentlichen Dienstes und Europakompetenz öffentlich Bediensteter. Anforderungen des Europäischen Verwaltungsraums an das deutsche System', in Magiera S., Sommermann K.-P., Ziller J. (eds), *Verwaltungswissenschaft und Verwaltungspraxis in nationaler und transnationaler Perspektive. Festschrift für Heinrich Siedentopf zum 70. Geburtstag*, Berlin: Duncker & Humblot, 683–703.
Speer B. (2011), 'Un défi permanent: L'adaptation de la fonction publique allemande au droit et au fait communautaires', in Potvin-Solis L. (ed), *Vers un modèle européen de fonction publique?*, Brussels: Bruylant, 313–325.
Staroňová K. (2017), *Performance Appraisal in the EU Member States and the European Commission*, Bratislava: Government Office of Slovakia.
Staroňová K., Gadjuschek G. (2013), 'Civil Service Reform in Slovakia and Hungary: The Road to Professionalisation', in Neuhold C., Vanhoonacker S., Verhey L. (eds), *Civil Servants and Politics. A Delicate Balance*, Basingstoke: Palgrave Macmillan, 123–151.
Stelkens U., Andrijauskaitė A. (2020a), 'Introduction – Setting the Scene for a "True Administrative Law"', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 1–16.
Stelkens U., Andrijauskaitė A. (2020b), 'Sources and Content of the Pan-European General Principles of Good Administration', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 19–54.
Stelkens U., Andrijauskaitė A. (2020c), 'How to Assess the Effectiveness of the Pan-European General Principles of Good Administration. Research Methods and Approach', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 55–77.
Stelkens U., Andrijauskaitė A., Marique Y. (2020), 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration. Overall Assessment', in Stelkens U., Andrijauskaitė A. (eds), *Good Administration and the Council of Europe*, Oxford: Oxford University Press, 757–822.
Sydow G. (2004), *Verwaltungskooperation in der Europäischen Union. Zur horizontalen und vertikalen Zusammenarbeit der europäischen Verwaltungen am Beispiel des Produktzulassungsrechts*, Tübingen: Mohr Siebeck.
Szymczak D. (2011), 'Concepts de fonction publique et d'administration publique dans la jurisprudence de la Cour européenne des droits de l'homme', in Potvin-Solis L. (ed), *Vers un modèle européen de fonction publique?*, Brussels: Bruylant, 235–252.

Taillefait A. (2021), 'Le droit international public, source du droit français de la fonction publique', in Decaux E., Hajjami N. (eds), *Panser la guerre – Penser la paix. Mélanges en l'honneur du Professeur Rahim Kherad*, Paris: Editions Pedone, 363–374.

Taillefait A. (2022), *Droit de la fonction publique*, 9th edition, Paris: Dalloz.

Touzeil-Divina M. (2018), 'À propos de la/des contractualisation(s) croissante(s) dans la/les fonction(s) publique(s) française(s)', in Espagno-Abadie D., Peneranda A. (eds), *Fonction(s) publique(s): le défi du changement*, Rennes: Presses de l'École des hautes études en santé publique, 133–141.

Tryfonidou A. (2021), 'Article 45 TFEU', in Blanke H.-J., Mangiameli S. (eds), *Treaty on the Functioning of the European Union – A Commentary, Vol. I: Preamble, Articles 1–89*, Cham: Springer, 959–1011.

Uerpmann-Wittzack R. (2013), 'Rechtsfortbildung durch Europaratsrecht', in Breuer M., Epiney A., Haratsch A., Schmahl S., Weiß N. (eds), *Der Staat im Recht, Festschrift für Eckart Klein zum 70. Geburtstag*, Berlin: Duncker & Humblot, 939–951.

Ullrich N. (2021), 'Beamtentum und Neutralität', *Zeitschrift für Beamtenrecht*, 227–235.

UN Committee on Economic, Social and Cultural Rights (2019), 'Concluding Observations on the Third Periodic Report of Estonia', E/C.12/EST/CO/3.

UN Human Rights Committee (2011), 'General comment No. 34, Art. 19: Freedoms of Opinion and Expression', CCPR/C/GC/34.

van den Berg C.F., Toonen T.A.J. (2015), 'National Civil Service Systems and the Implications of Multi-level Governance: Weberianism Revisited?', in van der Meer F.M., Raadschelders J.C.N., Toonen T.A.J. (eds), *Comparative Civil Service Systems in the 21st Century*, 2nd edition, London: Palgrave Macmillan, 114–135.

van der Meer F.M., Steen T., Wille A. (2015), 'Civil Service Systems in Western Europe: A Comparative Analysis', in van der Meer F.M., Raadschelders J.C.N., Toonen T.A.J. (eds), *Comparative Civil Service Systems in the 21st Century*, 2nd edition, London: Palgrave Macmillan, 38–56.

van der Meer F.M., van den Berg C.F., Dijkstra G.S.A. (2012), 'Rethinking the "Public Service Bargain": The Changing (Legal) Position of Civil Servants in Europe', 79 *International Review of Administrative Sciences*, 91–109.

Ványolós I., Hajnal G. (2013), 'Hungarian Public Administration: From Transition to Consolidation', in Liebert S., Condrey S.E., Goncharov D. (eds), *Public Administration in Post-Communist Countries. Former Soviet Union, Central and Eastern Europe, and Mongolia*, Boca Raton: Routledge, 277–292.

Voßkuhle A. (2007), 'Europäisierung des öffentlichen Dienstrechts', in Pitschas R., Uhle A. (eds), *Wege gelebter Verfassung in Recht und Politik. Festschrift für Rupert Scholz zum 70. Geburtstag*, Berlin: Duncker & Humblot, 189–201.

Weichselbaum B. (2004), 'Berufsbeamtentum in Österreich in Erosion? Eine Bestandsaufnahme verfassungsrechtlicher Vorgaben und ihrer Negierung durch Gesetzgebung und Vollziehung', *Zeitschrift für Beamtenrecht*, 19–29.

Wenander H. (2022), 'Administrative Independence in the Nordic States – EU Law Requirements and National Traditions', 5 *Nordic Journal of European Law*, 20–39.

Wolff H.A. (2014), 'Die Unionalisierung des Beamtenrechts', *Zeitschrift für Beamtenrecht*, 1–8.

Zankina E. (2020), 'Public Administration Reform in Bulgaria: Top-down and Externally-driven Approach', 18 *Central European Public Administration Review*, 89–124.

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