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Civil Servants

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A. Introduction

1 Civil servants play a major role at the interface between the state and its citizens. They are tasked with implementing and enforcing the legislative will in concrete situations through executive action. The ways in which they perform this task is determinative of how the → *rule of law* is complied with in a given state, even before courts are involved in any litigation. Indeed, as courts are only able to adjudicate a limited number of cases, the majority of administrative action is never reviewed externally. The original administrative action taken by the civil service is thus the decision defining the legal position and/or entitlement of a citizen. This decision concretizes more or less comprehensively the individual rights, freedoms, and protection that the constitution provides for citizens. Each state developed its own civil service structure as an historical process, made up of compromises, lessons drawn from experience, and the search for innovation and → *effectiveness* (Reichard and Schröter 206). Yet, under the constitution, the civil service is shaped by three main features: first, the relationships between the civil service and the executive, and as a consequence their responsiveness to the political priorities of the day; secondly, the close link of loyalty between the civil servant and the state it serves; and thirdly, the similarities with, or distinctiveness from, citizens, ie the special rights and/or duties that civil servants enjoy and which set them more or less apart from the people they affect the rights and entitlements of.

2 Constitutions do not usually define what 'civil service' means, but they may refer to the roles included in the civil service under a distinctive treatment. For instance, constitutions include detailed provisions on judges (eg Art. 106 Constitution of the Republic of Italy: 27 December 1947 (as Amended to 2020) (It); Art. 176 Constitution of the Republic of Ecuador: 28 September 2008 (as Amended to 2021) (Ecuador)), public prosecutors (Art. 279 Political Constitution of Colombia: 1 July 1991 (as Amended to 2015) (Colom); Art. 187 Constitution of the Republic of Angola: 21 January 2010 (Angl); Art. 110 Constitution of Kosovo: 7 April 2008 (as Amended to 2016) (Kos)), auditors and staff of the court of audit (eg Art. 152 Constitution of the Republic of Fiji: 6 September 2013 (Fiji); → *auditing*), notaries (Art. 236 Constitution of the Federative Republic of Brazil: 5 October 1988 (as Amended to 2017) (Braz); Art. 131 Constitution of Colombia), or the staff of the National Registry Office (Art. 266 Constitution of Colombia).

3 Constitutions are patchy about the main features of the civil service. Different models of civil service can be distinguished, albeit partly overlapping in practice: career-based and position-based systems on the one hand; and the Whitehall-Weberian model, on the other. In the Whitehall model, the neutrality of the civil service is paramount to elicit trust; in the Weberian model, the expertise of the civil service is deemed to secure the general interest (Reichard and Schröter 211). The constitutional framing of these models is often only limited: the constitutional practice and architecture of power and of individual rights will indirectly flesh out the sparse constitutional provisions of the civil service. Since the 1980s, extensive reforms of the civil service under the umbrella of the *New Public Management* have blurred the notion of the civil service as well as the constitutional rights and duties attached to it.

4 Starting with the notion of the civil service and its recent evolutions following the *New Public Management* reforms (see Section B of this entry), five key constitutional areas can be identified: the overall relationships between the civil servants and the executive (Section C); the conditions for employment in, access to, and dismissal from the civil service (Section

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D); the appointment of top civil servants (Section E); the rights and duties applicable to the civil service (Section F); and the liability of the civil servants (Section G).

B. Civil Servants: Notion and Evolution

5 The 'civil service' is a notion closely connected to the domestic administrative → *culture* and the historical developments of state institutions: its scope can focus on one tier of government (such as the → *central government* in the United Kingdom ('UK')), or encompass all tiers (such as the central and the local levels of government in France), can focus on employees of public bodies (such as in the UK), include employees in public and private bodies (such as in Belgium), or include employees in specialized fields (such as hospitals in France). This means that the civil service can include a large part of the workforce of some countries (for 2021 statistics, see OECD (2021), in which Norwegian government employment accounts for 30 per cent of the total employment). This reached an especially high level in Western democracies in the 1970s, leading to fears that the civil service might become a state within the state, insulated from the socio-economic needs of the countries and working according to its own bureaucratic logic (MacNeil).

6 In the late 1970s, and early 1980s, these concerns led to *New Public Management* reforms and *Reinventing Government* (Osborne and Gaebler) whereby contractualization and privatization of the civil service were supposed to bring more effectiveness and responsiveness to socio-economic needs in the working of public administrations (Hood). At the international level, these reforms were driven in particular by the Organisation for Economic Co-operation and Development ('OECD'), and by its Support for Improvement in Governance and Management ('SIGMA') unit when it came to administrative capacity-building in Eastern European countries aspiring to become members of the European Union ('EU') (OECD (1999)). Observers of the *New Public Management* reforms have drawn a mixed review of the reforms, highlighting strong differentiation across countries (Pollitt and Boeckaert; Lægreid). However, the trend towards increasing contractualization and privatization remains ongoing, with some countries having adopted a totally private law approach to the civil service (such as the UK, the Netherlands, and Italy). The consequences of these reforms mean that the number of civil servants has decreased overall since the 1970s in Western countries, affected by the *New Public Management* reforms. In addition, so-called special advisors, drawn from outside the civil service, have taken a more prominent place in advising ministers, with questions arising about ministerial responsibility for their advice. The detailed consequences of these reforms in terms of constitutional guarantees would need a far more extended analysis than this short entry allows for (eg Sommermann, Krzywoń, and Fraenkel-Haeberle) as it is not always obvious that privatization of the civil service automatically means a lowering of protection for civil servants. The Belgian case provides a good illustration of this counter-intuitive claim (Slautsky and Marique).

C. Relationships with the Executive and the Rule of Law

7 Constitutions provide more or less direct pointers to the relationships between the civil service and the executive, especially in terms of the powers the Parliament exercises to organize the civil service, and hence to frame the interactions between the executive and the civil servants. The role of the Parliament varies. Indeed, some constitutions entrench its rights. For instance, the French Constitution provides that the Parliament sets the 'fundamental guarantees' enjoyed by the civil service (Art. 34 (2nd sentence) Constitution of France: 4 October 1958 (as Amended up to the Constitutional Law No. 2008-724 of 23 July 2008) (Fr)). In Spain, the Constitution equally provides that the law 'shall lay down the status of civil servants' (s 103(3) Constitution of Spain: 27 December 1978 (as Amended to 2011) (Spain)). A similar provision is found in the Dutch Constitution (Art. 109 Constitution of the Kingdom of the Netherlands: 24 August 1815 (as Amended to 2017) (Neth)). The

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German Basic Law provides that ‘the law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service’ (Art. 33(5) Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 13 July 2017) (Ger)). However, in other constitutions, the organization of the civil service falls within the scope of the executive. The Belgian Constitution is understood in such a way that the general principles of the civil service are set by the King (in practice the Government) (Art. 107 (2nd sentence) Constitution of Belgium: 4 February 1831 (as Amended to 2014) (Belg); Renders 172): as the King appoints civil servants, he is entitled to set the rules regulating the civil service.

8 For Member States of the EU and the → *Council of Europe (COE)*, the membership to these two international organizations influences deeply the constitutional principles applicable to the civil service. The relationships between the Constitution and the European obligations are not detailed here, although the case law of the Court of Justice of the European Union (formerly the European Court of Justice (‘ECJ’)) and the → *European Court of Human Rights (ECtHR)*, as well as Resolutions and Recommendations of the Council of Europe (such as Recommendation No. R(2000)10 on codes of conduct for public officials) interfere with the constitutional provisions—especially when it comes to roles restricted to citizens (see Section D of this entry) and the individual rights and freedoms enjoyed by civil servants (see Section F).

D. Access to the Function and Conditions

9 While constitutions most often remain silent on the principles underpinning the careers of civil servants or their dismissal, they often set the conditions to access the civil service and the main principles applicable to it. Overall, these constitutional provisions shape the special relationships between the civil service and the state by specifying one or more of the following elements.

10 First, constitutions often link access to the civil service and → *citizenship* (eg Art. 70 Constitution of Algeria: 30 December 2020 (Alg); Art. 14 Constitution of the Arab Republic of Egypt: 15 January 2014 (as Amended to 2019) (Egypt)), or nationality (eg Art. 33 Constitution of the Republic of Chad: 4 May 2018 (Chad)). However, ‘everyone has access to the civil service’ according to Article 14 of the Constitution of Côte d’Ivoire: 8 November 2016 (Côte d’Ivoire). In Europe, the citizenship condition led to adaptations following the case law of the ECJ about this matter. In 1980, the ECJ decided that the treaty exception for ‘employment in the public service’ (then Art. 48(4) European Economic Community Treaty) in relation to the free movement of workers applied for:

> posts 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 (*C-149/79, Commission v Belgium* (1980) (ECJ)).

11 This led to subsequent changes to access to the civil service in the EU (Morris, Fredman, and Hayes 20), although the constitutional texts were not always brought into conformity with the EU requirements. This lack of formal constitutional reform needs to be highlighted. Under EU law, the principles of direct effect and primacy imply that EU law can be directly invoked in domestic legal systems. However, the current waves of resistance against EU law in a range of Member States mean that the lack of a formal revision of

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national constitutions does not guarantee against different interpretations by domestic courts in the future (→ *amendment or revision of constitutions*).

12 Secondly, constitutions emphasize how access to the civil service should be organized, with special attention to the → *equality* principle in its formal or substantive sense. The principle of formal equality in regard to access to the civil service is best illustrated with Article 6 of the → *French Declaration of the Rights of Man and of the Citizen (1789)*, Article 10 (2nd and 3rd sentences) of the Belgian Constitution, Article 3 of the Dutch Constitution, and Article 33(2) of the German Basic Law. Depending on the constitution, there is a direct link between equality and the skills and merits of the civil servants (eg in Art. 33(2) German Basic Law; Art. 125 Constitution of Finland: 11 June 1999 (as Amended to 2011) (Fin); Art. 6 Declaration of the Rights of Man and of the Citizen (1789)). The Belgian Constitution does not make that link explicitly but the administrative interpretation of this principle has led to the recognition of 'recruitment and further progression' based on a comparison of titles and merits (Marique 614–16).

13 From relatively close wordings in constitutional texts, different conclusions are drawn when it comes to their actual operationalization. The French derive from the equality principle that competition is a constitutional requirement to access the civil service that the legislator cannot deviate from except with justification. This led to the organization of the highly selective process for recruiting future top civil servants for training at the *École Nationale de l'Administration* (set up in 1945, and now abolished and replaced in 2022 by the *Institut du service public*). The Italian Constitution provides formally for 'competitive examination' to access employment in the public administration (Art. 97 Constitution of Italy; Cavallo Perin and Gagliardi 445), as does Article 47(2) of the Constitution of the Portuguese Republic: 2 April 1976 (as Amended to 2005) (Port). In France, however, the formal imperative of equality leads to challenges. Indeed, the highly competitive process does not guarantee that the recruits have the appropriate skills for their future roles. Moreover, the competitive process is said to create an elite that is too detached from the concrete administrative issues arising on the ground. This reinforces a strong gap between the state and citizens. The recruitment process is thus incrementally adapted to become more inclusive and diverse (Bui-Xuan). The concretization of the competitive process may be entrusted to a central commission (eg Selor in Belgium, although the Constitution is silent about it), or left to each administration (eg in Germany; Reichard and Schröter 207). In the latter case, this may weaken the principles of equality and open access: these requirements can be by-passed in concrete cases so that role descriptions can be tailor-made to match pre-selected candidates (Braun). In theory the equality principle also requires that the jobs need to be advertised. This duty cannot be limited by the employer based on its organizational discretion. However, in some cases, the legal interests protected in the constitution may allow for the duty to advertise to be narrowly constructed (Braun).

14 Such selective, open, and fair processes are also part of the constitutional tradition of the Whitehall model of administration. A civil service commission goes back in practice to the Northcote-Trevylan report (1854) and was established in 1855 under royal prerogative in the UK. This commission was put on a statutory footing with the Constitutional Reform and Governance Act 2010 (s 2) (UK). Section 10(2) of this Act provides that 'a person's selection must be on merit on the basis of fair and open competition'. In addition, since 1995, following the first report of the Committee on Standards in Public Life, a commissioner for public appointments has been set up to monitor the selection of civil servants on merit based on a fair and open competition. The appointment process is regulated by a code of conduct adopted in 2017 by Her Majesty's Government. Ministers appoint the members of public boards, but the Commissioner ensures that the code is

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complied with. Only in exceptional circumstances is an appointment without competition allowed.

15 This system of commissions chairing the process of appointment for civil servants can be seen as the ancestor of similar commissions established elsewhere in the former British Empire and beyond. Selective processes through an appointment commission, without explicit mention of equality, are enshrined in constitutional texts, such as Article 320 of the Constitution of India: 26 January 1950 (as Amended to 16 September 2016) (India), Article 196 of the Constitution of the Republic of Ghana: 8 May 1992 (as Amended to 1996) (Ghana), and Article 243 of the Constitution of Nepal: 20 September 2015 (Nepal).

16 In its substantive sense, the equality principle leads to more diversity and representativeness among civil service staff, bearing the marks of national values or the past. For instance, equality between men and women is sometimes emphasized (eg Art. 194(1)(k) Constitution of Zimbabwe: 31 January 2013 (as Amended to 2017) (Zim); Art. 232 Constitution of Kenya: 27 August 2010 (Kenya)), or the inclusion of people with disabilities (Art. 194(1)(k) Constitution of Zimbabwe; Art. 232 Constitution of Kenya). Article 195(1) of the Constitution of the Republic of South Africa: 18 December 1996 (as Amended to 2012) (S Afr) pays special attention to 'the need to redress the imbalances of the past to achieve broad representation'. Article 148 of the Constitution of the Republic of Burundi: 17 May 2018 (Burundi) is even more detailed:

> The Administration is largely representative of the Burundi nation and must reflect the diversity of its people. The practices which the Administration observes in terms of employment are founded on objective and fair criteria of aptitude, along with the necessity to correct imbalances and to assure a large ethnic, regional, and gender diversity. Ethnic representation in public enterprises is filled at a rate of 60% or more for the Hutu and 40% or more for the Tutsi.

17 Some constitutions provide additional information about the conditions to access the civil service. Some constitutions expressly specify incompatibilities. For instance, the Peruvian Constitution provides that 'no official or civil servant may hold more than one remunerated office, with the exception of an additional teaching position' (Art. 40 Political Constitution of Peru: 29 December 1993 (as Amended to 2021) (Peru)). Other constitutions provide explicitly that some features do not constitute a ground for limiting access to the civil service. For instance, the German Basic Law mentions that religious affiliation cannot be a condition for rights acquired in the public service or a cause for being disadvantaged (Art. 33(3)). In Article 14 of the Constitution of Côte d'Ivoire, the interdiction extends to → *discrimination* on the basis of sex, ethnicity, or political or philosophical opinion. Article 70(2) of the Constitution of Turkey: 18 October 1982 (as Amended to 2017) (Turk) states that 'no criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service'.

18 The equality principle to access the civil service has some extensions in the subsequent treatment of civil servants, in terms of promotion and further promotion. For instance, the → *Constitutional Council of France (Conseil Constitutionnel)* recognized this principle to have constitutional value (Decision No. 76–67 (1976) (Fr)). Thus, the principle of equality has to be complied with throughout the careers of civil servants and in disciplinary matters (Taillefait 74). Similarly, in Belgium, the equality principle applies throughout civil servants' careers (Nihoul 675–76).

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19 Constitutions sometimes mention specialized education and training (Art. 138(1) Constitution of the Dominican Republic: 13 June 2015 (Dom Rep)), or 'training and experience requirements for any job, title or position approximate national standards' (Art. 52 Constitution of the Federal Democratic Republic of Ethiopia: 8 December 1994 (Eth)). The Constitution of Kenya extends the principles of fair competition and merit from recruitment to promotion and adequate and fair opportunities to training and advancement for men and women; members of all ethnic groups; and persons with disabilities (Art. 232(1)(i)). Security of appointment is mentioned only occasionally, such as in Article 103 of the Constitution of the Republic of Haiti: 10 May 1987 (as Amended to 2012) (Haiti).

20 Dismissal is only rarely mentioned in constitutions. Most often the same principles are supposed to govern the appointment and termination of civil servants. However, the Egyptian Constitution provides that civil servants 'may not be dismissed outside of disciplinary action except in those situations set out by law' (Art. 14 Constitution of Egypt). In addition to dismissal for causes set out in the law, Article 192 of the Political Constitution of the Republic of Costa Rica: 7 November 1949 (as Amended to 2020) (Costa Rica) adds that dismissal of civil servants is allowed 'in the case of [a] forced reduction of services, either for [a] lack of funds or to achieve a better organization of the same'.

E. Higher Civil Service and Top Officials

21 Constitutions may provide a more sophisticated regulation for key officials, especially members of the higher civil service. Their key roles in directing major departments and agencies give these officials a particular position, interfacing politics and administration. They are often entrusted by the legislation with broad discretion in setting policy priorities, and yet they do not enjoy direct legitimacy thanks to elections. Hence, their appointment or dismissal may be constitutionally provided for.

22 For instance, the French Constitution provides that the French President appoints civil servants (Art. 13 (2nd sentence)). A number of top officials, those exercising regalian powers, are appointed at the discretion of the government in the Council of Ministers: in particular state representatives in departments and the directors of central administrations (Art. 13 (3rd sentence)). In addition, an institutional act (ie, a statute that is adopted in accordance with Article 46 of the French Constitution, following specific procedural requirements) may provide that the power to appoint may be delegated. Furthermore, a constitutional reform sought to rebalance executive discretion partly in favour of the Parliament in 2008. Article 13 (5th sentence) of the French Constitution now provides that appointments to positions, key for the protection of individual rights and freedoms and the economic and social life of the nation, can only be made after parliamentary committees in the Lower and Upper Houses have given their advice, and provided the candidates did not attract more than three-fifths of the negative votes against their names in both committees. Again, a statute provides for the roles falling within this system. In practice, this new system is only partly effective in rebalancing the power in favour of the Parliament. Indeed, the threshold for the parliamentary committees to oppose a candidate is especially high and difficult to achieve as the overall political system in France is based on majorities broadly aligned with the presidential political party.

23 As a case in point of the more flexible unwritten constitution in the UK, a similar system of pre-appointment hearings has been informally developed since 2007 (→ *codified / uncodified constitutions*). The system is provided for in a protocol between the House of Commons and the Government, with frequent adaptations as to the roles covered by the system. Although the system is largely informal, it appears that debates during parliamentary hearings have led candidates to withdraw their applications or to resign

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(Hazell 232–34). This is an area where the UK Parliament seeks to gain more powers over governmental choice (Hazell 226–28).

24 This focus on the appointment of higher-ranking civil servants is in stark contrast with other domestic systems where the regulation focuses on the end of their tenures instead. For instance, in Germany, the so-called political civil servants—*politischer Beamter* or the civil servants who are at the top of the administration and serve as a 'transmission belt' between the administration and the minister—are appointed at the request of their minister and can be dismissed at any time, without reason. They are however protected in the sense that they keep their pension rights (s 54 *Bundesbeamtengesetz* (2009) (Ger); s 30 *Beamtenstatusgesetz* (2008) (Ger)). The main idea is that the ministers need to trust their most important civil servants.

25 These illustrations show the tensions between the special appointment and dismissal procedures and the general standards of equality and non-discrimination that are normally constitutionally protected when it comes to access to the civil service (as discussed in Section D of this entry). These special appointment procedures were justified by the need to ensure closer accountability regarding the appointment of high-ranking civil servants, potentially curtailing ministerial discretion.

F. Rights and Duties of Civil Servants

26 Civil servants are both citizens in their own right and in a particular position—to some extent, they embody the state, and they are entrusted with implementing the legislative will, and with pursuing the collective interest. This special position leads to distinct duties imposed on them so that they perform their missions in the collective interest. Hence, the constitution may provide guiding principles for these special duties. These guiding principles enshrine the special link that the constitution sets between civil servants and their role in the state. For instance, in Greece, the emphasis is laid on the loyalty of civil servants to the state: '[c]ivil servants shall be the executors of the will of the State and shall serve the people, owing allegiance to the Constitution and devotion to the Fatherland' (Art. 103(1) Constitution of Greece: 11 June 1975 (as Amended to 2008) (Greece)). In other countries, the emphasis is on a duty of impartiality, as in the Spanish Constitution (Art. 103(3)), or obedience to 'the principles of legality, impersonality, morality, publicity and efficiency' as in the Brazilian Constitution (Art. 37), or 'the principles of efficiency, hierarchy, objectivity, equality, transparency, economy, publicity, and coordination, with full submission to the juridical set of laws of the State' (Art. 138 Constitution of the Dominican Republic). This leads some constitutions to explicitly mention the need to regulate conflicts of interest (eg Art. 138(1) Constitution of the Dominican Republic).

27 As a consequence of this special link, certain roles may be constitutionally carried out only by civil servants to the exclusion of private employees. For instance, Article 33(4) of the German Basic Law provides that 'the exercise of sovereign authority on a regular basis shall be reserved for civil servants'. The text does not identify the roles covered by this 'exercise of sovereign authority', but it applies to police officers, tax inspectors, law enforcement officers, court administrators, and members of the prison service (Reichard and Schröter 212).

28 As citizens, civil servants are entitled to enjoy the same individual rights and freedoms as other citizens as a matter of principle. For instance, the ECtHR decided that civil servants were entitled to the guarantees offered by the → *European Convention for the*

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Protection of Human Rights and Fundamental Freedoms (1950) (*Glasenapp v Germany* (1986) (ECtHR)). However, the ECtHR recognized that:

> in each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law. The holders of such posts thus wield a portion of the State's sovereign power. The State therefore has a legitimate interest in requiring of these servants a special bond of trust and loyalty. On the other hand, in respect of other posts which do not have this 'public administration' aspect, there is no such interest (*Pellegrin v France* (1999) (ECtHR) para. 65).

29 This means that Article 6 of the ECHR can only be set aside when disputes pertain to civil servants 'acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities' (*Pellegrin v France* para. 66). However, this functional test did not work well, so, in 2005, the ECtHR held that there should be an assumption that any litigation between the state and a civil servant fell under Article 6, unless:

> the respondent Government demonstrate[s], 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 under Art. 6 for the civil servant is justified (*Vilho Eskelinen v Finland* (2007) (ECtHR) para. 62).

30 However, in other instances, special duties owed by civil servants may justify that their rights and freedoms are curtailed. In general, civil servants are not supposed to enjoy fundamental rights protection when they are acting in their official capacity. Domestic law often provides for duties that civil servants owe to the state such as the duty to comply with the orders of higher ranked officials and the duty of impartiality in France (Taillefait 379–93). Similarly, the German Federal Civil Service Law (ss 60–86 *Bundesbeamtengesetz* (2009) (Ger)) includes a list of the duties and obligations imposed on civil servants (such as impartiality and compliance). Tensions arise between the rights and freedoms that civil servants may seek to rely on, like any other citizen, on the one hand, and their special duties, imposed on them in order to ensure that they perform their roles in the collective interest, on the other. Three illustrations are briefly discussed here: first, the limits to the freedom of expression, second, the ban on headscarves, and thirdly, limits to their collective rights as workers.

31 First, civil servants often have a duty of confidentiality. However, this duty can come under pressure when civil servants note maladministration and seek to blow the whistle. A tension can then arise between their duty of confidentiality and their right to freedom of expression. The ECtHR has clearly affirmed the importance of the duty of confidentiality but has developed criteria for disclosures by civil servants to be protected by Article 10 of the ECHR (eg *Guja v Moldova* (2008) (ECtHR); *Marchenko v Ukraine* (2009) (ECtHR); *Soares v Portugal* (2016) (ECtHR)).

32 Secondly, civil servants have seen their duty of loyalty (or *devoir de réserve)* towards the state trump their freedom of religion, especially when it comes to wearing headscarves or turbans or registering marriages between same-sex couples when the law allows this. For instance, the → *Federal Constitutional Court of Germany (Bundesverfassungsgericht)* accepted that the ban on headscarves was constitutional in the name of the neutrality that the state needs to keep (2 BvR 1333/17 (2020) (Ger)). The French Constitutional Council

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decided that officials did not have the right to object that celebrating same-sex marriage was against their conscience (Decision No. 2013–353 QPC, *M Franck* (2013) (Fr)).

33 Thirdly, civil servants also enjoy collective rights as citizens, for instance of association and trade unions. In some constitutions, these rights are expressly recognized, such as in the Dutch Constitution, which provides for a right of participation for civil servants (Art. 109). However, this right of free association may be curtailed, for instance when civil servants join organizations that challenge the basic constitutional principles of the state. In its so-called *Radicals* decision (2 BvL 13/73 (1975) (Ger), the German Constitutional Court decided that the duty of political loyalty was one of the traditional principles of the professional civil service under Article 33(IV) of the Basic Law (Bumke and Voßkuhle 431). As a rule, the ECtHR accepts that the duty of loyalty justifies limits to the freedom of association (*Vogt v Germany* (1995) (ECtHR) paras 59 ff). However, a specific collective right, that of strike, leads to more problems. Indeed, the ECtHR ensures that the limits to this right are necessary in a democratic society and do not touch the core of the right. In 2018, the German Constitutional Court accepted that the ban on strike action for civil servants was constitutional (2 BvR 1738/12 (2018) (Ger) paras 1–191). For the German Constitutional Court, the limits to the constitutional rights of civil servants are justified by weighty interests protected under constitutional law. In particular, the ban on strike action for civil servants is a traditional principle of the career civil service system within Article 33(V) of the Basic Law, meaning that it goes back at least to the Weimar Republic and has a strong link with the 'foundations of the German career civil service under constitutional law, in particular to the duty of loyalty under civil service law and to the principle of alimentation' (2 BvR 1738/12 (2018) (Ger) para. 149). However, other countries such as France have long recognized the ways in which a balance between the individual rights of the civil servants and the collective interest has to be struck. In 1950, the French *Conseil d'Etat* (*Dehaene* (1950) (Fr)) accepted that civil servants could enjoy the right to strike, a right that the French Constitution of 1946 (Preamble, 7th sentence) recognized. This right, however, could only be exercised within what the law allows, and when no law has been adopted, according to governmental regulation. Indeed, the right to strike cannot be exercised in an abusive way or against the necessity underlying public order. In a similar fashion, the Constitutional Council of France accepted that the law could limit the right to strike of civil servants when their 'presence is necessary to ensure the functioning of the public service, whose suspension would harm the essential needs of the country' (Decision No. 79–105 DC (1979) (Fr)), but not as a matter of principle.

G. Liability

34 One of the contentious points that Dicey noted against the French system was its special regime for civil servants that set them apart from citizens, hence endangering the rule of law (Dicey 186). Indeed, the French Constitution of Year VIII (1799) (Fr) provided for special protection in favour of civil servants, known as '*garantie des fonctionnaires*'. Proceedings against civil servants could only be initiated after authorization from the French Council of State, when these proceedings pertained to their administrative action. This special protection was removed in 1870, but special protection remains owed by the state to its civil servants: this is not understood as a privilege but as a mission to be fulfilled by the state in the general interest (Taillefait 380–90). Some constitutions explicitly proscribe such a system, such as the Belgian Constitution since its adoption in 1831 (Art. 24). This means that ordinary rules for criminal and civil liability of civil servants apply. The German Basic Law is more nuanced in its Article 34, which provides that:

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> If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.

H. Conclusions

35 Although constitutions do not in the main provide a definition of the civil service, they do provide for special rights, obligations and protection for civil servants, expressing key features of the states. Most often equality in accessing the civil service is protected, with recent trends moving in the direction of substantive equality more than mere formal equality. Civil servants are also bound by special duties of loyalty and neutrality. This may contribute to an informal administrative culture that perpetuates older views of the relationships between civil servants and the state. This informal administrative culture and the rights and obligations of civil servants may be affected by the increasing pressure on the civil service to modernize and improve its efficacy, which often translates into pressure towards privatization. The concrete consequences for the civil service and the special link between the civil service and the state require in-depth consideration, with a closer look both at the global picture and the nitty-gritty details. The increasing need for civil servants to work across → *borders* and within regional and international organizations may also lead to incremental adjustments, whose overall direction remains unchartered so far in law and in domestic constitutions.

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