The changing (legal) position of civil servants and Public Sector Bargains:

A comparison

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Panel: Public Sector Bargains

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I. Introduction

The (legal) position of (top) civil servants within the system of government is part of wide ranging political-administrative and academic discussions covering many countries. In the slipstream of New Public Management but also as a result of a discourse amongst public labour law and HRM experts, the so-called ‘traditional’ public law formulation of the (legal) position and status has been questioned in some Western countries in recent years. This debate has been triggered by a number of considerations, such as perceived needs for introducing ‘modernising’ government labour relations, introducing more flexibility in the system and reducing the costs of reorganization and personnel cutbacks. However, as we will discuss, some of these considerations are somewhat at odds with the arguments in the direction of the emancipation of public officials, which, as a part of NPM-thinking gained, at least on paper, some popularity at the same time. In Sweden, Italy, (partially) Denmark the public law system of appointment, dismissal and administrative legal review has been abolished for the vast majority of public servants though in return of some additional benefits to civil servants. In other countries, like the Netherlands, a similar move is contemplated. This process of equalizing the legal position of civil servants with that of private sector employees is often called ‘normalization’ or ‘harmonization’; the word ‘normalization’ implying that private law arrangements are the standard ones. On the other hand, in Central and Eastern European countries, new civil service legislation (using a public law foundation) has been introduced to enhance the neutrality, impartiality and the quality of the service almost according to Weberian lines utilizing a public law employment scheme. In the UK, a new civil service act has been introduced for similar reasons; though perhaps less acute. We can call this the “distinct nature approach” of government and bureaucracy employment.

In our paper, we will examine both apparent extremes from the perspective of the public sector bargains that have been struck and the changes concerning these public sector bargains over time. In addition, we will look into the cases in the middle where currently in countries debates are waged between proponents of the harmonization and the distinct nature principles and how these principles are translated in PSBs. A change from a public law and/or distinct nature of public sector bureaucracy and deployment system towards a ‘normalized’ based on the private law schemes and private sector practises, as described in the introduction, looks like a shift from trustee like or Schafferian bargains towards more managerial oriented bargains. The movement in other countries mentioned above seems to be contradictory to this presumed trend. We will concentrate on higher and top civil servants as they are considered a special case in this debate. We start our analysis from the Dutch case and then try to compare developments here with those in other EU member states.

The paper is structured as follows. First we will discuss some issues in relation to Public Sector Bargain framework that will be used for our present purposes. Secondly we will provide an overview of changes in the legal position schemes in various countries within Europe. The first country we will examine is The Netherlands, where the debate on the legal position of civil servants has progressively gained importance and attention in the political and societal spheres. We then turn to the EU context and Britain, of which it is often claimed that due to its legal system, there is no such thing as a civil service status under public law. Next, Germany will be introduced as a classical example of a country with a civil service system under public law, including its distinction within the public personnel between formerly Beamter, Angestellten and Arbeiter, and presently just Beamter and Angestellten. Then we will address Switzerland, Sweden, Italy and Denmark, countries that are often cited by advocates of the process of ‘normalisation’ as examples to follow. Lastly, we will delve into the situation in France, Eastern
Europe and Southern European countries. The last two categories have in recent decades made efforts to come to civil service legislation under public law, in order to comply with specific requirements of good governance. We will find that both across and within national systems, there is both static continuity (in line with their historical administrative traditions and models) and dynamic change (instigated by societal, economic and political change, and changes in dominant thinking about the role of the state in society and subsequently the organization and management of the public sector). We then will analyse and review our findings in terms of changing bargains.

2. Public officials, civil service and civil service legislation and PSBs: some concepts

It is almost a cliché to state that public administration is first and foremost a matter of human activity. Nonetheless, it signifies that the quality of public administration strongly depends on its administrators: politicians and civil servants. The position of both groups of officials is defined through a multitude of institutional arrangements and in a formal sense, through legislation. Their positions, as they are today, laid down in laws, regulations etc. are the product of an evolutionary process, in which formal and informal rights and obligations have been defined through the interaction of a wide variety of actors. In this paper, we comparatively look into this process, its actors and its implications. As said in our introduction, our analytical focus is on the changing (legal) position of public employees; conceived as a changing public sector bargain. The public sector bargain perspective comes down to the implicit or explicit outcomes in which politicians gain some degree of loyalty, expertise and competency from civil servants, and those civil servants obtain a place in the government structure, responsibility and rewards (Hood 2001; Hood & Lodge 2006).

The word bargain suggests (two) directly involved (contractual) parties. This emphasis, though analytically simple and straightforward, might from a more realistic perspective be considered all too simple and leading to inaccurate conclusions. Given the multi-actor nature of modern governance and government, that view might be too simple. In effect, in the striking these bargains many other actors are directly and indirectly involved depending on the nature of the administrative system. A major point of departure as explained in the introduction is that public sector bargains do not just seem to be confined to “politicians and civil servants”, in which both groups are conceived as unitary players, but that for understanding the complexities and developments of the legal position of public employees, it is crucial to differentiate between various groups within both categories, with varying rationales, and interests: within the group of politicians, ministers should be distinguished from members of parliament and party officials, and within the group of civil servants, there is a relevant distinction between top civil servants and the rest, and between functionally politicized and functionally bureaucratized senior civil servants. Besides the obvious parties (being the executive officeholders and their personnel), other actors should not be overlooked: international organizations and institutions (EU en OECD primarily in the European cases) and the ILO and Human Rights institutions and courts at various levels. In addition we have in relevant cases trade unions, professional associations, academics (in this case labour and constitutional lawyers and political science and public administration experts). We assume that various actors involved play different roles and represent different interests, both within one country and across countries.

Before going into these discussions, it is important to note that the debate on the separate legal definition of the position civil servants is complicated in comparative terms by the wide variations in concepts, definitions and demarcations across the various countries. The great variety of terms and definition given the specific and unique character of the system of public govern-
The terminological discussion about the definition of government personnel, civil servants and civil servant status is already challenging within one country, given the variety in usages of the terms. This confusion becomes even greater when we involve a cross-national comparison. For instance, the Dutch term ambtenaar does not signify the same thing as the French fonctionnaire, the British civil servant or the German Beamte. There is danger that the substantive characteristics of the term in one of the various languages will be treated as the standard against which the terms from other national systems are measured. There is no such thing as a standard description of a “real civil servant”. Sometimes, comparative civil service system research efforts remain unsatisfactory as a result of confusion of terms (see Demmke and Moilanen 2010). There is a tendency to reserve the concept of civil servant only for those staff members who are employed within the so-called classical Weberian career bureaucracy. This approach might be somewhat too Franco-German inspired. When we use the term civil servant and civil service here; it is without the UK connotations and they refer to public officials and public service regardless of the political-administrative and legal regimes (Demmke and Moilanen 2010).

According to country and political institutional system the legal translation of these bargains and their legal translation will vary. They might be laid down in statutory law or in government prerogatives (or both). They might be codified or not. The legislation might be put down in a framework or an exhaustive law. They might be enshrined in constitutional law with or without qualified change mechanisms. These different forms off course have ample consequences for changing and altering these bargains; thus delivering additional bargaining instruments thus influencing the bargaining game. This might explain the often heavy and fierce nature of discussions regarding the reform of civil service legislation. An extra (complicating) factor is the difference in scope of these personnel systems. We refer to those parts of the public sector that are incorporated in public sector legislation according level of government, rank, salary, policy field and type of organisation.

3. Government officials and public service legislation: the historical roots and challenges for comparison

Returning to public service laws at present, most EU member states have one (or multiple ones), although their scope, comprehensiveness and legal foundation for appointment, dismissal and legal overview may vary (Auer et al 1996; Demmke & Moilanen 2010). We go into the current country situation and debates in detail in the next paragraph. In most European countries this legislation developed during the 19th century or early 20th century. As part of a bureaucratic reform, the civil service became enshrined in law and part of the Rechtsstaat. Defining the rights and duties of civil servants and enshrining these rights and duties is considered one of the cornerstones of the establishment of the Rechtsstaat or the rule of law.

Raadschelders and Rutgers (1996) have argued that the relation between defining civil servant rights and duties, and the maintenance of the rule of law coincides with the transformation of civil servants seen a personal servants to a ruler or a ruling class into an instrument to help and assist in the development of the public interest and to enforce public decisions within the context of the rule of law. The need for able, skilled and professional officials increased and personalist appointments based on nepotism and political criteria was increasingly deemed as administrative evil (Van der Meer 2011).
Interestingly enough, on the informal side things has been much more complicated seen from an historical perspective. A civil service act1 as enacted in Bavaria in 1805 (the first in Europe) by Montgelas was viewed with suspicion by higher civil servants themselves for fear of losing their autonomy by the introduction of a bureaucratic civil service order (Gotschmann 2005).2 Only with the rise of a power aspiring bourgeoisie, these civil servants sought an alliance with the executive (at that time the king). Thus - and not only based on this example - we have to note a construction of a public sector bargain between just (a) the executive politics or whatever principal and (b) public employees is far to simple for all cases. The same could be argued for a country like The Netherlands in the early 19th century. Here, higher civil servants were rather slow to accept regulations regarding their work as it was seen to diminish their status as independent service of the state; equating their positions to clerks or in W.S. Gilbert’s term ‘salaried minions’ (See also for France Bezes & Junot 2011). Nevertheless, also the higher civil servants increasingly fell under the civil service legislation with the notable exception regarding the tenure of position of the political civil servants for instance in France and Germany (Fisch 2005; Bezes & Junot 2011).

In many continental European countries, given their state culture and administrative tradition, a public law formulation has been chosen to define the duties and rights of civil servants. This choice can be understood in the light of the public powers of government vis-à-vis society and the individual and more in particular the one-sided nature of those powers: Traditionally the power given to the executive has been quite considerable. To counterbalance any possible misuse of power, to protect individual civil servants and thereby the overall quality and integrity of the state apparatus, ample guarantees laid down in civil service legislation have proven necessary. It is here that some problems and confusion does arise. Provisions regarding these right and duties might be formulated in civil service act, by laws and other legislation implying a public law basis.3 In order to make these provisions work, civil servants should be able to go to court to appeal what they consider unjust or contra legem decisions by the political executive. As said, in a number of countries, the debate on the legal status of public employees has regained in recent years prime attention among politicians, public managers, academics in the disciplines of labour law and public administration and representatives of trade unions. Each of these groups has their own arguments and purposes in order to maintain or attack the status quo and often within these groups we can find a considerable degree of contrary arguments. In part as a result of the popularity of New Public Management-thinking, an in part due to efforts of generic HRM and labour law experts to emancipate public sector workers, in some Western countries the special status of government employees has been questioned. Some argue that the abolition of this public law status will increase labour flexibility in the public sector and will decrease the costs of reorganizations and personnel cutbacks. However, what is often overlooked is that cause of the perceived rigidity in government personnel management systems is insufficient interdepartmental mobility and slow adaptation to internal and external change, rather than the special legal public law for civil servants. Be that as it may, in response to the need to modernise personnel management in the public sector, many reforms have taken place:

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1 Haupt- Landespragmatik über die dienstverhaltnisse der Staatdiener vorzuglich in Beziehung auf ihren Stand und Gehalt , 1 Januar 1805

2 This aversion helped much towards the downfall of Montgelas in 1817.

3 Some proponents of private law constructions argue that these issues can be taken care of in contractual terms in private labor law; nevertheless private labor laws are public law construction infusing public law norms with private law relationships; in additions these contracts are rather unilateral.
the normalisation of the legal public law, payment schemes, mobility and training (Demmke 2004; Demmke 2005; Demmke 2010). Before we go over to discuss the national situations and debates we have to go into the EU dimension; a dimension that is often overlooked in the national debates.

The role of EU legislation, and in particular that of the European Court of Justice is of great importance to the public sector labour relations. In principle, the various EU member states are still fully competent to maintain specific arrangements related to the labour position of civil servants, as long as these arrangements respect the free movement of labour, within the restrictions as are laid down in article 45(4) of the Treaty concerning the Functioning of the European Union. Member states have no entitlement to treat their own national citizens differently from national citizens of other member states when it comes to recruitment policies in the public service, unless it involves a specific position in which public authority is exerted of where the general interest of the state is at stake. As De Becker demonstrated in his inaugural lecture, over the past decades, various judgements of the ECJ have led to a gradual decrease in practice in the range of positions for which the above mentioned exception can be made. As a result, member states need to adjust their arrangements regarding civil service positions to the judgements of the ECJ. By the content of its rulings, the Court has defined the range of positions, which according to EU law belong to the ‘public service’ in increasingly narrow terms (see De Becker, forthcoming; De Becker 2011). This has more serious consequences for closed career systems as for instance in France, but less for the more open systems such as the Dutch system. This however does not imply that career systems – other than the mentioned exceptions – have to disappear, but only that an opening should be provided to citizens of other EU member states.

IV. Overview of arrangements and developments concerning the position of civil servants in the Netherlands

Though the need for a professionalized civil service with duties and rights enshrined in law was recognized, the process of creating the current legal basic framework took a considerable time. The founder of the modern Dutch constitution Thorbecke4 and most legal experts did emphasize in 1848 the importance of a legal (in his case constitutional) anchoring, yet his approach was not adopted (Stekelenburg 1999). The factor of perceived additional costs was one important element. The process of obtaining this law and formalizing the position of civil servants took about fifty years of pressure by public sector labour organization, constitutional lawyers Krabbe and Fokker 5) and even a specific association to attain a public law status for civil servants pointing to German examples and more in particular the Reichsbeamtengesetz of 1873. Resistance did not stem so much from the direction of the respective ministries of the Interior and Justice but the wider political system and Parliament for fear of costs and centralism. The concern for the rise of political radicalism (from 1886 onwards) helped this process to start. In 1929 the Civil Service Act (Ambtenarenwet) or CSA 1929 was adopted. The accompanying by law (ARAR) for central government was issued in 1931. Likewise a service act has been enacted in 1931 for the military. Both laws regulate and define the constitutional and legal posi-


5 H. Krabbe & E. Fokker (1897) Praeadvies NJV Welke is de aard der rechtsverhouding van den Staat tot zijn ambtenaren; moet zij wettelijk worden geregeld; en zoo ja, hoe in hoofdzaak?
tion of civil servants working and thus establishing what been called a public law status. Civil servants under the scope of these laws enjoy a so-called public law status. From 1931 onwards civil servants could go to administrative legal courts and procedures instead of using administrative appeal procedures (Van IJsselmuiden 1988; Stekelenburg 1999).

The words public law status used in the Dutch debates might be rather confusing given the fuzziness to the status concept. Until fairly recently it was mainly used to describe the whole legal system based on public law regulating all aspects of the position of public employees within government i.e. the system of appointment, dismissal and legal protection using administrative law and administrative courts, the deployment schemes and all the other provisions concerning integrity, public service codes, political-administrative relations, neutrality etc. More recently, the public law appointment, dismissal and legal protection elements have been separated from the others dimensions of the legal position as will be elaborated below.

Although the CSA 1929 applies to all levels of governments, most material provisions are in (decentralized) by-laws as a manifestation of the decentralized nature of the state. As such it (still) has the character of a framework law. Each government employer has a separate by-law regulation material provisions regarding rights, duties and rewards. Each government involved decides on its regulation. Since 1993 a decentralized bargaining system (labor sector model consisting of 14 sectors) is in existence made up by government employers and trade unions. Employers and trade unions are coordinating their respective positions through relevant umbrella organizations. Employers and trade unions meet each other (rarely nowadays) in a council on public personnel issues (ROP) and co-operate and meet informally in the Centre for Public Labour Relations (CAOP).

Traditionally within the diverse government personnel systems a fair degree of contractual workers were appointed given the nature of their job (temporary and non core tasks); later their number decreased with the exception of to a certain extent municipal government and independent public agencies. Public sector unions were much in favour of this line given the fact that amongst their membership blue collar and contractual workers were in the majority. In addition boundary issues played also an important role (see below comparable boundary issues in for instance Belgium, Germany and France).

From the late 1950’s (State committee Kranenburg 1959) onwards, the use and necessity of this separate arrangement for civil servants has been discussed regularly. Mainly it was a discussion within the legal academic community with constitutional and administrative experts in favour of maintaining the system and labour law experts against in particular with respect to the reward, appointment and social security system. The system though was upheld with the exception of harmonizing the social security system. Quite recently, discussions have started a new. In November 2010 two Members of Parliament (Koser Kaya – Liberal Democrats, and Van Hijum – Christian Democrats) submitted a bill, which aims at abolishing the public law position of civil servants and harmonising that of employees in the private sector; at least After revision the scope of the law was limited as far the rules of appointment, termination of employment and administrative legal review are concerned. The civil service act and other immaterial provision should be maintained and elaborated by the ministry of the Interior. Other public law regulations would remain in force. In the current coalition document (the document in which the coalition parties agree what the government’s policy agenda for its term will be) a provision was made to abolish the public law appointment and administrative legal protection. In this sense the legal review has become rather limited given the original ambitions.
One of the striking aspects of these recent debates on this so-called normalisation in The Netherlands, that these discussions have been primarily limited to the labour law-aspects of the public law status (Van Peijpe 2005), and, more recently, also to the management perspective, while in the earlier stages of the debate (1950s and 1960s), the constitutional and public administration side of the issue was better expressed (but see Van der Meer, Van den Berg and Dijkstra, forthcoming 2011). Advocates of abolition of the public law status seem to focus primarily as said on the public legal modus of appointment and termination of employment. The other aspects of this status including the public legal codes relating to integrity, anti-corruption and political-administrative interaction and the basic rights of civil servants, are given much less attention, or they are often considered as a residual category of aspects. These issues have been taken up by public administration experts and constitutional lawyers and the Council of State

The Dutch Council of State, the highest body advising Parliament and the Government on the quality and feasibility of proposed legislation, has written a highly critical opinion on the proposition of harmonisation, on the grounds that it neglects the distinct character of working within a political and governmental context, since the Council does not find it plausible that the anticipated flexibilization and cost-reduction will really be achieved through this new law.

There are different parties involved with different interests and positions:

<table>
<thead>
<tr>
<th>Group</th>
<th>Assumed interest</th>
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<tr>
<td>Political executive</td>
<td>Ending a perceived civil service ‘overprotection’ in order to realize cutbacks;</td>
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<tr>
<td>Parliament (sponsors)</td>
<td>Interest in acting as active and decisive in modernising and depriviliging the civil service in order to realize cutbacks and obliging the general public.</td>
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<tr>
<td>Top civil servants</td>
<td>Flexibilising the legal position of the rank and file in order to obtain more flexibility in HRM terms while remaining secure themselves given the existence of the ABD. Heavy criticism regarding the nature and scope of the proposed legislation</td>
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<tr>
<td>Council of State</td>
<td>Flexibilising the legal position of the rank and file in order to obtain more flexibility in HRM terms while remaining secure themselves given the existence of the ABD. Heavy criticism regarding the nature and scope of the proposed legislation</td>
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<tr>
<td>Rank-and-file civil servants</td>
<td>Preserving protection against political and managerial arbitrariness and material privileges, cf. public service motivation</td>
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<tr>
<td>Civil service trade unions</td>
<td>Protection of specific civil service rights though some trade union leaders at first (FNV the social democratic unions) were in favour given a perceived increase in power during the labour negotiations; other unions were very much against.</td>
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<tr>
<td>Academics</td>
<td>Where a distinction can be made between researchers of Public Administration and researchers of generic Labour Law. Among the first group more opponents can be found were as the second group are generally in favour</td>
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<tr>
<td>Media</td>
<td>Historically, both have an aversion to what may appear as bureaucratic privileges</td>
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<td>Broader public</td>
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Though originally a coalition made up by Liberal, Christen democratic and Populist parties, the new right wing coalition, some top civil servants different ideas behind these proposals as can be seen from the scheme above. In parliament the sponsors were interested by an initiative to liberalize the labour market by starting with government scheme (Koser Kaya of D66 a left wing liberal party) and making cutbacks in the public sector easier given the negative financial situation (Van Hijum), the same motives are to be found in the Coalition document.
Particular the position of top civil servants is interesting. Top civil servants had the idea to gain managerial freedom towards the rank and file of the civil service whilst their own position was fairly good protected through the ABD (Algemene bestuursdienst) or in English: Senior Executive service. The ABD was created in the 1990s for senior and top civil servants working for central government in a policy making or managerial capacity in the core departments. An exception was made for civil servants working at the Foreign Office and the military who already worked in functionalized career systems resembling to a certain extent the French corps. Instead of the old job oriented system the ABD constituted a separate career system. The standard employment system pertaining to the whole of central government with the exceptions made above was a job system; at least on paper. In practice civil servants remained with their government unit and did remain there for the larger part of their working life. Thus there was limited internal and external mobility. The same can be said of the other levels of government. Limited mobility and compartmentalization and a perceived need for enhancing civil service professionalism (for the higher echelons defined in terms of managerial competencies) were the official reasons within the academic community and reformist parts of the political academic community to propose a career system in central government and more particular the policy units starting at first at the top (from the director level upwards). On the informal side the added value for senior civil servant that were legally and in HRM terms separated from the rank and file thus giving them elite status. When the ABD became too large (about 800 members) a new top group within the ABD was formed called Top Management Group (TMG), consisting only of secretaries-general, directors-general, and their functional equivalents around 70 in total. In addition the ABD recruitment and promotion methods seem to include a depoliticisation of these procedures. Informal instruments in favour of the political officeholders were the mobility element and thus an instrument to curb civil service power particularly in relation to members of the TMG must change positions at least every seven years. They can move either horizontally or vertically, although very rarely a secretary-general will take a director-general position. Also the can been parked ‘in between jobs’ (on the bench / wartegeld/ wachtgeld). For the general civil service that has been abolished in 2001. Thus the TMG enjoy a higher degree of job-protection and privileges than the rank-and-file civil servants. In addition there are regulations to solve conflict between ministers and TMG members, involving transfers within the TMG system and finally there is at least on paper a system of performance appraisal, though the paper of Trui Steen and Morten Balle Hansen puts some doubts regarding the practical effects of this arrangement. In short the ABD and TMG members can count on ample protection, so that even without a generic public service status under public law, their position is highly sheltered. Nevertheless there are some caveats to be made which made some top civil servants to rethink their position. First their semi-autonomous position towards the political officeholders had deteriorated to some degree. Their appraisal and policy advisory function has become less in demand; the competition with internal (political) and external advisors) has increased. In addition the financial dimension of the managerialization of their position has come under pressure due to return to traditional public sector pay schemes given public pressure against an wariness concerning public performance pay, bonuses and salaries exceeding those of political officeholders; that are already being considered to be too high by the general public.

V. International overview of arrangements and developments concerning the position of civil servants in the EU

The United Kingdom is often hailed as an example of a state without statutory provisions regarding the position of public officials. Without delving to deep into the nature of public sector appointments, the British case shows a wide range of public officials with different employment
schemes and regulations depending of level of state, level of the public service etc. Focussing on the civil service we have seen a formalization of the position of these civil servants with the adoption of the Constitutional Reform and Governance Act 2010. Most of the substance of this act finds its origins in the 2007 white paper called “The governance of Britain”. With the adoption of this act the UK for the first time has a Civil Service law. Therefore, this can be seen as a historical step. Interestingly, the UK has introduced this type of codified legislation at the same time in The Netherlands, the Dutch Civil Service Act of 1929 is again criticised and up for debate on a number of crucial aspects. Also, the introduction of civil service legislation is remarkable, since the absence of such legislation has traditionally been seen as one of the defining features of the British civil service and a matter of course, given the typically British state- and governmental tradition which was thought of to be much less legalistic than the various Continental-European administrative traditions. The Act provides the British civil service with a legal basis by formally establishing the core values of the civil service – i.e. impartiality, integrity, honesty and neutrality – and the principle of merit-based appointment. The Act also establishes rules concerning the ‘special advisers’ and the Civil Service Commission, the organ which is responsible for policies concerning government personnel and the recruitment procedures and which falls directly under the prime-minister. The Civil Service Commission took effect on November 11, 2010 with the civil service rules laid down in the “Constitutional Reform and Governance Act 2010”.

The effectuation of the Constitutional Reform and Governance Act could be seen (perhaps from a continental point of view) as a step in the direction of a Weberian rule of law model of civil service legislation, while the British attitude until recently appeared to be fervently opposed to the codification of these types of norms. This is interesting, for two very different reasons. Firstly, the developments in Britain serve as an indication for the cross-national convergence in the way in which the legal position of civil service has been arranged in the various member EU member states: the British move towards a more or less Weberian conception of the civil service, reduces the fundamental differences across the countries of Europe. Secondly, what is striking is that at the same time various aspects of the developments in the United Kingdom seem contrary to the reforms which have taken place in countries such as Italy, Sweden and Denmark, which are cited as exemplary countries where the civil service status has to a certain extent been privatised (see the discussion below), rather than that their special, public legal nature has been underlined, as has been the case in Britain. The explanation in terms of PSB will be discussed in the next section.

Models that used to be starkly different, seem to be growing towards one another: the continental systems adopt elements of the Anglo-Saxon systems (less protection in material terms and more similarities with the labour conditions of the private sector) while the United Kingdom adopts elements of the Continental tradition (codification of core values and constitutional obligations). On the other hand, the introduction of this act in the UK can be seen as a rather modern response to the important question which present themselves in the context of the expanding number of special advisors, who are not bound to the norm of political neutrality, and who have become increasingly influential over the past years, regularly at the expense of the position of impartial career civil servants (Page & Wright 1999; Peters & Pierre 2004 and Van den Berg, 2011). In this respect, the act is both an arrangement, which demarcates the roles and positions of various types of civil servants in a context of multi-level governance and the enabling state, and an arrangement, which clarifies and demarcates the classical tasks of the state.

A large part of the governmental personnel in Belgium possesses a statutory appointment under public law. Besides the civil servants with a public law status there are also contract employees,
who are employed on the basis of private labour law. Although the labour conditions in the private and public sector have increasingly grown towards each other, at the same time the immaterial values, such as ethics, impartiality and civil service professionalism have increasingly become part of the discussion. At the federal level 27% of the civil servants have a contractual appointment (Hondegheem 2010). According to Hondegheem, in Belgium also at the federal level there is a lesser degree of outsourcing for lower-level functions compared to other countries. Besides elementary functions contracts are also used for flexible and technical jobs (Janvier and Peeters 2005). In local and provincial authorities more personnel works on the bases of a labour contract. After a strong increase of these contract staff, the proportions have stabilized since 2005. Often, these contracts are used for obligatory job placements or subsidized jobs (both of which may be permanent in nature) and functions at lower levels. Sometimes the criteria are less clear. In some cases, the question about the ratio behind a specific form of appointment becomes acute. There is a discussion about the rights of the contract employees in relation to civil servants, given that the former enjoy less protection (also from a political point of view, see De Becker) and have fewer career opportunities (Hondegheem 2010). For this reason, but also because of NPM and performance management reasons the question about a single unitary statute for all public sector personnel has sometimes been raised in some academic public management and HRM circles (see among other for the local and provincial levels: Janvier 2003; Janvier and Peeters 2006; Janvier and Henderickx 2010), although so far this has yet led to concrete results; though both the Flemish government and the unions want to address the most negative aspects of the divide between statutory and contractual public officials. Important in explaining the Belgian immobility is the division in Belgian Labour organizations in blue and white collar workers unions and a stalemate in politics and administration due to the many political divisions and neo-corporatist relationships.

Germany is seen as an exemplary country with respect to the distinct civil service status. Germany knows Beamter (those whose relation to the state is one of an employment relation under public law) and ordinary public sector personnel whose employment is arranged according to private law (Angestellten). Historically, it was decided that Beamter would have a special legal position, because the relations these people have to the state given their work, exceeds the relations normal citizens have towards the state. Beamter are positioned closer to the state, they are the representatives of the state vis-à-vis society. Beamter owe the state special service and loyalty, and in return there are granted certain privileges, (with the exception of the politische Beamte) life time employment in terms of salary, compensation in case of illness, and retirement pension. After the Second World War, the Allied Forces abolished the Beamtentum in West-Germany; holding this institution (partly) responsible for the German aggression in the past and the failure to uphold the rule of law in times of totalitarianism but also adding to it. However, this legal position under public law was re-instituted in 1950. During the past decades, the number of Beamter and their percentage relative to the general public service has slightly decreased, but this has primarily to do with the fact that since their privatisation, obviously no new Beamter have been appointed within the formerly state-owned enterprises (aviation, post, railways). Persons that already worked for the organisation at the time of privatisation have maintained their status of Beamter. Also in other public organisations, such as independent public bodies, the number of appointed Beamter has decreased given the change of position and status of these organizations.

The majority of the German governmental personnel are not Beamter, but Angestellten. The Angestellten are employed by the government on the basis of a labour contract. Concerning both groups of personnel, reforms have been carried through during the past years. The aim of these reforms has been to create more transparency and standardisation within HRM in the pub-
lic sector. However, in Germany the principle of a separate status for servants of the state (albeit for a select group within the larger apparatus) and the underlying consideration have not changed and amongst the dominant group of academics (the constitutional lawyers) it is still the formal doctrine. The Constitutional (federalisation) reform in 2006 has had consequences for the civil service legislation. Although Civil service unions did resist given agreement between the Federal and the Lander government the old framework was replaced by a Beamtenstatusgeetz and for the federal level a Bundesbeamtengeetz and the Lander level Landesbeamtengezetzes in which career, pension and remuneration issues were decentralized to the Lander with due consequence for position (particularly regarding flexibilization of the career system by combining or abolishing the different Laufbahngruppen of beamten ass is the case in for instance Bavaria and Rhineland-Palatinate) and pay differences between the Länder on these topics given the financial situation of the Länder (Goetz 2011). Still, just like in Belgium, the question is raised why some functions in organisation A get Beamte-status while the same functions in organisation B get Angestellte-status. This is for instance the case between various municipal governments. In the municipalities (but not so much the Lander) in the former GDR, where there never used to be a distinction between Beamter and Angestellten, the proportion of Beamter is said to be lower than in the Western parts of Germany though both in absolute and relative perspective their number is though even in the East a little increasing.

In France, the Constitution states that Parliament is in charge of the protection of servants in the military and public service. The Constitution however, is not explicit about whether or not the employees in the public service should have a status under public law. The legal basis for the unilateral appointment is laid down in ordinary legislation. A contractual appointment in the French public service is only possible (a) if there are no civil servants who can fulfil the position, (b) if the position is temporary, or if the position is the included on a list composed by the Conseil d’Etat for this specific purpose. All other employees in the French public service fall under public law. There are three so-called fonctions: the central level, the decentral level and health care. One of the typical features of the discussion in France is the position of the Corps. France knows a corporate organisation based on a career system divided by profession. The advantage of this system is that professional expertise and the emphasis on specialists. A disadvantage is the large degree of fragmentation and corps particularism, especially with respect to the power of the so-called Grands Corps. On this point, policies are oriented towards minimizing the disadvantageous effects by limiting the power of the corps, corps merger and (Bezes and Jeannot 2011). In changing these issue the French unions are a power that has to be taken into account according to Jeanne Siwek-Pouydessau(2010) civil service unions follow a three fold strategy “resistance without concessions (Force Ouvriere), defence of a civil service that serves citizens (CGT) or analyses focused on methods that are deemed to be inadequate (CFDT union)”.

Switzerland, Denmark, Sweden and Italy are often cited as examples of normalised systems. The situation in Switzerland is a bit different than is often claimed by some participants in the Dutch discussion. In 2001, after a referendum, a new Federal Personnel Act was adopted which replaced the old Civil Service Statute. Since the executive expected that they could rely on antibureaucratic sentiments among the general public, they issued a referendum on the question of changing the Statute. Thus, the instrument was used to change the PSB in formal-legal terms. In this way, the resistance of the public sector trade unions could be circumvented and the decision acquired and additional direct democratic legitimation. Also at the Canton-level the status of Beamter has been abolished in a number on cases. The main consequence of the abolition of the status is that civil servants do have to be reappointed to their position once every four years. That used to be a time-consuming and inefficient arrangement, which has now been abolished.
Moreover, a number of groups of Swiss civil servants have remained – also under the new regime – under public law. Article 8 of the Bundespersonalgesetz reads: 1 Das Arbeitsverhältnis ist öffentlich-rechtlicher Natur. Es entsteht (…) durch den Abschluss eines schriftlichen Arbeitsvertrags. The abolition of the Beamtenstatus has therefore not meant that the special legal position for these civil servants ceased to exist. On numerous aspects, predominantly on the matters of immaterial nature, arrangements under public law are in force. The abolition should therefore be understood as a measure to promote the efficiency of the HRM-policies and the civil service professionalism, and not to get to an equalization of the legal position of civil servants with employees in the private sector. Moreover, the protection of employees in the public service is still stronger than that of employees in the private sector.

In Denmark, the majority of the governmental personnel work in the service of the state on the basis of a collective labour agreement. Just like in Germany, Denmark knows Beamter, and staff that works for the state but does not have the status of a Beamte. Beamter may be senior civil servants, judges, police, prison, and defence staff, and high officials in the State Church. Other public sector employees are therefore not formally appointed as civil servants, but they still fall for most parts of the labour law under different laws than employees in the private sector. To them a Civil Service Act applies, and the Civil Service Pensions Law. Other labour arrangement such as the Holiday Act, the Equal Treatment Act and arrangements in the field of parental leave are the same for employees in the public and private sector. This constellation has been in force since January 1, 2001 (Minister of Finance, State Employers Authority, Employment in the Danish State Sector (2005)). It is important to note here that Denmark has indeed chosen for a partial normalisation of the legal position of a large part of the public sector personnel, but that at same time, two parallel systems are operated (see also Niessen 2010: p.25). Also, it is interesting to see what categories are, according to the Danish legislature, part of the inalienable domain of the state, and which categories fall outside of it.

In Sweden, the civil service status was abolished in the 1990s (heyday of NPM) and the legal position of the large majority of public service staff partially equalized with staff in the private sector. Yet, also in Sweden an exception has been made for instance for the judiciary. Moreover, one has to take the typical features of the Swedish societal model into account, which is characterized by egalitarian and cooperative (neo-corporatist) labour relations. In cases of involuntary termination of employment, the legislator takes a restricted role. Yet, the termination of employment Act of 1970 grants possibilities for redress against firing and for annulling the involuntary termination, even with a sanction for non-compliance by the employer of high financial compensation to the employee. Employers and employees enjoy a large degree of discretion in composing their collective labour agreements (Heemskerker 2009). What is typical of the Swedish model is that carrying out the negotiations is delegated to an independent agency, within which employers and employees negotiate. The government is only involved at arm’s length. It is important to note that this seemingly depoliticised model has its drawbacks, for example concerning the politicisation of the civil service and the preservation of a certain esprit-de-corps among civil servants.

In Italy the public law status of the labour relations for senior civil servants has been discarded in 1993: their legal position is arranged under private law. The aim of this reform was to neutralise the civil service in a political sense, to generate more mobility, to clarify the separation of roles between politicians and civil servants, and to enable a degree of accountability for the persons involved in terms of their compliance with these norms. The emphasis in Italy is clearly on professional quality, integrity and political impartiality, and in fact not on financial savings or the application of market-mechanisms to HRM within the government. Interestingly, in 2002
it was decided that the top civil servants (secretary general level) would again be appointed by
decree (a unilateral public decision) (Ongaro 2009). By doing so, the privatisation of the posi-
tion of the top civil servants has been partially reversed. The appointment is therefore arranged
under public law, but the salary is determined per individual and by private legal contract once
every three years. Mechanisms and parties

The former communist countries of Central and Eastern Europe take a separate position in this
debate. In the period before the fall of Communism, civil service systems were heavily subject
to the control of the dominant party. A separate legal position in or to be able to countervail the
influence of party and politics was absent (Dimitrova 2002). The system at the time was also
heavily affected by personalist relations originating from the (political and party) top down-
wards, resulting in nepotism and favouritism. After the fall of communism, initiatives have
started to equip the administrative organisation with a more solid basis, so as to let expertise
and (political) neutrality is more prominent features. These reforms were urged by the accession
process to the European Union. This has led to a legislative process in which new (public law)
civil service acts have been developed. The reform of the public service in these accession
countries was one of the most important prerequisites in the period following the Copenhagen
(1993) and Madrid (1995) EU summits. Additional criteria state that there is a professional civil
service, depoliticised, merit-based and that this civil service should work according to formal-
ised standards of integrity. The provisions and support given by the OECD, too, encourage
change in the same direction. In this way, the criteria for EU accession have contributed to We-
berian-inspired civil service legislation in these countries (Cardona 2009; Adomonis 2009).
However, practice has shown that political leaders have tried to circumvent these arrangements
and to delay their implementation.

This tour d’horizon along a number of European countries demonstrates that the debate about
civil servants’ legal position in a changing societal and governmental context is everywhere on
the agenda. It also shows that in the various countries, the discussion is not restricted to solely
aspects of labour law, but that the legal position of public sector staff is part of a broader debate
about the role and position of civil service in which also the specific professionalism, the rela-
tion to the world of politics and society and the degree of independence within the bureaucratic
organisation take a central role. It seems that decision makers have increasingly let the labour
conditions and social security issues in the public and private sectors grow more mutually alike.
In this respect civil service laws and regulation are altered. In this sense we find a movement to
so-called managerial bargains. Contrary, the issue of ‘normalisation’ of civil service rewards is
in most cases explicitly avoided, given the political and societal sensitivity of public sector re-
wards in general (see Peters and Brans 2011). Ample attention is been paid to a public law ar-
rangement of issues relating to integrity, moral competency, political neutrality and the protec-
tion of civil service professionalism, which are closely related to the other issues mentioned;
again this goes against a pure managerial and more to a hybrid bargain.
VI. Review in terms of PSB

Earlier we have pointed to the fact that, though there might be some discrepancies in the context and time of origin, all European countries have developed an extensive legal and more or less formalized framework for their public service over the past century or so. It can be seen as part of a bureaucratic and/or rule of law revolution (Van der Meer 2009). Hood and Lodge (2006) have phrased and analyzed the relationship between politicians and civil servants in terms of PSBs. Using these terms, a legal civil service law framework can be seen as formalizing public sector labour relationships (and ensuing bargains) into law and thus making these relationships more durable, limiting the room of interpretation and thus providing bargaining power in future encounters. All these features depend of course on the nature of the legal translation of the public sector bargains.

These bargains are according to this PSB conception the implicit or explicit outcomes in which politicians gain some degree of loyalty, expertise and competency from civil servants, and those civil servants obtain a place in the government structure, responsibility and rewards. By focusing on the legal framework we will look at bargained outcomes made explicit in legal rules. According to country and political institutional system (place of formal legal arrangements within these systems) the translation of these bargains will be vary.

The word bargain suggests two directly involved (contractual) parties. This emphasis, though analytically simple and straightforward, might from a more realistic perspective be all too simple and leading to inaccurate conclusions. In effect, in the bargains many other actors are directly and indirectly involved (the range depending on the nature of the administrative system.

A major point of departure is that the relevance of public sector bargains is not limited to so-called direct participants i.e. political officeholders and civil servants. First it is a misconception to view both groups as unitary players. These players consist of a variety of actors with their own interest, rationales and bargaining positions forming associations and coalitions. For instance within the group of politicians, ministers should be distinguished from members of parliament and party officials. The same applies to other levels of state and sector when applicable in certain political institutional arrangement. Within the category of civil servants, we have a multitude of relevant dividing lines including again government level and functional section but also across hierarchical levels involving top and senior civil servants and the ‘rest’, and between functionally politicized and functionally bureaucratized senior civil servants (Van den Berg, 2011). Secondly the (diverse) civil service labour unions play a role depending on their (formal) inclusion in the government labour relation mechanisms and the rate of membership mobilization and ‘radicalism’. As said in previous sections besides the ‘usual suspects’ (executive officeholders and civil servants), other influential actors should not be disregarded: international organizations and institutions (EU en OECD primarily in the European cases) and the ILO and Human Rights institutions and courts at various levels. In addition, we made mentioned that in some countries, professional associations, academics (in this case labour and constitutional law and political scientist and public administration experts) play a role.

We have set at the outset of our analysis and above that a public sector bargain perspective in this case seems particularly appropriate when examining the definition and the redefinition of the (legal) position of public employees within the wider political administrative system of a particular country. Of old the reasons for a formalized construction under public law has been argued in terms of a fairly simple bargain. A structured reward system, an ordered system of tenure, promotion, protection against nepotism, and political interference was the offer of the
political system: rewards and a place within the administrative system in exchange for loyal support.

From discussions in political, professional and academic quarters the thought might arise of a movement to what has been termed the normalization or harmonization of the (legal) position of public employees copying private sector standards. Underlying, what might be considered primary a legal debate, do rest some very fundamental assumptions regarding the nature of government in society and related the nature of public employment. The movement towards normalization is inspired by ideas concerning a generic nature of public and private employment. Private employment schemes could make public employment more flexible, adaptable to political needs given the diminished level of protection, the increasing professional autonomy and the use of private sector incentives.

Regarding these elements perspective we can find an extensive movement towards changes in civil service laws and regulations. Given this evidence, we would be moving towards a managerial bargain. Empirically this movement is somewhat fragmented and factually limited to very few countries and even there incomplete, while there are also cases in which a diametrically opposite movement seems to be taking place. Often normative aspirations of creating managerial flexibility and a modern outward-looking public service apt to deal with the challenges of the modern times are not supported, or even conflicting with the available evidence. In the previous section we have pointed to a vast number of initiatives regarding public law arrangement of issues relating to integrity, moral competency, political neutrality and the protection of civil service professionalism, which are closely related to the other issues mentioned; again which are closely related to the other issues mentioned; again this is leading away from a pure managerial and more towards a hybrid bargain.
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