



## Freedom of expression and the obligation of reservation: what jurisprudence says

Freedom of Expression

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**When a general officer leaves active service and joins the G2S, one of the first issues he may seek to resolve is that of the new freedom of expression that will be his... It must be acknowledged that investigations can be disappointing:**

- There are no rules specifically applicable to general officers, let alone those in the second section;
- The texts, which are common to all categories of military personnel, are in the end not very explicit (which in a way is to be welcomed);
- These reference texts are not, moreover, specific to the military function, but are in general those in force for all civil servants...

**So, when we talk about the duty (or obligation) of reserve, what are we referring to?**

The concept does not exist in the [legislation and regulations governing the French civil service](#). For example, Act No. 83-634 of 13 July 1983 on the rights and obligations of civil servants makes no mention of a "duty of reserve" or "obligation of reserve".

An answer to a written question from a Member of Parliament in 2001 reiterated this in a different way:

"The duty of reserve, which obliges public servants to exercise restraint in the expression of their opinions, particularly political opinions, or face disciplinary action, is not explicitly mentioned in the statutory laws relating to the civil service. ...] This is a creation of case law, which is reflected in certain specific statutes, such as those of magistrates, military personnel, police officers, etc. »

The official website of the French administration ([service-public.fr](http://service-public.fr)) provides some more precise indications:

"All public officials must show reserve and moderation in the written and oral expression of their personal opinions. This obligation does not concern the content of opinions (public officials are entitled to freedom of opinion) but their mode of expression. The obligation of reserve applies both during and outside working hours. »

"Failure to comply with the duty of reserve is assessed by the authority on a case-by-case basis. This duty is applied more or less rigorously depending on the circumstances:

- the place in the hierarchy, the expression of senior officials being judged more severely,
- the circumstances under which an officer spoke, ...
- the publicity given to the remarks, if the officer speaks in a local newspaper or major national media,
- and forms of expression, whether or not the agent used offensive or outrageous language. »

The civil service portal, for its part, specifies in the paragraph on the obligation of reserve that "the principle of neutrality of the public service prohibits the civil servant from making his or her function the instrument of any propaganda".

The General Statute of Military Personnel merely states that "military personnel shall exercise discretion with regard to all facts, information or documents that come to their knowledge in the course of or in connection with the performance of their duties".

The most instructive document is instruction No. 50475/DN/CC of 29 September 1972. It stipulates in particular that "the obligation of reserve, to which all civilian and military civil servants are subject ... prohibits them on the one hand from making the function exercised an instrument of action or propaganda, and, on the other hand, from making acts or statements of such a nature as to cast doubt not only on their neutrality, but also on the minimum degree of loyalty to the institutions that a person who has agreed to serve the State must show".

It states: "The scope of this duty varies according to the personal situation of each individual, characterized by the extent of this duty varies according to the personal situation of each individual, characterised in particular by the grade held and the post occupied, and also according to the circumstances and in particular the dissemination that is likely to be given to the views expressed. »

The major problem with this instruction is that it was written with reference to the previous general statute for military personnel, that of 1972, which did not apply to all military personnel. The main problem with this instruction is that it was written with reference to the previous general status of military personnel, that of 1972, which is no longer in force, and that it was not updated when the current status, that of 2005, was adopted. It still refers to the system of prior authorization....

These documents do not give us much information. And they seem in some cases difficult to apply to the "2S" position:

- To speak freely about the defense is not to act as "propaganda", far from it...
- the 2S generals no longer have a "function" that can be "instrumentalized";
- this obligation seems to concern "public agents"... which it is not...It is not certain that the generals continue to be under "2S" status (although they may temporarily become so again in the event of recall to the first section!...).

Nevertheless, a common core of practical provisions emerges from this corpus as a whole, which case law has enshrined over time.

It is thanks to the few authoritative opinions obtained from a legal expert that the following rules of common sense have been formulated: they finally delimit fairly well what one may or may not do when one wishes to express oneself.

While the status of officer - particularly general - is a not insignificant element, it is not sufficient to determine the limits of the reserve obligation of military personnel. Indeed, this obligation also varies, and above all, according to the object and purpose of the speech, as well as its tone and means of dissemination, and even the profile of the speaker.

**Four main objective criteria** can thus be established which will enable the disciplinary authority or the judge to determine whether or not the duty of reserve has been breached.

**1/ The functions performed and the grade occupied :** The duty of reserve is to be assessed in proportion to the responsibilities assumed, the rank the rank and nature of the duties performed; the duty of reserve is to be assessed in proportion to the responsibilities assumed, the rank in the hierarchy and the nature of the duties performed. The obligation of reserve is thus more intense in relation to officers and, consequently, the fact of holding a general officer's post is singularly likely to restrict freedom of expression.

On the other hand, in the case of 2S generals, since they no longer hold any office, their freedom of expression is more extensive.

This first criterion presents an obvious paradox: the rank and functions constitute both an encouragement to expression (to which they confer a form of legitimacy) and an important reservation to the freedom of the person expressing himself .

**2/ The object and purpose of speech :** The fact that a member of the armed forces criticises the organisation, operation, policy or direction of the armed forces or the Ministry objectively constitutes an infringement of the duty of reserve.

Nevertheless, the judge may have been led to take into account the fact that such criticism often amounts to a defence of the body to which the member belongs: denouncing a situation likely to affect the conditions of exercise of the mission may thus fall within the scope of a debate in the general interest and may not be sanctioned...

It cannot therefore be ruled out that certain criticisms of the general functioning of the military institution - in particular concerning the inadequacy of the means available - may be allowed a certain leniency.

General officers are obviously better able to exercise such professional freedom of criticism, given their position (current or past) at the top of the military institution.

**3/ The tone of the remarks: while** a member's critical remarks can therefore be tolerated, it will be much more difficult to do so when they are outrageous, insulting or defamatory. Conversely, the judge may be more conciliatory when a criticism is formulated in measured terms, without being polemical.

**4/ The methods of disseminating the remarks: the** wide publicity given by a member of the armed forces to his criticism of the institution is likely to offend his duty of reserve; public criticism, disseminated beyond the limits of the military cénacle, can therefore be judged as an infringement of the duty of reserve.

A fifth, more diffuse criterion can be added to this list: the profile of the speaker. The mere status of military personnel is sufficient in theory to impose the application of the strict obligation of loyalty. Nevertheless, the exercise of certain missions ancillary to, or even distinct from, the military function may be taken into account in order to alleviate this obligation.

The latter notion is of very direct interest to 2S generals who are called upon to express themselves in the context of the responsibilities they may have taken on in various associations .

Said in a more caricatural way:

- a young officer who writes in measured terms in the war school review that infantry combat tactics must be adjusted does not undermine the duty of reserve;
- it would be quite different from a former ECS who would write in strong terms in a major evening paper that nuclear deterrence is bullshit!

Then, of course, one can regret it, these rules do not allow a precise red line to be determined. On the other hand, they do have the merit of setting a "prudential framework" to enlighten us as writers: it is possible to say certain things with firmness and conviction, without fear of exposing oneself, provided that these rules are respected.

It is possible to say certain things with firmness and conviction, without fear of exposing oneself, as long as these rules are respected. It is also possible to say them with finesse and discernment, because everything is a matter of appreciation: the obligation of reserve applicable to military personnel in general and to general officers in particular must be understood without any system spirit. And in the knowledge that the legal lines drawn will fluctuate as disputes arise.

We may conclude by observing that the absence of precise texts does not, in the final analysis, hinder our expression. It is therefore undesirable to develop this framework. For it opens up a space of freedom, which we have every latitude to occupy intelligently, to participate in our country's debate on its defence.

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