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## Article

# Civil Society and the Legitimacy of Executive Power

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**Abstract:** *A liberal-democratic society (from a political theory perspective) is self-governing in the sense that people, through their directly elected representatives, exercise sovereignty and decision-making authority. Through this process, elected officials should have the power and the responsibility to decide all policy matters. In the real world, however, this is not so easy since public policy is made by bureaucrats and not by elected officials. With the birth of the Welfare State, in fact, the question of how much control representatives elected by citizens should exercise over the Public Administration (PA) has become a topic of relevance. The presence of permanent officials in relevant administrative roles corrects some of the major shortcomings of democratic governance and contributes significantly to the success and stability of liberal democratic States. It is therefore necessary to begin a reflection that can give relevance to the normative dimension of the executive power with a deontological analysis on the role of the civil servant/public official. This paper aims to underline the*

*importance of PA in a liberal-democratic political system and explain which are the limits of democratic legitimacy for public officials fulfilling their functions. In addition to this, an alternative approach will be proposed. A vocational model of accountability based on the neutrality of the public function and on a set of liberal values (efficiency, liberty and equality) as a healthy corrective to populism and illiberal democracies and an alternative to the democratic legitimacy.*

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**Keywords:** *administrative discretion; civil society; legitimacy; liberal democracy; public administration.*

## 1. Introduction

Thomas Hobbes is the first to provide the image of the State as something artificial rather than natural, a mechanism or a machine that operates through gears (Hobbes, 1991). These working components are the ones that make up the Public Administration (PA). With the birth of the Welfare State, the question of how much control people elected by citizens should actually exercise over PA has become a topic of relevance, since most public policy depends on and is managed by bureaucrats and not by citizens' elected representatives. This peculiar feature of our

political systems is well understood and yet often forgotten. It is therefore necessary to begin a reflection that can give relevance to the normative dimension of executive power. A democratic society (from a political theory perspective) is self-governing in the sense that people, through their directly elected representatives, exercise sovereignty and decision-making authority. Democratic theory thus holds that elected officials have the power and responsibility to decide all significant policy matters. Unfortunately, the real world of democracy is never that simple and basic theoretical principles are often violated in practice. In fact, if one looks more closely at the way public policies are developed, these features seem to be the rule rather than the exception. The notion of a good public policy is independent of the government of the day. Indeed, certainly a system in which experts can directly impose their preferred policies without the need to negotiate with the public's perspectives and interests is undesirable. The problem is that our current theories of democracy are inadequate to deal with this reality. According to the widely held view, politicians should channel the „general will“, turning it into policy ideas, legislating, and then entrusting the civil service with the implementation of regulations. This is probably a fair characterization of how the system works for a handful of major policy initiatives, on which politicians actively campaign and which are often adopted for strategic or ideological reasons. But when it comes to day-to-day policy changes, most initiatives go in the opposite direction, from the executive to the legislative. In this regard, Brian Cubbon (1993) argues that policy making is not a satisfactory term to describe the functions and roles of ministers in day-to-day activities. Ministers' actions and contributions are not as coherent and rational as it might seem because they think in terms of ideas and biases rather than policies. If we take this statement as an accurate reflection of a situation that often occurs in democratic states, it can be inferred that unelected officials possess substantial power. Cubbon asserts that public officials are the real holders of the exercise of power within a democratic system. The question then becomes how public officials should be guided in their reasoning when thinking about how to exercise state power. Modern democracies are not regimes of unlimited popular sovereignty. They are usually described as liberal-democratic states, reflecting the fact that the power of the „democratic“ side is tempered by a set of constraints reflecting the „liberal“ side. It follows that the role of the civil servant is justified in maintaining adherence to the basic normative principles that define a liberal political order. This is consistent with the institution of civil service neutrality because there are some basic liberal principles that are outside the scope of legitimate political contestation. Thus, while the civil service must be deferential to the legislature, it is also justified in maintaining an independent adherence to basic liberal principles and in promoting policies derived from those principles. It is therefore essential that public employees possess a certain degree of autonomy in their functions in order to guarantee a better functioning of the decision-making process.

## **2. Executive power: an overview**

The classic liberal division of state powers is divided into three branches: legislative, executive and judicial. ‘According to the ideal-typical formulation, the task of the legislature is to promulgate general rules; the role of the judiciary is to interpret and apply them; and the job of the executive is to enforce them’ (Heath, 2020: 19). If one adopts the Weberian view of the state as the institution that exercises a monopoly on the legitimate use of force in a territory, then the actual use of force is strictly the prerogative of the executive (the other two branches merely specify the conditions that make one or the other exercise of force legitimate). Thus,

under conditions of a liberal division of powers, the coercive power is in every case exercised by the executive. It is not just that the police, prison system and army all belong to the executive branch; the point is that the state employees are part of the executive branch. Since it is clear, then, that the state consists primarily of the executive, it is surprising how little theorized this branch of government has been.

Executive power can be seen as an independent source of political authority (Rosanvallon, 2008; Rosanvallon, 2011). The establishment of permanent civil service clearly implies a *quid quo pro*: politicians gain the benefit of having stable, competent and trained administrators, but this is inevitably accompanied by a reduction in their power. There is a tendency in the literature to treat this as a realist concern, a necessary evil. Heath (2020) takes a more positive stance. The presence of permanent officials in senior administrative roles corrects some of the major shortcomings of democratic governance and contributes significantly to the success and stability of liberal democratic states. It serves also as an important bulwark against the inconsistency of democratic-liberal values in our modern political systems, which is a major weakness of populist democracies (Țăranu, 2012; Țăranu, 2013). Administrative discretion increases the stability and predictability of the state and enhances its capacity for long-term commitment. Taking a consequentialist approach in political philosophy, it would not be difficult to justify the power and influence exercised by administrative officials; one could simply point to the contributions of executive power to a liberal democratic state<sup>1</sup>. Most political philosophers, however, take a more principled approach to normative theory, believing that institutional arrangements (such as democratic elections or judicial review based on constitutional norms) have more than instrumental value. Administrative power, on this view, could have beneficial consequences but still be illegitimate. This paper argues that administrative discretion constitutes a fundamental feature of our liberal-democratic political systems for many reasons. First, it allows civil servants to make decisions and carry out activities based on their expertise and judgment, contributing to the overall quality of PA. Secondly, it gives value to the tradition and the background knowledge of the administrative roles/functions. Thirdly, it is an invaluable characteristic of administrative office-holding, enabling public officials to engage in administrative statecraft and exercise prudential judgment (Heath, 2020; Falanga, 2018).

Most of the success of liberal societies is due to the efforts of public officials. Consequently, administrative power is a central feature of the most successful practices of our contemporary political systems. One of the results of having a good PA is that it often attracts more capable classes of individuals than the legislature. There is, thus, an obvious trade-off in terms of democratic control. The more successful one is in attracting and hiring competent and capable individuals in PA, the more the natural consequence will be an increase in the power of unelected officials, as opposed to representatives chosen by citizens (Heath, 2020). One of the important qualities of electoral democracy is that, ideally, it brings people from all walks of life into government. In practice, the results do not live up to the ideal, but nevertheless, the fact remains that people with different backgrounds and life experiences end up becoming ministers (The Sutton Trust, 2019; Heath, 2020). This is a positive feature of the system, which hardly many people would be interested in changing. Still, the state is a large and complex bureaucratic organization. Dealing with complex bureaucratic organizations requires an extremely specific skill set, which most people do not possess. The PA, however, seeks out certain people precisely for possessing this skill. The senior ranks of civil servants are populated not only by capable people, but also by people who are experts in making things work in a bureaucratic system<sup>2</sup> (Richardson, 2002). Autonomous PA contributes crucially to the success

of liberal democratic societies and makes democratic governance possible, as it acts as a counterbalance and corrective to many of the more dysfunctional tendencies of popular sovereignty. It becomes necessary to offer a normative reconstruction of the liberal democratic state that approximates existing practices. This includes not only recognizing the positive contributions that executive power makes, but also offering an affirmative justification for its exercise of power. This is important for many reasons, the most important of which is that without such an analysis it is impossible to distinguish legitimate exercises of administrative power from ones that are not legitimate.

### 3. Neutrality of the public function

The establishment of the permanent civil service generates significant benefits for the quality of public policies, public services and social welfare. In the modern world, what makes the permanence of civil servants possible is the institution of civil service neutrality. Heath (2020) calls it an „institution“ because, although there are some explicit rules and regulations that civil servants must follow, the majority of the commitment to neutrality takes the shape of an unwritten code of conduct; a well-established component of the system of professional ethics that rules administrative behaviour. Although this conduct has not been officially codified, many scholars have begun to describe it as a „constitutional convention“ (Sossin, 2006). At a more superficial level, the commitment to neutrality simply means that public officials should not support any political parties or engage in partisan political activities. This is a two-pronged principle: civil servants should not engage in partisan opposition to the government of the day or in partisan activities in support of the party in power. Thus, it is not only a matter of not demonstrating disloyalty to the government of the day, but also of avoiding excessive loyalty. At a deeper level, the ethics of neutrality requires much more than disregarding political and party activity. Adrian Ellis (1989) argues that political neutrality in its minimum form is the ability to serve different administrations with equal efficiency and effectiveness. Weber (1948), on the other hand, believes that the honour of the public official can be found in his or her ability to consciously carry out the order of a higher authority exactly as if the order corresponded to his or her own convictions. Instead, some theorists have decided to describe public servant neutrality as a kind of agreement, a set of conventions between politicians and permanent civil servants, which includes an element of *quid pro quo*. Donald Savoie (2003) claims that such an agreement determines that public servants must guarantee loyalty, impartiality, discretion and professionalism and nonpartisan siding to the government of the day, in exchange for anonymity and security of tenure.

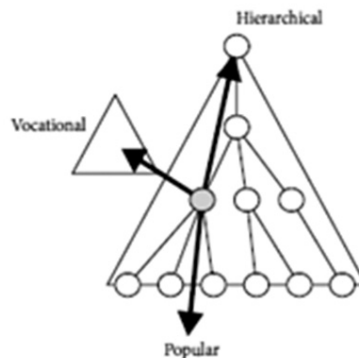
Heath's (2020) view has a theoretical basis in the principle of the division of powers and the idea that there could be a tension between the liberal and democratic components of a liberal democracy. The democratic principle is institutionalized in the legislature while both the judiciary and the executive maintain adherence to liberal principles, meaning that they follow a conception of justice that is relatively independent of public opinion. Pierre Rosanvallon (2008; 2011) endorses a system characterized by the supremacy of the executive, far from being undemocratic or counter-majoritarian, but rather the most effective and efficient way to realize democratic principles. He believes that the natural function of the executive is to represent the general will and unity of a country. The legitimacy of its impartiality is what gives the executive power and authority. The legislative, on the contrary, tends to reproduce the internal

divisions that exist in societies, and this problem is exacerbated in countries that adopt a proportional electoral system that also usually blocks the formation of majority governments.

#### 4. Three models of accountability for the PA

While, as said earlier, a public official should have a moral obligation to promote the general good, it is never his/her job to decide what it is or where it is. This is the classic distinction between policy and administration, the implication that public officials should be in the business of administering or implementing a particular policy but not defining it (Wilson, 1887). Whether government policy consists of providing goods or conferring status, the discretionary actions of public employees determine the benefits and sanctions of government programs and/or the actual access to government rights and benefits (Lipsky, 1980). This is why PA is almost always subject to accountability systems designed to ensure proper alignment of objectives between public officials and those who are more formally charged with determining where the general good lies. Thompson (2005), for example, distinguishes three distinct models of administrative accountability, which he calls the hierarchical, participatory and professional model. In the well-known hierarchical model, accountability is to be found in the chain of command and ends with the elected official presiding over a particular branch of government. In parliamentary systems, the hierarchical model corresponds to the well-known doctrine of ministerial responsibility<sup>3</sup>. The participatory model or as Heath (2020) calls it the „popular“ model reverses the lines of accountability and seeks to make the civil service directly accountable to the public, without the mediation of elected officials. Finally, the professional model requires civil servants to be held accountable to a set of independent professional standards that express, in some way, the universal interest of the state. Once again, the term used by Thompson is potentially confusing. Heath, in fact, refers to the latter model as the „vocational“ model (vocational in the sense that public servants are committed to a secular greater good). To efficiently visualize the difference between these models, let’s simply imagine an individual located somewhere in the middle of an organizational hierarchy and ask him/her what and where his/her loyalties are. The options are that these loyalties can flow up the organizational hierarchy to the minister, down the hierarchy to the public, or through a group of colleagues who maintain the set of professional norms (see Figure 1).

Figure 1. Three models of accountability of the PA



These models also provide a useful framework for thinking about professional ethics. Heath (2020) argues that the hierarchical model is the least attractive in theory, but influential as the official ideology of the civil service. The popular model is certainly the most attractive in theory, but the least important in practice. Much of the literature, however, considers these two options as exhaustive. What Heath tries to show, however, is that the vocational model, despite being the most often overlooked, is actually the most defensible and the best to capture and articulate what is correct about the other two.

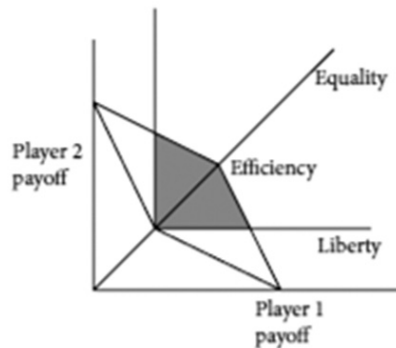
## **5. The vocational model: a normative framework**

This brings us to the most appealing model of public sector morality, the vocational model. The vocational approach to PA ethics looks at the example of other professional classes, such as doctors and lawyers, in thinking about the constraints to which public employees should be subject. In general, the need for vocational ethics arises when there is a class of workers engaged in tasks for which a division of labour is advantageous, but information asymmetries make it impossible (or extremely costly) for a principal to supervise an agent effectively or to assess the quality of his/her work. This makes full contracting impossible, leaving the parties without a legal mechanism to resolve agency<sup>4</sup> issues. As a result, the task could not be delegated or executed at all. In the face of this potential inefficiency, parties can benefit from institutional arrangements that allow the agent to engage credibly and refrain from acting opportunistically, thus creating trust between the parties. The different trappings of the official professions are all intended to establish a valid foundation for this trust to enable the parties overcome the issue of agency. These trappings may include a professional code of ethics, a set of licensing requirements, a grievance office, as well as a quasi-judicial body invested with the power to punish.

One of the most characteristic features of professional groups is this horizontal structure of accountability, in which the individual is called upon to justify his or her conduct, not to the principal or a superior, but rather to his or her peers. This is an obvious characteristic of more structured professions (in the fields of medicine and law), but it can be seen equally well in less formally structured professions (such as university professors). One of the consequences of this arrangement is that a group of professionals must develop their own, autonomous conceptions of what counts in doing their jobs well or poorly. In the case of civil servants, professional morality is just as clearly organized around an independent conception of what it means to „do the job well.“ As Arthur Applbaum (1993) says, one must start with the question of what values and purposes does the institution of the public servant role aim to achieve? The answer, in general, will be that the role of the public servant is to serve the state in such a way as to help it achieve its purposes. These purposes, in turn, cannot be defined simply as what the minister says or what the government of the day says, because our system of government is not one of unlimited popular sovereignty. He goes on to observe that answering the question about the role of the public servant requires a notion of the legitimacy, justice and goodness of government. Moreover, this notion must necessarily precede any specific political ideology that acquires influence through the democratic process, because it is this underlying notion that specify the particular role democracy must assign in the overall state structure<sup>5</sup>. For this reason, while the professional ethics of public officials must deal a key place to the goals of elected officials, it is not entirely subordinate to those goals.

The obvious objection to this analysis is that modern liberal societies are characterized by pluralism with respect to core values, and therefore the liberal state has no single purpose, or at least none that can be specified incontrovertibly (Overeem and Verhoef, 2014; Spicer, 2010; Wagenaar, 1999). The dominant response among proponents of the vocational model has not been to deny this, but rather to observe that a liberal state is nonetheless committed to certain principles; these are thin enough to be neutral with respect to the most contested values, but thick enough to serve as the basis for a strong conception of the morality of the civil service. There are many angles from which to approach the ethics of PA, but the most common one has been to identify a political morality for civil servants based simply on abstract liberal principles (in particular, those of efficiency, liberty and equality), as suggested by Denhardt (1997) and, somewhat differently, by Applbaum (1993).

Figure 2. Liberal principles of justice



Source: Heath, 2020: 143

## 6. Democratic legitimacy and its limitations

An analysis on the legitimacy of the liberal state is necessary to understand the perception and expectations on its role in society. In other words, a focus on legitimacy provides a different approach to answering questions about what the purposes of the State are and what the „goodness“ of government consists of. Thus, a more specific question can be asked about what the role of the executive is in ensuring the legitimacy of the state. Recent philosophical literature on this issue has been marked by an overwhelming emphasis on democracy and democratic practices as a source of legitimacy. This often translates, crudely, into an inability to conceive of ways in which the exercise of state power can be legitimate except through the democratic election of those who exercise it or the delegation of authority by a person so elected. In fact, according to democratic theory, when public policies are decided based on the rules of this system, citizens will consider these political decisions as legitimate. This is because they feel they belong to the political majority, or they accept the majority rule. From this perspective, the legitimacy of the executive branch depends entirely on the legitimacy generated by the legislature through its periodic election (Heath, 2020; Rothstein, 2011). This of course supports the hierarchical model of accountability. However, this is not the only or even the most plausible way to think about legitimacy. As Rothstein (2011) argues, democratic elections cannot be the main political instrument to justify such legitimacy. Heath's (2020) view is that the

executive branch also makes its distinctive contribution to state legitimacy, which is not reducible to its role in facilitating democratic governance. As Ian Shapiro has argued, an important aspect of the legitimacy of any political order *'depends on the problems it solves, and promises to solve, for the people who are subject to it'* (Shapiro, 2016: 47). This is what Pierre Rosanvallon (2011) is describing when he refers to the „legitimacy of effectiveness,“ which the State acquires through its ability to solve social problems. The State, in fact, is the central agent of collective action in society, and citizens naturally turn to it to solve a certain set of collective action problems, to provide solutions that are not only preconditions for the emergence of stable democratic institutions, but also create the social conditions necessary for the development of non-state solutions to many other problems. As the United States have seen in Iraq, democratic elections are of limited use in ensuring the legitimacy of the state if this last one simultaneously fails to fulfil its most basic responsibilities, such as providing security or essential public services.

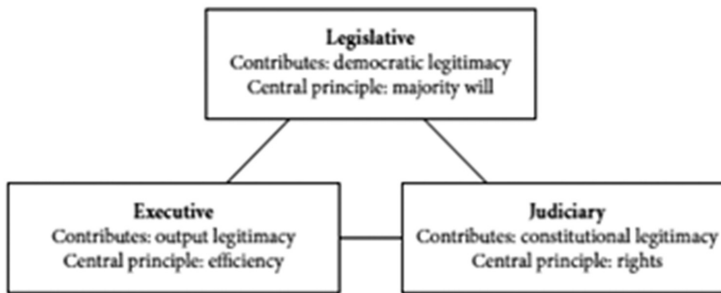
Generalizing, it can be said that when the state assumes the task of providing education, health care or transportation service to the population it also acquires the obligation to do so reliably, efficiently and under conditions that are fair to all citizens, regardless of the political party in office. This is, according to Heath (2001; 2014), the insight that was at the heart of New Public Management thinking<sup>6</sup>, but it was misconceived in populist terms. The correct idea was the thought that government officials acquire direct obligations to the public, that is, obligations unmediated by representative democratic institutions. When it comes to solving collective action problems, the guiding idea is that of Pareto efficiency. This is the rule that says that if it is possible to make some people better off (according to their view) without making anyone else worse off (always according to their view), then it should be done so. Collective action problems are simply cases where, because of the structure of the interaction, individuals fail to achieve a Pareto efficient outcome through self-interested action. This gives each individual a reason to accept some form of constraint on the basis that when everyone does so, a better outcome is achieved for all individuals, including those subjects to the constraint (Heath, 2001). Clearly, it is not ideal to be committed to a Pareto efficient outcome without taking into account the positive role of welfare policies, both in choice and implementation<sup>7</sup>. It is important, therefore, when thinking about the executive's contribution to the legitimacy of the state's output, not to consider it indifferent to the question of what outputs the state should produce. This is the central problem of Rothstein's (2011) influential work. On one hand, he clearly sees that the main sources of political legitimacy are located on the output side of the political system and are related with the quality of government. There is an important insight here, that citizens generally come into contact with the output side of the political system (with the administration) much more frequently and intensely than with its input side. Moreover, what happens to them on the output side is often crucial to their well-being. One could say that the PA is the political system, as citizens concretely encounter and experience it. The character of the administration is therefore decisive for the way the political system is viewed and it is fundamental that the values of the rule of law are respected by the executive branch.

What has just been said justifies the reasoning for administrative discretion and underlines its necessity to make public officials more efficient; this means that their actions produce outputs and outcomes that make citizens better off than they were before (both in practice and in perception). At the same time, Rothstein himself recognizes that people are not only interested in how results are delivered, but also that certain results are delivered. A State that decided that it was no longer interested in providing security services would suffer a huge deficit in legiti-



macy on its way out, even if it withdrew from those activities in an orderly and scrupulously impartial way. Consequently, there is a need for a more comprehensive regulatory model of the State in order to specify the principles that should guide the exercise of administrative power. The natural place to fulfil this purpose is liberal political philosophy. Heath (2020) is the one to provide a reconstruction of the practices that have emerged over time within public service, rearticulating them in the language of modern liberal theories of justice. He argues, as shown in figure 3, that each of the three branches of government contribute to the overall legitimacy of the State, animated by its own central principles. The crucial point is that the executive branch is not a neutral spectator or servant of the legislative. The executive brings something distinctive which must be weighed against the contributions and demands of the other branches. Good policy emerges from the productive tension between the three branches.

Figure 3. Three branches of the State



Source: Heath, 2020: 86

## 7. Conclusion

This paper has argued the necessity of the expansion of the role of the executive power to include substantial policy-making power. This is desirable both to correct some of the major shortcomings of democratic governance (such as populism and illiberal democracies) and to contribute significantly to the success and stability of liberal democratic states. The legitimacy of this power must be found in the proposed vocational model of accountability. This last one involves the neutrality of the public function based on a set of liberal values (efficiency, liberty and equality) and a major administrative discretion of the executive power. The justification for the conduct of public officials derives from a sort of professional morality, an ethics of PA which gives discretion and power to the “gears” of the State, provided that the ultimate goal is always the general good/interest.

## Notes

1. For more specifications of the major contributions of the executive power in a liberal democratic State see Heath (2020: 24-27).

2. In practice, people who are capable in running meetings, making personal decisions, reading and extracting key information from reports.

3. According to which ministers are responsible to the parliament for the conduct of their ministry and government as a whole. In parliamentary systems, this doctrine ensures the accountability of the government to the legislature and consequently to the population (Munro, 2016).

4. “In very general terms, an agent is a being with the capacity to act, and agency denotes the exercise or manifestation of this capacity” (Schlosser, 2019: 1).
5. Most importantly, it determines which decisions will be made democratically and which will not.
6. An approach developed in the 1980s, according to which the government and the public institutions/agencies should be more businesslike in order to improve their efficiency (Lane, 2000).
7. Environmental regulation, social insurance, mass public transportation just to cite a few.

## Conflicts of interest

The author declares no conflict of interest.

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