

# Legality on the Frontlines of Administrative Decision-Making

Matija Žgur\*

## Abstract

In this essay, the author deals with the decision-making practices of frontline administrative officials. In particular, he examines how administrative circulars become the primary source of these officials' decision-making norms, even when their content may be in contrast with hierarchically superior sources of law. The disposition of frontline officials to resort primarily to internal orders of hierarchically superior officials is explained as a consequence of the joint influence of several organizational principles upon their mental faculties. After introducing the problem and its relevance for legal theory, the author first defends the methodological approach to which he subscribes. Thereafter, he presents the central categories and organizational principles framing the institutional operations of public administrations. Finally, he provides a psychologically-informed explanation of the influence exerted by these principles upon the mental faculties of frontline officials which underpin the latter's preference for the use of administrative circulars as primary sources of decision-making norms.

**Keywords:** Public Administration. Administrative Circulars. Principle of Legality. Frontline Officials. Sources of Law. Psychodeontics.

---

\* Dipartimento di Giurisprudenza, Università Roma Tre, Via Ostiense 163, 00154, Roma, Italia, [matija.zgur@uniroma3.it](mailto:matija.zgur@uniroma3.it).

The ideas contained in this essay were first presented on 30 September 2019 at an internal seminar at the Department of Law, Roma Tre University and then, subsequently, on 8 November 2019 at the XXV *Seminario Italo-Franco-Luso-Spagnolo di Teoria del diritto* in Genoa. I am grateful to Sebastián Agüero, Federico Arena, Pierluigi Chiassoni, Arianna Colonna, David Duarte, Francesco Ferraro, Patrizio Gonnella, Dario Ippolito, Victoria Kristan, Fabrizio Mastromartino, Diego Papayannis, Ángeles Rodenas, Alessio Sardo and Natalia Scavuzzo for their valuable comments on those occasions. I also thank Bruno Celano, Miguel Fernández Núñez, Valeria Fiorillo, Kenneth E. Himma, Aleš Novak, Leonardo Ravaoli, Giuseppe Rocchè and Marco Segatti for their observations on a previous version of the text. I am fundamentally indebted to Giorgio Pino and Marco Brigaglia for their precious insights into the topic as well as for their countless explanations and suggestions throughout. Finally, I wish to thank two anonymous reviewers for *Analisi e diritto* for their critiques and suggestions.

## 1. Introduction

Decisions of administrative authorities follow us throughout our lives: be it birth certificates, research grants, building permits, tax decisions or death certificates – authoritative administrative acts fundamentally shape almost every aspect of our social lives, from the cradle to the grave<sup>1</sup>. Administrative law represents the bulk of public law produced in today's Western societies – perhaps the majority of all law<sup>2</sup>. Yet, if judged by the attention it has received in jurisprudential literature, one may be forgiven for thinking that it represents little more than a marginal phenomenon. Compared to the vast amounts of literature dedicated to legislative and, particularly, to judicial decision-making in the last decades, their administrative counterpart has been reduced to a mere footnote in mainstream jurisprudence<sup>3</sup>. Legal philosophers' lack of interest in, and the gap in knowledge on, e.g., the deontological attitudes, interpretative canons, or sources of law employed by administrative officials in their decision-making practices, is hardly comprehensible and – I dare say – unacceptable<sup>4</sup>.

The overlook of administrative decision-making by contemporary mainstream jurisprudence cannot be remedied in the space of a scholarly essay. What I propose here, therefore, is an eminently more limited enterprise. Accordingly, I focus on just one particular practical problem related to a specific type of administrative practice.

---

<sup>1</sup> Take birth certificates, for instance. Our first contact with (administrative) law is usually simultaneous to our entry into the world: technically speaking, we come to exist as persons in law only when the natural fact of our birth is registered into a birth certificate. The relevance of such registration ought not to be underestimated, as the following example illustrates. While the inscription of certain facts into the birth certificate is merely declaratory of natural facts (such as, for example, the date of birth), it is constitutive of a number of other important facts, including of our names. The inscription of one's gender, for example, is a more problematic issue, as it is controversial whether such an inscription is purely declaratory or constitutive of one's gender – at least for what the law is concerned. Given the unbridgeable abyss between the rigidity of legal categories (here in the form of a limited choice between two, at most three gender categories) and the complexities of gender as a biological category, it seems inevitable that a certain percentage of people will have legally designated a gender that does not correspond to their biological identity. This dissonance can be the source of numerous legal complications. On this point, see Duarte d'Almeida 2013.

<sup>2</sup> There are numerous reasons for the expansion of the administrative law's reach in the last several decades: the expansion of the State's jurisdiction with the development of the so-called Welfare (Social) State; the related explosion of normative production and, in particular, of sub-statutory acts; the specialization of technical knowledge concentrated in executive agencies; the progressive transferal of law-making (and some adjudicatory) powers from the legislator to the executive etc.

<sup>3</sup> I have struggled to find a single comprehensive legal philosophical study of administrative law or public administration in most of the major world languages. I welcome indications to the contrary.

<sup>4</sup> Characteristic in this sense is Kramer's remarks on H.L.A. Hart: «Hart's tendency to neglect the sundry roles of administrators who give effect to legal norms is likewise badly in need of rectification. Law-application is an enterprise conducted by the administrative branch as well as by the judicial branch of any system of governance» (Kramer 2018: 206).

The practice in question regards the use by frontline officials of administrative circulars as sources of law in their law-applying activities. The problem related to this practice can be explained in two steps. First, in the form of a three-pronged *thesis T* on the nature of the practice in question. I argue that

(T1) frontline administrative officials habitually use circulars as the principal (primary, pre-emptive) source of law in their decision-making practices; that (T2) the attitude *sub T1* develops and persists irrespective of the fact that circulars are not formally recognized sources of law – neither by most contemporary legal systems nor by legal theory; and that (T3) the attitude *sub T1* is a consequence of systemic factors – constitutive of the public administration’s organizational structure – that bear upon the decision-making practices of frontline officials.

Secondly, through a formulation of a proper *legal* problem. The situation just described appears quite unproblematic both from the doctrinal and the jurisprudential points of view. As long as the contents of circular orders are consistent with hierarchically superior, formal sources of law (e.g. the constitution, statutes, government regulations etc.), and merely determine the latter’s content in greater detail, such a practice appears legitimate and consistent with the principle of legality. This is how things are most of the time. However, it seems that the attitude *sub T1* persists even when the contents of such circulars contradict formal legal sources, i.e. even when the contents of a given circular are illegal (*consequence C*). The question, then, is how can we explain that administrative circulars are not only adopted by frontline officials as binding sources of decision-making norms, but that such an attitude persist even in cases where the circulars *qua* sources of law are apparently illegal?

The relevance of the stated problem should not be underestimated: according to this view, the phenomenon in question is not some accidental occurrence, but rather a systemic pathology with important consequences for our understanding of several major jurisprudential themes. In this essay, I explain the described phenomenon in terms of an entrenched normative attitude on the part of the law-applying officials, conditioned by organizational and legal principles constitutive of their decision-making practices. Therefore, I focus on examining the psychological processes characteristic of frontline administrative decision-making. This analysis will bring to light issues relevant to the jurisprudential undertaking: first, related to the nature, emergence, persistence, and the hierarchy of *sources of law* in the public administration; second, with regard to the functioning of the *principle of legality* on the frontlines of administrative decision-making<sup>5</sup>.

---

<sup>5</sup> The principle of legality with regard to the executive (the principle of legality *in the strict sense*) denotes the subjection of the executive agencies to the statutes and the constitution, meaning that every act of these bodies, which unilaterally affects the rights of individuals, must not only be conformant to the law but must also be expressly authorized by the law. See Guastini 2016: 146 f.

This essay proceeds as follows. In § 3., I present the conceptual and institutional framework relevant to the analysed phenomenon. In § 4., I propose a psychologically-informed explanation of the phenomenon in question. I conclude in § 5. First (§ 2.), however, I address the problem of the thematic and methodological limits of (one type of) mainstream contemporary jurisprudence and propose an alternative, multidisciplinary approach for legal theory.

## 2. Public Administration and Legal Theory

Above, I criticized the lack of legal theoretical analyses of administrative law and the public administration. The reasons for this omission may be various, but it seems that they can be reduced to two major problems of contemporary legal philosophy (at least one strand of it): namely, the *what* problem – related to the prevailing subject matter, i.e. judicial decision-making; and the *how* problem – related to the method typically employed for the study of that subject, i.e. the logical analysis of the legal language. Here, I briefly discuss these two problems and then sketch an alternative that I follow in this essay.

The *what* problem can be stated as follows. One of the major shifts that occurred with the rise of the Constitutional State in the latter half of the 20<sup>th</sup> century has been the extraordinary increase in importance of the judiciary and, in particular, of the newly-formed constitutional courts. With this, the focus of legal scholars dramatically shifted towards judicial decision-making<sup>6</sup>. While there has recently been an increased interest in the legislative discourse as well<sup>7</sup>, the bulk of today's scholarly work remains firmly focused on the analysis of judicial decision-making practices.

The *how* problem, on the other hand, regards the legal theory's methodological approach for the study of this privileged subject matter. While the scholarly marketplace of ideas admits of many approaches to the study of one and the same subject, analytical legal theory, nevertheless, stands today as the paradigmatic jurisprudential approach in many parts of the world<sup>8</sup>. The methodological approach of this school of thought (at least one strand of it) is built around two presuppositions: the "meta-philosophical" presupposition that philosophy is merely the logical analysis of language (rather than an autonomous form of knowledge with its own specific object and corresponding methodology); and the "ontological-juridical" presupposition that law is but a language (a discourse) of normative authorities. It follows that the analytic legal philosophy is, quite simply, the logical analysis of the legal

---

<sup>6</sup> See, for example, Celano 2018: chs. 12 & 13; Pino 2008; Pino 2017.

<sup>7</sup> By way of example, see Waldron 1999, Wintgens 2002, Ferraro 2019.

<sup>8</sup> Within this type of legal philosophy there are, too, conceptual and methodological differences. Cfr. Himma 2015 and Guastini 2012.

language<sup>9</sup>. Applied to the judicial discourse (understood as meta-language, i.e. as a language or a discourse about the language of the legislator or some other normative authority), the work of analytical scholars revolves around the linguistic analysis of judicial decisions, i.e. of the logical structure of their argumentation, of the interpretative canons employed by judges, their (re)construction of legal institutes, their self-understanding as law-makers etc.<sup>10</sup>

The tool-kit of this kind of legal philosophy, as well as the issues analysed with it, has recently come under intense criticism by Marco Brigaglia and Bruno Celano<sup>11</sup>. These authors argue that contemporary (analytic) legal theory has (1) unjustifiably focused almost exclusively on the analysis of judicial decision-making (with the odd exception of legislative processes) and has, in so doing, (2) limited itself to the logical-argumentative analysis of legal reasoning as the visible, linguistic manifestation of the judges' decision-making process (i.e. the context of justification). Against this, Brigaglia and Celano claim that legal theory ought to (1) expand its field of interests so as to include the analysis of administrative law and the functioning of bureaucratic apparatuses, which represent a crucial part of contemporary legal practices; (2) include into its methodological approach the analysis of psychological processes leading up to the decision – what is typically considered the purview of the context of discovery. Note that this approach requires that legal norms be perceived not as linguistic entities, but rather as psychological entities (mental contents) and rule-based decision-making not as a discursive practice, but rather as socio-psychological in nature. In a previous work, Celano proposed to call this new, psychologically-inspired, naturalized kind of doing legal theory, “psychodeontics”<sup>12</sup>.

<sup>9</sup> Guastini 2012: 51 f.

<sup>10</sup> Guastini 2012: § 2.2. One important offshoot of this approach is the distinction between motives and reasons: the former are considered mental or psychological states – impulses, emotions, attitudes etc. that induce one to have a belief, hold a thesis, adopt a decision; the latter, on the other hand, are linguistic utterances that are publicly presented in favour of a thesis or a decision (they are premises of a reasoning procedure). See Guastini 2012: § 1.5. The methodological consequences drawn from this distinction are criticized by Brigaglia and Celano (see below).

<sup>11</sup> Celano 2017, Brigaglia & Celano 2017, Brigaglia & Celano 2018, Brigaglia 2019.

<sup>12</sup> This term first appears in Celano 2017. Celano and Brigaglia are also highly critical of legal philosophy's clear-cut separation between legal theory and sociology of law. On their view, due to an increasing specialization of knowledge, today's legal philosophy has become too narrow in scope and increasingly unable to give new insight into legal phenomena, particularly in the wake of new scientific discoveries (in cognitive and neuro- sciences in particular). Thus, on Celano's and Brigaglia's view, the thematic and methodological divorce between philosophy of law and sociology of law, ought to be abandoned in favour of a more comprehensive, empirically-oriented legal scholarship. Nevertheless, there is a growing awareness of the importance of empirical sciences for legal theory: this is seen in the emergence of a new field of legal studies called “experimental jurisprudence”. Within the ambit of public administration studies, this same awareness has culminated in the establishment of a scholarly *Journal of Behavioral Public Administration*. Some of the more programmatic works in this area include Grimmelhuijsen et al. 2016, Moynihan 2018, Nørgaard 2018.

In this essay, I follow the main features of this new legal theoretical approach and apply them – more or less faithfully – to the study of a concrete legal phenomenon. I look at the attitudes and dispositions of single legal operators regarding a very particular legal phenomenon (e.g. the use of circulars *qua* sources of law) and in a specific institutional setting (e.g. the frontline public administration)<sup>13</sup>. In so doing, I provide a psychologically-informed analysis of the relevant legal phenomena. I reject the ideal of “full” rationality as the central background presupposition regarding the nature of human decision-making and, rather, embrace the idea of law as created and operated not by some ideal *homo rationalis*, but by real-life individuals with provenly limited and fallible cognitive faculties. I thus accept the “bounded” rationality model of human decision-making<sup>14</sup>, and seek to understand how legal operators actually perceive the law that they create and use in their daily practices.

This project avails itself of a wide array of know-how, drawing from the fields of social psychology, organizational studies and sociology. Regardless of its breadth, it is importantly limited in several ways. First, it deals with just one particular type of official practice (the use of administrative circulars as sources of law), and explains it as a consequence of the influence of organizational principles attributable to one particular organizational model of bureaucracy (a Weberian-type bureaucracy). This narrow focus does not mean that other, even diametrically opposite practices cannot be seen to also exist within the same organizational model. Indeed, they do

---

<sup>13</sup> I also hope to show that even such obscure little things as administrative circulars can offer important insight into larger theoretical problems. For example, one thing that makes the use of circulars in frontline administrative practices a relevant theoretical problem is the fact that most state legal orders – as well administrative law dogmatics and legal theory – classify administrative circulars as *internal* acts of the administration (see *T2*, above). (On how administrative law scholarship perceives administrative circulars as internal acts, see, for instance, Clarich 2013; Mazzamuto 2015; Ruggeri 1973.) As such, circulars (ought to, supposedly) produce legal effects only within the specific organizational unit in which they are emanated but not in the administration’s external relations with its clients, i.e. they do not (ought not to) create rights and obligations on the part of citizens. Despite this, circulars are continuously used by administrative officials as a means of transmitting binding orders and interpretative directives to their subordinates; they are, moreover, regularly perceived as binding by their addressees, who then regularly treat them as sources of law in authoritatively deciding individual cases. In consequence, circulars come to have a direct bearing on the rights and obligations of citizens, i.e. they become the source of norms which dictates a given decision. There may be still further and more wide-ranging consequences of this phenomenon. For instance, if, as follows from *T1*, frontline officials tend to give precedence to orders from their superiors contained in circulars over any other source of law, then this reality should somehow reverberate on our theories of the sources of law. Even more importantly: if *T3* is true, and the use of circulars *qua* sources of law among frontline administrative officials is a systemic consequence of the normative design of our legal systems – and if this is further connected with the above “conclusion C” – then relevant theoretical consequences with respect to how the principle of legality functions in concrete circumstances of law-application ought to follow.

<sup>14</sup> The idea of bounded rationality was introduced to this field of study by Herbert Simon. See Simon 1997.

exist and surely have some effect on the attitudes and dispositions here examined<sup>15</sup>. Nevertheless, they cannot here be examined in detail. Moreover, this project also does not pretend to say anything about the nature of similar official practices within different organizational models, although it can be expected that the results will be different depending particularly on the rigidity of vertical relations in an organization. Second, it attempts to explain the attitudes of frontline officials only in relation to the influences originating from the organization itself. It does not, for example, take into consideration the influence of the officials' personal characteristics of their official behaviour<sup>16</sup>, although these factors are indeed relevant in understanding the bureaucratic behaviour and would require further consideration in the future.

With these limitations in mind, let us now proceed with analysing the main problem.

### 3. The “Mysteries” of Bureaucracy’s Inner Workings on Display

The administrative practice that is the object of *thesis T* (§ 1.), and the problems related to it, can be elucidated on a concrete example.

Consider Art. 94 of the Slovenian Civil Servants Act. This legislative provision regulates the performance of the public officials' work in accordance with instructions and directions of superior officials<sup>17</sup>. It determines, among other things, that civil servants are obligated to perform the tasks, required from them by their superiors, according to the latter's written directions and instructions<sup>18</sup>. Should, however, such directions or instructions require unlawful conduct, the subordinate officials may refuse to carry them out, while they must refuse to do so if their actions would amount to a criminal offence. If they nevertheless follow the given written instructions, and in so doing cause damages to a third party or commit a disciplinary violation, they do not incur tort liability. This, on the other hand, also means that they are not released from responsibility for actions carried out on the instruction of superior officials that constitute a criminal offence.

This regulation appears to establish a reasonable balance between two fundamental, yet antagonistic operational principles in the public administration, namely the principle of obedience to superiors (the hierarchical principle), on the one hand,

---

<sup>15</sup> For general theoretical studies of public administration, see, for instance, Hummel 2015, Fredrickson et al. 2012, Simon 1997 etc.

<sup>16</sup> On how the individual's personality may affect her organizational behaviour, see, for instance, DeHart-Davis 2007.

<sup>17</sup> Similar provisions, with substantively the same content, can be found in many other similar legal orders. In this sense, the example is a paradigmatic one.

<sup>18</sup> More specifically, the officials are required to perform the requested work or to perform the work in the requested manner.



and the principle of legality, on the other hand. According to the balance struck by the legislator, the obedience to orders emanated by superior officials is to be considered the rule, while disobedience represents an exception, legitimate only insofar as the required behaviour would either amount to an unlawful act or constitute a crime.

Consider now the case that some superior official issues – via an administrative circular – an instruction to her subordinates in which she requires of them to commit an illegal act: for example, to erase from the registry of permanent residents a select group of individuals, without there being a legislative mandate for doing so and in clear violation of fundamental constitutional rights of these individuals<sup>19</sup>. Supposing that such an instruction raises no serious interpretative issues, so that it is more or less obvious to all addressees that they are being ordered to commit an illegal act, the question that interests us here – one which is at the centre of this investigation – is: why would the officials, to whom the unlawful instruction is addressed, comply with the illegal order, despite a legislative requirement to disobey? How can their compliance with illegal orders be explained?

The claim that I support in this essay – one premised on the *thesis T*, and expressed in the *consequence C* (§ 1.) – is that frontline officials, charged with executing an unlawful order, by and large (i.e. consistently, as a matter of rule etc.) perform the required action, regardless of the fact that some other legal rule prescribes the possibility, or indeed the obligation, to refuse to execute such an order, and regardless of the negative consequences, they may later face for doing so<sup>20</sup>. Their tendency to do so, I claim, is the result of a combined influence of several organizational principles on the psychological processes involved in these officials' decision-making. Put in other terms, I claim that in the specific organizational settings, the (influence of the) hierarchical principle will tendentially prevail over the (influence of the) principle of legality, not only in normal cases but also in most non-normal, i.e. exceptional cases<sup>21</sup>.

---

<sup>19</sup> This is what happened in the case of the so-called Erased when, in February 1992, the administrative authorities of the newly-established Republic of Slovenia perpetrated an unconstitutional erasure of more than 25.000 individuals from the registers of permanent residents on the basis of a series of “in-house” instructions (circulars) issued by the ministry of the interior. For a detailed legal account of the Erasure, see Kogovšek Šalamon 2016 and the ECtHR decision in *Kurić et al. vs. Slovenia*.

<sup>20</sup> Note that I will be attempting to provide only a very general scheme of the psychological mechanisms involved in the officials' decision-making, which means that numerous factors involved therein will be abstracted or, indeed, omitted. For instance, the pragmatic considerations involved in deciding whether or not to follow illegal orders, including trade-offs between the costs of disobeying the superiors' illegal orders and the costs of the punishment for obeying such orders, intuitively seem to be an important factor in the individual's decision about whether to obey or not. Nevertheless, such factors will not be explored separately here, but only as part of the whole set of factors bearing on a given decision.

<sup>21</sup> I should make two qualifications in this regard. (1) It seems quite plausible that the nature of an official's mental processes involved in her response to an order that is “merely” unlawful will be different than in the case of an order requiring her to commit a criminal offence. But absent empirical proof, I



In the rest of this essay, I aim to explain the reasons for this being the case. First (§ 3.1.), I briefly discuss some key concepts employed in this essay, while in the next segment (§ 3.2.), I discuss the organizational principles that underlie and determine the relevant activities of public administration officials. Thereafter (§ 4.), I provide a psychologically-based explanation of the phenomenon.

### 3.1. “*The Who*” and “*the What*” of Bureaucracy: Some Conceptual Clarifications

In this segment, I elaborate on three key terms that are at the centre of this work, namely (i) frontline administrative officials, (ii) administrative circulars, and (iii) sources of law. This will, hopefully, help us avoid some misunderstandings and permit us to better focus the discussion.

I begin with the term *frontline administrative officials*. To those familiar with bureaucratic studies, the term may sound familiar. That is because it bears a resemblance to “street-level officials” (or bureaucrats), a term introduced by M. Lipsky in his well-known study of everyday bureaucratic activities<sup>22</sup>. Though similar, the two terms should not be understood as interchangeable. According to Lipsky, street-level bureaucrats are «[p]ublic service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work»<sup>23</sup>. Examples include law enforcement officials, judges and other court officers, but also teachers, social and health workers as well as «many other public employees who grant access to government programs and provide services within them»<sup>24</sup>. In this essays, on the other hand, the term frontline officials is used to denote a more circumscribed set of public officials, i.e. those agents of public administrative agencies (such as government ministries or similar units of the executive branch) that are authorized by law with enforcing legal regulations on behalf of the state, predominantly by issuing written authoritative administrative acts in cases regarding the rights and duties of persons in their relation to the state<sup>25</sup>. While the two sets may overlap (e.g.

---

shall henceforth disregard this possible difference. (2) I consider it perfectly viable that my argument stops in extreme cases, such as, for example, should a superior ministerial official order her subordinates to burn down the entire building of the ministry for no specific reason; or to kill a client in front of them because of the colour of their hair; or perform some similar, bizarre and completely unwarranted action, unrelated to the jurisdiction of that organ. The issue, however, is more complex when militarized organs are considered. There, the principle of hierarchical obedience is significantly more emphasized than in a classical bureaucracy and ample proof suggests that obedience to even manifestly illegal orders, such as the torture of prisoners, is not to be excluded in such contexts. Cfr. Iafate 2016; Zimbaro 2007 (in reference to the Abu Ghraib prison case).

<sup>22</sup> Lipsky 2010.

<sup>23</sup> Lipsky 2010: 3.

<sup>24</sup> Lipsky 2010: 3.

<sup>25</sup> I am excluding from my consideration members of armed forces, including the police. The reasons for this are, in part, elaborated above in note 20.

social workers may function as street-level bureaucrats when visiting a couple to verify whether they comply with the requirements for adopting a child and as frontline administrative officials when issuing an administrative decision on child allowances), there are also relevant differences between the two: for one, frontline officials, unlike street-level officials, do not typically perform material acts, but only issue individual authoritative administrative acts. Regardless, Lipsky's definition does emphasize two characteristics that are also central for our definition of frontline officials: (i) they are those (the only) officials whose decisions directly affect third parties (i.e. citizens); and (ii) they wield substantial *de facto* discretion in applying the law in their contacts with these third parties. I should add, (iii) that the officials in question are also the last link in the hierarchical chain of command in a particular administrative agency, and are, as such, exclusively the addressees of orders from superior officials, unable to transmit them themselves to further subordinate officials.

Note that characteristics (i) and (ii) refer to the officials' external relations with citizens, while characteristic (iii) pertains to the officials' internal relations with their superiors. Note also that the two poles ((i) & (ii), on the one hand, and (iii), on the other hand) appear to be in tension: paradoxically, frontline officials seem to have ample *de facto* discretion in law-application in concrete cases (the external dimension)<sup>26</sup>; and are limited in their discretion by their superior officials' interpretation of the relevant legal sources (the internal dimension)<sup>27</sup>. While it would be interesting and necessary to analyse how this tension resolves in concrete circumstances, I do not engage with the problem here<sup>28</sup>. Rather, I focus only on the inner workings of the public administration, and thus only on the (power) relations running from hierarchically superior towards hierarchically inferior public officials<sup>29</sup>.

Let us now examine the term *administrative circulars*. For the purposes of this essay, I perceive administrative circulars as various kinds of written communication emanated by a hierarchically superordinate official, addressed to a larger number of hierarchically subordinate officials within the same administrative organization

---

<sup>26</sup> In Žgur 2018, I distinguished between three types of discretion in relation to the frontline officials' law-application in a concrete case: first, whether the law as such will be applied at all; second, which norm will be applied in the given case (among the apparently applicable ones); third, how a given norm will be applied (the matter of the norm's interpretation). On how this discretion reverberates on the frontlines, see Barsky 2016.

<sup>27</sup> Cfr. Merkl 1987, who recognizes that statutes can never fully and precisely tell us what ought to be done in a particular case and, thus, that there is always an element of discretion present in the application of the law by the ultimate (frontline) legal official.

<sup>28</sup> Cfr. Oberfeld 2010.

<sup>29</sup> Crozier argues that there are always two types of power present in hierarchical organizations: opposite to the hierarchical power of superior officials is the bottom-up "power of the expert". As said, neither the nature of this latter nor the nature of the relationship between the two is the object of the present analysis. See Crozier 2000: 183 ff.

(or a different organization belonging to the same chain of command)<sup>30</sup>. On a more detailed look, three salient sets of characteristics of such communication can be identified, namely (i) form-related, (ii) content-related, and (iii) function-related characteristics. Let's examine each briefly.

First, as to their *form*, circulars bear the following characteristics: (a) they are a *written* form of communication. While circular orders may be issued orally, this possibility is of no interest here for several reasons. According to Weber, whose model of bureaucracy is here employed (see below, § 3.2), written official communication is a typical characteristic of bureaucracies, useful and necessary for the pursuit of several organizational objectives (e.g. efficiency, precision, traceability etc.)<sup>31</sup>. Also, it has been shown that «[w]ritten rules are more likely than unwritten rules to receive higher compliance»<sup>32</sup>. Finally, the traceability of written communication greatly facilitates its *ex post* analysis<sup>33</sup>. (b) The official *naming* of such acts is here irrelevant – acts with the same function may sometimes be called “instructions”, “internal guidelines”, “notifications”, “protocols”, “memorandums” and so on. A circular's name will usually depend on the content of the communication, but will have no bearing on its authoritative weight – which will rather depend on its content<sup>34</sup>. (c) The circular-issuing individual is typically not in any way limited by any formalized *procedure* for their issuing. Second, the circulars' *content* can be highly diverse, and can include raw data, specific orders<sup>35</sup>, more general directives, interpretative guidelines etc.<sup>36</sup> Importantly, the form of communication does not, in any way, limit the content that can be transmitted through it. Finally, as to their *function*, circulars are a particularly useful instrument of governance in hierarchical bureaucracies, as they may serve numerous functions<sup>37</sup>. Co-ordination of opera-

---

<sup>30</sup> Circulars are not necessarily an instrument of hierarchically superior offices. As Giannini argues, «non è vero che sia necessario un rapporto di gerarchia, di supremazia, e altro qualunque rapporto organizzatori, per poter diramare circolari. In altro ordine di concetti si può dire che non esiste un 'potere' di dirigere circolari, essendo la circolare una misura da ogni ufficio adottabile» (Giannini 1960).

<sup>31</sup> Cfr. Weber 1978: 957.

<sup>32</sup> See DeHart-Davis et al. 2013.

<sup>33</sup> Traceability is a key characteristic of any document, and is particularly relevant in bureaucratic organizations. Cfr. Ferraris 2014.

<sup>34</sup> Cfr. Giannini 1960.

<sup>35</sup> Due to the nature of circulars, their content cannot be an individualized order to a specific subordinate official.

<sup>36</sup> Cfr. Chiti's definition of circulars, as «atti la cui unica caratteristica omogenea è di essere indirizzati ad una pluralità di figure giuridiche soggettive, cui vengono comunicate disposizioni generali ed altri contenuti di disparata natura» (Chiti 1988).

<sup>37</sup> Legal scholarship has for some time acknowledged that circulars have a *de facto* central role in administrative decision-making. Cfr. Romano 1959: 117: «gli organi amministrativi, nello svolgimento dell'attività di loro competenza, operano pressoché esclusivamente sulla base delle circolari a loro impartite, trascurando generalmente di tenere diretto conto dei testi di legge, per la cui applicazione pure dette circolari sono emanate»; Hogan 1987: 194: «there is some evidence that some Government Departments

tions in complex organizations requires, among other things, that members of the bureau be informed of the tasks they are required to perform, and of the manner in which they are to perform them. Seeing how political leaders at the apex of the executive-administrative apparatus mostly operate with broad policy orientations and programmatic goals, progressively lower levels of officialdom must see to it that they be appropriately specified in order to be implementable by the frontline officials. To assure that the “message” does not become (overly) distorted, that is, in order that the content of individual administrative acts respects to the greatest possible extent the policy goals, it is necessary that the “hierarchy of authority” is properly aligned with “the hierarchy of knowledge”<sup>38</sup>: officials at each level serve as kind of “communication intermediaries”, screening out information received from superiors which they deem relevant for lower-level officials in order for them to effectively exercise their duties. The transmission of relevant information downwards in bureaucracies typically flows precisely by way of circulars.

Finally, let us elucidate the term *source of law*. Administrative circulars, we said, serve as sources of law in the decision-making practices of frontline administrative officials. The term “source” (of law) is to be understood as some *thing* (a *fact*) from which officials draw legal norms on the basis of which they then decide in concrete cases. There is little, if any *a priori* limits as to what kinds of facts can count as sources of law<sup>39</sup>. On the one hand, different legal theories impose their own criteria and conditions as to what can (ought to) be properly considered a source of law<sup>40</sup>. On the other hand, as a matter of fact, each legal system has its own particular set of sources of law, whereby the conditions for something counting as a source of law in that legal system are determined by the (positive) law itself<sup>41</sup>. Such a standard, “top down” conception of legal sources (“top down” because it presumes that law is a system of hierarchically organized sources of law, whereby the hierarchically superior ones determine the conditions of existence of hierarchically inferior ones) is here rejected as part of the “traditional” way of doing legal philosophy<sup>42</sup>. As

---

prefer to issue – almost as a matter of policy – administrative rules and circulars rather than opt for legislation»; Chiti 1988: «Mentre infatti per la migliore dottrina non esiste un problema [delle] circolari, dato che queste non risultano atti sostanziali bensì mere misure di comunicazione di regolamenti, direttive, ecc [...] nella prassi amministrativa – al contrario – le circolari svolgono un ruolo fondamentale finendo per risultare il vero punto di riferimento dell’operato degli organi agenti, ed imponendosi come un diaframma rispetto al dettato legislativo»; and so on. Cfr. also Gjergji 2013 for its fundamental role in governing entire legal (sub)fields.

<sup>38</sup> See Marx 1971: addition to § 297. Cfr. also Crozier 2000: 183: «Lo strumento principale della gerarchia sarà in definitiva la manipolazione delle informazioni o almeno il controllo dell’accesso alle informazioni».

<sup>39</sup> Cfr. Pino 2020: 2.2.; Guastini 2014: 111.

<sup>40</sup> Legal positivism, for instance, requires that these facts be “social” facts. Cfr. Raz 1979: 37.

<sup>41</sup> Guastini 2014: 110 ff. In this sense, the law is an autopoietic phenomenon.

<sup>42</sup> This, however, does not mean that (i) the system of legal source is not normatively so organized

part of the “new” legal theory, the conception of what constitutes a source of law advocated in this essay starts from the point of view of legal officials charged with deciding concrete cases. I argue that it is their understanding of what makes something a source of law that ought to be the primary focus of this kind of legal theory. In this sense, a more satisfying definition has recently been proposed by Giorgio Pino<sup>43</sup>. Pino argues that «for some fact F to count as a source of law, a practice of recognition must be in place among the law-applying officials to the effect that F is to be consulted in order to know what counts as law»<sup>44</sup>. The definition focuses on the conditions compliant to which a given fact is transformed into a source of law in the practices of a certain set of officials. On Pino’s view these conditions regard in particular the *regularity* of the officials’ practices. Firstly, the practice of recognizing some fact F as a source of law must be of a certain *intensity*, i.e. there must be a certain amount of officials that repetitively – as a matter of course, normally etc. – treat F as a source of law. Of course, it is impossible to determine in advance with any exactness just how many officials and with what intensity must engage in such a practice – but the point is, I believe, nevertheless clear. Secondly, as to the qualitative side of these practices, it does not suffice – argues Pino – that a mere «factual regularity» or «a convergence by mere happenstance» is in place. Rather, «the relevant regularity is of a *normative* kind», meaning that «the convergence of behavior [is] associated with a *normative attitude*, evidenced by a social pressure for conformity»<sup>45</sup>. In other terms, the relevant officials of the legal system must perceive themselves as required (bound, obligated etc.) to use the fact F as a source of law, i.e. as the source from which norms that are to be used in deciding concrete cases are drawn. This, on pain of having their decisions overruled, suffering disciplinary punishment or similar<sup>46</sup>.

Pino’s definition certainly hits the mark in accounting for what is required for some fact to be considered by the sundry officials of a given system as a source of law which they are *legally* required to employ in their decision-making. Put briefly, it all boils down to a specific *attitude* by the relevant officials which manifests itself in a particular practice of recognition (of some fact F as a source of law). However, this definition does not engage with the origins and the specific nature of the relevant attitude – nor is that its intent, of course. It remains uncommitted to any explanation

---

(because it is), and that (ii) officials of the system do not, for the most part, actually respect this hierarchy (because they do).

<sup>43</sup> As per author’s declaration, the definition is Hartian in its essence. See Pino 2020: 2.1. Cfr. Hart 1994: ch. VI.2.

<sup>44</sup> Pino 2020: 2.2.

<sup>45</sup> Pino 2020: 2.2 (Emphases are mine). Note that «when such a normative attitude is in place, we will say that the law-applying institutions are ‘legally required’ to use a given source of law». The focus of this discussion is precisely on legal sources of law.

<sup>46</sup> Cfr. note 20, above. See also Pino 2020: 2.2.

as to how this attitude comes to existence, how it is maintained, or how deeply it is anchored in the minds of the officials. Thus, Pino's definition of what constitutes a source of law is a good starting point for the purposes of this essay. What it needs, if it to be useful in the context of this particular investigation, however, is a psychologically-informed upgrade – one which I attempt to provide below (in § 4.).

### 3.2. *Framing the “Bureaucratic Mind”: the Organizational Structure of Contemporary Bureaucracies*

In this segment, I discuss several organizational principles, constitutive of the practices of frontline public administrative officials. While other principles may be involved in framing these practices, I consider these to be decisive in forming the relevant “bureaucratic mind”<sup>47</sup>. The principles of political neutrality, professionalization, rule-reliance and accountability are thus analysed below. These principles support and complement the two central operational principles in administrative agencies, i.e. the hierarchy principle and the legality principle (§ 3.)<sup>48</sup>. In this analysis, I presuppose a classical, Weberian-oriented model of bureaucracy – of its structure and functions<sup>49</sup>. While this model may not be fully representative of how today's Western public administrations are organized – in light of numerous organizational changes they underwent in the last decades –, I nevertheless assume that, on the whole, it is a sufficiently useful working model. In particular, because the general tendency towards action rationalization, the hierarchical organization of relations, and the neat division of labour (horizontal and vertical) are those characteristics of the Weberian model of bureaucracy that continue to hold a preeminent role in contemporary administrative organizations and profoundly affect the attitudes of officials working within them. Going forward, the limitations of the explanatory power of this essay in light of its circumscribed perspective ought to nevertheless be kept in mind.

(i) *Political neutrality & professionalization.* Considering the nature of the frontline officials' work, their “contamination” with politically-sensitive materials is inevitable. The requirement of political neutrality should thus be understood not as a full rejection of the officials' participation in policy activities (something quite

---

<sup>47</sup> With this expression, I refer to a set of dispositions and attitudes usually attributed to bureaucrats. In our cultural milieu – that of continental Europe, civil law systems – it is sufficient to recall Franz Kafka's work to realize that the generality of us share a set of background clichés and intuitions about, but also similar personal experiences with, the typical functioning of administrative officials. See Kafka 2014 (especially the novels *The Trial* and *The Castle*).

<sup>48</sup> In practice, these principles are inter-related and, at times, difficult to distinguish as the following discussion will show. Nevertheless, it is possible and useful to analyse them separately.

<sup>49</sup> See especially Weber 1978: ch. XI.

impossible), but rather as requiring that «administrators, in their professional capacity of public functionaries, should not take sides in political controversies»<sup>50</sup>. Thus, while as citizens, they will naturally have their political preferences, they nevertheless ought to – to the greatest possible extent – refrain from publicly expressing them and from taking part in partisan politics, and rather exercise their duties on the basis of laws and professional standards<sup>51</sup>. In this sense, the requirement of political neutrality is a public administration-specific version of the more general requirement of *professionalization*. Professionalization of the bureaucratic occupation is characterized (established and maintained), among others, by the following: attribution of a specific power (stemming from the officials' specific institutional position); highly specialized knowledge which is obtained through continued vocational (juridical) training; operational specialization; full-time occupation; an objectivized merit-based systems of selection; a transparent system of promotion and remuneration; a guarantee of vocational security; a distinctive professional culture etc.<sup>52</sup> Particularly relevant for our discussion is that administrative officials *qua* professionals have at least some basic legal education and are continuously trained in the specific subject matter of their competence<sup>53</sup>.

(ii) *Accountability*. From the public administration's institutional position stems its accountability to the political apex of the executive branch<sup>54</sup>. By extension, the same applies within individual administrative agencies: lower-level officials are accountable for their actions to higher-level officials. The establishment of accountability is thus a manner of regulating power relations within bureaucratic organizations<sup>55</sup>. Clearly, there is a strong, and at times inseparable connection between the principles of accountability and hierarchy. Indeed, the latter is a universal feature of all (contemporary) bureaucracies<sup>56</sup> and the “default option” for

---

<sup>50</sup> Overeem 2005: 313. The proper distinction between politics and policy is here crucial. See Overeem 2005: 318 ff; cfr. Kernaghan 1976.

<sup>51</sup> This requirement is, in other words, «a shorthand expression for the impartiality of administrators in political issues» (Overeem 2005: 313). As a more specific principle, *impartiality* requires that officials have no personal stake in the case at hand, meaning that they have no (improper) interest in the outcome as such, a (improper) preference for a particular outcome, nor «a relation to one party to a dispute that made it unfair for the decision maker to decide between the parties» (Endicott 2011: 154). Cfr. Kramer 2007: 53 ff. discussing impartiality as a crucial ingredient of the Rule of Law.

<sup>52</sup> Cfr. Ritzer 1975: 631.

<sup>53</sup> Cfr. Weber 2004: 44 ff. On the relevance of training, see below (§ 4.).

<sup>54</sup> The exact nature of this relationship will depend on the wider characteristics of the system of power relations in a given state. Cfr. Elgie 1997; Peters & Pierre 2012: Part 7.

<sup>55</sup> Cfr. Crozier 2000: 178.

<sup>56</sup> Cfr. Weber 1978: 957: «The principle of *office hierarchy* and of channels of appeal (*Instanzenzug*) stipulate a clearly established system of super- and sub-ordination in which there is a supervision of the lower offices by the higher ones. Such a system offers the governed the possibility of appealing, in a precisely regulated manner, the decision of a lower office to the corresponding superior authority».



establishing accountability<sup>57</sup>. Here, I believe it is important to distinguish between the administrative officials' *external accountability* towards third parties and their *internal accountability* towards their superior officials. While the two are sometimes connected, I am here interested specifically in the latter. An official's internal accountability can be further distinguished into her *collective accountability* as a member of a given set of hierarchically equivalent officials, or of her particular agency (or the public administration as such), towards the superior officials or the political leadership, and her *individual accountability* towards her immediately superior official. With regards to the latter, we also ought to distinguish between an official's accountability related to authoritative acts she issues in the name of the public administration and her accountability for other work-related actions. It is the former that interests us here. Now, while the reasons, as well as the specific mechanisms for asserting an official's individual, internal accountability for decisions she adopts via individual administrative acts, vary with each particular legal system, we may nevertheless identify several general factors whose nature on my view importantly influences the official's responses to different types of orders received from superiors. For example, it is reasonable to assume that an official will behave differently depending on whether the official overseeing her actions is either the directly hierarchically superior official in the same executive chain of command or some external (judicial) agent (note that in this case accountability is properly external). Also, the type of legal mechanisms with which the supervisory body may intervene in relation to the frontline official's authoritative acts will likewise bear on the latter's actions: the freedom an official feels she has in her decision-making will certainly differ if the supervisory body may, for instance, only invalidate her decision and return it to her for reconsideration, or if it may overturn it and decide on the merits itself<sup>58</sup>. In the latter case, it is likely that the hierarchically subordinate official will feel more bound by what she believes to be the will of the superordinate official than in the former case. It could be said that in general, «the distribution of power, and the power relations within an organization have a decisive influence on the possibilities and on the ways its members adapt, as well as on the effectiveness of the organization as a whole»<sup>59</sup>.

(iii) *Rule-reliance*. On Weber's account, two fundamental characteristics of bureaucracy are (a) that «[t]he management of the modern office is based upon

---

<sup>57</sup> Meier & Hill 2007: 64.

<sup>58</sup> Cfr. Weber 1978: 218: «Hierarchies differ in respect to whether and in what cases complaints can lead to a "correct" ruling from a higher authority itself, or whether the responsibility for such change is left to the lower office, the conduct of which was the subject of the complaint».

<sup>59</sup> Cfr. the original (Italian) text: «la distribuzione del potere e il sistema dei rapporti di potere nell'ambito di un'organizzazione hanno un'influenza decisiva sulle possibilità e sui modi di adattamento di ciascuno dei suoi membri e sull'efficacia dell'organizzazione nel suo complesso» (Crozier 2000: 164).

written documents» and (b) that «[t]he management of the office follows *general rules*, which are more or less stable, more or less exhaustive, and which can be learned»<sup>60</sup>. In other terms, the overall impregnation of the bureaucratic environment with *written* and *general rules* is arguably its most characteristic aspect, as well as the clearest manifestation of the rationalizing character of bureaucracies. It is this characteristic which, in particular, makes bureaucracies technically superior to all other forms of organization in that the rule-based work provides, among others, for superior precision, predictability, (hierarchical) control and speed of work at a lower cost<sup>61</sup>. Pre-established, general rules regulate all aspects of the organization's existence, from its internal structure and functional division of labour, the system of salaries and promotions, the mechanisms of internal communication and so forth. As for the latter, we said that circulars are typically the primary vehicle of communication within bureaus. Such a manner of communication has certain upsides, but also certain drawbacks. Merton, for instance, emphasizes one of the upsides of rule-based functioning by saying that it «preclude[s] the necessity for the issuance of specific instructions for each specific case»<sup>62</sup>, reducing both the time and the costs of decision-making as well as increasing its predictability. However, paradoxically, if the rule-based organizational system is too invasive, i.e. if there is no space left for discretion at any level of work, the positive value of hierarchical relations greatly diminishes to the detriment of the individuals and the organization itself<sup>63</sup>.

The previous segment (§ 3.1) served to expound the conceptual alphabet of this discussion. In this one, we examined the institutional setting within which the circulars-as-sources phenomenon takes place. In the next section, I provide an explanation of how the organizational principles described above contribute to the development of the relevant psychological mind frame.

#### 4. The “Bureaucratic Mind” (Partially) Explained

Above, I proposed that frontline administrative officials ordered to execute an unlawful act will routinely follow such an instruction – within certain limits, of course. I attributed this strong deferential tendency, at least in part, to the influence exerted over their cognitive processes by the organizational elements that shape

---

<sup>60</sup> Weber 1978: 957 f.

<sup>61</sup> Cfr. Weber 1978: 973 ff.

<sup>62</sup> Merton 1940: 561; see also Schauer 1991: 147: «A rule-based system is [...] able to process more cases, operate with less expenditure of human resources, and, insofar as rule-based simplicity fosters greater predictability as well, keep a larger number of events from being formally adjudicated at all».

<sup>63</sup> Cfr. Crozier 2000: 210 f.

the institutional environment in which they operate<sup>64</sup>. Here, I provide a (sketchy) psychologically-based explanation of these influences.

The genetics of bureaucratic compliance share their fundamental building blocks with most other manifestations of authority-deferring behaviour. Seeing how bureaucracy is «formally the most rational known means of exercising authority over human beings»<sup>65</sup>, it is to be expected that the mechanisms involved in obedient behaviour in general, will be present *a fortiori* in the bureaucratic setting. In this sense, Milgram's classical study provides sufficient fundamentals for understanding the psychological mechanisms of obedience among bureaucrats<sup>66</sup>.

Milgram distinguishes between the preconditions of obedient behaviour (the "antecedent conditions of obedience") and the factors that help maintain one's obedience (its "binding factors"). The antecedent conditions of obedience are the «forces that shaped [one's] basic orientation to the social world and laid the groundwork for obedience»<sup>67</sup>. These factors can roughly be distinguished into the antecedent conditions proper and the "immediately antecedent conditions". The former provide «the background against which [one's] habits of conduct were formed» and are independent of any particular institutional situation<sup>68</sup>. For this reason, they are of no particular interest here. On the other hand, the immediately antecedent conditions lead directly to the so-called agentic state in a particular situation and are conditioned by it<sup>69</sup>. These factors jointly contribute to the formation of the perception on the part of the individual faced with a particular institutional context that she is entering a situation in which it is appropriate for her to expect that she will be submitted to an authority, which in that situation may legitimately issue orders to her<sup>70</sup>. The formation of the agentic state is crucially determined by whether or not the individual's entry into a given situation is voluntary or not, and, in consequence, by her acceptance of the legitimacy of that authoritative situation as such<sup>71</sup>. In short, on

---

<sup>64</sup> See Merton 1940 (especially pp. 562-654).

<sup>65</sup> Weber 1978: 223.

<sup>66</sup> Milgram 1974.

<sup>67</sup> Milgram 1974: 135.

<sup>68</sup> These conditions include «the individual's family experience, the general societal setting built on impersonal systems of authority, and extended experience with a reward structure in which compliance with authority is rewarded». Perhaps the most relevant point here regards the results of the last-mentioned insertion within authority structures. Milgram notes that the result of these experiences is «the *internalization of the social order* – that is, internalizing the set of axioms by which social life is conducted. And the chief axiom is: do what the man in charge says» (Milgram 1974: 138).

<sup>69</sup> Milgram defines the agentic state as «the condition a person is in when he sees himself as an agent for carrying out another person's wishes» (Milgram 1974: 133-4). It is important to note that being in an agentic state does not equal being obedient to the authority's demands. It simply «enhances the likelihood of obedience» (Milgram 1974: 148).

<sup>70</sup> See Milgram 1974: 138-143. See also note 20, point (2), above.

<sup>71</sup> That is, as representing a «legitimate realm[s] of activity [...] justified by the values and needs of society» (Milgram 1974: 142).

Milgram's view, «[a]n authority system [...] consists of a minimum of two persons sharing the expectation that one of them has the right to prescribe behavior for the other», whereby «[t]here is a general agreement not only that [one] *can* influence behavior but that he *ought* to be able to»<sup>72</sup>. Of the two, the individual holding the expectation that she ought to be subject to the other's orders, is thus the one in the agentic state. The agentic state is, in simple terms, an individual's psychological disposition to follow orders from a given authority. After this brief general introduction into the psychology of obedience, I examine the relevant psychological modifications in an agent's cognitive makeup in the context of the administrative frontlines.

Bureaucracy's technical superiority over other systems of governance – which includes the superior exercise of authority – has already been mentioned (§ 3.2). This superiority is achieved, on the one hand, through a rational organization of the bureau's processes which, in this case, can be considered a “constant variable”<sup>73</sup>; on the other hand, from the personnel point of view, if the organization is to be successful in achieving its goals, it must «attain a high degree of reliability of behavior, an unusual degree of conformity with prescribed patterns of action».<sup>74</sup> To achieve such behavioural predictability and reliability, bureaucracies resort to a high level of disciplination of the officials' actions, which must be supported «by strong sentiments which entail[s] devotion to one's duties»<sup>75</sup>. First, I briefly discuss the latter, and then focus on the former of the two factors.

A strong sentimental attachment to the organization, particularly to its goals and organizational rules, on the part of officials, is usually the result of several factors, all of which cannot be fully discussed here. For instance, the fact that not only do officials voluntarily enter the bureaucratic workforce, but that to obtain employment in the civil service they must typically participate in a selection procedure, will undoubtedly strengthen their emotive bond with the organization: those who result as winners of such competitive processes will inevitably be instilled with a particular sense of pride in their achievement which will bind them to the organization from the very beginning. Moreover, the characteristics of employment in public administration (the “vocational security”) are also an important binding factor: «The function of security of tenure, pensions, incremental salaries and regularized procedures

---

<sup>72</sup> Milgram 1974: 142-3. When more than two individuals are brought into a system, the coordination requirement will inevitably bring them into a pyramidal form of hierarchical organization. Cfr. Milgram 1974: 128 ff.

<sup>73</sup> By this somewhat oxymoronic phrase, I mean that, on the one hand, there are differences in the organizational make up of bureaucratic institution, as well as that the organization of a single institution may change in time (this is the “variable” part of the phrase); on the other hand, these changes typically occur over longer periods of time and, in particular, are seen as fixed and unalterable by a given individual upon his entry into it (this is the “constant” part of the phrase).

<sup>74</sup> Merton 1940: 562.

<sup>75</sup> Merton 1940: 562.

for promotion is to ensure the devoted performance of official duties»<sup>76</sup>. Again, it is important to remember that the devotion of bureaucrats is not focused so much on a particular person, as it is on «*impersonal and functional purposes*»<sup>77</sup>.

Weber defined (the notion of) discipline as the «probability that by virtue of habituation a command will receive prompt and automatic obedience in stereotyped forms, on the part of a given group of persons»<sup>78</sup>. In relation to this – highly psychologized – definition, it is useful to distinguish between (i) the *goals* of discipline and (ii) the *means* (the techniques) of disciplining<sup>79</sup>. In line with the above definition, the goal of discipline is quite simply “to discipline” – be it an individual or a collective, or rather, a particular activity of theirs. Disciplination of someone (or something), in other terms, can be seen as a systemic effort to transform, to the maximal possible extent, an agents’ disposition to defer to the authority into actual obedience of the authority’s commands<sup>80</sup>. Specifically, the disciplination process strives to produce in the agent a near-perfect reiteration of a specific, predetermined type of behaviour and, what ultimately amounts to the same, to avoid, as much as possible, any deviation from those predetermined types of behaviour<sup>81</sup>.

On the other hand, several typical means by which disciplining occurs can be distinguished: (a) the preventive organization of the activity, (b) the training required for carrying out that activity, and (c) the monitoring of the activity’s execution<sup>82</sup>. Here, I only deal with the former two, with particular emphasis on the training<sup>83</sup>.

(a) *The preventive organization of (bureaucratic) activities*. At this point, the effect of the organizational structure over the bureaucratic agents’ behaviour needn’t be emphasized any further – after all, this is precisely the central topic of this essay

<sup>76</sup> Merton 1940: 561 (cfr. also p. 564).

<sup>77</sup> Weber 1978: 959. Nevertheless, it seems sensible to believe that subordinate officials will at least attempt to attune their actions to what they perceive are the wishes of the immediately superior official, especially when the latter controls the mechanisms of their promotion or similar.

<sup>78</sup> Weber 1978: 53.

<sup>79</sup> Brigaglia 2019: 235 ff.

<sup>80</sup> Cfr. Brigaglia 2019: 236: «Lo scopo caratteristico del potere disciplinare è, anzitutto, ottenere un alto grado di disciplinamento: far sì che il bersaglio si attenga in modo quanto più preciso ad uno schema d’azione prefissato dettagliamente».

<sup>81</sup> As Brigaglia puts it, «lo scopo del potere disciplinare sarà addirittura quello di far sì che il bersaglio sia *vincolato* alla reiterazione disciplinata di quello schema d’azione [...] lo scopo sarà cioè quello di rendere quanto più improbabile che il bersaglio possa decider di, o riuscire a, deviare da quegli schemi, non esercitare quelle abilità nel modo previsto, mutare le sue attitudini, dare un corso innovativo e deviante al proprio sviluppo morale» (Brigaglia 2019: 239).

<sup>82</sup> Brigaglia 2019: 240.

<sup>83</sup> I do not deal with monitoring activities (they are partly addressed above, in 3.2., in reference to the accountability principle). Brigaglia defines them as «l’osservazione dell’attività da disciplinare, *sorvegliandone* costantemente l’esecuzione e i risultati, ed *esaminando* periodicamente le competenze, abilità, attitudini individuali, per controllare che non devino dagli schemi prefissati e, in caso contrario, per ripetere, rafforzare, correggere l’addestramento» (Brigaglia 2019: 243).

and has been extensively discussed above. Here, I examine only some of the changes in the cognitive processes of frontline officials brought about by the principle of division of labour – both vertical (the hierarchical principle) and horizontal (the competence principle). Division of labour is a clear example of a trade-off in the bureaucratic setting, whereby increased quality and effectiveness of work come at the expense of a “fragmentation of knowledge”<sup>84</sup>. From a top-down perspective (§ 3.1), the individual officials at the bottom of the hierarchical chain have a very restricted access to information about the activities of the organization as a whole. For this reason, they are usually unable to fully comprehend the effects of their work – which represents but a fragment of the whole – on the end result in individual cases. This inability to “see the whole picture” may eventually render the frontline officials oblivious to the moral implications of their work<sup>85</sup>. Unable to control the end results of their actions, the officials rather turn towards those minute details of their tasks that they can control, that is, to certain «particular details of behaviour required by the rules»<sup>86</sup>. In this situation, as Merton puts it, «[a]dherence to the rules, originally conceived as means, becomes transformed into an end-in-itself; there occurs the familiar process of *displacement of goals* whereby “an instrumental value becomes a terminal value”»<sup>87</sup>. Bauman called this phenomenon the substitution of moral for “technical responsibility”<sup>88</sup>. Such technical responsibility of the agents is characterized foremost by the fact that «a man feels responsible *to* the authority directing him but feels no responsibility *for* the content of the actions that the authority prescribes»<sup>89</sup>. In other terms, it is therefore much more important, from the perspective of the single frontline official, to do what (and in the manner in which) the superior has requested, then what would, for instance, be correct according to some superior, legislative act.

(b) *Entrenchment*. Training is the core activity of discipline<sup>90</sup>. According to Weber’s initial definition of discipline, the relevant kind of obedience is “prompt

---

<sup>84</sup> Luban et al. 1992: 2355.

<sup>85</sup> Cfr. Luban et al. 1992.

<sup>86</sup> Merton 1940: 563.

<sup>87</sup> Merton 1940: 563. It is once again worthwhile noting how the same mechanisms that provide for the efficiency of bureaucratic operations, including all the «incentives for disciplined action and conformity to the official regulations» and which are designed to have the official «adapt [her] thoughts, feelings, and actions to the prospects of this career» also lead «to an over-concern with strict adherence to regulations which induces timidity, conservatism, and technicism. Displacement of sentiments from goals onto means is fostered by the tremendous symbolic significance of the means (rules)» (Merton 1940: 564).

<sup>88</sup> Bauman 1989: 101.

<sup>89</sup> Milgram 1974: 145-6.

<sup>90</sup> Training is here perceived in a narrow sense, as only those activities that take place within the administrative organization, excluding the activities of formal (legal) education that an official obtains prior to entering the administrative workforce – although such education crucial in developing certain mental schemes and, in particular, a generalized disposition to defer to authority.

and automatic” and is achieved “by virtue of habituation”. How, then, does a certain, predetermined type of response by frontline officials to orders from superiors obtain such characteristics? A particularly important role in this falls to the already mentioned system of labour division (§ 3.2) which sees individual officials specialize in highly limited and specific parts of the overall process (i.e. the production of an individual administrative act). This, in consequence, means that they are constantly exposed to the same kinds of input material that they are required to process. In the case of frontline administrative officials, this translates to being regularly required to decide on cases (or parts thereof) with substantially the same factual background (e.g. only applications for building permits, research grants or the like). On the other hand, bureaucratic efficiency (but also legal principles, such as legal predictability, prohibition of discrimination etc.) requires that such cases also be resolved, *ceteris paribus*, in the same manner, i.e. with the same legal consequence attaching to them. It seems clear, then, that decision-making mechanisms in such an environment will inevitably be (come) highly automatized. Indeed, the introduction of automatized decision-making – its “incorporation” – into the practices of (frontline) administrative officials is precisely at the core of training activities in the public administration<sup>91</sup>.

A comprehensive analysis of the psychological mechanisms involved in this “incorporation” process would go beyond the scope of this essay. Hence, I rather focus on one, particularly salient characteristic of automatized decision-making processes in bureaucracies – the so-called *rule entrenchment*<sup>92</sup>. In general (and highly simplified), entrenchment – understood a cognitive process – enables certain particularities of complex worldly phenomena to become suppressed by some (entrenched) generalization regarding those phenomena, making them less mentally accessible to the individual confronting a particular situation<sup>93</sup>. The force of the results of entrenchment *qua* process is seen in the fact that despite other circumstances of the same phenomenon being equally, or even more pertinent for properly grasping it, the individual will nevertheless perceive as relevant only those particularities that have previously been entrenched through repetition of the same patterns of behaviour, imitation of others’ behaviour etc. In the context of a bureaucratic agency,

---

<sup>91</sup> According to Brigaglia, this process consists «nell’indurre intenzionalmente nel bersaglio *l’automatizzazione dello schema di comportamento* che si vuole che egli adotti [footnote omitted]: la disposizione, in risposta a certi stimoli, a reagire in modo automatico, fluido, immediato, senza l’interposizione di una scelta o riflessione esplicita, adottando un comportamento che soddisfa quello schema» (Brigaglia 2019: 240).

<sup>92</sup> Note that entrenchment needn’t only be related to automatic decision-making processes, but can also be related to ratiocinative processes. Cfr. Brigaglia 2018, 218. On the difference between quick, automatic decision-making, on the one hand, and slow, effortful decision-making, on the other hand, see Kahneman 2011.

<sup>93</sup> Cfr. Schauer 1991: 43.



an individual is immediately exposed to a pre-determined set of *modi operandi* and (in)formal rules, both of which she is expected to re-iterate in her decision-making processes. Through re-iteration of the relevant practices and repetitive application of the operational rules – which may regard the relevant ways of internal communication, the sources of law to be used, the expected outcomes etc. – the latter become increasingly entrenched. This means that these entrenched rules will determine the official's behaviour (decisions) in the specific type of cases she is entrusted to deal with – even though, for example, a particular case may exhibit characteristics that set it apart from the other repetitive cases and which justify a differential treatment; or, even though the norms contained in the source of law which is to be used in a specific set of cases, contradict norms from a different potentially applicable and hierarchically superior legal source which would seem to require the disapplication of the former (entrenched) source etc.<sup>94</sup> Such deferral to the entrenched rule occurs because a «decision-maker treats a generalization or instantiation as itself providing a reason for action even when there are good reasons not to»<sup>95</sup>. Or, as Brigaglia explains the functioning of entrenchment,

the simple fact that certain rules R originate from certain sources, or from certain procedures (orders, directives, regulations, statutes etc.) tends to – within certain limits – automatically inhibit the assessment of the correctness of R's content [that is, to inhibit R's reconsideration] without the need to explicitly recall any additional rules R1 which prescribe to execute R without reconsidering it, or doctrines justifying the prohibition of reconsideration» (the translation is mine)<sup>96</sup>.

In other terms: because the whole of the organizational structure and system of rules and practices in a hierarchically organized bureaucratic agency pursues the goals of maximal efficiency and predictability of result, it now becomes quite clear how administrative circulars issued by hierarchically superior officials become the decisive source of decision-making norms for inferior, frontline officials. As a consequence, it also becomes clear how in this context, the hierarchical principle will of necessity – in most cases at least – supersede the principle of legality.

---

<sup>94</sup> On rule reconsideration, see Brigaglia 2019: 217 f; Brigaglia & Celano 2018: 137 f.

<sup>95</sup> Schauer 1991: 71.

<sup>96</sup> Cfr. the original text: «il semplice fatto che certe regole R provengano da certe fonti, secondo certe procedure (ordini, direttive, regolamenti, leggi, e così via), tende – entro certi limiti – ad inibire automaticamente la valutazione della correttezza del contenuto di R, senza che sia necessario richiamare alla mente eventuali, ulteriori regole R1 che prescrivono di eseguire R senza riconsiderarle, o dottrine che giustificano il divieto di riconsiderazione» (Brigaglia 2019: 228).

## 5. Conclusion

Circulars are the foremost source of norms for frontline administrative officials' decision-making. When they serve to detail the terms and conditions contained in hierarchically superior acts, such a practice is consistent with the principle of legality. However, circular orders are often respected even though their content quite clearly clashes with the dispositions of superior acts, that is even though they are illegal. This essay explored the reasons underpinning this peculiar attitude of frontline officials. The investigation was premised upon a multidisciplinary methodology which emphasizes the necessity of approaching traditional legal theoretical problems with the know-how of empirical sciences, and, in particular, of social psychology. Thus, the main source of the frontline officials' almost unqualified deference to the orders of superiors was shown to be the consequence of a joint influence exerted over their mental dispositions by a set of organizational principles, constitutive of their decision-making practices. In particular, it was shown how continuous exposure to a pre-determined set of operational procedures and rules, together with a repetitive caseload, leads to the entrenchment – in the minds of frontline officials – of certain rules of action. Officials come to defer to these rules automatically in deciding cases, regardless of the presence of other rules which require them to decide in a different manner. The strict division of labour in hierarchically organized institutions, together with the highly automatized nature of the officials' work, thus leads to the entrenchment of the attitude of obedience to orders from superiors, which at times flies in the face of the principle of legality, i.e. of the requirement that officials check the legitimacy of their superiors' orders in light of superior legal sources. The conclusions reached here about this seemingly marginal legal phenomenon point to the necessity of rethinking how legal theory understands key questions, such as the definition of sources of law and the principle of legality.

## References

- Barsky, R.F. (2016). *Undocumented Immigrants in an Era of Arbitrary Law. The Flight and the Plight of People Deemed "Illegal"*, Oxon-London, Routledge.
- Bauman, Z. (1989). *Modernity and the Holocaust*, Cambridge, Polity Press.
- Brigaglia, M. (2019). *Potere. Una rilettura di Michele Foucault*, Napoli, Editoriale Scientifica.
- Brigaglia, M., Celano, B. (2017). *Rivoluzione cognitivista e teoria del diritto: un programma di ricerca*, «Diritto & questioni pubbliche», XVII, 2, 523-535.
- Brigaglia, M., Celano, B. (2018). *Reasons, Rules, Exceptions: Towards a Psychological Account*, «Analisi e diritto 2017», 131-144.

- Celano, B. (2017). *Ragionamento giuridico, particolarismo. In difesa di un approccio psicologistaico*, «Rivista di filosofia del diritto», VI, 2, 315-344.
- Celano, B. (2018). *Lezioni di filosofia del diritto. Costituzionalismo, Stato di diritto, codificazione, positivismo giuridico*, Torino, Giappichelli.
- Chiti, M. (1988). *Circolare (amministrativa)*, in *Enciclopedia giuridica*, Roma, Treccani.
- Clarich, M. (2013). *Manuale di diritto amministrativo* (3<sup>rd</sup> ed.), Bologna, il Mulino.
- Crozier, M. (2000). *Il fenomeno burocratico. Il significato della burocrazia nelle organizzazioni moderne*, Milano, ETAS.
- DeHart-Davis, L. (2007). *The Unbureaucratic Personality*, «Public Administration Review», 67, 5, 892-903.
- DeHart-Davis, L., Chen, J., Little, T.D. (2013). *Written versus Unwritten Rules: The Role of Rule Formalization in Green Tape*, «International Public Management Journal», 16, 3, 331-356.
- Duarte d'Almeida, L. (2013). *Legal Sex*, in L. Green, B. Leiter (eds.), *Oxford Studies in Philosophy of Law. Vol. 2*, 277-309.
- Endicott, T. (2011). *Administrative Law* (2<sup>nd</sup> ed.), Oxford, Oxford University Press.
- Elgie, R. (1997). *Models of Executive Politics: a Framework for the Study of Executive Power Relations in Parliamentary and Semi-presidential Regimes*, «Political Studies», XLV, 217-231.
- Ferraris, M. (2014). *Documentalità. Perché è necessario lasciar tracce*, Roma-Bari, Laterza.
- Ferraro, F. (2019). *Razionalità legislativa e motivazione delle leggi: un'introduzione teorica*, Milano, Giuffrè.
- Frederickson, H.G., Smith, K.B., Larimer, C.W., Licari, M.J. (2012). *The Public Administration Theory Primer* (2<sup>nd</sup> ed.), Boulder, Westview Press.
- Giannini, M.S. (1960). *Circolare*, in *Enciclopedia del diritto* (VII), Milano, Giuffrè.
- Gjergji, I. (2013). *Circolari amministrative e immigrazione*, Milano, FrancoAngeli.
- Grimmelikhuisen, S., Jilke, S., Olsen, A.L., Tummers, L. (2016). *Behavioral Public Administration: Combining Insights from Public Administration and Psychology*, «Public Administration Review», 77, 1, 45-56.
- Guastini, R. (2012). *Manifesto di una filosofia analitica del diritto*, «Rivista di filosofia del diritto», 1, 51-66.
- Guastini, R. (2014). *La sintassi del diritto* (2<sup>nd</sup> ed.), Torino, Giappichelli.
- Guastini, R. (2016). *Legalità*, in G. Pino, V. Villa (eds.), *Rule of Law. L'ideale della legalità*, Bologna, Il Mulino, 137-152.

- Hart, H.L.A. (1994). *The Concept of Law* (2<sup>nd</sup> ed.), Oxford, Clarendon Press.
- Himma, K.E. (2015). *Conceptual Jurisprudence. An Introduction to Conceptual Analysis and Methodology in Legal Theory*, «Revus - Journal for Constitutional Theory and Philosophy of Law», 26, 65-92.
- Hogan, G.W. (1987). *The Legal Status of Administrative Rules and Circulars*, «The Irish Jurist», 22, 194-211.
- Hummel, R. (2015). *The Bureaucratic Experience. The Post-Modern Challenge* (5<sup>th</sup> ed.), London-New York, Routledge.
- Iafrate, C. (2016). *Obbedienza, ordine illegittimo e ordinamento militare*, «Diritto & questioni pubbliche», 16, 2, 313-338.
- Kafka, F. (2014). *The Essential Kafka*, Ware, Wordsworth.
- Kahneman, D. (2011). *Thinking, Fast and Slow*, London, Penguin Books.
- Kernaghan, K. (1976). *Politics, polics and public servants: political neutrality revisited*, «Canadian Public Administration», 19, 3, 432-456.
- Kogovšek Šalamon, N. (2016). *Erased. Citizenship, Residence Rights and the Constitution in Slovenia*, Frankfurt am Main, Peter Lang.
- Kramer, M. (2007). *Objectivity and the Rule of Law*, Cambridge, Cambridge University Press.
- Kramer, M. (2018). *H.L.A. Hart. The Nature of Law*, Cambridge, Polity Press.
- Lipsky, M. (2010). *Street-level Bureaucracy. Dilemmas of the Individual in Public Service* (1980), New York, Russell Sage Foundation.
- Luban, D., Strudler, A., Wasserman, D. (1992). *Moral Responsibility in the Age of Bureaucracy*, «Michigan Law Review», 90, 8, 2348-2392.
- Marx, C. (1971). *Critique of Hegel's Philosophy of Right* (1843-44), Cambridge, Cambridge University Press.
- Mazzamuto, M. (2015). *L'atipicità delle fonti nel diritto amministrativo*, «Diritto amministrativo», 4, 683-742.
- Meier, K., Hill, G. (2007). *Bureaucracy in the Twenty-First Century*, in E. Ferlie, L. Lynn Jr., C. Pollitt (eds.), *The Oxford Handbook of Public Management*, New York, Oxford University Press. Online edition. doi: 10.1093/oxfordhb/9780199226443.003.0004.
- Merkel, A. (1987). *Il diritto dal punto di vista applicativo*, in Id., *Il duplice volto del diritto*, Milano, Giuffrè, 282-323.
- Merton, R. (1940). *Bureaucratic Structure and Personality*, «Social Forces», 18, 4, 560-568.
- Milgram, S. (1974). *Obedience to Authority. An Experimental View*, London, Tavistock.

- Moynihan, D. (2018). *A great schism approaching? Towards a micro and macro public administration*, «Journal of Behavioral Public Administration», 1, 1, <https://doi.org/10.30636/jbpa.11.15>.
- Nørgaard, A.S. (2018). *Human behavior inside and outside bureaucracy: Lessons from psychology*, «Journal of Behavioral Public Administration», 1, 1, <https://doi.org/10.30636/jbpa.11.13>.
- Oberfield, Z.W. (2010). *Rule Following and Discretion at Government's Frontlines: Continuity and Change during Organizational Socialization*, «Journal of Public Administration Research and Theory», 20, 4, 735-755.
- Overeem, P. (2005). *The Value of The Dichotomy: Politics, Administration, and The Political Neutrality of Administrators*, «Administrative Theory & Praxis», 27, 2, 311-329.
- Peters, B.G., Pierre, J. (eds.) (2012). *The SAGE Handbook of Public Administration*, London, SAGE.
- Pino, G. (2008). *Diritti fondamentali e ragionamento giuridico*, Torino, Giappichelli.
- Pino, G. (2017). *Il costituzionalismo dei diritti*, Bologna, Il Mulino.
- Pino, G. (2020). *Sources of Law*, in L. Green, B. Leiter (eds.), *Oxford Studies in Philosophy of Law* (forthcoming).
- Raz, J. (1979). *The Authority of Law. Essays on Law and Morality*, Oxford, Oxford University Press.
- Ritzer, G. (1975). *Professionalization, Bureaucratization and Rationalization: The Views of Max Weber*, «Social Forces», 53, 4, 627-634.
- Romano, A. (1959). *In tema di circolari amministrative*, «Rivista di diritto finanziario», 2, 109-134.
- Ruggeri, A. (1973). *Circolari amministrative e circolari di indirizzo politico*, «Rivista trimestrale di diritto pubblico», 2, 1758-1822.
- Simon, H.A. (1997). *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization* (4<sup>th</sup> ed.), New York, Macmillan.
- Schauer, F. (1991). *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford, Clarendon Press.
- Waldron, J. (1999). *The Dignity of Legislation*, New York, Cambridge University Press.
- Weber, M. (1978). *Economy and Society. An Outline of Interpretative Sociology*, Berkeley-Los Angeles, University of California Press.
- Weber, M. (2004). *Politics as a Vocation*, in Id., *The Vocation Lectures*, Indianapolis-Cambridge, Hackett Publishing Company, 32-94.

- Wintgens, L. (2002). *Legisprudence. A New Theoretical Approach to Legislation*, Oxford, Hart Publishing.
- Zimbardo, P. (2007). *The Lucifer Effect: Understanding How Good People Turn Evil*, New York, Random House.
- Žgur, M. (2018). *¿Por quién doblan las campanas del Derecho? Sobre la exclusión jurídica y sociopolítica de los inmigrantes indocumentados*, «Discusiones», 21, 1, available at: <http://revistadiscusiones.com/wp-content/uploads/2020/03/INTERIOR-DISCUSIONES-22.pdf>.