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The Privileged Working Conditions of Public Employees Sanctioned by Public Law: Adding One Dimension to Inequality

Paolo D'Anselmi†

1. Introduction

Public law includes provisions about public administration mandates and organization, and likewise it defines civil service status and working conditions. This Paper argues that such provisions are based on the implicit hypothesis that the “received view” of Max Weber’s theory of bureaucracy is a good predictor of public administrations’ capabilities and organizational behavior. In other words, public administration that is organized according to our understanding (or “received view”¹) of Max Weber, will implement efficiently, effectively, and unambiguously whatever public policy the government will formulate. This Paper also argues that such public law provisions create privileged working conditions for public employees, thus adding one dimension to inequality that is wholly man-made and sanctioned by the law.

This Paper joins the debate about inequality and public management reform. Authors have been thinking about equality—and inequality—mostly in terms of income and wealth² and less in terms of living and working conditions, e.g. the digital divide.³ Adding to the literature about inequality in working conditions, this

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1. The “received view” of Weberian thought was proposed to the Author in a discussion with Sam Whimster who has edited multiple works on Weberian theory. Email from Sam Whimster to Paolo D'Anselmi, author (Aug. 22, 2018, 12:10 PM) (on file with author).

2. *See generally* ANTHONY B. ATKINSON, *INEQUALITY: WHAT CAN BE DONE?* (2015); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* (2012); JOSEPH E. STIGLITZ, *THE GREAT DIVIDE* (2015); JEAN DRÉZE & AMARTYA SEN, *AN UNCERTAIN GLORY: INDIA AND ITS CONTRADICTIONS* (2013).

3. *See generally* JEREMY RIFKIN, *THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM, WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE* (2000).

Paper shows that a significant amount of value, or ‘shadow’ income, can be perceived from a person’s working conditions,⁴ and this is the case of public employees globally. On the other hand, there is debate about public law⁵ and management reform⁶ that explicitly acknowledges the Weberian origin of public administration’s organizational arrangements. In Section 2, the paper discusses that public employees’ status comes from Weber. Section 3 argues that such status is privileged. Section 4 discusses the relevance of this new dimension of inequality and its limitations. Section 5 draws conclusions and puts forth a possible future research program.

2. Public Employees’ Working Conditions Come from Weber

The proposition that public employees’ working conditions come from Weber will be dealt with in two steps: (1) public law scholars are aware of their Weberian hypothesis about organizational arrangements and organizational behavior; and (2) the received view of Weber generates the working conditions of public employees.

The link between the working conditions and their origin from Weberian theory is not necessary to show that those conditions are privileged. However, it is necessary to show that those conditions are law-made and useful to show that those conditions globally have a common etiology and theoretical basis. We want to show those conditions are an unintended consequence of purposive design by public law.⁷ In case we obtain a positive result in showing the privilege, we would need to go back to their theoretical basis in order to amend public law: an important consequence.

It is also worthwhile mentioning at this stage that studies, old and new, while acknowledging the relevance of the study of

4. See *generally* THE ROUTLEDGE COMPANION TO REWARD MANAGEMENT (Stephen J. Perkins ed., 2019) (providing a compilation of different perspectives regarding rewarding people in employment).

5. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634 (2000).

6. See Lawrence E. Lynn, Jr., *What Is a Neo-Weberian State? Reflections on a Concept and Its Implications*, 1 NISPACEE J. PUB. ADMIN. POL’Y 17 (2008); CHRISTOPHER POLLITT & GEERT BOUCKAERT, *PUBLIC MANAGEMENT REFORM: A COMPARATIVE ANALYSIS — NEW PUBLIC MANAGEMENT, GOVERNANCE, AND THE NEO-WEBERIAN STATE* (3d ed. 2011).

7. POLLITT & BOUCKAERT, *supra* note 6, at 118 (listing among the Weberian elements of the Neo-Weberian State: “[p]reservation of the idea of a public service with a distinctive status, culture, and . . . terms and conditions”).

bureaucracy to many sciences, appear to have neglected its impact on law.⁸

2.1. Public Law Scholars Are Aware of Their Weberian Hypothesis about Public Employees

Public law scholars are aware of their Weberian hypothesis about public employees. The following is an example of public law doctrine applied to the received view of Max Weber's theory of bureaucracy as an explicit hypothesis in a passage from eminent constitutionalist Bruce Ackerman. Ackerman's vision of a functional specialization between politics and public administration "requires a candid assessment of a nation's cultural and human resources."⁹ His key passage for our purpose is the following:

Before functional separation can make sense, there must be the makings of something I shall call a "Weberian culture." At least some talented people must find inspiration in the prospect of professional service to the state. Otherwise, the functional separation of powers will serve merely as a fig leaf for corruption and clientelism Public-spirited specialists are . . . in short supply in many parts of the world — in which case there will be many more important things to worry about than the functional separation of powers.¹⁰

Professor Ackerman acknowledges he is assuming a public administration that will work according to Max Weber's mandate and will implement efficiently, effectively, and unambiguously whatever public policy the government will formulate. What Ackerman makes explicit in this passage is widely echoed in documents of global public organizations and in the global media. In fact, Ackerman's hypothesis about the existence of a "Weberian culture" and "public-spirited" specialists speaks to the notion of a class of 'higher echelons'¹¹ in public administration implied in

8. See generally MARTIN ALBROW, BUREAUCRACY 13 (1970) ("Political scientists, sociologists, management scientists have all devoted major pieces of theory and research to bureaucracy."); Lynn, *supra* note 6, at 17 (mentioning only the "literatures of political science, sociology, and public affairs").

9. Ackerman, *supra* note 5, at 690.

10. *Id.* A limitation of this quotation is that it is twenty years old. However, it should be noted that Professor Ackerman's current work still includes the acknowledgement of Weberian "bureaucratic rationality." See BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW 1 (2019).

11. See MAX WEBER, ECONOMY AND SOCIETY 1418 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978) (1956).

today's media.¹² The widespread notion about public administration's 'higher echelons' (higher ranks) is that it is sufficient that public executives respond to the Weberian ideal type and the whole public administration will prove as the most efficient and rational way to carry out an organized task. Such Weberian thinking also permeates many international and national public organizations' management and policy.¹³

Ackerman's hypothesis also raises a question about what exactly the public administration literature is dealing with: is it the hundreds of millions of people (and their higher echelons) who are employed by governments, or is it only the higher echelons themselves? This article argues that the Weberian hypothesis *de facto* applies to *all* public employees, not only to their higher echelons—as will be discussed in the next section on the received view of Weber's theory, which is widely applied to all of public administration.¹⁴ Likewise, the intellectual and emotional nourishment of "public-spirited specialists" is the basic tenet of many schools of public administration around the world, including the Harvard Kennedy School (HKS), which Ackerman mentions explicitly.¹⁵ These schools work under the Weberian hypothesis whereby training and endowing as many public employees as

12. See generally *Bureaucratic Blight*, ECONOMIST, Sept. 7, 2019, at 25; *Mandarin Lessons*, ECONOMIST, Aug. 9, 2014, at 47; *Aiwa (Yes) Minister*, ECONOMIST, Nov. 14, 2015, at 53; *From Red Tape to Joined-up Government*, ECONOMIST, Jan. 2, 2016, at 1.

13. See INT'L MONETARY FUND (IMF), FISCAL AFFAIRS AND LEGAL DEPARTMENTS, CORRUPTION: COSTS AND MITIGATING STRATEGIES, iii (May 2016), <https://www.imf.org/external/pubs/ft/sdn/2016/sdn1605.pdf> [<https://perma.cc/ANV2-LJ47>] ("Perhaps most importantly, however, addressing corruption requires effective institutions. . . . [T]he objective is clear: the development of a competent civil service that takes pride in being independent of both private influence and public interference.").

14. To provide a feeling for quantities, in the U.S. there are approximately 2 million federal executive branch employees and about 22 million federal, state, and local government employees. U.S. BUREAU OF LABOR STATISTICS, NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES BY OWNERSHIP: FEDERAL, STATE, AND LOCAL GOVERNMENT, INCLUDING GOVERNMENT-OWNED SCHOOLS AND HOSPITALS AND THE U.S. POSTAL SERVICE (May 2018), <https://www.bls.gov/oes/current/999001.htm> [<https://perma.cc/VB5T-FXAM>]; U.S. BUREAU OF LABOR STATISTICS, NATIONAL INDUSTRY-SPECIFIC OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES: NAICS 999100 – FEDERAL EXECUTIVE BRANCH (OES DESIGNATION) (May 2018), https://www.bls.gov/oes/current/naics4_999100.htm [<https://perma.cc/5XCU-FN4Y>]. To provide an idea of the relevance of such a workforce, the total employed population of the U.S. is about 161 million. U.S. BUREAU OF LABOR STATISTICS, TABLE 1.2 EMPLOYMENT BY DETAILED OCCUPATION, 2018 AND PROJECTED 2028, <https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm> [<https://perma.cc/ZA2D-ZPB8>].

15. Ackerman, *supra* note 5, at 687, 690, 715.

possible with the ‘right’ skills will result in better public administrations—and they, the schools, will have made ‘a difference.’ Such an all-out effort and an expectation of public-spiritedness appears to be aimed not only at the higher echelons, but to the whole body of employees on public payroll globally.¹⁶

2.2. *The “Received View” of Weber*

Having provided some evidence that indeed public law abides by Weberian philosophy, at least from a normative point of view, let us discuss the “received view” of Max Weber’s theory of bureaucracy that public law is practicing and what that received view exactly is. The “received view” of Weber refers to the current understanding of Weber’s theory of bureaucracy in public discourse. It refers to what we have understood, what we have retained, and how we have implemented Weber. It is a cautious way to refer to Weber’s thinking since it would be very strong to say, “This is what Weber really said and what Weber really meant.”

The received view of Weber can be summarized in two ‘recipes’ for obtaining the highest degree of efficiency of public administration through bureaucratic arrangements: (1) context and structure of the public administration organization; and (2) status of the civil servant.¹⁷ In teaching Weber today, Professor Iván Szelényi at Yale University highlights the following characteristics of Weber’s ‘recipe’ for the context and structure of a legal-rational authority: (i) continuous rule bound conduct, (ii) a specific sphere of competence (or jurisdiction), (iii) a hierarchy of right of appeal, (iv) specialized training for administrative staff, and (v) complete staff separation from ownership of the means of production or administration.¹⁸ The second Weberian ‘recipe’ Professor Szelényi discusses is the characteristics of bureaucracy and bureaucrats, where staff members are: (i) personally free, (ii) organized by hierarchy of office, (iii) employed by free contract on a fixed salary and hired on the basis of technical qualifications, and (iv) employed solely by the office such that it constitutes a career.¹⁹ As portrayed

16. THOMAS HOBBS, *LEVIATHAN* Ch. XXIII (1651) (answering the question by enumerating, rather extensively, on whom is to be regarded as a public minister).

17. See WEBER, *supra* note 11.

18. Iván Szelényi, Lecture 20: Weber on Legal-Rational Authority, at 9:11–14:30, Yale Open Course (Fall 2009), <https://oyc.yale.edu/sociology/socy-151/lecture-20> [<https://perma.cc/M6DW-JN5Q>] (quoting WEBER, *supra* note 11, at 218–19). This quote is not intended to imply that Professor Szelényi has a limited view of Max Weber; instead, the lecture is provided as an authoritative source of the basic instruction in Weberian philosophy that permeates public law worldwide.

19. *Id.* at 19:33–23:39 (quoting WEBER, *supra* note 11, at 320–21).

by Weber, “the purely bureaucratic type of administrative organization . . . is, from a purely technical point of view, capable of attaining the highest degree of efficiency”²⁰ Thus, this type of organization is highly predictable.²¹

We may *in actu oculi* notice discrepancies between what Weber wrote about bureaucratic efficiency and the efficiency of public administration we observe in reality. In fact, Weber himself also wrote:

[T]here is another tendency . . . in contradiction to the above . . . the tendency of officials to treat their official function . . . in the interest of the welfare of those under their authority This tendency to substantive [instrumental] rationality is supported by all those subjected to authority . . . [and who are] interested in the protection of advantages already secured. The problems which open up at this point belong in the theory of “democracy.”²²

Weber was aware of what scholars have shown empirically over the last century: public employees, like all other human beings, will protect their jobs in the first place, more than caring for the mission of their organization. Such crucial concern of Weber’s seem to have been overlooked by predictably self-interested legislators and bureaucrats who have emphasized, out of context, the slogan of bureaucracy as “attaining the highest degree of efficiency.” What Weber regarded as a hindsight assessment of an aspect of world history, has been acritically, and, with self-interest, taken as an effective prescription for the future. Even before Weber, other classics of administrative behavior provide a different view of organizations from the Max Weber rational and impartial model. In fact, the notion of organizational self-serving behavior in political science on the part of organizations goes back at least to Michels,²³ who formulated the “iron law of oligarchy,” focusing his gaze on political parties, which—once established—would only (or primarily) hold the scope of self-perpetuation.²⁴ A brief summary of the thread of thinking on organizational behavior since Michels

20. *Id.* at 23:39–26:18 (quoting WEBER, *supra* note 11, at 223). Szelényi also highlights the connection between capitalism, socialism, and bureaucracy: “the primary source of the superiority of bureaucratic administration lies in the role of technical knowledge Bureaucratic administration means . . . domination through knowledge.” *Id.* at 26:18–34:44 (quoting WEBER, *supra* note 11, at 223–25).

21. WEBER, *supra* note 11, at 223.

22. *Id.* at 226.

23. ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (Eden Paul & Cedar Paul, trans., 1966) (1911).

24. *Id.* at 342.

includes Mayo and Barnard writing in the 1930s and 1940s,²⁵ Charles Lindblom,²⁶ Herbert Simon,²⁷ William Niskanen,²⁸ Graham Allison,²⁹ and Oliver Williamson.³⁰ Throughout the twentieth century, organizational science and micro-economics have been revising the rational organization model. Although these thinkers come from very different approaches and disciplines, they have a common denominator: they would not expect rational, impartial, or altruistic behavior from organizations. Charles Lindblom's title conveys the idea precisely; organizational science is "The Science of 'Muddling Through.'"³¹ In fact, leveraging the organizational behavior and microeconomics literature of the last century, an "Administrative Behavior Hypothesis," alternative to the Weberian Hypothesis, could reveal itself more efficiently as a predictor of public organizations' behavior. In light of Professor Ackerman's hypotheses and U.S. schools of public administration, it is interesting to notice that expectations of a Weberian bureaucracy are high even in the U.S., where a Madisonian view of the State is asserted to mark a difference vis-à-vis the Neo-Weberian State.³² The U.S. federal government, for instance, is endowed with an Office of Government Ethics and expects a special behavior of public employees vis-à-vis private employees.³³ Most importantly from a

25. See ELTON MAYO, *THE SOCIAL PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (1945); CHESTER I. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1968).

26. See Charles Edward Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79 (1959).

27. See HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* (4th ed. 1997).

28. See William A. Niskanen, *Non-Market Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. ASS'N 293 (1968).

29. See GRAHAM T. ALLISON & PHILIP D. ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (2d ed. 1999) (revealing the existence of the implicit Weberian hypothesis in explaining foreign policy and exploring the relevance and empirical value of two alternative hypotheses).

30. See Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595 (2000) (examining the dynamics of principal-agent behavior).

31. See Lindblom, *supra* note 26.

32. See Ackerman, *supra* note 5.

33. U.S. OFFICE OF GOV'T ETHICS, AGENCY PROFILE, <https://www.oge.gov/web/oge.nsf/Resources/OGE+Agency+Profile> [<https://perma.cc/9ZQ6-DNAT>]; U.S. OFFICE OF GOV'T ETHICS, STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH (2017), <https://www.oge.gov/Web/oge.nsf/Resources/Standards+of+Ethical+Conduct+for+Employees+of+the+Executive+Branch> [<https://perma.cc/J8PJ-FQYW>]; WALTER M. SHAUB, JR., U.S. OFFICE OF GOV'T ETHICS, CONFLICT OF INTEREST PROSECUTION SURVEY (2015), <https://www.oge.gov/Web/OGE.nsf/Resources/LA-16-05:+2015+Conflict+of+Interest+Prosecution+Survey> [<https://perma.cc/26N2-QXYE>].

theoretical point of view, much of the literature criticizing the Weberian approach to bureaucracy has been developed in the U.S.,³⁴ dealing with U.S. examples ranging from the Cuban missile crisis³⁵ to the implementation of federal programs in California.³⁶

3. The Privileged Working Conditions for Public Employees

Contrary to common wisdom—however not unforeseen by Weber himself, as shown above—the Weberian received view of public employees’ working conditions has implications that make civil service a privileged status vis-à-vis the working conditions of the other workers in the world. In this way, public law adds a new (or as yet unrevealed) dimension to inequality: the privileged working conditions of public employees. This section provides some qualitative as well as quantitative evidence of such statements.

Monopoly status of public administration organizations is the fundamental element that characterizes public administration vis-à-vis the other sectors of the economy. This monopoly added to the Weberian ‘recipes’ discussed herein generate the following three characteristics of privilege:

1. *de facto* non-evaluated performance;
2. *de facto* lifetime employment and pension, and consequent shelter from the economic cycle; and
3. right to strike against an agent rather than a principal.

All of the elements above will be shown by empirical evidence henceforth.

The above are the specific qualitative consequences of the Weberian recipes that make civil service a privileged working status vis-à-vis the rest of the workers. These elements of the working conditions are equivalent to a significant amount of money, even when enjoyed in low salary conditions, and to an intangible ease of life. In other terms, they could also be thought of as ‘shadow’ income.

Mostly, such characteristics are not stated overtly as such, but can only be shown indirectly through quantitative evidence, that is why we have adopted the *de facto* qualifier for two of them. In the following, we provide some quantitative evidence about the four

34. See *supra* notes 23–30.

35. See ALLISON & ZELIKOW, *supra* note 29.

36. See JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND (1973).

elements stated above: monopoly, performance evaluation, shelter from the economic cycle, and right to strike.

3.1. Empirical Evidence

First, let us concentrate on the key discriminating element of the monopoly status of the whole bureaucracy. Such status is shown quantitatively by the higher salary conditions vis-à-vis other sectors of the economy, such as business firms and non-profits, that are subject to competition. According to the neoclassical theory of the firm, production factors (such as labor) under monopoly conditions enjoy higher salaries than in competitive situations. Contrary to public discourse that would have public salaries lower than private sector salaries, global empirical evidence of self-serving behavior on the part of public administration is provided by International Monetary Fund data (Table 1)³⁷ showing that the remuneration of public administration employees worldwide is higher than in the manufacturing sector and lower in the sole case of the (much smaller) financial sector,³⁸ thus debunking conventional wisdom about underpaid public sector employees. The root cause of high salaries is explained as a monopolistic rent by labor, labor being a production factor of public administration's monopoly, thus sharing in the benefits of such monopoly status. As stated above, such monopoly status is the crucial qualitative consequence of the Weberian recipes.³⁹

The figures underscored in Table 1 are also worth commenting on: Africa has the highest public administration-to-manufacturing wage ratios (Africa: 1.8) and a 1.9 public administration-to-GDP ratio, implying that being a civil servant in low-income countries is a bigger privilege than it is in non-low income countries. That privilege is exactly what one would predict by following an alternative "administrative behavior hypothesis," different from the

37. BENEDICT CLEMENTS ET AL., EVALUATING GOVERNMENT EMPLOYMENT AND COMPENSATION (2010), <https://www.imf.org/external/pubs/ft/tnm/2010/tnm1015.pdf> [<https://perma.cc/TM7J-GE4J>].

38. The financial sector is generally about one-tenth the size of public administration. See Table 1.

39. Max Weber was very much aware of the monopoly concept. He famously used the monopoly concept—quite originally bridging an economic concept to politics—in his definition of the character of state power “to monopolize the use of force,” but *did not* use it for bureaucracy. WEBER, *supra* note 11, at 56.

Weberian hypothesis discussed above, and based on the neo-Weberian literature⁴⁰ of the 20th century.⁴¹

Table 1: Global public sector wages in relation to other economic sectors

	Number of countries in the study	Ratio of average public administration wage to per capita GDP	Ratio of public administration wage to financial sector	Ratio of public administration wage to manufacturing sector
Africa	3	1.3	0.7	1.8
Asia and Pacific	7	1.4	0.9	1.4
Europe	28	1.4	0.7	1.3
Western Hemisphere	11	1.4	0.8	1.3
Middle East and Central Asia	8	1.2	0.5	1.3
European Union	17	1.3	0.7	1.3
Low-income Countries	4	1.9	0.7	1.4
Middle-income Countries	35	1.4	0.6	1.4
High-income Countries	18	1.2	0.8	1.3

About the specific U.S. situation within this global picture, the U.S. Government Accountability Office (GAO) found that federal employees' salaries compare with their private sector counterparts in a range going from about minus 30% (for the higher ranks) to

40. CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* 119 (3d ed. 1986) (defining neo-Weberian). Neo-Weberian literature here is not to be confused with the literature on the Neo-Weberian State. See Ackerman, *supra* note 5. For a complete discussion of the neo-Weberian literature of the 20th century, see Paolo D'Anselmi, *Can We Afford to Separate Politics from Administration? Designing Powers in the Service of Implementation*, 5 *IT. L.J.*, no. 2 (forthcoming Jan. 2020).

41. See MAYO, *supra* note 25; MICHELS, *supra* note 23; SIMON, *supra* note 27; Lindblom, *supra* note 26; Szelényi, *supra* note 18.

about plus 30% (for the lower ranks).⁴² Such evidence is consistent with the notion of privilege below the line of wealth, and the very notion of privilege through easier working conditions, rather than by salary and financial wealth. Such evidence also shows the monopoly situation takes place more in the lower ranks, still consistent with expectations.

Coming now to the three characteristics of the privileged working conditions, not surprisingly we notice that U.S. academic attention and study of the Weberian hypotheses in public management, as noted above,⁴³ coupled with political attention and debate over the Madisonian state,⁴⁴ have generated in the U.S. some curbing of the privilege. In fact, we can probably observe globally a continuous spectrum of the privilege phenomenon whereby the Anglo-Saxon tradition of public service experiences lower privilege. Table 1 shows that salary differences are more marked in Low-income Countries.

The first two characteristics of privilege—(1) *de facto* non-evaluated performance; and (2) *de facto* lifetime employment and pension, and consequent shelter from the economic cycle—are not enforced by statutory rules. However, their *de facto* prevalence in reality can be shown ‘not false’ through some statistics. For example, quits rates by industry show significantly different numbers: government, 0.8, vs. total private, 2.5.⁴⁵ Such a difference, consistent over time,⁴⁶ could be a sign of consistently positive evaluations of employee performance [characteristic 1] and securer job position vis-à-vis the economic cycle [characteristic 2]. It is important here that governmental sources are cited since the

42. U.S. GOV'T ACCOUNTABILITY OFFICE, RESULTS OF STUDIES ON FEDERAL PAY VARIED DUE TO DIFFERING METHODOLOGIES 23 (2012), <https://www.gao.gov/assets/600/591817.pdf> [<https://perma.cc/BS8L-QR4S>]. To provide a feeling for the global continuous spectrum of specific country situations, in Italy, the 2014 Spending Review study found that public employees' salaries had been consistently higher by approximately 27.5% vis-à-vis their private sector counterparts over the last 30 years. IL COMMISSARIO STRAORDINARIO PER LA REVISIONE DELLA SPESA PUBBLICA, PROPOSTE PER UNA REVISIONE DELLA SPESA PUBBLICA (2014-16), 16 (Mar. 27, 2014), http://revisionedellaspesa.gov.it/documenti/prime_proposte_per_una_revisione_della_spesa_xfinal_x.pdf [<https://perma.cc/PQA2-54D3>].

43. See *supra* notes 4, 18, 23–27.

44. See Ackerman, *supra* note 5.

45. U.S. BUREAU OF LABOR STATISTICS, TABLE 4. QUILTS LEVELS AND RATES BY INDUSTRY AND REGION, SEASONALLY ADJUSTED (June 2019), <https://www.bls.gov/news.release/jolts.t04.htm> [<https://perma.cc/4BD8-TBDL>].

46. See Charlotte Oslund, *Which Industries Need Workers? Exploring Differences in Labor Market Activity*, U.S. BUREAU LAB. STATISTICS: MONTHLY LAB. REV. (Jan. 2016), <https://doi.org/10.21916/mlr.2016.1> [<https://perma.cc/2DPU-G4FR>].

argument may get very political and be frustrated from this paper's point of view.⁴⁷

Still about performance evaluation, “about 99 percent of permanent, non-[Senior Executive Status] employees received a rating at or above ‘fully successful.’” About 61 percent of employees were rated as ‘outstanding’ (33.1 percent) or ‘exceeds fully successful’ (27.4 percent).⁴⁸ The 99 percent pass rate motivates the *de facto* non-evaluation of performance statement.⁴⁹

The third statement—right to strike against an agent rather than a principal—needs some clarification in itself. The statement makes reference to the principal-agent theory.⁵⁰ One element justifying the right for workers to strike is the self-restraining condition whereby the strike takes place in industrial action that sees the confrontation of two principals: the workers and the owners of the firm, both acting for their own interest and money. Such situations appear in equilibrium; both parties are furthering their own personal interest and have also an incentive for self-restraint, e.g. to avoid their firm losing market traction thus jeopardizing both parties, the owners and the workers. On the other hand, when the right to strike is granted to government workers, the confrontation necessarily sees principals (the workers) vis-à-vis a counterpart that does not act on behalf of their own money. Such counterparts, be it the President, the Parliament, or an Agency, find themselves in the position of an agent, thus making the confrontation unbalanced, or at least qualitatively less accountable than private sector confrontations.

U.S. government workers, e.g. federal employees, do not seem to enjoy the right to strike, at least in order to further their economic salaries. The procedure to set federal employee salaries is defined, and the final decision ultimately belongs to the President of the

47. Such statistics are likely to represent a lower bound of the public-private divide because they include turnover generated by age and retirement, besides non-voluntary separations. If one were able to look at non-voluntary separations, a bigger difference would probably be found.

48. U.S. GOV'T ACCOUNTABILITY OFFICE, DISTRIBUTION OF PERFORMANCE RATINGS ACROSS THE FEDERAL GOVERNMENT, 2013, 5 (2016), <https://www.gao.gov/assets/680/676998.pdf> [<https://perma.cc/AW6R-Y6FR>] (providing examples from the continuous spectrum of country-specific situations, citing that the harshest measure the self-governing body of the magistrates in Italy can impose on one of their members is relocation to another city).

49. A counterpart to *de facto* non-evaluation of performance can be found in the emphasis that is oftentimes placed in the harshness of entrance examinations into public service, which goes back to Hegel. KARL MARX, CRITIQUE OF HEGEL'S 'PHILOSOPHY OF RIGHT' 50–51 (Annette Jolin & Joseph O'Malley trans., Joseph O'Malley ed., 1970).

50. Williamson, *supra* note 30.

United States.⁵¹ Therefore, this third condition cannot be shown as applicable to the U.S. public administration's context. This situation differs, for instance, from the Italian context whereby the right to strike is granted in the constitution.⁵²

3.2. Further Evidence

Further qualitative evidence about the pursuit of special status for public employees is provided by the following phenomena:

1. public discourse and international public organizations' striving to create a class of civil servants;⁵³
2. the very use of the phrase "civil servant" identifies a different species of people than "public employee" would;⁵⁴
3. considering itself *per se* efficient, the bureaucracy claims it operates at the feasibility frontier,⁵⁵ as shown by the following sub-points:
 - 3.1. the limited results of spending review efforts;⁵⁶
 - 3.2. the need of new programs for specific and additional funding;⁵⁷
 - 3.3. the backlog is assumed as a symptom of heavy workload and the cause of bureau ineffectiveness, which becomes an opportunity to claim understaffing and blame the citizenry rather than the bureaucracy itself (e.g. the

51. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 42, at 5–6.

52. Art. 40 Costituzione [Cost.] (It.) (providing the right to strike).

53. Ackerman, *supra* note 5; Albrow, *supra* note 8.

54. Andrea Lapicciarella, *On Bureaucratic Behavior*, in PUBLIC MANAGEMENT AS CORPORATE SOCIAL RESPONSIBILITY 103, 107–09 (Massimiliano Di Bitetto, Athanasios Chymis & Paolo D'Anselmi eds., 2015).

55. See AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 213 (2d ed. 1974) (describing how one branch of the government blames another for imperfect budgets arguing that the budget would operate effectively if the other branch only cooperated with the first branch); Francis M. Bator, *The Simple Analytics of Welfare Maximization*, 47 AM. ECON. REV. 22, 22–59 (Mar. 1957).

56. Compare CAMERA DEI DEPUTATI, IL CONTROLLO DELLA SPESA PUBBLICA E LA SPENDING REV. 4 (2019) (finding a reduction of around 1.3 billion euro was necessary in the latest spending review in Italy), with *Capire per Conoscere*, *Puntata n.209*, Mario Baldassarri (Apr. 15, 2019), <http://www.mariobaldassarri.net/site/2019/04/15/capire-per-conoscere-puntata-n-209-del-15-aprile-2019> [<https://perma.cc/73J7-6ZS2>] (discussing waste in the same budget), and MARIO BALDASSARRI, QUARANT'ANNI DI SPENDING REVIEW: L'ITALIA AL BIVIO SUI TAGLI DI SPESA (2018).

57. The Italian military mission to Afghanistan had to be specifically and additionally funded, notwithstanding the several billion euro budget of the organizations that were involved. MINISTERO DELLA DIFESA, DOCUMENTO PROGRAMMATICO PLURIENNALE PER LA DIFESA PER IL TRIENNIO 2018-2020, 92, 155–56 (2018), https://www.difesa.it/Content/Documents/DPP_2018_2020_15_ottobre_2018.pdf [<https://perma.cc/N52D-9SX3>].

backlog of pending lawsuits is blamed on the high “litigiosity” of the population).⁵⁸

4. thematization that failure is due to imperfect application of the Weberian recipes and there is need for more controls.⁵⁹

The major symptom is this received and popularized view of Max Weber permeates public law without amendment. Public law, based on a limited and self-serving understanding of Max Weber’s theory of bureaucracy, adds one dimension to inequality that is wholly man-made and sanctioned by the law.

4. Relevance, Limitations, and Recommendations

The privileged conditions constitute a relevant global justice issue, applying to an estimated half billion employees of public administration globally.⁶⁰ Such conditions create ‘mass privilege,’ an oxymoron with vast consequences. In fact, working conditions privilege might very well constitute the other side of the government ineffectiveness coin.⁶¹ It is however crucial to the stability of this argument that government ineffectiveness not be brought in the discussion as proof of the existence of the privilege. Government ineffectiveness can be very elusive to show and to pinpoint. The argument is strictly about the inputs to public

58. MINISTERO DELLA GIUSTIZIA, RELAZIONE SULLA PERFORMANCE 2011 - DIPARTIMENTO DELL'ORGANIZZAZIONE GIUDIZIARIA, DEL PERSONALE E DEI SERVIZI (2012), https://www.giustizia.it/giustizia/it/contentview.page?contentId=ART779081&previousPage=mg_14_7 [<https://perma.cc/Y658-T9NM>] (“Questo elevato tasso di litigiosità potrebbe derivare da una propensione socio-culturale italiana alla conflittualità . . .”) (“This high rate of litigiosity could derive from an italian socio-cultural propensity to conflict . . .”).

59. Ackerman, *supra* note 5.

60. This article takes ‘the view from below’ to public administration, and it argues the basic Weberian conditions apply to all civil servants worldwide. The phrase is borrowed from Ralph S. Brower & Mitchel Y. Abolafia, *Bureaucratic Politics: The View from Below*, 7 J. PUB. ADMIN. RES. & THEORY 305 (1997).

61. See generally EDELMAN, EDELMAN TRUST BAROMETER GLOBAL REPORT (2018), https://www.edelman.com/sites/g/files/aatuss191/files/2018-10/2018_Edelman_Trust_Barometer_Global_Report_FEB.pdf [<https://perma.cc/SL5Y-8XS2>]; MCKINSEY CTR FOR GOV'T, DELIVERING FOR CITIZENS: HOW TO TRIPLE THE SUCCESS RATE OF GOVERNMENT TRANSFORMATIONS (2018), <https://www.mckinsey.com/~media/McKinsey/Industries/Public%20Sector/Our%20Insights/Delivering%20for%20citizens%20How%20to%20triple%20the%20success%20rate%20of%20government%20transformations/Delivering-for-citizens-executive-summary.ashx> [<https://perma.cc/8PFV-XKX4>]; *Worldwide Governance Indicators*, WORLD BANK, <http://info.worldbank.org/governance/wgi> [<https://perma.cc/X3J9-JB5A>].

administration: the privileged status of its labor force. Whether such privileged status may have anything to do with government ineffectiveness is only hinted here as a theme for future research.

On the other hand, arguments about salaries being geared to education, experience, tough selection at entry, and other variables, should take into account that much of the comparative salary literature deals with competitive labor markets. What is missing in the case of public administration is exactly competition. And competition is missing because the Weberian paradigm is hegemonic in public law and public administration. We go back again to the idea of public administration's monopoly status.

The discussion takes salaries into account only as a proof of the existence of the monopoly status and the consequent privileged conditions. Instead, the inequality focus centers around the three dimensions of privilege stated above:

1. *de facto* non-evaluated performance;
2. *de facto* lifetime employment and pension, and consequent shelter from the economic cycle; and
3. right to strike against an agent rather than a principal.

The mass privilege enjoyed by civil servants is as elusive as it is 'privilege below the threshold of wealth.' Most of the time it is not conspicuous. In fact, it shows itself in the humblest of jobs, which are nonetheless privileged vis-à-vis their private sector counterparts as they enjoy shadow income through easier working conditions and intangible value. Such privilege has mass nature, involving at least one seventh (slightly less than 15%) of the employed population globally: one half billion over a total employed population estimated at 3.5 billion.⁶² The vast dissemination of this inequality made by law accounts for its stability, its own hegemony in public discourse (e.g. in the public narrative of lower pay public jobs), the difficulty in revealing it, and the difficulty in containing it.

Recommendations about amendment of such inequality in the working conditions of public employees should strictly avoid possible salary cuts. Differences on salaries have not been shown here as an item of privilege, thus underlining that privilege can take a very different and yet pervasive turn, bypassing money. Salaries

62. This estimate is based on available statistics from: the International Labour Office, the OECD, specific statistics from China, and personal communication about India. Data interpolation was used to estimate values for other countries. The Microsoft Excel file is available upon request.

are only effects of monopoly; the spirit of the recommendation then is to remove some of the monopoly status, while keeping the same organizational structure, only changing the personnel system.⁶³ The remedy should not be about punishment; the remedy should be about sharing the intangible benefit of being a public employee. On the other hand, for sake of effectiveness of public administration and of the economy in general, it is key that employees rotate between the public and the private sector, thus generating a possibly productive dynamism. Civil service jobs could also be made as medium-term jobs (e.g. 5 or 10 years), then persons employed in the public administration should go back to the private sector and new employees should be taken in from the private sector into the public administration. Such an arrangement should be implemented through staggered personnel turnover, making sure there is overlap and smooth transition within jobs and organizations. Necessity for continuing education and continuing evolution of public and private organizations would be a consequence of such an organizational arrangement. However, such new arrangements are already a necessity of our age.

The Weberian idea of “domination through knowledge”⁶⁴ is still valid today, but it can no longer be implemented through monopolistic practice. “[D]omination through knowledge”⁶⁵ today is probably part of “soft power,”⁶⁶ and it is exerted in much more complex and sophisticated ways. Only a few years after Weber wrote his works, Antonio Gramsci⁶⁷ formulated the ancestor concept of soft power: hegemony, whereby the abstract plane of doxy is dominated that influences both orthodox and heterodox points of view.

“Neo” elements of the Neo-Weberian State reinforce the notion of “[a] professionalization of the public service, so that the ‘bureaucrat’ becomes not simply an expert in the law relevant to his or her sphere of activity, but also a professional manager, oriented

63. Monopoly has at least two facets: (1) monopoly of organizational structures; (2) monopoly of the labor force working within monopolistic structures. Here, this Paper proposes to remove the second type of monopoly. Future studies could investigate the possible removal of the first type of monopoly, as well, beyond New Public Management.

64. Weber, *supra* note 11, at 225.

65. *Id.* at 225.

66. See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004).

67. ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* (Quintin Hoare & Geoffrey Nowell Smith, eds. & trans., International Publishers 2018) (1971).

to meeting the needs of his/her citizen/users.”⁶⁸ This notion appears to be a new version of the “domination through knowledge,”⁶⁹ which can acquire an eerie connotation in the era of the Internet, algorithms, and profiling of individuals.

Such recommendations, which are not focused on the abatement of salaries, but on the dissemination of the experience of being a government employee—and, by the same token, the dissemination of the experience of being a private sector employee—appear to be very much egalitarian ones. It could be argued that lifetime stability of citizens in either status, public or private employee, may lead to a reverse form of that “corrosion of character” that has captured the imagination of scholars and general readers.⁷⁰ The recommendation may give the individuals a glimpse of that well-balanced “original position” that John Rawls saw as a device for the generation of the individual’s preferences in the just society.⁷¹ The individual’s point of view could change for the better, due to a cross-sector work experience over a lifetime. Consequently, the “burdens of judgement”⁷² could be mitigated thanks to a more diverse individual work experience in their lifetime.

The problem that is identified and the solving arrangement that is proposed here are not completely novel. On the one hand, this all takes the shape of a ‘dual labor market,’⁷³ albeit that theory did not identify the law-made nature of the dual labor market. The present theory can be thought of as a special, law-made case of that general theory. On the other hand, New Public Management (NPM) has generated some of the kind of dynamic that is envisioned here, through the concepts of public value⁷⁴ and of the contracting state.⁷⁵ However, NPM, as implemented in the U.S. and in the U.K.,

68. POLLITT & BOUCKAERT, *supra* note 6, at 119.

69. Weber, *supra* note 11, at 225.

70. This statement is probably a point of view about the argument of his book to which Richard Sennett would not subscribe. RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* (1999).

71. JOHN RAWLS, *POLITICAL LIBERALISM* 304–10 (2005).

72. *Id.* at 54–58.

73. See MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1984).

74. See Herman B. Leonard & Mark H. Moore, *Pursuing Public Value: Frameworks for Strategic Analysis and Action*, in *PORTS IN A STORM: PUBLIC MANAGEMENT IN A TURBULENT WORLD* 84 (John D. Donahue & Mark H. Moore eds., 2012).

75. See CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 338–92 (3d ed. 2009).

appears to have had in mind quick (and nonetheless stable) wins.⁷⁶ NPM is not concerned about the root problem: the Weberian theory underlying public administration organization as determined by public law. On the other hand, NPM is limited to public services; it does not get into core public administration. Rotation across the private and public sectors of the economy needs to be extended to all public administrations. The possible benefits resulting from such arrangements appear to overcome the alleged costs from loss of experience, expertise, and seniority. Worst case, what is lost in one sector, is gained in the other sector, public or private; best case, rotation revitalizes the energy of people employed, and cross-fertilization of experience could be fruitful for society and the economy.

5. Conclusion and Future Studies

This paper proposes the thesis that careers in public administration are a form of privilege and inequality and recommends a possible remedy. This paper establishes the existence of a new dimension of inequality that has been not very much explored: the privilege of being an employee of public administration as sanctioned by public law, following the Weberian theory of bureaucracy. Part of the argument proposed here (the existence of privilege) is not new; what is new is the specification of such privilege in the working conditions rather than salary and the tracing of the theoretical and philosophical underpinnings of it through law and mainstream theory.

Future studies should start from the limitations of this paper and develop more quantitative evidence about the existence of the dimension of inequality that is argued here. Top priority should be given to the establishment and acknowledgement of such inequality, and the existence of the problem. For instance, evidence could be collected about the lower turnover of personnel in the public administration than in the private sector. Such evidence would be synergic with the existence of privilege in the public administration. Also, the ratio of the number of available posts to the number of participants entering in public vis-à-vis private contests for jobs could be an interesting indicator of the distorted extra appeal of public administration jobs. Much of this evidence can be collected only on a specific country basis, which should be

76. A. C. L. Davies, *Beyond New Public Management: Problems of Accountability in the Modern Administrative State*, in ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION 333, 333–53 (Nicholas Bamforth & Peter Leyland eds., 2013).

thought of as a contribution to comparative literature, rather than as a parochial issue. Further recommendations on how to amend inequality—detailing or integrating the remedy of rotation—could occupy another chapter of future studies.

On the theoretical side, the underpinnings of this inequality could be traced through the insufficiency of Max Weber's received recipes as a way to predict organizational behavior in public administration. An alternative Administrative Behavior Hypothesis⁷⁷ should be investigated, leveraging the organizational behavior and microeconomics literature of the last century. The implications of such alternative hypothesis would be profound on public law worldwide.

If the discussion has shown a possible pathway to unravel unintended consequences of the Weberian recipes, this same pathway could lead to a generalization about the conceptual inadequacy of the same Weberian recipes as effective predictors of public administration organizational structures' optimal behavior altogether. What is at stake is the very "rational-legal" source of authority, in the classical Weberian three-partite taxonomy,⁷⁸ that may need further investigation, because that source is based on the same Weberian recipes.⁷⁹ One could at this point ask the question: public administration is probably rational, but for whom? Rationality might be in the intentions of bureaucracy and of the legislators—these would be inputs to the process of public governance—but is there rationality in their consequences, i.e. in the outputs and the outcomes of public administration action? The very notion of bureaucratic rationality is at stake. If it can be shown that at least in part the way we have interpreted and implemented Max Weber's legacy has led to unintended consequences, maybe that same interpretation may prove questionable in other fields, such as the entire organizational arrangements of public administration.

77. SIMON, *supra* note 27.

78. WEBER, *supra* note 11, at 926–38.

79. A philological study is underway because Max Weber himself apparently never formulated the third pure type of authority as "rational-legal." See WEBER, *supra* note 11.