MAX WEBER'S IDEAL TYPE AS A BEHAVIORAL HYPOTHESIS IN PUBLIC LAW THE LEXICON OF CONSTITUTIONS ON PUBLIC ADMINISTRATION

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Abstract

Public administration is a topical global industry that employs half a billion people and covid-19 reminded us that relief from emergency hinges upon political decisions as much as it does on the capability of public administration to implement those decisions. Public administration is shaped by public law. It is topical then that public law be effective in performing the task of shaping public administration. Legal scholars have acknowledged the debt of public administration's organizations to Max Weber's ideal type of legal-rational authority. But how exactly has Weber's ideal type permeated public law? The literature does not seem to have asked this question. On the other hand, public law seems to have remained on the margin of the debate about the Weberian state. Legal scholars have said public administration is Weberian more from their general view than by citing specific elements of law. This paper identifies one of the ways such permeation has happened. In fact, the purpose of this article is to show that the influence of Max Weber's ideal type of legal-rational authority on public law – constitutions, specifically – is revealed by public law's use of the lexicon and the characteristics of the same ideal type to shape the organizational model of public administration. This purpose will be pursued by showing that the language of Max Weber's ideal type has been transposed into legislation without further elaboration. The demonstration is pursued through comparative text analysis and inductive approach based on qualitative empirics of a sample of constitutions and legislation. The importance of conducting such operation is to make explicit that public law adopts Max Weber's ideal type of legal-rational authority as a behavioral hypothesis about public administration. This is a contribution to the interdisciplinary field of law and sociology of organizations. Policy implications open the way for a fresh look at

public administration reform, questioning the basic conceptual model that is underlying legislation.

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1. Introduction

The pandemic of 2019-2021 has brought public administration center-stage in the global governance domain because it has shown that relief from medical emergency hinges upon the political decisions of leaders as much as it does on the capability of public administrations to implement those decisions, in health care, economic welfare and other areas of government. Public administrations then constitute a large and topical global industry. They employ half a billion people[1] from the global employed population of 3.5 billion making about 15% of the total. Public administrations collect and spend sizeable shares of GDP (from 13% to 55%, depending on the specific country[2]) through levying taxes, providing merit and non-merit goods and services, and managing market economies or acting instead of the market economy in large parts of the globe. Public administrations are a crucial and

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[1] P. D'Anselmi, *The Privileged Working Conditions of Public Employees Sanctioned by Public Law: Adding One Dimension to Inequality* 1 Inequality Inquiry 46 (2020) https://scholarship.law.umn.edu/jii/1

[2] https://tradingeconomics.com/country-list/government-spending-to-gdp accessed 31 January 2021

instrumental sector for the management of all salient public policy issues from climate change and the green transition to the alleviation of poverty and inequality, from the Fourth Industrial Revolution to debt and unemployment, and last but not least, the mentioned covid-19 pandemic. Nonetheless most public administrations seem to be underperforming globally and public administration reform is part of international organizations' agenda for problem countries, so much so that public administration reform appears to be the common denominator to several of the Washington Consensus' ten points[3]. Of course there are nuances in the performance of different public administrations and in the therapies that are put forth in each country to cope with the issue: some public administrations are much better than others.

Public administrations are governed by public law and other disciplines that have acknowledged each other's influence on this subject[4]. However, public law is the hegemonic discipline governing public administrations around the world[5]. Public law includes administrative law and constitutional law. Administrative law descends from constitutional law and 'civil service law and bureaucratic organization' are a subset of administrative law[6]. Bradley and Ewing define the relationship between the two branches of public law:

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[3] J. Williamson *What Washington Means by Policy Reform* in: J. Williamson (ed.), *Latin American Readjustment: How Much has Happened* (1989)

[4] M. Albrow, *Bureaucracy* 13 (1970), "Political scientists, sociologists, management scientists have all devoted major pieces of theory and research to bureaucracy." W. Wilson, *The Study of Administration* 2.2 Political Science Quarterly (1887) https://doi.org/10.2307/2139277

[5] L.E. Lynn Jr., *Public Management: Old And New* i (2006), Lynn recognizes the prevalence of public law and law in general: 'constitutions and constitutional institutions, legislatures, and courts regulate the evolution of managerialism'. See generally S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, (2010); V.C. Jackson and M. Tushnet, *Comparative Constitutional Law*, (2014); R. Masterman and R. Shutze, *The Cambridge Companion to Comparative Constitutional Law*, (2019); M. Rosenfeld and A. Sajo, *The Oxford Handbook of Comparative Constitutional Law*, (2013). Handbooks of comparative constitutional law provide a global landscape for the relevance of public law in public administration.

[6] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 1

> "Administrative law is a branch of public law concerned with the composition, procedures, powers, duties, rights and liabilities of the various organs of government that are engaged in administering public policies. Administrative law includes at one extreme the principles and institutions of constitutional law and at the other the detailed rules in statutes and ministerial regulations."[7] "There is no precise demarcation between constitutional and administrative law."[8] "Constitutional law is that part of national law which governs the system of public administration and the relationships between the individual and the state."[9]

Hegemony of public law especially reflects the reality in the least developed systems, where managerial sciences are not so much developed and implemented.

Legal scholars have acknowledged the debt of public administration's organizations to Max Weber's ideal type of legal-rational authority. But how exactly has Weber's ideal type permeated public law? The literature does not seem to have asked this question. Public law seems to have remained a little on the margin of the debate about the Weberian state[10]. Legal scholars have said public administration is Weberian more from perception and their general view[11] than by citing specific elements of law. This paper identifies one of the ways such permeation has happened. In fact, the purpose of this article is to show that the adoption of Max Weber's ideal type as a behavioral hypothesis about public administration is revealed by public law's use of the lexicon and the characteristics of the ideal type to shape the organizational model of public administration. The demonstration is pursued through comparative text analysis. This is

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[7] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* 605 (2011).
[8] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7, 451.
[9] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7, 451.
[10] C. Pollitt and G. Bouckaert, *Public Management Reform: A Comparative Analysis-New Public Management, Governance, and the Neo-Weberian State* 71-72 (2011). L.E. Lynn Jr., *What Is a Neo-Weberian State? Reflections on a Concept and its Implications*, NISPAcee Journal of Public Administration and Policy 17 (2008).
[11] C. Harlow and R. Rawlings, *Law and Administration* (2009); A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7.

important because public administration reform should take into account the basic conceptual model[12] that is underlying legislation about the organization of public administration.

Public law's effective shaping of public administration requires first of all an awareness on the part of public law that it is doing so and that this happens in specifically identifiable instances. Such operation would be a contribution to the legal interdisciplinary field of law and sociology of organizations. Public law would be drawn into the debate about Max Weber's ideal type and hypotheses on the organizational behavior of public administration, opening perhaps the way for a fresh look at public administration reform.

Constitutions are a key element of public law and constitutions appear to be a good starting point for the study of the influence of Max Weber's ideal type on public law. Constitutions are key as objects to be observed and studied for the purpose of this paper. Not only constitutions are laws that are present and characterise every country, but by their very – abstract or higher level - nature constitutions set models and principles which is exactly what we are looking for. The language of constitutions is homogenous to Max Weber's level of language in the ideal type of legal-rational authority. Constitutions make explicit what ordinary legislation often times takes for granted or implicitly assumes. Constitutions explicate the general views that legislative bodies hold about the public administration and other bodies that make up a country's government. Constitutions of countries around the world have a common denominator when it comes to their shaping of public administration and the civil service. The thesis of this article is that common denominator is the use of Max Weber's language of the ideal type of legal-rational authority[13].

This article investigates a small and interdisciplinary niche, revealing the literal transposition of Max Weber's ideal type which is

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[12] G.T. Allison and P. Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis* (1999).

[13] W.J. Mommsen, *The Age of Bureaucracy: Perspectives on the Political Sociology of Max Weber* 73, 81 (1974) A more precise way to say 'legal-rational authority' is 'legal domination by means of bureaucratic administrative techniques'. The very difference between legal-rational authority and legal domination should be the subject of relevant study.

embodied in public law. It will do so through a comparative analysis of world public administration organizational arrangements as written in the constitutions and other major pieces of domestic legislation. Originality of this study is in defining and contributing to the interdisciplinary niche where public law and sociology of organizations overlap revealing the underlying behavioral model of public law and innovating in the methodology of analysis by lexicographic search. Relevance of such study is noteworthy because – as already mentioned - on the effectiveness of such organizational arrangements embodied in public law depends the work of about half a billion public employees globally – affecting all of humanity, people and GDP[14].

Methodology of this paper implies a comparative[15] inductive approach to theory development: an analysis of individual pieces of legislation is performed to argue by logical grouping that public law's view of public administration is based on Max Weber's ideal type. The thesis – once again - is that public law, globally, uses the ideal type of legal-rational authority as a behavioral hypothesis[16]. The technique will be to perform text analysis or qualitative empirics of constitutions and other public law provisions.[17] The time frame is in the present time, analyzing present legislation in a global cross-section, leading to an exercise in comparative constitutional law.

The plan of this article is as follows: section 2 is a statement of Max Weber's ideal type that will act as a template for the qualitative empirics analyzing legislation in section 4. In section 3, we provide a literature review of Weber in public law doctrine, acknowledging Max Weber's influence but also revealing a possible gap. Section 4 -

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[14] P. D'Anselmi *The Privileged Working Conditions*, cit. at 1, 449.

[15] B. Ackerman, *The New Separation of Powers*, 113.3 Harvard Law Review 706 (2000) 'Comparative public administration is not a well worked field'. However, comparative public administration is the only way to assess the status of each country's public administration, given each public administration's monopolistic status in their own country

[16] S. Whimster, *Understanding Weber*, 111, 112 (2007); see generally P. D'Anselmi *Ideal Types and Behavioural Hypotheses: Public Law, Max Weber and the New Public Administration*, Max Weber Studies 20.2 (2020)
doi: 10.15543/maxweberstudies.20.2.168

[17] Constituteproject.org, World constitutions were translated into English language, homogenized in their texts and made available through constituteproject.org.

Analysis of legislation – is dedicated at showing that legislation (constitutions) have borrowed Max Weber's language, which is outlined in section 2. The article shows how this has been done by citing specific articles of constitutions and comparing these articles' language to the language of Max Weber's ideal type, as illustrated in Section 2 – The language of the ideal type. Finally the policy implications are discussed and conclusions are drawn.

2. Max Weber's language of the ideal type

For sake of analysis this section defines what is meant by language of the Weberian ideal type of legal-rational authority. Let us now listen to Max Weber's[18] voice, in the classical summary of the characteristics of the ideal type of legal-rational authority:

1: characteristics of the legal-rational authority
i [there is] continuous rule bound conduct
ii specific sphere of competence (jurisdiction)
iii there is a hierarchy (right of appeal)
iv specialized training is necessary [for] administrative staff
v_ staff should be completely separated from ownership of the means of production or administration.

2: characteristics of bureaucracy and bureaucrats
[members of staff are:]
1_ personally free
2_ are organized in hierarchy of office
3_ office is filled by free [contract] … on the basis of technical qualifications [and office holders receive] fixed salaries

[18] I. 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]
M. Weber, *Economy and Society* 1418 (Guenther Roth & Claus Wittich eds., 1978, 1956). Full text and pdf available at https://archive.org/details/MaxweberEconomyAndSociety full text pp. 1720 "3. Legal Authority: The Pure Type" starts at page 338/1720 of the full text

> 4_ office is sole occupation of the incumbents [and it] constitutes a career [this implies a pension]

As a corollary to the characteristics of the ideal type of legal domination, the queen of the Weberian lexicon is 'ethics'. Ethics in public administration derive from Weber's *Politik als Beruf*, extended – beyond politicians - to civil servants by metonymy[19]. Metonymy of course has also delivered public ethics from The Protestant Ethic.[20] Ethics is not explicitly mentioned in the constitutions however it is the basis for much legislation on public administration, leading to an expectation of special 'public ethics' on the part of public employees. The precursor of ethics is 'vocation':

> "I. Office Holding as a Vocation -
> That the office is a "vocation" (Beruf) finds expression, first, in the requirement of a prescribed course of training, which demands the entire working capacity for a long period of time, and in generally prescribed special examinations as prerequisites of employment. Furthermore, it finds expression in that the position of the official is in the nature of a "duty" (Pflicht).'[21]
> 'However, when a civil servant appears in his office daily at a fixed time, he does not act only on the basis of custom or self-interest which he could disregard if he wanted to; as a rule, his action is also determined by the validity of an order (viz., the civil service rules), which he fulfills partly because disobedience would be disadvantageous to him but also because its violation would be abhorrent to his sense of duty (of course, in varying degrees).'[22]

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[19] Weber's notion of civil service as vocation, obtained from Politics as Vocation, was conveyed – for instance - to a "public-spirited" audience in the sermon delivered at the interfaith religious service of the five year reunion at the Harvard Kennedy School, a school for public employees and managers, May 15, 2016.
[20] See generally M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (1976)
[21] M. Weber, *Economy and Society*, cit. at 18, 1063 of 1720
[22] M. Weber, *Economy and Society* , cit. at 18, 151 of 1720

In this section we have outlined Max Weber's basic language of the ideal type. These terms will be useful in section 4, where they are searched in the constitutions.

3. Literature review: Weber in public law doctrine

How exactly has Max Weber's ideal type of legal-rational authority permeated public law? It is not easy to test empirically the reception of Weber's ideal type in public law. The influence of Weberian bureaucracy (and institutions in general) on economic growth has been studied from an economics and political science point of view[23], however this link has stayed mostly in the background of law studies. Nonetheless, the following literature review is intended to show the basic accord of legal scholars on Max Weber's influence on public administration.

An early encounter of public law with the theory of the organization of public administration is to be found about one hundred years before Max Weber's age, in Hegel's Philosophy of Right. We will notice that several of Max Weber's characteristics and words are found already in Hegel. We can profitably work on Hegel through Karl Marx's Critique, where both authors speak[24]. The distinction between public management and public policy is intimated in the following passage:

> 'There is a distinction between the monarch's decisions and their execution and application, or in general between his decisions and the continued execution of maintenance of past decisions, existing laws, regulations, organizations for the securing of common ends, and so forth.'[25]

Hegel continues with a description of the bureaucracy and an intimation of the professional status of civil servants:

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[23] A. Cornell et al., *Bureaucracy and Growth*, 53.14 Comparative Political Studies (2020) https://doi.org/10.1177/0010414020912262; more broadly: D. Acemoglu and J. Robinson, *Why Nations Fail: The Origins Of Power, Prosperity, And Poverty* (2012).
[24] K. Marx, *Critique of Hegel's 'Philosophy of Right'* (2009).
[25] K. Marx, *Critique of Hegel*, cit. at 24, 41 par. 287 these are Hegel's words.

> 'The nature of the executive functions is that they are objective and that in their substance they have been explicitly fixed by previous decisions (see Paragraph 287); these functions have to be fulfilled and carried out by individuals. Between and individual and his office there is no immediate natural link. Hence individuals are not appointed to office on account of their birth or native personal gifts. The objective factor isn their appointment is knowledge and proof of ability. Such proof guarantees that the state will get what it requires; and since it is the sole condition of appointment, it also guarantees to every citizen the chance of joining the class of civil servants.'[26]

Still Hegel on civil servants says what Max Weber will echo: 'A dispassionate, upright, and polite demeanor becomes customary [in civil servants]'.[27] Marx comments:

> 'A division of labor occurs in the business of the executive. Individuals must prove their capability for executive functions, i.e., they must sit for *examinations*. The choice of the determinate individual for civil service appointment is the prerogative of the royal authority. The distribution of these functions is given in the nature of the thing. The official function is *the duty and the life's work* of the civil servants.'[28] (emphasis added)

Marx uses here the word examinations which is going to be found in the constitutions, it is articulated in Weber and echoes to the present day; also at 'the duty and the life's work' read 'vocation', another intimation of Weber.

In their turn, contemporary comparative studies in constitutional and administrative law have taken the basic elements of the state or public administration as a given. 'Civil service law and bureaucratic organization charts and rules provide an essential

[26] K. Marx, *Critique of Hegel*, cit. at 24, 43 par 291 these are Hegel's words.
[27] K. Marx, *Critique of Hegel*, cit. at 24, 44 par 296 Hegel's words.
[28] K. Marx, *Critique of Hegel*, cit. at 24, 45 Marx comments on Hegel's parr. 290-297.

background, but our emphasis is on the law's fundamental role in framing the way individuals and organizations test and challenge the legitimacy of the modern state outside of the electoral process'.[29] One could observe comparative scholars are interestingly concerned with the 'dynamics' of the administrative state while this article is concerned with its basic 'statics'. We deal with this statics subject because we think statics too affects the effectiveness of the 'external checks that enhance the democratic accountability and competence of the administration.'[30]

Individual scholars have acknowledged the influence of Weber on public administration. Harlow and Rawlings take a 'law in context' approach and acknowledge that: 'The British civil service set in place by Northcote-Trevelyan was Weberian to a limited extent'[31]. Harlow and Rawlings describe as Weberian something that came before Weber, albeit 'to a limited extent'. Weber however, is the touchstone for describing public administration. An overt acknowledgement of Weber's influence is to be found in Ackerman who acknowledges the need for a 'Weberian culture' in public administration[32]. Merloni [33] explicitly expresses a wish to better internalize Weber:

> 'We entertain the hope that in the future the model of organizational behaviour for public administrations—which is implicit in the law—will take into account those organizational behaviour theories that have been formulated over the past century which describe and modify the Weberian ideal of rational bureaucracy.'

Concluding this literature review, we notice how legal scholars have appreciated the influence of Max Weber's ideal type on public administration. However, there appears to be a gap in the

[29] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 1
[30] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 1
[31] C. Harlow and R. Rawlings, *Law and Administration*, cit. at 11, 53
[32] B. Ackerman, *The New Separation of Powers*, cit. at 15, 687; B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* 1 (2019), where Ackerman acknowledges Weberian 'bureaucratic rationality'.
[33] F. Merloni, *Corruption and Public Administration: The Italian Case in a Comparative Perspective* 138 (2019).

literature about the exact mode of internalization of Max Weber into public law and awareness of the behavioral hypothesis that is implied in it. We now turn to show how legislation has tended to take in Max Weber's ideal type.

4. Analysis of legislation

The purpose of this section is to show how specific constitutions were permeated by Max Weber's language of the ideal type. Constitutions are going to be analysed for a sample of countries. Such sample has been identified in order to include first of all the US and UK tradition vis-à-vis the European tradition, which are distinct, as Parrillo clarifies in the following passage: the 'emerging corps of public servants often did not conform to the Weberian ideal type of bureaucracy; what united the more bureaucratic forms of administrative power on the European continent with their relatively less bureaucratized counterparts in Britain and the United States (at least in the nineteenth century) was the increasing importance of positive law – legislation – in framing the limits of public authority.'[34] On the continental Europe side, France, Germany, Greece, Italy and Romania were analysed. The sample has been extended to include more countries of the Anglo-Saxon tradition, including India, South Africa, South Sudan, as constitutions of more recent framing. Finally China was included as a pivotal country in the globe, between developing and developed countries. More than half the world's population is thus represented in the sample.

The present analysis starts from the United States constitution which is rather laconic about public administration. The only reference (to what will become public administration) is found in article II.

Article II
Section 2

[34] N. Parrillo, *Testing Weber: Compensation for public services, bureaucratization, and the development of positive law in the United States*, in S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 3.

> [The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices.
> Section 3
> [The President] shall take Care that the Laws be faithfully executed.
> Section 4
> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.[35]

Article II, Section 4 – which of course was written before Weber – is an intimation of later higher standards for civil servants. In fact, US legislation expects civil servants to abide special ethics, through the Ethics in Government Act of 1978 and the Inspector General Act of 1978. We have seen – in section 2, above - that ethics is a major Weberian keyword. The Ethics in Government Act of 1978 establishes the Office of Government Ethics, whose director's prerogatives are the following:

> 'TITLE IV—OFFICE OF GOVERNMENT ETHICS
> § 402. Authority and functions
> (a) The Director shall provide, in consultation with the Office of Personnel Management, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency'[36]

The nature of the expected ethics is expressed in terms of avoidance of 'conflict of interest'[37], a keyword to be added to the Weberian

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[35] constituteproject.org *United States of America's Constitution of 1789 with Amendments through 1992*

[36] US Ethics in Government Act of 1978, public law 95-521, statutes 92 Stat. 1824. US Inspector General Act of 1978, United States federal law, public law 95-452, statutes 92 Stat. 1101, established Offices of Inspector General in departments and other bureaus of the federal government with capability to initiate investigations. Also Inspector General Reform Act of 2008 Public Law 110-409.

[37] See generally F. Merloni, *Corruption and Public Administration: The Italian Case in a Comparative Perspective*, cit. at 33. Anti-corruption legislation and action is very much based on the administrative prevention of conflict of interest.

lexicon. Ethics remains otherwise unspecified as in the following clause:

> (b) The responsibilities of the Director shall include—
> (1) developing, in consultation with the Attorney General and the Office of Personnel
> Management, rules and regulations to be promulgated by the President or the Director pertaining to conflicts of interest and ethics in the executive branch[38].

One additional element is 'financial disclosure', potentially revealing conflict of interest. Ethics remains otherwise unspecified.

> (6) interpreting rules and regulations issued by the President or the Director governing
> conflict of interest and ethical problems and the filing of financial statements;
> (14) providing information on and promoting understanding of ethical standards in executive
> Agencies.[39]

Notwithstanding the Madisonian legacy of not relying on the virtues of individuals[40], US legislation expects special ethics from their public employees, operationalizing such ethics through one of its possible

[38] F. Merloni, *Corruption and Public Administration: The Italian Case in a Comparative Perspective*, cit. at 33.
[39] US Ethics in Government Act, cit. at 36.
[40] J. Madison, *Federalist Paper 51* (1788) 'Ambition must be made to counteract ambition' https://founders.archives.gov/documents/Hamilton/01-04-02-0199; *Federalist Paper 10* also says: 'It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm'.
https://founders.archives.gov/documents/Madison/01-10-02-0178 Let us also notice that the very notion of "civil servant" is a Weberian notion (A. Lapiccirella, *On Bureaucratic Behavior* in M. Di Bitetto, A. Chymis and P. D'Anselmi (eds.), *Public Management as Corporate Social Responsibility: The Economic Bottom Line of Government* 107 (2015). 'Public employee' would be the public equivalent of a private employee. Constitutions however do not seem to concern themselves with private sector workers as much as they do with civil servants.

precursors, conflict of interest, and through one of its possible consequences: inappropriate financial gain. Enforcement of special ethics is entrusted in specific organizational structures and functions: the Office of Government Ethics and the Inspector Generals.[41]

The United Kingdom famously does not have a one document constitution[42], however its Civil Service Code 'declares that civil servants are expected to carry out their role "with dedication and commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality'"[43]. Reform had been brought about by the Constitutional Reform and Governance Act 2010[44]. Such legislation enriched the lexicon and it introduced several keywords ancillary to 'ethics': integrity, objectivity, impartiality. Bradley and Ewing show an appreciation for nuances deviating from Weber's ideal type: 'There is now great emphasis not only on the public service values of impartiality, objectivity and integrity, but also on the need for "greater creativity, radical thinking, and collaborative working", as well as efficiency in the delivery of public services.'[45], which can be interpreted as a sign of the unsatisfactory nature of the core values of impartiality, objectivity and integrity.

On the other hand, constitutions of more recent establishment, in countries of Anglo-Saxon influence, deal with civil service more at length. India, South Africa and South Sudan incorporate in their constitutions provisions that the US and the British wrote in their laws. One such element is the British Public Service Commission:

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[41] US Ethics in Government Act, cit. at 36; also see generally US Office of Government Ethics, www.oge.gov *Agency Profile: Preventing Conflicts of Interest., Standards of Ethical Conduct for Employees of the Executive Branch.* Retrieved 1 January 2017, *Conflict of Interest Prosecution Survey*. Retrieved 27 July 2016. Analogous analysis can be carried out for the states. For instance the State of Massachusetts, Const. Article LXXXVII, about reorganization plans of the executive branch, at *Section 2.(c)* is concerned about preserving 'the civil service status, seniority, retirement and other rights of any employee to be affected by such plan'.

[42] P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* 1 (2016). Constituteproject.org does however have a text for the UK as well, it is of about 700 pages: *United Kingdom's Constitution of 1215 with Amendments through 2013*.

[43] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7, 279.

[44] Constitutional Reform and Governance Act 2010 (c. 25)

[45] A.W. Bradley and K.D. Ewing, *Constitutional & Administrative Law,* cit. at 7, 283, citing Cabinet Office, Civil Service Reform – Delivery and Values (2004)

'The Constitutional Reform and Governance Act (CRGA) places the management of the civil service on a statutory footing, but it also establishes a Civil Service Commission which is responsible for appointing civil servants."[46] Here is what section 3 of the CRGA says[47]:

> *Civil Service Commission*
> 2 Establishment of the Civil Service Commission
> (1) There is to be a body corporate called the Civil Service Commission ("the
> Commission").
> (2) Schedule 1 (which is about the Commission) has effect.
> (3) The Commission has the role in relation to selections for appointments to the
> civil service set out in sections 11 to 14.

Here is what the South Africa[48] constitution says about the public service commission:

> 196. Public Service Commission
> 1. There is a single Public Service Commission for the Republic.
> 2. The Commission is independent and must be impartial, and must exercise its
> powers and perform its functions without fear, favour or prejudice in the
> interest of the maintenance of effective and efficient public administration and a
> high standard of professional ethics in the public service. The Commission must
> be regulated by national legislation.

The South Africa constitution is also more explicit about civil service and ethics[49].

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[46] P. Leyland, *The Constitution of the United Kingdom*, cit. at 42, 182.
[47] Constitutional Reform and Governance Act 2010, PART 1 THE CIVIL SERVICE CHAPTER 1 STATUTORY BASIS FOR MANAGEMENT OF THE CIVIL SERVICE, *Application Civil Service Commission* 2 Establishment of the Civil Service Commission *Power to manage the civil service,* 3 Management of the civil service.
[48] Constituteproject.org, *South Africa's Constitution of 1996 with Amendments through 2012*.

> CHAPTER 10: PUBLIC ADMINISTRATION
> 195. Basic values and principles governing public Administration
>
> 1. Public administration must be governed by the democratic values and principles
> enshrined in the Constitution, including the following principles:
> a. A high standard of professional ethics must be promoted and maintained.
> b. Efficient, economic and effective use of resources must be promoted.
> c. Public administration must be development-oriented.
> d. Services must be provided impartially, fairly, equitably and without bias.
> e. People's needs must be responded to, and the public must be encouraged
> to participate in policy-making.
> f. Public administration must be accountable.
> g. Transparency must be fostered by providing the public with timely,
> accessible and accurate information.

South Sudan[50] about the public service commission and ethics:

> 140. The Civil Service Commission
> 1. There shall be established a Civil Service Commission composed of persons
> of proven competence, experience, integrity and impartiality.
> 3. The Civil Service Commission shall advise the National Government on the

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[49] These constitutions were established before the UK *Constitutional Reform and Governance Act (CRGA) of 2010*, however reciprocal influence must be acknowledged.

[50] Constituteproject.org, *South Sudan's Constitution of 2011 with Amendments through 2013*.

> formulation and execution of policies related to public service, employment
> and employees.
> 4. The Commission shall be independent and impartial, and shall exercise its
> powers and perform its functions without fear, favour or prejudice in the
> interest of the maintenance of an effective and efficient Civil Service and a
> high standard of professional ethics therein.
>
> 139. Basic Values and Guidelines for Civil Service
> 1. The Civil Service shall be governed by, inter alia, the following values and
> principles:
> a. a high standard of professional ethics shall be promoted and maintained through focusing on merit and training;

For sake of brevity let us recall only a few lines from India's constitution[51] about the public service commission:

> 320. Functions of Public Service Commissions
> 1. It shall be the duty of the Union and the State Public Service Commissions to
> conduct examinations for appointment to the services of the Union and the
> services of the State respectively.

Wording of constitutions about the Service Commissions confirms the lexicon we found in the UK legislation: integrity, objectivity, and impartiality are assumed to be possible on the part of civil servants. The Indian constitution adds a word we already found in Hegel and Marx[52]: examinations. We will come back to this point. Following

[51] Constituteproject.org, *India's Constitution of 1949 with Amendments through 2016*; also Dipankar Gupta, *An inconstant Constitution*, Times of India, Mar 1, 2014.

[52] Examinations were in Karl Marx's language supra note 24, p. 45: 'A division of labor occurs in the business of the executive. Individuals must prove their capability for executive functions, i.e., they must sit for examinations.' Marx is explicating what Hegel implies in parr. 290 and 291, pages 42 and 43

Parrillo and coming to continental Europe, we find closer Weberian influence and more words are added by the Greek constitution[53]: allegiance and devotion.

> Article 103.1. Civil servants shall be the executors of the will of the State and shall serve the people, owing allegiance to the Constitution and devotion to the Fatherland.

The Italian constitution[54] speaks of exclusive service:

> Art. 98.1: "Civil servants are exclusively at the service of the Nation."

Allegiance, devotion and exclusive service implement Weber's characteristics: 'office is sole occupation of the incumbents [and it] constitutes a career'[55]. Ethics – on the other hand - is widely mentioned in the codes of ethics of civil service that most countries have adopted. The Italian constitution reveals the adoption of a Weberian lexicon. Let us take our lead from art. 97 and 98 of the Italian constitution[56].

> Section II: Public Administration
>
> Art 97
>
> Public offices are organized according to the provisions of law, so as to ensure the efficiency and impartiality of administration.
>
> The regulations of the offices lay down the areas of competence, the duties and the responsibilities of the officials.
>
> Employment in public administration is accessed through competitive examinations, except in the cases established by law.
>
> Art 98
>
> Civil servants are exclusively at the service of the Nation."[57]

Notions of personnel system and notions of structure are very much intertwined in the Italian constitution. Let us examine this wording in detail by juxtaposing excerpts from it to excerpts from Weber, as cited

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[53] Constituteproject.org, Greece's Constitution of 1975 with Amendments through 2008

[54] constituteproject.org, *Italy's Constitution of 1947 with Amendments through 2012*.

[55] M. Weber, *Economy and Society*, cit. at 18

[56] constituteproject.org. *Italy's Constitution* cit. at 54.

[57] constituteproject.org, *Italy's Constitution*, cit. at 54.

above. Where the Italian constitution says: "Public offices are organised according to the provisions of law" it implements Weber's characteristic "1.i [there is] continuous rule bound conduct". This constitutional provision then generates administrative law defining bureau organization and judicial review, thus implementing Weber's characteristic: "1.iii there is a hierarchy (right of appeal)". The same generation of administrative law has to be found in the Romanian constitution:

> CHAPTER V: Public Administration
> Section 1: Central Public Administration
> Article 116: Structure
> 1_ The ministries are organized under the direction of the Government.
> 2_ Other specialized bodies can be organized under the direction of the Government or of the ministries or as autonomous administrative authorities.
> Article 117: Establishment
> 1_ The ministries are established and organized and operate in accordance with the law.[58]

The basic tenets of public administration's organizational structure are warranted under art. 117 of the Romanian constitution which generates administrative law defining bureau organization and judicial review: "1.iii there is a hierarchy (right of appeal)". We must acknowledge that for the purpose of this article, the Romanian constitution yields less satisfactory results. The rule bound and the hierarchical nature of public administration generated in turn the subordination of technical and managerial skills to legal skills, leading to the predominance of law graduates hires in public administration.

The above language defines organizational structure and systems of public administration. The following is concerned about performance of the public administration. Going back to the Italian constitution, let us recall the second part of art. 97.1: 'so as to ensure

[58] constituteproject.org, *Romania's Constitution of 1991 with Amendments through 2003*.

the efficiency and impartiality of administration'; this passage implements Weber's statement 'the purely bureaucratic type of administration is, from the technical point of view, capable of attaining the highest degree of efficiency'[59]. It makes possible a particularly high degree of calculability"[60] A keyword is added to the lexicon here: efficiency. Besides we find once again the word impartiality. Impartiality was most dear to Weber's ideal type: the public official performs his task 'sine ira et studio'[61]. Let us hear from Weber his notion of impartiality:

> 1_ Decentralized and Typified Administration As a Consequence of Appropriation and Monopolization
> In a patrimonial state every prebendal decentralization of the administration, every jurisdictional delimitation caused by the distribution of sources of fee incomes among competitors, and even more so every appropriation of benefices signifies not rationalization but typification. In particular the appropriation of the benefice, which made the officials — as we have seen — often practically irremovable, can have the same effect as the modern legal guarantee of judicial 'independence', although its meaning is completely different; its aim is the protection of the official's right to his office, while modern civil service law endeavors to insure the official's impartiality in the interest of the ruled through 'independence', that means, through his irremovability unless he has been properly tried and convicted.[62]

Two more words are added: irremovability and independence. One aspect that is synergistic with irremovability comes up when we notice that the Weberian status of '[members of staff as] 2.i_ personally free', implies they benefit the rights of all citizens, including the right of strike, sanctioned by art. 40 of the Italian constitution: "Art 40 - The right to strike shall be exercised in

[59] M. Weber, *Economy and Society*, cit. at 18, 344 of 1720, 'highest degree of "efficiency" high degree of calculability'.
[60] M. Weber, *Economy and Society*, cit. at 18, 344 of 1720.
[61] M. Weber, *Economy and Society*, cit. at 18, 975.
[62] M. Weber, *Economy and Society*, cit. at 18, 1137 of 1720.

compliance with the law." Also the Greek constitution[63] is concerned about the right to strike in the civil service:

> Art. 23.2 - Strike constitutes a right to be exercised by lawfully established trade unions in order to protect and promote the financial and the general labour interests of working people. Strikes of any nature whatsoever are prohibited in the case of judicial functionaries and those serving in the security corps. The right to strike shall be subject to the specific limitations of the law regulating this right in the case of public servants.

This is interesting because it sanctions a privilege of public employees: the right to strike against an agent, whereas private employees strike against a principal.[64] Constitutions also worry about the right of civil servants to stand for election, prescribing some kind of limitation. For sake of brevity this theme will not be pursued in this article. Coming back to irremovability, the German constitution[65] is also concerned about job protection:

> Article 132: [Retirement of civil servants]
> 1_ Civil servants and judges who enjoy life tenure when this Basic Law takes effect may, within six months after the Bundestag first convenes, be retired, suspended, or transferred to lower-salaried positions if they lack the personal or professional aptitude for their present positions. This provision shall apply mutatis mutandis to salaried public employees, other than civil servants or judges, whose employment cannot be terminated at will.

This provision appears to be concerned about the transition from the previous regime to the new constitutional regime. Note however the vision of a possible two tier system of Germany that is implicit in this provision: some civil servants may enjoy job tenure (albeit not 'life tenure') while others do not. This is relevant to a key global issue as it appears that most of the half a billion public employees globally enjoy job tenure status. In principle, public employees in several

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[63] *Greece's Constitution*, cit. at 53.
[64] P. D'Anselmi, *Privileged Working Conditions*, cit. at 1, 39.
[65] Constituteproject.org, *Germany's Constitution of 1949 with Amendments through 2014*.

countries – like for instance the USA and the UK - can be fired or made redundant for reasons non relevant to their misconduct, such as budgeting reasons. However it is rather rare – at least at the federal or central government level - that such circumstance has historically taken place.[66] The German constitution is also concerned about job protection in specific areas of the civil service:

> Article 143a: [Exclusive legislative power concerning federal railways]
> **1. ….** Civil servants employed by federal railways may be assigned by a law to render services to federal railways established under private law without prejudice to their legal status or the responsibility of their employer.
> Article 143b: [Privatisation of the Deutsche Bundespost]
> **3.** Federal civil servants employed by the Deutsche Bundespost shall be given positions in the private enterprises that succeed to it,

This is relevant again to the issue about the number of public employees who enjoy constitution protected status. This is not only about the public administration, it is also about publicly owned services and State Owned Enterprise. Irremovability is also a concern of the Greek constitution:

> Art. 103.4. Civil servants holding posts provided by law shall be permanent so long as these posts exist … civil servants may not be transferred without an opinion or lowered in rank or dismissed without a decision of a service council consisting of at least two-thirds of permanent civil servants.

Irremovability and independence of civil servants leads us to the constitutional concern about the personnel hiring system of public administration. Where the Italian constitution says: 'Employment in public administration is accessed through competitive examinations" it implements Weber's characteristics "1.iv specialized training is necessary [for] administrative staff" and "2.iii_ office is filled by free [contract] … on the basis of technical qualifications". We already

[66] P. D'Anselmi, *Privileged Working Conditions*, cit. at 1, 42.

found the prescription of competitive examinations in the Indian constitution and we find it again in the Greek constitution[67]:

> Art. 103. 7. Engagement of servants in the Public Administration … shall take place by competitive entry examination"

Weber is dealing here with the role of knowledge:

> 'Legal Authority With a Bureaucratic Staff – 'Bureaucratic administration means fundamentally domination through knowledge. This is the feature of it which makes it specifically rational.'[68]

Germane to the hiring system of personnel is the issue of salaries and pensions. Art. 98 of Italian constitution says: 'Civil servants are exclusively at the service of the Nation' implements characteristic '2.iv_ office is sole occupation of the incumbents [and it] constitutes a career'. The notion of a lifetime career leads to consider salaries and pensions which in the civil service are not a marginal issue. Conventional wisdom wants salaries in the public sector to be lower than in the private sectors.[69]

About structure of public administration, where the Italian constitution says: "The regulations of the offices lay down the areas of competence, the duties and the responsibilities of the officials." it implements Weber's characteristic "1.ii specific sphere of competence (jurisdiction)".[70] Such provisions lead to division and an implicit organizational principle of administrative law: 'one function, one bureau': when a new function is identified for the public administration, most likely this is dealt with the constitution of a new specific bureau. The 'one function, one bureau' organizational structure principle inappropriately derived from Max Weber's ideal type of bureaucracy, has been applied to the very observance of the

[67] *Greece's Constitution*, cit. at 53.
[68] M. Weber, *Economy and Society*, cit. at 18, 345 of 1720.
[69] However International Monetary Fund statistics tell a different story, showing the monopolistic aspect of the privileged status of public employees, see P. D'Anselmi *Privileged Working Conditions*, cit. at 1, 41.
[70] M. Weber, *Economy and Society*, cit. at 18, 138 of 1720.

bureaucratic principles through the institution of special courts or better through the survival of special tribunals meant to check on the appropriate conduct of public employees. Such provision was constitutionalized in France:

> 'ARTICLE 47-2
> The Cour des Comptes shall assist Parliament in monitoring Government action. It shall assist Parliament and the Government in monitoring the implementation of Finance Acts and Social Security Financing Acts, as well in assessing public policies. By means of its public reports, it shall contribute to informing citizens. The accounts of public administrations shall be lawful and faithful. They shall provide a true and fair view of the result of the management, assets and financial situation of the said public administrations.'[71]

Italy's founding father, count Camillo Cavour, also argued the need of a special court of audit, back in 1852: "It is an absolute necessity to concentrate ex ante and ex post audit in an irremovable magistrate".[72]

China's constitution of 1982 does not seem to mention the public administration[73]. 'East Asia has a long tradition of centralized, hierarchical, and bureaucratic rule – a sort of "administrative law" avant la lettre. And yet, in forging its own modern variants, East Asia has also drawn on Western (and particularly German and US) models.'[74] 'John Ohnesorge notes, in East Asia, for example, the term 'administrative law' was unknown; nevertheless, the prevailing traditional system of government was something of a pioneer.'[75]

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[71] Constituteproject.org, *France's Constitution of 1958 with Amendments through 2008*.

[72] Cited in the speech of the president of the Court of Audit, in Matera, 2019 (author's translation)
https://www.corteconti.it/Home/Organizzazione/Presidente/DiscorsiPresidente/11Mar2019Matera accessed 08 12 2019

[73] Constituteproject.org, *China (People's Republic of)'s Constitution of 1982 with Amendments through 2018*

[74] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 1.

[75] S. Rose-Ackerman and P.L. Lindseth, *Comparative Administrative Law*, cit. at 5, 2; ibidem J. Ohnesorge, *Administrative law in East Asia*.
Professional bureaucracy existed in China well before its appearance in Europe where bureaucratic rationality legitimized the modern state. In Chinese culture the

However in our times China as well relies on special ethics[76]. Reports about China say president Xi Jinping:

> "appears to be betting that transforming the moral character of officials will enable him to leave intact the institutional structure of the one-party state." [77]

This may seem very difficult in the eyes of Westerners. However, change the word "one-party" and write democratic, and that is exactly governments in the West and all other parts of the world are trying to do: 'transforming the moral character of officials'. The issue is not in the one-party system, the issue is in the institutional structure. China and the rest of the world are relying on the "moral character" of officials, from directors general of internal revenue services to groundskeepers of graveyards and to full-fledged public employees that are school janitors. Reliance on Confucius ethics, with due respect, seems quite traditional: "Govern with virtue and keep order through punishments."[78]

Xunzi, a second-century BC Confucian thinker, did not reject "the importance of institutions, only that he saw them as secondary to the people running them." The logic was "Should each official cultivate righteousness in himself and let morality guide his actions and decisions, a well-ordered state and society will naturally result."[79] We

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notion of the 'state' was absent. To make sense of this seeming contradiction, we need to separate the ideal type from the behavioral hypothesis. The legal-rational ideal type is of the modern state, whereas the charismatic and the traditional ideal types do not need the state. Real bureaucracies participate of all three ideal types. Therefore, bureaucracy in (ancient) China was founded on the charismatic and the traditional ideal types. Bureaucracy does not need rationality to exist. Modern states have turned the legal-rational ideal type in a template for the design of an ideal bureaucracy, but Max Weber never said that. On this subject see generally P. D'Anselmi, *Ideal Types and Behavioural Hypotheses: Public Law, Max Weber and the New Public Administration*, Max Weber Studies 20.2 (2020).

[76] M. Keliher and H. Wu *How to discipline 90 million people: Can China's president reform the world's largest one-party state by reforming its officials?* The Atlantic April 7, 2015.

[77] M. Keliher and H. Wu, *How to discipline 90 million people*, cit. at 76.

[78] M. Keliher and H. Wu, *How to discipline 90 million people*, cit. at 76.

[79] M. Keliher and H. Wu, *How to discipline 90 million people*, cit. at 76. The Atlantic then wax populist: 'Modern-day state-building efforts in the Middle East and Africa have confirmed much of Xunzi's thought. It is not enough to set up

see the fallacy of composition at work here: if we are all good, the aggregate good will result.[80]

Taking stock at this point from the lexicon of constitutions, it could be argued that also private sector organizations tend to implement and speak in the language of Max Weber about ethics and other Weberian keywords. It is however in the case of public organizations only that faith in special public ethics allows reliance on monopolistic organizational structures. Albeit it is not explicitly written in the constitutions, we need to introduce a last keyword into this Weberian lexicon: monopoly.

> 3. Group Structures and Economic Interests: Monopolist versus Expansionist Tendencies
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> This monopolistic tendency takes on specific forms when groups are formed by persons with shared qualities acquired through upbringing, apprenticeship and training. … But normally this concern for efficient performance recedes behind the interest in limiting the supply of candidates for the benefices and honors of a given occupation. The novitiates, waiting periods, masterpieces and other demands, particularly the expensive entertainment of group members, are more often economic than professional tests of qualification. Such monopolistic tendencies and similar economic considerations have often played a significant role in impeding the expansion of a group[81].

This excursus on the constitutions may well end by noticing that a common and unwritten implication of constitutions is the monopolistic organizational arrangement of public administration.

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independent courts or to hold elections. For democracy to flourish and the rule of law to reign, citizens and those who govern them must share a set of values to inform behavior and promote collective goals.' Anyway, public law is about institutions by definition. If we do not believe in the importance of institutions. We do not need public law.

[80] T. Schelling, *Micromotives and Macrobehavior* (1978).

[81] M. Weber, *Economy and Society*, cit. at 18, 462-463 of 1720 "3 4 4 ECONOMIC RELATIONSHIPS OF ORGANIZED GROUPS - CH. 11".

5. Lexicon, implications and conclusions

Summarizing, this article has included the more obvious and literal citations of Max Weber in constitutional language as well as the more general and cultural influences, from literal to conceptual. Use of the ideal type lexicon has generated a cascade of concepts and keywords, leading from irremovability, independence and impartiality to monopoly. Weber's original keywords are: rule bound conduct, specific sphere of competence, personally free, specialized training, hierarchy of office, technical qualifications, fixed salaries, sole occupation, right of appeal. From Weber writings and beyond, more keywords have found their way into public administration regulation: efficiency, vocation, ethics, public spiritedness, examinations, permanence in office, life employment (career), pension, right to strike.

This article constitutes an empirical verification of the language of constitutions and of its organizational implications. By induction it has been shown how pervasive the legacy of Max Weber's ideal type of legal-rational authority has been in the highest expression of public law: the constitutions. Through the language of the Weberian ideal type, constitutions seems to adopt a Rational Behavior Hypothesis vis-à-vis the public administration[82]. Therefore, public law needs to join the debate about Max Weber's ideal type and the organization of public administration. Policy implications open the way for a fresh look at public administration reform, starting from questioning the basic model that is underlying legislation.

From a methodology point of view, this article has provided a proof of concept of simple method for testing the Rational Behavior Hypothesis vis-à-vis the more complex case study method[83]. The Weberian lexicon is susceptible of further investigation through data mining and computational means towards a comprehensive survey of world constitutions and legislation. For sake of comparative study, it is desirable that such legislation be homogeneous in its subject and endeavor; for instance legislation and governmental action on anti-

[82] G.T. Allison and P. Zelikow, *Essence of Decision*, cit. at 12, speak of 'rational actor model'.

[83] G.T. Allison and P. Zelikow, *Essence of Decision*, cit. at 12, adopted the case study method.

corruption in public administration is a key candidate as a subject for the kind of analysis that has been carried out here.