

LEGITIMATE DISCRETION

On the legitimacy of the influence of the values of civil servants on the policy process



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Legitimate discretion

On the legitimacy of the influence of the values of civil servants on the policy process

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1.

Introduction

We are not here to receive orders, mentally to click our heels, and to say, 'Jawohl!'.

That's not why we are here. On the contrary.

- *A senior civil servant (Putnam, 1973)*

This thesis is about discretion. Discretion is the freedom a civil servant has within the limits on her or his power (political decisions, budgetary limits, the law) to 'make a choice among possible courses of action or inaction' (Davis, 1971, p. 4).

A politician in a small rural municipality, inhabited by only a few hundred people, gives a civil servant a budget and a simple assignment. She has to find out whether our citizens are satisfied with the politician's waste collection policy. This might seem a straightforward task. The municipality is small and, as is often the case in these sort of communities, everyone knows one another. It would be easy for the civil servant to ring on everyone's door and ask how they feel about the municipalities waste collection program. The civil servant's task seems pretty straight forward. Yet this does not mean that the civil servant can start his research straight away. First, a few questions need to be addressed. When do you count a citizen as being satisfied? Does 'satisfied' mean that the citizen has no remarks, or that the citizen explicitly expresses being happy with the program? Do you need to speak to every citizen individually, or does a sample suffice? The civil servant has to answer these questions herself: she exercises discretion.

1.1 Why civil servants answer value questions

What makes discretion an interesting subject for a philosophical master thesis is the legitimacy-question that arises from it. What justifies that a non-elected civil servant answers these value questions?

The ‘classic’ answer, to this question, provided by ‘fathers of public administration studies’ Weber and Wilson is that it is an irrelevant question. According their classical theories on the division of tasks within a government, hereafter referred to as the politics - administration dichotomy, politicians set norms and civil servants execute policies (Wilson, 1886, p. 370 - 376). In this process of executing, they are to be led by ‘purely objective considerations’ (Weber, 1948, p. 215). This implies that civil servants simply have to find the most efficient way to execute political decisions, and that efficiency needs to be the only guiding principle in their decisions. The question this immediately raises is: efficient according to whose standards (Stone, 2012, p. 78 -79)? The classic answer would be that in the dichotomy between politics and administration, standards are to be set by politicians, as they are the ones to make value-related decisions. The question is whether this is a realistic way of looking at the politics-administration dichotomy. If all questions that have to do with norms and values are to be answered by politicians, is there anything left to do for the civil servant?

1.2 Scope and research question

Answering that question starts by an investigation into who this ‘civil servant’ is, and where we can find them. With whom are we dealing here?

Rohr defines a civil servant as a public official ‘hired, retained and promoted through a merit system’ (as opposed to being elected). They are able to exercise ‘administrative discretion in a way that has at least some effect on public policy’ (Rohr, 1978, p. 2). Civil servants, Svava adds, can be found in positions ranging from ‘*the top executives (city managers in municipal government [...]) to the staff members who handle a variety of specialized tasks. Some will have supervisory responsibilities and, therefore, are the administrative superiors of the staff they supervise. Others work without subordinates, for example, analysts and many frontline service providers including teachers, counsellors, eligibility specialists or police officers*’ (Svava, 2015, p. 4). This makes the civil servant different from a politician, who is not hired but elected, and thus directly accountable to the public.

An essential characteristic of the civil servant is that he or she has, as Rohr says, a certain discretion with which he or exercises some influence over public policy. This does not only hold for administrators in top level positions. The bus driver and the garbage collector have this kind of discretion too. The garbage collector has, for instance, the discretion to decide whether he or she picks up wrongly placed garbage bags. The bus driver can use his discretionary space to decide to let an old lady ride the bus without a ticket because she forgot her wallet.

Some civil servants are hired explicitly to make discretionary value judgements. Eligibility specialists have the task to decide whether someone applies for certain benefit programs, teachers are hired to judge the performance of their students. For others, making value judgements is not explicitly part of their task description. As Rohr says, administrators are generally hired through a merit system, meaning they are hired because of their excellence and expertise. In hiring someone to develop food safety standards, her or his knowledge of food safety is what matters most in the application process, most likely augmented with the social skills necessary to function within the food safety authority – not his moral judgements.

What type of decisions do these civil servants make? The contents of the immigration test, deciding which type of trains to purchase for a new high speed line or, more controversially, setting limits to financial support for people who can't afford a lawyer or the freedom to choose your own doctor (Van der Lugt, 2016; Van Gompel, 2015; NOS, 2015): these are all examples of decisions made by administrative bodies.¹ These decisions have a technical component (what can we reasonably expect people to learn, what are the technical possibilities for railway transportation?), but they also contain value decisions. Politicians have provided a general framework (develop a test for immigrants, provide excellent railway transportation), but within these frameworks, there is still room for judgements which, in the classic politics-administration dichotomy, would most definitely be seen as political if one adheres to the idea that politicians make value decisions and civil servants execute (what does an immigrant need to know before becoming a citizen? What does 'excellent railway transportation' mean and require?). A part of the discretion of civil servants is thus used to make value judgements (Simon, Smithburg & Thompson, 1973, p. 316; Putnam, 1973).

'Regular' citizens get to give their views on such matters every couple of years during elections. A civil servant gets to both vote in elections, and make these kinds of value judgements as part of her or his job. Is a civil servant a mere citizen with an 'unlegitimized second vote', or is there another source of legitimacy for discretion? This thesis will investigate the legitimacy of civil servants using their discretion to answer value questions by means of the following research question:

What legitimizes a civil servant's discretionary value judgements?

¹ All examples originate from the Netherlands.

In order to answer this question, the following sub-questions will be addressed:

- *What forms of discretionary judgements are there?* Discretionary value judgements come in different shapes and sizes. A thesis investigating their legitimacy needs an overview of the different kinds there are.
- *What legitimizes these discretionary judgements?* Different types of discretionary value judgements suggest that there might be different sources of legitimacy, too.

1.3 Relevance

This research has both societal and academic relevance. The societal relevance stems from the idea that by making policies, a government impinges on freedom. By producing legislation, a government creates duties for its citizens; they expect citizens to behave along certain lines. Obviously, this is not necessarily a bad thing. It does, however, mean that a government in a liberal society is under a burden to legitimize its actions (Richardson, 2002, p. 26-27).

In the past decades, the civil servant has become increasingly autonomous. This is largely so due to ‘New Public Management’ thinking in the 1980’s and 1990’s, where many parts of the administrative division of western countries were either privatized or placed at an increased distance from politics (Kjær, 2004, p. 25-40). In the Netherlands, this led to the establishment of semi-autonomous agencies;² agencies that largely operate as if they are private companies, yet are accountable to a minister.

In addition to being more independent, the civil servant has also become more powerful. Administrative divisions employ an increasingly large amount of people and have an increasingly large amount of resources at their disposal. Administrative divisions have come to play a still expanding role in regulating a country’s society and economy (Guy Peters, 2001, p. 15). Combining these two insights – a more powerful administration that is under less direct influence of elected representatives – raises the question whether the ‘standard’ legitimization model, where a government’s legitimacy derives from a mandate by its citizens still suffices.

In addition to the societal importance of a legitimate use of discretion, there also appears to be a ‘missing link’ in academic literature when it comes to the legitimacy of discretion. On the one hand, there is a vast amount of literature – mainly from political science – on the role and tasks

² My own translation of the Dutch term ‘zelfstandig bestuursorgaan’.

administrative division, and on the principles that should govern this division. The consensus seems to be that we cannot do without at least some form of administration.

On the other hand, there is an equally large amount of literature on administrative ethics: what principles should guide their use of discretion? However, as chapter 2 of this thesis will point out, there are certain uses of discretion which can be legitimized neither by a general legitimization for the existence of certain organizations, nor by the fact that discretion will be used according to strict ethical guidelines. In absence of a clear constitutional guiding principle, why is a civil servant entitled to choose option *a* over option *b*? This thesis hopes to find an answer.

1.4 Contents and structure

The structure of the argument in this thesis will be as follows. Chapter 2 will provide a more detailed overview of the different ways in which a civil servant can use discretion. It will show that there are certain uses of discretion that are not unlawful, but do not fall within the scope of legitimizations of administrative organisations in general either. These cases are of particular interest to this research: they are not illegal, but neither are they explicitly legitimate. They are not illegitimate, but unlegitimized. The rest of this thesis will be dedicated to finding a source of legitimacy for these cases.

A third chapter will investigate what makes a civil servant a competent decision maker. Does the civil servant's expertise make him or her more qualified to make value judgements? We will find that, even though the civil servant indeed possesses some qualities which aid him or her in answering value questions, these qualities do not necessarily make him more competent in deciding on issues of value. The epistemic qualities a civil servant possess do not necessarily legitimize the value judgements embedded in her or his decisions. This chapter will end with the observation that instead of trying to define what subjects a civil servant should or should not decide on, we might need to legitimize why specific individuals are allowed to answer value questions.

This leads to an exploration of Richardson's theory of qualified populism in chapter 4. Richardson suggests in order to legitimize discretion, citizens should play a more involved role in the democratic decision making process. His proposal is that citizens should deliberate on the contents of a policy proposal, until they have reached the point at which they feel all essential value questions have been answered, and the remainder of the policy process can be carried out by civil servants. The second part of chapter 4 shows that this does not actually solve our legitimacy problem. It concludes with the argument that the only way to solve it is by

allowing citizens to somehow influence who is to carry out the remainder of the policy process after citizens have answered all value questions relevant to them. The most important reason for this is that it allows citizens to select a civil servant based on his or her values, which will be the values that will be used to make decisions in the remainder of the policy process.

1.5 Clarifications

Before continuing, it is necessary to briefly clarify a terms used in this thesis.

Liberalism

This thesis is written within the context of a liberal democracy. What exactly a liberal democracy is, is heavily debated amongst philosophers. Even though I do not have the room here to do the complexity of this debate justice, I need to clarify some terms that I use in this thesis.

The ‘core commitment’ of liberalism is liberty. The starting point of most theories is that in principle, people are free, and that restrictions on liberty must be justified (Gaus, Courtland & Schmitz, 2015). However, philosophers differ on what exactly liberty and freedom mean. A liberal democracy wants to do justice to the multitude of conceptions of the good life in a society. A conception of the good life is ‘an ordered family of final ends and aims which specifies a person’s conception of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life’ (Rawls, 2001, p. 19).³ It is, in other words, one’s idea of what to strive for in life. Some theorists argue that a state may only interfere in cases where a citizen’s behaviour (as a result of a conception of the good) has a negative influence⁴ on other citizens. Others have stricter requirements, asking that conceptions of the good life have a certain reasonableness to them. The general consensus, however, seems to be that one should at least enjoy some freedom in pursuing a conception of the good life.

Value decisions and political decisions

In this thesis, two types of decisions are mentioned; value decisions and political decisions. When I speak of political decisions, I refer to decisions taken by politicians in their capacity of representatives of the people. It does not say anything about the nature of the decision other

³ To keep the scope of this paper within limits, I will largely simply assume that granting people as much freedom to pursue their own conception of the good as reasonably possible is a valid aim.

⁴ The most famous example of this is John Stuart Mill’s harm principle. According to this principle, the state may only interfere if a citizen causes harm to others (Mill, 1859, p. 8). The exact meaning of the word ‘harm’ is debated, but it at least refers to physical harm.

than that. Sometimes, I refer to decisions that would have been seen as political in the classic politics-administration dichotomy. By this, I mean that these decisions are of such nature that classic politics-administration theorists would be inclined to say that it would be desirable to have these decisions taken by political representatives. These decisions usually are value decisions.

‘Value decisions’ refers to the content of a decision. It means that in order to take a decision, the decision maker needs to answer value questions. She or he needs to see whether the facts involved in a decision can be linked to her or his values, and on the basis of that linkage attribute value to each fact. This happens, of course, on how one views his or her own values; which ones take priority over others?

The civil servant

In this thesis, the civil servant is my primary unit of analysis. I consequently refer to the civil servant as an individual. This does not mean that I believe that civil servants are not influenced by anything but their own personal values. On the contrary. A civil servant is often heavily influenced by all sorts of external forces, and seldom takes decisions alone. Generally, administrative decisions are made by groups of civil servants. Decisions are no doubt heavily influenced by these group processes. However, I choose to refer to the civil servant as an individual, as this is the smallest possible unit of analysis. An important concept in this thesis is that of the ‘inherent vagueness’ inherent in policy decisions: they always require interpretation (Richardson, 2002, p. 116 – 117). Even if a group takes a decision, that decision will mean something different to each individual in that group, even though their interpretations might not deviate much from one another. The smallest level at which interpretation can take place is the individual level, hence I use ‘civil servant’ singular, even to refer to group decisions.

2.

Discretion: exploring the concept

Civil servants can be found in many places; the administrations of most countries have been ever-growing over the past decades. It thus goes without saying that there is more than one way in which a civil servant can use her or his discretionary powers. This chapter illustrates why no state can do without an administrative division, and what types of uses of discretion can be found within these administrative divisions.

2.1 The 'why' of an administrative division that exercises discretion

In (most) modern visions on the dichotomy between politics and administration (such as those by Overeem, 2012; Vile 1967; Dahl, 1956; Richardson, 2002 and Almond, 1960), the idea that a decision making process is divisible in a part in which norms are set and a part which is solely about the execution of these norms is replaced by a more modern version of it. In this version of the dichotomy, politics formulate ends towards which civil servants subsequently reason. This means that, if politicians

Because of a 'significant level of vagueness' as a result of the impossibility of capturing every alternative way that a 'piece of complex legislation might be drafted' (Richardson, 2002, p. 116 - 117), civil servants need to answer value questions in order to be able to produce any policies at all. It is next to impossible for politicians to assign tasks to their administration that can be executed without requiring some interpretation by civil servants. Stone reflects on this and summarizes as follows:

'Is (or are) a Siamese twin(s) with one head and two lower bodies one person or two people? [...] There are no objective answers to this question, because nature doesn't have categories: people do.' [...] Is a person born in Denmark to a Danish mother and a Turkish immigrant father a Dane, is our economy in a recession or just a normal downturn? Has the nation whose drone kills civilians violated

international war treaties? What is an Islamic political party or leader? [...]
There are, to be sure, more or less objective facts underlying all these situations.
[...] But these facts are not the ones that matter in politics. [...] What communities
decide about when they make policy is meaning, not matter. And science can't
settle questions of meaning' (Stone, 2012, p. 381).⁵

What Stone suggests here is that it does not matter how seemingly specific the standards and frameworks citizens or their representatives provide are, as the policy process is a process of interpretation; of determining the meaning of facts. Facts itself are important, but not central. They do not determine what a piece of policy looks like: that is precisely what is determined by the value one attributes to facts.

Richardson takes a similar position, stating that it is impossible to, as 'classic' theories on the politics - administration dichotomy suggest, divide a decision making process in political questions of what we *ought* to do, and administrative questions about what we *shall* do given the political answers to ought-questions. With the word 'ought', Richardson refers to value question. What ought we to do given our conception of the public good? 'Shall' implies that questions of value already have been answered. All the civil servant has to do, is figure out how to implement political decisions. The word 'shall' suggests that there is one optimal way of implementing a political decision, meaning that civil servants simply have to figure out what this way is.

Instead of functioning according to this division between ought- and shall-questions, both politics and administration concern themselves with ought-questions (hereafter: value questions). The difference is that a government's administrative division tries to answer these within the frameworks provided by politics (Richardson, 2002, p. 132). It is thus impossible to require from an institution that it fulfils only a single task in the dichotomy.⁶ A court of law will, for instance, not only fulfil its judiciary function, it will also practice politics and carry out administrative tasks that are relevant to the exercise of its primary function (Almond, 1960, p. 17-19).

⁵ A statement that is supported by, among many others, Waldo (1948), Putnam (2009), Richardson (2002), Rohr (1978), Overeem (2012) and Svara (2015).

⁶ Or, for that matter, to fulfil only tasks belonging to one of the three branches of government if using a division of government functions according to the *trias politica*, where power is divided over a legislative, a judicial and an executive branch. Vile has written on the way the ideas of a separation of powers and the politics-administration dichotomy fit together. Shortly summarized, his suggestion is that an executive organization produces both political and administrative output. Subsequently, it will also perform legislative and judicial tasks which are relevant to the execution of its main function (Vile, 1967, p. 339).

Even though from a democratic point of view, it might seem undesirable to have these value questions answered by nonelected civil servants, an administrative division is generally not thought of as something a society can do without. First and foremost, the average government in this day and age is of such a size, and covers such a wide variety of terrains, that it would not be able to operate without a range of bureaucratic institutions and specialized civil servants (Richardson, 2002, p. 9).

Secondly, elected officials typically serve relatively short terms and are ‘captured’ by the will of the people. The fact that they are elected makes that politicians are more sensitive to pressure from the people that elected them, making it difficult to make unpopular decisions such as to uphold an unpopular policy. Because of the nature of the decisions we ask our governments to make, we also need officials who are in office for a longer amount of time. This provides ‘assurance of the development of skills and expertise, experience and specialization’ (Dunshire, 1973, p. 159; Vile, 1967, p. 330). It allows administrative organizations and the people in them to become excellent in exercising their task. It allows a tax collecting agency to become really good at collecting taxes, a primary school really good at teaching, etcetera.

In addition to these rather concrete advantages, the fact that a society has an administration can be seen as a reflection of the idea that power should be exercised in a legitimate way, and not be concentrated in one place. In light of this value, it seems sensible to ‘park’ at least part of the decisions or decision making processes in administrative organizations as opposed to placing everything under popular control. There might not be empirical evidence supporting the claim that a separation of powers prevents tyranny (Dahl, 1956, p. 136), but designing a government in which power is divided over different institutions does reflect a desire to prevent tyranny (Vile, 1967, p. 338).

The above is a source of legitimacy to the extent that it can legitimize the existence of an administration in a general sense. One should think of the democratic decision making process as a layered process, in which each layer presents a different level of generalization. The more abstract a concept, the more vulnerable it is to empirical objections at low levels of generalization. The distinction between politics and administration should be regarded as being a constitutional principle: it should be reflected in general rules and procedures, on which less generalist legislation can be based (Overeem, 2012, p. 187). So, even though at a very general level, the necessity of an administration may legitimize that certain ought-questions are being

answered by civil servants, this does not automatically mean that every answer a civil servant comes up with is legitimate.

If we want to be able to legitimize individual instances in which discretion is used, it is necessary to develop a clearer idea of the concept of discretion; see in what shapes and sizes it comes. As will become apparent throughout this chapter, there are different ways in which a civil servant can use discretion.

2.2 The limits of discretion

If the existence of an administration as such has already been extensively legitimized by a broad variety of authors, why is studying discretion relevant? I will explain why by means of three different cases, displaying three archetypical cases in which the legitimacy of a civil servant's discretionary judgement can be questioned.

Case I: Use of force by police officers

The Dutch law on the police force (politiewet), listing the tasks and competences of Dutch police officers, states that a police officer is:

'authorized (...) to use force or freedom-limiting means when this is justified by the pursued end in question, in case this end cannot be reached by other means. Where possible, the use of force is preceded by a warning.' (Art. 7.1)⁷

In this case, there are three open norms for the civil servant to fill in. The police officer – who is the civil servant in question – needs to decide:

- a) When the end in question justifies the use of force;
- b) If the end in question cannot be reached by other means;
- c) If it is possible to warn before using force.

Obviously, the civil servant is not left solely to her or his own standards when making these decisions. He or she receives training on the use of force and on dealing with all sorts of threatening situations. However, the all the training and schooling the civil servant receives does not take away the fact that it, in the end, is still him or her who has to make decisions a, b and c. Training might provide *guidance*, but it will not wholly *account for* the decision the civil servant will make. In the end, it still comes down to the civil servant's interpretation of the

⁷ Own translation

training he or she received and the assessment of the situation he or she is in (Guy Peters, 2001, p. 86).

Nevertheless, we generally would not say the civil servant's use of discretionary power is very controversial in this example. There is a vast body of law setting clear limits to the cases in which a police officer can use force. Furthermore, the legitimization of the civil servant's judgements is covered by the legitimacy of the police force as an organization at a more general level. We apparently care more for a safe society than for a society in which everyone is free to do whatever they want. We prefer a society with a police force over a society without one. In order to function, a police force needs 'boots on the ground' to uphold the law. The end (a safe society) justifies the means (a police force consisting of civil servants who might sometimes make a judgemental errors but are the most effective means towards the end)⁸ in this case. Legitimacy is thus up to a great extent legitimized by the results the organization yields (Heath, forthcoming, p. 28).

A similar example is that of the university professor grading a paper. Her or his job is to teach, and part of teaching is grading papers to assess students' performance. Grading a paper involves value judgements: the professor literally has to determine what value to attach to the work of the student. However, these value judgements are not controversial from a legitimacy point of view, as the professor is a) specifically hired to make these judgements, and b) having an experienced academic assess the performance of students is arguably the best way to do so, as such a thing as objective and neutral paper-grading robots or computers do not exist.

Case II: Defrauding civil servants

In 2014, the Dutch prosecutor started a large case against former city manager Jos van Rey, accusing him of corruption, bribery, election fraud and money laundering. Among other things, Van Rey had presumably awarded construction contracts to a company in exchange for bribes (Seegers, 2014). Van Rey used his discretionary power to award contracts in a way that is unlawful in the Netherlands.

In this case, it is not so much the legitimacy of the civil servant's actions that is questionable, but the legality of them. In case I, the actions of the civil servant were legal, but not explicitly legitimized at the individual level. We had to 'zoom out' to a more general level

⁸ A more general version of this argument is found in Conley (2015, p. 115). It also is indebted to Kant's idea that "whoever wills the end also wills (...) the indispensable necessary means to it that are within his power" (as cited in Williams, 2016).

to find a source of legitimacy for these cases. In case II, the civil servant's actions are simply illegal and thus not even fall within a civil servant's discretion as defined in the introduction of this thesis.⁹

Case III: The Healthy School Canteen

In 2002, the Netherlands Nutrition Centre (NNC)¹⁰ launched a program to improve the health of Dutch school children. The NNC planned to help schools keeping their students healthy by thoroughly revising the way school canteens were set up. The NNC decided that, amongst other things, they would 'nudge'¹¹ children towards healthy lunch options by placing healthy products on those positions on the canteen counter, that would make children subconsciously pick them over unhealthy products (Renes & Stinesen, 2014, p. 22). In the layout of the program as described here, the NCC made at least two interesting judgements:

- a) It is permissible to target school children with campaigns;
- b) It is permissible to use a nudge in this scenario.

These two points might need some more explanation as to why they are so interesting. After all, telling school children what to eat seems less controversial than using force to stop a perpetrator. In the case of police officers using force, it was the organisational goal (a safe society) that legitimized the judgement calls of individual officers. Now let us look at the organizational goal of the NCC, as formulated on their own website:

The Netherlands Nutrition Centre (Voedingscentrum) provides information on, and encourages consumers to make, healthier and more sustainable food choices.

Our mission is based on a number of general environmental factors:

- *Nutrition is the basis of good health;*
- *Our food supply has an impact on society and the environment;*
- *We live in a pluriform and complex society;*
- *Everyone has freedom of choice.*

(NCC, 2016)

⁹ Unless one believes that, in certain cases, it is justified to break laws one sees as unjust, or when breaching the law actually is done in such a manner that it is in the spirit of that law, which is a discussion outside the scope of this thesis.

¹⁰ In Dutch: Voedingscentrum

¹¹ A general definition of a nudge: 'any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives' (Thaler & Sunstein, 2009, p. 6).

Comparing judgement calls *a* and *b* to the mission statement above, targeting school children with campaigns is not necessarily the type of decision we are interested in for the purpose of this research.¹² A campaign definitely falls within the limits of ‘provid[ing] information on, and encourages consumers to make, healthier and more sustainable food choices.’ Judgement call *b* – that it is permissible to employ a nudge – is more interesting. Nudging currently is both a fashionable and a controversial government practice. A nudge, as employed by the NNC, does not appeal to a citizen’s capacity for rational decision making. Instead, it targets her or his subconsciousness to steer the citizen towards the desired choice.¹³ Nudging is controversial from an ethical point of view, as some liberal and libertarian thinkers tend to feel it does not respect a citizen’s capacity for autonomous choice. Even though human beings might not always exercise this capacity, this does not justify that a government ‘disrespects’ it by steering citizens towards certain decisions without them being aware of it (Leggett, 2014).

This is interesting for two reasons. If the liberal critique on nudging is justified, this would mean that the NNC has apparently decided health is to be valued over autonomy.¹⁴ Other than in the first casus, where the legitimacy of decisions made by civil servants was covered by the legitimacy of the organization they belonged to, the fact that the Dutch parliament at some moment decided that the NNC was to be created, does not automatically imply that the Dutch parliament felt that health was more important than autonomous choice.¹⁵ The NNC itself made this judgement. They were able to do this, because the mission statement of the NNC is not fully comprehensive: it does not cover all decisions the NNC can be reasonably expected to

¹² Partly because investigating whether targeting children with campaigns is a morally sound practice would be a thesis project in itself.

¹³ The idea is that nudging leaves an opt-out open. This means that, if a child makes the rational decision to order a cheese puff instead of a cheese sandwich, the nudge does not prevent him from doing so. Applying this to the NNC’s nudge: both healthy and unhealthy foods are served in the canteen. Even though children are nudged towards the healthy decisions, they can still decide to choose whatever they please. It just takes a slight effort. Thaler & Sunstein, whose 2009 book *Nudge* made the nudge famous, in addition propose that nudges should only be trying to achieve ends the citizen already has, but cannot achieve due to him or her being prone to all sorts of biases, heuristics and cognitive errors (Thaler & Sunstein, 2009).

¹⁴ Or that they failed to recognize that this decision was part of designing the program. This is, however, not a problem for a theory on the legitimacy of the value judgements of civil servants. It is a practical problem, having to do with the civil servant’s conception of the decisions they make.

¹⁵ The observable reader might remark here that in 2014, the Dutch Minister of Economic Affairs issued a statement on nudging, acknowledging the intention to experiment with its usefulness as a policy tool (Dutch Ministry of Foreign Affairs, 2014). This could obviously be a legitimization for the NNC’s decision. However, the NNC started the program discussed here in 2002, eight years before the Minister’s statement.

make. By employing a nudge as a policy tool, the NNC itself has taken a decision that would most definitely qualify as a value decision, and thus would be seen as a political decision in the classic way of thinking about the division of labour between politics and administration.

To summarize: in case I, the fact that a civil servant has the chance to apply her or his own vision of what is dangerous is legitimized by the aim this has: we need police officers on the streets to guarantee a safe society. In case II, the civil servant uses her or his discretionary power unlawfully. This type of lack of legitimacy does not need to be solved by finding a source of legitimacy for illegally using discretionary power, it needs to be solved our legal system. Situations similar to case III will be the focus of this thesis. In this case, civil servants make a decision that does not conflict with political decisions, but is not supported by them either. The decision of the civil servant is not legitimized by a political framework, nor by the general aim of her or his organization. What the civil servant's decision thus comes down to is her or his private judgements, be it that these judgements may be shaped by – for example – schooling or organizational ideology (Guy Peters, 2001, p. 211).

Case III is not an isolated case, nor is it very rare. Dutch law even knows a special procedure for codifying an administration's interpretations of political decisions. This so called General Administrative Measure¹⁶ (GAM) is used to provide civil servants with a tool to specify political decisions so that they better fit the practice they are meant to be effective in. If a law does not cover a particular case, or is formulated in rather general terms on purpose, a ministry can publish a GAM containing a specification of the law by having the respective minister discuss it in the council of ministers. These GAMs have the same status as a law, be it that the process of drafting is slightly different. A few examples of instances in which GAMs have been used: to determine the exact places citizens can light fireworks, to determine when someone can receive certain military honorary knighthoods and to outlaw certain polluting fuels used in heavy industry.¹⁷

As already briefly elaborated upon in the first chapter of this thesis, it is impossible to provide civil servants with frameworks which are so watertight that they can be interpreted in one specific way, there is always room for interpretation. After examining the different ways in which a civil servant can use discretion, it has become apparent that they frequently make use

¹⁶ My own translation of the Dutch *Algemene Maatregel van Bestuur*.

¹⁷ A full list of all 1698 currently active GAMs can be found on <http://st-ab.nl/wettenalfabetoverige.htm>. Another list of examples of case III-type uses of discretion can be found in Davis (1971).

of their discretion to answer value questions. Thus, what needs to be legitimized is a civil servant's personal values. Or, to be more precise, the influence of her or his personal values on a piece of policy.

We can start our search for this legitimization in two places. Firstly, we can see if the civil servant has certain characteristics or competences that legitimize the fact that she or he makes value decisions. Secondly, we can look for a source of legitimacy in the democratic process that precedes the civil servant's value decisions. Can we somehow adapt this process to be a legitimization of discretionary value judgements? These two approaches to what I will henceforth call 'our legitimacy problem' will be the subject of the following two chapters.

3.

The competences of the civil servant

Stone and Richardson's suggestion that in fact, the whole of the policy process is about meaning instead of matter shows how widespread our legitimacy problem seems to be: it is impossible for a civil servant to participate in a policy process without answering discretionary value questions. As we have established on the previous page, the meaning attributed to facts, rather than facts themselves, is central in the policy process.

Does this mean that we have to elect every civil servant, or do away with the administrative branch all together? The arguments presented in section 2.1 of this thesis were arguments for the existence of an administrative division in general. Advocating some sort of administration, but not *our specific administration and everything that happens in it*, they are not a legitimization of the influence a civil servant's personal values have on the policy process.

The writing of philosophers such as Heath and Conley seems to offer a solution to this problem. At the core of their arguments lies the idea that civil servants possess certain qualities that give them an advantage over regular citizens when it comes to decision making: their decisions thus are of a better quality. This suggests that leaving certain value questions at the discretion of civil servants is legitimate because it is preferable over a situation in which citizens were to answer those questions for themselves. This chapter will investigate what literature from both philosophy and administrative and political science argue these qualities are and whether they succeed in solving our problem. If any of these qualities are supported by sufficiently convincing argumentation, they might indeed prove a solution for our legitimacy problem. A second possibility – which will in fact be the conclusion of this chapter – is that these qualities cannot be the sole source of legitimacy for a civil servant's value answers. They are all essentially epistemic claims, which means they cannot account for a civil servant's answer to 'pure' value questions, in which epistemic facts play a subordinate role. One cannot, as will be argued below, be an expert at answering value questions.

3.1 The civil servant as an expert

First and foremost, the civil servant is claimed to be an expert. We ask of civil servants that they '[possess] within themselves the knowledge and organizational expertise that will make them active rather than passive participants' (Simon, Smithburg & Thompson, 1973, p. 312, 315; Waldo, 1948, p. 90). This task description suggests that there are two types of expertise a civil servant can possess. Working in the public sector is different from working in the private sector in the sense that it is a different system. The public sector is often thought of as more complex due to the multitude of rules, procedures and interests that employees have to take into account. In addition, it requires a broad understanding of a wide array of topics (Appleby, 1953, p. 58, 63). The civil servant does have to understand this system and be able to function in it. He has to be an expert on working in the civil service.

I think this organizational expertise is indeed of importance, but mainly because our current decision making process has the kind of complexity that requires organizational expertise of civil servants. Let us, for the sake of the argument, assume that the only difference between my decision for a type of breakfast cereal and a policy decision is that I choose my breakfast cereal in a supermarket, whilst policy decisions are made in a very complex and convoluted system of rules, procedures and organizations. Choosing cereal would require no expertise, a policy decision would require no expertise apart from expertise on how this complex decision making process works. Following this observation, one could proceed by either arguing that civil servants must thus be experts on the decision making process to function in it, or it could be argued that the process is too complex if it can only be accessed after several years of studying it. The fact that policy is made in a complex system does not necessarily lead to the conclusion that one thus has to be an expert on this system to make policy. It might also show that the process needs to be made simpler. The organizational expertise of the civil servant is thus not necessarily a source of legitimacy for the civil servant's discretion.

The second type of expertise we might ask of a civil servant is specialist knowledge of a certain relevant area (Conley, 2012, p. 4). Conley gives the example of medicine: when we feel ill, we visit a doctor, because a doctor possesses a vast amount of knowledge on illnesses and how to cure them.

I would not go as far as to argue that because of the expertise a doctor has, her or his decisions are objectively better than mine.¹⁸ However, expertise knowledge might be necessary in order to be able to understand the contents of certain decisions. If I were to judge whether a certain drug should be allowed on the market, I would need to be in possession of specialist medical knowledge as I would need to be able to research and understand the effects a drug would have on the human body. At the same time, such a judgement is more than the logical outcome of a list of facts about a drug. The judgement is no doubt heavily influenced by a civil servant’s knowledge, but is determined by the *value* a civil servant attributes to different facts about the drug. I will exemplify what I mean here by presenting a few possible outcomes of this particular decision making process in heavily simplified tables.

One possible outcome is that the civil servant concludes the drugs’ side effects are so dangerous that it should not be allowed on the market, even though it cures a chronic disease;

<i>Fact</i>	<i>Attributed value</i>
Cures chronic disease	+
Potential painful side effects	--
<i>On the market?</i>	No

Another civil servant might judge that the fact that it cures a chronic disease justifies its side effects;

<i>Fact</i>	<i>Attributed value</i>
Cures chronic disease	+++
Potential painful side effects	--
<i>On the market?</i>	Yes

A third civil servant might even say that the drug should be released on the market, so people can decide for themselves whether they feel like the curing effect justifies the side effects of the drug;

<i>Fact</i>	<i>Attributed value</i>
Cures chronic disease	+
Potential painful side effects	n.a.
<i>On the market?</i>	Yes

¹⁸ Not because I necessarily feel this is untrue, but because defending whether this statement is true or false distracts from the point I will be trying to make in this section.

Three civil servants decide on the basis of the same information, yet the outcome is different for the variability of value they attribute to each fact about the medicine.¹⁹ Specialist knowledge is necessary to understand the decision that is to be made, but does not wholly account for the value attributions displayed above.

How does this process of value attribution work? Simon (1976) and Lewis & Gilman (2012) describe this process as follows. They state that one can be an expert in medicine, but there is ‘no “scientific” or “expert” way of making value judgements (Simon, 1976, p. 56-57; Lewis & Gilman, 2012, p. 64). The civil servant’s expertise allows him or her to attach ‘intermediate values’ to facts: values depending on the believed ‘empirical connection to a more final end’ (Simon, p. 53):

<i>Fact</i>	<i>Corresponding ‘more final end’</i>	<i>Attributed value (to the final end, and thus the related fact)</i>
Cures chronic disease	Living a long life	+++
Potential painful side effects	Living a life free of intense suffering; Living a life without as few dangerous risks as possible	--
<i>On the market?</i>		Yes

The civil servant attaches values to a drug’s healing powers and side effects because he or she sees a connection between that fact and a more final end.²⁰ The value a civil servant attributes to a fact thus more or less corresponds to the value he or she attributes to a more abstract value, such as living a long life.

The larger share of literature on administrative ethics concerns itself with the question what these ‘more final ends’ should be. The consensus seems to be is what the civil servant could

¹⁹ This is, of course, a simplified model of such a decision. The + and – symbols serve to display a greater or lesser amount of value; they are not there to suggest that value – in this sense – comes in measurable units.

²⁰ Simon speaks of ‘more final ends’ presumably for two reasons. Firstly, a ‘more final end’ can be pursued in relation to an ‘even more final end’: living a healthy life can be an end in itself, but can also be pursued by someone who’s ultimate end is to be happy, and sees health as an important contributor to happiness. Secondly, final values, Simon argues, are ‘seldom final values in any psychological or philosophical sense’, meaning they are subject to constant re-evaluation (Simon, 1976, p. 52).’

(and probably should) do is refrain from acting on her or his private idea of what these more final ends should be. Instead, he or she should aim to pursue the ‘public interest’, where the civil servant finds a balance between citizens’ individual preferences and a shared common good (Lewis & Gilman, 2012, p. 64; Svava, 2015, p. 35). This means balancing the interests of the individuals involved and the good of the whole of society. For example, a civil servant would have to find a balance between transport companies demanding a higher maximum speed on highways on the one hand and road safety and clean air on the other. Alternatively, or additionally, the civil servant can turn to regime values: constitutional values found by interpreting law and existing policies (Rohr, 1978, p. 49- 75).

But these final ends and constitutional values often have a certain generality to them (Rohr, p. 74). If a citizen were to declare that her or his end is to lead a healthy life above all, this does not automatically provide an answer to all value questions a civil servant might possibly face. Overeem rightfully observes that the problem with applying general concepts – such as the wish to lead a healthy life - to specific situations is that they require refinement to fit these specific situations (Overeem, 2012, p. 187²¹; Richardson, 1990). The question that civil servants ask themselves is not ‘what choice do I make in situation x given end y ’, but rather ‘how should I interpret end y , and what consequence does this interpretation have in situation x ’. If we were to say that a civil servant is responsible for promoting the public interest in the decisions he or she makes, the interpretation of these ends comes down to her or his discretion. In other words: we are now back at Stone’s observation that it is meaning, not matter that is central in a policy process.

3.2 The civil servant as a more rational decision maker

Next to being an expert, the civil servant is said to be able to make more rational decisions compared to citizens (Conley, 2012, p. 16-46). Regardless of whether the decision requires expertise or not, the civil servant is able to make decisions which are the product of better reasoning.

Psychological research has shown that we tend to overestimate ourselves our self-image when it comes to decision making. Even though we often perceive of ourselves as such, the average citizen is not a very rational decision maker. We require of ourselves that we make cost-benefit analysis, set goals rationally and then determine what the most adequate means to

²¹ This argument is a variation on Overeem’s idea that the more abstract a concept is, the more vulnerable it is to empirical objections at levels of low generalization (Overeem, 2012, p. 187).

determine these goals are. In fact, a large portion of our decisions are heavily influenced by our subconsciousness: all sorts of biases, heuristics and anchors ‘manipulate’ our decisions without us being aware of it.

A civil servant, being a human being too, is no less prone to these factors. The key difference is the position the civil servant and the citizen are in at the time of making the decision. The environment in which a choice is made and the moment at which it is made play a major role in the outcome of the decision making process (Thaler & Sunstein, 2009). I might be inclined to watch my weight, but if I drive home from work hungry, it becomes very difficult to resist a snack stop. The difference between a citizen and a civil servant is that the civil servant is not influenced by all the contextual factors that guide a citizen towards a certain decision (such as my fatigue and hungriness when driving home from work). This leads Conley to argue that they are in a better position to determine what would be the rational choice in a given situation (Conley, 2012, p. 118).

This argument is subject to a multitude of objections. Firstly, the idea that a civil servant is able to decide more rationally in comparison to the average citizen is prone to a similar objection as the idea that a civil servant’s expertise allows for better decisions. Determining whether choice *a* is more rational than choice *b* cannot be done without some standard of reference. Conley herself often uses the example of smoking. It is rational not to smoke, she says, yet we still do it. The rational thing to do would thus be to outlaw smoking, or at least discourage it (Conley, 2012, p. 169 – 170). However, this argument is too simple. The correct formulation would be that it is rational not to smoke, *provided that being healthy is an end we actually pursue and find more important than other ends*, such as relaxation (Pugh, 2014).

In addition, I find the claim that we should assume that a rational decision is always a better decision doubtful, as Nussbaum suggests in her work *Love’s Knowledge* (1992). It is not necessarily true that a decision that is made behind a civil servant’s desk, in the absence of all that influences the citizen as a decision maker, is a better decision by default (p. 54 - 104). Such a claim can only be made if we accept the idea that rationality is a virtue that should be valued higher than – to name but an example – passion. But even if we were to take the idea that rationality is more important than passion as undisputable, the actual answer one gives to a value question depends on what one’s definition of rationality is. Again, the policy maker still cannot seem to do without attributing meaning to – in this case – ends.

Lastly, the claim that civil servants are able to make more rational decisions is doubtful from an empirical perspective. A vast amount of research in public administration studies has

been dedicated to understanding what influences civil servants when designing policies. Whilst the civil servant might not be in the same situation as a citizen when making decisions, her or his own context and the rationale of the organization²² he or she is in are likely to be a larger influence than the individual civil servant's rationality (Weiss & Ilgen, 1986, March & Olsen, 1975). A civil servant has to operate within budgets, often has limited time for a multitude of tasks, and has to produce measures that achieve positive results above all else. The citizen might be to 'distracted' to make rational decisions, the civil servant is not free from distraction either. The difference between citizens and civil servants is not that the one can decide rationally and the other less so, it is that they are under different kinds of influences.

3.3 The civil servant as a long term planner

Thirdly, authors such as Vile and Dunshire – both political scientists – believe the civil servant to be a counterweight to the 'quirks' of the public. Politicians are in office for a relatively short term. This is a good thing: it means their performance gets regularly evaluated by the electorate (Dunshire, 1973, p. 159). The obvious drawback is that this makes it difficult for politicians to plan ahead for longer than the terms they serve. Having an administrative division makes it possible for government to enjoy a certain level of independence from popular control. Without this independence, it would likely not be able to function effectively (Vile, 1967, p. 330). As civil servants are in office for a longer amount of time and are not accountable to the public in the direct way politicians are, they are in a better position to secure long term goals and develop skill and expertise in their field (Dunshire, 1973, p. 159).

In order to evaluate this argument properly, it is important to distinguish between what is a means and what is an end in this argument. The end here is to have a government which is able to make long term plans which are to a degree independent from popular control. The means towards this end is, in this case, an administrative division that employs nonelected civil servants.

Earlier in this thesis, I gave an example of a case in which a civil servant's use of discretion was legitimized by the end it served. This example showed that we were inclined to allow police officers to use force in certain cases, as we believed this was the best way available

²² By organizational logic, I refer to the set of rules, standards and routines of an organization that influence the behaviour of the civil servants working in it. A very simple example: imagine a dangerous crossing near a school. Cars drive very fast here, and children need to be protected. Someone working at a municipality's traffic department will likely opt for placing signs and adding speedbumps to the crossing, whilst a teacher from the local school might start teaching children about traffic safety.

to achieve a safe society. In the argument as presented by Vile and Dunshire, it is less clear whether the same goes for an administration as the ‘guardian of the long term planning’. Having an administrative division is a way, but not the only way to protect the continuation of long term plans. Vile himself, for example, argues that what makes a legislative process stable, is that it functions according to an unchanging set of rules ‘implicit in the behaviour of those who are involved’ (Vile, 1967, p. 345). No matter how eclectic the outcomes of a legislative process might seem, beneath it is a stable process of continuous legislation. What makes this process stable is not the administration that carries it out, but the fact that this administration functions in coherence with the constitutional principles Vile is referring to. In other words: the primary source of stability in this example is a constitution, which is under popular control.

3.4 Quality based legitimizations: a general objection

Something that connects all three arguments based on the qualities of a civil servant, is that they have a certain level of generality to them. In the example of the use of force by police officers, both the means and the end are specific in the sense that they have a specificity to them that makes it understandable what exactly it is we legitimize and why we do so. The fact that we can understand what it is exactly that we have legitimized makes it easy to check whether discretion is used the way we intended. If a police officer decides to use force, there is a sufficiently clear²³ connection between his use of force and the end it serves. Someone needs to be stopped from committing a wrongful act or tries to escape the consequences of one, and refuses to cooperate with the police officer who attempts to either prevent the act or the escape in a way that is dangerous given the context in which all this is happening. He or she could for example be threatening the life of the police officer or a citizen. It is easy to imagine what sort of scenarios we legitimize when we say that a police officer should be allowed to use force.

This type of clarity does not apply to the idea that influence of a civil servant’s individual values on a policy process are legitimate because she or he is an expert, more rational or because we need an administrative division that generates long term plans. What exactly do we legitimize, when we would accept this idea? The generality of the statement suggests that the value questions that an administrative division answers are ‘normative small change’:²⁴ the price we pay for a stable, smoothly operating society. However, in the complex societies of today, it is safe to assume that every moral decision is at least important to some (such as those

²³ If there is not, his use of force would be unlawful.

²⁴ A term I owe to Jos Philips (personal conversation, April 26, 2016).

directly affected by it). If we are to take seriously the liberal ideal that people should be as free in their choice of ends as possible, the starting point should not be that it is acceptable that value questions are answered without public legitimization in light of a greater aim. Rather, it should be that each value question matters a great deal to someone somewhere in a society. The generality of the arguments based on civil servants' qualities do not allow for this type of reflection. Instead, they suggest certain ends, such as stability, are more important than a free choice of ends, regardless of what these ends are. In light of the liberal values described in chapter 1, this is a bold statement, given that it is not even clear that providing the administrative branch with this kind of discretionary power is the best or only means of achieving a stable society. While case I shows that there sometimes is no other option than to leave some value decisions at the discretion of civil servants, we should at least make a serious attempt to keep the number of value decisions left to discretion as low as possible.

As the epistemic qualities of civil servants cannot legitimize the fact that they make value judgements, the next logical step in our inquiry will be to find a way to minimize non-legitimized use of discretion. I ended chapter two by saying that there are two roads along which we can try to solve our problem. Now that the qualities of civil servants have proven to be no adequate source of legitimacy, it is time to turn to the second of our two options. In the next chapter, I will look at the process through which we make decisions.

4.

Populism as a source of legitimacy

The slight shift in focus on which we ended the previous chapter steers us away from the science and philosophy of public administration, into the territory of democratic theory. This field of study is centred around the question ‘who decides?’ This is exactly the question that has become relevant, now that we ended the previous chapter with the observation that it is desirable to keep the number of value questions left to discretion as low as possible. This chapter will investigate whether we can solve our legitimacy problem by changing the person that answers the value questions. Starting point will be Richardson’s theory of ‘qualified populism’, the subject of his book *Democratic Autonomy* (2002). This theory aims to legitimize discretionary judgements by arguing for a greater involvement of citizens in the public decision making process. As this chapter will argue, Richardson’s theory points in the right direction, but does need adjustment.

Before continuing, it is important to briefly look into the meaning of the term ‘populism’. This term is nowadays typically associated with extreme right and left wing political parties whose main aim seems to be to challenge the ruling elite by ‘giving power back’ to ‘the people’ (Mény & Surel, 2002, p. 8-9). This claim typically involves a distinction between the ‘true people’ and groups who form a threat to the sovereignty of the true people – wealthy bankers and immigrants are two ‘threats’ that have been the target of current populist parties (Mény & Surel, 2002, p. 12).

This is not the type of populism Richardson refers to. In Richardson’s work, the term populism refers to a vision on democracy in which the people enjoy ‘democratic autonomy’. Richardson uses this term in reference to the Rousseauvian idea of ‘freedom as collective self-mastery’ (Richardson, 2002, p. 59). Point of departure is the idea that people in principle are

free,²⁵ which means that a state that wishes to exercise power over its citizens has a burden of legitimization as to why they are doing so. If a state does not fulfil this duty, meaning power is exercised over the people in an arbitrary manner – Richardson refers to this as ‘domination’ – their rule is illegitimate (Richardson, 2002, p. 33). Domination can be prevented if a people can for itself decide when and where a state may exercise power over them. This can only be possible if citizens are directly involved in the legislative process. It is important to note that when speaking of ‘the people’, Richardson is not referring to individual persons, but rather to all citizens of a state as a collective. The argument that the people should rule themselves is not libertarian: it does not imply that each individual should rule him or herself with as little interference from others as possible.

4.1 Henry Richardson: legitimizing discretion through dialogue

If you give a civil servant discretion, it comes with the unavoidable risk that the civil servant makes value judgements arbitrarily as opposed to on the basis of legitimate reasons. (Richardson, 2002, p. 5). One of the key characteristics of discretion is namely that is exercised outside direct political control. Richardson states that unlegitimized discretion is a ‘problem [...] that inevitably rises for any large scale democracy’, as these societies require a bureaucratic apparatus to ‘elaborate and implement law’ (Richardson, 2002, p. 16). We can thus not do without discretion, but it is not a preferred option for decision making.

If we cannot do without discretion, we should at least be able to exercise some control over it. As said in section 2.1, Richardson characterizes the policy process as a continuous reasoning about what we ought to do, given our value commitments. The point at which we hand over a decision to our governments administration can thus not be the point at which we have answered all value questions (for this is impossible). His proposed solution is to let citizens deliberate on what tasks an administration carries out. To be more specific, they must, through processes of deliberation, determine the point at which they ‘can credibly conceive of the agencies continuing the process whereby we make up our minds about what we ought to do’ (Richardson, 2002, p. 132). This means that the people literally have to be in a continuous dialogue with civil servants – not only about practicalities but also about values (Richardson, 2002, p. 220-221). Discretion is thus legitimized by the fact that citizens have mandated civil

²⁵ This claim refers back to the assumption about the validity of liberalism made in chapter 1 of this thesis.

servants to answer any upcoming value questions citizens left unanswered, or that might come up in the future of the policy process.

This focus on deliberation is what makes Richardson's proposal populist; it asks for a direct involvement of citizens in the legislative process. Citizens must rule, and they must do so by reasoning with one another (Richardson, 2002, p. 73). His proposal is based on two arguments. The first argument consists of the epistemic benefits of decision making through deliberation, of which Richardson names three. The first references Aristotle's idea that in deliberation, 'each participant brings something unique to compensate for the one-sidedness of each'. Deliberation arguably leads to better decisions because it allows for combining perspectives (Richardson, 2002, p. 77). Second is a point originally brought up by the American politician James Madison, one of the authors of the original United States' constitution. He saw deliberation as a decision making mechanism that could generate more impartial decisions by 'cancel[ing] out the various partiality of factions' (Richardson, 2002, p. 77). The last empirical benefit of deliberative decision making that Richardson mentions is that deliberation ensures decisions take time. Whilst this might not immediately sound as something beneficial, Richardson states that the deliberation process ensures that the outcome of this process is well reasoned, rather than motivated by the 'passions of the moment' (Richardson, 2002, p. 77).

As Richardson himself recognizes, these empirical benefits have an obvious drawback. The desire to combine a multitude of perspectives on the public good, which are not always commensurable, might just as well paralyze the debate. It also invites for a type of rhetoric that makes arguments seem as universally acceptable as possible, masking the true intent of participants in a deliberative process.

In recognition of the fact that these empirical claims can be questioned - as is the case, to be frank, with all empirical claims about any other decision making mechanism - Richardson's second argument in favour of deliberative decision making is a normative argument. His claim is based on the idea that rule should be reasoned: the ruled are entitled to reasons for decisions by their rulers. As it is the populist's requirement that the people rule themselves, which means that citizens exercise power over one another, it logically follows that they owe reasons for their decisions to one another. These reasons must carry some form of what Richardson calls 'public reasonableness', which requires that arguments are presented in such a way that others can reasonably accept them as arguments (Richardson, 2002, p. 81).

It is important to note that this does not require arguments to be presented in such a manner that others necessarily find the contents of the arguments convincing enough that they change their position. To exemplify, Richardson gives the example of how ‘because it benefits the multibillionaires who got rich on internet companies’ is not very acceptable as a reason, as the wealth of the multibillionaires most likely already enables them to enjoy all benefits of which we would say that it is just that a citizen enjoys them. In contrast, ‘because it benefits the citizens of town A’ would be acceptable as a reason.

Now in a society where pluralism²⁶ causes that some arguments based on one system of belief might not be acceptable to a proponent of another system, this criterion asks of citizens that they are able to put themselves in the place of their fellow citizens. For example, someone who is a fanatic atheist and liberal might not be convinced of the reasonableness of the Christian argument that something has to be done for the sole reason that God wishes it so. The other way around, the fanatic Christian might not be convinced by the liberal atheist’s argument that he or she feels individual liberty and self-worth are two essential cornerstones of society of which the importance should be taught to each and every child. In order to present arguments valuable to deliberation, both sides will have to find elements in the position of the other party that allow them formulate additional arguments, which are acceptable to the other party (Richardson, 2002, p. 82). For example, the liberal might present the Christian with the argument that it is her respect for these values that enables the Christian to practice her or his faith freely.

What would such a process look like in practice? If we were to take casus III from chapter 2 as an example, the process would look as follows. Say the NNC feels it is necessary to launch a program reducing obesity amongst children. They have discovered that children eat pretty healthy at home, but eat a lot of snacks in the school canteen. The next step would be to identify relevant partners. In this case, these would at least be parents, school boards, canteen suppliers and the NNC’s own experts. The citizens are those who have the power to decide whether they find the NNC’s proposal acceptable, but the other parties are necessary for the implementation of the proposal. They might thus offer valuable insights. Together, the gathered parties would deliberate on the contents of the program. If the NNC would like to nudge children, they would

²⁶ Pluralism, simply meaning ‘there are many of the thing in question’, is often used to refer to the plurality of value systems in a society. Philosophers have taken positions on this topic ranging from the idea that all of these value systems are equally true to the idea that some of these value systems are more reasonable than others, and only the reasonable one’s should be tolerated (Mason, 2015).

propose this to the gathered parties, who would be able to state their views on it. The NNC's proposal would be discussed and altered until a compromise would be reached. If a compromise would be impossible, the majority vote of the citizens present would determine what the final proposal would look like (Richardson, 2002, p. 205). After the deliberative process would have reached a conclusion, the NNC would continue by working out the details citizens left open and implementing the proposal.

4.2 The problem with deliberation

Does a continuous dialogue, a process of 'negotiated rulemaking', solve our problem? While it might seem so at first glance, I do not believe it fully does. To illustrate why, we should take a more detailed look at what exactly Richardson is legitimizing with his proposal. Or, in other words, what it is we decide on exactly when deliberating on the point at which we let the civil servant take over a policy process?

Suppose that a society's public transportation company has decided that it needs to replace all its busses. What needs to happen according to Richardson is that 1) citizens need to approve spending government resources on the acquisition of new busses and 2) citizens need to answer all value questions that they care to answer, in dialogue with the public transport company. After having done so, they hand over the process to the public transport company. Let's say that in this case, the people agree that spending a certain amount of money on renewing the busses is necessary. Additional conclusions from the deliberative process are that they want the busses to be more accessible to the physically disabled, that the busses are to have a higher capacity than the busses currently in use to accommodate the growing number of users during rush hour, and that the busses are to have the colour blue. The citizens then decide that they trust the civil service with answering any further value questions that might come up in the remainder of the process. These value questions include deciding when busses are sufficiently accessible to the disabled, as long as it is an improvement over the previous situation, deciding what an adequate bus size is, given the number of people that travel in rush hour, and deciding on the right shade of blue. But it also means that it is up to the civil servant to decide whether the busses run on diesel fuel or are powered by an electric motor, to name just one decision not covered by the framework provided by the citizens.²⁷ The standards the

²⁷ Richardson's *Democratic Autonomy* (2002) contains a much more detailed description of such a deliberative process in chapters 16 and 17 of the respective work. The example I have given here is an abstracted and simplified version of this description. It nevertheless suffices, as it is not my intent to

citizens have produced still have a certain vagueness to them, and there is still room for the personal values of civil servants.

This vagueness we have so far not been able to get rid of means that there is never a clear overview of all possible alternatives involved in a decision (Richardson, 2002, p. 116-117). So if ‘we, the people’ were to decide that we have reached the point at which we feel we have answered all relevant value questions and should hand the process over to civil servants, what exactly will we be handing over? How do we know these civil servants will interpret our decisions as we meant them ourselves? As Richardson himself writes:

‘By no means should we invite bureaucrats to indulge in [...] speculations about values. What we can reasonably do, is to hope that the contextually specific features of people’s evaluative judgements will find their way into agency decision making indirectly through public hearings and processes of negotiated rulemaking’ (Richardson, 2002, p. 239).

As we established that in a liberal democracy, it is safe to assume that every value decision matters to someone somewhere, the word ‘hope’ indeed is no indication of a satisfactory solution. Manin, Stein & Mansbridge accurately specify why this makes the inherent vagueness of policy decisions problematic:

If a voter chooses poorly, that is, if he opts for the least effective policy for a society, the effect on his own position will usually become apparent only after a long time. At that time, the voter would presumably change his original position, but the change would come too late to correct the initial decision in an effective manner (Manin, Stein & Mansbridge, 1987, p. 356).

Applying this citation to the legitimacy problem this thesis tries to solve: if the public transport company paints their busses a shade of blue which is undeniably blue, but still considered extremely ugly by citizens, the paint is already on the busses when the citizens find out. We may think that we adequately addressed the colour of the busses, but we do not know for certain until we actually see the busses driving around town. Say that I am part of the majority of citizens preferring blue busses. I love **blue**, but at the same time hate **green**. By stating that I

criticize the practical details of Richardson’s version of deliberative democracy, but rather the broader concept of deliberative democracy in connection to our legitimacy question.

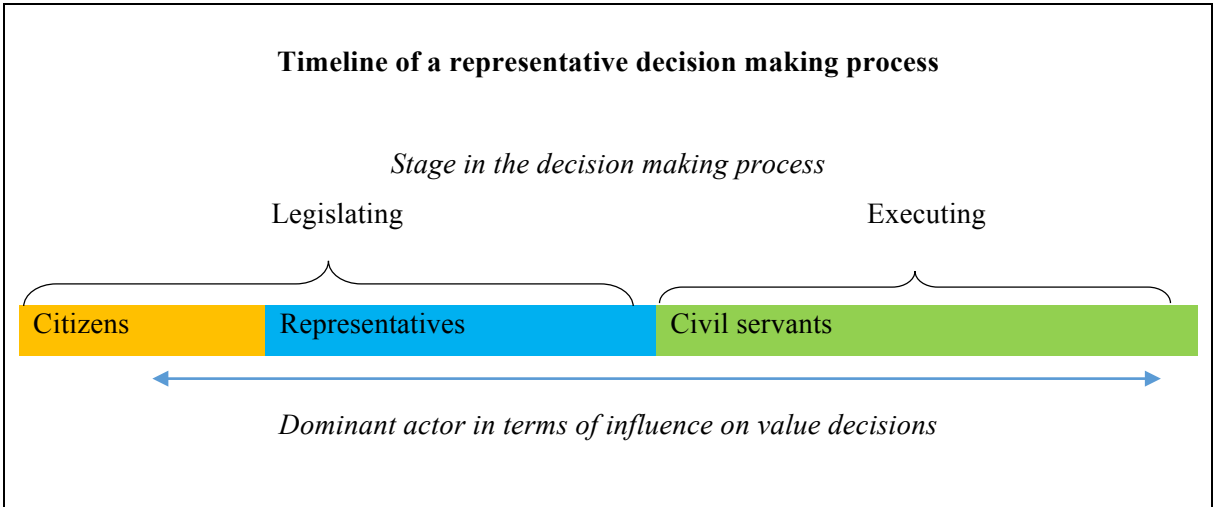
want a blue bus, I might not consider that there are shades of blue that have a strong green tone to them, or not even consider this truly blue. So what I need to prevent the public transportation company from painting a type of blue which resembles green, is that the decision I made is interpreted by a civil servant with whom I share a broader set of values. If my decision is interpreted by just any civil servant, the busses might end up greenish-blue. If it is interpreted by a civil servant who shares my disliking of the colour green, I know he or she will paint the busses a shade of blue, but not greenish-blue. What matters here is *who* decides. I would even argue that who decides matters more than what exactly we decide on. If I knew the colour of the busses was decided someone who shared my dislike of green, and love for blue, I would not even have to deliberate with my fellow citizens on the exact colour of the busses, for I would know the civil servant deciding the colour of the busses would not paint them greenish-blue. The problem with Richardson's proposal is that it allows us to evaluate a civil servants' values only after they have manifested themselves in a policy decision. Richardson lets citizens deliberate with the NNC about the importance of children's health and the role school canteens play in that process, but when a civil servant decides that autonomy is more important than health after this deliberative process is over, 'the paint is already on the busses' when citizens find out.

4.3 Deliberation versus representation

According to Brennan & Hamlin (1999), this sort of issue is exactly what is prevented in a representative democracy, as opposed to a deliberative democracy. They argue that voting for representatives is expressive rather than instrumental. If voting would be instrumental, we would vote for politician *a* because we want policies 1, 2 and 3 implemented. However, this idea of voting is based on a misconception. It would be true if citizens could vote for an electoral outcome, which would allow them to dictate which policies should be implemented. Instead, a vote in a representative democracy is an expression of certain values the voter sees mirrored in the representative of her or his choice. A voter cannot decide the outcome of an election, but he or she can express a preference for a certain candidate and the values he or she represents (Brennan & Hamlin, 1999). I vote for a person or a party that shares my idea of the public good not because I expect that they implement my conception of the public good directly. Rather, I vote for a party or a person because I trust that they will make value judgements derivative from my conception of the public good, if they get elected.

Applying Brennan & Hamlin’s objection to deliberative democracy leads to the conclusion that democratic rulemaking would be a solution to our legitimacy problem if it allowed citizens to determine the outcome of a policy process. However, given that it is necessary to have a certain part of the decision making process be carried out by civil servants and the deliberators do not determine who these civil servants are, we can only be sure that civil servants interpreted the people’s decision in a satisfying manner after it has been implemented.

Nevertheless, sticking with representative democracy as our method of decision making is not the complete solution to our problem (if it were, this thesis would be much shorter). In a representative democracy people vote for representatives. These representatives deliberate on what we ought to do, and then hand the process over to civil servants. In a simplified model, a representative this process looks as such in terms of the actors making value decisions:



What Richardson proposes is that the people do not choose representatives, but instead deliberate themselves on what we ought to do, amongst themselves and with civil servants. Then, they hand over their decision to civil servants.

civil servants can still exercise discretion, citizens can only ‘hope’ that civil servants take their values into account.

The second model featured in this chapter is the representative model. In this model, citizens elect representatives on the basis of their values. That is this model’s strength: it allows citizens a say in the values of their representatives, which are the values that influence the choices these representatives make. The weakness of this model is the way in which it is implemented: citizens usually elect representatives, who then basically take up the tasks citizens would have in a deliberative democracy.

What both of these models seem to struggle with, is the necessity of some form of a civil service. As has been repeatedly stated in this thesis, a large society needs some sort of professional civil service to ensure a smooth operation of that society, and a smooth implementation of the principles according to which it is supposed to function. The difficulty this brings is that it is thus inescapable that at some point in a policy process, a civil servant gets what I in the introduction called an unlegitimized second vote: a civil servant gets to put her or his interpretation of our decision into practice. This is inescapable, unless literally everything in a society would be done by citizens as a collective. Of this, we have already established that it is impossible. A society needs ‘boots on the ground’. At the end of the day, someone needs to stand up and say ‘I’ll paint the buses!’ ‘I’ll test the drug’ ‘I’ll pick up your garbage’. We cannot collectively do this in a manner that would be beneficial to society: try to imagine an effective system in which every individual citizen would have to carry out every single step in a waste-collecting and -recycling program for her or himself.

The remainder of this thesis can thus only be an optimization exercise: how can we legitimize discretion as completely as possible?

Up until this point, we have seen two ways in which we minimize unlegitimized discretion. The deliberative approach as defended by Richardson would be to minimize the instances in which discretion can be used, along with citizens implicitly mandating civil servants to answer the remainder of the value questions that might occur in a decision making process. The representative approach lets citizens choose who represents them in a decision making process, on the basis of values.

Brennan & Hamlin (1999) present their argument in favour of representative democracy as an argument against deliberative democracy. They rightly state that in deliberative democracy, citizens actually have less of a say in the outcome of a policy process in comparison to representative democracy, as they have no say in the values of those responsible for the value

decisions that have to be made after the deliberative process has finished. I do not interpret this as an argument against deliberative democracy. Rather, I interpret it as an incentive to adapt the proposal put forward by Richardson. Whilst the assumption that citizens can determine the outcome of a policy process might be incorrect, the epistemic and normative advantages of deliberative decision making are not necessarily rejected by it. Additionally, it does not mean that minimizing discretion is not preferable over mandating civil servants to make discretionary judgements on the basis of their values. If Brennan & Hamlin's aim is to give citizens control over the outcome of a policy process, directly letting citizens answer value questions seems preferable over mandating others to answer these questions in citizens' name. Rather than being a rejection of Richardson's proposal, Brennan & Hamlin show where Richardson's proposal needs adjustment. It just shows that we might have to deliberate on more aspects of the decision making process than we initially thought.

Combining the strengths of both the representative and the deliberative model, we would end up with a model in which a deliberative phase, which allows citizens to answer those value questions important to them. Because citizens cannot answer all value questions, and are unlikely to oversee all possible value questions that might come up in a policy process, the deliberative phase must somehow be combined with a phase in which citizens get a say in who is to represent them in the remainder of the policy process. This combination would allow citizens a chance to minimize the number of discretionary value judgements, and it would enable them to influence the values of civil servants making value decisions.

4.4 Implementing the proposal

The suggestion I am presenting here is not very specific. How should deliberation be organised? Should citizens elect civil servants, should they have a say in in the application process? If this would be a thesis in political science or public administration, this would be the part where I would start a very elaborate discussion of democratic practices and the context in which my proposal would have to be implemented. It would be a study *an sich* to design the optimal practical implementation of my proposal. Unfortunately, I do not have the room to do so here. What I will do is discuss a couple of obvious drawbacks and counterarguments against representative democracy, deliberative democracy and the idea to combine the strengths of both. As I see my argument as a proposal for optimizing the democratic decision making process, listing drawbacks and counterarguments is important. They can both be incentives to

continue the optimization exercise further and provide important insights into what to take into account when implementing my proposal.

4.4.1 The issue of time and interest

An obvious question that might come over the reader when reading about deliberative democracy is ‘where do I find the time for that?’ Most citizens who are eligible to vote have a full time job, a family or combine these two things. Deliberative democracy arguably asks more of these people than our current representative system does by being more punitive to people who are unwilling or unable to actively participate. In a representative democracy, a citizen can get away with casting a semi-informed vote once every couple of years. The people’s representatives do the bulk of the political work. In a deliberative democracy, this work load is moved from politicians to citizens themselves. This call for a greater commitment is precisely what makes Heath (forthcoming) - who is a proponent of representative democracy - very pessimistic about the idea of deliberative democracy:

‘[...] public participation seems to be incapable of serving as a genuine governance mechanism. It is one thing for the public to be called upon to provide input, quite another to expect that same public to exercise control over the behaviour of public servants [...] Because the public has interests that are extremely diffuse, very few individuals have any incentive to do the research and spend the time required to acquaint themselves with “the file” on any particular issue’ (Heath, forthcoming, p. 24).

Inviting citizens to deliberate assumes that citizens are a) interested in participating in a decision making process and b) have the time to properly prepare themselves for the role they are to play. I will go over these two assumptions separately.

Citizens who are not interested in participating can be divided into two categories. The first category of citizens is not interested in participating because they are not interested in politics or the way their country is governed. Motivating this group of people to participate is a challenge regardless of the decision making model one adopts. People have a right to vote and to participate, and implicit in that right is the right not to make use of that right.

The second category of citizens who are not interested in participating, are people who do not want to participate because they have no faith in the political system. Again, with every decision making system comes at least one person who has no faith in that system. One advantage that deliberative democracy has over other forms of democracy in this regard is that it is a very direct type of democracy. It allows individual citizens to directly influence the

outcome of a policy process, as opposed to a representative system where influence has to be exercised through politicians. The indirectness of a representative system might (and does) cause citizens to feel that they are not being heard. The citizen's values are represented by a politician, who most likely does not share all values with a citizen, but a similar set of values. The politician enters policy negotiations with this set of values, and has to make compromises in order to achieve results. This means that the politician has to make an estimation of what her or his voters would see as an adequate compromise. She or he has to interpret and specify values. In a deliberative process, the politician as middle man is taken out of the process. The citizen her or himself is responsible for a proper representation of her or his values. This means that whether the outcome of a decision making process is actually acceptable to the citizen, depends for a greater extent upon the citizen him or herself, instead of on others, such as elected representatives.

Then there are, as said, people who are interested in participating, but are somehow unable to do so. The incentive is not the problem here, time is. How much participation can we reasonably ask of citizens? In the normative argument presented by Richardson, this point has not been discussed extensively. Richardson's argument is about the moral justness of deliberative democracy. It is about why people *ought to* participate in a deliberative system. Whether citizens actually have the time to participate does not make Richardson's proposal any more or less just from a moral perspective. Still, it is an important issue to consider, for it is an issue that is very likely to occur.

Voting for a political representative allows me to express my thoughts on a large number of issues with one single vote. Going to meetings on all of these issues separately would likely require an incredible investment in terms of time, set aside the fact that I would have to prepare myself for these meetings too. Deliberative democracy gives every citizen an equal chance to participate on paper, but how do we prevent that only the retired and the unemployed participate in the decision making process?

One possible solution would be to have policy decisions made at a local level whenever possible. Whilst it might be difficult for someone to form a well-reasoned opinion on primary school education on a national level, it is probably easy for them to form such an opinion about the education that is offered by the local school, as her or his children go there.

A second option would be to allow citizens to have themselves represented by some sort of interest group. In fact, this is the sort of function trade unions have already. Trade unions

represent their members, mostly all working in a specific field or branch, in large scale negotiations on employment conditions with employers. Additionally, they function as lobby organizations. In a trade union, members gather a certain amount of times a year to deliberate on the course and the positions of the organization. On the basis of the outcomes of that deliberative process, representatives of the union then promote the interests of members.

One might remark that this is often the way political parties are organized too. However, a political party (generally) aims to represent a citizen in all value decisions. Interest organizations such as unions represent the values of a citizen in one specific policy area. They are representative organisations, but one could argue that the fact that they focus on one specific policy area allows for a nuanced form of representation, fit for a deliberative democracy. Representation by union like organizations does not turn deliberative democracy into a slight variation on representative democracy. Rather, it allows for a deliberative democracy in which deliberation happens on multiple levels. Citizens deliberate in different specific interest groups, these interest groups then deliberate amongst another. Whilst going to an interest group meeting a few times a year still asks more of citizens than casting a vote every now and then, it is a considerably lighter burden than attending all meetings that might possibly interest a citizen individually.

4.4.2 The issue of politicisation

A large part of this thesis has been dedicated to proving that civil servants all make value decisions, even though this is not their explicit task. In light of that idea, the idea that civil servants are not necessarily hired on the basis of their values might seem like an undesirable leftover of classic politics-administration thinking. However, it also indicates where the priorities of a civil servant most likely lie. In chapter 3, I extensively discussed (and dismissed) the idea of a civil servant as a ‘better’ or ‘more rational’ decision maker. At the same time, there is something to say for a civil servant who bases her or his decisions on what he or she perceives to be a more value-neutral conception of the public good than his or her own conception of that public good. Instead of blatantly acting according to an own conception of the public good, a civil servant of which we ask to be objective, acts on what he or she perceives to be the greater good according to some standard outside her or himself - whatever that standard may actually be.

However, the point of this thesis has not been to test the epistemic value of the decisions of a civil servant. Gutmann & Thompson say of deliberative democracy that it “[does] not guarantee morally right results, but [...] offer a more defensible way of reaching mutually

justifiable policies (Gutmann & Thompson, 1996, p.229)”, meaning that deliberation does not guarantee that the conclusion of the deliberative process is the ‘One True Conclusion’. Rather, it guarantees that whatever the outcome of the process may be, it is an acceptable outcome to every participant at best, and the majority of participants at the least. Even if the latter is the case, the outcome of the process has been justified to the minority.

I believe this is indeed all one can ask of a policy process. As, among others, Stone, Simon and Richardson said, and I frequently repeated throughout this thesis, a policy process is about attributing value to facts, and deliberating on the meaning of these facts. This means we have no way to judge the quality of a decision of a civil servant that does not require some conception of the public good to measure the decision by. Given the plurality of conceptions of the public good that exist in a society and the fact that at least some of these are generally deemed reasonable, the only feasible standard we have to judge policies by is the standard of mutual justifiability.

Politicisation may also threaten the quality of administration in terms of expertise. As said in section 3.1, making policy decisions often requires a certain level of technical expertise. I cannot judge whether a certain drug is too dangerous to be put on the market or not, since my medical knowledge is very limited. If citizens were to have a say in the appointment of civil servants, we run the risk of ending up with a civil service consisting of laymen with great rhetorical skill. As I possess little medical knowledge, I cannot judge whether someone would be a good civil servant in terms of medical knowledge, I can only determine whether I agree with someone’s values or not. It thus seems wise to somehow ensure that people who actually are experts in medicine have a say in the appointment of civil servants as well. Two possible options are to form panels composed of ‘regular’ citizens and experts, or to only appoint civil servants in certain key positions in order to retain a balance between representativeness and expertise.

5.

Conclusion: deciding who *and* what

This research started out by observing that many of the decisions made by civil servants involve value questions. Currently, these value questions are left at the discretion of the civil servant in question, without a satisfying form of legitimization. The aim has been to find this satisfying legitimization by exploring different types of legitimization. The types of legitimization fall within two categories. Authors such as Heath see a legitimization in the output of a decision making process (Heath, forthcoming;). The basic idea is that the civil service as it is produces desirable results. It consists of expert civil servants, who are perceived to make more rational decisions and are able to provide long term plans, as opposed to politicians. What these theories fail to recognize is that, as Simon said, policy making essentially is about connecting values to epistemic facts, and that one cannot be an expert at 'values'.

The second category of legitimizations is argued for by Richardson and Manin et al. These authors claim that a civil servant's discretionary value judgements can be legitimized by more directly involving citizens in the policy process. Citizens would deliberate with each other and with civil servants until they have answered all value questions the majority of citizens feel the need to answer, after which civil servants carry out the rest of the policy process. Richardson offers convincing arguments in favour of deliberation, both normative and epistemic. Deliberation is supposed to lead to better decisions with a broader support amongst citizens. Deliberative decision making also prevents citizens from being subject to arbitrary exercise of power by civil servants or other citizens. This second type of legitimization is more promising than the first because it recognizes that expertise is mainly relevant in *translating* moral principles into a complex praxis – not in deciding general governing principles. However, it leaves out some relevant aspects of the policy making process. Given the sheer impossibility to make decisions which are completely free of room for interpretation by civil servants, what

matters is *who* interprets the outcome of the deliberative process, more than what the exact outcome of the deliberative process is. The answer to the research question with which we started this investigation is thus that we can legitimize civil servants' value judgements by, in addition to deliberating on *what* ought to be done, deliberation on *who* is to carry out the remainder of a policy process as well.

6.

Discussion

This thesis has sought a legitimization for value judgements by civil servants by combining literature from political philosophy and administrative and political science. Its outcome is a normative argument in favour of some sort of democratization of the process by which we appoint civil servants, or by which we assign them to policy areas. I have not explored in great detail the practical shape my proposal might take. I can imagine that appointing civil servants for each and every policy process might be highly impractical. Alternative options might be to develop a way in which citizens can influence the appointment of civil servants such as an election or some sort of public jury that selects on the basis of values. My aim was to show that it is important to allow citizens a say in the civil servant that carries out their policy decisions, it is by no means a guide on how to implement this principle. In this light, it is also important to mention that I did not pay much attention to the epistemic value of the qualities of a civil servant addressed in chapter 3 of this thesis. Whilst these qualities do not provide a normatively satisfying legitimization of a civil servant's value judgements, they might be worth taking into consideration when researching the implementation of the argument I have presented here.

A criticism one might have against the argument I have displayed here is that it essentially still is a theory in which we leave value decisions to civil servants with no certainty of the outcome. This is indeed true. My theory is not the ultimate solution; it is an attempt to improve over the current situation. I tried to maximize the legitimacy of a system in which we need some form of public administration, but want as much control over value questions as possible. I believe my solution incorporates the strengths of both deliberative and representative democracies, providing a setup for a decision making process in which we can do more than 'hope for the best' when it comes to a civil servant's value judgements – but I do not claim to have fully solved the legitimacy problem I presented at the start of this thesis.

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