

# LEGAL THEORY AND PHILOSOPHY CHALLENGED BY THE OMNIPOTENCE OF THE STATE

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**Abstract:** *In this text, the author tries to reactivate some of the key legal and theoretical insights of Montesquieu and Weber for understanding the modern functioning of the State as an entity which, in relation to the ancient concept, has erupted into its own opposite. Both thinkers, each in his own way and using the original typology, warn of the possibility of a distortion of a State which, instead of the means to establish a fund between the "subjects" of a community, becomes a goal for itself. The author points to the relevance of above-mentioned thinkers' indication to the necessity of finding such modes that would limit the authority so that it is not abused. The author in the article insists on this possibility which, according to his view, represents the essential characteristic of the State (post) modern era. The author concludes that the State is completely abolished of the entelechy aura of a man's companion on the path of improvement: it has become a power emanation, a mechanized apparatus that serves as a mere instrument for the single motive of achieving and maintaining the force of pressure and the suffocation of individual freedoms and rights.*

**Keywords:** *state, monarchy, republic, despotism, democracy, aristocracy, Weber, legality, legitimacy, bureaucracy and charismatic authority.*

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## 1. OMNIPOTENCE PRINCIPLES OF THE STATE AND THE NEED FOR MECHANISMS FOR LIMITATIONS OF ITS ABUSE

Instead of considering the form of the overall dynamics of the State arrangement - positioned according to the ancient idea of the state as an ethically refined completion of an individual - Montesquieu introduces an exclusive focus on the anatomy of the power types in theory. The difference is obviously evident only in the orientation and narrowing of the focus, but the effect is far-reaching. Leaving philosophical assumptions as the necessary sources of interpretation and studying an isolated phenomenon of governance and administration, basically means abandoning the belief that the task and scope of analysts consist in the ability to perceive State functioning as a whole – the point is therefore on abandoning the belief that the State is an organism which is equal (or even, subordinate in its genetic

dependence on human nature) for all its inhabitants. Even at the time of Montesquieu's work, the State began to rise in the eyes of the scholars as a self-sufficient being with features that cannot be reduced to the determinants of vocabulary of human nature. The state thus becomes a present state that precedes human nature in a social sense; hence the turning to the study of the anatomy of the authorities is logical by itself.

Moreover, if the judgement of this turning point is philosophically radicalized, it is justified to determine how modernity causes the loss of an imminent experience of individual freedom in relation to the state: while the ancient insight considered the state as a creative creation throughout whose laws the conditions of human development can be arranged, the modern thought considers the State apparatus primarily as a source of supervisory coercion, and the question it asks does not refer to the developmental incentives (the realization of justice and good), but the most acceptable conditions of coercion (or in consequence with Marx, conditions leading to the abolition of oppressive State supremacy).

Of course, this turning point at Montesquieu is not so distinct. However, freedom for him explicitly means the right to do everything that State laws allow. Thus, the true bearer of freedom is determined in the state as a law-abiding party. More importantly, Montesquieu acknowledges that power in human hands is inevitably "perishable goods," since every man is inclined to abuse it; hence, Montesquieu, as an original practical solution sees only the establishment of a parallel, independent level of authority that will be able to stop and limit it. In other words, Montesquieu's practical interest is primarily to find a way to limit authority so that it cannot be abused. It is, therefore, clear that this basic intent is already far from ancient.

As far as the typological division of power is concerned, Montesquieu does not depart himself much from the antique patterns. In the *Spirit of Law Act*, he first simply states that there are three types of government: monarchist, republican and despotic.

Furthermore, depending on the entity that holds the prerogatives of power, the republic is divided into: democracy, in which the people as a governing body have sovereign power, and an aristocracy in which power belongs to one part of the people.

Monarchy, however, is such a government in which the distinctive character is not so much the power of an individual, but rather the presence of additional mediating and dependent powers: it is all the nobility in the first place, but also of the clergy, as well as the mediating class of city authorities.

Despotism is theoretically and practically absolute power of an individual for the indefinite period of time, while Montesquieu argues that this theoretically pure form of despotism is quite rare since the despot is often faced with natural limitations of his own abilities to perform operational authority and thus authorizes a capable representative. In such a country, Montesquieu believes that the institution of the vibrant is typical. Clearly, Montesquieu emphasizes a Turkish sultanate as an example of despotism.

Somewhat more intriguing is Montesquieu's focus on studying the main principles – the ones that the basic movements of human passion come from – on which each of the described types of rule rests on. In democracy, the essential principle is virtue, while in aristocracy, in addition to virtue there is the aspect of moderation of aristocrats. In the monarchy, the central value as the principle of administration is honor as a political virtue. In despotism, however, the basic management principle is intimidation, or the spread of fear, which permeates every act of power and guides every ambition of those who are in power.

Alongside Aristotle's thought, Montesquieu argues that the distortion of each government is preceded by a distortion of its basic principles. The principle of democracy is distorted whenever the principle of equality is lost or when the uncritical spirit of universal equality unfolds. The process of eradicating the principle of the monarchy leads through the progressive withdrawal of privileges to mediating instances of power. As for despotism, the distortion has already been implanted in its very principle, since it is degraded by its very nature.

From these basic principles, Montesquieu arises with further elaboration of those characteristics that these principles of governance favor and provoke in citizens. The analysis of the educational and characteristic climate in the despot environment is especially interesting for our subject: here everything is focused on achieving the ultimate servitude, and the educational disciplinary procedures are reduced to the naked punishment of behavior that is reduced to a rigid dichotomy obedience-disobedience. Also, Montesquieu has already noticed that the pacification of merely every rebellion or critical thought, as well as the very potential for free judgment and the emergence of the obedience scheme, is the ultimate goal of despotism. We can only add here: the means are changing, but this goal remains.

Montesquieu's tacit acknowledgment of the mismanagement of any government, as well as the desire to establish, along with the power, the institutions of another government that would serve as a competing corrective and potential alternative to the first one, undoubtedly point to the basic feature why government can be misused: its availability of coercion instruments that suppress resistance. It is precisely from this point that the most important political theories about State governance emerge and mark the modern epoch. The state completely abolishes the entelechy aura of a man's companion on the path of improvement. The state is the development of power, a mechanized device that serves as a mere instrument for the sole motive of achieving and maintaining a force of pressure. It is about this and nothing else. Completely demystified as a philosophical notion, the State is further exposed to the investigator as a sophisticated coercive labyrinth.

## 2. THE STATE AS A MEANS OF COERCION

In a modern disagreement with the illusion of the State's utility tailored according to the human freedom, the most decisive, most developed and certainly with Marx's most influential argument was provided by Max Weber. Based on the premise that the whole policy is in essence a search for the way in which any political organization, including the state, shows obedience to the ruling authority, Weber's theory points out that the establishment of an administrative order is the main instrument of this basic intent of the ruling entity within a political organization.<sup>1</sup> In other words, the establishment of coercion has been carried out through every administrative structure, and the latter *differentia specifica* that allows forms of coercion is certainly the possibility of instigating real threats to the subordinates, i.e. the potential for the use of violence. Once this is recognized as a distinctive feature, it becomes clear that from the focus of consideration as the real criteria for defining a political

1 By ... "power should be called a chance that a certain group of people will obey certain/or all imperatives, and not every kind of potential that they will enjoy the 'power' and 'influence' on other people ... "A certain minimum of will for obedience, i.e. the minimum of interest (external or internal character) for obedience, is inherent in every right attitude towards the authorities." Max Weber, *Economy and Society I*, Belgrade 1976, p. 167.

organization, both the objectives of its operation and the values that explicitly or implicitly proclaim must be completely eliminated. All that remains as the differentiating characteristic of a political organization is precisely the use of coercion, i.e. the method of forcible treatment as a means of self-regulation. The inexorable logical sharpness that Weber uses to demystify the state is truly impressive.

The methodological approach that Weber in its capital work *Economy and Society* almost regularly applies is particularly significant here. Openly recognizing that the procedure of its analysis is retroactive, i.e. always starting from the modern forms of developing one phenomenon - in this case from modern forms of rule - and from the perspective of actuality examines the features of the studied subject in previous epochs, Weber basically operates modernity as a global causal excuse, i.e. shows the involvement in the whole of the civil society as responsible for the State of the studied phenomenon. Considering the state of civil society, Weber emphasizes the clarity with which its institutions of the army and the police and bureaucracy show that the country is actually a rational organization that has a monopoly of legitimate physical coercion. However, what is so clearly in the modern state, according to Weber, has always been a distinctive feature of all countries at all times – still with not merely so developed forms of the same character structure. And of course, this claim that the modern state distinguishes from its precursors only by the degree of realization of the same above described tendency, allows Weber to express his typology of political rule.

First of all, for the government to be realized at all, according to Weber, it must fulfill one precondition. He argues:<sup>2</sup> “...for every power over a large number of people, one (usually not always absolutely) apparatus of people (administrative apparatus) is needed, i.e. (under normal circumstances) reliable prospects for such actions of certain unconditionally obedient people who are focused solely on the implementation of the general demands of the government and its specific orders.” From this fulfilled precondition, Weber immediately turns to the classification of conditions that lead to different types of power. “The initiatives for the obedience of this administrative apparatus to the master (or masters) can lie simply in the habit of being purely affective, they can be hindered in material interests or be purely of a conceptual nature (value-national). These types of initiative to a large extent determine the type of government. Still neither custom nor personal interests, nor purely affective or purely value-based initiatives on which connectivity is based, could not constitute a reliable basis for any authority. In the normal case, there is another aspect along these: faith in legitimacy.”

### 3. THE DESIRE FOR LEGITIMACY

So Weber arrives at the key criterion for the division of power: every authority seeks to awaken faith in its “legitimacy” and tries with all its powers to maintain it. “But depending on the type of legitimacy that is being sought out, there are also basic differences between the type of obedience, the type of administrative apparatus designated to guarantee that obedience and the character of the power performance... Therefore, it is desirable to divide the types of authority according to the type of requirement for the legitimacy which is typi-

2 This and all of the following Weber statements were taken from: Max Weber, *Economy and Society I*, “Types of Power”, Belgrade, 1976, p. 167-238.

cal for them.” Weber distinguishes three types of legitimate authority, i.e. “the validity of their legitimacy may be primary one”:

1. The rational character: “it may be based on the belief in the legality of legally based orders and the rights of persons who are called upon to perform power on the basis of them.” This is the so-called legal power.

2. The traditional character: “it may be based on a common belief in the holiness of traditions that exist from time to time and on the belief in the legitimacy of persons who are called upon to perform authority.” This is the so-called traditional power.

3. The charismatic Character: “It may be based on the exceptional dedication to holiness or heroism, or the exemplary qualities of a person and the order that one has revealed or created.” This is the so-called charismatic power. It should be noted here that Weber assumes the term “charisma” from ancient Christian terminology, meaning “gift of grace”.

Furthermore, Weber undertakes, typical for him, minuscule classification that seeks to encompass all the existing diversity of relationships within the said types of power. By this specific procedure, which can be termed “down to the minimum amount of generality,” Weber actually succeeds in making a very suggestive assertion of the correctness of his starting points. One after another, the modalities of power relations based on a latent and, if necessary, easily activating presence of available force, i.e. from explicitly enumerated forms of governance it is easy to conceive and recognize realistic states of the dynamics of threat-obedience.

Like any handbook for realizing the reality in terms of the real motivational basis and purpose of political engagement, Weber leaves no dilemmas about the fundamental State predicament as a political organization: it is always a more or less massively rational enterprise, but the one based on an irrational drive of compulsion. The entire complexly rational construction (Weber uses the concept of “rational” in the strictly original meaning of “calculating” or “calculation”), which in a modern society of legal authorities with the establishment of an impersonal bureaucratic apparatus takes on grandiose scopes, is actually pervaded by one primordial irrational urge. What is of key importance to our topic is the fact pointing at the movement of the urge - which Weber named a decisive separation of the legalization of coercion as a distinctive feature of political organization and politics in general - through the greatest variety of historical and organizational forms. With this conclusion in mind, we will put a more detailed description of the above mentioned classification.

— Legal authority is based on the belief that the following interconnected representations are true:

1. Any right can be by contract or imposition rational – target-nationally or in a value-oriented way (or in both ways) – in terms of finding the requirement that it manages the members of an organized group, and regularly those in the sphere of power of the groups who enter certain social relationships that the order of that organized group has declared relevant (including territorial groups);

2. Every right is, by its very essence, a cosmos of abstract, under normal circumstances intentionally established rules, that the judiciary represents the application of these rules to

an individual case, while the administration represents rational taking care of the interests envisioned by the group's orders;

3. That the typical legal master, "the superior", personally in his orders and orders obeys the impersonal order in which he directs his actions (This also applies to that legal master who is not a "clerk", for example for the elected president of the state.)

4. That - as it is usually said - the person who obeys, does it only as a member of the group and only obeys "the law". (As a member of an association, a community, a church, and in a state: a citizen.)

5. According to the number 3, there is a notion that members of the group, by showing obedience to their master, do not submit to his personality but to the already mentioned impersonal orders, and that therefore they are obliged to obey only in the domain of the rationally limited jurisdiction given by these orders.

Within the segment on legal authority, it should be added that Weber considers that the purest form of this type of government is the one in which power is exercised through a bureaucratic administrative apparatus. Weber considers bureaucratic management as the most important property in the domain of managing modern civilization in general.

Thus he writes: "The development of modern forms of an organized group in all areas (state, church, army, party...) is absolutely identical to the development and constant expansion of bureaucratic administration: their emergence is, for example, a call from which a modern state developed in the West. " By skipping a detailed analysis of the bureaucracy, we indicate Weber's observation which seems particularly important for our topic. He writes: "But just as bureaucratization makes the leveling of the stock (and historically it can be proven to be a normal tendency), and vice versa, any social leveling promotes bureaucratization, which is in all areas mandatory shadow of progressive 'mass democracy'..."

— Traditional authority is the one whose legitimacy relies on the holiness of the ancient ("forever existing") orders and powers, and when it is believed in on the basis of that holiness. A master or a number of masters are determined according to traditional rules: others obey them for their own dignity that they enjoy according to tradition. The group in power is, in the simplest case, a primarily organized group that is based on a great respect as a result of common education. A person who governs is not a "superior" but a personal master; his administrative apparatus does not consist mainly of "clerks" but of personal "servants"; the "members" of the group are not subordinates or 1) "traditional comrades" or 2) "subjects". The attitudes of the administrative apparatus to the master are not determined by objective official duty, but by the personal devotion of the servant. What is more, there is no obedience to statutory provisions, but rather to a person who is called upon by tradition to be in charge or determined by a traditional master.

Depending on the position (or presence or absence of important authority) of the administrative apparatus, Weber distinguishes:

1. The patriarchal authority (the gerontocracy - the authority of the oldest members as the best connoisseurs of the tradition - and the patrimonial - the power is exercised on the basis of the absolute point and arbitrariness of the personal right of a ruler), i.e. administration in which there is no personal administrative apparatus of the master.

2. The class authority which implies the form of patrimonial authority where admin-

istrative apparatus attributes a certain power and appropriate economic prospects. Certain organized groups of persons who are privileged by the state on the basis of apportioned master's power, through compromise with the master, adopt political or administrative regulations, specific administrative orders or control measures.

— charismatic authority; The “charisma”, according to Weber, should be used to refer to the personality of a person being the basis for considering one to be exceptional and the reason for considering this person to be endowed with supernatural or superhuman, or at least specifically exceptional, not with every available power or qualities; they are believed to be goddesses or to be exemplary, and therefore such a person is treated as a leader. This feature was originally regarded as magically conditioned, whether it refers to prophets or persons who were considered to be wise men when it comes to treatment or rights, and even when it comes to hunters and war heroes. Of course, as far as the concept is concerned it is completely irrelevant how one would “objectively” evaluate the feature from any ethical, aesthetic or other point of view. It is only important how the people who are charismatically subordinated evaluate it - supporters.

#### 4. CONCLUSION

The organized group with power which is based on emotional form of association represents a charismatic community. The administrative apparatus of the charismatic master is not a “clergyman”, and it is the least professionally trained officialdom. There is no “placement” in service or “dismissal,” no “career” or “promotion”; there is only a reference to the inspiration of the leader, based on the charismatic qualification of the one in charge. There is no “hierarchy” but only the intervention of the leader when it turns out that the administrative apparatus is not sufficiently qualified in charismatic terms in general, or in some cases for a task. There are no “authorities” set up, but only “apostles” who are charismatically authorized as much as their power is given by their master, or on the basis of having their own charisma.

The next Weber's observation is especially useful for our topic: it is about, to say so, the revolutionary potential of the charismatic government. Namely, due to the fact that it represents something unusual, charismatic power is a sharp contrast to the rational one - especially bureaucratic - but also traditional power. Both are specific daily forms of government, while the real charismatic authority is in a specific sense their opposite. The bureaucratic power is specifically rational being related to the rules that can be discursively analyzed, while charismatic power is specifically irrational in that it is unfamiliar with any rules. Traditional government is linked to the preceding past, and thus it is oriented to the rules; the charismatic government breaks (within the limits of its reach) the past, and in that sense it is specifically revolutionary.<sup>3</sup>

Let us in the end mention the following, almost “charismatically” prophetic Weber's opinion: charisma is a great revolutionary force. Unlike the same revolutionary force (represented by) the “ratio” - which acts externally by changing living conditions and life problems, and thus indirectly, by changing attitudes toward them, or by intellectualizing - charisma

3 Weber adds in remarks: “It's hardly necessary to explain something to what has been said. All this holds true for a purely ‘plebiscitary’ charismatic ruler (Napoleon's ‘rule of genius’ that transformed the plebeians into kings and generals) and for the prophet or war hero.”

can be a change from inside, arising out of despair or enthusiasm. This change is a change of central attitudes and direction of actions with a completely new orientation towards all individual forms of life and towards the “world” in general.

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