

Max Weber's Conception of the State

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There is documentary and interpretive evidence to the effect that Weber intended to write a systematic treatise on the state. His sudden death in the summer of 1920 prevented him from realizing his plan. Instead of a finished product, he left behind only fragments and occasional writings (Weber 1958a) bearing, directly or indirectly, on the problem of the state. This article is based on a larger work of the author, in which he has attempted to reconstruct from these fragmentary writings the planned sociology of the state. The reconstruction has been undertaken in the belief that, contrary to conventional interpretations dwelling upon the "types of legitimate authority," Weber's political sociology, and current political reality as well, can only be adequately understood by focusing on the state as a structurally specific and historically unique organization of the rule of men over men.

Modern political sociology in general, and its Anglo-American variants in particular, projects a picture of politics in which there is no place for an all-encompassing political institution such as the state. The victorious "revolution in the behavioral sciences" rejected the term "state" itself and everything it implied as the remnants of an "outmoded" approach to politics. (Easton, 1953; Truman, 1955; Eulau, 1963). The term "state" lived on in Marxism, but the class of objects that it denoted was not identified exactly; it was used only as a catchword for the designation of the "political superstructure," which, in the interpretive paradigm of Marxism, is a set of ephemeral phenomena whose "real" organizing principles are to be found outside their own domain: in the "economic substructure," that is. Recent works by the so-called neo-Marxists have not gotten farther than attributing to the state a greater degree of "autonomy" than was proposed by Marx and Engels. (Miliband, 1969; Poulantzas, 1975; Jessop, 1982).

Theoretical weakness and conceptual laxity characterize even the studies in mainstream social science that, tinged with Marxism, want to "bring the state back in." The term is just thrown into scholarly pieces about "war making," the patterns of income distribution, corporatism in Europe, the American welfare system,

and many other topics that, in the intention of the authors, are to be treated from the aspect of their relationship to "the state" (Evans, Rueschemeyer, & Skocpol, 1985). There are even studies that set out to investigate the development of the state, without making a serious effort at defining the subject the development of which is to be investigated (Tilly, 1975).

This article has two goals: to clarify the concept of the state as a specific organization of political rule and thus to highlight the background that imparts modern politics its characteristic features. The noted political theorist, Michael Oakeshott, writes that a new and extensive vocabulary is needed to describe what he calls the "modern European state" (1975, pp. 319-320). But while Professor Oakeshott has cleared a great deal of the "conceptual muddle" writings about the state tend to get into, he has not gotten very far in suggesting a new vocabulary. This article will not only provide this vocabulary, but it will also show what emergent social relationships have called for it.

This author agrees with the "behaviorists" that collective terms like the state are empty words unless one can determine what corresponds to them in the empirical world. But he rejects their thesis that there is no such thing as a "state" in the sensible world of human affairs because there are only behavior patterns there. What about a certain pattern of behavior and the consciousness of the existence of this pattern, hence behavior having a definite pattern, what about this being "the state?"

This brings us directly to Max Weber. For Weber assigned to sociology the conscious realization of the fact that every social entity, be it a class, a status group, a religious, economic or political body, state or empire, capitalism or barter economy, can eventually be traced to human conduct as its ontological substance. In Weber's words, "concepts such as 'state,' 'association,' 'feudalism,' and the like generally indicate for sociology categories of certain kinds of joint human action; it is therefore the task of sociology to reduce these concepts to 'understandable' action, meaning without exception, the action of the participating individual" (Weber, 1981, p. 158).

But Weber did not stop here. One who searches in his *Economy and Society* (1968) for a direct application of his outlined program must be deeply disappointed. There is little mention in his substantive works of action and communication, of individual actors orienting their behavior to the expectation of others. The pages of *Economy and Society* depict status groups, classes, parties and other collective units of people confronting each other in an unceasing sequence of wars, conquest, subjugation and domination;

from the never-ceasing clashes between such groups emerge cities, kingdoms and empires, their continued existence secured by a mixture of brute force, unquestioned usages, and invented and rationalized doctrines.

Now, why did Weber do the opposite of what his “methodological individualism” would seem to suggest. Why this discrepancy, noted by some commentators (Andreski, 1964; Mommsen, 1974), between the program Weber assigned to sociology and its actual realization? In fact, there is no discrepancy here. The alleged contrast in Weber between his “action frame of reference” and the actual practice of structural-formal analysis is not a symptom of intellectual schizophrenia, but is a reflection of the very nature of social reality that thought tries to explore. Weber was fully aware that combined action of a plurality of individuals results in something *sui generis*, which cannot be reduced to the action of the one, not even of multiple ones. From the combination of “unit acts” there emerge ever more complicated structures, the complexity of which at one point reaches a degree where they appear as an objective, external bond standing over against the acting agents. The mode, therefore, in which the constellation of actions is constituted and sustained is more important than the “unit acts.” By virtue of coercion, legitimacy and objectified systems of meaning, particular actions are integrated into organized complexes, collective units. While embodied in the action of concrete individuals, these entities exist as more or less stable formations amid the transitory individual manifestations. Hence the possibility of structural analysis as Weber practiced it in *Economy and Society* (Winckelmann, 1966, p. 230).

Institutions as the Struggle for Power

The significance in this paradigm of the concept of the state as an objectified structure of political rule is (or should be) obvious. According to Weber, power and struggle are primordial components of social life; they are the very stuff out of which politics is composed (Weber, 1958b, pp. 78, 116; Weber, 1968, p. 55). Neither power nor struggle exists, however, in its abstract essentiality (Freund 1968). Embodied in concrete social actions they give rise to particular structures in which power is institutionalized and in the framework of which power is contested. There is thus more to politics than “struggle for power;” there are institutional structures which, although themselves but the resultants and the mode of organization

of social action, give concrete form and direction to political struggle.

Weber was also aware, more than anybody else, we believe, that like all social phenomena, political institutions are historically changing. An adequate understanding of the politics of any historical epoch (including the one we live in) presupposes then a knowledge of the specific institutional context in which the struggle for power, a phenomenon that cannot be eliminated from social life, has taken, or, is taking place. The bulk of Weber's sociology of domination is devoted to the analysis of these institutions (Roth, 1968; Winckelmann, 1964; Winckelmann, 1965). Because of his early death, however, exactly those components of his work remained unfinished that would have identified the institutional matrix of modern politics. That matrix he called "the state," which he conceived as a historically and structurally specific organization of the rule of men over men.

The purpose of a sociology of the state is, therefore, to identify these structural traits, to show how the specific structures developed in the course of history amid incessant struggles of people for the right to command others, and to make conceptually clear how a specific organization of political rule influences the exercise of power as well as the struggle for its appropriation and redistribution.

Modes of Conceptualization

There are, of course, several ways in which such a complex phenomenon as the state can be approached. The German historian Otto Hintze lists the following "forms of appearance" of the "modern state" (1962, p. 476):

- (a) the sovereign power-state in the framework of the European system of states;
- (b) The relatively closed commercial state based on the capitalist mode of production;
- (c) the liberal legal-constitutional state with its emphasis on individual rights and liberties;
- (d) the democratic nation-state.

In his review of a handful of recent studies in which the state is central, Stephen Krasner discerns four different conceptualizations of the state (1984):

- (a) the state as government, that is, as a set of personnel occupying decisional authority in the polity;
- (b) the state as an administrative apparatus and as an institutionalized legal order;
- (c) the state as ruling class;
- (d) the state as a normative order.

Weber's conceptualization of the state covers several of the above approaches, but it is not identical with any one of them. For Weber the sovereign power-state tends to be identical with the nation-state, which, regarding its internal structure, is constituted as a liberal-democratic state securing individual liberties and allowing the voluntaristic interplay of conflicting interests. In the process of such institutionally secured competition the personnel of highest decisional authority is selected. This personnel, the government, has at its disposal an administrative apparatus that functions according to set rules. All powers of command in the political community are in the form of official jurisdictions created and regulated by a normative order. Consequently, the ruling class is more or less identical with the group of persons who are incumbent in offices in which powers of command are vested.

The above is not, however, a definition but only a summary paraphrase of the different aspects that are integrated in Weber's conception of the state. The real significance of his approach is that it aims at comprehending structural traits that cut across "forms of appearance" and even substantive domains because they refer to the specific modes in which social actions are interrelated. His approach also integrates and transcends the purely "historical" in the phenomena under investigation. For Weber, the historical specificity of the state consists in the specificity of its organization. That is to say, what makes the state historically unique is not its existence in a limited period of time, but the specific mode in which political rule is organized.

A Preliminary Definition

At the end of Chapter One of *Economy and Society* (1968, p. 56) Weber identifies the state with the following characteristics:

- (a) the claim to the monopoly of the legitimate use of physical force within a given territory;

- (b) centralization of the material and the ideal means of rule;
- (c) planned distribution of the powers of command among various "organs" (a rational constitution);
- (d) an administrative and legal order which claim binding authority not only over the members of the state, the citizens, but to a large extent over all actions taking place within its area of jurisdiction;
- (e) subjection to change of this order through "legislation" (*Satzung*);
- (f) organized activities oriented to the enforcement and realization of this order (an administrative staff);
- (g) regulation of the competition for political offices and selection of the bearers of rulership according to established rules.

These historically dominant characteristics can be expressed, and actually are expressed by Weber, in more abstract terms; in those "basic sociological terms," namely, by which Weber in Part One of *Economy and Society* attempts to conceptualize the objectively possible structural forms of complexes of social action. The purpose of increased abstraction is to bring out the pure organizational traits of the state as a specific structure of political rule.

Thus by applying the concept *Anstalt*, a quasi-corporative compulsory institution, to the state, Weber means to emphasize the impersonality of political rule, the character of its order (established rules), the mode of the validity of this order (compulsory), the rational distribution of the powers of command (jurisdictions), hence their organization as a system of offices. The term *Betrieb* refers to the exercise of the powers of command as a continuous, persistent sphere of activity (*Geschaeft*) adapted to day-to-day needs (routinized). It implies, then, the existence of a bureaucratic administrative apparatus. Linking the static concept of *Anstalt* with the dynamic concept of *Betrieb*—*Anstaltsbetrieb* or *Betriebsanstalt*—suggests that as a state political rule is a continuous activity of a plurality of men, specified by set rules, and exercising the powers of command not on the basis of personal authority and according to their own whim, but on the basis of impersonal norms established by enactment. In other words, the capacity of an individual to issue commands binding on others does not have its source in his person, but is derived from a normatively defined set of impersonal "competences." As a state, political power is depersonalized and rule bound. The exercise of power is an office. To acquire the incumbency of an office (or offices) is what political struggle in the state is about.

Those, therefore, for whom the notion of the state as a set of formal arrangements is of no significance because, as they say, “no causal relationship exists between the structure of the governmental mechanism and the actual location of power” (Loewenstein, 1957, p. 26) are patently wrong. It follows analytically from what was said above and it can also be ascertained empirically that in the modern state there is a strong correlation between the normatively assigned and actual possession of power. While the realization of one’s will despite the resistance of the other, which is Weber’s definition of power, can take place on different grounds and in different ways, that kind of power which works with authoritative command supported by the threat or application of physical violence is inseparably linked in the modern state to a legitimate office created by the normative-legal order of the political community. That this order itself is the outcome of past struggles between different forces in the community is another matter. Once established, the system of normatively anchored powers acquires a life of its own and limits, even determines, the forms and the resolution of conflicts in the political community (Krasner, 1984, p. 225; Skocpol, 1985, p. 21).

Historical Uniqueness and Structural Specificity

More will be said below how (and how not) the structural form of the political community designated as “state” constrains and conditions the struggle for and the exercise of political power. Before we get there we have to gain a clearer picture of what the state is than is provided by the above outline of its chief characteristics. The term “state” will here be used without any qualifier, for the reason that, as was said above, what it signifies is a historically unique and structurally specific organization of political rule. The past has known a great variety of political formations: fortress kingdom, aristocratic polis, citizen polis, bureaucratic city monarchy, liturgy monarchy, bureaucratic empire, warrior communism, sacral kingship, urban signoria, *Staendestaat*, etc. (Weber, 1976a). All these are historical instances of political organization, that is to say, institutionalized forms of the regulation of the interrelation of the inhabitants of a given territory by the threat or application of physical force (Weber, 1968, p. 901). But none of them is a “state.”

“For our purposes it remains expedient to use the term ‘state’ in a narrower way,” Weber writes (1968, p. 1142). What he means is not

just that for the purposes of a particular mode of analysis it is appropriate to restrict the use of a specific concept for specific phenomena. This would only mean that in an alternative theoretical framework it would be justifiable to use the term in its indiscriminate meaning. But concepts in general, and concepts designating political reality in particular, are not neutral terms. "All political concepts, images, and terms," writes Carl Schmitt, "have a polemical meaning. They are focused on a specific conflict and are bound to a specific situation" (1976, p. 30).

The "state" is markedly a time- and condition-bound concept. In fact, the singularity and historical novelty of the form of political organization we are dealing with is implied by the historical novelty of the very term with which it came to be signified. There is considerable controversy among specialists as to the origins of the term "state" (Dowdal, 1923; Kern, 1949; Meyer, 1950; Mager, 1968; Skalweit, 1975; Mansfield, 1983). To us the most plausible explanation is that the "state" is derived from the Latin *status*, a term which in Roman Antiquity denoted a person's legal position. During the final phases of the middle Ages, *status* had acquired a broader meaning by its transference from a person to a legally organized body of men. (This also had precedence in Roman usage, as Ulpian's expression *status rei Romanae* indicates.) In late medieval and early modern political usage *status* denoted the form of government or constitution. Thus Thomas Aquinas, in connection with the Aristoteleian concepts of aristocracy, oligarchy, and democracy, spoke of *status optimatum*, *status paucorum*, and *status popularis*. Likewise Jean Bodin distinguished between *etat populaire* and *etat royal*, and Hobbes wrote of *status monarchicus*, *status democraticus*, and *status mixus*. But for the designation of the body politic as such, Bodin used *res publica* and Hobbes used *civitas*. The first traces of the modern usage of the term appeared during the Italian renaissance in the wake of the development of the institution of *podesta*. The *podesta* was a political entrepreneur who, in possession of a power-apparatus, sold his services to a city or a prince. This apparatus and its proper use in the maintenance or acquisition of political rule came to be designated by the word *stato*, most prominently in Machiavelli's writings. It was, however, only in the political parlance of the nineteenth century that "state" acquired the meaning of the supreme political authority within a precisely defined territory. This meaning grew out of a pertinent political reality characterized by the sovereignty of the ruler, the territorial validity of his rule, the existence of permanent military and administrative bodies, the separation of the private sphere and the

public sphere, the opposition of political power, having either the form of princely rule or that of a unitary public power separate from both the ruler and the ruled, to “civil society” (Riedel 1975).

Approximations to some of these conditions or rudiments of the individual traits characteristic of the state may be found in historically earlier political formations. But, Weber says, “no matter how many beginnings may be found in the past, in its full development all this is specifically modern” (Weber, 1958c, p. 295). Applying the term “state” generically presents, then, the danger that either the characteristics of the current form of political rule are carried over into other historical epochs, or, to avoid this fallacy, the analysis remains on such a level of generality that concrete differences will not count. The result is the the same in both cases: the specific, inherent reality of phenomena under investigation remain hidden.

This fallacy was especially characteristic of the “general theories of the state” mass-produced in Weber’s times in Germany (and France, one should add) as well as of the “origin of the state” theories (Beyer 1931). While Weber moved with ease in the conceptual universe of *Staatslehre*, he opposed its claims that its concepts had timeless and universal validity. He held that what the “theories of the state” referred to was a unique historical phenomenon. For this same reason, Weber attributed little significance to contemporary theories of the “origins of the state.” What Engels, Oppenheimer and countless others saw as the origins of the state, Weber understood as the emergence of political rule as a separate structure in the undifferentiated conditions of a primitive community (1968, pp. 901–902). According to Weber the state developed out of patrimonial and feudal structures of domination—both historically advanced and differentiated forms of the rule of men over men.

The way, however, Weber understands the historic positional value of the state is not that of historiography. Weber was well aware of what a philosopher termed the “history locked in the object” (Adorno, 1983, p. 295), but he delivered this history in a way he held to be specifically sociological. From a sociological viewpoint, the historical specificity of social phenomena, as sets of social actions, consists in the specific structural forms that those actions take. On the other hand, specific structures, as particular modes of the organization of social actions, can develop only in the medium of history, the mode of Being of human reality (Kurt H. Wolff, 1950, p. 16). The sociologically relevant history, however, is not progression in time. Time is only the neutral medium in which the empirical manifoldness of social life develops. Weber’s grandiose disregard for “dates,” his practice of specifying time and place by vague ex-

pressions like “at the beginning of English constitutional history” (1968, p. 724) and particularly his practice of relating to each other events centuries apart, are not symptoms of his lack of historical sense, but stem from his sociological perspective. From “actual history” Weber abstracts in such a way that only those aspects of it are noted and drawn into analysis that contribute to the emergence and consolidation of specific contents and structural forms of social action.

The Emergence of the State

Given the specific structural characteristics of the state, its formation can be understood as involving:

- (1) monopolization of the use of legitimate force,
 - (a) expropriation of the autonomous bearers of political rule,
 - (b) appropriation of the material means of power,
 - (c) its concentration in the hands of a “supreme ruler;”
- (2) *Vergesellschaftung* of the exercise of political rule, that is,
 - (a) the creation of a body of officials,
 - (b) whose continuous activities,
 - (c) regulated by set rules,
 - (d) serve as transmitters of the will of the supreme ruler;
- (3) fusion of autonomous power-blocks into an all-encompassing compulsory association with
 - (a) a territorial basis,
 - (b) a unitary legal order,
 - (c) a unitary public power (*Staatsgewalt*), and
 - (d) a system of relationships of direct obedience to and protection by the public power;
- (4) the transfer of the fullness of powers from the person of the ruler to an impersonal institution, which,
 - (a) as the embodiment of the **will** of the politically united people (*Volk*, nation),
 - (b) expressed by the mediation of representative bodies,
 - (c) becomes the bearer and trustee of all prerogatives of command and physical coercion.

This scheme serves only heuristic and expository purposes. It identifies, in the form of ideal-typical representation, certain general tendencies in the development of the organization of political rule

that led to the formation of the state. It does not suggest “historical laws” in the sense of Hegelian-Marxian philosophy: concrete phenomena are not their emanations, nor do they prevail by necessity against “historical accidents” (Weber, 1949, pp. 102–103). The formation of a structure of political rule we call “the state” was a sequence of “accidents” neither guaranteed nor guided by the Absolute Spirit or by Objective History. The lines of development ideal-typically imputed to the empirical historical process are not even components of an evolutionary scheme suggesting a standard sequence of developments that every political community has to pass through. Political entities constituted as quasi-corporative compulsory associations (*Anstalten*) with continuous operation and with the monopoly of legitimate violence, viz., states, are the product of a wholly individual historical process of what Weber calls the Occidental world (1976b, p. 16–17).

Weber underscores a number of features in European constitutional history which were “typically relevant” in this respect:

- (a) the settlement of barbarian tribes with a characteristic political organization (war-lords, warrior-kingship, military retinue, popular assemblies);
- (b) the nature of Occidental feudalism (“free feudalism” based on contract; fealty and fief combined), which resulted in the appropriation of the powers of command by “officials” and enfeoffed lords;
- (c) the evolving dualism of the Estates and the prince;
- (d) the nature of Occidental Christianity (devoid of magic);
- (e) the quasi-corporative, institutional (*anstaltliche*) organization and cosmopolitan character of the Catholic Church;
- (f) the conflict between *Imperium* and *Sacerdotium*;
- (g) the nature of the Occidental city as a “sworn fraternity” and an autonomous community (*civitates superiores non recognescentes*);
- (h) the largely uninhibited development of capitalistic interests;
- (i) the rational character of Canon law and Roman law.

Unlike its Oriental forms, patrimonialism in the Occident meant the basis of the power of the many great and petty lords, and not the unconditional supremacy of one central ruler. The latter also derived his power from his status as a patrimonial lord, but for this same reason he was confronted by other patrimonial “lords in their own right” or attached to him by the ties of vassalage. The ruler’s power was thus restricted from the very beginning. For all the efforts to

restore the unity of the Occidental world in the form of an imperial overlordship, a multi-centered political body came into being, the constituent parts of which were set on a course of independent development. The rulers of the individual territorial-political units increasingly asserted their independence from the imperial overlord and related to each other as equals. The ensuing struggles between the polities accelerated the internal centralization of power and strengthened the position of the territorial rulers, who, by the beginning of the modern era, emerged as national kings. Even as national kings, however, the rulers everywhere were confronted by the Estates. Their *modus vivendi* was institutionalized in the form of a *Staendestaat*: a system of mutual constraints between the ruler and the *meliores et maiores* constituted as corporative associations.

These unique features of European constitutional development set the stage for the decisive drama of "state-building:" the struggle for power between the prince and the estates, and between the rising territorial political bodies. In general, Weber interprets the development of the structures of political domination as a dynamic process the substance of which is the clashes between competing powers. The history of politics is for Weber basically this: on the one hand, the institutionalization of the powers of command (typical organizational forms); on the other hand, the emergence of power-blocs and the competition of the powerful either (a) to transform their socially pre-eminent position into political prerogatives, or (b) to acquire political prerogatives in addition to their social ones, or (c) to acquire the incumbency of political offices (typical conflicts). "Typical organizational forms" and "typical conflicts" are, however, only two aspects of one and the same process: it is in the medium of conflicts between the powerful, in their struggle about the allocation, appropriation, expropriation, and redistribution of power that the institutions develop. The latter are but the resultants and modes of organization of particular conflicts between political actors.

The "heroic age" of the development of the modern state is represented by the ruler's drive to monopolize the material and ideal means of rulership and to assert the royal supremacy vis-a-vis the Estates. In these struggles the ruler was able to draw on the many prerogatives and resources pertaining exclusively to royal lordship, such as

- (a) his protective powers (royal *mundeburdium*, king's peace, ban on feuds and private armies);
- (b) his powers as a military leader (*Heerban*);
- (c) his status as a feudal overlord (*dominus ligius ante omnes*);

- (d) his resources as the greatest landlord (the royal domain);
- (e) the *regalia* (power of taxation, tolls, and various monopolies).

The struggle of the ruler against the Estates resulted everywhere, Weber claims, in the resurgence of patrimonialism: a princely bureaucracy and a standing army, supported by compulsory and systematic taxation, were created, which were destined to dissolve the *Ständestaat* (1968, p. 1087). The king came to be regarded as embodying in his person the whole realm, in whose hands was concentrated the fullness of powers; he, therefore, did not tolerate powers not derived from his sovereign will. "Sovereignty" thus came to mean not just a particular form or quality of political authority, but political authority itself, "in its own essential substance" (Gierke, 1934, pp. 41-42).

This political authority resides in the king as the famous, though fictitious, slogan "l'Etat, c'est moi" makes clear. It expresses, however, not simply the absolutistic claims of the ruler, which is implied already by the very concept of sovereignty, but the "representative" character of the latter; the idea, namely, that in his person the king, as the supreme earthly authority, absorbs the whole body politic. In the—assuredly real—words of Louis XIV: "The king represents the nation as a whole, and no individual represents another individual against the king. Consequently, all power, all authority resides in the king . . . The nation is not embodied in France: it resides in its entirety in the person of the king" (Jellinek, 1905, p. 658).

Subsequent developments concern the decoupling of *summum imperium* from the person of the ruler and its attachment to the body politic as such, conceived as an impersonal entity of corporative nature. This qualitative leap in the realm of ideas was prepared by a number of real life developments, among others, by the fact that the princely bureaucracy had outgrown its creator and had acquired a life of its own. The administrative machinery and the standing army, which remained as stable formations amid the coming and going of particular rulers, became the visible embodiments of the unity of the realm. The idea of the transpersonality of the political association emerged, finding its ultimate expression in the juristic concept of the personality of the state. It demolished the representative-patrimonial conception of rulership by separating the sovereignty of the state from the sovereignty of the ruler. The ruler and all physical persons or groups of persons came to be regarded as mandatories, "organs," of the state, the latter being the subject and the bearer of all prerogatives of rulership.

The State: A Quasi-Corporate, Compulsory Institution

Neither the publicistic theories of the Middle Ages nor the natural law theories of the seventeenth and eighteenth centuries conceived the political commonwealth in terms of an abstract, legal person (Gierke, 1958; Gierke, 1934; Haefelin, 1959, pp. 24–66). The conception of the unity of the body politic in the natural law theories is based on the medieval doctrine of contract and aims either at attacking princely sovereignty or at legitimizing it. In neither case is the political association conceived as an impersonal entity separated from and posited above all its members. For Althusius, Grotius, and Locke, the *civitas* is identical with the community of citizens, the *populus*. For Hobbes, the unity of the *civitas* is represented by the person of the ruler (in monarchies) or by that of the rulers (in aristocracies and democracies) (Quaritsch, 1970, p. 477; Gierke, 1934, p. 137).

The State as a Legal Person

Only in nineteenth century German *Staatslehre* is the conception of the state as a legal personality, and hence as the subject of the prerogatives of rulership, elaborated in all its details, becoming the foundation—pro or contra—of theoretical discussions of the state and politics in Germany, France, and Italy (Haefelin, 1959, p. 66).

The concrete political motives underlying these juristic theories are most varied; they stemmed as much from legitimist-monarchical convictions as from liberal-democratic ideologies (Quaritsch, 1970, p. 487; Emerson, 1928, p. 51). Still, a conception that attributed a separate, juristic personality to the *Herrschaftsverband* as such, and thus asserted the separateness of the ruler and the state, not only undermined the monarchical conception of the absorptive-representative character of the ruler, but implied the subjection to legal-normative legitimation and regulation of the exercise of the powers of rulership (Thoma, 1926, p. 749; H. J. Wolff, 1933, vol. 1, pp. 2–3). The state thus came to be conceived not just as a system of power relationships but as a complex of empowerments, of duties and rights, in short, as a system of legal relations. The unity of the *Herrschaftsverband* is given both by its organization and by its normative embodiment, the legal order.

The abstract concept of the state as a legal personality may cover the most varied institutional arrangements (*Regierungstypen*;

systems of government). It is equally valid for a constitutional monarchy and a republic. Common to both is impersonal character of the exercise of political rule given by the distinctiveness and unity of public power. There are, however, marked differences between the two *Staatstypen* as to what component of the political community is elevated to the rank of a distinct legal personality embodying the interdependency and integration of concrete institutions.

The principal difference concerns the relation of the state and the nation (*nation, Volk*). In French legal theory, influenced by the republicanism of Rousseau, the state is the juristically personified "people," the legal form of the "nation" as a politically and mentally united plurality of individuals. "The powers of the state belong to the nation," wrote the famous French jurist, Carre de Malberg (1920, p. 13). In the equally striking words of Esmein: "The state is the legal personification of the nation; it is the subject and the basis of public authority" (1927, p. 1).

In the German *Staatslehre* of the nineteenth century, corresponding to constitutional reality, the *Volk* is just an element, an "organ" among other "organs," of the state. As mere organs, neither the *Volk* nor the ruler is sovereign. Sovereignty belongs to the state as such. The state is the holder of all sovereign powers, it is a *Herrschaftsverband*, the organizational embodiment and unification of the capacities of rulership. It is this organization which is personified as an ideal unity, and not the *Volk* or the ruler (H. J. Wolff, 1933, vol. 1, p. 435).

Weber's conception of the state as principally a *Machtapparat*, an apparatus of power, is rooted in this perspective. It was not by chance that from the vast conceptual armory of the legally oriented *Staatslehre* Weber picked the term *Anstalt* and, integrating it into his system of sociological terms (*soziologische Kategorienlehre*), applied it for the designation of the structural form of the state. The use of *Anstalt* (a quasi-corporative, compulsory institution) rather than *Koerperschaft* (corporation), is intended to emphasize that the state is not the embodiment of the united will of the people, but an instrument of power, of which the people is more the object than the subject (Weber, 1968, p. 645).

A review of the meanings in which nineteenth-century jurisprudence used the terms *Anstalt* and corporation will make the above distinction more precise (H. J. Wolff, 1933, vol. 1, pp. 1-87). Where an association of persons is to be endowed with juristic personality, it can be constructed in two possible ways: as a *Koerperschaft* and as an *Anstalt*. Common to both is the hypostatization of the abstract unity of the association, the fact, namely,

that “a perceptively not experienceable unity of wills is transformed into a person transcending the individual members” (Gierke, 1954, p. 968). The result is a separation of the legal sphere of the members as individuals from the legal sphere of the association. The legal relations of the latter do not affect the individual members but are imputed to the separately constituted associational unit.

The differences between *Anstalt* and *Koerperschaft* concern the criteria of associational membership as well as the source of associational will. As a corporation (*Koerperschaft*) the body of members is constituted as a fixed group of persons (Weber, 1968, p. 707). These persons, who acquire the status of membership according to fixed rules, are as a whole the source and “carriers” of associational will, the administration of which is carried on by virtue of their mandate.

By contrast, the *Anstalt* has no organized body of members but only “organs” by which it is represented and which operate on behalf of a group of people determined according to certain objective criteria or according to the discretion of the organs (Weber, 1968, pp. 707–708). These people are not the “carriers” of the juristic person, but are the passive object (the *Destinaere*) of the activity of its organs. They may have some influence on the management of the affairs of the *Anstalt*, but this influence is not founded normatively.

According to Gierke, the difference between *Anstalt* and *Koerperschaft* stems from the dualism of fellowship (*Genossenschaft*) and lordship (*Herrschaft*) (1954, pp. 958–971). To the former corresponds the concept of *Koerperschaft*, to the latter that of *Anstalt*. In a *Koerperschaft* it is the empirically existing unity of the members that is transformed into an imaginary unity and constituted as a person. In an *Anstalt* it is the empirical lord and his will that are transformed into a legal person. The corporation is then a fellowship, the legal form of the associated wills of the members, while the *Anstalt* is a *Herrschaftsverband*, the legal-organizational form of the exercise of some kind of rulership.

When Weber adopted the term *Anstalt* and integrated it into his sociology, he stripped it of its legal-technical meanings, but retained its essential characteristic as a concept expressing the very principle of political domination: organized force confronting individuals, the “compulsory members of the association,” as if from the outside. As an *Anstalt*, the state is considered not as the embodiment of the unified will of its constituent parts, but as a specific organization of the control and administration of that will, however generated. The functional and organizational aspects and not the substance or the goals of political power step thus into the foreground. The principal

actors in this perspective are not the totality of the members of the political community, but the office-holders, "the rulers and their staffs." It is in their normatively regulated acts that the existence of a political association, as a cause and effect complex, can be experienced directly.

The Monopoly of Legitimate Physical Violence

The fusion of all prerogatives of command and physical coercion in a "unitary public power" and the formation of a relationship of direct obedience to and protection by the public power, have created a basis for political power that contrasts sharply with conditions that prevailed in Europe up to the Age of Absolutism. Nowhere is this contrast sharper than with respect to the conditions and organization of violence as the specific means of political domination. An association that monopolizes legitimate physical force and maintains this monopoly in a definite area of the earth's surface has not always been here, but is a late product of history.

The political bodies of the Occidental Middle Ages were so constituted that none of their constituent parts had the right, not to mention the capacity, to issue commands binding on all members, and none of them had the exclusive right to back up commands by physical force. The right to violence was diffused all over the political association, so that, as Brunner puts it, "every member owned part of the executive power" (1965, p. 55). Not only was there no monopoly of force by the prince, but he who by status qualifications was denied the right to bear arms, was excluded from the political association. The latter was not a group of persons subject to an order sustained by the force-monopoly of an "impersonal organization" (*Anstalt*), but was an "association of persons" exercising rulership as a personal right, including the right to violence (Weber, 1968, pp. 643, 670, 712, 843).

By singling out the monopoly of legitimate violence as the chief characteristic of the state, Weber clearly separates the latter from the political associations that historically preceded it. But that same characteristic sets the state apart from all other concurrently existing associations. The state, Weber says, differs from all other associations with respect to the drastic nature of its means of ultimate control, viz. physical violence. The state is today the only association that successfully claims the right to apply physical force in the maintenance of its order (Weber, 1968, pp. 54-56, 904; Weber,

1958b, p. 78; Weber, 1958d, p. 334). Other associations may apply physical force only to the extent permitted, more precisely, prescribed by the state. No individual has this right on his own. He can legitimately resort to violence only in his capacity as a representative, an "organ," of the state.

The monopolization of violence by the coercive apparatus of the state has been accompanied, then, by the spread of pacification, i.e., the gradual separation of those aspects of the relations between men that are based on force, from the rest of human relations (Weber, 1981, p. 173). "When a monopoly of force is formed," writes Norbert Elias, "pacified social spaces are created which are normally free from acts of violence" (1982, p. 236). The relations between men acquire that pacifistic-moralistic character that is considered the very essence of social living. But this "radical moralization" of the communal life is only possible because the threat of physical force, as the ultimate guarantor of the order of the community, has been "confined to barracks" and from "this storehouse it breaks out only in extreme cases" (Elias, 1982, p. 238). Violence is banned, taken out, so to speak, from human relations, not in order to get rid of it forever, but to transfer it into a separate sphere. Force is not eliminated from society, but is deposited and stored in a separate domain of its own, from which it might and does spread out into the whole community.

As an association that has the monopoly of force, the state is the supreme authority within a definite territorial area. Weber is rather equivocal on this point, claiming that "the assumption that a state 'exists' only if the coercive means of the political community are superior to all other communities, is not sociological" (1968, p. 316). He refers, among other things, to ecclesiastical law, which is valid independently of the state and can even come to conflict with state-law, as happened, for example, in Bismarck's Germany.

To put Weber's dictum concerning the supremacy of the state's power into proper perspective we have to recall his definition of law as a system of norms for the enforcement of which some kind of coercive apparatus is available. Not all law is state-law, but all those norms that are enforced by some agency are "law." Now since the exercise of physical coercion has become the monopoly of the political community, the enforcement by any other association of its own autonomously created norms is reduced to "psychological coercion" in the broadest sense of the term. While this kind of coercion, for instance, ostracism, can be as effective as direct physical coercion, it has limits in two important respects: it can be directed only against the "associational members," and it does not include any kind of punishment. With respect to the former: if the

member quits the association, it loses its jurisdiction over him. With respect to the latter: the breach of associational norms is a “crime” only if it is stipulated by state-law, and can, accordingly, be punished as such only by the state. Any other association than the state has, then, only limited jurisdiction over an always precisely delimited plurality of individuals (Weber, 1968, pp. 695, 699, 904). The validity of associational norms is based, so to speak, on the principle of personality, while the validity of state-law is based on the principle of territoriality. Concerning the difference in the type of coercion: an association has *Disziplinaergewalt*, disciplinary power; the state has *Herrschergewalt*, in principle unconditional and irresistible power (Jellinek 1905, p. 415).

According to Jellinek, the character of state-power as *Herrschen* is the criterion that distinguishes the state from any other association. To Jellinek’s concept of *Herrschergewalt* corresponds Weber’s force-monopoly of the state. It is because the state has arrogated to itself the right to physical coercion that it is an “irresistible power” able to enforce its norms unconditionally. It does not have to invoke the power of other associations, but is able to generate by itself the necessary powers and set them in motion by its own autonomous will. The concept of sovereignty expresses basically this: negatively, the opposition of the state-power to the power of other associations; positively, the autonomous and autocephalous character of the state. The power of the state is a *General- und Blankovollmacht*, a generalized and systematic potential to create the ever necessary means and competence to the enforcement of its rules (Krueger, 1964, p. 829).

Political Rule and Legal Norms

The monopoly of physical violence is the defining attribute of the state. It is, however, not the only attribute. In fact, the monopoly of physical violence makes sense only if it is considered as a component of a particular constellation of characteristics that are constitutive for the state. “Territory” is one of these additional characteristics and is closely related to the monopoly of force. That is to say, the state’s monopoly of force is valid only within the confines of a definite territorial area. This territorial area is the *Staatsgebiet*, a precisely defined space within which the state is authorized to perform coercive acts (Kelsen, 1961, p. 46). In this respect the sovereignty of the state means the sovereignty of the state-power as

the supreme and exclusive territorial ordering power (Heller, 1963, pp. 244-246).

To be an "ordering power" the state needs be more than just a monopoly of force. Given the nature of action, as conduct oriented to a meaning, political rule implies the imposition of an order (*Ordnung*) and specific guarantees of its validity as an actual object of action-orientation. Duration and effectiveness of power can only be secured through the creation of such objectified system of meanings, to which the power-holders normally orient their actions and in the name of which they demand obedience from the power-addressees (Weber, 1968, pp. 56, 652, 904; Heller, 1931, p. 304).

The peculiar nature of such an objectified system of meanings as a "rational legal order" and the structural form of the political community designated as "state" are most intimately interrelated (Weber, 1968 pp. 655, 809, 846, 957). Modern law is "rational" in the sense that it is planned and is created intentionally, and is therefore determinate in its meaning, calculable in its impact and infinite in its applicability. It thus makes possible the "most precise and practical guidance and regulation of political activity, the least fallible weighing and balancing of the behavior which constitutes and activates political power" (Heller, 1931, p. 304). By virtue of its technical attributes law lends persistence and continuity in time to the "evanescent and ever-changing manifestations of power" (Heller, 1931, p. 304) and transforms the empirical constellation of powers into a normatively structured whole, into a hypothetically gapless system. The legal order contains authoritative pronouncements as to the residence and incidence of political power. It determines in a normative, hence generally binding, form the organs of the political community, the mode of their creation, their mutual relationship, the circle of their competence, as well as the status of the individual in his relation to the political community (Weber, 1968, pp. 642, 644, 652; Jelinek, 1904, p. 491; Loewenstein, 1957, p. 127; Wheare, 1956, pp. 46-75).

This normative plan of dominancy relations is the legal constitution as distinguished from the factual and empirically ascertainable distribution of power in a community (Loewenstein, 1961). Constitution in the latter sense, as a characteristic pattern of subordination, coordination, and superordination of people in relation to each other, obtains for every political community. But constitution in the sense of a normative, ideal, planned, and systematic ordering of the powers of command and of the conditions of obedience is peculiar to the modern state as a quasi-corporative, compulsory association.

The Separation of the Private Sphere and the Public Sphere

The idea that the political community can be created intentionally, that it can be organized as a unitary system of precisely defined competences, was necessarily remote from the nature of patrimonial and feudal structures of domination. Political rule was segmented into a multitude of overlapping powers appropriated by various individuals by virtue of special privileges. It was in the juxtaposition and in the mutual limitation of one holder of privileges with the power of another one that the political community was constituted. This rigid structure of “acquired rights” was not amenable to abstract regulation (Weber, 1968, pp. 1040, 1099). Accordingly, throughout the Middle Ages *constitutio* was used either in the sense of Aristotle’s *politeia* (“a way of life” of the polis), or as denoting, on the model of Ulpian’s definition, certain imperial enactments, such as the two “constitutions” of Frederick II, concerning the rights of the spiritual and secular princes, or the *Constitutio* of Louis the Bavarian asserting the independence from the Papal Curia of the election of the emperor (Meisner, 1962).

The modern connotation of the term, referring to a systematic, comprehensive plan of the total structure of the body politic, emerged in the wake of the formation of power-centers strong enough to overcome the centrifugal tendencies of particularistic powers and to draw these powers into the field of the center’s autonomous operation. As the absolutist prince absorbed in his person all powers of rulership and regarded every instance of its exercise as emanating from his own sovereign will, the body politic came increasingly to be viewed as an objective, calculated, and willed political entity.

On the other hand, in the wake of the concentration of power in the hands of the absolutist prince and of its bureaucracy, political authority, as Habermas puts it, “consolidated into a concrete opposition for those who were merely subject to it” (Habermas, 1983, p. 32). The latter became “private individuals,” excluded from public authority and constituting a politically neutral population, the *publikum*, subject to the supervision and care of the bureaucratic political authority (Kern, 1949, p. 54). The “civil society,” which since antiquity had been conceived as including both the community of citizens (*polis, civitas*) and the political constitution, the “common wealth” (*koinon, res publica*), in other words, as being a politically constituted society (*status civilis sive politicus*), fell apart into its constituent components. In contrast to the *status politicus*, manifested in the continuous activities of permanent administrative

bodies serving public purposes, stands now the *status civilis*, the realm of "private affairs," of concerns and activities, that is, which are not connected directly with the exercise of political authority (Riedel, 1975, pp. 746-747).

The evolving dualism of the private sphere and the political-public sphere has given rise to the idea that political rule cannot be ascribed to the individual power-holders as pertaining to their persons, but must be ascribed to the political community or to the institution as such. The individual power-holder, even if he is in the highest position, is thus no longer identical with the man who possesses authority in his own right. The right to exercise the powers of command is detached from the person and is incorporated into the political association, conceived as an impersonal entity of corporative nature, an *Anstalt*. The latter is the bearer of all sovereign prerogatives, the bearer and trustee of "office power," and the acting individuals are only its officials. Whoever holds power holds it as a trustee of the impersonal and compulsory association, and wields the powers of command on behalf of this association, on behalf of the state (Weber, 1958c., p. 295; Weber, 1958, p. 670). The official is not the personal servant of a ruler, as he was under feudal and patrimonial authority, but a servant of the state, or of the public, a "public servant," whose activities are devoted to impersonal and functional purposes. This position of the official finds expression in that his activities are in the nature of a "duty," of a "specific fealty" to the purpose of the office (Weber, 1968, p. 959).

Political Rule as an Office

The term *officium*, signifying the legal and factual separation of the private sphere from the public sphere, the separation of private rights from official duties, is of Roman origin, bequeathed to modern public law through the mediation of medieval Canon Law. In the usage of Roman lawyers (Berger, 1953), *officium* referred to specific moral duties originating, for example, in family relationships or friendship (*officium amicitiae*); it also referred to the duties connected with the defense of another person's interests (*officium tutoris*, *officium curatoris*). In public law, *officium* denoted the duties of persons employed in public service as well as the office of a magistrate together with its personnel. The term was also applied to provincial offices and officials, and in particular to provincial governors.

The Romanist conception of "office" as a set of impersonal duties and obligations lived on in the canonical institute known as an ecclesiastical or sacred office (Heintschel, 1956). Although, as Heintschel writes, it has never been defined precisely and has had various connotations at different times of history, the concept of an ecclesiastical office has indicated, after the end of the charismatic epoch of the early Church, a clear separation of the duty of carrying out Christ's commission of leading mankind to salvation from the personality of those who have taken this task on themselves (1956, p. 57).

According to Weber, it was here that the legal construction of organizations had its point of departure (1968, p. 829). "For the decisive fact is the separation of charisma from the person and its linkage with the institution and, particularly, with the office" (Weber, 1968, p. 1164). The Church ceased to be a community of personally charismatic individuals, and became the bearer and trustee of an office charisma. The "trust fund" of eternal blessings, though offered to everyone, could thus be administered only by certain qualified individuals, by a professional priesthood. As an institution to which charismatic sanctity had been transferred, the Catholic Church was the first quasi-corporative, compulsory association (Weber, 1968, pp. 829, 1166).

Still, the concept of the *Anstalt* was not fully developed in the purely legal sense until the period of the modern state. The technical needs of administration led to the establishment as a separate juristic person of the state with its heteronomous and heterocephalous organs. To separate the powers of command at the disposal of the incumbent of an office from his private sphere, to vest these powers in the institution as such, and to imply that the exercise of these powers is subject to legal regulation—these are the concrete grounds for the emergence of the conception of the state as a legal person. The concept of the state as a juristic person is a legal-technical instrument to bestow on specific individuals definite rights and obligations, to impute the actions of these individuals to the state, to give expression to the unity of the actions of the individuals, and to indicate that the state as an institution has an existence beyond and above the individuals who exercise specific functions as official duties (Weber, 1968, p. 670).

The political association thus is considered not as a mere aggregate of individuals, but as a system of offices which exists independently of the individuals who are incumbents of the offices and which has, so to speak, a life of its own. "Organ of the state" is the technical-legal term by which the independence from the individuals

of the functions to be performed by the state as well as the possibility of their being transmitted *pro partibus indivisis* are expressed. A “state-organ” is a complex of competences, an organized set of empowerments, duties, and obligations—defined without regard to persons—to perform a function on behalf of the political community (Ross, 1961; H. J. Wolff, 1970, pp. 42-58). The organs are created by the legal order, which not only defines the competences, i.e. circumscribes the sphere of obligations to perform duties, provides the incumbent with the necessary powers, and subjects the use of the means of compulsion to definite conditions, but also creates the basis of their legitimacy (Weber, 1968, pp. 52-54, 218). “A modern government exercises its functions as a legitimate jurisdiction, which means legally that it is regarded as resting on authorization by the constitutional norms of the state” (Weber, 1968, p. 644).

Given, however, that even impersonal functions can only be performed by individual persons, the legal order also defines under what conditions, by virtue of what qualifications, and through what specific procedures an individual can acquire the competence to act as an organ of the state. The specific function of public law is to create the criteria by which specific actions of specific individuals can be qualified as actions of the state so as to distinguish them from actions of private individuals. From this aspect, the modern state can be viewed as a consociation of bearers of certain defined *imperia*, whose legitimacy to give commands rests upon rules that are rationally established by enactment (*Satzung*): by agreement or by imposition (Weber, 1968, p. 652). Thus, even though the “will of the state” is but the will of concrete people, not every kind of will can produce binding commands, but only a will possessed of certain characteristics, a will authorized by the law and assigned to a particular office (d’Entreves, 1967, p. 81).

Because of this, power in the modern state appears as something impersonal. “Orders are given in the name of the impersonal norm, rather than in the name of a personal authority” (Weber, 1958c, p. 295). The person commanding is himself subject to an impersonal order and can give commands only in the form of norms. Obedience is thus given not to the person, but to norms which are purposefully thought out, enacted and announced with formal correctness (Weber, 1968, p. 217).

Limitation of Political Rule

Political power in the state is thus inherently subject to a two-fold limitation. There is in the first place the limitation of power as

determined by law. It is inherent in the very notion of political rule as an *imperium* vested in an office and exercised according to, and in the name of, generally binding norms. Such norms, Weber writes, act as restraints upon the *imperium* within the sphere in which they obtain: "The power holder may issue only commands of a certain type, or he may issue all sorts of commands except in certain cases or subject to certain conditions" (1968, p. 652).

The requirement that the exercise of power be in conformity with law implies certain principles for the state's organization and for the exercise of powers vested in it. In a strict legal sense, however, it does not establish any rights of the individuals subject to power. Legality only implies duties of the government, duties which, because of the very nature and *telos* of state-power, can be, and, in fact, are frequently disregarded. The state is engaged, in the first place, in a permanent struggle for power with other polities, in which respect its "absolute end is to safeguard or change the external and internal distribution of power" (Weber, 1958d, p. 334; Weber, 1980). Besides the effectuation of this primary concern, the state pursues other concrete objectives as well, objectives of an ethical, utilitarian, social welfare, or some other kind. "In the final analysis," Weber claims, "the whole course of the state's inner political functions, of justice and administration, is repeatedly and unavoidably regulated by the objective pragmatism of 'reasons of state'" (Weber, 1958d, p. 334). From this point of view, to the state "the individual and his interests are in the legal sense objects rather than bearers of rights" (Weber, 1968, p. 641).

The perception of this has given rise to the idea that a boundary line between the sphere of the state and of the individual must be drawn, a boundary line which the state cannot overstep, and behind which the individual is protected from any intervention by public authority (Loewenstein, 1958, p. 315). The inviolability of this area is given legal expression by the incorporation into the positive legal order of certain "fundamental liberties" and "rights of man" as personal rights, that is, as claim norms of the members of the state over against the state as a whole (Jellinek, 1901; Jellinek, 1905, p. 398).

A third type of restraint is created in the so-called "constitutional states" by the separation of powers. In this case it is not only norms, but specific social relationships and groups, and their functions, which limit authority. One *imperium* conflicts with another *imperium*, and the extent of authority of the one limits the extent of authority of the other (Weber, 1968, p. 652).

The division of powers may take different forms, among which the following three are the principal kinds: a) it involves a plurality of

incumbents of the same office, or a number of persons in offices whose spheres of authority are directly competing; b) it involves collegial decision, in which case a governmental act is only legitimate when it has been produced by the cooperation of a plurality of people according to rationally determined rules; c) it involves not merely the separation of spheres of jurisdiction but also of ultimate powers (Weber, 1968, pp. 271-273).

Collegiality in the exercise of the ultimate powers of rulership implies specific bodies which either are governmental agencies or which directly influence (limit) governmental agencies. Such limiting agencies have the following principal functions: a) a monopoly of the creation of rules which govern the exercise of political authority completely, or at least of those rules which limit the independent authority of the bearers of the powers of command; b) supervision of adherence to the rules, if need be through an inquiry; and c) a monopoly of the granting of the means which are necessary of the governmental function (Weber, 1968, pp. 271-272).

According to Weber, "the functionally specific separation of powers is not wholly a modern phenomenon" (1968, p. 282). As historical precursors, Weber cites the division of ultimate powers in the *societas christiana* between an independent political authority and an independent hierocratic authority, the separation of the spheres of competence of the different Roman magistracies, and the demarcation of military command as a separate "office" in the patrimonial states of the Orient, in China, Persia, the empire of the Caliphs, and the Ottoman Empire (1968, pp. 282, 279, 1025-1031). "But in these cases," Weber writes, "the concept of separation of powers loses all precision" (1968, p. 283).

The limitation of patrimonial political authority by an estate-type division of powers, characteristic of the medieval Occident, approximates the modern conception more closely. The appropriation of governing powers and of the means of administration by privileged groups, the competition among privileges, feudal claims, and other appropriated rights turned Occidental feudalism into a kind of constitutional government (Weber, 1968, pp. 652-653, 1082). The extent of the ruler's power was restricted by the subjects' exemptions, immunities, and privileges, whether these were granted or sanctified by tradition. The system of estates gave some permanency to these relations, in that it combined both separation and limitation of powers with corporative-institutional structures. But this type of distribution of powers was based on contracts between the prince

and the estates, which was both inimical to functional regulation and excluded the larger segment of the community.

“The rational, formally enacted constitutional form of the separation of powers,” Weber claims, “is entirely a modern phenomenon” (1968, p. 283). It developed on the basis of a unique constellation of historical circumstances, such as the financial needs of the prince made acute by the permanency of conflict between the European polities; the necessity for him to secure financing through the consent of privileged persons assembled in estates; the rise of capitalistic interests capable of providing the prince with the needed provisions, but in turn demanding a share in political power; the emergence in the wake of the disintegration of feudal *seigneuries* of a new plebeian stratum, which increasingly asserted its claim to be included into the political community; the articulation of the demands of the “fourth estate” in the form of a radical republicanism, which transformed the medieval idea of contract into the ethical-metaphysical concept of *volonte generale* given legal-political expression in the doctrine of the people as the *pouvoir constituant*; and last but not least the rationalistic spirit of the eighteenth century, filled by a belief that the mechanical laws of nature are transferrable to the social-political world and that through the agency of reason a balanced political community can be created by the functional separation of powers (Loewenstein, 1961, p. 436; d’Entreves, 1967, p. 144).

What Weber calls a “rational constitution” is thus nothing else than a system of rules—enacted, announced and promulgated according to formally correct procedures—which subjects the dynamics of political power to normative regulation and which, by dividing powers in terms of their functionally objective character, controls, limits, and constrains the exercise of rulership. It is the coexistence of limitation of power and separation of powers on the basis of the distribution of competence among its various organs which so distinctively characterizes the modern state. “Indeed,” Weber says, “this modern state is essentially characterized by the following criteria: it is a consociation (*anstaltsmaessige Vergesellschaftung*) of bearers of certain defined *imperia*; these bearers are selected according to rationally enacted rules; their *imperia* are delimited from each other by general rules of separation of powers; and internally each of them finds the legitimacy of its power of command defined by set rules of limitation of power” (1968, p. 652).

The Struggle for Power and Purposive-Rational Formalism

In light of the preceding analysis we can say that the modern constitutional state represents a gigantic historical experiment in transforming the brute facticity of force, inherent in political rule, into a normatively founded and regulated relationship of domination where "the legitimacy of authority rests upon the legality of general rule" (Weber, 1958c., p. 299). Still, it would be an enormous naivete to think that in the modern state every instance of the exercise of power and all struggles about its allocation and redistribution are but a series of actions channeled by norms, hence peaceful and calculable. The normative regulation of political rule has limits.

In the liberal postulate of the rule of law politics is more or less identical with the creation of norms for the exercise of power and their application in the forms of adjudication and administration. To Weber, the domain of politics is much wider. It contains not only the orderly discharge of the functions of domination, but includes all those actions and projects which, from whatever motives, aim at the appropriation, allocation, or redistribution of positions from which commands binding on others and supported by coercive means can be issued. That the unavoidable struggle of the often irreconcilable ideal and material interests does not normally lead to the mutual annihilation of the competing parties is a result of many factors, the most important of which is the institutional set up of the modern constitutional state. In it, the potentially life-and-death struggle of competing interests is transformed into a pacified competition for electoral votes and into a normatively regulated, and hence, calculable coercive threat by those in power (Weber, 1981, p. 173). But even this regulated competition for the legally defined seats of power, a form of political struggle which only reduces but does not wholly eliminate the appeal to the use of force, can and actually does create "unstable and consequence-laden situations," which are too unpredictable to be fully subjected to standard regulation (Poggi, 1978, p. 7).

It is therefore exactly at the critical junctures of the life of a political community that norms are unable to determine the course of political action. This weakness of norms comes to the fore most obviously during so-called emergency situations that lead to the establishment of "crisis government." Loewenstein writes that "it is impossible to find accurate legal criteria for what constitutes a crisis or emergency situation . . ." (1957, p. 219). The courts are, then, not qualified to decide whether there is an emergency situation,

warranting the introduction of “crisis government.” The decision that a crisis has occurred is a “political” one, a problem decided upon and solved according to the empirical constellation of power in the political community (Loewenstein, 1957, pp. 217-227).

Even under normal conditions, situations and conflicts may develop for the solution of which the legal constitution does not offer normative guidelines. In fact, such situations arise exactly because the constitution contains such “legal vacua.” It is an empirically ascertainable fact that the modern constitutional state brought about a “closer practical coincidence” between the normatively assigned and the actual possessor of power than before had been possible (Emerson, 1928, p. 257). Still, the conception of the legal constitution of the state as a closed and gapless system of norms that provides a normative solution for every eventuality emerging in the exercise of, or in the struggles about, power is a mere juristic fiction. The most fundamental questions concerning the distribution of power either cannot be normatively regulated or they are left intentionally unregulated by law. According to Weber:

This was done simply because the interested party or parties who exercised the decisive influence on the drafting of the constitution in question expected that he or they would ultimately have sufficient power to control, in accordance with their own desires, that portion of social action which, while lacking a basis in any enacted norm, yet had to be carried on somehow (1968, p. 330).

Another limit to the extent of the normative regulation of power is set by the fact that the hierarchy of the organs of the state has a bottom and a top. That is to say, the order of positions of the powers of command in terms of subordination and superordination must necessarily end with an organ or organs above which no earthly authority stands. Thus, while the adherence by any organ lower than the highest level organ to its normatively defined competence is guaranteed factually and legally by the control superordinate organs exercise over it, in case the highest organs are unwilling or incapable of practicing the functions assigned to them by the constitution, no legally constituted unit of power is at hand to enforce the norm. If, therefore, we mean by law a set of norms guaranteed by a coercive organization, it is evident that with reference to the apex of power hierarchy we can speak of the normative regulation of power only in a very limited sense. Effective constraints on the exercise of power by the highest organs of the state are set not so much by legal norms as by the mutual limitation

of the power of one organ by the opposing power of another organ. Such constraints, however, do have a normative character in that the status of the individual organs is based on the constitutional division of powers.

In the confines of their constitutionally defined jurisdiction, the organs can exercise their power more or less freely, according to their own discretion. The self-determining character of the acts of the highest organs is juristically expressed in that their competences are defined in terms of the ultimate powers that accrue to them, rather than in terms of specific actions that they must undertake. The legal norms by which an organ is constituted prescribe not what the organ must do but what it can do. In other words, an organ is not simply a bundle of precisely delimited functions, but is a set of competences, of legally secured capacities, to perform the necessary tasks on behalf of the political organization.

Such free activity is especially characteristic of that segment of the unitary public power which is called "the government." The function to be undertaken by this organ, namely, the modulation and articulation of overall policy, is by its very nature inimical to detailed and formal regulation. This is most obvious in the sphere of foreign policy. The exigencies of "world politics" resulting from the competition between sovereign polities require that the government be allowed a free space to articulate its reaction to the demands of the situation. But even in the domain of domestic politics, the competition of organized interests, given more or less free rein in a constitutional-democratic state, and the necessity for the government to respond to the articulated needs of political groups, or to articulate a policy in anticipation of latent needs, make the regulation in minute detail of the activities of the highest executive organs impossible.

To this sphere of free activity, political action proper, stands opposed administration as *Herrschaft im Alltag*, which functions on the basis of the formal rules of a bureaucratic order. It is oriented toward the satisfaction of ongoing, routine, calculable needs with ordinary, routinized means. Nevertheless, there is an element of free activity even in this sphere of minutely regulated, precisely circumscribed competences. Administration is not mechanical application of general rules to particular cases, mere implementation of policies set by the government. It is none of these, not simply because each individual case has peculiar qualities transcending the formalized rules designed to guide the discharge of administrative duties, but for more important reasons.

The decisive basis for the existence in administration of a political element is created by the institutional set-up of the modern constitutional state; by the fact, namely, that in a parliamentary democracy the administrative heads, the ministers, are selected by and are responsible to the parliament, viz., the representative body of the political forces in a community. They are, then, at the same time administrators, the heads of a complex of routinized activities, and politicians, the leaders of parliamentary factions, who, on the one hand, mediate the demands of their factions to the cabinet, and, on the other hand, represent the government vis-a-vis the factions (Guilleaume, 1967; Redsløb, 1918; Salter, 1952). Administration, therefore, cannot take place solely according to the requirements of purposive-rationality, but takes place in a political field, where the purposes to which administrative activity is oriented are largely defined by the demands of social forces articulated by the political parties in the parliament. These articulated needs, however, must be brought into harmony with each other in order that they may be satisfied according to the requirements of purposive-rationality, the *sine qua non* of orderly administration.

This strain between purposive-rational formalism and political functions is more characteristic of the modern state than the much discussed dualism of bureaucracy and political leadership. A rigid separation of administration and government obtains more prominently in absolutistic political bodies than in the modern state. Political leadership in the former rested with the monarch, who, although listening to the expert advice of his cabinet, made his decisions on the basis of his autonomous will. The task of the cabinet, a body of men composed of princely advisors and of the heads of administrative resorts, consisted in the implementation of the manifestations of the princely will by translating them into the language of purposive-rational action and transmitting them in the form of administrative directives, to specialized administrative agencies. The determination of policies and their execution were thus clearly separated both with respect to personnel and to the tasks involved. They were all the more separated since well into the nineteenth century government was concerned first of all with the management of foreign affairs, viz., with the management of the state in its relation to other states. Politics meant here principally "world politics," decisions and activities oriented to the maintenance or change of the distribution of power between sovereign states. The maintenance of internal order was not politics but mere administration (Guilleaume, 1967).

The democratization of politics, namely, the expropriation by a collegiate body of the powers of the monarch as political leader, the constitutional empowerment of the parliament to participate in the formulation of policies, and the incorporation into the political process of larger and larger segments of the population through the extension of the suffrage, has changed the relation of government and administration. Though the management of foreign affairs does not lose its importance, its weight as well as the way it is carried out change considerably. It still remains a sphere of largely discretionary activity, but since the personnel to carry it out is selected in a process of competition between domestic political forces, the government must give an account of the result of their activities to the forces that put them into the position of leadership. The constellation of internal forces becomes thus as significant as the constellation of power between states. Domestic affairs take on an added significance because the government aims not only at securing the power of the state vis-a-vis other states, but pursues objectives of a utilitarian or ethical kind postulated by the very forces on the support of which its power is based.

The intertwining of the tasks of policy determination, policy implementation, and of securing the support of politically significant segments of the population gives modern political life its special dynamics. It is the basis of the major or minor, but in any case perpetual, excitements that the newspapers bring us day to day. Governments fall not only because there are momentous changes in the empirical constellation of political forces, but because they are incapable of meeting the articulated and ever-changing needs of political factions, or because they do not manage to ensure the support for their policies of the politically significant segments of the population represented by the parties in the parliament.

The fact that the purposive-rationality of government and administration is perpetually hampered by the requirement of assuring the consent of parliamentary factions as well as of public opinion by negotiation, persuasion, and manipulation, is responsible for the presence of a modicum of governmental inefficiency in all constitutional democracies. The elimination of this inefficiency in electoral democracies is both impossible and undesirable. As long as the institutional set-up of the exercise of political power and the mechanisms of political will-formation are such that they make possible the articulation and mediation of the demands of various segments of the political community, there will be dissension, competition, and conflict. This is what pluralism means. Its only

alternative is the suppression of conflicting interests by totalitarian rule. Here political goals, instead of being the outcome of the competition and conflicts between pluralistic groups, are set by one particular group and are implemented by a mixture of sheer manipulation and of the naked violence of coercive means. The apparent harmony of interests, goals, and policy outcomes is thus nothing else than the necessary manifestation of “the pacifism of social impotence under the tutelage of the only really inescapable power: the bureaucracy in state and economy” (Weber, 1968, p. 1403).

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