

## 4. Liberal constitutionalism and its critics: Carl Schmitt and Max Weber

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Carl Schmitt occupies a special position within the field of modern legal and political theory. On the one hand, Schmitt is one of the foremost specialists in liberal constitutionalism; but on the other hand, he is also one of its keenest critics. His *Verfassungslehre* of 1928 dissects the constitution of the Weimar Republic, interpreting it along the lines drawn up by the German constitutional tradition from Wilhelm von Humboldt and Lorenz von Stein to Georg Jellinek and Max Weber. In all of his writings, Schmitt unites themes drawn from both conservative and radical critiques of the ideology of constitutionalism. He asserts a discrepancy between idea and reality, and, turning reality against idea, finally rejects the concepts of the liberal *Rechtsstaat* and the parliamentary legislative state as outdated bourgeois ideology. His alternative is absolute state power.

This chapter is built around Schmitt's theory. I shall begin with a brief introduction to the liberal theory of the *Rechtsstaat* based on Schmitt's *Verfassungslehre* [I]. The tension existing between the liberal *Rechtsstaat* and the Hobbesian *Machtstaat* forms the basis of Schmitt's criticism and rejection of liberalism [II]. In his alternative theory of politics and law, Schmitt combines two motifs: political Machiavellianism and normative decisionism [III]. Examination of Schmitt's work sheds considerable light on the political theory of Max Weber. Weber – who may rightly be considered a forerunner of Schmitt – also occupies a position opposed to Schmitt's in seeking to incorporate Machiavellian power-politics within a constitutional-democratic framework [IV].

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## I The liberal Rechtsstaat

In his *Verfassungslehre*, Carl Schmitt attempts to delimit what he terms “the ideal concept of the constitution of the bourgeois *Rechtsstaat*.” He is referring explicitly to the kind of state constitution which had been established in Western Europe and North America since the eighteenth century. Since that time “the only constitutions designated as constitutions have been those which correspond to the demands of civil freedom and which contain definite guarantees of this freedom.”<sup>1</sup> Schmitt emphasizes two basic features of this type of constitution. First, the constitution contains a system of guarantees of freedom. Fundamental here is freedom in the sense of freedom *from* state interference, especially in the field of legislation. As constitutional embodiments of this sort of freedom, Schmitt lists the following: “recognition of basic rights, the division of powers, and a minimum of popular participation in the legislative process by means of a civil assembly.”<sup>2</sup> The proclamation of basic human rights – *Grundrechte* – implies the establishment of a general concept of freedom. The principle of division of powers is meant to ensure that this principle of freedom has an organizational guarantee, against misuse of the power of the state. Without this principle and this guarantee, the result will be “despotism, absolutism, dictatorship – terms which are not simply rhetorical, but which receive legal meaning through a contrast: they denote the union of (the organizational principle of division of) the legislative, executive and judicial powers.”<sup>3</sup> Secondly, the constitution is to be based on a written document more difficult to alter or amend than other legislation. This is to ensure a greater degree of stability and permanence.<sup>4</sup> Such a view of the constitution as a written contract is in line with the tendency reflected in the U.S. Declaration of Independence of 1776, as distinct from the English tradition.

The guiding purpose of the *Rechtsstaat* is to protect the freedom of the individual citizen against the *power of the state*. In this connection, Schmitt formulates two main principles for the liberal constitution: a distributive principle, and an organizational one. By “distributive principle” is meant the following: “The sphere of individual freedom

<sup>1</sup> C. Schmitt, *Verfassungslehre* (1928) (Berlin, 1970), pp. 37f.

<sup>2</sup> *Ibid.*, p. 38.

<sup>3</sup> *Ibid.*, p. 39.

<sup>4</sup> Cf. *Ibid.*, pp. 39f., 16ff.

is simply presupposed insofar as the state is concerned; indeed, the freedom of the individual is *in principle unlimited*, whereas the authority of the state to intervene in this sphere is *in principle limited*.<sup>5</sup> According to this principle – which implies that whatever is not forbidden is permitted – the individual possesses certain basic rights of a pre- or meta-political nature. These include both rights concerning each individual as such (freedom of religion, inviolability of private domicile, private property) and rights concerning the individual in interaction with others (freedom of speech, freedom of the press, freedom of organization):

These basic rights receive their content not through any laws or acts, but according to legal standards or within legal limits; rather, they designate the – in principle – unbound scope of individual freedom; the state serves to protect them, thereby finding the true justification for its existence. The individual's right of resistance is the final guarantee of these rights; it is an inalienable right but one which cannot be organized.<sup>6</sup>

From the point of view of the *Rechtsstaat*, all state interventions in the private sphere of the individual are to be regarded as exceptions, “and indeed as in principle limited and measurable, generally regulated exceptions.”<sup>7</sup> State intervention will thus represent a deviation which must be justified. This view is quite in line with a classical theme of the liberal philosophy of freedom: the free individual is subject not to the rule of other persons, but only to that of reason. The light of reason may eventually bring an individual to see a limitation of his freedom perfectly justified to the extent that the freedom of one individual is not to be sacrificed to that of another. This is why free individuals enter into a contract establishing state regulation of their exercise of freedom: to make the freedom of one compatible with that of all the others.<sup>8</sup>

The second main principle – the organizational principle – serves the realization of the first one: the power of the state – which is in

<sup>5</sup> *Ibid.*, p. 126.      <sup>6</sup> *Ibid.*, pp. 163f.      <sup>7</sup> *Ibid.*, p. 166.

<sup>8</sup> Cf. Kant, *Die Metaphysik der Sitten. Werke in zwölf Bänden* (Frankfurt a.M., 1978), vol. VIII, p. 399.

principle limited – is to be divided into legislative, executive and judicial branches, combined in a normative system designating spheres of competence. In this way, provision is made for mutual control and binding of the state apparatus.

The liberal *Rechtsstaat* is a *legal state*, in the sense that the only form of intervention into the free sphere of the individual which is legitimate is intervention *based on law*:

A state may be termed a *Rechtsstaat* only when all administrative authority – especially that of the police – is subject to the conditions and procedure of law, and when intervention into the sphere of individual freedom is permissible solely on the basis of a law. Its identifying characteristic is the lawlike nature of the administration. The guarantee of its citizens' freedom lies in its law.<sup>9</sup>

According to liberal constitutionalism, rulers act “on the basis of a law” (“auf Grund eines Gesetzes”) or “in the name of the law” (“im Namen des Gesetzes”) – this is “the rule of law”: “The laws rule – not persons, authorities or administrators. More precisely: laws do not rule – they only serve as norms.”<sup>10</sup> Governors “rule” only in the sense that they follow the existing positive norms in a competent way: “The fundamental ‘principle of legality’ of all state activity ultimately means that, in the end, there will be no more ‘ruling’ or ‘commanding,’ because only impersonally valid norms will be enforced.”<sup>11</sup> The legitimacy of the liberal state rests on the general “legality of all its exercise of power.” However, not just any kind of law can be regarded as law, from such a point of view. The “rule of law,” liberally understood, implies more than simply that all actions of the state should be legal. According to liberal constitutionalism, laws must fulfil specific criteria. In this respect, then, constitutionalism may be characterized as a doctrine specifying which characteristics particular rules need to possess in order to be regarded as law. These characteristics distinguish a law from a command or an ordinance. The main characteristic of law, in the constitutional sense, is the *generality* of the

<sup>9</sup> Schmitt, *Verfassungslehre*, p. 130.

<sup>10</sup> C. Schmitt, “Legalität und Legitimität” (1932), in *Verfassungsrechtliche Aufsätze* (1958) (Berlin, 1973), p. 264.

<sup>11</sup> *Ibid.*

norm involved. This is, according to Schmitt, the Archimedean point: “One quality cannot be announced without nullifying the *Rechtsstaat*: this is the *general* character of its legal norms. Herein lies the final guarantee of the traditional *Rechtsstaat*’s distinction between a law and a command, between reason and will – and thus the ultimate foundation of the *Rechtsstaat* itself.”<sup>12</sup> This constitutional concept of law is opposed to pure formalism, “which designates as law whatever comes into being through the proceedings necessary for legislation”: “Whatever can be said of the rule of law or the rule of norms, all talk of ‘normativity’ is contradictory and confused if the general character of rules is abandoned and any single command, and legislative measure whatever, can be considered a valid ‘norm’ or a ‘law.’”<sup>13</sup> The generality of the law makes it possible for individuals to predict state intervention. Moreover, the general character of laws is meant to make them as binding as possible on the legislators – be these democratically elected or not. If legislators were not bound by and to their own laws, there would be no preventing the abuse of legislative authority, the arbitrary exercise of power and the reduction of legislation to a mere instrument of power: “A legislator whose individual measures, special edicts, exemptions or decrees are just as legally valid as are his general norms – such a person is in no way bound by his own laws. Being bound by law is, for those who can make any ‘laws’ they wish, but a meaningless turn of phrase.”<sup>14</sup> The state – “the strictly controlled servant of society” – is thus seen as identical with a system of norms, “so that it is nothing but norm or procedure.”<sup>15</sup> In this regard, the liberal *Rechtsstaat* is a normative system of “Gesetzmässigkeit, Kompetenzmässigkeit, Kontrollierbarkeit und Justizförmigkeit”: “It is pretended first, that the constitution is nothing but a system of legal norms and prescriptions; second, that this system is a closed one; and third, that it is ‘sovereign’ – i.e. that it can never be interfered with, or indeed even influenced, for any reasons or necessities of political existence.”<sup>16</sup> The ideal of the liberal *Rechtsstaat*, writes Schmitt, culminates “in a general ‘juridification’ of the entire life of the state.” From this perspective, the independence of the courts of law

<sup>12</sup> Schmitt, *Verfassungslehre*, p. 142.

<sup>13</sup> *Ibid.*, p. 142.

<sup>14</sup> *Ibid.*, p. 139.

<sup>15</sup> *Ibid.*, p. 125.

<sup>16</sup> *Ibid.*, p. 131.

becomes “a particularly important organizational characteristic” of such a state.<sup>17</sup>

Dominant in this perspective of the *Rechtsstaat* is the negative point of view – the protection of individual citizens against the possible abuse of power by the state: “It is not so much the state itself which is organized by the principles of the *Rechtsstaat*, but rather the means and methods by which it is controlled; guarantees against state abuse are created, and an endeavour is made to secure checks on the exercise of state power.”<sup>18</sup> The central purpose of liberal constitutionalism is to institutionalize a system of defense mechanisms for the citizen vis-à-vis the state. Given the unequal relationship between citizen and state, such institutions should enable the citizen to withstand and check the potentially overwhelming power of the state. The institutions of the *Rechtsstaat* consist of “a series of bars and checks as regards that state, a system of guarantees of the freedom of the citizen and the limitedness of state power.”<sup>19</sup> Thus the *Rechtsstaat*, as the controlling arrangement of law, presupposes the existence of the *Machtstaat*, the political power apparatus to be controlled:

All the effort of the bourgeois *Rechtsstaat* goes into repressing the political, compressing all expressions of the life of the state into a series of prescriptions, and transforming all state activity into actions performed within precisely articulated, and in principle limited spheres of competence. As a consequence, the bourgeois-*Rechtsstaat*-element can at most comprise but a part of the total state constitution, while another part must register a positive decision concerning the form of political existence.<sup>20</sup>

## II The total *Machtstaat*: constitutionalism as ideology

The various arrangements of the *Rechtsstaat* sketched above serve to make more concrete the pivotal concept in the constitutional tradition of Locke and Kant: *the power of the state must be limited and bound by legal norms*. However, such liberal constitutionalism makes sense only if one also presupposes a major political concept in the tradition

<sup>17</sup> *Ibid.*, pp. 131ff.

<sup>18</sup> *Ibid.*, p. 41.

<sup>19</sup> *Ibid.*, p. 200.

<sup>20</sup> *Ibid.*, p. 41.

from Machiavelli and Hobbes: *the establishment of the power monopoly of the state*.

According to Schmitt, Hobbes bases his political state on fear of the state of nature. The goal to be achieved is a civilian, state-guaranteed peace and security.<sup>21</sup> Against the background of the religious civil wars and their controversies over competing politico-religious truths, Hobbes launched his *Leviathan*:

For Hobbes, the point was to overcome, by means of the state, the anarchy of feudal, local or church rights of resistance, as well as affiliated danger of civil war: to medieval pluralism, church demands for dominion, and other “indirect” powers, he opposed the rational unity of a clear, effectively protective and predictable functioning system of legality. Such a rational state power must above all assume all risks, and in this sense, take full responsibility for the protection and security of the state’s subjects. Should this protection cease then the state itself will cease to exist and all duty to obedience subside. Then the individual regains his “natural” freedom.<sup>22</sup>

The state of nature is left behind not only by virtue of a *social* contract based on a general consensus: social peace is guaranteed by the establishment of a *state* contract, in which political power is ceded to a higher third instance, “the sole guarantor of peace”:

The sovereign-representative person is far more than simply the sum of the powers of all contracting individual wills. The accumulated *angst* of individuals fearing for their very lives calls into being the Leviathan, a new power: a god more conjured up than created. So far, this new god transcends the sum total of individual subjects – but only in a legal, not a metaphysical sense.<sup>23</sup>

Hobbes is concerned with institutionalizing the state’s monopoly of power: the state as model for political unity, “the bearer of the most astounding of all monopolies – the monopoly on political decision-

<sup>21</sup> C. Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes* (Hamburg, 1938), p. 47.

<sup>22</sup> *Ibid.*, p. 113.      <sup>23</sup> *Ibid.*, p. 52.

making, that brilliant creation of Europe and of occidental rationalism.”<sup>24</sup> The Hobbesian power state – *Machtstaat* – concerns what Schmitt terms the strictly *political* aspect of the modern state, “the positive decision about the form of political existence”: an institutionalized monopoly apparatus for peaceful conflict-resolution within a given society, binding exercise of political power and the efficient implementation of political decisions. Such a state would have to have a unique kind of authority, according to Hobbes. But in attributing to this state an *absolute* authority, Hobbes proves his anti-liberalism. The aim of the liberal *Rechtsstaat* is to bind the *Machtstaat* to general norms – not to eliminate it. There still remains a problem from the liberal point of view: as Hobbes remarked, a state strong enough to protect everyone is potentially strong enough to repress everyone as well.<sup>25</sup> According to Hobbes’s *Leviathan*, sovereign state power is by definition unbound by norms. For the sovereign power there exists but one alternative: that of self-binding, and this does not make any sense to Hobbes. No one can be bound to himself, “because he that can bind, can release; therefore he that is bound to himself only, is not bound.”<sup>26</sup>

Carl Schmitt sees in Hobbes a classical example of *decisionist* thought:

All *Recht*, all norms and laws, all interpretations of the laws, all orders and arrangements – these are for him [Hobbes] essentially decisions of the sovereign: and “the sovereign” is not a legitimate monarch or competent authority, but precisely he who sovereignly decides. *Recht* is law, and law is the command which settles the dispute about what is *Recht*: *Auctoritas, non veritas, facit legem*.<sup>27</sup>

The sovereign decision is, writes Schmitt, the absolute beginning; and this beginning is “nothing but sovereign decision-making” – i.e., “State dictatorship which creates law and order.”<sup>28</sup>

<sup>24</sup> C. Schmitt, *Der Begriff des Politischen* (1932) (Berlin, 1979), p. 10.

<sup>25</sup> T. Hobbes, *De Cive*, in *The English Works of Thomas Hobbes*, vol. 2 (Darmstadt, 1966), pp. 175f.

<sup>26</sup> T. Hobbes, *Leviathan*, *ibid.*, vol. 3, p. 252.

<sup>27</sup> C. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg, 1934), p. 27.

<sup>28</sup> *Ibid.*, pp. 28, 29.



In the scientific study of politics, Schmitt defends the principle of *methodical situationalism*: that is to say, all political concepts can be understood only on the basis of the concrete, polemic situation in which they belong. Otherwise, they become “misunderstandable, meaningless abstractions”:

Therefore, it is not admissible to abstract from the concrete situation – i.e., from concrete political antagonism. This applies to theoretical considerations of political phenomena as well. Every political concept is a polemic concept. Every political concept has a political enemy in mind, an enemy which determines much of its intellectual standing and power as well as its historical importance. Words like “sovereignty,” “liberty,” “*Rechtsstaat*” and “democracy” receive their precise import only by means of a concrete antithesis.<sup>29</sup>

In his *Der Begriff des Politischen*, Schmitt presents a critical summary of the idea of liberal constitutionalism:

The systematic theory of liberalism is almost exclusively concerned with the internal struggle against state power; it consists of a series of methods by which to split, curb, balance or control this state power for the protection of individual freedom and private property. Liberalism seeks to make the state into a compromise and the arrangements and concerns of the state into a “safety valve.” This cannot be termed either a form of government or a theory of government, even though it usually refers to itself as a theory of the “*Rechtsstaat*.”<sup>30</sup>

The liberal theory of the *Rechtsstaat* must, he emphasizes, be understood on the basis of its polemic context, its “situation”: the 1800s and their positivist faith in legality, “the belief in the rationality and ideality of systems of norms.”<sup>31</sup> Initially polemical, positivism began as a struggle against any and every form of higher law, against any

<sup>29</sup> C. Schmitt, “Hugo Preuss – sein Staatsbegriff und seine Stellung in der deutschen Staatslehre,” in *Recht und Staat in Geschichte und Gegenwart*, 72 (1930), 5.

<sup>30</sup> C. Schmitt, *Der Begriff des Politischen*, original version (1927), quoted from H. Hofmann, *Legitimität gegen Legalität* (Neuwied, 1964), p. 103.

<sup>31</sup> Schmitt, *Verfassungsrechtliche Aufsätze*, p. 270.

body of non-positive law. Gradually, positivism shifted the emphasis of its legitimization: from the intent of the legislator, via the intent of the law, and finally to the law itself, “the self-contained norm”: “One subjects oneself only to the norm and to its specifiable content. On the face of it, this endows legal positivism with the greatest objectivity, stability, inviolability, certainty and calculability: in short, its very quality of positiveness.”<sup>32</sup> Schmitt’s claim that every political concept is also a polemical concept must also be applied to his own theory. For Schmitt, liberalism is the enemy, with its veiling of concrete political reality. Political reality is not governed by “abstract institutions and systems of norms,” but ruled by tangible people and organizations.<sup>33</sup> Schmitt attacks what he regards as the neutralizing and de-politicizing effects of liberalism, its “negation of the political”:

The liberalism of the past century has singularly and systematically altered and denaturalized all political ideas . . . Liberal thought completely avoids or ignores all questions relating to the state and politics. Instead, liberalism moves in a recurrent polarity between two heterogeneous spheres: ethics and economics; soul and commerce; culture and property.<sup>34</sup>

The liberal perspective is outdated given the new situation, i.e., the “metamorphosis” of the modern state from a liberal to a total state. In an article written in 1931, “The turn to the total state,” Schmitt describes the present system of government as the product of a tension between the norms, values and institutions of the nineteenth century and a totally different, twentieth-century, situation. The underlying premise of liberal constitutionalism – i.e., the dualism of state and society – is no longer valid. It no longer has any meaning; it is “irrelevant.” This distinction is under attack on both flanks: “The society-turned-state” becomes “the Economic State, the Culture State, the Caring State, the Welfare State, the Provider.” At the same time, “the state-as-the-self-organization-of-society” intervenes in all aspects of social life. This erosion of the distinction between the previously discrete functions of state and society turns the liberal,

<sup>32</sup> Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, p. 31.

<sup>33</sup> Schmitt, *Der Begriff des Politischen*, p. 72.

<sup>34</sup> *Ibid.*, pp. 68, 69.

neutral state into a “potentially total” state.<sup>35</sup> In an article from 1929, Schmitt claims that the leading industrial nations still cling to the traditional constitutional blueprint of 1789 and 1848. There are two exceptions: Bolshevik Russia and Fascist Italy. These are the only states to have attempted to “break away from the inherited constitutional clichés of the nineteenth century. Through their written constitutions they have expressed the great changes that have taken place in the economic and social structures of their nations in the very organization of the state.”<sup>36</sup>

According to Schmitt the development toward a total state can be traced along two lines. First, there is the state that is total “in a purely quantitative sense, in the sense of sheer volume.” This is the state that intervenes “indiscriminately” in all aspects of social life. In this sense, writes Schmitt at the beginning of the 1930s, the Weimar Republic is a total state. Its expansion is the result of weakness, not strength. It is total “because of weakness and lack of capacity to resist, because of its inability to stand up to the assaults of organized interests and factions.”<sup>37</sup> Schmitt’s terminology may seem confusing since he is suggesting that the result of these developments is the disintegration of the state’s power: “This eventually leads to a plurality of moral ties and obligations, a ‘plurality of loyalties’ by which pluralist divisions are increasingly hardened, and the formation of state unity becomes steadily more endangered.”<sup>38</sup> Schmitt sees Social Democratic theorists such as G. D. H. Cole and Harold Laski as the ideologists of pluralism. Their concern is not only with the pluralization of the power of the state, but also the vanquishing of the notion that this power is “in some way of a different and higher order” from other types of social organization: “The state becomes a social group of organization that at best stands at the same level as, never above, other organizations. In its ethical consequences this leads to the individual having to live in a multiplicity of disorganized concurrent social duties and loyalties.”<sup>39</sup> Secondly there is the state that is total “in a qualitative sense.”<sup>40</sup> This is the state that systematically exploits the possibilities of modern

<sup>35</sup> C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles 1923–1939* (Hamburg, 1940), pp. 151f.

<sup>36</sup> *Ibid.*, p. 111.

<sup>37</sup> *Ibid.*, p. 187.

<sup>38</sup> *Ibid.*, p. 156.

<sup>39</sup> C. Schmitt, “Staatsethik und pluralistischer Staat,” in *Kantstudien*, (1930), p. 29.

<sup>40</sup> Schmitt, *Positionen und Begriffe*, p. 186.

technology to strengthen its own power. Both Fascism and Communism try in different ways to retain the “supremacy” of state power in this sense. Contrary to the assumptions of liberalism, there is, according to Schmitt, no distinct “political” sphere. The specifically political, from which all political actions and motives originate, lies in the dichotomy between friend and enemy. This, then, is the political equivalent of the dichotomy good/evil in morals, beautiful/ugly in aesthetics and profitable/non-profitable in economics. The friend/enemy dichotomy represents “the full range of intensity between union and separation, association and opposition.” For Schmitt, politics is autonomous only in the sense that the validity of political categories is independent of moral, economic or other categories:

The political enemy is not necessarily morally bad, nor is he necessarily aesthetically ugly. He need not appear to be a financial competitor; indeed, it may even be advantageous to do business with him. Essentially he is the “other,” the alien. It is sufficient that he be existentially different and alien in a particularly intense way. Thus, in extreme circumstances, conflicts with him may occur. These will be conflicts which cannot be resolved either by reference to commonly held norms, or by the intervention of a disinterested – and therefore impartial – third party.<sup>41</sup>

The friend/enemy dichotomy has existential significance. Only the political actors themselves can, in a concrete situation, decide whether the “otherness of the alien” will threaten “to negate one’s own mode of existence.”<sup>42</sup> The friend/enemy distinction expresses “awareness of a serious situation”: “The concepts ‘friend,’ ‘enemy,’ ‘struggle’ receive their true significance through the fact that they imply the real possibility of physical killing.”<sup>43</sup> Schmitt emphasizes that the political enemy is not a private opponent: there is no personal antipathy. Rather, he is the public enemy – he is *hostis*, not *inimicus*; he is *polemios*, not *echthros*. Thus, having political enemies is quite compatible with the Christian commandment

<sup>41</sup> Schmitt, *Der Begriff des Politischen*, p. 27.

<sup>42</sup> *Ibid.*, p. 27.      <sup>43</sup> *Ibid.*, p. 33.

“Love thine enemies,” for an “enemy” is here *inimicus* or *echthros*.<sup>44</sup>

Schmitt’s political categories are existential ones insofar as politics is analyzed in existential terms and not in substantial ones. Such political existentialism is total in that it is universally applicable, the sole criterion being “that most intense of all distinctions – the grouping into friend and enemy”:

Existentially, this dichotomy is so strong and decisive that in the very instant that it arises it overshadows all previous non-political antagonisms such as those based on ‘purely’ religious, economic or cultural criteria and motivations. The situation becomes political, although from the purely religious or economic point of view its consequences and conclusions may often appear contradictory and irrational.<sup>45</sup>

Schmitt seeks to dig beneath the surface of liberalism’s “fictions and normativity,” beneath its “system of demilitarized and depoliticized concepts,” to the brute fact of politics: the struggle between friend and enemy. Only in a real struggle do the final consequences of the friend–enemy relationship become clear: “the specifically political tensions in human life are gained in these most extreme circumstances.” A world without this struggle between friend and enemy would be “a totally conciliatory world,” that is to say, a world without politics.<sup>46</sup>

Schmitt looks to Hobbes for his theoretical position. But he sees Hobbes at best through the eyes of Rousseau. For Hobbes, the state of nature with its “war of all against all” was banished with the introduction of the political dimension, i.e., the state’s monopoly on power. Schmitt, however, seeks to reintroduce the state of nature as the prevailing political condition. As a romantic Schmitt discerns behind the collapse of liberalism “a return to undamaged, uncorrupted nature,” “silent and dark.”<sup>47</sup> In this respect, then, it might be more accurate to describe Schmitt as a Rousseauian of the Hobbesian school.

Schmitt’s political thinking combines existentialism’s “intensity”

<sup>44</sup> *Ibid.*, p. 29.

<sup>45</sup> *Ibid.*, p. 39.

<sup>46</sup> *Ibid.*, p. 35.

<sup>47</sup> *Ibid.*, p. 93.

with militarism's "struggle." More than any other theorist of the twentieth century he champions the Machiavellian position: politics is a battle to conquer and retain political power, impatient of all normative bonds. Because of their hard-eyed political realism, Hobbes and Machiavelli are the ideal political theorists.

Schmitt aspires only to describe political reality as it exists behind the veil of normativism. However, in his attempt to remove this veil, Schmitt launches yet another normative theory: Machiavellian realism. Politics is ultimately and necessarily superseded by internal or external war, and thus by the possibility of "the physical killing of other human beings": "There is no objective so rational, no norm so correct, no social ideal so beautiful, no legitimacy or legality, that it can justify human beings killing one another for it."<sup>48</sup> In keeping with Machiavellian thinking, Schmitt believes that the *Machtstaat* overrides the *Rechtsstaat*. In a state of emergency, the *Rechtsstaat* must yield: "The state of emergency clearly reveals the nature of the state's authority. Here, the decision separates itself from the legal norm and (put paradoxically) authority shows that it creates *Recht* but does not have to be *Recht*."<sup>49</sup> Being a political existentialist, Schmitt is attracted to extreme and exceptional political situations. For example, the concept of sovereignty can be defined only in the light of such a situation: "whoever resolves the state of emergency is sovereign."<sup>50</sup> The state of emergency should not be regarded as a marginal or last-resort predicament, but rather as "a universal concept central to political knowledge": "Control over the emergency is in a very real sense the power to decide."<sup>51</sup> Seen from this point of view, the state of emergency cannot be regarded as a state of chaos or anarchy. It is, in a sense, order – order imposed by sheer power, not by justice: "The existence of the state proves here to be of greater importance than the validity of the legal norms. Decision-making is freed from all normative bonds, and becomes, in a real sense, absolute."<sup>52</sup> The power-wielder thus monopolizes the "ultimate" decision. Therein lies the "essence of state sovereignty," which Schmitt defines as a "decision-making monopoly" rather than

<sup>48</sup> *Ibid.*, p. 49f.

<sup>49</sup> C. Schmitt, *Politische Theologie* (1922) (Berlin, 1979), p. 20.

<sup>50</sup> *Ibid.*, p. 11.      <sup>51</sup> *Ibid.*, p. 11.      <sup>52</sup> *Ibid.*, p. 19.

a “monopoly of force or domination.”<sup>53</sup> The state as a political unit has the power of *jus belli*, i.e., it can, in certain circumstances, define hostile elements “on the strength of its own decisions” and combat them.<sup>54</sup>

As an alternative to the dogmatism of constitutionalism, Schmitt espouses extreme scepticism. In *Politische Theologie*, he clarifies his form of scepticism, which he calls “decisionism”: the validity of a political decision is established “irrespective of its content”; the decision is “from a normative point of view, born of nothing.” Once a decision has been made, there can be no further discussion, “even though doubts may still endure.”<sup>55</sup> A political decision is the outcome of a struggle between alternatives that cannot be supported by reasoning or discussion. Real politics, i.e., the struggle for power, starts where communication leaves off; in politics it is important *that* decisions are made, not *how* they are made. According to Schmitt’s theory of *decisionism*, political decision-makers are bound neither from below by the demands of the citizenry nor from above by the norms of the law:

The ultimate legal argument of all legal value and validity is to be found in the act of will – the decision – that as decisions in general first creates *Recht*, and whose force of law (*Rechtskraft*) is not derived from the force of law of decision rule, since even a decision not compatible with legal precepts is right. This force of law of antinormative decisions is part of all legal systems.<sup>56</sup>

Schmitt regarded his theories as part of what he called “counterrevolutionary political philosophy,” which included de Maistre and Bonald, both critics of the French Revolution, and the Spanish Roman Catholic Dononso Cortes. Of Cortes, he has this to say: “Cortes is of a ‘decisionistic’ cast of mind: always expecting the worst, always awaiting Doomsday. This is why he despises the liberals, and regards atheist anarchist socialism as a respected, but deadly enemy, of diabolical stature.”<sup>57</sup> Schmitt feels the same way. Sorel’s anarcho-

<sup>53</sup> *Ibid.*, p. 20.

<sup>54</sup> Schmitt, *Der Begriff des Politischen*, p. 45.

<sup>55</sup> Schmitt, *Politische Theologie*, p. 42.

<sup>56</sup> Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, p. 25.

<sup>57</sup> Schmitt, *Politische Theologie*, p. 80.

syndicalist work, *Reflections on Violence*, is the radical counterpart to Schmitt's theory. Sorel's "doctrine of direct action" is not only at odds with "the absolute rationalism" of marxism and its form of dictatorship, but also with the "relative rationalism" of liberalism with its "balancing, public discussion and parliamentarianism."<sup>58</sup> According to Schmitt the bourgeois ideal of "peaceful agreement" is, for Sorel, a "creation of cowardly intellectualism": "The bourgeois concept of balance is in direct contrast to another vision: the warlike ideal of a bloody, definitive, devastating, decisive battle."<sup>59</sup> The people, driven by their instincts, will one day smash "the rostrum of the Sophists," writes Schmitt, paraphrasing the words of Dononso Cortes, which in turn "word for word could have come from Sorel."<sup>60</sup>

For Schmitt all references to norms and rules is pure rationalization that conceals an underlying struggle for power. If politics has to refer to anything, then it must be to *Ordnung* or order, Schmitt wrote after 1932. The specific nature of this order varies according to circumstances. Schmitt launched a new theory, "Konkretes Ordnungsdenken," a doctrine of order, in response to the situation that now existed. This was an alternative not only to the normativism of liberalism, but also to his own theory of *decisionism*.<sup>61</sup> The watchword was now: "The *Führer* is the guardian of the *Recht*."<sup>62</sup> Liberalism's vulnerable combination of *Rechtsstaat* and *Machtstaat*, based on the dualism of state and society, now gave way to the "Führerstaat" with its "Staat, Bewegung, Volk."<sup>63</sup> Schmitt was for some years a legal ideologist to Hitler. The new theory, writes Schmitt, is based on the complete rejection of the general concept of constitutionalism, both in theory and in practice:

Among the great experiences and encounters that have driven me as legal theorist to the National Socialists is a conversation I had in 1932 with a celebrated, widely travelled, highly experienced lawyer from the U.S.A., a man over seventy years old. He gave me the

<sup>58</sup> Schmitt, *Positionen und Begriffe*, p. 11.

<sup>59</sup> *Ibid.*, p. 12.      <sup>60</sup> *Ibid.*, p. 12.

<sup>61</sup> Cf. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, pp. 57ff.

<sup>62</sup> Schmitt, *Positionen und Begriffe*, pp. 199ff.

<sup>63</sup> C. Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg, 1933).



benefit of his experience, and summed up his diagnosis of our current state of affairs in the following maxim: “we are today experiencing the bankruptcy of *idées générales*.”<sup>64</sup>

### III Machiavellianism and constitutionalism in conflict

Max Weber’s major political concern is with the inexorable expansion of the bureaucratic apparatus and the possibility of political steering. Weber considered bureaucratic rule to be the purest form of rational–legal rule: the instrumental–rational, hierarchic system, organized around a cluster of special competencies, makes for extremely effective rule. The modern state bureaucracy, organized on the basis of the principles of the *Rechtsstaat*, functions – “at least in principle”<sup>65</sup> – in correspondence with general, rational calculable norms. It is thus predictable – like a “machine.” What Weber feared was the possibility that lies “in the lap of the future,” that this machine-like apparatus may receive all power. This bureaucratic machinery is already

at work, producing the cage of bondage of times to come, with which someday people, powerless like the fellahin of ancient Egypt, will be forced to comply, when a purely technical benefit – namely, a rational administration and provision – is the final and sole thing of value to determine the conduct of their affairs.<sup>66</sup>

In the face of this “basic fact of the inexorable progress of bureaucratization,” the following questions concerning political forms of organization arise: firstly, how is it at all possible “in the face of this preponderance of the tendency to bureaucratization” to save the remnants of individual freedom of movement? And secondly, how can there be any guarantee “in the face of the increasing indispensability and thereby increasing power of state bureaucracy” that there will be forces capable of curbing and effectively controlling this superior force? How can democracy “even in this limited sense” be at all possible? And the third question, “the most important of all”: granted

<sup>64</sup> Quoted from Hofmann, *Legitimität gegen Legalität*, p. 167.

<sup>65</sup> M. Weber, *Gesammelte politische Schriften* (1921) (Tübingen, 1980), p. 322.

<sup>66</sup> *Ibid.*, p. 332.

that there are things the bureaucrats *cannot* do, and that the role of the political leader is different from that of the bureaucrat – what then is this role?<sup>67</sup>

The role of the state bureaucrat, says Weber, ends where that of the politician begins. He illustrates this difference with reference to the type of responsibility involved in the two roles: for the bureaucrat, de-personalized responsibility for his office, above and beyond conflicting sides, the question of “official duty”; for the politician, “individual and personal responsibility for his affairs,” “the struggle for personal power” by means of taking a stand publicly.<sup>68</sup> The obligations of the bureaucrat concern an institution; those of the politician, his own affairs and positions.

When the bureaucratic universe determines the direction of politics, the very character of politics – struggle – vanishes in favour of a weak “Eudaemonism.” The awareness of the normatively irrational nature of power is displayed by “that humanly lovable and praiseworthy, yet unspeakably petit-bourgeois softening of the mind which finds it possible to replace political ideas with ‘ethical’ ones, and then proceeds to identify these harmlessly with optimistic hopes of prosperity and good fortune.”<sup>69</sup> Naturally enough, Weber’s analysis of the power position of the bureaucracy was influenced by the German context, including the heritage of Bismarck. From a bureaucratic point of view, the situation in Wilhelmine Germany was close to perfect, according to Weber: the bureaucracy directed a dilettante monarch and an impotent parliament which had, ever since the days of Bismarck, repeatedly demonstrated its will to powerlessness. For Weber, however, the problem faced by Germany was but an example of a central dilemma of all modern mass societies.

Besides general and universal suffrage, there were especially two reforms which Weber proposed as possible antidotes to the bureaucratic spirit in politics: the parliamentarization of government activity, and the selection of the president by plebiscite. Weber’s argumentation in connection with these two reform proposals documents his main political insight: namely, that the specific quality of politics can be saved from the encroaching bureaucratic trend only by

<sup>67</sup> *Ibid.*, pp. 333f.

<sup>68</sup> *Ibid.*, p. 335.

<sup>69</sup> *Ibid.*, p. 24.

concentrating political attention on the selection of political leaders.<sup>70</sup> Even persons possessing those qualities which, in Weber's opinion, mattered in politics – the power instinct and a sense of responsibility – lacked institutional arenas for developing their talents.

Thus, Weber's reasons for parliamentarization differ from the predominant liberal democratic view of parliament as the institutional mediation of the will of the people. What Weber sees in parliamentary democracy is first and foremost an efficient means of selecting and producing political leaders. With British parliamentarianism as his ideal, he presupposed that political leaders would so to speak be created through the parliamentary set-up – from the painstaking deliberations in committee work to the open fight for voter support. According to Weber, the British parliament has been “the place in which those politicians have been selected . . . who have understood how to bring one-quarter of humanity under the rule of a tiny but governmentally well-versed minority. And indeed – the main point, in fact – this has to a considerable degree even been a voluntary submission.”<sup>71</sup> Weber's second proposal for institutional reform concerned the selection of the president by means of direct elections. In parliamentarianism, he saw an antidote to the professional politicians of the bureaucracy and their monopoly on knowledge. It was his further contention that a president elected by plebiscite would counteract the increase in party bureaucratization and the related narrowing of the field of candidates for political leadership. In a direct competition for voter support, the “responsibility structure” of politics would emerge, clear and true. For that reason, Weber considered anything but direct election of the president to be “a mockery of the principles of democracy in the interests of parliamentary horse-trading.”<sup>72</sup> In his view, the institutional system of direct election represents “the safeguard of true democracy – not powerless submission to a coterie, but submission to leaders chosen by the people themselves.”<sup>73</sup> Under conditions of modern mass democracy, the “trust and belief of the masses” in their political leaders is established by mass demagogy. Every modern democracy tends toward what Weber calls “a Caesarean selection of the leader”; the most specifically Caesarean method

<sup>70</sup> *Ibid.*, pp. 351ff.

<sup>71</sup> *Ibid.*, p. 355.

<sup>72</sup> *Ibid.*, p. 498.

<sup>73</sup> *Ibid.*, p. 501.

is the referendum: “This is no ordinary ‘voting’ or ‘election,’ but the profession of a belief in the appointment of a leader for those from whom this acclamation is expected.”<sup>74</sup> In discussions concerning the establishment of a new German republic after 1918, Weber proposed a political system combining both parliamentarianism and Caesarism. Caesarism in the form of the institution of Reichspräsident would, in turn, represent a safeguard against “parliamentary absolutism,” since the president would be a kind of parliamentarily controlled monarch.

Weber’s proposal for a plebiscitary representative constitution may be seen as a variant of the classical idea of a *constitutio mixta*. In this respect, Weber’s proposals are in line with a liberal concept of the dispersion of power by means of an institutionalized system of division of powers. But with his idea of a *Führerdemokratie* as an alternative to the *führerlose Demokratie*, Weber makes clear his scepticism about another liberal concept: the discontinuation – or at least minimalization – of dominion (*Herrschaft*). Weber’s main concern is not to limit the power of the state but rather the expansion of *political* power. According to Weber, the alternative is either “*Führerdemokratie* with *Maschine*, or leaderless democracy, i.e., the rule of professional politicians with no profession, without those inner, charismatic qualities that are precisely what make a leader.”<sup>75</sup>

In combating what he calls the bureaucratic iron cage of politics, Weber is willing to pay the price of Caesarism: extreme personification and irrationalization in the formation of political will. Characteristic of the Caesarean *Führerdemokratie*, Weber writes, is that there should in general be a highly emotional type of devotion to – and trust in – the leader. This accounts for a tendency to favor the type of individual who is most spectacular, who promises the most or who employs the most effective propaganda measures in the competition for leadership.<sup>76</sup> But despite such observations, Weber underestimated the danger that a Caesarean democracy might turn into a Caesarean dictatorship. In retrospect, one may say that Weber’s view is pretotalitarian in a dual sense: firstly, it was formulated prior to the rise of modern totalitarian regimes; secondly, it is situated in a

<sup>74</sup> *Ibid.*, p. 394.      <sup>75</sup> *Ibid.*, p. 544.

<sup>76</sup> M. Weber, *Wirtschaft und Gesellschaft* (1922) (Tübingen, 1980), p. 157.

political no man's land between democracy and the discontinuation of democracy.

A general motif in Weber's political analyses is the concept of politics as power politics understood in the Machiavellian sense of the normatively unfettered struggle for power. As early as 1895, in his inaugural lecture, Weber announced: "Nicht Frieden und Menschen-glück haben wir unseren Nachfahren mit auf den Weg zu geben, sondern den *ewigen Kampf* um die Erhaltung und Emporzüchtung unserer nationalen Art."<sup>77</sup> The subject of this lecture was "Der Nationalstaat und die Volkswirtschaftspolitik"; Weber emphasized that for the German state the *Staatsraison* is "the final measure of value" *also* in respect to economic policy too:

wir wollen mit diesem Schlagwort die Forderung erheben, dass für die Fragen der deutschen Volkswirtschaftspolitik . . . im einzelnen Fälle das letzte und entscheidende Votum den ökonomischen und politischen Machtinteressen unserer Nation und ihres Trägers, des deutschen Nationstaates, zustehen soll.<sup>78</sup>

And, more than twenty years after this, in his "Parlament und Regierung im neugeordneten Deutschland," Weber promulgates the same idea – struggle as the basic phenomenon of politics:

Entscheidend wichtig ist: dass für die politische Führerschaft jeden-falls nur Persönlichkeiten geschult sind, welche im politischen *Kampf* ausgelesen sind, weil alle Politik dem Wesen nach Kampf ist.<sup>79</sup>

Like Carl Schmitt after him, Weber saw politics as the continuation of warfare by other means. In this tradition, the distinction between war and peace becomes diffuse, as when Weber discusses "peace" in inverted commas:

Conflict (*Kampf*) cannot be excluded from social life. One can change its means, its objects, even its fundamental direction and its bearers, but it cannot be eliminated . . . "Peace" is nothing more

<sup>77</sup> M. Weber, *Gesammelte politische Schriften*, p. 14.

<sup>78</sup> *Ibid.*, pp. 14f.      <sup>79</sup> *Ibid.*, p. 392.

than a change in the form of the conflict or in the antagonists or in the objects of the conflict, or finally in the chances of selection.<sup>80</sup>

Machiavellianism is decisionism transferred to the field of politics: strictly political decisions are the result of choices which cannot be justified by rational consensus. On the question of law and right Weber also takes a decisionist stand; but the legal decisionism of Weber differs from that of Schmitt in being, in certain respects, normatively modified.

According to Weber, it is not possible for there to be scientifically founded pleading for practical stands within the spheres of politics, jurisprudence or morals, "because the various spheres of the world stand in irreconcilable conflict with each other."<sup>81</sup>

Following the monotheistic intermezzo of rationalism, "polytheism" is returning, under scientific assumptions, in the form of a polytheism of *values*:

according to our ultimate standpoint, the one is the devil and the other the God, and the individual has to decide which is God for him and which is the devil. And so it goes throughout all the orders of life.

The grandiose rationalism of an ethical and methodical conduct of life which flows from every religious prophecy has dethroned this polytheism in favour of the "one thing that is needful." Faced with the realities of outer and inner life, Christianity has deemed it necessary to make those compromises and relative judgments, which we all know from its history. Today the routines of everyday life challenge religion. Many old gods ascend from their graves; they are disenchanting and hence take the form of impersonal forces. They strive to gain power over our lives and again they resume their eternal struggle with one another.<sup>82</sup>

Put in non-metaphorical terms, this polytheism means that "the ultimately possible attitudes toward life are irreconcilable, and hence their struggle can never be brought to a final conclusion."<sup>83</sup> This

<sup>80</sup> M. Weber, *The Methodology of the Social Sciences* (New York, 1949), pp. 26f.

<sup>81</sup> *Ibid.*, p. 147.      <sup>82</sup> *Ibid.*, pp. 148f.      <sup>83</sup> *Ibid.*, p. 152.

modern polytheism of Weber builds on the philosophy of Nietzsche and his reckoning with the moral theories of rationalism. In values, the decisive choice is left to the charismatic leader or the individual private human being.

The Machiavellian view of politics is so systematically and repeatedly stressed in the writings of Weber that any interpretation of Weber's works as being "steeped in the tradition of European liberalism,"<sup>84</sup> seems remarkably naive. Compared with this mild, liberal interpretation, the crass characterization of Weber provided by Lukács – who saw Weber as the ideologue of German imperialism – would appear far more adequate. According to Lukács, the democratization of Germany was for Weber "but a technical means for the purpose of a better functioning kind of imperialism."<sup>85</sup> But this interpretation makes the political theory of Weber undeservedly one-dimensional. In fact, the interesting thing about Weber and his theory of politics is precisely the unresolved tension – and thereby its "antinomian structure"<sup>86</sup> – between two competing elements: Machiavellian power politics and democracy; decisionism and constitutionalism; Caesarism and parliamentarianism. Weber as a political theorist is interesting precisely because he so uncompromisingly analyzes the problems of applying liberal–democratic ideas, originally formulated in bourgeois society, to conditions of modern mass society.

Weber rejects as utopian the concept of democracy as the free self-organization of the people. Likewise, he cannot accept another classical view of democracy, namely, as the institutionalized will of the people: "Concepts like 'the will of the people,' the true will of the people, no longer exist for me – they are *fictions*. It is just as if one were to speak of the will of the purchaser of a pair of boots as being authoritative for how the cobbler ought to pursue his craft. The buyer may know how the shoe pinches – but never how to make a better

<sup>84</sup> A. Giddens, *Politics and Sociology in the Thought of Max Weber* (London, 1972), p. 56.

<sup>85</sup> G. Lukács, *Die Zerstörung der Vernunft* (Neuwied, 1962), p. 536. See also H. Marcuse, "Industrialisierung und Kapitalismus im Werk Max Webers," in *Kultur und Gesellschaft*, vol. 2 (Frankfurt a.M., 1965), pp. 107ff.

<sup>86</sup> W. Mommsen, "Die antinomische Struktur des politischen Denkens Max Webers," in *Historische Zeitschrift* (1981), 35ff. See also Mommsen's pioneering study, *Max Weber und die deutsche Politik 1890–1920* (1959) (Tübingen, 1974).

shoe.”<sup>87</sup> The question of democracy and its ordinances is for Weber a “state-technical” matter: democracy is the most expedient way of managing the selection of political leaders. This instrumental view of democracy has in fact led to the formation of two main schools within modern political theory: on the one hand Schumpeter and the realistic modernization of democracy;<sup>88</sup> on the other, Schmitt and the Caesarean discontinuation of democracy.

Weber’s political theory remains vague on one central issue: the relationship between the two institutional arrangements for the selection of a leader, i.e., the parliamentary and the Caesarean. What Weber leaves as an unresolved institutionalized competitive relation is given a clear, unambiguous solution by Schmitt. From *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1923) to *Der Hüter der Verfassung* (1931) Schmitt’s work is highly critical of the concept of a liberal, debating, politically sovereign parliament. The activities of organized interest groups and the expansion of bureaucracy has, according to Schmitt, reduced parliament to a mere façade which conceals the political impotence of the institution. Neither does Schmitt regard parliamentary institutions as suitable instruments for performing what, for Weber, was a vital function: *Führerauslese* – the selection of a leader. The election of the President of the Republic by plebiscite was, for Schmitt, the only valid process by which a leader could be selected. Schmitt integrates Weber’s concept of *Führerdemokratie* into his theory, assigning to the President of the Republic the role of the “Guardian of the Constitution.”<sup>89</sup> Schmitt thus makes absolute Weber’s idea of the directly elected *Führerdemokratie*, albeit in an altered context. Whereas Weber regarded the Caesarean or autocratic leader as a counterbalance to anonymous, leaderless bureaucracy, Schmitt saw in it an alternative to liberal democracy.

Weber’s lack of clarity as a democratic theorist is further highlighted in his typology of the three legitimate forms of authority: the traditional, the charismatic and the legal-rational.<sup>90</sup> As mentioned above, legal-rational authority is the type of authority characteristic

<sup>87</sup> Max Weber in a letter to Robert Michels (1908), quoted from W. Mommsen, *Max Weber*, p. 421.

<sup>88</sup> On Schumpeter’s political theory from this point of view, see R. Slagstad, *Rett og politikk* (Oslo, 1987), ch. 1.

<sup>89</sup> C. Schmitt, *Der Hüter der Verfassung*, (Tübingen, 1931).

<sup>90</sup> Weber, *Wirtschaft und Gesellschaft*, pp., 124ff.



of the *Rechtsstaat*. Authority is exercised in accordance with universal and formal norms, designed to ensure the greatest possible degree of predictability in their application. Legal-rational authority means government by officialdom, with its high degree of specialization and division of labor. According to Weber's analysis, bureaucratic authority – legal-rational authority in its purest form – is spreading in modern industrial societies, ousting traditional authority which had been accepted on the belief that its rules were decreed by divine authority.

Since the modern, democratic form of *Herrschaft* is by definition the opposite of bureaucracy, and the traditional forms of authority are also excluded, it would seem that Weber has no alternative but to include the democratic form of legitimacy as an aspect of charismatic authority. It is interesting to note that Weber's analysis of democratic authority does not appear in connection with either legal-rational or traditional authority. Instead, in *Wirtschaft und Gesellschaft* (1922), he deals with "democratic legitimacy" in an extension to the chapter on charismatic authority.<sup>91</sup> Charismatic authority is based on a belief in a leader's extraordinary personal qualities. As such it is the antithesis of bureaucratic authority, since it contains none of the characteristics essential to bureaucracy: predictability, impersonality and regularity. Weber's point here is that the principle of charismatic legitimacy, which must by definition be seen as authoritarian, "may be subject to interpretation or development in an anti-authoritarian direction."<sup>92</sup>

Given the inherent rationalization of modern societies (i.e. the elimination of the transcendent), the acceptance of charismatic leadership changes character. No longer is leadership accepted on the strength of its charismatic legitimacy; the acceptance itself becomes a basis for legitimacy, i.e., "democratic legitimacy": "The leader whose legitimacy rested on his personal charisma then becomes leader by the grace of those who follow him, since the latter are formally free to elect and elevate to power as they please, and even to depose . . . The chief now becomes the freely elected leader."<sup>93</sup> Democratic legitimacy becomes a by-product of charismatic leadership. The traditional relationship between the leader and his followers is maintained, even

<sup>91</sup> *Ibid.*, pp. 155ff.

<sup>92</sup> *Ibid.*, p. 155.

<sup>93</sup> *Ibid.*, p. 156.

though an anti-authoritarian shift has taken place in the charismatic type of legitimacy. In *Wirtschaft und Gesellschaft* Weber makes no clear distinction between elections (where a choice may be made between competing candidates) and acclamatory referenda. Thus in his typology of legitimacy he makes no allowance for democratic legitimacy in its classical, bourgeois sense: democracy as the institutionalization of the citizen's political role. This neglect of the civic dimension of politics is a central feature of Weber's political theory. He fails to take into account the ability of human beings to create a framework of promises and agreements, within which political battles are fought. In *Wirtschaft und Gesellschaft* Weber introduces this theory of "the phases of development" of law: its initial foundation in religious doctrines, the "natural law" tradition and modern positivist view:

From this perspective, the formal qualities of the law emerge as follows: arising in primitive legal procedure from a combination of magically conditioned formalism and irrationality conditioned by revelation, they proceed to increasingly specialized juridical and logical rationality and systematization, sometimes passing through the detour of theocratically or patrimonially conditioned substantive and informal expediency. Finally, they assume, at least from an external viewpoint, an increasingly logical sublimation and deductive rigor and develop an increasingly rational technique in procedure.<sup>94</sup>

A positivist explanation of the factors contributing to the creation of legal systems must exclude a concept such as "natural law." Legal positivism has, writes Weber, "at least for the time being advanced irresistibly. The disappearance of the old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities."<sup>95</sup> The collapse of natural law also means that questions of legitimacy must be analyzed in terms of their legality. Thus, political authority is legitimate if it is embodied in law. The consequences of this positivism are that any law can be

<sup>94</sup> Weber, *Economy and Society* (New York, 1986), p. 882.

<sup>95</sup> *Ibid.*, pp. 874f.

freely and sovereignly enacted or abolished, as long as the correct formal procedure is followed. According to Weber, legal legitimacy is based on “a belief in the ‘legality’ of patterns of normative rules and the right of those elevated to authority under such rules to issue orders.”<sup>96</sup> The content of a law is arbitrary and may be established either “by agreement or by imposition.”<sup>97</sup> The basis of all authority – and thereby also legal authority – is *belief*, “a belief by virtue of which persons exercising authority are lent prestige.”<sup>98</sup>

Weber’s political and legal decisionism is, however, tempered with normativism: even though legal and political norms may not be rationally justified, they still possess a very real power. Weber’s fear of the expansion of bureaucracy is nothing less than a fear that these norms may become *too* binding. It will be remembered that for Weber the most favored alternative was *Führerdemokratie*, a charismatic leader elected by plebiscite.

<sup>96</sup> *Wirtschaft und Gesellschaft*, p. 124.

<sup>97</sup> *Ibid.*, p. 125.

<sup>98</sup> *Ibid.*, p. 153.

