LEGITIMACY, LAW, AND PUBLIC ACTION

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ABSTRACT – A definition of political power as both power over and power to prompts a reconsideration of the repertoire of justification on which political legitimacy is built. For a long time the ideal type of Weberian rational-legal legitimacy characterized a method of political domination that was proper to Western states. It is now the target of many critics who regard it as inadequate and unable to account for changes in the political regulation of our contemporary societies. In a period of erosion of state power, law and bureaucracy, which were at the heart of the Weberian model, have lost their centrality. Not only do these criticisms not take into account Weberian analysis of political responsibility, which shows that legitimacy must be thought of in terms of the exercise of power, but empirical studies do not demonstrate either the end of the bureaucratic mode of organization or the irreversible decline of the place of law in the management of public affairs. A deeper reflection on political legitimacy leads more to an renewal of the Weberian model than a simple renunciation of it.

KEYWORDS – Authority, bureaucracy, domination, law, legality, organization, power, public action, public policy, State, Weber

The renewal of analytical perspectives in political sociology, and in particular in the development of a political sociology of public action descended from Policy Sciences and Policy Analysis, has undoubtedly led to a better understanding of political power. Interest in the concept of political power lies in the combination it brings to mind of a position of authority that determines a right to be in control, with the ability to impose its will that is contained within the idea of power itself. What indeed would an authority be without power, given that, as Max Weber noted, belief in the legitimacy of
political power also comes from the reality of the strength and force of that power? However, focus on the answer to the question, “Who governs?” has meant that an aptitude for controlling and subjugating individuals and groups has long been more significant than an ability to produce results.\(^1\) Political power has historically been identified more as a logic of power over than power to, even though it is clear that, in practice, the latter can hardly exist without the former; to use Peter Morris’s expressive terminology, it is a question of affecting rather than effecting.\(^2\) However, if the question of political order and its corresponding regime cannot be avoided, we can also no longer ignore the fact that power is also justified by what is done with it. In historical terms, the strong internalization of a model of the state as protector, within societies that used to be called advanced capitalist economies, has unquestionably made citizens more sensitive to the performance of public authorities, to the point where efficiency has been made into a criterion of legitimacy and the form and content of democracy have become linked to one another. People do not obey due only to the rules that condition actions, but also due to what they think are the results of those same actions. Political power must incorporate a new dimension that is related to its ability to deal with the problems that affect the community. According to a definition of democracy that has been termed two-dimensional, a good government now has a duty to be responsive—sensitive to social demands—and problem solving—efficient in handling problems that affect the community.\(^3\) If politics is still the manifestation of a balance of power, power games, and domination strategies, it is also an activity that involves fixing collective goals that are crystallized in the formulation and implementation of public policies. More specifically, this involves the ability to define collective goals, to mobilize resources in pursuit of them, to make the decisions that achieving these goals requires, and ultimately to accept the consequences that result from them. Any valid definition of political power now has to give a key place to

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1. Although this question refers to the title of a famous book by Robert Dahl, it should be remembered that he was well aware of the inherent limits of framing the issue in a restrictive way, which led him to focus more specifically on decision decision-making processes in relation to specific issues. Dahl’s contribution to the development of Policy Analysis has, moreover, been crucial (Dahl, 1971).
public action, understood as the range of social processes through which problems that are considered within the jurisdiction of public authorities are addressed and whose resolution conditions legitimacy and responsibility. Public action is therefore clearly one dimension of the exercise and legitimacy of political power, and an analysis of it is essential for the purpose of updating the sociology of the state.

It is in the articulation of authority and power that what are widely called “the metamorphoses of political regulation” affecting state power take place. Nowadays our political institutions are faced with the central issue of steering public action in a situation in which the remit, the nature, and the scope of political power has changed. It is simple to make a broad summary of the well-known transformations that have affected all contemporary states, even if the intersection of their problems should not obscure the diversity of their empirical grounding, which is linked to individual pathways towards state building. Firstly, the state is no longer comprised of politicians alone, and it finds itself in competition with other sources of public decision-making. The advent of the “postnational constellation”—to draw on Habermas’s formulation—is characterized by a new configuration of institutional polyarchy in which the extension of the political system has occurred through the promotion of new players at both the subnational level (in the form of local authorities created through a decentralization movement that has affected at least all Western states) and the supranational level (in the form of various international institutions such as the World Trade Organization and the International Monetary Fund, and also the emergence of new political centers such as the European Community). Moreover, actions taken by government institutions are no longer merely centered on a simple provision of services in response to more or less onerous social demands. Rather, government-institution actions must also cover the imperatives of managing “public problems,” over which the institutions rarely have monopoly control and the handling of which, in terms of nature, extent, and degree of responsibility, creates consequences that define the reality of their performance. In this context, democracy can therefore no longer be considered solely in

terms of electoral activity; it must also both ensure the participation of all those affected by the consequences of public action and promote an impartial oversight of government activities through appropriate monitoring institutions.\(^7\) Clearly, the weakening of political power resulting from these transformations prompts a reappraisal of the mechanisms that determine the legitimacy of those who govern, with legality alone not being able to embody the exercise of power and make compliance with the law the only source of legitimacy.

Insofar as one of the characteristics particular to political power—relative to other forms of power—is that it is subject to the constraints of legitimation, it comes as no surprise that the question of legitimacy has become a recurrent theme at a time when political power—and in particular the power of the state—is moving away from its traditional reference points. If we accept that to be fully stabilized, all power must be justified and accepted, the secularization of the political could only make modern political regimes more sensitive to the variations in the levels of trust that their subjects have tended to afford them. Political power is no longer able to simply assert itself, and must now find a justification for its own existence.\(^8\) The reconfiguration of the justificatory categories of political power, which is very directly linked to a new definition of political power itself, evidently calls for new “conceptual lenses” and stakes out a new field of research. It is regrettable that analysis is very often limited to the agreed critique of the Weberian model of rational-legal domination. At the same time, this is hardly surprising, given that the model coined by the German sociologist has until now been the dominant reference point for characterizing the modern state’s political legitimacy. According to this model, a state gains its legitimacy from the exercise of power in accordance with the law.\(^9\) This model, however, is now being challenged through the questioning of its most significant dimensions, namely the relevance of the classical model of bureaucracy and the centrality of the law in the management of public affairs.

7. This corresponds to Pierre Rosanvallon’s triptych of impartiality, reflexivity, and proximity (Rosanvallon, 2008).
8. François Bourricaud even sees a kind of definition of democracy in this. “For the ‘democrat,’ a legitimate power is a power that accepts or even which establishes its own process of legitimation” (François Bourricaud, 1961).
9. To the point of having contributed to the creation of what Michel Dobry identifies as the “standard paradigm” of legitimacy (Michel Dobry, 2003).
The aim here is not to address the theme of Weberian legitimacy as a whole, which would in any case be an excessive ambition, but rather to confine the scope to considering legitimacy from the perspective of the claims of legitimacy made by those who govern. In other words, examining the reception of these claims from the angle of a belief in legitimacy—that is to say, that which creates the empirical “validity” (*Geltung*) of a legitimate order—is not a part of this discussion. Under this condition, a rational reappraisal of this nature of the legal form of domination should allow us to better understand and elucidate the shifts that have constructed the current particularity of political power being channeled through the prism of public action, and thus allow us to reveal the mechanisms of reconfiguration of the justificatory categories of power that have led to a rethinking of the role of law in political regulation. And just as it cannot be said that the Weberian conceptualization fully captures the whole relevance of the exercise of political power, a conclusion of the irremediable decline of bureaucracy and legality cannot be drawn. While more than ever political power must be justified, the complexity of the exercise of power explains the widening of legitimation, an understanding of which is less a rejection of the Weberian model than it is a case of going beyond it.

**From a Narrow to a Broad Theory**

It should be acknowledged that Weber raised an issue that remains a priority for any extensive analysis of political power and is a feature of every new historical configuration, namely the relationship between the state, legitimacy, and legality. The fascinating power of Weber’s thought lies simply in the fact that, as Breuer notes, in his concept of legitimacy, he hit upon what is a “core problem” for any modern political formation. Moreover, he was one of the first to raise this crucial issue of legitimacy. Until Weber, legitimacy had not played a major role. Even an author such as Jellinek—to whom Weber was very close—wrote his general theory of the state (*Allgemeine Staatslehre*) without reference to legitimacy as such.10 Unlike examinations

10. Jellinek (Jellinek, 2005) elucidates theories of justification of the state (Part One: “General Theory of the State,” chapter 7, 297–347) as well as state power, though he defines it as a power of domination (*Herrscherwalt*, “sovereign power”), that is to say, as a state.
of the state such as those that dominated positive law during his era, Weber did not restrict himself to solely viewing the state as a political grouping. Instead, he brought the category of legitimacy into play, a category of analysis without which the relationship between the state and dominance could not be conceived. Weber is certainly the first to have made it into an analytical category for understanding the state: “Legitimacy is the twin sister (Zwillingsschwester) of the modern state.”

It is, as Anter commented, “the Archimedean point of his sociology of domination.” For Weber, the state, domination, and legitimacy are inseparably related. Moreover, Weber ceaselessly stated that legitimacy plays a crucial—and insufficiently appreciated—role in stabilizing political regimes. The importance of Weberian reasoning on political sociology has therefore been decisive. And it is no coincidence that the work undertaken with the publication of the volume *Max Weber-Gesamtausgabe*, which focuses on the sociology of domination, is an opportunity for a revival of the debate on the relevance of Weberian concepts. This opportunity comes at a historical conjuncture that has rightly been characterized as “an advanced process of erosion of the traditional concept of the state.”

Weber’s theory of legitimacy is particularly difficult to grasp because it covers a multitude of facets and because it is misleading to confine it to the apparent simplicity of the ideal-type formulation. In particular, maintaining a narrow conception of domination as a relationship of obedience leads to a narrow view of political power. Weber was aware of this and for this reason it is possible to find in his work the presence of a broader theory which allows legitimacy to be thought of in a fuller way, namely, as a combination of *justification for the distribution of authority* and *a justification for acts of power*. He was led, through a consideration of the political profession, to view legitimacy as the exercise of a form of political responsibility that is also defined as historical responsibility.

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Legitimacy without Qualities

The goal here is not to reconsider the historical processes through which rational-legal legitimacy became the modern form of political domination, or at least its ideal-type incarnation. It is certainly possible to understand from a historical point of view how the defenders of natural law were able to play a decisive role in the emergence of democracy built on law, but it is also possible to understand how the idea of legality is the result of a complex rationalization process in which the disintegration of axiomatic natural law led to the consolidation of an instrumental form of legal positivism. What is clear is that the sociology of law is, according to Weber, an important element in the construction of his sociology of domination, something that can be seen in the proximity of the formal rationality of law to “rational-legal” domination, which presupposes the overlap between law and state. Moreover, Weber talks about the state as the “only coercive public institution that claims to be the sole source of all ‘legitimate’ law.”14 The victory of formalist legal rationalism led to the development in the West of the legal type of domination, the purest incarnation of which remains bureaucratic domination, which is essential for the emergence of the modern state. The coherence of the blueprint for modernity as sketched by Weber is embodied in the unique “functional reciprocity” between the state, law, and bureaucracy.15 The rational state “is based on a specialist civil service and rational law” in the sense that the state requires a predictable (berenchenbar) form of law and a form of administration governed by formal rules.16 The state needs there to be a belief in the lawfulness of the actions undertaken in its name, and law cannot exist without the state. The existence of an effective formal bureaucracy can have no real significance without the support of a rigorous and coherently applied legal system.17 Conversely, the rationalization of administrative channels contributes to the unification and systematization of law. The state therefore has a monopoly on the use of force to ensure respect for the legal order that it itself established and which gives it a specific legitimacy for deploying physical coercion. In non-Weberian

15. See the article by François Chazel in this issue.
17. On all these points, see Michel Coutu’s excellent book (Michel Coutu, 1995).
terms, it could be said that what we have here is a particularly decisive systemic interdependence.

The other significant dimension is the development of formal rationality, which is regarded as being at the heart of the overall process of rationalization. The legitimacy of domination is related to a belief in the legality of rule, “which is general, developed according to an end, and established and promulgated according to criteria of formal rectitude.” Formal legal rationality could indeed be described as the modern way of making legal interpretations to scientifically generate new legal norms from legislative postulates. Western law is therefore characterized by both a high degree of logical systematization and the importance of deductive reasoning. The formal principle of legitimation means that the legitimacy of formally rational law rests on the principle of legality and procedural regularity, and not a substantive criterion of legitimacy.

It is striking that a kind of “dematerialization” of politics corresponds to the insistence on the formal dimension of legal domination. Just as Weber does not define the state by the nature of its activities, he does not attribute any specific content to politics. If politics can be summarized as a battle (Kampf), then in general, political activity appears to be “seeking to be involved with power or influence its distribution,” or even: “We will say that social activity is ‘politically motivated’ (politisch orientiert) when and insofar as it seeks to influence (in a nonviolent fashion) the direction of a political group, and in particular the appropriation, expropriation, redistribution, or allocation of leadership powers.” Politics is linked to the distribution of power and authority. At the same time, Weber does not assign a specific content to legitimacy, whether it is of a traditional, charismatic, or rational-legal nature. A state “without qualities” (ohne Eigenschaften), in accordance with Anter’s evocative formulation, corresponds to a legitimacy that is “without qualities.” In fact, legitimacy is hollow in nature and defines in a very broad way the framework for the exercise of power independently of the way in which power is exercised. This has several consequences.

Firstly, Weberian typology is clearly conceptualized from the perspective of those who dominate, in that Weber considers legitimacy to be the consent given by the dominated to claims of legitimacy. This is what makes Weber largely ignore the real factors that determine the obedience of the dominated, and focus instead on the reality of their behavior from the point of view of their being successfully dominated. As Breuer observes, “a multitude of factors that underpin the dominated’s belief in legitimacy are almost deliberately ignored.”21 This is not Weber’s problem because it is not the focus of his attention, which is why he chose to examine the empirical validity of systems of order at the expense of paying greater attention to the root causes that lead social actors to adhere to the order and orient their actions accordingly. In fact, the legitimacy of an order must be able to adapt to the plurality and diversity of practical interests.

Secondly, Weber’s approach allows him to reject any form of normativism. This is why, after having briefly considered adding a fourth type of legitimacy, that of democratic domination, to his typology, Weber quickly abandoned the idea. For it was not consistent with the wholly sociological dimension of his theory of legitimacy. Democracy cannot validly embody a type of legitimate domination for the sole reason that domination requires a minimum of decision-making power, and democracy under these conditions cannot lead to viewing rulers solely as “servants” of the governed. Domination is the ability to determine the practical agenda of actors, as it would be put today, and this is the reason why Weber also tells us that the contract between the employee and his or her boss is not a contract between two equal parties. Furthermore, it is also possible to view democracy as being a form of rational-legal domination simply because it is based on relations of domination that have been framed by law. This should not under any circumstances be seen as being critical of democracy, and Stefan Breuer is absolutely right to say that anyone who would put forward such an argument has not grasped the meaning of Weber’s theory of legitimacy. Weber, moreover, did not attempt to develop in his theory any underpinning normative standard through which any given state order may be approved or condemned. Accordingly, any protest movement based on the will of the dominated is always sociologically speaking “originally illegitimate,” which, again, has nothing

to do with any value judgment of the reasons that have prompted the dominated to challenge the "law of those who dominate." Thus, so long as those who challenge the established order fail to prevail, they cannot define the lawful order. This is what pushes Weber to see in the city an example of non-legitimate domination, with it embodying rebellion against the privileges of property owners of the Middle Ages. His work on the city offers an analysis of challenges to legitimate power in the sense that the city is itself a structure of domination that has breached feudal society’s systems of order. It is only through a process as long as it is complex, that the city, as a historical expression of non-legitimate domination, would give birth, through the formation of bourgeois freedom, to the modern political institutions that would be embodied in the state.22 Sociological categories are clearly present in all of this.

Weber was always aware of the fragility of legitimacy, or at least the lack of absolute certainty of it, and he never discounted challenges to it, for two different reasons. Firstly, no political regime is "genuinely legitimate" because there is a plurality of principles of legitimacy.23 Secondly, within the same society different social orders coexist, which the actor will have to face without ever being certain of bringing them together, other than to conceal acts of dishonesty. The example of a duel illustrates this situation. The legitimate social order prohibits dueling, but the code of honor that governs a different social order to which the individual adheres makes dueling a compulsory activity for ensuring respect. Weber’s sociology is not interested in the gap between the claims to legitimacy made by those who dominate and the motivations of the dominated, as long as these motivations do in fact remain compatible with the claim of legitimacy.

In any case, it is important to note that for Weber problems of legitimation and organization must be considered together, because domination clearly refers to the exercise of leadership.24 From this point of view, the role of bureaucracy in rational-legal legitimacy is but the logical outcome of legitimacy defined as domination.

22. This is explained by Catherine Colliot-Thélène in seeing in it an outline of a "sociological theory of democracy" (Catherine Colliot-Thélène, 1995).
Weber clearly grasped this for himself: “All domination expresses itself and functions as administration.” Consequently, and as Anter has remarked, Schmitt’s concept of an administrative state would for Weber be tautological.25 As he very explicitly put it: “In all forms of domination, the existence of administrative leadership and its continued actions with a view to maintaining docility that extends to orders being carried out under duress is vital.”26 In other words, legitimate domination implies acts of government and makes them possible or authorizes them, in the strictest sense of the term. The issue of legitimacy therefore gives rise to the formation of a power apparatus that is designed to act as a potential counterbalance to the fragile nature of legitimacy. At the same time, the obedience of members of the administrative leadership that supports domination is essential, and Weber rightly emphasizes the role of military leaders in the processes of legitimation and delegitimation of power. Unlike in Rosanvallon’s formulation, legitimacy cannot be so easily likened to an “invisible institution”; it is certainly a belief, but it is not irrelevant to the constitution of power mechanisms. What is essential for legitimate state domination is the belief in the legitimacy of the members of the state authorities and of institutions in which the legitimation process happens. The fragile nature of domination is what makes it necessary for a limited circle to form around those who dominate.

Without dwelling on the sociological value of understanding legitimacy as a relationship of domination, it is nevertheless worthwhile to emphasize the limited scope of such a perspective. In fact, analyzing domination only in terms of “power over” has led to legitimacy being given a narrow dimension in which the distribution of power is restricted to exercising the right to control. At the same time, analysis of legitimate domination takes on a “quasi-constitutional” character in the sense that what is focused on only relates to the power-distribution order. It is no coincidence that Weber himself accepts this formulation. Indeed, for Weber the reality of domination expresses the “real constitution” (Verfassung)—that is to say, that which does not simply come from the rules contained in a rational

and explicit text—of the political grouping that is the state.\textsuperscript{27} For ultimately—and this is the result of legitimacy being conceived as a relationship of domination—what counts is the answer to the following question: “To which men do those who, according to current interpretation, are continually subjected to coercion ultimately ‘submit,’ and to what extent and under what sort of relations?”\textsuperscript{28} One of Weber’s great insights in relation to this issue was to develop the notion of empirical legal order (\textit{empirische Rechtsordnung}). However, one may wonder if this was not about highlighting a first level of legitimacy, one that makes it possible to steadily exercise domination, without telling us anything about the reality of its exercise. Belief in legality only defines a leader’s legitimate access to power, but it does not define the legitimacy of it continuing to be held, as will be seen through another category of justification. It is likely that the impossibility of finding a metalegal basis for formal legality as a definitive criterion for the legitimacy of the state, along with “the irremediable disparity of the world’s past forms of representation,” led Weber to be content with an agreement on procedures.

This aspect of Weber’s conception of legitimacy is part of his theory of modernity. In a fully secularized society, no single value can in fact fully impose itself, and competition between them finds its expression largely in democratic regimes; it is for this reason that only systems made up of formal rules ensure the possibility of their expression and that discussion of them can take place when appropriate. This is a point made by Jean-Marie Vincent in his remarks defending Weber’s position: “Democracy that has no message is democracy that tolerates a plurality of messages, and even promotes them in opposing fanaticism.”\textsuperscript{29} In a less grandiose but nevertheless equally realistic way, the “paradox of rival partners” coined by François Bourricaud is relevant here, according to which political action is based on “an awareness of the contentious nature of collective action,” though Bourricaud did not see an agreement on common norms predetermining in any way a necessary alignment of points of view.\textsuperscript{30} Alter-

\textsuperscript{27} Max Weber, “Essai sur quelques catégories de la sociologie compréhensive,” 1965, 393.
\textsuperscript{29} Jean-Marie Vincent, 1998, 196.
\textsuperscript{30} François Bourricaud, 1961.
natively, one could, like Luhmann, see behind this generalization of legitimacy, “which almost creates a gratuitous acceptance of it,” a kind of “fundamental consent” that allows legitimacy to be conceived as a generalized disposition to accept, within certain limits, decisions whose content is as yet undetermined. In a world in which neither a totally common will nor a universal general interest can ever truly be achieved, it is reasonable to see laws as offering effective methods for managing social relationships once compromise becomes necessary. This is what led Weber to oppose any excessive attack against legal formalism and to make Jehring’s expressive turn of phrase his own: “Form is the enemy of arbitrariness and the twin sister of liberty” [“die Form sei die Feindin der Willkür, die Zwillingsschwester der Freiheit”]. However, he clearly doubted that a belief in the legitimacy of domination could find sufficient basis in a purely formal conception of legality. When the force behind rules comes only from their features, that is to say when the law is no longer seen as sacred and is seen only as “a rational technical apparatus,” is this alone enough?

Weber was in fact well aware that the legitimacy of power should incorporate other dimensions. In particular, it is likely that his sociology did not allow him to fully believe in the success of a simply anonymous mode of domination. Weber describes the inherent complexity of the mechanisms for accepting political power in the following passage by discussing the possible combination of types of legitimacy: “In general, it must be remembered that the foundation of all domination, and therefore all docility, is a belief in the ‘prestige’ of the ruler or rulers. This belief rarely has a single meaning. It is never a belief in a purely legal form of ‘legal’ domination. Rather, belief in legality is ‘acclimatized,’ and thus conditioned by tradition, with the breaking down of tradition potentially reducing it to nothing. It is also charismatic in a negative way; resounding and repeated

government failures, whatever they may be, contribute to the government’s defeat, break its prestige, and make the situation ripe for charismatic revolution.”34

Weber was undoubtedly aware of the fragility of a type of legitimacy that was based solely on a belief in the merits of its legality alone, and this is certainly what led him to attempt to consolidate it through other mechanisms such as plebiscitary democracy and seek guarantees of responsible political power through the quality of politicians.

**Legitimacy as the Exercising of Responsibility**

A typology of forms of legitimacy does not exhaust Weber’s thoughts on legitimacy, and in the concept of the ethics of responsibility and in Weber’s observations on politics as a profession there are further insights to be found. Certainly, following Fichte’s precept Weber knew that one cannot assume man is good and perfect. This is what led him to reflect on the institutional conditions that would be likely to bring men to behave in a way that was if not virtuous then at least in compliance with the requirements of their duties. However, political action cannot be separated from those who lead, and thus, for Weber, the viability of a political regime is linked to the quality of the men who govern. Beyond acquiring a legitimate right to control, they must also provide “verification” (Bewährung) of the merits of their position through the quality of their actions. If legitimacy of domination is expressed on a rational-legal basis, the success of individuals is also measured by the results of their actions. Having the right to rule does not provide exemption from governing well, with belief in the legitimacy of power also being nurtured by the reality of power.35 Acts of government must be simultaneously effective and useful. Through Weber, the exercise of power became an element of political legitimacy.

Given the troubled nature of the period in which he lived, Weber could not help but be sensitive to the fact that, without characterizing the state by the nature of its activities, it was difficult to understand

35. For further discussion of this issue, see chapter 2 (“Action publique et pouvoir politique, la difficile conciliation de la légitimité et de l’efficacité”) of Patrice Duran, 1999.
the nature of the actions of politicians independently of the content of their interventions, especially when these were carried out according to a logic of means-ends rationality that also aimed for efficiency. Although his “political writings” are more concerned with practical issues that draw more on the categories of combat, struggle, and power relations than they do those of order and legitimacy, one may also find in them further analysis of the criteria that serve to justify power, as well as the demands based on which it is possible to consider leaders’ legitimacy.

The figure of the politician promoted by Max Weber plays an exemplary role, with Weber distinguishing politicians by vocation (Politiker kraft Berufes) from mere professional politicians (Berufspolitiker).36 “The genuine politician” is one who knows how to articulate an ethic of conviction (Gesinnungsethik) and an ethic of responsibility (Verantwortungsethik). There are, for Weber, two kinds of mortal sin in the political domain: an absence of cause and an absence of responsibility. Of course, the politician cannot avoid power games and power relations, but his or her actions are informed by an ethical consciousness that binds his appointment to a responsibility towards the political community.

If politics are driven by a cause, they are equally a matter of choices and measures taken. Significantly, Weber had also previously characterized as Machtethik, the ethic of power, what was to become the ethic of responsibility in the sense that the actual exercise of power is what determines the politician’s responsibility. To put it another way, the quality of the stated ideals does not alone confer dignity on the individual who expresses them. Weber gives us a “complete” representation of what political power in modern societies should be: Political power is at once the task of the formulation and realization of ends. Above all, however, Weber developed a very modern conception of responsibility, one that relates not just to measures taken (what public policy analysis would later call outputs), but more profoundly their results, namely the consequences produced by the actions (outcomes in the language of public policy analysis). The consequences are in actual fact the true criteria from which one can evaluate (bewerten) the contribution of politicians in dealing with the community’s problems. Weber was certainly not the first to

36. We repeat here some of the analysis published in Patrice Duran, 2009.
emphasize the importance of the consequences of actions, but he was essentially the first to truly put the question of consequences at the heart of politics and make them the responsibility of politicians by relating that responsibility to the national political community, whose future needed to be considered. The presence of this community allows the relationship between conviction and consequences to be evaluated, and thus to define the nature of responsibility. It is precisely from the community’s perspective, in this case “the vital interests of the nation,” that the consequences of actions—or in other words their impact—are evaluated. By defining the political community as a historical reality, Weber gives responsibility both empirical and prospective dimensions.

The superiority—or more precisely the importance—of the ethic of responsibility finds its justification in the concern of the community that inspires it, and shows that political choice has a specific rationality. The ethic of responsibility cannot be read as a mere limitation of the ethic of conviction on behalf of some form of realism; rather, it represents the introduction of another consideration, specifically that of the community, in the appreciation of the relationship between conviction and consequences. This in fact implies a rehabilitation of means-ends rationality, through which it becomes clearly apparent that rationality cannot be reduced to a merely instrumental form. Emphasis on results is actually far removed from a narrow and utilitarian type of rationality. It comes from another rationale, that of the public figure whose actions should always be considered from the community’s perspective and based on the specifics of the situation that have been determined by the singularity of its historical context. This amounts to “defining effective policy as the ‘art of the possible’ [Kunst des Möglichen].” Weberian “contextualism” is both a sociological analytical position and a practical position of actions. This is a conception of political action that has developed “in the world” and which focuses less on its foundations than on its capabilities and its limits to “make” history.

If responsibility is not unrelated to being held accountable, it is also largely prospective in nature. In it there is the affirmation of the

37. On the question of the state and the nation, see—naturally—Wolfgang Mommsen, 1985.
politician’s mission in the respect that what he or she is concerned
with is “the future and responsibility for the future.” In a world
characterized by the marks left by consequences, reference to the
past cannot serve as the sole sign of responsibility, and if it is crucial
to ask how political choices can be made and their implementation
achieved, it is because of the future that is under construction, and in
which the politician participates. In other words, the politician must
not only be accountable for what he has done, but he must also be
accountable for a probable future. This very modern evocation of a
responsibility towards future generations suggests that Weber would
certainly have been very sensitive to the emergence of what Nor-
berto Bobbio identifies as “third-generation rights,” which include
the right to live in an unpolluted environment. It would probably
have simply made him intensify the stress he placed on responsibility
while demanding effective public action in these areas.

However, if Weber clearly sees the need for and the full legiti-
macy of political courses of action, he does not offer such a clear
analysis of what responsibility should lie with the public administra-
tion, in spite of its role as the enforcer of political activity. If he is
convinced of the efficiency of the bureaucratic model for carrying
out actions, it is only in terms of responsibility that he separates the
politician from the civil servant. Unlike politicians, civil servants are
certainly responsible for what they do, but not for the consequences
of their deeds, for two analytically distinct but closely linked reasons:
firstly, because their specialization on the one hand prevents them
from appreciating the impact of their actions on other areas, and also
for the fundamental reason that they are not in charge of the future of
the nation. The limited responsibility of civil servants from a sectoral
and temporal perspective is in contrast to the politician’s overall and
historical responsibility. In other words, the distinction between these
two actors is programmed into the very structure of the tasks they
perform. The superiority of the politician lies in his or her ability
to “determine policy” owing to the fact that “setting political aims is
not a matter of specialization.” If a public policy can be understood
as “the methodical articulation and management of specific practi-

cal interests,” and as such calls for involvement from civil servants, it is above all the affirmation of an “end” which well and truly means the “leadership of the political grouping” to which the state amounts. To be sure, civil servants must work *sine ira et studio*, but they cannot be afforded the privilege of acting “without checks and responsibility.” Weber’s distrust of bureaucracy lies in its responsibility; he was not especially interested in administrators’ actions. Weber was essentially a practitioner of private law who never showed a genuine interest in public law beyond constitutional questions. This is unfortunate because the process of rationalization of public law was left aside in his sociology of law in spite of it being essential from the point of view of the sociology of domination. Furthermore, in keeping with his time, Weber viewed the administrative apparatus as being subordinate, with his view of it being fairly close to that developed later by Kelsen. Public administration is seen primarily as an important cog; Weber does not see it as having control over the direction of actions. For these reasons, Weber was hardly able to perceive the importance of administration to public action as we do today.

A careful examination of Weberian thought allows a distinction to be made between the different levels that analytically comprise political legitimacy:

- The *procedural* level, which corresponds in fact to rational-legal legitimacy in the sense that it determines the framework and instruments of the actions of public authorities and the conditions under which these must take place, namely legal and procedural compliance. This legitimacy defines the framework of public-authority intervention and hence the nature of the political regime.

- The *political responsibility* level and the properly political actions that articulate the chosen ends, the specific objectives, and the desired effects, as well as the resultant consequences. Being responsible for a policy means being able to give the grounds on which to “justify” it and also being accountable for its results. *Legitimacy of actions* is defined by responsibility.

44. On this point, Michel Coutu, 1995, 96.
This clarification is important in both its theoretical and empirical implications. It shows the plurality of principles of justification of power and also its different levels. But it also shows the competition, or “tension,” as Weber would say, that is likely to occur between them. The empirical validity of political legitimacy also becomes more difficult to grasp when belief in legitimacy is likely to depend at once on respect for the law and the performance of the authorities. The interdependence of the two dimensions means that instilling a sense of legitimacy with regard to political power is all the more uncertain and contingent. All this only goes to show the irredeemably subjective and relative nature of legitimacy and its fragility.

This is the question concerning democracy that is posed when efficiency comes into conflict with legality. Weber shows in fine that the antagonism between legality and legitimacy will not go away inasmuch as the collapse of a type of domination can be clearly linked to the weakening of the performance of power and the proliferation of illegal behavior.46 In fact, Weber’s thoughts on political responsibility show that legality can hardly be the only sign of the legitimacy of political power, and this may be what led Weber to give so much consideration to the institutional configuration of a well-ordered democracy (Geordnete Demokratie) to ensure the selection of worthy leaders.

**Legitimacy and Public Action**

An examination of the initial model of rational–legal legitimacy in terms of a broader theory of legitimacy invites greater attention to be paid to the conditions for the exercise of political power themselves and opens up exciting research perspectives on what is undoubtedly a difficult question. Yet it has been the ideal type of rational–legal domination that has kept people’s attention and that has been established as the interpretative framework for Western political systems and as the most significant characterization of the ways in which they operate.

The decisive development of public policy analysis, and more broadly the closer attention paid to the developmental processes of public policy, however, has led to questioning the relevance of

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46. The reader is referred to the very illuminating passage about the situation in Germany in 1918 in *Économie et société*, 273.
the model and even considering it to be hopelessly outdated. If one accepts that public action is now an essential part of the justification of power, it is necessary to reconsider the place occupied by the two major components of the ideal type of rational-legal domination, namely bureaucracy and law. Bureaucracy was of the purest type when modern Western law seemed to be the most complete incarnation of formal rationality, and the two worked as both the principles and instruments of legitimation. Even if critiques have often proceeded from a conventional use of a little-understood model, they are rooted in empirical observations that demonstrate the reality of the transformation of public administration.

The emergence of the concept of “governance” has served as a convenient label for a new age of public action characterized by the complexity of public issues, the growth of interdependence and international competition, the multiplicity of decision centers without a clear hierarchy, and the development of informal decision-making methods to counteract the inflexibility of bureaucratic structures. Governance is a reminder that public action can no longer be reduced to the action of “governments” alone, the study of which can no longer account for the complexity of an activity that transcends the boundaries between private and public, cuts across politico-administrative nomenclature, and mixes different levels of both infra- and supranational intervention. Finding a way to reconcile collective goals whose formulation is tricky, actors whose statuses and interests are very different, together with diverse places is what is at the heart of discussions on collective action. The perspective advocated in the most accomplished work remains state-centric because, although we are in a post-strong-state era, the state remains the key political actor in society and the predominant expression of the collective interest. It is in any case the only actor that can actually be assigned a legitimate political mandate to do what it needs to do. All, however, place clear emphasis on the ability of public authorities to create and implement public policies, or in other words, to steer social groups of varying degrees of magnitude. The very harsh criticism of the interventionist

47. Our intention here is not to revisit the relevance of the large amount of work done whose coherence or quality is not always guaranteed due to confusion among some authors between normative and prescriptive logics of administration and a strictly scientific approach. See, within an abundant body of literature, Jon Pierre and B. Guy Peters, 2000. See also Duran, 2001.
welfare state behind this line of research has also led to the activities of government being considered more as the cause and less as the solution to the problems that society faces, thereby extrapolating Wildavsky’s old view of “policy as its own cause.” The approach aims at the same time to further emphasize political capabilities rather than the holding of formal powers, just as attention is focused more on the production of outputs and outcomes than monitoring inputs. It is the results of actions that matter.

Under these conditions, it is logical that renewed attention has been paid to the question of organization and the tools of government, leading to a twofold critical assessment of rational-legal domination:

- That of bureaucracy as a mode of organization;
- That of law as an instrument of public action.

While previously the law and bureaucracy were considered independently, they must now be seen in terms of their adjustment to public policies that have been formulated and implemented, being both constituted by public action and constituent parts of it. This has led to a twofold shift that marks the current configuration of public action and has introduced a strong break with the past relative to the ideal type that provided an understanding of it:

- Public action cannot be reduced to simply the activities of public bureaucracies, whose organizational model is, moreover, being strongly contested. Mechanisms for the management of public problems are being driven to seek ways of coordinating action that are more than simply hierarchical in nature. The changing nature of public-action issues is generating other forms of cooperation that often involve hybrid organizational models. Steering actions is no longer just a matter of steering public bureaucracies.
- The law, in this case public—and specifically administrative—law is being called upon to change. This is because in addition to feeling the effects of changes in public action, it also accompanies or precedes them. It is still an indispensable instrument of public action, but it is now just one of the available instruments of political power and, moreover, the order of administrative law no longer overlaps with bureaucratic order.

These are as much practical issues as research questions that are not specific to one particular state or another, but rather occur at least throughout all Western states. Therefore it is less the question of legitimacy as a whole that is at stake, than the transformations that current modes of public action have caused in rational-legal domination. So what is in fact determining public action if it is no longer bureaucracy and law?

Reinventing the Organization

Public action must now be clearly considered taking into account the multiorganizational characteristics of public programs. The diagnosis is understood, and is linked to the development of an approach to public management in terms of public policies or action programs that has led to a move away from the bureaucratic model, which is increasingly condemned for its rigidity and inefficiency. Bureaucracy was unquestionably originally the institutionalization of means-ends rational actions, and it is worth appreciating the historical dimensions of this in contrast to patriarchal and patrimonial structures. Weber fully demonstrated the significant role bureaucracy played in the construction of the modern state by both ensuring the social democratization of its staff through legally regulated recruitment procedures and the professionalization brought about by way of an emphasis on qualification. Weber reminds us that law and bureaucracy are inseparable by alluding to the civil servant whose acquiescence is the result of an impersonal attachment to a duty that is framed by the law: “This ‘official duty’ and the right of domination which corresponds to it—the remit—are defined by rationally established norms.” The two elements share a grammar: formal law corresponds to a deductive logic in which the particular is derived from the general, while

50. In light of the strange ignorance of the Weberian analysis of bureaucracy, it is worth reading the François Chazel’s useful clarifications in “Éléments pour une reconsideration de la conception webérienne de la bureaucratie,” originally published in Las-counies, 1995 and also in Chazel, 2000
51. It is also quite significant that in the postcommunist countries of Central and Eastern Europe or even in the very different context of African countries, modernization and consolidation of the state has taken place through the construction of a competent administration backed by rational legal rules, based on the “Weberian model.” On these issues see, for example, Philippe Bezes, 2007.
bureaucracy corresponds to an identical logic with regards to qualification in the sense that lower-level qualifications are derived from higher-level ones. The bureaucratic hierarchy reflects a gradation of skills, turning bureaucracies into transitive hierarchies. Bureaucracy offers a significant advantage in the respect that it represents a twofold solution to the legitimacy of the social order and to the effectiveness of actions, where it is both authority—creating a legitimate social order—and power—a method of organizing work to solve practical problems. Issues of legitimacy and efficiency are two separate matters, and Weber revealed the duality of the organization, which derives its significance from the separation of authority and power, though finds their articulation in a single hierarchical model. The strength of bureaucracy certainly lay behind the perfect overlap of the principles of order and principles of actions, authority, and power.

Of course, it was known that organizations struggled to operate according to their own structuring, as the sociology of organizations as a whole has abundantly shown, though at a cost of misunderstanding the Weberian model since, once more, it was believed that the reality of a bureaucracy’s functioning could be found in its ideal type. Yet Weber never thought that a bureaucracy could function in itself smoothly or without a few slips. On the contrary, he himself envisaged the probability of informal or ersatz mechanisms that are more aligned with his conception of the social actor. As he himself said, rule “runs” itself. He gives the timely reminder that office management is based on general rules that are more or less stable, more or less comprehensive and clear, and always subject to a learning process. Furthermore, legal compliance may be offset by the strength of interests, and also by their actions, with actors being liable to distort the objective of an instruction at the same time as respecting it. Nevertheless, analysis of organizations is primarily a discussion of hierarchy and control. It is not by chance that the English term hierarchy is actually a synonym of organization. But what characterizes a

55. This is of course also related to the influence of the economic literature that has long seen the organization as an antimarket. See among the abundant literature, for example, the thoughts of Oliver Williamson (Williamson, 1975).
hierarchy is essentially a centralization defined by a cascade of transitive asymmetries that link actors together. In reality, and as the entire sociology of organizations shows, a pure type of centralization does not exist. Organizations do not work like machines to mechanically produce decisions. There is at all levels of their hierarchy deviance that takes the form of weakened symmetries, breaks in transitivity, loosening of authority, etc. The organizational hierarchy therefore must not be seen as a machine, but rather as a statistical structure, which is to say that it must be considered in terms of probabilities. It always plays a crucial role, providing organizational law and reducing the likelihood of random actions, and also establishing constraints that result in margins for maneuver and opportunities for action (boundaries, jurisdictions, procedures, authorizations to act, etc.).

To put it another way, in practice bureaucratic organizations always involve two types of authority: that of the hierarchical line designed as the point for determining the practical agenda of the organization’s actors (identification and definition of problems to deal with) and that of contextualized knowledge from the domain of performing tasks, which always proceeds from specific local orders. The functioning of organizations always remains dependent on the level of congruence between these two types of authority. This is what Jean-Daniel Reynaud sought to demonstrate in identifying the two logics and the two regulations that correspond to them, namely “control regulation” and “autonomous regulation,” which seek their potential articulation in a “joint regulation.” This also means that defects and malfunctions can be resolved within the organization itself. But the same no longer applies when public bureaucracies have to manage public problems which are passed on to them and whose origin and definition is not derived solely from the qualifications of their members. In adopting a public policy perspective, at stake is not so much hierarchy management than adapting satisfactorily to the problem that is meant to be managed. The bureaucracy model is a hierarchy-management model within a centralized world, and is no longer a model for producing public action, which may give us a framework for thinking about public policy.

The heart of public action is now more a matter of handling “public problems” than of achieving organizational goals; public action is problem-oriented, as they say. The particularity of public problems lies in their ambiguity and indeterminacy. To give a few examples: How can jobs be preserved and industrial restructuring managed? How can a given territory be developed in accordance with sustainability principles? How can health risks that have implications for sectors of economic productivity, the health of individuals, and local economies be managed? This is a well-known area: public problems are “ill-structured” in the sense that they are defined as problems characterized by the interaction of a large number of elements whose behavior is highly variable and therefore highly unpredictable, requiring as a result contextualized knowledge. Public action therefore refers to two ways of defining and handling public issues whose solution goes far beyond the hierarchical lines and organizational boundaries of the authorities concerned. Problem-solving capacity must be clearly distinguished from control capacity, and it is necessary to consider public policies independently of strictly administrative structures. It is not enough to rationalize means, to better allocate personnel, and to rethink the chain of command to improve the efficiency of administrative action; this lies in large part in the quality of the coordination of public intervention. Multiple stakeholders, the often contingent nature of coalitions to be put in place, and public problems that are by their nature evolving and have fluid boundaries are some of the many arguments in favor of a more flexible approach to action. The challenge is to create institutional arrangements adapted to the reality of public problems. This entails concurrently combining two profoundly different organizational systems. On the one hand there are tightly coupled systems, which generally correspond to hierarchical organizations that are characterized by a cascade of transitive asymmetries that connect actors with one another (in this, the classical model of bureaucracy is clearly visible). And on the other hand there are loosely coupled systems, which have no real central authority, are oriented towards processing problems, and whose interactions and communications are controlled precisely by the nature of the problems at hand and not by organizational charts.58

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58. On these concepts and their use, see of course Karl Weick’s seminal, “Educational Organisms as Loosely Coupled Systems,” 1976, but also among others Martin Landau, 1991; Donald Chisholm, 1989; Mark Mandeles, 2005.
Bureaucratic logic is therefore not very suitable for many current aspects of public action and is challenged by new management principles and new perspectives on integrating functional and operational tasks. The sociology of organizations has long clearly identified the existence of these two systems, but the combination of the two still proves to be problematic. Administrative history is embodied in the growing complexity of organizations through strong logics of differentiation; nowadays the logic of administrative action is to be found more in the ability to organize opportunities for cooperation, which are never fixed. Everyone defends a coordinated approach to problems, but there continues to be tension between people management and problem management, between bureaucracy and public policy, and between administration and policy. We do not know how to join these two logics together, which is a real challenge of both a theoretical and practical nature. At the same time, we often proceed according to the logic of structuring large administrative units by grouping services, simplification of procedures, etc., or, to put it another way, according to mechanisms that are still more or less akin to bureaucratic solutions, or mechanisms based around externalization, with the current trend towards agencification being a good illustration of this. Joint regulation remains more a problem than a solution. The sociology of organized action still has a bright future ahead of it.

The Disenchantment of the Law

Placing an emphasis on steering public action has the consequence of placing constraints on the law in the respect that the rule of law becomes one instrument of public policy among others—that is to say, “an identifiable method for structuring collective action for handling public problems.” The development of a public management approach also indicates other modes of regulation beyond strictly legal ones. In short, “law is no longer the focus of public action.”

Aside from its pessimism, this diagnosis is nothing new. But the desire to take the law out of public action has gained momentum

60. If we may refer to our own article, Duran, 1993.
over the past twenty years. For example, the reforms introduced by Britain in 1990 with the program *Next Steps*, or by the Clinton administration in the United States with the *Government Performance and Results Act* of 1993, which were later followed in France with the *Loi organique sur les lois de finance* [Organic Law on Finance Laws] (LOLF) in August 2001, clearly intended to promote a logic of results-based management in the public sector, something that is not without consequences for the place of law. Dissemination within both states and international organizations of the precepts of *New Public Management* (NPM) has been a key element in the success of their reception, which can easily be measured through their translation into administrative-reform policies. A sort of “doctrinal puzzle,” as Philippe Bezes has rightly termed it, NPM is essentially based on a heterogeneous set of axioms that are inspired by economic theories and managerial precepts that often come from successful practical experiences, with the result being a variety of management formulae and techniques (agencies, performance-based management, contracting, downsizing, etc.) that compete very directly with legal instruments. These amount to progressive challenges to and sometimes even the dismantling of legal precepts. The functioning of the conventional model of administration was based on principles from formal law—disclosure, transparency, legality, validity, neutrality, equality, formal coherence—which also governed the logic of administrative bureaucracies. These principles are now highly contested, both in terms of people management and in determining actions to be taken. It is evident that the imperative of results to which public action is subject changes things. At the same time, the effectiveness of public administration tends to take precedence over compliance with established law. Efficiency was a byproduct of regularity, but it can no longer be conceived in equivalent terms, thus favoring the expansion of management approaches. All this leads *in fine* to “discrediting the achievements of public law based on the ‘rational-legal model,’ which assumes the effectiveness of abstract, general, and impersonal rules, including those arising from the law and regulations.”

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63. Daniel Mockle, 2007, 250
regard to law, though it is possible to highlight their most significant effects on the issue under consideration here on a sociological level.

Beyond all the doom and gloom, the law undoubtedly remains a major reference point and it is not certain that the competition it faces today as an instrument will lead to its being reduced to just a peripheral role. While not foreseeing any “eclipse of the law,” however, all are agreed that the question of the role of the law in determining public action needs to be rethought. It is more worthwhile, however, to ask how the transition from the “legal state” to the “managerial state,” to use the expressive language of one keen observer of these ongoing changes, will be brought about. The expression of this formulation is sociologically relevant as it immediately draws attention to two key points. Firstly, the legal state and the rule of law are not the same thing, with the managerial state also being an expression of the rule of law that simply attempts to be its modern form. Secondly, the term forces us to return to the sociological considerations that Weber would have strongly encouraged: what are the carrier groups (Trägerschichten) of the changes being observed? Indeed, the current focus on public action also signifies a shift of relevant knowledge, now that lawyers, or more precisely the people whose primary qualification is based on the law, have lost their monopoly on expertise. Competition through knowledge is also a war of experts. Focusing on the question of the stewardship of public action signifies both the shift of professional knowledge towards non-legal paradigms and the updating of professionals themselves.

The use of the law as an instrument is logically related to the development of an approach to public policy. When a course of action is developed to achieve a specific goal, it is quite logical that the concern is to measure and evaluate its effects in terms of both implementation and impact. To be sure, the influence of NPM has mainly been in contributing to developing strictly managerial approaches in which the objectives of efficiency and cost control have largely trumped the pursuit of results, which are always more difficult to establish, but also politically more disruptive, as Weber demonstrated. But our focus does not lie here, except to emphasize that the law, with its emphasis on regularity, does not give us a better

ability to discover consequences than the quest for efficiency alone. However, it is significant to observe that the “managerial state” brings about a managerial transformation of public action “wherever it puts, even relative to its own law, efficiency concerns before considerations relating to the regularity and legality of its actions.” This explains the turn towards alternative instruments that fall outside the law (strategic plans, profit centers, various kinds of charters, etc.), as well as the growth of efficiency imperatives within the law itself under the influence in particular of the Law and Economics trend. The law, like any tool, is also expected to account for its own performance. Thus there is a general process of hybridization of the traditional categories of legal thought. Governance also needs the law when new concerns must use legal channels. A good example of this is that of the evaluation of public policies whose institutionalization could only be achieved through legal recognition, and which, moreover, has legal consequences.

Equally significantly, the law is now used to approve the evolution of a form of public management that has come out of public bureaucracies and takes the form of public policies that involve extended networks of multiple public and private actors, mixing together different levels of government, from the local to the European level. Not only has the horizontality—or more precisely the transversality—of governance led to a decompartmentalization of the law and human rights (public law/private law; common law/civil law), but it has also promoted the adoption of negotiated and contractual forms of regulation. Granted, the lawyer can see the emergence of hybrid forms that deviate from the original formula of the contract in these transactional practices, but it is also important to highlight the role of the law in the diversification of social exchange that today’s public management has given rise to. The discovery of systems of action through which public action can be developed has allowed there to be a focus on the manner in which the actions of a large number of actors with very different statuses or interests, and characterized by both their autonomy and dependence, are considered compatible. It is this double dimension of autonomy and dependence that leads to power relations that are more explicit and direct, propelling the institutionalization of collective action, and even on occasion a veritable

“constitutionalization” of systems of action. The assertion of a state that wants to play a regulatory role also explains the development of “constitutive” public policies—that is, policies that define the rules of the game rather than the goal. Cofinancing, partnerships, and contracting have additionally become the emblematic methods of a form of modernist governance that explains both the formal rules of the game through the development of contractual procedures as well as more broadly the new role of legal methods within public administration. It must not be forgotten that the law is a way of managing social relationships. A contract is a way of regulating power relations in a context of reciprocity and dependence. In a situation of power and unequal partners, the law, by way of contracts, can help to define a space of acceptable behavior in which actors can self-organize. The difficulty of clearly defining policy objectives or clarifying the stakes makes an agreement on common rules all the more necessary. Like any rule, the contract provides a basis for exchange and a framework within which other forms of regulation can become involved. It is necessary with regards to this to accept what economists call incompleteness of the contract. The extension of multiple exchanges taking places here, there, and everywhere and the growth of transactions creates a demand for structuring coordination mechanisms, from which the law is never totally excluded. The extent of the number of points of contact in which public action takes place has increased considerably, thereby creating a real “need for law.”

The hypothesis of a “decline of law” therefore does not hold up easily, and the reality of the situation is more complex. Clearly, the law no longer has the same structuring function, either for organizing the state or for managing its administrative activities. Governance thus at once represents a significant supplanting of the law while also being anchored in it. As Daniel Mockle brightly puts it, “It is by means of the law that a departure from law is happening.” What is new, in fact, is less the presence of the law than a new relationship with it and a form of law that is to a large extent policy oriented.

We know the law will never be totally rational—Weber himself fully emphasized the antirational tendencies of modern law—and nor can legal rationality be solely formal. Weber also had a rather

dialectical view of the relationship between formal and substantive rationality. Substantive law inevitably means subordination of legal considerations to the immediate imperatives of political issues. One of the main features of the law nowadays is precisely the weakening of formalist methods of legal reasoning through a substitution for ends-oriented processes centered on public policy choices, in which Weber saw “the inevitable contradiction between the abstract formalism of legal logic and the need to make substantive propositions through legal channels.” The rule of equality therefore submits decision-making to formal and non-substantive criteria, as it is a rule based on distribution. By contrast, the fairness that guides policy choices related to developing a given territory involves substantive criteria that are not legal-formal in nature. The use of vague and undefined notions to convey through law the formulation of equally vague and indefinite public problems does not help with their logical implementation and makes it difficult for the legal system to fully function “as a technically rational system.” Again, Weber was well aware that logical precision is greatly reduced when formal legal concepts are replaced by sociological, economic, or ethical reasoning. Nevertheless, the materialization of law does not lead to the abandonment of formal rationality. Some authors even see in the analysis of public policy a way to construct a new ideal type of legal practice of “formalized substantive rationality.”

We will not discuss the validity of such a paradigm for the lawyer. For the sociologist, it has some virtues in the sense that it explains the considerable changes that have occurred in both the reality of the exercise of political power and in the way of accounting for it. It also allows us, as Jacques Caillosse invites us to do, to see the transformations underway less as a decomposition of the law and more as recomposition of it. Faced in particular with public action spilling over into all aspects of administration, it is no longer possible to continue to make law for administration out of administrative law, and there would certainly be benefits and purpose to move towards the formulation of law for public action.

Despite significant changes that have marked the public sphere, it can be seen to what extent the law is still a key element of public action. A broader view also shows that different branches of the law are not affected in the same way for the reason that they are themselves engaged with social spaces with their own dynamics. Similarly, an examination of litigiousness provides a counterexample against hasty assumptions of the decline of the law. The growing role of the courts in the implementation of public policies also demonstrates the strategic role of the law in the political regulation of contemporary societies. The “delegalization” observed by some may be only partial. It is accompanied by a “legalization” which shows that it is necessary to have a balanced view of things and that perhaps it is the idea of legality itself that is being transformed, something suggested by Jacques Commaille and Laurence Dumoulin.73 The current role of legality as well as the persistence of bureaucratic modes of organization shows that the immediate abandonment of the Weberian ideal type of rational-legal legitimacy would be unfair, with the dated nature of the model not meaning that the reasoning behind it is also dated. Seeking to go beyond something does not mean discounting it.

**With Weber beyond Weber**

Far from representing conceptual fetishism or excessive reverence, in this return to a “classic” we must simply see a manifestation of how the same research interests can persist in different historical contexts. Max Weber not only bequeathed us what is undoubtedly the most significant sociological thought on legitimacy, but he himself fully understood the fragility of any political order, with there being no definitive basis for political obligation in a secularized world that displays the signs of “demagification” (*Entzaubierung der Welt*).

Rational-legal legitimacy was in fact based on a triptych whose coherence gave it at once its attractiveness and explanatory power: state, law, and bureaucracy. But now political power is no longer limited to the state, the law is not the only instrument by which government institutions steer their actions, and bureaucracy is consequently no longer the most adequate form of organization for

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Legitimacy, Law, and Public Action

handling public problems. To put it as Stefan Breuer did, the idea of a centralized steering had had its day when law lost its systematic side and bureaucracy its authority and jurisdiction. If the centrality of the state was constructed through a triple process of the nationalization of the law, the legalization of state, and the bureaucratization of government mechanisms, it may seem logical that the erosion of the state corresponds to that of law and bureaucracy given the links between the two. Has the transformation of the historical conditions for the exercise of political power signed the death warrant of the Weberian ideal type of rational-legal domination? We do not believe so, because the situation is more complex: Weber himself firmly demonstrated that sociological causality is not historical causality.

The ideal-type conceptualization introduced by Weber in fact allows us to carry out a historical comparison that shows, by contrast, the uniqueness of the transformations taking place in the present political order. The strength of the model, whose formulation will always be linked to a specific historical reality, is just such that that it allows us to make sense of the present and its distance from the model by providing us with criteria for understanding it. Its comparison with a sociology of public action, which is defined as the sociology of political power, is highly interesting owing to what it shows us. When political power receives its justification from what it does—that is to say, its ability to address the problems that the community faces—it is likely that the claim of legitimacy likewise cannot come down to conformity with the legally regulated exercise of power. We have seen fit to equate “crisis of the state” with “crisis of the law” even though it is necessary to distinguish the two phenomena analytically. There are certainly links, but these can generally be explained through other factors, such as the emergence of other areas through which the law of a state is produced. In the case before us, the loss of the law’s centrality is less linked to that of the state as it is to its own loss of centrality in the management of public affairs. Not only does the law no longer seem to be the only instrument of public power, but it is now in competition with other principles of justification.

75. On these key points, see the article by François Chazel contained in this issue.
76. If sociology stands in opposition to history, as Weber said, in the sense that it develops concepts in the form of types (Typen-Begriffe) and seeks general rules, it gets its material from the realities of social activity. Max Weber, *Économie et société*, 1971, 17.
of power, which the development of New Public Management has exacerbated through the introduction of performance and efficiency criteria. At the same time, however, the distancing of the handling of public problems from bureaucratic solutions has led to a separation of legal order from bureaucratic order. In other words, it is largely in the properties of public action that one must search for the reasons for the changes taking place in the order of political power, its representation, and its exercise, rather than in the nature of the state alone. Again, it is risky to speak of a crisis of law, when it would be more prudent to discuss transformations in its uses. The place of law in the management of public affairs explains its place in the justification of power; law cannot alone embody the exercise of power, just as the formal rationality of law cannot alone embody all formal rationality. It is certainly difficult to envisage the current transformations in public action in terms other than those of rationalization, but this rationalization must be expressed in forms other than strictly legal ones.

Are legality, tradition, and charisma the only resources of justification that political power can mobilize? Certainly not, and Weber fully appreciated this, extending the question of legitimacy to acts of power through the crucial theme of political responsibility. The introduction of consequences of actions as a measure of responsibility is decisively important because it is another way of validating the legitimacy of power. Where obedience characterized the empirical validity of a relationship of domination, consequences validate the exercising power that results from it. There are, in Weber’s thought, premises for articulating power over and power to. Although this enrichment is real, it is not without a number of problems, which will be briefly discussed as a conclusion. Legitimacy is linked, as we have seen, to the existence of mechanisms for coercion, as well as actions whose method of organization is contained in bureaucracy. Paying attention to consequences implies, for its part, the establishment of a system of knowledge that is not only available to authorities so as to allow them the reflexivity needed to learn, but is also available to the public, since there cannot be responsibility without disclosure (Öffentlichkeit). In this sense, Weber shows that the counterpart to obtaining a position of power is being accountable for its use. There is no accountability without democracy.
However, there can be no theory of legitimacy without a theory of community, it is not by chance that Weber considered the question of legitimacy as being related to a theory of the institution and the group. The discovery of consequences is a matter of “objective” (sachlich) policy, which is a key component of political modernity, but it also requires the ability to determine the value of the action undertaken, and to make an “evaluation” (Bewertung) of it. Weber’s mind was made up; it is the political community that becomes the reference point for “qualifying” a policy. Responsibility means that we can identify those with a stake in the consequences of a policy, namely those who Dewey considered to be the “public.” However, although we appreciate that this was self-evident in Weber’s time, the issue is more difficult today as there is some uncertainty about what the political-community reference point should be. It is clear that this depends on the scale of the consequences themselves. This can clearly be seen in third-generation rights and sustainable development. The reference point obviously cannot be the nation, but the planet as a space in which we write our common “destiny.” In addition, the secularization of politics shows the possible plurality of public interests. If we think, for example, in terms of a given territory’s planning of both employment and infrastructure policies, it is clear that there are a multiplicity of public interests that may become competitors: the municipality, the region, the state, Europe, and so on. The interference in reference points introduced by the European framework is itself a good example of these difficulties. If the state no longer has the monopoly over the public good according to the classical formula of Léon Duguit, how do we settle this new war of the gods? What, for that matter, is the community that should be “chosen” as a referential framework for acts of power?

Via the issue of consequences, reasoning leads on to problems that Weber certainly could not have anticipated, but which are clearly political issues, as well as theoretical ones. In fact, we find it hard to lament the passing of politics that revolved around a single public figure. The state’s monopoly on the definition of the general interest has had its day. We are now faced with the fragmentation of sovereignty and the dispersion of political authority. Sovereignty flows between levels of government; it has become in part a nomadic sovereignty. How

can political power and its legitimacy now be viewed in a world characterized by a plurality of political centers, a multiplicity of actors, a diversity of areas of reference, and heterogeneous values? The practical agenda is also a research one, a coincidence that would neither have surprised nor displeased Weber.

Of course, one can still say that Weber’s theory of legitimacy remains imperfect or incomplete, but what social science theory has such a complete quality when placed into an analytical perspective? As Weber said about the ideal-type characterization of legitimate domination, “the terminology proposed here is not intended to break into the infinite variety of patterns of historical reality; it only seeks to build conceptual points of reference that can be used for specific purposes.” In this sense, the typology developed is not only engaged in the analysis of the past, but is also a contribution to sharpening our powers of analysis. It is up to us to extend or recast this typology based on the valuable insights provided by Weber.

Weber’s unquestionable contribution has been to show that a sociology of legitimacy was possible. The great richness of his work lies to a large extent in the multiplication of analytical angles based on a variety of levels of aggregation which, at the same time, allow a better understanding of the various dimensions of which legitimacy is but the outcome. The complexity of their articulation explains both the difficulty of their acquisition and of their explanation, continuing to ensure that legitimacy retains its sense of mystery.

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BIBLIOGRAPHY


