

DISCRETIONARY POWER AND ABUSE OF POWER IN THE ACTIVITY OF STATE INSTITUTIONS

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ABSTRACT:*The advent of the modern democratic state was the moment when, the relationship between power, of whatever kind, and the individual seen as citizen, was really formed. The modern state, since its beginnings, was formed and developed in a context of terror, of oppression, the terror exercised by the power of the state over the individuals, in the name of establishing fundamental rights and freedoms. Raising the masses to the rank of citizens and taking them into consideration was only made in the historical context of passing from one stage of state organization to another. Many aspects concerning the power-state-citizen relationship have their origin in the historical imbalances of this relationship, the power understood as force and the power understood as consent. There is a strong imbalance in the relationship between power and the subsystems of society, as the stronger the power, the lower the communication with the subsystems of society, the less transparency, the more the gap between the real and declared goals increases.*

KEYWORDS: *power; authority; citizen; discretionary power; transparency; organization.*

JEL Code: *K00, K1, K14*

The state is "a socio-historical way (approach) of social organization through which social groups have promoted their common interests and in which the whole society has found its concentrated expression. (Nicolae, 2008) In other words, the state, through its institutions, must respond to the needs of the community that gave birth to it.

The term state, which, previously, meant only the status of a citizen belonging to a territory, began to change its meaning starting with the 15th century, and it was later introduced, in the common vocabulary, by repeated use, by Niccolò Machiavelli, in the famous work "Il Principe", 1513.¹

Defining the characteristics of the absolute state, Jean Bodin introduced the concept of sovereignty. (Bodin, 1992) Closer to what we understand today by state is John Locke's conception, highlighted in the second treatise on government, from 1690, according to which the state is not seen as absolute, but as a functional and legitimate entity, exclusively in defense of individual freedoms. (Martinelli, 2016) In the same

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¹ Martinelli, Claudio, " Le radici del costituzionalismo: Idee, istituzioni e trasformazioni dal Medioevo alle rivoluzioni del XVIII secolo", Editore G. Giappichelli, 2016, p.31

paper, Locke makes a fundamental contribution to constitutionalism, providing a formulation of the modern concept of popular sovereignty. (Nicola, 2016)

Kant considers that "the legitimate state (the rule of law) is that which aims to defend the inalienable rights of man and in which politics is subordinate to morality." (Nicolae, 2008).

During the formation of the modern state, in 15th-19th century Europe, a new conception of the state appeared, seen as having the legitimate monopoly of the use of the armed and police force, endowed with a bureaucratic structure and apparatus. The need to develop a permanent military structure arises as a result of numerous conflicts and will lead to the establishment of forced / compulsory military service. This need implies the exponential increase of the fiscal burden on the population, the administrative apparatus having the obligation to recover the debts. Thus, the state begins to intervene in the economy.

The French Revolution is considered to be the moment of the birth of the democratic state, since the central power, in order to be legitimate, needs support and consensus from the subjects / population, transformed into citizens. We must not forget, however, that the French Revolution, despite the proclamation of equality of citizens and human rights, of the sovereignty of the nation, introduced, for the first time, the term "terrorism" (terror, hence the notion of terrorism) as a way to exercise of power² (Hoffman, 1999) The results of the French Revolution are impressive, with over 500,000 people arrested, over 100,000 people guillotined, prominent figures also falling victims of the guillotine: Maximilien de Robespierre, George Danton, Jacques Hébert.

In other words, the modern democratic state is born in a context of terror, of oppression, the terror exercised by the state power over individuals, in the name of establishing fundamental rights and freedoms. In reality, the masses were elevated to the rank of citizens, and taken into account, due to the fact that only by involving and mobilizing the crowd, the French royalty could be overthrown. (Magaldi, 2017)

As we can see, since the beginnings of the modern, democratic state, there is a contradiction between the stated goals, hereinafter referred to as *the declared goals (DO)* and the methods of their implementation, between the *connotation* attached to the *meaning (positive-concept, related to the declared goals)* and the *significant (negative-image, related to the implementation of DO)*, dichotomy perpetuated to this day, in our opinion. Even the *power-citizen relationship*, where the power is seen as authority, is one of force, of justification of the terror imposed in the name of the declared goals.

Also during the French Revolution, the specific ways of manipulation were born to justify the phenomenon of terror of the state.

Thus, Jacques Hebert and Jean-Paul Marat instigated the population, through "*L'amie du peuple*"³ (www.jeanpaulmarat.tumblr.com, n.d.), to radical, immediate measures, to mass guillotines under the pretext of saving the revolution.

In fact, they benefited from massive funding from extremely powerful vested interests that had the goal of removing any possibility of returning to power of the

² Hoffman, Bruce, "A Mano Armada, Historia del Terrorismo", Editura Espasa Calpe, Madrid, 1999, p.17;

³ www.jeanpaulmarat.tumblr.com;

Bourbons and ensuring, a political and financial stability in France, based on control and protectionism.

“*LA GRANDE FINANCE SUISSE*”, represented by *Perregaux* and his associate *Jacque Laffitte*, as well as “*UNITED FUND*” by *William Herries* and *Walter Boyd* strongly financed the radical group of Hebertists⁴ (Sédillot, 1987) taking advantage of the external conflict and of the civil war to establish the interests of the banking groups.

One of the results of the French Revolution was the *anti-monarchist* feeling (*which became, in time, anti-system*) propagated throughout the rest of Europe, as well as the *nationalist* feeling based on the principle of center of power (the people) and not the principle of representation of a line of royalty.

A further effect of the French Revolution is the attack on symbols, used for the first time in history to influence the collective subconscious. At that time, anonymous or already established artists began to appear, such as *Jaques-Louis David*, "who created a language capable of spreading the ideals of the revolution and the new model of organizing the society."⁵ (Warren, 2000).

When talking about the art of the French Revolution, we refer not only to paintings, sculptures, architectural projects produced around 1789, but especially to collective gestures, such as the destruction of images that represented the old monarchical power, the invention of events and festivals that glorified new ideals and in which the crowd participated as the protagonist, and *David* lived in that era. Thus, the Bastille, the ugliest symbol of the previous royalist regime, was demolished, stone by stone, in July 1789. This gesture was followed by other similar events, such as the beheading of statues of kings, as a consequence of beheading of *Louis XVI*. Everything was related to the symbols of the revolution: the same suggestive slogans "*libertè, egalitè, fraternitè*", the education of the citizen of the republic was largely entrusted to the suggestive power of images, even for playing cards, in which kings were replaced by philosophers, virtuous citizens, to create a reality that expressed a radical transformation of life. In each market was raised the "tree of freedom"⁶ (*Augustin Challamel*, 1893), adorned with flowers, ribbons, flags, on top of which was placed a Phrygian hat, a symbol of the liberation of slaves, special places were arranged to celebrate the consolidation of the new world order through lavishly organized festivals, with complex scenery, which ensured participation of many people, like in a big open-air theater.

This brief foray into the past is meant to bring back to attention the origins of some phenomena we have been facing ever since: Depending on *the real goals (RO) and declared goals (DO)* of a power, at a certain point in time, we find an ample staging, with direct and subliminal messages, "... visual and auditory, in order to increase the impact at the level of the individual, corresponding to his representation".⁷ (Olanescu, 2003) In most cases, the actual goals do not coincide with the stated ones. An example

⁴ Sédillot, René, "Le coûde la Révolution française", Editura Perrin, 1987, p.243;

⁵ Warren, Roberts, "Jaques-Louis David and Jean -Louis Prieur revolutionary artists: the public, the populace and images of the French revolution", State University of New York Press, New York, 2000, p.229;

⁶ Challamel, Augustin, Boursin, Elphège, "Dictionnaire de la revolution française", Editura Jouviet et Cie, Paris, 1893, p.32-33;

⁷ Olanescu, Rozemarie, "Strategii și tehnici de comunicare managerială", CD, București, 2003, Editura Facultății de Comunicare și Relații Publice, ISBN 973-8376-28-9, p.21;

of this is, in my view, the way in which governments refer to an institution such as the World Bank, a UN-affiliated international organization, founded in 1944, with the stated aim of promoting economic growth and reducing poverty in the Member States (189 states affiliated to IBRD - International Bank for Reconstruction and Development, 173 states affiliated to IDA - International Development Agency).

In a "public report by the World Bank, an institution that claims to help the development of poor countries and eradicate poverty, presented by the Economic Committee of the US Congress, it is acknowledged that there is a success rate of only 40% for all projects implemented"⁸ (Umberto Calamita, 2020)(by this institution). In 1968, the World Bank intervened with large sums of money in Ecuador, and by 1998 the country's debt had risen from \$ 240 million to \$ 16 billion, while the share allocated to people living at poverty threshold had fallen from 20% to 6%. At the beginning of the year 2000, the entire country's budget was allocated to the payment of external debts. Of the "top 100 world economic forces, 47 are from the US - Wal-Mart, General Motors, Exxon, etc., whose economic and financial power is greater than that of some countries such as: Saudi Arabia, Poland, South Africa"⁹ (Rozemarie Olanescu, 2016) the list may continue.

As we mentioned, one of the consequences of the French Revolution is the power relationship between authority and the citizen, the latter considered a legitimate part of the power.

Power is defined as "the ability to cause others to comply with demands, even when they conflict with their will." (Maurizio Ambrosini, 2015)

According to Max Weber, power represents: "the possibility of listening to a command that has a certain content." (Maurizio Ambrosini, 2015) In modern societies, each type of power is always delimited by areas and methods of exercise. In reality, "every power tries to awaken and cultivate faith in its own legitimacy." (Maurizio Ambrosini, 2015)

Ideal types of power are: "traditional, charismatic or legal-rational." (Maurizio Ambrosini, 2015)

Traditional power "is accepted by ancient legal systems, seen as pre-existing, as representing continuity with the past and, therefore, the connection with traditions invested with sacredness." (Maurizio Ambrosini, 2015)

Charismatic power refers to "the attribution of extraordinary qualities, of exceptional virtues to an individual so as to generate [in the consciousness of the followers] feelings of devotion, trust, enthusiastic (Maurizio Ambrosini, 2015) and unconditional adhesion".

The judiciary power "asserts itself simultaneously with modern society. It is based on impersonal norms, rationally established, defined and accepted as legal. ... it requires consolidated legal systems and well-defined forms of duties and responsibilities." (Maurizio Ambrosini, 2015) The judiciary is one of the three fundamental powers in a modern democratic state, according to Montesquieu's principle called "Separation of Powers in the State," the other two powers being the executive and

⁸ Calamita, Umberto, "La Banca Mondiale, L'altro centro operative dell'imperialism transnazionale", <http://www.contradizione.it/bm.rtf>;

⁹ Olanescu, Rozemarie; Olanescu, Sandra; Olanescu, Alexandru; "Terrorisme et Manipulation Financiere", Curentul juridic, Editura Universității "Petru Maior", Tg.Mureș, p.143-144, citat din Perkins, John, "Confessions of an Economic Hit Man", Berrett-Koehler Publishers, 2004, p. 89;

the legislature." (Maurizio Ambrosini, 2015) In many jurisdictions, the judiciary has the power to change laws through the judicial review process. Courts, with the power of judicial control, may annul laws and rules of the state when they consider them incompatible with a higher norm, such as the primary law, the provisions of the Constitution or International law.

Outside the legal realm, scientists are divided on how to see power: is it a material asset (substantial vision) or a relationship between individuals? Today, the second theory is the one accepted and considered to be correct.

In politics, public power is defined by Raymond Aron as: "... the attribution, to one or more individuals, of the capacity (recognized as legitimate) to establish rules for all, to impose the observance of these rules on all and, in conclusion, to make binding decisions for everyone."¹⁰ (Hoffmann, 2006)

From a technical and organizational point of view, power is defined as a decision-making authority, with autonomy exercised in accordance with the norms and regulations in force (related to a spatial-temporal context), exercised by a governing body, in the scope of their own competences and work-management responsibilities. ¹¹ (Norberto Bobbio, n.d.)

Power was considered, more generally, to be identified with life itself. Emerson, in his famous essay on "Power," said that "Life is a search after power; and this is an element with which the world is so saturated, — there is no chink or crevice in which it is not lodged, — that no honest seeking goes unrewarded." (Rescigno, 2012) This, in our opinion, an extra-political view of power.

Another distinction should be made between power as force and power as consent. The force represents "the ability to manifest will, even in the face of opposition (opponent / obstacle) while consent is the ability to achieve consensus (obedience) by certain individuals who have a minimum desire of submission, i.e. an interest in listening." (Rescigno, 2012) This distinction had already been anticipated by Machiavelli when he spoke of "lions and foxes: the former would only use force to gain power and are defeated in the long run, the latter accept (persuasion) and win by resistance." (Reinhard, 2001)

The German sociologist Max Weber in his book "The Theory of Social and Economic Organization", defines power as "the ability of a social actor to exercise (sometimes through the use of force) control over the behavior of one or more actors, even without the consent of the latter, influencing, their decisions."¹² (Max Weber, n.d.) By power, Weber means wealth, prestige, social position, numerical and physical strength, organizational efficiency, any element designed to provide an advantage. However, the sociologist develops a very articulate and influential theory in this regard. Weber begins by distinguishing two concepts: the concept of "Macht" (power) and "Herrschaft" (legitimate power).

¹⁰ Hoffmann, Stanley, "Raymond Aron et la théorie des relations internationales", în *Politique étrangère*, 2006/4, p.723-724;

¹¹ Bobbio, Norberto, "Il problema del potere, Introduzione al corso di scienza della politica", Università degli Studi di Torino, www.bibliotecabobbio.unito.it;

¹² Weber, Max, "The Theory of Social and Economic Organization", Oxford University Press, 1947, descărcată de pe www.questia.com; p.57;

By the term, "Macht", Weber means: "any possibility of asserting the will in a social relationship, even in the face of opposition, regardless of its grounds"¹³ (Max Weber, n.d.), while by "Herrschaft": "the possibility of finding obedience (submission), among certain persons, to a command (request / message) that has a certain content."¹⁴ (Max Weber, n.d.) The first expression refers to a social relationship in which the stronger subject is able to assert his will, to impose himself, in any contextual situation, and the second expression refers to the relationships in which the weak subjects obey, unconditionally, the decisions of the other because they recognize them as valid and therefore legitimate.

According to Weber, the birth of political power takes place with the transition from closed social groups to political communities and, finally, to the modern state. Weber emphasizes that social groups are characterized by closed social relationships because they do not allow access to new members. This ban is linked to the operation of several responsible factors. During their development, some of these social aggregates become real power groups, equipped with well-organized apparatuses. Finally, by extending its actions to the outside, which previously took place only inside, it tries to control the territory and the individuals who inhabit it. Therefore, they organize the life of that well defined territory, by using coercive means. Thus a true political community is born which, when it becomes institutionalized, gives life to the modern state.

In addition to political power, Max Weber identifies two other forms of power: economic power and ideological power. The first form of power is exercised by those who have material or financial resources, which allows them to induce certain behaviors into other actors in the economic market, depending on the goals pursued, manifested or not (example: entrepreneurs vs. workers). Ideological power consists in "the ability to influence the ideas of the people by those who are invested with a certain authority."¹⁵ (Max Weber, n.d.) Weber regards political power as a sovereign power, with all other spheres of power subordinated to it, including the judiciary. This is due to the fact that the state influences and regulates all human activities, be they social, economic, cultural, etc.

Modern states need an administrative apparatus to exercise political power. The administrative apparatus is resulted by the organization of individuals specialized in different fields, which fulfill certain roles. "The main task of the members who make up the administrative apparatus is the execution of decisions taken by the authority (the state)."¹⁶ (Max Weber, n.d.) Weber uses the term "bureaucracy" to define administrative organization. It outlines an ideal type of bureaucracy. The main features of this ideal model of administration are the following:¹⁷ (Max Weber, n.d.) division and specialization of tasks; hierarchical structure of the administrative apparatus; contract employment; cash remuneration of staff; separation between individuals and means of administration; separation of individuals in an office on the grounds of training.

¹³ Ibidem, p. 36;

¹⁴ Ibidem, p.37;

¹⁵ Weber, Max, "The Theory of Social and Economic Organization", Oxford University Press, 1947, descărcată de pe www.questia.com; p. 38;

¹⁶ Ibidem, p.72;

¹⁷ Ibidem, p.79;

According to Weber's theory, the administrative apparatus is subject to checks and regulations.

In conclusion, we can say that, according to Weber, the exercise of political power requires legitimacy, an administrative structure and a "legitimate monopoly of force."¹⁸ (Max Weber, n.d.)

Elitist theories all converge towards the fact that in society there is a minority that exercises power and a majority that bears power. Among the most important exponents of this current of thought are: Niccolò Machiavelli, Gaetano Mosca, Vilfredo Pareto, Robert Michels.

A special interest presents Michels' studies on political parties and organization. Analyzing the structure of political parties, Michels formulated the "iron law of the oligarchy," which highlights how parties tend to concentrate power in a small circle of people, creating a widening gap between leaders and members."¹⁹ (Michels, 2001) According to Michels, this distance between the ruling class and members induces an oligarchic organization of the party, with consequences for the functioning of the state, including affecting the judiciary. This oligarchic form makes leaders pursue their own interests and only formally the interests of the masses. Michels demonstrates how the oligarchic organization of parties allows the concentration of power in the hands of several leaders, as well as preventing the realization of political candidacies from the party base. This is because parties are a complex organization in which the leader needs specific skills to lead. Those who possess such abilities form that oligarchy which, structuring itself in a bureaucratic way, moves the center of power into the hands of the leaders who lead the crowd.

Talcott Parsons is the exponent of the "structural-functionalist theory", developing a very complex conception of the social system. According to Parsons, "the social system is made up of several functional subsystems."²⁰ (Parsons, 1996) There are four functional subsystems according to Parsons: "economic, cultural, integrative and political."²¹ (Parsons, 1996) Parsons' theory seeks to explain the role that different subsystems play in society. The social system theorized by the sociologist is constantly developing and renewing, therefore the functions of the subsystems also tend to change. The political subsystem, designed by Parsons, uses power to interact with the other subsystems of society. In Parsons' analysis, power has the function of transforming, developing and integrating society. The political structure (the state) implements its decisions through the use of power.

In conclusion, Parsons argues that political power should be used to maintain social order and to make other subsystems operate at the best level. From our point of view, the theory starts from the premise of a level of political honesty necessary and sufficient for a good functioning of the state.

¹⁸ Ibidem, p.80;

¹⁹ Michels, Robert, "Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy", Batoche Books, Ontario, 2001, p. 241, descărcat de pe <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/michels/polipart>;

²⁰ Parsons, Talcott, "The Theory of Human Behavior in its Individual and Social Aspects.", *The American Sociologist*, Vol.27.no.4. Winter 1996, p.13–23, descărcat de pe <https://www.britannica.com/>; /Talcott-Parsons;

²¹ Ibidem, p. 26;

In reality, there is a strong imbalance in the way of relating power to subsystems of society, the stronger the political power, the lower the communication with the subsystems of society, as the degree of decision-making transparency decreases and the gap between real and declared goals increases.

There is a radical current of thought, starting from Parsons' theories, the so-called neo-elite, which claims that the: political, administrative and social powers are generally related to the economic wealth of a small circle of people.

Floyd Hunter is an important exponent of this line of thinking and after conducting studies on an American city, came to the conclusion that the main source of power is economic wealth. He stressed that "the political life of a city is determined by the interests of entrepreneurs. According to Hunter, important decisions in a city are made by those who own the economic wealth. Such decisions are not formalized in a state institution, but are the result of "high-level" meetings that take place in private clubs, or in private homes." ²² (Hunter, 1969)

Another prominent neo-elitist line of thinking is that of C. Wright Mills. Mills stressed that there is a strong concordance of interests between economic, political and military organizations. According to Mills, this convergence of interests means that "political power is only formal and seemingly democratic, while in reality it is rigidly oligarchic." ²³ (Mills, 1999) Mills' thesis can be summarized as follows: there is only one ruling class, consisting of businessmen, politicians and military personnel who make decisions freely, without being subject to any effective public control. The domination of this type of elite over society, according to CW Mills' theory, is almost total.

Michel Foucault elaborates a "microphysics of power", in which power is not something to be divided between those who possess it, or hold it exclusively, and those who do not have it, or suffer from it. Power should be regarded as something moving or rather as something that works just like a chain: it is never located, here or there, it is never in the hands of someone, it is never evaluated as wealth or asset. Power works and is exercised through a reticular organization." ²⁴ (Foucault, 2001) The concept of power expressed by Foucault is a kind of relational field, never run by anyone (politicians, entrepreneurs, etc.)

Analyzing the plurality of power theories, as expressed in different stages, we can sense the fragility of the power relationships.

When we talk about the authority of someone to act based on his/her own power and judgment, we refer to something called discretionary power.

In law, discretionary power may be considered, for example, in terms of the power of evaluation exercised by a judge on judgments, relating to the exclusion of evidence in a trial. Some see discretionary power as negative, while others see it as positive. The power of discretion is present at all levels of law enforcement and in many types of administrative institutions.

²² Hunter, Floyd, "Community Power Structure: A study of Decision Markers", University of North Carolina press, 1969, p. 156, de pe <https://www.britannica.com/Floyd-Hunter>;

²³ Mills, Charles Wright, "the Racial Contract", Cornell University Press, 1999, p.86,

²⁴ Foucault, Michel, Power, The New press, 2001, 1st edition

Discretionary power was called by Lord Scarman as "the art to match action with specific circumstances."²⁵ (Leslie George Scarman, Jan 2011) Those in power are, in most cases, able to exercise a discretionary power when it comes to how to apply or exercise that power. "The ability to make decisions is a responsible choice and an understanding of what is legal, correct or wise."²⁶ (Malcolm, 2008)

In the legal system, discretion is often defined as the judge's ability to choose where, how and with what severity a convicted person can be punished. A person chooses to use their options and decides which one to use, whether it is a police officer arresting someone on the street (criminal case), or evacuating someone from an apartment (civil case), or either of these two. There are some arguments that the exercise of discretion nullifies, or weakens, the rule of law. However, the law cannot be written without the use of discretion and therefore the rule of law guides discretion to society's expectations, its rules, and partly to the public interest.

If we talk about the criminal law, the term "crime" is defined as an action that is prohibited, or limited, by law, restricted and enforced by punishment. But, between where the law ends and discretion begins, stands the application of the law. Law's servants and police officers are charged with applying these regulations, but, often, indictment and arrest is up to them. For example, in a case of traffic irregularities, a police officer can simply issue a warning even when the situation requires more drastic measures. In fact, discretion can be found in all stages of the criminal justice system. The victim has the freedom to use the argument of self - defense and to report the crime on this occasion. The dispatcher decides the priority of the call, the responding officer is free to take statements from witnesses, as well as to detain any potential suspects. The suspect / defendant has the freedom to request a lawyer, to decide how to plead and is able to take a settlement. The prosecutor has the opportunity to investigate a case, to drop the charges and to suggest settlements. The judge has the freedom of choice, every time when there is an objection, or when evidence is brought in. These examples are just a small section of the chain of choices made at the level of criminal law.

A famous case, which had an intense media coverage, at that time, provoked a heated debate regarding, precisely, the freedom to choose with reference to the criminal law.

French-Basque activist Aurore Martin, 33 years of age, was the subject of a European arrest warrant, EAW, issued in 2010 by a magistrate in Madrid for "acts of participation in a terrorist organization and terrorism."²⁷ (Anon., 2012)

The European Arrest Warrant, the EAW, was established by the Framework Decision 2002/584 / JHA of 13 June 2002, after being approved at political level in the Laeken European Council (December 2001), shortly following the attacks of 11 September 2001. It replaces the extradition proceedings between the Member States of the European Union through a judicial proceeding.

The EAW presents itself as any "judicial decision issued by a Member State for the arrest, or surrender, by another Member State, of a requested person for the purpose of:

²⁵ Scarman, Leslie George, Baron Scarman, Kirby, Michael, "The Right to Know", The Guardian, www.theguardian.com, /law/jan 2011;

²⁶ Malcolm, Thorburn, „Justifications, Powers, and Authority". Yale Law Journal, 2008, 117 (6): 1070–1130, www.yalelawjournal.org;

²⁷ <https://www.sudouest.fr/ 2012/11/07/arrestation-d-aurore-martin>;

conducting a criminal prosecution; executing a custodial sentence; execution of a detention order."²⁸ (Anon., n.d.)

The European Arrest Warrant replaces, from 1 January 2004, various previous conventions, such as the "European Convention on Extradition"²⁹ (Anon., n.d.) of 1957; The agreement of 26 May 1989 between the 12 Member States on the simplification of the transmission of extradition requests; The 1995 Convention on the Simplified Extradition Procedure; The 1996 Extradition Convention; the provisions of the Schengen Agreement on extradition (however, cooperation with the Schengen Information System - SIS - as well as with Interpol is foreseen).

Aurore Martin was accused of attending public meetings in Spain as a member of Batasuna, an organization authorized in France, but banned in Spain. On the other side of the Pyrenees, it has been considered a terrorist organization since 2003 and banned for its alleged links to the Basque separatist group ETA. It all started with an episode in 2003, when she was suspected of helping a pro-Basque independence activist escape from the Bayonn police station. Suspected of associating with a criminal organization, she found herself imprisoned in the Paris region of Fleury, and placed in isolation.

Marked by the "injustice" of this episode, the young woman joined the Batasuna Independence Party, after a year, which was considered to be the political showcase of ETA, the Basque terrorist organization. At the same time, Batasuna, which refused to condemn ETA's violence, was banned in Spain, but allowed in France. With the arrests of officials of the Spanish party, Aurore Martin quickly found herself propelled to the national office of the party. She was transferred to the border to be extradited to Spain where she was to be handed over to the Civil Guards in Madrid and then presented to the National Court, the main criminal court in Spain.

The circumstances of Aurora Martin's arrest have raised numerous questions that have resulted in serious allegations of abuse by the authorities. "Officially, Aurore Martin was arrested during a traffic control. The arrest was declared "accidental", according to the statement from the police, at that time, a gendarme asked for her permit, which she did not have with her. At that moment, she was identified and, as her name appeared in the file of the wanted persons, she was arrested. Aurore Martin did not resist the arrest."³⁰ (Anon., 2012) The activist's relatives, however, revealed that they had testimonies according to which, on that day, other checks had been carried out by gendarme crews on the roads in the area. Two days after Aurora Martin's arrest, Mediapart, an online investigative daily, wrote that "her arrest was not accidental, stating that François Hollande validated the extradition, a version denied by the Ministry of Justice that excludes any intervention by the executive branch." that is, of the President and of the Government. "³¹ (Anon., 2012) A careful reading of the indictment prepared by the investigating judge of the Spanish National Court reveals, however, serious shortcomings in the extradition procedure. The indictment refers to events that took place in France, not in Spain, and to the fact that the militant attended a Batasuna press conference in September 2006, as reported by the newspaper "Gara."

²⁸ https://e-justice.europa.eu/content_european_arrest_warrant-90-fr.do;

²⁹ <https://eur-lex.europa.eu/legal-content>;

³⁰ <https://www.sudouest.fr/2012/11/07/arrestation-d-aurore-martin>;

³¹ Ibidem;

The Court of Appeal in Pau, where Martin first appeared in 2010, refused to execute the European Arrest Warrant because the acts were committed in France where, let us remember, Batasuna was not considered a banned political party.

According to the regulations in force in France at the time: "The Framework Decision of 13 June 2002 aims to simplify and speed up the prosecution and facilitate the execution of criminal convictions against a person on the territory of another member state of the European Union. It [the EAW] intends to replace the extradition procedure, which, under French law, involves a decision of the executive branch and a fully judicial procedure, the role of the executive branch being limited to "practical and administrative support".³² (JAI, n.d.)

Despite all the irregularities, nothing prevented the Spanish judiciary, once they were handed over Aurore Martin, from blaming her for those acts. After a month in detention, Aurore Martin was released as a result of vehement statements from human rights organizations that highlighted the many irregularities in this case, including those related to the execution of the EAW (European Arrest Warrant).

During 2019, the world of Italian justice was shaken by an unexpected event, namely, the Palamara case, a case of abuse of power, at the highest level, in the Justice of the Peninsula.

Luca Palamara, former full member of the Superior Council of Magistracy of Italy (excluded since 2014³³ (Anon., 2020) as a result of the start of the criminal investigation), former president of the National Association of Magistrates, former Attorney General of the Reggio-Calabria Region, was being investigated for corruption offenses related to abuse of office-regarding the disclosure of information, traffic of influence / purchase -sale of court sentences.³⁴ (Anon., n.d.) During the investigation, a number of acts of corruption came to light right inside the SCM, during his tenure as chairman of the "Quinta commissione", which appoints magistrates in office.³⁵ (Anon., n.d.)

During the last meeting of the "Quinta Commissione del SCM" with Palamara selected as president, they have adopted a series of legislative reforms that reduced the retirement age of judges. Also during that period, the SCM has made "over a thousand appointments, an absolute record. The analysis of the interceptions of Palamara's conversations with another magistrate, Fava, showed that many of these appointments were piloted".³⁶ (Federico Giuliani, 2020)

Following the hearing of Stefano Fava, he recalled that "Palamara asked me to apply as a deputy (for Quinta commissione), as he might be interested."³⁷ (Federico Giuliani, 2020) Fava has not been charged, so far, with Palamara, despite the fact that he appears in

³² Décision-cadre 2002/584/JAI du Conseil relative au mandat d'arrêt européen et aux procédures de remise entre États membres - Déclarations de certains États membres sur l'adoption de la décision-cadre, 32002F0584, adoptée le 13 juin 2002, JO du 18 juillet 2002, p. 1-20, www.textes.justice.gouv.fr;

³³ www.csm.it/scheda-consigliere;

³⁴ www.tribunapoliticaweb.sm;

³⁵ www.csm.it/scheda-consigliere;

³⁶ Giuliani, Federico, "Palamara parlava anche con il giudice che indagava su di lui", mai 2020, www.ilgiornale.it;

³⁷ *Ibidem*;

many of the interceptions precisely due to the lack of evidence, Fava refusing the job offered.

An important aspect is highlighted by the investigation of the prosecutors of the Umbria Prosecutor's Office and refers to the case of the businessman, Fabrizio Centofanti, friend of the former Italian Prime Minister, Matteo Renzi, accused of influence peddling regarding "appointments of magistrates in management positions."³⁸ (Giovanni Bianconi, 2020) Centofanti, following the nominations made, of magistrates promoted on "recommendation", with the help of Palamara, would have offered, to the latter, luxurious vacations, in exotic destinations. Centofanti - wrote the magistrates of Umbria - "carried out his "lobbying" activity for a long time on behalf of important business groups, in political and institutional offices. In this operational context, he aimed to increase his capacity to influence decision-makers by generating a relational network with representatives of different institutions and with subjects who, in turn, represented the interests of important pressure groups. "³⁹ (Giovanni Bianconi, 2020)

Another investigation, derived from the Palamara file, concerns Giuseppe Pignatone, the President of Vatican City State Tribunal, which, according to statements made by Stefano Fava, before the prosecutors of Perugia, "was aware of the illicit activities of Palamara for about a decade."⁴⁰ (Marco Miggiano, 2020) "Within the SCM, Palamara promoted Pignatone's requests for all office appointments. I know that, for about ten years, they were in excellent relations, even when he was in Reggio Calabria. "⁴¹ (Paolo Comi, 2020)

Also in connection with the Palamara-Pignatone case, Fava states that "on November 24, 2016, Captain Silvia Di Giamberardino, in the presence of Marshals Michele Iammarone and Cristian Amori, was employed, at that time, at "nucleo speciale di Polizia della Guardia di Finanza " and informed me that from Centofanti's statements, it appears that he and Pignatone were in a very close relationship, that they were often seen at dinner together, even in the presence of the General of the Finance Guard, Minervini" (Domenico, former interregional commander of central Italy, convicted in 2017 of corruption, ed.).

Lidia Brutti, judge in Perugia, "has accepted all the 200 taps in the Palamara case and ordered their complete transcript."⁴² (Anon., 2020) Palamara's attorney challenged the validity of the interceptions due to the way in which they were carried out, namely through a virus inoculated directly into the mobile phone of the former prosecutor and former member of the SCM, Luca Palamara. The investigation is ongoing.

The Palamara case confirms the thesis of C. Wright Mills namely the fact that there is a strong concordance of interests between economic organizations, the political and the military, with connections in all spheres within the state, including in the judiciary,

³⁸ Bianconi, Giovanni, "palamara:7 anni di lusso, vacanze pagate e I 68 mila euro pagati da Centofani", august 2020, www.corriere.it;

³⁹ Ibidem;

⁴⁰ Miggiano, Marco, "Il 21 luglio il processo a Palamara, il grande accusato tenterà di processare le correnti citando ben 133 testimoni", iulie 2020, www.genteditalia.org;

⁴¹ Comi, Paolo, " Le rivelazioni di Fava:palamara era l'uomo di Pignatone al CSM", iulie 202, www.ilrifirmista.it;

⁴² https://www.repubblica.it/cronaca/2020/09/21/news/caso_palamara_tutte_valide_le intercettazioni;

representatives of these organizations acting as a ruling class who makes decisions freely, without being subject to any effective popular control.

Another abuse investigation that is shaking Italy at the moment concerns serious accusations made by the famous attorney Carlo Taormina against the former Prime Minister Conte and the ministers in his government, Bonafede, Di Maio, Gualtieri, Guerini, Lamorgese and Speranza.⁴³ (Federico Garau, 2020)

The criminal complaint filed by Taormina against Conte and addressed to the General Prosecutor of Rome, concerns serious accusations in the management of the state of emergency generated by the Coronavirus pandemic.

At the heart of the present complaint by the attorney Taormina is the evaluation of the political and managerial actions of the Conte government, during the state of emergency, as well as the responsibilities of each of its members, which is the subject of that complaint. The actions of ex-Prime Minister Conte, ex-Minister Speranza, the Minister of Health, as well as many consultants who worked during the state of emergency are evaluated, one of the accusations being "homicidio colposo", manslaughter, according to Article 589, Italian Penal Code,⁴⁴ (penale, n.d.) "targeting the Covid-19 massacre in Italy."⁴⁵ (Federico Garau, 2020)

Fourteen files with evidence were sent to the Court of Ministers⁴⁶ by attorney Carlo Taormina, after having previously been presented to several prosecutors.

The criminal complaint filed by the attorney Taormina is based on the files of 35,000 victims of Covid-19, from Italy, caused by "delay of the authorities, lack of speed in making decisions."⁴⁷ (Anon., n.d.) The main dispute highlights the way in which, in the 25 days following the proclamation of the state of emergency, "nothing was done to stop the massacre".⁴⁸ (Federico Garau, 2020) The authorities were informed "at least from the beginning of January, if not even December [of what was to happen and therefore] thousands of infections and thousands of deaths could have been avoided."⁴⁹ (Carlo Taormina all'attacco: porcherie assassine del governo, 2020)

"The Court of Ministers, based on the evidence submitted, will have to verify the testimonies of health staff, doctors and virologists"⁵⁰ (Anon., 2020), the attorney explained in a press conference broadcast by all the television channels in the Peninsula, stating that "they told me that they agreed with the reasons of the complaint (refers to the medical staff) and provided me with absolutely reliable scientific documents."⁵¹ (Anon., 2020)

⁴³ Garau, Federico, "Taormina contro Conte: Ora il caso è sul tavolo del tribunale dei ministri", iulie 2020, www.ilgiornale.it;

⁴⁴ Codice penale, www.brocardi.it/codice-penale;

⁴⁵ Garau, Federico, "Taormina contro Conte: Ora il caso è sul tavolo del tribunale dei ministri", iulie 2020, www.ilgiornale.it;

⁴⁶ Il Tribunale dei Ministri, in struttura juridică italiană reprezintă o secție specială în cadrul tribunalului obișnuit, specializată în judecarea doar a Președintelui Consiliului de miniștri, primul ministru, și miniștri

⁴⁷ www.ilemop.it;

⁴⁸ Garau, Federico, "Taormina contro Conte: Ora il caso è sul tavolo del tribunale dei ministri", iulie 2020, www.ilgiornale.it;

⁴⁹ Coronavirus, Carlo Taormina all'attacco: porcherie assassine del governo, Giuseppe Conte è incastrato. Le carte", august 2020, www.liberoquotidiano.it;

⁵⁰ www.radioradio.it/politica;

⁵¹ www.radioradio.it/politica;

"The delays and the absence of interventions have therefore allowed the virus to spread throughout the country. And here come the consultants called by the government: what role did they play in managing the emergency situation? Did the government heed the warnings? In recent months, virologists and consultants have offered differing and contradictory opinions, also minimizing the "danger of infections". If before we talked about underestimation, now we start to think that behind government decisions, supported by controversial opinions of virologists who do not live up to the situation, there may be something more serious than negligence in performing the function mentioned in recent weeks. The spread of the virus could have been prevented by drastically closing everything, right from the start. From the moment the maximum restrictions were extended, by which it was decided to impose, on the entire national territory, the restrictions to travel, it started to stop the spread of the infection and to decrease the number of deceased persons. I want to make it clear that I don't blame the doctors for the murders. There are deaths that would have been avoided if the government had closed all regions on 31 January and, I repeat, there were horrible deaths. Mathematically speaking, if (measures) had been implemented immediately, at least as of January 31, 2020, thousands of deaths and, before that, thousands of infections that were the direct cause of them, would not have occurred."⁵² (Anon., n.d.), concludes Taormina in the complaint filed against former Prime Minister Conte.

In addition to the criminal complaint filed by Carlo Taormina against former Prime Minister Conte, more than 200 other criminal complaints from ordinary citizens, concerning abuses suffered by them during the state of emergency, were entrusted to prosecutors Eugenio Albamonte and Giorgio Orano.⁵³ (Anon., n.d.)

The investigation carried out by the Prosecutor's Office in Rome against Prime Minister Conte and some of his ministers, concerns the activity of the government on the Covid front, deeply contested, especially in connection with the failure to establish the red zone in Nembro and Alzano, Lombardia.

Currently, in Italy, there are two currents of opinion: those who say that the Italian government has done too little in the fight against the virus and, in this case, the proposed hypothesis is that of manslaughter, crimes against humanity, abuse of office, and the second current of opinion that includes criminal complaints denouncing the fact that blocking citizens, and activities, was a disproportionate measure compared to the real situation, involving crimes of abuse of office and violation of fundamental rights of the citizens.

In our opinion, the Italian judiciary, through the prosecutors and judges involved, is called upon to respond to a great challenge: on the one hand to ascertain whether, and under what conditions, the fundamental rights and freedoms of the citizen have been violated by establishing a state of emergency, and, on the other hand, to rule, on the basis of ongoing evidence and investigations, on serious allegations against members of the Italian government, with the Prime Minister in office at the head, related to manslaughter and abuse of office.

The situation in Italy can be analyzed in relation to any state of the European Union.

⁵² www.edicolaweb.tv/prima-pagina;

⁵³ www.tg.la7.it;

Across Europe, the fight against Covid-19 led to the widespread introduction of surveillance measures and tracking technology that violates civil liberties. And while some radical initiatives may be justified by an unprecedented situation, the major concern is that the various aspects of digital authoritarianism that have been imposed will remain in place even after this crisis is over.

In a climate of fear and uncertainty constantly promoted through all media, measures were introduced that previously would have seemed unthinkable and would probably have had to face strong opposition, in any other circumstance.

All these measures, of fight against the Covid-19 pandemic were introduced without a careful examination of the balance between the individual and collective sanitary security and the fundamental rights and freedoms of the citizens guaranteed in each EU Member State. I consider that even the term “social distancing” is used improperly, on the medium and long term having a major psychological impact on whose result will be the serious alteration of the social relations between individuals, within the society.

As we found from the brief overview of the situation in Italy, which is valid for the whole of the EU, it's been noticed that, during state of emergency, adopted measures leave enough room for abuse of power, and they intensify, under the constant threat of the third wave of the virus.

Among the first measures widely adopted, was drone control, introduced in Belgium, Croatia, France, Greece, Hungary, Poland, Spain, Turkey and the United Kingdom, to check if people follow the rules on social distancing.

The State Council, the French supreme administrative court, declared on 18 May 2020 that the use of drones as a method of monitoring citizens was illegal, due to the violation of privacy, because the data collected made it possible to disclose the identity of the persons pursued.⁵⁴ (Anon., n.d.)

In Poland, the government has launched an application that requires persons "under quarantine orders to load a selfie, within 20 minutes, to confirm their presence at home. These selfies are then verified by facial recognition combined with geolocation, but there is no explanation why the images should remain on government servers for six years, assuming this is a temporary solution."⁵⁵ (Bachelet, 2020)

Russia has set up a network of 100,000 facial recognition cameras to track people during quarantine. Many of those who went out just for shopping, were contacted, in minutes, by the authorities and, subsequently, fined for violating the rules, showing that the technology is linked to a large network of collecting other personal data.

In Slovakia, a law has been passed that allows the Public Health Office to use the geolocation of smartphones to track quarantined people. Although the government claimed that very little data would be collected and used, only in the context of the epidemic, information was published containing the sex, age and addresses of people.

Serbia went further, President Aleksandar Vucic publicly acknowledging that the government tracked telephone numbers to check the mobility of people, especially foreigners, and warned citizens "not to try to go out leaving their phone in one place

⁵⁴ www.conseil-etat.fr/ressources;

⁵⁵ Bachelet, Michelle, “Covid-19: les mesures exceptionnelles ne doivent pas servir à couvrir les abus et les violation des droits de l’homme”, News and Press Release, aprilie 2020, Geneva, www.reliefweb.int;

[while out and about] because we have found another way to track the people who break the rules. ”⁵⁶ (Bachelet, 2020)

Bulgarian police has been able to request and obtain information from telephone and internet operators about their citizens' private communications in order to monitor those in quarantine. From this information, the authorities can track the location, in real time, and see who they talked to and what sites were accessed.

Germany and Liechtenstein have already tried the biometric bracelet on their citizens in quarantine, which, as in the previous case, provides the location of the holder and informs the authorities if the person stayed home or left.⁵⁷ (Bachelet, 2020)

Council of Europe Commissioner for Human Rights Dunja Mijatović said journalists in the Czech Republic, Serbia and Italy had their rights violated by obstructing their participation in "press conferences, obtaining information from health authorities or reporting on the operations of the police forces",⁵⁸ (Anon., n.d.)and insisted that appropriate measures be implemented with regard to information and disinformation. The commissioner said " no one can threaten the freedom of the press ".⁵⁹ (Anon., n.d.)

In Hungary, where the government has suspended European data protection regulations in the midst of the crisis, anyone who spreads "false" or "falsified" information faces up to five years in prison. For this reason, several citizens and even a member of the opposition party were stopped by the police for postings published on the Internet. A similar law, which the government intends to keep, even after the crisis, has been passed in Bulgaria.

The last months have served as a base for comprehensive surveillance through applications tracking contacts, developed by the governments that will be imposed more aggressively as soon as there will be a third wave of the pandemic. These applications will provide, in our opinion, more and more room for violations of privacy, of freedom of expression and of human rights.

A study by the Ogury Agency, in May 2020, showed that there is a serious lack of confidence in governments, at EU level, in terms of data protection in applications for tracking contacts in the five most populous countries in Europe.⁶⁰ (Anon., n.d.)

Even the WHO (World Health Organization) has acknowledged that "the effectiveness of digital tools that facilitate contact tracking remains unknown."⁶¹ and that "there is currently no way to assess the effectiveness of digital tools".

The constant threat of a third wave of the virus comes directly from governments looking forward to imposing tighter control on their populations, backed by large technology companies. In addition to recording a long list of breaches of privacy, the latter are also the biggest beneficiaries of this crisis.

⁵⁶ Ibidem;

⁵⁷ Bachelet, Michelle, "Covid-19: les mesures exceptionnelles ne doivent pas servir à couvrir les abus et les violation des droits de l'homme", News and Press Release, aprilie 2020, Geneva, www.reliefweb.int;

⁵⁸ Nessuno minacci la libertà di stampa: il richiamo della commissaria per I Diritti umani, Dunja Mijatovic" www.articolo21.org/

⁵⁹ Ibidem;

⁶⁰ "Ogury pubblica The Realty Report", www.engage.it/dati-e-ricerche;

⁶¹ Ibidem.

As a result, contact tracking applications, as well as other invasive technological measures that will be intrinsically linked to every aspect of everyone's life, are, if not properly verified and analyzed, a frightening new reality.

CONCLUSION

The relationship between power and citizens, the power seen as authority, is one of force, of justification of a degree of control, sometimes even of oppression, imposed in the name of correct and honest goals that are affirmed and declared. The problem in terms of exercising power, occurs when considering the limit to which it can exercise the ability to influence others to comply with the requirements, even when they conflict with their will, when, in a social relationship, the stronger subject is able to assert its will, to impose itself, in any contextual situation. The lack of action / reaction on the part of the individual leaves room for abuses and discretionary use of power, whatever form it may have.

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