

De Gaulle
the Restorer
of the Republic

Kazimierz
Michał
Ujazdowski
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ARCHE

**De Gaulle —
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A Study on the Origins, Identity and Vitality
of the Constitution of the 5th French Republic


ARCHE

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In Memory of Heroes of the Home Army and Résistance

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This is how our constitutional problem can succinctly be explained:
the point is that – based on our feelings and political experience
of the nation – we should prepare institutions that will enable us to
rebuild the power of France during the life of one generation.

Michel Debré, *Constitutional Problem of France*,
Cahiers politiques, April 1944

Only one man dared to remind us a couple of times that democracy
is the sovereignty of the people and not their representatives. This
was again Charles de Gaulle. I only repeat this truth after him.
Yes, democracy is the sovereignty of the people articulating
their will directly in a general vote.

René Capitant, *Democratic constitution*.
Republican constitution, May 1946

Introduction

René Rémond, an outstanding French historian, was convinced that the political ideas he studied were the manifestation of human freedom and creativity in history.¹ The best example that proved his intuition was the political system designed by Charles de Gaulle. The foundation of the Fifth Republic of France was a rare historical example of the victory of idea over reality, the formation of the political system based on original political concepts put forward by de Gaulle and his aides. It seems that such a fundamental shift in the constitutional-pluralist system had never been effectuated in the European history.² The Fifth Republic was established in confrontation with the systems based on parliamentary supremacy, applicable in France after 1870. Noteworthy, the Third and Fourth Republics enjoyed the support of the majority of political elites and were anchored in the solid doctrinal grounds.

¹ René Rémond presented his scientific credo and understanding of political ideas in a recent edition of the classical study on the French Right. That edition was made available to the Polish readers; R. Rémond, *Francuska prawica dzisiaj*, Wyd. Iskry, 2008 (R. Rémond, *Les droites aujourd'hui*, Points Seuil, 2007).

² I have applied this term after Raymond Aron who had used it to define a political system that was a real political competitor. R. Aron, *Essais sur les libertés*, Calmann-Lévy, 1965, cited after the Polish edition: R. Aron, *Essey o wolnościach*, Fundacja Aletheia, 1997, p. 146.

Georges Vedel, a French constitutionalist, wrote about the exceptional significance of the voluntaristic factor (*facteur volontariste*) in the foundation of the Fifth Republic.³ De Gaulle offered an example of the policy going beyond the horizons of the short-term goals and focused on establishing good (effective) institutions, which enabled France to overcome its political weakness. It is very meaningful that the title of the first chapter of his *Mémoires d'espoir* is "Institutions."⁴ Interestingly, in de Gaulle's view, it was an institutional policy that was supposed to be a proper response to the Gaelic propensity for divisions, which is a fundamental national vice of the French people.⁵ Institutionalism, that is a conviction that even the best-quality policy is ineffective without good institutions – was a hallmark of the constitutional thought of Michel Debré, a close aide of de Gaulle and undoubtedly an architect number two of the Fifth Republic Constitution and its main editor.⁶ In the article *Le problème constitutionnel français*, which he wrote when he was a member of Résistance, he asserted that "experience shows that success of big policies and the value of statesmen depend largely on the institutions."⁷ Undoubtedly, the Constitution of 1958 provided France with a battery of tools for pursuing active national policy and regaining the leader's position on the Old Continent.⁸ Even if the political and economic position of France became weaker after the unification of Germany and its purport of sovereignty was revaluated, the Fifth Republic is still capable of establishing and striving for its goals and managing its fate.

Since the very moment of its foundation, the political system of the Fifth Republic has posed interpretative problems. Actually, the

³ G. Vedel, *Le hasard et la nécessité*, Pouvoirs, No. 50, 1989, pp. 15–30.

⁴ Ch. de Gaulle, *Mémoires d'espoir*, Plon, vol. 2, 1970–71.

⁵ *idem.*, *Discours de Bayeux*, cited after the Polish edition, in: K. M. Ujazdowski, *V Republika Francuska. Idee, Konstytucja, Interpretacje*, OMP, 2010, pp. 76–88.

⁶ Institutionalism in a form offered by Michel Debré was highlighted by Silvano Aromatario, the author of the recent study on constitutional concepts; S. Aromatario, *La pensée politique et constitutionnelle de Michel Debré*, L.G.D.J., 2006.

⁷ M. Debré, *Le problème constitutionnel français*, Les Cahiers politiques, 1944, cited after the Polish edition [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 141.

⁸ Jarosław Szymanek has recently paid attention to this facet of the foundation of the Fifth Republic. In the paper *Aksjologia konstytucji V Republiki Francuskiej* (*Axiology of the Constitution of the Fifth Republic*) he asserts that "for the founder of the Fifth Republic, strong France (in political, economic or international terms) was the primary goal of political modernization, which was necessary for Republique Française to regain its due position as a model democratic country, constitution or just good (optimal, effective) political system"; J. Szymanek, *Aksjologia konstytucji V Republiki Francuskiej*, Przegląd Sejmowy, No. 6, 2008, p. 40.

original political construction devised by de Gaulle had no equivalent in any adopted and still functioning political system. The Fifth Republic abolished parliamentary supremacy and created the strong-presidency institution as a centre of national leadership. On the other hand, the government was still accountable to the parliament, which was the primary foundation of the parliamentary system. Consequently, it could be qualified as neither the presidential nor parliamentary system. A look at the Fifth Republic from the comparatist perspective makes it possible to identify other facets of its originality. France was the first big country that implemented the institution of direct democracy to make decisions of critical importance for the people by the people. Until 1970, the Fifth Republic was a leader in several referenda held on the key issues⁹ and still the only big Western country applying this institution. Moreover, the inventiveness of a legislative referendum, outlined in the Constitution of 1958, consists in the introduction of statutes directly by the people in the general vote. The Constitution introduced a unique (different from that of Kelsen) model of the review of the constitutionality of acts and a pioneering (among the European communities) procedure of the review of the constitutionality of international commitments, applied at the very early stage, prior to passing the ratification act (Art. 54 of the Constitution). Finally, one cannot forget about the original contribution of Michel Debré and his associates from the Council of State – a French model of the rationalized parliamentary system¹⁰ consisting in the combination of the voting law reform and concurrent application of a wide range of mechanisms strengthening executive power at the expense of the parliament. This provided the Fifth Republic Constitution with internal flexibility and adjusted to the system of *cohabitation*, i.e. the stable and effective functioning of the parliamentary government without presidential support.

⁹ A. Antoszewski, R. Herbut, *Demokracje zachodnioeuropejskie*, Wydawnictwo Uniwersytetu Wrocławskiego, 1997, p. 258.

¹⁰ A term “rationalized parliamentary system” was devised by B. Mirkine-Guetzévitch, a French constitutionalist of the Russian origin. He used this term to describe the stage of development of the parliamentary governments after World War I, that followed juridification (thus – some degree of elimination) of the parliamentary supremacy over the executive. Rationalization of the parliamentary system replaced the customary norms that created unlimited hegemony of the legislative power. Yet, in Michel Debré’s view, the rationalized parliamentary system introduced by the Fifth Republic Constitution means something different: a combination of the electoral law reform with the introduction of a number of constitutional institutions to provide stability and effectiveness of the government accountable to the parliament. This issue is elaborated in Chapter V.

This book is about the origins and identity of the Fifth Republic Constitution, in the version developed between 1958 and 1962 (I defend the view that introduction of general presidential elections in 1962 was the ultimate outcome of the original reform plan and met the doctrinal assumptions of the Fifth Republic.) I use the term *constitutional identity* understood as a set of principles referring to the people's goals, subject of sovereignty, mode of its exercising, a primary body of national power and the hallmarks of political architecture.¹¹ Noteworthy, this term is more detailed than the constitutional identity of any country. Constitutional identity of France is associated with the republican political system, principles of the nation's sovereignty, indivisibility, secularity and a social nature of the republic. The term was first applied in the adjudication of the Constitutional Council (*Conseil Mémoires de guerre*) issued on 27 July 2006 on the relationship between French constitutional norms and the norms of the European law.¹² French constitutional identity is actually identical with its republican tradition discussed in Chapter I. Yet the constitutional identity of the Fifth Republic is also impacted by the rules prescribing a mode of the sovereignty expression, a major power (sovereign organ) and hallmarks of the state's architecture. In my view, the components of the Fifth Republic Constitution included its provisions, the Declaration of Human and Civil Rights of 1789, a preamble to the Constitution of 1946, and organic law critical for the constitutional order.¹³

¹¹ The term *constitutional identity* was applied by Leszek Garlicki in the article about the relatively unchanged constitutional norms. L. Garlicki, *Normy konstytucji relatywnie niezmienniane*, [in:] *Charakter i struktura norm konstytucji*, ed. J. Trzcíński, Wydawnictwo Sejmowe, 1997, pp. 137–156.

¹² See 27 July 2006, Adjudication of the Constitutional Council, 2006-540 DC; see M. Troper, *Identité constitutionnelle*, [in:] *Cinquantième anniversaire de la Constitution Française*, ed. B. Mathieu, Dalloz, 2008, pp. 123–133; K. Wojtyczek, *Europeizacja konstytucji V Republiki Francuskiej*, Przegląd Sejmowy, No. 6, 2008; K. Wójtowicz, *Rola sądów konstytucyjnych w tworzeniu zintegrowanej europejskiej przestrzeni prawnej*, [in:] *Europejska przestrzeń sądowa. L'espace judiciaire européen*, ed. R. Grzeszczak, Wydawnictwo Uniwersytetu Wrocławskiego, 2010, pp. 13–27. See the insights made by Krzysztof Wojtyczek on the fundamental constitutional rules prescribed the country's constitutional identity in his book: *Przekazywanie kompetencji państwa organizacja międzynarodowym*, Wydawnictwo UJ, 2007, pp. 27–54.

¹³ See the insights made by Ewa Gdulewicz on the constitutional status of organic laws. E. Gdulewicz, *O ustawie organicznej*, [in:] *Instytucje prawa konstytucyjnego w dobie integracji europejskiej*. A jubilee book dedicated to Prof. Maria Kruk, ed. J. Wawrzyniak and M. Łaskowska, Wydawnictwo Sejmowe, 2009, pp. 541–547; See a full list of organic laws passed after 1958: http://www.senat.fr/connaitre/pouvoirs_publics/pouvoirs_publics7.html.

I am absolutely convinced that the prerequisite indispensable for the extended analysis of the origins and identity of the Fifth Republic Constitution transcends dogmatic and legal facets. Thus, a doctrinal analysis is necessary to show the hallmarks of the French republican tradition shaped by the French Revolution and de Gaulle's attitude towards this tradition when his concept of the state organization matured.¹⁴ The doctrinal reflection facilitates the identification of the diverse sources of the Fifth Republic: reformatory output of the 1930s, explicitly republican nature of the doctrine of Free France, original political concepts of de Gaulle and his aides, where Michel Debré and René Capitant led the way. Yet, a very presentation of the constitutional ideas underlying the 1958 Constitution is not its only advantage. Identification of the identity of the Fifth Republic Constitution is facilitated when we look at this document from the perspective of the ideas underlying the newly established regulations. All the more so because in the case of France, other methodology would impoverish reflection and lead to wrong conclusions. Adhémar Esmein and Raymond Carré de Malberg, the outstanding French jurists, asserted that in the case of France this is a logical sequence of the ideas shaping institutions. The doctrinal analysis allows for the identification of the principles underlying political solutions. The foundation of the Fifth Republic required challenging the doctrine of the parliamentary republic and replacing it with a new justification.¹⁵ Hence, I pay a lot of attention to those works of Adhémar Esmein and Raymond Carré de Malberg that are rather unknown in Poland. The first one was an advocate of the parliamentary government and author of the doctrine of the Third Republic, while the latter one reinterpreted the primary republican notion in the spirit of democracy, which provided conditions for a profound institutional change.¹⁶ Another purport of the doctrinal reflection should be highlighted: the reinterpretation of the thought of Montesquieu and Rousseau by the founders of the Fifth Republic. A reader should become convinced that the French constitutional

¹⁴ The insights made by Michał Jaskólski on the methodology of political and legal doctrines are quite valuable; M. Jaskólski, *Szkice o historii doktryn politycznych i prawnych*, Zeszyty naukowe UJ, vol. DCCXII, 1985.

¹⁵ It is impossible to agree with the opinion offered by Paweł Kaczorowski, who asserted that the French debate on the state was essayistic and journalistic and not scientific, just as in Germany. P. Kaczorowski, *Państwo w czasach demokracji. Rudolf Smend i Carl Schmitt o istocie porządku państwowego Europy kontynentalnej*, ISP PAN, 2005, p. 41.

¹⁶ The views of Adhémar Esmein and Raymond Carré de Malberg are extensively discussed in Chapters I and III.

thought still makes use of their output, which results in new interpretations that are rather unknown beyond France.

A reflection on the doctrinal facets can be found in a large number of French legal studies on the Fifth Republic, primarily authored by Philippe Ardant, Pierre Avril, Paul Bastid, Olivier Beaud, Dominique Chagnollaud, Guillemme Drago, Olivier Duhamel, Jean Gicquel, Bernard Mathieu, Didier Maus, Jean-Claude Ricci or Georges Vedel.¹⁷ Yet some Polish constitutionalists studying France before World War II, including Ignacy Czuma, Adam Piasecki, Maciej Starzewski, as well as after the war – such as Konstanty Grzybowski and Jerzy Stembrowicz¹⁸ – also highlighted that reflection. I would like to express my big respect for their output that may still inspire constitutional reflection.

I have made use of all available source materials in my studies on the origins and identity of the Fifth Republic Constitution. Their major part concerns the writings of several pre-eminent political thinkers, including Charles de Gaulle, André Tardieu, Raymond Carré de Malberg or René Capitant and Michel Debré, the authors of the Bardoux Committee report,¹⁹ where they offered coherent constitutional ideas. I included the most significant ones, along with extensive insights, in the anthology *V Republika Francuska. Idee, konstytucja, interpretacje (the Fifth Republic of France, Ideas, Constitution, Interpretations)*, published by OMP in 2010. In the introduction to that anthology, I endeavoured to interpret the origins and identity of the Fifth Republic. This book is the outcome of the developed and extended studies on these issues. Special attention should be paid to a book, unknown in Poland, authored by Michel Debré *Refaire la France* and the documents showing the position of the Assembly of French People (*Rassemblement du peuple français – RPF*), established in 1947 to effectuate constitutional reforms. Important source materials include the documents on the process of drafting the Constitution of 1958 (from the period between June and October), edited in four volumes by the *Documentation française*.²⁰ Moreover, I discuss the

¹⁷ A full list of the aforementioned studies is included in the bibliography.

¹⁸ See I. Czuma, *Absolutyzm ustrojowy*, Biblioteka Uniwersytetu Lubelskiego, 1934; K. Grzybowski, *Demokracja francuska*, Czytelnik, 1947; A. Piasecki, *O parlamentaryzmie III Republiki*, Fiszer i Majewski, 1928; M. Starzewski, *Środki zabezpieczenia prawnego konstytucyjności ustaw*, Krakowska Spółdzielnia Wydawnicza, 1928; J. Stembrowicz, *Rząd w systemie parlamentarnym*, PWN, 1982.

¹⁹ I also made use of purely analytical and rather incomplete studies whose impact on the establishment of the Fifth Republic Constitution was minor. They include those of Emil Giraud, Maurice Hauriou, Marcel Prélot and Marcel Waline.

²⁰ *Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958*, vol.

memoirs, diaries and letters of the Founding Fathers of the Fifth Republic and main actors of the political scene of the time, which have not been published in the official collection of documents. Special attention should be paid to the writings of the politicians and scholars, including Michel Debré, Raymond Janot, François Mauriac and Léon Noël. Moreover, I have had an opportunity to talk to some former officials and collected valuable oral accounts during the interviews with Pierre Lefranc, a head of the technical cabinet of de Gaulle in 1958, Professor Pierre Mazeaud, a member of the political cabinet of the Prime Minister Michel Debré, and Jean-Louis Debré, an expert at the birth of the Fifth Republic. Prof. Pierre Mazeaud chaired the Constitutional Council and Jean-Louis Debré holds this position nowadays. A reader may also find a few titles rated among the classical literature masterpieces – by the authors such as Maurice Barrès, Anatol France, de Goncourt brothers, Charles Péguy or François Mauriac, which makes it possible to thoroughly explain ideological affiliations of the founders of the Fifth Republic and depict the intensity of antagonism between the republican tradition and monarchist tradition in France. They are included in a separate item in the bibliography.

Publication of the unknown documents on the process of writing the 1958 Constitution sparked a renaissance of interest in its origins and identity.²¹ Another factor encouraging scientific reflection was the 50th anniversary of enacting the Constitution. The book is also aimed to respond to the opinions on the sources and identity of the Fifth Republic, put forward in the recent studies. They include a number of innovative and extremely interesting interpretations offered in the books and articles authored by Silvano Aromatario, Daniel Bourmaud, Evangelia Georgitsi, John Bell, Olivier Duhamel, Louis Favoreu, Didier Maus, Olivier Passelecq, Frédéric Rouvillois and Odile Rudelle. Their full list is included in the bibliography.²²

I: *Des origines de la loi constitutionnelle du 3 juin 1958 à l'avant projet du 29 juillet 1958*, La Documentation française, vol. II, 1987; *Le Comité Consultatif Constitutionnel, de l'avant projet du 29 juillet 1958 au projet du 21 août 1958*, vol. III, 1988; *Du Conseil d'État au référendum, 20-28 septembre 1958*, vol. IV, 1991; *Commentaires sur la Constitution*, 2001.

²¹ In 1988, a seminar on the Fifth Republic Constitution was held to present and discuss the newly published documents. They made a huge contribution to the development of further studies on the origins and identity of the 1958 Constitution. *L'écriture de la Constitution de 1958. Acte du colloque du XXXème anniversaire Aix-en-Provence 8, 9, 10 septembre 1988*, ed. D. Maus, L. Favoreu, J.-L. Parodi, Economica, 1992.

²² *Les 50 ans de la Constitution*, éd. D. Chagnollaud, Litec, 2008; *1958–2008. Cinquantième anniversaire de la Constitution française*, ed. B. Mathieu, Dalloz, 2008; J. F. Sirinelli, S. Guillaume, J. Garrigues, *Comprendre la V^e République*, PUF, 2010.

Contrary to the popular thesis, in my view, the Fifth Republic could not be established as a republican monarchy. The Republic in France was the outcome of the French Revolution and it shaped its values in the confrontation with the monarchist tradition.²³ A specifically understood idea of the nation's sovereignty, shaped under the influence of the thought of Rousseau, along with the ideas of indivisibility and secularity of the republic, created a totally new model of the state. In such a case, the synthesis of antagonistic traditions was impossible. Republican and monarchist principles excluded each other and could not develop a coherent construction. Although de Gaulle grew up in a family whose members espoused the monarchy, he was an advocate of state patriotism and accepted the republic as a permanent form of France's political existence.²⁴ His views matured under the influence of republican nationalists, such as Charles Péguy and Maurice Barrès. De Gaulle's state patriotism accepting the republic, inclusive, with regard to diverse ideologies and seeking consolidation, of the state structures as the tools of the power of France, was the outcome of their inspiration. During World War II, de Gaulle, a leader of Free France, consistently and resolutely consolidated the republican tradition in the confrontation with Vichy. He had a right to say in his *War Memoirs* that in 1940 he saved the Republic abandoned by the overwhelming majority of the political elite. In the years 1944–1946, acting as the prime minister of the Provisional Government, he transformed the republican principles into the foundations of post-war France. In those times, de Gaulle developed a statist model of economy and shaped a social nature of the Republic of France. The decisions made by de Gaulle as the leader of Free France and the prime minister of the Provisional Government provided the basis for the constitutionalising of the republican principles and an explicit reference to the Declaration of Human and Civil Rights of 1789 and its appreciation in both post-war Constitutions.

Therefore, the Fifth Republic could only be established as an institutional change in the republican axiology. De Gaulle and

²³ See R. Aron, *Essais sur les libertés*, Calmann-Lévy, 1965, Polish edition: R. Aron, *Esaj o wolnościach*, Id.; S. Berstein, *Une monarchie républicaine*, [in:] J. F. Sirinelli, S. Guillaume, J. Garrigues, *Comprendre...*, Id.; D. Bourmaud, *Monarchie, dyarchie, polyarchie: variations autour du pouvoir sous la V^e République*, Pouvoirs, No. 99, 2001; M. Duverger, *La monarchie républicaine (ou comment les démocraties se donnent des rois)*, Laffont, 1974; R. Ghévantian, *Czy prezydent V Republiki jest monarchą republikańskim?*, Przegląd Sejmowy, No. 6, 2008; A. Hall, *Naród i państwo w myśli politycznej Charles'a de Gaulle'a*, Neriton, 2005.

²⁴ A notion of the "state nationalism" in reference to the thought of de Gaulle is used in the works of Olivier Duhamel. See O. Duhamel, *Discours de Bayeux 16 juin 1946*, [in:] F. Châtelet, O. Duhamel, E. Plisier, *Dictionnaire des œuvres politiques*, PUF, 1986, pp. 367–369.

reform advocates did not act in the intellectual void, they could make use of the reformist achievements from the 1930s, polemical towards parliamentary supremacy, as well as coherent reforms devised by André Tardieu, Raymond Carré de Malberg and the Bardoux Committee. Yet in no way was the Fifth Republic a product of the mechanical application of those concepts. Instead, it owes its unique nature to the original thought of de Gaulle and its co-shaping trends: republican democratism and rationalized parliamentary system. When de Gaulle returned to power in 1958, he offered a plan of a profound political change. An analysis of the documents on drafting the new Constitution proves a coherent vision of the new Constitution of 3 July 1958 de Gaulle and his aides had and shortly after a new constitutional act was adopted they delineated the direction of further legal works. The very *avant projet* was the effect of the application of the concept framed in Bayeux and extended with a model of the rationalized parliamentarism devised by Michel Debré. I discuss the continuity of constitutional thought. It should be noted that the underpinnings of the model of rationalized parliamentarism were developed by Michel Debré the la Résistance times.

In *Les idées politiques à l'origine de la Constitution de 1958*, Jean-Claude Ricci²⁵ asserts that de Gaulle abandoned nationalism in the spirit of Barrès when he built the Fifth Republic. Contrary to that opinion, I think that this type of nationalism inspired him to establish the Fifth Republic, as its originality results from the combination of the state patriotism, manifested in the will to build a strong and sovereign country, and the revival and democratization of the Republic. The Fifth Republic Constitution established a strong presidency that became a centre of national life, with a mandate received in the general elections. Furthermore, the act consolidated executive power entrusted to the two bodies at the expense of the parliament but retained the government's accountability to the parliament and paved the way to direct democracy. Hence, the new constitutional system may not, also in the institutional dimension, be qualified as the republican monarchy and does not resemble the July Monarchy or the Third Republic at the initial stage of existence, when its Founding Fathers posited that its transformation into the balanced constitutional monarchy was still possible.

²⁵ J. Ricci, *Les idées politiques à l'origine de la Constitution de 1958*, [in:] *Les 50 ans de la Constitution...*, *Id.*, pp. 13–31.

A doctrinal analysis of the birth of the Fifth Republic explains a purport of the French republican tradition, its continuity, the capability of internal revival, and primarily shows the key significance of the idea of the nation's sovereignty and a need to respect it by the advocates of political changes. Its predecessors, the Third and Fourth Republics, associated this notion with the supremacy of parliament as the only institution providing sovereignty. The authors of the 1958 Constitution referred to the democratic version of the republican tradition, which opened the way to the real institutional revolution. When it is recognized that the most valuable form of sovereignty representation is accomplished when "the Nation speaks directly and in its entirety"²⁶ in the general presidential elections or a referendum, there is no parliamentary supremacy.

I discuss other meanings and ramifications of the reinterpretation of the nation's sovereignty. The Fifth Republic has established a pre-eminence of the constitution non-existing before. It is usually posited that this was the ramification of the establishment of the Constitutional Council and implementation of the mechanism of the review of the constitutionality of acts. Yet the very pre-eminence of the constitution and establishment of the Constitutional Council would have been impossible without the democratization of the republic. Thus, the constitutional referenda de Gaulle staged in 1945 and 1958 were of key importance as they introduced the distinction between the constitution-making power entrusted to the people and the legislative power entrusted to the parliament, which framed the primacy of the constitution over statutes.²⁷ The preventive review of the constitutionality of international obligations entrusted to the Constitutional Council, which, as mentioned before, was a breakthrough in those years, was the manifestation of the primacy of the constitution.

Noteworthy, the development of the constitutional judiciary in France may not transgress the frameworks of republican tradition, critical of the judicial review *in concreto* and hostile towards "the power of judges" that is thought to be unauthorized to undermine the republic's laws *ex post*. The guiding spirits and authors of the Fifth Republic Constitution, Raymond Carré de Malberg,

²⁶ De Gaulle first used this term in his *Mémoires d'espoir*, Plon, 1970, trans. J. Nowacki, Wydawnictwo MON, 1971, p. 28), where he explained the purport and goal of the political change effectuated in 1958.

²⁷ The terms 'constitution-making power' and 'constituted authorities' were devised by Sieyès and used in his famous book *Qu'est-ce que le Tiers-État?* A brilliant interpretation of his theory is included in the study by O. Beaud, *La puissance de l'État*, PUF, 1994.

Michel Debré and René Capitant, advocated the review of the constitutionality of acts but at the same time knew that such a demand should conform with the republican tradition. The studies on the origins and identity of the Fifth Republic also reveal the impact of the negative facets of republican tradition manifested by effective opposition to the separate parliamentary representation of professional and economic organizations or a corporate model of the Supreme Judicial Council. Those demands were recognized as contrary to the principle of the sovereignty of the nation, which was critical for the republican order.

I devote a lot of attention to those elements of de Gaulle's constitutional work that are less known in Poland: the origins of legislative referendum or the professionalization of a political system manifested by the enhanced status of the Council of State. A large number of authors emphasize the role Pierre Pflimlin and Guy Mollet, Ministers of State, played in drafting the Constitution. They were consistent advocates of the government's strong position and its accountability to the parliament.²⁸ I am not going to depreciate their contribution to the drafting of a new constitution in any way but I would also like to highlight the creative contribution of the young jurists from the Council of State (*Conseil d'État*), in particular those most outstanding as Raymond Janot and Jérôme Solal-Céligny. I am going to prove that they played a creative role throughout the constitution-making process and did not just provide Michel Debré with a wide range of constitutional techniques.

In his renowned *Vichy France* study, Richard Paxton draws an analogy between the political system of Vichy and the constitutional output of de Gaulle.²⁹ If we look at the Fifth Republic from the doctrinal perspective, we will see that this is a wrong thesis. The Fifth Republic Constitution did not introduce an authoritarian system. Instead, accountability of the government to the parliament was respected and the institution of general voting was applied extensively. It is for these reasons that the thesis about any resemblance of the Polish April Constitution and the Fifth Republic Constitution is wrong. Yet some links between Polish

²⁸ See P. Ardant, *Institutions politiques et droit constitutionnel*, L.G.D.J., 2000; P. Avril, *Le régime politique de la V^e République*, L.G.D.J., 1964; G. Burdeau, F. Hamon, M. Troper, *Droit constitutionnel*, L.G.D.J., 1997; J. Gicquel, *Droit constitutionnel et institutions politiques*, Montchrestien, 2001.

²⁹ R. O. Paxton, *Francia Vichy (Vichy France): Old Guard and New Order, 1940–1944*; Polish edition: *Stara gwardia i nowy ład, 1940–44*, Bukowy Las, 2011.

and French constitutional systems require attention and are discussed separately.

Another subject of the jurists and political scientists' reflection is the political practice and evolution of the Fifth Republic in response to some huge challenges, such as the Algerian crisis, May 1968 unrest, political transformations after de Gaulle's resignation, decentralization and rapid European integration. What gave the Fifth Republic a strong political legitimation and determined its vitality? Does it still, fifty years after its foundation, perpetuate its original uniqueness? How did it respond to global processes, such as the European integration and increasingly stronger position of the constitutional tribunals? I offer a look at the evolution of the Fifth Republic from the perspective of its underlying principles. In my view, the original identity of the Fifth Republic Constitution has not been questioned so far. It seems appropriate to agree that this is owing to its flexibility and openness.³⁰ Yet it should also be emphasized that the Fifth Republic has not only been deeply rooted in the republican tradition but has also consolidated the constitutional identity of France to a degree larger than in the years of its predecessors.

I am not in any way going to make an impression that the Constitution of 1958 is the outcome of the free or arbitrary application of any doctrine. Actually, the constitutional thought of the Republic founding fathers was not constructivist. Even de Gaulle in his Bayeux speech, delivered in June 1946, warned against furthering ideas promoting the creation of some perfect political system. The Fifth Republic founding fathers displayed a capacity to make the constitution in the perspective of generations, avoid extreme solutions and perpetuate political balance. At the same time, they were aware of the fundamental flaw of the French political culture – individualism and dislike for the strong state power, hence the integrity of political reform combining institutional restructuring and enacting new electoral law.

The book structure meets the research assumptions and the main thesis. Chapter I defines the hallmarks of the French republican tradition, presents its internal diversity, elaborates the doctrine of the Third Republic and the crisis of the political system

³⁰ A number of authors, including Jan Baszkiewicz, highlighted that facet: "The Fifth Republic owes this to the changeable and flexible interpretations. The semi-presidential political system of the Fifth Republic is capable of adjusting to a wide range of political line-ups in the rapidly transforming country," J. Baszkiewicz, *Francja w świecie XX wieku*, *Dzieje Najnowsze*, No. 3, 1997, pp. 5–7. See also J. Szymanek, *Aksjologia konstytucji...*, *Id.*

built on its foundations. Chapter II is devoted to the shaping of de Gaulle's views under the influence of republican nationalism and recognition of the republic as a permanent form of the existence of France. The role de Gaulle played in the reconstruction of republican order during World War II and after liberation is discussed there, too. Much attention is consistently paid to the republican doctrine of Free France and antagonism towards Vichy's stance. Chapter III includes an analysis of the concepts of the 1930s reformatory movement that inspired the founders of the Fifth Republic. Chapter IV is devoted to the original political vision offered by de Gaulle and the constitutional thought of Michel Debré and René Capitant, authors of the two systems shaping the Fifth Republic: rationalized parliamentarism and democratic republicanism. In this chapter, I discuss the development of the Gaullian constitutional thought in the years 1947–1951 (when RPF enjoyed the biggest political successes) and devote quite a lot of space to the criticism of the federal forms of European integration and its constitutional ramifications. In chapter V, I describe the mode in which de Gaulle effectuated the political change in 1958 and I elaborate on the fundamental tenets of the Fifth Republic Constitution. They have determined its identity and originality.

In the final chapter, I offer an answer to the question repeatedly asked by Polish scientists about the Fifth Republic's vitality and still-perpetuated identity and discuss relationships between the Polish constitutional tradition and de Gaulle's political output. Finally, I conclude and underscore the universal values and benefits accruing from the studies on the origins and identity of the Fifth Republic Constitution.

* * *

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Chapter I

Republic à la française

– Specific French Understanding of the Concept of the Republic

A. The Idea of the Nation's Sovereignty and its Ramifications

According to some authors, including Maurice Duverger and Raymond Aron, the Fifth Republic has developed a political system that may be defined as a republican monarchy.¹ In my view, this is not a definition reflecting the very essence of this political system as the point of departure for the explanation of the origins and identity of the Fifth Republic is awareness of the critical role that Charles de Gaulle played in the reconstruction of a republican order during World War II and after the liberation of France. Owing to him, post-war France made an explicit choice of the republic and republican values in the meaning this term is used in the French political thought and political solutions.

Universal interpretations of a republic do not explain the meaning of this word in French political thought and tradition. According to the universal theories, the republic is an alternative political system for the hereditary transfer of power (in this meaning elective monarchies were actually republics) or – in the extended version – they perceive the republic as a community of citizens espousing specific laws and values.² On the other hand, the French republic is primarily the outcome of the French Revolution that established the new legitimation of power based on the specifically understood idea of the nation's sovereignty and shaped its values

¹ R. Aron, *Esej o wolnościach*, Id.; M. Duverger, *La monarchie républicaine...*, Id.

² R. Aron, *Essais sur les libertés*, Calmann-Lévy, 1965, Polish edition: B. Szlachta, D. Pietrzyk-Reeves, *Republika*, [in:] *Słownik społeczny*, ed. B. Szlachta, WAM, 2004, pp. 1081–1117; see also S. Filipowicz, N. Gładziuk, S. Józefowicz, *Republika. Rozważania o przemianach archetypu*, ISP PAN, 1995.

in stark contrast to the monarchist tradition.³ In Maurice Agulhon's view, being a republican primarily means that one is an advocate of the non-personal, non-hereditary, non-permanent, and non-arbitrary power and the republic denoted identification with the tradition deriving from 1789.⁴

Thus, in France, the notion "republic" conveys the content different from that offered in the universal interpretations and denotes not only opposition against hereditary transmission of power but also its new legitimacy inspired by the philosophy developed by Jean-Jacques Rousseau and, which is equally significant – an axiological project embodied in the Declaration of the Rights of Man and of the Citizen, with a key role of the rules of the indivisibility and secularity of Republic. The sentence spoken by de Gaulle on the Square of Republic in September 1958, just before the constitutional referendum, that republic was "the sovereignty of the people, the call of liberty, the hope of justice,"⁵ includes one of the most famous formulas determining the French understanding of the republic. This was repeated by Philippe Séguin in his famous speech delivered during the debate on the Maastricht Treaty ratification. He reminded that the republic has a unique meaning in the French political tradition as it is not only a kind of institutional system but also a system of shared values shaped by the heritage of revolution. The Republic of France exists just like the Republic of Rome once existed.⁶

Given such context, we will better understand the opinion offered by the outstanding French historian who said that republic in the meaning of the French intellectual tradition had developed over the last two decades of the 19th century, when the revolution had accomplished its goals and became institutionalized.

³ J. L. Quermonne, République, [in:] O. Duhamel, Y. Mény, *Dictionnaire constitutionnel*, Presses Universitaires de France, 1992, p. 921.

⁴ M. Agulhon, *Histoire de France*, vol.5: *La République, 1880 à nos jours*, Hachete, 1990. A similar definition of the republic is offered by Guy Carcassonne in his commentary to the Fifth Republic Constitution, Cf. *Idem*, *La Constitution*, Éditions du Seuil, 2007, p. 40; see also *La Constitution de la République Française. Analyses et commentaires*, ed. F. Luchaire, G. Conac, Economica, 2008, pp. 130–133; Ch. Vimbert, *La tradition républicain en droit public français*, LGDG, 1992.

⁵ Ch. de Gaulle, *Speech delivered on Place de la République (Przemówienie wygłoszone na Placu Republiki w dn. 4 września 1958 r.)*, [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.* p. 249.

⁶ "Republic is primarily a system of the commonly shared values that molded France into what it is still today in the eyes of the world. The Republic of France exists just as the Republic of Rome once existed. This motto has remained the same since the very beginning: the sovereignty of the people, the call of liberty, the hope of justice," P. Séguin, *Oui, nous voulons l'Europe, mais debout*, [in:] M. Mopin, *Les grands débats parlementaires de 1875 à nos jours*, La Documentation française, 1988, pp. 311–321, trans. B. Plonka.

Only the victory of republicans over monarchists in the early years of the Third Republic is an ultimate proof of the victory of revolution across the whole country; Jules Ferry, a teacher and a missionary of the 1789 principles, is rather a symbol than an instrument of that long and victorious campaign.

– François Furet asserts in his essay *A Real End of the French Revolution*.⁷ The Republic was ultimately shaped when the legal institutionalization of the heritage of French Revolution was effected. Passing the act that recognized *La Marseillaise* as the national anthem (1879), recognition of July 14th as the national holiday by the Senate in 1880, and the 1875 constitutional amendment defining relations between public authorities, which excluded restoration of the monarchy.⁸ Article 8 of the Act on the organization of public organs was supplemented by the following sentence: “A republican form of the government may not be subject to any revision of the constitution. Members of the families that ruled in France are unelectable for the office of the president of Republic.”⁹ The 1884 amendment abolished public prayers following the inauguration of the new term of the National Assembly chambers (previous Section 3 of Article 1 of the aforementioned act)¹⁰ and introduced a reform of the Senate consisting in the deprivation of non-dismissible senators of mandates and abolishment of preferences for rural districts¹¹

Moreover, the two last decades of the 19th century witnessed the introduction and development of the state and secular educational

⁷ F. Furet, *La Révolution française est terminée*, Gallimard, 1978, cited after the Polish edition: F. Furet, *Prawdziwy koniec rewolucji francuskiej*, Wydawnictwo Znak, 1994, p. 10; *idem.*, *La Révolution: de Turgot à Jules Ferry, 1770–1880*, Hachette, 1989.

⁸ The legal and moral meaning of the ban on reintroduction of the monarchist form of the government is discussed by Nathalie Droin in her extremely interesting paper on the constitutional reform of 1884. The author’s citations include Carl Schmitt’s theory defining the differences between the constitution (in the strict meaning of this term) and the constitutional act. Any revision of the constitutional acts may not undermine axiological underpinnings of the constitution. In Nathalie Droin’s view, in this way a German law theorist provided arguments supporting juridical advantage of the ban on the restoration of the monarchy. See N. Droin, *Retour sur la loi constitutionnelle de 1884: contribution à une histoire de la limitation du pouvoir constituant dérivé*, RFDC, No. 80, 2009.

⁹ J. Godechot, *Les Constitutions de la France depuis 1789*, Garnier-Flammarion, 1970, p. 337.

¹⁰ Previous section 3 in Art. 1 set forth that “On the Sunday following the opening of the session, prayers shall be raised in churches to ask for support for the Assembly members in their work.” J. Godechot, *Les Constitutions...*, *Id.* p. 334.

¹¹ C. Bigaut, *Le réformisme constitutionnel en France (1789–2000)*, La Documentation française, 2000, pp. 44–46.

system developed by Jules Ferry. The last stage of the revolution institutionalization process comprised the introduction of the radical separation of the Church and State.¹²

Noteworthy, the republican nature of the state, secularity and indivisibility of the Republic are, according to the Constitutional Council's adjudication of 27 July 2006, inseparable from the French constitutional identity.¹³ In this way, the Constitutional Council confirmed that the heritage of the French Revolution identifies core constitutional values. Before that, as early as in 1953, the Council of State underscored the republican constitutional tradition, exposed in the Declaration of the Rights of Man and of the Citizen of 1789, in the preamble to the Constitution of 1946.¹⁴

Thus the French Republic is undoubtedly a country where citizens identify themselves with the heritage of the French Revolution. This marks a new beginning for the French statehood, which is manifested by the dearth of any references to the heritage of the pre-revolution state in the republican constitutions. The Nation is not defined as the community moulded by history and culture, which is present in the German and Polish constitutional traditions, but rather a political community united around the heritage of the revolution. It is because of this reason that Philippe Séguin asserted that "a notion of the nation is stronger than a notion of Homeland."¹⁵ This explains the opening of the Republic to the people not moulded in the French cultural environment but accepting the heritage of the revolution as well as a primary and direct purport of citizenship based on *lus soli*.¹⁶

¹² Secularization of France has been discussed in a large number of books and papers, including the major studies by P. Barbal, *La laïcité selon Jules Ferry*, Projet, 1981; E. Poulat, *Liberté, laïcité. La guerre des deux France et le principe de la modernité*, Le Cerf-Cujas, 1987; R. Rémond, *L'anticléricalisme en France, de 1815 à nos jours*, Complexe, 1985.

¹³ See the Constitutional Council's adjudication of 27 July 2006, 2006-540 DC and a commentary on that ruling made by Krzysztof Wojtyczek and Krzysztof Wójtowicz: K. Wojtyczek, *Europeizacja V Republiki Francuskiej*, *Id.*; K. Wójtowicz, *Rola sądów konstytucyjnych...*, *Id.*; K. Wójtowicz, *Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej*, *Przegląd Sejmowy*, No. 4, 2010, pp. 19–21.

¹⁴ Ch. Vimbert, *La tradition...*, *Id.* p. 202. In the same study, Vimbert analyzed the notion "republican tradition" understood as a set of fundamental republican values confirmed by the historical experience and political practice.

¹⁵ P. Séguin, *Oui, nous voulons Europe...*, *Id.* p. 315.

¹⁶ *ibid.*, Chantal Delsol used to write in the similar spirit: "republican France predominantly wished to maintain the unity among multicultural groups, embrace all the people but still be united," Ch. Delsol, *Parę zapisków o republice francuskiej*, [in:] *Idee republikańskie*, Fundacja Res Publica im. Henryka Krzeczkowskiego, 2011, p. 19.

The Republic also shaped a new meaning of patriotism understood as an act of the people's disagreement on the conquest of France coupled with the identification with republican values. "If we were to identify the day of its birth, I would say it was rather Valmy, when people took up arms, and not the Convention on the day after, when Assembly Members made a decision to overthrow the monarchy" – Philippe Séguin said in the aforementioned speech.¹⁷ When *Comité général d'études* appointed by the Résistance surveyed its members, nearly all respondents associated republicanism with patriotism. An anonymous historian involved in the survey made the following conclusion:

French people perceive a republic as a system designed for all the people, it is a great idea that heightened people's feelings in all national issues. It is the Republic that repelled a threatening invasion in 1793, revived French feelings towards the enemy in 1870, managed to maintain French unity between 1914 and 1918, during the time of dreadful ordeals; its splendour is the splendour of our people and any defeat is our pain.¹⁸

Moreover, the Republic moulded by the heritage of the French Revolution, is rather the country of the nation than the community of citizens in the spirit of republican tradition derived from Cicero. In the Ciceronian tradition "the Republic is a matter of the Nation" and "the Nation is not just any group of people gathered by any means but a large group of people united by the recognition of the same law and the benefit of the shared living."¹⁹ Meanwhile, regarding the French Republic, the existence of the real community of citizens espousing specific laws and values is not as essential as the very fact that the people possess the state built on the values moulded by the revolution heritage. This is why Gérard Baudson asserts that a concept of the state-nation is a voluntarist and political creation. "Thus a contract consists in establishing the state – therefore «resorting to the state» is something most essential. If the state-nation disappears, a social contract between citizens will be severed."²⁰ It appears that the social isolation of de Gaulle and Résistance

¹⁷ P. Séguin, *Oui, nous voulons Europe...*, *Id.* p. 315.

¹⁸ H. Michel, B. Mirkine-Guetzévitch, *Les idées politiques et sociales de la Résistance*, Presses Universitaires de France, 1954, p. 47, trans. B. Perlińska.

¹⁹ B. Szlachta, D. Pietrzyk-Reeves, *Republika*, *Id.* p. 1085.

²⁰ G. Baudson, *L'Europe des apatrides*, Luynes, 1994, p. 39, trans. B. Perlińska.

resulted considerably from the dearth of tradition of national activity outside state structures.

The notions of the national sovereignty and *volonté générale*, set forth in the Declaration of the Rights of Man and of the Citizen (Articles III and VI), moulded under the influence of Rousseau, are fundamental in the French republican tradition). Primarily, attention should be paid to the transfer of sovereignty from the royal power onto the nation. Implementation of this rule resulted in dramatic ramifications as even the Constitution of 1791, formally a monarchist one challenged the royal sovereignty. In his book on the French constitutionalism, Michel Morabito expressed a view that the Constitution of 1791, pursuant to the 1789 ideals, challenged the royal sovereignty investing the king with a status of the people's representative. The monarch exercised executive power and participated in exercising legislative power but had no share in the constitutional power that solely depended on the legislative bodies representing people.²¹ Similarly, Adam Piasecki, in his study on the parliamentarism of the Third Republic, concluded that: "In France, the transfer of sovereignty from the king onto the nation was revolutionary. The Constitution enacted by that Assembly, affixed with the declaration of human rights, is the manifestation of the theory on national sovereignty adopted in the hereditary monarchy."²² Hence, the basic difference between American and French revolutionary experience may be identified. At the first stage of the American revolution, before the constitution of the Union was enacted, the people's right to participate in the legislation process or the ban on actions without the people representative's consent, was enshrined in the *Bill of Rights* of the States of Virginia, Maryland and Massachusetts,²³ while the French declaration challenged totally the monarchy's participation (negation of royal sovereignty) as well as the participation of intermediary organizations (such as corporations) by stipulating that it was solely the people who could exercise the sovereign power.

²¹ M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique de la France: 1789–1958*, Montchestien, 1996, cited after the Polish edition: M. Morabito, D. Bourmaud, *Historia konstytucyjna i polityczna Francji (1789–1958)*, Temida 2, 1996, p. 46.

²² A. Piasecki, *O parlamentaryzmie...*, *Id.* p. 65.

²³ Comparison of the *Bill of Rights* in the constitutions of specific American states with the French Declaration of the Rights of Man and of the Citizen is discussed by G. Jelinek, *Deklaracja praw człowieka i obywatela*, trans. Z. Libkund-Lubodzicka, Księgarnia Powszechna, 1905, pp. 31–44.

Total exclusion of the monarchy from the area of sovereignty as early as in the initial phase of the French Revolution is not the only hallmark of the French understanding of people's sovereignty. More importantly, the idea of people's sovereignty developed under the influence of Rousseau's thought and was coupled with the concept of the general will. According to the phrase offered by Georg Jellinek, a renowned German jurist, *volonté générale*, which "makes autonomous decisions about its boundaries and neither should nor may be limited by any power,"²⁴ is absolutist in the thought of the author of the *Social Contract*. Thus, in Rousseau's view, sovereignty may solely be granted to the entire nation based on the complete ceding of individual rights to the nation-sovereign.²⁵ Jacques Maritain offers a similar opinion. In his view, a myth of the general will was used to transfer the separate and transcendental royal power to the nation that was also invested with a separate, transcendental, and absolute power.²⁶ It is hard to reconcile the French republic

²⁴ *ibid.*, p. 19.

²⁵ In his excellent sketch, Georg Jellinek expressed a view that the social contract developed by Rousseau and inspiring the Declaration includes only one clause: waiver of all individual rights in favour of the society. "An individual retains not a single atom of law at the moment he becomes a member of the society. He is invested with all the rights by the *volonté générale* that unilaterally prescribes its boundaries and no power may or should restrict them. Even the ownership right is granted to an individual only with the state's consent." G. Jellinek, *Deklaracja praw...*, *Id.*, pp. 18–19. Rousseau's thought is interpreted in a similar spirit by Dorota Pietrzyk-Revees, who highlights also its collectivist nature, also *Idem: Republikańska koncepcja umowy społecznej*, [in:] *Umowa społeczna i jej krytycy w myśli politycznej i prawnej*, eds. Z. Rau, M. Chmieleński, Scholar, 2010. Moreover, an interpretation offered by David Boucher is also interesting: he confirms an absolutist nature of a notion of the general will: "The general will is something more than merely a sum of individual wills as it is neither the reflection of the general good nor the interest of individual groups. Opposing the general means opposing one's own real will" – asserted David Boucher, a commentator of Rousseau's thought; also *idem., Rousseau*, [in:] *Myśliciele polityczni. Od Sokratesa do współczesności*, ed. D. Boucher, P. Kelly, Wydawnictwo UJ, 2008, p. 327.

²⁶ "A myth of the general will, which is by no means the majority's will but a monadically overriding, indivisible will emanating from the people as an individual creation, the will "that is always right" – it was only a means to transfer separated and transcendental royal power to the people. Yet, that power remained separated and transcendental as the mystical impact of the general will enables people to become an individual sovereign exercising the separate, absolute and transcendental power, the top-down power on itself as a group of individuals," J. Maritain, *L'Homme et l'État*, DDB, 2009, cited after the Polish edition: J. Maritain, *Człowiek i państwo*, translated by A. Grobler, Wydawnictwo Znak, 1993, p. 520. Maritain included the same view in his other work on the thought of Luther, Cartesius and Rousseau. The French philosopher concluded that "Actually, this is not a pact at all, it has a specific nature, includes in its essence a number of clauses, without which it would be nothing – it is them that John James derived all his system from. Certainly, all these clauses come down to the one, total annihilation of each partner along with his rights toward a social group;" also *idem., Trzej reformatorzy*, trans. K. Michalski, Verbum, 1938, p. 137.

lican tradition with Tocqueville's view where it is the individual's sovereignty that provides the basis for the nation's sovereignty at the last count.²⁷

An absolutist understanding of the general will underscores the idea of the sovereignty of the act as an outcome of its manifestation. Thus, the sovereignty of the act would denote its primacy, subject unlimitedness and a rule that it may not be subject to the review of constitutionality. A number of scholars, including J. Barthélemy, P. Duez, L. Duguit or M. Hauriou, put forward an idea of the review of the constitutionality of acts which would give citizens a right to institute such a review whenever the constitutional rights of individuals were violated. Yet such proposals were rejected as contradictory to the rule of the Republic.²⁸ Although provisions of the Declaration of the Rights of Man and of the Citizen of 1789 were intended to have a special status, it was also posited that any parliamentary obligations to effectuate them were of only moral nature since the resolutions passed in the parliament were not subject to any review as they pronounce the general will. Noteworthy, the French republican tradition is not free from internal tensions. On the one hand, the Declaration of 1789 recognizes freedom and ownership as natural human rights that are not subject to the statute of limitation. On the other hand, however, the nation's general will is absolutist and poses a threat to the rights of an individual in Rousseau's view. As we could see, advocates of the establishment of the review of constitutionality of acts had to address that question in the doctrinal dimension.

Thus, statism and centralism found solid support in the idea of the nation's sovereignty defined in such a manner. The administrative monarchy was replaced by an indivisible, unitary, and centralized republic. Tocqueville's writings provide a penetrating description of the continuity of administrative centralization since the decline of monarchy until the mid-1800s.²⁹ In the aforementioned

²⁷ A. de Tocqueville, *De la démocratie en Amérique*, Gallimard, 1986, cited after the Polish edition: A. de Tocqueville, *O demokracji w Ameryce*, vol. I, trans. H. Szumańska-Grossowa, Społeczny Instytut Wydawniczy Żnak, 1996, pp. 65–66.

²⁸ See P. Duez, *Le contrôle juridictionnel de la constitutionnalité des lois en France. Comment il convient de poser la question*, [in:] *Mélanges Maurice Hauriou*, Sirey, 1929, pp. 211–249. Those concepts were discussed by M. Starzewski in *Środki zabezpieczenia prawno-go...*, *Id.* pp. 221–226. See also A. Kubiak, *Francuska koncepcja kontroli konstytucyjności ustaw*, Uniwersytet Gdański, 1993.

²⁹ “Meanwhile, the Revolution was against the monarchy and provincial institutions. Driven by the blind hatred, it destroyed everything that had been before its outbreak, both absolute power and any organizations that could weaken its force. Revolution was

paper, Jacques Maritain also discerned the continuity between the monarchy and the republic in this sphere since both political models did not tolerate the rights of fragmentary communities in the state.³⁰

The centralism of the French Republic has still been its hallmark. Inability to reconcile the French model of a republic with a federation and confederation model is quite obvious. The rigidity of French centralism is particularly noticeable in the list of the decentralization range in the unitary states. Notably, in the early 1980s the Constitutional Council considerably limited the range of reforms aimed at the state's decentralization. Their resumption by President Chirac required constitutional amendments, which were implemented in 2003.³¹

François Furet and Michel Morabito indicated that rejection of historical and more complex legitimization theories in the Declaration of the Rights of Man and of the Citizen of 1789 must have inevitably led to the centralization and refusal to grant corporations public and state rights. François Furet wrote about that rejection during the crisis of the legitimization-concept monarchy, most strongly expressed in the writings of Henri de Boulainvilliers, who emphasized the rights of intermediary organizations as the third, along with the royalty and nation, partner of the contract that constituted France.³² On the other hand, Morabito mentioned a political concept developed by Malby, which recognized the nation as the compound community of social classes,

both republican and centralist," A. de Tocqueville, *De la démocratie en Amérique*, *Id.*, cited after the Polish edition: A. de Tocqueville, *O demokracji w Ameryce*, *Id.* p. 97. The description of the extent of administration at the expense of local rights and intermediary organizations is also provided by Tocqueville in his outstanding study *L'Ancien Régime et la Révolution*, another most famous work of this author (A. de Tocqueville, *L'Ancien Régime et la Révolution*, Gallimard, 1985, cited after the Polish edition: A. de Tocqueville, *Dawny ustrój i rewolucja*, Społeczny Instytut Wydawniczy Znak, 1994, pp. 62–101).

³⁰ "The ramification of the rules offered by Rousseau, along with the consolidation of the belief in the uncomplicated transfer of the transcendent supreme royal independence and power onto the people, which resulted in the loss of any individual independence in favour of indivisible general will, the principle recognized as obvious during the French Revolution was that people's sovereignty – absolute, monadic, and transcendent (as each sovereignty) – excludes the possibility of autonomy of any group or organization. Significantly, no fragmentary communities were allowed in the state," J. Maritain, *L'Homme et l'État*, *Id.*, cited after the Polish edition: J. Maritain, *Człowiek i państwo*, *Id.*, p. 54.

³¹ Amendment was quite extensive, but its basis was the sentence about decentralized organization of the republic, enshrined in Article 1. L. Favoreu, L. Philip, *Les grands textes du Conseil constitutionnel*, Dalloz, 2007, pp. 440–466. See also J.-M. Ohnet, *Histoire de la décentralisation française*, L.G.D.J., 1996.

³² F. Furet, *La Révolution française est terminée*, *Id.*, cited after the Polish edition: F. Furet, *Prawdziwy koniec...*, *Id.*, p. 45.

putting stress on “the separate representation of different social classes inside the organ of the legislative power.”³³ An idea of the nation’s sovereignty and related rule of indivisibility has also a statist and centralist purport. Noteworthy, in their extensive commentary on the Fifth Republic Constitution, François Luchaire and Gérard Conac show its multitudinous ramifications. Indivisibility of the republic involves a unitary nature of the state, concentration of all normative power in the central state organs, a ban on investing local and regional communities with the competences in foreign policy affairs and, on the other hand, extensive competences of the government administration in the supervision of local self-governments. The authors highlight the fact that voting in the European Parliament elections is not the manifestation of sovereignty or its delegation to the institutions that would be irreconcilable with the rule of indivisibility of the republic. Moreover, in their view, that rule results in the indivisibility of the French nation, which means a ban on granting collective rights to the language, religious, and ethnic minorities.³⁴

Noteworthy, the French Revolution considerably diminished the rights of associations and corporations that, in the extreme scenarios, could not be established. This is enshrined in Article 1 of *Loi Le Chapelier* (“Le Chapelier Act”) passed on 17 June 1791: “Since the abolition of all forms of corporations in the same social class or occupation is one of the constitutional underpinnings, it is forbidden to recreate such a corporation under any pretext whatever.”³⁵ The Act banned any forms of corporations or associations of the “citizens of the same class or occupation,” introduced fines for organizing such associations and prohibited administration to accept any addresses or petitions “written on behalf of the class or occupation.”³⁶ Parliament members were convinced they enforced the provisions of the French Constitution that recognized solely individual and people’s rights. Corporation rights were recognized as a threat to the freedoms confirmed in the Declaration of the Rights of Man and of the Citizen. Noteworthy, advocates of the corporation rights had

³³ M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique de la France: 1789-1958*, *Id.*, cited after the Polish edition: M. Morabito, D. Bourmaud, *Historia konstytucyjna...*, *Id.*, p. 46.

³⁴ F. Luchaire, G. Conac (ed.), *La Constitution...*, *Id.*, pp. 133–139.

³⁵ “Ustawa *Le Chapelier* z 14 czerwca 1791 r.”, trans. T. Janasz, [in:] *Powszechna historia państwa i prawa*, ed. M. J. Ptak, M. Kinstler, Wydawnictwo Uniwersytetu Wrocławskiego, 1999, p. 65.

³⁶ *ibid.*

to challenge the republican rules. René de La Tour du Pin, a precursor of the corporations-based political solutions, criticized the Declaration of the Rights of Man and of the Citizen. In his view, the Declaration inspired liberalism and socialism and denied associations their rights recognizing only individuals and the nation.³⁷ It also should not be surprising that Léon Duguit, the author of the solidarist concept of law, was extremely critical of the notion of the nation's sovereignty and republican legal rules and supported recognition of the rights of economic and professional corporations.³⁸

The Republic continued to deny the rights of associations and corporations even after the severe Le Chapelier Act was repealed. The French political model prohibits investing professional and economic corporations with public rights, which is quite common in a large number of the European countries.³⁹ Economic interests are represented exclusively inside the state structures, which explains a unique nature of the strongly statist model of the French capitalism. In the 1930s, a manner of passing opinions on bills became institutionalized in the form of the Economic Council. Initially, the Council acted on the basis of the presidential decree of January 1925 and then the act of 1936. In the Fourth Republic, the Council became a constitutional institution. Characteristically, it is this institution that Konstanty Grzybowski recognized, just like the Council of State, as an intermediary body limiting the political power.⁴⁰ Given the dearth of the real social bodies independent of the administration structures, it was the national institutions enjoying autonomy, such as the Council of State or the Economic Council, that were to revise any decisions made by political powers. The latter one developed as a consultative institution. It is quite meaningful that no decision was made to invest it with a right to contribute to the development of the collective contracts. This was due to the alleged threat of the development of corporatism beyond the state's control.⁴¹

³⁷ This facet of the thought of René de La Tour du Pina was highlighted by Czesław Strzeszewski in his synthesis of the Catholic social science: *Idem, Katolicka nauka społeczna*, ODISS, 1985, pp. 241–242.

³⁸ See L. Duguit, *Traité de droit constitutionnel*, vol. 1, Ancienne Librairie Fontemoing et Cie, 1921, particularly chapters V (*Le problème de l'État*) and VI (*La conception réaliste de l'État*), pp. 393–564.

³⁹ In Jadwiga Staniszkis' view, this model of capitalism lasted in France until modern times and should be analyzed with regard to political economy and not pure economics. Cf. the same author's *Postkomunizm, Słowo obraz terytoria*, 2001, p. 219.

⁴⁰ K. Grzybowski, *Demokracja francuska*, *Id.* pp. 105–106.

⁴¹ On the one hand, the Council was to be an arbitrator and referee in economic and

Moreover, it should be noted that the republican tradition remained reserved towards a strong position and independence of the judiciary. One of the key rules of the French judiciary system was the nomination for the position of judges done by the executive power.⁴² Notably, the French judiciary is not regarded as the independent power but a function. A document produced by the Bardoux Committee, which is going to be thoroughly analysed below, included one of the most interesting opinions about the crisis of the Third Republic and the conclusion that, unlike British, French judiciary has no position of independent power.⁴³ It is recognized that judicial institutions are not intended to attain the idea of the nation's sovereignty, which is confirmed in the commentaries on the Fifth Republic Constitution.⁴⁴ A similar definition of the specific features of the republican legal traditions was offered by René David in his synthetic analysis on the French law.⁴⁵ Encroachment of the judiciary into legislative powers has always been regarded as a violation of the French republican model. This distrust was manifested in the speech of Nicolas Sarkozy delivered in July 2008, where he announced revision of the Constitution.⁴⁶ A critical attitude towards a strong position

social conflicts and was to contribute to the content of collective contracts and, on the other hand, an advisory body for the government and parliament. The first intention found no support in the parliament chambers as their members thought it could open the way to corporatism and, consequently, push National Assembly into the political background, Cf. K. Grzybowski, *Demokracja francuska*, *Id.*, p. 106. Marc Bloch included essential insights on corporate bodies in his *A Frenchman's Examination of Conscience*. According to this outstanding historian, those bodies had a stronger position than the parliament and ministers. "And did our parliaments and ministers really have so big power? They retained a large number of official bodies after previous systems and actually did not supervise them strictly," M. Bloch, *Examen de conscience d'un Français*, [in:] the same author *L'étrange défaite*, Gallimard, 1990, cited after the Polish edition; Oficyna Naukowa, 2008, p. 246.

⁴² R. Perrot, *Le conseil supérieur de la magistrature. La Justice*, Cahiers français, La Documentation française, 1991, No. 251.

⁴³ J. Bardoux, Comité Technique pour la Réforme de l'État, *La France de demain. Son gouvernement, ses assemblées, sa justice*, Sirey, 1936, pp. 55–56.

⁴⁴ See, for example, G. Carcassonne, *La Constitution*, *Id.* pp. 47–50.

⁴⁵ "French people tend to see a threat in the dictatorship of executive power rather than Parliament. Similarly, they were unable to accept something that a Frenchman, not without a Jacobin aversion and a sense of the necessity for opposition, defined as a «government of Justices»." R. David, *Le droit français*, Librairie générale de droit et de jurisprudence, 1960, cited after the Polish edition: R. David, *Prawo francuskie*, PWN, 1965, p. 60.

⁴⁶ "Incessant polemics are ongoing about the independence of the judiciary. The debate is ongoing whether the judiciary is to be merely an ordinary office or the power, the same as the executive or legislative power. I am against recognizing a judiciary system as a competitor for the other two powers," see N. Sarkozy, *Przemówienie w Épinal (A speech*

of the judiciary is also explained by an explicit objection to the judicial review of the constitutionality of acts⁴⁷ Due to the same reasons, a specific model of the review of administrative decisions excluding any participation of the courts of general jurisdiction has been developed.⁴⁸

The idea of the nation's sovereignty – “the sovereignty of the will of all people”⁴⁹, according to the definition offered by Carré de Malberg, has become the most essential element of the continuity of the republican political system, legitimization of national authorities, and law (a bill as a manifestation of *volonté générale*).⁵⁰ In his thorough study on the Third Republic, Adam Piasecki highlighted the fact that the notion of the nation's sovereignty, taken from the philosophy developed by Rousseau, provided the ideological basis for the constitution of republican France.⁵¹ Presumably, this was even the basis of all post-revolutionary constitutions except the two periods: the Restoration between 1815 and 1830 and Vichy. The essential controversy between the Republic and the Restoration, discussed by Furet, should not be regarded as a journalistic formula since this is a good reflection of the fundamental difference between the French monarchist and republican tradition. Only the Constitutional Charter from the period of the Restoration, effective between 1815 and 1830, restored the monarchic legitimization rules and challenged the republican order. According to Adhémar Esmein, an outstanding French law expert, whose influence on teaching constitutional law in Europe is difficult to overestimate, “The most significant principle expressed by the Great

delivered in Épinal), 12 July 2007, [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 373.

⁴⁷ See M. Starzewski, *Środki zabezpieczenia prawnego...*, *Id.* p. 209. See also A. Kubiak, *Francuska koncepcja kontroli konstytucyjności ustaw*, *Id.* L. Garlicki, *Rada Konstytucyjna a ochrona praw jednostki we Francji*, Wydawnictwo Sejmowe, 1993, pp. 7–14.

⁴⁸ See H. Izdebski, *Francja*, [in:] *Sądownictwo administracyjne w Europie Zachodniej*, ed. L. Garlicki, PWN, 1990. See also F. Longchamps de Bérrier, *Kontrola Rady Stanu nad administracją we Francji*, Kontrola Państwowa, 1962, no 5, pp. 46–55.

⁴⁹ R. Carré de Malberg, *Considérations théoriques sur la question de la combinaison du référendum avec le parlementarisme*, RDP, 1931, p. 144–161, cited after the Polish edition, [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.* p. 129.

⁵⁰ See G. Vedel's insightful reflections about the constitutional continuity in France after 1789. G. Vedel, *La continuité constitutionnelle en France de 1789 à 1989*, RFDC, No.1, 1990.

⁵¹ “In French political views, a notion of the nation's sovereignty is deeply rooted and an issue of sovereignty is subject to lively discussions in the jurists' circles. England is different. The power of the sovereign of the English dynasty was gradually transformed into the English nation, but that process was unseen. Nowadays, the monarch shares power with the organs whose members were elected and, actually, is inundated with the power of parliament being one of its components,” A. Piasecki, *O parlamentarzmie...*, *Id.*, pp. 64–65.

Revolution is the nation's supremacy. Apart from the 1814 Charter, it was recognized and adopted as the basis in all, so much different, French constitutions."⁵² Thus, the rule of the nation's sovereignty was the basis of the constitutional monarchy system from the years 1789–1792, July Monarchy, Consulate period, First and Second Empire. It is true that the republican tradition opposed Bonapartism and its personalized and arbitrary power. Yet it should be remembered that the Empire adopted the republican axiology along with the reference to the nation's sovereignty and spread the revolutionary political and legal heritage beyond the borders of France.

B. Different Strains of Republican Tradition and the Doctrine of the Third Republic

When the nation's sovereignty and a statute perceived as a manifestation of the general will were the fundamental elements of the political continuity, a mode of the manifestation of sovereignty had to inevitably become a basic constitutional issue. So, the question is which entities were authorized to exercise sovereignty. Noteworthy, the republican tradition is diversified in this respect. Jacobin and Second Republics, albeit different in many respects, referred to the thought of Rousseau in their recognition of direct democracy (First Republic) and general presidential elections (the Constitution of 1848). It should be reminded that under the Second Republic's laws all adult males were granted general electoral rights. Notably, in the democratic republican tradition a notion of the "people's sovereignty" was applied in opposition to the "nation's sovereignty." The people's sovereignty recognized a voting right as an absolute individual right and conferred it upon all adult citizens. Consequently, the direct democracy was advocated. Contrary to the idea of the people's sovereignty, an idea of the nation's sovereignty did not involve the necessity of the introduction of the general electoral rights as the nation was not defined as some individuals residing on the specific territory at the specific time but as the continuity of successive generations. As Esmein put it, "Actually, the supreme power belongs to the nation as such and not individuals constituting the nation, which is a sum of successive generations." Consequently, the electoral right is a function and should be conferred upon those

⁵² A. Esmein, *Éléments de droit constitutionnel français et comparé*, Édition Panthéon-Assas, 2001, cited after the Polish edition: A. Esmein, *Prawo konstytucyjne*, Księgarnia Hoessicka, 1921, p. 211.

who have a faculty for exercising this right for the nation's benefit.⁵³ Thus, the nation's sovereignty rejected direct democracy, allowed for exceptions to the general voting (electoral qualifications, non-granting electoral rights to women) and ruled out an institution of imperative mandate.⁵⁴

The Third and Fourth Republics were founded on the ground that the parliament is a holder of the nation's sovereignty; in the latter one it was expressed *explicite* in the Constitution of 1946, whose Article 3 provided that in all fields except enactment of the constitution "nation exercises sovereignty through its MPs sitting in the Assemblée nationale (National Assembly)."⁵⁵ Thus, any republican constitutional reforms had to be in conformity with this fundamental principle. We will see that the interpretation based on an assumption that "sovereignty belongs to the nation the moment it speaks directly and in its entirety"⁵⁶ and its execution is entrusted not only to the parliament but also to the president as a representative of the nation, was the key to the political shift brought by the Fifth Republic.

I have mentioned a still widespread conviction about the superior and unchanging status of the articles of the Declaration of the Rights of Man and of the Citizen of 1789.⁵⁷ Yet the attitude

⁵³ The arguments put forward by Esmein offered a number of convincing arguments: "The electoral right is not the absolute right of an individual, an indispensable part of the very essence of a human being and appropriate for each and every member of the nation, but a social function. Such a view results from the abovementioned principle that the nation's superiority is not shared among all members of the society and remains an indivisible function of the very nation perceived as a series of successive generations. Thus, at different stages of this evolution, people exercise political electoral right and actually do not act on their individual behalf but on behalf of the nation whose representatives they are. In this way they perform a certain function," A. Esmein, *Éléments de droit constitutionnel français et comparé*, *Id.*, cited after the Polish edition: A. Esmein, *Prawo konstytucyjne*, *Id.* p. 259. According to this French constitutionalist, granting electoral rights may depend on the faculty of their exercising for the benefit of all people. In this manner the author justified why women were not granted electoral rights. As he put it, "because the historical development of humanity led to dramatic enfeeblement of their political faculty." *ibidem*.

⁵⁴ See G. Burdeau, F. Hamon, M. Troper, *Droit constitutionnel*, *Id.* pp. 182–183. Cf. M. Granat's deliberations about the principle of nation's sovereignty in the first chapter of the work entitled *Sądowa kontrola konstytucyjności prawa w państwach Europy Środkowej i Wschodniej*, Wydawnictwo Sejmowe, 2003.

⁵⁵ *Constitution de la République Française*, cited after the Polish edition: *Konstytucja Republiki Francuskiej* (), trans. A. Mycielski, Księgarnia Akademicka, 1947, p. 11.

⁵⁶ See endnote 26.

⁵⁷ Crucial studies on the significance of the Declaration of the Rights of Man and the Citizen of 1789 include L. Jaume, *Les Déclarations des droits de l'homme: du débat de 1789–1793 au Préambule de 1946*, Flammarion, 1989; *La Déclaration des droits de l'homme et du citoyen et la jurisprudence*, Colloque des 25 et 26 mai 1989 au Conseil constitutionnel,

towards this document explains internal diversification of the republican tradition. The Declaration was supposed to be a separate, distinguished element of the constitution and, as René Capitant put it, should be above the “arbitrary will of the legislator.”⁵⁸ The first advocate of this opinion was Nicolas de Condorcet who asserted that “Declaration should be passed prior to the Constitution and put to a referendum as a set of those liberties that citizens find necessary to exempt from the state interference.”⁵⁹ The Declaration of the Rights of Man and of the Citizen of 1789 recognized liberty, property, security, and resistance against oppression as the human rights that are inherent and do not fall under the statute of limitation. Liberty understood as full freedom unless liberty of other people is not violated and the property right recognized as the sacred and inviolable right indicate that the primary founding act of the Republic of France was liberal in this respect.

Yet republicanism in the extreme leftist, Jacobin form challenged that item in the act. Consequently, the Constitution of 1793 and the draft passed by the First Constitutional Assembly in spring 1946 gave the Declaration a new shape and made it an integral, interior part of the Constitution.⁶⁰ In this case, human and civil rights lost the status of impassable limits of power, the “demarcation lines” mentioned by Georg Jellinek.⁶¹ The Constitution of 1793 no longer recognized the property right as inviolable and sacred. The First Republic also revised the liberal understanding of liberty, recognized justice as its measure and boundary and established the germ of social rights by introducing a right to work and access to the education. In this concept, the society’s overriding objective was happiness of all people and not fulfilment of inherent human rights. The Jacobin constitution became a model for all radical leftist trends. The draft constitution of the First Constitutional Assembly, of April 1946, explicitly rejected liberalism of the Declaration of 1789 and emphasized social rights of a human being, guaranteeing “his/her full physical,

PUF, 1989; G. Conac, M. Debène, G. Teboul, *La Déclaration des droits de l’homme et du citoyen de 1789: histoire, analyse et commentaires*, Economica, 1993.

⁵⁸ See R. Capitant, *Ecrits constitutionnels*, CNRS, 1982, pp. 305-313, cited after the Polish edition: R. Capitant, *Konstytucja demokratyczna. Konstytucja republikańska*, [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.* pp. 191-192.

⁵⁹ M. Starzewski, *Środki zabezpieczenia prawnego...*, *Id.* p. 27.

⁶⁰ See J.-P. Gross, *Égalitarisme jacobin et Droits de l’homme, 1793-1794. La Grande Famille et la Terreur*, Arcantères, 2000.

⁶¹ G. Jellinek, *Deklaracja praw...*, *Id.* p. 21.

intellectual, and moral development.”⁶² The property right was defined as a socio-economic right with a ban to exercise it “against the social benefit.”⁶³ Moreover, the draft laid solid grounds for the nationalization as it provided that each enterprise having a public status should remain the property of community.⁶⁴

The Second Republic eliminated a contradiction between liberalism of the Declaration of 1789 and a radical and leftist position of the radical Left. The Constitution of 1848 was more moderate than the Jacobin constitution and contained clearly solidaristic elements. Although, similarly to the First Republic, human and civil rights regulations were included in the supreme act, the Constitution of 1848 also accepted existence of older rights and obligations as those that were superior to the positive rights, which should be interpreted as a reference to the values enshrined in the Declaration of 1789. The triad: Liberty, Equality and Fraternity was complemented with the values: Family, Work, Property, and Order. Attention should be paid to the strong protection of private property and family as a new constitutional value. The latter one was introduced by the politicians of the Christian ideological profile, including Alphonse de Lamartine,⁶⁵ who played a special role in drafting the constitution. Moreover, a social nature of the Second Republic should be highlighted: the ideas such as equality in the relations between employers and employees, access to work and free education or public works organized by the government

⁶² Art.22 of the draft constitution of the French Republic of 19 April 1946..., [in:] *Konstytucja Republiki Francuskiej*, intr. and trans. K. Grzybowski, Spółdzielnia Wydawnicza Książka, 1948, p. 36.

⁶³ See Art. 35 and Art. 36, *ibid.*, p. 59.

⁶⁴ See Art. 36, *ibid.*

⁶⁵ Alphonse de Lamartine (1790–1869), a poet, writer and statesman. He was in opposition to Louis Phillipe. Published *Histoire des Girondins* that was enthusiastically received. In 1848 de Lamartine was appointed the minister for foreign affairs. Throughout the years of the Second Empire he was in opposition to Napoleon the Third and returned to writing. Lamartine had close relations with Adam Mickiewicz. See M. Czapska, *Szkice Mickiewiczowskie*, Oficyna Wydawnicza Rytm, 1999. In the essay on republicanism, Jan Baszkiewicz asserted that the revolution of 1848 was “the least secular and anticlerical compared to all French revolutions,” J. Baszkiewicz, *Le républicanisme*, [in:] *Idem, Ustrój i polityczna kultura*, [in:] *Państwo, kultura, rewolucja*, Wydawnictwo Poznańskie, 2010, p. 513. Interesting evidence on this subject may be found in the letters written by Alexis de Tocqueville. In the letter to William Nassau Senior, of 8 March 1849, he wrote that: “...this Revolution, which appeared destined to continue and perhaps to surpass the work of 1793, has restored not only to religion but to the clergy an influence a thousand times greater than the Restoration, which actually ruined itself for their sake, was able to do,” A. Tocqueville, *Oeuvres complètes*, Gallimard, 1951, cited after the Polish edition: A. de Tocqueville, *Listy*, trans. by B. Janicka, Społeczny Instytut Wydawniczy Znak, 1999, p. 236.

to hire unemployed people. The Constitution guaranteed care for abandoned children, disabled and elderly people without any incomes and deprived of their families' support.⁶⁶

The Second Republic referred to the heritage of 1789, confirmed the rights to freedom and property as natural, which had nothing in common with the radicalism of the Jacobin constitution. At the same time, the Constitution of 1848 furthered the social idea of the state's accountability and highlighted protection of the family. We will later see that the axiology of the Fourth and Fifth Republics resembles most the republican tradition shaped by the revolution of 1848.

The Third Republic combined republican principles with the parliamentary supremacy deriving from the thesis offered by Sieyès, who, in *What is the Third Estate?*⁶⁷, a famous text from 1789, substantiated the monopoly of the parliament on the expression of sovereignty. Yet at the initial period, the Third Republic was in a state of limbo, transformation into the parliamentary monarchy was still possible as it was a product of the alliance of the two monarchist currents, Burbons and Orléans, and republicans united by the fear of the return of Bonapartism and, consequently, a strong power of an individual holding a direct mandate of the people. The principle allowing for general voting only in the parliamentary elections (Chamber of Deputies) was a political canon deeply rooted in the doctrine of the Third Republic.

Until 1879, the Third Republic preserved a balance between executive and legislative powers, typical of the parliamentary monarchy. The president's power to dissolve the Lower Chamber of the General Assembly (chamber of deputies) upon the Senate's consent, which balanced political accountability of ministers to the parliament, was of fundamental importance. In the excellent study on the European parliamentary governance model, Jerzy Stembrowicz wrote that initially the political system of the Third Republic had consisted in the "replacement of the monarch by the president elected by the legislature" and might evolve into the hereditary and parliamentary monarchy on the pattern of the July

⁶⁶ See Art. VIII of the Constitution of 1848, [in:] J. Godechot, *Les Constitutions...*, *Id.* p. 264.

⁶⁷ J. Sieyès, *Qu'est-ce que le tiers état?*, intr. J.-D. Bredin, Flammarion, 1989. The most crucial studies on the thought of Sieyès include P. Bastid, *La place de Sieyès dans l'histoire des institutions*, *Revue d'histoire politique et constitutionnelle*. 1939; G. Lefebvre, *Compte rendu de Sieyès et sa pensée*, *Annales historiques de la Révolution française*, vol. 16, 1939, pp. 431–443; M. Gauchet, *La Révolution des pouvoirs. La souveraineté, le peuple et la représentation (1789–1799)*, Paris, Gallimard, 1995; P. Pasquino, *Sieyès et l'invention de la constitution en France*, Odile Jacob, 1998.

Monarchy.⁶⁸ Jacques Bainville, an outstanding French historian, put it in a different way: “This Republic, still provisional, as the revision of constitutional rights was planned, this Republic, in a way monarchist, was still the Republic without republicans. Politicians agreed that it was going to be conservative.”⁶⁹

Yet successive years brought not only the aforementioned institutionalization of the heritage of the French Revolution, i.e. establishment of the “Republicans’ Republic”, but also evolution of the political system into the parliamentary supremacy. Such evolution seemed to have met the internal logic of the constitutional system. Raymond Carré de Malberg highlighted the political ramifications of Art. 1 of the Constitution, which regulated relations between public authorities and entrusted legislative power to the lower and upper chamber (*Chambre basse and Chambre haute*). Carré de Malberg interpreted that regulation along with the provisions of famous Article VI of the Declaration of the Rights of Man and of the Citizen, which recognized the act as a manifestation of the general will.⁷⁰ According to this logic, the only institution representing *volonté générale* was the parliament. A nearly identical interpretation of the Third Republic was offered by Adam Piasecki, who wrote that “584 deputies and 314 senators are subjects of the subjective and objective will of the nation. These 898 people fulfil the will of France and communicate this will in a mode prescribed by the constitutional regulations about the organization of state authorities, through the executive bodies that ensure its execution.”⁷¹ Parliamentary absolutism bore serious ramifications: pre-eminence and subject boundlessness of the act, full freedom of National Assembly’s chambers in prescribing the contents of their regulations, vertical primacy of the

⁶⁸ J. Stembrowicz, *Rząd w systemie parlamentarnym*, *Id.* p. 61, Undoubtedly, in the monarchists’ view the July monarchy perpetuating considerable independence of the executive power on the parliament could be a positive point of reference. Interesting insights on its specificity can be found in the article by Adolf Bocheński, *Monteskiusz i pułkownik Sławek*, *Bunt Młodych*, no 33, 1939.

⁶⁹ J. Bainville, *Histoire de France*, Texto, 2007, cited after the Polish edition: J. Bainville, *Dzieje Francji*, trans. J. Stryjeński, Wyd. J. Przeworskiego, 1946, pp. 465–466.

⁷⁰ R. Carré de Malberg, *La loi, l’expression de la volonté générale*, Sirey, 1931. Chapter I includes analysis of the notion of the legislative power held by the National Assembly’s chambers.

⁷¹ A. Piasecki, *O parlamentarystyce...*, *Id.* p. 111; Other important studies on the Third Republic include G. i E. Bonnefous, *Histoire politique de la Troisième République*, vol 7, PUF, 1956–1967 and its re-editions *Centenaire de la III République* (actes du colloque de Rennes, 15–17 mai 1975), J.-P. Delarge, 1975; F. Goguel, *La politique des partis sous la III République*, Le Seuil, 1970; J.-M. Mayeur, *La vie politique sous la Troisième République (1870–1940)*, Le Seuil, 1984. Significant classical writings include A. Siegfried, *Tableau des partis en France*, Grasset, 1930; J. Barthélémy, P. Duez, *Traité de droit constitutionnel*, Dalloz, 1933 (ré-ed. 1985).

National Assembly over the president and ministers. The President and ministers were only state officials and not exponents of the general will; this attribute was reserved only for the Chamber of Deputies and the Senate. It is hard to deny that the “parliamentary absolutism” had its underpinnings in the constitutional acts. They allowed for the extension of the General Assembly’s hegemony in an ordinary bill and regulations of its chambers as well as political practice that was in no way substantially abridged.⁷² The rule ordering a newly established government to apply for the parliamentary investiture had a status of a social norm, which was a hallmark of the National Assembly governance model.⁷³

Importantly, the Third Republic placed full confidence in moral qualifications and competencies of the parliamentary elite.⁷⁴ Adhémar Esmein, the author of the republican doctrine of the constitutional law, asserted that a parliamentary governance model was an excellent manifestation of the national and legal culture of the Western civilization.⁷⁵ In the view of this outstanding ju-

⁷² Regulations of both chambers were in no way abridged in regulating political issues and extending the supremacy of the parliament. See Assemblée Nationale (1871–1942), *Chambre des députés, Règlement de la Chambre des députés*, Martinet, 1926.

⁷³ K. Wojtyczek, *Formy konstytucjonalizacji zasad konstytucyjnych*, [in:] P. Sarnecki, *Konstytucjonalizacja zasad i instytucji ustrojowych*, Wydawnictwo Sejmowe, 1997, pp. 33–34. See also the article by R. Capitant, where he analyzed social norms and recognized them as extremely significant elements of the constitution. R. Capitant, *La coutume constitutionnelle*, *Gazette du Palais*, 20 décembre 1929, RDP, juillet-août 1979.

⁷⁴ The quality of the parliamentary elite of the Third Republic is highly appraised by Stanisław Estreicher, who, however, is absolutely critical about its political solutions. See S. Estreicher, *Przewodnia idea konstytucji marcowej*, [in:] the same author: *O Konstytucji i polityce Drugiej Rzeczypospolitej*, introduction, selection, and edition by A. Wolek, Wydawnictwo Sejmowe, 2001, pp. 70–81.

⁷⁵ Adhémar Esmein, an author of the republican doctrine of the constitutional law; born in 1848 in Tournai, the Charente region, where his family lived for years and rendered considerable services for the region; used to say that he came from the place where the frontier between d’oil and d’oc languages was evident; prepared a selection of songs, fairy tales and drawings entitled *La Vieille Charente, chansons et croquis saintongeais, contes populaires de la Charente* (1910); advocated classical education and felt a sense of debt towards Roman civilization achievements in the field of law; his speech to students, where he opposed reductions in the Roman law university syllabuses, has been preserved; before publishing his most famous work on the constitutional law, studied the history of criminal law, Roman law, and ecclesiastical law (which is amazing, given today’s narrow specializations of scholars); the list of his writings include *Histoire de la procédure criminelle en France et spécialement de la procédure inquisitoire depuis le XIII^e siècle jusqu’à nos jours* (1882; ré-ed.: Topos Verlag AG, Vaduz, 1978), *Études sur les contrats dans le très ancien droit français* (1883), *Mélanges d’histoire du droit et de critique. Droit romain* (1886), *Études sur l’histoire du droit canonique privé. Le Mariage en droit canonique* (vol 2, 1891) *Histoire du droit français de 1189 à 1814* (vol 3, 1892–1908); in later years published *Zasady prawa konstytucyjnego* (*Principles of Constitutional Law*) – his most outstanding work; began university career at faculty of law in Douai, in 1873; lectured criminal law; professor of history of law, ecclesiastical

rist, the European parliamentary governance model – “this form of the total political freedom is an excellent system as it amalgamates and reconciles two opposite poles: free operation of the executive power and omnipotent influence exerted by the parliament chambers on the government.”⁷⁶ Full trust in the parliament (parliamentary elite) eliminated a review of the constitutionality of acts, institutions of direct democracy, and abolished primacy of the constitution. Esmein’s views on this issue were extremely representative of the doctrine of the Third Republic. In his opinion, representative democracy offered a reliable guarantee that any bill passed by the parliament would be a norm of justice and public interest. The Third Republic’s doctrine was based on the assumption that *ethos* and competences of the parliament members were the most reliable guarantees of the respect for freedom and rational decisions adhered to the public good. Esmein’s views were consistent in his opposition to the referendum institution – the legislative one as well as the one held to approve a bill passed by the parliament. In his view, the latter one could provoke “obstruction against rational reforms and legislative stagnation.”⁷⁷ Esmein was equally critical of the consultative referendum institution, exempting “the majority of assemblies from moral accountability that has

law and constitutional law at the university of Paris; lectured at l’École libre des sciences politiques; founded periodical *Nouvelle revue historique de droit français et étranger*; member of the Supreme Council for Public Education (*Conseil supérieur de l’Instruction publique*); was appointed a member of Académie des Sciences Morales et Politiques (Academy of Moral and Political Sciences) in 1904; died in 1913, when his intellectual work was in full bloom; the two-volume *Zasady prawa konstytucyjnego* is listed in all bibliographies of the French constitutional law textbooks, including those published quite recently; *Opus magnum*, first published in 1896, influenced European jurists who recognized the parliament governance model as the one that should be followed. This study provoked academic reactions and was a subject of fierce parliamentary discussions. In Poland, the first volume of Esmein’s work had a huge impact on the constitutional thought. It was first published in 1904, in the period of the Partitions, translated by Władysław Konopczyński and Karol Lutostański; the second edition comes from 1921 and the most recent was published based on the 1921 edition. See A. Esmein, *Prawo Konstytucyjne*, introduction by K. M. Ujazdowski, Wydawnictwo Sejmowe, 2013. The extremely interesting studies on the role Esmein played in the history of French constitutionalism, authored by S. Pinon and G. Sacriste, have recently been published: S. Pinot, *Le “nouveau droit constitutionnel” à travers les âges, VII^e Congrès français de droit constitutionnel*, 2008; G. Sacriste, *La République des constitutionnalistes*, Presse de SC. PO, 2011.

⁷⁶ A. Esmein, *Éléments de droit constitutionnel français et comparé, Id.*, cited after the Polish edition: A. Esmein, *Prawo konstytucyjne, Id.* p. 187. In the other part of his book he wrote: “Yet we still stick to our deep-seated belief in this system of the government. This is the best and most perfected form of the representative government but also the only one under which France enjoyed regulated liberty.” *ibid.* p. 202.

⁷⁷ *ibid.* p. 316.

to be posited in the representative government.”⁷⁸ In his view, direct democracy involved a threat of populism and a chaos and was in its essence a flawed system “because the vast majority of citizens, absolutely capable of understanding their representatives, as they know their views, and – consequently – enjoy the indirect impact on the legislation and government, are unable to evaluate the bills they are given to review.”⁷⁹ For the same reasons, the Third Republic’s doctrine challenged the nation’s participation in the constituting power, which excluded the constitutional referendum. Noteworthy, Art. 8 of the constitutional act on the organization of public authorities, of 1875, provided that the Constitution could be revised on the initiative of the president or any parliament chamber. The procedure of the Constitution amendment required adoption of the resolution by each chamber of the National Assembly separately, by absolute majority of votes, and then the two chambers convened as the National Assembly, could pass the complete or partial revision of the Constitution, in this case absolute majority was also effective.⁸⁰ Esmein challenged a purport of the review of the constitutionality of acts, on assumption that at the last count the parliament would be their most powerful guarantor. Elimination of any forms of the review of the constitutionality of acts and entrusting the parliament with the right to revise the constitution led to elimination of differences between the constituting and legislative powers and consequently, abolishment of the constitutional primacy.

Institutions of the Third Republic posited that classical parliamentary governance model functioned, where parliamentary elite, capable of governing through a discussion, was ready for a compromise and the truth seeking. Intentionally, Carl Schmitt, who offered a brilliant description of this governance model, referred to Esmein’s views.⁸¹ Yet the parliamentary elite of the Third Republic proved to be incapable of forming stable and effective governments. Esmein’s opinion that in the Third Republic the executive power was in no way limited in its activities, did not correspond with the political practice. In a very short time, the

⁷⁸ *ibid.*

⁷⁹ *ibid.* p. 314.

⁸⁰ J. Godechot, *Les Constitutions...*, *Id.* p. 332.

⁸¹ See C. Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty*, trans. George Schwab, University of Chicago Press, 2005, cited after the Polish edition: C. Schmitt, *Duchowa i historyczna sytuacja dzisiejszego parlamentaryzmu*, [in:] *Teologia polityczna i inne pisma*, Wydawnictwo Aletheia, 2012, p. 158.

parliamentary elite undermined a system of checks and balances at the expense of the executive power. Firstly, the president's power to dissolve the parliament, which balances political accountability of the government in each parliamentary system, was actually abolished. The turning point was deposition of President Mac Mahon in 1879, after he had dissolved the Lower Chamber upon the consent of the Senate and stepped down after the electoral defeat of his political camp.⁸² A practice of countersigning all legal documents, including even nomination of the prime minister (in this case the stepping down prime minister countersigned nomination), made the president wholly dependent on the parliamentary chambers. The political system of the Third Republic became the rule of the Assembly, where all power rested with the leaders of parliamentary groups. The government was, in a way, the parliament's representation as its composition fully depended on the parliamentary groups, which substantially undermined the position of the prime minister. In his classical work entitled *Capitalism, Socialism and Democracy* J. A. Schumpeter found that system pathological.⁸³ Adam Piasecki asserted that in the case of the minister's dismissal, the candidacy of the predecessor was considered collectively.⁸⁴ The government members were authorized to act only after they had been granted a vote of confidence voted by the parliamentary chambers. As parliamentary commissions assumed departments' functions, the accusation was made that the National Assembly inhibited ministers from governing although it had no prerogatives to govern. Hence, the thesis about

⁸² J. Stembrowicz, *Rząd w systemie parlamentarnym*, *Id.* pp. 67–68. See also interesting insights made by J. Massot on the position of president and prime minister in the years of the Third Republic, Cf. J. Massot, *L'arbitre et le capitaine. La responsabilité présidentielle*, Flammarion, 1987, pp. 33–73.

⁸³ "Except pathological cases, such as French *chambre*, MPs' wishes are generally an insufficient basis for the process resulting in the government election." J. A. Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, 1976, cited after the Polish edition: J. A. Schumpeter, *Kapitalizm, socjalizm, demokracja*, Wydawnictwo Naukowe PWN, 1995, p. 346. In the same work, he also wrote about the position of the prime minister in the Third Republic: "Let us imagine the prime minister's situation, for example. Given so unstable governments, which we saw in France after 1871 until the breakdown in 1940, he has to focus almost entirely on the task resembling building a pyramid with snooker balls. Under such conditions, only people of extraordinary power are able to summon up energy to handle current administrative work on a bill etc. and only such exceptional people are able to win authority among subordinate officials who – like everybody around – know perfectly that their boss will soon say good bye to his office." *ibid.* p. 357.

⁸⁴ A. Piasecki, *O parlamentaryzmie...*, *Id.* p. 143.

the absence of authority in the Third Republic is justified.⁸⁵ On the other hand, as the Assembly manifested legislative impotence, a practice of issuing decrees having the force of law became common in the 1920s.⁸⁶

Dismissal of the government was applied without any procedural restrictions, both in the form of a vote of censure and review procedures. A practice of the government dismissal by the Lower Chamber or the Senate developed. The electoral law multiplied political divisions and made it impossible to establish stable government majorities. In the period of the Third Republic, except between 1884–89 and 1921–27, a system of the two-ballot election in one-mandate districts was effective but detailed legal regulations provoked political fragmentation. The electoral law envisaged that all candidates running on the first ballot and even new candidates could stand for elections on the second ballot. As the second ballot winner was a candidate who obtained a relative majority, it frequently happened that a deputy supported by a group of voters constituting less than the fifth part of electorate won. Such an electoral law model corresponded to the individualistic profile of the French culture. A typical deputy understood their mission as the representation of local interests towards state authorities and had a relatively low purport of political solidarity. Consequently, governments frequently collapsed due to purely particularistic factors.

The Third Republic was characterized by the absence of parliamentarism, weak executive power, instability, reluctance to strong personalities and decline of political responsibility. Marcel Prélôt wrote about a state of permanent constitutional instability.⁸⁷ Between 1876 and 1940, France was governed by as many as 107 cabinets, the average time of their tenure was only 7 months. Thus, the parliamentary republic that de Gaulle knew was very far from being the idealistic presentation found in Adhémar Esmein's writings.

⁸⁵ G. Burdeau, Fr. Hamon, M. Troper, *Droit constitutionnel*, Id. p. 357.

⁸⁶ *ibid.* p. 356.

⁸⁷ M. Prélôt, *Pour comprendre la nouvelle constitution*, Le centurion, 1959, p. 14.

Chapter II

The Rescue of the Republic

A. Under the Influence of the Republican Nationalism – De Gaulle's State Patriotism

The formula of the Fifth Republic as a republican monarchy suggests that de Gaulle succeeded in his endeavour to achieve the axiological and institutional synthesis of both traditions. François Mauriac wrote in his *Bloc-notes* in a similar spirit. In his view, de Gaulle put an end to the controversy between the nationalist and monarchist Action française and the Christian – Democratic, distinctly pro-republican Le Sillon movement led by Marc Sangnier.¹ Yet none of these interpretations seems to explain clearly either the mode of shaping de Gaulle's views or the origins and identity of the Fifth Republic.

De Gaulle was raised in the family of committed Christians and zealous patriots bound to the monarchist tradition. This is how Jean-Raymond Tournoux described monarchism of de Gaulle's parents and their opposition to the legacy of the Revolution: "In the late 1890s Charles de Gaulle's parents, who were cousins, descendants of cousin brothers, perceived a republic as a mindless woman, a usurper. In those times such a feeling was quite common in the aristocracy, bourgeoisie and even, to a certain extent, among the country people. Thus the atmosphere

¹ "Once, a great person devoted to de Gaulle, his (and my) peer, told me aptly :«Only Catholics from our generation are able to understand who de Gaulle is as he adopted the legacy of Sillon as well as Action française. He drew on both antagonistic sources and conciliated them in him, which, on the other hand, made him lonely all the time»." F. Mauriac., *Bloc-notes*, Seuil, 5 vol., 1971, Polish edition: F. Mauriac, *Bloc-notes*, trans. Z. Milewska, PAX, 1979, p. 137. Interestingly, for a short time Mauriac was under the influence of the Sillon movement and its charismatic leader. His collaboration and splitting up with the Sillon movement was the theme of his first novel *Ciężkie okowy dzieciństwa*, PAX, 1985 (French edition: F. Mauriac, *L'enfant chargé de chaînes*, Grasset, 1913). Noteworthy, de Gaulle, a keen reader, fully appreciated Mauriac writings and, on the other hand, the writer supported political actions of the Free French leader in his articles. In 1964 Mauriac published a book devoted to de Gaulle. The same author, *De Gaulle*, Grasset, 1964. The writer's son, Claude Mauriac, was de Gaulle's secretary after the liberation of France in 1944 and, like his father, devoted a book to him (*Aimer de Gaulle*, Grasset 1978).

prevailing in de Gaulle's family was neither extraordinary nor shocking.²²

Yet the Third Republic was not a product of consensus, as its polity developed at the expense of the national unity. Jean-Louis Quermonne wrote that despite the Vatican's call for the recognition of the republic included in the encyclical *Au milieu des Sollicitudes*³ authored by Pope Leo the XIII, unanimity on that subject prevailed only during *L'union sacrée* that united French people during World War I.⁴ Between the 1880s and the 1940 defeat, the Third Republic was under fierce criticism of the people presenting well-justified doctrinal standpoints and exerting social influence. A considerable part of the French society remained committed to the monarchist tradition and opposed a radical secularization resulting in the elimination of Church from the public and social life. The division of France was reflected in the classics of the French literature, such as the diaries of Goncour brothers and the novels by Anatole France and Roger Martin du Gard.⁵

Establishment of the nationalist and royalist Action française in 1899 made this trend more dynamic and provided it with prestige and influence in the intellectual circles.⁶ Charles Maurras coupled nationalism with monarchism, which provided a new justification for monarchy: "Monarchy is a natural and rational constitution in France, the only possible constitution of central power. If there is no king, everything that conservatives want to restore is inevitably doomed to decay – Maurras asserted in his *Autobiografia*

²² J.-R. Tournaux, *Jamais dit*, Plon, 1971, cited after the Polish edition: J.-R. Tournoux, *Po raz pierwszy ujawnione*, trans. A. Galica, Książka i Wiedza, 1971, p. 18.

³ An interesting analysis of the French Catholicism of that era as well as the reasons for which Leo XIII issued the encyclical *Au milieu des Sollicitudes* and emboldened Catholics to recognize the republican order, can be found in the text by Roger Aubert, *Kościół katolicki od kryzysu 1848 do pierwszej wojny światowej*, [in:] *Historia Kościoła*, vol. V, PAX, 1985. Another study that should be mentioned is by C. Brice, *Essai d'une politique chrétienne en Europe jusqu'en 1914*, [in:] *Nouvelle histoire des idées politiques*, ed. P. Ory, Hachette, 1987.

⁴ J.-L. Quermonne, *République*, Id., p. 922.

⁵ The most significant and representative works include the diaries of Goncourt brothers (E. and J. de Goncourt, *Dzienniki*, PIW, 1988), 4-volume novel series by A. France, *Historia współczesna*, Książka i Wiedza, 1949 and *Rodzina Thibault*, by Roger Martin du Gard (Czytelnik, 1987). The issues pertinent to the ideological roots of political arguments are also found in François Mauriac's writings. See F. Mauriac, *Nowy pamiętnik życia wewnętrznego*, PAX, 1967. In the same context a reference should be made to the book authored by J. M. G. Le Clézio, *Powracający głód*, WAB, 2009.

⁶ Recent Polish studies on Action française include J. Bartyzel, *Umierać, ale powoli. O monarchistycznej i katolickiej kontrrewolucji w krajach romańskich 1985–2000*, Arcana, 2002; A. Wielomski, *Nacjonalizm a konserwatyzm w myśli Ch. Maurrasa*, [in:] J. Bartyzel, D. Góra-Szopiński (ed.), *Nacjonalizm a konserwatyzm i monarchizm. Action française i jej promieniowanie*, Wydawnictwo Adam Marszałek, 2011, pp. 84–110.

filozoficzna.⁷

In the doctrine developed by Action française, the republic was an alien body imposed by the people hostile to the centuries-old historical legacy. The founder of integral nationalism wrote about four social groups destroying France: Jews, Protestants, Masons, and foreigners. "Third Republic is the anarchy systematized, regulated, and exploited by external factors being not anarchic in themselves or to themselves."⁸ Due to its character, the republic marginalized state's interest, particularistic issues got the upper hand over the common issues. "The republic may be defined as a predominance of interests, feelings, and wishes of political parties over the national interest in the facet of international conditions."⁹ As the French Republic was something that was "head-lacking" and deprived of the permanent factor, in the view of the Maurras school, breaking with the republic and reconstruction of monarchy provided a primary condition for the restoration of the power of France.

In view of a few historians, including Aleksander Hall and Eric Roussel, the authors of the new biographies of the General, his father, Henri de Gaulle, a highly regarded teacher and tutor of a large number of generations of pupils, had a liking for Action française although, unlike Charles Maurras, did not believe Dreyfus collaborated with the German intelligence.¹⁰ Yet he rather seemed to have been a monarchist, legitimist and critic of the idea and political practice developed by Action française,¹¹ which is highlighted in the memoirs of Philippe de Gaulle.¹² Anyway, Hen-

⁷ C. Maurras, *Credo. Autobiografia filozoficzna*, trans. J. Bartyzel, [in:] J. Bartyzel, D. Góra-Szopiński (ed.), *Nacjonalizm a konserwatyzm...*, *Id.*, p. 49.

⁸ C. Maurras, *La démocratie religieuse*, Nouvelle Librairie Nationale, 1921, p. 329.

⁹ C. Maurras, *Enquête sur la Monarchie*, 1924, cited after J. Bartyzel, *Umierać, ale powoli...*, *Id.*, p. 576.

¹⁰ A. Hall, *Naród i państwo...*, *Id.*, p. 28; E. Roussel, quoting the opinion offered by Edouard Bonnefous, a disciple of Henri de Gaulle and a minister of state in the years of the Fourth Republic, wrote about his zealous piety and a tragedy he suffered when Action française was excommunicated. After the Holy See's decision, Henri de Gaulle abandoned reading the diary of Maurras. E. Roussel, *De Gaulle I. 1980–1945*, Perrin, 2002, pp. 23, 24.

¹¹ Penetrating criticism of the Action française school offered from the legitimist position can be found in the article by J. Bartyzel: *Neoroyalizm nacjonalistyczny Action française w świetle zasad legitymizmu monarchicznego*, [in:] J. Bartyzel, D. Góra-Szopiński (ed.), *Nacjonalizm a konserwatyzm...*, *Id.*

¹² Attention should be paid to Philippe de Gaulle's testimony on his grandfather's views: "Certainly, my grandfather Henri, a teacher in the religious school, might have been interested in Maurras' opposition to the anti-clericalism of the «daddy» Combes. Yet, as a dreyfusard, to use this common term, he condemned militarism and the violent

ri de Gaulle was explicitly critical of the republican order. Noteworthy, he resigned from the post in the ministry of home affairs in the protest against the 1884 laws and since that time devoted himself to the teacher's career in Catholic schools.¹³

Jeanne, the General's mother, was a zealous Catholic of distinctly monarchist and anti-republican views. The testimonies of her critical reaction to their sons' approbation of the republican system have been preserved: "Grandmother Jeanne was nearly a fanatically religious person and spoke about her views forcibly and distinctly. Before 1914, she regretted that her sons, including my father, had become republicans. In her opinion, republican ranks included too many atheists, doubters and cosmopolitans who could not be trusted since they did not consider themselves to be French and did not follow French traditions" – Philippe de Gaulle recalls.¹⁴

In his new and compelling interpretation of the development of the de Gaulle family's views, Odile Rudelle points to the profound influence *Le Correspondant*, a Catholic-Liberal magazine of a moderate monarchist profile, subscribed by the family for

reaction of Maurras-like Catholics, the diatribes of Leon Daudet, who was regarded as a boozier or the insults Edouard Drumont offered to everybody. In this situation – given intransigent and unbounded insults showered by «L'Action française» – the count of Paris resolved to establish a competitive magazine «Le Courrier Royal». In my family – at the de Gaulle family as well as the Vendroux family (my father's parents-in-law) «Action» was read very rarely as Maurras proclaimed himself the sole heir of the monarchist ideas, regardless of the legal pretender. This was too much for my grandfather. Moreover, Action française recognized Christianity but not Roman Catholicism that was accused of the deformation of the church. My grandfather was a little bit a Gallican in the historical understanding of this word – he sometimes criticized camarillas of Italian cardinals but, as a devout Catholic, would have never decided to abandon his apostolic Roman Catholicism. In his view, Maurras was no longer a Christian and believed solely in his ideas. In January 1926, «L'Action française» was put on the papal index and since that time it was no longer read at my grandmother Jeanne's home, as she was uncompromising on the religious issues." Ph. de Gaulle, *De Gaulle, mon père*, Pocket, 2005, cited after the Polish edition: Ph. de Gaulle, *De Gaulle mój ojciec*, vol. I, translated by E. Derelkowska, Z. Domański, Zysk i S-ka, 2008, p. 397.

¹³ E. Roussel, *De Gaulle I..., Id.*, p. 22.

¹⁴ Ph. de Gaulle, *De Gaulle, mon père*, Id., cited after the Polish edition: Ph. de Gaulle, *De Gaulle mój ojciec*, vol. I, Id., p. 395; similar opinions are enunciated by E. Roussel, *De Gaulle I..., Id.*, p. 23 and in the biography of Yvonne de Gaulle. G. Molle, *Yvonne de Gaulle*, ed. Historia i życie, Warsaw, 2004, pp. 31–32: "Charles' mother, a person of the passionate nature, uncompromising Catholic, devout patriot, «nearly a fanatic» – as her children recollect her – sobbed at the news of the defeat of Sedan. Even before that, she cried bitter tears and experienced painful moments when count de Chambord resolved to abandon the throne rather than recognize the three-colour banner." J. R. Tournoux, *Po raz pierwszy ujawnione..., Id.*, p. 19.

several dozen years, had on them. As an advocate of constitutional legitimism, *Le Correspondant* espoused the balance between state's power and freedom of an individual, defended traditional freedoms, particularly religious freedom and the rights of Catholic schools, criticized the dictatorship of the Second Empire and the governance based on plebiscites as well as the Republic of Republicans.¹⁵ In the mid-1800s the magazine's authors played a crucial role in the French culture and politics. They included Alfred de Falloux (1811–1886) and Charles Montalembert (1818–1870). De Falloux was a historian and politician with legitimist views. He went down in history as the author of the 1850 laws granting privileges to the clergy teaching in common schools. Charles Montalembert, a publicist and statesman, endeavoured to reconcile Catholicism and the post-revolutionary polity and also found religion critical in the educational system. He was a friend of Mickiewicz, translator of *Księgi narodu polskiego i pielgrzymstwa polskiego* (*The Books of the Polish People and of the Polish Pilgrimage*) into French and an ardent advocate of the Polish cause in the international arena.¹⁶ Although

¹⁵ O. Rudelle, *L'année 1946: les stratégies d'intervention du général de Gaulle*, [in:] Fondation Charles de Gaulle, *La Genèse du RPF*, 1997, pp. 179–199.

¹⁶ Charles Forbes de Tryon de Montalembert (1810–1870), French publicist and statesman; collaborated with Lamennais and Lamartine in the editing of the daily "L'Avenir;" in the argument between Lamennais and Pope accepted the verdict condemning Lamennais; member of the House of Peers since 1831; endeavoured to blend Catholicism with the French form of democracy; opposed monopoly of the government in the area of public education and defended the freedom of press; voted against the exile of the Orléans and the Constitution of 1848; after the 1848 events in Italy and banishment of Pius IX from Rome became a zealous advocate of French intervention aimed to regain the rule of Pius in the Papal State; clashed head-on with Victor Hugo; in 1850 granted with the Rome citizenship by the Holy Father in reward for his deeds during the years that were so difficult for the papacy; was elected a member of the French Academy in 1851; became involved in the government activities in the early 1850s but over years got disappointed with the policy of Napoléon III; after electoral defeat in 1857, withdrew from public life; challenged the dogma of papal infallibility in 1869; advocate of the Polish cause in public speeches and press articles; a well-known, critical speech on the Austrian policy towards Poland and Prince Metternich's approach, 19 March 1846; demanded French intervention after the Republic of Cracow lost autonomy; in 1861 arrived in Cracow where sentiments of the Polish society, particularly national mourning after Russian repressions in the Kingdom of Poland (Congress Poland), induced him to write new articles in the defence of the Polish people's rights; before his death he handed over his valuable collections to the Polish Library in Paris. Montalembert's writings include *Histoire de Ste Élisabeth de Hongrie* (1836) and *Les Moines d'Occident* (7 volumes, 1874–1877). Another significant writing is *Karol Hrabia Montalembert*, an article on Montalembert, authored by Paweł Popiel, [in:] *idem.*, *Choroba wieku. Wybór pism*, ed. J. Kloczowski, OMP, 2001, pp. 24–48. Interesting insights on Montalembert's views can be found in the study on liberal ideology in the years of the Second Empire developed by Prof. Maria Zmierzczak, *idem.*, *Ideologia liberalna w II Cesarstwie*, UAM, 1978, p. 47. Montalembert was a friend of Adam Mickiewicz and translated *Księgi narodu polskiego*

the magazine still had a sentimental attachment to the institution of monarchy, it was not automatically against the republican order: Montalembert supported social and national unity, reinforcement of the state structures, and criticized dictatorship as well as parliamentary supremacy.

Given the tradition of *Le Correspondant*, it is easier to understand why Charles de Gaulle could accept republic notwithstanding his regard for historical merits of the monarchy. All the more so because de Gaulle's views were influenced by the ideas of republican nationalists, such as Maurice Barrès or Charles Péguy, and not legitimistic monarchism or that from the doctrine developed by Action française.

Maurice Barrès, a writer and politician of a great educational effect, was a republican nationalist and called patriots of various ideological orientations for unity.¹⁷ This is also another reason why the organicist vision of the nation he so much advocated may have been close to de Gaulle's heart. Barrès was emotionally attached to the heritage of revolution that he found inseparable with the national destination: destination of France.¹⁸ Thus, this is the reason why he never thought about challenging the republican form of governance. His views on the polity were not explicitly defined. In the initial phase of his writing a bill he advocated for a strong executive power held by the president elected in the universal suffrage and approved a direct democracy. In the later period he paid no attention to the constitutional issues as he found that it was a moral condition of political class that was of critical importance. During World War I, in the period of the unity of the French people, manifested by *l'Union sacrée*, he highly appreciated this condition.¹⁹ It is most likely that regionalism advocated by Barrès

i pielgrzymstwa polskiego from Polish into French. A lot of valuable information on his collaboration with Mickiewicz and support he offered to the Polish cause is included in the study authored by Maria Czapska, *Szkice Mickiewiczowskie*, Oficyna Wydawnicza Rytm, 1999. See also B. Szlachta, *Ch. Montalembert*, [in:] *Słownik historii doktryn politycznych*, vol. IV, Wydawnictwo Sejmowe, 2009, pp. 230–235.

¹⁷ The literature on that subject also includes the essays by François Mauriac on the moral and intellectual Barrès's influence on the younger generation: *Spotkanie z Barrèsem and Barrès*, [in:] F. Mauriac, *Burza cichnie o zmierzchu*, PAX, 1962. The recent writings on Barrès include Z. Sternhell, *Maurice Barrès et le nationalisme français*, Armand Colin, 1972 (ré-éd. Presses de Sciences Po, 2000); F. Broche, *Maurice Barrès*, J.-C. Lattès, 1987; E. Godo, *Ego scriptor: Maurice Barrès et l'écriture de soi*, Éd. Kimé, 1997; A. Bihr, *L'actualité d'un archaïsme: la pensée d'extrême droite et la crise de la modernité*, Page Deux, 1998; M.-A. Kirscher, *Relire Barrès*, Presses Universitaires du Septentrion, 1998; S. Vajda, *Maurice Barrès*, Flammarion, 2000.

¹⁸ R. Giradet, *Barrès*, [in:] F. Châtelet, O. Duhamel, E. Pisier, *Dictionnaire...*, *Id.*, p. 73.

¹⁹ See A. Wielomski, *Nacjonalizm francuski 1886–1940. Geneza, przemiany i istota filozofii politycznej*, Wydawnictwo von Borowiecky, 2007, pp. 279–306.

had some influence on the reformist thought that emerged in the 1930s and de Gaulle himself. The writer called for the reconstruction of the French regions as the bodies of the unique cultural characteristics and capable of making France more dynamic.²⁰

In the name of the principle of the continuity of French history, Barrès rejected an idea of the removal of any stage of this history.²¹ In his biography of de Gaulle, Éric Roussel asserts that, unlike Charles Maurras, a royalist theoretician of integral nationalism, Barrès did not condemn any period of the history of France, even the Revolution. This French historian finds Barrès-related streaks in the final part of de Gaulle's *War Memoirs*²² and cites a letter de Gaulle sent to Jean-Marie Domenach, the author of the biography of Barrès, in which the General confirmed that he was inspired by his thought.²³ Noteworthily, Yvonne and Charles de Gaulle admired Barrès' writing, particularly *Colette Baudouche*, where he injected patriotic and anti-German notes.²⁴

²⁰ At the initial stage of his public activity, Maurice Barrès advocated the idea of regional autonomy. In the mature period he espoused limited competences of regions, restricted primarily to education. He called for the incorporation of the knowledge about regional traditions and culture into school syllabuses. Barrès made it clear that his version of the regional architecture was in opposition to separatism and the identification with a region was aimed to reinforce the ties with France. See A. Barut, *Egotyzm, etyka, polityka. Myśl konserwatywna Maurycego Barrèsa*, Arcana, 2009, pp. 275–279.

²¹ R. Giradet, *Barrès...*, Id., pp. 71–73. In the study on the counter-revolutionary Right, Jacek Bartyzel asserted that recognition for republic resulted from traditionalism of Barrès: "In Barrès' view, being a traditionalist today means accepting Republic as this is required by the principle of continuity... To avoid a conflict with the requirements of social realism, a traditionalist must accept things as they are in the specific reality, which – in this case – means approbation of republican institutions, since it is them and monarchy that are real. As long as the monarchy existed, it was a real incarnation of France, it built common good and this is the monarchy that France owes the glory. Working for common good means repairing what is now and not restoring something that is just a part of the national graveyard, even the most majestic one." J. Bartyzel, *Umierać, ale pozwoli...*, Id., p. 475.

²² This is the final part of *Mémoires de guerre*, where de Gaulle expressed his love for the Country connected with the love for the fertile soil: "Old Soil furrowed with the plough of time, lashed with rains and storms, exhausted with the vegetation but always, until eternity, ready to produce everything needed to ensure the succession of generations, so that the living ones could follow one after another! / Old France, bearing the burden of History, exhausted with wars and revolutions, striding continually from the greatness to the fall but revived century by century by the spirit of revival! / Old man, worn out by the hardships of life, losing touch with the real world affairs, sensing that the coldness of eternity is coming but still looking for a glimmer of hope in the darkness!" Ch. de Gaulle, *Mémoires de guerre*, Plon, 1954, cited after Polish edition: Ch. de Gaulle, *Pamiętniki wojenne*, trans. J. Nowacki, vol. III, Wydawnictwo MON, 1968, p. 294.

²³ E. Roussel, *De Gaulle I...*, Id., p. 35.

²⁴ "She does not know yet that – like her – Charles adores *Colette Badauche*, a book by

Charles Péguy, an essayist and poet, underwent evolution from socialism to zealous patriotism and genuine Christian faith. At the time of the Dreyfus affair he called for an appeal against the sentence and spoke in defence of the accused officer. In 1900, Péguy established *Les Cahiers de la Quinzaine*, a magazine where he published articles on the political and artistic issues. Owing to Maritain, he experienced deepening of his faith and became a zealous patriot and Christian.²⁵ Like Barrès, Péguy accepted the republican system and subscribed to open, integrating patriotism. His political writings also attracted people brought up and educated outside the Christian cultural circle, such as Michel Debré.²⁶ De Gaulle was influenced by the thought combining faith and patriotism with a purport of social responsibility. In the thought developed by Charles Péguy France was the sum, entirety and the place where ancient, Christian and revolutionary traditions met. According to Jean Touchard, the author of already classical history of political ideas, “Péguy, who would read Michelet, integrated revolution with the French tradition. He was convinced that France had a double vocation – to be Christian and further freedom. Joanna d’Arc epitomized both.”²⁷ Péguy introduced distinction between mysticism, i.e. vitality of idea, and politics that destroys ideals. Revolutionary and Christian mysticisms are close to each other but political practice makes them distant. Each party sticks to its own mysticism and dies from its policy.²⁸ In the essayist’s view, French public life is enfeebled by a cosmopolitan party of intellectuals hostile to the revolutionary ideals as well as Christian tradition.

The attitude and oeuvre of Charles Péguy were compared to those of Stanisław Wyspiański.²⁹ The poet proved the unity of thought and deed: died on the battlefield in 1914. Presumably, young de Gaulle was under his influence: his book *La France et son*

Maurice Barrès. In his view, this is a story about young Lorraine girl’s resistance against German invaders. He interprets it as a tragedy of the girl who wishes to remain loyal to her homeland and a memory of her ancestors despite her love,” G. Moll, *Yvonne de Gaulle*, *Id.*, p. 27.

²⁵ Y. Avril, *Życie i twórczość Charles’a Péguy*, [in:] *Charles Péguy – człowiek dialogu*, Akade, 2003, p. 22.

²⁶ S. Aromatario, *La pensée politique...*, *Id.*, p. 20.

²⁷ J. Touchard, *Histoire des idées politiques*, PUF, 2005, vol. 2, p. 695 and bibliography, p. 712.

²⁸ Ch. Péguy, *Notre jeunesse*, [in:] *idem, Les œuvres en prose*, Edition Gallimard, 1961 pp. 508–521.

²⁹ E. Krakowski, *Des poètes de l’héroïsme: Charles Péguy et Stanisław Wyspiański*, V. Attinger 1937.

armée was preceded by a motto taken from his poem.³⁰ After World War I, he confirmed that Péguy's writings had a huge impact on him throughout his adolescence and youth: "No author has ever had so profound impact on my youth as Péguy, no author inspired me so much in my undertakings: you can find the spirit of the Fifth Republic in «Cahiers de la Quinzaine»."³¹ De Gaulle fully identified with the poet's view on the unity of the history of France, expressed excellently in the famous formula: "The one and indivisible Republic, this is one Kingdom of France."³²

Thus, it seems that de Gaulle's state patriotism arose from the ideas developed by the writers such as Barrès or Péguy: patriotism that accepted a republic, the one that arose beyond sharp political divisions; patriotism inclusive towards various ideological traditions and aiming at the consolidation of the state recognized as a tool for building France's power and significance. In his view, the State founded on the republican principles was not necessarily doomed to weakness and had potential for the consolidation of France's power, just as the monarchy did in its most glorious years. The determinants in the process of shaping de Gaulle's views included historical erudition that proved that both the monarchy and the republic had great achievements. In *La France et son armée*, the book published in 1930s, the future general referred to the examples of effective politics in the history of the First, Second and Third Republics, praising particularly the accomplishments of such politicians as Lazare Carnot, Léon Gambetta, Raymond Poincaré and Georges Clemenceau.³³

Thus, de Gaulle could not accept nationalism demonstrated by Action française since, in his view, they challenged republican tradition and were harmful to France.³⁴ Affinities between Maur-

³⁰ It's about a verse from the poem Ève: "Mère voici vos fils qui se sont tant battus," <http://www.lettresvolees.fr/degaulle/peguy.html>; Ch. de Gaulle, *La France et son armée*, Plon, 1938.

³¹ As cited in E. Roussel, *De Gaulle I...*, *Id.*, p. 35. Moreover, references to *Un jardin sur l'Oronte*, a novel by Barrès, can be found in the letters de Gaulle wrote to Yvonnez, his wife, when he travelled around Middle East. G. Moll, *Yvonne de Gaulle*, *Id.*, p. 60.

³² As cited in E. Roussel, *De Gaulle I...*, *Id.*, p. 35.

³³ Ch. de Gaulle, *La France et son armée*, *Id.*

³⁴ Aleksander Hall offers a similar definition of the difference between political ideas developed by de Gaulle and Action française: "Unlike Maurras, de Gaulle combined his nationalism with republican tradition and built collective memory about all glorious moments in the French history, regardless of polity and ideology. Such nationalism was closer to the ideas advocated by Barrès and Péguy than those of Maurras," *idem., Idee polityczne i wizja Charles'a de Gaulle'a a doktryna Action française*, [in:] J. Bartyzel, D. Góra-Szopiński (ed.), *Nacjonalizm a konserwatyzm...*, *Id.*

ras and de Gaulle included vigilance against German expansion and appreciation for geopolitical analyses developed by Jacques Bainville, while the formula of patriotism and attitude towards the state made them different. Therefore, contrary to Mauriac's opinion, de Gaulle rejected the Action française heritage and can by no means be recognized as their follower.

Neither was he, which an outstanding writer suggests, an heir of Le Sillon movement. Inspirations by the Christian and social thought, crucial to understand de Gaulle's ideas and policy, require a precise explanation. De Gaulle's views are not influenced by the concepts and enthusiasm for republican and democratic values developed and demonstrated by Marc Sangnier, the founder of Le Sillon movement.³⁵ According to Le Sillon followers, those values were of Christian origins so, consequently, their recognition for the republican axiology was considerably larger than that of those who – pursuant to the Pope's Leo XIII recommendation made in the encyclical *Au milieu des Sollicitudes* – went for *ralliement* by joining the Republic. While *ralliement* resulted from the conclusion that republican system provided space for the accomplishment of Christian tasks, Marc Sangnier asserted that, out of ethical reasons, only a democratic polity may be recognized as a truly Christian one. In one of his articles, the founder of Le Sillon movement wrote:

While a man is unable to "democratize" Divinity, God can do this. Christianity is actually nothing but democracy of Divine life, eternal life, as the Gospel says. Owing to this life, God's omnipotence gets committed. Although God could treat us as a monarch, He preferred to propose us a republican ideal [...] We know that democratic ideas were absorbed unnaturally. In Antiquity nine slaves and helots are thought to have been per one free citizen, which is a little less than animals and a bit more than items. And then one man arose, who opposed a principle of democracy against that of political barbarity [...] That man was Christ, our Lord. He established and perpetuated the principle of democracy. Therefore democracy should by no means be in opposition to Christianity.³⁶

³⁵ See R. Aubert, *The Christian Centuries: The Church in Secularised Society*, Paulist Press, 1978, cited after the Polish edition: R. Aubert, *Kościół katolicki od kryzysu...*, *Id.*, pp. 39–41. Interesting analysis of Sillon's ideas can also be found in the book on that movement, authored by Janusz Stefanowicz. Also *idem.*, *Chrześcijańska demokracja*, PAX 1963, pp. 146–160

³⁶ Citation after J. Stefanowicz, *Chrześcijańska demokracja*, *Id.*, pp. 150–151.

In the years 1903–1905, when the radical separation of the Church and the State was effectuated, Le Sillon staged rallies in support of the republican order. In 1910 the movement's doctrine was condemned by the Holy See in the encyclical *Notre charge apostolique*.³⁷ Pius X accused the Le Sillon movement of equating Christian tasks with building a democratic and egalitarian society and limiting the movement's Catholicism to an exclusive support for the democratic form of governance and subjecting religion to the political orientation.³⁸ In the Pope's view, the movement began by Marc Sangnier abandoned Catholicism in favour of the vision of the universal Church and egalitarian, brotherly society.³⁹ After the decision was announced, all groups alluding to the tradition of Le Sillon could no longer enjoy the status of religious organizations. Consequently, they continued their activities as political and social movements of a distinctly pro-Republican ideological profile. One of them was *La Jeune République*⁴⁰ that became affiliated with the left-wing groups and Christian Democratic – Popular Party (Parti démocrate populaire – PDP), a co-founder of the right-wing Republican bloc in the interwar period. The activists of the latter one, who declared themselves as the “Republicans of heart and reason,”⁴¹ played a crucial role in Résistance as de Gaulle's associates. Those who should primarily be mentioned, include Georges Bidault, François Menthon, Marcel Prélot and Pierre-Henri

³⁷ Pius X, *Notre charge apostolique*, Wydawnictwo Te Deum, 2002.

³⁸ *ibid.*

³⁹ Here, a reference to a fragment of the above-mentioned encyclical should be made: “Time was when Sillon – as such – was distinctly Catholic. They did not acknowledge any spiritual power except Catholic one and asserted that democracy would either be Catholic or there would be no democracy at all. But then the moment came when they changed their minds: left each and every man free to choose their faith and philosophy, ceased to consider themselves Catholics and changed the dictum «democracy will be Catholic» into «democracy will not be anti-Catholic», just as it is not going to be anti-Jewish or anti-Buddhist. Those were the times of the so-called “great” Sillon. All workers of every faith or representing every sect were called for building a society of the future. They were only required to believe in the same social ideals, respect every faith and contribute some spiritual energy.” *ibid.*, p. 24.

⁴⁰ De Gaulle cooperated with Colonel Emil Mayer, who was close to La Jeune République movement. Their cooperation was associated with the campaign for the army modernization, staged by de Gaulle, so it cannot be identified as a manifestation of linking to the views of the representatives of the left wing of Christian Democracy.

⁴¹ “We are Republicans of heart and reason ... We do not accept the view that the question of polity should be a subject of a discussion. We are democrats,” M. Prélot, *Manuel politique, le programme du Parti Démocrate Populaire?*, Éditions Spes, 1928, cited after: J. Stefanowicz, *Chrześcijańska demokracja, Id.*, p. 156.

Teitgen. The Republican–Popular Movement (Mouvement républicain populaire – MRP), established in 1944, was the follower of the Christian-Democratic PDP. MRP had glorious episodes as a member of Résistance and was, along with the Communist Party and French Socialists united in SFIO (Section Française de l'Internationale Ouvrière (the French Branch of Workers' International), the strongest political party of the Fourth Republic.⁴²

Meanwhile, de Gaulle was not a Christian Democrat who would give a democratic polity a Christian sanction (which was quite typical in that school of thought). By no means did he share a social radicalism of Marc Sangnier. Therefore, Mauriac's opinion about extremely strong bonds between de Gaulle and Le Sillon is just not true. To support this, rather unknown correspondence between de Gaulle and Maritain from World War II years should be referred to. In his letter of 1942, the outstanding philosopher suggested that de Gaulle should invoke Evangelical values in his public speeches, since they were the source of the revival of democracy. The leader of Free France rejected that suggestion and replied that Republic had a supra-ideological purport for him and could integrate French people only in such a way. Thus, a clear reference to the Christian values could hamper national integration if the reference to Democratic Liberalism were recognized as the principle idea of Free France.⁴³

Noteworthy, de Gaulle did not challenge a secular nature of Republic although he had definitely a negative attitude towards aggressive secularism.⁴⁴ He might – just as Barrès, his master – have hoped that the separation of Church and State would not have led to the dechristianization and anti-clericalism France experienced at the turn of the 19th and 20th centuries. After World War II he focused on the extension of the pro-family legislation. In 1959, he managed to implement a system of public support for

⁴² René Rémond discussed ideological tradition of the French Christian Democrats in his book on the French right-wing movements. R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition R. Rémond, *Francuska prawica dzisiaj*, *Id.*, pp. 282–316.

⁴³ A review of the correspondence between de Gaulle and Maritain is included in the text by Odile Rudelle, *De Gaulle et la République*, [in:] S. Bernstein, O. Rudelle, *Le modèle républicain*, PUF, 1992, pp. 395–396. In his letter to Maritain, de Gaulle openly criticized the attitude of the majority of bishops who supported Vichy, saying that such attitude made it even more difficult for Free France to refer to Christian values..

⁴⁴ “Four young de Gaulles openly support Republic. Their convictions are rooted in the idea that shaped the nation's awareness much earlier. When they start debating nothing can stop them (...) They even approve separation of Church and State although they are ardent Catholics as much as ardent Republic supporters.” G. Moll, *Yvonne de Gaulle*, *Id.*, pp. 31–32.

religious schools, which was warmly welcomed by Catholics. The adopted statute, devised by Michel Debré (*loi Debré*), envisaged funding private Christian schools on condition that they fulfilled their duties towards the State.⁴⁵

De Gaulle was a devout man, which François de Gaulle, his nephew and a monk from the Congregation of White Fathers, testified. The General regularly took Communion on every Sunday although not during the masses celebrated on the occasion of official events, such as the Mass celebrated in the Cathedral of Reims, after signing a French-German treaty with Konrad Adenauer on 7 July 1962.⁴⁶

⁴⁵ Loi n° 59-1557 du 31 décembre 1959 sur les rapports entre l'État et les établissements d'enseignement privés. www.assemblee-nationale.fr/histoire/loidebre/sommaire.asp. Constitutional facets of the freedom of teaching are the subject of the study on the Constitutional Council, conducted by Leszek Garlicki. L. Garlicki, *Rada Konstytucyjna...*, *Id.*, pp. 96–100.

⁴⁶ An interesting account can be found in the memoirs written by Father François de Gaulle, who frequently celebrated the Mass in a private chapel the president set up in the Elysee Palace: “On Friday, he says, the General’s aide phoned the House of White Fathers, located in Roger-Verlomme Street, where I was a provincial superior in those years, to ask whether I could come on Sunday to celebrate a silent Mass. They usually phoned us and when I was absent, some other members of our congregation replaced me. I was usually called there twice or three times a month. I always went there a little bit earlier to prepare my vestments and waited until the General came. At half past eleven he turned up, accompanied by his wife, wearing either civilian clothes or a uniform, depending on his duties on that day. An aide would always accompany him, sometimes along with other family members. A ceremony was 45 minute long. Sometimes I gave a short sermon. As my uncle and aunt were people of deep faith, they received Communion every Sunday. After that we had a modest meal that was sometimes joined by the guests invited to the Mass. A friendly atmosphere emboldened people to talk freely about diverse news and current events. De Gaulle, who chose the Lorraine Cross as a symbol of Free France, spoke about his religion willingly. His broadly-understood culture helped him learn and respect different religions, even if his own faith led through piety and Christian roots. We should remember that he wished *Magnificat* were sung at the Notre-Dame Cathedral on 26 August 1944, despite nearby shootings, moments before liberation of the French capital. Moreover, on 7 July 1962, he invited Konrad Adenauer, German Chancellor, to the Mass at the Reims Cathedral to pray for peace, after signing the French – German treaty of reconciliation. Yet, although that act brought «a touch of sacrum» into that event, and the General sacrificed his private life to God – which he never made a secret – he would not receive Communion then. In his view, a head of state should not take the liberty of doing any religious observances in public ... After a walk in the park, a gendarmarie car, that brought me there in the morning, took me back to the Fathers from the third district. Before I left, my uncle would repeat with affection: «you are not a priest from Elisee Palace, this is the private Mass you celebrate because I am not the president of Catholics but of all the French people. The President of the Republic should by no means be confused with the Archbishop of Paris. Certainly, I also celebrated the Mass during the funeral of my honorable uncle, on 12 November 1970. My most touching memory dates back to the day of my holy orders, when he knelt down to ask me for blessing.” The memoirs of François de Gaulle were published by Caroline Pigozzi, *La Laïcité selon de Gaulle*, Paris Match, 17 April 2011. Noteworthy, during

De Gaulle owed his awareness of social responsibility of the state, necessity to overcome social class conflicts and to seek social balance to the social teachings of the Catholic Church. He defied Manchester Capitalism that exposed individualism and controverted social obligations of the capital.⁴⁷

This is an ideological source of the policy aimed to nationalize capitalism, launched in the years 1944–1945, and also a concept of combining capital and labour from the years of the Assembly of the French People, and last but not least, the idea of participation that had political ramifications. In my opinion, de Gaulle was closer to the conservative group of the Christian social thought, represented primarily by Albert de Mun and René de La Tour du Pin. A group exposed a need for solidarity and overcoming class egoism, did not put forward radical social demands and rejected egalitarianism. This is where the French corporatism was formed. Initially, the movement founders were critical of the heritage of the French Revolution and demonstrated monarchist sympathies.⁴⁸ Later on, Albert de Mun gave a positive response to the call of Leo XIII and conducted *ralliement* to the republic after arriving at the conclusion that fruition of corporatism and solidaristic ideas was attainable within its framework. In my view, it is the output of that group that inspired de Gaulle to put forward – after

his official visit in the Soviet Union, in June 1966, de Gaulle received Communion at the Mass celebrated at the French chapel in Leningrad (today: Sankt Petersburg), applying a rule of the freedom of religion to make an official gesture in the country where people were deprived of so many freedoms.

The writings on de Gaulle's attitude towards religion and its significance in the public life, include *Charles de Gaulle chrétien, homme d'État*, Fondation Charles de Gaulle, August 2011; C. G. Bardy, *Charles le catholique*, Plon, 2011; A. Latreille, *De Gaulle, la Libération et l'Église catholique*, Cerf, 1978; M. Brisacier, *La Foi du Général*, Nouvelle Cité, 1998; J.-M. Mayeur, *Catholicisme social et démocratie chrétienne. Principes romains et expériences françaises*, Cerf, 1986; Ph. Portier, *Le général de Gaulle et le catholicisme. Pour une autre interprétation de la pensée gaullienne*, Revue historique, 1997, no 602, pp. 533–562. Also materials from the conference on those issues provide interesting information: *Charles de Gaulle, chrétien, homme d'État – 13 et 14 novembre 2009*, Paris, Fondation Charles de Gaulle.

⁴⁷ In Ph. Portier's view, in the 1930s, de Gaulle attended sessions on the social teaching of the Church in the Jesuit community *Mouvaux*, wrote an article for *Aube*, where Georges Bidault and Francisque Gay also published, was a member of Amis de "Temps présent," a magazine continuing the "Sept" traditions. Author highlights affinities between de Gaulle's thought and Pope's social teaching. Ph. Portier, *Catholique*, [in:] *Dictionnaire de Gaulle*, ed. C. Andrieu, P. Braud, G. Piketty, Éditions Robert Laffont, 2006, pp. 172–174.

⁴⁸ C. Brice, *Essai d'une politique chrétienne...*, *Id.* Czesław Strzeszewski reminded of René de La Tour du Pin's position, a forerunner of corporatism ideas, who criticized the Declaration of the Rights of Man and the Citizen. In his view, the Declaration inspired liberalism and socialism, denying rights to any associations operating between an individual and the nation. C. Strzeszewski, *Katolicka nauka społeczna*, *Id.*, pp. 240–241.

World War II – the idea of a separate representation of economic and professional associations in the Senate and regional self-government institutions that he designed.⁴⁹

In the biography of de Gaulle, Aleksander Hall writes that in the 1930s the General “accepted republican and democratic order but was critical of the parliamentary system that functioned in France in those times.”⁵⁰ As early as in his young years, he was aware of the weakness of parliamentary governments. In his books on military issues, *Le fil de l'épée* i *La France et son armée*⁵¹, de Gaulle underscored the significance of national unity, which definitely impacted the critical assessment of the rule of political parties. On the other hand, his writings in no way expose his mistrust towards the republican order or a purport of advantage over the civilian world of politics, frequently observed in military men and characteristic of the authoritarian thinking. In *Le fil de l'épée*, the book I have already mentioned, de Gaulle called for cooperation between military commanders and politicians, which he found indispensable for the country's success.⁵² Thus, we need a lengthy discussion on his acceptance of the republican system. It seems that Odile Rudelle, a French, is quite right about that issue. Based on de Gaulle's notes from his young years, she concludes that he accepted the Republic as a permanent way of France's existence in modern times.⁵³ De Gaulle just followed a formula developed by Charles Péguy, where he underscored continuity of the history of France: “The one and indivisible Republic, this is our kingdom of France.”⁵⁴ Presumably, acceptance of the Republic was an act of reason and not heart. That was the interpretation of de Gaulle's republicanism offered by René Rémond, an outstanding French historian:

De Gaulle is convinced that in our times there is no other legitimate form of governance except the nation's sovereignty or any other source of power, except the nation's will pronounced in a democratic mode. This is how de Gaulle turns out to be more a democrat

⁴⁹ J. C. Ricci, *Les idées politiques ...*, *Id.*

⁵⁰ A. Hall, *Naród i państwo...*, *Id.*, p. 91.

⁵¹ Ch. de Gaulle, *La discorde chez l'ennemi*, Berger-Levrault, 1924 (ré-éd. Le Livre de poche, 1973); *idem*, *Le fil de l'épée*, Berger-Levrault, 1932 (ré-éd. Le Livre de poche, 1973); *idem*, *La France et son armée*, *Id.*

⁵² On that issue Ch. de Gaulle wrote a separate chapter in his book, entitled “Politique et soldat” (Politics and a Soldier), *Le fil de l'épée*, *Id.*, pp. 143–184.

⁵³ O. Rudelle, *De Gaulle et la République*, *Id.*

⁵⁴ See note 149.

- presumably out of some rational reasons and not his disposition
- but isn't this typical of the most ardent defender of some specific political system? Certainly, Charles Maurras converted to monarchism in the aftermath of reasoning where an element of calculation had a larger share than a passion of feeling.⁵⁵

Thus, de Gaulle might be thought to have accepted republican axiology as early as in the 1930s and only left open the question of specific institutional shape of the Republic. Noteworthy, he cooperated with republican politicians, mainly Paul Reynaud, who fully shared his project of the army modernization⁵⁶. Acquaintance with Colonel Emil Mayer, who stayed close to La Jeune République movement, helped him know a purely republican environment where he could further his concept of the deterrence of German expansionism. Moreover, de Gaulle did not hesitate to enunciate his concepts to Léon Blum, Prime Minister and leader of French socialists.⁵⁷

In those times de Gaulle had no remedy for a political crisis of the Third Republic. Rejection of his plans of army modernization by Paul Reynaud, the Prime Minister, resulted from the political pressure exerted by political parties. In his *Mémoires de guerre* de Gaulle writes that during his work in the General Secretariat of National Defence (1932–1937), a permanent body attached to the Office of the Prime Minister, he became aware of the volatility of the then cabinets and weakness of the state where the parliament played the supreme role and political parties were hegemons.⁵⁸

⁵⁵ Like Odile Rudelle, René Rémond asserted that his family tradition in no way prevented him from accepting democracy principles. "De Gaulle – the future president – found nothing in his family tradition that could prevent him from accepting democracy: his father was an anti-Dreyfussist, and Odile Rudelle showed that his intellectual formation was under the influence of the liberal, Catholic, periodical «Correspondant»,” R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*, p. 226.

⁵⁶ Paul Reynaud (1878–1966), a French jurist and politician associated with Republican Right; advocate of army reforms and de Gaulle's plan of its modernization; was appointed prime minister on 21 March 1940; compelled to resign on 16 June 1940, when parliament majority opted for armistice; in September arrested by the government of Vichy and charged with involving France in the war; from November 1942 till the end of World War II imprisoned in Nazi concentration camps; was appointed minister of finance in 1948; lent support to de Gaulle and chaired the Constitutional Committee in 1958; departed with de Gaulle in 1962, opposing popular presidential elections.

⁵⁷ Ch. de Gaulle, *Mémoires de guerre*, *Id.*, cited after Polish edition: Ch. de Gaulle, *Pamiętniki wojenne*, vol. I, *Id.*, pp. 19–20.

⁵⁸ This is what de Gaulle says about his work in the government institutions in 1930s in the memoirs published after World War II: "In those times, between 1932 and 1937,

B. Against Vichy – Defence of Republican Tradition

Political weakness of the Third Republic became apparent in dramatic circumstances in 1940. The French were unable to face up to the German expansionism. The Republic did allow for the annihilation of its principles in the constitutional acts that laid foundations of the French State. Simone Weil wrote that June 1940 brought “depression and abdication of all the nation.”⁵⁹

This is how she enunciated a unique position of de Gaulle in her *Legitimacy Of Provisional Government*:

Thus, legitimacy is not a treasure that the French nation was robbed of: it was perpetrated by neither enemy nor some conspiracy in the country. As a whole, the French nation – from its elites through the working class – just opened the hand and dropped a jewel onto the ground without even looking where it was going to roll (...) Given

I was assigned to the General Secretariat of National Defence – a permanent body attached to the Office of the Prime Minister and responsible for the preparation of the state and nation for war. As the cabinet changed fourteen times over that period, I had an opportunity to know political, technical and administrative activities regarding the country's defence. In particular, I knew that the security and arms limitation plans enunciated in Geneva by André Tardieu and Paul-Boncour; helped Doumergue's cabinet substantiate the decision he made, when he decided to choose a different road after the Führer had come to power; I had to amend a statute on the state's organization during the war countless times. I drew up orders needed for the mobilization of civilian administration, industry and council bodies. A kind of the functions I performed – the sittings I had to attend and contacts I had to establish – showed me the abundance of our resources but at the same time the state's weakness. This is where the consequences of the volatility of our governments became fully apparent. I am not going to say that the members of successive cabinets lacked intelligence and patriotism. On the contrary, I met undoubtedly valuable, sometimes even outstanding people, who became ministers. Yet, the regime machine wasted their energy and crippled will. As a cautious and reserved but, on the other hand, a passionate observer of public affairs, I saw how the same scenario repeated over and over again. Each new prime minister, as soon as he assumed his office, had to face countless demands, criticism, power pretenders getting into the bragging match, which used up all his energy to thwart those maneuvers but always failed to stop them. Not only did the parliament not help him but set the same traps and betrayals. Cabinet members, who were his subordinates, were also his rivals. Public opinion, press, political groups representing diverse interests put all blame upon him for each failure. Actually everybody knew – and he knew best – that his term was going to be short. Such conditions prevented people responsible for national defence from implementing any ongoing plan, making mature decisions, completing already started actions – in other words – everything that used to be called politics.” Ch. de Gaulle, *Mémoires de guerre*, *Id.*, cited after Polish edition: Ch. de Gaulle, *Pamiętniki wojenne*, vol. I, *Id.* pp. 3–4. See also de Gaulle's correspondence with Paul Reynaud [in:] Ch. de Gaulle, *Lettres, notes et carnets, 1905–1941*, Robert Lafont, 2010, pp. 766–942.

⁵⁹ S. Weil, *Écrits de Londres et dernières lettres*, Gallimard, 1957, cited after the Polish edition: S. Weil, *Pisma londyńskie i ostatnie listy*, Wyd. Brama, 1994, p. 48.

such conditions, what is actually the relationship between de Gaulle and legitimacy? When the jewel was on the ground, scorned by everybody, it was him that picked it up and proclaimed that he was going to be its repository until its owner was able to demand it.⁶⁰

De Gaulle guarded the state's legitimacy treasure in accordance with republican tradition.⁶¹ After years, in his *Mémoires de guerre*, he had a right to say that he "saved the Republic from death," when social elites and political institutions failed.⁶² During World War II, de Gaulle combined state patriotism with the republican tradition and this made republican principles unquestionable foundations for post-war France. That opinion may not be challenged by the fact that political circles that established Free France were pluralistic in ideological terms and the General's associates also included people linked to Action française.⁶³ Indeed, in 1940 de Gaulle

⁶⁰ *ibid.* pp., 48–49.

⁶¹ The notions of the 'legitimate government' and 'legal government' became a subject of deliberations as soon as the Vichy regime emerged. Before 1940, they were not juxtaposed and every legal rule was found legitimate. R. Rémond emphasized that de Gaulle's attitude towards France's surrender was fundamental for the distinction between legitimacy and legality: "General de Gaulle's disobedience – in the name of supreme principles – against the government set up under the rule of Marshall Petain, which was undoubtedly legal, introduced into our political philosophy a really exceptional notion of the «legitimization» – different from the notion of «legality»." Such distinction sparked a dispute that has been on until today: since legitimization no more denoted legality, the former one is recognized superior. The government's decision or an act passed by the parliament may not be called illegal, provided that it had been passed in conformity with the provisions specified in the regulations on the mode of the functioning of national institutions but despite this may be illegitimated when it violates specific rules of law," R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*, p. 220. See also T. Janasz, *Państwo francuskie 1940–44*, PWN, 1977, pp. 53–58. Legality (*légalité*) recognized as a formal category denoting acts undertaken by public authorities and based on legal regulations, while legitimacy (*légitimité*) was identified as an act done in conformity with the people's will and republican principles. See A. Hauriou, *Droit constitutionnel et institutions politiques*, Editions Montchrestien, 1966, pp. 628–683. Jurists and political scientists asserted that the Vichy government was legal but illegitimate. See G. Burdeau, Fr. Hamon, M. Troper, *Droit constitutionnel*, *Id.*, p. 362. The Free France's doctrine consistently denied Vichy either of those attributes. The notions became the discourse subject again after 1958. De Gaulle's opponents challenged legitimacy of his rule and the Fifth Republic Constitution, claiming that it was founded in the aftermath of *coup d'État* and contrary to the rules of democracy and republican values. De Gaulle's departure after the lost referendum dismissed that allegation and sealed legitimacy of the Fifth Republic.

⁶² Ch. de Gaulle, *Mémoires de guerre*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *War Memoirs (Pamiętniki wojenne)*, *Id.*, vol. III, p. 93.

⁶³ In view of S. Giocant, an author of the latest biography of Maurras, supporters of Action française included future marshals Leclerc and de Latre de Tassigny, future prime ministers Pierre Messmer, Guillaime de Bénouville and Jacques Renouvin. S. Giocanti, *Maurras. Le chaos et l'ordre*, Flammarion 2006, p. 431.

demonstrated ability to gather around him people of outstanding skills and diverse views. The first Free French included Christian Democrats Maurice Schumann, Gilbert Renault (Rémy) educated in the Action française school, and René Cassin, a professor of law, of explicitly republican and secular views.⁶⁴

The Free France's position on the legal and state aspects was unambiguous since 27 October 1940, when "Manifesto on the French war effort,"⁶⁵ published in Brazzaville. On the same day de Gaulle also issued the *ordonnance* (decree) that specified the organizational scheme of public authorities during the war, established the Imperial Defence Council, and proclaimed the organic declaration explaining legal and political reasons for both statutes.⁶⁶ They were issued by the Free French leader, on behalf of the people and French Empire, which was the manifestation of a republican and national approach. De Gaulle recognized the Nation as a subject of sovereignty and declared actions on behalf of the republic, state and empire. Art.1 of the Brazzaville *ordonnance* underscored the legal continuity of the Third Republic and said that until "French government along with legal and sovereign representation of the French people are established in all parts of the Empire liberated from its enemies, public authorities shall act under the French laws effective prior to 23 June 1940."⁶⁷

"Manifesto..." recognized "the body seated in Vichy as unconstitutional and subordinated to the invader."⁶⁸ This is what the document says:

There is no longer a truly French government. The body that has its seat in Vichy and claims to bear that name is unconstitutional and subordinated to the invader. Such dependence makes this body nothing but a tool used by the enemies of France against the honour and interests of our country.⁶⁹

⁶⁴ Aleksander Hall made remarkable insights on the pluralism of ideological attitudes of Free French in his study on de Gaulle's political thought, *Naród i państwo...*, *Id.*, pp. 124–127.

⁶⁵ *Manifeste relatif à la direction de l'effort français dans la guerre*, [in:] M. Duverger, *Constitution et documents politiques*, PUF, 1996, p. 191.

⁶⁶ *Ordonnance n° 1 organisant les pouvoirs publics pendant la guerre et instituant le Conseil de défense de l'Empire (21 octobre 1940). Déclaration organique complétant le manifeste du 27 octobre 1940*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, pp. 192–196.

⁶⁷ *ibid.* See also insights made by J. Chapsal in the option for republican tradition adopted by de Gaulle. J. Chapsal, *La vie politique en France depuis 1940*, PUF 1984, p. 59.

⁶⁸ *Manifeste relatif à la Direction...*, *Id.*, p. 191, trans. B. Perlińska.

⁶⁹ *ibid.*

De Gaulle declared that he would exercise his powers in the name of France and solely in its defence and undertook to report about his endeavours to the representatives of the French nation as soon as they could be freely elected.⁷⁰ This was a very strong obligation to restore parliamentarism and respect for the government's accountability to the parliament. Such stance was maintained in successive documents produced by Free France, French National Committee and French National Liberation Committee, which ensured that republican and democratic political system was restored.

Ordonnance (Art. 2) set up the Imperial Defence Council tasked to “remain faithful to France, provide external and internal security, manage economic activities and maintain ethical cohesion of the territories of Empire.”⁷¹ Pursuant to this political act, decisions were to be made by the leader of the Free French after consulting the Imperial Defence Council. The Act stated that the General, legislative decisions were to be made in the form of ordonnances published in *Journal officiel l'Empire français*, which – depending on their content – would have the legal validity of a bill or decree. Directors of services appointed by the Free French leader were invested with the ministers' powers. Another manifestation of the endeavours aimed to maintain legal continuity was the announcement of the establishment of the bodies invested with the legal competences normally conferred upon the Council of State, Court of Cassation and the Tribunal of Justice.

Organic Declaration ... that supplemented the Manifesto... was even the forceful manifestation of the defence of republican principles and thus legitimized the acts of Free France. De Gaulle asserted that Vichy made fruitless endeavours to substantiate its establishment but actually systematically and brutally violated the Constitution.⁷² The declaration said that since all the territory of France was under direct or indirect control of the enemy, “the body called the government of Vichy, that claimed to be substituting the Government of Republic, did not enjoy freedom indispensable for exercising the power.”⁷³ The document listed in detail all the violations of constitutional norms at the time when the Vichy authorities were being established, highlighted the breach

⁷⁰ *ibid.*

⁷¹ *Ordonnance n° 1 organisant...*, *Id.*, p. 192.

⁷² *ibid.*, p. 193.

⁷³ *ibid.*

of the procedure of the constitutional revision and the fact that the president of the Republic, although he did not hand in his resignation, was deprived of his rights and prerogatives. The Declaration reminded that “pursuant to the provisions of the Constitution of 1875, a draft of revision should be put to a vote in both Assembly chambers, Chamber of Deputies and the Senate, debating separately. Only when that procedure proves to be ineffective, a draft is submitted to the National Assembly that may be convened only in Versailles.”⁷⁴ In de Gaulle’s view, Vichy government violated the rules “recognized by Gambetta and Ferry, the main lawmakers of the Republic, as an indispensable guarantee that prevented a hasty and treacherous change of the Constitution.”⁷⁵ The authors of the Declaration accused Vichy of effecting the change outside Versailles although the founders of the political system “did not expect that anyone could ever make use of the unhappy situation of the Parliament exiled and dispersed by the attacking army, to convene it in the capital of some department and terrorize its members to vote for the violation of the basic rights of the Republic.”⁷⁶

Moreover, the document underscored the fact that a proper procedure of the constitutional change required submitting a draft of its revision and reviewing this “article by article” by the National Assembly. Instead, “the unconstitutional and absurd decision was made to entrust real powers to a third party *in blanco*, which meant that that party would draft and enact a new Constitution.”⁷⁷ Noteworthy, the constitutional act of 10 July 1940 conferred upon Pétain government the powers to issue and promulgate the French Constitution in a form of one or several acts. De Gaulle reasoned that such a declaration was pointless “since the alleged head of the state may at his own discretion decide about the political line up of future assemblies as well as the terms and regulations of ratification.”⁷⁸

The Declaration also reminded that in the event when the parliament was in no position to freely make decisions, France could articulate its will through the general councils that, pursuant to the act of 15 February 1872, were in power to manage the country

⁷⁴ *ibid.*

⁷⁵ *ibid.*, p.194

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

in emergency situations. Yet by the decision of Vichy authorities general councils were deprived of the right to convene their sessions and undertake public tasks. The document issued in Brazzaville stated that:

as there is no free parliament operating on the regular basis, France should be in a position to articulate its will through the general councils; pursuant to the act of 15 February 1872 and given the illegal nature of the Vichy body, general councils should be in power to deal with the administration of the country but by the laws of the so-called decree of 20 August 1940, the hereinabove body prohibited them – based on the so-called act of 12 October 1940 – to convene and supersede them with the commissions appointed by central authorities.⁷⁹

In addition, “Organic Declaration...” highlighted the fact that “the civic right to freely decide about ratification of treaties, which was found traditional and sacred in France, conferring upon the Head of State conclusion and ratification of international agreements, including any peace treaties or those regarding renouncement of territories, that may undermine integrity, independence or even the very existence of France, its colonies, protectorates or mandate territories.”⁸⁰

Not only did de Gaulle expose the violation of specific constitutional norms but also raised an argument of critical importance for the republican constitutional tradition. Declaration stated that Vichy abandoned the republican Constitution and breached the rule that said that a republican form of the government may in no way be revised. The legal and state doctrine developed by Free France guarded republican principles and defied any endeavours to restore any elements of the monarchist tradition. The hereinabove declaration referred to the constitutional act of 1884, that guaranteed inviolability of the political system and proclaimed its violation by the constitutional act of 10 July 1940. Furthermore, de Gaulle contended that the decision made by Pétain removed

the word Republic from the so-called constitutional acts issued by Vichy and vested the head of the so-called State of France with the powers as big as those of the absolute monarch, which he might – at

⁷⁹ *ibid.*

⁸⁰ *ibid.*

his own discretion – exercise throughout all his life or transfer to any person he appoints at his own discretion, or even make it a hereditary power.⁸¹

The position of Free France remained unchanged after the French National Committee was established by the ordonnance of 24 September 1941. National Committee was a more advanced institutional form of the Free France organization, when the empire's territories independent of the enemy gained strategic importance and – consequently – a role the French Armed Forces gathered around de Gaulle became crucial. In the justification of ordonnance it was underscored that Free France authorities needed “ordinary powers that public authorities are invested with over the temporary period.”⁸² The decisions made by the Committee were intended to be in the same form as those taken by the parliamentary governments in the years of Third Republic. The committee headed by General de Gaulle consisted of the commissioners he appointed. Since the National Committee was invested with the legislative power, any documents with the power of statutes had to be reviewed by all the Committee members and then signed and promulgated by General de Gaulle and countersigned by at least one commissioner.⁸³ Under Art. 3 of the ordonnance, those statutes “shall be obligatorily submitted to the national representation for ratification as soon as possible.”⁸⁴ The same procedure was to be applied with regard to international agreements that under normal circumstances should be submitted for the approval to the parliamentary chambers under Art. 8 of the constitutional act of 16 July 1875. On the other hand, *pouvoir réglementaire* was to be attained by means of decrees issued by the head of the Committee upon a motion or based on a report of any of the commissioners. The ordonnance provided that national commissioners, who were at the same time Committee members, had individual and collective tasks that were usually assigned to the ministers.

⁸¹ *ibid.*

⁸² *Ordonnance n° 16 portant organisation nouvelle des pouvoirs publics de la France Libre (24 septembre 1941)*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, p. 196, trans. B. Perlińska.

⁸³ See the insights by J. J. Chevallier, *Histoire des institutions politiques de la France de 1789 à nos jours*, Dalloz, 1952, p. 613.

⁸⁴ *Ordonnance n° 16 portant...*, *Id.*, p. 196, trans. B. Perlińska.

De Gaulle announced appointment of the Consulting Assembly “representing possibly the widest scope of the national opinion,”⁸⁵ which was put into effect two years later in Algeria. The ordonnance confirmed the principle that the rules regarding execution of public powers were to remain effective temporarily until the representation of French people was established and that representation was capable of pronouncing the nation’s will regardless of the enemy’s will.⁸⁶ Georges Burdeau, an outstanding French political scientist and constitutionalist, defined those endeavours as “the organizing of republican continuity.”⁸⁷

De Gaulle did not change his stance on the lawfulness and legality of the national authorities even when the unity of authorities acting on behalf of France was built after North Africa was captured by allied forces (he found that time particularly hard). In autumn 1942, when allied forces began their operation in North Africa, the deputy of Marshall Pétain and the chief commander of the French Army, General Darlan, after a short resistance against the US Army, resolved to surrender to Americans and conclude an agreement, based on which they recognized him as a political partner. On 11 November 1942, as soon as Germans seized the unoccupied zone, General Darlan assumed power over that territory as a High Commissioner of France residing in French Africa. The authorities he began to establish, comprised largely officials of the French state. The ordonnance issued by the High Commissioner on 7 December in consistency with the legalism defined according to the Vichy regime’s concept based on the constitutional act of 10 February 1949, was “to be effective as the law of the French State.”⁸⁸ The ordonnance issued by Darlan established the Imperial Council as a consultative body cooperating with the High Commissioner and convened by him. Art. 2 of the ordonnance provided that “Imperial Council is convened periodically at the call of the High Commissioner of France residing in French Africa, to review the essential issues interesting to the Empire.”⁸⁹ Only two weeks later, on 23 December 1942, the High Commissioner of France, residing in French Africa, established the consultative legislative committee.

⁸⁵ *ibid.*, p. 197.

⁸⁶ *ibid.*

⁸⁷ G. Burdeau, F. Hamon, M. Troper, *Droit constitutionnel*, *Id.*, pp. 367–368.

⁸⁸ *Ordonnance n° du 7 portant réaction d'un Conseil impérial*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, p. 199.

⁸⁹ *ibid.*

After the murder of General Darlan, General Henri Giraud⁹⁰ was appointed the chief commander of the French Army in Africa. The argument between the two centres of power, gathered around General Giraud and General de Gaulle, was political and legitimate, and regarded the way they were to be united. Given the subject of this book, decisions regarding legitimacy and legality of the provisional French authorities are crucial. Importantly, the interpretational line applied in the documents produced by Free France was adopted under de Gaulle's pressure. In his book *Francja na rozdrożu 1943–44. Walka o kształt ustrojowy Francji* (*France at a Crossroads 1943–44, Struggle for the French Political System*), Jan Zamojski wrote:

De Gaulle's overriding goal in the process of creation of the unified, sovereign, central organ of power on the territories independent of Vichy and its armed forces was to establish such an organ in compliance with the rules adopted by the French National Committee. [...] Generally, he demanded that Giraud should make a declaration recognizing the truce of June 1940 and its ramifications as invalid, condemned Vichy, removed disgraced Petain officials from French North Africa and restored republican legislation.⁹¹

At the press conference held in London, in February 1943, de Gaulle enunciated his stance on the French centre of authority in North Africa and said that he expected that General Giraud would explicitly break with the Vichy legislation and espouse republican and democratic order.⁹² De Gaulle juxtaposed legitimacy of the Republic with the legitimacy of Vichy and demanded an explicit choice of the republican tradition. In his view, the North African French authorities “evade defining their political and ideological underpinnings, which leads to confusion.”⁹³ He added that “to a vast majority of the French people, liberation meant

⁹⁰ Henri Giraud (1879–1949), a general, commander of the 8th Army; after the defeat of France imprisoned by Germans; managed to escape and get to Algeria in 1942; main partner of Americans after their invasion in North Africa and death of Darlan; civil and military commissioner, since 1943 co-president, along with de Gaulle, of French Committee of National Liberation; removed from that post by de Gaulle in April 1944; had no influence on the Committee's activities. See G. de Charbonnières, *Le duel Giraud – de Gaulle*, Plon, 1984.

⁹¹ J. Zamojski, *Francja na rozdrożu. 1943–44*, IH PAN, 1992, p. 79.

⁹² Ch. de Gaulle, *Discours et messages 1940–1946*, Plon, 1970, pp. 260–269.

⁹³ *ibid.*, pp. 261–262.

restoration of the Republic.”⁹⁴ Answering the questions asked by journalists, de Gaulle argued that he was in no position to determine how the Republic was going to be restored, but asserted that Fighting France was convinced that the republican political system provided a sole basis for legitimacy and this was inconceivable to pronounce the will and dignity of the French people in any other way than through the laws enacted by the Republic.⁹⁵ He demanded not only acceptance but also application of republican laws and, in particular, restoration of fundamental freedoms: freedom of press, freedom of thought, conscience and religion, freedom of assembling and the freedom of speech, effective in the parts of French Empire that were under control of Fighting France. De Gaulle demanded that competences of the department general councils were restored in Algeria and, under the statutes, empowered to manage the general administration. In addition he espoused establishment of the National Consulting Council that, in the absence of the parliament, would be in a position to actively participate in the substitute national representation.⁹⁶

De Gaulle’s pressure proved to be effective. The declaration and ordonnance of 14 March 1943, issued by General Giraud,— the then civil and military chief, on validity of the legislation effective on the territories under his control, was a step towards the interpretational line Free France had adopted before. The act revised interpretation of the Vichy legislation that was no longer found legitimate since the legislator was in no position to “freely exercise sovereignty” and “was obliged to receive a prior consent of the enemy.”⁹⁷ The document provided that the legislation passed on 22 June 1940 had no foundations of legitimacy and therefore the ordonnance revoked all the constitutional bills and other laws issued after that date. In the declaration, General Giraud declared respect to the territories, rights and interests that France had before 22 June 1940 and accepted an obligation to give account of his activities before the court appointed by the French people after liberation of France.

Henri Giraud revoked the Vichy laws but neither condemned the regime nor announced application of the laws of Republic. Thus, his stance was definitely different from that of Free France,

⁹⁴ *ibid.*

⁹⁵ Ch. de Gaulle, *Discours et messages...*, *Id.*, p. 262.

⁹⁶ *ibid.*, p. 265.

⁹⁷ *Ordonnance du 23 décembre 1942*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, p. 200.

since de Gaulle totally rejected Vichy legitimacy and legality and emphasized his allegiance to the rule of the Republic.

Despite those differences, the stance adopted by Henri Giraud facilitated establishment of the new authorities based on legitimacy and legality in de Gaulle's understanding. Three months later, the leader of Free France solved all political and legitimate issues germane to the unification of the French armed forces in North Africa and managed to conclude an agreement with General Giraud based on the rules he consistently furthered after 1940. On 26 May 1943, he issued his last *ordonnance* as the Head of the National Committee. The document was drawn up based on the report developed by Professor René Cassin.⁹⁸ Art. 2 of the *ordonnance* provided that "new or modified organization of authorities shall be aimed to unite all French people and shall ensure national sovereignty" and added that "it should be in conformity with the fundamental rules of the Republic."⁹⁹ Art. 3 of the legal act issued by de Gaulle emphasized a need for perpetuating continuity of public authorities and adopting "the rules that will enable the Nation to pronounce its will in possibly shortest time."¹⁰⁰

In June 1943, de Gaulle and Giraud signed the decree implementing precise and detailed regulations regarding organization and functioning of the French Committee of National Liberation. The document defined the Committee as a governmental body making decisions by the majority of votes, given the joint and several liability of its members – commissioners. In addition, a rule (art. 4) was adopted to proclaim that an *ordonnance* provided a necessary legal basis for the issues that had been subjected to the statutory regulation prior to 16 June. Noteworthy, since the establishment of the Committee, legal instruments were published in the *Official Journal of the Republic of France*, while earlier it was the *Official Journal of Fighting France*. Such a change represented a symbolic restoration of the provisional French authorities.¹⁰¹

Establishment of the Provisional Consultative Assembly was a pertinent step towards restoration of the Republic. An idea to

⁹⁸ R. Cassin, *Rapport au président du Comité national*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, p. 200–201.

⁹⁹ *Le Comité français de la Libération nationale et le Gouvernement provisoire de la République. Ordonnance n° 55*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, p. 202.

¹⁰⁰ *ibid.*

¹⁰¹ *Ordonnance du 3 juin 1943 portant institution du Comité français de la libération nationale*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, pp. 202–203.

establish such a body was submitted as early as in 1941. The ordonnance proclaiming establishment of the Provisional Consultative Assembly was issued on 17 September 1943. Under Art. 1, the Provisional Consultative Assembly was tasked to “provide possibly the most extensive expression of the national opinion.”¹⁰² The body comprised representatives of Resistance from the mother country and other territories, representatives of general councils and those senators and deputies who opposed surrender and did not authorize Marshall Pétain to exercise constitutional powers. Officials of the French State, people supporting the enemy’s enterprises or fighting against the Resistance could not become the Assembly members.

The Assembly was a consultative body and enunciated opinions on the issues submitted by the Committee. Yet the latter one was obliged to ask the Assembly for the opinion regarding the budget act and loans amounting to over 500 million francs. The Assembly’s critical opinion on reduction of budgetary expenditure or higher taxes resulted in another review of the subject. The ordonnance specified that the Assembly should give opinions on the draft of the ordonnance regarding establishment of provisional government. It appears that the role of the Assembly was larger than the powers specified in the ordonnance, which under war circumstances could not correspond to the competences of the democratically elected parliament. Importantly, a decision about establishing a quasi-parliamentary body consolidated legitimacy and legality of France. Furthermore, it confirmed the intention (expressed consistently since autumn 1940) to transfer power to the national representatives elected after liberation and announced sanctions against the Vichy officials.¹⁰³

Serge Bernstein, the author of the study on the history of Gaullism, contends that political Gaullism underwent a fundamental mutation between May and November 1943.

The logic of the choice of anti-Vichy policy, effectuated in 1940, [...] resulted in the combination of the republican nationalism and basic liberal democracy principles, and a switch from proclaimed political neutrality to the determination to restore republican values.

¹⁰² *ibid.*, p. 204.

¹⁰³ The speech delivered by René Capitant at the session of the Provisional Consultative Assembly is extremely interesting and representative for Free France. R. Capitant, *Que sera l’Assemblée provisoire* [in:] H. Michel, B. Mirkine-Guetzévitch, *Les idées politiques et sociales...*, *Id.*, pp. 265–268.

The transformation was completed in Algiers between June and November 1943, which meant transition of the Gaullist state into the stage of the virtual republican state, ready to restore republican law and order in liberated France.¹⁰⁴

Berstein seems to not fully recognize a fact that the pro-republican nature of the legal doctrine of Free France developed as early as in 1940.¹⁰⁵ In the first half of 1944, the French Committee of National Liberation made legal and institutional endeavours to liberate the territory of the mother country. The ordonnance issued on 21 April regulated the organization of public authorities in France after liberation and proclaimed “convention of the National Assembly as the Constitutional Assembly as soon as circumstances allow for ‘normal’ elections, not later than one year after the total liberation of the territory of our country.”¹⁰⁶ The ordonnance established electoral rights for women and the Committee’s territorial organization along with the new rules of the functioning of the Assembly. The ordonnance vested Assembly with more powers (Articles 27–30). Deputies were to elect the president of the provisional government by an absolute majority of votes, which meant adoption of the mechanism typical of the parliamentary government (Art. 25).¹⁰⁷ On 3 June 1944, the French Committee of National Liberation was transformed into the Provisional Government of the French Republic and since that time it operated in conformity with the rules specified in Algiers until 2 November 1945, when the constitutional act passed in a referendum became effective.

Undoubtedly, this was an explicit manifestation of republican rules. Based on them, Free France recognized Vichy as an unlawful and illegal regime. Noteworthy, Résistance members were by no means republicans in their thoughts and feelings.

The idea of the Republic was born spontaneously, refined and restored, out of the sacrifice, pain and friendship of the Résistance members [...] Therefore, just as in the times of the first republic, the

¹⁰⁴ S. Bernstein, *Histoire du gaullisme*, Perrin, 2001, p. 64, trans. B. Perlińska.

¹⁰⁵ Mirkine-Guetzévitch disagreed with the opinion about de Gaulle’s anti-republicanism or neutrality regarding this doctrine. Although the Author showed some lack of republican passion and emphasis in de Gaulle’s speeches, he interpreted his political line as an explicitly pro-republican. H. Michel, B. Mirkine-Guetzévitch, *Les idées politiques et sociales...*, *Id.*, p. 116.

¹⁰⁶ *Ordonnance du 21 avril 1944 portant organisation des pouvoirs publics en France après la libération*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, pp. 210–213.

¹⁰⁷ *ibid.*, p. 212.

words “patriots” and “Republicans” became synonyms again. The Republic was reborn under a slogan of uncompromising patriotism¹⁰⁸

– declared a respondent in the survey in which representative members of the Resistance were involved.

The doctrine of Free France was enunciated by René Cassin who deserves particular attention given a role he played in the European legal culture of the 20th century. R. Cassin (1887–1976) came from the family of the Jewish origins and, as already mentioned, was a man of explicitly republican and secular convictions. In 1940, Cassin had already a strong professional position as a public law expert. In London, he actively contributed to the establishment of UNESCO and got engaged in drafting a new declaration promoting the rights of an individual and citizens at the international scale. Cassin was the main author of the historic Declaration of Human and Civil Rights adopted by the General Assembly of the United Nations in 1948, which brought him a Noble Prize in 1968. After liberation he was the head of the Council of State (until 1960), consolidated authority of that body and in 1958 actively worked on the draft of the Constitution of the Fifth Republic.¹⁰⁹

Owing to the *Revue du Droit Public* editors, René Cassin’s writings from the years 1940 and 1941, were published in *France Libre* under the title *Un coup d’état. La soi-disant constitution de Vichy*. The so-called Constitution of Vichy¹¹⁰ was recounted. After reading those articles no one has doubts about the authorship of official documents issued by Free France. Cassin precisely lists all the breaches of the constitutional acts of 1875, focusing on challenging the lawfulness of the Vichy regime. Apart from the arguments raised in the documents of October 1940, Cassin stated that the deputies who left for North Africa to continue their fight against Germans were not admitted to the sessions.¹¹¹ He reminded that the adjudications issued by the Council of State and the

¹⁰⁸ H. Michel, B. Mirkine-Guetzévitch, *Les idées politiques et sociales...*, *Id.*, p. 96.

¹⁰⁹ *Dictionnaire de Gaulle*, *Id.* Information on René Cassin’s works on the foundation of UNESCO and a new declaration of the human and civil rights is available in the selection of Résistance documents: H. Michel, B. Mirkine-Guetzévitch, *Les idées politiques et sociales...*, *Id.*, pp. 12–14; René Cassin’s achievements in the years when he was a deputy chairman of the Council of State were recently elaborated by Catherine Teitgen-Colly, *René Cassin, Vice Président du Conseil d’État*, RDP 2011, no 1.

¹¹⁰ R. Cassin, *Un coup d’état. La soi-disant Constitution de Vichy*, (reprint) RDP 2010, no 3 (articles were published in *La France Libre* in December 1940 (vol. 1, No. 2) and January 1941 (vol. 1, No. 3), trans. B. Plonka.

¹¹¹ *ibid.*

Court of Appeal found any decisions made by legal persons or public institutions under threat or violence invalid. In addition, he highlighted the official change of the country's name and its ramifications in the international arena.

In Cassin's view, the constitutional act of Vichy provided foundations for the new, authoritarian and anti-democratic regime. Given the unlimited range of powers conferred upon the Head of the French State, a new political order was both monarchical and Caesarist. The author of the doctrine of Free France observed that the transformation of political system effected by Pétain had the hallmarks of the top-down revolution (*révolution par en haut*) as it was coerced neither by the invader nor pressure of the public opinion. The Author claimed that destruction of the republican order resulted from *coup d'État* carried out in favourable circumstances (defeat in the war against Germans). Cassin identified a wide range of sources of the political order established by Vichy, which was characteristic of the radical republicanism. He highlighted Boulangism, late 19th century nationalism and the school of Action française.¹¹² In the view of de Gaulle's associate, in his pre-war writings Ch. Maurras expressed hope that a sudden change in the political situation would result in the fall of the Republic. Cassin recognized *Croix-de-Feu*, the organization led by Colonel de La Rocque, and a number of obviously fascist movements as the forerunners of Vichy and

¹¹² Noteworthy, even a wider range of the sources of Vichy was offered by R. O. Paxton in his book *Vichy France: Old Guard and New Order*. The factors that Paxton classifies as those that provided the political underpinnings for Vichy also include the endeavours made by republican politicians to consolidate executive power: "Advocates of the strong executive power came from all political parties. Léon Blum, who was then a young member of the State Council and experienced former *chef de cabinet* of Marcel Sembat, a socialist minister for public works, designed a detailed plan in which he envisioned a much larger prime minister's cabinet, like that in Great Britain. On the other side of the political scene, in the parliament, André Tardieu, whose successive attempts to form a strong government failed, wrote about «a sovereign in captivity» and «a revolution that should be repeated»" R. O. Paxton, *Vichy France: Old Guard and New Order, Id.*, pp. 238–239. The Author makes no clear distinction between those projects and the ideas aimed to consolidate executive power, just as Action française and groups opposing republican traditions demanded. In my view, Paxton is wrong when he exposes affinities between the plans to rescue the Republic through the consolidation of executive power and proposals made by political groups opposing all republican traditions. It is really hard to posit that establishment of an institution consolidating the prime minister's position in the government demonstrates departure from the democratic and republican forms of the government. Similar association between republican drafts intended to consolidate executive power, presented by A. Tardieu, and monarchist and authoritarian concepts is found in the book by J. Eisler, *Od monarchizmu do faszyzmu. Koncepcje polityczno-społeczne prawicy francuskiej 1918–40 (From Monarchism to Fascism. Socio-political Concepts of the French Right in the Years 1918–40)*, PIW, 1987. The Author discusses Tardieu's concepts in the chapter on the ideas of the authoritarian and fascist state.

national revolution. He also ascribed co-responsibility for undermining the republican system to the 1930s reformism. In this context he listed a draft of the reform devised by Gaston Doumergue¹¹³ and scholarly publications of Joseph Barthélemy.¹¹⁴

Certainly, de Gaulle did not share all the views expressed by René Cassin, particularly his non-legal assessments published in *France Libre*. Yet there is no doubt that he consulted Cassin on the development of the doctrine of Free France. Cassin's writings are full of passion and exaggeration but they are an excellent manifestation of the fundamental controversy between republican rules and the Vichy order. This is because the French ideological profile was shaped by political strains critical of the republican tradition: monarchism, corporatism and authoritarianism. Definitely, Cassin was unjust when he exposed Fascist and Nazi inspirations of the Vichy regime. François Furet aptly observed that unlike the countries where the crisis of parliamentary democracy led to the establishment of fascist systems, Vichy adopted the political solutions close to the traditionalist doctrine and rejected the French Revolution heritage from this position.¹¹⁵ That remark corresponds to the view expressed by the majority of historians who emphasized the fundamental significance of the impact of political ideas of Action française on the Vichy regime. Jacques Godechot contended that Marshall Pétain's closest aides comprised mostly

¹¹³ Gaston Doumergue (1863–1937), a French politician espoused with radical groups; president of France; 1902–1905 minister for colonies, trade and education, 1909–1910; prime minister and minister for foreign affairs, 1913–1914; president of France, 1924–1931; returned to politics in the aftermath of the 6 February crisis; was appointed a prime minister in 1934; put forward a number of proposals for political reforms intended to consolidate the executive power.

¹¹⁴ Joseph Barthélemy (1874–1945), a professor of law and a centre-right French politician; critical of the parliamentary supremacy in the political system of the Third Republic; an advocate of the review of the constitutionality of laws and economic freedom threatened with interventionism; drew Michel Debré's attention to the significance of the regulations established by the National Assembly; his *Traité de droit constitutionnel* is one of the classics of the French constitutional law; in 1937 played a crucial role in the drafting of the constitutional reforms designed by the Bardoux Committee; after the 1940 defeat, a minister for justice in the Vichy government, 1941–1943; the author of the draft constitution in 1944; died during his criminal trial following his war activities.

¹¹⁵ This is what F. Furet wrote about the identity of Vichy: "Veneration for the 1789 rules, a subject of so many pedagogical endeavours, or denunciation of the 1793 crimes, which is actually the rejection of those rules, are still in the centre of attention of French political ideas until the 1950s. Fascism gives the international dimension to the conflict of ideas. Importantly, in France this conflict takes not a fascist but traditionalist form rooted in the hostile obsession about 1789," *idem.*, *Prawdziwy koniec rewolucji francuskiej*, *Id.*, p. 10, French edition: F. Furet, *La Révolution française est terminée*, *Id.*

advocates of Maurras and Action française as well as supporters of the authoritarian solutions adopted by Francisco Franco and António Salazar. Their primary goal was to destroy the Republic and expunge the heritage of the Revolution.¹¹⁶ The draft constitution adopted in 1944 was most representative for the political doctrine of Vichy. The document drew up by the team headed by J. Barthélemy could become effective but remained an extremely significant proof depicting the departure from republican tradition. Jacques Godechot contends that the draft constitution of Vichy provided for the regulations regarding the relations between executive and legislative powers similar to those specified in the acts of 1875 but in the authoritarian purport.¹¹⁷ Yet in my view, Vichy broke with the republican rules and heritage of the French Revolution unwaveringly and explicitly. The draft did not adopt a rule of sovereignty of the nation as a source of power and built legitimacy of the national authorities in a different way. A pivotal constitutional value was the weal of the state as an institution ensuring order and justice, whose “authority is based on the nation’s consent.”¹¹⁸ This formula was a hallmark of the authoritarian response to the crisis of parliamentary democracy.¹¹⁹ Thus, the parliamentary supremacy was challenged after going beyond the idea of the nation’s sovereignty. Consequently, the Head of French State was vested with supreme powers – he was to “epitomize the nation and bear the burden of its destinies.”¹²⁰ Pursuant to the fundamental regulations, the Head of the State is “the arbitrator of supreme interests of the country, ensures functioning of its institutions by maintaining a permanent trust between a government and nation.”¹²¹ The draft constitution stipulated that the power came out of the Congress comprising “representatives of the nation and delegates from the territorial communities.”¹²² Yet the electoral

¹¹⁶ J. Godechot, *Les constitutions...*, *Id.*, p. 342.

¹¹⁷ *ibid.*

¹¹⁸ M. Duverger, *Constitutions et documents politiques*, Presses universitaires de France, 1996, pp. 175–180, cited after the Polish edition: *Projekt konstytucji Państwa Francuskiego z 1944 roku*, trans. T. Janasz, [in:] *Idem, Państwo Francuskie 1940–1944*, *Id.*, p. 307.

¹¹⁹ On the other hand, there are certain affinities between a draft of the Vichy Constitution and the April Constitution. I raise this issue in the last chapter. See also H. Izdebski, *Les idées constitutionnelles du général de Gaulle et l'Europe d'aujourd'hui*, Espoir, 1992, No. 85.

¹²⁰ M. Duverger, *Constitutions...*, *Id.*, pp. 175–180, cited after the Polish edition: *Projekt konstytucji Państwa Francuskiego z 1944 roku*, *Id.*, p. 308.

¹²¹ *ibid.*

¹²² *ibid.*

rights were to be conferred upon only native French, which contravened the idea of the nation as a community of all citizens. The authors of this document also rejected an idea of the separation of powers since, in their view, it was a threat to the state's unity. Instead, they proposed the division into functions corresponding to the three facets of the state's activity. The governmental powers were to be exercised by the Head of State, Ministers and Secretaries of State; legislative powers by the Senate and Chamber of Deputies; judiciary powers by judges and prosecutors with a separate status, which was to guarantee their independence.

The draft sought no republican rationalization for establishing a constitutional court. The Supreme Tribunal of Justice was to be also a constitutional court and an institution tasked to enforce constitutional accountability. The document provided for the constitutional review of parliamentary statutes whenever their constitutionality was challenged. Thus, the Tribunal was tasked to review every allegation of unconstitutionality that could be filed "solely in the event of a breach (by a law) of the specific constitutional instruction by the parties of judicial argument, prosecutor and on the court's initiative in the first instance proceedings."¹²³

Thus, the draft constitution of Vichy was in no way rooted in the heritage of the French Revolution: abandoned the 1789 Declaration of the Rights of Man and of the Citizen, recognized human freedom and dignity as supreme and inviolable values and posited that to protect them, the state should ensure order and justice. Hence, a Thomistic concept of a human person as a free existence, rooted in the society and having a sense of duties towards community, is embedded in the doctrine of Vichy. The individualistic and liberation Declaration of 1789 was replaced by a strive for *harmony* between order and freedom. The draft rejected individualistic and a counter-state understanding of the rights of an individual prescribed in the Declaration and put them in the context of existence in the community and fulfilment of related obligations.¹²⁴ The Vichy law also rejected the idea of a secular

¹²³ *ibid.*, p. 311.

¹²⁴ The question of ownership was defined in accordance with the ideals found in the Christian social science in between war years, in response to the crisis of capitalism and a process of its oligarchization. The draft also guarantees the inviolability of the private ownership on condition that it was "acquired through one's work and family's prudence." Thus, a social and family function of ownership was emphasized as its fundamental justification. In addition, the draft of Vichy constitution provided particular protection to the family as a bedrock of social order and granted the head of a family an additional vote in elections. Although this idea was first articulated in the constitution of 1848, it

state. The draft acknowledged rights of religious communities and political practice was focused on the cooperation with Church. Vichy abandoned a model of secular school and entered into intensive cooperation with Church in this field.¹²⁵ Decentralization and corporatism took a legal form. The rights of territorial communities were recognized according to the political recommendations made by Action française, that called for decentralized monarchy.¹²⁶ Chapter V of the draft was devoted to the self-government institutions. A plan to establish the provincial councils consisting in two thirds of the representatives elected by department councils and in one third of the people appointed by the government of the representatives of professional and Corporation organizations as well as representatives elected from the provincial elite (art. 40) was definitely something new. The draft specified that representatives of the territorial communities and deputies formed the Congress that elected the Head of the State.¹²⁷

C. Reconstruction of Republican Legality

The defeat and ensuing fiasco of the “Vichy project” undermined severely the position of ideological strains critical of the republican tradition. Yet, in my opinion, the significance of de Gaulle’s view as well as his decisions should not be played down. The leader of Free France consolidated the republican tradition through the consistent policy based on the coherent and well-thought-out doctrine. Contrary to R. Rémond’s view, the doctrine of Free France controverted not only legitimacy but also legality of the Vichy regime.¹²⁸ De Gaulle’s stance on that issue

was here a manifestation of the consistent pro-family policy. *ibid.*, p. 307.

¹²⁵ R. O. Paxton, *Vichy France...*, *Id.*, pp. 198–216.

¹²⁶ Other doctrinal sources were elaborated by Jacques Godechot, who contended that a corporatist system of a professional organization developed under the influence of Hubert Lagardelle, a theoretician. J. Godechot, *Les constitutions...*, *Id.*, p. 341.

¹²⁷ Yet, political practice was in contradiction to the idea of decentralization, which is confirmed by historians studying the practice of Petain’s government. Teresa Janasz emphasized the dissolution of general councils and their substitution by appointed commissioners and dissolution of district councils whose powers were conferred upon prefects. The government appointed mayors in the districts where a number of residents totaled over 2000. This view was shared by Georges Burdeau, who contended that the corporatist ideas were never put into practice in the Vichy polity.

¹²⁸ R. Rémond, *Les droites aujourd’hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*, p. 220.

never found a common acceptance. Noteworthy, de Gaulle's line of interpretation provoked doubts even among Free Frenchmen, which is demonstrated in R. Aron's memoirs, where he showed some reservation about the explicit denunciation of Vichy and the legal views furthered by Cassin.¹²⁹

Hence, *Rétablissement de la légalité républicaine*, declared in August 1944, was a logical outcome of the legal and political doctrine of Free France.¹³⁰ Indeed, de Gaulle had no intention to proclaim the Republic in the Paris Town Hall, which Georges Bidault suggested on 25 August 1944 and which was in conformity with the revolutionary tradition. Thus, he refused to take over power on the conditions set by Résistance, dominated by the communist movement in those years. This fact was highlighted by André Siegfried in the book where he analysed transition from the Third to the Fourth Republic.¹³¹ Yet the doctrine developed consistently since the Brazzaville Manifesto allowed for the proclamation of the continuity of the Republic:

The Republic never ceased to exist. Free France, Fighting France and the French Committee of National Liberation embodied it successively. Vichy had no legal significance in the nation's life. I am the president of the Government of the Republic. Why should I proclaim it?¹³²

In his book *Demokracja francuska (French Democracy)* Konstanty Grzybowski provided a very accurate analysis of the situation of the Free Frenchmen leader as the Prime Minister of the Provisional Government in 1944: "de Gaulle was a legal continuation of the Third Republic and at the same time a road to the restoration of democracy."¹³³ De Gaulle's policy in the years 1944–1945 enunciated political underpinnings of post-war France. Before he pictured his own vision of the constitutional reforms in Bayeux, in

¹²⁹ R. Aron, *Le Spectateur engagé*, Livre de poche, 2005, cited after the Polish edition: R. Aron, *Widz i uczestnik*, CDN, 1984, pp. 61–62.

¹³⁰ *L'ordonnance du 9 août 1944 relative au rétablissement de la légalité républicaine sur le territoire continental*, [in:] M. Duverger, *Constitutions et documents politiques*, Id., p. 213.

¹³¹ A. Siegfried, *De la III^e à la IV^e République*, Grasset, 1956, p. 126.

¹³² Ch. de Gaulle, *Mémoires de guerre*, Id., cited after Polish edition: Ch. de Gaulle, *Pamiętniki wojenne*, Id., vol. II, p. 330. In this case Konstanty Grzybowski was wrong asserting that de Gaulle put an end to the arguments of formalists as late as in August 1944, when illegality of Vichy government was proclaimed. Actually, the ordonnance of 9 August 1944 on the reconstruction of republican lawfulness closed the process initiated in autumn 1940. See K. Grzybowski, *Demokracja francuska*, Id., p. 161.

¹³³ K. Grzybowski, *Demokracja francuska*, Id., p. 161.

June 1946, de Gaulle had implemented changes that became the fundamental principles of the Fourth and Fifth Republics.

Four issues that turned out to be germane to the post-war shape of the French statehood should be highlighted. Firstly, reconstruction of republican lawfulness was effectuated in a disciplined manner and without disrupting the continuation of national institutions.¹³⁴ The ordonnance of 7 August 1944 on “the restoration of republican lawfulness” paved the way for making the Vichy illegal and, at the same time, preserving continuity of activities of national institutions.¹³⁵ The ordonnance of 9 August 1944 declared invalidity of all statutes and legal regulations promulgated after 16 June 1940 and, at the same time, imposed a requirement that invalidity of the laws promulgated by the Vichy government must be clearly found. Invalidity was found with regard to the constitutional act of 10 July 1940, all the statutes recognized as constitutional, statutes establishing special jurisdictions, statutes imposing forced labour for the enemy, statutes regarding secret associations and imposing any kind of discrimination against Jews. In other cases transitional period in the process of elimination of the legal ramifications of the Vichy statutes was to be applied or the statutes could even be recognized if their change would lead to excessive disturbances. Noteworthy, post-war France perpetuated some Vichy laws, primarily pro-family, retirement or anti-alcoholic regulations.¹³⁶

Secondly, another element germane to the reconstruction of the state was the modernization of administration. To put this into effect, École nationale d'administration (ENA) was established, based on the idea offered by Michel Debré before World War II, to educate and train post-war political and bureaucratic elites and improve the quality of governance.¹³⁷ The school's overriding objective was to facilitate promotion of the young people of non-bourgeois background for senior public positions and

¹³⁴ J. Chapsal contended that the composition of provisional government also manifested the search for synthesis of traditional parties and new political powers springing out of Résistance. J. Chapsal, *La vie politique...*, *Id.*, p. 80.

¹³⁵ *L'ordonnance du 9 août 1944...*, *Id.*, p. 213.

¹³⁶ A joint publication on different aspects of the restoration of republican legality is the outcome of the conference held by the Foundation Charles de Gaulle: *Le rétablissement de la légalité républicaine*, Complexe, 1996.

¹³⁷ M. Debré, *Un projet d'École nationale d'administration*, Dalloz hebdomadaire, 1938, no 7. This is how de Gaulle explained why that institution was established: “When the structure delineated in this way takes a final shape, the State shall command new levers ensuring sufficient impact on France's activity to make this country stronger and more externally radiating.” (*idem*, *Mémoires de guerre*, *Id.*, cited after the Polish edition: *Pamiętniki wojenne*, *Id.*, vol. III, p. 104).

thus provide democratization of the clerical elite. Marc Bloch,¹³⁸ a pre-eminent French historian, elaborated on that subject in *Examen de conscience d'un Français*. The country was consolidated following a close cooperation between de Gaulle and the Council of State, an exceptional institution combining powers of the supreme administration court and a body consulting parliamentary bills. On 31 July 1945, de Gaulle issued the ordonnance under which all the bills submitted by the government were to be obligatorily consulted by the Council of State.¹³⁹ Future developments proved that the Council of State played a critical role in the process of development of the draft Constitution of the Fifth Republic¹⁴⁰ and its consulting role was enshrined in the Constitution. De Gaulle still had a particular respect for the Council of State after his resignation as a president. In his article on the high-level administration's role in the Fourth Republic Dominique Chagnollaud refers to de Gaulle's letter to Cassin, written in 1951, where the General manifests particular respect for the Council of State as a "solid bastion of the state."¹⁴¹

Thirdly, there is definitely no doubt that de Gaulle contributed to the consolidation of the republican tradition. In the years of Free France, de Gaulle consciously employed the phrase "primary principles of the Republic" as those that were crucial for the constitutional identity of France. Under the doctrine of Free France, the Constitutions of the Fourth and Fifth Republics confirmed inviolability of the republican forms of the governance.

Furthermore, de Gaulle's decisions provided the basis for the constitutionalising of the idea of indivisibility, secularity, democratism and social nature of the Republic in the post-war constitutions. The doctrine of Free France advocated a superior status of the Declaration of the Rights of Man and of the Citizen passed in early years of the French Revolution. The preamble to the Constitution of 1946 confirmed "human rights and liberties honoured by the Declaration of 1789 and fundamental principles recognized by the laws of the Republic."¹⁴² Reference to the heritage of the French Revolution

¹³⁸ M. Bloch, *L'étrange défaite*, *Id.*, cited after the Polish edition: M. Bloch, *Rachunek sumienia Francuza*, *Id.*, pp. 246–247.

¹³⁹ J. Sauvé, *Le Conseil d'État et la Constitution*, RFDC, 2009, No. 77

¹⁴⁰ *ibid.*

¹⁴¹ D. Chagnollaud, *La haute administration au pouvoir? Les «Grands commis» de la IV^e République*, Pouvoirs, 1996, No. 76.

¹⁴² *Constitution de la République Française*, cited after the Polish edition: *Konstytucja Republiki Francuskiej*, trans. A. Mycielski, *Id.*, p. 9.

coincided perfectly with the ideological line of the Free France leader. Noteworthy, the amendment supplementing the preamble to the Fourth Republic Constitution by reference to the principles recognized by the laws of the Republic was proposed to highlight the relationship between the heritage of 1789 and liberation.¹⁴³

Moreover, de Gaulle's policy pursued in the early post-war years led to the development of a statist model of economy and a social nature of the Republic of France. It should be reminded that the provisional government made a decision on the nationalization of the banking, insurance, power and coal industries as well air transport. In January 1946, Bank of France and large deposit banks were nationalized.¹⁴⁴ Walter Laqueur highlights the extension of the state's interventionism that had already been discernible in the French politics. It was then, that the mechanisms of economic planning, applied in the Fourth and Fifth Republics¹⁴⁵, were introduced. In the years 1944–1945, the insurance cover and a system of family support were extended. De Gaulle and his associates shaped a social orientation of the Fourth Republic. Importantly, the Constitution of October 1946 defined France as an indivisible, secular, democratic and social republic (Art. 1 of the Constitution of 13 October 1946) and a preamble to the Constitution stipulated new economic and social rules. They included a right to work, strike, join trade union, establish working conditions and influence the way the enterprise is managed. A preamble also declared a right to have access to the health care, social insurance, rest and leisure, equal access to vocational education and culture, and family policy ("The Nation provides an individual and a family with conditions necessary for their development"¹⁴⁶) and also provided support in the process of nationalization, by stating that: "Every estate or enterprise whose exploitation is or is going to be a public service or real monopoly should become a property of the community."¹⁴⁷

A continuity between the Fourth and Fifth Republics is also discernible. The Constitution of 1958 confirmed indivisibility,

¹⁴³ Amendment was tabled by M. Guérin, a M.R.P deputy, Ch. Vimbert, *La tradition...*, *Id.*, p. 204.

¹⁴⁴ J. Baszkiewicz, *Historia Francji*, Ossolineum 1978, p. 700.

¹⁴⁵ See W. Laqueur, *Europe in Our Time: A History 1945-1992*, Penguin Books, 1993, cited after the Polish edition: W. Laqueur, *Historia Europy 1945-1992*, Puls, 1993, p. 233.

¹⁴⁶ *Constitution de la République Française*, cited after the Polish edition: *Konstytucja Republiki Francuskiej*, trans. A. Mycielski, *Id.*, p. 10.

¹⁴⁷ *ibid.*

secularity, democratism and social nature of the Republic, which gained a constitutional status after World War II. As I have already mentioned, in 1953 the Council of State proclaimed the existence of the republican constitutional tradition, embodied in the Declaration of the Rights of Man and of the Citizen of 1789, preambles to the Constitutions of the Fifth and Fourth Republics. Five years later a preamble to the Fifth Republic Constitution declared attachment to human rights and rules of national sovereignty, just as they were stipulated in the Declaration of 1789, and supplemented by a preamble to the Constitution of 1946. In 1971, the Constitutional Council defined the term a “constitutional bloc” as a broad basis for the review of the constitutionality of laws. According to the Council’s adjudication, the “constitutional bloc” comprised the text of the Constitution, norms included in the Declaration of 1789, political, social and economic rules enlisted in the introduction to the Constitution of 1946 and “fundamental rules recognized by the laws of Republic” to which this introduction referred. “The constitutional bloc” of such a broad structure would have been impossible had it not been for de Gaulle’s conscious endeavour to reinforce the republican tradition.¹⁴⁸

Fourthly, de Gaulle extended political rights and democratized the Republic. In April 1945, women were, for the first time, vested with voting rights in the municipal elections. A year later, de Gaulle introduced a change of great importance: the constitutional referendum institution. The ordonnance of 17 August 1945 was of great importance since it introduced consultations with the French people through the institution of a referendum. Under the ordonnance, the people were empowered to make decisions critical for the constitutional order, before the National Assembly was elected.¹⁴⁹ Firstly, the French people were asked to decide about the end or the continuing of the Third Republic by answering the question specified in Art. 2 of the ordonnance: “Do you

¹⁴⁸ L. Garlicki, *Rada Konstytucyjna...*, *Id.*, p. 61–63.

¹⁴⁹ In the view of J.-L. Debré, de Gaulle’s associates pondered over the idea that the Constitution draft should be drawn up by the provisional government and put to a vote in referendum. Such a solution could be effectuated only in the first months after the liberation of metropolis. De Gaulle repudiated it, convinced that France needed restoration of political life and a new political elite. In May 1945, a provisional consulting assembly began to work in a new line up, as a *quasi*-parliamentary institution. Thus, the referendum staged in November 1945 was a compromise, in-between solution putting to a vote de Gaulle’s draft and return to the laws of 1785. J.-L. Debré, *Les idées constitutionnelles du général de Gaulle*, L.G.D.J, 1974, pp. 64–65.

want the National Assembly to become Constitutional Assembly?" The "yes" answer to this question meant that the Third Republic would cease to exist ensuing from the citizens and not the National Assembly's decision. Secondly, through the referendum institution the nation was to decide about the provisional government's form until a new Constitution was effectuated, which ensured a kind of a balance between powers, and set a seven-month time constraint to finish the process of drafting the new Constitution. The question specified in Art. 4 was about whether the Assembly was totally free to make decisions or it was rather bound by the nation's will. Thirdly, the *ordonnance* introduced the institution of the constitutional referendum¹⁵⁰ into the French constitutional system. This, in turn, meant that the Constitutional Assembly was subject to the revision by the nation empowered to make a final decision about endorsing constitutional solutions. This regulation was retained in Art. 90 of the Constitution of the Fourth Republic. De Gaulle ordered a referendum in which the nation was vested with *pouvoir constituant* (constituting power) which had been before conferred solely upon the parliament. It was citizens who, in the referendum, put an end to the Third Republic, decided about elections of Constitutional members, the deadline for drafting a new constitution and a rule that in future any statute passed by the Constitutional Assembly should be endorsed in referendum. The latter decision meant that the nation was to be invested with *pouvoir constituant* powers also in future.

De Gaulle contended in his *Mémoires d'espoir* that such a decision had a constitutional precedent's effect that undermined the position of political parties:

Nonetheless, bearing the future in mind, even before the National Assembly was elected, I established the institution of a referendum so that the Nation could on its own decide that ever since a constitution should have its direct endorsement before it became effective. In this way, I designed a democratic instrument that I could employ the other day to enact a good constitution to supersede the one that was soon going to be adopted by the parties and in their interest.¹⁵¹

¹⁵⁰ *Ordonnance no 45-1836 du 17 août 1945, instituant une consultation du peuple français par voie de référendum et fixant le terme des pouvoirs de l'Assemblée consultative provisoire*, [in:] M. Duverger, *Constitutions et documents politiques*, *Id.*, pp. 224–226.

¹⁵¹ Ch. de Gaulle, *Mémoires d'espoir*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Pamiętniki nadziei (Memoirs of Hope)*, *Id.*, p. 30.

André Siegfried, an outstanding French historian and political scientist, was right to note that a referendum involved the adoption of a rule that “it is the nation and not the National Assembly that exercises sovereignty.”¹⁵²

Putting an end to the Constitutional Assembly’s monopoly for *pouvoir constituant* and granting this power to the nation in the referendum endorsing Constitution was a crucial step towards democratization of the Republic. De Gaulle was able to do this owing to personal authority and popularity and a fact that in the years 1940–1945 he upheld republican traditions so that republican principles became the foundations of post-war France. This is why the Fifth Republic could be established as an institutional shift within republican traditions.

¹⁵² A. Siegfried, *De la III^e à la IV^e République*, *Id.*, p. 130.

Chapter III

Deep Roots –

Republican Reformism in the 1930s.

A. First Projects of Republican Reformism

There is much evidence that in 1945 de Gaulle had no lucid vision of the new institutions that could be an alternative for the parliamentary republic. Jean Louis Debré, in his book *Les idées constitutionnelles du général de Gaulle*, noted that in those years de Gaulle's constitutional doctrine was based on the negative assessment of the Vichy laws. Denunciation and elimination of the Vichy system as well as the criticism of the Third Republic were of critical importance but this did not necessarily mean that he demonstrated a totally negative attitude towards the constitutional laws of 1875.¹

Yet the experience he gained as the head of the provisional government between August 1944 and January 1945 showed him a fundamental weakness of the polity based on the parliamentary supremacy. De Gaulle's policy was contested by the elites of the primary political parties that resumed their activities after World War II. The General consciously repudiated the idea of power based on the conditions dictated by party leaders. The direct reason for his resignation from the post of the prime minister of the Provisional Government in January 1946 was his opposition against the motion tabled by a socialist deputy André Philip who strived to reduce defence expenditure by 20 per cent in the 1946 budgetary act. The motion he tabled was typical of the parliamentary governments. A parliamentary majority did not dismiss the government but imposed their will about the issues of critical importance for the state. Consequently, the government was no longer able to act in accordance with its own program.

¹ J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, p. 48.

De Gaulle had no doubts about the return of the practices typical of the parliamentary governance. This is what he said about it in his *Mémoires de guerre* :

Party governance is back again. I denounce this kind of governance. But apart from enforcing dictatorship, which I do not wish and which would undoubtedly have a disastrous ending, I am in no position to hamper it. Therefore, I must give in.²

A demand for a fundamental reform of the political system and consolidation of the state had no advocates among Résistance members. When de Gaulle issued the aforementioned ordonnance introducing consultations with the French people through the referendum (17 August 1945) he faced the opposition of a wide spectrum of political groups, including those that grew out of Résistance. A speech delivered by François Menthon,³ Minister for Justice, before the Consulting Assembly in the French Committee of National Liberation was representative in this respect. The aforementioned André Philip, whose motion was the direct cause of de Gaulle's resignation, was an active member of Résistance and commissioner in the French Committee of National Liberation in Algeria.

Noteworthy, the majority of groups involved in Résistance and Free France had no intention to launch any institutional changes in the process of the national revival. Boris Mirkine-Guetzévitch, the author of a series of articles in which he enunciated social and constitutional ideas of Résistance, emphasized that the demands for replacing elites and forming a new leadership class to replace the disgraced elites of the Third Republic, purging administration and prosecuting people collaborating with German occupants and Vichy regime were much more important than any drafts of political reforms.⁴ It seems that there are certain affinities between those demands and the manifesto of Solidarity, where the revival of civic attitudes and a sense of responsibility for the public weal were recognized as more crucial than institutional reforms.⁵ The

² Ch. de Gaulle, *Mémoires de guerre*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Pamiętniki wojenne*, *Id.*, vol. III, p. 289.

³ J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, p. 73.

⁴ *La pensée politique et constitutionnelle de la Résistance*, [in:] H. Michel, B. Mirkine-Guetzévitch, *Les idées politiques et sociales...*, *Id.*, pp. 39–77.

⁵ See R. Matyja, *Konserwatyzm po komunizmie*, Wydawnictwo Akademickie i Profesjonalne, 2009; K. M. Ujazdowski, *Ciasna przestrzeń demokratycznego socjalizmu*, [in:] *Polska Solidarność. Kontrowersje, oblicza, interpretacje*, ed. J. Kloczkowski, OMP, 2011, p. 137–155.

majority of constitutional drafts proposed by the groups involved in Résistance provided for the political superiority of the parliament at the expense of the executive power.⁶ Thus, the question arises whether there was any output of the constitutional thought that could be exploited by de Gaulle and his associates interested in building a strong state and eliminating the faults that led to the fall of the Republic in 1940 and re-emerged after Liberation.

Endeavours to reform constitutional acts were made as early as before World War I. Noteworthy, nearly all of them were initiated by the exponents of the republican Right. As it had already been mentioned, at the early stage of his political activity Maurice Barrès was an advocate of the democratic republic and called for the introduction of institutions of general presidential elections and a referendum. At the mature stage of his activity he paid no particular attention to political issues. In 1899, Paul Déroulède, a republican nationalist, tabled a resolution draft aimed to remove from the constitutional acts any instructions contrary to the “principle of sovereignty voiced in the general elections.”⁷ Action libérale populaire (Liberal and Popular Action) established in 1902 and led by Jacques Piou, offered a plan of the fundamental reforms, including president’s election by a large and representative electoral college, introduction of the referendum institution and establishment of the Supreme Court as a guardian of the constitutional rights of every individual.⁸ The latter demand was put forward by Charles Benoist, a jurist and politician, in 1906, in the resolution draft calling for constitutional amendments.⁹ Noteworthy, none of those resolutions envisaged a procedure of the constitutional revision. No reform endeavours made in those

⁶ Mirkine-Guetzévitch, an expert at this subject, distinguished five options: return to the constitution of 1875 and Third Republic; return to the Third Republic with certain corrections; replacing the parliamentary system with the presidential system in the American version (only marginal support in Résistance); the assembly governance, unicameral parliament and preconization of the people’s democracy, like that imposed by the communists in Bulgaria, Poland, Romania and Hungary (that option was proposed by the Communists); the constitutional solution adopted in the Fourth Republic, which, in Mirkine-Guetzévitch’s view, was the combination of political democracy and the guarantees for social rights and faithfulness to the parliamentary system. *Idem: La pensée politique et constitutionnelle de la Résistance, Id.* See also J.-L. Debré, *Les idées constitutionnelles...*, *op. cit.*, pp. 36–49.

⁷ C. Bigaut, *Le réformisme...*, *Id.*, p. 48.

⁸ *ibid.*

⁹ Charles Benoist (1861–1936), was the only reformer who evolved from the Republican Right to monarchism. His publications include *La réforme parlementaire*, Librairie Plon, 1902, *Les maladies de la démocratie*, Edition Prométhée, 1929, *La crise de l’état moderne*, Maison Didot, Firmin-Didot et Cie, imprimeurs-éditeurs, 1897.

years ever took a shape of specific proposals for any constitutional reforms.¹⁰

Obviously, during World War I, when all French political parties were united in l'union sacrée, political reforms were not the subject of any public debate. Yet after the end of the war the interest in constitutional reforms re-emerged with much bigger power. The first initiative in this respect was launched by President Alexandre Millerand in 1923 and aimed to restore a literal reading of the constitutional laws of 1875 and grant the president a right to dissolve the parliament chamber.¹¹ During the electoral campaign, Millerand stated that he would step down if the National Block lost, which sparked heavy criticism from the Left and radical political groups. After election victory of the left-wing parties, the president was forced to step down, which meant perpetuation of the passive role of the president in the constitutional system.¹² In the 1920s, in response to the parliament's poor legislative efficacy, there emerged a practice of using the decree legislation based on the authorizations granted by the chamber of deputies. Its forerunner was Prime Minister Raymond Poincaré, who called mighty parliamentary commissions the institutions characterized by small steps and great pretensions.¹³ An instrument of the decree legislation was applied over successive years by a number of prime ministers: G. Doumergue in 1934, P. Laval in 1935, C. Chautemps in 1937 and É. Daladier in 1938.¹⁴ This produced a new constitutional rule without any amendments made to the constitutional laws. The authorizations for issuing decrees did not solve a problem of the management efficacy in a long-term perspective and manifested a deep crisis of the parliament's legislative function. Yet this could inspire politicians to devise a reform of the legislative power and reduce, if not eliminate, the abuses observed at the parliamentary stage of the legislative process.

Parliamentary work on the revision of the polity reached their height in 1934. The February mass protests against corruption of political elites resulted in the change of the government and showed a need for constitutional reforms. Among their advocates was Gaston Doumergue, the former president, who was appointed

¹⁰ This is confirmed by the opinions of C. Bigaut i N. Wahla. C. Bigaut, *Le réformisme...*, *Id.*; N. Wahl, *Aux origines de la nouvelle Constitution*, RFSP 1959, No. 1.

¹¹ C. Bigaut, *Le réformisme...*, *Id.*, pp. 50–51.

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

the prime minister. Under his auspices the parliament began to work on the political reforms. In March 1934, the Commission for the Reform of the State was established at the Chamber of Deputies, tasked to submit one or several reports including proposals for changes. The Commission's demands and recommendations regarded different fields but offered no coherent vision of political transformation. The body proposed a reform of the Lower Chamber regulations that would concentrate legislative activities in the parliamentary commissions. Amendments to statutes would be put forward there and not at the plenary session of the Lower Chamber. Moreover, reduction of several permanent commissions was recommended. Rollin's report called for empowering the government to issue decrees whenever controversy between the Chamber of Deputies and the Senate aroused during the legislative process. The president's right to dissolve the Chamber of Deputies was reconsidered. Paul Reynaud espoused abolishing the requirement for the Senate's approval and proposed investing the president with the power to dissolve the Lower Chamber without a countersignature, excluding a three-month period following the Senate election. Furthermore, the Commission pondered financial stability of the country and suggested that any increase in expenditure or decrease in incomes in the budgetary act were allowed, provided that equivalent sources of funding were specified. Finally, the Commission's recommendations included reduction of a number of ministers to 19, establishment of the Prime Minister's Office and the national economic authorities comprising regional economic councils and a national economic council.

In August 1934, Prime Minister Doumergue presented a draft devised by a team of his associates, where former Prime Minister André Tardieu, an ardent advocate of reforms played a very significant role. The draft envisioned for investing the president with the power to dissolve the Lower Chamber. During the first year of the tenure such power could be exercised upon the Senate's consent, and over successive years solely at the president's discretion. The draft presented by Prime Minister Doumergue provided for the reduction of a number of ministers to 20 and excluded any amendments to the budgetary statutes unless both chambers of the National Assembly pass the adequate income. In the event that the budget were not passed up to the 1st of January, the president was empowered to effectuate a mini-budget by the decree adopted by the Council of Ministers. The demand to establish a special status of officials, which ensured stability and respected

political neutrality, was quite innovative.¹⁵ Charles Bigaut noted that there was a substantive affinity regarding primarily rationalization of the budgetary procedure and protection of public finances between the draft devised by the Commission for the Reform of the State and that offered by Prime Minister Doumergue.¹⁶

Legislative output of the Commission for the Reform of the State and the draft proposed by Prime Minister Doumergue yielded no desired outcome.¹⁷ Still, a number of issues were addressed: the Prime Minister's Office was established, which enabled the head of the government to effectively perform this function without a need to take over another department *loi de finance du 24 décembre*. Noteworthy, such an institution had already functioned in Germany and Great Britain. Another positive outcome was the establishment of the Economic Council that was a forum for submitting opinions and presenting economic interests. The Council operated and participated in consulting the statutes important from the economic point of view, based on the act passed in 1936.

Hence, constitutional laws establishing the political system of the Third Republic were not amended since 1884. The only exception was amendment to the constitutional act of 10 August 1926, regarding the organization of public authorities, that established the autonomous fund of the national defence budget management. After the electoral victory of the Popular Front in 1936, a process of reforms was blocked and its leader Léon Blum opposed planned reforms. The leader of French socialists accused advocates of the political reform of the return to Boulangism and a strive for the authoritarian dictatorship. Blum sought revival of good political practices and establishment of the big political parties capable of stabilizing parliamentary governments.¹⁸

¹⁵ *ibid.*, p. 55.

¹⁶ *ibid.*

¹⁷ The reasons for failure of the constitutional reform and related accountability of prime minister Doumergue are discussed by Christopher Charles in "*Héros de la normalité*" et circonstances inhabituelles: *incapacité de Gaston Doumergue à réformer L'État à la suite du 6 février 1934*, RFDC 2005, No. 64.

¹⁸ Léon Blum (1872–1950), a jurist, socialist politician; was appointed prime minister three times, 1936–1937, 1938 and 1946–1947; since 1914 a leader of the French Socialist Party; after 1940 defeat and establishment of Vichy government was imprisoned in Buchenwald; after 1945 was appointed an ambassador in the USA and head of French UNESCO mission; advocate of political reforms aimed to consolidate prime minister's position; in his young years, as an associate of prime minister Marcel Sembat, put forward a proposal to establish a general secretariat of the government; however, acting as the prime minister obstructed endeavours to set up such a body; strong opponent of de Gaulle's political concepts in the postwar years.

* * *

The political reforms drafted by the parliament and the government recognized the constitutional acts of 1875 and envisaged their amendments or supplementations. As the parliamentary supremacy was acknowledged constitutionally, the supreme act could become the domain of the regulations of the lower and upper chambers, which, in turn, were not ready to curb on their competences.

Unlike those drafts, the original concepts that developed outside the parliament could go beyond the limits prescribed by the constitutional acts of the Third Republic and were comprehensive. Hence, the output of André Tardieu and Raymond Carré de Malberg as well as the reform drafts designed by the Technical Committee (working under auspices of Senator Jacques Bardoux) deserve particular attention and need a discussion. They made up the intellectual resources to be used by those who wished to endeavour a profound transformation within the frameworks of republican traditions.

B. André Tardieu – Referendum Institution in the Hands of the Executive Power

André Tardieu (1876–1945), a writer and politician, launched his campaign for political reforms in 1930s, after years of the prime ministership. Thus, he was already a very experienced politician when he tabled his innovative proposals. Tardieu began his public activity as a journalist discussing international issues.¹⁹ Tardieu was first time elected to the Chamber of Deputies in 1914. During World War I, he served in infantry.²⁰ A close aide of Georges Clemenceau at the time of the Versailles peace conference and the Minister for Liberated Regions since 1919 (his first ministerial appointment). His tasks included managing Alsace and Lorraine regions. In the 1920s and 30s, Tardieu was a member of many governments, acting as the prime minister in 1929, 1930 and 1932. Despite innovativeness of the applied methods (radio)

¹⁹ Before World War I Tardieu published: *Questions diplomatiques*, Félix Aclan, 1904; *La Conférence d'Algésiras* (3ème éd.), Félix Alcan, 1910; *La France et les alliances* (4ème éd.), Félix Alcan, 1910; *Notes sur les États-Unis* (6ème éd.), Calmann-Lévy, 1917; *Le Prince de Bülow* (7ème éd.), Calmann-Lévy, 1931; *Le Mystère d'Agadir* (3ème éd.), Calmann-Lévy, 1912.

²⁰ He described first war months in the book *Avec Foch*. A. Tardieu, *Avec Foch*, Flammarion, 1939.

and presentation of a special government programme, his mission failed.²¹ In 1934, Tardieu was a member of the cabinet headed by Doumergue and, as I have already mentioned, influenced the content of the reform project. In those years he launched an intensive press campaign espousing constitutional changes. His writings included *La réforme de l'État* – 1934, *Le souverain captif* – 1936 and *La profession parlementaire* – 1937.

In 1929, in a letter to his father, de Gaulle hoped that Prime Minister Tardieu would revive French politics that Briand “disgracefully denationalized.”²² Thereafter, he personally met Tardieu when he worked in the General Secretariat of the Government. A letter with kind regards, attached to the book *Vers l'armée de métier*,²³ de Gaulle sent to Tardieu, has survived. The influence Tardieu exerted over de Gaulle's constitutional views was elaborated by Éric Roussel, a pre-eminent historian exploring the thought and politics of the French leader.²⁴ Odille Rudelle, also confirmed that Tardieu exerted influence over de Gaulle's views. In his view, the lack of references to this inspiration in the official statements de Gaulle made during World War II may be explained by the fear that any references to the output of the politician who epitomized, in view of a large part of the public opinion, the powerlessness and crisis of the parliamentary system in 1930s.²⁵

André Tardieu was the first and only politician of the Third Republic who espoused introduction of a consultative and legislative referendum into the constitutional system. In Tardieu's view, France was a body without head, without leadership and responsible power.²⁶ The parliamentary republic had no longer the leadership and none of its institutions was in the position of the

²¹ *Histoire des institutions politiques de la France de 1789 à nos jours* synthesis by J.J Chevallier included an extensive analysis of the politics pursued by Tardieu. The Author highlighted the fact that after his stay in the USA Tardieu intended to launch a political reform following the British and American model and, as the Prime Minister, he strived for the two-party system by associating a number of radical parties with the parliamentary Right. J. J. Chevallier, *Histoire des institutions...*, *Id.*, pp. 565–571.

²² *Lettre à son père du 2 novembre 1929*, [in:] Ch. de Gaulle, *Lettres, notes et carnets 1905–1941*, *Id.*, p. 723.

²³ Ch. de Gaulle, *Lettres, notes et carnets 1905–1941*, *Id.*, p. 781.

²⁴ E. Roussel, *De Gaulle I...*, *Id.*, p. 72.

²⁵ O. Rudelle, *Le rôle du Général de Gaulle et de Michel Debré*, [in:] *L'écriture de la Constitution de 1958...*, *Id.*, pp. 755–759.

²⁶ André Tardieu did not devise this term – it can be found in many authors, including Charles Maurras (J. Bartyzel, *Umierać, ale powoli...*, *Id.*) and political novels by Anatol France (*Histoire contemporaine*, *Id.*). Yet, this is André Tardieu that promulgated that term in the writings of the advocates of political reforms.

governing body. This is what Tardieu contended in his passionate book *La réforme de l'État*::

Who is in charge in France? This is not the president of the Republic who performs only representative functions or handles government crises.

This is not the prime minister, a betrayed head of the cabinet whose composition was determined by political parties and who is up against the wall by the parliament chambers whenever deputies start reading government statements.

This is also not the ministers who are the slaves of the parliament and bureaucracy.

This is also not, although it sometimes seems to be, the administration preoccupied with strengthening its lasting between the good will of the parliament and the trade unions' demands.

France is a body without a head. The body cannot see that it has no head.²⁷

The former prime minister asserted that political crisis resulted from the chain relationship that destroyed the subjectivity of power: "All in France, from the executive power compelled by the legislative power to the legislative power and electorate predominated by oligarchy, proves the failure of this relationship, the failure of material and moral power."²⁸ In his book *Le souverain captif* Tardieu analysed the nation's loss of sovereign rights in favour of party oligarchies, interest groups and press.²⁹ French democracy was confiscated by the omnipotent parliament and parliamentary elite (*profession parlementaire*). André Tardieu wrote about the total dictatorship of the two assemblies in the system where unrestricted parliament's power undermined stability and impaired efficacy of the executive power.³⁰ The tyranny of legislature had no limits, parliamentary commissions took over executive powers and parliament members tabled budgetary amendments and intervened in the administration to handle purely particular affairs. Interestingly, Tardieu asserted that instead of fulfilling a moderating role, the Senate only exacerbated political crisis and consolidated parliament's hegemony. Both chambers were controlled by the

²⁷ A. Tardieu, *La réforme de l'État*, Flammarion, 1934, cited after the Polish edition, in: K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 102.

²⁸ *ibid.*, p. 103.

²⁹ A. Tardieu, *Le souverain captif*, Flammarion, 1936.

³⁰ *idem.*, *La profession parlementaire*, Flammarion, 1937.

same elite. “The Senate consists of former deputies and the Lower Chamber consists of future senators. The composition of the Senate and the Chamber of Deputies is identical. Actually we have one parliament chamber” – Tardieu contended in *La profession parlementaire*.³¹ Furthermore, the Senate virtually blocked application of the institution of dissolution of the Lower Chamber and instead, on its own initiative, a number of times led to the dismissal of cabinets.³² Therefore, Tardieu espoused abolition of the Senate and establishment of the unicameral parliament.

André Tardieu pictured the parliamentary elite as a group jointly and severally defending its privileges, accumulating parliamentary and local mandates, tolerating corruption practices and being virtually unverifiable (*rééligibilité indéfinie*). A politician espoused with the republican right asserted that the parliament’s hegemony was shaped by professional parliamentarians subordinated to local financial interests determining their re-election. Equally important, those who created *profession parlementaire* evaded accountability for the power they wielded, opposed the executive by putting forward particular demands and impairing conditions for the stable and effective governance.³³

The author of *La réforme de l’État* consciously transcended the narrow boundaries of the constitutional acts of 1875. In his view, France should implement fundamental political reforms to avoid revolution.

The present situation is too serious at home and in the world and France can no longer hesitate to implement reforms unless we want a revolution. The choice is simple – revolution or reform. If we want to avoid the former one, we must not give up reforms.³⁴

The plan of political reforms was aimed to provide a system of checks and balances between executive and legislative powers and restore civil rights. The draft posited that the president was empowered to dissolve parliament chambers (at one’s discretion), parliament members were no longer in a position to put forward amendments to increase budgetary expenditure and, what is most significant, a popular vote could be applied in a wider range

³¹ *ibid.*, p. 246.

³² *ibid.*, pp. 246, 243–245. Noteworthy, the cabinets dismissed by the Senate included those headed by Bourgeois (1896), Herriot (1925), Tardieu (1930) and Laval (1932).

³³ A. Tardieu, *La profession parlementaire*, *Id.*, pp. 359–360.

³⁴ *idem.*, *La réforme de l’État*, *Id.*, p. 103.

of cases. Regarding the latter issue, the plan aimed to introduce the referendum institution and grant women electoral rights. André Tardieu highlighted non-representativeness of the French political system and a fact that over a half of the citizens had no electoral rights.³⁵ In *La réforme de l'État*, he asserted that the plan of reforms should be supplemented by the establishment of a new status of public officials to ensure their independence and abolish those of their rights (like the right to strike) that were not in conformity with the public service requirements.

Olivier Passelecq highlighted integrity and cohesion of the constitutional thought of Tardieu's proposals for reforms included there.³⁶ Actually, the former prime minister also mentioned the absence of fundamental rights of an individual and the lack of institutional guarantees for their protection. In his view, the lack of *recours constitutionnel* manifested the parliamentary despotism:

The acts of 1875 are silent on the fundamental civil rights and their protection. Well, individuals cannot enjoy complete freedom when they have no specific rights or when they are not guaranteed in any way. As France has none of them it knows no constraints in demonstrating lawlessness that the parliamentary majority calls law.³⁷

The author of *La profession parlementaire* deplored the fact that a judicial review of the constitutionality of acts was abandoned and reminded of the concept developed by Sieyès who proposed establishing a special organ of the constitutional judiciary.³⁸ Tardieu also noted that the idea of the referendum institution in the event of the revision of the constitution was abandoned and reminded that in the initial period of the Third Republic left-wing parties were ardent advocates of the application of such an institution.

³⁵ *idem.*, *La profession parlementaire*, *Id.*, pp. 355–357.

³⁶ O. Passelecq, *De Tardieu à de Gaulle... Contribution à l'étude des origines de la Constitution de 1958*, RFDC 1990, No. 3.

³⁷ A. Tardieu, *La profession parlementaire*, *Id.*, p. 241, trans. M. Miałkowska.

³⁸ "Since the very beginning of the United States, it was established that any acts passed against the law would be recognized as a manifestation of tyranny. They always thought that a judiciary power was competent to review the constitutionality of directives issued by officials and the laws passed in the legislative bodies. Tribunals frequently sentence the former and refuse to apply the latter ones. At the beginning, France strived for such a model (Constitution of 1791; the Constitutional Commission draft developed by Sieyès; Constitution of the year VII and 1852). Yet, those endeavours were a total failure." A. Tardieu, *La profession parlementaire*, *Id.*, p. 241.

Undoubtedly, an idea of the institution of constitutional referendum proposed by André Tardieu was really innovative and original. Francis Hamon, an author of the interesting comparatist study on the referendum, noted that it was Tardieu who rehabilitated this institution in the French political thought.³⁹ The author of *La réforme de l'État* contended that a consultative referendum should precede legislative decisions and that its result should be binding upon the legislative power. Thus, he recommended a *par le haut* [from the top] referendum, which is a term proposed by Francis Hamon,⁴⁰ and which would be an instrument applied to strengthen executive power and a counter-body for the parliamentary oligarchy. In this view, a consultative referendum was to be an instrument used by the executive power and nation to make substantive decisions aimed to overcome particularism of political groups.

A referendum denotes voting for ideas. When we begin to act, this word has a lot of different meanings. Generally speaking, this is a counterbalance (the nation's will) against the power abuse of any parliament chamber. Voting for ideas. – instead of compelling the nation to vote for people, the referendum calls them to vote for on issues. In the furtherance of reforms aimed to restore balance and stability in our distorted republican system, we just cannot afford to ignore this instrument⁴¹

–Tardieu forcibly contended.

The referendum institution has republican and democratic roots and Rousseau is thought to be its forerunner. His opponents perceived it as the fruition of his ideas.⁴² Republican nationalists, such as Maurice Barrès and Paul Déroulède, who recommended extension of a popular vote and introduction of referendum, referred to the ideas of the author of *The Social Contract*.⁴³ On the other hand, Tardieu made no references to the theses developed by Rousseau and gave a new purport to the idea of referendum picturing usefulness of this institution from the point of view of the state's weal and quality of politics. The author of *La réforme de l'État* challenged the position of the referendum opponents in the field

³⁹ F. Hamon, *Le référendum. Étude comparative*, L.G.D.J., Collection Droit Public, 1995, p. 78.

⁴⁰ *ibid.*, pp. 22–23.

⁴¹ A. Tardieu, *La réforme de l'État*, *Id.*, p. 104.

⁴² See A. Ranney, *Référendum et démocratie*, Pouvoirs, 1996, No. 77.

⁴³ See A. Wielomski, *Nacjonalizm francuski...*, *Id.*, pp. 279–306.

of historical experience and political practice. Importantly, he defended the referendum against an accusation about the reconstruction of the plebiscitary system. Noteworthy, it was this objection that was one of the main challenges against the referendum. Tardieu highlighted a fundamental difference between a plebiscite and a referendum:

Referendum provides space for the direct governance in a representative system, while the plebiscite is a tool for representation that the nation may use to delegate sovereignty and legislative power onto one person. This was exactly what the plebiscite was held for on 20 December 1852.⁴⁴

Furthermore, in Tardieu's view, the referendum improved the quality of legislation. The author referred to the real experience of direct democracy, where voters were frequently less statist and more economical than the parliament. A liberal vein can also be found in the arguments tabled by Tardieu, which is manifested by his reference to Herbert Spencer's opinion: "While in the past liberalism was tasked to reduce the king's power, in future its task will be to reduce the parliament's power."⁴⁵ His constitutional thought provides a response to the arguments put forward by Adhémar Esmein, who, as we remember, exposed the threat the referendum posed to the quality of law and challenged all its types, including a constitutional referendum. Importantly, Esmein also challenged the quality of the Swiss model of direct democracy⁴⁶ whereas in

⁴⁴ A. Tardieu, *La réforme de l'État*, *Id.*, p. 113. Similar views are found in *La profession parlementaire*, *Id.*, p. 238.

⁴⁵ *idem.*, *La réforme de l'État*, *Id.*, p. 114, René Rémond regarded Tardieu as a continuator of the Orlean strain, particularly sensitive about the protection of the individual's rights. It seems that it would be wrong to recognize Tardieu's views as a part of the French political thought that explicitly espoused the consolidation of the parliament's position just because an idea of the referendum is such a crucial element of Tardieu's concept. R. Rémond, *Plaidoyer pour une histoire délaissée. La fin de la III République*. RFSP, avril 1953, p. 253.

⁴⁶ Noteworthy, Tardieu elaborated the experience of the Swiss democracy: "If any conclusion is to be drawn from so many votes held at the federal and cantonal level to decide about a wide range of affairs, this is that over these fifty years, the referendum revealed that the Swiss people are more cautious, more conservatist, less statist, more economical and free from superstitions than the legislators.

Necessary and detailed law on the army, prohibition of absinthe, retention of military tribunals, rejection of a costly system of federal insurances, a progressive property tax and a large-impact retirement act provide best-known examples of the wisdom of the nation's decisions and its resistance to the fervent campaigns staged by socialists." A. Tardieu, *La réforme de l'État*, *Id.*, p. 107.

Tardieu's view, the history of the Swiss democracy "which we owe the most continuous, flexible and comprehensive application of the direct vote of the nation and a referendum"⁴⁷ definitely weighs in favour of that form of direct democracy.

André Tardieu asserted that France should focus on establishing the institution of a consultative referendum. He contended that curbing on the parliament's power is possible "only through the restoration of powers of the executive and the nation and direct communication between them. Such a need is best addressed by the consultative referendum."⁴⁸ Unquestionably, Tardieu may be called a guiding spirit of de Gaulle's policy and the Fifth Republic Constitution. It seems that Tardieu's anti-oligarchic argumentation inspired de Gaulle when he resolved to stage a constitutional referendum in autumn 1945. The consultative referendum proposed by the author of *La réforme de l'État* impacted a form of the legislative referendum that was one of the original institutions of the Fifth Republic. The thought about referendum as an instrument of the direct communication between executive power and the nation, providing an opportunity to consolidate the state and set it free from the predominance of party elites came to fruition in 1958.⁴⁹ Noteworthy, in André Tardieu's view, the president should be empowered to call a referendum upon the government's motion, which also manifests a pioneering meaning of such a recommendation for the Fifth Republic. This is why a number of studies on the origins of the Fifth Republic, including, certainly, the writings of Olivier Passelecq, attribute a particularly significant meaning to the political thought of André Tardieu.⁵⁰

In a few analyses, the Tardieu's thought is interpreted as the one that belongs to the authoritarian strain and stands in contradiction to the republican tradition.⁵¹ Yet such an opinion is not confirmed in the public activities and writings of the former prime minister. Tardieu intended to strengthen republican state structures and lead a parliamentary group of independent republicans,

⁴⁷ *ibid.*, p. 106.

⁴⁸ *ibid.*, p. 114.

⁴⁹ S. Pinon, *Les réformistes constitutionnels des années trente. Aux origines de la V^e République*, L.G.D.J, 2003, pp. 88–101.

⁵⁰ O. Passelecq, *De Tardieu à de Gaulle...*, *Id.*

⁵¹ S. Pinon contended that the wording "Revolution to be done" – used by Tardieu – may have voiced disappointment with the rules and values of democracy of 1789. S. Pinon, *Les réformistes constitutionnels...*, *Id.*, p. 10.

such as Paul Reynaud.⁵² His policy bothered Action française that was worried that they would invigorate the republic.⁵³ It would be an over-interpretation to recognize Tardieu's views as similar to those that can be found in the Croix-de-Feu programme as the author of *La réforme de l'État* espoused the government's accountability before parliament.⁵⁴

The wording *révolution à refaire* (revolution to be done), which Tardieu applied, did not mean that he was going to depart from the republican tradition but rather manifested his intention to restore sovereignty of the people expropriated of their political rights by the parliamentary elite.⁵⁵ It should also be remembered that Tardieu consistently warned against the threat posed by France's eastern neighbour. In the book published in 1934 – *L'heure de la décision* – he wrote about a growing significance of Germany after World War I and weakness of the French politics.⁵⁶ In the years preceding the World War II outbreak Tardieu vehemently opposed the Munich pact.⁵⁷ Julian Jackson, an American historian, was right to say that Tardieu's writings are the testimony of the existence of the reformatory trend inside the French republicanism.⁵⁸

C. Democratic Constitution of Raymond Carré de Malberg

While André Tardieu was the first politician of the Third Republic that proposed to introduce the institution of a referendum into the political system, Raymond Carré de Malberg contributed to the theoretical rationalization of the fundamental political transformation. Indeed, suggestions for a necessary constitutional reform had been put forward before by other authors. Noteworthy, Maurice Hauriou espoused popular presidential elections ("people seek executive power and executive power seeks

⁵² A. Tardieu, *La note de semaine*, Flammarion, 1936.

⁵³ J. J. Chevallier, *Histoire des institutions politiques...*, *Id.*, p. 567.

⁵⁴ Noteworthy, the ideas furthered by Croix-de-Feu, such as a call for the consolidation of the executive power, cooperation between capital and labour were interpreted by a number of authors as a manifestation of internal restoration of the republic. See J. Eisler, *Od monarchizmu do faszyzmu...*, *Id.*, pp. 158–159.

⁵⁵ A. Tardieu, *La profession parlementaire*, *Id.*, pp. 355–357.

⁵⁶ *idem.*, *L'heure de la décision*, Flammarion, 1934, pp. 39–97.

⁵⁷ *idem.*, *L'année de Munich 1938*, Flammarion, 1939.

⁵⁸ J. Jackson, *France: the dark years 1940–1944*, Oxford University Press, 2003.

people”)⁵⁹ and a number of authors, such as Émile Giraud or Marcel Prélôt, highlighted the benefits of the referendum institution.⁶⁰ Yet those were only marginal remarks and were by no means part of any analysis of the constitutional regulations. None of those authors developed, unlike Carré de Malberg, a coherent vision of the constitutional transformation.

Raymond Carré de Malberg (1861–1935) was a pre-eminent French jurist and law theoretician (his primary interests included Roman and civil law). In his doctoral dissertation, de Malberg focused on the institution of exception in the Roman law, applied in the past French procedure.⁶¹ A shift towards public and constitutional law was related to his personal experience. The family of Carré de Malberg belonged to a tiny minority of the inhabitants of Alsace who refused to take German citizenship and emigrated to France after Third Reich annexed that country. A family of Michel Debré had a similar experience. Raymond Carré de Malberg focused on the legal status of Alsace in the Third Reich and highlighted the advantage the Third Republic had over the monarchist and federal Reich in terms of a range of political liberties.

The outstanding writings of the French constitutionalist – *Contribution à la théorie générale de l'État*⁶² and *La loi, expression de la volonté générale*⁶³ are part of the French and European classic of the legal thought. In his earlier study Carré de Malberg defined the state as an entity attributed with authority and organized around the superior power. In this perspective, a strong state poses no threat to freedom but on the contrary – preconditions its fruition. Noteworthy, the same standpoint is found in the writings of Michel Debré and even Charles de Gaulle. In Carré de Malberg's view, the theory of the state should contribute to the unity of the national authorities. Consequently, he was critical about the idea of the

⁵⁹ M. Hauriou, *Précis de droit constitutionnel*, Sirey, 1923, p. 393.

⁶⁰ Emile Giraud contended that a referendum made it easier to tackle any issues touchy and germane to voters without a risk of breaking up the government coalition. E. Giraud, *Le pouvoir exécutif dans les démocraties d'Europe et l'Atlantique*, Sirey, 1938, p. 399. M. Prélôt enunciated a view that a referendum protects people against the despotism of the lower and upper chamber of the parliament. M. Prélôt, *Manuel politique...*, *Id.*, pp. 58–59.

⁶¹ R. Carré de Malberg, *Histoire de l'exception en droit romain et dans l'ancienne procédure française*, Librairie Nouvelle de Droit et de Jurisprudence, 1888.

⁶² *idem.*, *Contribution à la théorie générale de l'État*, Sirey, 1920 (vol. I), 1922 (vol. II), ré-éd. Centre National de la Recherche Scientifique, 1962.

⁶³ *idem.*, *La loi, expression de la volonté générale*, Sirey, 1931 (ré-éd. Economica, 1984).

division of powers that, in his view, led to ineffective functioning of the state.

In the book *La loi, expression de la volonté générale*, published in 1931, the author made a positivist analysis of the provisions of 1875 constitutional acts, in relation to the resolutions included in the Declaration of the Rights of Man and of the Citizen, where he exposed the primacy of the parliamentary powers and a special status of a statute in the French legal system. As I have mentioned in Chapter I, it was Carré de Malberg who first applied a notion of the parliamentary absolutism with reference to the essence of the constitutional system of the Third Republic. Moreover, he asserted that French public law was moulded by the legitimist ideas and legal notions grounded in the French Revolution. In the book mentioned before, Carré de Malberg first enunciated critical opinions about the parliament's monopoly on expressing sovereignty of the nation and forcibly contented that it was not based on the founding ideas and legal tenets of the French revolution:

Or we are going to espouse the concept developed by Rousseau and embraced by the revolution, which says that people's will provides the basis for any parliamentary statute and its subject is expression of this will. In such a situation it is no longer possible to settle for the argument that all citizens attend the parliamentary session at the moment the bill is passed since this argument is associated with some mystic vision lacking any connection with reality. Thus, if we really want the statute to be a manifestation of the people's will and if it is this feature of the people's will that we derive its validity from, we must inevitably grant voters some active role in the act of enacting laws.⁶⁴

In the conclusions of this work, R. Carré de Malberg put forward a proposal for political reforms aimed to make the Republic more democratic and liberate from the fetters of parliamentary absolutism. The jurist from Strasbourg espoused an idea of empowering people to put any laws passed by the parliament to a referendum and the right for launching a legal initiative.⁶⁵

⁶⁴ R. Carré de Malberg, *La loi, expression de la volonté générale*, p. 217, trans. B. Plonka.

⁶⁵ De Malberg's stance is well illustrated here: "A minimum right citizens should have in the legislative process is to challenge any bill passed by the Chamber of Deputies and Senate. If they win a sufficient number of advocates, they should be empowered to vote in a referendum to either adopt or reject a challenged statute. At the same time, it is logical that if the people's will supremacy underpins the concept and the

In his last book, published before he died, Carré de Malberg juxtaposed Kelsen's hierarchy of norms with the theory of the hierarchy of public authority organs shaped according to the rate of closeness of the source of sovereignty.⁶⁶ The status of a norm was to be determined by the position of the issuing body, which meant that the norms enacted directly by the people (a sovereign) were of supreme importance.

In the 1930s, in the aftermath of the legal reflection on the political system, Carré de Malberg's writings aroused interest among advocates of political reforms. His writings differed from those recognized as the main current of the studies on the constitutional law, which was strictly dogmatic.⁶⁷ In those years, he confided in his student, Marcel Waline,⁶⁸ that by going beyond a pure analysis and deciding to enunciate demands for a reform he released his intellect from the constraints embedded in the legal dogmatics.⁶⁹ This is what aroused Michel Debré and René Capitant's interest in the thought of Carré de Malberg.⁷⁰ R. Capitant took over his chair at the University of Strasbourg and implanted his theoretical thought into the Gaullist political doctrine.

In Capitant's view, Carré de Malberg openly criticized Montesquieu idea of the division of powers as he asserted that "dividing sovereignty between two organs" is dangerous and "triggers a war between them and leads to anarchy."⁷¹ In his view, division

proposed act, a legislative initiative in its democratic understanding should be granted to the people. Otherwise, the supremacy of the people's will would be incomplete as people, independently of the legislative power, would have no right to implement any new laws opposed by the parliament but supported by the majority of citizens." R. Carré de Malberg, *La loi, expression de la volonté générale*, *Id.*, p. 219.

⁶⁶ *idem.*, *Confrontation de la théorie de la formation du droit par degrés avec les idées et les institutions consacrées par le droit positif français relativement à sa formation*, Sirey, 1933.

⁶⁷ See S. Pinon's insights on the history of teaching constitutional law in France. S. Pinon, *Le "nouveau droit constitutionnel" à travers les âges*, VII^e Congrès français de droit constitutionnel, Paris 2008; G. Sacriste, *La République des constitutionnalistes*, *Id.*

⁶⁸ Marcel Waline (1900–1982), a political scientist and constitutionalist; member of the Institute of France; in the interwar years his publications included *La Notion judiciaire de l'excès de pouvoirs: l'excès de pouvoirs du juge* and *Défense du positivisme juridique*; Vichy opponent during the war; disciple of Raymond Carré de Malberg; his influence can be traced in the post-war writings of M. Waline: *Les Partis contre la République* or *L'Individualisme et le droit*; appointed by General de Gaulle a member of Conseil supérieur de la magistrature, 1958; member of Conseil constitutionnel, 1962–1971.

⁶⁹ R. Capitant, *La nature représentative du régime parlementaire*, [in:] *Écrits constitutionnels*, CNRS, 1982, p. 255.

⁷⁰ S. Pinon, *Les réformistes constitutionnels...*, *Id.*; S. Aromatario, *La pensée politique...*, *Id.*, pp. 28–31.

⁷¹ R. Capitant, *La nature représentative...*, *Id.*, p. 255, 257.

of powers and distribution of sovereignty stands in contradiction to the principle of the unity of state. The Montesquieu idea had a historical purport and became outdated when the balanced constitutional monarchy became history. The pre-eminent law theoretician cited a positive example of the British political system where sovereignty was indivisible and resided fully with the parliament that appointed an accountable and effective government. At the same time, the British Parliament, as a sovereign state organ, remained under a strict supervision of the nation (sovereign), the prime minister had powers to dissolve the parliament, which resulted in the instant resignation of the cabinet and general elections.

Yet this is not the pro-British affection but an innovative text where he rehabilitated the institution of a referendum as a republican one and useful for the state, that ensured Raymond Carré de Malberg an enduring place in the history of the French constitutional thought. A demand for a referendum as a supplement to the representative democracy, can be found in the writings of Marcel Prélôt and Émil Giraud, but none of them provided any theoretical rationalization for such an institution.⁷² On the other hand, Carré de Malberg's article *Considérations théoriques sur la question de la combinaison du référendum avec le parlementarisme* was a real breakthrough in the republican tradition:⁷³ destroyed the doctrinal principles of the Third Republic through the justification for the parliamentary superiority in the political system and exposed possible political advantages brought by the introduction of the referendum institution.

Raymond Carré de Malberg provided multitudinous arguments to the advocates of an extensive political revision within the framework of republican principles. The author of *Considérations théoriques sur la question de la combinaison du référendum avec le parlementarisme* contended that the parliament was granted the status of a sovereign through the adoption of the concept of the representative system at the initial stage of the French Revolution. A purport of the then-moulded concept of representation rested in the identification of the people's will with the parliament's will, pursuant to Sieyès's view that the nation may express its opinion solely through its representatives.

⁷² See reference 329.

⁷³ R. Carré de Malberg, *Considérations théoriques...*, *Id.*

The Parliament is a sovereign because, most of all, as a representative of the people's will, has, in a transcendent mode, a power superior to the competences of all other power branches. Parliament is a sovereign with regard to the nation it is representing also because citizens have no capacity to pronounce any other will with respect to the deputies' decisions in any other way than that included in the decisions made by the deputies.⁷⁴

– the author asserted in the analytical part of his text.

According to the fundamental thesis enunciated by Carré de Malberg, only application of the referendum institution as a tool designed for the citizens' direct participation in exercising power may undermine the foundations on which the parliamentary supremacy rests. Reconstruction of the executive power holding a mandate or an idea of the review of the constitutionality of acts as partial regulations, will be ineffective as long as the nation is not granted a status of the real host of the country. To challenge the absolutist parliamentary power, it was necessary to introduce an actor holding a mandate more powerful than that held by the parliament. Such an actor could only be the nation and its active participation in the process of law enactment.

This is how Raymond Carré de Malberg pictured the main tenets of project of political transformations:

Were the current political system not transferred, it would lose its exclusiveness and completeness. It would be extended with the institutions combining advantages of parliamentarism and direct democracy. Parliament would no longer be a sovereign, would no longer be in a position to enunciate people's will. Citizens would be granted a right to exercise full legislative power through the civic initiative. On the other hand, decisions taken by the Chamber of Deputies or the Senate would no longer be sovereign in any way. They could become binding provided that they were ratified, literally or putatively, through the general vote or in the event when a referendum was not required.⁷⁵

In the political system that provided for the institution of a referendum and verification of the parliament's decisions by the nation, the parliament was to lose the status of the superior institution

⁷⁴ *ibid.*, p. 123.

⁷⁵ R. Carré de Malberg, *Considérations théoriques....*, *Id.*, p. 124.

and become – according to Sieyès's category – one of the constituted powers.

The nation becomes a real sovereign equipped with the legal tools for enacting laws in the final instance, i.e. adjudicating whether a decision made by the Senate and the Chamber of Deputies is in conformity with the nation's will. Sovereignty and the will of the general public have become identical and are embedded in the nation.⁷⁶

A huge advantage of the text authored by Carré de Malberg is the enunciation of a set of arguments weighing in favour of the institution of a referendum, based on the same foundations that gave start to the development of the French parliamentary system. The Strasbourg professor asserted that a reference to the citizens' opinion, which is the governance basis, is the foundation of the parliamentary system. Such reference was manifested in the French Revolution acts on the citizens' right to participate and contribute to enacting laws.⁷⁷ Carré de Malberg reminded that expansion of the parliamentary system originated from the reference to the democratic legitimization granted by elections and reference to the citizens' opinion – actually the same arguments that weighed in favour of the development of the parliamentary system weighing even more in favour of the direct participation of citizens in exercising the power. Development of the mixed political system, providing for the mechanisms of direct democracy, would be a minimum reform:

Thus, this initial concept showing the main direction and a deep purport of the parliamentary system, which, in the 19th century, was affirmed by calling it the governance based on an opinion, means that adding more powers to the people is rational and logical. Obviously, given such an assumption, one may conclude that a parliamentary system evolves and its natural destination is, if not a full democracy, at least a blend of direct and representative democracy institutions.⁷⁸

⁷⁶ *ibid.*, p. 125.

⁷⁷ Art. IV of the Declaration of the Rights of Man and of the Citizen of 1789, [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 258.

⁷⁸ R. Carré de Malberg, *Considérations théoriques...*, *Id.*, p 127.

Carré de Malberg contended that the parliamentary legitimating powers enhance the chances of introduction of the referendum institution and other forms of direct democracy not just because they refer to the democratic opinion. A specific concept of the statute, found in the primary acts of the French Revolution, is also significant. A statute perceived as an expansion of the general will derived its power from the will pronounced by all citizens directly or indirectly through their representatives. In Carré de Malberg's view, parliament became a sovereign power and established its supremacy when it monopolized an expression of the general will through the constitutional settlements. An argument that "the parliament has, as a body capable of pronouncing the people's will, a power deriving from this will, i.e. the same power as that of the sovereign"⁷⁹ was germane to the development of the parliamentary supremacy. As the parliament's hegemonic power resulted from the reference to the will of all citizens, a legitimization of a referendum was even stronger since this is the people's will pronounced directly by citizens and not through their representatives.

The Author of *Considérations théoriques...* recognized the defence of the parliamentary primacy as a usurpation of the nation's sovereign rights. He asserted that if the parliamentary system's reason is execution of the rights of all citizens in a form of representation, a representing party may not challenge the superiority of the party that grants representation. This is how he put it:

A surprising contradiction of an idea of the people's sovereignty, it has been used against those who are supposed to pronounce such a will. Moreover, it has been used to supersede the nation's will with the parliament's will and exempt the legislature's decisions from any intervention of the nation.⁸⁰

In *La loi, expression de la volonté générale*, Malberg was even tougher for the advocates of the theory of representation substantiating the parliament's superiority. He contended that parliament's monopoly over expression of the people's will actually meant development of the authoritarian system identical in its very essence to the monarchist absolutism.⁸¹ Noteworthy, a contradiction be-

⁷⁹ *ibid.*, p. 129.

⁸⁰ *ibid.*, p. 130.

⁸¹ R. Carré de Malberg, *La loi, expression de la volonté générale*, *Id.*, p. 219. Noteworthy there is a striking affinity between Carré de Malberg's arguments and analyses included in the writings of Ignacy Czuma. Cf. I. Czuma, *Absolutyzm ustrojowy*, *Id.*

tween the nation's sovereignty and hostility towards direct forms of power was identified by Stanisław Estreicher, with no intention to introduce a referendum into Polish constitutional system.⁸²

Importantly, Carré de Malberg was extremely consistent in his arguments while referring to the ideas of Rousseau, who was actually a guiding spirit of Art. 6 of the Declaration of the Rights of Man and of the Citizen and, as an advocate of direct democracy, asserted that the people's will might not be represented due to its essence.⁸³ Carré de Malberg referred to Rousseau who asserted that there is affinity between adolescence of the nation and adolescence of a human being. In such a perspective, representative democracy is a transition system, typical of a childish form of the existence of the nation. This is what he wrote in a reference to the author of *Du contrat social*:

You may say that, as Rousseau put it, the nation behaves just like an individual. When people are children or adolescents they need care takers or representatives, a monarch or the parliament, to handle their affairs. But when the nation becomes mature, it should be able to independently comprehend the scope of its interests and defend them.⁸⁴

Thus, the arguments put forward by Carré de Malberg may by no means be recognized as polemic to the views of Adhémar Esmein, who as we remember, cautioned against the ideas of Rousseau and recognized direct democracy as a looming threat to the quality of legislation and the state's policy.

The reflections of Carré de Malberg also exposed an aspect of the social base of a republican system as a parliamentary republic was tasked to ensure advantage of the bourgeoisie over people.

Yet let it be remembered that according to the intentions of the founders of a parliamentary system, its real goal was to establish and ensure the advantage of the bourgeoisie over people, which was manifested by the composition of national assemblies, the fact that the electoral system devised during the Revolution definitely favoured the bourgeoisie in the parliamentary elections.

⁸² S. Estreicher, *Suwerenność Sejmu czy suwerenność narodu*, [in:] *Idem., O Konstytucji i polityce...*, *Id.*, pp. 55–70.

⁸³ J. J. Rousseau, *Du contrat social*, Flammarion, 2011, cited after the Polish edition: J. J. Rousseau, *Umowa społeczna*, PWN, 1966.

⁸⁴ R. Carré de Malberg, *Considérations théoriques...*, *op. cit.*, p. 128.

Consequently, deputies from this social group predominated in both parliament chambers.

– a French constitutionalist wrote.⁸⁵ The parliamentary supremacy and the electoral law favouring the bourgeoisie resulted in the departure of representative democracy from the principles prescribed in the original documents of the French Revolution. Unsurprisingly, Carré de Malberg praised the Jacobin constitution of 1793, which was the only one that followed the premises being its underpinnings.

It seems that in Carré de Malberg's view, picturing advantageous effects of the democratization of the republic was as significant as challenging the theoretical underpinnings of the parliamentary hegemony.⁸⁶ A French jurist asserted that introduction of the referendum institution enhanced a balance of powers, consolidated executive power, ensured the advantage of the constitution over parliamentary statutes, opened a perspective of the review of the constitutionality of acts and restricted the omnipotence of political parties.

Independence of the executive power was intended to be a significant element of the proposed institutional revolution. The Author of *Considérations théoriques...* contended that establishment of the superior power embedded in the nation was going to ensure a balance between the government and the parliament, which would consequently lead to the emergence of democratic dualism that would balance the positions of both powers and bring them under the supervision of the nation, a host of the country. This is how the French constitutionalist pictured desirable political ramifications of such a change:

The day when the parliament's sovereignty will be subdued to the sovereignty of the nation that was going to make decisions on the enacted laws and the government's actions in the direct vote will mark establishment of the supreme power (so much lacking

⁸⁵ *ibid.*, p. 130.

⁸⁶ J. Gicquel discerns the impact of the constitution of Weimar Republic on the thought of Carré de Malberg. J. Gicquel, *Droit constitutionnel...*, *Id.*, p. 494. Indeed, the insights on the provisions of this constitution are included in *La loi, expression de la volonté générale*. Yet, it seems that Carré de Malberg did not follow any polity and his reform proposals resulted from the objective, positivist analysis of republican legal terms. V. A. Le Divellek is right to assert that German constitution was a negative point of reference for the French jurists. V. A. Le Divellec, *Parlementarisme dualiste: Entre Weimar et Bayeux*, RFDC, 1931.

nowadays), appointed to fulfil a role superior over these two powers. Parliament and government will be then in a position to appeal to the nation so that it would decide about the issues where these institutions are unable to reach a compromise. Thus, the government's power would be consolidated while the parliament's powers curbed but not subdued to the government. Consequently, solely the people would wield binding and superior power.⁸⁷

In his article *Considérations théoriques sur la question de la combinaison du référendum avec le parlementarisme* Carré de Malberg found it necessary to introduce the president's right to dissolve the parliament and establish the institution of a referendum as an instrument for solving the disputes between the government and the parliament. Yet when this is confronted with the conclusions of *La loi, expression de la volonté générale*, it is obvious that Carré de Malberg was also a precursor of the general presidential elections as he contended that if the nation has supreme power, election of the executive power by the nation is logical, given the ideas governing these state institutions:

Any democratic constitution that does not provide for executive and legislative competences of the parliament and – instead – establishes the executive power that is, to some extent, independent, will have to establish the people, as a sovereign, the supreme power to regulate relations between the two powers. This is a source of such institutions as the election of the head of executive power by the nation and the right of legislative or executive power, to appeal to the nation when divergences arise between them.⁸⁸

Another significant effect of the introduction of the referendum institution was the distinction between the parliament and the nation's constituting power, a distinction that was effaced after constitutional rules of 1875 were adopted. Carré de Malberg contended that the introduction of the institution of referendum on any bill involves – *a fortiori* – a constitutional referendum:

If the introduction of the institution of a referendum means that constitution becomes binding by its sovereign endorsement by the nation, even if the endorsement is effectuated in a form of the silent

⁸⁷ R. Carré de Malberg, *Considérations théoriques...*, pp. 133–134.

⁸⁸ idem., *La loi, expression de la volonté générale*, *Id.*, p. 218.

consent, it is clear that the constitution is the act of nation from the legal point of view.⁸⁹

Thus, neither the initiative on the constitutional change nor passing a new constitution may be the one launched solely by the parliament chambers. A demand for liberating nation's *pouvoir constituant* undermined the foundations of the Third Republic, where the parliament chambers were invested with the constituting power. Thus, Carré de Malberg adopted the stance on the issue germane to the French constitutionalism: relations between the constituting power and established powers. The jurist of Strasbourg asserted that even if the parliament is the supreme established power “it is the competences of such power that may be, unlike the sovereign’s competences, solely the secondary competences and therefore they are subject to restrictions.”⁹⁰ The legislative and judiciary powers had a status of the established powers. This is where explicit criticism of the 1875 constitutional acts on the revision of the constitution is discernible. Unlike Esmein, Carré de Malberg contended that the constitution did not invest the parliament with the constituting power as this made it “permanent in relation to this power, which actually exists only owing to the constitution.”⁹¹ Non-encroachment of the parliament’s competences is non-reconcilable with the status of the established power. “A single organ may contain conflicting functions of the author of the Constitution and a power established by this constitution. Consequently, this means the blocking of the constituting power” – Carré de Malberg asserted.⁹² Actually this was a call for enacting the constitution through the referendum and challenging the parliament’s monopoly over constitutional revision. It seems that the arguments put forward by the Strasbourg professor corresponded to de Gaulle’s intuition when he called a constitutional referendum in 1945.

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⁸⁹ idem., *Considérations théoriques...*, *Id.*, p. 134.

⁹⁰ idem., *La loi, expression de la volonté générale*, p. 220.

⁹¹ *ibid.*

⁹² *ibid.*

Predominance of the constituting power over the parliament's power provided an opportunity for the review of the constitutionality of laws, which could not be put into effect in the Third Republic due to the unlimited legislative sovereignty of the parliament. This is how Carré de Malberg pictured a mechanism of the necessary change:

The situation would change dramatically on the day when the nation would become a sole sovereign following the establishment of the referendum institution, and a parliament chamber would only be the body exercising constitutionally specified competences and having capacity to enact the laws solely within the framework determined by those competences. In such an event, an idea about the constitutional revision of parliamentary statutes would inevitably emerge or one might even assert that such solution would be necessary since any bill would have to be consistent with laws and effective on condition that it was consistent with the constitution. As regards the nation, its consent for the statute passed by the parliament chambers would not impair the court's actions aimed to review the constitutionality of this act.⁹³

I have already mentioned that a demand for the review of the constitutionality of acts had been enunciated by a number of authors, including Joseph Barthélemy, Maurice Hauriou, Paul Duez and Léon Duguit. The latter one was critical of the republican legal tradition, while others failed to supplement the constitutional judiciary system by republican rationalism. Only Carré de Malberg correctly predicted that the relationship between a constitutional referendum and a constitutional review of parliamentary statutes, release of the nation's constituting power, allowed for the restoration of the constitutional primacy. Importantly, even an enfeebled form of the review of the constitutionality of acts, enshrined in the Constitution of the Fourth Republic, could become effective only after the constitutional referendum institution introduced on de Gaulle's initiative in autumn 1945. Undoubtedly, Carré de Malberg may be recognized as an advocate of the review of the constitutionality of acts also in view of his original institutional idea. A Strasbourg professor contended that the review of the constitutionality of acts should be applied based on the constitutionality

⁹³ R. Carré de Malberg, *Considérations théoriques...*, *Id.*, p. 134–135.

challenge launched in the court trial, which should be examined by the institution established solely for this purpose.⁹⁴

Finally, Carré de Malberg's reasoning was turned against petty party politics manifested by extreme particularization of the parliament. A significant issue in the legal reflection was a role political parties should play in the polity. The authors whose contribution was particularly valuable there include S. Estreicher, B. Gutzwilcz and H. Kelsen.⁹⁵ In Carré de Malberg's view, a party predomination was another factor undermining legitimization of the representative parliamentary system.

No one can assert that a sovereign power, recognized as competent for the people's will, is limited to the parliament's will, which is actually the political party's will, what is more, the one that has the majority only for the time being. If the people's will is replaced by the party's will in the parliament, this means that the parliament's power is considerably constrained. As the idea of the people's will is subject to moderate or fierce criticism, the idea of the sovereignty of the will of the party that is currently in power becomes a kind of the tyranny. This is simply unacceptable.⁹⁶

This is distinctly divergent from the theses put forward by Esmein, who generally idealized the parliamentary republic. Carré de Malberg underscored that the value of the referendum verdict is higher than that passed by the parliament members who "rather vote according to the tactics adopted by their party than their own convictions."⁹⁷ In his view, when the nation's will is superior to that of the political parties, a referendum has anti-oligarchic consequences and favours decisions made in accordance with the public weal.

Noteworthy, in the 1930s, the idea of direct democracy was subject of interest of theorists of law. It was then that Kelsen proposed to "develop the referendum institution and retain parliamentary governance."⁹⁸ He called for the introduction of the

⁹⁴ *ibid.*, p. 135.

⁹⁵ See S. Estreicher, *Walka z partyjnictwem*, [in:] *idem.*, *O Konstytucji i polityce...*, *Id.*, B. Mirkin-Guetzévitch, *Les nouvelles tendances du droit constitutionnel*, Marcel Giard, 1931; H. Kelsen, *Foundations of Democracy*, „Ethics” Vol. 66, No 1, 1955, pp. 1-101, the Polish edition: H. Kelsen, *O istocie i wartości demokracji*, translated by F. Turynowa, Biblioteka Umiejętności Prawnych i Politycznych, Księgarnia Powszechna, 1936.

⁹⁶ R. Carré de Malberg, *Considérations théoriques...*, *Id.*, p. 136.

⁹⁷ *ibid.*, p. 135.

⁹⁸ H. Kelsen, *Foundations of Democracy*, *Id.*, cited after the Polish edition: H. Kelsen, *O istocie i wartości demokracji*, *Id.*, p. 55.

constitutional referendum and, importantly, a legislative referendum as an option. Moreover, he called for adoption of the people's initiative.⁹⁹ Yet, in Kelsen's view, opening to the direct democracy hindered consolidation of the parliamentary system. He justified parliamentary governance by pragmatic reasons and did not deny that calling it the people's representation is a pure fiction. Yet in his opinion, it is possible to identify the essence of such a system and substantiate its value as a specific means of the social technique employed to establish the polity, without referring to the fiction of representation.¹⁰⁰ The author of a normative law concept asserted that a parliamentary system inhibits primitive forms of political freedom. Kelsen was not compelled to challenge the principles of parliamentary supremacy and propose any institutions of the direct democracy. Carré de Malberg's point of view was different: he asserted that significance of an idea of the nation's sovereignty in the French polity obliged him to put forward theoretical arguments. Regarding France, a logical sequence of ideas

⁹⁹ *ibid.*

¹⁰⁰ An extensive passage cited below pictures Hans Kelsen's reflections on the fictitious nature of the parliamentary representation of the nation's will: "Obviously, a fictitious nature of the concept of such representation did not become part of political awareness as long as democracy struggled against autocracy and a parliamentary system did not ultimately defeat the claims made by monarchs and Estates General. In the years of constitutional monarchy, when the parliament elected by the people was recognized as a supreme manifestation of the curb put on the power of the absolutist monarch, any criticism of the democratic state based on the question whether parliament may utterly pronounce the nation's will, is pointless. Yet as the parliamentary system rule was fully adopted, particularly in the republic, and constitutional monarchy replaced by the parliament's omnipotence referring to the principle of the people's sovereignty, critics could no longer pretend they did not discern pure fiction embedded in the theory developed in 1789 by the National Assembly. According to that theory, the parliament is actually the only representative of the nation, whose will determines the content of parliamentary statutes. Thus, it should not be surprising that the primary argument against the parliamentary system is that the state's will shaped by the parliament is not at all the nation's will since the constitutions of parliamentary states do not provide for any expression of the nation's will except for an act of elections.

This is a pertinent argument that, however, may not be applied against the parliamentary system as long as we seek legitimization of the parliamentary system in the principle of the sovereignty of the people trying to define its essence by means of an idea of freedom. From such a perspective, a parliamentary system really offered us the advantages it had never brought and actually had never been able to bring before. Despite this, it is possible to define its essence and substantiate its value as a specific means of social technique in establishing the state order without using the fiction of representation. Defining the parliamentary system as a necessary compromise between a primitive idea of political freedom and a rule of the division of labour, it is possible to precisely delineate how the parliamentary system reform should be implemented." H. Kelsen, *Foundations of Democracy, Id.*, cited after the Polish edition: H. Kelsen, *O istocie i wartości demokracji, Id.*, pp. 45–46.

shaped the institutions. Under such conditions any opening to the direct democracy required reinterpretation of the primary principles of the republican legal tradition.

By no means may the innovativeness of Carré de Malberg's thought be underrated. A pioneering nature of his writings may not raise any doubts. He might be said to have developed a doctrine alternative to that of Esmein. Carré de Malberg challenged a theory of parliament's sovereignty from the republican perspective, which had a significant impact on thinking of the juristic elites participating in drafting the Fifth Republic Constitution. Carré de Malberg opened the door of the republican tradition wide to general presidential elections and a referendum. He delineated the solution he recommended as the one that was in full accord with the notions and principles of the French Revolution. He applied the legal language to underscore the fact that the republic democratization would allow for the empowerment of the executive power, restoration of the constituting power of the nation, primacy of the constitution and, consequently, the review of the constitutionality of acts. De Malberg made a breakthrough in the French theory of constitutional law and thus opened up an opportunity for staging a republican institutional revolution that was an act of the founders of the Fifth Republic.

D. Bardoux Committee – Reconstruction of a Strong Executive Power and Professionalization of the Polity

Presentation of the achievements of the reformist thought of the 1930s would be incomplete without an in-depth analysis of the Committee works on the Reform of the State, headed by senator Jacques Bardoux. He was a politician of the nationalist-republican views, a jurist specialized in English political solutions, a president of the Academy of Moral and Political Sciences attached to the French Institution and, in earlier years, a member of the delegation for the League of Nations.¹⁰¹

¹⁰¹ Jacques Bardoux (1874–1959), a politician and political writer of the right-wing views; staged campaign against the French communist party and highlighted threat posed by the Soviet Union, Popular Front years; elected a senator from the UDR list, (Democratic and Radical Union), 1938 and 1940; member of the First and Second Constitutional Assembly and deputy, 1946–55; grandfather of president Valéry

A document entitled *La France de demain. Son gouvernement, ses assemblées – sa justice*¹⁰² was drafted by a team of pre-eminent French jurists, including Joseph Barthélemy, a constitutionalist, member of the French Institution, professor of the University of Paris and Boris Mirkine-Guetzévitch, an author of the acclaimed comparatist work on the trends in constitutional law after World War I.¹⁰³

Noteworthy, the document has a huge intellectual value in the diagnostic and positive sphere. Undoubtedly, along with the writings of Raymond Carré de Malberg and André Tardieu, this is the most innovative proposal for political changes drawn up in the 1930s.

The Bardoux Committee members asserted that the crisis had a dual dimension: affected elites and institutions. “France will neither regain a trust in itself nor prestige abroad as long as it is unable to revive its parliamentary elite and improve perverted institutions.”¹⁰⁴ The authors of the document refused to embrace any foreign patterns as they reasoned that the French political thought should seek its own and original response to the threat affecting parliamentary democracy systems. Obviously, they voiced reservation about copying British solutions in the French polity. Instead, the Bardoux Committee sought its own means to restore efficacy of the Western state and maintained a distinctly critical stance on any authoritarian solutions.¹⁰⁵

Giscard d’Estaing; renounced to run for the National Assembly in 1956 to enable future president to make his political debut.

¹⁰² J. Bardoux, Comité Technique pour la Réforme de l’État, *La France de demain...*, *Id.*

¹⁰³ A full composition of the Bardoux Committee: Alibert, honorary *maître des requêtes* at the Council of State, honorary professor of the Academy of Political Science; Barthélemy, member of the French Institution, professor at the Faculty of Law in Paris; Blondeau, a Doctor of Law; Gidel, professor at the Faculty of Law in Paris and Academy of Political Science; Laferrière, professor at the Faculty of Law in Paris; Lambert-Ribot, honorary *maître des requêtes* at the Council of State; Lavergne, professor at the Faculty of Law in Lille; Lyon, attorney at the Court of Appeal in Paris; Marlio, a member of the French Institution, honorary *maître des requêtes* at the Council of State; Mercier, a chief engineer in the Navy; Mirkine-Guetzévitch, General Secretary of the Institute of Comparative Law at the University of Paris; Pichon, honorary *maître des requêtes* at the Council of State. The Committee was not homogenous regarding political affinities. Robert Alibert and Joseph Barthélemy played a significant role in the governments of Vichy. Barthélemy, which was mentioned in Chapter I, was the main author of the draft constitution of the French State. Robert Alibert was a minister of justice in the governments of Vichy and author of the constitutional acts passed in 1940. On the other hand, Mirkine-Guetzévitch made different choices and supported Résistance in the war years. After World War II, along with H. Michel, drew up the first anthology of political ideas of Résistance. H. Michel, B. Mirkine-Guetzévitch, *Les idées politiques et sociales...*, *Id.*

¹⁰⁴ J. Bardoux, Comité Technique pour la Réforme de l’État, *La France de demain...*, *Id.* p. 5.

¹⁰⁵ The passage below shows well how determined the Bardoux Committee members were to submit original proposals for reforms: “France has so far sufficiently

Analyses conducted by the Bardoux Committee indicated that the crisis stemmed from blocking the executive and judiciary powers by the hegemonic and omnipotent legislative power coupled with particularistic interests and incapable of embracing new challenges. The Bardoux Committee consciously challenged the conviction of the superiority of the legislative power that was deeply rooted in the French legal and political thought. Meanwhile, the Committee members who prepared the draft of political changes recognized the executive as a fundamental institution determining the very state's existence.

Wherever the separation of power into three branches is applied, executive power becomes the organ of critical importance, the 'brain' that devises and leads, the power that invigorates and unites. Undoubtedly, the remaining branches of power are indispensable elements to provide effective supervision and make decisions. The lack of independent judicial power and limited legislative power would deprive the state of its moral mission and destroy modern civilization. Yet they may be temporarily suspended out of ordinary or extraordinary reasons and this will not lead the state to annihilation. On the other hand, when it is the executive power that is limited, a life of a modern nation will sooner or later lose its rhythm in the economic and moral sense. The blood pressure drops, blood circulation slows down, the disease affects all the body and may lead to death.

When the institutional crisis affects only the judicial and

contributed to the development and promotion of the ideas, acts and solutions of fundamental importance for the bourgeois, economic and parliamentary liberalism. Today our country, an exponent of the Western European political culture, must determine the conditions under which the state based on the *trias politica* principle (executive, judiciary and legislative branches of power) may become more effective and competent. The French thought should seek original solutions. Modern nations, except the Western ones, oscillate either between corporate state and a military dictatorship or the Soviet-like communism and a workers' state. As all these models offer reactionary solutions there are more affinities than differences between them.

This is France, that foreign propaganda, trying to outshine its splendour, reproaches for losing political and social invention and, consequently, incapacity to set a good political and constitutional example for other countries, that is ineluctably obliged to solve a constitutional crisis with reverence for the freedom of conscience and equality of rights and launch appropriate initiatives.

Unless effort is made to do so and the endeavour is successful, the French political thought will lose its prestige across the world. If, in turn, France proves that a modern Western state has capacity to successfully reconstruct and accommodate its mechanisms to new needs and challenges, enhance their efficacy without curbing freedoms and impairing justice, it might set a good example in the old and new world." J. Bardoux, Comité Technique pour la Réforme de l'État, *La France de demain...*, *Id.*, p. 5–6.

legislative powers and the country is free and civilized, public opinion and a government have some time to think it over and are able to apply appropriate measures to launch its restoration. When, however, the crisis affects the executive power or it is enfeebled by any dependent reasons, reforms should be implemented instantly and require more energy. In this event, this does not concern the disease that is curable in a wide range of modes but a problem that should be handled instantly.¹⁰⁶

A crisis of the French constitutional system regarded primarily the executive power that lost vitality. Unable to exercise state leadership, the executive had no capacity to supervise administration and proved to be incapable of enforcing laws effectively. Governments did not inhibit waste of public funds and were vulnerable to the pressure exerted by trade unions. In the Bardoux Committee's view, a deep source of defects of the political system was the particularization of politics. The Parliament, whose competences gradually grew and paralyzed the executive power, actually became a hostage of purely particularistic interests. A passage from the cited report is quite meaningful:

Binding deputies by their parties agendas is like a cancer that wracks the Republic. This is killing the State. If the legislative body contravenes the provisions and a spirit of the Constitution, if it is superseding the executive power instead of succumbing to its impulses, if it is taking over the competences of the judiciary power instead of succumbing to its arbitration, this always serves particularistic, sometimes local but most frequently individual interests.¹⁰⁷

A basic factor that enabled deputies to further their egoistic interests was a two-mandate constituency and a model of the electoral law favouring local interests. A political system blocked by particularistic interest was incapable of appointing authorities that would attend to the weal of the Republic. Here the Committee's view was similar to the penetrating diagnosis developed by André Tardieu, who elaborated on the process of oligarchization of French politics. The criticism included in the document prepared by the Bardoux Committee concerned not only the abusive use of the parliament's supervising powers or those that impaired effective governance but

¹⁰⁶ *ibid.*, pp. 7–8.

¹⁰⁷ *ibid.*, p. 29.

also formation of the governance elites. Particularization of the politics favoured only such candidates for the ministerial posts whose primary asset was availability to the parliamentary groups and their narrow interests. The document provides an evocative portrait of a typical minister of the Third Republic:

An ideal minister is, in the view of this wretched parliament, more a victim than a perpetrator, an exact opposite of the competent minister [...] This paragon of a man of the republic of constituencies, [...] is a model for everybody that would like to be appointed a member of the executive power, helpless and enslaved by the omnipotent and obsequious legislative power. No matter whether he runs for the position in the directorate, prefecture or ministry.¹⁰⁸

The Committee's overriding goal was to enunciate a full-scale response to the crisis symptoms they identified. The authors of the document applied a term the Fourth Republic, which pronounced the will to implement profound political changes. A reform draft devised by the Bardoux Committee envisaged subjectivation of the executive power, reform of the electoral law, polity professionalization, reconstruction of the territorial self-government, creation of the regional level of public authorities and a completely new model of independent judiciary power based on the strong corporate rights.

In each of those fields, the Bardoux Committee submitted new constitutional proposals and a number of them inspired the founders of the Fifth Republic. Reconstruction of the strong executive power transcended the framework delineated in the acts of 1875. A proposal envisaged reconstruction of the bipartite executive exercised by the president and prime minister. "The powers exercised by the President of the Republic must be confirmed and revived. A scope of powers exercised by the Prime Minister must be determined and organized."¹⁰⁹ Reconstruction of a strong position

¹⁰⁸ *ibid.*, p. 9.

¹⁰⁹ *ibid.*, p. 13. This is how the document refers to the political role of the president and prime minister: "The first one appoints. The second one is in charge. The first one supervises, while the second one administers. The first one seeks compromise, while the other one gives orders. President of the Republic is the head of the country, while the prime minister is the head of the government. The President is cross-party, while the prime minister is the majority leader. The Constitution of 1875 specifies the President's competences. It may not order the Prime Minister to do anything. The presidential powers are limited by the lack of the possibility to act. The prime minister's powers are actually extended ... As long as this double-undermined keystone is not reconstructed, full restoration of the executive power is impossible." *ibid.*

of the president as the chief official attending to all state affairs was to be put into effect through the simultaneous application of a number of reformatory measures. Unlike the reform proposals of 1934, the authors of the Bardoux project disbelieved in the possibility of reconstruction of the strong presidency by the return to the literary interpretation of the bills of 1875. The project was innovative: its authors coupled a call for a longer, 10-year tenure of the president, which, in their view, “would give president a will to exercise his constitutional prerogatives,”¹¹⁰ with a total change of the basis of his mandate. Undoubtedly, a call for the establishment of a large electoral college was innovative and had at least one fundamental advantage: the president became independent of the parliament and main political parties. The electoral college appointing the president was to comprise not only deputies and senators but also members of the regional councils comprising councillors – representatives of the general councils, business and professional organizations. And last, but not least, college members were also to include representatives of the intellectual elite appointed by the Institute of France.

Thus, a region became a crucial part of a new political construction. Inclusion of the corporate element into the Electoral College was intended to facilitate streamlining of the election process. The idea of a large college shall henceforth be a significant strand in the reform projects. Meanwhile, by highlighting president’s independence of political groups, members of the Committee of Jacques Bardoux could assert that “the Chief Official of the Republic, appointed by the Electoral College and finally liberated, will truly epitomize national unity and make a full use of his executive powers.”¹¹¹

A new mandate, with the legitimization stronger than that held by the parliament, was intended to provide the president with an opportunity to independently exercise prerogatives such as designation of the prime minister, dissolution of the Lower Chamber, nomination of permanent undersecretaries of state in the ministries and promotion of high-rank officials. The authors of the Bardoux project also aimed to strengthen the other pillar of the executive power by applying a new procedure for the government appointment and putting into effect constraints lest the distrusting vote be applied. The president was empowered to appoint a prime

¹¹⁰ *ibid.*, p. 15.

¹¹¹ *ibid.*, p. 16.

minister without a ministerial countersignature for the whole tenure of the legislative body.¹¹² To eliminate the abuse of the distrusting vote procedure, the Committee demanded that it could solely be applied if at least one third of the deputies signed a motion. The President was empowered to dissolve the assembly in response to the distrusting vote passed, which was intended to stabilize the executive power. The proposal set forth that the president was empowered to accept the government's resignation, dissolve the parliament or put a controversial bill to a consulting referendum. The document provided that

The Cabinet shall resign unless, within three days after the distrusting vote was passed, the head of the state gives the prime minister either a decree on the dissolution of the parliament or – in the event of a different view regarding the bill's content – a decree on the consulting referendum.¹¹³

An introduction of the parliamentary sessions was devised as a means aimed to balance executive and legislative powers. The Committee members asserted that two parliamentary sessions should be introduced and their total time should not exceed six months.¹¹⁴ Furthermore, the document provided professionalization of the executive power through the introduction of a highly competent, permanent, independent of political fluctuations, undersecretary of state into each ministry. Professionalization was also intended to affect the parliament. The Committee members called for reduction of a number of permanent commissions and close cooperation with the Council of State in the legislation process and with the Court of Auditors in planning and substantiating expenditure.

As the Committee recognized the state authorities' dependence on the particularistic interests as a primary source of crisis,

¹¹² "The Committee sought a solution by combining the British system (designation by the head of state) and the Swiss system (appointment by the parliament chamber) – a non-confrontational amendment that would be a continuation of the French tradition and supplement constitutional provisions. The President appoints a prime minister for the tenure of the legislative body without a ministerial countersignature within maximum one month since the date of the general elections. After signing the decrees on ministerial nominations and drawing up the government's declaration, the prime minister, within seven days and nights, will apply to the chamber for a vote of confidence, approval of his and his ministers nominations that is voted after the debate by a roll-call vote (each deputy is called by name to cast a vote)." *ibid* 17.

¹¹³ *ibid.*, p. 18.

¹¹⁴ *ibid.*

the reform plan envisaged a thorough change in the electoral law: "Current system, voting in small constituencies in two ballots, ineffectually leads to the moral decay, poor discipline and servilism"¹¹⁵ – the report's authors concluded. Therefore, the Bardoux Committee recommended deconstruction of the electoral system (small constituencies) and introduction of the proportional and centralized electoral statute, which meant that voters made a choice among political parties and could no longer choose individual candidates from the lists. The plan's authors put trust in the party leaders who, they asserted, were capable of pursuing policy overcoming egotism of particularistic interests.

Consistent endeavours to professionalize polity and establish mechanisms strengthening meritocratism of the state authorities are definitely innovative elements of the reform project developed by the Bardoux Committee. Moreover, which is crucial, they also included introduction of permanent undersecretaries of state and a call for the rationalization of parliamentary procedures. While these proposals may be recognized as a supplement to the package of reforms aimed to liberate executive power from the parliament's hegemony, an idea of the separate corporatist representation was really revolutionary and collided with the republican understanding of the nation's sovereignty. Now the regions were to be new institutions of public authorities, of the self-government and corporative characteristics.

Although France has never decided to supplement political representation by corporative representation, the reform proposal of 1937 contributed to a regionalization process that was eventually effectuated in 1980s. This is proved by not only a number of 26 proposed regions, but also the identity of arguments put forward by the Bardoux Committee, including those that justified the 1980s reform.

In the Committee's view, there were four reasons for the establishment of regions: the regional bonds perpetuated by history proved to be stronger than the post-revolution administration;¹¹⁶ the regional framework was expected to meet economic needs; a region provided an opportunity to build a homogenous

¹¹⁵ *ibid.*, p. 31.

¹¹⁶ "Region is a historical entity. Even today, fifty years after they had been abandoned, the borders of the provinces are still discernible on the maps of trade, fairs, customs or dialects. Certainly, the department borders blend in with the ground but still here and there they break down under the strain of habits, sometimes a thousand year old tradition to blend in with the other, much broader frontiers." *ibid.*, p. 44.

administration entity since the borders of already-operating regions – military, judiciary, university and economic – did not overlap. The Bardoux Committee recommended to supersede these tangled and contradictory divisions with 26 regions whose borders overlapped with those of the past provinces and met local economic needs.¹¹⁷ And last but not least, the regions were not political districts: location of several administration bodies in their capitals put an end to the corruptive influence of local politicians.

Such a legal entity was intended to be a laboratory for setting up a new institution coupling a modern and managerial administration with the representation of professions and business interests. The project envisaged that public activities in the regions were under the supervision of prefects-governors invested with special powers similar to those of the “Roman consuls, constructors of the roads and bridges,” nominated by the Council of Ministers upon the prime minister’s motion.¹¹⁸ Prefects-governors were recognized as the new-type administrators, animators of the regional life, undertaking to hold larger investment ventures. Their mission was defined in opposition to the old-type prefect who focused on passive administrative functions and was dependent on the local political elite.

The project envisaged that administration and financial services were established in the regions and supervised by the regional directors. Along with them, special authorities responsible for the public aid and construction of bridges and roads were to be established. A regional public official appointed by the Chairman of the Court of Auditors was to be responsible for finances and control of expenditures. A new, specialized regional administration was aimed to support professionalization of the self-government administration at the level of departments, cantons and districts.

The prefects were to cooperate with regional councils appointed for a long, 6-year tenure. Their composition included representatives of department councils (one per ten members of the council), representatives of business institutions and trade unions and prominent representatives of the regional elite appointed by co-optation. The authors of the reform project paid special attention to the experience and competences of the representatives of business chambers and professional groups. A typically corporatist argumentation highlighted advantages of such representation and its advantage over the quality of political representation.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*, p. 45.

Proposals for the reconstruction of an independent judiciary system and introduction of the partial review of the constitutionality of acts were equally interesting and innovative. These issues were recognized as fundamental to put into practice the reform of the state:

The respect they win, the values they represent and independence the judges of the courts of general jurisdiction have, remain the fundamental criteria of political culture. The measure of political culture is the scope of freedom of the judiciary system and its willingness to pronounce fair adjudications.¹¹⁹

– the report's authors asserted.

In this event, the Bardoux Committee members did not conceal their extreme pessimistic evaluation of the French judicial system that, in their view, was just a function and not power, which, in turn, translated into a considerably weak position compared to that of the parliament and administration. The courts of general jurisdiction did nothing but applied the laws and never opposed the abuses of the legislative power or administration. Actually, the judiciary system could not exercise any power as nominations and promotions of judges depended solely on the executive power.¹²⁰ The judicial administration system was a rare exception,

¹¹⁹ *ibid.*, p. 55.

¹²⁰ This is well pictured in a document excerpt including a historical analysis of the reasons for the degradation of the French judiciary system: "Judges, doomed to being nothing but low-level administration clerks by the tradition whose distant beginnings merge with the beginnings of the French state could not avoid suffering from the blows given by modern customs and participating in the fall of the public authorities.

As early as in the 19th century, in the years of monarchy and Bonapartists, the judiciary power, separated from the legislative power, neared excessively the executive power. This had certainly an impact on its *modus operandi*: it became more like that of the executive branch, less willing to serve people's interests, especially when the legislators' interventions favoured particularistic interests.

Noteworthy, the Constitution provided for a number of exceptions regarding separation of powers: political disputes could be settled by the authorized assemblies and the National Assembly chambers were empowered to settle electoral disputes. Moreover, operation of the judiciary was impaired by the expropriation act and assemblies were invested with a power to perform judiciary functions, set up special courts, pass retroactive acts and review the cases validly adjudicated. Significantly, politicians could interfere with the process of nomination, appointment or promotion of removable or non-removable judges. This increased a risk. A few levels in the judicial hierarchy were as nearly the same as in the army and everybody, from a corporal to a marshal, including ministerial proxies of political parties, was given access to any rank. Such unpredictable organization multiplied opportunities for interventions and gave pretexts for such interventions as voting in the election districts impaired the quality of representatives and, consequently, undermined good practices. On the

with the Council of State (*Conseil d'État*) at the top of the hierarchy; only this body was empowered to overrule administrative decisions contrary to law and actually played some role of the constitutional court in this respect.

A British model of the judiciary system, which enjoyed independence and high prestige, was a positive point of reference for the Bardoux Committee members:

A historian must discern here that the situation on the either sides of the English Channel is not the same yet. Despite common roots dating back to the Anglo-Norman kingdom, the differences in the evolution of the judiciary institutions have gradually become even more discernible. Today they are discernible at a first glance. In England a judiciary system is independent while in France this is just a tasked body. There – this is the third branch of power. Here – this is just a service. On the other side of the English Channel justice is one for everybody. On this side, this is a double or even triple standard. An English judge creates customary law, while a French judge just interprets the constituted law. [...] Respect and independence British judges enjoy enable them to give political culture of the island empire a well-founded advantage over France. And only recently it has been France whose highly-valued administration and local assemblies have given it a natural advantage over England and electoral victory of the Labour Party downgraded the House of Commons and the Council of Ministers compared to the French parliament and cabinets.¹²¹

The Bardoux project provided for a total revision of the French judicial model shaped in the years of the monarchy and consolidated by the French Revolution. The Committee members asserted that the prerequisite for the establishment of the state respecting separation of powers is investing the judicial system with sovereign power. A political transformation, they contended, should aim at granting the judiciary system a corporative autonomy and relieving it of any political interventions.

Thus, the Bardoux Committee challenged one of the key principles of the French polity model – investing the executive power with the exclusive authority to decide on the appointments

other hand, as a competition was established and its quality increased, the judicial organ was empowered with the initial selection of candidates, which meant that there were no other options for appointments." *Ibid.*, p. 59.

¹²¹ *ibid.*, p. 56.

of judges. This meant that the minister of justice was no longer empowered to nominate and promote judges.¹²² The decisions of key importance for the judiciary system, nominations and promotions in the judicial hierarchy, were to be made by a strictly corporative body comprising the Chief Justice of the Court of Cassation, the Chair of the Section of Proceedings at the Council of State and the Dean of the Faculty of Law at the University of Paris. The elite and, independent of the pressure of the executive power, the Commission for Nominations and Discipline were empowered to apply sanctions and disciplinary penalties, promote and fill judicial vacancies, except for the nomination of the Chief Justice of the Court of Cassation, which was a competence of the Joint Chambers of the Court of Cassation. The Chief Justice was elected in the secret ballot. Also in this case the project posited that a corporative mechanism would be applied. The Bardoux Committee members had no doubts that such a mechanism would mould independent and competent judicature. Given the British model, the Committee members recommended combination of the competition procedures and nominations of the representatives of the law sciences, which, they asserted, would open the profession and attract elite of jurists to the judicature. A corporative solution was also intended to be applied in the administration judicature that, in the committee members' view, should remain independent. Regarding the Chairman of the Council of State, the body at the top of the judiciary hierarchy, he was to be elected by the council members.

Finally, the Bardoux Committee members expressed conviction that the review of the constitutionality of acts was a prerequisite for the independence of judicature.

The judiciary power could not be sovereign if it were not constitutionally invested with the power to repeal any statutes infringing fundamental rules of political culture. This elementary right is the keystone of the modern state [...] Ever since, any exception of unconstitutionality could be filed by a prosecutor, also *ex officio*, or by

¹²² The passage below highlights the will to definitely deprive the minister of the authority to nominate judges: "...a set of rules and regulations set forth that a minister, who is an exponent of party interests, no longer exerts influence on the policy of nominations, designations and promotions. Although the minister of justice may «within fifteen days of appointment apply to the Commission for re-appointment or drawing up a list of alternative candidates», a risk of parliamentary intervention is reduced by the likely sanctions and a total ban. Sanction: any intervention made in writing or in speech is instantly reported to the Supreme Court." *ibid.*, p. 63.

the parties, before all instances. A judge that considers the exception admissible, adjourns adjudication until the Supreme Courts renders a sentence

– the authors of the project contended.¹²³

Like Carré de Malberg's concepts, the Committee's proposal posited a limited review of the constitutionality of acts *in concreto*, based on the unconstitutionality charge that could be brought in the proceedings run *ex officio* or by the parties. A charge brought in the event of infringement of the primary principles of constitutionality was to be a subject of the adjudication rendered by the Supreme Court,¹²⁴ which, as a special organ of the constitutional judicature and was empowered to declare regulation invalid if they contravened the rules of the legislative process specified in the constitutional regulations, the principle of *res iudicata*, the principle of non-termination of contracts, the principle of the deprivation of property for legitimate compensation, freedom of consciousness and equality of citizens, the principle of non-retroactive legislation and the principle of the separation of powers. The project authors highlighted the fact that those principles were already included in the Declaration of the Rights of Man and of the Citizen. They did this in search of republican legitimization for the new institution.

The reform project offered by the Bardoux Committee constituted the original and comprehensive response to the crisis of the Third Republic. The harsh diagnosis of the constitutional faults challenged the foundations of the polity construction: hegemony of the legislature, weakness of the executive power and vulnerability of the whole system to particularistic interests. The overriding

¹²³ *ibid.*, p. 70.

¹²⁴ The document on the appointment and status of the Supreme Court judges: "Judges, who enjoy the sovereignty of power, must enjoy appropriate status, both moral and material. They will be nominated by the president of the Republic «with no participation of any minister». The first ones from the two lists of candidates, drawn up by the Council of State and the Court of Cassation, and the others, in the event of any vacancies, from the lists drawn up by the Court which appoints one of the two candidates for each place. By the force of law, the nominees include people «decorated with the Grand Cross and Grand Officers of the League of Honour». They may not be awarded with any distinctions of honour. They may neither run for the parliament nor perform any other function «not earlier than five years after they step down from the posts of the Highest Court judges.» They may not be forced into retirement before they are 75, unless they are seriously ill or misbehaved in the Court's view. After retiring a judge retains remuneration at a rate depending on their function. The Chief Justice and three chairs of the chambers are elected for life by their peers in a secret ballot, by the absolute majority of votes." *ibid.*, p. 71.

goal of the reform should be reconstruction of the strong executive power as the key one for the very existence of the state. If the president were elected by a special college and his tenure radically prolonged, he would be in a position to exercise a real power as the head of the state. The Committee members put forward detailed proposals to ensure stable and effective two-part executive. The project's hallmarks included the state's professionalization, manifested by a close cooperation between the parliament, Council of State and Court of Auditors, and appointment of senior state officials, which made the government and regional administration independent of any political influences. An absolutely innovative idea was establishment of the regional level of power along with professional and business representations at the regional council and college whose members were to elect the president. French constitutional thought was supplemented by an idea of independent judicature, a detailed project of its institutionalization and proposal of the review of the constitutionality of acts. Yet, unlike Carré de Malberg, the Bardoux Committee members failed to address the contradiction between their demands and the principle of the nation's sovereignty. Their reference to Barrès and republican patriotism from the times of World War I was quite meaningful.¹²⁵ Actually, all the drafts discussed in this chapter were rooted in the tradition of republican nationalism. This is confirmed in the view that this ideological strain inspired constitutional reforms in an exceptional way but always in accord with the republican principles. André Tardieu was, as I have already mentioned, an outstanding exponent of the parliamentary republican Right. Raymond Carré de Malberg had similar ideological affinities.¹²⁶ Apparently, the 1930s reformism developed reformatory intuition of the people such as Barrès or Piou, which transformed ideas into institutional solutions that could later be applied in the process of consolidation and reconstruction of the Republic.

There are five essential elements of the 1930s constitutional reforms:

¹²⁵ *ibid.*, p. 74.

¹²⁶ According to prof. Eric Roussel's testimony, members of the family of Carré de Malberg were surprised that his theoretical thought was furthered by René Capitant, a jurist of the leftist and progressive views, while the professor was a man of the right-wing and republican views. The Author's interview with prof. E. Roussel, Paris, 11 May 2010.

- reconstruction of the strong executive power, where the president was invested with his own powers (*pouvoirs propres*). This primarily concerned his right to dissolve the parliament. Presidency was to become independent as a result of the general elections (Carré de Malberg) or the indirect election by the body representing a wide social spectrum (Bardoux Committee);
- introduction of the referendum institution as a means to rebuild independence of the executive power (Tardieu) and transform the polity (Carré de Malberg);
- rationalization of the parliamentary procedures, including introduction of parliamentary sessions, a constrained number of permanent commissions, deputies' restricted access to the budgetary works and a new formula of the government's accountability (Tardieu, Bardoux Committee). Importantly, a doctrinal reflection did not focus on the reform of electoral law;
- establishment of the constitutional judicature and review of the constitutionality of acts (Bardoux Committee, Carré de Malberg). Noteworthy, a few authors put forward such an idea as a manifestation of their concern about respecting individual rights and freedoms infringed by the statutes (Tardieu, Bardoux Committee);
- professionalization of the polity, integration of the government and special bodies attached to the Council of State and the Court of Auditors, appointment of independent senior officials enjoying a permanent status in the ministries and administration (Bardoux Committee).

A separate and exceptionally significant asset was the theoretical reflection of Carré de Malberg, who re-interpreted fundamental values of the republican tradition. The outstanding jurist was a great advocate of the general presidential elections and a referendum. Furthermore, he was the first author who demanded that constitutional judicature should become part of the republican tradition.

Ineluctably, several reform proposals put forward in the 1930s (professional representation in the Senate and regions, corporatist model of the judicature) could not become part of this framework as they were contradictory to the idea of the nation's sovereignty. This confirmed the power of the republican tradition and possibility to implement reforms provided that its principles were still respected.

Chapter IV

Visions of the New Republic

A. René Capitant and Michel Debré – Republicans of Heart and Reason

De Gaulle had no knowledge of the whole output of the reformist thought of the 1930s. As I have already mentioned, he read and appreciated the writings of André Tardieu. Yet the projects of constitutional reforms were certainly the subject of great interest of his aides – René Capitant and Michel Debré. The former made his debut in the pre-World War I years and may therefore be recognized as a contributor to the reformist endeavours of those years.¹ Presumably, the writings of those jurists may be recognized as a kind of a bridge between the 1930s reformism and the Fifth Republic. Michel Debré and René Capitant developed the trends that moulded the Fifth Republic Constitution: rationalized parliamentarism and republican democratism.

Let us have a look at their intellectual and political profiles.

René Capitant (1901–1970) was a son of Henrie Capitant, an outstanding civil jurist, and shared his scientific passions. In the 1930s, René Capitant began his academic career at the University of Strasbourg, where he met Raymond Carré de Malberg and took the chair at the constitutional law department after him. A political thought of René Capitant matured largely through the influence of that theoretician of law. He was a staunch advocate of the republican tradition in its radical and social version. In the early 1930s R.Capitant had an opportunity to visit Germany and learn the nature of Nazism.² Soon, after he had returned to France, he

¹ René Capitant's paper, *La réforme du parlementarisme* was published in 1934. The author contained references to the Tardieu's thought there. See R. Capitant, *La réforme du parlementarisme*, Recueil, Sirey, 1934. cited after the Polish edition: René Capitant, *Reforma parlamentaryzmu*, [in:] K. M. Ujazdowski, *V Republika Francuska...*, Id., pp. 161–185.

² In those years René Capitant published a series of articles on the Nazi ideology. They were recently reminded by Olivier Beaud. See R. Capitant, *Face au nazisme: écrits 1933–35*, préf. O. Beaud, PU Strasbourg (2004); O. Beaud, *René Capitant et sa critique de l' idéologie nazie (1933–39)*, [in:] "Revue Française d'Histoire des Idées Politiques"

became head of *Comité de vigilance des intellectuels antifascistes* that aimed to make students aware of the threat posed by the Nazi dictatorship.³ Before World War II, R. Capitant also became involved in the public activities as a member of the Political Cabinet of Prime Minister Léon Blum. Yet he resigned, disappointed with Blum's reluctant attitude towards constitutional reforms.⁴ In winter 1939, upon his own request, he was summoned for military service. This is when he met de Gaulle in the headquarters of the 5th Army, in Wangenbourg.⁵

After the defeat of France, René Capitant got engaged in the formation of Résistance in Clermond-Ferrand and after being transferred to Algiers set up a local branch of the combat movement and organized a pro-Gaullist propaganda. In June 1943 Capitant became a member of the French National Liberation Committee as a commissioner for education. After liberation of the metropolis appointed the Minister for Education in de Gaulle's government.⁶ At that time, he made a decision to abandon the Vichy legislation regarding academic institutions. In 1945 de Gaulle's aide was appointed a member of the First Constitutional Assembly and thereafter held a deputy mandate between November 1946 and 195.⁷ After de Gaulle's resignation in January 1946, R. Capitant founded the Gaullist Union and thereafter became an activist in the Assembly of the French People (RPF) and influenced their stance on the constitutional affairs. René Capitant could not participate in drafting the 1958 Constitution as he headed the Institute of French Culture in Tokyo at that time.⁸

(2001), no 2. During his stay in Germany, René Capitant met Carl Schmitt, with whom he maintained scientific contacts until 1934. G. Le Brazidec, *René Capitant, Carl Schmitt: crise et réforme du parlementarisme: de Weimar à la Cinquième République*, préf. de J. Chevallier, Éd. L'Harmattan (1998).

³ J. F. Muracciolo, *René Capitant*, [in:] *Dictionnaire de Gaulle*, Id., p. 164.

⁴ R. Capitant framed a very critical opinion on Léon in *La réforme du parlementarisme*. In his view, Blum was a politician who contributed grossly to the political crisis. See R. Capitant, *La réforme du parlementarisme*, Id., cited after the Polish edition: R. Capitant, *Reforma parlamentaryzmu*, Id., p. 183.

⁵ M. Waline, *Diversité de son œuvre, unité de sa pensée*, Espoir, 1981, No. 36, p. 5.

⁶ See J. Thomas, *René Capitant, ministre de l'Éducation nationale*, Espoir, 1981, No. 36, pp. 22–27.

⁷ See http://assemblee-nationale.fr/sycomore/fiche.asp?num_dept=1426.

⁸ René Capitant arrived in Poland along with general de Gaulle during his official visit in 1967. Noteworthy, Capitant was conferred *honoris causa* doctorship by the University of Lodz that maintained close scientific contacts with France in the area of law sciences in particular. See W. Szubert, *Motion qui accorde à René Capitant le titre de docteur honoris causa de l'université de Lodz (Pologne) Extraits*, Espoir, 1981, No. 36, p. 43

On his return to France, along with Louis Vallon, led a left-wing social strain in the Gaullist movement. René Capitant called for workers' participation in the enterprise management and opposed liberal economic policy of Prime Minister Georges Pompidou.⁹ In May 1968 resigned from his parliamentary seat as he had no intention to support Pompidou's government in a vote of no-confidence.¹⁰ After Gaullists' victory in the parliamentary elections of 1968, upon a direct request of the President, assumed the function of the minister of justice in the government of Couve de Murville¹¹ but resigned after de Gaulle's defeat in the 1969 referendum.

Along with public activities, René Capitant continued his academic career at the faculty of law in Paris. A pioneering nature of his writings may by no means raise any doubts. In the 1930s, he furnished a draft on the rationalization of the parliamentary system, including proposals whose contents was afterwards reflected in the Fifth Republic Constitution. After liberation of France, his political thought turned towards direct democracy and referendum. He openly referred to the idea of Rousseau and introduced theoretical arguments developed by Raymond Carré de Malberg into the Gaullist doctrine. In spring 1946, René Capitant was among the jurists with whom de Gaulle consulted his own political vision featured in Bayeux. General asked him to make a list of significant constitutional studies.¹²

Similarly to René Capitant, Michel Debré (1912–1996) combined legal reflection with political involvement. He was born in 1912 in a bourgeois family of the Jewish origin but completely assimilated in the French society. After Germany annexed Alsace, his family refused to live under the German occupation and moved to Paris. Robert Debré, Michel's father, gained reputation as a paediatrician and reformist of medical education. Like his son, he was a member of Résistance.¹³

After graduating from École des Sciences Politiques (School of Political Sciences in Paris) and receiving a doctorate in law he assumed the position of an auditor in the Council of State. In 1938

⁹ See J. F. Muracciole, *René Capitant*, *Id.*, p. 164; M. Waline, *Diversité de son œuvre...*, *Id.* L.Vallon, *Il était de ceux qui n'ont pas peur de la vérité*, Espoir, 1981, No. 36, p. 13.

¹⁰ See M. Waline, *Diversité de son œuvre...*, *Id.*, p. 6.

¹¹ See H. Maynier, *René Capitant, ministre de la Justice*, Espoir, 1981, No. 36, p. 28.

¹² J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, p. 62.

¹³ See S. Aromatario, *La pensée politique...*, *Id.*, and P. Debré, *Robert Debré*, [in:] *Dictionnaire de Gaulle*, *Id.*, pp. 318–319.

became a member of the cabinet of Paul Reynaud, who was believed to be in position to break political passivity and oppose German expansionism. Noteworthily, in those years he was an aide of Reynaud and de Gaulle. The latter one convinced him of his concept of the army modernization.

In 1940, after escaping from German imprisonment, Debré managed to get to the free zone and again began to work at the Council of State that was then moved to Royat. For a short time he was under the illusion that the Vichy policy could have a positive impact on the French and France. In February 1943, Debré joined Ceux de la Résistance and two months later became a member of Comité général d'études (CGE), founded by Jean Moulin to design the post-war policy. His activity and enterprise in CGE had a huge impact on the draft of political reforms. In 1944 Michel Debré was a *commissaire* of the Republic and in April 1945 he became a member of de Gaulle's cabinet, where he was responsible for administration reforms. On his initiative and according to his idea he put forward long before (in the pre-war years), the National School of Administration was founded.¹⁴

After de Gaulle's resignation, in 1946, Debré belonged to the circle of his closest aides and was a founder member of the Assembly of the French People. He staged a press and parliamentary campaign (as a member of the Council of the Republic) against political faults of the Fourth Republic and for the return of de Gaulle to power. A separate subject of his public activity was his criticism of the project of the European integration. Michel Debré asserted that the supranational institutions such as the European Community of Coal and Steel, European Defence Community and European Economic Community had no democratic legitimization since their foundation infringed the nations' sovereignty. In 1957 he put a motion that the Constitutional Committee should review the conformity of the treaty establishing the European Economic Community with the Constitution of France.¹⁵ In June 1958, when de Gaulle returned to power, Debré was appointed the minister of justice in his government and upon the General's authorization was in charge of drafting the Constitution of the Fifth Republic. In August 1958, he put forward the constitution draft principles before the Council of State. Between 1959 and 1962 Debré was a prime minister. He pursued the policy loyal to de Gaulle

¹⁴ See M. Debré, *Un projet d'École...*, *Id.*

¹⁵ S. Aromatario, *La pensée politique...*, *Id.*, pp. 222–242.

although did not share his views on the two issues of critical importance for Paris: Michel Debré could not accept the loss of Algeria and, as an advocate of the rationalized parliamentary system, was not very keen on the general presidential elections introduced in 1962.¹⁶ In the 1960s he defended independence of the Council of State when the body was in conflict with de Gaulle.¹⁷

In later years Debré was a minister in the cabinets of Pompidou, Couve de Murville, Chaban-Delmas and Messmer. After General de Gaulle's death he was recognized as a Gaullism 'pope,' embodying the movement's doctrine in the orthodox version. In the 1970s he called for the pro-life demographic policy (opposed the adopted pro-abortion laws), support for agriculture and strict adherence to the state's secularity. The 'pope' of Gaullism opposed the development of European integration (including general elections to the European Parliament) and highlighted the threat posed by the rise of economic and political power of Germany.¹⁸ He perceived the policy pursued by Jacques Chirac as a departure from the Gaullist principles and therefore decided to run for presidency in 1981 but suffered a devastating defeat (1.65% of votes).¹⁹

When his constitutional concepts matured, Debré began to be recognized as an expert at the Roman law focused on the reconstruction of a strong state,²⁰ while René Capitant – as a parliamentary critic of the republic from the democratic and anti-capitalist perspective. Yet, which should be highlighted, they fervently and explicitly espoused republican values. René Capitant identified with the tradition of 1789 and, more broadly, with the French Enlightenment that, in his view, expressed a special respect for human rights.²¹ In young Debré's view – and it is worth remembering that he grew up in the secular, republican and patriotic tradition – France meant Republic. In his *Mémoires* he repeatedly applied the formula developed by Charles Péguy: "The Republic is indivisible, this is our kingdom of France."²²

¹⁶ S. Bernstein, *Michel Debré*, [in:] *Dictionnaire de Gaulle*, *Id.*, pp. 314–318.

¹⁷ Author's interview with Thierry Olson, Paris (15 May 2010).

¹⁸ M. Debré, *Qui refuse à la France la maîtrise de son destin?*, [in:] *Les grands discours parlementaires de la cinquième République*, Armand Colin, 2006, pp. 190–201.

¹⁹ S. Bernstein, *Michel Debré*, *Id.*, p. 318.

²⁰ N. Wahl, *Aux origines de la nouvelle Constitution*, *Id.*, pp. 30–66.

²¹ See O. Beaud, *René Capitant et sa critique...*, *Id.*

²² M. Debré, *Trois Républiques pour une France. Mémoires*, Éd. Albin Michel (1984–1994), vol. 2, p. 24.

René Capitant and Michel Debré knew well the output of the reformist reflection from those years and were convinced that France needed a political breakthrough and not just minor amendments of the current institutional and legal order. They were both members of the jurist elite and steadfast advocates of the consolidation of *Conseil d'État*. Noteworthy, René Capitant and Michel Debré were not Jacobine-type republicans: they espoused a superior status of the Declaration of the Rights of Man and of the Citizen of 1789, which they found the underpinnings of the review of the constitutionality of acts. At the same time they were aware that it ought to be put into effect in conformity with the republican principles and hallmarks of the French legal tradition. Their political thought was recognized as the liberal one, with the reservation that a hallmark of French liberalism is a positive attitude towards the state ("liberalism through the state.")²³

Their writings demonstrate a strong opposition against the appropriation of public life by political parties at the expense of the quality of politics and the voters' influence on political decisions. Undoubtedly, the thought of Capitant and Debré contains some British traces. They were both convinced of the necessity to consolidate the state within democracy. In the pre-war years they showed great interest in the crisis of Weimar Republic and fiercely criticized Nazi dictatorship. The crisis of the parliamentary system in Germany and its ramifications were another reason for the internal enhancement of the governance of the Republic. Certainly, from this perspective stable and effective English democracy aroused awe in the young French jurists. They particularly appreciated two-part executive and majority elections that empowered voters to make political decisions and definitely determined election results and directions of the state's policy. Responding to the *Esprit* survey on the models of political representation, René Capitant indicated the

²³ René Remond made a very meaningful comment on the hallmarks of the French political thought: "You should remember that in France, unlike in the Anglo-Saxon world, there is no liberal thought repudiating all regulations imposed by the state authorities. Apart from a handful of politicians and economists, our country does not know liberals that would put so much trust in freedom to make it a driving force of all activities and a principle of political play. Our right-wing parties remain loyal to the Colbert tradition where the role played by the state is the prerequisite of the national grandeur." R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*, p. 213. See L. Jaume, *L'individu effacé ou la paradoxe du libéralisme* Francis, Fayard (1997). O. Beaud asserts that "Gaullism of René Capitant has become part of tradition of liberalism implemented through the state (...) that is a typical, if not predominating, factor in the French liberalism." O. Beaud, *René Capitant et sa critique...*, *Id.*

British model of democracy as a positive example of the political system where the voters' decisions and not coalition arrangements of the party leaders determine the government's policy.²⁴

B. Rationalized Parliamentary System

Noteworthy, René Capitant's *La réforme du parlementarisme*, published in 1934, is one of the first books where a plan of the fundamental political change was put forward.²⁵ The point of departure for Capitant's deliberations was challenging the theory of the power separation, developed by Montesquieu. In Capitant's view, the thought of the author of *The Spirit of the Laws* could refer to the balanced parliamentary monarchy and not modern parliamentary system. The latter one posited that executive and legislative branches should be integrated and conferred upon parliament, which was actually in opposition to the principle of the separation of powers. The influence of Carré de Malberg's reflection in Capitant's thought was conspicuous, which is not surprising as de Malberg asserted that the theory of Montesquieu could not be applied in modern parliamentary democracies.²⁶

Unlike de Malberg, in René Capitant's view it was the British constitutional system that should be the point of reference, as he contended, only this system ensured absolute separation of powers and invested a leader of the parliamentary majority with the executive and legislative powers.

"When we speak about separation of legislative and executive powers we still use the language of the constitutional monarchy"²⁷ – René Capitant asserted. In his view, political reform may only be implemented in the system that envisages parliament's supremacy, provided that it is the parliament, and actually a leader of the parliamentary majority, that – in accordance with the reform internal logic – is invested with legislative and executive powers.

²⁴ R. Capitant, *Les leçons de la démocratie anglaise: pour un "two party system,"* Esprit, 1939, no 78.

²⁵ Olivier Duhamel and Nicholas Wahl recognize it as a pioneering document underlying the Fifth Republic's constitutional system. O. Duhamel, *Droit constitutionnel*, Éditions du Seuil, 1993, p.15; N. Wahl, *Aux origines de la nouvelle Constitution*, *Id.*, pp. 30–66.

²⁶ R. Capitant, *L'œuvre juridique de Raymond Carré de Malberg*, "Archives de philosophie du droit et de sociologie juridique," 1937, no 1–2.

²⁷ *idem.*, *La réforme du parlementarisme*, *Id.*, cited after the Polish edition: *Reforma parlamentarizmu*, *Id.*, p. 166.

Possibly, something that we call expropriation of the executive by the legislative power, which so many recognizes as an underlying cause of the crisis of our political system, is actually France's advantage that should facilitate implementation of any reforms... separation of executive and legislative powers is a false idea. Nonetheless, this is an outdated and anachronistic idea, a remnant of Montesquieu and moderate monarchy that should have been abandoned long time ago. It does not matter all the power is conferred upon the parliament now. That's even better! We've already gone through the first stage in the process of the parliament's dissolution. Instead of exercising power, the parliament may just delegate it to the government that is nothing more but one of its emblems – just a committee acting on behalf and under supervision of the Assembly. This helped us be half way to the goal. We should appreciate what has already been done and finish what we have to do yet.²⁸

A large number of reformists embraced the idea of the return to the original interpretation of the constitutional acts of 1875 and a call for reinvesting the President with the power to dissolve parliament. René Capitant cherished no hope that such an interpretation would ever be applied again. A French jurist professed that the constitutional system should ultimately eliminate any hallmarks of the balanced monarchy and still embedded in the constitutional system of the Third Republic. Hence, to ensure the right direction of political evolution, he demanded that president be no longer empowered to dissolve the parliament and this competence should be transferred to the prime minister. For the same reasons, he asserted that Senate, as the institution of the balanced monarchy, lost its *raison d'être*.²⁹

²⁸ *ibid.*, pp. 173–174.

²⁹ René Capitant was ready to espouse ideas of A. Tardieu who called for abolition of the Senate that, in his view, was the chamber consolidating hegemony of the parliament. This is what he thought about a political role of the Senate: “Undoubtedly, André Tardieu brought up the Senate issue under the influence of Capitant’s memories about his government experience. Recent years have proved that the Senate’s power to overthrow the government results in the instability of our governance and this is something France is suffering from. Fragility of alliances of the left-wing parties led to the fall of the governments of radicals while the Senate’s hostility resulted in the fall of the right-wing governments. The most serious drawback of the bicameral system rests in a wide range of possible political majorities. From the historical perspective, this is also justification for the Senate’s existence. The bicameral system is justified by the fact that they are in opposition to each other. Yet, today it is exactly this rule of liberalism in Montesquieu’s version that we are challenging. The House of Lords has always been

Thus, a question arises about the definition of the modern parliamentary system and its reform ramifications. “The parliamentary system is nothing but the governance exercised by accountable ministers. This is epitomized in the two principles: the government rules and the parliament supervises,”³⁰ – René Capitant asserted. Hence, the first principle of the rule of the parliament was that an integrated parliamentary majority should be organized at first. Therefore, Capitant was an ardent advocate of the strong government with a prime minister invested with “dictatorial powers” and “holding all prerogatives and all governance machinery.”³¹ Noteworthy, Boris Mirkine identified evolution of the parliamentary governance in a similar way. In his view, when the parliament became dominated by political parties, a sense of the ministers’ accountability to this branch of power changed profoundly. Their accountability to the governmental majority became a tool for their cohesion and execution of their programme.³²

The author of *La réforme du parlementarisme* asserted that the vision of Rousseau, where he defined parliamentary statutes as permanent and general rules setting the framework of justice and equality “where life of simple and virtuous society was to go on,”³³ was absolutely anachronistic and gone forever.³⁴ René Capitant analysed the nature of governance at times of the law specialization and its presence in the new spheres of social life. In his view, a modern parliamentary system should integrate the executive power with the parliament because the governance process rested in the law making (*gouverner c’est légiférer*).

a chief asset from the Tories’ perspective, while the Senate has always favoured radical parties because of the way its members were elected. Yet, the House of Lords has never overthrown His/Her Majesty’s government. The French Senate has won such power after a hard struggle and this is why the upper chamber hinders functioning of the bicameral system much more than the House of Lords. We did not discern this problem as our two parties were divided. Yet, after they were united as a result of the first reform, we should discern this now and the position of Senate will become a public issue. Unfortunately, today this question is not considered as urgent, which does not mean that the unique position of the French Senate is in conformity with the parliamentary system.” R. Capitant, *La réforme du parlementarisme*, *Id.*, cited after the Polish edition: R. Capitant, *Reforma parlamentaryzmu...*, *Id.*, pp. 181–182.

³⁰ *ibid.*, 161.

³¹ *ibid.*, 162.

³² B. Mirkine-Guetzévitch, *Les constitutions de l’Europe nouvelle*, Libr. Delagrave, 1938, pp.18–19.

³³ R. Capitant, *La réforme du parlementarisme*, *Id.*, cited after the Polish edition: R. Capitant, *Reforma parlamentaryzmu...*, *Id.*, p.166.

³⁴ R. Capitant alluded to Mirabeau and John Stuart Mill, who envisaged a fundamental change in the role of law. See R. Capitant, *La réforme du parlementarisme*, *Id.*, cited after the Polish edition: R. Capitant, *Reforma parlamentaryzmu...*, *Id.*, p. 166.

Governance trespassed a narrow space of law enforcement and required activity in designing and making legal regulations. René Capitant contended that

in a modern state, legislation is an instrument of governance. Economy management, protection of industry, lifting or imposing tariffs, changing the army status, stimulating or establishing social security and insurance institutions are nowadays put into force by parliamentary statutes. Governance does not mean undertaking actions in accordance with the statutes in-force but managing the legislative process. To put it briefly, governance means law-making. These two notions are now closely combined and a parliamentary system is sensible only if it takes into account this truth and invests a government with executive and legislative powers.³⁵

A call for the modernization of the political system and law and their adjustment to modern requirements appeared in many writings that inspired the Fifth Republic founders, including the Bardoux Committee report or André Tardieu's writings. Yet this is René Capitant who was the first to call for the introduction of decrees having the force of law as a permanent instrument of the governance. At the same time, he rejected allegations about unconstitutionality of decrees and the government's abuse of power.³⁶

Decrees having the force of law are the real decrees having the force of law, or even more – they are statutes. Instead of opposing them they ought to be recognized as a fundamental part of the parliamentary reform. Instead of accusing of the constitutional breach, they should rather be recognized as a logical and necessary completion of the process of building a parliamentary system. They should be adopted as an ordinary instrument of governance and law making.³⁷

– Capitant asserted.

Presumably, his arguments paved the way for the spontaneous legislation of the government. René Capitant asserted that the

³⁵ *ibid.*, pp.166–167.

³⁶ See J. Stembrowicz, *Ustawodawstwo rządowe w powojennej Francji*, Państwo i Prawo, 1960, No. 2.

³⁷ R. Capitant, *La réforme du parlementarisme*, *Id.*, cited after the Polish edition: R. Capitant, *Reforma parlamentaryzmu...*, *Id.*, p. 175.

government legislation offers opportunities for overcoming the legal crisis, instability, internal contradiction, bureaucracy and unpredictability from the perspective of the addressees of norms. The author provided practical examples of the regression of French insurance legislation, urban regulations or incoherence in the regulations effective in Alsace-Lorraine.³⁸

A reform that Capitant drafted was intended to establish institutions supporting stable and effective parliamentary governance. The author of *La réforme du parlementarisme* professed that the governance stability may be accomplished by investing a prime minister with the power to dissolve a chamber and by introducing majority, two-ballot election in single-mandate constituencies. The prime minister's right to dissolve the parliament was intended to be "a kind of a referendum uniting people and government"³⁹ and a valuable instrument enabling prime minister to consolidate cohesion in the government majority:

The power to dissolve the parliament makes him a policeman who curbs ambitions and maintains discipline. Consequently, a change of the government corresponds to a change in the people's views. A strong, heeling breeze from the outside improves atmosphere in the parliament and puts an end to the period of unrest, a fever resulting in the discord and intrigues, establishment of informal groups, all this that is so easily born in the stifling atmosphere of any closed human groups.⁴⁰

Also, in this regard there are affinities between René Capitant and Carré de Malberg's ideas as the latter one exposed a democratic nature of the parliament dissolution that enables a dialogue between the government and public opinion and empowers the nation to ultimately determine the outcome of elections and direction of the state's policy.⁴¹

Influenced by the Weimar Republic experience, René Capitant emphasized a need to combine the prime minister's power to

³⁸ "Can the French think of Paris suburbs without a shame? Why did we need so many attempts to finally implement social insurance? How is it possible that 15 years after the war there is still an impenetrable maze of rules and regulation in Alsace-Lorraine so that judges and clerks get lost in them? It must be said clearly: France is a legislative bankrupt." *ibid.*, p. 176.

³⁹ *ibid.*, p. 171.

⁴⁰ *ibid.*, pp. 171–172.

⁴¹ See R. Capitant, *La nature représentative...*, *Id.*, p. 258.

dissolve the parliament with the majority election act. He had no doubt that only co-existence of both institutions could result in the political stability:

[...] dissolution of the parliament may yield a beneficiary result provided that its effects are not undermined by the election act. Proportional statute may totally thwart its result, which German example illustrated. A condition for effective dissolution of the parliament is existence of the two main political parties between which the nation's support swings. It is only then that he is in a position to play a role of an arbitrator. Nonetheless, when a lot of political parties stand in elections, their verdict is divided and ineffective: one coalition is substituted by another one and is by no means more reliable and long-lasting than the previous one.⁴²

The author of *La réforme du parlementarisme* regarded a proportional statute as a remnant of the balanced parliamentary monarchy and thus an institution that did not meet requirements of the modern parliamentary system. Proportional electoral law corresponds to the idea where the parliament represents a wide spectrum of opinions and interests in relations with state authorities, just as in the parliamentary monarchy. Meanwhile, a prerequisite for parliamentary governance is a stable and internally integrated government majority at the expense of a full spectrum of opinions in the parliament:

If we wish to return to a moderate monarchy, we should mould the parliament as a representative of the nation in relations with state authorities. Yet we really do care about the parliamentary system, which is our overriding goal. This is why we should give up representativeness and mould the parliament as a sovereign but at the same time remember that to act as a sovereign, this branch of power needs majority to appoint government and support it.⁴³

In René Capitant's view, proportional statute was the underlying cause of destruction of the parliamentary democracy, leading

⁴² *idem.*, R. Capitant, *La réforme du parlementarisme*, *Id.*, cited after the Polish edition: *Reforma parlamentaryzmu...*, *Id.*, p. 172. R. Capitant would repeat his views on the crisis of Weimar Crisis in the interview he gave to the editors of *Revue politique et parlementaire*. See also *idem*: *La constitution doit-elle être révisée?*, *Revue politique et parlementaire*, 1964, No. 742, pp. 11–18.

⁴³ R. Capitant, *La réforme du parlementarisme*, *Id.*, cited after the Polish edition: R. Capitant, *Reforma parlamentaryzmu...*, *Id.*, 169.

to the multiplication of political parties and even disintegration of the state structures.⁴⁴ Therefore, he rejected adoption of such electoral model in France and found the plan devised by André Tardieu and Paul Reynaud harmful, ineffective and aimed to break up the alliance of socialists and radicals by means of the proportional election act.⁴⁵

Another Capitant's polemist was Hans Kelsen, an ardent advocate of proportional electoral law, who did not discern its destructive ramifications: elimination of the notorious hallmarks of the parliamentary politics and full subordination of parliament members to the party headquarters. Noteworthy, Hans Kelsen exposed advantages of proportional statute in his paper on the distillation and value of democracy. In the view of the Austrian jurist, proportional statute reflected a real line-up of interests in the parliament, which, he contended, was a primary premise of the compromise indispensable in the parliamentary democracy. Furthermore, he asserted that proportional statute consolidated a positive trend to strengthen political parties and "transform them into constitutional organs moulding the state's will."⁴⁶ Hans Kelsen published his work in 1929, before NSDAP came to power. René Capitant's book was published five years later. He discerned a kind of continuity between depersonalization of the politics and its deprivation of subjectivity in Weimer years, along with its militarization at the initial stage of Nazi dictatorship. Equally important, Capitant could not agree with Kelsen's view that a change in building political coalition from "the field of elections to the parliament building" is a positive phenomenon.⁴⁷ Once again, it is necessary to

⁴⁴ "We have a parliamentary system in France and since we wish to perpetuate it, we should adopt a parliamentary electoral statute. And proportional statute is anti-parliamentary. This ineluctably increases a number of the parties and, which is worse, stiffens their organization and autonomy. Proportional statute promptly leads to the division of the country into several political parties pursuing their own policies, having own organization and discipline. Then, it is no longer possible to talk about any majority, only coalitions forged by agreements, accords and alliances are possible. State disintegrates. Politics becomes bidding. A homogenous state returns to the stage of confederation. We have a society of political parties instead of the state. Weimar Republic represents a tragic example of such a process." *ibid.*, p. 170.

⁴⁵ *ibid.*, p. 176.

⁴⁶ H. Kelsen, *Foundations of Democracy*, Id., cited after the Polish edition: H. Kelsen, *O istocie i wartości demokracji*, Id., p. 82.

⁴⁷ H. Kelsen defended proportional electoral law aware of all possible ramifications: "proportional election system was primarily accused of encouraging politicians and party activists to establish small and minor parties, which might lead to political fragmentation as none of the political parties represented in the parliament may have absolute majority, which hampers any parliamentary proceedings. Yet, on

emphasize that the French jurist identified the essence of democracy with a system where it was the voters' decisions and not those made by the party leaders after parliamentary elections, which determined a shape of the government coalition. Something that Hans Kelsen calls "political integration" should be determined by voters in elections. Meanwhile, proportional electoral law deprives them of the right to politically determine the direction of the state's policy. There are distinct affinities between Capitant's thought and a classical theory developed by Schumpeter who saw the essence of democracy in the voters' deciding on the outcome of the competition between political groups and appointment of the government. Noteworthy, Schumpeter, like René Capitant, espoused the majority statute.⁴⁸ Yet they differed in a number of regards: e.g. in René Capitant's view, coalition governments established regardless of the voters' will were not democratic. Therefore, in René Capitant's view, the Third Republic was not a democratic system. On the other hand, Schumpeter, despite his critical attitude towards French political practice, did not address a problem of the voters' relatively small influence on the formation of the government.

Thus, René Capitant called for the constitutional reforms aimed to establish a coherent governmental majority. He asserted that a real division across political opinions is between the right and left-wing parties. Capitant made use of the sociological analyses made by André Siegfried, an outstanding political scientist, who asserted that the French public opinion was divided into the two formations: the Right and the Left, that, contrary to the voters' expectations, disintegrate in the parliament.⁴⁹

René Capitant's parliamentary reform project envisaged single-mandate constituencies and majority elections in the two ballots. The author asserted that such electoral law would facilitate formation of the government majority, consolidate independence and accountability of parliament members before voters. Importantly,

careful consideration, it turns out that in this regard proportional representation only changes a need for the coalition of the parties, i.e. a need to ignore minor differences and focus on the primary common interests in the parliament. Political integration effected in the party coalitions and enforced by the majority rule, is ineluctable and actually represents progress and not, as some may assert, a social evil. Furthermore, nobody can deny that such integration is effected much easier in the parliament than among voters." H. Kelsen, *Foundations of Democracy*, Id., cited after the Polish edition: H. Kelsen, *O istocie i wartości demokracji*, Id., pp. 81–82.

⁴⁸ J. A. Schumpeter, *Capitalism, Socialism and Democracy*, Id., cited after the Polish edition: J. A. Schumpeter, *Kapitalizm, socjalizm, demokracja*, Id., p. 341.

⁴⁹ A. Siegfried, *De la III^e à la IV^e République*, Id., pp. 11–75.

political context in which such proposal was put forward should be highlighted. As I have already said, in the years of the Third Republic, except for the intervals 1884–89 and 1921–27, two-ballot elections staged in single-mandate constituencies were effective but detailed legal regulations resulted in political disintegration. The electoral law envisaged that everybody who ran in the first ballot and even new candidates were eligible to run in the second ballot as well. Thus, a requirement to obtain absolute majority was not effective. In a general view, such a model manifested individualism of the French political culture, did not enforce election coalitions and led to political fragmentation. René Capitant proposed two-ballot elections based on the assumption that only two candidates who obtained the largest number of votes were eligible to stand in the second ballot. The first ballot would give a chance to new candidates and offer an opportunity for the generational transformation of the French politics and the second ballot was to ensure consolidation of the parliament's political composition. As we will see, this is exactly a model de Gaulle introduced when the Fifth Republic Constitution became effective.

A typical French parliament member defined his/her mission as a representation of local interests in relations with state authorities and thus had a relatively low sense of political solidarity with the government despite officially declared support for their policy. A reform of the parliamentary system drafted by René Capitant was aimed to integrate the government majority: ministers were to be appointed from among parliament members and any cases of disloyalty towards the ruling party were to be eliminated. A logical ramification of such an assumption was assignment of the critical and control functions only to the parliamentary opposition. René Capitant hoped that a well-organized parliamentary system would eliminate irresponsible parliament members or those who were acting in the particularistic interests in relations with the state administration. His views were in this respect similar to the scrutiny offered by André Tardieu and authors of the Bardoux Committee report although, unlike Capitant, the Committee members espoused majority elections.

The project of the parliamentary reform was supplemented by the calls for the introduction of the institution of the prime minister and establishment of the special Prime Minister's Office. René Capitant put forward a proposal to appoint permanent general secretaries in the ministries and had called for appointment of qualified officials along with the minister's aides in the political cabinets before the

Bardoux Committee did this. A demand for the institution of the active minister having capacity to fill the ministerial policy with real contents emerged in its mature form in his post-war writings.

René Capitant emphasized close cooperation between the Council of State and the National Economic Council. The latter one was aimed to be a fundamental institution representing economic interests. Regarding this, the author was also a firm advocate of the transition from the parliamentary monarchy to the parliamentary supremacy. As the parliament was, like a monarch in the monarchy political system, to be a governing institution he was not in position to play a role of the representative of a wide spectrum of sometimes contradictory economic opinions. Given such logics, special institutions had to represent different interests.

In the view of Olivier Duhamel and Nicholas Wahl, *La réforme du parlementarisme* is certainly a pioneering document underlying the Fifth Republic Constitution.⁵⁰ Certainly, the value of René Capitant's writing is determined by its critical aspect as well as innovativeness of his proposal. The author highlighted uselessness of an idea of the power separation in the constitutional scrutiny and inability to effect such a reform in the constitutional framework of the Third Republic. Yet the pre-war works of René Capitant may hardly be recognized as a document inspiring primary constitutional provisions of the Fifth Republic. René Capitant posited that the parliament and its elite (that regained its capacity) would generate a coherent majority and effective governance. In his reform bill, the parliament majority was to confer powers upon the government. Yet the Fifth Republic developed a new political architecture where national leadership was conferred upon the president who held a democratic mandate. Undoubtedly, in his pre-war writings René Capitant laid foundations for the construction of the rationalized parliamentarism and his demands for an introduction of the majority electoral law and government legislation became crucial elements of the reformist constitutional thought.

Yet a primary architect, along with de Gaulle, of the Fifth Republic Constitution and a rationalized parliamentarism was Michel Debré. The speech he delivered before the Council of State, in August 1958 is, along with that one de Gaulle made in Bayeux, recognized as a foundation of the Fifth Republic Constitution.⁵¹

⁵⁰ O. Duhamel, *Droit constitutionnel*, Id., p. 15; N. Wahl, *Origines de la nouvelle constitution*, RFSP, 1959, pp. 30–66.

⁵¹ See M. Debré, *Discours devant le Conseil d'État*, MJP-Digithèque MJP, 1958, cited after the Polish edition: M. Debré, *A speech delivered before the Council of State on 27 Aug. 1958*

Constitutional views of Michel Debré began to mould as early as in the pre-war years, certainly under some influence of the reformist movement. There is much evidence that he knew the conclusions included in the Bardoux Committee works. In his memoirs he wrote that the lectures given by prof. Barthélemy made him aware of the political significance of the rule of the parliament chambers.⁵² I have already mentioned that he met René Capitant as early as in the pre-war years, which, in turn, helped him study the writings of Carré de Malberg. As he opposed restoration of the institution of a referendum and direct democracy as such, he used to emphasize that an outstanding theoretician of law made him aware of the incompatibility of the constitutional reflection currents stemming from Montesquieu and Rousseau.⁵³

Noteworthy, Michel Debré's activities were not purely legal as the constitutional reform bill stemmed from the reflection integrating legal, civilizational and sociological aspects. Michel Debré was brought up in the family where the republican tradition was accepted without slightest reservation. France and the Republic were the twin notions, which was reflected in the very language of Michel Debré. In 1958, when he put forward his constitution draft in the Council of State, he asserted that any reform should consist in the restructuring of power "without which there is neither state nor democracy, which means, as far as we are concerned, neither France nor the Republic."⁵⁴ It seems that this is the republic, which with its open civic formula, enables a Jewish-rooted family to identify with France. Michel Debré did not show any slightest liking for the monarchist tradition, still alive in the families of de Gaulle's parents. Furthermore, he had deep reservation about the republican right and did not identify himself with Maurice Barrès and his ideological message. This is confirmed by the evidence from his young years. He may even be thought to have had a liking for radicals and moderate Left, like Raymond Aron, his peer.⁵⁵

(*Przemówienie przed Radą Stanu 27 sierpnia 1958 r.*), [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*

⁵² S. Aromatario, *La pensée politique...*, *Id.* pp. 31–33.

⁵³ *ibid.*, p. 29.

⁵⁴ See M. Debré, *Discours devant le Conseil d'État*, MJP-Digithèque MJP, 1958, cited after the Polish edition: M. Debré, *A speech before the Council of State...* (*Przemówienie przed Radą Stanu...*), *Id.*, p. 225.

⁵⁵ R. Aron, *Mémoires*, Bouquins Editions, 2010. Polish edition: R. Aron, *Wspomnienia*, *Sprawy polityczne* (2007).

Noteworthy, Michel Debré emphasized legal ramifications of Republicanism. He defined a republic as a system respecting nation's sovereignty and supremacy of the parliamentary statute, which established the uniform law to ensure freedom and equality of individuals. Thus, in his view, the functioning of the Republic requires political, legislative and administrative uniformity and a legal status of individuals and groups is not associated with any special privilege. Other ramifications of the adoption of republican principles is abolishment of provinces and establishment of the uniform public education system. This is what Debré said in his writing *République une et indivisible*:

Particularisms and privileges, regional or legal differences between individuals disappear under strong political centralization. Abolishment of provinces and development of one form of education are the two ramifications of democracy and manifestation of the Jacobin political system, which, however, for over fifty years has also been a political system adopted for all republicans, both moderates and opportunists, radicals and socialists. A principle of centralization and political unity is, along with all ramifications, including cultural ones, associated with national sovereignty and equality of all individuals before the law.⁵⁶

In 1946, Debré voiced a strong opposition to the attempts to introduce Breton as a supplementary language in public schools. In the paper cited above, he contended that for the same reason Action française tradition as well as the policy of the French Communist Party were in opposition to the republican tradition⁵⁷ as they both

⁵⁶ M. Debré, *République une et indivisible*, [in:] *Idem, La République et ses problèmes*, Nagel (1952), pp. 29–30, trans. M. Miałkowska.

⁵⁷ A lengthy excerpt cited below shows an extensive interpretation of the French understanding of the Republic: "Assumptions of the monarchical power are absolutely different. Society's unity and power stem from the monarch and one might say that one of the methods to establish and perpetuate this power is to transform the institution of monarchy into a federal organ that establishes common standards for the territory or society and perpetuates its unity. This is not just reasoning but also a lesson stemming from experience: royal power created France by manifesting itself as a sole link between different social classes and provinces whose political characteristics were perpetuated.

As regards a communist state, the power is always conferred upon the party recognized as the nation's avant-guard, which demonstrates its superiority and authority. To ensure power and emphasize that it is the state, a communist party must also draw its power from the belief that it is the only institution capable of ensuring the social unity. Otherwise, the state risks are divided by the arguments voiced by minorities. Undoubtedly, the communist party's power in the country such as Yugoslavia is based on the remnants of the past monarchy and this, perhaps even more than

challenged legal uniformity. In the monarchy social unity is guaranteed by the king whose federal powers integrate the society and territory. In the communist state the ruling party recognizes itself as a source of the real power and, consequently, is ready to allow for different legal statuses in the state. Debré put forward Yugoslavia as an example of the federal state governed by the communist party. In later years, Debré used republican principles as an argument against corporate representation, which, in his view, was contrary to the legal and political uniformity of the state. As early as in his Résistance years, he opposed any representation of economic and social interests in the Senate. He asserted that French people exploit state organs to further professional interests and corporatist representation would only exacerbate a negative trend. In his view, the Senate was to be elected in indirect elections run by general councils or, optionally, could extend its composition by 30 senators elected through the co-optation.⁵⁸

Compared to other authors of the Constitution of the Fifth Republic, Debré was also an institutionalist who put forward a precise plan of political reforms. He asserted that a political will and a good custom are insufficient to restore France's power and significance without support of appropriate institutions:

Many French people are wondering what kind of Constitution France will soon need. They are absolutely right as our experience has proved that political success and the value of statesmen depend largely on the institutions... Our constitutional problem may simply be described in the following way: based on the feelings and political experience of the nation, we must establish institutions that will enable us to restore France's power throughout the life of one generation.⁵⁹

Thus, he challenged a wide-spread republicans' conviction that revival of the French politics may be accomplished not through the institutional transformation but only through a shift in attitudes and civic engagement. As I have mentioned, such views

a monarchy, ensures the state's unity through racial or social minorities, which is warmly welcomed by the social majority against all odds. Similarly, given the Soviet-like federalism recognized as the official political system in the Constitution of the Soviet Union, the Soviet communist party is recognized as the only guardian of the national unity and a guarantor of the future." *ibid.*, pp. 29–30, trans. M. Miałkowska.

⁵⁸ J. Bruère, *Refaire la France: l'effort d'une génération*, 1945, p. 151.

⁵⁹ M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.*, p. 145.

predominated in Résistance circles and political parties coming from there.

Institutionalism meant no centralism preferences. Michel Debré asserted that administration was already extremely centralized, which was contrary to the spirit of freedom. Centralization strikes at the “local freedoms that are the best way of public education of voters and those who are being elected.”⁶⁰ Debré’s writings include an in-depth analysis of the disorders of French administration, omnipotence of the ministry of finances, particularism of public agencies (“we have no administration, we have administrations”) and heavy criticism of the groundless privileges of public enterprises.⁶¹ Noteworthy, Michel Debré also highlighted a need to raise the status of courts of the general jurisdiction as an institution ensuring respect for civil rights.⁶²

In the pre-war years, Michel Debré sought the forms of synthesis of order and freedom. He would read Walter Lippmann’s writings where the author revised the liberalism stance towards the state, which in his view, should play an active but limited role in the elimination of external inequalities.⁶³ He also shared the American author’s conviction that any process of democratization involves a risk of the depreciation of the state’s policy and therefore it is necessary to consolidate executive power and make it independent of the volatile game of parliamentary and professionalized forces.⁶⁴

⁶⁰ *idem.*, *La République et ses problèmes*, *Id.*, p. 43.

⁶¹ *ibid.*, p. 44.

⁶² M. Debré, *Pour une réforme constitutionnelle*, [in:] *La République et ses problèmes*, *Id.*, pp. 43–44.

⁶³ Michel Debré was impressed by Lippmann’s *Cité libre* and referred to this book in his paper on the evolution of contemporary political ideas. Only few works on W. Lippmann’s thought can be found in the Polish scientific literature. V. W. Bernacki, *Lippmann Walter*, [in:] *Słownik historii doktryn politycznych*, vol. III, Wyd. Sejmowe, 2007; J. Branecki, *Walter Lippmann*, *Przegląd Polityczny*, 1987, no 9. Walter Lippmann’s influence on the French political thought was elaborated by Jean Touchard in his history of political ideas. J. Touchard, *Histoire des idées politiques*, vol. 2, *Id.*, pp. 824–825.

⁶⁴ This facet of W. Lippmann’s thought was highlighted by J. Branecki in his reference to the American writer’s stance: “Now the road to reconstruction leads in the opposite direction – to the restoration of the government. A natural relationship between representative bodies and executive power should be restored and this must be a primary objective. The executive power should be active-this should be the «asking and proposing» power, while any representative assembly is primarily a «consenting power». A balanced relationship between the two powers is the foundation of freedom, order and prerequisite for the efficiency of the system in which elements of the institutional structure limit and supplement each other, by which they may yield a revitalizing mutual impact and a democratic governance system will regain its once-lost efficiency.” J. Branecki, *Walter Lippmann*, *Id.*, 83.

Presumably, also under Charles Péguy's influence, the author of *La République et ses problèmes* discerned a positive relationship between order and freedom.⁶⁵ Michel Debré repeatedly asserted that a strong state ensures freedom and space for its attainment. Meanwhile, the rule of the parliament in the Third Republic did not ensure a stable power and tolerated violation of individual's rights. In his in-depth analyses, Debré displayed a fundamental transformation of its nature since the French Revolution. The democratic system that would manifest an aspiration for a fundamental social transformation and breaking off with the ancient regime became conservative in the first half of the 20th century. European parliamentary democracy defended a social *status quo* and was incapable of embracing new challenges. In Debré's view, its feebleness resulted from the dependence on the short-term and particularistic interests that make strategic goals unattainable and hamper actions undertaken to ensure a better future of the next generations. Debré asserted that democratic systems may survive provided they become effective – otherwise they are defeated in the confrontation with totalitarian systems that do not avoid assuming responsibility for solving social and economic problems.⁶⁶

Regarding France, effective democracy was the prerequisite for retaining a global power status. Elements of the empire are easily discernible in Debré's thought.⁶⁷ The author of *La République et ses problèmes* is convinced of a unique position of France and its vocation to play an active global role. An architect of the Fifth Republic seems to be a continuator of the imperial republican tradition originated by Jules Ferry.⁶⁸ Thus, it is not surprising that the constitutional reform was perceived as reconstruction of France's leading role in Europe and across the world. New constitution was to generate institutional power to fulfil such ambitions:

Obviously, the new French constitution should be based on the people's will and guarantee all freedoms. Yet its task will also be to help the nation embrace challenges and lead it towards the glorious fate of a great global power.⁶⁹

⁶⁵ S. Aromatario, *La pensée politique...*, *Id.*

⁶⁶ M. Debré, *La véritable faiblesse de la démocratie*, [in:] *Idem, La République et ses problèmes*, *Id.*, p. 34.

⁶⁷ S. Aromatario, *La pensée politique...*, *Id.*, pp. 243–265.

⁶⁸ V. remarkable insights made by Odile Rudelle on his admiration for Ferry and holidays young Debré spent on the farm of his brother Charles Ferry. O. Rudelle, *Le rôle du général de Gaulle...*, *Id.*, pp. 759–760.

⁶⁹ M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré,

Michel Debré believed in France's special vocation and his public activities were focused mostly in Africa.⁷⁰ He reluctantly accepted de Gaulle's policy that paved Algeria's road to sovereignty. Noteworthy, his call for the restoration of France's power and prestige had primarily a German context. Soon after World War II, Debré identified a threat posed by the reconstruction of the German power. This factor determined his decision to launch a campaign against the treaties establishing the European Coal and Steel Community (ECSC) and the European Defence Community (EDC).⁷¹ Debré raised this subject again in his renowned speech against general elections to the European Parliament. Thus, the reconstruction of France's power as an overriding goal of constitutional reforms was associated with the competition with Germany about the European leadership.⁷²

Michel Debré's constitutional views were finally moulded during World War II and did not change significantly thereafter. As I have already mentioned, Michel Debré contacted Résistance in 1942. It is then that he, together with Emmanuel Monick, wrote a book *Refaire la France*, where he put forward a draft of the reconstruction of French politics after liberation, including a vision of the constitutional reform. In the aftermath of the publisher's arrest, the book was published only after the war.⁷³ As a member of Comité général d'études, Michel Debré exerted a profound influence on the political reform project designed by that body. The

Konstytucyjny problem Francji, Id., p. 152.

⁷⁰ S. Aromatario, *La pensée politique...*, *Id.*, pp. 251–252.

⁷¹ This is discussed more extensively in sub-chapter F, Chapter IV.

⁷² "When in 1949, in the speech I gave at Comité général d'études, I said that it was time to close that chapter of history, a number of the audience members voiced their outrage. Today, when impressed by the restoration of German power I say that they may be tempted by the phantoms of their history and thus France needs to be strong to cooperate with them, I can again hear some mourning here and there. Yet, this is the truth and nothing can change this. Germany is a populous country and Germans are hard-working, economical, resourceful, expansive, and determined to strenuously defend their interests. Therefore, we should also be populous, hard-working, resourceful, expansive, and dynamic. Let's defend our interests strenuously. Our cooperation is possible only under such conditions and only then it's going to be beneficial for all Europe. The future of the French-German brotherhood depends on the French people's will to strengthen France, i.e. make it capable of managing its fate. In other words, independence of France preconditions its enduring cooperation with Germany." M. Debré, *Qui peut refuser à la France la maîtrise de son destin? Michel Debré et Raymond Barre. Première séance du 14 juin et deuxième séance du 15 juin 1977*, [in:] M. Mopin, *Les grands débats...*, *Id.*, p. 193, trans. B. Plonka.

⁷³ J. Bruère, *Refaire la France...*, *Id.* Jacquier Bruère is a common pseudonym of M. Debré and E. Monick.

Committee was predominated by senior officials, professors, nationalists and technocrats, which was the reason why he became closer to de Gaulle and his Algerian committee than the domestic resistance movement.⁷⁴

From our perspective, the most crucial issue is that the Committee played “a special role in forging the doctrine of the Fifth Republic.”⁷⁵ Michel Debré’s article *Le problème constitutionnel français*, first published in the underground *Les Cahiers politiques*, expressed the stance adopted by CGE.⁷⁶

Michel Debré sought some original political model for France and therefore he had a critical attitude towards the American-like presidential system. The young jurist challenged a sense of the transfer of such a system to any other country. He doubted whether “French people had a strong sense of civic responsibility to follow the American-like president without reservations.”⁷⁷ Debré reminded that a strong presidential system in Latino-American countries was actually a military dictatorship.⁷⁸ Interestingly, a future architect of the Fifth Republic Constitution feared the power

⁷⁴ The Committee was set up in the late 1941 on Jean Moulin’s initiative and its goal was to consider prospective reforms that could be effected after the liberation of France. The body was led by François Menton, a professor of law, future close aide of de Gaulle and minister in the provisional government. Other contributors included Paul Bastid, Robert Lacoste, Alex André Parodi and Pierre Henri Teitgen. Although the Committee members had different political backgrounds, it was recognized as the only Résistance organ where there were no communists and the only socialist was Robert Lacoste. Moreover, before World War II François Menton and Pierre Henri Teitgen were politicians from the Democratic–Popular Party that was actually a Christian–Democratic party, were Résistance members during the war and established the Republican–Popular Movement (Le Mouvement républicain populaire) after the war. See N. Wahl, *Origines de la nouvelle constitution*, *Id.*, pp. 30–66.

⁷⁵ J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, p. 38.

⁷⁶ Professor Pierre Mazeaud, a member of the cabinet headed by Michel Debré, asserts that also his superior opposed the 1962 amendment. Pierre Mazeaud emphasizes the profound significance of Debré’s article published in 1943 in the underground press in the occupied zone. He highlights its affinity with the general direction of the statements de Gaulle made in London on the post-war political order in France. My interlocutor played down the significance and influence of René Capitant, who, in his view, was considerably less influential than Debré. The author’s interview with prof. P. Mazeaud, Paris, (10 May 2010).

⁷⁷ M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.*, p. 143.

⁷⁸ “The thinkers who espouse adoption of the presidential constitution in France usually refer to the USA as an example of the country where the presidential system has been so successful for nearly one hundred and fifty years. Yet, they tend to ignore the fact that such a system is also functioning in other American countries ... as long as military coup d’État allows for this.” M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.*, p. 147.

abuse on the part of the president and doubted “whether in difficult situations he will respect the institutions that he is supposed to guard.”⁷⁹ Thus, Debré defies a strong personal power, which stems from his fear of the return of Bonapartist practices. As I have said, Michel Debré did not embrace the idea of general presidential elections: in 1958 voiced criticism about a possibility of their adoption;⁸⁰ in 1962 only exceptional loyalty towards de Gaulle inhibited him from exposing his doubts in public.⁸¹

Sceptic about the presidential system, Debré also defied the rule of the Assembly, which, in his view, led to the fall of France.⁸² In the article cited above he said:

We are not sufficiently aware of the fact that the fall of France over the last decade was to a large extent caused by the degeneration of the 1875 political system that produced this type of governance. The President of the Republic was not the head of the state. The Senate has become merely a controlling body whose influence continually decreased. The Lower Chamber invested itself with unlimited power and did not fear being dissolved as a representative of the nation’s sovereignty. Its sessions were nearly permanent. The government was just the body to be given orders and dismissed in the event of the slightest conflict. Parliamentary commissions permanently supervised ministers. In this way, our political system has gradually evolved to reach the stage of the chaotic and transitory dictatorship based on the delegation of full powers to the government, which was quite characteristic of the rule of the Assembly.⁸³

The rule of the Assembly (or I should rather say ‘misrule’) did not attain synthesis of order and freedom as their freedom impacts the power at the expense of the public weal. In Debré’s view, such a system made it impossible to pursue any long-term national policy.

⁷⁹ *ibid.*, p. 143.

⁸⁰ M. Debré, *Discours devant le Conseil d’État, Id.*, cited after the Polish edition: M. Debré, *A speech before the Council of State... (Przemówienie przed Radą Stanu...), Id.*, pp. 230–231.

⁸¹ Pierre Mazeaud asserts that M. Debré adopted a critical attitude towards the idea of general presidential elections when it was put into effect and consistently remained an advocate of the strong rule of the parliament. The author’s interview with prof. P. Mazeaud, Paris, (10 May 2010).

⁸² M. Debré, *Le problème constitutionnel français, Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji, Id.*

⁸³ *ibid.*, p. 149. Yet he also said that “French parliament collapsed and led France to the collapse;” J. Bruère, *Refaire la France... Id.*, p. 146.

Regarding the rule of Assembly, a general interest was succumbed to the particularistic interests of different social classes and rights and freedoms were threatened by the Assembly whose sovereignty has no boundaries.⁸⁴ In his book *Refaire la France* Michel Debré emphasized that the Third Republic had actually no head of state:

In France, the lack of the head of state is considerably more serious that it is generally thought, as this means there is no most effective instrument to put an end to the parliamentary abuses. The government has no support and becomes just a group of commissioners representing the parliamentary majority. Our parliamentary system evolves into the rule of the convention: one assembly exercises unlimited power. Sovereignty is ensured but the respect for freedom has been squandered.⁸⁵

Michel Debré defied the opinion (quite common among the Résistance activists) that France needed only minor political corrections. He had no doubts that this would result in the perpetuation of the rule of assembly with all its negative ramifications. The author of *Refaire la France* defined a reform as construction of the authentic parliamentary system in the opposition to the assembly-chosen governments. Michel Debré will thereafter regularly use these notions and repeat them in his renown speech at the Council of State session in August 1958.⁸⁶

In his war-time writings, Debré pictured a whole spectrum of new institutions enshrined in the Fifth Republic Constitution. Importantly, as early as then, Debré designed a well-thought and coherent vision of the rationalized parliamentarism intended to build stable and effective parliamentary governments.

Rationalized parliamentarism designed by Debré combined the reform of electoral law with the new format (*agencement*) of the

⁸⁴ Similar thoughts were put forward by M. Debré in his article *Les problèmes constitutionnels*: “The government has become a representative of the parliament. The drafts of acts and budgets are the subject of a discussion, submitted by parliamentary commissions that tend to replace them by their own proposals. Its accountability before the parliament is constantly subject to refutation so that it would not be able to enjoy its theoretical powers vested by the Constitution. In the very depth of the public service, the influence of a member of parliament predominates over the minister’s authority. The government instability, a fundamental principle and tradition of the Third Republic absolutely proves the Assembly’s power.” M. Debré, *Les problèmes constitutionnels*, [in:] M Debré, *La République et ses problèmes*, *Id.*, p. 39.

⁸⁵ J. Bruère, *Refaire la France...*, *Id.*, pp. 117–118, trans. M. Miałkowska.

⁸⁶ M. Debré, *Discours devant le Conseil d’État*, *Id.*, cited after the Polish edition: M. Debré, *A speech before the Council of State...* (*Przemówienie przed Radą Stanu...*), *Id.*

relations between executive and legislative powers. The author of *Refaire la France* was a staunch advocate of the one-ballot majority elections. “When elections become a duel between two political powers they build majority” – he contended in *Pour une réforme constitutionnelle*.⁸⁷ Debré asserted that the two-ballot elections, adopted in the Third Republic, (where all candidates could run in the second ballot, including even those who did not stand in the first ballot) postpone any political competition, do not coerce electoral coalitions and lead to political fragmentation.⁸⁸ In this respect, Debré’s views somehow evolved. In his war-time writings the author of *Refaire la France* put forward a proposal to establish multi-mandate electoral districts (3–5 mandates) corresponding to the departments to provide the representation independent of local particularisms.⁸⁹ This, along with a reduced number of the parliament members (450–500 in the Chamber of Deputies and 200–250 in the Senate) was supposed to reduce a number of political parties. After the liberation of France, Debré advocated one-mandate, British-like, electoral districts.⁹⁰

Michel Debré asserted that the government backed by the parliamentary majority should be invested with full powers and the prime minister should be a real political head of state, empowered to table a motion to dissolve the lower and upper chamber and act as an arbitrator. “The government is led by the prime minister appointed by the head of state, depending on the parliamentary majority elected by voters. The prime minister is the political head of state: bears responsibility for the government; is supervised by the parliament; may also, depending on the situation, address to the nation by forwarding a motion to dissolve the assembly elected directly by the people. Such a motion should be submitted to the head of state”⁹¹ – Debré proposed.

In the vision outlined by the author of *Pour une réforme constitutionnelle* the president was to be the “keystone of the vault” (*clef de*

⁸⁷ *idem.*, *Pour une réforme constitutionnelle*, *Id.*, p. 36.

⁸⁸ *ibid.*, p. 37.

⁸⁹ M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.*, p. 57.

⁹⁰ See also the same author’s, *Scrutins-Partis-Institutions*, Cahiers politiques, 1946, no 22; Jean Louis Debré asserts that in those years his father recognized majority elections in the multi-mandate districts – departments as a temporary solution that should precede establishment of elections in one-mandate, British-like, districts. J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, p. 69.

⁹¹ M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.*, p. 151.

voûte) of the re-built parliamentary system, a guardian of the prime minister and not an active constructor of the executive power. In this respect, there will be a profound difference between Debré's views and de Gaulle's doctrine, where presidency was intended to be an active centre of the active national leadership. Noteworthy, de Gaulle asserted that the president should be empowered to dissolve the chamber, while Debré planned to invest the prime minister with this power. In Debré's view, the president's political mission should be restricted to attending to the country's weal in a long-term perspective and loyal support lent to the government. Therefore, Debré might be said to refer to Constant's concept of the monarchy as neutral and moderating power. Certainly, calling the president a "keystone of the vault" of the constitutional system originates from the concept developed by Constant.⁹² The proposal envisaged extension of the president's term and a change in the nature of his mandate. The president was to be elected for a 12-year-long term without a right to be re-elected.⁹³ Like the Bardoux Committee members, Michel Debré, espoused an appointment of the president by a separate body that "apart from the parliament members, would comprise representatives of general and municipal councils, maybe the representatives of the institutions of higher education, judiciary and trade unions."⁹⁴ The combination of both institutions was to ensure a positive political outcome – president's subjectivity: "Twelve-year term, life-long remuneration with no right to be re-elected, and a larger electorate should be enough to provide the French institutional construction with the keystone that we have lacked so much for fifty years."⁹⁵

The key streak of Debré's draft was the parliamentary government provided with a battery of instruments to ensure effective governance: a session-based model of the parliament's functioning, a fixed number of permanent committees, constitutionalism of the budgetary debate, prohibition of the use of the institution of parliamentary question to enforce the government's political accountability to the parliament. Evidently, the origin of those institutions is British. They were customary norms sanctioned by the

⁹² See W. Szyszkowski, *Benjamin Constant. Doktryna polityczno-prawna na tle epoki*, PWN, 1984, p. 89.

⁹³ Finally, a 7-year term was adopted in the CGE draft.

⁹⁴ M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.* p. 153.

⁹⁵ *ibid.*

rules of both parliament houses.⁹⁶ Yet Michel Debré did not believe the French parliamentary elites would ever abandon their habits and privileges. Therefore, in *Refaire la France*, the architect of the Fifth Republic demanded constitutional intervention in that area and convinced that those institutions should enjoy a status of constitutional norms.

The proposals put forward in 1943 prove that Michel Debré had a perfect knowledge about the 1930s constitutional reformism although never referred to it. Yet the Debré's draft was definitely independent, creative, original and included completely new institutions.

Primarily, his demand for the constitutional definition of the statutory domain in the issues of fundamental importance, which opened the way to the government legislation, should be highlighted. In *La réforme du parlementarisme* René Capitant defended the legislative powers of the government (the executive branch was empowered to issue decrees with the statutory power). Debré's approach was even more radical as he put forward a proposal concerning the whole political system. It had a double goal: to empower the council of ministers to effectively govern through independent legislation and perpetuate the parliament's exclusive powers in the in areas of key importance for the functioning of the political community. This is what he said in his article *Le problème constitutionnel français*:

Thus, the Constitution should prescribe for the parliament a number of issues, those it may not delegate, so that the legislative body would not lose the nation's respect in view of either excessive activity or passivity. Those issues should primarily include human rights, freedom of press, freedom of views, civil status of an individual and primary political problems, such as organization of public power or agreements with other countries. On the other hand, the government should be free to decide about the matters other than those prescribed for the parliament.⁹⁷

In *Refaire la France* Michel Debré framed his concept of the review of the constitutionality of acts.⁹⁸ As I have mentioned, Debré, influenced by the writings of Charles Péguy and Walter Lippmann,

⁹⁶ See H. Doering, *Time as a Scarce Resource: Government Control of the Agenda*, [in:] *Parliaments and Majority Rule in Western Europe*, ed. H. Doering, St. Martin's Press, 1995, pp. 226 and 232.

⁹⁷ M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.*, p.155.

⁹⁸ F. Rouvillois, *Michel Debré et le contrôle de constitutionnalité*, RFDC, 2001, No. 46.

sought the synthesis of order and freedom. On the one hand, freedom required efficient state but, on the other hand, the state was obliged to protect fundamental rights of every individual. Unlike the exponents of the Jacobin republicanism, the author of *Refaire la France* discerned a threat posed by the parliament to human rights. This is what Debré said in *Le problème constitutionnel français*:

there are certain fundamental freedoms that must just be recognized: individual's freedom, freedom to express one's opinion, freedom of press and freedom to teach. Encroachment on any of them is not only an act of the violation of the primary human rights but also perversion of the mechanism of democracy. These freedoms should be guaranteed by the superior control.⁹⁹

This outstanding jurist realized that any institutional solution of that problem should comply with the republican principles and French specificity. Thus, Debré challenged the adoption of an American model of the judicial review of the constitutionality of acts. The French judiciary system had no, in his view, sufficient authority to cope with such a task.¹⁰⁰ Michel Debré proposed to set up a special tribunal to review the constitutionality of acts. Such an organ would be designed as an institution of mixed composition, comprising parliament members, judges and the Minister of Justice.¹⁰¹

⁹⁹ J. Bruère, *Refaire la France...*, *Id.*, p. 155.

¹⁰⁰ Given significance of the review of the constitutionality of acts, an extensive excerpt from Debré's deliberations on this subject well illustrates his view: "Following recent parliament's abuses, some people contend that it would be advisable to copy the American solution and invest the judiciary system, or actually the Supreme Court, with the power to review the laws. The problem is, however, that in the American system one man (a president) is invested with a really huge power, while the parliament's position is strictly defined. Moreover, a federal system of the American Republic empowers every state with the right to enact its own laws. Hence, there is a need for the effective judiciary system to guard the constitutional provisions.

In France, the government is supervised by the parliament chambers which represent the nation, guarantee the human rights' protection, protect individuals against the power abuses and ensure the uniformity of law. Given such conditions, there is no need to establish the American-like judiciary review of the constitutionality of acts. [...] Our nation, exhausted with political disputes and social divisions, wants a sagacious state. Common judges have no sufficient knowledge to adjudicate on such disputes. Undoubtedly, to implement this legally-justified reform into our customs, we need a special tribunal whose composition would meet political requirements: officials, parliament members and a minister of justice to chair its sessions. This is how the laws and their appropriateness would be expressed at the same time." J. Bruère, *Refaire la France...*, *Id.*, pp. 154–155.

¹⁰¹ F. Rouvillois underscores that M. Debré corrected his views on the composition of the

As I have already said, Michel Debré was the originator of the establishment of the National School of Administration (ENA). The jurist was also an ardent advocate of the professionalization of the state, close cooperation between the government and the Council of State and extension of the composition of this institution so that it would no longer “comprise the jurists living in detachment from politics and administration.”¹⁰² Michel Debré considerably contributed to the implementation (in July 1945) of the mechanism of seeking approval from the Council of State for bills prepared by the government. The author of *Refaire la France* played a crucial role in the development of the November 1945 ordinance on the enactment of the Constitution and tasks of the Constitutional Assembly.¹⁰³ Undoubtedly, as de Gaulle’s close aide, Michel Debré influenced his constitutional views.

C. Democratic Republicanism

While the reconstruction of a strong state as a tool of France’s power and a succinct draft of the rationalized parliamentarism was the hallmark of Michel Debré’s thought, the post-war writings of René Capitant extended the Gaullist political doctrine with republican democratism and perspective of political transformation through the democratization of the republic. After liberation, René Capitant became an ardent advocate of direct democracy and, in particular, an extensive application of the referendum institution.

Although in the writings of 1946, Capitant openly referred to the tradition of thinking originated by Rousseau but distanced himself from the Jacobin tradition. He juxtaposed the nation’s sovereignty with the sovereignty of the parliament or just simply democracy with the representative government: “yes, democracy is the people’s sovereignty to pronounce their will directly in the general voting.”¹⁰⁴ René Capitant referred directly to the thought

constitutional court. In 1947, he proposed appointing the tribunal members by the parliament chambers but not from their members. F. Rouvillois, *Michel Debré et le contrôle...*, *Id.*, p. 232.

¹⁰² M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.*, pp. 155–156.

¹⁰³ J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, pp. 389–410.

¹⁰⁴ See R. Capitant, *Ecrits constitutionnels*, *Id.*, cited after the Polish edition: R. Capitant, *Konstytucja demokratyczna...*, *Id.*, p. 189.

of Carré de Malberg. He asserted, like de Malberg did, that the French parliamentary system developed in the years of the Third Republic as an oligarchy of party leaders and the parliament gained the absolute power and independence of the voters. He pointed out that abandoning the president's right to dissolve the parliament and unwillingness to be judged by voters was the manifestation of a split between the parliamentary system and democracy. Thus, René Capitant emphasized a need for a reform of the electoral system and investing the president with the power to dissolve parliament.¹⁰⁵

The influence Carré de Malberg wielded is evident in the arguments offered by René Capitant, who borrowed his notion on the fictitious sovereignty of the nation. This is what he asserted in his writing *Le conflit de la souveraineté parlementaire et de la souveraineté populaire en France depuis la Libération*:

Undoubtedly, the goal as well as the outcome of the illusion of the nation's sovereignty was concealment of this primary component of the French public law from the nation, which resulted in the confusion of the notions of the nation's sovereignty and the parliament's sovereignty, despite the fact that Rousseau proved explicitly how divergent they are. Such an illusion, along with the resulting confusion of these notions, constituted underpinnings of the legitimization of the French parliamentary system. This allowed for the consolidation of the parliament's sovereignty in relation to the executive power, which had already no share in the sovereignty, as well as the nation that was consistently kept away from any form of the direct democracy.¹⁰⁶

In René Capitant's view, two dates had a fundamental significance for the republican and democratic tradition: 1793 and 1940. Thus, he referred to the First Republic and Rousseau's thought. On the other hand, establishment of Free France in 1940 was, in his view, a democratic response to the abuse of power by the parliament that surrendered to the invader and paved the way to dictatorship. Capitant asserted that the delegation of power to Marshal Pétain

¹⁰⁵ *idem.*, *Les leçons de la démocratie anglaise...*, *Id.*

¹⁰⁶ See R. Capitant, *Le conflit de la souveraineté parlementaire et de la souveraineté populaire en France depuis la Libération*, « *Revue Internationale d'histoire politique et constitutionnelle* » 1954, No. 14 (April-May), cited after the Polish edition: R. Capitant, *O konflikcie między suwerennością parlamentu a suwerennością narodu we Francji po wyzwoleniu*, [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 200.

proved that the parliament enjoyed unlimited sovereignty, including delegation of one's powers.¹⁰⁷ Meanwhile, de Gaulle did not recognize parliamentary supremacy and referred directly to the will of the nation. "And what did Resistance do? By refusing the parliament sovereignty that it was invested with by the Third Republic and which it abused in 1940, Resistance "let the nation speak" in a referendum. In other words, they proclaimed sovereignty of the nation and established direct democracy in France."¹⁰⁸

René Capitant emphasized historical and revolutionary significance of the ordonnance of 17 August 1945, which invested people with the constituting power. He contended that

In this way we broke off with our constitutional history, not only that of the Third Republic but also much older tradition dating back to 1789, tradition of the representative political system which established sovereignty of the "representatives." This tradition was disrupted only once – in 1793 – by, notably, the Constitution that never became effective. The second time it was disrupted it was disrupted was in 1945, when the powerful popular movement defended, like in the past, the motherland against an external enemy and internal emigrants.¹⁰⁹

The article *Constitution démocratique. Constitution républicaine*, published in May 1946, after the constitution passed by the first Constitutional Assembly was rejected in referendum, provides interesting insights in this respect.¹¹⁰ Noteworthy, the draft produced by the First Constitutional Assembly was the outcome of the political victory of the French Communist Party. The unicameral parliament was invested with full powers and adopted axiology typical of communism and radical socialism.¹¹¹ Hence, René Capitant attacked the Communist Party and Socialists in the aforementioned article but also harshly criticized the Christian-Democratic *Le Mouvement républicain populaire* for their inability to frame a lucid constitutional alternative.

René Capitant implanted an idea of the legislative referendum in the Gaullist constitutional thought. The author of *Democratic*

¹⁰⁷ *ibid.*, p. 201.

¹⁰⁸ *ibid.*, p. 202.

¹⁰⁹ See R. Capitant, *Le conflit de la souveraineté parlementaire et de la souveraineté...*, Id., cited after the Polish edition: R. Capitant, *O konfliktach...*, Id., p. 203.

¹¹⁰ *idem.*, *Konstytucja demokratyczna...*, Id., pp. 188–197.

¹¹¹ J. Bougrab, *Aux origines de la Constitution de la IV^e République*, Dalloz, 2002.

Constitution... asserted that the requirement to approve the constitution in a referendum proved to be an effective tool of democracy. He called the nation a “sovereign arbitrator and referee in the legislation,”¹¹² who may any time apply a legislative referendum as an instrument to make the ultimate decision.

Parliament chambers are just the means to develop a form of the general will; replace it when this is required by actual situation; and make endeavours to pronounce this will in a possibly most accurate manner but always under the voters’ supervision and arbitration.¹¹³

This outstanding jurist espoused a broad application of the institution of the referendum, including the citizens’ initiative. In his reference to Carré de Malberg’s arguments, René Capitant clearly highlighted positive ramifications of the democratic interpretation of sovereignty: “If we adopt a new interpretation of the nation’s sovereignty, the only suitable one for the real democracy, this means that sovereignty should no longer be conferred upon the Lower Chamber.”¹¹⁴ Reinterpretation of the principal republican principle was aimed to produce dramatic consequences in the hierarchy of national institutions. Hence, neither the Lower Chamber nor any other state’s organ was empowered to enjoy the status of the leading and sovereign institution as it was subordinated to the nation – the sovereign. Thus, the road to making the executive power independent of the legislative power was paved.

The way René Capitant interpreted the idea of the separation of powers was innovative. In this respect a Gaullist politician returned to the idea of Montesquieu, which he abandoned before World War II and tried to combine its elements with those included in the thought of Rousseau, an advocate of the direct democracy. “Separation of powers from Montesquieu’s perspective, later followed by Jean Jacob Rousseau, means that state organs should be invested with different national powers.”¹¹⁵

René Capitant asserted that “in a well-organized state we need a legislator empowered to accept bills, a government empowered to rule and judiciary empowered to adjudicate. Each of these organs, invested with one of these powers, should be separate and

¹¹² See R. Capitant, *Écrits constitutionnels*, *Id.*, cited after the Polish edition: R. Capitant, *Konstytucja demokratyczna...*, *Id.*, 191.

¹¹³ *ibid.*

¹¹⁴ *ibid.*, p. 190.

¹¹⁵ *ibid.*, p. 192.

independent of the other two.”¹¹⁶ In his view, separation of powers could be effectuated when executive and legislative powers held separate and independent mandates. Undoubtedly, like Carré de Malberg, René Capitant thought of a system of the democratic dualism and an independent executive branch that was to hold its own legitimization based on the general poll.

In René Capitant’s concept, the president elected by the college representing a big social spectrum or the nation in direct voting was to become a central political institution. The author of *Constitution républicaine* wrote about the president independent of political parties and enjoying a discretionary right to dissolve the parliament. In his definition, the president was “the real head of the executive power.”¹¹⁷ His powers included the review of the regulations under which a prime minister was to be elected by the National Assembly. Capitant called for ministers’ appointment by the president and not the parliament. Government ministers were to be held accountable before the parliament but, since the government was to be appointed by the president, they would remain independent of political parties.

Challenging the sovereignty of the Lower Chamber paved the way to the solution of the problem posed by the bicameral parliament. When the two chambers became subordinated to the nation, there was no more problem caused by the hierarchy in their relations. The author changed his attitude towards that issue. Although Capitant espoused the unicameral parliament in *La réforme du parlementarisme*, published in 1934 after World War II, he contended that the Senate should exist but its importance should be reshaped. In his view, the Senate should

...express interests of the major economic and social groups whose significance is constantly increasing in the nation’s life – organizations representing different categories of manufacturers, district and department self-governments, associations of families, institutions of higher education as well as any associations of intellectuals, writers, artists, particularly scientists, whose commitment to the economic and spiritual reconstruction of France is indispensable.¹¹⁸

¹¹⁶ *ibid.*, pp. 192–193.

¹¹⁷ *ibid.*, pp. 192–193, 195.

¹¹⁸ *ibid.*, p. 191.

At the same time, Capitant opposed the economization of the Lower Chamber and demanded that it expressed synthetic opinions on the state-related issues.¹¹⁹

Noteworthy, René Capitant called for the consolidation of the position of the Senate that was to be empowered to declare a referendum in view of the dispute with the Lower Chamber and table a vote of non-confidence against the government. Thus, another premise for the stability of the government was framed. The Council of Ministers could be dismissed only in view of the vote of non-confidence carried by both chambers. “Actually, a vote of non-confidence resulting in the overthrowing of the government should be, just as a statute, passed by both chambers. The benefit of such a solution would be the improved stability of the government.”¹²⁰

René Capitant posited that the parliament should focus on enacting laws, provided that the president, the government and the parliament were invested with a legislative initiative. The author of *Constitution démocratique...* was a tough opponent of the proportional election statute. In his view, its application would lead to the dispersion of sovereignty. Capitant contended that the monarchism of assembly, typical of the Third Republic, would be replaced by the pluralism of parties holding sovereignty. In Capitant’s view “the sovereignty of political parties is even more illegitimate than the sovereignty of the members of the Lower Chamber, typical of the Third Republic.”¹²¹ Since none of the political parties may hold the parliamentary majority, sovereignty is dispersed and may only be exercised collectively in a form of the volatile parliamentary coalitions. This, in turn, results in the degeneration of parties’ accountability to voters. When the proportional statute is in force, voters do not determine the direction of the state’s policy but lend their support to individual parties that after elections enjoy full freedom in choosing their coalition partners as well as defining the policy contents.¹²² René Capitant sustained his pre-war concept of the majority elections staged in two ballots, given that two candidates with the best result achieved in the first ballot, stand in the second ballot.¹²³ The requirement to achieve the absolute majority was supposed to

¹¹⁹ R. Capitant, *Écrits constitutionnels*, *Id.*, p. 289.

¹²⁰ *idem.*, *Konstytucja demokratyczna...*, *Id.*, p. 196.

¹²¹ *idem.*, *Le changement du régime*, [in:] *Écrits constitutionnels*, *Id.*, p.333.

¹²² *idem.*, *Le conflit de la souveraineté parlementaire et de la souveraineté populaire en France depuis la Libération*, [in:] *Écrits constitutionnels*, *Id.*, p. 293.

¹²³ J. Bougrab, *Aux origines de la Constitution...*, *Id.*, p. 361.

consolidate a party system and facilitate formation of the parliamentary majority. In Capitant's view, this was a really democratic model as the voters' verdict determined which party or parties were to form the government and pursue the national policy.

He was also the first who put forward an idea of the incompatibility of ministerial functions with a parliamentary mandate. René Capitant recognized *incompatibilitas* as a fundamental ramification of the separation of powers and a need to make ministers, the real heads of administration, independent. Thus, Capitant fervently opposed the anarchic, in his view, concept of ministers acting as the parliament representatives and ordinary reviewers delegated by the parliament members to take on the ministerial posts. This is what he said in the writing published in May 1946:

When a minister is not the head of his administration, offices have no heads. Unfortunately, this is how anonymous democracy, which is effective in France, looks like. Thus, the desired reforms to be implemented, should aim at combining this bureaucracy into the executive power. Therefore a minister should be the head of his ministry.¹²⁴

Noteworthy, a concept of a minister as the parliament's advocate and representative, which René Capitant so fervently criticized, had a number of defenders. "Ministers are erroneously recognized as the people who are more learned than their subordinates. A minister is nothing but a delegate of the nation tasked to supervise a specific job" –Alain, a theoretician of the Third Republic,¹²⁵ asserted. Daniel Halévy shared this opinion but from a different perspective. In his view, a balance of powers was attained through the independence of senior ministerial officials.¹²⁶

¹²⁴ See R. Capitant, *Ecrits constitutionnels*, *Id.*, cited after the Polish edition: R. Capitant, *Konstytucja demokratyczna...*, *Id.*, p. 197.

¹²⁵ Alain (Émile-Auguste Chartier), *Éléments d'une doctrine radicale*, Gallimard, 1925, cited in: Alain (Émile-Auguste Chartier), *Elementy doktryny radykalnej*, [in:] B. Sobolewska, M. Sobolewski, *Mysł polityczna XIX i XX wieku. Liberalizm*, PWN (1978), p. 445. Alain's views were discussed by Adolf Bocheński who studied constitutional issues and had an extensive knowledge about the French constitutionalism: "an outstanding and quite original theoretician of the French radicalism, perceives a role of the delegates of the legislative power, ministers, exclusively and solely in the defence of individual rights against the abuse of the administration. All other affairs were to be delegated to the non-partisan administration independent of political changes." A. Bocheński, *Monteskiusz i pułkownik Sławek*, *Id.*, p. 75. See also R. Capitant, *Les Propos d'Alain ou l'idéologie de la Troisième République*, Mélanges Paul Negulesco, Bucarest, Imprimerie nationale roumaine, 1935.

¹²⁶ See D. Halévy, *République des comités*, Grasset, 1934. Polish political writers also discussed

René Capitant rejected this concept definitely:

While according to the theory popular in the years of the Third Republic they should be just the ordinary reviewers delegated by the parliament members to their posts, they should rather be the part of the legislative power and its proxies. Yet this is a purely anarchic theory. If a minister is not the head of his administration, offices have no bosses, have no head. Therefore a minister should be the head of his ministry.¹²⁷

In his concept, an active minister ought to be a national-policy maker and someone that incorporates bureaucracy into the policy defined by ministers. Incompatibility of the ministerial functions with a parliamentary mandate was intended to facilitate ministers to focus on their government, day-to-day activities. In such a concept, *incompatibilitas* was aimed to ensure efficacy and individual accountability of ministers to the public opinion. This demand was adopted by de Gaulle and enshrined in the Fifth Republic Constitution.

Like Michel Debré, René Capitant highlighted a need for reviewing the constitutionality of acts. While Debré was unable to embrace contradiction between the statute superiority and the constitutional protection of individual rights, René Capitant developed a more powerful theoretical rationalization. Like Tocqueville, he asserted that “a democratic principle ... is based on the sovereignty of individuals.”¹²⁸ He perceived the heritage of French Revolution primarily as a special respect for human rights.¹²⁹ Capitant interpreted Rousseau’s thought as the one that defied discrimination of an individual. In his view, understanding of any statute as a manifestation of the general will does not mean its absolutization. He asserted that any parliamentary statute is a general act in view of its origins (manifestation of the general will) as well as

the problem of independence of the French administration and its stabilizing impact. An excerpt from the analysis made by Adolf Bocheński provides a good example: “Finally, the third way in which separation of powers could be attained is to make ministers dependent solely on the legislative power and appoint them only by this branch of power. A balance of powers is attained, at least partially because top representatives of the state administration have more considerable standing than ministers. The administration has simply such big authority that ministers seem to be insignificant.” A. Bocheński, *Monteskiusz i pułkownik Sławek*, *Id.*, p. 75. See S. Estreicher, *Przewodnia idea...*, *Id.*

¹²⁷ See R. Capitant, *Écrits constitutionnels*, *Id.*, cited after the Polish edition: R. Capitant, *Konstytucja demokratyczna...*, *Id.*, p. 197.

¹²⁸ *ibid.*, *O konfliktach...*, *Id.*, p. 206.

¹²⁹ O. Beaud, *René Capitant et sa critique...*, *Id.*

in view of the fact that this is an instrument for protection of freedom and equal status of individuals. Thus, any statute not meeting such criteria may be subject to the review of its constitutionality.

A Gaullist politician asserted that direct democracy may co-exist with the autonomy of individuals and respect for the minorities' rights.¹³⁰ He also perceived a referendum from the individualist perspective – as a right of the citizen – member of the national community. In his view, the question of human rights protection against the abuse of power by the parliament was of critical importance. This was a response to the skipping of the Declaration of the Rights of Man and of the Citizen in the draft made by the First Constitutional Assembly that, instead, introduced there its own, egalitarian and socialist regulations. "Thus, our constitution (meaning the one he demanded – KMU) will include the declaration of rights to effectively protect human rights against the legislator's arbitrary will, just as it was proposed in the communist and socialist constitution"¹³¹ – Capitant concluded.

In Capitant's view, Declaration of the Rights of Man and of the Citizen should be a hallmark of the constitution and it should be superior in the hierarchy of the sources of law. René Capitant adopted the same stance in the debate held in the First Constitutional Assembly, as he referred to the individualist heritage of 1789.¹³² In this respect Capitant seemed to have been the follower of Condorcet's thought, where preference for direct democracy was coupled with the demand for the protection of freedoms proclaimed in the Declaration of the Rights of Man and of the Citizen.¹³³

This strand in his writings deserves particular attention. As I have already mentioned, Capitant was an exponent of the left-wing Gaullism that demonstrated an anti-capitalist attitude. Yet he defended the absolute status of human rights against the arbitrariness of the law-maker.¹³⁴ Those who remember R. Capitant's intellectual output and life attitude tend to highlight his particular sensitivity about respecting an individual's rights.¹³⁵

¹³⁰ See R. Capitant, *Démocratie et participation politique*, Bordas (1972), pp. 22–31.

¹³¹ *ibid.*, *Konstytucja demokratyczna...*, *Id.*, pp. 191–192.

¹³² O. Beaud, *René Capitant et sa critique...*, *Id.*

¹³³ This facet of Condorcet's thought was elaborated by M. Starzewski. *Idem. Środki zabezpieczenia prawnego...*, *Id.*, p. 27.

¹³⁴ J. Bougrab, author of the latest study on the origins of the Fourth Republic, underscores the fact that René Capitant was an outspoken advocate of a strong constitutional statute of the Declaration of the Rights of Man and of the Citizen of 1789. J. Bougrab, *Aux origines de la Constitution...*, *Id.*, p. 330.

¹³⁵ See J. Djordjevic, *Un défenseur de l'autonomie de la personne humaine*, Espoir, 1981, no 36, pp. 40–43; L. Vallon, *Il était de ceux...*, *Id.*, 13.

Yet apart from the aspect of personal testimony, Capitant identifies himself with the republican tradition in a polemic form towards the Jacobin attitude.

By rejecting the Jacobin tradition he managed to solve another significant constitutional issue of those years. Noteworthy, R. Capitant showed an enormous interest in the constitutional aspects of the French Union. He was the first jurist to actively get engaged in the political life, he took on the question that became an important strand of the constitutional reform. In 1946, this outstanding Gaullist published *Pour une constitution fédérale*.¹³⁶ René Capitant contended that the parliament's supremacy inhibited a flexible formula of France's co-existence with the associated countries and territories as the very logics of the parliamentary republic did not allow for granting the associated nations a federal status including autonomous rights in the area of legislation. "As it is impossible to extend democracy in overseas France and associated countries without granting them autonomy that would make them federal nations"¹³⁷ – asserted Capitant. Meanwhile, the president of Republic, who had no prerogatives and was accountable for all his acts before the parliament, had no capacity to be a real president of the French Union. "Basically, the President of the French Union is not different from the President of the French Republic as he is not released from the obligation to get the countersignatures of the ministers of Republic."¹³⁸ In Capitant's view, the centralized parliamentary republic inhibited any form of autonomy of overseas France within the framework of the French statehood:

The Assembly of the French Union is only a consulting body. Thus, it does not exist from the legal point of view.

The Supreme Council of the French Union is only the body lending support to the government of the French Republic.

Overseas France enjoys only administrative autonomy, which places their councils at the level of metropolitan general councils and not autonomous legislative assemblies.¹³⁹

¹³⁶ R. Capitant, *Pour une constitution fédérale*, Renaissance, 1946.

¹³⁷ *idem.*, *Konstytucja demokratyczna...*, *Id.*, p. 206. Jerzy Holzer highlighted the rigidity of French constitutional solutions in his synthetic history of post-war Europe. J. Holzer, *Europa zimniej wojny*, Znak, 2012, pp. 405–406.

¹³⁸ See R. Capitant, *Ecrits constitutionnels*, *Id.*, cited after the Polish edition: R. Capitant, *Konstytucja demokratyczna...*, *Id.*, p. 206.

¹³⁹ *ibid.*

Only after investing the president with specific competences he was in position to perform functions of the federal organ that united the French Union and France: organize and gather the community of nations around this organization. René Capitant openly claimed that the powers of the President of the French Union should be, in the federal dimension, more similar to those of the President of the United States than the Third Republic of France.¹⁴⁰ In the article *Pour une constitution fédérale* he cautioned against the ramifications of the adoption of the rigid constitutional solutions that could provoke associated nations to leave the French Union.¹⁴¹ Subsequent historical events proved that his forecast was correct.

René Capitant was a very consistent advocate of the republican democratism. In 1945 he tried to convince de Gaulle to develop an original constitution draft and put it to a referendum.¹⁴² When the Fourth Republic was established, he heavily criticized its regulation. He was disappointed that de Gaulle made no harsh criticism of the Fourth Republic from the standpoint of the authentic democracy and a referendum as an instrument used to determine the national policy.¹⁴³ In the subsequent years, as an active RPF member, Capitant combined struggling for the establishment of political and social democracy in the opposition against a capitalist system. The author of *Écrits constitutionnels* highlighted his respect for private property and market but opposed recognizing the employer-employee relations as the civil-law contracts. R. Capitant became a major advocate of combining capital with labour and authored a programme of employees' participation in the management of private enterprises.¹⁴⁴

Still, a key asset of his post-war concepts was the implementation of Carré de Malberg's arguments into the Gaullist doctrine. Democratization of the idea of the nation's sovereignty paved the way to the profound institutional transformation within the

¹⁴⁰ R. Capitant, *Écrits constitutionnels*, *Id.*, p. 324.

¹⁴¹ *ibid.*, Similar insights on the construction of the French Union were made by Georges Burdeau. See also G. Burdeau, F. Hamon, M. Troper, *Droit Constitutionnel*, *Id.*, p. 387; F. Borella, *Évolution politique et juridique de l'Union française depuis 1946*, Paris, Librairie générale de droit et de jurisprudence, 1958; P. Lampué, *L'Union française d'après la Constitution*, L.G.D.J., 1947.

¹⁴² J. Bougrab, *Aux origines de la Constitution...*, *Id.*, p. 260.

¹⁴³ "Admittedly, the Bayeux speech did not highlight sufficiently what the necessary underpinnings of the new Constitution were, the nation's sovereignty, which deprived all other institutions of their underpinnings and legitimization." See R. Capitant, *Le conflit de la souveraineté...*, *Id.*, cited after the Polish edition: R. Capitant, *O konflikcie...*, *Id.*, p. 210.

¹⁴⁴ *idem.*, *Le changement du régime*, *Id.*, pp. 333–346.

framework of republican traditions. There is much evidence that this was the subject of his discussions with de Gaulle, in the spring of 1946, when the General worked on his constitutional model.¹⁴⁵

D. De Gaulle in Bayeux and Épinal – Strong Presidency and Democratic Legitimization

On 16 June 1946, during the official celebrations of the second anniversary of Bayeux's liberation, de Gaulle enunciated a positive political vision of the future political system of France. The speech he delivered in Normandy is widely recognized as the most significant act in which he elaborated on the underpinnings of the Fifth Republic.¹⁴⁶

The moment was not incidental. A few weeks before, on the 5th of May, a majority of the French who participated in the referendum rejected an extremely left-wing and parliamentary constitution draft that provided an example of the extreme application of a concept of the parliamentary governance. A bicameral system was abolished and all power was conferred upon the unicameral parliament. The president was no longer invested with the power to countersign the documents signed by the prime minister. In the constitution draft of April 1946 the prime minister was chosen by the National Assembly. As I have mentioned in Chapter I, the radicalism of this document was also manifested by denying the Declaration of the Rights of Man and of the Citizen of 1789 a distinguished constitutional status. Following the Jacobin tradition, human and civil rights were set forth differently, at the expense of their protection. The Second Constitutional Assembly elected in June began to draw up another constitution draft. A leader of Free France still hoped that Constitutional Assembly would design a stable and effective political system and avoid defects of the Third Republic. In the subsequent months of 1946, de

¹⁴⁵ See J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, p. 62, S. Pinon, *Les réformistes constitutionnels...*, *Id.*, p. 5.

¹⁴⁶ Noteworthy, the most pre-eminent experts at de Gaulle's speeches in Bayeux include O. Duhamel, *Discours de Bayeux 16 juin 1946*, *Id.*, pp. 367–369; Fondation Charles de Gaulle, *Le discours de Bayeux*, Presses Universitaires d'Aix-Marseille-Economica, 1991; P. Mazeud, *La vie de la Constitution à la lumière du discours de Bayeux*, Espoir, 1996, No. 108; O. Rudelle, *L'Année 1946...*, *Id.*

Gaulle developed a constitutional thought in his speeches in Bar-le-Duc¹⁴⁷ and primarily, in his underestimated speech he gave in Vosges Department, in Épinal, the day after the Second Constitutional Assembly passed the constitution draft and two weeks before it was adopted by the referendum.¹⁴⁸

To develop his own constitutional vision, de Gaulle exploited the reformatory output, including in particular the writings of André Tardieu, René Capitant and Michel Debré. The two latter ones exchanged their views with the General in spring 1946. Yet it should be highlighted that de Gaulle's vision made up the original entirety and was primarily developed under the influence of the in-depth analysis of the history of France and his own political experience. This is what makes de Gaulle's concepts different from those developed by the constitutionalists discussed before, including Raymond Carré de Malberg, René Capitant and Michel Debré. The language of the founders of the Fifth Republic does not include any legal notions or terms typical of constitutional law. Instead, there are references to history. Odile Rudelle highlights the influence of historical writings of François Guizot and Jules Michelet on young de Gaulle. In his view, they moulded de Gaulle's thought regarding balanced polity and the state as a guardian of the common weal.¹⁴⁹ De Gaulle's political experience proved a need for the strong state as a prerequisite of the nation's integration and development of its potential. In the speech delivered in Bayeux de Gaulle appealed:

Let's be prudent and strong enough to establish and adhere to the rules of the nation's coexistence that will unite us despite the fact that our national character incessantly leads us to divisions! All our history consists of the periods of great suffering and dispersion of the nation as well as the periods of its prolific power, when we gathered around the strong state.¹⁵⁰

¹⁴⁷ Ch. de Gaulle, *Discours prononcé à Bar-le-Duc*, [in:] *Discours et messages, dans l'attente février 1946 – avril 1985*, Plon, 1970, pp. 12–17.

¹⁴⁸ Ch. de Gaulle, *Discours prononcé à Épinal 29 septembre 1946*, [in:] Ch. de Gaulle, *Mémoires d'espoir. Allocutions et messages (1946-1969)*, Plon, 1994, pp. 317-323, cited after the Polish edition: Ch. de Gaulle, *A speech delivered in Épinal on 29 Sept. 1946* (*Wystąpienie w Épinal 29 września 1946 r.*), [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, pp. 88–97. See the collective study on Épinal speech: Fondation Charles de Gaulle, Association Française des Constitutionnalistes, Fondation Nationale des Sciences Politiques, *Le discours d'Épinal, Rebâtir la République*, Presses universitaires d'Aix-Marseille-Economica, 1997.

¹⁴⁹ O. Rudelle, *Le rôle du général de Gaulle...*, *Id.*, p. 756.

¹⁵⁰ Ch. de Gaulle, *A speech delivered in Bayeux on 16 June 1946* (*Wystąpienie w Bayeux, 16 czerwca 1946 r.*), [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 87.

Thus, de Gaulle focused on the state as a necessary and fundamental institution of the national unity and a tool to attain interests of France. In Bayeux, the General spoke about the state capable of building up the unity of nation and empire, a country free from any external interference and the nation united around the strong state.¹⁵¹

As I have mentioned, de Gaulle recognized a republic as a sustainable political solution as early as in the pre-war years. He asserted that such a form of polity is capable of continuing national endeavours of the monarchy – a political output of the Capetian Dynasty, Richelieu and Colbert.¹⁵² In Chapter III, I have written that the leader of Free France consistently consolidated republican tradition in his dispute with Vichy, and in the later years, as the head of the provisional government, shaped the political order in accordance with its values. In 1946, de Gaulle combined the idea of a strong state with republican traditions to an even greater extent. Shortly before his speech in Bayeux, he paid tribute to Clemenceau.¹⁵³ In autumn, in Épinal, a future architect of the Fifth Republic spoke about a need to restore a republic, aversion of a danger of establishing power outside the Republic, about political frameworks worthy of the Republic and republican institutions needed to save and restore France.¹⁵⁴ No less meaningful was a change in the still-current thoughts of Jules Ferry (1832–1893), a native of Saint Dié in Vosges, an ardent patriot and republican, architect of the colonial power of France and a secular educational system.¹⁵⁵

Thus, it is necessary to underscore the fact that in de Gaulle's post-war speeches there was no trace of any furtherance of the synthesis of the monarchist and republican tradition. The republic was to supersede the monarchy as a sustainable form of France's existence.

¹⁵¹ *ibid.*, p. 81.

¹⁵² See A. Plantey, *Une certaine idée de l'État*, Espoir, 1996, No. 108.

¹⁵³ Ch. de Gaulle, *Discours prononcé sur la tombe de Georges Clemenceau*, [in:] *Discours et messages*, tome II *Dans l'attente*, *Id.*, pp. 3–4.

¹⁵⁴ Ch. de Gaulle, *Discours prononcé à Épinal 29 septembre 1946*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Wystąpienie w Épinal...*, *Id.*, p. 92.

¹⁵⁵ Jules Ferry (1832–1893), a French politician, opponent of Napoleon III in the years of the Second Empire; Mayor of Paris during the siege by the Prussian army, 1870–1871; republican leader in post-war years; prime minister: 1880–1881 and 1883–1885; minister of education; introduced compulsory and secular education system; embraced the idea of building a colonial empire to enhance the political and economic position of France after the defeat at the war against Prussia and in view of the competition with united Germany; as a minister of foreign affairs and prime minister implemented a program of colonial expansion in Africa (Madagascar, Tunisia, Congo) and the Far East (Indochina); step down from the office of prime minister in the aftermath of the events named as the Lang Son, during the war in China, 1885.

Undoubtedly, de Gaulle was a continuator of republican nationalism. Like Barrès and Peguy, the General adopted the republican system and wished to integrate different ideological traditions under its roof. His overriding objective was to build a strong state as a tool of France's power. Olivier Duhamel highlights a fundamental difference between de Gaulle's open, state-oriented nationalism and Action française thinkers who condemned the republican tradition and rejected the possibility of reconstruction of a strong state.¹⁵⁶ On the other hand, de Gaulle, contrary to such an assumption, expanded republican nationalism with a mature concept of the reform of the state.

According to the historian Alain Plantey, the state is a concept central to the Gaullist conception of French history, as much by reference to the founding role of the Capetian monarchy as by the ability of its authorities to implement strategic plans.¹⁵⁷ The same definition of the distillation of de Gaulle's thought was offered by René Rémond, an outstanding French historian and political scientist. This is how he put it in his study *Les droites aujourd'hui*:

A pivotal factor of the political will, the one that puts it into effect, is a state. And nothing else in position to do it. And this is what forged the nation. Would have the French nation ever existed without the state? Only the state has a capacity to understand a general interest of the nation and make it superior to any particularistic interests. All other groups are focused on protecting their benefits: economic autocrats, corporations, social groups, political parties. Only the State has sufficient resources, particularly in emergency situations. Only the state still reasons in terms of lasting and is in a position to make even unpopular choices to secure the future.¹⁵⁸

Yet, owing to his historical erudition and public experience, de Gaulle was far from idealizing the French past. In view of the architect of the Fifth Republic Constitution, the legitimate and strong state was in position to overcome the French national vices. Thus, the project designed to restore the Republic should be perceived as an institutional response to the French propensity to divisions and conflicts. The excerpt below from the speech de Gaulle made in Bayeux well illustrates his attitude:

¹⁵⁶ O. Duhamel, *Discours de Bayeux 16 juin 1946*, *Id.*, pp. 367–369.

¹⁵⁷ A. Plantey, *Une certaine idée de l'État*, *Id.*

¹⁵⁸ R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*, p. 223.

Over the period that did not exceed a man's life-span even twice, France was invaded seven times and, to make matters worse, experienced thirteen different political systems. All these upheavals have accumulated poisons in our public life which became fuel for our old Gaullist propensity to division and arguments.... That is an undeniable fact which has its roots in our national temperament, in the vicissitudes of history and in the upheavals of the present. But it is vital for the country's future and democracy that our institutions took take into account and guard against it to preserve the credit of the law, the coherence of government, efficient administration and the prestige and authority of the State.¹⁵⁹

Thus, a strong state was to be an effective alternative for the disintegration and weakness of France. In de Gaulle's view, it was a response to chaos which "ineluctably cause citizens' disaffection with the institutions of their State"¹⁶⁰ and poses a risk of dictatorship. In this perspective, new political institutions were tasked to absorb political conflicts. De Gaulle forcibly voiced conviction that order provides the underpinnings of freedom. As current deliberations reveal, the thought that restoration of the state's power is a pre-condition of freedom and effective protection against anarchy and dictatorship is also part of the thought of Michel Debré, René Capitant and, although in a different perspective, theoretical deliberations of Raymond Carré de Malberg. As we remember, these outstanding jurists recognized the unity of the state power as a precondition for the human rights attainment.

De Gaulle was convinced that the underpinnings of the state's legitimization should be the citizens' trust. In the Bayeux speech he forcibly concluded that "the power has no legal or real value unless it is based on the citizens' trust and meets the highest interest of the nation. Building institutions upon any other foundations is like building castles on the sand."¹⁶¹ The architect of the Fifth Republic Constitution did not voice this thought in the language of the democratic dogma. Unlike René Capitant and Raymond Carré de Malberg's writings, De Gaulle's statements never included any references to Rousseau's ideas or the heritage of the First Republic.¹⁶² Yet de Gaulle had no doubt that the road to the

¹⁵⁹ Ch. de Gaulle, *A speech in Bayeux...* (*Wystąpienie w Bayeux...*), *Id.*, p. 83.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*, p. 82.

¹⁶² Only A. Plantey claimed that de Gaulle was familiar with Rousseau's writings and discerned some influence of the author of *Du contrat social* on de Gaulle's concepts. In

renewal of the state's legitimization led through the democratization of the republic. Democratic orientation consisting in the broader application of general voting was a permanent streak of de Gaulle's thought and political practice. In 1945, the General empowered nation to participate in the execution of the constituting power by adopting a constitutional referendum.

Therefore J. M. Lipset's assertions about de Gaulle's authoritarian views are absolutely groundless.¹⁶³ One of the hallmarks of the authoritarian systems is elimination of democratic mechanisms, political competitions and the government's accountability to the parliament.¹⁶⁴ In the authoritarian system, political power may only be changed within the frameworks of the political ruling elite (constitutions of authoritarian countries provide for the choice of the head of the state by a selected college.)¹⁶⁵ Instead, de Gaulle demanded that the state power enjoy indisputable trust of the citizens and unquestionable democratic mandate. By no means may he be ascribed any intention to build a political system with no democratic competition. I have already mentioned that in his pre-war writings on the military issues there is nothing that could prove distrust of the democratic order. De Gaulle fulfilled the obligation he took on at the moment, Free France was established and after liberation regained representative institutions. One of the reasons for his dispute with the advocates of the parliamentary supremacy was his trust in the social direct participation in the political life. Noteworthy, a majority of the then political elite shared Adhémar Esmein's view that the only form of a positive application of the general voting at a big-country scale was participation in the elections to the Lower Chamber.

my view, such an interpretation is groundless in the light of an analysis of the thought and political practice of the architect of the Fifth Republic. A. Plantey, *Une certaine idée de l'État*, *Id.*

¹⁶³ S. M. Lipset, in *Political Man, The social base of Politics*; Polish ed.: *Spoleczne podstawy polityki*, qualified Gaullism as a cast of Fascism and placed it in the sub-chapter entitled *Fascism. Left, Right, Centre*. S. M. Lipset, *Spoleczne podstawy polityki*, Wydawnictwo Naukowe PWN, 1998, pp. 164–172. R. O. Paxton suggests continuity between the policy and practice of Vichy and consolidation of executive power in the Fifth Republic. O. Paxton, *France Vichy...*, Polish ed.: *Francja Vichy...*, *Id.*, p. 408.

¹⁶⁴ See J. J. Linz, *Totalitarian and Authoritarian Regimes*; Polish ed.: *Totalitaryzm i autorytaryzm*, [in:] J. Szczupaczyński, *Władza i społeczeństwo. Antologia tekstów z zakresu socjologii polityki*, ISP PAN, 1995, vol II, pp. 303–328; M. Bankowicz, *Autorytaryzm*, [in:] *Słownik społeczny*, *Id.*, pp. 19–25; See G. Sartori, *Théorie de la démocratie*, Dalloz-Sirey, 1997, cited after the Polish edition: G. Sartori, *Teoria demokracji*, PWN, 1994, pp. 232–238.

¹⁶⁵ See the insights Teresa Janasz made on the Vichy constitution. T. Janasz, *Państwo francuskie*, *Id.*, pp. 308–311. This facet of the April Constitution has been elaborated in Chapter VI.

De Gaulle offered a quite original solution: he coupled an idea of the nation's sovereignty (of key importance for the republican tradition) with the reconstruction of the state's leadership. He did this as he sought a dialogue between the president as a real head of the state and the nation, an arbitrator making decisions of primary importance in the general voting. This is a source of the presidential power to dissolve the parliament, enshrined in the Constitution of 1958, which made the nation an arbitrator and referee in political disputes. Thus, the two primary underpinnings of de Gaulle's political vision are the presidency shaped as a central institution of the Constitution and an idea of mediation exercised collectively by the president and the nation. In such a perspective, a position of political parties or rather their leaderships was to inevitably become weaker.¹⁶⁶ Opposition against party hegemony and oligarchization of the political system was a permanent strain of the reformatory thought, discernible in the writings of Tardieu, Carré de Malberg, Capitant and the Bardoux Committee report. Similarly, de Gaulle did not believe in the capacity of French political parties to pursue a responsible national policy since the Constitution invested them with full powers. The General asserted that political parties' struggle in France "had a fundamental nature and always undermines everything – in the heat of this struggle we forget about the top interest of the nation."¹⁶⁷ Consequently, the General strongly defended independence of the Supreme Judiciary Council and defied proposals to recommend its members by political parties. In the speech delivered in Épinal, de Gaulle asked a rhetorical question: "If everybody is aware of the pertinence of the judiciary system independence for every citizen, would it be right to transfer administration over it to the Council where half of its members are elected by the parties?"¹⁶⁸

De Gaulle defined the president's political mission as an arbitration over political divisions and assurance of national independence and the treaties entered by France. As we will see, both of these terms were introduced into the Constitution of the Fifth Republic in Article 5, that was germane to the definition of the

¹⁶⁶ See P. Mazaeud, *La vie de la Constitution...*, *Id.*, p. 17.

¹⁶⁷ Ch. de Gaulle, *A speech in Bayeux...* (*Wystąpienie w Bayeux...*), *Id.*, p. 86.

¹⁶⁸ Noteworthy, the constitution draft designed by the Second Constitutional Assembly envisaged that half of the members (6 representatives) of the Supreme Judiciary Council would be made up by the people elected by the parliament. Ch. de Gaulle, *Discours prononcé à Épinal 29 septembre 1946*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *A speech in Épinal...* (*Wystąpienie w Épinal...*), *Id.*, p. 96.

political mission of the president of the Republic.¹⁶⁹ Furthermore, the Bayeux speech includes the underpinnings of the presidential special powers, set forth in Art. 16 of the Constitution.¹⁷⁰

De Gaulle's constitutional thought emphasized the government's independence of the parliament and excluded combining governmental and parliamentary functions. The latter demand was certainly inspired by René Capitant. The future architect of the Fifth Republic strived for releasing the executive power and making it independent of the parliament. In his Épinal speech he expressed a need for the separation of powers more precisely than in Bayeux:

I think that any democratic state must be a real democratic state, which means that each of the three powers – executive, legislative and judiciary – should be a really uniform power, i.e. its tasks should be limited and separated from those performed by the other two powers and should be solely and fully accountable for them.¹⁷¹

Obviously, de Gaulle alluded to Montesquieu as an advocate of the institutional balance. The General recognized him as a thinker who opposed any balance disturbing, including the legislative power abuse at the expense of the executive power. Noteworthy, such an interpretation of Montesquieu's thought is actually absent apart from the French intellectual reflection.¹⁷² Thirty years

¹⁶⁹ In the Épinal speech, the president's political mission was also defined precisely: "I think that the head of state should be a real head of state, which means he should be elected to effectively represent France and the French Union; ensure the smooth functioning of the institutions and protect vital national interests against ramifications of a political struggle that makes our country so-much divided, enfeebled and vulnerable. The president will have capacity to perform these tasks provided that he is empowered to appoint a government, chair the Council of Ministers, sign decrees or dissolve the parliament elected in the direct voting, when the lack of coherent majority in the parliament prevents him from performing his legislative tasks or supporting the government. The president should be in position to ensure the country's independence, territorial integrity and all the treaties signed by France regardless of circumstances."

¹⁷⁰ This was definitely the purport of the sentence cited below: "In the event that the country is under threat, it is the president who would be a guardian of national independence and the treaties signed by France." Ch. de Gaulle, *A speech in Bayeux...* (*Wystąpienie w Bayeux...*), *Id.*, p. 86.

¹⁷¹ *idem.*, Ch. de Gaulle, *Discours prononcé à Épinal...*, *Id.*, cited after the Polish edition: *A speech in Épinal...* (*Wystąpienie w Épinal...*), *Id.*, p. 94.

¹⁷² Such interpretation is not applied in the classical studies of I. Berlin, Y. Kawade, D. Lowenthal. See I. Berlin, *Monteskiusz*, [in:] Z. Dorosz, *Literatura na świecie*, 1986, no 6, pp. 277–317. Y. Kawade, *Monteskiusz*, (trans. A. Dąbrowska, T. Sieczkowski), [in:] *Mysłiciele polityczni...*, *Id.*, pp. 289–310; D. Lowenthal, *Monteskiusz* (trans. R. Kuczyński),

after de Gaulle's speech in Épinal, similar interpretation of Montesquieu's thought was offered by Pierre Manent in *Histoire intellectuelle du libéralisme*:

Montesquieu discerns that in any political system based on representation it is a legislative body holding a mandate of the legitimate representation that shows a natural propensity to abuse power or, in a way, increase its extent. Therefore, it is necessary to undertake the measures aimed to provide the executive with sufficient power. To put it simply, all constitutional mechanisms should be aimed to balance the capacity of executive and legislative powers. Otherwise, under the power of the legitimization principle, which Montesquieu reminds of at the beginning of the chapter, the executive would be totally subordinated to the legislature.¹⁷³

Undoubtedly, de Gaulle could exploit the idea where the president is chosen by a large electoral college, which was proposed in the draft designed by the Bardoux Committee and Michel Debré.¹⁷⁴ The president chosen by an extended collegial body held a mandate not given by the parliament, which enabled him to create and shape the executive power.

Thus, the executive power should origin from the head of the state, a statesman, regardless of any political divisions, somebody chosen by a collegial body comprising broadly understood parliament members, which would make him both – the President of the French Union and the President of the Republic.¹⁷⁵

De Gaulle asserted that a precondition necessary to maintain the authority of the executive power is its cohesion and discipline, that could not be achieved if the government ministers were dependent on the legislative power, i.e. – in modern democracy – particularistic interests of political parties. Thus, the Bayeux draft envisaged that the executive power would origin from the president

[in:] L. Straus, J. Cropssey, *Historia filozofii politycznej*, Fronda, 2010, pp. 519–543.

¹⁷³ P. Manent, *Histoire intellectuelle du libéralisme*, Fayard/Pluriel, 2012, cited after the Polish edition: P. Manent, *Intelektualna historia liberalizmu*, trans. A. Miszański, Arcana, 1994, p. 88.

¹⁷⁴ According to O. Passelecq, Tardieu also contended that the president should be elected by a college comprising a wide range of electors. O. Passelecq, *De Tardieu à de Gaulle...*, *Id.*

¹⁷⁵ Ch. de Gaulle, *A speech in Bayeux... (Wystąpienie w Bayeux...)*, *Id.*, p. 86.

who would independently appoint the prime minister and government ministers “given the trends emerging in the parliament.”¹⁷⁶ It seems de Gaulle meant the construction where ministers do not come from the parliament but are accountable to it. Furthermore, in Épinal, de Gaulle criticized the possibility of applying individual accountability of ministers to the parliament. The architect of the Fifth Republic underscored the cohesion of the government acting under the leadership of the prime minister and elimination of an individual accountability of the ministers. “What is the government’s solidarity going to be if every minister is individually accountable to the National Assembly?”¹⁷⁷

The Bayeux draft envisaged that the president, a statesman standing above political divisions, should be empowered to appoint the prime minister to be in charge of the policy and cabinet activities, appoint ministers; put statutes into effect, adopt decrees (since they are “obligations towards the state) and chair governmental sessions, which will ensure *continuum* so much needed for the country,”¹⁷⁸ and, finally, dissolve the parliament in the event of a political crisis. De Gaulle, as I have already mentioned, did not delineate his proposals in the legal language but interpretation of his Bayeux speech suggests that he thought of granting the president his own powers (*pouvoirs propres*). Certainly, such a status would empower him to appoint the prime minister and dissolve the parliament. Noteworthy, de Gaulle clearly alluded to the concept developed by Tardieu as, in his view, a prerogative to dissolve the parliament should be the president’s own, discreet and unconditional power. Thus, Olivier Passelecq is right to highlight de Gaulle’s reference to Tardieu’s concept as it is only then that the dissolution of the parliament is the power counterbalancing its power and facilitating formation of the governmental majority.¹⁷⁹

Undoubtedly, as early as in 1946, de Gaulle pictured his constitutional vision where the president exercised national power. In those years, the General was not in position to put forward an idea of general presidential elections¹⁸⁰ since a need to set up the

¹⁷⁶ *ibid.*, p. 86.

¹⁷⁷ *idem.*, Ch. de Gaulle, *Discours prononcé à Épinal...*, *Id.*, cited after the Polish edition: *Wystąpienie w Épinal...*, *Id.*, p. 96.

¹⁷⁸ *idem.*, *Wystąpienie w Bayeux...*, *Id.*, p. 86.

¹⁷⁹ O. Passelecq, *De Tardieu à de Gaulle...*, *Id.* Noteworthy, in the Épinal speech, de Gaulle defined the president’s right to dissolve the parliament in response to the lack of coherent majority supporting government and its legislative activities.

¹⁸⁰ P. Mazeaud asserted that de Gaulle mentioned the possibility to apply general

French Union involved the election of the president by the electoral college. De Gaulle did not allude to Constant's idea of the moderating and neutral power.¹⁸¹ The architect of the Fifth Republic espoused the model where the president was an active arbitrator and political head of the state governed by the cabinet of ministers. In his Épinal speech, de Gaulle delineated a concept of the dual executive power, spoke about a need to establish the government gathered around its head (prime minister), as he had never thought of the adoption of the American-like presidential system. Presidency, however, was devised to be a central and active policy institution.¹⁸² De Gaulle posited that the president would be in a position to shape relations with the prime minister to meet French political needs.

Pursuant to the rule of the separation of powers, the Assembly elected in general and direct voting was to exercise executive power: enact laws and pass the national budget. Thus, the legislative body no more enjoyed the status of a primary political institution, the only one that expressed national sovereignty, which was enshrined in all constitutional drafts tabled in the years of the First

presidential election in Épinal, when he said that the head of the state should be elected to truly represent France and the French Union. See P. Mazeaud, *La vie de la Constitution...*, *Id.*, p. 18.

¹⁸¹ W. Szyszkowski, an expert at the thought of Benjamin Constant, emphasized that "a system of neutral power should not be equated with a presidential system, where the head of state is invested with a wide range of powers. A monarch may never have such powers as neutral power." The author unequivocally contended that a presidential system, "like that, for example, of the Fifth Republic," would be contrary to the Constant's doctrine W. Szyszkowski, *Benjamin Constant...*, *Id.*, p. 89. See also Z. Rau, *Liberalizm. Zarys myśli politycznej XIX i XX wieku*, Fundacja Aletheia, 2000, p. 40.

¹⁸² The excerpts from de Gaulle's Épinal speech well illustrate how he defined a political role of the president and government: "I think the head of state should be a real head of state, which means he should be elected to truly represent France and the French Union and his task should be to ensure effective functioning of the institutions and guard the vital national interests in view of the political struggle. This is essential in our divided, enfeebled and vulnerable country. The president of the Republic will have capacity to perform these tasks provided that he is empowered to appoint the government, chair the sessions of the Council of Ministers, sign decrees or dissolve the parliament elected in the direct voting in the event that no coherent majority allows him to perform his constitutional legislative functions or support the government. Regardless of circumstances, he will be in position to ensure the country's independence, territorial integrity and the treaties signed by France."

In my view, the government of France should be a real council of ministers – a team of people sharing similar values and beliefs, united to act collectively under the leadership of the prime minister; collectively accountable for their acts to the parliament, truly and obligatorily loyal in all their acts, in all services and failures. Otherwise, it is going to be just a substitute of the government and not the government." Ch. de Gaulle, *Discours prononcé à Épinal...*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *A speech in Épinal... (Wystąpienie w Épinal...)*, *Id.*, pp. 94–95.

and Second Constitutional Assembly.¹⁸³ Furthermore, de Gaulle not only opposed an idea to abolish the Senate but tabled his own project of the rationalization of its political mission. Noteworthy, a far-left draft drew up in the First Constitutional Assembly (and rejected in May 1946) abolished a bicameral system.

Meanwhile, de Gaulle espoused a balanced bicameral system where the active upper chamber was to counterbalance the threat posed by “the irrational and unbalanced” decisions made by the Lower Chamber and reduce a risk of the extreme politicization of the legislation.¹⁸⁴ This is how the General argued this in Bayeux:

Thus, the Upper Chamber, elected in a different manner and having a different composition, should be tasked to review in public all bills passed by the Lower Chamber, propose amendments and drafts. This chamber will in a way supplement the other one: the body will review its legislation by introducing into the law-making process an administrative factor, so frequently disregarded by a strictly political collegial body.¹⁸⁵

The upper house was to bring a different type of representation into the French constitutional system. De Gaulle perceived it as an institution representing local France (representatives of general and municipal councils), overseas territories, as well as business, family and intellectual organizations “so that the opinion voiced by the largest professional groups could be heard inside the state’s institutions.”¹⁸⁶

The latter demand proved that de Gaulle was inspired by the social-corporative thinkers – Tour du Pin and Albert de Mun.¹⁸⁷ Interestingly, it was the only non-republican idea in de Gaulle’s constitutional thought.¹⁸⁸

The French political tradition made no room for the application of corporative ideas in a version that would mean granting public

¹⁸³ See J. Bougrab, *Aux origines de la Constitution...*, *Id.*, J. Zakrzewska, *Spór o parlament w Konstytucjach Francji i Włoch po drugiej wojnie światowej*, PWN, 1961.

¹⁸⁴ Ch. de Gaulle, *A speech in Bayeux...* (*Wystąpienie w Bayeux...*), *Id.*

¹⁸⁵ *ibid.*, pp. 84–85.

¹⁸⁶ *ibid.*, p. 85.

¹⁸⁷ J. C. Ricci, *Les idées politiques...*, *Id.* In Polish literature, the most insightful study on this issue is A. Roszkowski’s *Korporacjonizm katolicki*, Księgarnia świętego Wojciecha w Poznaniu, 1932. See also M. Manteuffel, *Ustrój korporacyjny w poszczególnych krajach*, [in:] *Korporacjonizm* (collective work), Lublin, Uniwersytet, Towarzystwo Wiedzy Chrześcijańskiej, 1939, pp. 198–233.

¹⁸⁸ J. C. Ricci, *Les idées politiques...*, *Id.*

rights to professional and business organizations, just like in the German political system. Similarly to the authors of the Bardoux report, de Gaulle might have pondered introduction of the corporate representation into representative institutions, as an extension of the political representation. Thus, de Gaulle's concept may be recognized as a kind of the neo-corporatism that is not in a collision with the parliamentary democracy rules, something different from the anti-parliamentary corporate system put into effect by Mussolini in Italy, General Franco in Spain and Salazar in Portugal.¹⁸⁹

An influence of the thought of Maurice Barrès on de Gaulle's concepts should not be downplayed in this case. In his young years, Barrès espoused a system of regional autonomy and representation of social associations in the regional authorities. As we remember, in the 1930s, authors of the Bardoux Committee report planned to establish regions with corporate representations as a part of electoral colleges choosing the president. Yet an idea to introduce corporate representation into the Upper Chamber was developed by René de La Tour du Pin who framed it as early as in the 1880s.¹⁹⁰ De Gaulle must have had excellent knowledge of his concept as he repeated it nearly in full in his Bayeux speech. The author of the French corporate system posited that particular professions could set up free corporations enjoying a legal-public status. Antoni Roszkowski, an expert at these issues, wrote that René de La Tour du Pin planned institutional changes in his social-economic reform. He put it in this way: "De La Tour du Pin was going to establish provincial councils along with the current national representations. New bodies would comprise representatives of corporations and the Senate representing interests of corporations."¹⁹¹

This cast of neo-corporatism, discernible in the European political thought and practice in the interwar years, also emerged in Poland and was part of the political concepts developed by Jan Piwowarczyk, Antoni Roszkowski, Antoni Szymański and an editorial team of "Polityka," led by Jerzy Giedroyc.¹⁹² Similarly,

¹⁸⁹ Analysis of the evolution of post-war neo-corporatism is in the study by G. Smith, *Życie polityczne w Europie Zachodniej*, Puls, 1992.

¹⁹⁰ R. de La Tour du Pin, *Vers un ordre sociale chrétien*, Chambly de la Charce Reliure, 1921, p. 499.

¹⁹¹ A. Roszkowski, *Korporacjonizm katolicki*, *Id.*, pp. 153–154.

¹⁹² J. Piwowarczyk, *Korporacjonizm i jego problematyka*, Rada Społeczna przy Prymasie Polski, 1936; A. Roszkowski, *Korporacjonizm katolicki*, *Id.*; A. Szymański, *Zagadnienie*

in de Gaulle's thought, neo-corporatism did not result from distrust of representative institutions. It seems that seeking some institutional means of responding to the state's legitimization crisis, alienation and poor participation of citizens in the public life were of the key importance. Noteworthy, as the RPF leader, de Gaulle raised the question of the association of capital and labour as a third road between socialism and individualistic capitalism.¹⁹³ That idea of association may also be qualified as an endeavour to open a new space between an individual and the state although its primary sense was the socialization of capitalism.

There is much evidence that in 1958 and 1969 de Gaulle made attempts to effectuate the solutions inspired by corporate ideas. In the late 1960s they emerged again following the draft of the regionalization of France. Yet the principle of sovereignty belonging to the nation as an entirety, which was the key question for the constitutional identity of France, turned out to be an insurmountable obstacle inhibiting establishment of the separate representation of intermediary bodies.

The Bayeux and Épinal speeches also confirmed continuity of the reformatory thought in the process of planning the institutional future of the French Union. Undoubtedly, de Gaulle made use of René Capitant's thought in this area. In Bayeux the General made an endeavour to embrace a primary challenge: find a political form for the co-existence of France and its affiliated nations. He expressed a belief that the French Union should be a stable and flexible federation. In de Gaulle's view, the electoral college choosing the president should include

spoleczne, Towarzystwo Wiedzy Chrześcijańskiej, 1938; Polityka, *Polska idea imperialna*, 1937. In those years rejection of the corporate solutions in their extreme version was germane to the ideological and political perspective. The corporate system of the 1930s challenged the social representativeness of political parties, which, in view of its advocates, held no real social mandate and degenerated social life. Cooperation between professions, real, natural and positive social relations were thought to have been the underpinnings of a new state. Substantial support for this kind of political thought was lent by encyclical *Quadragesimo anno*, issued by Pope Pius XI. Corporatist concepts were put into effect in Italy of Mussolini, Spain under the rule of Franco and Salazar's Portugal. Regarding Italy, the corporatist solutions paved way to statism. In the Polish corporatist thought, a new organization of the socio-economic life was supposed to release social energy and was – to a large extent – directed against centralism and statism. The studies by Antoni Szymański, Antoni Roszkowski, Jan Piwowarczyk and Polityka Team present anti-ethatist corporatism, guarding economy against the liberal model of free competition as well as collectivism.

¹⁹³ See P. Guiol, *R.P.F., et L'Association Capital-Travail (1947–1955)*, Espoir, 1976), No. 17, pp. 7–99. *Idem*, *L'Association Capital-Travail: le projet de loi du RPF. Génèse et destinée*, Espoir, 1979, No. 28.

representatives of the territories associated with France, which would make him “the president of the French Union and the president of Republic.”¹⁹⁴ The opinions of overseas territories were to be pronounced in the Upper Chamber and its members, along with delegates of the overseas local assemblies, were to make up a great Council of the French Union.¹⁹⁵ A few months later, in Épinal, the General expressed a belief that the Union’s future would not “depend on the powerless bodies.”¹⁹⁶ This opinion absolutely coincided with the already-discussed analyses of René Capitant, who reasoned that the parliamentary supremacy coupled with the requirement of countersignature imposed on the president inhibit legislative autonomy of the bodies making up the federation. The president dependent on the primary parliamentary institution of the metropolis was not in position to effectively perform functions of the Union’s federal organ. Meanwhile, de Gaulle intended to make the Union more flexible and espoused a flexible institutional construction:

I think that the French Union should be a union and must be French, which means that the overseas people sharing our fate should have a possibility to develop in accordance with their nature and their strive to manage their affairs on their own, along with the progress they make. Such a solution would allow them to be associated with France, protect their interests and France would retain its predominance in all areas, including foreign policy, national defence, means of communication and business. Yet this would make it necessary to establish effective local institutions competent for specific territories along with a number of common institutions: Council of State, Assembly of the French Union, a president of the French Union, ministers responsible for common areas.¹⁹⁷

¹⁹⁴ Ch. de Gaulle, *Wystąpienie w Bayeux...*, *Id.*, p. 86.

¹⁹⁵ *ibid.*, p. 85.

¹⁹⁶ *idem.*, Ch. de Gaulle, *Discours prononcé à Épinal...*, *Id.*, cited after the Polish edition: *Wystąpienie w Épinal...*, *Id.*, p. 97.

¹⁹⁷ *ibid.*, p. 95.

E. The Road to the Fourth Republic. Constitutional Doctrine of the French People's Rally (RPF)

De Gaulle was in no position to prevent enacting a constitution that perpetuated a political system that failed to provide stability and efficacy. The draft produced by the Second Constitutional Assembly was approved in a referendum by a small majority of votes (only 53.24 per cent of approving votes) and a high voter abstention (one third of voters did not participate in the referendum). Just after the referendum outcome was announced, Raymond Aron harshly criticized a new constitutional system:

The executive remains a mandatary of the Assembly. The Upper Chamber is even not empowered to apply a suspending veto. There is no review of the constitutionality of laws [...] The President of the Republic has no real powers to appoint a prime minister or dissolve the parliament chamber. There is no procedure to delay or sanction any significant changes by staging new elections. No institution invested with any real powers is independent of the party game or, in other words, the will of the party leaders and their aides.¹⁹⁸

The Fourth Republic Constitution expressed republican identity differently from the draft produced by the First Constitutional Assembly. Once again, its preamble referred to the Declaration of the Rights of Man and of the Citizen of 1789, which regained in this way a constitutional status and strong protection. Unlike the April 1946 draft that, following the Jacobin tradition, recognized human and civil rights as an internal part of the constitution and ascribed them its own contents. The Fourth Republic Constitution alluded to the values of the French Revolution from its preliminary, liberal stage. Furthermore, the September 1946 Constitution introduced a social correction that was to a large extent reflected in de Gaulle's decisions made shortly after the liberation of France. Presumably, its axiology manifested state's social accountability along with strong reserve towards the Jacobin tradition. Professor Jan Baszkiewicz noted that the identity of the Fourth Republic Constitution was most similar to the republican tradition strain that emerged in 1848. The Second Republic Constitution recognized

¹⁹⁸ R. Aron, *Mémoires, Id.*, cited after the Polish edition: R. Aron, *Wspomnienia, Id.*, p. 205.

the heritage of 1789 and declared a need for the state's socialization and respect for family rights.¹⁹⁹

The choice made by the Second Constitutional Assembly had permanent ramifications: the draft of April 1946 defined the property right as an economic not an individual's right and moulded it in accord with the Constitution of 1793. Furthermore, as I have mentioned in Chapter I, the draft provided strong foundations for nationalization as it set forth that each enterprise enjoying a public status should remain the property of community.²⁰⁰ Meanwhile, a draft produced by the Second Constitutional Assembly and accepted in a referendum restored full constitutional protection of the property right recognized as an individual's right. In 1980, in the justification of the adjudication that found the nationalization statutes unconstitutional, the Constitutional Council reminded that in the 1946 referendum people rejected a constitutional draft providing for a limited scope of protection of the private property right.²⁰¹

De Gaulle discerned a difference between the Fourth Republic Constitution and an extreme, left-wing draft investing the parliament with supreme powers, rejected in a referendum in 1946. Certainly, he appreciated the fact that the ideas paving the way to the socialist state were abandoned but in the institutional dimension de Gaulle sustained his negative attitude by highlighting the flaws characteristic of the parliamentary republic.

The Fourth Republic Constitution was a testimony of the topicality of Adhémar Esmein's doctrine where he advocated parliamentary supremacy and furthered an idea that the state's interest was an overriding goal of the parliamentary elite. The primary weakness of the Fourth Republic Constitution was that it perpetuated the governance model from the Third Republic: a weak position of the president, Council of Ministers and the prime minister. In de Gaulle's view, the executive power should be made independent of the parliament and this task was of key importance.

How is the government going to be independent if the executive power is headed by someone appointed by political parties? [...] Is it right to establish the rules that perpetuate omnipotence of political

¹⁹⁹ J. Baszkiewicz, *Le républicanisme*, *Id.*, p. 513.

²⁰⁰ See note p. 94.

²⁰¹ L. Favoreu, L. Philip, *Les grands textes...*, *Id.*, p. 234.

parties [...] when everybody sees that such a system coupled with political divisions inhibits the state's functioning?²⁰²

The Fourth Republic soon returned to a practice moulded in the 1880s, i.e. governments were formed by parliamentary groups and depended on their fluctuations. Noteworthy, under Art. 45 of the Constitution (effective until 1954), a newly designated prime minister was to table the government's program and policy before National Assembly. After obtaining *a vote of confidence* by an absolute majority of votes, he received a nomination and upon his motion ministers received a nomination. From the formal point of view, such a procedure was aimed to consolidate the position of the prime minister, as it was him who received the parliament's investiture. The authors of the Constitution did not want the prime minister to receive the Assembly's approval for the government's composition or introduce ministers to the parliament. Paul Coste-Floret, the co-author of the Constitution of 1946 and the constitutional commission speaker furthered such a solution as an evident advantage of the new Constitution.²⁰³

Yet since the cabinet members headed by Paul Ramadier²⁰⁴ were appointed in 1947, a practice of investiture with a strong participation of the National Assembly developed, which actually meant a return to the Third Republic practice. M. Morabito, the author of the history of the French constitutionalism, asserted that the government headed by Ramadier put into effect a system of the dual investiture.²⁰⁵ Indeed, after Ramadier received a personal vote of confidence from the parliament, which was not required by the Constitution, he asked the parliament for a new vote of confidence for him and his ministers. Ramadier's attitude manifested continuation of the Third Republic practice where all ministers should introduce themselves to the Lower Chamber.²⁰⁶

²⁰² Ch. de Gaulle, *Discours prononcé à Épinail...*, Id., cited after the Polish edition: Ch. de Gaulle, *Wystąpienie w Épinail...*, Id., p. 96.

²⁰³ *Rapport de Paul Coste-Floret sur le projet de Constitution du 5 mai 1946*, Pouvoirs, 1976, No. 76, pp. 7–27.

²⁰⁴ Paul Ramadier (1888–1961), a French socialist politician, member of the National Assembly; La Résistance member during World War II; in 1947 prime minister of the first government in the Fourth Republic, which, however, collapsed after a few months. Expulsion of the communists from the government coalition was the highlight of that period.

²⁰⁵ M. Morabito, D. Bourmaud, *Historia konstytucyjna i polityczna Francji...*, Id. See M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique...*, Id.

²⁰⁶ M. Morabito wrote that such practice demonstrated “that political class by no

In 1954, a constitutional habit in which the government appointment depended on the inter-party arrangements was sanctioned constitutionally. The application of Art.45 left no doubts that the political practice was based on the parliament's trust, which actually meant party leaderships. Therefore, René Capitant asserted that sovereignty was confiscated by political parties in the Fourth Republic. Furthermore, a proportional model of the electoral law inhibited consolidation of the party system and establishment of stable government majorities. In Capitant's view, the Fourth Republic was not a democratic political system since the voters' decisions did not determine the government's appointment and its agenda. Yet they had an impact on the size of parliamentary representation of particular parties that were absolutely free to enter into volatile coalitions.

However, such a direction of the evolution of the political system was absolutely in conformity with the constitutional rules. The Constitution of October 1946 shaped the parliamentary republic where the National Assembly was the only institution to exercise national sovereignty. Art. 3 of the Constitution specified this principle *explicite*.

Compared to the Third Republic, the names of the parliament chambers were symbolically changed. The Lower Chamber was supplanted by the National Assembly, which was intended to emphasize a leading position of that institution. The Constitution, unlike the draft rejected in a referendum, established the Upper Chamber, the Council of the Republic in place of the Senate, which was to manifest a departure from the conservative understanding of its political mission. The Council of the Republic, however, was of minor importance in political terms although, as we will see, its position was consolidated after the constitutional revision effectuated in 1954. Yet until then, the Council of the Republic played a minor role in the law-making process.

The French political system consistently developed the parliament's superiority. The only form of direct democracy envisaged in the Constitution was a referendum approving constitutional revision but it could also be amended without referendum. The Constitution excluded delegation of the legislative power, which ensured an absolute primacy to the parliamentary statute in the

means abandoned republican spirit, which is manifested by the violation of the constitution. President Vincent Auriol was the only politician who highlighted this fact." M. Morabito, D. Bourmaud, *Historia konstytucyjna i polityczna Francji...*, *Id.* See M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique...*, *Id.*

legal system. Yet, like in the years of the Third Republic, the government was gradually empowered to issue decrees having the force of law.²⁰⁷

The institutions of the president, prime minister and the Council of Ministers were of minor importance compared to the National Assembly. According to the logic of the Third Republic, the president was to play a role of the state's representative and an institution tasked to solve governmental crises. All presidential acts had to be countersigned by the prime minister or ministers. Even Art.51-based decision to dissolve the Parliament was envisaged only in exceptional situations (two ministerial crises over 18 months) and made by the Council of Ministers, while the presidential decree was solely an executive act. Actually, a requirement that the Council of Ministers should seek support of an absolute majority in the National Assembly, aimed to ensure the government political stability, bred multitudinous complications in the process of forming the cabinet. Jean-Jacques Chevalier asserted that the Constitution was "rational but not judicious and emphasized complicated procedures of investiture (absolute majority) and dismissal of the government, which, from the moment the Constitution became effective, bred scepticism about its advantages."²⁰⁸

Although architects of the Fourth Republic were the first in the history of French constitutionalism who gave the prime minister a constitutional status, actual weakness of the position of this office was a hallmark of the Fourth Republic.²⁰⁹ The Fourth Republic did not recognize the prime minister as the head of the executive power. This also pertained to politicians of unquestionable output and strong personality. The premiership experience of Pierre Mendès France, who made attempts to exercise strong leadership within the effective constitutional framework, was quite meaningful. A politician with a glorious past in Résistance hoped for the revival of republican values and transformation of the political class. Mendès France endeavoured to fill his cabinet's policy with homogenous contents, made tough decisions on his own and initiated a practice of the direct communication with his voters.²¹⁰

²⁰⁷ See J. Stembrowicz, *Ustawodawstwo rządowe...*, *Id.*

²⁰⁸ See J. Godechot, *Les constitutions...*, *Id.*, p. 366.

²⁰⁹ See S. Arné, *Le président du Conseil des ministres sous la IV^e République*, L.G.D.G., 1962; J. Massot, *Le président du conseil, Pouvoirs*, 1996, No. 76, p. 45.

²¹⁰ The policy pursued by Pierre Mendès France won respect of the commentators who definitely cannot be recognized as the repositories of the tradition of French radicalism, such as François Mauriac. F. Mauriac., *Bloc-notes*, *Id.*, cited after the Polish

Such a leadership model faced a fierce reaction and was rejected by the parliamentary elite. That experience confirmed Debré's thought: even the best-designed policy is helpless in the face of institutional weakness.

However, the review of the constitutionality of acts was put into effect to a moderate degree. Competences and composition of the Constitutional Committee substantiated the French legal tradition's reservation towards a thorough review of the constitutionality of acts. The Committee, designed as a political and parliamentary body, was headed by the president of the Republic and comprised the speakers of both chambers, seven appointees of the National Assembly and three appointees of the Council of Republic. The Committee was tasked to review whether a statute passed by the parliament involved any constitutional revision. If it did, the statute was sent back for the re-examination. The body was to operate based on the joint motion tabled by the president of the Republic and the Chairman of the Council of Republic, which shows that the authors of the Constitution posited that the power to review the supreme act was conferred upon the Upper Chamber, which – in turn – may be recognized as a reflection of solutions adopted as early as in the Napoleon times. In no way, a flawed process of the review of the constitutionality of acts could ensure the primacy of the Constitution.

René Capitant observed that the Fourth Republic Constitution provided for the review of the constitutionality of acts as the institution tasked to solve prospective conflicts between the parliamentary chambers:

Under such conditions, the Constitutional Committee is not in position to be a repository and defender of the nation's sovereignty. Instead, the body may just protect the interests of one parliamentary majority against the other parliamentary majority.

Moreover, the latter role is undermined since its competences do not include Chapter IX of the Constitution, the one that pertains to the constitutional amendments, which means distinction between constituting and legislative powers.²¹¹

Compared to de Gaulle's decision from autumn 1946, when he

edition: F. Mauriac, *Bloc-notes*, *Id.*

²¹¹ See R. Capitant, *Le conflit de la souveraineté...*, *Id.*, cited after the Polish edition: R. Capitant, *O konflikcie...*, *Id.*, p. 205.

introduced the institution of a constitutional referendum, the reduced nation's participation in exercising the constituting power was more germane. Meanwhile, Art. 90 of the Constitution of 1946 departed from an obligatory constitutional referendum, which meant that any constitution draft did not have to be put to a popular vote after being passed by the National Assembly (by a two thirds majority of votes) or passed by each of the chambers by a three fifths majority of votes. Noteworthy, it was a regress compared to not only a democratic formula of the constituting power de Gaulle adopted, but also to a draft produced by the First Constitutional Assembly, which provided for an obligatory constitutional referendum (Art. 123).²¹² Also this aspect was highlighted by de Gaulle in Épinal:

If our institutions should rely on the free will of the citizens, is it right that they are not asked about their opinion about a general manner in which they would like to elect their representatives and that in future people will be deprived of the right, which they reserved, to decide on their own about the Constitution in a referendum?²¹³

In Bayeux Gaullism was conceived as a doctrine and political movement. Since then, the furtherance of the new polity was de Gaulle's primary task. In autumn 1946, the General departed from the Christian and Social Popular Republican Movement (MRP). Until then, MRP- a political group with a glorious war past, was de Gaulle's closest political ally recognized as a faithful party. In May 1946, MRP called for the rejection of the extreme left-wing constitution draft. In several issues the movement stance coincided with de Gaulle's doctrine, including corporate representation in the Senate. Yet in the Second Constitutional Assembly, contrary

²¹² Therefore Art. 123 of the constitutional draft of 19 April 1946 should be cited: "This constitution adopted by the French people may only be amended by the people. / Revision is put into effect in the following forms: / In the resolution passed in an open voting by a majority of votes, the National Assembly declares that the Constitution should be revised. / The Resolution specifies the subject of revision. / It is subject to the second reading within at least 3 months. / After the second reading has been completed, the National Assembly draws up a draft of the act on revision of the Constitution. The act is passed by the majority of votes in the forms provided for ordinary acts. / The draft of the act is put to a referendum. / When people approve the draft, it is proclaimed by the President of the Republic as a constitutional act within 8 days following the referendum date." *Le projet de Constitution du 19 avril 1946*, [in:] *Konstytucja Republiki Francuskiej*, trans. K. Grzybowski, *Id.*, pp. 78–79.

²¹³ Ch. de Gaulle, *Discours prononcé à Épinal...*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *A speech in Épinal...* (*Wystąpienie w Épinal...*), *Id.*, pp. 97, 102.

to de Gaulle's attitude, MRP made a political compromise with Socialists and the Communist Party and called for endorsing the constitution draft in a referendum. MRP actively participated in the governments of the Fourth Republic. It seems that a dispute with the ideologically close political movement, so much engaged in Résistance, demonstrates de Gaulle's attachment to the idea of political reforms.²¹⁴ In the polemics with his former war friends, the General voiced harsh criticism: "But I'm not doing these magic tricks. On the contrary, in my view there is nothing more germane to France than possibly the fastest restoration of efficacy and authority of the republican state."²¹⁵

In 1947, de Gaulle set up RPF, a movement rare in the European history, focused only on the radical constitutional change.²¹⁶ RPF achieved very good election results but did not manage to overcome a hegemony of the parties guarding parliamentary supremacy. Sociology of the social support for RPF confirmed the primacy of an idea of the radical constitutional change. In view of Serge Bernstein, an author of *Histoire du gaullisme*, two kinds of sensitivity were represented in RPF: people with right-wing views, who supported Colonel Rocque's League or Tardieu's ideas before World War II²¹⁷ and modern radicals embracing state reforms and discerning a kind of ideologically-indifferent patriotism in Gaullism. Bernstein identifies RPF as a right or centre-wing movement and adds that it was "the conservative, dynamic Right restoring authority of the executive power."²¹⁸ Indeed, under the roof of the republican tradition de Gaulle managed to gather groups of different ideological sensitivity united by the vision of the restoration of a strong state.

From the perspective of the study on the origins of the Fifth Republic, development of the constitutional doctrine in the times of RPF is germane. Upon de Gaulle's request, as early as in June 1948, Michel Debré drew up a draft of the constitutional revision, which he defined as "the first stage aimed to express ideas in

²¹⁴ Like de Gaulle, MRP espoused bicameralism and review of the constitutionality of acts. See J. Bougrab, *Aux origines de la Constitution...*, *Id.*; J. Zakrzewska, *Spór o parlament...*, *Id.*

²¹⁵ Ch. de Gaulle, *Discours prononcé à Épinal...*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Wystąpienie w Épinal...*, *Id.*, p. 96.

²¹⁶ See Fondation Charles de Gaulle, *La genèse du RPF*, *Id.*; Fondation Charles de Gaulle, Université de Bordeaux-III (CARHC), *De Gaulle et le RPF – 1947–1955*, A. Colin, 1998. See also *La Lettre du général de Gaulle aux sénateurs R.P.F. 20 mai 1949*, [in:] J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, pp. 428, 432–433.

²¹⁷ S. Bernstein, *Histoire du gaullisme*, *Id.*, p. 143.

²¹⁸ *ibid.*

a form of the legislative regulations.”²¹⁹ The draft of 1948 should be perceived as a legal manifestation of the concepts put forward in Bayeux and Épinal and supplemented by the proposals tabled by Debré. The draft’s contents confirms originality of the Gaullist political concepts.

The president was to become independent of the parliament in the aftermath of the election by the electoral college comprising deputies and members of the Council of the Republic, representatives of general and municipal councils as well as delegates from business and intellectual associations, which corresponded to de Gaulle’s corporate ideas. Michel Debré proposed to establish a wide-spectrum college comprising several dozen thousand members, extended with district representatives.²²⁰ Moreover, the idea of the election of the president in a general vote was considered. Debré asserted that the main obstacle was “the position of the president of the Republic who must also be the president of the French Union.”²²¹ “It is hard to heed election of the president of the Republic of France in a general vote, who would only be elected by the metropolitan inhabitants” –Debré reasoned in the introduction to the draft.²²²

The president was to hold a wide range of own powers (*pouvoirs propres*), including appointment of the prime minister, dissolution of the parliament, declaration of a referendum and formulation of addresses to the nation. Debré did not require a countersignature to put such decisions into effect. The president was empowered to dissolve the parliament in response to the motion of no confidence for the government or when the latter one called the chamber for passing a motion of confidence and it was rejected (Art. 23 of the draft).²²³ In the latter event, the president was empowered to alternatively put to a referendum a draft that became a subject of a dispute between the government and the parliament. Moreover, the president was empowered to apply the referendum institution when he refused to promulgate a statute and sent it back to the parliament which passed it again contrary to

²¹⁹ *Projet de révision constitutionnelle rédigé par Michel Debré*, [in:] J. L. Debré, *Les idées constitutionnelles...*, *Id.*, p. 421.

²²⁰ *Note sur l’élection du président de la République, 1948*, [in:] J.-L. Debré, *Les idées constitutionnelles...*, *Id.*, p. 428.

²²¹ *ibid.*, p. 427.

²²² *ibid.*

²²³ *Projet de révision constitutionnelle...*, *Id.*, p. 424.

his stance (Art. 6 of the draft).²²⁴ Thus, in Michel Debré's view, both institutions should act under strictly specified conditions.

The draft of 1948 manifested development of the reformatory constitutional thought and proved that a whole range of constitutional solutions and procedures were put to a test. This does not pertain to the new concepts of the institutions of a referendum and dissolution of the parliament. The document produced by RPF provided for setting up three parts of the Council of the Republic: Conseil politique (Political Council), Conseil économique et social (Economic and Social Council) and Conseil d'Outre mer (Overseas Council). The Council of the French Union and National Economic Council, acting under Constitution of 1946, were to be abolished. The Councils were to participate in the legislative process depending on the issue a bill pertained to but any questions related to foreign affairs and defence of the French Union were to be examined at the plenary session of all members of the Council of the Republic. The draft provided for a parity mixed commission tasked to draw up a collective draft in the event of any controversies between parliament chambers (Art. 15). Such a commission was first introduced into the Constitution of the Fifth Republic. The draft authors proposed that the Commission comprise three fifths of the National Assembly members and two fifths of the representatives of the Council of the Republic, which proves that the institution introduced in a slightly different form into the Constitution of the Fifth Republic (Art. 45) was the outcome of a reformatory thought.²²⁵

Several regulations Michel Debré included in his draft made up a model of the rationalized parliamentarism. An agenda of parliamentary sessions was to be set by the Assembly Office upon the prime minister's consent. Moreover, the government's head was empowered to open and close parliamentary sessions (Art. 18 and 22).²²⁶ Any parliament members' legislative initiative on public spending was excluded (Art. 17 of the Draft). Finally, the draft provided for the institution of organic law of special pertinence: election of the president and parliament members, individual freedoms and a freedom of expression of thoughts, citizenship, civil rights, political system, status of ministers, departments, districts or judiciary system, criminal law and overseas territories

²²⁴ *ibid.*, p. 422.

²²⁵ *ibid.*, p. 423.

²²⁶ *ibid.*, pp. 423–424.

organization. In these subjects, no legislative power could be delegated. Debré proposed here a perspective of the legislative domain reserved for the parliament, which differed from that discussed in *Refaire la France*. A legislative domain also included authorizations to issue orders having the force of law in the remaining fields.

F. Criticism of the Federal Forms of the European Integration – Constitutional Ramifications

In the 1940s, de Gaulle frequently emphasized a need for the reconstruction of the strong state, which in his view, was required by international competition. In the “tough and dangerous world”²²⁷ determined by the Soviet-American competition coupled with the enfeeblement of Europe, “France and the French Union have an opportunity to maintain their independence, security and rights provided that the state will have capacity to appropriately bear the burden of full responsibility.”²²⁸

Yet it seems that the majority of studies on the origins and identity of the Fifth Republic Constitution tend to omit the constitutional ramifications of the Gaullists’ special attachment to the idea of the sovereignty of the national state and a special position of France in the European integration. We will see that a special respect for these values and the criticism of federal forms of the European integration had a significant impact on the constitutional regulations of 1958. The question is not about the will of the profound consolidation of the state and development of a strong state leadership centre in a form of presidency but also about the conscious planning of the review of the constitutionality of international treaties. As I have underscored in the introduction, France was the first member state of the European Communities to introduce preventive mechanisms of the constitutional review of treaties.

In the late 1940s, in view of the Soviet threat, general de Gaulle espoused an idea of Western unity and American leadership. The RPF leader approved the establishment of NATO but

²²⁷ Ch. de Gaulle, *Discours prononcé à Épinay...*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Wystąpienie w Épinay...*, *Id.*, p. 97.

²²⁸ *ibid.*

demanded a greater participation of the European countries and France in the process of building up a Western military community. Gaullists, however, were absolutely critical of any projects of close, federalist European integration, particularly if this led to the reconstruction of the strong position of Western Germany. De Gaulle opposed restoration of united Germany and opted for the reconstruction of Western Germany as a loose confederation, a long-term control over the Ruhr district, and incorporation of the Saar into France.²²⁹ In Bayeux, he even demanded that the Saar be represented in the Upper Chamber by its own representatives.²³⁰ In the study on the origins of the European integration, Piotr Wandycz, a pre-eminent emigre historian, wrote that “de Gaulle, who was the head of the French government just after the end of World War II, strongly espoused an idea of the separation of Rhineland, Saar and Ruhr from Germany, which, however, was not welcomed enthusiastically by Western allies.”²³¹

²²⁹ Presumably, de Gaulle's stance on the German issue was influenced by the studies of Jacques Bainville, an outstanding historian involved in Action française, who was particularly sensitive to a threat posed by Germany. Noteworthy, this outstanding historian was convinced that consolidation of the state's international position may result from the relativization of any state-competitor's power. In Jacques Bainville's view, only divided Germany could serve France's interests and help it maintain a leading role in Europe. See J. Bainville, *Histoire de France*, *Id.*, the Polish edition: J. Bainville, *Dzieje Francji*, *Id.*; G. Kucharczyk, *Niemcy, Francja i kwestia polska w myśli politycznej Jacquesa Bainville'a (1879–1936)*, [in:] J. Bartyzel, D. Góra-Szopiński (ed.), *Nacjonalizm a konserwatyzm...*, *Id.*, pp. 111–127. Bainville's views about the mechanisms of international relations inspired Polish political thinkers, including Adolf Bocheński. See K. M. Ujazdowski, *Żywotność konserwatyzmu, Idee polityczne Adolfa Bocheńskiego*, Iskry, 2005, p. 55.

²³⁰ Ch. de Gaulle, *Speech in Bayeux... (Wystąpienie w Bayeux...)*, *Id.*, p. 85.

²³¹ See P. Wandycz, *Zjednoczona Europa. Teoria i praktyka*, Polonia Book Fund Ltd., 1965, p. 56. Moreover, Piotr Wandycz presented the reasons for which de Gaulle's concept could not be welcomed with understanding by the USA and Western countries in those circumstances: “In Germany political and economic void emerged, coupled with a moral crisis caused by the war defeat. And what the then international situation was. A process of disarmament of America and England was already under way and American public were mainly interested in the return of American soldiers from Europe and their prompt demobilization. In both countries pro-Russian liking, consistently incited during the war, was quite strong. Political shift to the left – elections in England, France or Italy – aroused stronger interest in home issues and social reforms. Given such conditions, the Soviet Union could hope for considerable opportunities for ideological and political expansion into all Germany and, gradually, Western countries. Further decomposition of Germany resulting in France's full control over the key industrial centres would be inconsistent with such goals.” *ibid.*, pp. 56–57. De Gaulle's policy in this area was described, with a little bit of criticism, by Raymond Aron: “[L]et us remind de Gaulle's concepts of 1945–47 which envisaged that French vetoes in Berlin were aimed at preventing the introduction of a joint administration in the four zones and the public declaration of 1947 was issued to defy the Western powers' decision to establish Trizone and, in a further perspective, the Federal Republic

Much indicates that de Gaulle and his aides were ready to accept deep European integration, provided that France maintained its leading role and a definite advantage in Europe. Noteworthy, prior to the reconstruction of Western Germany, the General and his aides put forward a number of interesting and daring concepts of the European integration. They may be found in *Project du pacte pour une union d'États européens*, a study authored by Michel Debré (in those years he explored the subject of the European integration) but interestingly, omitted by other political thinkers.²³² Debré's project provided for the European federation including not only liberalization of the trade and leading industries but also unification of the currency and coordination of foreign policy. The union of the European countries was to be headed by an arbitrator elected by all the Union citizens.²³³ Silvano Aromatario recognized

of Germany. In that time de Gaulle still rejected the very idea of Reich and opted for the federation of its lands." R. Aron, *Mémoires, Id.*, cited after the Polish edition: R. Aron, *Wspomnienia, Id.*, p. 242. Over ten years later, in his *Pamiętniki nadziei (Memoirs of Hope)*, to comment on the defeats of the Fourth Republic, de Gaulle reasoned that "despite the lack of appropriate guarantees, a consent was given to reinstate the central German government in the three occupation zones; the European Coal and Steel Community was founded, which deprived our destroyed mines of the funds earmarked for reconstruction and released Germany from the obligation to supply us with fuel. At the same time, Italy was provided with everything they needed to develop strong steel industry, while the incorporation of Saarland economy into France and establishment of the autonomous administration there were abandoned." Ch. de Gaulle, *Mémoires d'espoir, Id.*, cited after the Polish edition: Ch. de Gaulle, *Pamiętniki nadziei, Id.*, p. 33.

²³² M. Debré, *Project du pacte pour une Union d'États européens*, Nagel, 1950.

²³³ In the late 1940s, Michel Debré was an active participant of the European League for Economic Cooperation, an organization set up by the initiative of Paul van Zeeland, a Belgian. Soon he became a member of the Parliamentary Assembly of the Council of Europe. The Union of European Countries, drafted by Debré, aimed to manifest protection and promotion of the Western values threatened by the Soviet totalitarianism. The author of *Project du pacte* wrote about the birth of a federalist idea and correctly defined the Union's powers, including defence of the member countries, trade liberalization, development of the mining industry and other industries, unification of the fundamental administrative standards and judicial institutions. Noteworthy, the draft provided for the unified trade law, criminal law and obligatory proceedings before the judiciary, unification of the self-government system in districts and towns. Noteworthy, in these areas the draft provided for a more extensive integration: the author suggested that elimination of the curbs inhibiting free trade should challenge monetary sovereignty and put forward an idea of collective, actively coordinated foreign policy along with a privilege to maintain autonomic organization of national policies. To substantiate this, the author of *Project du pacte* reasoned:

"All member states of the future Union actually pursue almost identical foreign policy. Their accession to the Union will highlight a current state of affairs and, at the same time, channel their future policy. It would probably be right to posit that relations between member states will no longer be diplomatic in the traditional sense of this word. Yet, this question is of minor importance. On the other hand, each member state may

the concepts offered by Michel Debré as a “tri-colour Europe” and rightly observed that their author posited that France was to play a leading role in Europe.

De Gaulle could no longer ignore the process of formation French Europe proposed by Debré. On the other hand, even Debré’s attitude radically evolved after establishment of the Federal Republic of Germany. De Gaulle’s concept provided for the possibility of formation of the confederation of European countries but did not provide for any supranational institutions. Piotr Wandycz, a historian I have mentioned before, asserted that de Gaulle’s views were definitely polemical of the drafts providing

retain power to design and pursue autonomous foreign policy as a manifestation of the international, unquestionable personality. The Union authorities will be responsible for the coordination of actions that no member state will be in position to reject unless it leaves the Union. Nations do not want to give up their sovereignty which they confuse with the freedom of their citizens. They are just semblances that, however, should, under no circumstances, be eradicated, except for any of their negative ramifications which should be corrected.” M. Debré, *Project du pacte...*, *Id.*, p. 40.

Institutional proposals corresponded to the federalist option. An arbitrator of the Union, elected by all citizens of the Member States in general elections, was to be a key institution. The arbitrator was to bear responsibility for the Union throughout his five-year tenure. He would exercise power through his deputies and the Senate that was to be the executive and to comprise ministers delegated by member states and commissioners nominated by the arbitrator. Michel Debré explained that he aimed to combine a cautious action, unquestionable authority and respect for the national sovereignty of Member States.

The power in the Union was to be concentrated in the hands of the arbitrator and his subordinated institutions. Apart from the Senate, Michel Debré planned to establish an advisory body – The Council of Union consisting of four departments with the federation-like powers: industry and labour, education and universities, cities and agglomerations, public initiatives and enterprises. The Committee of Ministers, comprising ministers appointed by the Member States’ governments, was to be an institution coordinating a foreign policy.

Regarding the assembly of European nations, Debré entrusted it with control and consultative functions in passing the budget and statutes. This proposal may signal establishment of the European Parliament. Michel Debré consistently rejected proportional elections. Assembly would be elected in single-mandate districts, based on a parity; one deputy per million inhabitants. The Union’s architecture would be crowned with a Tribunal comprising 8 to 20 judges responsible for the execution of rulings on the Union or its Member States.

Michel Debré underscored a federal nature of the Union of European countries and a need for the concentration of responsibility in the hands of one person enjoying authority and holding a democratic mandate won in the general direct elections: “Moreover, the European Union must bear huge responsibility. The body that has been entrusted with a mission to head it, will feel the burden of this responsibility each and every day. And given our experience, we know that a single man is aware of their responsibilities to a greater extent than a group of people or a large assembly. He just cannot evade the entrusted task without suffering defeat.” M. Debré, *Project du pacte...*, *Id.*, 42. The author referred to the American experience and asserted that a strong power of an arbitrator would build up the European unity. Michel Debré did not conceal a leading role of France in such construction: in his view, the arbitrator and central Union authorities should be seated in Versailles. Referring to the heritage of the French Revolution, he also underscored the open nature of the federation and its readiness to admit refugees from the Soviet bloc.

for the integration closer than the confederation of the European countries:

He is an advocate of the “Europe of Fatherlands,” i.e. the union including sovereign states whose sovereignty could in no part be transferred to the Union, which, by the way, was defined rather unequivocally. The state should retain full independence and a role of the Union should be limited to periodical consultations of the heads of states, ministers of foreign affairs or other ministers, aimed to frame a collective policy.²³⁴

Noteworthy, controversy over the model of the European integration had deep doctrinal roots. De Gaulle continued republican tradition of nationalism in the spirit of Barrès who perceived nation as a basic community of reference and a sovereign country as a basic tool for its protection and development. Meanwhile, the founders of the European integration openly admitted that its construction required challenging Barrès like approach to the nation and redefining patriotism. Robert Schuman openly polemicized with Barrès’s doctrine and contended that nationalism, which played so meaningful role in the past as a power “whipping up national awareness”²³⁵ and providing foundations for the state independence, became anachronistic after World War II.

This is what he asserted in the paper *Le morcellement de l’Europe est devenue un anachronisme* :

We no more seek political inspiration in Maurice Barrès or Paul Déroulède. Anything national evolves into supranational. European policy is aimed to provide the European nations with the organic structure capable of putting anarchy to an end, anarchy in which they struggle hopelessly, incapable of overcoming huge problems piling up before them.²³⁶

Exceptionality of the European integration consisted in building up the Community as a special international organization invested with a set of competences and capable of their direct application and effective implementation beyond the power of national

²³⁴ P. Wandycz, *Zjednoczona Europa...*, *Id.*, p. 258.

²³⁵ R. Schuman, *Pour l’Europe*, Les Éditions Nagel, 2005, cited after the Polish edition: R. Schuman, *Dla Europy*, trans. Magdalena Krzeptowska, Wydawnictwo Znak, 2003, p. 21.

²³⁶ *ibid.*

states. Schumann's historic declaration lucidly defined the overriding objective: building the European federation through "the combination of basic industries and establishment of the new High Authority, whose decisions will be binding upon France, Germany and other Member States. This project is going to carry out the first outlines of the European federation, so indispensable to maintain peace."²³⁷ The French politician aptly defined innovativeness of solutions included in the treaty establishing the European Coal and Steel Community and observed that

Until 1950 no institution beyond and over the national sovereignty had ever been established [...] The primary idea that has been attained for the first time in the international arena was insolvable, unlimited in time community managed by the statute whose observance is guaranteed by the impartial, independent and objective court. Community management has been entrusted to the High Authority empowered (under the statute) to make decisions independent of any, executive or legislative, national power branch. It is exactly in this sense that we can talk about supranational power protected by the international judiciary. Community owes its existence to the unanimous voting of national legislatures but since the Community was established, it has lived its own life and has been protected against any dramatic turnabouts in the national policies.²³⁸

Moreover, in 1955 a considerable change in the experts' views on the international law was observed: they recognized the community law as that that was directly in force. It officially happened at the international congress on the application of the treaty establishing the European Coal and Steel Community, in Milano where politicians and jurists met.²³⁹

²³⁷ *ibid.*, pp. 67–68.

²³⁸ *ibid.*, p. 66. Jean Monnet shared this stance on the European integration at the preliminary session of the Supreme Authority, on 10 August 1952. A French politician said that "... upon mature debate, by the huge majority of votes, six parliaments made a resolution to establish the European Community that combines a part of national sovereignty and subordinates it to the common interest (...) The competences conferred upon the Supreme Authority under the treaty included special powers given by the six Member States to make decisions with an immediate effect on the territory of those countries." Ch. Zorgbibe, *Histoire de la construction européenne*, PUF, 1993, cited after the Polish edition: Ch. Zorgbibe, *Historia integracji europejskiej*, trans. Agnieszka Górńska, Instytut Europejski w Łodzi, 1998, p. 58.

²³⁹ J. Bailleux, *Le premier Congrès international d'études de la CECA (Milan-Stresa 1957)*, RFSP, 2010, No. 60.

De Gaulle and Michel Debré, the most active political thinker on this issue, criticized federal solutions included in the treaty establishing the European Coal and Steel Community. In Debré's view "European legitimization may only be obtained through the intergovernmental agreements as only they enjoy legitimization and are in position to legitimize engagement of their nations."²⁴⁰ He, therefore, called for the establishment of a regular committee of the heads of the Western European governments in place of the High Authority provided for in the ECSC treaty. He asserted that the parliamentary assembly established by the ECSC could assume responsibility for any decisions only if it were elected and held a real democratic mandate. Michel Debré reasoned that advocates of the European integration confused the state's sovereignty with the nation's sovereignty. The latter one was a static dogma since the moment when "the will to couple human management with freedom was expressed."²⁴¹ In a basic sense, sovereignty is associated with the existence of the sovereignty subjects – nations. Given that, there is no European nation and thus any separate, supranational power has no legitimating underpinnings. Debré's stance may be defined as sovereignty-oriented and critical of any forms of integration except for loose cooperation of national states. Yet the distinction between the nation's sovereignty (static dogma) and sovereignty of the state (dynamic dogma) offered an opportunity for a more flexible response in future. This denoted that there was a possibility to transfer execution of a number of competences of the sovereign state to an international organization within the constraints determined by the principle of the nation's sovereignty.

De Gaulle opted for the delayed ratification of the treaty but he was in no position to inhibit it. Charles Zorgbibe, a historian of the European integration, wrote that "the paradox is that the treaty's ratification was most delayed in France as the government became a victim of the double opposition of the Communist

²⁴⁰ S. Aromatario, *La pensée politique...*, *Id.*, p. 222.

²⁴¹ This is well illustrated in an extensive excerpt from M. Debré's argumentation: "Sovereignty of the state denotes some special powers given to political authorities to rule and make laws; sovereignty is a manifestation of the social power. Its limitation is a subject of the democratic doctrine as law is made to limit state's arbitrariness, which means that no unlimited power could ever be exercised. (...) Yet, the national sovereignty is not the same! National sovereignty is not recognized as a manifestation of power. Instead, this is a rule of power (...) originating from the will of all citizens, this is a live image of the Nation (...), sanctioned by the source of power." S. Aromatario, *La pensée politique...*, *Id.*, p. 230.

Party and the Assembly of the French People, which resulted from de Gaulle's statement made at the press conference in December 1951, where he asserted that the ECSC was only a semblance."²⁴²

Anti-federal stance of Gaullism was extended during the discussion on the ratification of the treaty establishing the European Common Defence, the most dramatic and heated debate ever held in the years of the Fourth Republic.²⁴³ The stance represented by de Gaulle and RPF has been discussed extensively in the historical literature.²⁴⁴ From our perspective, it is crucial to reconstruct the doctrinal and constitutional arguments that became the underpinnings of the new regulations introduced by the Fifth Republic Constitution. Michel Debré repeatedly levelled the same charges against the rules of the treaty establishing the European Defence Community as he did against the European Steel and Coal Community. In his view, the European Defence Community was contrary to the national power and rejected democratic legitimacy:

You do not need to eradicate nations and national authorities just because some nations are incapable of coping with the Soviet threat. (...) Nations are the political phenomenon deeply rooted in Europe. Europe consists of Nations. You must not organize Europe without respect for the national reality. (...) When you eradicate all national power, everything constituting the reality of our continent, when you want to set up new Europe that rejects this deeply-rooted political phenomenon, it brings us: to a college of technocrats headed by the American general.²⁴⁵

²⁴² Ch. Zorgbibe, *Histoire de la construction européenne*, Id., cited after the Polish edition: Ch. Zorgbibe, *Historia integracji europejskiej*, Id., p. 46.

²⁴³ R. Aron, *Mémoires*, Id., cited after the Polish edition: R. Aron, *Wspomnienia*, Id., p. 265. Ch. Zorgbibe makes an interesting insight on the dispute about the European Defence Community in *Histoire de la construction européenne*, Id., cited after the Polish edition: *Historia integracji europejskiej*, Id., pp. 46–.

²⁴⁴ A monographic study on France's role in the process of the European integration, authored by Marek Mikołajczyk, provides an interesting insight into this issue. An extensive part of this study concerns the debate on the establishment of the European Defence Community. M. Mikołajczyk, *Rola Francji w procesie integracji europejskiej w latach 1946–1958*, Wydawnictwo naukowe UAM, 2011, pp. 294–311. See also the quotation of R. Aron in his memoirs: "Gaullists, led by Jacques Soustell and Michel Debré, staged an aggressive campaign against the European Defence Community. The first one, in my view, held political rallies along with Communists, while the latter one devised the most striking polemic formula: EDC involves construction of the German Army and deconstruction of the French Army." R. Aron, *Mémoires*, Id., Polish edition: R. Aron, *Wspomnienia*, Id.

²⁴⁵ S. Aromatario, *La pensée politique...*, Id., p. 226.

The European defence against Soviet threat should be underpinned by the real premises: cooperation between nations and states.²⁴⁶

In the course of the campaign against ratification of the European Defence Community Treaty, Michel Debré put forward a few arguments for the introduction of specific constitutional curbs inhibiting ratification of the treaty. A Gaullist politician asserted that Art. 30 of the Constitution of 1946 was breached. Pursuant to the article's provisions, the president nominated for senior officer ranks, while the treaty establishing the European Defence Community specified that such nominations were the powers of the newly established community authorities and not any national instances. Moreover, Debré made several significant insights: a contradiction between treaty regulations and Art. 47 of the Constitution, which empowered the prime minister to staff all civil and military posts; Art. 13 empowered the National Assembly to pass all laws and did not delegate such power to any other body. The bills passed by the National Assembly specified the length of military service, army size and military budget, while the treaty regulations did not delegate any powers in the military issues, including the length of military service, number of conscripts, staff and funds earmarked for pays and disability allowances. Furthermore, the treaty regulations breached Art. 16 of the French Constitution: they deprived the National Assembly of the power to pass the budget, enshrined in this article. National Assembly could only accept or reject the total amount of spending. Finally, a Gaullist politician reminded of the principles of the nation's representation, which made up the core of Republic and Art. 14 of the Declaration of the Rights of Man

²⁴⁶ Michel Debré also emphasized that EDC did not include French overseas territories and left them without security guarantees. In his view, the principle of the indivisible Republic did not allow for the introduction of two different legal statuses within the framework of one state. De Gaulle's close aide submitted a relevant resolution at the Council of the Republic, where he called for the scrutiny of the treaty's ramifications for the French overseas territories. A politician emphasized that "France is not just a European nation but also a non-European nation." S. Aromatario, *La pensée politique...*, *Id.*, p. 228. Debré asserted that these two facts should be combined as the newly-framed European policy did not take them into account. France is being cut off from its non-metropolitan territories and is going to submerge into the European structure that will restrict its sovereignty. This is going to put the future of the French Union under a big question: "If the French authorities yield to the European authorities, if the rights of the French citizens are inferior to the rights of the European citizens, we will neither retain our overseas territories nor a French sense of being a citizen." *ibid.*, p. 228. The report based on the resolution tabled by Marius Moutet called the government for "setting up a commission tasked to scrutinize relations between the French Union and the European organization." M. Debré, *A speech in the Council of the Republic (Wystąpienie w Radzie Republiki)*, [in:] S. Aromatario, *La pensée politique...*, *Id.*, p. 228.

and the Citizen, which confirmed a citizen's right to directly or indirectly determine the volume of public spending (public contribution). Meanwhile, the EDC treaty deprived citizens of that right. Michel Debré also challenged the interpretation of the preamble to the Constitution of 1946, which provided that "under condition of mutuality France agrees on the restriction of sovereignty needed to organize and defend peace."²⁴⁷ Noteworthy, such an interpretation corresponded to the treaty provisions. Michel Debré reasoned that the treaty did not ensure equal restriction of sovereignty of all parties as Germany did not fully enjoy sovereignty and any treaty concluded with Bonn would not meet the condition of mutuality.²⁴⁸ In Debré's view, the preamble made no provisions for the transfer of sovereignty. He reminded that its articles stipulated the restriction of sovereignty and not its transfer. De Gaulle's close aide contended that an idea of the transfer of sovereignty was unacceptable from the constitutional perspective: any transfer of national sovereignty, which was an overriding principle and the source of power was by no means possible.

The EDC campaign created an opportunity to raise the question about the Constitution's superiority over the law of the treaty. Michel Debré rejected such an interpretation of Art. 26 of the Constitution, which recognized the treaty law as superior to not only ordinary statutes but also the Constitution and constitutional acts. A politician demanded that the government table the question of the treaty's conformity with the Constitution at the session of the Council of State and called for launching relevant proceedings at the Constitutional Committee. He asserted that any ratifications of the EDC treaty should be preceded by relevant constitutional amendments. This is what he said at the forum of the Council of Republic:

ratification of the treaty, which is to replace the Constitution in a number of its parts, may, pursuant to the law, be allowed provided that the Constitution empowers the bodies responsible for putting ratification into effect or gives consent to this to any other bodies authorized to do this, with the powers to revise the Constitution. Meanwhile, our current Constitution requires amendments to a number of articles before it may be put into effect.²⁴⁹

²⁴⁷ *Constitution de la République Française*, cited after the Polish edition: *Konstytucja Republiki Francuskiej*, trans. A. Mycielski, *Id.*, p.10.

²⁴⁸ S. Aromotario, *La pensée politique...* p. 230.

²⁴⁹ *ibid.*

Noteworthy, given fierce resistance and indecisive stance of the government led by Mendès France, the treaty ratification was not put into effect.²⁵⁰ Under new circumstances, Gaullists approved foundation of the Western European Union as a community rejecting supranational governance and based on the cooperation of national states.

On the other hand, an idea of the constitutional supervision of the European laws was tabled again during the debate over the treaty founding the European Economic Community. Michel Debré was not against the idea of the common market and admitted that for a long time France paid high price due to the non-reflective protectionism. Yet, following the current line of argumentation, he objected to the supranational integration model, i.e. regulations adopted in the European Steel and Coal Community. During the debate staged at the Council of the Republic Debré challenged the stance adopted by a majority of political class, which posited that after signing the treaty all constitutional and statutory orders should be subordinated to its application. In Michel Debré's view,

It is unacceptable that constitutional orders were rescinded by the treaty since such a decision may only be modified by the procedure of revision and under the conditions set forth in such a procedure; the treaty adopted by the ordinary majority of votes may not be juxtaposed to the constitutional provisions accepted by *majorité large* (broad majority) or in a referendum.²⁵¹

In July 1957, Michel Debré and Senator Léo Hamon tabled a motion calling for the supervision of the bill passed by the National Assembly, which authorized ratification of the Rome Treaties by the president of France and the Constitutional Committee. The authors of the motion asserted that Art. 189 of the treaty founding the European Economic Community and Art. 161 of the treaty founding the European Coal and Steel Community were inconsistent with the French Constitution since they empowered the council and commission to make effective decisions in the area of legislation.

²⁵⁰ Ch. Zorgbibe, *Histoire de la construction européenne*, *Id.*, cited after the Polish edition: Ch. Zorgbibe, *Historia integracji europejskiej*, *Id.*, pp. 49–50; See W. Laqueur, *Europe in Our Time: A History 1945–1992*, *Id.*, cited after the Polish edition: W. Laqueur, *Historia Europy...*, *Id.*, p. 152.

²⁵¹ S. Aromotario, *La pensée politique...* p. 240.

In Michel Debré's view, both treaty regulations contravened Art. 13 of the Constitution, which provided that only the parliament was empowered to pass any bills.²⁵² The motion was rejected by the regulation commission. Speaking on its behalf, a future Speaker of the Senate and a candidate for the president in 1969, Alain Poher contended that the Constitutional Committee undertook measures only in the event of the collision of stances adopted by the parliament chambers.²⁵³

Rome Treaties were ratified and became effective on January 1, 1958. Eventually de Gaulle accepted the ramifications of that decision. When de Gaulle assumed power, he inhibited further integration and bet on the collective resolutions made by the heads of states.²⁵⁴ Yet a doctrinal and constitutional criticism of the European treaties was one of the crucial experiences impacting the new Constitution provisions. A failed endeavour to review the constitutionality of the Rome Treaties resulted in the constitutional regulations concerning the review of the constitutionality of international obligations.

Olivier Gobin, who was the first one to study Debré's views on the European integration, had no doubts that they lay at the roots of a preventive review of the international obligations and was a factor arguing for the establishment of the Constitutional Council.²⁵⁵

²⁵² *ibid.*

²⁵³ Alain Poher (1909–1996), Resistance member; renowned politician of the Popular Republican Movement (MRP); influenced by Emmanule Mounier; demonstrated a critical attitude towards de Gaulle's policy; ran in presidential elections in 1969; Senate Speaker, 1969–1982; in 1971, upon his motion, the Constitutional Council issued a historic ruling that provided the basis for the review of the constitutionality of acts.

²⁵⁴ See the insights on de Gaulle's European policy in the book by Luuk von Middelaar, *The Passage to Europe*; Polish edit.: *Przejsie do Europy. Historia pewnego początku*, Wydawnictwo Aletheia, 2011, p. 79–98. Charles Zorgbibe, the already cited French historian of the European integration, wrote that “the leaders of the Fifth Republic began to increasingly challenge the demands of newly formed Europe: superiority of the supranational structures over international cooperation and pro-American orientation of the Western European diplomacy under the great Atlantic community.” Ch. Zorgbibe, *Histoire de la construction européenne*, *Id.*, cited after the Polish edition: Ch. Zorgbibe, *Historia integracji europejskiej*, *Id.*, pp. 67–68.

²⁵⁵ Moreover, the author asserts that G. Monnerville, the President of the Council of Republic, also opposed ratification of the European Defence Community but was not in a position to do so on his own, given the French President's unwillingness to assume control. Based on that experience, there came an idea to invest a speaker of each parliament chamber with the right to launch the review of international obligations. O. Gobin, *Construction européenne et Constitution française: l'apport de Michel Debré*, RFDC, 2002, No. 51.

Contrary to the declarations made by its founding fathers, the Fourth Republic did not avoid vices of its predecessor. Between 1946 and 58, the average tenure of the cabinet did not exceed 6 months. Political parties, including party groups, had a final say on the government's composition, which impaired its effectiveness.²⁵⁶

Table 1. Presidents and Cabinets of the Fourth Republic

De Gaulle	13 November1945 – 20 January1946
F. Gouin	23 January1946 – 12 June1946
1 G. Bidault	19 June 1946 – 28 November1946
L. Blum	12 December1946 – 28 November1947
Presidency V. Auriol (16 January1947 – 16 January1954)	
P. Ramadier	21 January – 05 May1947
P. Ramadier	After reconstruction 05 May – 19 November1947
1 R. Schuman	22 November 1947 – 19 July1948
A. Marie	24 July – 27 August1948
2 R. Schuman	31 August – 07 September1948
1 H. Queuille	10 September1948 – 06 October1949
J. Moch	13–17 October1949
1 R. Mayer	20–22 October1949
2 G. Bidault	27 October1949 – 03 February1950
G. Bidault	After reconstruction: 07 February – 24 June 1950
2 H. Queuille	30 June – 04 July1950

²⁵⁶ Bernard Lefort made a penetrating analysis of this issue in his paper *Les partis et les groupes sous la IV République*, Pouvoirs, 1996, no 76. In M. Morabito's view, instability of governments contributed substantially to the return of radicals to power since they had a remarkable capacity to establish government coalitions with socialists and Popular Republican Movement (MRP). In those years, politicians espousing such a cooperation predominated in that political environment. They included René Mayer, Henri Queuille, André Marie or Édouard Herriot who, in his view, embodied radical conservatism of the Fourth Republic and defence of the parliament's supremacy." Although radicals are not in the position to build a political system, they became a driving force of the «third power»." See M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique...*, *Id.*, cited after the Polish edition: M. Morabito, D. Bourmaud, *Historia konstytucyjna i polityczna Francji...*, *Id.*, p. 517.

1 R. Pléven	11 July 1950 – 28 February 1951
3 H. Queuille	09 March – 10 July 1951
2 R. Pléven	08 August 1951 – 07 January 1952
1 Edgar Faure	17 January – 29 February 1952
A. Pinay	06 March – 22 December 1952
2 R. Mayer	07 January – 21 May 1953
J. Laniel	26 June 1953 – 02 January 1954
Presidency R. Coty (16 January 1954 – 08 January 1959)	
J. Laniel	02 January – 12 June 1954
P. Mendès-France	17 June – 03 September 1954
P. Mendès-France	After reconstruction 03 September – 13 November 1954
P. Mendès-France	After reconstruction: 13 November 1954 – 20 January 1955
P. Mendès-France	After reconstruction: 20 January – 05 February 1955
2 Edgar Faure	23 February 1955 – 24 January 1956
G. Mollet	01 February 1956 – 10 June 1957
M. Bourguès-Maunoury	12 June 1957 – 30 September 1957
F. Gaillard	05 November 1957 – 15 April 1958
P. Pflimlin	13 May 1958 – 31 May 1958
2 De Gaulle	01 June 1958 – 08 January 1959

Generally speaking, although an amendment to the Constitution of 1954 brought no expected outcomes, a number of good solutions could be put into effect: a mechanism of checks and balances between the parliament chambers was restored and the procedure of the consular enactment of law (*navette*) was reintroduced. Other crucial changes included a procedure of the government formation, vote of confidence and no confidence. As I have already mentioned, the amendment constitutionalized a practice of the government formation with an active participation of parliamentary groups, applied since the times of the government of Ramadier. Thus, the adopted amendment meant that the designated

prime minister was to appoint his cabinet members and present the government's composition. Then a vote of confidence and approval for the government's program and policy were passed. Prior to the voting, ministers introduced themselves to the chamber and actually they were chosen by the parliamentary groups. Thus, it was a manifestation of the formation of the assembly government as the cabinet was actually established as a federation of political parties and even smaller groups that made up the parliamentary majority.

Additionally, a requirement of absolute majority was superseded by an ordinary majority in a vote of confidence for a prime minister and government members. That regulation was aimed to facilitate the investiture of the cabinet. Yet a relatively easy procedure for the government formation did not solve fundamental constitutional problems.²⁵⁷ They could not be solved by Art. 45 or the institution of a vote of confidence applied by the prime minister. Designed as a kind of the whip it was used ineffectively and rather as a procedure for scrutinizing the scope of support for the government than a tool for effective governance.²⁵⁸ Importantly, the Constitution of 1946 did not provide for an obligation to combine a vote of confidence with an opinion on the specific bill. Cabinet crises resulted from ineffective governance, lack of majority ready to endorse the bills submitted by the government. The essence of political weakness of the Fourth Republic was well captured by Jerzy Stembrowicz:

Frequently it happened that ... the government that was not opposed by the constitutional majority was forced to resign following the rejection of any bill recognized as that of critical importance for the government's policy. Thus, the government resigned because of the lack of ordinary majority. Officially the cabinet was not ousted but had no means (bills) to pursue its policy.²⁵⁹

²⁵⁷ Noteworthy, scholars made diverse assessments of the reform of 1954. J. Gicquel, *Droit constitutionnel...*, *Id.*, p. 49.

²⁵⁸ J. Solal-Céligny, *La question de confiance sous la IV^e République*, *Revue du Droit Public et de la Science Politique*, 1952, No. 3.

²⁵⁹ J. Stembrowicz, *Rząd w systemie parlamentaryzm*, *Id.*, p. 192. Morabito pictured that mechanism similarly: "Actually, a vote of no confidence was recognized as passed when the absolute majority of parliament members endorsed this. Yet, parliament members approved unanimously a custom to vote against the government on a draft by the ordinary majority. In this way, the government was deprived of any means to pursue its policy although it was not forced to step down." See M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique...*, *Id.*, cited after the Polish edition: M. Morabito, D. Bourmaud, *Historia konstytucyjna i polityczna Francji...*, *Id.*, p. 522.

Failed attempts to amend the Constitution, made over the last few months of the Fourth Republic, proved that there was a political crisis and a need for reforms. In July 1955, when the National Assembly and the Council of Republic adopted a resolution that paved the way to the procedure of the constitutional amendment, cabinets of Gaillard and Pflimlin put forward the draft amendments to a new regulation of a vote of confidence and a vote of no confidence.²⁶⁰ Gaillard's draft, adopted in January 1958, predicted that a vote of confidence should be coupled with passing or rejecting a bill questioned by the government. Such a change made this institution tougher and more realistic.²⁶¹ A motion to adopt a vote of confidence put forward in response to a *motion de confiance* tabled by the government was to include a counter-bill. As a motion was tabled by the opposition, who aimed to oust the government, it had to present the principles of the programme of a new cabinet and a name of a future prime minister.²⁶² Gaillard's draft referred to the German constructive vote of no confidence but did not adopt this institution entirely. On the other hand, an idea of a constructive vote of no confidence was put forward in the Pflimlin's draft adopted on 22 May 1958. The government was to be elected for the whole legislature tenure and recalled on condition that a new candidate for a prime minister was presented. Importantly, the draft paved the way to passing a bill authorizing (*loi d'habilitation*) the government to issue orders with the force of law.²⁶³ It was posited that the government might be invested with extensive powers with the exclusion of the rights of an individual, public freedoms, election code and criminal law.²⁶⁴ Any

²⁶⁰ Pierre Pflimlin (1907–2000), Christian – Democracy MRP politician; a prime minister in the Fourth Republic in May 1958; along with President René Coty facilitated de Gaulle to return to power; minister of agriculture and finances; Minister of State in the government of G. Pompidou; long-standing mayor of Strasbourg, 1959–1983; President of the European Parliament, 1983–1987. Félix Gaillard (1919–1970), a radical socialist; appointed minister of finances in the government of M. Bourguès-Maunoury, 1957; prime minister between November 1957 and 14 May 1958; head of the radical Socialist Party in 1960s.

²⁶¹ *Le projet de révision de Félix Gaillard*, Pouvoirs, 1996, No. 76, pp. 133–134.

²⁶² Importantly, Gaillard's draft included additional solutions that made it harder to recall the government. The draft envisaged that National Assembly members were obligated to vote for or against the motion. Those who abstained from voting were to be recognized as those who voted against the motion. Moreover, a draft introduced a demand for prohibiting National Assembly members to table amendments reducing incomes or increasing spending, which had been already put forward by the reformists.

²⁶³ *Le projet de révision de Félix Gaillard*, *Id.*, pp. 139–140.

²⁶⁴ This provided P. Avrilow and J. Gicquelow with the grounds for putting forward a statement that the Fifth Republic exploited reformatory output created at the final stage of existence of its predecessor. Both authors also reminded that the division

competence argument between the government and opposition was to be adjudicated by the Constitutional Committee. Undoubtedly, this was the reference to the thought of Michel Debré, who – noteworthy – reported the draft resolution that provided the basis for the constitutional amendment in the Council of the Republic. Yet none of the drafts won support in the Upper Chamber.²⁶⁵

In the final years of the Fourth Republic, a need for the constitutional amendment was also voiced by the scholars, including those who were definitely not de Gaulle's supporters, such as Borys Mirkin-Guetzévitch, who in a brilliant essay proclaimed the fall of the rationalized parliamentary system in the form that developed after World War I.²⁶⁶ In such a definition, rationalized parliamentary system was to be a legally regulated and limited form of the superiority of the legislative branch over the executive branch, so that stable and effective governance could be provided. In Mirkin-Guetzévitch's view, this political model seemed to be the last chance for the parliamentary republic. He did not frame any plan of political reforms as he recognized that applicable constitutional techniques were constrained in number and discerned that the European parliamentary democracy crisis had deep cultural roots. On the other hand, he cherished hope for the revival of political customs and republican virtues. In this respect he espoused Pierre Mendès France who also underscored the significance of the internal revival of political class.²⁶⁷

Mirkin-Guetzévitch's arguments resulted in seeking political remedies outside the model based on the parliamentary supremacy, which was logical. Georges Vedel, aware of the impracticality of the Fourth Republic governance, published a report on its instability, where he put forward an idea of building an American-like, but adjusted to the French reality, presidential republic.²⁶⁸ Vedel asserted that proposals of changes within the framework of the parliamentary republic were nothing but half-measures as they did not eliminate the primary source of the crisis, lack of majority providing

into statutory area and government legislation was introduced into the bill authored by André Marie, Prime Minister, where issuing decrees was authorized. P. Avril, J. Giquel, *La IV^e entre deux Républiques*, Pouvoirs, 1996, No. 76, p. 36.

²⁶⁵ *Rapport relatif à la révision de la Constitution par M. Michel Debré, sénateur, 7 juillet 1955*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, pp. 65–70.

²⁶⁶ B. Mirkin-Guetzévitch, *L'échec du parlementarisme rationalisé*, Revue Internationale d'Histoire Politique et Constitutionnelle, Presses Universitaires de France, 1954, No. 4.

²⁶⁷ *Documents pour servir à l'histoire...*, vol. I, *Id.*

²⁶⁸ G. Vedel, *Libérer exécutif, sinon organiser les partis*, Fédération août septembre, 1955.

the basis for the stable and effective government. His stance was endorsed, although with some reservations, by Maurice Duverger in a series of articles published in *Le Monde*.²⁶⁹ Noteworthy, both jurists were not Gaullists and even voiced criticism against the General. An opinion voiced by Max Waline, a constitutionalist, Carré de Malberg's follower and a fierce critic of the hegemony of political parties, should also be cited. A list of his demands included dissolution of the parliament in response to a vote of no confidence, introduction of the referendum institution (as an instrument for solving conflicts between the government and the parliament as well as between the parliament chambers) invested with a wide range of powers, review of the constitutionality of acts, and reform of the electoral law, similar to that put forward by René Capitant.²⁷⁰

In 1955, P. Solal-Céligny a young jurist who played a crucial role in drafting the Fifth Republic Constitution, reasoned that even the best designed procedure of a vote of confidence may yield only limited results unless it is part of the coherent political construction. In the article published in *Revue Internationale d'Histoire Politique et Constitutionnelle*, P. Solal-Céligny fiercely criticized the founders of the Fourth Republic, who asserted that "appropriate regulation of the question of confidence would ensure the government stability."²⁷¹ In Solal-Céligny's view, such a course of thinking led to the establishment of artificial constructions, such as the principle of no confidence in view of the absolute majority, enshrined in the Constitution of 1946. Meanwhile, the institution of the vote of confidence may prove to be effective on condition that "in the event of a serious conflict, the government has a real weapon in the event of a serious conflict, that is, a real right of dissolution (neither automatic nor conditional) and permanent majority that may only stem from the electoral system that supports its cohesion."²⁷² Yet the political elite of the Fourth Republic was incapable of the implementation of the comprehensive plan of constitutional reforms and recognition of the subjectivity of the factor independent of that elite.

In those years, de Gaulle had not only a political vision but also abundance of institutional proposals. The General was ready to reconstruct national leadership in the hands of the president and

²⁶⁹ C. Bigaut, *Le réformisme...*, *Id.*, p. 74.

²⁷⁰ M. Waline, *Les partis contre la République*, Éditions Rousseau, 1948, pp. 160–161

²⁷¹ J. Solal-Céligny, *La question de confiance...*, *Id.*, trans. M. Miałkowska.

²⁷² *ibid.*

renew the state's legitimacy through the democratization of the republic and establishment of a referendum institution. The Bayeux draft included several solutions that could become the basis for any reformatory endeavours: the president's independence (election by the electoral college) and *incompatibilitas* of the government and parliamentary functions. Michel Debré devised an original model of the rationalized parliamentarism that could successfully supplement the Bayeux draft and provide the two-branch, stable and effective executive. Moulded by the republican nationalism, de Gaulle wished to implement a constitutional reform within the republican tradition. The thought of Carré de Malberg and René Capitant offered theoretical arguments for such a strategy and emboldened constitutionalists to couple an idea of building a strong state with the democratization of the republic.

Chapter V

Identity of the Fifth Republic Constitution

A. Constitutional Momentum

The day after de Gaulle delivered his speech in Bayeux, Raymond Aron wrote an article for *Le Figaro*, where he asserted that

...for a system nobody is pleased with, even those who are in power, there is at least one option. A mixed political system, the one between British parliamentary and a presidential system, delineated by de Gaulle, is rather unlikely to be successful in peaceful times but at least helps us discern an endeavour for which political parties will not give their consent on their own but some day will find it necessary to adopt at least in part.¹

Aron's forecast proved to be true after 12 years. Institutionally weak, the Fourth Republic could have existed in peaceful times but failed to manage the Algerian crisis. A mutiny against the government incapable of managing the situation in Algeria opened up an opportunity for a political change.²

The output of the Fourth Republic is not unequivocally negative. In the introduction to a special issue of *Pouvoirs* magazine devoted to the Fourth Republic,³ Philippe Ardant emphasized an economic effort, social policy, establishment of the foundations of the European integration and decolonization as its most significant achievements. In his history of post-war Europe, Walter Laqueur contended that "contrary to a common opinion, economic progress in difficult years 1946–1958 was substantially larger than in the years of Gaullism."⁴ Raymond Aron, who, as de Gaulle's supporter and active RPF member, may by no means be suspected

¹ R. Aron, *Mémoires*, *Id.*, cited after the Polish edition: R. Aron, *Wspomnienia*, *Id.*, p. 205.

² *ibid.*

³ P. Ardant, *La IV^e République – Introduction*, *Pouvoirs*, 1994, No. 77.

⁴ See W. Laqueur, *Europe in Our Time: A History 1945–1992*, *Id.*, cited after the Polish edition: W. Laqueur, *Historia Europy...*, *Id.*, p. 234.

of any affection for the Fourth Republic, admitted that the European integration and French-German reconciliation were put into effect against the General's will.⁵ Also, the political elite of the Fourth Republic does not deserve a negative assessment. This was the period when outstanding individuals, many of whom were prominent members of Résistance, exerted strong influence on the political life in those years. They included Georges Bidault, Pierre Mendès France or Robert Schuman.

Certainly, their criticism against the Fourth Republic's order was sometimes quite heavy. For example François Mauriac voiced it in his *Bloc-notes*:

After all, the Fourth Republic was doomed to failure. It was too late even for the army to raise the alarm. Everything had already been rotten from the inside: external constructions just covered a nervous hustle and bustle of termites finishing their work. Patriotic slogans provided just a cover for a whirl of clashing interests.⁶

De Gaulle returned to power with a plan of a deep political reform. In the speech he delivered on 1 June at the National Assembly he announced that after being given an investiture he was going to table a motion investing him with special powers for the period of 6 months to solve the crisis.⁷ De Gaulle's idea was attained on the next two days – 2 and 3 June. The parliament passed a resolution suspending its activities for 6 months. The government was empowered to issue ordonnances on all issues germane to the nation's condition improvement, except for fundamental freedoms, criminal and electoral laws.⁸

⁵ "I doubt, however, that in the years of his prime ministership Jean Monnet had any chance to convince ministers to further a project of the European Coal and Steel Community and win support from the National Assembly for the Rome Treaty. The contemporary French have forgotten that Jean Monnet and Robert Schuman paved the way to the French-German reconciliation owing to the institution that the General and Gaullists consistently fought against." R. Aron, *Mémoires, Id.*, cited after the Polish edition: R. Aron, *Wspomnienia, Id.*, pp. 219–220.

⁶ F. Mauriac, *Bloc-notes, Id.*, cited after the Polish edition: F. Mauriac, *Bloc-notes, Id.*, p. 130.

⁷ See *Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958*. Volume I: *Des origines de la loi constitutionnelle du 3 juin 1958 à l'avant projet du 29 juillet 1958*, La Documentation Française, 1987, cited after the Polish edition: Ch. de Gaulle, *Inaugural address to the National Assembly, 1 June 1958* (*Przemówienie inauguracyjne przed Zgromadzeniem Narodowym, 1 czerwca 1958 r.*), [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, pp. 219–220.

⁸ R. Rémond, *Le retour du Général de Gaulle*, Éditions complexe, 1983, pp. 102–103.

In de Gaulle's view, the power to amend the Constitution was most crucial. In the speech delivered at the National Assembly he announced his intention to eradicate the underlying cause of a political crisis, a chaos in power branches resulting in their impotence, and announced that he was going to table a constitutional act authorizing government to draw up a constitution draft and send it to a referendum.⁹ After de Gaulle was granted investiture and powers to issue ordonnances, a constitutional act allowing for a deep political change was passed, which was, to a large degree, a result of his effective actions in the National Assembly. Noteworthily, he formed the government whose political base was quite broad – the newly-appointed ministers of state were Guy Mollet,¹⁰ a leader of the Socialist Party, and Pierre Pflimlin, a stepping down prime minister from MRP. They were both advocates of the parliamentary supremacy. De Gaulle respected their opinion when the constitution draft was being drawn up.

The Constitutional Act of 3 June amended Art. 90 of the 1946 Constitution on the constitution revision: the government was empowered to draw up a constitution draft and send it to a referendum. Raymond Aron compared de Gaulle's stance to that of "a Roman dictator invested with special powers to effectuate political reforms."¹¹ De Gaulle's opponents highlighted an analogy to the powers granted to Marshal Pétain in 1940.¹² Yet, compared to the constitutional act of 10 July 1940, which empowered Marshal Pétain to draw up and promulgate the Constitution, de Gaulle's powers of June 1958 were limited. The document provided for the participation of the Constitutional Committee, comprising in two thirds the

⁹ See *Documents pour servir à l'histoire...*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Przemówienie inauguracyjne...*, *Id.*, pp. 219–220.

¹⁰ Guy Mollet (1905–1975), a socialist politician; Résistance member; since 1945 mayor of Arras; general secretary of SFIO, 1947–1969; minister and prime minister, January 1956 – June 1957; started Suez War; in 1958 endorsed de Gaulle as a prime minister; minister of state; after introduction of the general presidential elections criticized de Gaulle's policy and constitutional system of the Fifth Republic. See G. Mollet, *15 ans après. La Constitution de 1958*, Éd. Albin Michel, 1973; *Le Parti socialiste dans la société française, de la Libération à la Guerre froide, 1944–1948*, ed. Serge Bernstein, Frédéric Cépède, Gilles Morin i Antoine Prost, Publications de la Sorbonne, 2001.

¹¹ R. Aron, *Discours à Harvard*, [in:] *Raymond Aron (1905–1983). Histoire et politique. Textes et témoignages*, Commentaire Julliard, 1985, p. 442.

¹² See important speech of Jean-Louis Tixier-Vignacour, who declared against delegating competences to draw up the constitutional draft to the government as contrary to de Gaulle's line in the period of Free France and denounced the parliament's decision of 1940. *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 172. Therefore, comparison of both delegations became the subject of constitutional and political reflection. See e.g. O. Duhamel, *Droit constitutionnel*, *Id.*, pp. 25–27.

representatives of competent commissions set up by the National Assembly and Council of the Republic¹³ to provide assistance in the process of writing the Constitution. The Council of Ministers was to definitely adopt the draft upon consulting the Council of State. This was the first time in the history of French constitutionalism when the Council of State played such an active role in the process of drawing up a constitution draft.¹⁴ The final stage of the process of the constitutional revision was putting a draft to a vote in a referendum.¹⁵ Thus, the nation had the largest share in the constituting power, which was in accordance with a democratic definition of this notion. Olivier Duhamel emphasized that in a strictly democratic concept only people should be vested with the original constituting power.¹⁶ The constitutional act of 3 June 1958 met that criterion, unlike that of 10 July 1940.

Table 2. Constitutional drafting process timeline (1958)

29 May	President René Coty designates de Gaulle the prime minister
1 June	Vote of confidence for de Gaulle's government
3 June	Bill that changed the constitutional revision procedure was passed
4 June – 29 July	Committee of experts and the Constitutional Committee attached to the government work on the initial draft (<i>avant projet</i>)
26 July	Le Conseil de Cabinet receives the preliminary draft
29 July – 19 August	Constitutional Committee sessions chaired by Paul Reynaud
20 August	Le Conseil de Cabinet accepts the draft after considering opinions put forward by the Constitutional Committee

¹³ Other Committee members included nominated politicians. The Committee was chaired by Paul Reynaud – former prime minister (March–June 1940) and de Gaulle's advocate in the campaign for army modernization.

¹⁴ J. M. Sauvé, *Le conseil d'État...*, *Id.*

¹⁵ Noteworthy, the constitutional act of July 1940 provided for the promulgation of the Constitution by Marshall Petain. The Nation was to ratify the Constitution and not pass it in a referendum, just as in 1958.

¹⁶ O. Duhamel, *Pouvoir constituant*, [in:] O. Duhamel, Y. Mény, *Dictionnaire constitutionnel*, *Id.*, p. 778.

27 August	Michel Debré delivers a speech at the Council of State session
22 August – 2 September	Council of State works on the draft and frames amendments
3 September	Council of Ministers accepts the draft with amendments put forward by the Council of State
4 September	De Gaulle delivers a speech at the Square of the Republic
28 September	Constitution is passed in a referendum
4 October	Constitution becomes effective

Charles de Gaulle and Michel Debré espoused a stronger political position of the Council of State. In those years the Council was chaired by professor René Cassin, famous as an author of the legal and state doctrine of Free France and a co-author of the Universal Declaration of Human Rights of 1948. A team of experts chaired by Michel Debré, who drew up the preliminary draft (*avant projet*), was almost entirely composed of young jurists engaged in the Council of State's activities.¹⁷ Some of them, Raymond Janot or Jérôme Solal-Céligny, played a creative role in that process and contributed to the establishment of new institutions. Raymond Janot edited a constitutional act of 3 June 1958 and authored regulations prescribing presidential powers.¹⁸ Jérôme Solal-Céligny

¹⁷ A group of experts chaired by Michel Debré included Raymond Janot, Michel Aurillac, Louis Bertrand, Roger Belin, Jacques Boitreaud, André Chandernagor, Françoise Duléry, George Galichon, Alain Gerbod, Yves Guéna, Erwin Guldner, Michel Guillaume, André Jacomet, Lucien Paoli, Alain Plantey, Jean Mamert, Max Querrien, Jérôme Solal-Céligny, Jean Foyer, François Luchaire and Jean Port.

¹⁸ Raymond Janot (1917–2000), a jurist; member of the Council of State; played a significant role in the constitutional drawing process, 1958; UDR politician but later joined centre-right UDF (L'Union pour la démocratie française/Union for French Democracy); chair of the Regional Council of Burgundy, 1989. http://www.charles-de-gaulle.org/pages/1_homme/dossiers-thematiques/1958-1970-la-ve-republique/la-constitution-de-la-ve-republique/temoignages/raymond-janot-naissance-d-une-constitution.php [archive].

The memoirs of Raymond Janot reveal the inside story of drawing up the draft of the Act of 3 June 1958 and the choice of a form of the constitutional revision. "It was Georges Pompidou, my colleague from the Council of State, who contacted me with de Gaulle. When he left the Council and moved to the private sector, we decided to meet regularly to think how to improve the relations between public sector and enterprises; actually, the question was about two different worlds that disregarded each other due to insufficient knowledge about each other. Those meetings provided opportunities for political discussions.

When I learned that RPF sought a constitutional change consisting in transferring constituting power to General de Gaulle at an appropriate moment, I explained

exerted a huge impact on the regulations regarding a new formula

to Georges Pompidou that such authorization was impossible from the legal point of view, as in accordance with the French laws, none of the power branches had capacity to delegate their powers unless they were authorized to do this by the newly-enacted law. Moreover, from a moral perspective, it was inconceivable to make any new constitutional laws identical to those of July 1940, which led to the fall of the Republic.

Instead, it was quite possible to attain an anticipated outcome through the change in the process of the constitutional revision. Thus, the way had already been paved as the pressure exerted by MRP resulted in the resolution both chambers adopted to make any constitutional revision legally attainable. On the other hand, President Coty advocated political return of the most outstanding French public figure.

These arguments convinced Georges Pompidou, who told me not to believe in the General's return. However, he must have remembered that conversation as one day he asked me to come to the Council of State to present my point of view once again. Actually, he wanted me to meet him in Solferino street. There, he told me that the General was coming to Paris to meet President Coty. It was on 31 May 1958 when de Gaulle had already been on his way to Paris.

Pompidou asked me to briefly discuss my point of view before his meeting with the president of Republic. So we went by car to meet the General's car. The moment our driver spotted it, there was an exchange of light signals and the cars stopped. Georges Pompidou crossed the street to talk to the General ...

The General asked me to get into his car. He was curious about my opinion on the draft of the communique he prepared to inform the public opinion about his meeting with the president of the Republic. I had just one reservation: in my view, the text was excessively detailed so I suggested deleting one sentence so that readers did not think everything had already been fixed.

The General accepted this and asked me what I would like to tell him.

I summarized the issues already discussed with Georges Pompidou. As he had a good knowledge of what had been implemented by previous governments, he instantly accepted the formula I offered. He told me: "If everything is fine, I will designate you a technical advisor for the constitutional problems in my cabinet."

President Coty offered the General a position of the prime minister, which he accepted. He appeared before the National Assembly members who entrusted him with powers for six months and approved, after overcoming a few minor obstacles, a change in a mode of the constitutional revision.

Indeed, as a very assumption raised no doubts, its attainment caused a number of problems. The General left the National Assembly building to make a long phone call to Algiers and Monsieur Pflimlin was appointed a proxy tasked to fix the timeline of the constitutional revision process with the parliament members.

Thus, it soon turned out that the original text tabled by the government should be amended to include the parliament into the procedure. Negotiations led to the establishment of the Constitutional Committee. (...) This was a reasonable solution. The decision had to be made before midnight. It was nine o'clock in the evening ...

As the General was unavailable because he kept a permanent phone contact with Algiers, I suggested to Monsieur Pflimlin that he should make the decision on his own. He refused. Then, I consulted Michel Debré, a minister of justice. He also refused and said: "it is the General or any member of his cabinet who should decide." As Georges Pompidou was the cabinet director I told him that it was him who should make the decision. He replied that it was out of the question: I was entrusted with that affair and thus it was me who ought to make the decision. (...)

Thus, I assumed responsibility for the amended text, which meant, parliament members were going to receive a correcting letter, including Charles de Gaulle's name and surname printed in capital letters, on the next day. Around midnight, I was coming back home aware that I did what I ought to do, but at the same time feeling huge anxiety.

When I arrived at hotel Lapérouse, where the General and his aides stayed, at 8 o'clock

of a vote of confidence and no confidence as well as a new format of ordonnances and organic law.¹⁹

The Act of 3 June 1958 obligated de Gaulle's cabinet to follow a set of specific rules. It seems they had a double meaning. On the one hand, they guaranteed respect for a democratic mandate the national power held (Art. 1), separation of powers (Art. 2), government's accountability to the parliament (Art. 3), independence of the judiciary as the underpinnings of the observance of fundamental freedoms (Art. 4). Moreover, the Act obligated national powers to arrange relations between the Republic and associated peoples, i.e. transformation of the French Union into a new community. On the other hand, the rules played a reformatory role, opening an opportunity for political changes and moulding their direction.

Articles 1 and 2 were quite innovative. Art. 1 specified that legislature and the executive were elected in a popular voting or by the bodies elected in a general voting. Such a regulation ensured a democratic mandate of the executive power, independent of the parliament. Thus, along with the legislative power, also the executive power was to have its origin in a popular voting or election staged by the body elected in a popular voting. In this way powers became separated. The power of the president elected by the electoral college, whose members were elected in a popular voting, received legitimization. Consequently, the very act of the ministers' appointment by the president became legitimate. In Pierre Avril's view, the constitutional act of 3 June 1958 referred to the theory developed by Carré de Malberg, as it lucidly pictured the executive power as the one that was as significant as the legislative power. This opened the way to democratic dualism, which became a hallmark of the Constitution of the Fifth Republic.²⁰

in the morning, a receptionist told me that the General had already called me three times.

De Gaulle was outraged and told me: "this is a scandal! You didn't have a right to use my name without my consent." He found it preposterous that he learnt about that text in that way. I agreed with him but also asked him to let me explain what happened the night before. To summarize this, I told him that such an act was wrong indeed but I was convinced about the possibility of avoiding a political crisis.

I also said that if he thought I was wrong he could just apply some kind of sanction against me. Yet, he comprehended difficulty of the choice I had to make and eventually approved my approach.

All this proves how much de Gaulle was sensitive about problems encountered by his aides." R. Janot, *Épisodes peu connus ou inconnus du passage de la IV^e à la V^e République*, Espoir, 1998, No. 118, trans. M. Miąłkowska. See also *Idem*, *Du discours de Bayeux à la Constitution de la V^e République*, "Espoir" 1996, No. 108; R. Belin, *Lorsque une République chasse l'autre*, Éd. Michalon, 1999.

¹⁹ J. Solal-Céligny (1920–1974), jurist, member of the Council of State. See also R. Janot, *Du discours de Bayeux...*, *Id.*; *Documents pour servir à l'histoire...*, vol. 1, *Id.*, pp. 336–339.

²⁰ P. Avril, *Le régime politique...*, *Id.*, p. 31.

An analysis of the documents produced at the first stage of the drafting of the preliminary draft (*avant projet*) proves that de Gaulle and his aides had a coherent vision of the new constitution and soon after the bill was passed they specified the directions of further actions. On 6 June, on his return way from Algeria, de Gaulle pictured fundamental constitutional ideas to François Luchaire.²¹ The President “was to be invested with significant prerogatives that would allow him to freely dissolve the National Assembly and order a referendum.”²² According to the idea presented in Bayeux, the government was no longer to be elected by the parliament but by the president, who, in turn, was to be elected either in a popular voting or by a broad electoral college. De Gaulle emphasized incompatibility of the ministerial function with a parliamentary mandate, which meant that parliament members were obliged to hand in their mandates the moment they were appointed to the government posts. Moreover, he advocated the idea of parliamentary sessions as the basis of the parliament’s activities and consolidation of the position of parliamentary commissions. The General also endorsed the once-furthered idea of the Senate as the body representing interests of local governments, business and overseas territories.²³ Similar assumptions made by a team of experts headed by Michel Debré determined directions of changes unequivocally. Presidential power was defined as “limited but well-anchored.”²⁴ Presidential fundamental and unquestionable prerogatives included nomination of the head of the government, dissolution of the parliament and application of the referendum institution.²⁵ Constitutional experts recommended a seven-year

²¹ François Luchaire (1919–2009), a law professor; specialized in constitutional and international law; engaged in Résistance – a soldier of Free France; wounded in the battle of Mers el-Kebir; began his academic career at the University of Nancy, 1949; moved to Paris; was appointed an expert in the ministry for overseas territories, 1951; advisor in General Secretariat of Government, 1957; involved in the constitutional drafting process, 1958; aide of Louis Jacquinot, minister of state; Council member upon nomination of the Senate Speaker, Gaston Monnerville, 1965–74; exerted a huge impact on Conseil’s decision on the constitutional bloc, July 1971. See O. Rudelle, et al., *La République en quête de Constitution (archive)*, Séminaire préparatoire du colloque *Normandie constitutionnelle*, Centre d’histoire de Sciences Po; F. Luchaire, *In memoriam*, RFDC, 2010, no 81, pp. 207–218.

²² *Conversation avec le général de Gaulle 6 juin 1958*, [in:] *Documents pour servir à l’histoire...*, vol. I, *Id.*, p. 235.

²³ *ibid.*

²⁴ *Compte rendu de la réunion du groupe de travail du 12 juin 1958 établi par M. François Luchaire*, [in:] *Documents pour servir à l’histoire...*, vol. I, *Id.*, p. 242.

²⁵ *ibid.*, pp. 241–242.

long tenure of the president and his election by the electoral college.²⁶ Jean Mamert, another expert, highlighted a need to ensure stability of the government by constraining parliamentary powers.²⁷ Mamert underscored that the government's accountability to the parliament should not lead to the instability of the executive branch and to avoid this new procedures were necessary. Thus, literally during the first days of drafting, the principles of the new Constitution were defined: the president as a central political institution invested with prerogatives; stability of the executive power, constrained prerogatives of the parliament; direct democracy in a form of a referendum.

Furthermore, the question of reference to the Declaration of the Rights of Man and of the Citizen of 1789 was also resolved: it was supplemented by a preamble to the Constitution of 1946 and its powerful constitutional status. On Michel Debré's initiative, it was decided that those regulations would precede the Constitution's first chapter on the powers and position of the president of the Republic.²⁸

Similarly, at the preliminary stage of drafting, a range of presidential arbitration and own powers were determined. De Gaulle and his aides had no doubts about outdatedness of passive arbitration. A note Raymond Janot prepared for the General on 16 June 1958 included a concept of a radical change of the president's constitutional position. In Janot's view, as the departure from the passive and neutral arbitration was necessary, he asserted that "...an arbitrator is not any party to a dispute but is also not a spectator. The arbitrator is a person who decides in a number of particularly important cases and, consequently, is invested with the so-called own powers to decide in these important cases."²⁹

Raymond Janot contended that the very notion of own powers was of key importance and therefore the question of the minister's countersignature on acts already signed by the president was purely technical: "The Constitution should be clear and unequivocal in this respect: it should explicitly specify that there are own powers of the President of the Republic and this should be displayed by the lack of countersignature needed to exercise

²⁶ *ibid.*

²⁷ *Note sur les travaux constitutionnels du 11 juin 1958 établie par M. Jean Mamert*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 237.

²⁸ *Compte rendu de la réunion...*, *Id.*, p. 277.

²⁹ R. Janot, *Note pour le général de Gaulle du 16 juin 1958*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 257.

those powers.”³⁰ The author of the note asserted that counter-signature was actually a manifestation of the signatory’s lack of any accountability: “any act being a subject of countersignature regards those who countersign and not the one who signs.”³¹ A prerequisite for the profound political change is exemption of the presidential fundamental powers from the countersignature requirement. “Well, own powers of the president of the Republic are indispensable if it is impossible to return to the parliamentary system, which, actually, is traditionally transformed in France into the National Assembly model”³², Raymond Janot stated forcibly. Thus, it should be emphasized that active arbitration was planned by the authors of the Constitution of the Fifth Republic³³ and was not a product of the evolution of the constitutional system.

Also striking is the authors’ concern to clearly define the constitutional principles underpinning the political reform. The Constitutional act of 3 June was recognized as the theoretical underpinnings of the proposed changes and was continually referred to during the process of writing the Constitution.³⁴ In early June, at the preliminary stage of the constitutional drafting, de Gaulle “reminded of the fundamental principles of the act of 3 June, which should inspire the reform.”³⁵ In view of the authors of the Fifth Republic Constitution, a constitutional act solved a problem of the executive branch’s independence of the legislature.

Noteworthy, the authors of the Constitution also highlighted the idea of power separation and ascribed it a new, original sense. At the first meeting, held to discuss the drafting progress and attended by de Gaulle and René Cassin and Michel Debré, the ministers of state, separation of powers “was called the heart

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

³³ This was highlighted by Krzysztof Wołowski, who said in the article *Arbitraż prezydencki w konstytucji V Republiki Francuskiej* that “current arbitration is in contradiction with that of the Third and Fourth Republic. There arbitration was deprived of any measures and commanded its own means of intervention”, [in:] “Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu,” 1971, p. 135. See also Ewa Popławska’s insights on the understanding of presidential arbitration and its doctrinal sources: E. Popławska, *Instytucja prezydenta w systemie politycznym V Republiki Francuskiej*, Wydawnictwo Sejmowe, 1995, p. 44–53.

³⁴ *Compte rendu de la réunion...*, *Id.*, p. 245.

³⁵ *ibid.*, p. 245.

of the constitutional question.”³⁶ In de Gaulle’s view, the separation of powers meant the independence of the mandate of the executive power from the legislative. Powers are separated when they have different origins.³⁷ “Separation of powers entails the head of state’s independence of the legislative power,” F. Luchaire wrote in the Note to Louis Jacquinot, the Minister of State.³⁸ In his constitutional thought, de Gaulle highlighted the government’s independence of the parliament and incompatibility of ministerial functions with a parliamentary mandate. Regarding that question, he referred to Montesquieu, who, in his view, was an advocate of the institutional balance who discerned a threat posed by the executive power abuse and thus was critical of the legislature’s abuse of power at the expense of the executive.

A new approach to the separation of powers was revealed during the drafting of *avant projet*. This is primarily manifested in the writings of M. Debré and J. Solal-Céligny, where they discussed the underpinnings of *avant projet*. In their view, the very sense of the separation of powers evolved profoundly and, consequently, a law making process became the distillation of governance. Michel Debré asserted that the essence of the governance was establishment of general rules in the area much broader than the rationing power in the current scope. Thus, he consistently developed arguments known from his articles published in the years of Résistance. Minister of Justice asserted that the parliament’s mission had also been redefined. In a new political situation this is the supervision of the government, definition of state’s structures and protection of human and civil rights. The outgrowth of a new sense of the separation of powers is determination and reduction of the statutory domain, extension of *pouvoir réglementaire* (legislative powers of the government) as well as a specific model of the parliamentary organization. Regarding the latter issue, the constitution’s authors intended that the government had the upper hand in relations with the parliament, was in a position to determine its daily schedules, reduce a number of parliamentary commissions, influence the contents of the government bills and a special procedure in passing the budget.³⁹

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *Notes préparées pour le Conseil interministériel du 30 juin 1958*, [in:] *Documents pour servir à l’histoire...*, vol. I, *Id.*, p. 309.

³⁹ *Exposé des motifs de l’avant-projet de Constitution soumis au Comité consultatif constitutionnel le 29 juillet 1958, approuvé par M. Michel Debré*, [in:] *Documents pour servir à l’histoire...*, vol. I, *Id.*, pp. 517–520.

Likewise, J. Solal-Céligny pictured the underpinnings of *avant projet*. In his view, separation of executive and legislative powers would entail determination of statutory domain, incompatibility of ministerial functions with a parliamentary mandate as well as the government's accountability to the parliament. In such a perspective, separation of powers leads to the emergence of institutions of rationalized parliamentarism, which inhibit the parliament from intervening in the system of governance and organization of a legislation process. In Solal-Céligny's view, an idea of the separation of powers lay at the roots of a new formula of a vote of no confidence.⁴⁰ Noteworthy, the *avant projet* propounded to the Constitutional Committee on 27 July, included all innovations determining identity of the Fifth Republic Constitution. This also pertains to the higher status of organic laws adopted in a special procedure and submitted to the obligatory review by the Constitutional Council. Noteworthy, organic law were adopted in the French legal order long before that. The Second Republic Constitution of 1848 as well the Constitution of the Fourth Republic referred to the organic law but made no distinction between the status of ordinary and organic laws.⁴¹ The authors of *avant projet* also designed ordonnances as the bills enacted by the government upon authorization provided for specific time to attain program goals.⁴²

In view of a large number of authors studying preparatory works on the constitution draft, the main controversy aroused between de Gaulle and Mollet and Pflimlin, the ministers of state,⁴³ who advocated parliamentary superiority and, consequently, adopted a critical stance towards strong presidency. They rejected the idea of investing the president with the powers including dissolution of the parliament and calling a referendum. In their view, a role of the president as an arbitrator meant that he could no longer be a real branch of the executive power. During the process

⁴⁰ J. Solal-Céligny, *Exposé des motifs de l'avant-projet de Constitution du 29 juillet 1958*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, pp. 521–522.

⁴¹ J. Solal-Céligny offered interesting analysis of possible variants of the status of organic laws. *idem*, *Note concernant les lois organiques qui pourraient être envisagées dans le cadre de la réforme constitutionnelle*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, pp. 337–339.

⁴² *Documents pour servir à l'histoire...*, vol. I, *Id.*, pp. 335–336.

⁴³ See P. Avril, *Le régime politique...*, *Id.*; P. Ardant, *Institutions politiques...*, *Id.*; J. Gicquel, *Le rôle de ministres d'état*, [in:] *L'écriture de la Constitution de 1958...*, *Id.*; G. Burdeau, F. Hamon, M. Troper, *Droit constitutionnel*, *Id.*; J.-M. Denquin, *La genèse de la Ve République*, Presses Universitaires de France, 1988; J.-M. Donégani, M. Sadoun, *La V^e République. Naissance et mort*, Gallimard (collection Folio histoire), 1999; R. Rémond, *Le retour de Gaulle*, Éditions Complexe, 1983.

of making the *avant projet* they sought strengthening the political position of the government and prime ministers. Mollet and Pflimlin reasoned that it was the prime minister and the president who should be empowered to dissolve the parliament.⁴⁴ As a rule, they defied presidential prerogatives, which is confirmed in the already-cited document authored by Raymond Janot.⁴⁵

Guy Mollet and Pierre Pflimlin also represented a critical attitude about a referendum. Ministers heavily criticized the original draft that provided for a referendum in the event of any draft rejected by the National Assembly, as well as any issue of the fundamental importance, which would make the parliament permanently dependent on the president.⁴⁶ Moreover, Mollet and Pflimlin were outspoken opponents of the rule of *incompatibilitas* banning holding ministerial functions and those public ones that, in the original version, included also self-government posts.

De Gaulle did not give in to the principal issues, primarily in the formation of the presidency as a centre of national leadership invested with *pouvoirs propres* (own powers) in a form of prerogatives. Yet ministers managed to reach a number of compromise solutions in the three areas: 1) separate constitutional position of the government; 2) regulations regarding a referendum; 3) softer formula of *incompatibilitas*. Regarding the first area, the government's political mission and autonomic status in relations with the president were determined. Famous Art. 20 of the Constitution, under which the government designed and pursued national policy, resulted from the pressure exerted by those politicians. Noteworthy, in the original version of the article, the author posited that determination and implementation of the national policy belonged to the president.⁴⁷ Politicians also obtained a declaration

⁴⁴ *Compte rendu de la réunion...*, *Id.*, p. 247.

⁴⁵ R. Janot, *Note pour le général de Gaulle...*, *Id.*, p. 257.

⁴⁶ Art 6. du *Avant-projet de Constitution préparé à la mi-juin élaboré par Michel Debré*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 252.

⁴⁷ Art.1: The President of the Republic shall ensure national independence and territorial integrity. / Supported by the government, shall define general objectives of internal and external policy of the country and shall ensure their continuity. / The President of the Republic shall take on all necessary initiatives so that public authorities could perform the tasks they are entrusted with in the interests of the nation and effective Constitution. Art 1. de l'*Avant-projet de Constitution préparé à la mi-juin élaboré par Michel Debré*, [in:] *Documents pour servir à l'histoire...*, vol. I, *op. cit.*, p. 251. Noteworthy, the authors of Balladur Committee Report proposed those provisions were part of the constitutional mission of the president of the Republic. *Rapport du Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V^e République*, JORF n° 252 du 30 octobre 2007, cited after the

confirming that the president would not be empowered to dismiss the prime minister.⁴⁸ As regards a referendum, Mollet and Pflimlin managed to persuade the Constitution authors to withdraw the original version of regulations and adopt the one that explicitly specifies the subject of a referendum. Consequently, only a draft regarding organization of public authorities or consent to the ratification of an international treaty could be adopted in a referendum. Thus, the authors of *avant projet* abandoned an initial idea that any bill or question of the fundamental importance could be adopted in a referendum.

Regarding *incompatibilitas*, a softer version of that principle was adopted. At the initial stage of drafting, Michel Debré and his aides considered an application of a more rigorous version of incompatibility of local governmental functions with a parliamentary mandate.⁴⁹ On the other hand, Mollet and Pflimlin endorsed Michel Debré's endeavours aimed to develop mechanisms of rationalized parliamentary system. It is them who the Constitution owes Art. 49–3, which allows the government to combine the question of accountability with an attitude towards the government bill. As I have mentioned before, this regulation was earlier included in the project of 1958, authored by Prime Minister Félix Gaillard.

Contrary to the frequently expressed opinions, de Gaulle's dispute with his ministers of state did not include all controversies that arouse at the stage of drafting the *avant projet*. The other ones included primarily regulations regarding international obligations, defied by legal services, Ministry of Foreign Affairs

Polish edition: *Raport Komitetu Balladura* (2007), [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 384.

⁴⁸ That issue provoked controversy. Michel Debré contended that the president of the republic was empowered to dismiss the prime minister just as he was empowered to appoint him. See *Notes préparées pour le Conseil...*, *Id.*, p. 312. On the other hand, in de Gaulle's view the Constitution did not empower the president to dismiss the prime minister at the forum of the Constitutional Committee. *Documents pour servir à l'histoire...*, vol. II, *Id.*, p. 300.

⁴⁹ Michel Debré espoused incompatibility of the post of the chair of the General Council, mayor of a big city and a parliamentary mandate. See *Comptes rendus de la réunion du groupe de travail du 1^{er} juillet 1958*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 320. An extremely interesting analysis of the restrictive version of incompatibility of a number of public posts was carried out by André Chandernagor. The author asserted that necessity to renounce local and parliamentary mandate by ministers would create a situation where ministerial functions would be limited to the senior administration officials and business people. As regards parliamentary politicians, only those who had no chances for reelection would primarily apply for ministerial posts, which would result in a negative selection. *Notes rédigées en vue du Conseil interministériel du 7 juillet 1958*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 371.

and a few experts. Michel Debré's experience gained in the period of failed endeavours to review the constitutionality of the treaties establishing the European Coal and Steel Community and European Defence Community⁵⁰ played a crucial role. In view of those reasons, the constitution draft did not provide for the regulations recognizing international treaties as superior to any bills passed by the National Assembly. Noteworthy, such a regulation was included in the Constitution of the Fourth Republic (Art. 28 of the Constitution of 27 October 1946). Michel Debré contended that none of the Community member states posited that international law was superior to the national law and thus France could not be *plus bête que les autres* ("more stupid than other countries").⁵¹ Hence, Art. 55 of the Fifth Republic Constitution, which introduced a rule of the mutuality in this respect, stating that any treaties or agreements appropriately ratified or approved become more powerful than statutes, provided that the other party applied this in reference to those agreements and treaties. On Michel Debré's initiative, a considerably more fundamental change was effectuated. The Republic of France became the first European Community Member State that introduced a mechanism of a review of the constitutionality of international obligations. The Minister of Justice overcame resistance of the representatives of the Ministry of Foreign Affairs and a few experts engaged in the Constitution drafting. François Luchaire, who defied that idea, asserted that France could contribute to the disintegration of the European Communities through its failure in the implementation of the international law.⁵² *Avant projet* posited that in the event when a treaty included a constitution or any organic law amendment, its ratification would be possible on condition that the Constitution or an organic law were revised.⁵³ In the final version, under the influence of the Constitutional Committee and the Council of State, a solution effective until now was adopted. Art. 54 states that when *Conseil constitutionnel* finds that an international obligation contains a clause

⁵⁰ Andrzej Kubiak made crucial insights on that issue. The author asserted that: "Ratification of the Rome Treaty of March 1957 aroused huge doubts about its conformity with the Constitution of the Fourth Republic. Yet, despite endeavours made by M. Debré and L. Hamon to make it a subject of the review in the Constitutional Committee, the treaty was ratified. To avoid similar problems in future, a mechanism of the review of the constitutionality of international treaties was introduced." A. Kubiak, *Francuska koncepcja kontroli konstytucyjności ustaw*, *Id.*, pp. 80–81.

⁵¹ *Compte rendu de la réunion...*, *Id.*, p. 382.

⁵² *ibid.*, p. 382.

⁵³ See Art. 49 *Avant-projet*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 511.

contrary to the Constitution, consent to ratification or ratification of such an international obligation may be given only after the Constitution amendment had been made.⁵⁴

Moreover, controversy over the format of the French Community aroused. Two trends were discernible in the course of the constitution drafting: federal, furthered by Léopold Senghor,⁵⁵ future President of Senegal, and confederate, authored by Félix

⁵⁴ An extensive fragment of the internal discussion preceding the ultimate decision perfectly illustrates that problem. It seems that the differences in opinions were very representative for the constitutional dilemmas accompanying European integration: "The Minister of Justice defies this proposal and reminds that other constitutional provisions enable the Government to submit for a discussion primarily bills tabled by him.

In spite of the request made by the Ministry of Foreign Affairs representative, the Minister of Justice is against the constitutional clause on the superiority of international convention over the national law.

Importantly, such a principle was not adopted by other member countries and thus France should not consider itself as more stupid than them or enter into any international obligations for future; the Minister of Justice would accept such a principle provided that other countries adopted it.

Monsieur Luchaire does not share the Minister's opinion in this respect.

Firstly, any distinction between the countries adopting supremacy of international law and those that do not is absolutely unfeasible as you cannot ask a judge to review if some international resolution is duly applied in all countries. Perhaps opposition of the Minister of Justice is right with regard to the treaties of public law but not those including private law directives, especially that in this area tribunals review and evaluate treaties without applying for an official interpretation of the Ministry of Foreign Affairs.

Secondly, it would be a pity if France demonstrated an example of a failed application of the international law.

Thirdly, a proposal put forward by the Minister of Justice would actually lead to the disintegration of European Communities, perhaps this was his goal, but it'd be better to say about this sincerely. Actually, a proposal of the act passed upon request of the association of beetroot producers is sufficient to hinder implementation of any decision made by any European Community body.

The Minister of Justice retains his strong position and even requests that the Constitution provided for the modification of a treaty by the national laws. However, he posits that this question will be considered next morning, after the meeting of Mr. Janot, Mr. Luchaire and professor Gros." *Compte rendu de la réunion...*, *Id.*, p. 382.

Earlier, the Ministry of Foreign Affairs drew up a soft version of the regulations regarding international relations, not substantially different from those provided for in the Constitution of 1946. See *Projet de lettre relatif aux relations internationales du 26 juin 1958*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.* pp. 289–290.

⁵⁵ Léopold Senghor (1906–2001), Senegalese politician and poet; graduated in Paris; follower of de Gaulle; member of Résistance; was appointed a member of the Second Constitutional Assembly; fellow author of the Fourth Republic Constitution; contributed to the constitutional drafting process as a member of the Constitutional Committee; was appointed the president of Mali Federation, 1959; thereafter appointed the president of Senegal; settled down in Paris after stepping down from presidency; one of the most pro-French African politicians. See R. Otaeyek, *Senghor Leopold Sédar*, [in:] *Dictionnaire de Gaulle*, *Id.*, p. 1065.

Houphouët-Boigny from Ivory Coast.⁵⁶ While at the first stage of *avant projet* drafting a decision was made to build federation, in the final version a compromise solution, something “between confederation and federation”⁵⁷ was adopted. Noteworthy, the Constitution of the Fifth Republic provides for a considerably more flexible format of the French Community than its predecessor. The French Community was established following bilateral agreements concluded between the Republic of France and individuals and member countries. Its competencies included foreign policy, defence, financial system, common economic and financial policy and strategic resources policy.⁵⁸ Country members of the French Community enjoyed autonomy and managed their affairs on their own. Thus, a vision pictured in Bayeux was attained in the established stable and flexible French Community. As an organ integrating the Community, the president of the Republic, was to be elected also by a college whose members included representatives of Member States (Art. 81).⁵⁹

⁵⁶ Félix Houphouët-Boigny (1905–1993), a very influential African leader; president of Ivory Coast, 1960–1993; de Gaulle’s fervent follower; was appointed a minister of state, 1958; expert at pursuing policy combining actions for national independence and pro-French orientation. See R. Otaeyek, *Félix Houphouët-Boigny*, [in:] *Dictionnaire de Gaulle, Id.*, pp. 612–613

⁵⁷ See M. Prélôt, *Pour Comprendre...*, *Id.*, p. 49. See also G. Conac, *Titre XII: De la communauté*, [in:] *L’écriture de la Constitution de 1958...*, *Id.*

⁵⁸ This issue was regulated by former Art.78 of the Constitution, effective until 1995: “The Community’s prerogatives include foreign policy, defence, currency, common economic and financial policy as well as strategic raw materials policy. Furthermore, except for special agreements, the Community is empowered to supervise the judiciary system, higher education institutions, general organization of external and common transport system and telecommunication. /Special agreements may establish other common fields of competence or provide for any transfer of competence from the Community to any of its Member Countries.” *Konstytucja Republiki Francuskiej z dnia 4 października 1958 r.* Legal status as of 31 December 1969 (Biblioteka Sejmowa, 1970).

⁵⁹ Regulations on the model of the French Community played a crucial role in the constitutional drafting period. This is how M. Debré explained the President’s political position in the speech he made at the Council of State: “As a Chair of the Community, the president of the Republic is invested with the powers of a different nature as in this event he is not the head of the parliamentary state – he is a Chief of the collegial political system, who – through the power he is granted as a Chairman and the power of the Governments of member countries – is tasked to create conditions for pursuing common policy. The Chair of the Community represents all Community members and in this respect his powers in the area of national defence and foreign affairs are essential. He chairs the Executive Council sessions and submits matters to the Community Senate.” D. Maus, *Les grands textes de la pratique institutionnelle de la V^e République*, La Documentation française, 1998, cited after the Polish edition: M. Debré, *A speech in the Council of State...* (*Przemówienie przed Radą Stanu...*), *Id.*, p. 239. See also de Gaulle’s insights about the same issue: Ch. de Gaulle, *Mémoires...*, *Id.*, cited after the Polish edition: *Pamiętniki nadziei, Id.*, p. 57.

In accordance with the demands made by René Capitant, entities making up the Community were granted with a wide-range of autonomy, which was impossible before, when power was utterly consolidated in the hands of the parliament. Under such conditions, the president had no capacity to play an integrating role in the Community and only vesting him with new powers provided such an opportunity.

Noteworthy, the Constitutional Committee had some substantive impact on the Constitution's provisions regarding primarily review of the constitutionality of international obligations. The Council of State, that gave its opinion about the constitution draft at the final stage of drafting, played primarily a legislative and editorial role by making amendments to the overwhelming majority of articles.⁶⁰ Yet in a number of cases the Council of State exerted also substantive influence. Actually, that body drew up regulations pertaining to the president's position as a guarantor of independence of the judicial branch, who chairs the Supreme Council of Judiciary.⁶¹ Furthermore, the Council of State had a profound impact on the regulations on *incompatibilitas*, civil and military posts, where the president makes decisions at the sessions of the Council of Ministers. In addition, regulations on the countersignature were clarified.

The new Constitution was passed in a referendum of 28 September 1958 by a majority of 85.1 per cent of votes (turnout – 80%) and became effective on 4 October 1958. After the Constitution had been enacted, de Gaulle could complete his institutional reforms since he was authorized to issue ordonnances until new parliamentary elections, that were to be held in November 1958. The organic laws, of key importance for the constitutional order, were issued as ordonnances. They regulated a number of significant issues, including composition and tenure of the Lower Chamber and the Senate, detailed conditions of the president's election, statues of judges, conditions of the functioning of the High Council of the Judiciary and organization, functioning and procedure of proceedings before the Constitutional Council.⁶² A choice of an electoral model was of critical importance. Pursuant to the French legal tradition, a form of such a model was regulated by a relevant

⁶⁰ See R. Ghevontian, *Rôle du comité consultatif constitutionnel dans l'écriture de la constitution*, [in:] *L'écriture de la Constitution de 1958...*, Id.; É. Burin des Roziers, *Rôle du Conseil d'État dans l'écriture de la Constitution*, [in:] *L'écriture de la Constitution de 1958...*, Id.

⁶¹ M. Prélôt, *Pour Comprendre...*, Id., pp. 148–151.

⁶² http://www.senat.fr/connaître/pouvoirs_publics/pouvoirs_publics7.html.

bill. In René Rémond's view, de Gaulle's stance on that issue was dubious,⁶³ unlike that represented by René Capitant and Michel Debré. It should be reminded that Capitant consistently (since 1934) espoused two-ballot, majority elections held in single-mandate constituencies, where an absolute majority was needed to win. Michel Debré furthered the British model of one-ballot majority system, held in single-mandate constituencies. Noteworthy, in 1945, in fear of the victory of the French Communist Party, de Gaulle decided to adopt proportional elections, which – as a political practice of the Fourth Republic proved – multiplied political groups represented in the parliament and hindered establishment of a stable parliamentary majority. Despite this, in autumn 1958, P. Pflimlin, a Minister of State, tabled a proposal to retain proportional statute. After hesitations de Gaulle went for a model furthered in the constitutional thought of René Capitant.⁶⁴

The majority electoral law contributed to the development of a bipolar party system, based on the left-right opposition. Importantly, a model of the electoral law adopted in 1958 diminished parliamentary representation of extreme parties, such as French Communist Party and National Front.⁶⁵ Moreover, until the 1980s, a hallmark of the French polity was the two-party system.⁶⁶ Importantly, however, bipolarization resulted from the simultaneous impact of the two factors: electoral law and general presidential elections.⁶⁷ Actually, this effect was discernible only after 1962, the first referendum on the general presidential elections was held and thereafter presidential elections developed bipolarization of the party system. Noteworthy, in the first legislature of the Fifth Republic, (November 1958 – October 1962) de Gaulle still did not enjoy a majority.⁶⁸

In 1958 de Gaulle had no intention to introduce general presidential elections. Fears about autocratic rules and a plebiscite system were too deep. Furthermore, the French Community project and fear about strong influences of the French Communist Party⁶⁹ also stood in the way of the general presidential elections.

⁶³ R. Rémond, *Le retour de de Gaulle, Id.*, pp. 141–142.

⁶⁴ *ibid.*, p. 142.

⁶⁵ See J. Gicquel, *Droit constitutionnel...*, *Id.*, p. 418.

⁶⁶ G. Burdeau, F. Hamon, M. Troper, *Droit constitutionnel, Id.*, pp. 481–482.

⁶⁷ See É. Perraudau, *Le système des partis sous la V^e République*, Pouvoirs, 2001, no 99.

⁶⁸ J. Cadart wrote about *l'effilochage de la majorité* ("ragged majority"), see J. Cadart, *Le droit constitutionnel de la V^e République*, *Economica* 199, p. 859.

⁶⁹ Election of the president in two ballots was intended to reduce the risk of the victory

We should remember that the president, as an organ integrating the French Community, had to be elected also by the representatives of associated territories and countries. Consequently, general presidential elections could not be held over the territory of the whole Community as this would involve granting full civil and political rights to the residents of associated countries.⁷⁰ Thus, the Fifth Republic Constitution introduced the presidential election by a special college in two ballots, provided that in the first round none of the candidates would obtain absolute majority.

In December 1958, de Gaulle was elected by the electoral college whose composition corresponded to the concept that was first put forward in the Bardoux Committee project.⁷¹ The college comprised parliament members, members of general councils, members of the assemblies of overseas territories and representatives of district communities. Representation of the self-government communities in the electoral college clearly reflected preference for small districts, which in turn, undermined the influence of the French Communist Party. Interestingly, the designed composition of the electoral college was changed during the constitution drafting process. Amendments made by the Constitutional Committee and the Council of State enhanced the position of the smallest self-government communities in the electoral college comprising over 80 000 members.⁷² Electoral college comprised

of the candidate of the French Communist Party in future. In the post-war years FCP regularly gained over 20 per cent of votes in parliamentary elections.

⁷⁰ See *Documents pour servir à l'histoire...*, vol. I, *Id.*, pp. 285–286.

⁷¹ De Gaulle won 78.5 per cent of votes in the college comprising over 80 000 members. Maranne, a communist senator gained 13.1 per cent of votes and dean Châtelet from the left-wing Union of Democratic Forces – 8.4 per cent of votes.

⁷² Pursuant to the original provision of Art. 7, effective until 1962, “The president of the Republic shall be elected for a term of seven years by the electoral college comprising members of the parliament, general councils and assemblies of the overseas territories as well as elected representatives of the municipal councils. / The latter ones included / – a mayor in the districts inhabited by less than 1000 residents; / – a mayor and his first deputy in the districts inhabited by 1000 – 2000 residents; / – a mayor, his first deputy and one municipal councilor in the order on the list of councilors in the districts inhabited by 2001 – 2500 residents; / – a mayor, his first and second deputy in the districts inhabited by 2501 – 3000 residents; / – a mayor, his first and second deputy and three councilors in the order on the list of councilors in the districts inhabited by 3001 – 6000 residents; / – a mayor, his first and second deputy and six councilors in the order on the list of councilors in the districts inhabited by 6001 – 9000 residents; / – all councilors in the event of districts inhabited by no more than 9000 residents; / – moreover, in the districts inhabited by over 30 000 residents, delegated appointed by the municipal council in proportion 1 per 1000 residents over the number of 30 000.” See *Constitution française du 4 octobre 1958 après la révision de juillet 2008*, La Documentation française, 2008, cited after the Polish edition: *Konstytucja V Republiki*

nearly 3 500 representatives of the countries constituting the French Community.⁷³

The institution of general presidential elections was introduced in 1962 and the impetus for such a change was an assassination attempt on the life of de Gaulle, staged on the initiative of Organisation de l'Armée Secrète (OAS – Secret Army Organisation) in Petit Clamart. Negative premises also disappeared: influence of the French Communist Party significantly diminished and the French Community ceased to exist following the ongoing de-colonization process. Under Art. 11 of the Constitution, de Gaulle amended it through a referendum.⁷⁴ Undoubtedly, according to the principle that sovereignty belongs to the nation that pronounces its will as a whole and directly, de Gaulle confided *pouvoir constituant* to the nation once again.

Yet the decision of 1962 should be recognized as the completion of the political reform and not departure from its principles. And this is not just because de Gaulle consciously postponed putting this reform into effect.⁷⁵ What is essential is the fact that general

Francuskiej, [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 266. Noteworthy, election of the president by the college where electors from small self-government communities were over represented encountered harsh criticism from Goerges Vedel and response from Michel Debré. See M. Debré, *Refaire une démocratie, un Etat, un pouvoir*, Plon, 1958, p. 15.

⁷³ Electoral college comprised the representatives of associated countries: Dahomei, Upper Volta, Cameroon, Madagaskar, Mauretania, Niger (Chad), Senegal, French Sudan (Mali), Togo, Ivory Coast, Central Africa (Gabon), Congo, that enjoyed the status of overseas territories. Guinea did not accept association with the Republic of France. See M. Prélot, *Pour comprendre...*, *Id.*, pp. 70–71 and tables showing demographic potential of member countries, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 268.

⁷⁴ De Gaulle's decision met with a critical opinion of the Council of State. Meanwhile, the adjudication Constitutional Council issued on 6 November 1962 actually meant that the body recognized itself as incompetent to adjudicate on the laws adopted in the referendum. See L. Favoreu, L. Philip, *Les grands textes...*, *Id.*, pp. 162–174.

⁷⁵ Interesting insights are found in de Gaulle's memoirs about the way general presidential elections were enacted: "I have had for long a thought that the only means to attain such a goal is election of the president of the Republic by the nation because if the president was designated by all French people, and nobody else would ever be in such a position, he could become «the first-born son of the country», and thus he would be in the eyes of all French people and his own ones burdened with the largest responsibility, the same as rests on his shoulder according to the constitutional texts. Obviously, he had to be ready and able to bear this burden. Undoubtedly, there is no act that could guarantee this, compensate for the ineptitude demonstrated by the head of the country. And contrary: success is only possible when talent goes along with appropriate tools. There is no worse system where capabilities are wasted in fruitless endeavours.

Indeed, when in 1946, in Bayeux, I spoke about the political system France needs, and in 1958, when I headed the sessions and debates where our new Constitution was

presidential elections were a logical attainment of the doctrinal underpinnings of the Fifth Republic. In the article on the civic participation in the political life of the Fifth Republic, René Capitant, observed that if the Constitution was accepted through a referendum it may as well be revised through this institution.⁷⁶ This is because, noteworthily, general presidential elections were part of the logic of the constitutional act of 3 June and Art. 3 of the Constitution, which was its continuation. During the period of *avant projet* drafting a possibility to apply such a solution was suggested a number of times. If the executive power had its own and direct source in a form of the general voting, it seems obvious that the president's election in a general vote was as much or even more justified than indirect elections by the electoral college. F. Luchaire observed fragility of the legitimization of an election made by the college, particularly when over-representation of small districts in this body is posited. In his view, the parliament may have a sense of the legitimate superiority over the president. He, therefore, espoused general presidential elections since, he contended, only this kind of election provides the president with "an opportunity to freely play a political role in opposition to the parliament chambers."⁷⁷ Notewor-

forged, I did not suggest that the head of state should be elected in a general vote. Initially, I asserted that he should be designated by a big electoral college, corresponding at a national scale to those that elect senators at the department level. In my view, it was better not to do everything instantly. As I appealed for setting the country free from the arbitrary rules of political parties and deciding that the primary source of power and politics should be the president and not the parliament, it was necessary to wait for a while before such a huge change was effectuated. At the same time, I must admit that (...) I found it necessary to take into account unrestrained prejudice that any thought about «plebiscite» provoked in many social groups since the times of Louis Napoleon. When application of a new Constitution proves in practice that concentration of power at the highest level involves no dictatorship, it will be time to recommend such a fundamental reform to the nation. In addition, I was going to take up the post of the head of the state, and given the events that had already become the past as well as a current circumstance, the way I would posit that the office would be nothing but a sheer formality, with absolutely no ramifications as far as my role is concerned. Yet, considering future, I was determined to complete my work before my seven-year term was over." Ch. de Gaulle, *Mémoires d'espoir*, *Id.*, cited after the Polissn edition: Ch. de Gaulle, *Pamiętniki nadziei*, *Id.*, pp. 360–362.

⁷⁶ R. Capitant, *Démocratie et participation politique*, *Id.*, p. 164.

⁷⁷ F. Luchaire furthered an idea of general presidential elections in the *Note* he wrote for Louis Jacquinot: "Separation of powers denotes that the head of State does not come from the legislative power. / Yet the legislative power comes from the nation. / To fully play its role in relations with the National Assembly, the head of State should be granted his powers by the nation. Any other solution deprives him of the underpinnings of legitimacy necessary to pertain the balance of the legislative power. / First of all, an idea of the electoral assembly composed of the councilors endorsing over-representation of settlements should be abandoned. In such an event the head of state

thily, critics of the Constitution, primarily Pierre Mendès France, highlighted weakness of the legitimacy of the president elected by the college even before its enactment.⁷⁸ On the other hand, de Gaulle was aware of the threat posed by the return to the old political practice and hegemony of political parties. General presidential elections substantially reduced that threat.⁷⁹

B. Three Pillars of the Fifth Republic Constitution

Interpretations of the Fifth Republic Constitution were focused on the determination of the new relations between the president, government and the parliament. According to such a logic a number of different definitions of the new constitutional system were formulated. Michel Debré pictured the Fifth Republic as the real rule of the parliament that followed the rule of the Assembly.⁸⁰ Maurice Duverger defined the Fifth Republic as a semi-presidential system with two hallmarks: the president elected in general elections and invested with a set of competences and the government accountable to the parliament members.⁸¹ Yet many constitutional experts reasoned that such a definition encompassed different political systems – unlike in the Fifth Republic, there were semi-presidential political systems where the president's position was quite weak (Austria, Finland, Ireland, Iceland, Portugal).⁸² On the other hand, Jean Gicquel defined the Fifth Republic as

would be elected by every fifth French voter. / To play autonomous role, the president of the Republic should be something more than a super senator. In present times, general elections are thought to be something right. / A solution of 1851 is proposed but its advocates forget that in those years French public opinion was not in favour of the Republic. / Experience of the Constitution of 1875 proved that any president that is not elected in a general vote inevitably yields to the National Assembly he comes from. Election of the president of the Republic in a popular vote shall prevent repetition of such experience. / However, this does not exclude ministers' accountability to the parliament." *Note établie par M. François Luchaire pour M. Louis Jacquinot au sujet de la réforme constitutionnelle à l'occasion du Conseil interministériel du 30 juin 1958*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 309.

⁷⁸ See *Documents pour servir à l'histoire...*, vol III, *Id.*, p. 107.

⁷⁹ See Ch. de Gaulle, *Mémoires d'espoir*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Pamiętniki nadziei*, *Id.*, pp. 267–275.

⁸⁰ M. Debré, *Discours devant le Conseil d'État*, *Id.*, cited after the Polish edition: M. Debré, *A speech in the Council of State...* (*Przemówienie przed Radą Stanu...*), *Id.*, pp. 225–247.

⁸¹ M. Duverger, *Les régimes semi-présidentiels*, Presses Universitaires de France, 1986.

⁸² O. Duhamel, *Droit constitutionnel*, *Id.*, p. 70.

a presidential system where power is concentrated in the hands of the head of the state elected in a general voting and commanding parliamentary majority.⁸³ Jerzy Stembrowicz applied identical definition with reference to the Fifth Republic in his very penetrating comparatist study on the government in the parliamentary system.⁸⁴ Olivier Duhamel highlighted inconvenience of the Gicquel's definition, where constitutional elements were combined with political and just time-serving elements. Presidentialism corresponds to the situation where the president commands parliamentary majority and by no means describes the nature of the French political system during the period of cohabitation.⁸⁵ Duhamel recommended distinction between the two different notions: constitutional system and political system. While the first would be defined as a semi-presidential, the latter one would recognize presidentialism as the most typical application of the constitutional principles.⁸⁶ In his other writing Duhamel defined the Fifth Republic as an ultra-presidential system in view of the fact that its typical application meant that the president accumulates prerogatives of the American president and those conferred upon the British prime minister as a leader of the parliamentary majority.⁸⁷

Interpretations cited above include bits of the truth but do not refer to all political issues and, importantly, omit importance of the turn towards direct democracy. It seems that the hallmark of the Constitution of the Fifth Republic is the combination of state patriotism, manifested by the will to build a strong state and presidency as a centre of the national leadership, and the restoration and democratization of the Republic. If we seek a synthetic name of such a constitutional system, a term 'democratic presidentialism' seems to be most adequate.⁸⁸

The Constitution of 1958 consolidated republican tradition and within its framework created strong presidency as a centre of national leadership, consolidated the bipartite executive branch of power at the expense of the parliament but pertained

⁸³ J. Gicquel, *Droit constitutionnel...*, *Id.*

⁸⁴ J. Stembrowicz, *Rząd w systemie parlamentarnym*, *Id.*, p. 168; Stembrowicz applied a similar definition earlier, in the study on political systems of Western Europe. J. Stembrowicz, *Systemy polityczne wybranych państw kapitalistycznych*. *Francja*, Warsaw 1977, p. 75.

⁸⁵ O. Duhamel, *Droit constitutionnel*, *Id.*, p. 69.

⁸⁶ *ibid.*, p. 72–73.

⁸⁷ O. Duhamel, *V^e République*, [in:] O. Duhamel, Y. Mény, *Dictionnaire constitutionnel*, *Id.*, pp. 138–139.

⁸⁸ The wording was used by O. Duhamel in *Une démocratie à part*, *Id.*

parliamentary accountability of ministers and introduced direct democracy. The reform of 1958 provided France with a tool for pursuing an active national policy aimed to reconstruct the country's strong position in Europe. In the speech made at the Council of State, Michel Debré said that "the point is to reconstruct power branches as this determines the very existence of our country and democracy, meaning, in other words, France and the Republic," which was a perfect manifestation of reformatory intentions and confirmed existence of the "superpower's" motivations.⁸⁹

Construction of the Fifth Republic was erected on three pillars: a new centre of national leadership in the form of a strong presidency, consolidation of the bipartite executive branch of power and democratization of the Republic. Making presidency a permanent national factor and a centre of national leadership ruling through the government was of primary importance. The president elected for a seven-year term, holding a strong legitimation, which was even made more powerful when general elections were introduced in 1962, became a central institution of a new constitutional order. Art. 5 of the Constitution entrusted the president with a mission of the guardian of the Constitution, an arbitrator and referee ensuring the effective functioning of public authorities and continuity of the state. Literal interpretation of this article could suggest that the president exercised passive and neutral arbitration. Yet the regulations specifying presidential competences dramatically consolidated his position. Thus, Michel Debré defined his constitutional mission as a role of "the ultimate judge of the national interest."⁹⁰ Debré's formula expresses active, effective arbitration as the basis for granting the president own powers and other instruments for exercising national leadership. The president's own powers include appointment of the prime minister (Art. 8), dissolution of the National Assembly (Art. 12), declaration of a referendum (Art. 11), the institution of the review of the constitutionality of acts and international obligations (Art. 54 and 61) and delivery of addresses to the National Assembly as well as delivery of speeches before the legislative bodies convened for this purpose as the Congress (Art. 18). Emergency powers specified in Art. 16 also enjoy the status of prerogatives. Noteworthy, in this event the Bayeux proposal was also effectuated. In June 1946, de Gaulle

⁸⁹ M. Debré, *Discours devant le Conseil d'État, Id.*, cited after the Polish edition: M. Debré, *Przemówienie przed Radą Stanu...*, *Id.*, p. 229.

⁹⁰ *ibid.*, p. 239.

offered a view that the president should guarantee national independence and the treaties concluded by France when the country's security was under threat. There are a number of different origins of such a constitutional statute. J. Gicquel highlights Art. 48 of the Constitution of Weimar Republic that invested a president with emergency powers in the event of any threat to the country's security and public order.⁹¹ It seems, however, that Art. 16 was the ramification of 1940 experience and the constitutionalising of de Gaulle's appeal of 18 June of that year. De Gaulle was absolutely convinced that the state must be provided with a strong instrument to counteract any existential threat.⁹²

The Constitution met de Gaulle's political ideas by investing the president with a number of instruments for exercising national leadership. The president is not only an active arbitrator but may appoint the government and determine its policy. The president became, in accordance with the demand put forward by René Capitant, a real head of the executive power. The president has been invested with the competences in foreign policy (Art. 14) and defence policy as a chief commander of military forces (Art. 15). In the aftermath of these regulations, the president has become an active subject of the executive power in the national security policy. Another ramification of the constitutional regulations was the decree of 14 January 1954 that provided the president with a power to decide about the use of nuclear weapons.⁹³ Noteworthy, the president's capacity to submit a motion to review the constitutionality of international obligations has consolidated his political position of the guarantor of the constitutional adherence and national independence. The head of the state has been invested with a number of new powers: he chairs the sessions of the Council of Minister (Art. 9), signs ordonnances and decrees passed at these sessions and appoints senior officials. Despite the fact that such decisions require countersignature, they immensely consolidate the president's position, especially when the government is formed out of his will and meets his political line.⁹⁴ Importantly, the Fifth Republic Constitution, unlike those of the Third and Fourth Republics, purposefully applies the term "government" and recognizes the Council of Ministers as merely a form of its

⁹¹ J. Gicquel, *Droit constitutionnel...*, *Id.*, p. 591.

⁹² See Ch. de Gaulle, *Mémoires d'espoir*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Pamiętniki nadziei*, *Id.*, p. 57.

⁹³ E. Popławska, *Instytucja Prezydenta w systemie...*, *Id.*, p. 152.

⁹⁴ See J. Gicquel, *Droit constitutionnel...*, *Id.*, pp. 597–600.

functioning under the leadership of the president.⁹⁵ Thus, the Constitution of 1958 manifests the unity of the executive power sitting under the leadership of the president. Interestingly, also in this regard the Bayeux speech inspired the Constitution drafting.

The idea of a strong and coherent state, pertinent to understand the Constitution, was attained not only in a form of the new model of presidency but also long-lasting consolidation of the bipartite executive branch of power. P. Ardant highlighted the two hallmarks of the Fifth Republic: consolidated the bipartite executive branch of power and weakened the parliament.⁹⁶ Similarly, J. Gicquel recognizes primacy of the executive power as its primary characteristics.⁹⁷ Consolidation of the government is manifested by a radical departure from the assembly's superiority, effective in the constitutional regulations of the Third and Fourth Republics. The objectives of the Bayeux project were accomplished as regards ministers' accountability to the parliament. On the one hand, the Constitution eradicated the procedure of investiture and posited that the government appointed by the president enjoyed the parliament's support. On the other hand, the act introduced a mechanism of parliamentary accountability of the government and thus respected a fundamental premise of the rule of parliament.

P. Ardant wrote about diarchy, a two-part executive power branch, with the stress put on a strong position of the president, who was "responsible for the government's actions under his leadership."⁹⁸ Consequently, the Constitution speaks about the prime minister and not the president of the Council of Ministers. The Fifth Republic entrusted the prime minister with the responsibility for chairing cabinet meetings, national defence, implementation of statutes and nominations for civil and military posts (without prejudice to the appointments for top positions made by president at the sessions of the Council of Ministers). A crucial element of the diarchy system is the regulation providing for appointment and dismissal of ministers upon the motion submitted by the prime minister, while the government is not formally accountable to the president. Noteworthy, Art. 8 provides that the

⁹⁵ See J. Massot, *Chef de l'État et chef du Gouvernement: la dyarchie hiérarchisée*, La Documentation française, 2008.

⁹⁶ P. Ardant, *Institutions politiques...*, *Id.*, pp. 450–454.

⁹⁷ See J. Gicquel, *Droit constitutionnel...*, *Id.*, p. 484.

⁹⁸ P. Ardant, *Institutions politiques...*, *Id.*, p. 451. A view on the duality of executive power was put forward by J. Massot in his study on the political position of the president and prime minister. J. Massot, *Chef de l'État...*, *Id.*

president may dismiss prime minister only when he announces his resignation.⁹⁹ Finally, Art. 20, which provides that the government determines and pursues the policy of the Nation, protects the autonomous status of the government, which is essential during the periods of *cohabitation*.

However, a combination of the electoral law reform and original model of the rationalized parliamentarism was of critical importance for stability and efficacy of the executive power. Majority election staged in two rounds, furthered by René Capitant in his *La réforme du parlementarisme*, favoured consolidation of the party system, built its duality and inhibited influence of the French Communist Party. In the country prone to political divisions and multiplication of political groups such an electoral model would not bring a desirable effect if it were not for the institutions of rationalized parliamentarism designed by Michel Debré.

A notion of rationalized parliamentarism has no explicit contents. As I have already mentioned, it was introduced to the French legal thought by the Russian-born French constitutionalist Boris Mirkine-Guetzévitch, in his book *Les nouvelles tendances du droit constitutionnel*.¹⁰⁰ He interpreted rationalized parliamentarism as a jurisdictional form of the parliament's supremacy over the executive. Boris Mirkine-Guetzévitch, who conducted comparatist studies on the new constitutions passed in the first half of the 20th century, asserted that it was rationalized parliamentarism that determined their characteristics. New constitutions introduced legal regulations regarding the government's accountability, where customary norms determining unrestricted parliament's supremacy had been effective before.¹⁰¹ Meanwhile, according to the definition developed by the authors of the Fifth Republic Constitution, rationalized parliamentarism was identified as a set of rules consolidating the executive power when stable parliamentary majority is uncertain or absent.¹⁰²

One of the hallmarks of the Fifth Republic Constitution was the simultaneous application of several institutions to consolidate

⁹⁹ De Gaulle confirmed such interpretation of the Constitution in his speech at the forum of the Advisory Committee. *Documents pour servir à l'histoire...*, vol. II, *Id.*, p. 300.

¹⁰⁰ B. Mirkine-Guetzévitch, *Les nouvelles tendances...*, *Id.*

¹⁰¹ The author asserted that rationalized parliamentarism introduces complicated process of political life into legal frameworks to ensure that the government enjoys a minimum stability. B. Mirkine-Guetzévitch, *Les Constitutions de L'Europe nouvelle*, *Id.*, pp. 18–19. See also J. Stembrowicz, *Rząd w systemie parlamentarnym*, *Id.*, pp. 84–85.

¹⁰² J. Gicquel, *Le parlementarisme rationalisé*, [in:] O. Duhamel, Y. Mény, *Dictionnaire constitutionnel*, *Id.*, p. 696.

stability and governance efficacy. Along with the institutions developed by British parliamentarism, a number of innovative solutions have been adopted. British inspiration is discernible in a number of powers conferred upon the prime minister, including the agenda of cabinet sessions and regime of legislative and budgetary works. Other British-like solutions include impermissibility of parliamentary draft bills or amendments submitted by parliament members, whose passing would result in the increase of budgetary spending or decrease in revenues.¹⁰³ Interestingly, these rigid solutions are aimed to not only reduce deficit and any excessive spending but also prohibit any tax rate reductions.¹⁰⁴ In this respect, the Fifth Republic constitution provides for the regulations more rigid than those specified in its predecessor, which prohibited only to increase spending and establish new ones.¹⁰⁵ Furthermore, Michel Debré transplanted onto the French ground an idea of a fixed and constrained number of permanent parliamentary commissions to eliminate their interference with the ministers' work, which was quite frequent in the Third and Fourth Republic.

On the other hand, limitation of the subject scope of the bills and government legislation either in a form of decrees having the force of bills (Art. 37) or ordonnances in the areas that are normally governed by a bill (Art. 38) was an original idea. The government jurisdiction designed by Michel Debré in Résistance years is a powerful instrument of the executive power. Art. 37, Item 1 specifies its foundations, providing that "areas not governed by the bill are regulated by the acts of the executive power." Consequently, the Constitution paved the way to the government's decrees amending bills in those areas (Art. 37, Item. 2, sentence 1). The bills passed before the new Constitution came into force could be amended by decrees, provided that the Constitutional Council ruled that "they concerned areas regulated by executive acts" (Art. 37, Item. 2, sentence 2). The whole content was supplemented by Art. 41 that enabled the government to prevent any attempts made by the parliament to interfere with the area

¹⁰³ All regulations discussed above are included in the rules and regulations of the Lower Chamber. See H. Doering, *Time as a Scarce Resource...*, *Id.*, pp. 226, 232.

¹⁰⁴ See interesting insights on political practice regarding passing the budget in the Third Republic, made by Adam Piasecki. A. Piasecki, *O parlamentarystwie...*, *Id.*, pp. 252–255.

¹⁰⁵ Art. 17, Item 2 of the Constitution of 1946 provided that "No project aimed to increase anticipated spending or introduce new ones shall be tabled during the discussion on any anticipated or additional bank loans", See *Constitution française du 4 octobre 1958...*, *Id.*, cited after the Polish edition: *Konstytucja Republiki Francuskiej*, trans. A. Mycielski, *Id.*, p. 14.

of distribution. The objection could pertain to the parliamentary draft bill as well to amendments submitted by parliament members. In the event of disagreement between the government and the speaker of a parliament chamber, a dispute was settled by the Constitutional Council.

Such a procedure also pertained to the bills and amendment proposals in the scope specified in the authorization for issuing ordonnances. This was possible as the government was empowered to ask the parliament for the authorization to issue ordonnances in the areas governed by the bills for a limited period of time (Art. 38, Item 1). Ordonnances were intended to be special legislative instruments for the execution of the government's programmes. Pursuant to the constitutional provisions, ordonnances are passed at the sitting of the Council of Ministers after the opinion submitted by the Council of State had been obtained. They come into force after publication, which requires cooperation with the president, and cease to be effective when a relevant bill approving their scope is not submitted in the parliament before the time specified in the authorizing bill is over. If the government applies both instruments, it has the largest capacity in Europe to shape the legal order.¹⁰⁶

Just like in the concept developed by Michel Debré, the government was granted with the competences providing influence on the course of the parliamentary stage of the legislative process. The Constitution posits that drafting government bills refers to the texts submitted by the government in the relevant parliament chamber. Government may demand submission of the drafts to the commission set up exclusively for this purpose (Art. 43, Item 1) and oppose any amendments that had not been submitted to the commission before (Art. 44, Item 2). Moreover, the government may table a motion to "run one voting on the entire text or its part covering only amendments submitted or accepted by the government" (Art. 44, Item 3). The prime minister has also been empowered to apply a straightforward legislative procedure in the event of a dispute between the parliament chambers and recognize such a draft as an urgent one.

Establishment of the Constitutional Council and introduction of a preventive model of the review of the constitutionality of acts as a protection against abuses of the parliament were, in the intention of the reform authors, to supplement instruments enabling

¹⁰⁶ See information on the promulgated ordonnances, [in:] D. Maus, *Les grands textes de la pratique institutionnelle de la V^e République*, La Documentation française, 1998, pp. 188–189.

effective governance. Undoubtedly, institutions empowering the prime minister to combine the government's accountability with an attitude towards a bill must have also been found innovative (Art. 49, Item 3), which allowed for its adoption in the event when a vote of no confidence was not passed with an absolute majority. Another innovation was a vote of no confidence procedure, which was more difficult to trigger. The new Constitution provided that such a procedure was applicable only when it was instituted by at least one tenths of parliament members and voting could be held within 48 hours since the motion was tabled and its adoption required absolute majority of the parliament members (Art. 49, Item 2). Furthermore, the institution of the incompatibility of ministerial functions with a parliamentary mandate, which had been used before in the constitutional systems based on the strict separation of powers, was also innovative.¹⁰⁷ The latter demand corresponded to de Gaulle's thesis on making ministers independent of the pressure of political parties and his conviction that ministers should be the real heads of their departments and not parliament representatives in relations with bureaucratic apparatus, which was emphasized by René Capitant.¹⁰⁸

Rationalized parliamentarism has changed dramatically the status of the regulations of the parliament chambers in the Third and Fourth Republics, the content of regulations was subject to absolutely free settlements made by the chambers, which reflected parliamentary supremacy in the constitutional system. In the Fifth Republic Constitution, regulations established by the chambers became subject to an obligatory review effectuated by the Constitutional Council. In 1958, tradition of the parliament's omnipotence in all matters not prohibited in the Constitution was abandoned. Instead, a rule of action based on the explicit competences was introduced. Since that time, the parliament has had only the competences specified in the Constitution. The parliament chambers have become constitutional branches of power and only within such constraints may determine the content of their regulations.¹⁰⁹

¹⁰⁷ Principle of the incompatibility of ministerial functions with a parliamentary mandate paved the way for highly-qualified professionals and not party activists to the ministerial posts. See A. Śledzińska-Simon, *Prawa polityczne urzędników*, Wydawnictwo Sejmowe, 2010, pp. 235–242.

¹⁰⁸ See R. Capitant, *Écrits constitutionnels*, *Id.*, cited after the Polish edition: R. Capitant, *Konstytucja demokratyczna...*, *Id.*, p. 197.

¹⁰⁹ As early as in 1959, the Constitutional Council adjudicated that provisions included

Rationalized parliamentarism can be recognized as the introduction of the constitutions into the area governed so far by the regulations established by the chambers and customary norms.¹¹⁰ The customary norms shaped by the parliamentary elites of the Third and Fourth Republics were essential for the parliament's supremacy.¹¹¹ Michel Debré asserted that jurisdiction of the constitutional norms might inhibit re-development of the customary norms contributing to the parliamentary supremacy.

Originality of the French model of the rationalized parliamentarism rests in the simultaneous application of a large number of mechanisms consolidating executive power in relation to the parliament. Owing to this, since the very beginning, the Constitution of the Fifth Republic has been internally flexible and designed either a “presidential or “parliamentary” model of the constitutional system. Obviously, the Constitution would not pass a cohabitation test without high political culture that excluded a negative interpretation of provisions, resulting in the paralysis of political powers. Yet coherent constitutional regulations minimizing a risk of conflict between power branches were of key importance. Noteworthy, the Fifth Republic Constitution eliminates a risk of conflict between the president and the government by enforcing their cooperation also in the event of a referendum (Art. 11) or constitutional amendments (Art. 89, Item 5). Noteworthy, the president has no instrument of a negative power in the form of effective legislative veto. All these regulations invest government with the institutional bedrock for effective and stable functioning, notwithstanding the president's endorsement.

in the regulations of the Lower and Upper Chambers were inconsistent with the Constitution. The Constitutional Council challenged constitutional compliance of Art. 82 of the regulations of the Chamber of Deputies which empowered the National Assembly to pass resolutions other than those expressly specified in the Constitution. In the Constitutional Council's view, regulations may not develop any procedures of adopting a stance on the external issues, not provided for in the Constitution since this would lead to new forms of the government's accountability to the parliament. For the same reasons, the Council found the Senate's regulations unconstitutional. Noteworthy, those matters were freely interpreted in the regulations of both parliament chambers in the Fourth Republic. See G. Berlia, *La Constitution et les débats sur les règlement des Assemblées Parlementaires*, RDP, 1959, No. 3; J. Stembrowicz, *Parlament V Republiki Francuskiej*, PWN, 1963, pp. 85–88.

¹¹⁰ See M. Bonnard, *Le status du parlement*, [in:] *L'écriture de la Constitution de 1958...*, *Id.*, pp. 291–311. The author highlights that the revolution in the parliament's status was not the subject of the works of the Constitutional Committee but Debré's achievement who, in the author's view, referred to the reformist thought of the 1930s.

¹¹¹ See K. Wojtyczek, *Formy konstytucjonalizacji...*, *Id.*, pp 33–34.

Another crucial issue is the position of political parties in the Fifth Republic Constitution. De Gaulle was always critical of their role in the political systems of the Third and Fourth Republics. In his view, any constitutional system based on the hegemony of political parties ineluctably leads to the division of sovereignty. In *Mémoires d'espoir* he concluded explicitly that it was inadmissible that political parties representing particular interests could share sovereignty.¹¹² De Gaulle's formula, according to which "sovereignty belongs to the nation when it speaks directly and in its entirety,"¹¹³ challenged any constitutional mechanism that conditioned formation of the government and national policy by the coalition arrangements made between the leaderships of political groups. On the other hand, de Gaulle never had authoritarian views and respected the government's accountability to the parliament. In addition, the Fifth Republic Constitution was the first that constitutionalized a position of political parties and confirmed a right to political competition under respect for the rule of the nation's sovereignty (Art. 4).¹¹⁴ There are two crucial factors that changed the political position of political parties. Firstly, introduction of the referendum institution meant that party leaderships were no longer involved in the decision-making process, which was in accordance with the principles found in the thought of Tardieu and Carré de Malberg. Secondly, the new Constitution changed the rules of political competition and government formation. Presidential election and a new model of the electoral law made up a system where it was voters' decisions and not party coalitions' arrangements that determined a national policy, which met the demand made by René Capitant. In the aftermath of such evolution, political

¹¹² Ch. de Gaulle, *Mémoires d'espoir*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Pamiętniki nadziei*, *Id.*, p. 28.

¹¹³ See footnote 26.

¹¹⁴ An obligation to adhere to the rules of sovereignty and democracy seems to have had also other meanings. There is much evidence that such a regulation was aimed to counteract the French Communist Party, strongly dependent on the Soviet Union. In the speech made at the forum of the Council of State, Michel Debré said: "Why should those whose task is to strengthen France and consolidate the Republic agree to widely open the doors of the national institutions to political groups who did not adhere to the rules without which neither France nor the Republic could exist?" M. Debré, *Discours devant le Conseil d'État*, *Id.*, cited after the Polish edition: M. Debré, *Przemówienie przed Radą Stanu...*, *Id.*, p. 243. The constitutionalizing of political parties was, I have mentioned before, the achievement of the Constitutional Committee. During extensive discussions, commission members considered introduction of the new provisions restricting activities of the Communist Party and its influence on public authorities. See the speech delivered by a member of the Constitutional Committee, M. Blacq Mascarot, *Documents pour servir à l'histoire...*, vol. II, *Id.*, p. 202.

parties switched into the model of governance based on the rules of individual accountability of their leaders and the whole system began to resemble the "Westminster" model of democracy."¹¹⁵

The third pillar of the Fifth Republic is the institution of popular voting applied in an extended range of cases and opening to the direct democracy.

Art. 3 played a crucial role in the reform since its provisions interpreted a principle of the national sovereignty and opened an opportunity for the democratization of the republic. The article says that national sovereignty is vested in the people who exercise it through their representatives by means of a referendum. Such an amendment had a few serious ramifications. In its aftermath, the parliament was no longer the sole representative of the nation. Pursuant to Art. 3, the president became the nation's representative notwithstanding his election in indirect or direct elections. Clearly, there is a continuity between Art. 1 and Art. 3 of the Constitution of 1958. Furthermore, compared to the Constitution of the Fourth Republic, a scope of sovereignty exercised directly by the people, which had before been constrained to the election to the Lower Chamber, and a constitutional referendum. At the first stage of the constitutional drafting, François Luchaire observed that in the light of the president's right to dissolve the parliament and order early elections a notion of "the nation's and not "president's arbitration" should be adopted."¹¹⁶ Interestingly, a notion of the nation's arbitration was applied in the constitutional proposals put forward by René Capitant. Such a solution extended a scope of application of the popular voting in the Fifth Republic. Yet introduction of general presidential elections in 1962 had considerably more serious ramifications as it extended the nation's political rights and provided the president and the state, suffering from the legitimization crisis since 1940, with very strong legitimization. In addition, a switch to the direct democracy was also effectuated by extending the referendum institution.

In this view, Andrzej Antoszewski and Ryszard Herbut classify France, along with Denmark, Ireland and Italy, as a country with a strong trend towards supplementation of a classical parliamentary mechanism by a referendum.¹¹⁷ Direct democracy played a more

¹¹⁵ See A. Antoszewski, R. Herbut, *Demokracje zachodnioeuropejskie*, *Id.*, pp. 29–39.

¹¹⁶ *Compte rendu de la réunion du groupe de travail du 19 juin 1958*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, p. 271.

¹¹⁷ A. Antoszewski, R. Herbut, *Demokracje zachodnioeuropejskie*, *Id.*, p. 257.

important role only in Switzerland. Importantly, when the Fifth Republic was established, France was the only large European country where the institution of a referendum was introduced to make decisions germane to the state community. After 1918, a referendum and the people's initiative were included in the constitutions of Austria, Czechoslovakia, Ireland, Lithuania, Latvia, Estonia, Greece and Weimar Republic.¹¹⁸ Before the Fifth Republic was established, the referendum institution had not been applied in the countries of comparable size, except for Germany in Weimar years, but that case cannot be recognized as a positive political experience.¹¹⁹

Table 3. Referendums in France after World War II

21 October 1945	establishment of the constitutional referendum institution
05 May 1946	constitutional referendum on the draft of the First Constituent Assembly
13 October 1946	constitutional referendum on the draft of the Second Constituent Assembly (the Fourth Republic Constitution)
28 September 1958	constitutional referendum endorsing the Fifth Republic Constitution
08 January 1961	self-determination of Algeria
08 April 1962	Evian treaties (independence of Algeria)
28 October 1962	constitutional reform, direct presidential elections
27 April 1969	establishment of regions and reform of Senate

¹¹⁸ B. Mirkine-Guetzévitch, *Les constitutions de L'Europe nouvelle, Id.*, p. 27.

¹¹⁹ It should be reminded that the constitution of Weimar Republic, of 11 August 1919, introduced the referendum institution as an arbitration between a president and a parliament. The act provided for a referendum ordered by the president on the bill passed by the parliament (Art. 73) or at the demand of a third part of parliament members, with support of one twentieth of parliament members authorized to vote. Regarding the latter case, such motion meant that publication of the statute was postponed. *Nowe konstytucje*, ed. J. Makowski, Księgarnia Hoesicka, 1925, p. 381.

23 April 1972	accession of Denmark, Ireland and Great Britain to the European Community
6 November 1988	self-determination of New Caledonia
20 September 1992	ratification of the treaty of Maastricht
29 May 2005	ratification of the treaty establishing Constitution for Europe

Table 4. National referendums in Western Europe (1945–2006)

Country	1945–2006	Including those before 1970	After 1970
Austria	2	0	2
Belgium	1	1	0
Denmark	16	8	8
Finland	1	0	1
France	12	8	4
Germany	0	0	0
Great Britain	1	0	1
Greece	4	4	0
Iceland	0	0	0
Ireland	28	3	25
Italy	63	1	62
Luxemburg	1	0	1
Malta	3	2	1
Netherland	1	0	1
Norway	2	0	2
Portugal	3	0	3
Spain	5	2	3
Sweden	5	2	3
Switzerland	396	NA	NA

René Rémond, a pre-eminent French historian and political scientist, reasoned that the Fifth Republic embodied authentic democratic orientation:

When in 1945 a decision was made to ask people for their opinion about the proposals regarding future political institutions, a practice of a referendum was cleansed of a sulphur smell hovering over this institution since the times of autocratic empire, which proved the difference between a democratic referendum and a plebiscite held to accomplish the goals of a ruler: in 2004 leftist democrats will be the first to make a demand that it should be the people to make a final decision about adoption of the European constitution. In 1962 de Gaulle postulated a change that would invest the nation with a new power: the president would no longer be elected by a small group of electors but by the nation. This meant that the General was rather a democrat than liberal. His resignation in 1969, which ensued from the rejection of the draft he put to a referendum, dispelled any doubts about his commitment to democracy.¹²⁰

The position of the referendum institution in the Fifth Republic Constitution requires special attention. The act of 1958 provided for the two kinds of the referendum. The first one aimed to approve constitutional amendments (Art. 89), which was actually a repetition of the solution applied by de Gaulle in autumn 1945 and also enshrined in the Constitution of the Fourth Republic in a slightly different form. Pursuant to Art. 89, acting upon the motion submitted by the prime minister and parliament members, the president is empowered to launch an initiative aimed at constitutional amendments. A draft or proposal of such an amendment should be passed by both parliament chambers in the same wording and accepted in a referendum. Referring to the regulations of the Third and Fourth Republic, the referendum alternative, acceptance of constitutional amendments in a form of the Congress resolution passed by

¹²⁰ R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*, p. 227. This is how de Gaulle explained the reasons for his resignation: "But how could de Gaulle be still responsible for France as a president if the French people – who he asked so solemnly for their opinion – decided that he was wrong with regard to the matter so germane to their future? Staying at his post in such a situation would just be unconceivable and would deprive him of honour and authority, and he was a founder of the new Republic whose bedrock and a driving force was, from the very beginning, a direct agreement between the people and their leader?" Ch. de Gaulle, *Pamiętniki nadziei*, *Id.*, p. 388.

the qualified majority of the three fifths of the votes casted, was perpetuated.

While the referendum institution adopting the Constitution was applied since spring 1946, a legislative referendum was absolutely innovative. *Référendum législatif*, had never been applied before in any other country with a constitutional-pluralistic system. Art. 11 stated that the president of the Republic, upon the motion submitted by the government during the parliament session or a joint motion of the two parliament chambers, announced in the Official Journal, may put to a referendum any draft bill on the organization of public authorities or aimed to give consent to the ratification of any treaty that being not in contravention to the Constitution, would impact the functioning of the institution. Thus, a referendum could be held to decide about the structure of public authorities or give consent to the ratification of international obligations of special significance (the treaties that may have impact on the national institutions). Regarding consent to the treaty ratification, the authors referred to the European treaties, which, in their view, should be put to a referendum. They were right in this respect and future political practice confirmed their approach. This form of asking people for their consent to the ratification of the treaties France intended to make was applied a number of times: in 1972 on the extension of the European Economic Community, in 1986 on the autonomy of New Caledonia, in 1992 on the Maastricht Treaty ratification and finally, in May 2005, a majority of the French people who participated in a referendum rejected ratification of the treaty establishing the Constitution for Europe (Rome Treaty signed in October 2004).¹²¹

As Francis Hamon put it, a legislative referendum was to be ordered by the top authorities as a kind of “the prince’s appeal.”¹²² Pursuant to Art. 11, application of a referendum requires cooperation between the president and the government, the government or the president and the parliament chambers in the event when this is ordered not during the parliament’s session. It should be underscored that the regulation specified in Art. 11 is quite close to the idea of André Tardieu, both with respect to the institution of the procedure (the president upon the prime minister’s motion) as well as the subject (decision on the structure of public authorities.)¹²³

¹²¹ See J. Gicquel, *Droit constitutionnel...*, *Id.*, p. 590.

¹²² See F. Hamon, *Le référendum. Études comparative*, L.G.D.J., 1995, p. 73.

¹²³ Architects of the Fifth Republic consciously did not adopt a referendum model where

Voting for ideas, which Tardieu called for, evolved into a legislative referendum and, which was in accordance with Tardieu and de Gaulle's intentions, also meant to be anti-oligarchic since it was the nation, upon the president's initiative and without the key participation of party elites, who was to make a final decision. Noteworthy, de Gaulle established the referendum institution but did not invest people with excessive powers, which demanded advocates of the republican democratism. It should be reminded that Raymond Carré de Malberg espoused empowering people with an effective legislative initiative in ordinary statutes as well as constitutional amendments. Similarly, René Capitant asserted that the Fifth Republic Constitution did not fully respond to a model of participative democracy. In the study *Démocratie et participation politique* Capitant reasoned that Constitution actually did not vest constituting power in the nation but only provided for the participation in such power.¹²⁴

Yet a status of the bills adopted directly by citizens was very high. Exemption of the referendum bills from the supervision of *Conseil constitutionnel* was of critical importance.¹²⁵ This meant that referendum acts received special status.¹²⁶ Referendum acts, thought to be the direct manifestation of *volonté générale*, were recognized as an act of the nation's constituting power that should by no means be subject to verification. Importantly, under Art. 11 provisions on the referendum, a few extremely significant

the president could act as an arbitrator and referee in a dispute between the government (parliamentary majority) and opposition. B. Mirkine-Guetzévitch asserted that the referendum institution was introduced into new constitutions of the European countries after 1918 and only in the arbitration format "to some extent substituted the president's power to dissolve parliament chambers." Certainly, in such a format a referendum was enshrined in the constitution of Weimar Republic. Noteworthy, such a format ran a risk of conflict between the two bodies of the executive power: president and government. Adoption of such a solution would invest the president with a negative power in relations with the government, which, in turn, would undermine a model of rationalized parliamentarism developed with intention of support lent to the parliamentary government acting with no president's endorsement. France adopted a referendum model that did not impair internal cohesion of the constitution passed with the intention to consolidate all executive power bodies.

¹²⁴ In René Capitant's view, people should be called by the president or parliament chambers to participate in exercising the constituting power but may not exercise *pouvoir constituant* on their own initiative. Moreover, the Constitution still provided for the parliamentary procedure of the constitutional revision and at the same time did not provide for the people's initiative in this area. R. Capitant, *Démocratie et participation politique*, *Id.*, p. 165.

¹²⁵ See L. Favoreu, L. Philip, *Les grands textes...*, *Id.*, pp. 162-174.

¹²⁶ See A. Sulikowski, *Konstytucja w systemie źródeł prawa V Republiki Francuskiej*, Uniwersytet Wrocławski, 2003.

decisions were made and constitutional amendment was put into effect. This is how election of the president of the Republic in general elections became effective in 1962. The consent to ratification of an international obligation is also recognized as the attainment of *pouvoir constituant*.

If we analyse all constitutional regulations on the referendum (Art. 11 and Art. 89), we may conclude that the Fifth Republic Constitution conferred upon the nation participation in the execution of *pouvoir constituant*. In those years, constitutions of the large European countries did not provide for any constitutional amendments effectuated directly by the people. Italy, for example, introduced a constitutional referendum as late as in 1970.¹²⁷

Thus, the Fifth Republic Constitution introduced an extended scope of general voting, which actually meant the democratization of the Republic and attainment of reformatory goals defined by Carré de Malberg and Capitant. The Fifth Republic referred to the early republican tradition open to the direct democracy and treated representation institutions with reserve. Carré de Malberg pictured it as a more legitimate and closer to the French revolution and principles of the post-revolution public law. Therefore, the Fifth Republic Constitution may be recognized as a posthumous victory of Carré de Malberg over Adhémar Esmein.

Francis Hamon, the author of an outstanding study on the institution of a referendum, asserts that it was Condorcet and not Rousseau who was progenitor of the direct democracy in France. In Hamon's view, French constitutionalism owes Condorcet a project of the referendum application in a large country, created with an intention of unrestricted expression of the people's will.¹²⁸ Anyway, a turn to direct democracy meant restoration of the cast of republican tradition, abandoned for many years after establishment of the Third Republic. References to this tradition became part of political discourse. In 1962 Georges

¹²⁷ See Art. 38 of the Constitution of the Republic of Italy, trans. Z. Witkowski, [in:] *Konstytucje państw Unii Europejskiej*, Wydawnictwo Sejmowe, 2011 p. 866.

¹²⁸ In F. Hamon's view, Rousseau asserted that direct democracy was possible to adopt only in small communities. Contrary to that opinion, Condorcet introduced people's initiative into the Girondist constitution draft. He proposed that every assembly at the lowest level could initiate constitutional revision and then the draft should be accepted by all district and next all department assemblies. The next stage of such a procedure would include adoption or rejection of the draft by a legislative body (parliament). If a draft was rejected, the will of fundamental assemblies would be of critical importance. In Hamon's view, the draft was aimed to reduce arbitrariness of Jacobins or, as he put it, "diminish the centre's influence on the country." See F. Hamon, *Le référendum...*, *Id.*, pp. 74–76.

Pompidou, prime minister, in his polemics with Paul Reynaud, referred to the Constitution of 1793 as a source of inspiration for the Fifth Republic and reasoned that people had right to decide about constitutional provisions.¹²⁹

According to the critics of the Fifth Republic, the legislative referendum was the continuation of Bonapartist plebiscitary traditions. Such an accusation was made by François Mitterrand and Pierre Mendès France.¹³⁰ Meanwhile, the legislative referendum institution performed primarily decision-making and legitimation functions;¹³¹ decision-making because de Gaulle entrusted people with making crucial decisions about political community and legitimation because referenda built up trust in the state in the early years of the Fifth Republic. De Gaulle's departure after the defeated referendum of 1969 sealed the legitimacy of the Fifth Republic, which was still challenged by those who contended that de Gaulle's assumption of power was actually *coup d'état*.

France was the first big Western country that turned to semi-direct democracy. Giovanni Sartori, a devoted critic of direct democracy, asserted that the referendum institution was a dangerous tool to attain any goals of the democratic system since its application ineluctably resulted in incompetent decisions.¹³² The author of *Théorie de la démocratie* contends that the degree of citizens' engagement goes along with extremism. In my view, any *in abstracto* assessment of the referendum institution is pointless if it is not supplemented by an analysis of its specific institutional form. France's case demonstrates that a referendum enhancing

¹²⁹ "In that case, Ladies and Gentlemen, Art. 11, one of the most principal in our Constitution, is crucial and really innovative as it provides space for the direct democracy for the first time since 1793 ...". *Intervetnion de M. Georges Pompidou. Premier ministre*, [in:] D. Maus, *Les grands textes...*, *Id.*, 1998, p. 92.

¹³⁰ See F. Mitterrand, *Le coup d'État permanent*, Plon, 1965. Pierre Mendès France's speech in the National Assembly, 1 June 1958: *Compte rendu de la séance de l'Assemblée, 1^{er} juin 1958*, [in:] *Documents pour servir à l'histoire...*, vol. I, *Id.*, pp. 107–110.

¹³¹ F. Hamon lists four functions of the referendum: legitimization, restriction of the power's arbitrability, arbitration and manifestation of trust. F. Hamon, *Le referendum...*, *Id.*, pp. 49–63. In-depth and interesting analysis of the political functions of the referendum institution is included in Laurence Morel's study, *Le recours au référendum*. The author discusses the reasons behind initiatives aimed to introduce the referendum institution: 1) avoid divisions inside one's own political movement, 2) provoke divisions among political competitors, 3) solve difficult issues in advance. See also A. Antoszewski, R. Herbut, *Demokracje zachodnioeuropejskie*, *Id.*, pp. 255–267.

¹³² See G. Sartori, *Théorie de la démocratie*, *Id.*, cited after the Polish edition: G. Sartori, *Teoria demokracji*, *Id.*, pp. 150–156. A wrong opinion on a plebiscitary nature of a referendum in the Fifth Republic is also voiced by Magdalena Musiał-Karp in her study *Referenda w państwach europejskich*, Wydawnictwo Adam Marszałek, 2008.

state's legitimization, a substantive and decision-making referendum is possible. Innovativeness of the Fifth Republic Constitution rested in coupling reconstruction of the strong national leadership with democratization of a political life without a risk of triggering the consequences Sartori and other critics of direct democracy warned against.

C. Professionalization of the Polity and Introduction of the Review of the Constitutionality of Acts

De Gaulle was aware that any good political system needs professionalization and consolidation of the state institutions. For these reasons, just after the war, he founded the School of National Administration (ENA – École nationale d'administration) and consolidated the Council of State by implementing a procedure for the obligatory review of bills submitted by the government, which was effectuated in July 1945. Moreover, since the Bayeux speech, he consistently defied any ideas aimed to weaken the position of the Upper Chamber in the political system. The Fifth Republic Constitution substantially consolidated the position of the Council of State that, after 160 years, regained a constitutional status it deserved.¹³³ In the light of the constitutional provisions, the opinion issued by the Council of State was obligatory for the draft decrees, government bills and ordonnances issued by the Council of Ministers (Art. 37, 38, 39).¹³⁴

Establishment of *Conseil constitutionnel* did not undermine the position of the Council of State that still performed functions of the administrative court of the highest instance, issuing relevant adjudications reviewing the constitutionality of administrative decisions. As I have already mentioned, government legislation was beyond the constitutional review performed by *Conseil constitutionnel*. De Gaulle did not weaken the Council of State's position after its adjudication on the Canal case, where the council members issued a negative opinion on the decree establishing the

¹³³ The Council of State enjoyed such a status in the 1848 Constitution of the Second Republic, whose Chapter VI provisions pertained to this organ. Before that, it was granted constitutional position in the Constitution of the 8th year (published on 4 December 1799). See J. Godechot, *Les Constitutions...*, *Id.*, pp.155–157 and 272–273.

¹³⁴ Interesting insights on the position of the Council of State in the Fifth Republic Constitution are included in the study of J. M. Sauvé, *Le conseil d'État...*, *Id.*

military tribunal against OAS members.¹³⁵ De Gaulle said that he restored the Republic's head, which also met expectations of the national administration and judicature.¹³⁶

Noteworthy, in a number of reform proposals, such as those forwarded in the Bardoux project, professionalization of the state was to be effectuated at the expense of the institutions holding a democratic mandate. In the Vichy political system, authoritarianism consolidating a position of administration and expert bodies is discernible. The authors of the Fifth Republic Constitution chose a different option: political professionalization was effectuated along with the state's democratization.

The Senate's status had a more complicated nature. De Gaulle was an outspoken advocate of a strong position of the Senate and consistently defied any attempts made to undermine the constitutional position of the Upper Chamber. The Senate played a crucial role in the Third Republic, where, along with the Lower Chamber, made and influenced law and, which is not less essential, enforced the government's accountability, declined in the Constitution of 1946. The Fourth Republic Constitution vested supreme powers in the Lower Chamber and only this branch of power fulfilled nation's sovereignty (Art. 3). A switch in the name of the upper chamber, which was no longer called the Senate but the Council of Republic was a symbolic manifestation of political inferiority of this body, which also pertained to the law-making area. The Fifth Republic Constitution just brought back the old name and a partnership position of the Upper Chamber. In other words, de Gaulle introduced a balanced bicameralism: consolidated the

¹³⁵ *Recours pour excès de pouvoir ordonnances du Président de la République circonstances exceptionnelles principes généraux du droit*, CE Ass. 19 oct. 1962, CANAL, Robin et Godot, Rec. 552, [in:] M. Long, P. Weil, G. Braibant, P. Delvolvé, *Les grands arrêts de la jurisprudence administrative*, Dalloz, 2010. De Gaulle reacted sharply, enforcing changes in the composition of the Council of State but neither reduced its competences nor weakened a political position. The Council of State preserved autonomy in the aftermath of the conflict-soothing actions undertaken by Michel Debré, Alexandre Parodi and Georges Pompidou. The author's interview with Thierry Olson, Paris, 15 May 2010. De Gaulle abided by a positive opinion about that body in his *Mémoires de guerre*. After resignation from the president's office in 1969 he wrote: "The Council of State always comprises elite of outstanding minds formed by the law or economic sciences university course. Moreover, the Council youngest members only recently graduated from the School of National Administration, where they learnt the basics of those sciences. Many of the Council members, notwithstanding their age, remain neutral in their analyses of legal issues and disputable questions, which is *raison d'être* and the glory of this state organ." Ch. de Gaulle, *Mémoires d'espoir*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *Pamiętniki nadziei*, *Id.*, pp. 336–337.

¹³⁶ *ibid.*, p. 340.

position of the Senate but did not restore its past hegemony. Regulations of the legislative process, based on the partnership participation of both parliament chambers, were of key importance. Noteworthy, between 1958 and 1962 composition of the electoral college electing the president was almost the same as the one that elected senators, which provoked Marcel Prélôt to write about the *Senatorial Republic* (*République sénatoriale*).¹³⁷ Like in the past, the Senate ensured representation of the territorial communities of the Republic and was the parliament chamber that represented the French people living abroad.¹³⁸ Importantly, the Constitution provided that the Senate speaker substituted the president if his office was vacant (Art. 7, Item 3) and, like the speaker of the Lower Chamber, was empowered to launch the review of the constitutionality of acts. Yet the Senate did not regain the position it had in the Third Republic. The authors of the Fifth Republic Constitution posited that the government held accountability solely to the Lower Chamber. Moreover, a political position of the parliament weakened in relation to the president and the government.

Also the establishment of the Constitutional Council (*Conseil constitutionnel*) and its political ramifications deserve attention. Undoubtedly, the Constitutional Council was established as part of a model of rationalized parliamentarism. Léon Noël, the first chairman of the Constitutional Council and a very influential French politician, mentioned that the very idea of the establishment of the Council was put forward soon after the team of experts framed regulations restricting the statutory domain, which was by no means intended to contain parliament within its scope of activity.¹³⁹ Similarly, Michel Debré defined a sense of this institution as “a countermeasure against abuses of the parliamentary system”¹⁴⁰ although he had earlier demanded an extensive review of the constitutionality of acts along with the power to level a charge of unconstitutionality in a court trial.

¹³⁷ M. Prélôt, *Pour comprendre...*, *Id.*, pp. 46–49.

¹³⁸ Since July 2008 the French residing abroad are represented also in the Chamber of Deputies. See Art. 24 of the Constitution of the Fifth Republic of France.

¹³⁹ See L. Noël, *Comprendre de Gaulle*, Plon, 1972. Interestingly, establishment of the Constitutional Council was opposed by René Cassin, deputy chair of the Council of State. See *Compte rendu de la réunion...*, *Id.*, p. 249. Max Querrien also challenged the very sense of this institution as a rule and Michel Aurillac expressed the view that it was only justified as an institution reviewing a charge of unconstitutionality levelled by the Council of State or the Court of Appeal. *Compte rendu de la réunion...*, *Id.*, p. 382.

¹⁴⁰ M. Debré, *Discours devant le Conseil d'État*, *Id.*, cited after the Polish edition: M. Debré, *A speech in the Council of State* (*Przemówienie przed Radą Stanu...*), *Id.*, p. 237.

Indeed, over the initial period, the Constitutional Council issued adjudications interpreting restrictively a scope of statutory domain, which contributed to the extension of the rationing power of the government.¹⁴¹ Notworthily, the review primarily concerned bills adopted by the parliament. Thus, the laws made by the government, that were subject to the review of the Council of State, were beyond revision of the Constitutional Council, which additionally consolidated the position of the executive power. Moreover, the Council obligatorily reviewed conformity of the regulations produced by parliamentary chambers with the Constitution which, as I have already mentioned, should be recognized as a hallmark of the French system of rationalized parliamentarism. This may indicate that the Constitutional Council became a supervisor of the applications of the Constitution as a result of the obligatory review of the constitutionality of organic law.¹⁴² Moreover, the Constitution of 4 October 1958 vested the Council with the powers to review legitimacy of elections, which also proved that the parliament's competences were significantly reduced. Such power, the review of the legality of elections, was vested in the parliament before. By constraining a number of bodies empowered to initiate the review of the constitutionality of laws to the president, prime minister and speakers of the parliament chambers enabled the Council to counteract abuses of the parliament. The French republican tradition did not allow for the adoption of Kelsen's model of the review of the constitutionality of acts, where a consequent review was applied. Moreover, the judiciary, American-like model of the review of the constitutionality of acts was also recognized as unacceptable although proposals to apply it had been put forward before. France could not become a "constitutional country," where the constitutional court would play an active role, as John Kelly put it in *A Short History of Western Legal Theory*.¹⁴³ Two determinants played crucial role in that process: a critical attitude towards the power of judges and concern for the law of the Republic, which pronounced a common will. The first one decided about establishment of the

¹⁴¹ See L. Garlicki, *Rada Konstytucyjna...*, *Id.*, pp. 21–22.

¹⁴² A. Kubiak defined the obligatory review of the constitutionality of organic laws and regulations of the parliament chamber as a protective function aimed to perpetuate constitutional supremacy of the executive power. *Idem.*, *Francuska kontrola konstytucyjności ustaw*, *Id.*, p. 101.

¹⁴³ J. Kelly, *A Short History of Western Legal Theory*, Polish ed.: *Historia zachodniej teorii prawa*, Wyd. WAM, 2006, pp. 425–426.

non-judiciary organ of the constitutional review and its political composition, while the latter one about a preventive model of the review of the constitutionality of acts.

The Constitutional Council comprised 9 members elected for a 9-year tenure and former presidents of Republic, who held their office for life. Noteworthy, each institution that represented nation's sovereignty, the president, speakers of the Lower and Upper Chamber, were empowered to nominate candidates for its members. The Constitution established the Constitutional Council as a political body and political practice proved that the majority of its members were political elite and not jurists.¹⁴⁴ On the other hand, consideration for the laws of the Republic determined the choice of the preventive model of the constitutional review. Moreover, Art. 3 of the Constitution provided that the Council was not the institution expressing the nation's sovereignty, which was essential for any *ex ante* review, and had no legitimacy comparable to the president and the parliament.¹⁴⁵ The attitude of Dominique Rousseau, who recognized the Constitutional Council as an institution of constitutional democracy, vested with strong legitimization, gets no support either in the constitutional institutions or political practice.¹⁴⁶ Preventive and abstractive review ensures certainty of law and respect for the principle that effective law of the Republic may not be challenged *ex post*.

Yet the two innovations that later invigorated the French constitutional judiciary have already been pictured in the studies on the constitutional drafting. In the discussion held at the Constitutional Council, a demand was tabled to increase a number of subjects entitled to institute the constitutional review by senators and parliament members.¹⁴⁷ As early as at the stage of studies on the *avant projet*, Michel Aurillac, a Council of State expert, reasoned that establishment of the Constitutional Council was sensible provided that it is

¹⁴⁴ G. Carcassonne, *Les membres du Conseil constitutionnel: 1958–2008*, Colloque du cinquante-enaire du Conseil constitutionnel, 3 novembre 2008, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/Colloques/carcassonne_031108.pdf.

¹⁴⁵ Georges Vedel asserted that the Constitutional Council held no democratic mandate and, consequently, may review constitution but not freely interpret it in his acclaimed article *Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme*. G. Vedel, *Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme*, Pouvoirs, 1988, No. 45.

¹⁴⁶ See D. Rousseau, *La justice constitutionnelle en Europe*, L.G.D.J., 2020, cited after the Polish edition: D. Rousseau, *Sądownictwo konstytucyjne w Europie*, Wydawnictwo Sejmowe, 1999.

¹⁴⁷ See L. Philip, *Conseil constitutionnel*, [in:] *L'écriture de la Constitution de 1958...*, *Id.*, pp. 471–472.

a court examining a charge of unconstitutionality upon the motion tabled by the Council of State or the Court of Cassation (*Cour de cassation*).¹⁴⁸ Interestingly, a similar proposal of the constitutional review framed in such a formula was included in the project of reforms of the Committee, tabled by senators Bardoux and Carré de Malberg. Similar proposals were offered by René Capitant and Michel Debré. As we know, an obligatory review of the constitutionality of acts became one of the articles of the Fifth Republic Constitution.

It is crucial that the very act of the establishment of the Council and the possibility of the constitutional review built up the Constitution superiority as a source of law. A forecast made by F. Luchaire, where he posited that “the Constitutional Council would restrict itself to resolving disputes between the state’s organs”¹⁴⁹ could never be fulfilled as the very fact that the Council was established, profoundly changed a hierarchy of legal acts. A definition of the act as a manifestation of general will within the framework of the Constitution meant that statutory norms became subordinated to the constitutional norms. Another proof for the supremacy of the Constitution was the preventive review of international obligations, which was, as I have already mentioned, an innovative solution in Western Europe.

Piotr Tuleja rightly observes that “in France evolution from classical majority representation to the constitutional democracy is associated with the development of the constitutional judiciary.”¹⁵⁰ Yet the fact that supremacy of the Constitution has resulted from the democratization is underappreciated. The Constitutional referenda of 1946 and 1958 re-invested the people with the managing power and a wide application of the popular vote (general presidential elections, referendums) helped the people to regain the state. Thus, the parliament lost the sovereign’s position and has become just one of the established powers. As the nation’s act, the Constitution, and not any parliamentary statute has become the supreme source of law.

¹⁴⁸ *Compte rendu de la réunion...*, *Id.*, p. 382.

¹⁴⁹ *ibid*

¹⁵⁰ “Only introduction of the review of the constitutionality of laws determined supremacy of the Constitution. Constitutional democracy inhibits automatic assignment of the nation’s will to the parliament, assumes separation of the sovereign’s will and the legislator’s will, which makes it possible to consider it lawful to oppose the will of the legislature.” P. Tuleja, *Stosowanie Konstytucji w świetle zasady jej nadrzędności (wybrane problemy)*, Kantor Wydaw. Zakamycze, 2003, p. 38; See also K. Wojtyczek, *Sukces, który zadziwia: Metamorfoza francuskiej Rady Konstytucyjnej*, [in:] *Prawa Człowieka, Społeczeństwo Obywatelskie, Państwo Demokratyczne*, Wydawnictwo Sejmowe, 2010.

Maciej Starzewski asserted that French Revolution had elevated an idea of the nation's special governing power in a close association with the democratic tradition.¹⁵¹ The Fifth Republic referred to that tradition through the introduction of the democratic formula of the execution of the constituting power. Thus, Carré de Malberg's thesis that reference to the direct democracy would result in abolishing parliament's supremacy and establishing the review of the constitutionality of acts turned out to be true.

Although the authors of the Constitution of 1958 did not aim to introduce any wide, material review of the constitutionality of acts based on the Declaration of the Rights of Man and the Citizen, establishment of the Constitutional Council paved the way to such a possibility. In the 1960s Jerzy Stembrowicz rightly observed that contrary to the Fourth Republic, where the review of the constitutionality of acts was not enshrined in the constitution but was a power of the Constitutional Committee, the Constitution of the Fifth Republic provided no such exclusion and referred to the Declaration of the Rights of Man and of the Citizen.¹⁵² Importantly, de Gaulle consistently, since the times of Free France, underscored a supreme status of the rights stipulated in the Declaration of 1789 and their primacy in relation to the legislator's arbitrary will.¹⁵³ Adjudication of 1971 that created the review's bed-

¹⁵¹ M. Starzewski, *Środki zabezpieczenia prawnego...*, pp. 27–28.

¹⁵² J. Stembrowicz, *Parlament V Republiki...*, *Id.*, p. 221.

¹⁵³ Noteworthy, Andrzej Kubiak, an expert at the French model of the review of the constitutionality of acts, formulated a hypothesis that such evolution was in line with the intentions of the founding fathers of the Fifth Republic: "However, a claim that review of the constitutionality of acts in the Fifth Republic – solely aimed to protect a new form of governance, different from the past one, would be not quite true. It can't even be explicitly claimed that this was the only original intention of the authors of the constitution. The 20-year experience of the Constitutional Council proves that despite characteristics of the French review format, the body facilitates execution of the second function: protection of civil rights. One may even put forward a hypothesis that such a function was intended to balance, although partially, authoritarian trends of the political system of the Fifth Republic." A. Kubiak, *Francuska koncepcja kontroli konstytucyjności ustaw*, *Id.*, 102. René Rémond put forward another interesting opinion. In his view, de Gaulle's appeal of 18 June 1940 was the underlying cause for the development of the state of law in France. "Thus, Gaullism has contributed a new quality to political debates. Would it be something wrong to think that exceptional attention that is nowadays paid to the notion of "the state of law" is a direct and delayed outcome of the 18th of July? Anyway, even if its authors may have not predicted all possible scenarios of further developments, the Constitution of the Fifth Republic, certainly a political product of Gaullists, has established the constitutional review of the statutes by including the distinction between legitimization and legality. This implies the principle that any bill passed by the democratic majority may be contrary to the common rules of law: for this purpose the Constitution established the judiciary, the Constitutional Council whose rulings are irrevocable as they are binding upon

rock would have been impossible if the Fifth Republic had not institutionalized republican principles, which was in accordance with de Gaulle's position, referred to in the Constitution's preamble to the Declaration of the Rights of Man and of the Citizen of 1789 and "confirmed and supplemented by the preamble to the Constitution of 1946."¹⁵⁴ Moreover, exclusion of the human and civil rights from the set of matters determined in a referendum manifested their special status and contributed to the formation of the material constitutional review. Human and civil rights, protected in the Declaration, were recognized as the supreme constitutional norms. Thus, one might say that the Fifth Republic paved the way to the review of the constitutionality of acts and protection of human rights to the extent as large as the adopted framework of the republican tradition.

D. Power of the Republican Legal Tradition

A doctrinal analysis of the constitutional drafting process reveals how crucial for the French legal order are the principles of the nation's sovereignty and indivisibility of the Republic. At that stage any proposals contrary to those principles were rejected. Consequently, professional and business associations were barred from delegating their representatives to the state organs, including the Senate. As I have mentioned before, this was the only non-republican idea in de Gaulle's constitutional thought. De Gaulle's corporate ideas inspired by the thoughts of such politicians as Albert de Mun and René de La Tour du Pin could not be in line with the fundamental constitutional rules of the Republic. Michel Debré and Guy Mollet blocked de Gaulle's proposition at the very initial stage of the *avant projet* drafting. M. Debré raised the question of dangerous ramifications of the politicization of economic interests. On the other hand, G. Mollet highlighted

all other authorities. This was a historical scope of that peculiar gesture being the founding act of Gaullism." R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, Iskry, 2008, pp. 221–223. Interesting insights on the status of the Declaration and a role of the constitutional judiciary are included in the study of M. Troper, *Pour une théorie juridique de l'État*, LÉviathan PUF, 1994.

¹⁵⁴ Philip de Gaulle's testimony that his father was critical of reference to the Declaration of the Rights of Man and of the Citizen of 1789 is not confirmed in the light of analysis of documents. Ph. de Gaulle, *De Gaulle, mon père*, *Id.*, cited after the Polish edition: Ph. de Gaulle, *De Gaulle mój ojciec*, *Id.*, vol. 2, p. 52.

a contradiction between that proposal of de Gaulle and the principle of the origins of the legislative power. In his view, these were the general elections where the whole nation could exert its sovereignty.¹⁵⁵ When 11 years later de Gaulle made another attempt to effectuate a corporatist formula of the Senate, combined with the project of regionalization of France, his opponents once again referred to the primary republican principles.¹⁵⁶ Thus, the principles of the nation's sovereignty and indivisibility of the Republic have undoubtedly a status of the fundamental constitutional principles. Their special significance rests in the elimination of any colliding institutional solutions, which contributes to the extremely strong internal cohesion of the Constitution.

Power of the republican legal tradition is also discernible in the constitutional regulations of the judiciary system and the status of judges.¹⁵⁷ The authors of the 1958 Constitution purposefully did not apply the term *pouvoir judiciaire* (judicature), which would mean that it was granted the identical legitimization as that of the government and the parliament.¹⁵⁸ The application of such a term would also trigger another unintended ramification, common judiciary would be vested with a power to adjudicate on administrative disputes. Meanwhile, in the French legal tradition, the judiciary is not recognized as an institution intended to exert the nation's sovereignty and is not granted with the status of the one of three powers.

Introduction of the term *autorité judiciaire* (judiciary) was absolutely in line with the republican tradition, independence of the judiciary was confirmed by the Constitution and there was no need to follow any rules resulting from the application of the term *pouvoir judiciaire*. Constitutional provisions confirmed the principle of non-removability of judges and determined that their status would be regulated by an organic law. The latter change was in line with the idea promoted by Debré in 1940s in *La République et son pouvoir*.¹⁵⁹ The minister of justice, who was in charge of the team of experts preparing those provisions, intended to restore

¹⁵⁵ An interesting stance on that issue was adopted by P. Pflimlin, a minister of state, who asserted that legal-economic regulations were primarily included in the directives and decrees so it was the Social – Economic Council where business interests should be represented. See *Compte rendu de la réunion...*, *Id.*, p. 247.

¹⁵⁶ A. Poher, *Extrait de discours prononcé par M. Alain Poher président du Sénat, devant le Sénat le 2 avril 1969*, [in:] D. Maus, *Les grands textes...*, *Id.*, pp. 105–106.

¹⁵⁷ J. Gicquel, *Droit constitutionnel...*, *Id.*, p. 635.

¹⁵⁸ R. Badinter, *Justice*, [in:] O. Duhamel, Y. Mény, *Dictionnaire constitutionnel*, *Id.*, pp. 549–550.

¹⁵⁹ M. Debré, *La République et son pouvoir*, Nagel, 1950. S. Thierry, Renoux, *L'autorité judiciaire*, [in:] *L'écriture de la Constitution de 1958...*, *Id.*, p. 687.

the process of the recovery of the judiciary system and stabilize the position of judges. In the speech delivered at the Council of State, the minister expressed conviction that independent judiciary system guaranteed respect for individual freedoms. Yet the constitutional regulations had to respect the framework of the republican tradition. Therefore, the minister of justice was empowered to nominate judges and no consent was given to the majority of the judicial corporation representatives in the High Judiciary Council.¹⁶⁰ Pursuant to the provisions of the 1958 Constitution, judges are appointed by the president upon the motion tabled by the minister of justice, while the High Judiciary Council is only empowered to review motions, except for the judges of the Court of Cassation and the first president of the Court of Appeal where it is the High Judiciary Council that tables a motion to the president to appoint them. Apart from the aforementioned competences, the High Judiciary Council was to be a disciplinary court for judges and consult application of the prerogative of mercy. Noteworthy, the Constitution retained the status of prosecutors who were subordinated to the minister of justice.¹⁶¹

De Gaulle was critical of any appointments of judges made in the parliament. In the Épinal speech he harshly criticized appointment of the persons recommended by political parties and elected by the speaker of *Chambre Basse* (Lower Chamber) to the High Council of the Judiciary.¹⁶² The judiciary system shaped in 1958 was under a strong influence of the executive power, while the position of the judicial corporation was relatively weak in the High Judicial Council. The constitutional draft provisions were quite meaningful in this respect. In its original version, *projet avant* entrusted the High Judiciary Council with a task to guard independence of the judiciary system. The draft submitted to the Constitutional Committee posited that the High Council of the Judiciary members were to be appointed by the president for a 6-year tenure but two-thirds of its composition should be professionally active or retired judges. In the discussion held at the Committee, Michel Debré declared that designation of the Council members according to the procedures applied with respect to the university

¹⁶⁰ R. Perrot, *Le conseil supérieur...*, *Id.*

¹⁶¹ K. Sitkowska, *Pozycja ustrojowa i karnoprosesowa prokuratury w Polsce na tle prawnoporównawczym*, Dom Organizatora, 2012, pp. 109–111. See also A. Simiaszko, M. Jankowski, M. Wojtyczek, *Uytuowanie prokuratury w wybranych krajach*, Prokuratura, 2000, No. 2, p. 15.

¹⁶² Ch. de Gaulle, *Discours prononcé à Épinal...*, *Id.*, cited after the Polish edition: Ch. de Gaulle, *A speech in Épinal (Wystąpienie w Épinal...)*, *Id.*, pp. 91–97.

bodies would be satisfactory for that institution.¹⁶³ The Constitutional Committee suggested that the head of state should preside the High Council of the Judiciary and half of its members were judges while another half of the presidential nominees.¹⁶⁴ Yet, in the final version sent to a referendum, a few significant amendments were put into effect. According to the final proposal, it was the president who was to guarantee independence of the judiciary system, and the High Council of the Judiciary was to be an institution supporting him in that mission. The Council's deputy chair was, by the force of law, the minister of justice (Art. 64). The Constitution provided that the president nominated 9 members of the Council on the conditions specified in the organic law, which eliminated a threat of the transformation of that institution into the body predominated by the judicial corporation. That was a significant modification in the system forged in the years of the Fourth Republic, when a motion of the nomination of judges was tabled by the High Council of the Judiciary composed of the representatives of political groups and corporations.¹⁶⁵

Noteworthy, despite significant modifications, subsequent amendments to Art. 64, effectuated in 1993 and 2008, did not undermine the principle of the nomination of judges and prosecutors by the executive power and did not result in the predominance of the representatives of the judiciary system in the High Council of the Judiciary.¹⁶⁶

The Fifth Republic did not evolve into any republican monarchy either in the axiological or institutional dimension. Regarding axiological dimension, consolidation of the republican tradition in the Constitution's preamble was crucial. By enacting the 1958 Constitution the French people proclaimed in its preamble commitment to human rights and principles of national sovereignty, just as they were specified in the Declaration of 1789, confirmed and

¹⁶³ See also T. S. Renoux, *L'autorité judiciaire*, [in:] D. Maus, I. Favereu, J.-L. Parodi, *L'écriture de la Constitution de 1958. Acte du colloque du XXX^{ème} anniversaire Aix-en-Provence 8, 9, 10 septembre 1988*, Economica, 1992, p. 694.

¹⁶⁴ *Documents pour servir à l'histoire...*, vol. II, *Id.*, pp. 360–361.

¹⁶⁵ The Constitution of 1946 established the High Council of the Judiciary composed of, apart from the president and the minister of justice, 6 people elected by the National Assembly but not its members, 4 judges, 2 representatives of judicial professions nominated by the president.

¹⁶⁶ P. Ardant, *Institutions politiques...*, *Id.*, pp. 633–634. Noteworthy, the demand for a stronger representation of judges in the High Council of the Judiciary was tabled by René Capitant when he was the minister of justice. H. Maynier, *René Capitant, ministre de la Justice*, *Id.*, p. 28.

supplemented by the preamble to the Constitution of 1946. Article 1, fundamental for the national identity, defined France as an indivisible, secular, democratic and social Republic. Bertrand Mathieu asserts that the authors of the Constitution of 1958 became part of the French republican tradition.¹⁶⁷ Actually, the Fifth Republic Constitution was something more than just an act of becoming part of the republican tradition. Certainly, this act consolidated republican constitutional identity of France. The preamble and the first three articles integrated all essential republican keynotes.¹⁶⁸ Just like the doctrine of Free France and the Fourth Republic Constitution, the act of 1958 confirmed inviolability of the republican form of governance. Furthermore, it consolidated constitutional status of the Declaration of the Rights of Man and of the Citizen supplemented by the preamble to the Constitution of 1946 and thus elevated a status of the fundamental principles recognized in the statutes of the Republic. The Fifth Republic Constitution established its primacy in the full dimension, including all elements of the future of the “constitutional bloc.” Yet it should once again be underscored that 1971 adjudication of the Constitutional Council, establishing the bedrock for the material review, would have been impossible if the Fifth Republic had not invested republican values with a strong constitutional status, which was in accordance with de Gaulle’s line.

Another aspect of the continuity in the republican legal heritage has also been omitted: the Constitution of 1958 brought back to life the legal institutions established prior to 1870. The Constitutional Council (*Conseil d’État*) was established by the Constitution of Year VII and that of 1848 where a separate chapter was devoted to that subject. One might also say that the Fifth Republic gave a new shape to the organic laws that were before in force as the acts whose status was the same as that of ordinary acts. Moreover, it also gave a new status to *ordonnances*¹⁶⁹ that were applied in the Constitutional Chart and July Monarchy laws as the executive acts. Free France used them in emergency periods. The Fifth Republic assigned them a new constitutional meaning.

¹⁶⁷ See the statement of Bertrand Mathieu, who said that because of the rules the founding fathers of the Fifth Republic referred to, the Constitution of 1958 became part of the French republican tradition: *VII^e Congrès de droit constitutionnel*, Paris 25–26–27 septembre 2008, RFDC, 2009, No. 77, pp. 36–37.

¹⁶⁸ See V. Constantinesco, S. Pierré-Caps, *Droit constitutionnel*, PUF, 2004, p. 363.

¹⁶⁹ The constitutional drafting process included an analysis of historical incarnations of those institutions. See *Note concernant les lois organiques*, *Documents pour servir à l’histoire...*, vol. I, *Id.*, p. 336.

A formula of the republican monarchy could describe institutional transformations effected on de Gaulle's initiative in the event that the Fifth Republic Constitution restored the political principles of July Monarchy or the Third Republic at the initial stage of its existence when, according to the definition reminded by Jerzy Stembrowicz, it was characterized by the "absence of the prince"¹⁷⁰ and was capable of evolving into the constitutional monarchy with a distinct separation of executive and legislative powers.¹⁷¹ Presumably, those constitutional systems were internally "inconsistent" since they were built on the underpinnings of the literally understood Montesquieu's theory, they were challenged by the parliamentary governance. They opposed the power transfer to a leader of parliamentary majority but did not invest a monarch with effective tools for governing.

The king's position in the July Monarchy referred to the concept of neutral and moderating power, like that in the thought of Benjamin Constant.¹⁷² Meanwhile, the Fifth Republic Constitution established completely new institutions by investing the executive power with considerably more powerful instruments than those from the years of the Constitutional Chart and July Monarchy. The Constitution of 1958 built an internally coherent political system. When the president of France enjoys support of the parliamentary majority he does not exercise neutral power and becomes an active arbitrator and national leader capable of ruling through the government. Certainly, he commands the largest scope of power compared to the leaders of the constitutional and pluralistic countries. On the other hand, under *cohabitation* conditions a range of instruments the prime minister may use is significantly more restricted than that in command of the chancellor of Germany or the British prime minister.

In a number of analyses, personalized power was recognized as something inherent to the monarchy and contradictory to the republican tradition. In my view, such interpretation is wrong. Republican systems have always accepted the executive power wielded by an individual holding a democratic mandate. Collegial executive may not be recognized as a *sine qua non* condition of the Republic. Noteworthy, the Second Republic Constitution

¹⁷⁰ J. Stembrowicz, *Rząd w systemie parlamentarnym*, *Id.*, p. 61.

¹⁷¹ Affinities between the Fifth Republic and July Monarchy („Orlean parliamentarism”) were also discussed by Wiesław Skrzydło in his study *Istota przemian polityczno-ustrojowych powojennej Francji (IV i V Republika)*, Wydział Prawa UMCS, 1963.

¹⁷² See foot-note p. 576.

introduced general presidential elections with no authoritarian intentions. Certainly, other monarchist traces are discernible in the Constitution of 1958, including chairing the Council of Ministers by the president. Yet this is not enough to define the Fifth Republic as a republican monarchy.

Possibly, the notion of the republican monarchy could be applied to describe constitutional proposals tabled by Michel Debré. It was him who in 1943 was the first to propose the term ‘a republican monarchy’ when he wrote that “a republican president, just like the king, may perform a monarch’s function.”¹⁷³ De Gaulle’s close aide recognized a president as a supervisor of a prime minister and a real national leader.

Debré’s thought refers distinctly to the historical pattern from the years of the monarchy governed by strong chancellors – Richelieu and Colbert. Yet the Fifth Republic Constitution placed national leadership in the presidency and paved the way to the direct democracy. Democratization of the Republic has distanced modern France from the monarchist tradition.

The way President de Gaulle wielded power, which provokes associations with the past system, is not sufficient proof to interpret the Constitution of 1958 as a republican monarchy. Indeed, de Gaulle was convinced that his mandate was based on the exceptional historical merit in the years when it was he who France was.¹⁷⁴ According to J. Touchard, de Gaulle liked the term “a republican monarchy.”¹⁷⁵ “Monarchist” impressions could also be aroused by his cultural policy, where he consciously sought to restore the position of France as a cultural superpower.¹⁷⁶ René Rémond perceived it as continuation of the royal patronage. Noteworthy, the founding father of the Fifth Republic established the ministry of culture and entrusted that office to André Malraux¹⁷⁷ who assigned that area an exceptional significance.

¹⁷³ M. Debré, *Le problème constitutionnel français*, *Id.*, cited after the Polish edition: M. Debré, *Konstytucyjny problem Francji*, *Id.*, p.153.

¹⁷⁴ F. Mauriac, *De Gaulle*, *Id.*

¹⁷⁵ J. Touchard, *Le gaullisme 1940–69*, p.537.

¹⁷⁶ “By continuing a monarchist tradition, centralized France managed to retain a crucial role of a patron and repository of culture. By coupling education and national culture, the state produced multitudinous regulations and endorsed establishment of a large number of organs and institutions responsible for culture.” P. Ory, *L’État et la culture de la révolution à 1959*, [in:] *Institutions et vie culturelles*, ed. J. Perret, G. Saez, Documentation Française, 2003, p.70. See also R. Rémond, *Les droites aujourd’hui*, *Id.*, R. Rémond, *Francuska prawica dzisiaj*, *Id.*

¹⁷⁷ Andre Malraux (1901–1976), a revolutionist, writer, Gaullist politician; went on the archeological mission to Cambodia, 1923; joined local revolutionaries; played crucial role in Kuomintang until 1927; left the movement when Chiang Kai-shek broke off

However, de Gaulle's constitutional idea did not develop as a synthesis of the republican and monarchist tradition. The Founding Father of the Fifth Republic was a continuator of the republican nationalism. De Gaulle invested that stream with institutional maturity and released it from the burden of authoritarianism, which was rightly assigned to the dictatorship of Napoleon III and Boulangism. Importantly, the Fifth Republic Constitution coupled an idea of a strong and sovereign country with the authentic democratization. The Fifth Republic political system combined M. Barrès' thought of the president elected in general elections and the democratic republic, as well as Ch. Péguy's ideas on the synthesis of order and freedom.

De Gaulle totally revoked functional criticism of the Republic. The Constitution of 1958 provided the Republic with effective governance and "restored its head" as André Tardieu used to put it. Thus, de Gaulle managed to attract a right-wing public, so far critical of the republican order, into the republican tradition.¹⁷⁸ Consequently, the arguments against the Fifth Republic that Maurras used so far, reasoning that it "was a systemized anarchy or manifestation of the predominance of interests, feelings and will of political parties and not national interest," became pointless.¹⁷⁹ The

with communists; returned to France through Afghanistan and Persia; was awarded the Goncourt prize for *La condition humaine*, Polish ed.: *Dola człowieka* in 1933; was appointed a president of the World Anti-Fascist Committee; organized the Republican Air Force and took their command during civil war in Spain; wounded and taken prison in 1940; escaped and organized (under pseudonym "colonel Berger") resistance in central France; wounded and arrested by Gestapo but not recognized; released by FFI (Forces Françaises de l'Intérieur – French Home Army) in Toulouse; took command of the brigade Alsace – Lorraine, later incorporated into the First French Army; close aide of de Gaulle; minister of information in the interim government; set up (along with de Gaulle) RPF; responsible for party propaganda; was appointed a minister of culture in de Gaulle's government, 1958; played crucial role in the government policy; author of novels, including *Le conquérants* (1928, Polish edition: *Zdobycy*, trans. Adam Ważyk, Rój, 1936), *La condition humaine* (1933, Polish edition: *Dola człowieka*, transl. Adam Ważyk, Nowości Literackie, 1935), *Le temps du mépris* (1935, Polish edition: *Czas pogardy*, transl. Waław Rogowicz, Rój, 1936). See J. Czapski, *Tumult i widma*, Znak, 1997; Ph. de Saint Robert, *Malraux*, [in:] *Dictionnaire de Gaulle*, *Id.*, 709–703; G. Lanson, P. Truffrau, *Historia literatury francuskiej w zarysie*, PWN, 1965, 697–700. B. Gierat-Biedroń, *André Malraux – gaullizm w kulturze*, Forum Europejskie, 2003, no 5; K. Kowalski, *Francja*, [in:] *Europejskie modele polityki kulturalnej*, Instytut Europeistyki Uniwersytetu Jagiellońskiego, 2005, pp.85–109.

¹⁷⁸ R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*, pp. 72–81.

¹⁷⁹ In the constitutional referendum of 1958, leaders of Action française called for the "yes" voting primarily because they rejected the Fourth Republic, "whose politics was disastrous, led to anarchy and impotence of the state," *Chronologia Akcji Francuskiej i Karola Maurrasa*, [in:] J. Bartyzel, D. Góra-Szopiński (ed.), *Nacjonalizm*

Fifth Republic provided France with prestige, effective governance and restored the country a leading role in Europe. This was confirmed in foreign opinions about the new Constitution.¹⁸⁰ Interestingly, Polish emigration centres, primarily the Paris-based “Kultura” edited by Jerzy Giedroyc, warmly welcomed establishment of the Fifth Republic. In their view, the new Constitution was an act of the restoration of an effective governance and adjustment to the requirements of international competition.¹⁸¹

It is necessary to underscore again that de Gaulle’s political work, beginning from 18 June 1944, had a republican nature. During World War II, de Gaulle, as a leader of Free France, consistently consolidated republican tradition in the dispute with Vichy. The decisions he made as the leader of Free France and the prime minister of the interim government lay at the roots of constitutionalism of republican principles and revealed a lucid reference to the Declaration of the Rights of Man and of the Citizen of 1789, whose position in the two post-war constitutions, particularly in that of 1958 was substantially consolidated. To a large degree, those decisions contributed to the broad acceptance of republican principles and consensus on the Republic.¹⁸² In view of the modern French people, de Gaulle is the greatest historical symbol of republican values.

Thus, the Fifth Republic Constitution consolidated the republican constitutional identity of France more than its predecessor. The authors of this Act did not return to the past and created it as an original draft. Coupling the idea of strong presidency with the democratization of the Republic, adoption of the original model

a konserwatyzm..., *Id.*, p. 509.

¹⁸⁰ D. Johnson, *Les conditions politiques de la transition entre la IV^e et la V^e République*, Espoir, 2007, no 151; A. Giovanelli, *La V^e République vue d'en face*, [in:] Pouvoirs, 1989, No. 50.

¹⁸¹ “The dominant political position of the National Assembly, characteristic for the political system of the Fourth Republic, could be convincible at the development of capitalism based on a free play of interests, when the speed of transformation and changes in international relations were slow, which allowed for the post-factum adjustments. The French liberal-parliamentary system had its moments of glory in the 1890s and prolonged after World War I began to undermine the position of France as a superpower, which undermined its moral and material strength primarily due to the biological and economic Malthusianism. After World War II, in view of the transformations in the international relations, a dramatic technological revolution, evolution of the French nation and a political model with the parliament’s superiority in the country whose fate depended on retaining its colonial position, turned out to be a paralyzing anachronism.” A. Kawałkowski, *Powrót Francji*, Kultura, 1958, No. 9, 11. See also J. Czapski, *Charles de Gaulle*, Kultura, 1970, No. 12.

¹⁸² R. Rémond, *Les droites aujourd’hui*, *Id.*, Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*

of rationalized parliamentarism, a unique review of the constitutionality of acts and professionalization of the state, manifested by the elevated status of the Council of State, are all critical for its identity. Finally, the uniqueness of the Constitution of 1958 rests in the fact that it has established and perpetuated its primacy as a supreme source of law, which has substantially increased its influence on the legal regulations and political practice of France, compared to the constitutional acts effective before.

Chapter VI

Evolution and Vitality of the Fifth Republic

A. Vitality of the Fifth Republic

Has the Constitution of the Fifth Republic retained its identity after over sixty years since it came into force? First of all, it should be emphasized that presidency as a centre of national leadership holding a strong democratic mandate won in the general presidential elections still enjoys a massive support. The institution of direct presidential elections, introduced in 1962, was harshly criticised by the majority of political class. De Gaulle was accused of the re-establishment of authoritarian practices, such as Bonapartist plebiscites. In his speech made in Épinal, in 2007, Nicolas Sarkozy highlighted the strength of the impact de Gaulle's critics exerted on the French political life: "We needed a change in the political majority and two seven-year presidential terms of François Mitterrand to change the attitude of some left-wing groups towards the Fifth Republic institutions, which – in their view – were 'permanent coup d'État.' We need a lot of time to change the attitude of all those who could not forget the events of 18 brumaire¹ and 2nd December² and asserted that 13 May 1958 was nothing but the repetition of those events. Eventually, they recognized legality of the election of the President of Republic in a general voting."³

Gradually, the institution of strong presidency has become the subject of a broad consensus. In this respect, evolution of François Mitterrand's views is most meaningful as he was, along with Pierre Mendès France, one of the most consistent critics of the

¹ 18 brumaire of year VIII (9 November 1799) – coup d'État of Gen. Napoleon Bonaparte; overthrow of directorate and establishment of consulate with Bonaparte as the first consul.

² Coup d'État of 2 December 1851 made on the anniversary of the coronation of Napoleon I and the battle of Austerlitz. The army and police arrested a large number of parliament members. Ludwik Napoleon, later emperor Napoleon III, dissolved the parliament, restored general voting and staged a plebiscite to determine a new political system of France. The overwhelming majority of voters (92%) supported proposed changes.

³ N. Sarkozy, *A speech in Épinal (Przemówienie w Épinal)*, *Id.*, p. 361.

Fifth Republic. In 1964, he published an acclaimed book *Le coup d'État permanent*, very critical towards a model of strong presidency.⁴ At the same time, it was Mitterrand who was a beneficiary of the political change. General presidential elections enforced cooperation of the Left and formation of political groups around leaders enjoying social popularity and support, which enabled Mitterrand to dominate non-communist left and gain advantage over communists. The presidentialization of the constitutional system was, apart from the majority electoral law, the second factor shaping a bipartisan system.⁵

Unlike the French Communist Party, that espoused the parliamentary republic and hegemony of unicameral assembly, the socialists' political attitude was more flexible. François Mitterrand's views were flexible regarding the constitution, which allowed for a number of adjustments in this respect. Paradoxically, it was Guy Mollet who was the minister of state in de Gaulle's government appointed in June 1958, who retained an explicitly critical attitude toward the presidentialization of the political system introduced in 1962.⁶ On the other hand, François Mitterrand became less critical of the Constitution in late 1970s. In his message he emphasized a need to enhance the parliament's position and repeal Art. 49–3 of the Constitution (connecting a vote of confidence with the question of the relationship to a bill). He exposed a demand for enhancement of the position of representatives of judicial corporation in the High Council of the Judiciary.⁷ Yet Mitterrand questioned neither a model of presidency nor any principal elements of the construction of the Fifth Republic. After victory in the presidential elections in 1980 and the Socialists' victory in the parliamentary elections, the new president kept a model of strong presidency that he had so fiercely criticized for over ten years. Even if Mitterrand's stance is interpreted in the categories of a political decision and not constitutional preferences, it is worth highlighting the fact that since the 1970s there have been no endeavours to restore a model of the parliamentary republic and abolish general presidential elections. Moreover, a report issued by the Committee for the constitutional revision, established in 1992 and headed by Georges Vedel, did not

⁴ F. Mitterrand, *Le coup d'État permanent*, *Id.*

⁵ This process was described by O. Duhamel in his book on the left-parties' attitude towards the Fifth Republic. O. Duhamel, *La gauche et la V^e République*, PUF, 1993.

⁶ See G. Mollet, *Quinze ans après, la Constitution de 1958 (1958–1973)*, Albin Michel, 1978.

⁷ This facet of President Mitterrand's views is discussed by Ewa Popławska. E. Popławska, *Instytucja prezydenta...*, *Id.*, pp. 93–94.

question any fundamental rules of the Fifth Republic and focused on the corrections consolidating parliamentary control and actually extending the scope of direct democracy and changing a constitutional status of the High Council of the Judiciary.⁸ In his justification of the draft of constitutional amendments, in November 1992, Mitterrand dotted the i's and crossed the t's, and clearly concluded: "We are not going to give up general presidential elections. This has become a part of our tradition and everything indicates that the French nation, who decided about it in a referendum, is attached to this vote more than ever before."⁹

Analysts of the political practice of the Fifth Republic emphasized departure from the Gaullist model of presidency presented by de Gaulle at the famous press conference in January 1964. In his interpretation of the constitutional system he emphasized a principal role the president should play. The founder of the Fifth Republic called the president "a sole holder of the state's power and a sole person empowered to delegate it."¹⁰ In his view, the president's power, holding a mandate won in the general elections, was indivisible, while any other power, including the government, administration, army and judiciary, stemmed from the president's decision to confer it and keep.¹¹ De Gaulle ignored both separate constitutional status of the government, set forth in Art.20, and a separate status of the judiciary power. De Gaulle's concept corresponded to the political practice of "the absolute presidentialism" in the years 1959–1974, when Presidents de Gaulle and Pompidou enjoyed support of the parliamentary majority.¹² In Olivier Duhamel's view, a term "absolute presidentialism" may also refer to those years of the presidency of Mitterrand and Chirac when they had a stable parliamentary majority.¹³

⁸ *Rapport remis au Président de la République par le Comité consultatif pour la révision de la Constitution, le 15 février 1993*, [in:] D. Maus, *Les grands textes...*, Id., pp. 13–15.

⁹ *Lettre adressée le 30 novembre 1992 par le Président de la République à: Monsieur René Monory, président du Sénat Monsieur Henri Emmanuelli, président de l'Assemblée nationale Monsieur Robert Badinter, président du Conseil constitutionnel*, [in:] D. Maus, *Les grands textes...*, Id., p. 11.

¹⁰ See *La Constitution française du 4 octobre 1958 après la révision de juillet 2008, La Documentation française, 2008*, cited after the Polish edition: Ch. de Gaulle, *Deklaracja generalna de Gaulle'a na temat roli Prezydenta Republiki...*, [in:] K. M. Ujazdowski, *V Republika Francuska...*, Id., pp. 323–331.

¹¹ In his analyses of de Gaulle's constitutional practice, Georges Vedel asserted that the president divides power prerogatives into "retained area" and "delegated area." Undoubtedly, such a broad scope of presidential powers was in no way enshrined in the constitution. G. Vedel, *Vers le régime présidentiel?*, RFSP 1964, No. 1.

¹² O. Duhamel, *Droit constitutionnel*, Id., pp. 38–39.

¹³ D. Bourmaud offers a different interpretation of the evolution of the Fifth Republic:

After President Pompidou died, many times the French political practice considerably diverged from the interpretation of the founder of the Fifth Republic. The new Constitution had to address the experience of the presidency of Giscard d'Estaing, who had no support of active majority and then had to cope with the challenge of cohabitation. Unlike his predecessors, Giscard d'Estaing had no strong support of the parliamentary majority. Olivier Duhamel highlights a fact that the president was "a minority in the presidential majority" and therefore described a political practice in those years as a model of "rational presidency."¹⁴ Similarly, Mitterrand in the years 1988–1993 and Chirac in the years 1993–1995 had to face the same challenge. In the 1970s, liberal centrists, overtly supporting President Giscard d'Estaing, were not as influential as Gaullists in the presidential block. A real position of the president became even more enfeebled when prime minister Chirac stepped down and Rally for the Republic [RPR] was established and soon turned out to be a modern and disciplined tool of the Gaullist policy. Noteworthy, during the presidency of Giscard d'Estaing institutions making up a rationalized parliamentarism became more significant. On a number of times, the government of Raymond Barre made use of the unique, as regards Europe, provision of Art. 49–3, that allowed for passing a bill without voting. This is how the bill on direct and general elections to the European Parliament was passed in June 1977, which was questioned by a large number of old Gaullists, such as Michel Debré, to name just a few.¹⁵

A crucial test for the vitality of the Fifth Republic was cohabitation, i.e. collision of the two majorities: presidential and parliamentary. As early as in the constitutional drafting years, Raymond Aron identified a contradiction between the president's policy and opinion of the parliamentary majority as the primary threat to the constitution draft.¹⁶ Aleksander Hall emphasizes the fact that in de Gaulle's opinion, cohabitation was contrary to the spirit of the Fifth Republic Constitution and in the face of the

he distinguishes periods of monarchy (de Gaulle), diarchy and poliarchy: *Monarchie, dyarchie, polyarchie...*, *Id.* On the other hand, in J. Cadart's view, extent of parliamentary support in specific tenures of National Assembly is of key importance. J. Cadart, *Institutions politiques et droit constitutionnel*, "Economica," 1991, pp. 858–869.

¹⁴ O. Duhamel, *Droit constitutionnel*, *Id.*, p. 39.

¹⁵ See speech of prime minister R. Barre and Michel Debré at the forum of the National Assembly. M. Mopin, *Les grands débats...*, *Id.*, pp. 191–201.

¹⁶ R. Aron, *Propos d'un conservateur*, "Le Monde", 19 August 1958, [in:] *Documents pour servir à l'histoire...*, vol. IV, *Id.*, pp. 384–386.

electoral victory of the opposition in 1967 he did not intend to entrust their representative with the mission of formation of the government.¹⁷ Yet exceptional experience of the cohabitation proved vitality of the Fifth Republic, its internal flexibility and resistance to political shifts. It seems that a number of factors had a critical impact in this respect: the Constitution reduced a risk of conflict between the two parts of the executive power (there was no institution of the president's veto, incapacity to make use of the referendum in a dispute between the president and the prime minister) and, first of all, the functioning of the mechanisms making up rationalized parliamentarism designed by Michel Debré. The French model of rationalized parliamentarism allowed for a stable and effective functioning of the parliamentary government without presidential support. The institutions such as governmental legislation, the prime minister's right to impact an order of parliamentary sessions, preferences for the government in the legislative and budgetary process and a special instrument – Art. 49–3 (adoption of a bill when a vote of no confidence for the government is not passed) – made up the effective set of instruments in the hands of the government. Art. 20 that sets forth that the government determines and pursues the national policy, provided the protection for a separate status of the government. In the years of cohabitation, Michel Debré reflected their conviction that the Constitution was ready to respond to such a challenge.¹⁸

Ewa Popławska observed that constitutional practice of the Fifth Republic frequently diverged from the liberal interpretation of the Constitution. In her book *Instytucja prezydenta w systemie politycznym V Republiki Francuskiej* (*The Institution of President in the Political System of the Fifth Republic*) she asserts that

The French practice demonstrates that in the process of enunciating and running the policy of the Nation (pursuant to the Constitution this was the government's power) legally groundless dominance of the president coupled with still-effective procedures required to specify a formal participation of the prime minister in the decision-making process undermines a model of the institutions set forth in the Constitution.¹⁹

¹⁷ A. Hall, *Naród i państwo...*, *Id.*, p. 377.

¹⁸ S. Aromatario, *La pensée politique...*, *Id.*, pp. 567–569.

¹⁹ E. Popławska, *Instytucja prezydenta...*, *Id.*, p. 269. A similar assessment was put forward by the authors of the Balladur Committee report: *Rapport du Comité...*, *Id.*, cited after the Polish edition: *Raport Komitetu Balladura...*, *Id.*, p. 384.

Yet this is rather not a proof for the departure from the liberal interpretation of the Constitution but rather a proof of the possibility of its usage in different ways. The Fifth Republic may function in the period of the “presidentialism” predominance as well during the period of the “parliamentary” predominance, without prejudice to the stability and effectiveness of the governance. France owes this to the flexibility of the constitutional construction adopted in 1958.

At the same time, the Fifth Republic Constitution clearly outlined boundary conditions for the changeability of a system. Thus, it is significant that the Constitution retained its fundamental identity and did not evolve into a presidential system or any assembly rule, which de Gaulle was worried about in the 1960s. Contrary to what Silviano Aromatario asserts, a thesis of the establishment of the presidential system has never been confirmed in the political reality.²⁰ It should be reminded that de Gaulle resolutely opposed introduction of the American-like presidential system. In 1960, such demands were put forward by a number of scholars, including professors Paule Coste-Floret and Georges Vedel.²¹ Such an option was also opposed by René Capitant in a number of witty papers. In his view, the American presidential system was a less democratic solution (the president had no power to dissolve the parliament or stage early elections) and less effective (the government has no power to influence legislation).²² At the same time, a model of the electoral law adopted in 1958 and institutions of the rationalized parliamentarism protect the French political system against evolution towards an assembly rule. Serge Berstein recognizes elimination of this risk as the strongest proof for the stability of de Gaulle’s constitutional solution.²³ Over sixty years after the

²⁰ S. Aromatario, *La dérive des institutions vers un régime présidentiel*, RDP 2007, No. 3. The author reasons that the evolution of the Fifth Republic made French political system similar to that in the USA as they share a number of hallmarks, including general presidential elections, the position of the constitutional court and extensive powers of states/regions. Yet, the two latter hallmarks cannot be ascribed to only presidential systems. Definitely, presidency, bipartite executive power and parliamentary accountability of the government still make the Fifth Republic different from the American political system.

²¹ G. Vedel, *Vers le régime présidentiel*, *Id.*; C. Bigaut, *Le réformisme...*, *Id.* Jerzy Holzer is wrong when he claims de Gaulle intended to introduce the American-like presidential system. J. Holzer, *Europa zimnej wojny*, Znak, 2012, p. 203.

²² R. Capitant, *Député, Ancien Ministre, Président de la Commission des lois*: “*La réforme de 1962, loin de déséquilibrer les pouvoirs aboutit au contraire à l’équilibre véritable*,” “*Revue Politique et Parlementaire*” 1964, No. 743.

²³ S. Berstein, *Une monarchie républicaine*, *Id.*

Constitution was enacted, France still has this original political system where the president is the centre of national leadership and the executive branch of power is bipartite. The system that does not evolve towards either a typical presidential system or parliamentary rule typical of the Third and Fourth Republics. Therefore, a thesis about formation of the Sixth Republic is by no means confirmed by constitutional regulations or political practice.²⁴

Yet attention should also be paid to the shortening of the president's tenure to five years, which was put into effect in 2000 on the initiative of former President Giscard d'Estaing, who held then a mandate of the senator. In a common view, such a change plus adjustment of the term of the National Assembly to the presidential term, put into effect in 2002, stands in contradiction to the interpretation put forward by de Gaulle. Historical Gaullists, including Michel Debré, opposed the shortening of the tenure of the president.²⁵ Certainly, such a reform had consequences: the president assumed more responsibility for current affairs and became a mobile element of the executive branch of power. It seems that an extremely active presidency of Nicolas Sarkozy substantially limited autonomy of the prime minister. Yet, contrary to some interpretations, *quinquennat* does not impinge identity of the Fifth Republic. Essentially, the French constitutional system still retains its originality. Diarchy of the executive power has been retained.²⁶ The president of the French Republic does not exercise executive power directly but through the government. After the presidency of Nicolas Sarkozy, President François Hollande returned to the practice of allowing greater autonomy to the prime minister and had to seek support from the conflicted and divided parliamentary base of the left. In turn, Macron's presidency is often interpreted as a return to the formula of De Gaulle's own rule and the president-prime minister relationship of that time. Like the founder of the Fifth Republic, Macron has broken the typical division between the left and the right, and has the parliamentary support of a movement that lacks subjectivity. So, the reduction

²⁴ Interesting insights on the originality and vitality of the Fifth Republic can be found in H. Roussillon's paper on the Sixth Republic myth. H. Roussillon, *Le mythe de la VI^e République*, RFDC 2002, No. 52. See also G. Carcassonne's paper on the "inviolability" of the Fifth Republic: G. Carcassonne, *Immuable V^e République*, "Pouvoirs" 2008, No. 126 and O. Duhamel, *Une démocratie à part*, "Pouvoirs" 2008, No. 126; Ch. Charbot, *Ceci n'est pas une V^e République*, RFDC 2010, No. 82.

²⁵ S. Aromatario, *La pensée politique...*, *op. cit.*, pp. 570–572

²⁶ See J. Massot, *Chef de l'État...*, *Id.*

of the presidential term to five years need not entail an overactive presidency as in the Sarkozy era. Moreover, *quinquennat* does not exclude a possibility of cohabitation, which is also highlighted in the Balladur Report.²⁷ Moreover, nobody questioned the government's accountability to the parliament.

Deliberations on the vitality of the Fifth Republic should by no means omit the institution of a referendum. The Constitution of 1958 combined restoration of the national leadership with the democratization of the republic. In the previous chapter, I have written about the decision-making function of the legislative referendum, which actually meant that the nation decided about the key issues for the political community. In 1969 de Gaulle, stepping down after the lost referendum on the regionalization and a new formula of the Senate, proved his democratic intentions and consolidated legality of the Fifth Republic. In 1972, president Pompidou called a referendum on the accession of Denmark, Ireland and Great Britain to the European Communities. Over ten years later, the institution of the referendum regained its constitutional significance: a referendum on the status of New Caledonia (1988), on the treaty of Maastricht (1992), on the five-year presidential term (2000) and, finally, on the ratification of the Constitution for Europe (2005) consolidated the position of this institution in the French political practice.

Gradually, critics of the institution of a referendum, including Presidents Giscard d'Estaing and Mitterrand, became its advocates. Giscard d'Estaing, in his book *Deux Français sur Trois* (1984), accepted the direct democracy value²⁸ although there were opinions that his presidency changed the Fifth Republic through actual departure from direct democracy.²⁹

President François Mitterrand, in the 1960s a fierce critic of a referendum since, as he asserted, it was an anti-democratic institution, ultimately recognized its value during his presidency.

²⁷ "These changes, even if they seem to enjoy social support, are fragile and expose a worrying lack of balance between the institutions of power. Their fragility results from the fact that although convergence of elections, favouring convergence of the presidential and parliamentary majorities, does not provide it, which makes it dependent on the situations such as death or dismissal of the president or dissolution of the National Assembly by the president." *Rapport du Comité...*, *Id.*, cited after the Polish edition: *Raport Komitetu Balladura...*, *Id.*, p. 384.

²⁸ See V. Giscard d'Estaing, *Deux Français sur trois*, Flammarion, 1984. V. Giscard d'Estaing, *Démocratie française*, Fayard, 1978.

²⁹ Georges Burdeau wrote about a *desuetudo* referendum during the presidency of Giscard d'Estaing and decay of direct democracy. G. Burdeau, F. Hamon, M. Troper, *Droit constitutionnel*, *Id.*, p. 438.

In 1984 he made an attempt to include in a referendum the issues concerning “guarantees of fundamental political freedoms.”³⁰ Eight years later, he established the Consulting Committee for the Constitutional Revision that proposed to extend referendum issues by adding “reforms in the economic and social policy.”³¹ Mitterrand’s projects did not come into force due to the lack of political support in the parliament but became part of the French reformatory output. A common consent to the consolidation of direct democracy proves vitality of the Fifth Republic. The proposals tabled by the Committee of Georges Vedel were used in the constitutional amendment made by President Jacques Chirac in autumn 1995, that extended the subject scope of a referendum in accordance with the original intentions of Mitterrand. Noteworthy, in the early 1990s, the Gaullist RPR espoused introduction of the institution of a referendum on the initiative of the opposition.³² Thirteen years later, in the extensive amendment of July 2008, President Sarkozy and his political background (UPM) managed to establish the institution of a referendum on the initiative of the opposition, which actually had characteristics of the referendum called on the people’s initiative.³³ A legislative referendum may be held on the initiative of one fifth of the parliament members and with support of one tenth of voters entered into the electoral registers. When the bill is not considered by two chambers in the time specified by the organic laws, the president is obliged to submit it to a referendum. Moreover, new applications of the institution of a referendum were enshrined in the Constitution. Due to the ratification of the Treaty of Lisbon, a new constitutional regulation was introduced, under which a referendum is a preferable form of pronouncing consent to the accession of any state to the European Union (Art. 88–5). Although political purport of this solution is a democratic supervision over possible accession of Turkey to the EU, which arouses French fears, this is another example of the focus on direct democracy in the Fifth Republic Constitution. Furthermore, in 2003, another

³⁰ *Projet de loi constitutionnelle portant révision de l'article 11 de la Constitution pour permettre aux Français de se prononcer par référendum sur les garanties fondamentales en matière de libertés publiques*, [in:] D. Maus, *Les grands textes...*, *Id.*, p. 110.

³¹ D. Maus, *Les grands textes...*, *Id.*, p. 16. See also the insights made by F. Hamon, *Le référendum*, Etude comparative, L.G.D.J., Collection Droit public, 1995, pp. 92–93.

³² F. Hamon, *Le référendum*, Etude comparative, L.G.D.J., Collection Droit public, 1995, pp. 91–92.

³³ The creation of a new form of a referendum in the constitution required the passing of an organic law after a few years <https://www.conseil-constitutionnel.fr/fondement-s-textuels/referendum-d-initiative-partagee-les-textes-legislatifs>

constitutional amendment was made with regard to the legislative referendum (Art. 11), where voters from the territorial community could be asked about issues concerning its organization, competences and the legislative system (Art. 72–4). Such a procedure may be applied by the president of the republic upon the government's motion during the parliamentary sitting or upon the joint motion tabled by both chambers not during the sitting.

Finally, it should be emphasized that an exceptional status of bills adopted in a referendum was confirmed by the Constitutional Council in the adjudication called Maastricht III, which recognized referendum acts as the direct manifestation of the national sovereignty and may not be subject to the constitutional review.³⁴ Thus, the Constitutional Council admitted that a referendum may be the way to exercise the constituting power by the nation (power to create a constitution).

Development and improvement of the French model of the review of the constitutionality of acts is recognized as a key constitutional change in the history of the Fifth Republic.³⁵ In early 1970s, the position of the Constitutional Council considerably consolidated. In 1971 the organ issued a historic adjudication that defined the 'constitutional block' as a set of texts including the Constitution, Declaration of the Rights of Man and of the Citizen and preamble to the Fourth Republic Constitution.³⁶ The Constitutional Council's adjudication of 1971 initiated extensive judicature in the area of individual freedoms and rights, political freedoms, nationalization, socio-economic issues and decentralization.³⁷ François Luchaire and Gerard Conac called this historic adjudication a relative amendment of the Constitution.³⁸ In October 1974, President Valéry Giscard d'Estaing made a constitutional amendment that invested the parliamentary opposition (60 deputies of senators) with a right to institute constitutional review of statutes. The amendment made

³⁴ See 23 September 1992, Decision of the Constitutional Council, 92-313 DC (Maastricht III).

³⁵ See J. Pascal, *Conseil constitutionnel*, "Pouvoirs", 2001, No. 99; speech of B. Mathieu at the opening of the Congress, *VII^e Congrès français de droit constitutionnel*, RFDC 2009, No. 77, p. 37.

³⁶ L. Favoreu, L. Philip, *Les grands texts...*, *Id.*

³⁷ Evolution of the Constitutional Council and its role in the protection of the individual rights in France was discussed by prof. Leszek Garlicki in his study, L. Garlicki, *Rada Konstytucyjna...*, *Id.*

³⁸ F. Luchaire, G. Conac, *La Constitution de la République française...*, *Id.*, pp. 32–34. See also G. Vedel, *Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme*, *Pouvoirs* 1988, No. 45

the review independent of the governmental majority. Obviously, both reforms had a considerable impact on the extent, contents and functioning of the Constitution. Krzysztof Wojtyczek underscored that the judicature of the Constitutional Council created unwritten constitutional norms, which allowed for the extension of the Constitution text.³⁹ A boost for the Constitutional Council involved the constitutionalizing of the specific branches of law.⁴⁰ A boost for the French constitutional jurisdiction was the achievement of the “Orleanist” right-wing politicians, who were to the highest degree sensitive to the protection of civil rights and freedoms.⁴¹ The adjudication of 1971 was issued in the aftermath of the motion tabled by the Speaker of the Senate Alain Poher, a centre-right politician, who had a critical attitude towards de Gaulle. The exponent of identical ideological trend was President Valéry Giscard d’Estaing, who during the electoral campaign of 1974, undertook to invest the parliamentary opposition with new rights.⁴²

A question is whether the change effectuated in the early 1970s contradicted the principles of the Fifth Republic Constitution. The adjudication of 1971 that provided a basis for the material review of the constitutionality of acts would have been impossible if the Fifth Republic had not established the Constitutional Council and, in compliance with de Gaulle’s attitude, constitutionalized republican principles and enhanced the status of the Declaration of the Rights of Man and of the Citizen. It should be reminded that a demand for the material review of the constitutionality of acts was put forward in the Bardoux Committee and writings of Carré de Malberg, René Capitant and Michel Debré.

The demand for the review following allegations of unconstitutionality, effectuated in July 2008, was put forward by Carré de Malberg and was also made during the *avant projet* drafting in June 1958, which I have mentioned in Chapter V. Noteworthy, the most significant innovation of the amendment of 2008 was put into effect with respect to the French republican tradition. In his Épinal speech president Sarkozy focused on the need to retain a model of the preventive review:

³⁹ K. Wojtyczek, *Sukces, który zadziwia...*, *Id.*

⁴⁰ Speech of B. Mathieu at the opening of the Congress, *VII^e Congrès français de droit constitutionnel*, *Id.*, p. 37.

⁴¹ See R. Rémond, *Les droites aujourd’hui*, *Id.*, cited after the Polish edition: R. Rémond, *Francuska prawica dzisiaj*, *Id.*, pp. 182–214.

⁴² See V. Giscard d’Estaing, *Spotkanie z prasą*, [in:] K. M. Ujazdowski, *V Republika Francuska...*, *Id.*, p. 384.

Is it, however, necessary to transform the Constitutional Council into the Supreme Court? Should judicature be supreme to statutes? Is it necessary to increase uncertainty of law? I do not think the judiciary should have a larger impact on the society. A judge should not be supreme to the legislature. This would mean a total departure from the model of the Republic.⁴³

The Parliament shared such a point of view and in July 2008 a new form of the review of the constitutionality of acts was introduced in a limited extent. Pursuant to Art. 61–1 of the amended Constitution, when an allegation of the unconstitutionality will not be raised during the court's proceedings (an act that infringes the rights and freedoms guaranteed in the Constitution), the Council of State and the Court of Cassation should submit such a case to the Constitutional Council. By no means a model adopted in France is not identical with an extensive ex-post review following a civil complaint. The reform of 2008, i.e. the review based on the allegation of unconstitutionality, did not undermine the foundations of the preventive review that respected a rule of certainty of law.⁴⁴

Attention should also be paid to the process of decentralization that had also its constitutional dimension in the Constitutional Council's adjudications of 1982⁴⁵ and an amendment of 2003. The adjudications of the 1980s strictly determined the framework of decentralization. It is hard to recognize this process as the one that infringed the identity of the Fifth Republic as it did not challenge the fundamental principles of the indivisibility of the Republic and a unitary model of the state. An amendment to Art. 1 of the Constitution, on the decentralized organization of the Republic, put an end to the severe controversy between decentralization and a rule of indivisibility of the Republic and opened the way

⁴³ See *La Constitution française...., Id.*, cited after the Polish edition: *Wystąpienie prezydenta Sarkozy'ego w Épinail*, [in:] K. M. Ujazdowski, *V Republika Francuska...., Id.*, p. 370.

⁴⁴ See V. Bernaud, M. Fatin-Rouge Stéfanini, *Reforma kontroli konstytucyjności prawa (refleksje na temat projektów artykułów 61–1 i 62 konstytucji przedstawionych przez Komitet Balladur)*, "Przegląd Sejmowy" 2008, no 6. M. Fatin-Rouge Stéfanini, *Le Conseil constitutionnel dans la révision constitutionnelle du 23 juillet 2008 sur la modernisation des institutions*, RFDC 2009, no 78. A thorough analysis on the position of the Constitutional Council after constitutional amendment of July 2008 is included in the paper by A. Chmielarczyk, published in "Przegląd Sejmowy": *idem., Rada Konstytucyjna po zmianach z lipca 2008*, "Przegląd Sejmowy" 2010, No. 1.

⁴⁵ L. Favoreu, L. Philip, *Les grandes décisions du Conseil constitutionnel*, Dalloz, 2007, pp. 440–446.

to the extension of decentralization and granting regions a constitutional status. Irreconcilable relationship between indivisibility of the Republic and federal or confederal constitutional model is quite obvious. A rigid framework of centralism in the French political model is discernible in the comparison with any unitary state. A study on the decentralization of France goes beyond the framework of this book and involves political sciences, administrative law and public finances. Yet André Roux is right when he asserts that decentralization effectuated in 2003 “did not undermine the principle hallmarks of the French state (...) France (...) evolved neither into a regionalist state nor a federalist state.”⁴⁶

Moreover, which is worth reminding, decentralization was a demand put forward by de Gaulle, who was aware of the crisis in the civil participation in the public life. The founder of the Fifth Republic espoused an idea that the Senate should comprise the representatives of local communities and wished it would be open to business, professional and social organizations. In the referendum of 1969 he put forward a project of the self-government at the regional level. It seems that decentralization, like a referendum, became the subject of a broad consensus. A reform was initiated by minister Gaston Defferre, during the presidency of Mitterrand, and completed by the government of J. P. Raffarin, who opted for the extension of competences of local governments, which was introduced into the Gaullist UMP agenda.⁴⁷

Finally, it should be emphasized that the Fifth Republic Constitution provided France with a number of effective tools for participation in the European Communities. Preventive review of the constitutionality of acts which, when it came into force, was recognized by a number of politicians, experts or scholars as a manifestation of deep mistrust towards European integration, allowed for the subjective participation in the European Union and respect for the principal constitutional values.⁴⁸ Importantly, the Fifth Re-

⁴⁶ A. Roux, *Konstytucja V Republiki a decentralizacja*, “Przegląd Sejmowy” 2008, no 6, p. 136. A similar assessment was given by Ewa Popławska in *Republika Francuska jako państwo zdecentralizowane w świetle ustawy konstytucyjnej*, [in:] *Instytucje prawa konstytucyjnego w dobie integracji europejskiej...*, *Id.*, pp. 279–286.

⁴⁷ Interesting insights on the process of gaining a broad consent to the decentralization are included in the book on the French Right, authored by R. Rémond, *Les droites aujourd'hui*, *Id.*, cited after the Polish edition: René Rémond, *Prawica francuska dzisiaj*, *Id.*, p. 92–96.

⁴⁸ O. Gohin observed this fact in his paper on Michel Debré’s contribution to the establishment of relations between Constitutional and European integration. See O. Gohin, *Construction européenne et Constitution française...*, *Id.* The French model

public introduced a specific (early) preventive review that may be launched even before the adoption of a bill authorizing ratification. Art. 54 of the Constitution postulates that in the event that an international obligation includes a clause violating any provision of the Constitution, its ratification may be effectuated only after a relevant amendment to the Constitution. Thus, whenever any doubts about the constitutionality of international obligation arise, they are resolved earlier than in Germany, where Federal Constitutional Court may review the constitutionality of international obligation only after a bill authorizing ratification had been passed. It seems that the French solution is optimal in terms of the efficacy of the national policy in the European Union. Thus, the constitutional institutions proved to be useful despite revaluation of the purport of sovereignty and shifts in the French policy that evolved from de Gaulle's sovereignism into active participation in the European Union.⁴⁹ Noteworthy, a chapter on EU in the French Constitution is the outcome of the adjudications of the Constitutional Council, issued under Art. 54, including the adjudication on the Treaty of Maastricht I.⁵⁰ Identification of the state's sovereignty as a dynamic category and the nation's sovereignty as a static category, introduced by Michel Debré in the 1950s, turned out to be crucial in the process of the constitutional review of the European treaties. The Constitutional Council does not question a possible

of a preventive review was highly appreciated also by Krzysztof Wójtowicz in his recent study on the position of constitutional courts in the European Union law: "Preventive review of the conformity of amendments in the EU primary law with the constitution seems to be the most desirable means to avoid collision between domestic and EU law in future. This is a justifiable method since frequent amendments to the primary law impact *par excellence* constitutional issues. For example, they result in investing the EU with new competences or a change in the scope of individual rights and obligations." K. Wójtowicz, *Sądy Konstytucyjne wobec prawa Unii Europejskiej*, Biuro Trybunału Konstytucyjnego, 2012, p. 62.

⁴⁹ Crucial studies on the modern meaning of sovereignty include: N. Walker, *Sovereignty in Transition*, Oxford 2003; J. Kranz, *Suwerenność państwa i prawo międzynarodowe*, [in:] *Spór o suwerenność*, Wydawnictwo Sejmowe, 2001, pp. 103–155. K. Wójtowicz, *Suwerenność w procesie integracji europejskiej*, [in:] *Spór o suwerenność*, Wydawnictwo Sejmowe, 2001, pp. 156–174.

⁵⁰ The Constitutional Council's adjudication of 9 April 1992, No. 92-308 DC (Traite de Maastricht I). An in-depth analysis of the process of Europeanization of the Fifth Republic Constitution can be found in the paper of Krzysztof Wojtyczek, where he highlights a unique nature of the French doctrine of constitutional law and judicature emphasizing superiority of the national constitution over international law, including the EU laws. K. Wojtyczek, *Europeizacja konstytucji...*, *Id.* See also K. Kubuj, *Decyzja francuskiej Rady Konstytucyjnej w sprawie Traktatu z Lizbony w świetle wcześniejszych orzeczeń dotyczących integracji europejskiej*, "Studia Prawnicze KUL" 2011, No. 2; E. Popławska, *Orzeczenie francuskiej Rady Konstytucyjnej w sprawie Traktatu z Lizbony*, "Prawo i Polityka" 2010, No. 1.

transfer of a number of state's competences to the European Union (which meant smaller sovereignty of the state) but reviews whether such a transfer does not infringe principal conditions for exercising sovereignty of the nation.⁵¹ One may conclude that the Constitutional Council has become an institution boosting subjective participation in the European Union. Its judicature has alleviated collision with the Community laws, with an assumption that the EU derived law may not "violate any rule or principle inseparably associated with the constitutional identity of France."⁵²

Noteworthy, before the constitutional drafting process began, a report had been published by the Balladur Committee, which proves high standards of the political reform drafting. The document shows openness of the constitutional thought to the real facets of the current political system and aggregation of the scientific output and experience in the political practice. It seems that it resulted from the pluralistic composition of the Committee, whose members included scholars and politicians.⁵³ Also a multi-dimensional aspect of the Committee's proposal is interesting as

⁵¹ See Adjudication of the Constitutional Council of 9 April 1992, no 92-308 DC (Maastricht I). The same procedure and legal grounds were applied to a review of the constitutionality of the Treaty on stability, coordination and management within the framework of Economic and Monetary Union. See Adjudication of the Constitutional Council of 9 August 2012, No. 2012-653 DC.

⁵² 27 July 2006, Adjudication on the Constitutional Council, 2006-540 DC. Moreover, another French organ empowered to review the primary and derivative community law is the Council of State due to its special position as the supreme administrative court. After introduction of the constitutional review of statutes upon allegation of their unconstitutionality the ex-post review of the community law has also become possible but it is too early to evaluate its outcomes. Interestingly, the president of the Constitutional Council, J.-L. Debré, said that the review based on the allegation of the unconstitutionality integrates judicature of the Council of State and the Constitutional Council in the area of studies on the constitutionality of derived EU law. See J.-L. Debré, *Réflexions*, [in:] *Les 50 ans de la Constitution...*, *Id.*, pp. 335–343. See also studies on the constitutionality of derived EU law. K. Wójtowicz, *Głos do orzeczenia francuskiej Rady Konstytucyjnej z dnia 10 czerwca 2004*, "Przegląd Sejmowy" 2005, no 1 (66); tegoż, *Francuski model kontroli konstytucyjności prawa krajowego implementującego prawo wspólnotowe*, [in:] *Prawa człowieka – społeczeństwo obywatelskie – państwo demokratyczne*, Wydawnictwo Sejmowe, 2010. K. Kubuj, *Opinia prawna na temat kontroli konstytucyjności prawa wtórnego Wspólnoty/Unii Europejskiej na przykładzie Francji*, Biuro Analiz Sejmowych, 15 February 2011.

⁵³ The deputy president of the Committee was Jack Lang – a popular socialist politician, former minister of culture during the presidency of Mitterrand. Other Committee members included outstanding constitutionalists and political scientists: Guy Carcassonne, Jean-Claude Casanova, Dominique Chagnollaude, Olivier Duhamel, Pierre Mazeaud (former president of the Constitutional Council) and Olivier Schrameck. *Rapport du Comité...*, *Id.*, cited after the Polish edition: *Raport Komitetu Balladura...*, *Id.* See also *Rapport de la Commission Balladur, Libres propos croisés de Pierre Mazeaud et Olivier Schrameck*, RDP 2009, No. 1.

its authors combined demands for the constitutional revision with institutional reforms that did not need constitutional amendments or any dramatic changes in the relevant acts. Other proposals included appointment of legal reviewers in the ministries and establishment of audit institutions in the parliament.⁵⁴

The reform of July 2008 did not undermine any constructional lines of the Constitution of 1958.⁵⁵ Actually, the Balladur Committee's proposal of the constitutional amendment was designed to modernize and not change the political system. Along with the aforementioned change of the position of the Constitutional Council, new forms of the review of the constitutionality of acts and consolidation of the institution of a referendum, three areas of the constitutional modernization should be highlighted: 1) reduction of presidential powers and new institutions of supervision over the executive power; 2) consolidation of the position of the parliament and related extension of the opposition's rights; 3) extension of civil rights and their guarantees.

Regarding the first area, the president may not carry out more than two consecutive terms of office (Art. 6); any emergency measures undertaken by the president are subject to the review conducted by the Constitutional Council (Art. 16); given new forms of the military engagement, the parliament is empowered to supervise military operations abroad and give consent to a military intervention lasting longer than four months (Art. 35); the president is invested with the power to grant pardons in an individual capacity only (Art. 17) and consent of a special commission comprising the members of both Chambers is required for the appointments to the civil and military positions of the State, which is of crucial importance (Art. 13). The same procedure is applied with regard to candidates for the Constitutional Council members.

⁵⁴ *Rapport du Comité...*, *Id.*, cited after the Polish edition: *Raport Komitetu Balladura...*, *Id.*, pp. 381–391.

⁵⁵ See the most significant studies on the amendment of 2008 include J.-P. Camby, P. Fraisseix, J. Gicquel, *La révision de 2008: une nouvelle Constitution?*, L.G.D.J., 2011; J.-P. Chevènement, *Revaloriser les Pouvoirs du Parlement*, [in:] *Les 50 ans de la Constitution...*, *Id.*; M. Kruk, *V czy VI Republika? Rozważania wstępne o kierunku zmian konstytucji francuskiej i ich znaczeniu dla doktryny polskiej*, *Przegląd Sejmowy* 2008, No. 6; A. Levade, *La révision du 23 juillet 2008, temps et contretemps*, RFDC 2009, No.78; *idem.*, *Les nouveaux équilibres de la V^e République*, RFDC 2010, No. 82; S. Marthe Fatin-Rouge, *Le Conseil constitutionnel dans la révision constitutionnelle du 23 juillet 2008 sur la modernisation des institutions: entre audace et modération*, RFDC 2009, no 78; P. Mazeaud, *La vie de la Constitution...*, *Id.*; P.-H. Prélôt, *La V^e République à l'anglaise ou la fin du „présidentialisme”*, [in:] *Les 50 ans de la Constitution...*, *Id.*

Regarding the consolidated position of the parliament, institutional balance has been restored with no risk of weakening the regulations providing stability and efficacy of governance. The parliament has been empowered to shape the agenda of sessions with reservation to the preferences for the governmental projects, which is guaranteed by Art. 48 of the Constitution. Granting the opposition the guarantee to influence a part of the sessions agenda is also innovative. Certainly, limitation of the scope of application of the aforementioned special instrument specified in Art. 49–3 to solely a budgetary bill and social insurance bills is also a crucial change. Moreover, this mechanism is applicable only once a year with reference to other bills. Noteworthy, legislative procedures have been rationalized, which prevents adoption of bills without a sufficient review and a number of standing committees have been increased from six to eight (Art. 43), and general debates may be held not only upon a no confidence motion (Art. 50–1). The Constitution also provides for the parliament's monitoring and assessing the government's actions, which is also new (Art. 24) and responds to challenges faced by the parliaments of all democratic countries. To achieve this, the parliament is assisted by the Clearing House in monitoring the implementation of Finance Bills, Social Security Financing Bills and assessment of public policies (art. 47–2). Moreover, amendments have invested Speakers of Chambers with a power to submit parliamentary bills to the Council of State for an opinion, which reflects consolidation of this institution and another step in the state professionalization (amended Art. 39). None of these amendments undermined superiority of the executive power over the legislative power, which was one of the primary hallmarks of the Fifth Republic. A model of the rationalized parliamentarism designed by Michel Debré was undermined but not to the extent that would prevent it from pursuing positive political goals. Moreover, the amendment to the Constitution (Art. 42) that brought a new set of regulations for the National Assembly resulted in the concentration of legislative studies in parliamentary commissions, which is certainly advantageous for the government and parliamentary majority. The President was also invested with the power to give an address in the parliament convened as Congress, which had not been applicable since 1873.

The third area, extension of civil rights, comprised a new form of the review of the constitutionality of statutory provisions, establishment of the institution of a referendum on the initiative

of the opposition, which had a number of elements characteristic of the people's initiative, and – noteworthily – a right to file a petition to the Socio-Economic and Environment Protection Council. Such a change proved that the French were also interested in making use of the solutions adopted in many European countries, where the institution of an ombudsman was established. Consolidation of monitoring and assessing functions of the parliament is a response to a challenge triggered by the crisis of trust to parliaments, which is now observed in all European countries. Presumably, extensive amendments of July 2008 were not an act of the fundamental political change. Yet it may definitely be said that to a large extent it drew on the proposals of political solutions tabled in the past.

In my view, all elements determining the identity of the Fifth Republic Constitution, combination of strong presidency with democratization of the republic, the bipartite executive branch, application of original model of rationalized parliamentarism, a unique review of the constitutionality of acts and professionalization of the state, remain topical six decades after it came into force.

Finally, it should be noted that the constitutional revision proposed in 2018 by President Macron failed. It was corrective in nature and fully respected the political foundations of the Fifth Republic.⁵⁶ One might even think that some of the proposals of the current French president, such as increasing the government's influence on the parliamentary agenda or the government's right to reject amendments by parliamentarians were closer to the Constitution in its original Gaullist version, which was in force before the 2008 amendment.

B. Polish References

Relations between Polish and French constitutional traditions, dating back to the end of the 18th century, have always stimulated interest from the Polish constitutionalists, politicians and political scientists in the constitutional system of the Fifth Republic. Although the Constitution of 3rd May (1791) may undoubtedly be recognized as an original product of the Polish constitutional thought, it was definitely influenced by the constitutional output of the French Enlightenment.⁵⁷ In the 19th century, French concepts had a considera-

⁵⁶ D.Vilemot, *La révision constitutionnelle d'Emmanuel Macron*, Démocratie vivante, 2018

⁵⁷ See W. Konopczyński, *Polscy pisarze polityczni XVIII wieku*, OMP 2012. B. Leśniodorski,

ble impact on the constitutions of the Duchy of Warsaw (1807) and the Kingdom of Poland (1815). The state supervision institutions, introduced by the Constitution of the Kingdom of Poland for the first time in the Polish territory, followed the French pattern.⁵⁸

After restoration of independence, Poland adopted the constitutional system similar to that of the Third Republic. In the early 1920s, a model of the parliamentary republic was recognized as an absolute political ideal not only in the Polish political culture but in all constitutions enacted in the countries that regained independence after World War I.⁵⁹ The French influence was so huge that even professor Michał Bobrzyński, critical of the idea of the nation's sovereignty, decided to prepare a constitutional draft (a so-called "*Constitutional Survey*" project) based on the French constitutional acts of 1875.⁶⁰

Politicians and lawyers who exerted a fundamental impact on the shape of the Polish constitution of 1921, including Edward Dubanowicz, Kazimierz Lutosławski or Waław Komarnicki, a future minister of justice in the Polish government in exile (after 1945), were ardent advocates of the French model of the parliamentary republic. Interestingly, their writings prove their extensive knowledge of the constitutional theory as well as specific constitutional regulations.⁶¹ Moreover, it is necessary to remind that *Éléments de droit constitutionnel*, a classical work by Adhémar Esmein, was translated into Polish by Karol Lutostański and Władysław Konopczyński long before 1918.⁶² Interestingly, the latter one voiced criticism for a referendum staged by the Polish communist regime in 1947, referring

Dzielo Sejmu Czteroletniego, (1788–1792). Studium Historyczno Prawne, Ossolineum, 1951; E. Z. Wichrowska, *W stronę Francji... Z problemów literatury i kultury polskiego oświecenia*, Wydawnictwo Wydziału Polonistyki Uniwersytetu Warszawskiego, 2007.

⁵⁸ See R. Szawłowski, *Najwyższe państwowe organy kontroli w Polsce w XIX wieku*, Dom Wydawniczy Bellona, 1999.

⁵⁹ See K. Kawalec, *Wizje ustroju państwa w polskiej myśli politycznej lat 1918–39*, Wydawnictwo Uniwersytetu Wrocławskiego, 1995, pp. 50–51.

⁶⁰ M. Bobrzyński, *O potrzebie "silnego rządu" w Polsce*, selection, introduction and edition by P. Majewski, Wydawnictwo Sejmowe, 2001, p. 144. See the insights on the "Constitutional Survey" project, S. Krukowski, *Geneza konstytucji z 17 marca 1921*, Ludowa Spółdzielnia Wydawnicza, 1977, pp. 22–60.

⁶¹ References to the views of Adhémar Esmein can be found in a number of Polish writings, including those by Waław Komarnicki, *Polskie prawo polityczne*, Wydawnictwo Sejmowe, 2008 and Edward Dubanowicz, *Rewizja konstytucji*, Wielkopolska Księgarnia Nakładowa Karola Rzepeckiego, 1926.

⁶² See A. Esmein, *Éléments de droit constitutionnel*, Hachette Livre - BNF, 2018, cited after the Polish edition: A. Esmein, *Zasady prawa konstytucyjnego*, edition and foreword by S. Posner, transl. K. Lutostański, W. Konopczyński, Wydawnictwo Ognia, 1904.

to the arguments against direct democracy put forward by Esmein.⁶³

The March Constitution, modelled on its Third Republic counterpart, consolidated parliamentary supremacy. Actually, the Constitution of 1921 provided for such a political model in its extreme form. Stanisław Estreicher wrote about an exaggerated form of the French model and asserted that introduction of the French solutions was the primary flaw of the March Constitution.⁶⁴ A Cracow conservative highlighted elimination of all instruments that could counterweigh the supremacy of the Sejm (lower chamber): the president was deprived of the real power and the higher chamber (the Senate) was established on the same political basis as the Sejm and without capacity to actively influence legislation.⁶⁵ Noteworthy, the Czech Constitution of February 1920 provided for a limited (at least) Senate's power to balance the supremacy of the lower chamber (longer term and greater legislative powers of Senators). Stanisław Estreicher wrote that the March Constitution established a principle of the parliamentary supremacy also over the nation – a holder of sovereignty.⁶⁶

Outspoken critics of the March Constitution included conservative lawyers.⁶⁷ Participants of the *Constitutional Survey*, carried out by professor Władysław Leopold Jaworski in 1923, gave assessment similar to that of Estreicher. They included Kazimierz Kumaniecki, Stanisław Kutrzeba, Stanisław Starzyński and Michał Rostworowski.⁶⁸ In their view, a weakness of the March Constitution resulted from doctrinarism (Michał Rostworowski) and distrust towards strong power, which should have disappeared after restoration of independence (Kazimierz Kumaniecki).⁶⁹ Their critical assessment also regarded proportional electoral statute that was blamed for multiplying political divisions. Moreover, in the Polish critics' view, the parliament was invested with excessive powers and the political system was characterized by ill-governance

⁶³ W. Konopczyński, *Referendum czy plebiscyt*, [in:] *idem., O wartości naszej spuścizny dziejowej. Wybór Pism*, OMP, 2009, p. 429.

⁶⁴ S. Estreicher, *Przewodnia idea...*, *op. cit.*, p. 49.

⁶⁵ *Ibid.*, pp. 47–49.

⁶⁶ *Ibid.*, p. 38.

⁶⁷ A detailed analysis of the political concepts of Polish conservatism is included in the writings authored by Bogdan Szlachta: *Polscy konserwatyści wobec ustroju politycznego do 1939 r.* (Wyd. Uniwersytetu Jagiellońskiego, 2000) and *Z dziejów polskiego konserwatyzmu* (Dante, 2003).

⁶⁸ *Ankieta o Konstytucji z 17 marca 1921 r.*, Krakowska Spółka Wydawnicza, 1924.

⁶⁹ *Ankieta o Konstytucji z 17 marca 1921 r.*, *op. cit.*, p. 20.

and unjustified aversion to the executive power. Thus, there is an essential convergence between Polish criticism of the parliamentary rule and its French analogy voiced in the writings of André Tardieu, Bardoux Committee, René Capitant or Michel Debré.

The appeal of the French constitutionalism in the Polish constitutional thought is manifested by the establishment of the Council of State. This demand had been included in the *Constitutional Survey* draft of March. Art. 47 of that project provided that

To draw up or review bills submitted by the government or any chamber, the Council of State shall be established. The Council shall comprise the president, deputy president, incumbent co-unsellers of state and members appointed temporarily to prepare specific drafts.⁷⁰

In his justification for the draft, professor Michał Bobrzyński emphasized the exceptional nature of the task aimed to merge and consolidate Polish law. The Council of State was designed as an institution reviewing legislative initiatives launched by the government and the parliament and its members who were to be the outstanding law theoreticians and practitioners.⁷¹ The aforementioned *Constitutional Survey* included a detailed draft of the bill on the establishment of the Council of State, designed by Eugeniusz Starczewski. In his concept, the body's tasks included preparation of bills, systematization of legislation and – like in France – performance of the administrative court's functions.⁷² Interestingly, the same demand was put forward and adopted at the Convention of Lawyers and Economists held in Poznań in 1922.⁷³

Noteworthy, an idea to establish the Council of State was promulgated by the lawyers of different ideological and political views, such as Stanisław Estreicher, Edward Dubanowicz, Stanisław Dzierzgowski, Franciszek Kasperek, Antoni Peretiatkowicz, Stanisław Starzyński and Władysław Studnicki.⁷⁴ There was a wide-spread belief that the Council of State would improve the quality of legislation given the poor quality of the parliamentary elite and insufficient competences of the government legislative services. Just as

⁷⁰ *Ankieta konstytucyjna*, [in:] M. Bobrzyński, *O potrzebie "silnego rządu"...*, *op. cit.*, p. 151.

⁷¹ *Ankieta konstytucyjna*, *op. cit.*, p. 165.

⁷² *Ankieta o Konstytucji z 17 marca 1921 r.*, *op. cit.*, pp. 49–41.

⁷³ A. Peretiatkowicz, *Reforma konstytucji polskiej*, Dom książki polskiej, 1929, p. 38.

⁷⁴ See B. Szlachta, *Polscy konserwatyści wobec ustroju...*, *op. cit.*, pp. 342–348.

Stanisław Estreicher recommended, referring to the French constitutional solutions, the Council of State should have a power to review bills submitted by the government and the parliament and – upon the government or Sejm's request – assume direct responsibility for their quality.⁷⁵ Antoni Peretiatkowicz, another critic of the March Constitution, asserted that neither the Sejm nor ministries had a high-quality legislative service. Moreover, the government had no institution capable of reviewing all legislation.⁷⁶ In the view of Peretiatkowicz, the primary task of the Council of State should be to review bills before they were passed in the parliamentary commissions and review drafts of any statutory instruments. A demand to establish the Council of State was also made by other lawyers who contributed hugely to passing the March Constitution and asserted that any constitutional reform should not go beyond the framework of the parliamentary rule. Edward Dubanowicz, a politician and constitutionalist, asserted that the Council of State should assume responsibility for drafting bills of particular significance and should be established based on the output of the Codification Commission.⁷⁷ Moreover, Dubanowicz highlighted improvement of the quality of the legislative services of the government and the need to coordinate governmental legislative activities by the Legal Department of the Council of Ministers. In his book *Rewizja konstytucji* (*Constitutional Revision*) Dubanowicz asserted that "if the quality of the competent organs of the legislative initiative were not going to change, a body providing technical assistance in the drafting process would not be of any help."⁷⁸

When Piłsudski's followers came to power, they challenged a parliamentary rule model and nine years after the coup d'État of 1926 (so-called *coup d'État of May*) a new supreme act, the – April Constitution, was adopted. Many years later it was compared to the Constitution of the Fifth Republic. Hans Roos reasoned that Piłsudski's thought and the April Constitution had some impact on de Gaulle's concepts. A German historian suggested that the future French President showed deep interest in Piłsudski's output,

⁷⁵ S. Estreicher, *Rada Stanu i udoskonalenie ustawodawstwa*, [in:] *idem, O Konstytucji i polityce...*, *op. cit.*, pp. 70–81.

⁷⁶ A. Peretiatkowicz, *Reforma konstytucji polskiej*, *op. cit.*, pp. 38–39.

⁷⁷ E. Dubanowicz, *Rewizja konstytucji*, *op. cit.*, pp. 66–67.

⁷⁸ *Ibid.*, p. 67. Interestingly, Edward Dubanowicz also referred to the thought of André Tardieu when he proposed limitation of the parliament's powers with regard to the budget drafting. See E. Dubanowicz, *Ku stałemu ustrojowi państwa polskiego*, Towarzystwo Wydawnicze Młodych Prawników i Ekonomistów 1936, pp. 48, 168–169.

had his writings in his library and ordered to translate a number of them into French.⁷⁹ It seems that Roos repeated such an opinion after Józef Czapski, who quoted André Malraux. He claimed that a writer, de Gaulle's close aide and a minister of culture in the governments of the Fifth Republic, told him in 1945 that "de Gaulle had all papers and books by Piłsudski and had them translated into French."⁸⁰ I have never found any proof to confirm the testimony of Malraux and the opinion framed by Hans Roos.

A view about a substantive convergence of the two constitutions was also expressed in a number of articles. In the opinion of Stanisław Cat-Mackiewicz, presidential powers prove their affinity. Cat-Mackiewicz asserted (with a bit of exaggeration) that in this respect the April Constitution played a pioneering role in the context of the Fifth Republic Constitution. He asserted that the April Constitution was the first European supreme act that put into force presidential own powers.⁸¹ Such a view is typical of the articles whose authors use simplifications. Actually, the president's own powers were adopted in parliamentary monarchies well before 1935. As it had already been discussed, the French mid-war reformers called for their implementation in the constitutional system (André Tardieu, Bardoux Committee). Professor Dariusz Górecki, an author of the monograph on the position of a president and government in the supreme act of 23 April 1935, wrote about similar solutions adopted by the two constitutions. Their affinities were manifested by the president's constitutional position, including tasks and competences, own powers, government's role, prime minister's position and restricted powers of the parliament with regard to the budgetary drafting (expenditures).⁸²

Actually, there is some affinity with regard to the constitutional mission of the president, enshrined in the April Constitution as an overriding and superior factor that synchronizes activities of the top state organs (Art. 11) and the mission of the president of the Republic of France who ensures, by his arbitration, the proper functioning of the public authorities and the continuity of the State (Art.

⁷⁹ H. Roos, Polish edition: *Józef Piłsudski i Charles de Gaulle*, "Kultura" 1960, No. 5, p. 17. See B. Szlachta, *Polscy konserwatyści wobec ustroju...*, *op. cit.*

⁸⁰ J. Czapski, *Tumult i widma*, Instytut Literacki, 1981, p. 331.

⁸¹ S. Cat-Mackiewicz, *W. L. Jaworski, Stanisław Car i de Gaulle*, "Kultura" 1961, No. 9. Similar arguments are put forward by Hans Roos in his aforementioned article, *Józef Piłsudski i Charles de Gaulle*, *op. cit.*, p. 16.

⁸² D. Górecki, *Pozycja ustrojowa Prezydenta i rządu w ustawie zasadniczej z 23 kwietnia 1935 r.*, Łódź, 1992, p. 281.

5 of the Fifth Republic Constitution). Yet it should be emphasized that consolidation of the French president's position did not reach the point where all state authorities are supervised by the president (Art. 3 of the April Constitution). The President of the Republic of France supervises the judiciary system and military forces. As regards the judiciary, the president was invested with relevant powers as the head of the High Council of the Judiciary. Yet the president in no way supervises the National Assembly and the Senate. The Fifth Republic Constitution has developed as a system of checks and balances with the presidential supremacy, while the April Constitution challenged the principle of the separation of powers and followed the recommendations put forward by Stanisław Car, who reasoned that the six powers should be under the president's supervision.⁸³ Therefore, the authors of the April Constitution did not provide for the formation of the parliamentary government against the president's will. On the other hand, owing to Debré's ingenuity, the Fifth Republic Constitution provided for such an option. Presumably, a fact that the Constitution of 1935 did not provide for the establishment of the constitutional court proved its closeness and incapability of their authors to take a risk of establishing an institution that could be granted an independent status. This is curious as a great number of the Polish lawyers of different political and ideological views, including Jan Bobrzyński, Stanisław Estreicher, Władysław Leopold Jaworski or the Parliamentary Club of National Democracy (the draft of 1928), promulgated an idea of establishing the Constitutional Tribunal.⁸⁴ Noteworthy, Estreicher's proposal to introduce a review of the constitutionality of acts was similar to that adopted in France in 2008.⁸⁵

In my view, a thesis about a considerable affinity between April Constitution and de Gaulle's constitutional output is to a large extent oversimplified. Consolidation of the presidential position,

⁸³ See S. Car, B. Podoski, *Główne wytyczne nowej konstytucji Rzeczypospolitej Polskiej*, Księgarnia Powszechna, 1935.

⁸⁴ W. L. Jaworski, *Projekt konstytucji*, Skład Główny w Księgarni Leona Frommmera 1928; J. Bobrzyński, *O reformę ustroju*, "Nasza przyszłość" 1931, vol. 7, pp. 4–29; A. Piasecki, *W sprawie Trybunału Konstytucyjnego*, "Nasza Przyszłość" 1931, vol. 15, pp. 42–54; S. Estreicher, *Odpowiedź na ankietę Marszałka Sejmu*, "Nowe Państwo" 1931, vol. 3, p. 26; W. Komarnicki, *O praworządność i zdrowy ustrój państwowy*, Skład Główny w Domu Książki Polskiej, 1928. Establishment of the Constitutional Tribunal was discussed in the articles authored by Andrzej Gwizdź and Adam Jankiewicz. A. Gwizdź, *O Trybunale Konstytucyjnym w II RP*, [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci profesora Janiny Zakrzewskiej*, Trybunał Konstytucyjny. Wydawnictwa, 1996, pp. 67–79.

⁸⁵ A. Piasecki, *Sprawozdanie z ankiety przygotowawczej do reformy konstytucji odbytej w dniach 30, 30 lipca i 1 sierpnia w 1928 r. w Warszawie*, Warszawa, 1928, p. 64.

including own powers, is just part of the constitutional issues. Given all principles and crucial regulations enshrined in both constitutions, any analogy between them seems to be less obvious.

Firstly, the Fifth Republic was the product of the institutional republican revolution and dogma of the sovereignty of the nation as the foundation of the political system. A theoretical basis for the change effectuated by de Gaulle was a democratic interpretation of the nation's sovereignty. In the theoretical and legal dimension, it was framed in the writings of Raymond Carré de Malberg and René Capitant. This new interpretation of the republican foundation of the legal tradition allowed for establishing a strong presidency, challenging parliamentary supremacy and introducing the institution of a referendum. On the other hand, the authors of the April Constitution intentionally rejected the notion of the nation's sovereignty as well as the heritage of the French Revolution. Adam Piasecki, one of the first commentators of the April Constitution, highlighted this aspect in his book *Zasady nowej konstytucji* (*Principles of New Constitution*).⁸⁶ It was the Polish State, defined as the common good belonging to all citizens, was the key constitutional value. The April Constitution defined fundamental constitutional values in the way that was characteristic of authoritarianism and had rather more in common with the constitution of the Republic of Portugal⁸⁷ or the constitutional draft of the French State (Vichy). Noteworthy, the axiological assumptions of the April Constitution were the product of the theoretical thought of its authors and guiding spirits: Stanisław Car, Władysław Leopold Jaworski and Waław Makowski. A common denominator of their theoretical thought was a rejection of an idea of the nation's superiority, which was, in their view, old-fashioned and leading to wrong political solutions.

This difference is also crucial because the April Constitution was preceded by a number of constitutional drafts providing for considerable consolidation of the executive power but sticking to the idea of the sovereignty of the nation. Importantly, a draft of the *Constitutional Survey* of March 1919 stipulated in Art. 1 that the supreme power belonged to the nation and should be exercised

⁸⁶ A. Piasecki, *Zasady nowej konstytucji*, *op. cit.*

⁸⁷ Art. 4 of the Constitution of Portugal provided that the nation established sovereign state and the state's sovereignty is subject to the restrictions determined by morality and law. *Constitution politique De La République Portugaise*, [in:] B. Mirkine-Guetzévitch, *Les constitutions européennes*, PUF, 1951, pp. 612–643. See also T. Janasz, *Państwo Francuskie*, *op. cit.*

by mutually independent organs: the Sejm as a legislative branch of power, the president as an executive power and an independent judiciary system. Each of these organs is a holder of its own legitimization as an organ of the nation.⁸⁸ The draft authored by Michał Bobrzyński envisaged the establishment of the presidential-parliamentary system. The president was to be elected in the popular vote and directly by electors. The government appointed by the president was politically accountable to the Sejm. The proposal put forward by Bobrzyński and espoused by Piłsudski was not taken into account in the constitutional drafting of the Legislative Sejm because the idea of parliamentary supremacy was ultimately abandoned. Stanisław Estreicher had no doubts that Michał Bobrzyński made an attempt to challenge the primacy of the Sejm due to respect for the nation's superiority. This is what he wrote in the text *Suverenność narodu czy Sejmu (Sovereignty of Nation or Sejm?)*:

To challenge a demand for the “sovereignty of the Sejm,” the authors of the Constitutional Survey sought a different slogan that would be clear to the people and believed that it could be found in the theory of the nation's sovereignty and by the establishment of the three mutually independent organs that would rule on behalf of the nation and control each other.⁸⁹

In his ideas Bobrzyński followed Carré de Malberg. Noteworthy, ten years later even S. Estreicher referred to the concepts put forward in the survey and proposed election of the president in the popular vote and by the electors appointed in the single-mandate districts.⁹⁰

A similar draft authored by Stanisław Bukowiecki was put forward in the preparatory Survey on the constitutional reform of 1928. Bukowiecki asserted that nation was the source of power and proposed *democratic dualism* (the same term Pierre Ardant applied in his study on the thought of Carré de Malberg and the Fifth Republic Constitution), where the president and the parliament members were elected in the popular vote.⁹¹ In Bukowiecki's view, the president would be elected in the plebiscite out of the two candidates appointed by the Sejm. The official draft prepared

⁸⁸ M. Bobrzyński, *O potrzebie “silnego rządu”...*, *op. cit.*, p. 144.

⁸⁹ S. Estreicher, *Suverenność Sejmu...*, *op. cit.*, p. 59.

⁹⁰ A. Piasecki, *Sprawozdanie z ankiety...*, *op. cit.*, p. 18.

⁹¹ A. Piasecki, *Sprawozdanie z ankiety...*, *op. cit.*, pp. 15–16.

in 1928 by the Parliamentary Club of the Nonpartisan Bloc for Cooperation with the Government (BBWR) included provisions similar to those in the Fifth Republic Constitution. Art. I of the draft stated that “The Nation is the source of power in the Republic of Poland and the good of the country is the supreme law.”⁹² BBWR espoused presidential elections in the popular vote (voters would choose between a candidate proposed by the National Assembly and a candidate appointed by the outgoing president), the president was to be invested with own powers (including a power to dissolve the Sejm and the Senate and power to appoint the Prime Minister),⁹³ and the council of ministers was to be accountable to the parliament. The aforementioned drafts may prove that Polish politicians and constitutionalists examined the possibility of the fundamental constitutional reform with respect for the nation’s sovereignty.

Yet the April Constitution led to the essential change in the axiology as it was aimed to break off with the liberal vision of the state and individual rights. Stanisław Car and Wacław Makowski called for a need to depart from the heritage of the French Revolution and challenged such an definition of relations between an individual and the state, enshrined in the Declaration of the Rights of Man and of the Citizen of 1789.⁹⁴ According to the authors of the April Constitution, it should be an act of the new type. Therefore the primary message of the Constitution of 1935 was that social life developed within the state’s framework and was based on the state. The

⁹² Motion of MP Walery Ślawek and his colleagues from the Non-Partisan Bloc for Cooperation with the Government on amending certain provisions of the Constitutional Act by the procedure laid down for its revision (*Wniosek posła Walerego Ślawka i kolegów z Klubu Bezpartyjnego Bloku Współpracy z Rządem w sprawie zmiany niektórych postanowień Ustawy Konstytucyjnej w trybie, przewidzianym dla jej rewizji*), Sejm Rzeczypospolitej Polskiej (period II), Report No. 444, p. 1.

⁹³ Art. XLI of the draft tabled by BBWR stated that “Official acts issued by the President shall be countersigned by the Prime Minister and competent Minister to become effective. By countersigning an act they assume responsibility for such an act. The documents that shall not have to be countersigned include a) addresses and any act concerning the Sejm and the Senate; b) appointment or dismissal of the Prime Minister, General Inspector of the Military Forces, President of the Supreme Audit Office and officials from the Civil Office of the President of the Republic of Poland; c) nomination or dismissal of officers of all ranks and any acts of the president as the Commander-in-Chief of the Military Forces; d) presidential pardons and acts of legal care transferred by bills; e) nomination of judges; f) nomination of the president and members of the Tribunal of State.” *Motion of MP Walery Ślawek... (Wniosek posła Walerego Ślawka...), op. cit.*

⁹⁴ See W. Makowski, *O naprawie konstytucji po raz drugi – zmiany. Przemówienie Sejmowe z 17 lipca 1926 r.*, [in:] W. Makowski, *O państwie społecznym*, introduction, selection and edition by W. T. Kulesza, Wydawnictwo Sejmowe, 1998, pp. 71.

state organs should provide conditions for the free development of society and, when this is required by the common good, the state should determine its direction or conditions. Activities of an individual were seen in the community perspective (Art. 5 Item 1 provided that “activities of an individual are the driving force of the community life”) and – contrary to the liberal perspective, it provided that the freedoms boundaries were determined by the common good. Moreover, the April Constitution declared that the right to influence public issues depended on the citizens’ efforts and merits in their strive for the common good. In the new social state individual’s rights were not recognized as “impassable demarcation line,” as Jelinek put it.⁹⁵ Adam Piasecki was right to assert that it was the original specification of the state’s tasks, a critical response to the liberal approach as well as totalitarian systems.⁹⁶ On the other hand, the Constitution of the Fifth Republic did not introduce significant changes in this respect. De Gaulle’s decisions of the years 1944–1946, which I have discussed in Chapter II, posed no challenge to the heritage of the French Revolution. Actually, they consolidated the republican tradition and supplemented a liberal approach to the individual’s rights, enshrined in the Declaration of 1789, with a social obligation of the state.

Secondly, unlike the Fifth Republic Constitution, a number of provisions of the Polish Constitution of 1935 were quite rigid, which, however, turned out to be sensible in the late 1930s and after World War II broke out: the president was empowered to appoint a successor for the war time, which ensured continuity of the state’s functioning after German and Soviet aggression in 1939. This advantage was appreciated even by the fervent critics of the April Constitution, including Edward Dubanowicz.⁹⁷ Yet in ordinary times, the constitution could be applied for the state’s benefit on condition that political lines of the president coincided with those of the parliamentary majority. Apart from the fact that the president was empowered to dismiss a government at any time, which was not enshrined in the Fifth Republic Constitution, the prime minister had no effective instruments to govern if he had to seek support only from the parliamentary majority. The April Constitution placed trust in the presidency and, consequently,

⁹⁵ See G. Jelinek, *Deklaracja praw...*, *op. cit.*, p. 21.

⁹⁶ A. Piasecki, *Zasady nowej konstytucji*, *op. cit.*, p. 16.

⁹⁷ E. Dubanowicz, *Nauka obywatelska*, Ministerstwo Wyznań Religijnych i Oświecenia Publicznego, Londyn 1943.

excluded flexible application of the regulations if the government majority opposed the president's policy. The act allowed either for the presidential governments enjoying support from the Sejm and the Senate or the presidential minority governments able to function by means of the effective use of a vote of confidence. In other words, the April Constitution did not provide conditions for *cohabitation* and formation of the parliamentary government in opposition to the president's will. The prime minister was not invested with the same powers as his counterpart in the Fifth Republic. The Polish constitution of 1935 lacked a coherent model of the rationalized parliamentarism. The Prime Minister was not empowered to decide on the parliamentary agenda and his few prerogatives included the use of the regulations rationalizing the procedure of passing the budget. The government had no instruments such as own legislation.⁹⁸ Moreover, the authors of the April Constitution intentionally eliminated a possibility of any political competition by enacting the electoral law that ensured *Sanacja* (political followers of Józef Piłsudski) a political majority in the Sejm and the Senate. Thus, the Lower and Higher Chambers did not reflect the real differences dividing public opinion. Similarly, regulations concerning election of the president aimed to ensure *Sanacja* political power. A concept of the national elite that was to establish foundations of the Senate and an assembly of electors choosing the president was subjected to the particularistic goals of the government and its political background. All these factors made that the Constitution of 1935 could not be a long-lasting political solution.

Thirdly, unlike the Fifth Republic Constitution, the April Constitution was critical of an extensive application of the institution of popular vote and rejected institutions of direct democracy. Noteworthy, that act expressed distrust in the institution of a referendum and other instruments of direct democracy, which was typical of the Polish constitutional thought in the interwar years. Interestingly, the only party that espoused the introduction of the institution of a referendum was Polish Socialist Party (March Constitution drafting, 1921).⁹⁹ Regardless of their attitude towards Piłsudski, an overwhelming majority of political groups

⁹⁸ Noteworthy, Art.55, Item 3 of the April Constitution provided that decrees should be issued by the President upon the motion of the Prime Minister.

⁹⁹ See A. Ajnenkiel, *Spór o model parlamentaryzmu polskiego do r. 1926*, Książka i Wiedza 1972; K. Kawalec, *Wizje ustroju państwa w polskiej myśli politycznej lat 1918–39*, Wydawnictwo Uniwersytetu Wrocławskiego, 1995, p. 52; M. Śliwa, *Polska myśl socjalistyczna*, Ossolineum 1988, pp. 42–49

and parties, remained critical of such an institution. Stanisław Esreicher, like other Polish conservatives, asserted that a referendum was the wrong solution given a poor educational level of the society and a poor level of public education. Other critics included moderate representatives of National Democracy, such as Edward Dubanowicz who, in his book *Rewizja konstytucji* (*Revision of Constitution*) referred to Esmein's argumentation that "popular vote is capable of undermining the representative system but incapable of substituting this system."¹⁰⁰ Prof. Dubanowicz asserted that popular vote did not meet minimum substantive requirements and led to random decisions, depending on the totally external circumstances. Like Esmein, he rejected the constitutional referendum: "Introduction of the popular voting in the area of constitutional legislation would be dangerous and grotesque recklessness. Legislation should remain as a prerogative of the legislative bodies."¹⁰¹

For the same reasons, Polish constitutional thought was critical of the institution of general and direct presidential elections. Antoni Peretiatkowicz, who espoused the idea of extended presidential powers, was a strong opponent of the general and direct presidential elections. In his view, they could lead to coup d'État. This is what he wrote in his *Reforma konstytucji polskiej* (*Reform of Polish Constitution*):

Certainly, election of the president by the whole nation may result in the establishment of Bonapartism and coup d'états, as we can see in Central or South America. This is a probable scenario when active, politically engaged individuals become leaders, provoke conflicts with the parliament and frequently decide to undertake radical, even illegal measures.¹⁰²

For the same reasons, Adam Piasecki highly appreciated the April Constitution authors' reservation towards general presidential elections.¹⁰³

Importantly, Raymond Carré de Malberg's article that provided theoretical foundations for the institution of a referendum was a subject of the in-depth and critical review made by Adam Piasecki. It seems that his arguments reflected the stance of the

¹⁰⁰ E. Dubanowicz, *Rewizja konstytucji*, *op. cit.*, p. 41.

¹⁰¹ *Ibid.*, p. 46.

¹⁰² A. Peretiatkowicz, *Reforma konstytucji polskiej*, *op. cit.*, p. 29.

¹⁰³ A. Piasecki, *Zasady nowej konstytucji*, *op. cit.*, pp. 20–21.

Polish conservative thought. Adam Piasecki pointed out that the institution of a referendum had been enshrined in the constitution of the Weimar Republic, which meant that the problem became really crucial. The Polish constitutionalist asserted that referendum would neither get a wide social acceptance nor build up the authority of the national power. Piasecki perceived the referendum "as a simplified definition of the people's omnipotence, an idea that had already displayed its negative ramifications."¹⁰⁴ Piasecki underrated or ignored the French constitutionalist's arguments when he defined the referendum as a means to reconstruct strong executive power, constitutional review and eliminate hegemony of political parties. In his view, the article by Carré de Malberg was the manifestation of "a narrow thinking dictated by political dogmatism of the late 18th century."¹⁰⁵ In his opinion, the referendum had no advantages. Moreover, application of this institution would lead to ochlocracy and destruction of the state.¹⁰⁶ Undoubtedly, an opinion tabled by Czesław Znamierowski was representative of the Polish legal thought. In his excellent study *Szkola prawa. Rozważania o państwie* (*School of Law. Reflections on State*) he said that "Community is unable to make use of any public functions apart from elections."¹⁰⁷ Probably, the reason why the Polish constitutional thought rejected the idea of a referendum and direct democracy was a fear against populism and a poor level of the Polish public education. On the other hand, de Gaulle assessed an ability of the French people to make political decisions much higher. He was also convinced that democratization of the republic was a prerequisite for the restoration of the legitimization of the state.

Authors writing about the affinities between the April Constitution and the Fifth Republic Constitution highlighted several common features of the political output of Piłsudski and de Gaulle. Political position of both statesmen was based on their exceptional historical merits: they were military professionals attaining national goals. Piłsudski played a key role in the restoration of independence by Poland and de Gaulle saved the honour and legality of France in 1940 and ensured his country a strong position among the war victors. They were not exponents of any political party and had a negative attitude towards parliamentary supremacy. They espoused

¹⁰⁴ *Idem.*, *Zwrot ku referendum*, "Przegląd Współczesny" 1931, No. 115, pp. 185–186.

¹⁰⁵ *Ibid.*

¹⁰⁶ A. Piasecki, *Zwrot ku referendum*, *op. cit.*, pp. 186–187. See also I. Czuma, *Carré de Malberg: La loi, L'expression de la volonté générale*, "Nowe Państwo" 1932, No. 2.

¹⁰⁷ Cz. Znamierowski, *Szkola prawa. Rozważania o państwie*, Pax, 1988, p. 450.

consolidation of the executive power and a fundamental constitutional reform.

Józef Czapski, who had direct contact with de Gaulle, could not resist comparing the General to Marshall Piłsudski in his article published in the Parisian “Kultura” soon after the death of the President of France.¹⁰⁸

For every Pole this is not only a glorious President of France who has passed away. This is also a young captain, a teacher of military tactics in Rembertów, who experienced, along with our army and nation, a looming defeat that finally turned into the glorious victory of 1920. Young de Gaulle, who was an eye-witness of the fate of Poland and its Commander, kept in Colombey-les-Deux-Églises all the texts of the speeches and writings of Piłsudski and read them much later, in the years that he called “a journey through the desert.”

Speaking about de Gaulle you cannot forget about Marshal Piłsudski: the same passionate and bitter love of the homeland, the same devotion to the cause until the very end, solitude and pride, Sulejówek – Colombey-les-Deux-Églises, struggle for the real power, never for an appearance of power, struggle against exponents of foreign interests and disdain for meanness, disdain for everything that was humiliating for their homelands from their perspective, the same combination of dreams and astonishing realism, flair for game and tactics, the same attitude towards parliament and political parties, struggle for the new constitution, reconstruction of the country from scratch.¹⁰⁹

It seems that the affinities between two leaders cannot veil considerable differences manifested primarily in their attitude towards state institutions and law. De Gaulle had respect for the state institutions and was willing to build a new political model that would strengthen France for many years. He did not subordinate the overriding goal to the interests of his political background. He had no intention to build up a system that would invest his political supporters with some special powers. On the contrary, he was capable of self-restriction and establishment of the balanced system where the government retained accountability to the parliament. De Gaulle restored France a strong legitimization,

¹⁰⁸ J. Giedroyc, *Autobiografia na cztery ręce*, Czytelnik 2006, p. 117.

¹⁰⁹ J. Czapski, *De Gaulle*, “Kultura” 1970, No. 12.

extending the scope of a popular vote and opening it to the institution of a referendum. He never considered adopting any electoral law that would eliminate political competition. Unlike Piłsudski, he performed a presidential function and prevented an emergence of gaps between real power and official power. He restored constitutional institutions their significance and legitimacy. Resignation from the presidency after the referendum defeat of 1969 consolidated the Fifth Republic and its founder showed a particular respect for the spirit of the Constitution. Meanwhile, Piłsudski and his successors were incapable of building any long-lasting political institutions. They rejected the thought of the synthesis of order and freedom. Instead, they sought to eliminate political competitors and, consequently, abandoned parliamentary dimension of the Constitution and condemned this act to impermanence.¹¹⁰ Although soft authoritarianism of the post-1926 governments protected Poland against totalitarian solutions, it failed to build any permanent institutional heritage.¹¹¹

Hans Roos is right to assert that de Gaulle drew conclusions from the experience of Piłsudski and avoided his errors:

Certainly, de Gaulle made attempts to draw conclusions from the errors Piłsudski made: after passing the new constitution, soon after he came to power, he decided to avoid a conflict with the legal institutions. Moderate and self-restraint governance and readiness for compromises despite moral and lawful power that would be legal in the event of a conflict are definitely hallmarks of the political style of de Gaulle.¹¹²

On the other hand, there are certain affinities between the thought of Debré and the concept of young conservatives from the periodicals “Bunt Młodych” and “Polityka.” In the mid-1930s, Adolf Bocheński, a leading representative of this group, believed, like Michel Debré, that the systems respecting the government’s accountability to the parliament are not condemned to the fall and may attain long-term national objectives.¹¹³ Both authors were

¹¹⁰ H. Roos, *Józef Piłsudski...*, *op. cit.*, p. 19.

¹¹¹ See the insights on relations between authoritarianism and fascism in W. T. Kulesza, *Koncepcje ideowo-polityczne obozu rządzącego w Polsce w latach 1926–1935*, Ossolineum, 1985, pp. 266–286.

¹¹² *Józef Piłsudski...*, *op. cit.*, p. 20.

¹¹³ Adolf Bocheński and Michel Debré studied at the prestigious Parisian École de Sciences Politiques nearly at the same time.

called “imperialists” as they asserted that good and effective institutions were the prerequisite for the state’s power. They espoused a political system that could bring together the state’s power and political freedom and, consequently, rejected the rule of the Assembly as well as an authoritarian dictatorship.¹¹⁴ Like Debré, Bocheński demanded presidency responsible for the strategic areas of the national policy (army, foreign policy), a government enjoying stable majority (in the aftermath of the majority statute) and competitiveness of the political system (opposition could come to power legally). Although Bocheński retained huge appreciation for Piłsudski, he was critical of his successors who in search of power for their own interests weakened the state structures. The author wanted to invigorate the April Constitution, he demanded introduction of the truly competitive electoral law. Similarly to Debré, he was an advocate of the majority electoral law and single-mandate electoral districts.¹¹⁵ In his view, parliamentarisation of the April Constitution would not undermine the position of presidency as a centre responsible for the state’s security.¹¹⁶

Political groups associated with periodicals “Bunt Młodych” and “Polityka” sought institutional possibilities of the synthesis of order and freedom. It seems that for the same reasons the Fifth Republic was highly appreciated by Jerzy Giedroyc, a founder of the Parisian “Kultura.” As I have mentioned before, this émigré Polish periodical recognized the Constitution of 1958 as a return of France to the leading position in Europe and rejection of the anachronistic system that made it impossible to face external challenges and new socio-economic problems. Noteworthy, the views of Giedroyc were not common among Polish post-war emigrants. Polish political thought sought improvement of the parliamentary system in response to the authoritarianism of the post-1926 governments.

Such a stance predominated in the policy statements of the Polish democratic opposition in the 1970s and 1980s.¹¹⁷ An exception was Ruch Młodej Polski [Movement of Young Poland] that referred to the Gaullist political concepts in search of the future constitutional model, independent Poland as the synthesis of the state’s power and freedom. The policy statement

¹¹⁴ See *Polska idea imperialna*, Polityka 1938.

¹¹⁵ A. Bocheński, *Zagadnienie ordynacji jednomandatuowej*, “Bunt Młodych” 1934, No. 6.

¹¹⁶ K. M. Ujazdowski, *Żywotność konserwatyzmu...*, *op. cit.*

¹¹⁷ See K. M. Ujazdowski, *Ciasna przestrzeń demokratycznego socjalizmu*, *op. cit.*

of 1984, *Miedzy Polską naszych pragnień a Polską naszych możliwości* (*Between Poland of Our Dreams and Poland of Our Possibilities*) included French features: a need for the national leadership, superior and harmonizing role of the president elected in a popular vote and, obviously, rejection of the dogma of parliamentary supremacy accepted by nearly all the democratic opposition.¹¹⁸ A similar proposal was tabled by Lech Mażewski – one of the major activists of Gdańsk liberals.¹¹⁹

After regaining independence in 1989, constitutional experience of the Fifth Republic was found interesting in the context of the restoration of the institution of a president after introduction of the institution of general presidential elections in 1990. Interestingly, French inspirations were discernible as early as in 1989, in the process of establishing the National Council of the Judiciary of Poland and building independence of the judiciary power.¹²⁰ A strong impact of the French model on the Polish constitutional thought was described by a few Polish authors, including Krzysztof Complak, Maria Kruk and Wojciech Sokolewicz.¹²¹ The French constitutionalism has still some impact on the Polish thinking, which is discernible in the drafts of the Council of State¹²² or discussions on the introduction of the governmental legislation¹²³ and organic law.¹²⁴ I absolutely share an opinion

¹¹⁸ Editorial team of “Polityka Polska,” *Miedzy Polską naszych pragnień a Polską naszych możliwości*, “Polityka Polska,” 1984, No. 4; A. Hall., *Idee polityczne generala de Gaulle’a*, “Polityka Polska,” 1986, No 8.

¹¹⁹ L. Mażewski, *Mechanizm rządzenia w nowej konstytucji*, “Przegląd Polityczny,” 1989, No. 12

¹²⁰ *Sprawozdanie z posiedzeń podzespołu do spraw reformy prawa i sądów* (full report from the activities of the sub-committee is kept in the Library of Sejm).

¹²¹ See K. Complak, *Arguments de la constitution française de 1958 à l’Assemblée constituante polonaise*, [in:] *1958–2008. Cinquantième anniversaire...*, op. cit., pp. 657–661. M. Kruk, *V czy VI Republika? Rozważania wstępne o kierunku zmian konstytucji francuskiej i ich znaczeniu dla doktryny polskiej*, “Przegląd Sejmowy” 2008, No. 6, pp. 181–182. W. Sokolewicz wrote about an impact of the French model on the Polish constitutional thought but was definitely critical of the transfer of any foreign patterns and espoused the idea of “independent development of the national political model.” *Konstytucjonalizm europejski i przyszła polska konstytucja*, “Państwo i Prawo” 1992, No. 8.

¹²² The Office of Ombudsman, <http://www.rpo.gov.pl/pliki/12087762480.pdf>. See also Centrum Myśli Polityczno-Prawnej im. Alexis de Tocqueville’a, *Piąta Debatą Tocqueville’owska. Kryzys tworzenia prawa w Polsce. W poszukiwaniu kierunków reform*, Łódź 2011.

¹²³ *Amendments to the RP Constitution concerning Poland’s membership in the European Union. Documents from the work of the scientific team appointed by the Speaker of the Sejm (Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej. Dokumenty z prac zespołu naukowego powołanego przez Marszałka Sejmu)*, ed. P. Radziejewicz, Wydawnictwo Sejmowe 2010, pp. 11–12.

¹²⁴ Discussions held in the Polish Academy of Sciences on the organic law. A seminar on the organic law in the Polish constitutional law. www.isp.org.pl/aktualnosci,233,

that the political system of the Third Republic of Poland is not a product of the coherent political vision and serious reflection on the Western-European models, including experience of the Fifth Republic.¹²⁵ Moreover, after 2015 constitutional democracy and judiciary independence have been seriously undermined in Poland, which prevents adoption and implementation of any useful constitutional reforms. Regardless of this fact, the prerequisites for the adoption of any foreign political models should be analysed separately. Anyway, automatic implementation of any foreign solutions should not be considered. Yet the French experience of the Fifth Republic provides a good lesson of self-reliance in the process of building a constitutional system.

622.html, (accessed: 21.02.2013. See also E. Gdulewicz, *O ustawie organicznej*, *op. cit.*, pp. 541–547.

¹²⁵ Krystian Complak is right to assert that the authors of the Polish Constitution had no coherent vision of the French Constitution of 1958. K. Complak, *L'influence de la Constitution française de 1958 sur la Loi fondamentale de la République de Pologne en vigueur* [in:] *École de droit français de Łódź et de Cracovie, 50^{ème} anniversaire de la Constitution française, Les journées du droit français en Pologne en 2008*, Presses Universitaires d'Orléans, 2008, p. 20. In the view of historians, political scientists and constitutionalists, a constitutional model of the Third Republic of Poland was a product of political compromises and short-term decisions. Jerzy Ciemniewski is right to assert that "evolution of the constitutional system effectuated in Poland between 1989 and 1992 was to a small degree driven by any comprehensive vision of the future constitutional system and clearly defined political and legal concepts regarding the sources of the constitutional theory and practice that could inspire constitutionalists in their search for a new model of the state." J. Ciemniewski, *Podział władz w demokratycznym państwie prawnym*, [in:] *Mała konstytucja w procesie przemian ustrojowych w Polsce*, ed. M. Kruk, Wydawnictwo Sejmowe 1993.

Ending

In my studies on the origins and identity of the Fifth Republic I was driven by a conviction that their understanding would be unachievable without going beyond a dogmatic and legal analysis. Moreover, a doctrinal analysis exposing the hallmarks of the French republican tradition shaped by the French Revolution and de Gaulle's attitude when his idea of the state became mature, are also necessary. The doctrinal thought reveals diverse sources of the Fifth Republic Constitution: reformatory output of the 1930s, original political concepts of de Gaulle and his aides - Michel Debré and René Capitant. Yet the very presentation of the historical sources of the Constitution of 1958 is not the only advantage. The ideas establishing new regulations or, in other words, the doctrinal underpinnings of political system are also crucial since, given French conditions, a different methodology would impoverish the thought and lead to the wrong conclusions. In the French intellectual culture institutional order should be the product of intellectual constructions. Such an approach seems to stem from rationalism and aspiration to embrace the reality. Therefore, Esmein and Carré de Malberg were right saying that in the case of France this was a logical sequence of the ideas shaping institutions. This is well explained by the confrontation of the views of Hans Kelsen and Raymond Carré de Malberg on the direct democracy. In Kelsen's view, a parliamentary system supplemented by the institution of a referendum and the people's legislative initiative was a purely pragmatic choice aimed to improve and open parliamentary democracy. Carré de Malberg asserted that to accomplish that goal, the nation's sovereignty should be given a new democratic interpretation. Thus, his legitimization of the innovation establishing theoretical underpinnings of the institutional "revolution" effectuated in 1958 by de Gaulle was of huge significance.

Contrary to this popular thesis, in my view, the Fifth Republic could not be established as a republican monarchy. In France, any republican system's content differs from the universalist interpretations since it originates from the French Revolution and its values were shaped by a serious confrontation with the monarchist tradition. A specifically understood idea of the nation's sovereignty, shaped under the influence of Rousseau's thought, ideas of the republic's indivisibility and secularity, established a completely new

model of the state. That difference was excellently highlighted by François Furet, when he reasoned that the republican model in the French intellectual understanding developed to a full extent in the 1880s and 1890s, when the Revolution “reached a harbour” and was institutionalized. In such a situation, any synthesis of antagonistic traditions was impossible. Republican and monarchist rules mutually excluded and could not create any coherent structure, even if Tocqueville was right pointing out a high degree of centralization as a common hallmark of the monarchy and the republic. Furthermore, it should be underscored that the restoration of the monarchism by nationalist *Action française* exaggerated the differences between the two traditions. The *Action française*’s doctrine was based on the assumption that a republic was a product of a foreign origin, imposed on France by people who demonstrated a hostile attitude towards a multi-century historical heritage of this country. From the point of view of Maurras’s thought, a break off with the republic and reconstruction of the monarchy were a fundamental condition for the restoration of France’s power.

Although de Gaulle was brought up in a family of the monarchist views, he advocated state patriotism and accepted a republic as a permanent form of France’s existence. His views matured under the influence of republican nationalists: Charles Péguy and Maurice Barrès. It is them who inspired de Gaulle to develop an idea of state patriotism that accepted a republic, was inclusionary compared to other ideological trends and oriented towards the consolidation of the state as a tool of France’s power. An exceptional influence Péguy exerted on de Gaulle, almost undiscernible in the Polish scientific thought, deserves particular attention. The founders of the Fifth Republic fully identified with the poet’s thought of the unity of the French history, excellently expressed in a famous formula developed by Péguy: “The one and indivisible Republic, this is one Kingdom of France.”

Thus, de Gaulle thought of the republic that integrated diverse ideological trends and not just combined the monarchist and republican traditions. Such an option followed from the way he perceived Christian obligations in the public sphere. In his view, Christian ideas were not doomed to failure in the world shaped by the heritage of the Revolution, which corresponded to the tradition of the Catholic-Liberal “Correspondant.” It should be emphasized that all the founders of the Fifth Republic espoused the republican tradition. André Tardieu was a republican nationalist, just like professor Carré de Malberg. Regarding René Capitant

and Michel Debré, they were fervent and enthusiastic republicans of “heart and reason.” At the same time, their rejection of the Jacobin strain of republicanism was fraught with consequences.

During World War II, as a leader of Free France, de Gaulle consistently strived to consolidate the republican tradition in his dispute with Vichy authorities. In the aforementioned memoirs he could justly write that in 1940 he “pulled the Republic out of its grave,” when it was abandoned by the majority of its political elites. Thus, *Rétablissement de la légalité républicaine*, proclaimed on 9 August 1944, was a logical ramification of the legal and state doctrine of Free France. In years 1944-1946, as the head of provisional government, he made republican principles the foundations of post-war France. De Gaulle’s ideas of indivisibility, secularity, a democratic and social nature of the state won the status of the fundamental constitutional principles in the Constitutions of the Fourth and Fifth Republics. As I have mentioned before, de Gaulle and his aides were republicans critical of the Jacobin tradition. Therefore, they also defended a supreme status of the Declaration of the Rights of Man and of the Citizen, which contributed to the establishment of the review of the constitutionality of acts and the Constitutional Council.

The leader of Free France fully embraced the principle of nation’s sovereignty as that of key importance for the public order. Moreover, de Gaulle was convinced that adoption of such a tenet should result in the democratization of France. This was a deep sense of the decision made in late autumn 1945 on the constitutional referendum, which meant that the nation was invested with the right to participate in *pouvoir constituant*. Thus, de Gaulle undoubtedly consolidated the republican constitutional identity of France. Therefore, the Fifth Republic could only be established as an institutional change within the republican axiology.

A thesis that the Fifth Republic is the manifestation “of the victory of ideas over reality” is by no means exaggerated as it was established as a product of confrontation with the parliamentary supremacy system that enjoyed huge support of the French political elites and was characterized by strong doctrinal rationalization expressed with the substantial consistency in the writings of Adhemar Esmein. Noteworthy, a majority of Résistance and Free France activists did not find it necessary to extend reconstruction by any dramatic transformation of the political system. The views of René Capitant and Michel Debré were in the minority and were not representative of the Résistance groups.

Reform advocates did not operate in the intellectual void and could draw on the 1930s reformatory output, included in the writings of Tardieu, Carré de Malberg and the Bardoux Committee Report. Generally, five principal elements of the republican reformism should be highlighted:

restoration of the strong executive power and investment of the president with own powers (*pouvoir propre*), which primarily concerned his power to dissolve the parliament; the president was to hold a much stronger democratic mandate after being elected in a general vote (Carré de Malberg) or election by the college representing a wide-spectrum of interests (Bardoux Committee)

introduction of the institution of a referendum to restore independence of the executive power (Tardieu) and launch a thorough political transformation (Carré de Malberg)

rationalization of parliamentary procedures: establishment of parliamentary sessions; restriction of a number of permanent commissions; curbing MPs' freedoms in the budget drafting process; introduction of a new formula of the government's accountability (Tardieu, Bardoux Committee)

establishment of the constitutional judiciary system and review of the constitutionality of acts (Bardoux Committee, Carré de Malberg)

professionalization of the political system: integration of the Council of State and Court of Auditors with the government; appointment of independent and permanent senior officials in the ministries and administrations (Bardoux Committee).

In no way, was the reformatory output of the 1930s automatically adopted by the authors of the Fifth Republic Constitution. It is their independent intellectual activities and de Gaulle's determination to implement a thorough political change that was of key importance. Undoubtedly, the 1930s reformism inspired René Capitant and Michel Debré, who developed rationalized parliamentarism and republican democratism as the two trends co-shaping the Fifth Republic Constitution. It should be emphasized once again that Michel Debré came up with a solution providing a parliamentary government with stability and instruments for effective governance as early as in 1943, in his book *Refaire la France*. The constitutional thought of Debré provides an example of the effective adoption of foreign patterns. A close aide of de Gaulle introduced the solutions well-known to the British parliamentary system and

supplemented by his original proposals (definition of statutory domain, government legislation). Moreover, significance of René Capitant's writings should also be not downplayed, since it was the pre-war period when he put forward a concept of the election law (elections in two rounds, given that absolute majority is necessary), effectuated in 1958. The author of *La réforme du parlementarisme* was the first who demanded *incompatibilitas* of the minister's post and a parliamentary mandate, convinced that a minister should be an active designer of policy and not just a passive representative of the parliament in relation to the ministerial bureaucracy, which was one of the manifestations of the Third Republic crisis. After the war, René Capitant, in reference to the theoretical thought of Carré de Malberg, his master, interpreted the idea of nation's sovereignty in the democratic spirit and paved the way to the extensive institutional changes: a referendum, empowerment of the executive branch (general presidential elections) and review of the constitutionality of acts. Noteworthy, René Capitant had defined the president as a real head of the state and the head of the executive power even before de Gaulle did this in his speech in Bayeux.

De Gaulle's constitutional thought, expressed in 1946 in Bayeux and Épinal, differed from the concepts put forward by Raymond Carré de Malberg, René Capitant and Michel Debré. It developed under the influence of the reflections on the history of France and the General's political experience. De Gaulle's concept aimed at the consolidation of the state and reconstruction of the national leadership in the president's hands combined with democratization of the republic. His key idea was the dialogue between "the president - a real leader of the state and the nation, an arbitrator, who was to decide about everything that was crucial for its fate." Interpretation of the thought of Montesquieu as an exponent of the institutional balance justified empowerment of the executive branch. De Gaulle espoused appointment of the government by the president. Following René Capitant's ideas, he called for *incompatibilitas* of the minister's post and a parliamentary mandate. The president independent of the parliament and vested with own powers (to nominate a prime minister, dissolve parliament) was to form the executive power and rule through the government. In Bayeux and Épinal de Gaulle defined the president's mission as an active arbitrator and a real head of the state. Noteworthy, a scope of the president's power was from the very beginning substantially larger than that specified in the Constant formula of the neutral and moderating power.

Beginning from the historic Bayeux speech of June 1946, the idea of the dramatic political change became a fundamental objective of the public activities of de Gaulle. Establishment of the RPF provided a rare example of the establishment of a political movement aimed to launch a fundamental constitutional reform. De Gaulle respected parliamentary accountability of the government and espoused extension of the application of the instrument of general vote. Hence, any analogy suggested, for example, by professor Paxton, between de Gaulle's model and the Vichy authoritarianism is just not supported by any real facts. In the years of RPF, the constitutional doctrine of de Gaulle developed and was extended with a number of legislative solutions (the draft of 1948). Importantly, de Gaulle and Debré expressed criticism of the federal formula of the European integration and made endeavours to introduce a mechanism of the review of the constitutionality of the treaties establishing the European Defence Community and the European Economic Community, which had been extensively discussed before. This is the experience that inspired French constitutionalists to introduce, in 1958, a mechanism of the preventive review of international obligations, unique in Europe and applied at the early stage, prior to the adoption of a bill giving consent to the treaty's ratification in the parliament.

In 1958, de Gaulle returned to power with a plan of the fundamental political change. An analysis of the documents concerning the process of constitutional drafting confirms the opinion that de Gaulle and his aides had a coherent vision of the new constitution and immediately after passing the act of 3 June delineated the directions of further drafting stages. *Avant projet* was the effect of the application of the Bayeux and Épinal doctrines extended with a model of the rationalized parliamentarism offered by Debré. At the first stage of drafting all crucial issues were agreed: the president as an active arbitrator and the real head of the state invested with explicitly defined own powers; institution of the legislative referendum; the bipartite executive branch of power; the government invested with a number of instruments for effective governance, much more powerful than those in the Third and Fourth Republics; a definition of the statutory domain; government legislation; a review of the constitutionality of acts; Constitutional Council.

Another interesting aspect of the process of the shaping of the Fifth Republic is a creative role of the legal elites. Charles de Gaulle and Michel Debré espoused consolidation of the political position of the Council of State. A team of experts headed by

Michel Debré, who devised a preliminary draft (*avant projet*), was almost entirely composed of young lawyers working in the Council of State. A few of them, including Raymond Janot or Jérôme Solal-Céligny, played a very creative role and contributed to the establishment of new institutions. It should be reminded that Janot was the author of the Constitutional Act of 3 June 1958, that paved the way to the fundamental political change, and drew up the regulations on the president's own powers. Jérôme Solal-Céligny exerted a huge impact on the shape of the regulations on the vote of confidence and non-confidence in the government as well as organic law and *ordonnances*. It seems that the role legal experts played in that process is underestimated and many authors even assert that the Fifth Republic Constitution was a product of politicians while lawyers played only a minor role. Actually, their contribution to the establishment of new regulations was at least the same as that of the ministers of state, such as Guy Mollet or Pierre Pflimlin.

A focus on the explicit definition of the constitutional principles providing a basis for institutional transformation, is also striking. Once again, Esmein's opinion that in France a logical sequence of ideas shaped institutions was confirmed. In Chapter V, I have discussed a significance of the act of 3 June 1958 and closely related Art.3 of the Constitution of the Fifth Republic. This is where a new democratic interpretation of the sovereignty of the nation was expressed. It should be reminded that Art. 1 determined the existence of a parliament-independent mandate of the executive power that could since then have its own origin manifested by general elections (general presidential elections) or election made by the instance established in such elections (election of the president by the college). Art. 3, Item 1 of the Constitution invested the president with the status of the nation's representative, reserved for the National Assembly in the Fourth Republic. Once again, it should be emphasized that presidential general elections constituted a logical attainment of the doctrinal underpinnings of the Fifth Republic and hence, a thesis may be advanced that the Constitution was shaped in the years 1958-62.

Interpretations of the Fifth Republic Constitution were focused on the definition of the new relations between the president, government and the parliament. Consequently, the Fifth Republic was qualified as a semi-presidential system (Duverger), presidential system (Giquel, Stembrowicz), parliamentary system in the opposition to the rule of the Assembly (Debré) or an ultra-presidential

system (Duhamel). Each of those interpretations contained a bit of the truth but they do not refer to all political issues; first of all they ignore ramifications of the extended application of the institutions of a general vote and referendum. In my view, the identity of the Fifth Republic Constitution combines state patriotism, manifested by the will of the establishment of a strong and sovereign state and democratization of the republic. Therefore, in my view, ‘democratic presidentialism’ is the most appropriate term to define the identity of the Fifth Republic.

The Constitution of 1958 effectuated the institutional change within the framework of the republican tradition: established strong presidency as a centre of national leadership, consolidated the bipartite executive power at the expense of the parliament, retained parliamentary accountability of the government and paved the way to the direct democracy. The reform of 1958 provided France with a set of tools for pursuing active national policy and retaining the strong position in Europe. A claim made by Michel Debré in his speech at *Conseil d’État*, when he said that “the aim is to reconstruct power without which there is neither state nor democracy, which means, in other words, neither France nor the Republic,” well illustrated reformatory intentions and confirmed existence of the “super-power” keynote. It is hard not to discern the deep ideological sources in the form of the republican nationalism aimed to maintain a leading role of France in Europe, which meant competition against Germany. Polish *émigré* thought, enjoying a complete freedom of speech, perceived the establishment of the Fifth Republic as a return of France to a leading role in Europe. This is reflected in the writings of Józef Czapski, Aleksander Kawalkowski and Piotr Wandycz.

A political model of the Fifth Republic was based on the three mainstays: the presidency as a new centre of national leadership, the consolidated bipartite executive power at the expense of the parliament, democratization of the republic. Empowerment of the presidency as a supreme political factor, pursuant to the concept tabled in Bayeux and Épinal was of primary importance. The president holding a strong legitimacy, especially when the institution of general elections was established in 1962, became a guardian of the Constitution and, as Michel Debré put it, “an ultimate arbitrator of the national interest.” Debré’s formula included a term “active arbitration” as a basis for the president’s key prerogatives, including appointment of a prime minister, dissolution of the National Assembly, an institution of review

of the constitutionality of acts, as well as special powers specified in Art. 16. Moreover, the executive power was to derive from the president. The Constitution met de Gaulle's ideas: the president was invested with instruments for exercising national leadership. Typical application of the Constitution means that the president is not only an active arbitrator but is in the position to appoint a government and determine its policy. Thus, as René Capitant put it, the president is "a real head of the executive power" and "a real head of the state."

Thus, an idea of a strong and coherent state, crucial for the understanding of the Constitution, was effectuated as a new model of presidency and permanent consolidation of the executive power at the expense of parliamentary supremacy. This is the reason, why Philippe Ardant exposed the two hallmarks of the Fifth Republic Constitution: the consolidated, bipartite executive power and a weakened position of the parliament. Consolidation of the government's position is expressed by a radical departure from the formula of the rule of the Assembly, set forth in the constitutional regulations of the Third and Fourth Republics. Under Art. 20, the government was granted a separate political status as an institution responsible for "defining and pursuing the policy of the Nation." The Bayeux draft was also effectuated in establishing the government's accountability to the parliament. The government members were no longer appointed by the parliament but the president, based on presumption that he had the parliament's support.

Yet it was the combination of the electoral law reform and the original model of rationalized parliamentarism that was critical for the stability and effectiveness of the executive power. Introduction of the majority elections held in two ballots (absolute majority in the second ballot), a solution René Capitant furthered since 1934, favoured the consolidation of the party system, developed its duality and prevented the influence of the French Communist Party. Noteworthy, the new Constitution changed the rules of political competition and the government formation. Presidential elections and a new model of the electoral law established a system where it was the elections and not coalition arrangements in the parliament that determined the state's policy. It was René Capitant who recognized this as something crucial for the democratic system. Such a change did not result in the marginalization of political parties but made it necessary for them to take actions based on the individual accountability of their leaders.

In a country characterized by political divisions and multiplied political groups, the electoral law reform alone would not bring a desired outcome if it had not been for a model of rationalized parliamentarism developed by Michel Debré. The model combined a number of institutions consolidating stability and effectiveness of the governance. Along with the institutions developed by British parliamentarism, we will find there a number of innovative solutions. British inspiration is traced in the prime minister's power to preside over sessions and a strict regime of legislation and budget drafting. Other British-like solutions included the prohibition of any amendments resulting in the increased expenditures and decreased incomes without the government's consent and a constrained number of permanent parliamentary commissions. Michel Debré implanted these solutions in the French political life and granted them a status of constitutional norms. On the other hand, limitation of the subject scope of bills and government legislation were original solutions. In the reform authors' view, establishment of the Constitutional Council and introduction of a mechanism of the review of the constitutionality of acts extended a range of instruments for effective governance. Undoubtedly, the innovative solution was the prime minister's power to make the government's programme or any policy statement an issue of a vote of confidence before the National Assembly (Art. 49, Item 3), which made it possible to adopt it in the event when the no-confidence resolution was not passed by an absolute majority of the Assembly members. Also the rule of incompatibility of ministerial functions with a parliamentary mandate, applied in the systems based on the rigorous division of powers, was an innovation.

The third mainstay of the Fifth Republic is an extended range of the general vote (general presidential elections, Assembly elections in the aftermath of the dissolution of the parliament) as well as an introduction of the institution of a referendum. It seems that this dimension of the Constitution of 1958 is not sufficiently appreciated in the Polish historical and legal thought. De Gaulle's consistency is worth emphasizing: in autumn 1945, he established the institution of a constitutional referendum, while in 1958 he opened the door wide to this institution. Noteworthy, a legislative referendum allows for passing a bill directly in such a procedure. Andrzej Antoszewski and Ryszard Herbut rate France, along with Denmark, Ireland and Italy, among the countries where classical parliamentary mechanism is extended with

the institution of a referendum. A larger scope of direct democracy is observed only in Switzerland. Noteworthy, after establishment of the Fifth Republic, France was the first large European country where a referendum was held to make decisions crucial for the state's community, including constitutional amendments. Only later were the provisions on the institution of referendum introduced into the Italian constitution and its mechanism applied in political practice.

The Fifth Republic did not evolve into the republican monarchy either in axiological or institutional sense. As regards axiological dimension, the republican tradition was consolidated in the constitutional preamble that referred to the Declaration of 1789, and Article 1, crucial for the country's identity, where France is defined as an indivisible, secular, democratic and social republic. Such provisions were in accordance with the views of General de Gaulle, who consolidated republican tradition during World War II and contributed hugely to the constitutionalism of republican principles and elevation of the status of the Declaration of the Rights of Man and of the Citizen of 1789 in the Constitutions of the Fourth and Fifth Republics. Thus, it is justified to say that the Fifth Republic Constitution laid very sound foundations for the republican identity of France.

The formula of the republican monarchy should include the characteristics of the institutional transformation effectuated upon de Gaulle's initiative if the Fifth Republic Constitution had restored the political principles of July monarchy or early years of the Third Republic, where, as Jerzy Stembrowicz put it, "the prince was absent" but still the political system could be transformed into the constitutional monarchy and the executive power could retain relative independence. Yet the Fifth Republic was established as the original product, did not return to the past and shaped quite new institutions. The Constitution of 1958 invested executive power with considerably stronger instruments and introduced the institution of direct democracy. The president of France does not exercise neutral power when he enjoys support of the parliamentary majority: becomes an active arbitrator and the country leader having capacity to rule through the government. Certainly, compared to other constitutional and pluralistic countries, the French president is invested with the widest range of powers. On the other hand, the prime minister's powers under the *cohabitation* conditions are not smaller than those of the chancellor of Germany or the prime minister of Great Britain. Moreover, the authors

of the Constitution consistently eliminated institutions that could provoke a conflict between the president and the government (lack of *veto*, a need to cooperate to stage a referendum or table constitutional amendments).

De Gaulle “restored the head to the republic,” as André Tardieu used to put it in his writings. In this way, he attracted the right-wing public opinion to the republican tradition but at the same time maintained his critical assessment of the republican order. Undoubtedly, he effectively eliminated the possibility of accusing the republic of misruling, so much discernible in the thought of Action française. Yet it should be underscored that de Gaulle’s political output had republican characteristics since his appeal of 18 June 1944.

I paid a huge amount of attention to the thought of Carré de Malberg. A pioneering nature of his writings may by no means be challenged. One might say that he developed the option for Esmein’s writings that justified “an advantage” of the rule of the parliament. He challenged the theory of parliament’s sovereignty from the republican stance, which had a crucial impact on the mode of thinking of the legal elite engaged in drafting of the Fifth Republic Constitution. Certainly, this pertained to Raymond Janot who drew up the constitutional act of 3 June 1958. Carré de Malberg opened the door of the French republican tradition wide to general presidential elections and a referendum. He was right to say that introduction of the institution of a constitutional referendum would result in a gap between the constituting power of the nation and the legislative power of the parliament, which would establish a supremacy of the constitution over statutes. It should be emphasized once again that the constitution’s supremacy would have been impossible without the democratization of the republic.

I intentionally highlighted less known strains of de Gaulle and his aides’ constitutional output, which had a crucial impact on the identity of the Constitution of 1958. Firstly, it is necessary to highlight their strive for the introduction of the institution of the review of the constitutionality of acts and its alignment with the republican principles. De Gaulle was also a consistent advocate of the professionalization of the French political system. In this regard the continuity of his thought and relevant decisions of political significance are discernible. In 1945, based on the draft prepared by Debré, de Gaulle established ENA. In July 1945, he issued an ordonnance that introduced a rule that bills drawn up by

the government were obligatorily reviewed by the Council of State. In 1958 he granted this institution a constitutional status, which was extended in the amendment of July 2008. I also sought to picture a negative impact of the republican tradition: elimination of the solution contrary to the French understanding of the nation's sovereignty and indivisibility of the republic. Since de Gaulle asserted that sovereignty referred to the whole nation, he could not espouse corporate ideas and introduce representatives of professions and business into the Senate. The same factor inhibited evolution of the High Council of the Judiciary into the corporate body. Something I call a negative impact of the republican tradition may inspire studies on the function of the fundamental constitutional principles and constitutional identity. Undoubtedly, in France the principles of the sovereignty of the nation and indivisibility of the republic enjoy an exceptional status of primary constitutional principles. Their special significance consists in the elimination of any institutional solutions found to be undermining internal coherence of the Constitution. Noteworthy, a principle of the sovereignty of the nation has become a platform for the review of the constitutionality of European treaties.

The continuity of the French constitutional thought was also reflected in the new interpretation of the writings of classical thinkers, Montesquieu and Rousseau, and their impact on the constitutional reform. The French political thought has always been under their impact. Carré de Malberg asserted that sticking to the theory of Montesquieu might lead to a deadlock. In his view, modern parliamentary governments confer power upon the majority leader and thus Montesquieu separation of powers became obsolete. The Strasbourg professor challenged legitimization of the Third Republic, referring to the thought of Rousseau and restoring the institution of a referendum. On the other hand, de Gaulle and Debré reasoned that Montesquieu was an advocate of the institutional balance. They referred to his thought to extend a list of arguments for the empowerment of the executive branch. René Capitant combined doctrinal threads of Rousseau and Montesquieu: democratization of the republic was to favour separation of powers as each of them was granted a separate democratic mandate. Finally, in 1958, Michel Debré and Jérôme Solal-Céligny concluded that the power separation was redefined as law enactment and became an inherent element of the governance. In their view, the separation of powers should mean restriction in the statutory domain, establishment of the government legislation

and a new model of the organization of the parliament's operations. Reinterpretation of Montesquieu's thought was intended to consolidate the structure of rationalized parliamentarism. These writings should be studied as the arguments included there are not discussed in the well-known interpretations of Hannah Arendt, Isaiah Berlin, Yoshie Kawade and David Lowenthal.

Chapter VI includes a discussion on the evolution of the Fifth Republic Constitution and its possible impact on the identity of this act, as well as its relations with the Polish constitutional tradition. De Gaulle's constitutional product turned out to be an effective variant of the pluralist and constitutional democracy and restored France effective governance without impairing competitiveness of the system. The General's resignation in 1969, after the referendum defeat, consolidated legitimacy of the new Constitution. The foundations of the Fifth Republic, a strong presidency, rationalized parliamentarism, introduction of the institution of a referendum, became the subject of consensus. The evolution of Mitterrand's views is meaningful, from the fundamental criticism of the Fifth Republic in his *Le coup d'État permanent* to the appreciation of its advantages. It seems that the most significant changes, such as reinvigoration of the constitutional judiciary in the early 1970s or decentralization effectuated in the early 1980s were "announced" by their authors. It is appropriate to repeat that although in 1958 an in-depth material review of the constitutionality of acts was not the reform's objective, it would have been impossible to implement without the constitutionalizing of republican principles and the Declaration of 1789. It is de Gaulle who was one of the few French politicians to design a regional level of the self-government with conviction that France needed to overcome alienation of the state, and citizens should actively participate in the life of political community. Resilience of the Fifth Republic Constitution is also observed in the area of norms referring to the European Union membership. Although integration processes have permanently changed the essence of the country's sovereignty which has been perceived in the context of the EU membership and its possible impact on domestic affairs, it should be said that a new European chapter was opened by the adjudication of the Constitutional Council, tasked to review the constitutionality of international obligations in search of their conformity with the Constitution. Therefore, France may shape its membership in the European Union without abandoning its constitutional identity.

I have also discussed Polish references thanks to the discernible impact of the French constitutional solutions on the Polish legal thought. Moreover, my study aimed to show the power of the impact of the Third Republic doctrine (Esmein doctrine) on the part of Polish political and legal elites as well as convergence between French and Polish (primarily conservatives) criticism of the parliament's supremacy. Yet I find it wrong to seek any affinities between the Fifth Republic Constitution and the Polish April Constitution. The latter one was merely a soft variant of the authoritarian system: eliminated political competition and abstained from a wide application of the institution of general elections. Scepticism towards extension of the democratic rights of citizens was characteristic for the whole Polish political thought in the interwar period.

I have been fascinated with the ideas establishing good institutions since my university years. In my view, they contain a power of human freedom and the capability of investing political community with permanent institutional framework. Out of these reasons, over ten years ago I became preoccupied with the political thought of Polish conservatism, in particular the concepts developed by Adolf Bocheński. Now, I will be hugely satisfied if my book on the origins and identity of the Fifth Republic Constitution encourages readers to learn about French constitutionalism and think of the conditions needed to draft a good constitution. The Constitution of 1958, still in force for a number of decades, has proved the significance of a positive political vision in the process of establishing effective institutions to ensure modernization of the state. Noteworthy, the authors of the Constitution of 1958 avoided any extreme solutions and focused on maintaining the political balance. The study on the process of drafting the Fifth Republic Constitution also reveals other advantages: penetrating an analysis of political flaws, "reference to the masters," which meant the accumulation of the experience of many generations of politicians and lawyers, affluence of constitutional techniques, capability of critical exploitation of foreign patterns and, which is not less crucial, rejection of constructivism, which would suggest aspiration for any ideal political system. In Bayeux de Gaulle brought to the memory a dialogue between Greeks and Solon. Asked about any ideal constitution Solon answered: "Tell me for what people and in which epoch."

Origins and Identity of the Constitution of the Fifth Republic of France

Summary

My study on the origins and identity of the Fifth Republic, the overriding goal of this book, is based on the assumption that any dogmatic and legal analysis would be insufficient to understand this issue. What we need is the doctrinal analysis of the hallmarks of the French republican tradition shaped by the French Revolution along with the presentation of de Gaulle's approach to this tradition when his approach to the model of the state took the final shape. The doctrinal reflection reveals a wide range of sources of the Fifth Republic Constitution: the output of the 1930s reformist movement and the original systemic concepts set forth by de Gaulle, and Michel Debré and René Capitant, his close aides. Yet such an analysis should not be limited to merely the presentation of historical background to the Constitution of 1958. The ideas determining new regulations or, in other words, the doctrine that provided the foundations of a new system are of equal importance as they constitute identity of the Fifth Republic Constitution. Furthermore, any different methodology applied here would impoverish reflection and lead to wrong conclusions as in the French intellectual culture any institutional order should be a product of the consistent intellectual constructs.

Contrary to quite a common view, in my opinion the Fifth Republic could not be established as a republican monarchy. The French understanding of the republic is different from its universalist interpretations since it dates back to the French Revolution whose values developed in opposition to the monarchist tradition. The understanding of the concept of the nation's sovereignty was quite specific as it had been moulded under the influence of Rousseau's ideas. The ideas of indivisibility and secularity of the Republic paved the way to a completely new model of polity. François Furet brilliantly highlighted this difference by asserting that the French model of the republic ultimately developed over the last two decades of the 19th century when, as he put it, the Revolution finally "pulled in to the shore" and became institutionalized. Given such facts, any synthesis of the two antagonist traditions was simply impossible.

Although de Gaulle was raised in a family of monarchist views, he embraced the idea of the state patriotism and accepted the Republic as a permanent form of France's existence. His beliefs evolved under the influence of republican nationalists: Charles Péguy and Maurice Barrès. Their ideas inspired de Gaulle's state patriotism, approbation of the republican system inclusive of various ideological families and seeking the consolidation of the state which should become an instrument for building France's power. Thus, instead of reconciling the monarchist and republican traditions de Gaulle sought a model of the republic that would integrate different ideologies.

During the World War II, as the leader of Free France, de Gaulle made substantial endeavours to strengthen republican tradition in opposition to the Vichy government. Therefore, in his memoirs he could justly write that in 1940 he "pulled the Republic out of its grave," when it was abandoned by the majority of the political elite. Thus, the declaration *Rétablissement de la légalité républicaine*, issued on 9 August 1944, was a logical ramification of the legal and state doctrine of Free France. In the years 1944-46, when de Gaulle was the head of the provisional government, republican principles became the foundations of post-war France. Owing to de Gaulle, the ideas of indivisibility, secularity, democracy and a social nature of the state became the fundamental constitutional principles enshrined in the Constitutions of the Fourth and the Fifth Republics.

The leader of Free France fully adopted the rule of the nation's sovereignty as that of the crucial importance for the public order. Furthermore he believed that it should result in the democratization of France. This was the fundamental idea behind the decision made in autumn 1945 on the constitutional referendum, whereby investing the nation with a power to participate in the *pouvoir constituant*. Beyond any doubt, de Gaulle strengthened the republican constitutional identity of France. This is why the Fifth Republic could be established as an institutional change in the republican axiology.

One can say without exaggeration that the Fifth Republic embodied "the victory of an idea over reality," as it was established in confrontation with the system of parliamentary supremacy, strongly espoused by the French political elites, and found its doctrinal justification in the writings of Adhemar Esmein who consistently supported this idea.

The reform advocates did not act in the intellectual void and made use of the reformatory output of the 1930s, contained in the writings of Tardieu, Carré de Malberg, as well as the Bardoux

Committee report. The republican pre-war reformism focused mainly on the restoration of the strong executive branch, president's investment with *pouvoir propres* (own powers), including the right to dissolve the parliament. The advocates of such empowerment of the presidency asserted that it could only be achieved in the general and direct presidential elections (Carré de Malberg) or the election of the president by a large collegial body (Bardoux Committee). Other proposed solutions included introduction of the institution of a referendum as a means to restore independence of the executive power (Tardieu) and profound political transformation (Carré de Malberg). Moreover, reformists called for the rationalization of parliamentary procedures through the introduction of parliamentary sessions, restriction of a number of permanent committees, a curb on the parliamentarians' freedoms over the budget drafting process and a new form of the governmental accountability (Tardieu, Bardoux Committee). Other crucial solutions tabled by the aforementioned authors included establishment of the constitutional judiciary and the review of the constitutionality of acts (Bardoux Committee, Carré de Malberg). Finally, the reformists called for the professionalization of the political system through the integration of the Council of State and the Court of Auditors with the government and appointment of senior officials enjoying an independent and permanent status in the ministries and other administrative bodies (the Bardoux Committee).

However, the output of the 1930s reformism was not automatically adopted by the founders of the Fifth Republic. Their own intellectual creativity and de Gaulle's determination to implement a deep systemic change were determining factors. Undoubtedly, René Capitant and Michel Debré, creatively used the reforms of the 1930s, by developing a rationalized parliamentarism and republican democracy as the two streams which co-created the Constitution of the Fifth Republic. It is worth adding that as early as in 1943, in his *Refaire la France*, Michel Debré put forward some solutions providing the government with the parliamentary stability and instruments for effective governance. Debré's constitutional thought embodies the good use of foreign models. As a close aide of de Gaulle, Debré borrowed solutions adopted in the British parliamentary system and added his own proposals (concerning the definition of the legislative domain and the government legislation). Other reformists of the 1930s who made huge contribution to the development of the French constitutional thought include René Capitant, the author of the draft reform of the electoral law (two ballots, with the absolute

majority requirement). His ideas became the reality in 1958. The author of *La réforme du parlementarisme* was the first to call for the *incompatibility* of the ministerial post and the parliamentary mandate. In his view, a minister should be an active policy-maker rather than a passive representative of the parliament vis à vis the ministerial bureaucracy, which was one of the reasons of the crisis in the Third Republic. After the war, René Capitant, referring to the theoretical thought of Carré de Malberg, his master, interpreted an idea of the nation's sovereignty in the spirit of democracy and paved the way to the deep institutional change involving the adoption of the institution of a referendum, the empowerment of the executive branch (the president elected in the general vote) and the review of the constitutionality of acts. Noteworthy, according to René Capitant's definition, the president was to become the real head of the state and the executive power, the opinion he had maintained well before de Gaulle's Bayeux speech.

However, the constitutional ideas de Gaulle put forward in Bayeux and Épinal in 1946 differed from the concepts developed by Raymond Carré de Malberg, René Capitant and Michel Debré. Those ideas primarily stemmed from de Gaulle's approach to the history of France and from his own political experience. Following de Gaulle's concept, the reconstruction of state leadership, which was exercised by the president, was intended to be coupled with the democratization of the Republic. De Gaulle believed in a dialogue between the president as the true leader of the state and the "nation's arbitrator and referee," as the nation was "to decide by itself about all that was important for its fate." The interpretation of the thought of Montesquieu, who advocated the institutional balance of power, justified the "empowerment" of the executive. De Gaulle opted for the appointment of the government by the president. Following René Capitant's footsteps, he called for the *incompatibilitas* of the minister's post and the parliamentary mandate. The president, independent of the parliament and invested with own powers (the right to nominate the prime minister and to dissolve the parliament), was supposed to constitute the executive power and rule through the government. In Bayeux and Épinal, de Gaulle defined the mission of the president as an active arbitrator, referee and the true head of the state.

In 1958 de Gaulle returned to power, planning a thorough change of the system. An analysis of the documents concerning the constitutional drafting process reveals that de Gaulle and his aides shared a consistent vision of the future Constitution. Its draft

(*avant projet*) was already the effect of the adoption of the doctrine put forward in Bayeux and Épinal and was complemented with the model of Debré's rationalized parliamentarism. All important issues, the role of the president as the active arbitrator, referee and the real head of the state with clearly defined prerogatives, the establishment of a legislative referendum, the bipartite executive branch of power, instruments for effective governance granted to the government (Debré's rationalized parliamentarism), and, finally, a unique model of the review of the constitutionality of acts along with the establishment of the Constitutional Council, were resolved at the first stage of the constitutional drafting process.

Interpretations of the Fifth Republic Constitution usually focus on the new interactions among the president, government and parliament. Following this logic, the Fifth Republic was qualified as a semi-presidential system (Duverger), a presidential system (Giquel, Stembrowicz), a parliamentary system as opposed to the parliamentary supremacy (Debré) or an ultra-presidential system (Duhamel). The aforementioned interpretations are only partially correct as they do not encompass the entire system of the Fifth Republic, omit the extended use of the general vote and establishment of the institution of a referendum. In my view, the identity of the Fifth Republic Constitution combines state patriotism, manifested by the intention to build a strong and sovereign state, and the restoration and democratization of the Republic.

The Constitution of 1958 was a crucial institutional change in the republican tradition: it established a strong presidency at the centre of the state leadership, consolidated the bipartite executive branch of power at the expense of the parliament but at the same time maintained accountability of the government to the parliament and paved the way for direct democracy. The reform of 1958 provided France with the instruments needed to pursue an active state policy and retained the country's strong position in Europe. In the speech made at *Conseil d'État*, Michel Debré asserted that "it is about the reconstruction of power, without which there is neither the state nor democracy, or in our case neither France nor the Republic", which well-expressed reformatory intentions and confirmed France's ambition to be a "superpower." It should be emphasized that conclusion of the political reform in 1962, resulting in the establishment of the institution of general presidential elections, was in line with the doctrinal ideas of the Fifth Republic.

I have consciously focused on those facets of the constitutional project designed by de Gaulle and his aides that are less

known but had a major impact on the identity of the 1958 Constitution. First of all, the conscious effort to review the constitutionality of acts and an idea to reconcile this demand with republican principles need to be mentioned. De Gaulle was a consistent advocate of the professionalization of the political system, which was mainly embodied by the consolidated position of the Council of State.

The last chapter is on the evolution and identity of the Fifth Republic Constitution in the context of the Polish constitutional tradition. De Gaulle's constitutional endeavours brought establishment of the pluralistic constitutional democracy, restored effectiveness of the French governance and improved competitiveness of the French political system. De Gaulle's resignation after the referendum he lost in 1969, strengthened legitimacy of the new Constitution. The foundations of the Fifth Republic - strong presidency, rationalized parliamentarism and openness to the idea of a referendum – were finally adopted as a consensus.

Obviously, I could not ignore the relevance of the French constitutional thought to Poland, given strong references to the French constitutionalism in the current Polish legal thought. My study shows how powerful the impact of the Third Republic doctrine was (the Esmein doctrine) on Polish political and legal elites and highlights the convergence of the French and Polish criticism of parliamentary supremacy, primarily voiced by conservatives. Yet, in my view, the affinity of the Fifth Republic Constitution to the Polish April Constitution is questionable. The latter one provided an example of the soft variant of the authoritarian system, where any political competition was prohibited and the extension of the use of the general vote considerably restricted.

The enactment of the 1958 Constitution shows how important it is to have a positive vision of the state system, be attached to the idea of building new institutions as part of the state's modernization process and draft the Constitution that would remain fully effective over a few decades. Noteworthy, authors of the Constitution avoided any extreme solutions and focused on the balance of the political system. The study of the evolution of the Fifth Republic Constitution also shows its other values: the in-depth analysis of the system deficiencies, "reference to the Masters," that is the accumulated experience of many generations of jurists and politicians, a wide range of constitutional techniques, ability to make use of foreign solutions and, last but not least, avoid constructivism – determination to establish any ideal political system.

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