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ON SUPREMACY OF THE EXECUTIVE-ADMINISTRATIVE AUTHORITIES IN THE WESTERN COUNTRIES AND IN RUSSIA, CONCURRENTLY ESTABLISHING THE THEORY OF THE CYCLIC CREATION OF THE LEGAL ORDER

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Abstract. *Being an extension of the author's considerations on the crisis of parliament and parliamentarism in the Western countries and in Russia, this article is an elaborate follow-up study on the process of turning the executive-administrative branch of government into the representative of the state, the process running along with the degradation of parliament as a representative body of the people. In reference to the current form of this process, the author poses a question: does this process ultimately lead to the dictatorship of the executive-administrative authorities? In that context, the author points out to the presence of some latent and manifest forms of dictatorship as a form of governance, drawing a clear distinction between dictatorship as a form of governance and dictatorship as a political regime. At this point, the author gives his own contribution to the political philosophy and legal theory in terms of introducing and defining the concepts of commissary and decemvirate (decemviri) dictatorship. On the other hand, by analyzing the process of "presidentialization" in the actual political and legal environment of the aforementioned states, the author establishes the concept of "the hexagonal crystal of political philosophy". The results of this research have also provided grounds for another significant contribution to the general theory of law. Thus, in the final part of this study, the author presents and elaborates on the theory of cyclic creation (formation) of the legal order. Apart from the descending line in the creation of the legal order, there is also the ascending line in the creation of the legal order. The discovery and presentation of the ascending line is the author's individual contributions to the theory of the cyclic creation of the law. In the closing statements, the author explains the original concept of the real legal order which is to include social solidarity as the primary legal principle. This novelty is also the author's original standpoint.*

Key words: *Pleins pouvoirs, presidentialization, dictatorship, theory of cyclic creation (formation) of the legal order.*

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This paper is an extension of the author's deliberations on the crisis of parliament and parliamentarism which began some twenty years ago. This topic is closely elaborated in the following papers published in the course of shorter or longer time spans: M. Petrović, *Genesis, Development and Crisis of Parliament and Parliamentarism*, an offprint, Legal and Social Sciences Archives, 1/1992, pp. 69-82; id., *Parliamenatary System against Caesaristic Presidentialism (Caesaropopulism)*, an offprint, Legal and Social Sciences Archives, 3/1995, pp. 363-381; id., *The 2006 Constitution of the Republic of Serbia as a Legal Framework for Party Oligocracy*, Facta Universitatis, Series: Law and Politics, 1/2005, 17-24. However, the focal point of this paper is now shifted from the parliament institutions to the executive-administrative authority as the second central institution of public law. What justifies the use of the term "executive-administrative"? Namely, the governing power does not include a mere enforcement of the laws enacted in parliament but also the delegated authorities aimed at substituting the parliament, as well as the powers directly vested in the executive authorities under the Constitution. Moreover, the executive branch of government has the supreme power of repression, *imperium* or monopoly on physical force. In that context, Hauriou (M. Hauriou, *Principes de Droit public,* 2-e, éd., Paris 1916, 719) rightly said: "The executive branch of government has a monopoly of instituting executive decisions or executive operations, or executive formulae. The other two branches of government cannot do without it. The parliament does not have the authority to enforce the enacted laws; it is the competence of the executive branch to make them enforceable by having them promulgated by the head of state. Nor does the exercise of the electoral power make the people competent to enforce the will of the electorate; again, it is the executive branch that is obliged to run the election process (thus turning it into an administrative operation) and to make the election results final and enforceable. Historically speaking, the executive branch is the earliest form of government which has always managed to preserved its continuity as opposed to the discontinuity frequently related to the practices of the other forms of government; this autonomy and continuity, this uninterrupted chain of authority is indispensable to the executive power in the process of turning decisions into actions." (Also see: J.C. Bluntschli, *Lehre vom modernen Staat*, II: Allgemeines Staatsrecht, 6. Aufl., durchgesehen v. E. Loening, Stuttgart 1885, 226 sqq., 270 sqq.)

All the demonstrations of this governmental power which exceed mere enforcement of legislation are called **prerogatives,** named after the respective institute in the English legal system. The autonomy of these prerogatives makes the term "executive-administrative" authorities even more consequential. Thus, in the representative legal system, the parliament is the representative of the people whereas the executive branch of government is **the representative of the state.** This study will focus on the process of turning the executive-administrative authorities into the representative of the state, the process running along with the degradation of parliament as the representative body of the people; the study will include relevant illustrations pertaining to the leading Western countries and the Russian Federation. The current developments in this process give rise to the following question: does this process ultimately lead to the dictatorship of the executive-administrative authorities? There is certainly a propensity towards this form of dictatorship, which is already present as a form of governance both in some **latent** and in some **manifest forms.** Here, it is important to make a clear distinction between dictatorship as **a form of governance** (which may apply to the executive-administrative authorities) and

dictatorship as **a political regime** (which implies an unlimited rule of a single political party). The dictatorship of the executive-administrative branch of government is always a **limited** form of dictatorship.

From the standpoint of constitutional policy and public law theory, the issue raised rather firmly in respect of the relationship between the parliament and the government was the issue of "legislative delegations", which were applicable in France. Namely, France was a country whose abundant constitutional tradition and doctrine were highly hostile towards the Parliament's delegation of legislative powers to the Government. Thus, the French Revolution constitutional scholar, abbot Sieyès, wrote in 1788: "More than on one occasion will it be necessary to remind the National Assembly of the fundamental and highly profuse principle that the legislative powers cannot be sub-delegated at all, and that the legislative power is an inalienable and untransferable property of the body of representatives." (*Des opinions politiques du citoyen Sieyès*, Paris an XIII, 82). One of the constitutions of the French Revolution, the Constitution of the year III (1795) explicitly upheld this idea in Article 45, stating that "In no case may the legislative body delegate to one or a number of its members, or anybody, any of the authorities it has been vested with under the current Constitution." This prohibition withstood for a long time. One of the leading French constitutionalists from the beginning of the 20th century, A. Esmein (*Éléments de Droit constitutionnel et comparé*, 6-e éd., Paris 1914, 682), expressed it in a nutshell: "In fact, the delegation of the legislative power, as well as any other prerogative vested in the Houses of Parliament under the Constitution, is legally impossible."

The constitutional life of the Third French Republic (1871-1940) started ensuing in a quite different direction in the 1920s; (the development of legislative delegation practices at that time of the French constitutional history was nicely illustrated by H. Tingstén, *Les Pleins Pouvoirs, L'expansion des pouvoirs gouvernementaux pendant et après la grande guerre,* Paris 1934, 15-57). It was a system of "absolute parliamentarism in the full sense of the word, which means a system in which Parliament, being the sovereign master in every way, fully prevails over the Executive, as opposed to the relative or dualistic parliamentarism where the governmental power is limited by the legislative power"(R. Carré de Malberg, *La Loi, expression de la volonté générale, reproduction en facsimile,* Paris 1984, 196). It was the period of weak governments but also (given the current state of affairs) completely contradictory to the logic of the regime marked by frequent legislative delegations of "vast powers" (*pleins pouvoirs*); thus, the Government was entitled to adopt all the statutory provisions with the power of law which enabled the Government to keep the entire economy under control. Thus, Laval submitted a draft rule (subsequently enacted) stating: "In order to avoid the devaluation of the national currency, the Government is authorized by the Senate and the House of Representatives to enact by 31st October 1935 all the statutory provisions with the power of law, which may be appropriate for the recovery of public finances, promote the revival of the economic activity, prevent and counteract the assails on the public credit. These executive orders… (etc)."

How can this ostensible paradox be explained? Senators and members of parliament were the representatives of the local interests, whose only purpose was to be re-elected and eventually become ministers. Being unaccountable and professionally incompetent, they kept overthrowing the governments not for their political mistakes but because there was always a new *clique* of pretenders to the ministerial positions. In the course of the seventy-year subsistence of the Third Republic, Parliament changed 104 governments.

(See: A. Tardieu, *La Révolution a refaire*, II: La profession parlamentaire, Paris 1937, 20 sqq., 169 sqq., 226 sqq., 250 sqq., 258 sqq.) Such a parliament was incapable and incompetent to enact good laws, and too bulky and inefficient to resolve problems by means of introducing urgent economic and financial policy measures; therefore, by granting "vast powers" to the government, such parliament actually appealed to the bureaucracy as the only social force capable of running the country. Thus, in the early 20th century, M. Barrès (*Leurs figures*, Paris 1906, 6) noticed that "In the French parliamentary system nothing is solid except offices. It is their duty alone to constitute France. They are the ones that think and work for 39 million Frenchmen".

Upon the liberation from the Germans in the Second World War, the powerful President of the Provisional Government and afterwards the President of the Republic, General Charles de Gaulle, did now allow the revival of the constitutional laws of the Third Republic. Nevertheless, the Constitution of the Fourth Republic of 27th October 1946 reinstated the concept of "absolute parliamentarism"; (M. Prélot, *Institutions politiques et droit constitutionnel*, 11-e éd., par J. Boulouis, Paris 1990, 558 sq.). The Senate abandoned its central decision-making position in Parliament, ceding it to the Council of the Republic as an advisory and initiative body. The legislative power was fully vested in the National Assembly. Yet, Article 13 of the Constitution explicitly prohibited the National Assembly to delegate its law-making powers. However, as the French colonial empire started falling apart, France was in a serious historical crisis again. Given that there was no judicial control of the constitutionality of the adopted legislation, the practice of delegating vast powers (*pleins pouvoirs*) was reinstated. (See: J. Soubeyroul, *Les Décrets-Lois sous la quatrième République*, Paris 1955, passim.) The State Council, acting in the capacity of the Supreme Administrative Court, issued a broad interpretation to justify this "new-old" practice: "In principle, the legislator has a sovereign right to delegate the power of enacting legislation" and may, accordingly, decide "to allocate some areas under the jurisdiction of the legislative power to the rule-making (regulatory) power. The executive orders adopted in these areas shall therefore fittingly change, repeal and subsitute legislative provisions..." Yet, these executive orders "will themselves be replaced by other executive orders until the moment when the legislator takes control over the specific area again, under conditions clearly precluding any further activity of the rule-making authorities." On the other hand, these broader competences cannot be applied in the areas which are reserved for constitutional legislation, constitutional tradition (or some other legal act); nor can they be applied when "the general nature or imprecision" of these broad competences reflects "the will of the National Assembly to allow the Government the exercise of national sovereignty", thus violating not only Article 13 but also Article 3 of the Constitution under which the national sovereignty is vested in the French people who "exercise the sovereignty through their representatives in the National Assembly on all issues regulated under the Constitution." (*Revue de Droit Public et de la Science Politique*, 1953, 171.)

The constitutional system which the creator to the Fifth Republic, de Gaulle, subjected to the 1958 national referendum had already been tried out in the German Weimar Constitution of 11th August 1919. The reason why the Weimar system had fallen through was the irreconcilable animosity of the extreme leftists and the extreme rightists toward the Weimar Constitution. The former wished to replace it with the dictatorship of "the proletariat" (meaning: the Communist Party) whereas the latter wished to replace it with the

dictatorship of the radical fascism. Quite the reverse, the French Constitution of 4th October 1958 was widely accepted by all except for the Communist Party and some smaller formations. In the referendum for the Constitution, from the total number of 45,840,642 voters, 31,066,502 voted in favour of the Constitution whereas 5,419,749 voted against it; (Prélot/Boulouis, op. cit., 607). It is interesting that de Gaulle, being a moderate yet charismatic right-wing leader, won (according to trustworthy estimates) a 42% vote of manual labourers in the presidential election in 1965, who are traditionally part of the electoral body (electorate) commonly associated with the Communist party; (see: B. Clift, in: *The Presidentialization of Politics*. A Comparative Study of Modern Democracies, ed. by Th. Poguntke/P. Webb, Oxford 2007, 239).

The Constitution of the Fifth Republic has established the undisputable supremacy of the executive-administrative branch of government over the legislative branch. Parliament is bicameral, comprising the National Assembly and the Senate. The National Assembly is superior to the Senate not only in terms of enacting legislation but also in respect of its capacity to independently subject the Government to the confidence vote. The Constitution explicitly provides the scope of its legislative competences while the unspecified areas fall under the jurisdiction of the rule-making authorities; however, the legislator is also entitled to vest powers in the Government to issue executive orders with the power of law. In order to properly understand the relationship between the legislation (enacted in parliament) and the executive orders, it is important to point out that the currently applicable legislation in France comprises 8,000 legislative acts and about 100,000 executive orders; (see: W. Safran, *The French Polity*, London 2003, 255). The dictatorship of the executive-administrative authorities involves two pinnacles in the form of a *duumvirate:* the President of the Republic and the Prime Minister, whose mutual relationship may vary depending on the given circumstances. Such a configuration of the executive-administrative power was designated as semi-presidentialism or the semi-presentialist system by M. Duverger (*A New Political System Model: Semi-Presidential Government*, European Journal of Political Research, 8/1980, 165-187). This term soon became part of the general legacy of the public law theory (see: G. Sartori, *Comparative Constitutional Engineering.* An Inquiry into Structures, Incentives and Outcomes, 2nd Ed., New York 1996, 121-140; D. Simović, *Polupredsednički sistem* (Semipresidentialism), an unpublished doctoral dissertation, Beograd, 2007).

The President of the Republic of France has to ensure the continuity of the state and the observance of the Constitution. He is elected in direct popular elections, just like the members of the National Assembly. He is entitled to dissolve the Parliament and refer any constitutional or statutory issues to be decided in a referendum. He appoints the Prime Minister, presides over the Government sessions and signs ordinances and other executive orders adopted by the Government. He is the Commander-in-Chief of the Army and he is entitled to act in a state of emergency. However, it is the Government (run by the Prime Minister who is concurrently the Vice-President of the Republic) that designates and administers the national policy. The Government is in charge of the public administration and the armed forces. Except for cases enlisted in the Constitutions, the Prime Minister and (if necessary) the relevant minister are entitled to countersign the acts issued by the President of the Republic. The Prime Minister is also in charge of the national defence and law enforcement, which gives him special political power. As a result, he has a huge technobirocratic apparatus at his disposal, which is not the case with the President. As a matter of fact, the constellation of pow-

ers of political parties in the National Assembly greatly depends on which of the two *duumvirates* has prevalence. In France, political parties have become "presidential machines", primarily devised to be a springboard for the presidential candidate and a source of his organizational resources (Clift, in: Poguntke/Webb, op. cit., 225). These political parties are, therefore, fully subject to "the iron law of oligarchy", which was formulated even before the First World War by R. Michels (*Les Partis Politiques. Essai sur les tendances oligarchiques des démocraties*, Paris 1914, 281 sqq.). Thus, if the President's political party or coalition has majority in Parliament, the President of the Republic is more powerful because in case of his disagreement with the Prime Minister, the President may remove the Prime Minister from his office by the majority vote of no confidence in Parliament; and vice-versa, the Prime Minister is predominant and more powerful if he enjoys the support of the parliamentary majority, in which case the President of the Republic may be just a bit more than a ceremonial figure, similar to the Head of State in the parliamentary system. For this reason, M. Duverger (*La Monarchie Républicaine,* Paris 1974, 188) correctly pointed out that "the monarch of the French Republic may be perceived as a King Proteus who changes his countenance and the form of governance in compliance with the nature of political forces in parliament."

The doctrine of the German 19th century constitutionalism did not include any limitations on legislative delegations simply because the German doctrine did not recognize the concept of the separation of powers at all. The idea of the constitutional monarchy, established in most German states after the revolutionary turmoil in 1848, was based on the "monarchist principle". Thus, pursuant to the Constitutional Charter of the Prussian State promulgated on 31st January 1850, the King (lord of the land) rules and appoints ministers and other officials, enacts laws and appoints judges who are in charge of the administration of justice on behalf of lord of the land. Moreover, the Charter stated that "the legislative power shall be vested in and jointly exercised by the King and two chambers of parliament"(Article 62), that the "judicial power shall be vested in the independent courts which shall be bound only by the law of the land" (Article 68), and that "it is only the King that has the executive power" (Article 45). Yet, the term "judicature" implied only the administration of criminal justice and civil lawsuits. In addition, the legislation was reserved with the most important administrative acts (concealed under the term "legislative act") while the administration was reserved with the most important legislative acts (concealed under the term "executive orders").

Upon the unification of all German states (except Austria) into "the German Empire" as the crown of the victory in the Franco-Prussian War, the Constitution of the German Empire of 1871 established a poliarchy of German rulers and governments with overall Prussian hegemony, which was equally unfamiliar with the liberalist concept of the separation of powers. The judicature was mostly regulated by each constituent state but the Federal Council jurisdiction included some elements of the constitutional judicature. The executive-administrative power was separated between the Emperor (being in that capacity as the King of Prussia) and the Federal Council which was a delegated representative body including the representatives of the constituent states' governments; (this body comprised 58 member seats, unevenly distributed among the states given the size of each constituent state; thus, Prussia had 17 seats on the Council while the smallest states and city-states had one seat each). The legislative power was jointly vested in the Federal Parlia-

ment (*Reichstag*) and the Federal Council. At the beginning of the First World War, there was no constitutional dilemma in terms of the admissibility of delegating legislative powers. The provision in § 3 of the Empire Law of 4th August 1914 regulating the authority of the Federal Council to decide on economic measures stated that "in times of war, the Federal Council is authorized to order statutory measures which prove to be necessary for eliminating the economic damage. The Federal Parliament (*Reichstag)* must be informed about these measures in the next session, and the measures are to be repealed upon the request of the *Reichstag*."

On the basis of this authority, the Federal Council adopted a vast number of executive orders. Yet, the official explanatory remarks in the appendix to this Empire Act stated that "the socio-political acts and labour-protection acts shall by no means be subject to any change whatsoever". This explanation was primarily aimed at calming down the workers' parties, as a guarantee that this authority would not be abused for adopting any antisocial regulations. The legal science correctly considered that this Empire Act actually established the dictatorship of the Federal Council; (see: Schiffer, *Die Diktatur des Bundesrates*, Deutsche Juristenzeitung, XX, 1915, Sp. 1158-1163).

After the military breakdown of the Empire, there was a revolution in Germany in November 1918 which resulted in establishing the governance of workers' and military councils (soviets). "The German Socialist Republic" was short-lived primarily because it was perceived as a temporary state of affairs by the Social-Democrat Party whose goal was to convene the Constituent Assembly, which was eventually accomplished after winning the majority in the central Government and the councils as well as after suppressing the Communist rebellions. In January 1919, the National Assembly was constituted as the supreme state authority with constituent powers. It is interesting that the state was given its old name "the German Empire" (*Deutsches Reich*) even though it was constituted as a republic, which evidently reflected the grief for the former grandeur but also a kind of revanshism for the lost war and the annexed territories. The sessions of the National Assembly did not take place in the national capital of Berlin (except for a short while) but in a small fortified town Weimar, for fear that the Communist agitators in Berlin might obstruct the operation of the National Assembly. For this reason, the Constitution of the German Empire, which was adopted by the National Assembly on 11th August 1919, is usually called the Weimar Constitution and the system of government resting upon this Constitution is called the Weimar Republic or the Weimar system, which ceased to exist in the period between 30th January and 21st March 1933. (See: E.R. Huber, Verfassung, Hamburg 1937, 35 sqq., 38 sqq.) The republican system of governance employed in the German Empire could be classified as "a relative parliamentary system or a semi-presidentialist system with the parliamentary supremacy". One of the leading constitutional jurists of the Weimar Republic, R. Thoma (in: *Handbuch des Deutschen Staatsrechts*, II, herausg. v. G. Anschütz/R. Thoma, Tübingen 1932, 117, underscored in the original source) pointed out: "**Considered statically (**i.e. as a standing system), this system may overwhelm by the seemingly excessive pluralism of the separation of powers and limitations of power which keep the Parliament wedged between the Empire Council, the President of the Empire, the plebiscitary legislation and the judicial control, whereas the President of the Empire is held down between being accountable to Parliament and bound by the countersignature (Articles 54 and 55) and the referendum for his removal (Article 43); it is all additionally complicated by the social pluralism of professional organizations, po-

litical parties, religious confession, provincial bureaucracy and constant battles between the Empire ministry departments. On the other hand, **considered dynamically,** the system is characterized by the determination of its parliamentary monism to unify the governing powers, entrusting the majority in the Empire Parliament with powers to enact laws and decide on the Government policy and personnel while "cocooning" the President of the Empire, who needs the countersignature from the Cabinet majority... "

The absence of a principled separation of powers led the legal science and the judicial practice to a conclusion that the Weimar Constitution made allowances not only for the delegation of legislative powers to the executive-administrative authorities but even permitted that these bodies may invalidate the constitutional provisions or depart from them, under the single condition that such a power must be vested in the executive-administrative authorities either by the Constitution or by an legislative act with the power to revise the Constitution; (see: E. Jacobi, in: Anschütz/Thoma, op. cit., II, 240 sq.). In line with this doctrine, on 17th April 1919, the National Assembly adopted the Act "on a simplified form of legislation for the purposes of transition economy"; by this Act, National Assembly authorized the Government of the Empire to issue (upon prior consent of some boards) "statutory measures which prove to be necessary and urgent for regulating the transition from the war-time economy into the peace-time economy". Under the Act adopted on 30th July 1919, the Government was authorized to implement the Versailles Peace Treaty. Then, there was a series of subsequent acts vesting vast powers in the Government of the Empire.

Yet, the most significant event in the legal history of the Weimar Republic took place after the outbreak of the world economic crisis in 1929, which particularly took its toll in the German economy which had already been on the brink of disaster. Hitler's National-Socialist German Workers' Party (NSDAP), which was until then just a small and insignificant Fascist party, dominated the elections on 14th September 1930 by winning almost 6,5 million votes and thus became the second strongest fraction (right after the Social-Democrats) in the Empire Parliament. The constellation of political powers was significantly shaken up by the strengthening position of the Communist Party which was (just like the Fascists) a fierce and uncompromising opponent of the Weimar system. This huge swing of the electorate to the right was hailed with great content by the President of the Empire, the old Marshal Hindenburg, who had been initially forging plans for the revival of monarchy. The last Social-Democrat Chancellor of the Empire, Hermann Müller, had to resign and his position was taken by the moderate nationalist H. Brüning; the Social-Democrats did not wish to participate in his Cabinet composed of "frontline soldiers" but Brüning was tolerated by party in its desperate attempt to prevent the militant nationalists to come to power. It was the beginning of the period when Parliament did not enact laws but had to put up with "the emergency decrees", which were - upon the Chancellor's proposal - adopted by the President of the *Reich* on the grounds of the authority contained in Article 48 paragraph 2 of the Constitutions. The legal science and the judicial practice are of the opinion that these emergency decrees could change even some constitutional provisions; (see: C. Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954*. Materialien zu einer Verfassungslehre, 3. Aufl., Berlin 1985, 319 sqq.).

As the German electorate kept swaying right, the National-Socialists had excellent results in the province elections. In such circumstances, on 30th May 1932, President Hindenburg denied confidence to Chancellor Brüning, dissolved the Empire Parliament and

scheduled new elections. In the elections held on 31st June 1932, the National-Socialists triumphed again winning a total of 13,745,800 votes; as the strongest political party in the country, they won 230 out of the total number of 608 parliamentary seats. Together with the Communists, who also strengthened their position, they formed a "negative majority" in Parliament. As he could not rely on Parliament's support any more, President Hindenburg instituted the presidential dictatorship, which was principally based on his plebiscitary mandate. He kept adopting emeregency decrees but their countersignatories (the Empire chancellors) were no more than public servants under his control. At the same time, he offered Hitler to enter into a right-wing cabinet in the capacity of a Vice-Chancellor; the offer was flatly refused because Hitler wanted the office of the Chancellor and unlimited power. Reluctant to give in, Hindenburg dismissed the Parliament again and scheduled new elections. In these new elections, the National-Socialists were heavily defeated and their popularity significantly started to dwindled. On the other hand, the number of Communist voters was constantly on the rise so that the power of the Communist Party almost equaled the power of the Social-Democrats. Under these circumstances, the possibility of collaboration among the Nazis, the Communists and the Social-Democrats became a reality, which was illustrated by the former Chancellor of the Empire, Brüning (in his posthumously published memoirs) in reference to the joint strike of the Berlin tram workers from 3rd to 7th November 1932; (H. Brüning, *Memoiren* 1918-1934, II, München 1972, 668). It was at that time that the Nazi propaganda launched the slogan: "If the NSDAP falls apart tomorrow, there will be ten million Communists more in Germany the very next day". (J. Fest, *Hitler. Eine Biographie*, Frankfurt-Main/Berlin 1989, 496).

Being in the dire straits, Hindenburg appointed Hitler Chancellor of the Empire on 30th January 1933. The last legislative delegation in the Weimar Republic took place on 24th March 1933; in the procedure for amending the Constitution, Parliament adopted the Act authorizing the Empire Government (meaning: Hitler himself) to enact executive orders which could change the constitutional provisions. Shortly afterwards, by utterly legitimate means, the Government abolished the party pluralism and instituted a single-party dictatorship of the National-Socialist Party, imbued with the ideology of extreme nationalism and racism.

The Basic (Constitutional) Law of the Federal Republic of Germany of 23rd May 1949 was primarily intended to draw upon the messages learned from the failure of the Weimar Republic. Under the Basic Law, the system was purely representative; it did not recognize the referendum nor the direct presidential election. The President is now elected by the Federal Assembly and he is largely just a "representative" figure. The role of constitutional justice is significantly strengthened. The Federal Constitutional Court was given a particularly important authority to rule on the unconstitutionality of political parties. Pursuant to Article 12 of the Basic Law, unconstitutional parties are those parties "whose objectives as well as their supporters' conduct are intended to impair or eliminate the libertarian democratic basic order or to endanger the subsistence of the Federal Republic of Germany." Thus, the Act introduced a clandestine dictatorship of political parties, which were identified with the regime as provided in the Basic Law and in charge of appointing the Federal Constitutional Court judges. The Court clearly demonstrated its orientation by banning the Socialist Party of the Empire (SRP) on 23rd October 1952, the Socialist Action Party (SDA) on 4th June 1956, and the Communist Party of Germany (KPD) on 17th August 1956. The Basic Law also significantly restricted the possibility of delegating

legislative powers. Pursuant to Article 80 para. 1 of the Basic Law, "the Federal Government, the Federal Minister, or the Government of a Federal Province may be authorized by a legislative act to enact executive orders. The content, the objective and the scope of the vested authority shall be determined in the Law. The legal ground shall be specified in the executive order. If the Law envisages that the authority may be subdelegated, it is necessary to issue executive order to regulate the subdelegation of authority." At this point, it is important to take into account that the German legislation makes a clear distinction between the "legal" decrees and "administrative" decrees. Legal decrees are adopted to regulate "general relation of governance" and they are related to the freedom and property of an individual; they are the ones the above limitations apply to. Administrative decrees are adopted to regulate "special relations of governance"; they are regulations of an internal administrative character; in case their adoption is not regulated by a legislative act, the administration may adopt such decrees even without the statutory authorization; (see, for example: E. Forsthoff, *Lehrbuch des Verwaltungsrechts*, I: Allgemeiner Teil, 10. Aufl., München 1973, 139 sqq.).

Yet, the Federal Parliament was basically weaker than the Federal Government, i.e. its leader – the Federal Chancellor. For this reason, a common term used in the FR Germany for this system was "chancellor democracy". Michels' theory of "the iron law of oligarchy" has unlimited validity in the German party which has majority in the Federal Parliament or prevalence in the governing coalition, and whose dictator is the Federal Chancellor. Under Article 65 of the Basic Law, the Federal Chancellor is entitled to lay down the basic guidelines of state policy and to administer his policy; (this powerful but vague authority was a vestage from his predecessor, the Empire Chancellor under the Weimar Constitution). Upon the Chancellor's proposal, the President could appoint and remove federal ministers; in that course, the President has "a bound competenceauthority", i.e. he was obliged to act upon the Chancellor's proposal in all cases, except if his performance would amount to a violation of the Constitution or the statutory law; (P. Badura, *Staatsrecht. Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland*, München 1986, 342). The Federal Parliament could be dissolved neither by the Federal Chancellor nor by the Federal President, nor by the Federal Government. On the other hand, the Federal Parliament could declare no confidence to the Federal Chancellor (Article 67 of the Basic Law) only by electing a new chancellor in the procedure known as "a constructive vote of no confidence". This formula gave the Chancellor's office rather distinctive presidential features.

The implementation of the state of emergency legislation resulted in a further concentration of the executive-administrative power in the hands of the Federal Chancellor. The legal provisions on this issue became part of the Basic Law in the new Article 115 to 115.1 adopted on 24th June 1968. In case of an armed intervention or an immediate danger of an armed intervention on the federal territory, the Federal Chancellor was authorized to act in the capacity of the Commander-in-Chief of the armed forces and the Federal Government had an unlimited power to issue guidelines for the governments of the federal provinces. The question that remains open is whether this regime was also applicable in case of "internal tensions", as suggested by some authors; (for example: H. Kolbe et al., *Parteien in der BRD*. Ein Handbuch, Berlin 1989, 71).

The presidentialization of the Chancellor's office was largely supported by the specific characteristics of the German federalism. The structure and organization of political par-

ties was uniform across the entire territory of the Federal Republic. However, the parties in federal provinces were largely independent from their central headquarters, which illustrates that the federal structure was replicated even within the political parties in Germany. In the German federal structure, the federal provinces were represented in the Federal Council (the former Empire Council) via the representative bodies of their governments; the Federal Council co-decided with the Federal Parliament on a number of (particularly legislative) issues. The need to coordinate different interests frequently resulted in the necessity to come up with compromising solutions. The key player in this "negotiation democracy" was the Federal Chancellor, acting as an impartial intermediary. (See: Holtmann/Voeltzkow, in: Zwischen Wettbewerbs- und Verhandlungsdemokratie, herausg. v. E. Holtmann/H. Voelzkow, Wiesbaden 2000, 9 sqq.)

The Constitution of the United States of America of 1787 regulated the governing system of the Union by endeavouring to consistently introduce the principle of the separation of powers. Thus, the legislative power was vested in the bicameral Congress (composed of the Senate and the House of Representatives), the executive powers were vested in the President of the States, and the judicial powers were vested in the Supreme Court. Yet, there were frequent conflicts and battles for prevalence between Congress and the President: first, because the legislative power could not be fully separated from the executive-administrative power and, second, because Congress and the President were both elected in direct national elections, which made them representative bodies of an equal standing. It is important to point out that the constituent states (federal units) basically replicated this system in their state Constitutions. However, in most of these federal states, the governors were not as powerful as the US President because they were obliged to share their executive power with the state officials elected in direct popular elections, such as the Vice-Governor, the State Attorney, the State Secretary, the Minister of Finances, the Budget Auditor, or the Superintendent of Education.

From the constitutional law point of view, Congress is superior to the President of the Union. Under the Constitution, Congress is eligible to enact legislation in all areas which are subject to the federal jurisdiction, by issuing a joint resolution of the two chambers of Congress. The President is obliged to enforce the federal laws. He has the right of a veto but the presidential veto is only suspensive in nature because Congress can override the veto and vote in favour of the same act by a two-third majority vote in each chamber. In particular, Congress exercises its supremacy in the process of impeachment. The House of Representatives is entitled to raise charges against the President seeking his removal from office on the grounds of "treason, bribery or some other felony or serious violations" of his constitutional powers; then, the Senate is required to decide to remove the President upon the approval of the two-thirds majority of the present membership. The impeachment process also applies to the Vice-President of the USA and any other federal officials. The US President has constitutional prerogatives of the Commander-in-Chief of the armed forces; he appoints and removes high federal officials, and he is eligible to sign international treaties and agreements. Even though Congress may not interfere with the military command of operations, the Senate approves the appointment of all high federal officials and confirms the ratification of international agreement by a two-third majority vote of the present membership. It all demonstrates the intention of the framers of the US Constitution to make the Senate not only a legislative body but also a kind of a governing body.

Yet, Congress managed to preserve its political supremacy throughout the 19th century. At the end of the 19th century, the renowned American President at the time of the First World War and a political theoretician Woodrow Wilson expressed his criticism on the insufficent power of the US President. In his book of a symbolic title "*Congressional Government",* he objected about "the government by the chairmen of Standing Committees of Congress" which are "our form of government", emphasizing that "the presidency is too silent and inactive, too little like a premiership and tooo much like a superintendency. If there be any one man to whom a whole party or a great national majority looks for guiding counsel, he must lead without his office, as Daniel Webster did, or in spite of his office, as Jefferson or Jackson did." (W. Wilson, *Congressional Government*. A Study in American Politics (1885), Mineola, N.Y. 2006, 82, 141.)

The political supremacy of the President over Congress was an immanent result of three complex sets of facts: **the populism**, **the imperialism,** and the war and economic **crises.**

The prominent German historian E. Nolte (*Deutschland und der Kalte Krieg*, 2. Aufl., Stuttgart 1985, 47 sqq.) defined the USA as " the first left-wing state". With all due respect, we cannot agree with this qualification. Leaving smaller political parties and movements aside, neither the Democrats nor the Republicans (as the two major political parties taking turns in the US administration) are left-wing parties. The parties of the left wing orientation (graded as the moderate, the radical and the extreme left parties) are social-democrat parties, socialist and anarcho-syndicalist parties, and communist parties (or movements of these three orientations). The right-wing parties (graded as the moderate, the radical and the extreme right parties) include liberal parties, corporativist parties and fascist parties (or movements of these three orientations). Yet, the features of some of these types of parties (or movements) may move up and down the same scale but they may also move, both horizontally and vertically, from one scale to another. This kind of structure may be described as **"the hexagonal crystal of political philosophy".** (See the basic features of this theory in: Milan Petrović, *Students' Movements in 1968* – An Outline of Political Philosophy, Nish 2010, 29 sqq.)

Consequently, the Republican Party in the USA has characteristics of an extremely liberal party while the Democrat Party has its liberal right wing and social-democrat left wing. Yet, what Nolte sees as the left-wing orientation is actually populism. Generally speaking, populism is a political platform for satisfying the immediate needs and expectation of a "small ordinary" man as opposed to the impersonal forces and privileges of large organizations, groups and secret societies. A very frequent motif of populist politicians in the USA (as the homeland of populism) has been the struggle for the interests of American farmers as small-scale producers of goods as opposed to the interests of the industrial trusts and financial capital; at times, they have also tried to appeal to the workers' unions. Yet, it certainly does not exhaust diverse constellations of populism, which prove to be extremely polymorphous. Thus, there is "the left-wing" and the "right-wing" populism. For example, if the populism of President A. Jackson (*fungebatur* 1829-1837) may be defined as a "left-wing" populism (see: Nolte, op. cit., 53 sqq), then the same term definitely may not apply to the populism of the conservative president R. Reagan *(fungebatur* 1981-1989) and the period known as "reaganism", and even less so to the populism of F.J. Strauss, a Bavarian politician and a former President of the anti-socialist Christian-Social

Union (CSU); (see: *Populismus und Aufklärung*, herausg. v. H. Dubiel, Frankfurt am Main 1986, 118 sqq., 161 sqq.).

At the end of the 19th century, the US bodies of national representation offered a pathetic picture of ignorance, incompetence and corruption which was evident not only at the federal level, where the deputies of the Republican Party were directly advised by the businessmen and tycoons on what to do (E.E. Schattschneider, in: Modern Political Parties. Approaches to Comparative Politics, ed. by S. Neumann, 2nd impression, Chicago 1957, 197 sqq.), but also at the state and city level. According to J. Bryce (*The American Commonwealth*, I, New Ed., New York 1920, p. 546), "the lowest place belongs to the States which, possessing largest cities, have received the largest influx of European immigrants, and have fallen almost completely under the control of the unscrupulous party managers. Thus, the cities of New York, Philadelphia, Baltimore, Chicago, Cincinnati and San Francisco have done their best to "poison" the legislatures of the States in which they respectively lie by filling these bodies with members of a low type, as well as by being themselves the centres of enormous accumulations of capital. They have brought the strongest corruption forces into contact with the weakest and the most corruptible material…" It all resulted, even before the year 1900, in establishing governors' offices in individual states; being popular leaders (tribunes) and dictators, governors used their right of a veto to cancel numerous legal proposal (bills) aimed at legalizing corruption. In fact, a Governor's veto could be overridden by a two-third majority vote in each of the two legislative chambers of a respective state but it actually never happened, not only because the two-third majority was difficult to obtain but also because the veto would obviously draw the general public attention and result in revealing the malversations. (See: Bryce, ibid., I, 557 sq.; W. Hasbach, *Die moderne Demokratie.* Eine politische Beschreibung, Neudruck der 2. Aufl. (1921), Aalen 1974, 176.). The populist dictatorship enjoyed a strong support of the press, as a body of the general public opinion. However, the power of the radio was even more consequential. Thus, the most popular President in the US history and the greatest reformer, F.D. Roosevelt (*fungebatur* 1933-1945), used to address the American people in radio speeches "sitting by the fire of his fireplace" (see: E. Ludwig, *Roosevelt, Studija o sreći i moći* (A Study on Happiness and Power), Zagreb 1939, 208 sqq., 229); in these speeches, he explained and justified his political measures but also attacked their opponents in Congress and the Supreme Court.

Shortly after setting the foundations of the new state, the United States started waging wars primarily aimed at territorial expansion: against the indigenous Indian tribes, against Mexico and against Great Britain. In 1898, the States were involved in a classical imperialistic war against Spain over the distribution of (overseas) colonies, after which the States obtained Cuba, Puerto Rico and the Philippines, and annexed Hawaii. The USA entered the First World War no sooner than in 1917 to fight for the Entente Forces against the Central Forces; however, the arrival of two million fresh American soldiers to the French battlefields certainly turned the odds and the new constellation of powers forced Germany to capitulate in November 1918. The USA came out of this war as the strongest military and economic world power; this position was further strengthened after the Second World War when the USA became the leader of the "free world" in combating communism, in what is known as "the Cold War", when the United States "networked" that "world" with a host of military-security agreements and military bases. H. Kissinger, a distinguished American diplomat and a history professor at Harvard University, wrote

about the current state of affairs in the North-American imperialism (H. Kissinger, *Da li je Americi potrebna spoljna politika. U susret diplomatiji 21.veka* (Does America need a Foreign Policy. Toward the 21st Century Diplomacy), Beograd, 2003, 13 sq), saying: "At the dawn of the new millenium, the USA domination exceeds those of the largest empires of the past. From arms to entrepreneurship, from science to technology, from higher education to popular culture, America prevails worldwide… As a result, American troops are deployed across the world, from the valleys of Northern Europe to the frontlines in East Asia. The *enroute* stations of the American involvement in the name of peace soon become permanent military missions. In the Balkans, the United States are essentially involved in the same kind of activities as those performed by the Austrian or the Ottoman Empire at the end of 19th century – they protect peace by establishing protectorates in-between the hostile ethnic groups. The United States have a dominant position in the international financial system and they are the largest single source of investment capital, the most attractive haven for investors and the largest trade market for foreign export". (For details on the forms and doctrines of the American imperialism, see: M. Petrović, *Democracy as a Worldwide Process and International Law Views of the United States of America,* Facta Universitatis. Series Law and Politics, 3/1999, 271 sqq.)

Foreign policy has the crucial role and position in imperialistic states. For this reason, the President of the USA, as the supreme diplomat and the Commander-in-Chief of the armed forces, has become the basic political factor in the country. Thus, it was no coincidence that the First World War and the period to come yielded some kind of a president personality cult. H. Finer (*The Theory and Practice of Modern Government*, II, London, 1932, 1017) observed that "the President is being *"sold"* to the people (by party managers, M.P.) as the greatest man on earth. In the course of his four-year term of office, he speaks with authority stemming from the outstanding popular belief in his personality. The eyes and the expectations of the entire nation are with him as if he were a savior. He is a plebiscitary leader of the executive, with limited liabilities but with huge latent possibilities."

Congress has always been quite reluctant in delegating its legislative powers, which is done only in cases of utmost necessity. Thus, during the USA involvement in the First World War, Congress entrusted President Wilson with the most extensive and far-reaching powers ever delegated in the history of the young American republic. He was authorized: to regulate export and transport priority issues; to establish the licence system for the import, production and distribution of food; to prescribe the conditions for the requisition of items for human and animal nutrition for the needs of the national defence; to regulate trade transactions; to set the price of wheat on the basis of the statutory minimum; to institute transport limitations; etc. Taking into account these major legislative delegations (a total of 33 enlisted delegations), this kind of dictatorship was appropriately termed as "presidential dictatorship". (Rogers, *Presidential Dictatorship in the U.S.*, The Law Quarterly Review, January 1919, 127).

Yet, the principled departure from the economic liberalism occurred much later, as well as the transition into a state of affairs which would be defined much later (in Germany, after World War II) as "the social market economy". In October 1929, the USA was struck by a huge economic crisis, which eventually spread throughout the world. The prices of stock at the exchange market plummeted; the production was reduced, the result of which was mass unemployment. The Republican President at the time, H.C. Hoover, (*fungebatur* 1929-1933) justified his inactivity by slumbering the nation into a fairy tale

that the crisis would soon be over all by itself and that prosperity would be back in no time, and promising each citizen "a hen in the pot and two cars in the garage" (Ludwig, op. cit., 199). Sick and tired of unkept promises, and hungry for bread, the nation elected a more efficient leader and a fierce fighter, a democrat F.D. Roosevelt, for its new President. Roosevelt's national salvation program, called "the New Deal" (meaning: new distribution), essentially involved a planned economy but without changing the property ownership. Emil Ludwig (op. cit., 215) says that "the New Deal" was based on the concept first introduced by a German large manufacturer of Jewish origin and Minister Walter Rathenau, who was killed by the nationalists in 1922 for his collaboration with the Western powers. Yet, the exercise of this program required "the constitutional revolution"; (H. Ehmke, *Wirtschaft und Verfassung.* Die Verfassungsrechtsprechung des Supreme Court zur Wirtschaftsregulierung, Karlsruhe 1961, 142 sq., 152 sqq.). It was reflected in a vast centralization of economic powers, in particular, by means of which the USA was transformed from a federal state into a quasi-unitary state; it was also reflected in the more relaxed criteria governing the judicial control of the legislative delegation in the judicature of the Supreme Court of the USA.

The beginning of the Second World War further strengthened of the position of the US President as the legislator. As of the year 1940, Congress reinstituted many former extensive powers of the President, and included new ones. In that context, it is particularly important to point out to the Lend & Lease Act of 11th March 1941. This Act vested vast powers in the President to organize the "indirect defence"' of the USA. On the basis of these powers, he was entitled to organize war-related cooperation with other countries which was declared to be of the vital interest to the USA defence, and to supply these states with materials necessary for running the war operations. After the USA had entered into the Second World War, Congress adopted the First War Powers Act on 18th December 1941, authorizing the President to urgently institute new administrative offices which would be entitled to take immediate action and issue relevant statutory regulation. These presidential powers were further extended only three months later by the adoption of the Second War Powers Act. The scope of President Roosevelt's power at the time is most evident in his Congressional address given on 7th September 1942 concerning his request to Congress to reinforce his presidential powers in the field of economic stabilization. In this address, he formally threatened Congress that he would himself take necessary action in case he were not delegated these new powers by 1st October 1942. Congress unconditionally abided by his request and adopted the Price Control Act on 2nd October 1942, which authorized the President to institute strict economic stabilization measures, primarily in the field of prices and wages.

It is also important to note that the US Congress does not delegate extensive powers to the President only. There are cases when the President may subdelegate the powers he has been vested with. There are also cases when Congress delegates its powers directly to individual or collegiate executive-administrative bodies, administrative organizations and even private persons; (Ehmke, op. cit., singulariter 481 sqq., 577 sqq.; A.C. Aman, Jr./W.T. Mayton, *Administrative Law,* 2nd Ed., St. Paul, Minn. 2001, 9 sqq.). The Supreme Court has the authority to exercise some, but very important, control of these delegations, which certainly cannot be completely harmless. For this reason, the National Industry Recovery Act of 16th June 1933, which was supposed to introduce "the New Deal" program, was found by the Supreme Court to be unconstitutional.

On the basis of the extensive legislative delegations instituted under the Recovery Act, the President started the reconstruction and statutory regulation of the socio-economic life in the USA in cooperation with organized interest groups in the field of economy. For this purpose, on the basis of Article 3 of this Act, either upon the proposal of respective interest groups or upon his own initiative, he adopted over a thousand "codes of fair competition" for particular economic groups and branches of industry – practically for the entire national economy. Any violation of the rules contained in these codes was qualified as unfair competition, which was punishable by imposing a fine. Congress did not prescribe any specific guidelines for the application of these (delegated) powers; only in very general terms did the National Industry Recovery Act refer to the Congress policy to safeguard the general welfare by means of organizing economic groups, to prevent unfair forms of competition and to promote the use of the industrial production capacities as much as possible. The discretionary power of the President was, therefore, unlimited. Having formerly found some minor and narrower authorities to be fully valid and effective, the Supreme Court, in its ruling of 7th January 1935 (in *Panama Refining Co. v. Ryan),* found Article 9 of the Oil Industry Act to be unconstitutional; subsequently, in its ruling of 27th May 1935 (in *Schechter v. United States*) the Supreme Court found all the authorizations delegated under the Recovery Act to be unconstitutional. In the reasoning, the Court says that the legislature may delegate its legislative powers only to the President but only provided that it has formerly established and limited the subject matter and the objective of these powers; however, the legislature is now allowed to turn the President into a legislator by enlisting any general goals and objectives which would give him unfettered discretion to enact laws as he deems necessary or appropriate for the rehabilitation and expansion of trade and industry. In his concurring opinion, the famous judge Cardozo particularly pointed out that the delegated powers from the 1933 Act do not refer to the activities and documents which may be identified or described as related to a "standard" of behaviour. In its ruling in *Schechter v. United States*, the Supreme Court also specifically pointed out that "the extraordinary conditions do not create or enlarge constitutional powers".

However, things are quite different in terms of the President's "war powers", a set of extremely broad and vague prerogatives which are applied not only in times of war but also in all possible war-like circumstances. The pivotal point of these powers is to be found in the constitutional prerogative that the US President is the Commander-in-Chief of the armed forces; in that case, these are "the constitutional war powers". Yet, there are certain powers that the President is vested by Congress; these are "the statutory war powers". Given the fact that, under the US Constitution, it is the Congress that has the right to declare war and organize armed forces, Congress and the President share the military power; for this reason, there are occasional conflicts of jurisdiction regarding the specific authorities of the two representative bodies. (On the current state of affairs, see: M.C. Cummings, Jr./D. Wise, *Democracy under Pressure. An Introduction to the American Political System,* 7th Ed., Fort Worth etc. 1993, 371 sqq.). In 1973, Congress adopted the act known as "the War Powers Resolution", which envisaged as follows: 1) Within 42 hours after sending the American Armed Forces to combat abroad, the President is required to submit a written report to Congress specifying the circumstance necessitating the action and the scope of his activities; 2) The termination of use of the American Armed Forces within 60 days unless Congress has approved the extension of this period

(for additional 30 days at the most if the President confirms that it is necessary for the safe removal of the Armed Forces); 3) Within 60, or 90 days, Congress may issue an order for a prompt removal of American Armed Forces, by adopting a concurring resolution which is not subject to the presidential veto. Yet, subsequent presidents considered that the War Powers Resolution was not constitutionally binding.

War powers are still subject to the judicial control of the Supreme Court; if such legal censorship did not exist, the President could become a military dictator, which is abundantly illustrated by the constitutional history of the Latino-American states. Yet, the Supreme Court is very benevolent towards the use of the presidential war powers. Here are some typical examples from the Court judicature; (for more details, see: M. Petrović, *Pravna vezanost i ocena celishodnosti u teoriji javnog prava* (The Bound Competence and Discretionary Powers in the Public Law Theory), unpublished doctoral dissertation, II, Beograd 1979, 446 sqq. with literature). After Japan entered the war, a strong pressure was exerted on the US President by the military circles, Congress, interest groups and the press to dislocate the persons of Japanese ancestry from the West Coast of the USA and place them internally in the mainland. On 19th February 1942, President Roosevelt issued an executive order authorizing the Secretary of War to establish "military territories", from which "any or all persons" may be removed for the purpose of preventing espionage and sabotage; concurrently, all military commanders were designated as persons in charge of exercising police powers in those areas. Thus, three westernmost states and a part of Arizona were proclaimed to be "military territories 1 and 2"; consequently, a total number of 112,000 people of Japanese ancestry, approximately 70,000 of whom were actually American citizens, were transferred into concentration camps inland. An American citizen of Japanese ancestry refused to abide by the police measures and was subsequently charged and convicted. The Supreme Court decided the case (*Korematsu v. United States*) in 1944. The Court majority held (by 6 votes for and 3 dissenting votes) that there was no violation of the appellant 's constitutional rights, as the interest to win the war may justify much wider powers of political authorities as compared to those used in times of peace, even though these powers are even then subject to constitutional limitations. As for the objection that the respective police measures were motivated by racial discrimination, the Court considered that such measures would be unconstitutional; however, as elaborated by Justice Black who delivered the majority opinion, given the fact that there was an imminent pubic danger of war and upon the evaluation of the actions taken by competent military authorities, their "fear" of invasion and the "feeling" that they were obliged to take some security measures, their "decision" that the military emergency justified a temporary removal of citizens of Japanese ancestry from the West Coast and its final approval by Congress as an expression of "confidence" in the military leadership, the Court could not say that the military actions were unjustifiable at the time.

The case *Hirota v. MacArthur*, reviewed by the US Supreme Court in 1948, was about a post-war trial of a number of Japanese nationals who had already been tried and convicted by an international military tribunal. The Supreme Court considered that the Court had no jurisdiction to review the rulings of such tribunals. In the concurring opinion, Justice Douglas explained that all the respective rulings could not be subject of their review because the sentencing tribunal was not a judicial body but a military body established by the executive power as an instrument of political and military power. In another case (*Burns v. Wilson*) ruled by the Supreme Court in 1953, the legal issue again concerned the

scope and the competences of the civil judicature to review the decision issued by military courts (courts-martial). In that ruling, the Chief Justice Vinson established that the constitutional guarantee of "*habeas corpus*" (an urgent judicial inquiry in case of detention) had always had a narrower effect in military matters than in civil matters, and that the application of this guarantee in military matters had been confined only to the judicial inquiry (review) on whether the military tribunal decision had "fully and fairly" addressed the allegations raised in the application.

However, in matters concerning the interests of American industrial magnates, the Supreme Court criteria were much more stringent. The case *Youngstown Sheet & Tube Company v. Sawyer,* ruled in 1952, did not concern the President's "war powers" but his authorities in cases of emergency. At the time of the nuclear armament during the Korean war, President Truman seized most of the steel plants to avert nation-wide strikes of steel workers. Congress, however, did not approve this measure. In their appeal to the Supreme Court, the owners of the steel plants claimed that the President exceeded his constitutional powers by issuing an executive order for seizure of another's private property, which cannot be exercised without a prior Congress approval. On the other hand, the President claimed to have been acting in line with his constitutional power to "take care that the laws be faithfully executed" and the power to act as the Commander-in-Chief of the Armed Forces. The Supreme Court found for the applicants. The Court did not take the position that the President was obliged to "abide by the law" but rather allowed that the President was entitled to take any action unless explicitly prohibited by the law; after providing an elaborate historical interpretation, the Court considered that Congress had never intended, except in times of war, to allow the President to take such consequential measures without obtaining the Congressional authorization for the seizure of private property from its own nationals. In that context, an expert on American law, E.S. Corwin (*The President: Office and Powers* 1787-1948, 3rd Ed., Second Printing, New York 1956, 192), points out that the President is "the sole judge" of the terms "state of emergency", "utmost emergency", and "sufficient emergency".

The presidential power has gained momentum lately. Until only recently, the parties have funded their presidential candidate's election campaigns. Yet, the Federal Election Campaign Act of 1971 (and its subsequent adjustments introduced in 1976) regulated that the federal contributions from public funds for running election campaigns should be granted to the presidential candidates themselves instead of being paid to the parties' electoral committees. Starting from the 2000 elections, the presidential candidates stated financing their election campaigns from their own sources, and not from the party sources. A contemporary author (S. Fabbrini, in: Poguntke/Webb, op. cit., 318, underscored in the original source) noticed that "American parties have actually transformed into support structures, equipped with tremendous technologies, working for the benefit of their presidential candidates. It is as if political parties have identified themselves with their candidates, meaning that the latter include the former, but not vice versa. America today is a democracy of **the candidates' parties**". Therefore, political parties are still a powerful and necessary factor in political processes but only as organized supporters and the "army" acting for each presidential candidate or for the US President. Thus, the US political establishment has made another step towards Caesarism.

In Russia, Ceasarism feels even more like "at home". Russia seems to have been learning from the American experiences but primarily in an attempt to excel and be one step ahead in its radicalism.

By the year 1906, Russia was an autocratic monarchy as the successor of the Byzantine Orthodox Dominate. The Russian Tsar was the supreme Head of State with unlimited secular powers and the Head of the Russian Orthodox Church. From the beginning of the 18th century, this regime started attaining the characteristics of the Western-European "enlightened" (beaurocratically rationalized) absolutism. This Russia admitted defeat in the Far-East war with Japan in 1904-1905, consequently losing not only its Pacific fleet but also its military-naval strongholds in Manchuria and South Sakhalin. A revolution ensued, proceeding throughout the year 1905 (for the absence of the main body of the army from the European part of Russia); this revolution as well as the pressure exerted by the state creditors - Jewish mega-bankers from Paris and Berlin (M. Weber, *Gesammelte politische Schriften*, herausg. v. J. Winckelmann, 4. Aufl., Tübingen 1980, 69) forced the Russian Tsar to institute a constitutional monarchy, mainly modeled on Prussia and Austria of that time.

The octroyed Basic (Fundamental) Laws of 23rd April 1906 regulated the state system of government. Yet, some time earlier, the Tsar issued special legislation which regulated the elections to the State Duma and the State Council. The Basic State Laws also contained the declaration on the rights and duties of the Russian subjects. This declaration, *inter alia,* envisaged sacrosanct and inviolable property rights, and guaranteed some political rights including the right to establish political parties whose goals were not contrary to the law. Under the Basic State Laws, Russia was a unitary state but the Grand Duchy of Finland enjoyed internal autonomy on the basis of special legislation. The supreme power was vested in the Tsar (whose official title was: the Sovereign All-Russian Emperor), branching into a huge number of prerogatives. He was in charge of foreign affairs; he had the power to declare wars and sign peace treaties; he was the Commander-in-Chief of the Russian Army and Navy. He was the supreme Head of the Administration, exercising his executive powers by issuing ordinances and commandments. The Tsar had the right to initiate and propose legislation in all areas but it was only upon his initiative that the Basic State Laws could be submitted to revision in the State Council and the State Duma. The Tsar, the State Council (upper house of parliament) and the State Duma (lower house) were legislative factors of an equal standing, and no law could be enacted without a prior approval from both houses and the Tsar's consent (sanction). By issuing an ordinance, the Tsar could dissolve the State Duma at his own discretion even before the expiry of the five-year term of office prescribed by the Basic State Laws, but he was also obliged to schedule new election for the State Duma and to set the date for its first assembly. In the period when the State Duma was not in assembly, the Tsar had dictatorial powers. In emergency, the Tsar could even take action or measures which would otherwise have to be subject to the legislative procedure. These measures could by no means change the Basic State Laws or the structure of the State Council or the State Duma, nor the legal provisions regulating the elections for the State Council and the State Duma. These measure would become ineffective if, in a period of two months after reinstating the State Duma operations, the Tsar failed to submit them to the State Duma for approval, or if they failed to be approved either by the State Duma or by the State Council.

The Emperor's power was definitely weakened (for the benefit of the bureaucracy) when the Basic State Laws were amended by introducing the institution of the Council of Ministers. The Tsar's ordinances and commandments were countersigned by the President of the Ministerial Council or a competent minister, or the chief administrative officer of a special department. They were accountable to the Tsar for running the general state administration; (they were not accountable to either of the houses because it would be the parliamentary and not the constitutional monarchy). Under the Basic State Laws, the Tsar could appoint and remove state officials at his own discretion but, in reality, he had to keep public officials in the Ministerial Council because, if he kept removing them, he would constantly have to consider other candidates for their replacement. The only real alternative to the bureaucrats for membership in the Ministerial Council were the leaders of parliamentary parties, but the parliamentary government was the last thing the Russian Tsar could agree to. The bureaucracy had the key role in the legislation as well. The members of the State Duma were elected by the people of the Russian Empire in indirect elections, where the representatives of the four *curias* (the landlords, the citizens, the peasantry and the workers) did not have equal voting rights. Moreover, half of the members of the State Council were the appointed representatives of the clergy, academy of science and universities, state assemblies, noblemen's societies, trade and industry. The other half of the State Council members was appointed by the Tsar himself from among the highest ranking state officials and dignitaries *("сановникь"),* who were bureacrats. For this reason, a series of liberal bills proposed by the Duma could not pass the State Council.

The Russian Empire did not become the state under the rule of law even after introducing the constitutional reforms; thus, there was no constitutional guarantee of the independent judiciary, nor the guarantee of the judicial control of the administration. The legal provisions on the administrative deprivation of freedom (imprisonment) and the exile were sustained. Max Weber (ibid., 77, 98) noted that "Russia fell apart into a myriad of administrative provinces *("satrapies"),* which were divided not only regionally between different governors and governors-general but also according to their participation in different state departments." In his great novel "*The Life of Klim Samgin* (aged 40)" Maxim Gorky pointed out that such an autocratic regime was too weak to rule the country, that the Tsar was "a worthless man of no values" while the Russian people were still waiting for a "strong-fist" leader, "a Gideon or the Maccabees". (M. Gorky, *Dela* (*Works*), XXIV, Beograd/Zagreb 1951, 380, 417, 468, 481). The strong and centralized "upper hand" came to the Russian people during the October Revolution in 1917, and was clearly manifested in Lenin and his Bolshevik Party. The last Russian Tsar Nicolay II Romanov can, however, be observed in quite a different light - as a tragic figure who genuinely endeavoured to institute (under impossible circumstances) a legal reform and a moral revival of the centuries-old regime, which he had inherited from a long line of his predecessors and which contributed to creating the Russian national identity and distinguished Russia as a great nation.

Dictatorship is, on its own, the pinnacle of the executive-administrative branch supremacy. Yet, whereas the traditional dictatorship (both commissary and *decemvirate)* implies just a **temporary** delegation of legislative powers to the executive-administrative authorities and a temporary suspension of the fundamental rights, the single-party dictatorship is a political regime where political rights (in particular) are suspended on a **permanent** basis. Thus, the single-party dictatorship actually draws closer to despotism. Yet, despotism does not necessarily have to be in the form of monarchy. Montesquieu (*Esprit*

des Lois par Montesquieu, Paris 1894, liv. VIII, ch. VI, liv. XI, ch. VI) made a distinction between the despotism of all, the despotism of one, and the despotism of aristocracy.

Under the Basic (Constitutional) Law of the Russian Socialist Federal Soviet Republic of 10th July 1918, Russia was proclaimed to be a republic in which "all powers" (at all level of governance) were vested in the Soviets of the Workers', Military and Peasants' deputies. The Constitution reaffirmed the workers' control over all means and instruments of production. The peoples (nations) had the right to self-determination. The working people were guarantee "real" political rights and the freedom of expression. However, all these declarative rights were suspended shortly afterwards. In February-March 1921, the Soviet War Navy in Kronstadt rebelled against "the communist usurpators" and their "commissary autocracy" ("commissarocracy"), requesting no more and no less than the observance and the implementation of the 1918 Constitution (including *inter alia* the freedom of the press and the freedom of association of anarchist and socialist parties); in response, the Bolshevists sent the Red Army troop to suppress the Kronstadt rebellion, which has ever since remained the symbol of the libertarian revolutionaries' battle against the Marxists. (See: P. Broué, *Le parti bolchevique*. Histoire du P.C. de l'U.R.S.S., Paris 1963, 149 sqq.)

The basic principle of the Bolshevik organization of government was the "unity of the governing powers"; this principle was, in one way or another, articulated in all subsequent Soviet Constitutions. Thus, under the Basic (Constitutional) Law of the Union of the Soviet Socialist Republics (USSR) of 5th December 1936 (subsequently amended and supplemented on 12th October 1967), the highest body of authority in this federal union was the Supreme Soviet of the USSR, a bicameral representative legislative body. However, such a status was also given to the Presidium of the Supreme Soviet of the USSR, which was authorized to enact decrees and ordinances, interpret the applicable laws of the Soviet Union, and annul the unlawful acts adopted by the Council of Ministers. Formally speaking, the Council of Ministers (the Government) was not defined in the Constitution as the highest state body of authority but as "the highest executive and administrative body of state authority", which was responsible and accountable both to the Supreme Soviet and to the Presidium of the Supreme Soviet of the USSR. In reality, however, the Council of Ministers was above the Supreme Soviet and the Presidium of the Supreme Soviet, both of which were the Council's "voting apparatus"; consequently, neither of these two bodies had *ever* - in the entire history of the Soviet Union - raised the issue of the Government confidence vote. This was so because the Government served the needs of the highest officials of the Communist Party, its Secretary-General, the Politbureau and the Central Committee which actually ran and administered the country. Formally speaking, the bodies of the Communist Party never adopted ordinances and decrees; this work was performed by their lower public (civil) servants. However, statutory acts on some important issues were jointly adopted by the Central Committee of the Communist Party of the Soviet Union and the Council of Ministers of the Soviet Union, as well as by the Council of Ministers and the All-Federal Central Council of (Workers') Unions; (see: *Административное право* (Administrative Law), Под ред. Ю. М. Козлова, Москва 1968, 74).

After initial turbulence, the Soviet Union was soon stabilized as an empire of bureaucracy. The only thing that was different now was the national and social composition of the highest bodies of state administration; (see: P. Sorokin, *Die Soziologie der Revolution*,

München 1928, 213 sqq.; A. Solženjicin, *Dva veka zajedno* (Two Centuries Together), II, Beograd 2003, 142 sqq.).

Russia's farewell to the Bolshevists was not void of symbolism. Namely, the beginning of the Bolshevists' rule was marked on 25th October/7th November 1919 by firing platoons from the battleship Aurora at the Winter Palace in St. Petersburg, which was the headquarters of the former Provisional Government. The definite end of the Bolshevists' rule was marked on 3rd- 4th October 1993; upon the order of the President of Russia, tank platoons were fired at the building of the Supreme Soviet of the Russian Federation. Thus, upon the capitulation of the Supreme Soviet, the last traces of the communist constitutionality were gone forever.

Given that the only remaining supreme body of state authority was the President, the forthcoming period was characterized by **a temporary revolutionary dictatorship** of the Russian President. In this short period of time, President Yelcin's administration submitted a proposal for the new Constitution of the Russian Federation which was accepted in the general national referendum on 12th December 1993. Concurrently, in anticipation of the positive referendum results, there were national elections for the new state authorities: the State Duma and the Council of the Federation.

Under this semi-octroyed Constitution, Russia was constituted as a democratic, federative, legal, social and secular state with a republican form of government based on the separation of powers; (see: М.В. Баглай, *Конституционное право Российской Федерации,* 6-изд., Москва 2007, 127 sqq., 143 sqq.). The Russian variant of this newly instituted semi-presidential system was characterized by the President's supremacy over the bicameral parliament (the State Duma and the Council of the Federation). Russia could certainly function without a parliament but not without a president. Some presidential prerogatives were laid down in such broad and vague terms that his vast executive powers were almost presumed. It made the competences of other state authorities, as well as the rights and freedoms of an individual, rather relative. Under the Constitution, he is not entrusted with the executive power because "the executive power is vested in the Government of the Russian Federation." However, in reality, the Government was so much subordinate to the Russian President that it would be much more appropriate to designate the Government as his executive office. The Russian Constitution did not recognize the institute of a countersignature.

Under the Constitution, the Russian President is designated as "the Head of State". Article 80 para. 2 provides that "The President of the Russian Federation shall be guarantor of the *Constitution* of the Russian Federation, of the rights and freedoms of man and citizen. According to the rules established by the *Constitution* of the Russian Federation, he shall adopt measures to protect the sovereignty of the Russian Federation, its independence and state integrity, and to ensure coordinated operation and interaction of all the bodies of state authority." In the opinion of some constitutional scholars, this provision grants the President "discretionary power" (Баглай, ibid., 456 sq.). Yet, its literal interpretation shows that the enlisted presidential measures must be within the boundaries of the constitutional order; therefore, they may depart from some statutory and constitutional provisions. The President is empowered to declare a martial law and a state of emergency, but this ordinance is subject to approval of the Council of the Federation. The President is the Commander-in-Chief of the Armed Forces of the Russian Federation. He is in charge of relation with foreign states

and signs international agreements, in accordance with the Constitution and the federal laws. He also lays down the basic guidelines of both the internal and the foreign policy of the state.

The President's supremacy and independence from Parliament is particularly reflected in a number of prerogatives. He issues ordinances (as general legal acts) and executive orders (as individual legal acts) which do not have to be based on the law; it means that they needn't comply with the principle of legality but they mustn't violate the Constitution and the federal laws. He schedules the referendum; he may initiate legislation; he dissolves the State Duma; he has the right of a suspensive veto (which can be overridden by a two-third majority vote of deputies in the State Duma and members of the Council of the Federation). The impeachment process for the President's removal from office is far more complex than in the USA Constitution. The Russian President may be removed from his presidential office only in case he has committed high treason or some other serious crime (felony). He is charged by a two-third majority vote in the State Duma and impeached by a two-third majority vote in the Council of the Federation. However, the Supreme Court of the Russian Federation has to determine whether the actions committed by the President contain the elements of a specific crime, whereas the Constitutional Court of the Russian Federation determines if the process of raising charges has been performed in compliance with the applicable law. In that way, the judicial bureaucracy (which is, as a rule, inclined to the President) has become the necessary factor in the impeachment process. The Constitutional Court of the Russian Federation is empowered to decide on the constitutionality and legality of the decrees instituted by the President. However, President Yelcin frequently disregarded some Constitutional Court decisions which were unfavourable for him. Moreover, after the adoption of the Constitution on 24th December 1993, he issued an Ordinance on the measures for harmonizing the federal legislation with the Constitution of the Russian Federation, thus making a series of existing laws ineffective (either partly or in whole). By issuing this unconstitutional act, he actually created a legal gap for introducing his executive legislation. The institute of the Russian President at the time may most properly and precisely be qualified in legal terms as that of an imperial regent chosen in plebiscitary elections.

However, given the fact that President Yelcin did not have "his own" party to back him up, there was a kind of a united front of political parties in the State Duma against him. Using its authority to approve the appointment of the Prime Minister, the State Duma often exerted pressure on the Russian President. The relations between the President and the Parliament can be illustrated by the fact that President Yelcin actually vetoed about one-third of the laws enacted in Parliament (Simović, op. cit., 191). The solution came from the Russian bureaucracy, particularly the military bureaucracy, which aligned behind "the United Russia", the political party of Yelcin's political successor, President Putin. In the last two parliamentary elections, this party completely defeated its rivals. Just as the Imperial bureaucracy had it metamorphosis in 1918/19 by turning into the Soviet bureaucracy (see: Weber, op. cit., 529), this restored Soviet bureaucracy has become the stronghold of the nationalist-oriented Russia. The renowned Russian historian and biographer, R. Medvedev (*Vladimir Putin: četiri godine u Kremlju* (Vladimir Putin: Four Years in the Kremlin), Beograd 2004, 541, 543) says: "However, the principal stronghold and support for the United Russia Party today are public officials and civil servants at all levels of government... The most decisive factor in the country are certainly not the weak and mutually hostile political parties but the public administration personnel, who have filled up the public offices at the detriment of the

most competent part of the former party elite and managers from all walks of social life. The consolidation of this new class of civil servants is taking place as we speak, and a part of this process is the formation of the United Russia Party. The public servants have proved to be the most resilient and the most patriotic class in the new Russian society"; (see to: R. Medvedev, *Putin – Povratak Rusije* (Putin - Russia Revisited), Beograd, 2007, 77sq, including statistical data).

The accomplishments of this research set the grounds for a new contribution to the general theory of law – **the theory of the cyclic creation of the legal order.**

A. Merkl and H. Kelsen, the representatives of "the Vienna School of Jurisprudence", put forward a very significant legal theory on the creation of a legal order (system). It is the theory of "the hierarchical structure in the creation of the legal order*" (Stufenbau der Rechtsordnung*). Although this theory was accepted by a number of legal scholars (particularly Austrian, Swiss and French), there have also been many attempts to challenge and refute it; one of these included the great French public law scholar Carré de Malberg (R. Carré de Malberg, *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, reprint de la l-e éd. 1933, Paris 2007, passim). We consider these attempts to be unsuccessful because the theory of "the hierarchical creation of the legal system" includes some true premises. For this reason, instead of trying to directly refute them, we shall attempt to build these premises into our own theory.

The founder of "the hierarchical creation" theory, Merkl (*Die Lehre von der Rechtskraft*, entwickalt aus dem Rechtsbegriff. Eine rechtstheoretsche Untersuchung, Leipzig/Wien 1923, 203) emphasizes that its point of departure is "the destruction of a still untargeted position of legal rules in the legal system" because "overrating the legal rules is necessarily associated with underrating other legal phenomena; abolishing the distinction between the laws (legal rules) and the law (legal system) simply means (in the original context) depriving fully valid legal phenomena (of an equal quality as a legal rule) of their inherent rights." The process of creating the law proceeds through the concretization of abstract legal norms by means of applying more specific individual norms (originally founded on the abstract ones), and the process is completed by issuing real legal acts which are enforced or performed by a private person or entity. Kelsen (*Vom Wesen und Wert der Demokratie*, Archiv für Sozialwissenschaft und Sozialpolitik, Bd. 47, 1920/21, 68) says: "Yet, a general legal act *(lex generalis)* is just a stage, neither the first nor the last one, in the process of creating the law; this process starts from a constitutional norm as the original or primary norm (as a rule for enacting legislatation), proceeds to a general legal act (as a general rule for issuing ordinances, judgments, administrative acts, and conducting legal affairs), and ends up in the concretization of the law– which is very much like the economic production process: from a raw material via a semi-final product to the final product." In support of the gradual and unsubstantial differences between certain types of legal acts, Merkl refers to his predecessor E.R. Bierling (in: Merkl, *Die Lehre von der Rechtskraft,* 194 sq., underscored in the original source): "Given that **any** enactment of subordinate legal norms has been designated as a legal affair, the private law legal affairs (i.e. enacted legal norms which are subject to one or more norms of a civil law system) are just **one** type of all the existing legal affairs, in addition to which there are other types of legal affairs in public law (whose validity rests upon the superior public law norms of a specific state) as well as in church law, international law, etc. Thus, a legisla-

tive act, which is usually designated by the leading doctrine as the only source of law in addition to the customary law, is just a prominent type among the public law legal affairs. In fact, little is it realized that **a legislative act or any executive order of the public authorities** (on the one hand) **and all kinds of private law legal affairs** (on the other hand) **are essentially the same thing**, **not simply on the grounds of their former legal validity but also considering how they have been established or created**; therefore, it may be most succinct and straightforward to use the same term "legal affair" for both".

Looking into the legal nature of the "hierarchical creation of the legal order", we come to a significant realization that the law-creating legal acts are concurrently the law-enforcement legal acts, i.e. that an act of enforcing the law is concurrently an act of creating the law. Merkl (ibid., 217 sq., underscored in the original source) says: "Different steps in the hierarchy of legal forms are related to a process which is (for the leading doctrine) manifested as the so-called **creation of the law** – in the descending line all the way to an executive order, beyond which is the so-called **application of the law** or **the enforcement of the law** (but not in all legal forms so that there is a fiction of some discontinuity within the legal system). If it has become evident in that process that the law is **constantly re-created** from other **legal forms**, then breaking down this process into a one-level or a multi-level structure for the creation of the law and a subsequent one-level or multi-level course for the application of the law is certainly unsustainable, which further clearly explains the **continuous parallel structure** of the so-called **creation of the law** and **the application** or **enforcement of the law** in the entire hierarchical structure of legal phenomena. The creation of a legal norm in some legal form concurrently implies the application of a constitutional legal rule; the application of a legal rule in some judicial or administrative act (although it may as well refer to the application of a legal rule in private law matters) actually means the creation of legal norms in the form of respective private or public legal affairs. Naturally, only the initial and the final element of this ambiguous process prove to be a mere creation of the law or a mere application of the law."

In that context, the discretionary power has a crucial role in the theory of "the hierarchical creation" of the legal system. Merkl (in: *Allgemeines Verwaltungsrecht,* Wien/Berlin 1927, 142, 144, underscored in the original source), says: "A relatively abstract act which is used as a rule for the creation of a relatively specific act cannot fully determine it but may only be a component in the process of concretization (specification); thus, it has to make way for another component – the discretionary power of the competent body in charge of the act of concretization. If the pre-formed objective law, which enters into the process of the creation or application of the law, is a **heteronomous determinant** of the body which creates or applies the rule, then the discretionary power is a corresponding **autonomous determinant.** Therefore, if the discretionary power is not just any arbitrarily prescribed positive law institute (as often indicated) or an unintentional flaw of a legal technique, primarily the language of law which – for the lack of relevant means of expression – must (as sometimes assumed) make some room for the discretionary power, but if it is a theoretically based necessity driven by the essence of the enforcement as a form of concretization of the abstract norm, then reserving the discretionary power for the administration shall be excluded, as well as the supremacy of the administrative discretionary power over the discretionary power in other areas."

It is very important to take into account that Merkl's opinion on one of the basic questions may be more justified than Kelsen's. For Kelsen, as a pure normativist, the legal or-

der is made exclusively from general and individual legal acts or, as he says, general and individual "legal norms"; (see, for example: H. Kelsen, *Reine Rechtslehre,* 2. Aufl., Wien 1960, 228 sqq.). In contrast, Merkl considers that the constituent parts of the legal order are both legal acts and the legal actions of their enforcement; he employs the term "legal phenomenon" as a super-concept whose sub-concepts are normative acts, one the one hand, and the factual actions of their enforcement and application, on the other hand; (Merkl, *Die Lehre von der Rechtskraft*, 218 sq.).

Under "the hierarchical creation" theory, the process of the creation of the law comes to an end after the completion of the individualization and concretization of the law; (see: Merkl, ibid., 220 sq.). Yet, in addition to this **descending line** in the creation of a legal order, there is also the **ascending line** in the creation of a legal order. The discovery and the presentation of this ascending line is a significant contribution to our theory of the cyclic creation of the law. If one of the axioms of the "hierarchical creation" theory is that the law itself regulates the conditions for its creation ("self-creation of law"), (H. Kelsen, *Allgemeine Staatslehre*, Berlin 1925, 98, 234), then the only conception which fully complies with the conditions of this axiom is the conception of **the cyclic creation of the law.**

In the contemporary state instituted on the representative legal system, the ascending line in the creation of a legal order begins with the election activities of political parties and voters. Political parties nominate their candidates for respective representative bodies, whereas the voters determine the personal composition of these bodies by voting for the party candidates. In terms of "the hierarchical creation" theory, this process reflects only the application or the enforcement of the election legislation. However, without these legal actions, which are legally terminated by enacting some kind of a collective act comprising the conditions of the electoral body (on acts-conditions and collective acts, see: L. Duguit, *Traité de Droit constitutionnel,* I, 3-e éd., Paris 1927, 311 sqq., 328, 375 sq., 398 sqq.), there are no constitutive or legislative bodies, there is no government and, therefore, there is no hierarchical structure in the creation of the legal order. G. Jellinek (*Allgemeine Staatslehre*, 3. Aufl. von W. Jellinek, Berlin 1914, 554) is right in saying that " If the American people in the Union and the constituent states did not participate in the elections which they are entitled to, the immediate consequence would be a complete disorganization of the USA, which would remain without its Congress, President and other representative bodies." Considering the decisive impact of political parties in the electoral process, G. Radbruch (in: *Handbuch des Deutschen Staatsrechts*, I, herausg. v. G. Anschütz/R. Thoma, Tübingen 1930, 288) designates political parties as "**the ultimate creational bodies of all other bodies of a party state".**

This may lead us to even more general conclusions. A normative legal order (comprising the entire body of general and individual legal acts) is only valid provided that the legal acts constituting the legal order are put into effect by applying the real (material) acts and factual situations envisaged in these acts, for instance: provided that the police exercise their powers to preserve law and order in public places, provided that the vendor effects the delivery of the purchased goods, provided that the ministers confer on the basic objectives of state policy, etc. The legal norm is valid only if there is an objective (real) situation or state of affairs it may apply to. The constituent elements of that objective situation or state are, in fact, these real (material) acts. Considered individually, these acts are no more than "mere forms of enforcement" (as denoted by the Vienna School of Law). Considered in their **totality,** as a collection of acts, they constitute **a real legal or-**

der, as opposed to the merely normative legal order. In a number of positive legal systems, this real legal order is designated as "the public order and peace", "public order (system)", or "the constitutionally established order", all of which indicate an overall awareness of the legal order in its entirety, as a totality. In his work "*Philosophy of Law*", Hegel designates "the *concrete-general* concept of law" primarily as a real legal order; (see: G.W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse,* Nach der Ausg. v. E. Gans herausg. v. H. Klenner, Berlin 1981, passim). On the one hand, the real legal order implies the enforcement of the normative legal order. On the other hand, it is its **ontological** presumption, *conditio sine qua non.* Santi Romano, a renowned Italian public law jurist, designates "the legal order" as the real legal order (just as we do) but he does not link it with the cyclic creation of the law. Romano (S. Romano, *Die Rechtsordnung*, herausg. v. R. Schnur, Berlin 1975, 23) says: "The legal order… is a whole which partly moves towards legal norms but primarily moves these norms itself, like pieces on the chessboard. Thus, these norms are an object and an instrument in the operation of the legal order rather than mere elements in its structure."

The legal science of the ancient times, unconstrained by the normativism which is rather conventional in the contemporary legal science, recognized that certain **real legal acts** had specific characteristics of the fundamental legal phenomena. Thus, *Corpus iuris canonici* (the Cannon Law Codex of the Roman-Catholic Church), originally created in the 12th century, remained in force until 1917, stated that "The law of nations includes the occupation of a land, building towns and fortifications, warfares, captivity, bondage and servitude, liberation from captivity, alliances and peace treaties, armistices, inviolability of deputies, prohibition of marriage with aliens." (*Ius gentium est sedium occupatio, aedificatio, munitio, bella, captiutates, seruitutes, postliminia, foedera pacis, induciae, legatorum non uiolandorum religio, connubia inter alienigenas prohibitio. Corpus iuris canonici, Editio Lipsiensis secunda, post Ae.L. Richteri, instruxit Ae. Friedberg, Pars 1. Decretum Magistri Gratiani, Union, N.J. 2000, dist. I. c. IX.)* The reason is that the ancient legal scholars perceived the law to be much closer to the immediate reality. However, in our theory of the cyclic creation of the legal order, we endevour to perceive the law as a real living organism.

Another indispensable element in the ascending creation of a legal system is **the interpretation of law.** A real legal order is an **external** manifestation of the ascending creation of law; the interpretation of law is its **internal** expression. Still, the creation of law does not imply just any kind of the interpretation of law (such as logical-grammatical one, for instance). Yet, legal rules (particularly the written ones) are, generally speaking, imperfect in terms of the legal matter they regulate, which inevitably results in having "leg gaps"; consequently, the public authorities in charge of applying these legal rules are obliged to supplement the contents of these legal rules and fill in the existing legal gaps, particularly by means of systematic and teleological interpretation, reasoning by analogy and the legal nature of the matter at issue. Thus, instead of being merely in charge of apply the law they actually become the co-creators of law. The judicature of the Supreme Court of the USA offers a historically significant example of the creation of law by means of judicial interpretation; thus, the current US Constitution was significantly amended by applying the so-called "broad construction"; (see: J.R. Schmidhauser, *The Supreme Court as Final Arbiter in Federal-State Relations*, Chapel Hill 1958, 28 sq.). We have to bear in mind that in the Anglo-Saxon legal and political theory, the term "construction"(unlike the term "interpretation") implies filling in the legal gaps; (see: F. Lieber, *Legal and Political*

Hermeneutics, Or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities, Enlarged Ed., 1836, Union, N.J. 2002, passim).

It is possible to compare the interpretation of law and the discretionary power as necessary aspects of the creation of the legal system. The discretionary power implies a descending creation of law by means of specifying the content of a legal rule. The interpretation of law implies an ascending creation of law by means of determining the content of a legal rule. Yet, these two aspects of the creation of law are in no way contradictory; as a matter of fact, one and the same legal act may be used in the process of creating the law both by means of interpreting the law and by the discretionary power.

Another extremely complex question in the ascending creation of law is the so-called "unlawful creation of law", which is also directly related to our theory of the cyclic creation of the legal order. Namely, if we accept the likelihood of "the unlawful creation of law", it actually invalidates the axiom that the law self-regulates the conditions for its creation, which may further undermine the entire theory we propose. The most characteristic forms of the "unlawful creation of law" are the illegal and unconstitutional customary law as well as a partial and complete revolution (i.e. the unconstitutional invalidation of some constitutional norms and the constitution as a whole). We have already pointed out that dictatorship as a form of government may sometimes lead to "the unlawful creation of law" but it is more likely to happen in the "*decemvirate"* dictatorship than in the "commissary" dictatorship.

The term "commissary" dictatorship comes from the name given to special officials of the absolute rulers in Western Europe (particularly in France) in the Middle Ages; these officials were obliged to execute some orders ("commissions"), which departed from the applicable law; thus, they were called "commissioners or commissaries". This type of dictatorship was discussed by Bodin (J. Bodin, L*es six Livres de la République,* Paris 1583, 2-e reimpression, Aalen 1977, liv. 3, ch. 2, 372 sqq.). The domain of this dictatorship is a state of emergency, siege or war. Under the "commissary" dictatorship, the laws are simply suspended. The laws are temporarily "silent" but they are still valid. The "*decemvirate"* dictatorship is a term we are interested in. The "*decemviri*" were Roman officials who were given unlimited powers in 451 B.C. to prescribe laws (The Laws of the Twelve Tables). (The topic of "*decemvirate"* was also discussed by Machiavelli, in: Machiavelli, *Rasprave o prvoj dekadi Tita Livija* (Discourses on the First Decade of Titus Livius) ch. 35, 40, 44, in: N. Machiavelli, *Izabrano djelo* (Selected Work), I, Zagreb 1985, 201 sq., 207 sqq., 211.) The *decemvirate* dictator may not only act against the constitution and the statutory law but he may also abolish the law and the constitutions. A typical example of the *decemvirate* dictatorship is the dictatorship of the National Convent at the time of the French Revolution, between 1792 and 1795. As a revolutionary authority instituted in revolutionary authority, the *decemvirate* dictator could even enact a provisional constitution; (see: Ch.Borgeaud, *Etablissement et révision des Constitutions en Amérique et en Europe*, Paris 1893, 409). Thus, King Aleksandar Karadjordjević abolished the Constitution of the Kingdom of the Serbs, Croats and Slovenes of 28th June 1921 and instituted the monarchist dictatorship by his Proclamation of 6th January 1929. On the same day, however, he enacted the Act on the King's Powers and the Supreme State Administration, instituting it as the Provisional Constitution of Yugoslavia (see: M. Yovanovitch, *Le régime absolu yougoslave,* Paris, 1927, 96).

Wrong interpretation of law, particularly by the judicial authorities, is another form of an "unlawful creation of law". W. Jellinek (*Gesetz, Gesetzesanwendung und Zweckmässigkeitserwägung,* Tübingen 1913, 176 sq., underscored in the original source) provides an excellent explanation on this issue, saying: "By the power of law, a judge is obliged to be a creator of law, and act as **a social authority**. Right or wrong, his judgment and his judicature have a significant impact on the public opinions (frame of mind); it is the legal order that gives the public opinions the effect of a legal rule, which consequently affects the applicable law. Yet, there is no legal interest in all this; a judge is no more than one of many social forces. A judge is simply a part of **the social reality which either grants or denies a right**... The temporary or the permanent **validity** of a legal rule depends on his understanding or misunderstanding of the legal issue. However, by the power of law, **it should not be so;** a judge must always go back to the original meaning of a legal rule; but, in reality, there are misconceptions which simply cannot be prohibited by a legal order as it would be like prohibiting a desolation of an island. A judge is a creator of law by **the power of the judicial custom**. After a certain period of a steadfast, uniform and unwavering judicature, whose authority has never been challenged or disputed, a **misconceived** legal rule may become a valid rule; but now, the judge cannot return to the original meaning of a legal rule, even if he wished, because he is prevented by the force of the customary law. The fallacy of the judiciary is refined by the power of time."

The "famous" Kelsenian concept of a presumed (hypothetical) "basic norm" *(Grundnorm)* has no other purpose than to build "the unlawful creation of law" into the system of "the hierarchical creation of the legal order". Thus, speaking of the genesis of customary law, Kelsen says (Kelsen, *Reine Rechtslehre,* 232): "As pointed out earlier, customary law may be applied by the bodies in charge of applying the law only provided that they have been vested with such an authority. If such an authority is not vested in them under the constitution (in a positive law sense), i.e. if the qualified customary law has not been envisaged in the constitution as a factual situation which produces the law, then it must be presumed (if the application of one particular customary legal rule and particularly the customary rule which derogates a statutory legal rule is deemed to be legally valid) that the legal provision envisaging the custom as a factual situation that produces the law is already present in the basic norm (such) as the constitution in legal-logical sense. It means that we must presume a basic norm which envisages not only the factual situation of adopting the constitution but also the factual situation of the qualified custom as a factual situation which produces the law."

Only, this basic norm cannot be a hypothetical norm, i.e. just any hypothesis. A hypothesis is always aimed at the reality and it seeks proof on whether something exists or not; (see: H. Vaihinger, Die Philosophie des Als Ob, 7.-8.Aufl., Leipzig 1922, 143 sqq., 603 sqq.). In "the basic norm", there is no such requirement; the basic norm is simply a (legal) **fiction**. The fictive character of "the basic norm" was recognized by Kelsen himself at the end of his scientific career. It is interesting that he was a fierce opponent of both proper and unproper fictions in legal science in an earlier period. Now, at the age of 85, Kelsen (in: (Die Funktion der Verfassung, Verhandlungen des Zweiten Oesterreichischen Juristentages, 1964, in: Die Wiener Rechtstheoretische Schule, Herausg. v. H. Klecatsky/R. Marcic/H. Schambeck, Wien 1968, p. 1977) pointed out that "The presumption of a basic norm (such as ... the basic norm of a legal order stating that "One shall act in the manner prescribed by the historical first constitution") is contradictory not only to the immediate reality (as there is

no such norm of a real act of will) but it is also contradictory to itself as it represents the authorization of a supreme moral or legal authority, and thus originates from a certainly feigned authority which is superior even to that authority."

"The unlawful creation of law" may be perceived as a constituent part of the system of the cyclic creation of the legal order only by employing the idea of **social solidarity**. The concept of the creation of law which is either based on or governed by social solidarity was legally qualified by Duguit; (on the learnings of L. Duguit, see: M. Petrović, M. *Oriu i L. Digi kao osnivači savremene teorije države i prava u Francuskoj* (*M. Hauriou and L. Duguit as the Founders of the Modern Theory of the State and the Law in France,* a print from the Collection of Papers on Legal Theory, the Serbian Academy of Science and Arts I, 1978, 161 sqq.)

Thus, Duguit (*Etudes du droit public*, II: L'Etat, les gouvernants et les agents, Paris 1903, 220) says "Wherever there is solidarity, a state of association, there is an inevitable legal rule, the objective law, whose foundation, measure and subject matter is the association itself; this objective legal rule implies objective duties and authorities which come from this association. Any type of social association, such as family, municipality or professional associations, creates "the condition of the objective law." Further on, Duguit (L. Duguit, *Traité de Droit constitutionnel*, II, 3-e éd., Paris 1928, 60) said: "The state authorities, being made of individual persons, are mutually connected by the bonds of social interdependence or solidarity. They are obliged to perform their duties in line with the rule based on that social solidarity or interdependence, which is the basis of what is referred to elsewhere as a social discipline." However, for Duguit, the social solidarity is a mere fact or a factual situation. Duguit (L. Duguit, *Traité de Droit constitutionnel,* I, 3-e éd., Paris 1927, 152 sq.) also said: "The rules of contemporary law…, such as those regulating the rights of the child, prohibiting of a lion's share contracts, preventing speculation, expanding the field of responsibility and prohibiting unjust enrichment, all rest upon the fact of social solidarity as presented in sociology." However, if the social solidarity is **just** some fact, then it cannot be a source of legal norms because such a conception departs form the axiom that the law itself regulates the conditions for its creations. This is actually the major objection made by the greatest French legal methodologist, Gény, who said that Duguit that could hardly avoid the confusing "the laws of the moral world" and "the laws of the physical world" so that his "methodology and epistemology...essentially remains…superficial and loose." (F. Gény, *Science et technique en Droit privé positif*, *IV,* Paris 1924 (Nouveau tirage 1930), 162; id., *Science et technique en Droit privé positif, II*, Deuxiéme tirage, Paris 1927, 198, nota 1). Yet, the social solidarity is not just a bare fact; it is indeed the ultimate **legal principle**. Philosopher Max Scheler (*Der Formalismus in der Ethik und die materiale Wertethik.* Neuer Versuch der Grundlegung eines ethischen Personalismus, 5. Aufl., herausg. v. M. Scheler, Bern/München 1966, 15, 284, 364, 523, 526, 530) points out that the principle of solidarity is a moral *a priori* of human history and community as well as a moral collective ideal of mankind.

In addition to the legal norm and the legal action, the legal principle is also a **legal category** in the creation of the law. Pointing out to the huge significance of legal principles in the contemporary judicial "construction" of the legal order, J. Esser (in: *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Tübingen 1956, passim), points out (ibid., 227), by calling upon other authorities as well, that legal principles are the "spirit"of the legal world shaped by the legislation, judicature and legal doctrine,

which we perceive as "an enclosed national legal order." He further says: "No *Corpus iuris* is just a mass (a mere collection of laws); first and foremost, it is (by declarative statements contained in that mass) a fixed system of principles, which allow the judge a freedom to choose, apply and reshape a positive norm." Without the legal principles which introduce some limitations, the discretionary power which proves to be an absolute necessity in the process of the concretization of the law turns into a tyrannical arbitrariness. Merkl (Verwaltungsrecht, 156) admits that too, saying: "In case of an obviously inadequate, almost mindless and even immoral application of the discretionary power, the legal science however would not be able to establish some flaw of fallacy in the discretionary power because it would then reach into the jurisdiction of another normative discipline." This statement demonstrates a (general) blindness for the legal principles of the Viennese positivism. The legal principles which have the greatest significance limiting the discretionary power are: the principle of equality, the principle prohibiting the abuse of the public power and authorities, the principle of proportionality, the principle of fairness and *bona fides,* and the legal nature of the matter at issue.

Today, when one world power has aspirations to impose its own understanding of international law upon all, it is particularly important to emphasize that the entire international law is governed by the principle of fairness and good faith (*bona fides*). It was emphasized in 1737 by one of the forefathers of the contemporary international law science, a Dutch scholar Cornelius van Bynkershoek (*Questionum Juris Publici*, Oxford 1930, II, 9), who said: "Contracts between private persons are governed by civil law; contracts between sovereigns are governed by fairness and good faith. If this principle were abolished, it would consequently end the relations between sovereigns created on the basis of express contracts; concurrently, it would invalidate the entire international law which has been created by means of implied and presumed contracts, subject to the operation of the human mind and custom. In order to prevent the invalidation of them all, it is important to preserve the fairness and good faith in contracts."

O SUPREMATIJI IZVRŠNO-UPRAVNE VLASTI U ZAPADNIM ZEMLJAMA I U RUSIJI. UJEDNO UTEMELJENJE TEORIJE KRUŽNOGA (CIKLIČNOGA) STVARANJA PRAVNOGA PORETKA

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Napisan kao nastavak autorovih razmatranja krize parlamenta i parlamentarizma u zapadnim zemljama i u Rusiji, rad predstavlja eksplikaciju procesa izrastanja izvršno-upravne vlasti u reprezentanta države, koji teče naporedo sa degradacijom parlamenta kao narodnog predstavništva. Imajući u vidu sadašnju formu tog procesa, autor postavlja pitanje, nije li njen završni lik diktatura izvršno-upravne vlasti? S tim u vezi, autor konstatuje postojanje latentnih i manifestih oblika diktature kao oblika vršenja vlasti, razdvajajući je pri tom od diktature kao političkoga režima. Na ovom mestu autor daje doprinos političkoj filosofiji i teoriji prava u vidu ustanovljenja i pojmovne razrade komesarske i decemvirske diktature. S druge strane, analizovanjem procesa "prezidijalizacije" u političkoj i pravnoj stvarnosti gore istaknutih država, autor ustanovljuje postojanje "heksagonskog kristala političke filosofije". Dostignuća ovoga istraživanja dala su podlogu i za jedan drugi autorov doprinos opštoj teoriji prava: teoriju kružnoga (cikličnoga) stvaranja pravnoga poretka, čije su

postavke razmatrane u završnom delu ove studije. Pored nizlazne linije obrazovanja pravnoga poretka, postoji i uzlazna linija obrazovanja pravnoga poretka, i otkriće i prikazivanje te uzlazne linije predstavlja doprinos autorove teorije kružnoga (cikličnoga) stvaranja prava. Autor rad okončava objašnjenjem realnog pravnog poretka sa društvenom solidarnošću kao vrhovnim pravnim principom, što takođe predstavlja originalno autorovo stanovište.

Ključne reči: *široka ovlašćenja (pleins pouvoirs), prezidijalizacija, diktatura, teorija kružnoga (cikličnoga) stvaranja pravnoga poretka.*