FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 9, N°2, 2011, pp. 85 - 97

Original Scientific Paper

THE "ACTS OF GOVERNMENT" AND THE LEGAL NOTION OF POLITICS

UDC 342.924:342.54

Milan Petrović

Faculty of Law, University of Niš, Serbia

Abstract. *Bearing in mind that "acts of government" are the original creation of the French law, the author of this paper first analyses the legal regime governing "the acts of government" as a legal institute envisaged in the French legislation throughout history until the present day. However, given the fact that the legislations of some other countries (such as England and Serbia) include a similar institute, the author points out that the qualification of certain administrative acts and acts of the administration as "the acts of government" is not merely a matter of historical coincidence but rather that it is deeply rooted in the nature of things. In that context, the author defines the legal nature of "the acts of government" and presents his original standpoint on the subjective public rights and the legal notion of politics as an exercise of absolute subjective public rights.*

Key words: *"acts of government", judicial review of legality, discretionary power, subjective public rights, legal notion of politics/policy.*

The institute of "the acts of government" (*actes de gouvernement*) is an original construction of the judicature of the Council of State (*Conseil d'État*), the French supreme administrative court. However, as there is a similar legal institute in the legislations of some other countries, it means that the designation of some administrative acts and acts of the administration as "acts of government" is not just a matter of coincidental historical circumstances but that it is deeply rooted in the nature of things.

The French law does not make allowances for lodging a complaint (request) for the nullification of an act of government, nor does it provide for filing a legal claim for the compensation of damage resulting from such an act. Upon receiving a complaint concerning some of these administrative acts, the Council of State declares itself *forum non*

Received August 02, 2011 / Accepted September 01, 2011
Corresponding author: Milan Petrović
Faculty of Law, Trg Kralja Aleksandra 11, 18000 Niš, Serbia
Tel: +381 18 500 229 • E-mail: milan@prafak.ni.ac.rs

conveniens, stating "not to have jurisdiction to act upon the complaint" (Conseil d'Etat, 28 févr. 1896, Rosat, Recueil Lebon, 203). However, in Article 26 of the Council of State Act of 24th May 1872, the executive branch of government was indirectly authorized to deprive the Council of State of its jurisdiction to render decisions on acts of government. Article 26 reads: "Ministers are entitled to refer to the Tribunal of Jurisdictional Disputes (*Tribunal des conflits*) requesting an exemption of cases which do not fall into the category of administrative disputes from the list of cases submitted to the Administrative Claims Department." This provision is actually a transcription of Article 47 of the Act adopted on 3rd March 1849, which was subject to similar interpretation (see: M. Le Courtois, Théorie des actes de gouvernement, thèse Poitiers, 1899, 56-76; this doctoral dissertation contains a bibliography of early papers on acts of government). However, as this legal provision had not been applied for a long while, Duguit concluded that it must have been "a legislative error" (*erreur législative*), for which reason it could not be applied (L. Duguit, Traité de droit constitutionnel, III, 3-e, éd., Paris 1930, 742).

The Council of State originally qualified an act of government as a politically motivated administrative measure. Thus, the Council of State considered that it had no jurisdiction to review the act of government concerning the dispossession of property which had been granted free of charge to the former Royal family Bonaparte (Conseil d'Etat, 1er mai 1822, Laffitte, Recueil Lebon, 376). Towards the end of the Second Empire, the theory on the politically motivated acts received a subtle yet final corroboration. In his address to the Senate in 1861, Prince Napoleon fiercely criticized his political opponents from the Bourbon Dynasty. A subsequent response came from Duke d'Aumale in the form of a brochure titled "*A Letter on the History of France*". The brochure was eventually confiscated and the police prefectures were ordered to take relevant measures to confiscate any such manuscript that might be published in the future by persons banished from the French territory. In line with that order, in 1862, the law-enforcement authorities confiscated a large number of copies of the manuscript titled "*The History of the Princes de Condé"*, which was written by Duke d'Aumale and published by Michel Lévy. In their complaint lodged with the Council of State, Duke d'Aumale and his publisher challenged this unlawful act performed by the state authorities. The Council of State declared not to have jurisdiction to act in this case, one of the arguments being that the subject matter involved "a political act" (Conseil d'Etat, 9 mai 1867, Dalloz 67, 3, 49; Sirey 67, 2, 124). The Council of State pointed out to the fact that "both the order of 19th January 1863 issued by the police prefect for the confiscation of the said manuscripts and the decision of 18th January 1866 issued by our Minister of the Interior confirming this confiscation measure are "political acts" which are not subject to judicial review before the Council of State, which does not have jurisdiction to decide on disputes related to actions ultra vires." Still, it is worth noting that the Council decision of 9th May 1867 was rendered in compliance with the conclusions contained in the official report submitted by the Government Commissioner, a prominent administrative jurist Aucoc; this is certainly a significant development in comparison to the earlier judicature because the decision introduced a correction which was almost harmless. Yet, the Council of State raised an issue concerning the validity of the confiscation. Although the Government Commissioner found that the administrative courts were not competent to decide on the legality of the confiscation act, the Government Commissioner pointed out that it could be done by regular judicial courts which have jurisdiction to adjudicate all cases involving any inter-

ference with a citizen's civil status, property or liberty. As a result, the parties embarked on a civil court action whereas the Government returned the confiscated books without waiting for the civil court judgment. (See: L. Aucoc, Conférences sur l'administration et le droit administratif, I, 3-e éd., Paris 1885, 495-497, 546.)

However, once the system of liberal parliamentarism had been established, the Council of State abandoned the doctrine of politically motivated acts and restricted the scope of circumstances that fell under the act of government regime. One of the first cases that reflected this new liberal spirit was decided by the Council of State in 1875. Namely, in 1873, the new government removed Prince Napoleon's name from an annual military journal, where he had the rank of Head of the General-Headquarters. Prince Napoleon first complained to the competent minister and, upon receiving an unsatisfactory reply, he lodged a complaint (request) with the Council of State. In his reply, the minister called upon the fact that the Court had no subject matter jurisdiction to decide this case considering the fact that the Prince's removal from the annual military journal occurred after the Ministerial Council session and that such an act of government was not subject to judicial review before the Council of State. Yet, the Council of State did not accept this argument and rendered the final decision. The claimant not win the case (due to some substantive issues); the ruling was based on the fact that the claimant had been in possession of this military rank on the basis of extraordinary measures granted under the 1855 Constitution which became ineffective when the Constitution was put out of force (Conseil d'Etat, 19 févr. 1875, Prince Napoléon Bonaparte, Dalloz 75, 3, 18, conclusions David).

Then, there was a standpoint that an act of government was not necessarily a politically motivated legal act but only an act which had been confirmed by the two houses of Parliament. This standpoint was associated with particular ordinance issued on 29th March 1880 concerning the dissolution of prohibited religious congregations. As these measures had been approved by voting in the two houses of Parliament, they were no longer considered to be administrative acts but the acts of government. The case was referred to the Tribunal of Jurisdictional Disputes, which held that an administrative act could not become either a legislative act or an act of government merely by virtue of having received the parliamentary approval but that it was still a legal act subject to judicial review before administrative courts. (Tribunal des conflicts, 5 nov. 1880, Marauding, Dalloz 80, 3, 127).

A number of prominent authors of that time took a standpoint (which is supported by some contemporary administrative scholars) that the criterion in defining an act of government was to be sought in the distinction between "the function of the government" and "the function of the administration", primarily in view of the fact that an act of government is a result of the exercise of "the function of government"; (see, for example: R. Chapus, L'acte de gouvernement, monstre ou victime, Dalloz 1958, Chronique, II, 5; J.-M. Auby/R. Drago, Traité de contentieux administratif, I, Paris 1962, 79).

Yet, Hauriou (M. Hauriou, Précis de droit administratif et de droit public, 12-e éd. par A. Hauriou, Paris 1933, 417) noticed that the French Constitution had vested "the function of government" and "the administrative function" in the same state bodies of authority, and that there was actually neither a special "government organ" nor a special procedure for adopting the acts of government. Even though the executive branch of government comprises the President of the Republic and his Cabinet of ministers, Hauriou concluded that the Council of State acknowledged the capacity of an act of government

even to the acts of some administrative bodies which are subordinate to the executive branch (such as the governor of a colony and the president of a municipality).

Ultimately, there is the so-called "negative theory" which further dissolves the legal concept of an act of government. One of the founders of this theory was Berthélemy, (H. Berthélemy, Traité élémentaire de droit administratif, 8-e éd., Paris 1916, 106 sqq.) who asserted that, after the departure from the theory of politically motivated legal acts, the acts of government "do not exist any more". In his opinion, some administrative acts may be exempt from being subject to administrative disputes but these may only be very specific administrative acts which have no common legal nature and may not be subjected under a common notion. In his opinion, these specific administrative acts are some measures which are envisaged in the Constitution and some acts of war resulting from a force majeure *(vis major)*.

The interpretation of the "negative theory" in the opus of L. Duguit illustrates that this theory may give rise to a legal and political postulate which involves removing the possibility of excluding the judicial review of administrative acts and measures. In his opinion (Duguit, op. et loc. cit., 736 sqq.), the doctrine under which the acts of government are not subject to judicial review is "ominous", "authoritarian (*régelienne)*" and "arbitrary". Duguit (ibid., 738) pointed out that "making allowances for such a concept of the acts of government would actually make allowances for the state authorities to arbitrarily depart (more or less substantially) from the fundamental principle of substantive legality whenever it is required by the reasons of the state (*raisons d'Etat*) even though it is the quintessential protection principle without which there is no state of law and, indeed, no public law." He also asserted (Duguit, ibid., 746 sq.) that the Tribunal of Jurisdictional Disputes condemned this theory on the acts of government in its judgment of 25th March 1911 in *Rougier v. Carteron* case (Recueil Lebon, 392, conclusions Chardenet, Sirey 1911, 3, 105). Later on, in the first edition of his book "Traité de droit constitutionnel", I, 213, he noted: "Thus, the doctrine which does not envisage the judicial review of the acts which are essentially aimed at protecting the government is definitely doomed; we should, therefore, rejoice because this doctrine was no more than a remnant of the authoritarian regime. Consequently, the term "acts of government" should be finally removed from the public law terminology as it may only give rise to futile and irrelevant future debates." However, during the First World War, the Council of State was infested by "inner evil" again, which resulted in reinstating this negation of the state of law. In the judgment of 4th January 1918 in *Graty* case, the Council of State reasoned that no complaint could deny the ministerial order to intern a Belgian subject in a special detention unit during the period of hostilities. By virtue of its subject matter and the official authority of the decision-maker (the Minister of the Interior), this order is an administrative act which may be challenged for actions ultra vires. Moreover, this act is apparently unlawful given the fact that the long-standing rules of both national and international law envisage that the competent authorities of the state at war may issue a legal order to intern only the subjects of the enemy forces but not the subjects of the allied forces (in this case, Belgium); the latter may only be banished from the national territory.

Generally speaking, negative theories have a scientific validity similar to the apophatic method in theology and ontology, when the subject matter of a scientific research cannot be perceived from a "positive" standpoint. However, we will show that the features of an act of government may certainly be observed from a "positive" point of view. We share

Duguit's opinion that administrative measures shall not be excluded from judicial review. However, an act of government exists not because it is excluded from the judicial review; quite the reverse, the judicial review is excluded (or substantially restricted) because there is an act of government.

What kind of legal acts fall into the category of the acts of government?

Let us first mention the acts regulating international relations. A Government Commissioner (R. Odent, Le contentieux administratif, I, Paris 1956, 157) wrote: "An administrative court judge who adjudicates cases under the internal French law does not have jurisdiction to get involved in the international relations, which are the subject matter of international law. The boundaries of administrative jurisdiction correspond in the slightest detail to the boundaries to French public law; the disputes concerning international law may only be heard by international courts." Hence, taking into consideration that international agreements are not enacted by the French administrative authorities but involve the participation of competent bodies from other states, the Council of State does not accept to adjudicate case involving the validity of international agreements; (see, for example: Conseil d'Etat, 1-er juin 1951, Société des étains et wolfram du Tonkin, Revue juridique et politique de l'Union Française, 1951, 254, note J. Donnedieu de Vabres). In this specific case, the Council of State ruled that, in case a person had sustained some damage as a result of entering into an international agreement, the injured party was not entitled to seek compensation for damage before the national courts. Consequently, French courts will refuse to interpret some imprecise or ambiguous provision contained in an international agreement if the provision is related to a public law issue; in that case, their decision will rest upon the interpretation provided by the competent minister. Thus, in case of being asked to resolve a preliminary issue concerning the meaning of some international agreement provision, the Council of State will stay the adjudication proceeding until obtaining the interpretation on the disputed provision from the Minister of Foreign Affairs (as a rule) or from some other competent minister (depending on the case at issue); the obtained opinion is binding upon the Council of State and it is regarded as a kind of an act of government; (see, for example: Conseil d'Etat, 3 févr. 1956, Petalas, Recueil Lebon, 44, Acutalité juridique, 1956, 2, 9184, note Vitu). In contrast, when civil courts are in a position to apply some provision from an international agreement concerning private interests, civil courts may interpret the provision autonomously (see, for example: Cour de cassation, Chambre civile, 22 déc. 1931, Sirey 1932, 1, 157, note Niboyet).

However, even in cases which do not involve interstate relations, for example when the Council of State is requested to rule on an administrative measure concerning a relation involving an international element, the Council of State is prone to consider such a measure as an act of government. Consequently, the Council of State dismissed the complaint filed by a French citizen who alleged that a French consul had failed to provide him adequate legal protection in the course of his arrest by the local police in a foreign state (Conseil d'Etat, 22 avril 1953, Dlle Buttner, Recueil Lebon, 184). The Council of State also dismissed the complaint challenging the prohibition order issued by the military commanding officer of the French occupation zone in Germany in a case concerning the prohibition of pulling apart a French newspaper (Conseil d'Etat, 15 déc. 1954, Roucaute, Recueil Lebon, 662, Dalloz 1955, 170). Another interesting case, much debated in legal science, was the *Radio Andorra* case, which was adjudicated by the Tribunal of Jurisdictional Disputes. This Tribunal is composed of an equal number of judges selected from

the Court of Cassation and the Council of State; in case there is a tie vote on the case at issue, the Minister of Justice is called upon to take the prevailing vote; (see: Tribunal des conflits, 2 févr. 1950, Radiodiffusion française, Sirey 1950, 3,73, conclusions Odent; M. Waline, (Traité de) Droit administratif, 8-e., Paris 1959, 193 sq.).

The Principality of Andorra is a miniature state on the border between France and Spain which is not fully independent because the power of the Head of State is shared (under the principle of co-imperium) by the President of France and the Spanish Bishop from Urgell. The Radio Station was established in the territory of Andorra but it broadcasted its program on the radio frequency granted under an international agreement to another state. Considering (for or without cause) to be responsible for the international liabilities of the Principality of Andorra, the French Government intervened asking the Andorra Government to close down the said radio station. The Andorra Government refused the French Government request; in return, the French Government started interfering with the Andorra Radio broadcasting by the emission of crackling noises. The Concessionary Corporation (which was in charge of the Radio Andorra public broadcasting) responded by filing a legal claim with a French civil court against France, claiming an act of violence (*voie de fait*), which was eventually confirmed by the first instance courts. Yet, in the appeal, France objected to the court's lack of subject mater jurisdiction, and the case ended before the Tribunal of Jurisdictional Disputes. The Tribunal ruled that the contested act of the French Government involved international relations, for which reason the case was not in the jurisdiction of any French court. Waline, one of the leading French theoreticians of public law, a professor and a Constitutional Court judge, criticized such a standpoint which (in reality) most frequently leads to a denial of justice (*dény de justice)* for the lack of a competent international court. He also pointed out to the contradictory argumentation of the Tribunal which found that the case involved a breach of international agreements by the radio station located "in the territory which is neither French nor subject to French legislation", which automatically implied "the adjudication of an international law issue."

In addition, the Council of State accepts the jurisdiction to decide on legal acts which are "detachable" (*détachables*) from international relations; (see: P. Duez, Les actes de gouvernement, Paris 1935, 37). For example, the Council of State had to decide whether an international agreement had been subject to a valid ratification and publication procedure in order to be able produce legal effects (Conseil d'Etat, 28 févr.1913, Cie des Chemins de fer de l'Est, Recueil Lebon, 307). The Council of State also ensures the observance of an international agreement as a source of French law and, consequently, repeals the administrative acts which are in contravention of the provisions of such an agreement; (see: Conseil d'Etat, 30 mai 1952, dame Kirkwood, Recueil Lebon, 291, Revue du Droit Public, 1952, 781, conclusions Letourneur, note Waline). The decision of the Tribunal of Jurisdictional Disputes (*Tribunal des conflits)* of 2nd February 1960 includes the conclusion written by the Government Commissioner Odent, who says that there is "a detachable act" rather than an act of government "from the moment when the French governing authorities start enjoying certain independence in the choice of proceedings by means of which they perform their international obligations, i.e. when they have the initiative in terms of instruments which help them comply with the accepted obligations."

The acts of government which are not subject to judicial review are "acts of war" (*faits de guerre*), which are qualified by the Council of State as activities associated with military operations. Thus, the Council of State found that an act of war was, for example, an arbitrary arrest at the time of the liberation from the German occupation (Conseil d'Etat, 8. déc. 1950, Jacquet, Recueil Lebon, 613) or an act of robbery committed by partisans (Forces Françaises de l'Intérieur – F.F-I.) (Conseil d'Etat, 31 juill. 1948, Oger, Dalloz 1948, Sommaire, 34). In times of peace, these actions would be regarded as ultra vires and criminal offences. In times of war, when the higher-ranking state authorities are not able to efficiently administer and control the lower authorities, there is a kind of force majeure (*vis major*) which prevents the state from acting in full observance of the law. Berthélemy also considered that acts of war were "the acts of force majeure" (op. cit., 106; see also in: Waline, op. cit., 195). However, they are not just any kind of force majeure; this specific force majeure is actually the state of war which hinders the state to act in compliance with its obligations.

Moreover, there are administrative measures which are issued out of necessity. The Council of State departed from an earlier approach that the ordinances aimed at proclaiming the state of siege are acts of government which are not subject to judicial review (Conseil d'Etat, 23 oct. 1953, Huckel, Recueil Lebon. 452). However, after the adoption of the 1958 Constitution of the "Fifth Republic", which instituted new legal solutions in this area, the Council of State recognized the acts of government again. Article 16 (paragraph 1) of this Constitution stipulates: "In case when the institutions of the Republic, state independence, territorial integrity or adherence to the international obligations have been exposed to a serious and immediate risk or danger and when the regular operation of constitutional public authorities has been disrupted, the President of the Republic is obliged, after having official consultations with the Prime Minister, the Presidents of the houses of Parliament and the Constitutional Council, to take relevant measures as required by the specific circumstances".

On the basis of the aforementioned constitutional provision, the President of the Republic ordered the trial to General Salan (accused of committing a number of serious crimes) to be exempt from the jurisdiction of regular criminal courts, and referred the case to a military tribunal. The case ended before the Council of State which was requested to rule on the validity of this measure, which was deemed to be inconsistent with Article 16 of the Constitution. In its decision of 11th May 1962, the Council dismissed the complaint as inadmissible (Revue du droit public et de la science politique 1962, 542). A few months earlier, the Council of State also declared not to have jurisdiction to deliberate in *Rubin de Debans* case concerning a presidential measure issued on the ground of Article 16 of the Constitution (Conseil d'Etat, 2 mars 1962, Revue du droit public et de la science politique 1962, 288 sqq.). In his conclusions, the Government Commissioner Henry justified the Council's lack of jurisdiction by asserting that Parliament was obliged to be in assembly all the time in the course of adopting the presidential measures, which actually means that Parliament "is entitled to cancel and even void the decisions based on Article 16 if they interfere with its legislative function". Yet, this opinion is unsustainable given the fact that Parliament's right to exercise discretionary control over these measures may not be a substitute for the judicial review which is to be preformed by the Council of State.

The Council of State as the highest administrative court is not entitled to exercise the judicial review of constitutionality of laws. However, the Council of State declares itself

to be *forum non conveniens*, i.e. not to have jurisdiction to examine the validity of both administrative acts and specific actions of the bodies of Parliament; these bodies include not only the two houses of Parliament (the National Assembly and the Senate, sitting either in joint or individual sessions) but also the subordinate bodies of authority (such as: the Office, the President, the Vice-President, quaestors, secretaries, standing committees, the Inquiry Commission, as well as the representatives in the two houses of Parliament and the civil servants (such as secretaries-general) working in Parliament services; (see: Auby/Drago, op. et loc. cit., 67). For example, upon examining the complaint against the acts issued by the presidents of the two houses to regulate the access of the press and the general public to parliamentary sessions, the Council of State dismissed the complaint as inadmissible (Conseil d'Etat, 17 nov. 1882, Merley, Recueil Lebon, 952). Ever since 1912, the Council of State has rejected to decide on the legality of ordinances related to scheduling dates for the election of senators (i.e. senatorial delegates) because "legislative assemblies which are entitled to verify the their members' authorities have jurisdiction to assess the legality of acts regulating the pre-election activities, unless prescribed otherwise by some other legal provision"; (Conseil d'Etat, 6 août 1912, Maître, Recueil Lebon, 952). However, Article 8 of the organic ordinance of 17th November 1958 imposed further restrictions on the exclusion of judicial review in this area. On the one hand, this provision made allowances for filing civil liability claims against the state before a competent court (either an administrative court or a regular court of justice, depending on the case at issue) and seeking compensation for damage caused by Parliament services. On the other hand, the same provision established the jurisdiction of administrative courts to hear all disputes on individual matters concerning the operation of civil servants in Parliament services.

By analogy, the Council of State does not review the act of government and the act of the administration concerning the relationship between the executive branch of government (in the widest sense) and the legislative branch (embodied in the two houses of Parliament). Thus, the Council dismissed the complaint against the decree issued by the President of the Republic concerning the promulgation of a legislative act; in the complaint, the claimant asserted that the wording of the promulgated legislative act was different from the legal text adopted in Parliament (Conseil d'Etat, 3. nov. 1933, Desreumeaux, Recueil Lebon, 993, Dalloz 1934, 3, 35, note Gros). Similarly, the Council refused to examine a order concerning a draft act (Conseil d'Etat, 9 mai 1951, Mutuelle nationale des Etudiants de France, Recueil Lebon, 253) and a government decision to withdraw the proposed bill from the legislative procedure (Conseil d'Etat, 19. janv. 1934, Cie Marseillaise de Navigation à vapeur, Recueil Lebon, 98, Sirey 1937, 3, 41, note Alibert). Yet, in disputes of this kind, the court jurisdiction may be established by an act of the legislature. In Articles 12 and 14, the ordinance of 13th October 1958 prescribed that administrative courts had jurisdiction to resolve disputes concerning a candidate's declaration on accepting the nomination whereas a court decision may be disputed only before the Constitutional Council when it is requested to deliberate on the regularity of the election process. The ordinance of 15th November 1958 on the election of senators in view of appointing senatorial delegates (Article 15) contained analogous rules.

The acts of government do not include the administrative acts pertaining to the activities of the judiciary but, in line with the principle of independence (the separation of powers) governing the relations between the administration and the judicature, the Council of State

considers not to have jurisdiction to adjudicate disputes arising from these acts; (see: A. de Laubadère, Traité élémentaire de droit administratif, I, 3-e éd., Paris 1963, 375). Yet, sometimes the Council of State resorts to making subtle distinctions there. Thus, the Council considers that the administrative measures which are subject to its jurisdiction are the legal acts pertaining to the organization of the judiciary. In his conclusions, the Government Commissioner-in-Council J. Donnedieu de Vabres says: All the issues related to the creation of courts, their distribution across the national territory and their general organization do not fall within the scope of the judicial function at all. They are elements in the organization of judicial public service ... but the power of judicial review over the operation of judicial public services is vested in the Council of State;" (Conseil d'Etat, 17 avril 1953, Falco et Vidaillac, conclusions Donnedieu de Vabres, Revue de Droit Public 1953, 462). Similarly, the Tribunal of Jurisdictional Disputes ruled that the damage caused to ministerial officers due to the lack of judges in the jurisdiction of Cayenne is a matter in the jurisdiction of administrative courts (Tribunal des conflits, 27 nov. 1952, Préfet de la Guyane, Jurisclasseur périodique 1953, 2, 7598, note Vedel). In the above *Falco et Vidaillac* case, the Council of State considered to be lacking jurisdiction to resolve the electoral disputes brought before the High Council of Judiciary (Conseil supérieur de la Magistrature) and, specifically to rule on the complaint against the decision of the election office (composed of civil judges from regular judicial courts). Another complex issue put before the Council of State is whether an act involves the operation of the criminal police (in which case the Council declares not to have jurisdiction to decide the case) or the operation of the administrative police (in which case the Council considers to be competent to decide the case); in both cases, the problem may be related to the same bodies of authority. As a rule, the operation of the criminal police involves the investigation and detention of a criminal offender whereas the operation of the administrative police covers "control and general supervision tasks" (Conseil d'Etat, 11 mai 1951, Baud, Sirey 1952, 3, 13, conclusions Delvolvé, note Drago). The administartive police have jurisdiction in cases when, for example, the police inspectors fraudulently appropriated another person's jewellery in the course of establishing the identity of foreigners in a cafe (Conseil d'Etat, 19. janv. 1945, Société Comptoir des Précieux, Recueil Lebon, 21). In contrast, the regular criminal police have jurisdiction in a dispute concerning, for example, a person's wrongful death resulting from the police action undertaken for the purpose of apprehending persons designated as criminal offenders (as in the *Baud* case above).

It is interesting that the Council of State initially considered the decree on granting pardons issued by the President of the Republic to be an act of government which was not subject to judicial review (Duez, op. cit., 44 sqq., 83). Later on, the Council of State altered this qualification and, ever since, the Council of State has been considered not to have jurisdiction on this issue because the decree on granting pardons is associated with the operation of the regular criminal courts, i.e. with the measures for the execution of criminal punishments (Conseil d'Etat, 28 mars 1947, Gombert, Revue de Droit Public 1947, 95, note Waline).

The ***Royal Prerogative*** (the prerogative of the Crown) in English law illustrates that the acts of government are not a specific feature of French law alone. This prerogative implies that, under specific circumstances, the monarch has the authority to issue a legal act outside the regular legislative procedure (*praeter legem*); the most significant example of such an act is an order issued in Private Council (*Conseil privé*). This prerogative is a remnant of the supreme royal power originating from the times when the House of Com-

mons did not exist as the legislative body. Originally, the prerogative was above the law. In the Middle Ages, it included some provisional orders with the force of law and the orders for regulating particular issues within statutory provisions; one of the most consequential prerogatives involved dispensing with legal orders and prohibitions (see: J. Hatschek, Englische Verfassungsgeschichte bis zum Regierungsantritt der Königin Viktoria, 2. Aufl., Neudruck, Aalen 1978, 204 sqq.). Yet, once Parliament established supremacy over the Crown in 1689, the courts were in a position to void an act based the prerogative in case the act was inconsistent with the legal provisions. Gradually, substantial areas once reserved for the prerogative were now regulated by statutory law. Yet, the prerogative is still valid in respect of a number of significant questions concerning, for example, the British relations with other states and extraordinary powers in times of war. In modern Britain, the prerogative is an instrument used by the Government (Cabinet) rather than by the Crown (Sir C. K. Allen, Law in the Making, 6th ed., Oxford 1958, 522 sq.).

In the past, the courts refused to examine the validity of the legal acts adopted on basis of the prerogative in case these acts were not in contravention of the statutory law. Today, some of these acts are still subject to judicial review, such as the decision of the competent authority refusing to issue a passport (see: (в.: Sir W. Wade, Administrative Law, 9th Ed. by Sir W. Wade/Ch. Forsyth, Oxford 2004, 639).

The Serbian law also included some kind of an act of government. The former Administrative Disputes Act of 1996 envisaged in Article 9 that an administrative dispute may not be instigated against administrative acts which have been directly adopted either by the National Assembly or by the President of the Republic of Serbia on the basis of their constitutional powers. The 2009 Draft Act on Administrative Disputes contained the same legal solution in Article 15, item 2. However, this restriction was not entered into the legal text of the Administrative Disputes Act adopted on 29th November 2009; consequently, the court in charge of adjudicating an administrative dispute has (at least) been given the opportunity to examine the formal legality of these high-politics administrative acts.

In the course of determining the legal nature of an act of government, we may start from the notion of the **discretionary power** (to examine the validity of such an act).

Hauriou (op. cit., 351 sqq.) was right in saying that the discretionary power emerges in an irreducible discrepancy between the legal rules and the legal subjects (participants in law) because legal rules (primarily legislative acts) "are not perceived as the principles governing human conduct, considering the fact that the legal initiative and legal activity are primarily aimed at individuals, but that they are rather given as limitations and restrictions imposed on the freedom and autonomy of legal subjects". It is particularly prominent in cases when the public administration operates as "an enterprise" ("a group of people organized to meet their specific needs"), as a dynamic phenomenon oriented towards an uncertain future; (see: Hauriou, ibid., 64; J.-C. Venezia, Le Pouvoir discrétionnaire, Paris 1959, 112 sqq.).

There is no doubt that the discretionary power is most prominent in the acts of government. Yet, the scope of discretionary power is substantially wider than the scope of an act of government. In his doctoral dissertation, the author of this paper pointed out that there are three qualitatively different forms of discretionary power stemming from different legal regimes: a discretionary power of a weaker intensity, a discretionary power of a stronger intensity, and a high-politics discretionary power (Milan Petrović, *Pravna vezanost i ocena celishodnosti u teoriji javnog prava* /Bound Competences and Discretion-

ary Powers in the Public Law Theory/, II, Beograd 1979, printed on hectograph, 298 sqq., 403 sqq.). Therein, the author was right in considering that acts of government are an expression of a high-profile discretionary power to examine politically motivated legal acts but he erred in designating them as legal acts which are not subject to judicial review due to the lack of a competent court (Petrović, ibid., II; 451). The problem is actually much more complex and its solutions should be sought is the distinction between **the public power** and **the public service**, as well as in a wide range of diverse **subjective public rights** their respective holders are entitled to; these rights include: the ***absolute*** subjective public ***rights*** and the ***functional*** subjective public ***rights*** (rights perceived as functions). This quest will ultimately bring us to an unexpected finding: **the legal notion of politics.**

Duguit was the founder of a renowned legal theory postulating that the contemporary state is "a cooperative of public services organized and controlled by the governing elite (*gouvernants*)"; (L. Duguit, Traité de droit constitutionnel, II, 3-e éd., Paris 1928, 59, 153 sqq., 756 sq.). He defined public services as follows (Duguit, ibid., II, 61): "Therefore, we may explore the concept of a public service, which is any activity whose exercise has to be facilitated, regulated and controlled by the governing authorities because its exercise is indispensable for achieving and developing the social interdependence; as such, this activity cannot be fully exercised without the intervention of the governing authorities. This activity is so important for the community that it may not be interrupted for a single moment. The duty of the governing elite is to use their power to ensure an absolutely continuous exercise of this activity". He also pointed out (Duguit, ibid., II, 64 sq.) that the power of public administration was by no means more prominent or present in the public services of warfare, police and judicature than in other public services.

M. de la Bigne de Villeneuve (L'Activité étatique, Paris 1954, 189), a reputable proponent of Duguit's legal theory, specified that these "necessary" public services of the state included: government services *stricto sensu*; security services; financial services; representation services; legislative services in true sense; and administrative services.

Although we consider that "*public service"* is a necessary legal term, we disagree that the term shall include all state authorities. Public services are not the highest state authorities. G. Jellinek (Allgemeine Staatslehre, 3. Aufl. von W. Jellinek, Berlin 1914, 544 sqq.) provided the following classification of state authorities: **the primary bodies of authority** (such as the monarch in monarchy and the electoral body in the republican form of government) and **directly elected representative bodies** (primarily the national assemblies and the elected heads of states). These state authorities are the holders of the *public powers* while all other bodies are the holders of *public services.* The distinctive feature between these two types of bodies of authority is the legal nature of the subjective public rights they are entitled to. The holders of public powers have absolute subjective public rights, essentially resting upon the absolute arbitrariness of their title holders; it further implies that these absolute rights may not be misused in the legal sense. On the other hand, the holders of public services have functional subjective public rights (rights-functions) which may be misused in case when the function imminent to these rights is performed in a wrong or ineffective manner. This theory on the misuse of powers is known in French law as "*détournement de pouvoir"*. **An act of government implies an exercise of public powers within the meaning specified above,** i.e. as an aspect of the provided meaning.

The difference between the absolute rights and the functional rights (rights perceived as functions) comes from the French private law science. The first scholar who pointed out to this distinction was the great theoretician of the abuse of rights - L. Josserand; (see, in particular: De l'esprit des droits et de leur relativité. Théorie dite de l'abus des droits, Paris 1927). **Yet, in this paper, the concept of misuse of rights is applied in the field of public law for the first time.** In Josserand's opinion, "the spirit of law" actually implies their finality and opportuneness. He said (Josserand, ibid., no 10): "Just as there is the spirit of a legal act and (more generally) the spirit of law perceived objectively and as a whole, so shall we acknowledge the existence of the spirit of individual rights which is a specific feature of each subjective authority, perceived in isolation; thus, just as a legal act could not be applied at the expense of its spirit and just as the river could not change the natural flow of its waters, we cannot expect to exercise our legal rights in contravention and inobservance of their social mission, which is unreasonable..."

Starting from their underlying spirit, Josserand (ibid., no 305) classifies these subjective public rights into three groups: the rights of an egoistic spirit; the rights of an altruistic spirit and the rights deprived of *causa* (*non causés*). The rights falling into the first and second group may be misused but the right from the third group cannot be misused because they are absolute.

We would like to point out that this differentiation may be applied only to subjective public rights of an individual; when it comes to the subjective public rights of state authorities, they may only be classified into absolute rights and functional rights (rights perceived as functions). Yet, some civil authors also classify subjective private rights into two categories but they use the terminology which is sometimes inappropriate in public law. Thus, A. Rouast (Les Droits discrétionnaires et les droits contrôlés, Revue trimestrielle de droit civil 1944, 1 sqq.) designated the absolute rights (as defined in this paper) as "discretionary rights"; however, these discretionary rights are actually subject to judicial review which may be very extensive, as in case of the discretionary power of a weaker intensity. Absolute subjective public rights are freely exercised and, in principle, they are not subject to judicial review because their holders are the highest state officials, i.e. the supreme bodies of authority which are the last instance of public power in a state.

The exercise of these absolute subjective public rights by the holders of public authorities actually reflects **the legal notion of politics.** Until now, politics has been observed as a non-legal phenomenon, for which reason all the definitions of politics have been incomplete and (consequently) incorrect.

This legal truth is reflected in everyday speech. Thus, we may hear people speaking about the politics of King Aleksandar Karadjordjević, the party politics in the electoral body and in the National Assembly, the Government politics and the policy of emission banks but not about the police "policy" and the "policy" of the Archives of Serbia. However, in everyday speech, there is an expression "politics" of corporations, which is correct. Private law, which regulates the activities of corporations, is not the only area of law dealing with private interests. At the outset of the 20th century, P. Laband asserted (Des Staatsrecht des Deutschen Reichs, III; 5. Aufl., Tübingen 1911, 52): "For, a majority of industrial private enterprises serve the public interest." These companies also receive significant public law privileges. They are entitled to demand expropriation in their private interest, to be given tax benefits, to have more substantial rights in neighbourhood relations, etc. G. Ripert says (Aspects juridiques du capitalisme moderne, 2-e éd., Paris 1951,

17): "Capitalism allegedly needs nothing but freedom and keeps reiterating: *laissez faire*; yet, it would all be in vain if the legislator had not provided or allowed the appropriate instruments for the concentration and exploitation of capital. However, capitalism was not content with general legal rules. It created its own legal rules. This law-making activity is a continuous and never-ending process. It involves devising relevant legal rules which would be most suitable to ensure the best possible operation of the capitalist enterprises".

Being provided with these absolute "unabusable" rights (which are also part of private law), corporations become competitors and even rivals of the state. Thus, they become an important factor of politics which mostly clandestine. This is a political regime known as **plutocracy,** whose essence was nicely depicted by Ripert (ibid., 19) who said: "The power of capitalism is, metaphorically speaking, the power of money. It is as difficult to understand as the power of number in the election pool. It is an occult power which is concurrently exerted on the voters and governing elite alike by means of the stock exchange, bank, the press, radio, theatre, advertisements... This power would be difficult to tolerate if it were contained in transparent legal provisions by making those who exercise this power well-known to the general public. The Revolution (of 1789, M.P.) had no mercy for the loan-sharks and stock exchange usurers. But, financial powers are in the hands of anonymous societies which have been designated in the general public by an obscure and mysterious term: **trusts**"; (underscored in the original source). The corporations holding the financial power are also involved in foreign policy; they have their permanent offices in other countries; they are involved in mutual "warfare" and "making peace"; (see: A.A. Berle, Jr., The 20th Century Capitalist Revolution, New York 1954, 116 sqq.). As for the countries where these "trusts" are headquartered, the state authorities involved in foreign policy most frequently act as the executive boards of these "trusts". In that way, international public law evolves and becomes a stepping stone for the implementation of international trade law.

TAKOZVANI "AKTI VLADE" I PRAVNI POJAM POLITIKE

Milan Petrović

S obzirom da predstavljaju tvorevinu francuskoga prava, autor u radu najpre analizuje pravni režim "akata vlade" u francuskom pravu, kroz istoriju i danas. Međutim, kako sličan institut poznaju i prava drugih država, na primerima engleskog i srpskog prava, autor predočava da kvalifikacija odgovarajućih upravnih akata i akata uprave kao "akata vlade" nije plod pukog sticaja istorijskih okolnosti, već utemeljenosti u prirodi stvari. S tim u vezi, autor definiše pravnu prirodu "akata vlade", iznoseći pritom originalno gledište o subjektivnim javnim pravima i pravnom pojmu politike kao vršenju apsolutnih subjektivnih javnih prava.

Ključne reči: *"akti vlade", sudska kontrola zakonitosti, diskreciona vlast, subjektivna javna prava, pravni pojam politike.*