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WILLIAM RYALL MARTIN

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CHAPTER I

INTRODUCTION

Representative democracy has been called a "child of peace . . . that cannot live apart from its Mother."[1] It would be more correct to say that representative institutions tend to be bred in tyranny, born in revolution, grow to adolescence under oligarchical circumstances, and mature in peace. However, whatever is the case, representative democracy must learn to live apart from peace, for optimum working conditions are no longer in sight. The ravages of economic inflation, deflation, and dislocation; the distortions of twentieth century hyper-nationalism; the stark realities of war or the threat of war and the demands of survival there entailed have profoundly affected the evolution and development of political institutions in the Western world. The result too often has been the creation of a "perpetual emergency" in which significant aspects of the business of government must be carried on by extraordinary procedures. Consequently, a substantial portion of the answer given by any nation to the questions presented by the stark realities of our times will be phrased

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[1]William E. Rappard, The Crisis of Democracy (Chicago: University of Chicago Press, 1938), p. 265.

of necessity in terms of the vitality and viability of that nation's crisis institutions. This is particularly true of the French nation. The development of her legal and governmental institutions provides an excellent example of the interweaving of extraordinary procedures with regular procedures in an attempt to find solutions to emergency situations. As representative political institutions are ultimately no stronger than their capacity to cope with crises whether they be war, internal subversion, economic hyper-inflation or deflation, or dissolutory colonial insurrection, the extensive French experience is of value.

The author's purpose is to analyze this French experience and to place it in proper perspective in relation to the evolution and development of parliamentary institutions. It is a primary thesis of this study that institutions and devices designed to cope with exceptional circumstances cannot be abstracted from the regular order of society. Such devices are indissolubly intertwined with the progressive development of legislative and executive powers and depend for implementation upon established civil officials and upon regular administrative procedures. These institutions have not developed superficially but have been woven into the fabric of the evolving constitutional order. At the same time, it should be recognized that these procedures may be either constitutional, quasi-constitutional, or extra-constitutional. Association with the constitutional order does not guarantee constitutionality.

For purposes of clarification we shall refrain from

using the omnibus concept "constitutional dictatorship." As defined by Clinton Rossiter, "it is a general descriptive term for the whole gamut of emergency powers and procedures in periodical use in all constitutional countries . . . "[1] It is felt that this phrase lacks the precision necessary to describe the interrelationship of regular, exceptional, and irregular procedures that personifies the intrinsic nature of exceptional political processes.

At the same time, the concept of traditional "emergency powers" is deemed to be too circumscribed. It implies the existence of a fundamental executive authority to deal with national crises. German and Austrian constitutional lawyers have labeled this power Staatsnotrecht and have distinguished it from the power to determine the existence of such a situation Staatsnotrand. The former is a question of law, the latter is a question of fact. Clearly, it is of the essence of "emergency power" that it cannot be categorically described or defined--its occurence is extraordinary. It is an action to be taken by the Executive and some discretion is to be used. Current usage recognizes two types of "emergency powers":

> The first is to let the Government act at its own peril and to leave the redress of insuing constitutional irregularities in the hands of Parliament . . . The second way of dealing with an emergency is to provide for it in advance . . . This implies that France, who is governed by a written and rigid

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[1]Clinton Rossiter, Constitutional Dictatorship (Princeton: Princeton University Press, 1948), p. 5.

> constitution, can only make them by inserting an emergency clause in her Constitution.[1]

Thus, the concept of "emergency powers" comprehends the use of emergency clauses incorporated in the constitutional structure and/or irregular procedures employed without the approval of the sovereign Legislature, but it does not recognize the value of legitimate ad hoc extensions of the regular order which are often employed to adjust to crisis situations.

As a result, the term "crisis institutions" is coined and is employed rather than "emergency powers" or "constitutional dictatorship." It is used interchangeably with "crisis devices" and "exceptional powers" and encompasses constitutional, statutory, customary, and illegal procedures available to the Legislature and Executive of France without specific limitation. However, this does not suggest that the three concepts--constitutional dictatorship, emergency powers, and crisis institutions--are mutually exclusive. Certainly "emergency powers" constitute a significant portion of the coterie of devices available to the French government under its "crisis institutions." It is also true that both concepts fall within the broad purview of "constitutional dictatorship." It may be a valid judgment that constitutional democracy can no longer live without constitutional dictatorship. However, French experience indicates that the ability of a nation to adjust to an emergency, which is after all the fundamental test of the viability of a political system, depends upon the efficacy of

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[1]Marguerite A. Sieghart, Government by Decree (New York: Frederick A. Praeger, Inc., 1950), p. 301.

regular as well as emergency procedures and upon the interaction of the two areas of governmental power. It is impossible for a valid analysis to ignore this interrelationship which is reciprocal in the sense that the availability and efficiency of regular procedures structure the area in which emergency powers are required, while the adequacy and competence of emergency procedures have a direct impact upon evolution of the regular order of society.

Several monographs are available which concern themselves with aspects of this problem. The most well-known crisis institution--the state of siege--is dealt with by Clinton Rossiter in his Constitutional Dictatorship, 1948. Government by Decree, 1950, by Marguerite A. Sieghart presents a detailed history of the use of the ordinance power in France to 1946, and Pierre Renouvin, The Forms of War Government in France, 1927, studies the institutions and procedures employed by France in the Great War to combat internal subversion and foreign invasion. Unfortunately, these studies present the problem of crisis institutions merely as a secondary consideration in conjunction with a primary endeavor. For example, Rossiter's investigation of constitutional dictatorship as an institution, or Sieghart's development of the history of ordinance powers in France which is presented as documentation of her plea for judicial supervision over the administrative organization of British government. In fact, neither French, English, or American scholarship has produced an analytical

study of the development, use, and implications of crisis institutions as exemplified by French experience since the ancien régime. It is this void which this dissertation attempts to fill. Four related themes are analyzed.

A continuing and persistent consideration is the evolution of the relationship between the legislative and the executive power. As the development of representative government produces a continuous and variable confrontation between the primitive, authoritarian nature of the Executive and the limiting pretensions of the elected Assembly, the result of this conflict largely determines the posture of political society. The use of crisis institutions takes place within the framework established by law as the will of the representative Legislature and of ordinance as the statement of executive discretion. It will be demonstrated that the progressive decline of the supremacy of the law and the concurrent unwillingness of French Legislatures to delegate adequate powers to the Executive agency has provided situations which were opportune for the creation and employment of crisis institutions.

A second theme is concerned with the validity, appropriateness, and applicability of the various crisis institutions. It is recognized that there is a great disparity between "institutions." Certain devices such as the state of siege and the state of emergency constitute rather complete emergency procedures in themselves while others, such as enabling acts, decree laws, and cadre laws are basically processes for the creation of policy. These methods for the simplification of the legislative

process may employ regular established crisis institutions or they may be used to develop ad hoc procedures designed to provide adequate adjustment to a particular problem. Each crisis institution has its own individual nature and yet each possesses distinctly similar features.

Related to considerations of validity and applicability are judgments regarding the interrelationship of the regular, the extraordinary, and the irregular order of society. The normal stereotypes of constitutionality and unconstitutionality will be shown to be inadequate. There appears to exist an area for the expansion of authority within the scope of the regular order in France. As interpretation plays a significant role in the evolution of any political society, it is suggested representative governments must look to the progressive elaboration of their regular institutions as well as to exceptional crisis devices and irregular procedures for the development of procedures adequate to the defense of the constitutional order.

A fourth theme is the impact of the employment of crisis institutions upon governmental forms in France. Unfortunately, there is no clear-cut judgment that can be drawn. In certain instances the use of crisis powers will appear to sustain representative government and in other instances to destroy confidence in liberal democratic procedures. It does appear, however, that the continued use of such devices diminishes the responsibility of representative institutions as well as public confidence in them.

A study of this type, of necessity, cuts across the historical-political landscape and makes use of pertinent elements from a variety of related subjects: constitutional law, public law, administrative procedure, history, and contemporary political practice. As "crisis institutions" are to a greater or lesser degree the concern of all nations, this study is related to the comparative study of political systems. It employs semantic devices for classifications--representative, assembly, executive, parliamentary, cabinet, personal--with the realization that such terminology can stultify and becloud rather than clarify, yet also in the firm conviction that it is the duty of the analyst to distinguish, to label, and to classify. For without criteria and method of identification, there can be no comparison--for all is one and one is all. Finally, the author has introduced, where appropriate, his own judgments as to the impact, significance, and meaning of institutions and events.

CHAPTER II

THE EMERGING CONFLICT BETWEEN ORDINANCE AND LAW

The French nation is an excellent example of the stress under which representative government has been placed. While her experience is distinctive and cannot be used as the sole basis for meaningful generalizations, the development of French legal and political institutions do offer valid insights into the need for crisis institutions, the methodology of their application, and the limits of their usefulness.

Few if any would dispute the fact that French history is a chronology of emergencies. Since the Revolution of 1789, France has authenticated sixteen different constitutions embodying a variety of governmental forms. Before the establishment of the Fifth Republic, French politics exhibited at least three divergent tendencies which traditionally have been designated as Republicanism, Monarchism, and Bonapartism. For analytical purposes these distinctions are somewhat inappropriate. Precision dictates (1) the fusion of the second and third tendencies into a category that properly may be called Executive government and (2) the recognition of the difference between Assembly and Cabinet government as divergent

streams within the Republican tradition.

Through the years since 1789 the evolution and development of French politics has given spasmodic but recurrent birth to each of these three diverse currents. Initially a revolutionary current led to government by Assembly--to dictatorship by the Legislature. In reaction to the omnipotence of the Assembly a presidential and imperial current developed. It tended to strengthen the administrative branch of the government and lead to dictatorship of the Executive. A third, perhaps the best known and least understood of the currents, developed as a reaction against the excesses of Assembly and Executive dictatorship and emerged as mixed government--the Parliamentary or Cabinet system.

When viewed as a sporadic continuum, it appears that France has experienced two constitutional cycles since the ancien régime. The first began with the Constituent Assembly of 1789 and ended with the Revolution of 1848. Though the Constituent still adhered to the Monarchy, it initiated the process of subordinating the executive power represented by the King and his Ministers to its own power and realized this aim in the Constitution of 1791. Assembly government became full-blown when the Legislative Assembly of 1791 superseded Louis XVI from his functions, and the Convention of 1792 abolished the Monarchy and instigated through its committees the Reign of Terror. In 1795 a moderate reaction set in which led to the Directorial Constitution of the same year

with its emphasis upon separation of powers in both the executive and legislative branches. As this collegial executive was discredited and its revolutionary elements gained the upper hand, France turned again to a virtual dictatorship of the Executive under the Consulate and the Empire. With the fall of the first Napoleon from power in 1814 there followed the Bourbon Restoration under a Charter of the same year and the Orleanist ascension under the Charter of 1830 which introduced a variety of Cabinet governments which prevailed until 1848.

The second cycle commences with the Revolution of 1848 which revived for a short period the ideals of 1789. A Constituent Assembly was elected by universal suffrage and it proclaimed a democratic Republic. The Presidential system entailed in the constitution voted by this Assembly was one of France's most democratic; yet, within four years it was perverted by a President pledged to its continuance and the second Bonaparte led France to a full dictatorship of the Executive. The transition to Parliamentary government and the consequent completion of the second cycle was achieved in the last months of the Second Empire (Constitution of May 21, 1870) and perpetrated in the constitutional laws of the Third Republic (Constitutional Laws of February 25, 1875) and the Constitution of the Fourth Republic (Constitution of October 27, 1946). Thus, the evolution of governmental forms twice went full circle from Assembly to Executive dictatorship

to Cabinet government. For the moment the development is completed by the curious amalgam of Parliamentary and Presidential forms called the De Gaulle Republic.[1]

To deal with recurrent crisis whether it be war, internal subversion, economic hyper-inflation or deflation, or dissolutory colonial insurrection, France has turned again and again to the use of crisis institutions. For the most part these institutions did not develop superficially outside the fabric of the law. They have tended to be woven into the evolving constitutional order. France has been a master at interweaving the extraordinary with the regular in attempts to find adequate solutions to emergency situations; nevertheless, no great consistency has developed. A specific crisis institution may vary in legitimacy from precise constitutionality to quasi-constitutionality to pseudo-constitutionality; in procedure, from strained formality to loose informality; and in application, from sole dependence upon normal and regular techniques to ad hoc innovations in the realm of the irregular.

Crisis institutions involve the application of formal constitutional procedures, statutory laws, and the regulatory power. Their application has frequently involved delegations of legislative competence as well as expansions of the

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[1]This term is employed to verbalize the impact of this charismatic leader upon the Republic of his creation. Philip Williams and Martin Harrison, De Gaulle's Republic (London: Longman's, 1960), pp. 212-13.

authority of the Executive. As a result, exceptional procedures have come into conflict with the established principles of French public law.

An essential tenet of public law in France is the concept of sovereignty. Rousseau, the spiritual father of the Constitution of 1791, regarded popular sovereignty as inalienable and stressed the necessity of exercising it directly without representation or delegation. He identified this sovereignty with the volonté générale, yet he would only recognize a direct democracy as proper form for the exercise of the legislative power. In seeming inconsistency, however, he approved of delegations to the administrative officers for the exercise of the executive power. Interestingly, with one exception, no French constitution has attempted to introduce a direct democracy for the exercise of ordinary legislative powers, though referenda and plebiscites have been repeatedly used as a form of approval for changes in constitutional form. On the whole the system of indirect representation has been accepted as the only workable one throughout the French constitutional history in the modern era.

In a system of public law founded upon sovereignty, statute law is the clearest manifestation of the will of représentant of the sovereign: the Legislature which draws its legitimacy from universal suffrage. It follows that the proper exercise of this authority must be initiated through the law (loi). This type of reasoning, dedicated as it is to formality and consistency, is the source of what Duguit

properly has identified as the fantastic worship of statut (statute law).[1]

Thus, in its traditional and classic formulation, law (loi) is an expression of the general will (volonté générale). It emanates from a sovereign Parliament and is the fundamental legal form (règle suprême) superior to regulatory authority.[2] Law is the initial and unconditional act. Regulation (règlement) is the act of execution which is subordinate and conditional (acte de puissance subalterne).[3] It may be true, as Carré de Malberg suggests[4] and M. P. Durand recalls,[5] that there is no difference in substance between the content of law and regulation and that the two are united in forming the regular order of the state.[6] Nevertheless, the law has the

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[1]Léon Duguit, Law in the Modern State (New York: B. W. Huebsch, 1919), p. 68.

[2]Jacques de Soto, "La loi et le règlement dans la constitution du 4 octobre 1958," Revue du Droit Public, LXXV (March-April, 1959), p. 244.

[3]By paraphrasing the third Article of the Constitution of February 25, 1875, De Malberg has developed a useful philosophy of the regulatory power: " . . . Regulation is an act of subordinate power which can be accomplished only under the general statutory order created by the laws . . . To execute the laws, such is the only and invariable province of the regulatory power." Carré de Malberg, Contribution à la théorie générale de l'Etat (Paris: Librairie de la Société du Recueil Sirey, 1920-22), p. 334.

[4]Ibid.

[5]M. P. Durand, "La décadence de la loi dans la Constitution de la Ve République," Juris Classeur Périodique, 1959, 1470.

[6]De Soto, LXXV, p. 244.

capacity statutaire--the capacity to make regulations.[1] Consequently, for classical jurisprudence the law is sovereign and regulation is subordinate. In theory French public law has clearly distinguished the legislative power (pouvoir législatif) to make the law (loi) from the executive power to make ordinances and regulations (pouvoir réglementaire). In practice, however, the frontiers of the law and ordinance overlap, and though French jurisprudence and doctrine has struggled mightily to remain faithful to the implication of legislative sovereignty--the preeminence, the primacy of the law--in actual fact long evolution and compromise has diluted if not negated this principle.

The general authority to make regulations in the execution of the laws has developed progressively in France since the Revolution. However, this development has been anything but clear and precise. The Constitution of 1791, based on the axioms of the sovereignty of the people and the separation of powers, conferred the legislative power upon a representative assembly and withheld from the Executive any right to make general rules in the execution of the laws. The Constituent Assembly issued the necessary regulations (Instructions détaillées) for the execution of organic laws which it had passed and delegated this authority to the Legislative Assembly which succeeded it.[2] However, the complete lack of ordaining

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[1]Ibid., LXXV, p. 245.

[2]A. Esmein and Henry Nézard, Eléments De Droit Constitutionnel (8th ed.; Paris: Recueil Sirey, 1927), II, p. 77.

power led to inadequate control because the Legislative Assembly and its committees found it impossible to deal with all administrative details. To combat this situation, the authority of the King to issue proclamations[1] was used to specify detailed regulations for the implementation of statute law, thus perverting executive authority and resulting in the embryonic growth of a limited ordaining power recognized as capable of interpreting the intent of statutes and implementing this intent through detailed regulations.

This type of problem did not arise during the reign of the Convention as all prerogatives, both executive and legislative, were concentrated in the hands of the Assembly. However, with the separation of powers under the Directorial Constitution of the Year III (1795), the problem reasserted itself. Article 144 of this document stated clearly that: "It (the Directory) can make proclamations conforming to the laws for their execution."[2] The intent was to provide the Executive with authority to issue ordinances in the execution

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[1]Constitution de 3 septembre 1791, Titre III, ch. iv., sect. 1, art. 6: "Le pouvoir exécutif ne peut faire aucune loi, même provisoire, mais seulement des proclamations conformes aux lois pour en ordonner ou rappeler l'exécution." Léon Duguit and Henry Monnier (eds.), Les Constitutions, (Paris: Librairie générale de droit et de jurisprudence, 1925), p. 96.

[2]"Constitution du 5 Fructidor An III," Léon Duguit and Henry Monnier (eds.), Les Constitutions, p. 96.

of the law and completely subordinate to the law in both letter and spirit.[1] Nevertheless, the Directory issued ordinances in the form of proclamations and in the form of departmental decrees (arrêtés), as well as ordinances based upon special delegations from Parliament and ordinances for which no legal basis seemed to exist.[2] This last type dealt with the organization of the public services and with matters of police. This power to provide by ordinance for the organization of the administrative machine and for the maintenance of the public order formed an essential element of state power which was originally considered to be part of the imperium. It is best understood as a remnant of absolute government which survived in England in the form of the prerogative ordinance, and in France in the form of the règlement autonome.[3] Though on occasion the source of authority for the regulation was dubious, it was most significant that during this period none of these ordinances, whether based on the power to issue proclamations, on special delegations from Parliament, on standing as règlements autonomes, attempted to suspend or to repeal any existing law.[4]

The Constitution of the Year VIII (1799) which established

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[1]Esmein and Nézard, II, p. 77.

[2]Marguerite A. Sieghart, Government by Decree (New York: Frederick A. Praeger Inc., 1950), p. 253.

[3]Ibid., pp. 257-58.

[4]Ibid., p. 253.

the Consulate clearly defined what has become known in more recent times as the ordaining power of the Chief of State of France (le pouvoir réglementaire du chef de l'Etat). The constitutional formulation is most precise (Article 44): "The Government proposes the laws and makes the rules necessary to assure their execution (fait les règlements nécessaires pour assurer leur exécution).[1] When you add to this the responsibility of the Government for the internal safety and external defense of the country (Article 47),[2] it is evident that at this point the Government was conceded a general power over all police forces; a power to issue ordinances dealing with police matters; and the authority to organize the military forces by executive ordinance. Constitutional procedure is becoming more refined, but the scope of authority is not new if one considers Article 144 of the Constitution of the Year III and the aforementioned règlements autonomes.

When seeking out a consistent pattern, it is crucial to note that the ordinances issued under Articles 47 and 48, the latter of which entrusts the Executive with the organization of the garde nationale,[3] were not designed as ordinances "in

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[1] "Constitution du 22 Frimaire An VIII," Duguit and Monnier (eds.), Les Constitutions, p. 123.

[2] "Le Gouvernement pourvoit à la sûreté intérieure et à la défense extérieure de l'Etat; il distribue les forces de terre et de mer, et en règle la direction." Ibid., p. 124.

[3] "La garde nationale en activite est soumise aux règlements d'administration publique; la garde nationale sédentaire n'est soumise qu'à la loi." Ibid.

execution of the law" meant to fill in the *minutiae* not regulated by statute, but were *règlements autonomes* which laid down general rules without any special statutory basis. Of course they were circumscribed in terms of their subject matter in that they dealt either with police matters or with the organization of the public services. But circumscription is of little value here. The First Consul, later to be Consul for life[1] and ultimately Emperor,[2] alone, to the exclusion of the Legislature, could initiate the laws. He appointed and dismissed the Ministers of State who were responsible directly to him. Under Articles 44, 47, and 48 he provided for the public safety and the defense of the realm; the military establishment was subject to his ordaining power; and the Constitution could be suspended by his order in the place and for the time he deemed necessary in case of danger to the security of the state.[3]

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[1]The *Sénatus-consult* of August 2, 1802 proclaimed Napoleon to be Consul for life, and the *Sénatus-consult* of August 4, 1802 adapted the Constitution to the requirements of the life-consulate and at the same time invested the Senate with dictatorial powers in time of emergency. These emergency powers included: (1) Suspend for five years the function of departmental courts where these measures are necessary; (2) Declare when and where these emergency situations exist; (3) Determine the time in which individuals arrested in virtue of Article 46 of the Constitution ("conspiracy against the state") will be brought before tribunals; (4) Annul the decisions of tribunals when they constitute a threat to the security of the State; (5) Dissolve the *Corps législatif* and the *Tribunat*; (6) Name the Consuls. *Ibid.*, pp. 131-40.

[2]The *Sénatus-consult* of May 18, 1804 bestowed the dignity of Emperor upon Napoleon Bonaparte and entrusted him with the Government of France. *Ibid.*, pp. 144-66.

[3]Article 92 of the Proclamation of December 13, 1799:

As Napoleon moved toward despotism he trampled upon the expectations of his collaborator, the Abbé Siéyès. Siéyès had envisioned an executive power that personified action and a government which provided thoughtful assistance and admitted deliberation. Following Boulay de la Meurthe and Roederer he had proposed a supreme elective magistrate, a Proclamateur-Elector or Grand-Electeur[1] to assure harmony between the branches of government. To avoid anarchy on the one hand and despotism on the other, he had invented the formula: "Le pouvoir viendra d'en haut, et la confiance d'en bas."[2] As France moved to authoritarian and centralized government under the First Empire, the initial segment of this formulation became reality but the counterbalance, the confidence from below, was still-born. The public was allowed to express its approval only in the form of listes de confiance which were but lists of notables from which the Senate (Sénat Conserva-

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"In the case of armed revolt, or of troubles which menace the security of the State, the law can suspend, in the place and for the time which shall be determined, the ascendancy of the Constitution. This suspension can be provisionally declared in this type of case, by an arrêté of Government, the Corps législatif being in recess, provided the Corps is convoked within a short time by an article of the same arrêté." Ibid., p. 129.

[1]Felix Ponteil, Napoléon Ier et l'Organisation autoritaire de la France (Paris: Librairie Armand Colin, 1956), pp. 26-27.

[2]Ibid.

teur)[1] or the Government chose ministers, legislators, administrators, members of the Council of State (Conseil d'Etat),[2] and members of the Court of Cassation (Cour de cassation).[3] The right of suffrage was thus perverted and converted into a right of presentation.[4]

"Confidence from below" was important to Bonaparte in

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[1]"Le Sénat est un grand corps vide, sans vie, sans contact avec l'extérieur, d'un formalisme très strict. Matériellement et moralement, il est faible. Artificiel et précaire, il ne tient pas ses pouvoirs de la nation et ne représente pas les vraies forces nationales... Il n'a pas de racines dans la tradition politique francaises. Il est l'oeuvre d'un théoricien, qui ne correspond pas à l'esprit public." Ponteil, p. 32.

[2]The Council of State is charged "de rédiger les projets de lois et les règlements d'administration publique, et de résoudre les difficultés qui s'élèvent en matière administrative." (Article 52 of the Constitution of the Year VIII.) It is significant that in its second part, this Article provides the basis for the administrative jurisdiction of the Council of State in modern times. Duguit and Monnier (eds.), p. 124.

[3]The Court of Cassation (Cour de cassation) is above all other law courts of civil and criminal jurisdiction. It consists of criminal and civil chambers. In French legal theory, the function of the Cour de cassation is limited to cassation--that is, the setting aside of judgments for errors of law appearing in the opinion of the court below, and referring the case for final determination to an appellate court other than that which referred the judgment. However, if after the Cour de cassation sets aside a judgment, the decision of the second lower court is challenged again on the same legal grounds as before, the case must be decided in les Chambres réunies (at least thirty-five members being present). A decision setting aside a judgment a second time is binding on the issue of law involved, and the appellate court to which the case is then remanded must follow the law of the case thus established by the Cour de cassation. René David and Henry P. De Vries, The French Legal System (New York: Oceania Publications, 1958), p. 35.

[4]Sieghart, p. 167.

his vain search for legitimacy, but he did not equate confidence with meaningful representation for the population. The representative organs were divided into two chambers: the Tribunate (Tribunat), which was responsible for the initial discussion of legislation, and the Corps législatif, which was responsible for the confirmation or rejection of projects of law. The Corps législatif was denied the right of initiative, amendment, or formal discussion. It voted in secret and was required to make its decision upon presentations presented to it by the Tribunate and the Government. When one considers that the recalcitrant Tribunate was splintered into sections and was forbidden to meet in general session and that the sessions of the Corps législatif were exceedingly brief, it becomes increasingly clear that the legislative organ was fragmented and rendered impotent.

The unique and most significant institution of this era was the Senate. This jurie constitutionaire of Siéyès was comprised of notables elected for life terms and debarred from any other public functions. It was intrusted with the guardianship of the Constitution and invested with the competence to annul all acts presented to it by the Legislature. The Senate's position as arbiter of the security of the State was employed by Napoleon to amend the Constitution. As examples, the First Consulship and the Emperorship were created by senatorial decrees (Sénatus-consults organique). On the other hand, it is interesting to note that this body proved stronger than the man responsible for its creation. For it was by

senatorial decree that the Emperor was dethroned and the right of succession in his family abolished.

Bonaparte was willing and anxious to disperse and nullify legislative authority to create greater administrative and policy-making freedom. He was equally willing to exceed constitutional limitations upon the use of ordinance powers in the pursuit of his own objectives. Under the cloak of police ordinances, he created new penalties,[1] established special jurisdictions, changed the laws of criminal procedure, and levied taxes and duties. In substance it appeared that the revolution had ended where it began--with absolute monarchy. Though the dividing line between law and ordinance was not abolished, it became blurred because the ultimate decision as to the use of statute laws, Sénatus-consults, or the ordinance power (ordonnances, règlements, décrets, arrêtés) was held in the hands of the Emperor. If one adds the règlements prescribed under the regular procedure of initiation by the Head of State to the multitude of décrets and arrêtés which were issued by the Emperor without previous consultation, and also considers the right of administrative heads of departments (préfet)and administrative heads of districts (sous-préfet) to issue regulations for their administrative units, one cannot be very far from wrong in asserting that the reign of the

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[1]For example, see the description of the extraordinary session of December 26, 1800, in which Bonaparte forced the Council of State to approve of the creation of an extraordinary tribunal to deal with terrorists. Ponteil, pp. 96-98.

ordinance in the First Empire was in substance not particularly different from executive dominance under the ancien régime.

At this point the use of the ordaining power by the Executive impinged deeply and continually upon the primacy of the law. Ordinances issued outside the context of constitutional delegation must be considered as illegal. However, a restricted number were declared to be valid by the Cour de cassation.[1] This group, issuing from the Head of State without any participation of the representative assembly, qualified as ordinances in form. But in content they could be considered as law (loi) because they dealt with subject matter within the scope of the legislative power. Also, they were equipped with the force of law (loi) in their authority to alter or to repeal existing statutes. Consequently, law (loi), defined as the issue of the pouvoir législative, could no longer be considered supreme in all instances. Ordinances dealing with the competence of the Legislature--decree laws (décrets-lois)--began to make their imprint upon constitutional and public law practice in France.

At the time of the Restoration (1814) the constitutional doctrines of both the Revolution and the Empire had fallen

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[1]The Cour de cassation declared a number of unauthorized decrees as valid because they had not been annulled by the Imperial Senate whose duty it had been to safeguard the Constitution from any breach. Many of these decrees remained in effect for a long period of time. Thus, a decree issued on October 15, 1810, concerning "établissements dangereux, incommodes et insalubres" and containing direct limitations on fundamental liberties with regard to industry and commerce was not replaced until 1917. Sieghart, p. 254.

into disrepute, and the prevailing tendencies pointed either to a revival of the institutions of the ancien régime or to the introduction of a constitution based upon the English model. The Charter of 1814 was an attempt to find a compromise between the two tendencies. It reintroduced the concept of kingship by divine right (jure divino)--the Charter being a conceded document (Charte octroyée) rather than a fundamental law deriving its competence from a grant of popular sovereignty. The Charter was a contract between the King and the Nation in which it was acknowledged that the Sovereign possessed a power exterior to the Nation; that he was not a simple agent for the execution of the national will. The King did not exist by virtue of the law: the law existed by virtue of the royal will.[1] Notwithstanding, the law regained in this period its primordiality vis-a-vis the regulatory power. Article 14 of the Charter upon the King a general power to issue ordinances "for the execution of the laws and the security of the State."[2] Legally, regulation was considered a derived and inferior type of legislation. It had no authority to transgress the boundaries prescribed by the law and when properly decreed it became part of the law (insérer dans le cadre de la loi proprement dit). However, in actual practice the Government

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[1]Paul Bastid, Les institutions politiques de la monarchie parlementaire francaise (1814-1848), (Paris: Editions du Recueil Sirey, 1954), p. 183.

[2]Article 14 of the Charter of 1814: "Le roi...fait les règlements et ordonnances pour l'exécution des lois et la sûreté de l'Etat." Duguit and Monnier (eds.), Les Constitutions, pp. 185-86.

extended the regulatory authority given to it in the Charter to the point where it was often substituted for the passage of regular legislation. As Lanjuinais concluded concerning the implementation of the Charter of 1814:

> It is too evident that for a third of a volume of laws, there are a dozen volumes of ordinances and if, as it is very true, these ordinances have derogated the laws, they have been declared abrogated, in a word if they have been issued in the place of laws, we find ourselves under the legislation not of the Charter and of the laws, but of regulations and of ordinances.[1]

On numerous occasions the Government did not consider it necessary to be invited by statutory law to issue specific ordinances dealing with subject matter within the competence of the legislative authority. The use of such regulatory power (<u>règlements spontanés</u>) without authorization of the law (<u>loi</u>), became an established fact. The control of the sale of tobacco, stamped paper, and saltpetre; the granting of postal franchises; and the organization of the royal lottery, among others, was legalized in this fashion. Further, the Government did not feel compelled on all occasions to remain within the framework of the objectives envisioned by the law when delegated authority by the Legislature. Finally, it should be noted that the regulatory power was often exercised by others than the King or his Ministers. For example, the Director-General of Police issued the controversial ordinance of June 7, 1814, concerning the celebration of Sundays and holidays. It was normal practice for the regulatory power to be delegated

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[1] Lanjuinais, <u>Essai sur la Charte Constitutionnelle du 4 juin 1814</u>, p. 311, as quoted in Bastid, p. 192.

to prefects or to sub-prefects by either law or ordinance, to municipal councillors by the law, and to royal councillors of public instruction by ordinance.

One enters another domain when one discusses ordinances for the security of the State (la sûreté de l'Etat). Though it survived for only sixteen years, Article 14 of the Charter of 1814 was a classic formulation of the power of emergency legislation and "became the prototype of all European emergency clauses."[1] Though it mentioned only regulations and ordinances, it provided the King with an authority limited only by political and moral considerations. Its purpose could not be served unless it were recognized that these ordinances had the force of law and could suspend or alter statutory provisions. Article 14 was intended exclusively for emergency situations, but it was employed to supply the Head of State with a competence which was coordinate with, and not subordinate to, that of the Legislature. By adding "sûreté de l'Etat" to the traditional formulation "exécution des lois" and, therefore, admitting only a subjective test for emergency ordinances, the exercise of absolute powers without formal infringement of the Charter was made possible. As a result, legal means for establishing a dictatorship under the very cloak of the Charter were established. Subsequently, Article 14 was used as the basis for the Royal Ordinance of July 13, 1815, which dissolved the Chamber of Deputies and regulated elections, and for the

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[1]Sieghart, p. 172.

controversial sanitary ordinances of September 27, 1821. The stark realities of unlimited emergency power and the possible abuse thereof did not fully impress itself upon French politics until Charles X and his ultra-Royalist cabinet dissolved the Chamber of Deputies twice within two months during the summer of 1830 upon the questionable report of the Minister of Justice, alleging that the Monarchy was in danger of collapsing. Upon this basis censorship of the press was arbitrarily applied and the electoral laws were rigged by Royal Ordinance. However, the legitimacy of these ordinances is a moot point. Their immediate result was the overthrow of the House of Bourbon and the passing of the Crown to the House of Orleans under amendments to the Charter of 1814, re-issued in the form of the Constitutional Charter of August 14, 1830.

With this restatement of the constitutional order, the formula for the ordinance power was changed from "Le Roi est le chef suprême de l'Etat...fait les règlements et ordonnances nécessaires pour l'exécution des lois et la sûreté de l'Etat" to the more limited Article 13 of the Charter of 1830: "Le Roi est le chef suprême de l'Etat...fait les règlements et ordonnances nécessaires pour l'exécution des lois, sans pouvoir jamais ni suspendre les lois elles-mêmes ni dispenser de leur exécution."[1] A clearer definition of the ordaining power is obtained in the latter statement. Article 13 concedes to the Government the right to issue ordinances in execution of the

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[1]Article 13 of the Charte Constitutionnelle of 14 août 1830, Duguit and Monnier (eds.), Les Constitutions, p. 214.

laws, whether based on the Charter or on Parliamentary invitation, and also implied a power to issue ordinances for the organization of the public services (règlements autonomes); but it does not, as previously, concede the right to issue ordinances in police matters, a limitation which was respected by Louis Phillippe.[1] It is here under the Government of the July Monarchy that the concept of le pouvoir réglementaire reaches a definitive formulation. The prohibition in the latter part of Article 13 which refuses to the Head of State the power to suspend the laws (lois) or to dispense with their execution returns the concept to one that is completely distinct from the pouvoir législative. In formal terms this ordaining power is subordinate to the legislative power in the sense that it cannot abrogate or alter existing laws; that is, it cannot act contra legem. Nevertheless, it is not a power derived from the Legislature. It is a direct and not a delegated power.[2] Article 13 appeared to make a reoccurrence of such a situation as that of July, 1830 impossible. However, the price of such proscription against threats to strict legality can be very great. Certainly, in times of exceptional and grave crisis, if adhered to, this doctrine can result in the paralysis of executive authority. The claims of constitutionality and absolutism demand moderation and it is to be

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[1]Sieghart, p. 254.

[2]Ibid., p. 259.

doubted that adherence to strict legality in all circumstances can provide a viable adjustment to their competing claims.

Efforts to preserve order during the Orleanist period (1830-1848) were highlighted by appeals to legality when possible and use of repressive techniques when necessary. As early as 1835, the Monarch induced the Government to pass the infamous lois de septembre which provided for modification of individual rights in criminal prosecutions and for limitations upon oral and written public utterances. Popular indignation was great and ultimately liberal and democratic reaction led to the Revolution of 1848.

The third French revolution was succeeded by the Second Republic. It was proclaimed by a provisional government consisting of Lamartine and six collaborators. This de facto government exercised a comprehensive legislative authority in the form of decrees. These orders were issued in a provisional manner without any statutory or constitutional justification--other than, that is, necessity. A Constituent Assembly, elected on the principle of universal suffrage, met on May 4, 1848 and announced the creation of a new Republic. Authority was immediately intrusted to a Parliamentary Committee which in this transition period revived the traditions of the Assembly. Ultimately, on November 4, 1848, a new constitutional document was promulgated. The executive power was vested in the President of the Republic. The holder of this office was elected by universal suffrage for a four-year term. The President was not accorded the competence to "sanction" laws but was obliged

"to promulgate the laws."[1] He was given the authority "de faire presenter des projets de loi à l'Assemblée nationale par les ministres," and "il surveille et assure l'exécution des lois."[2] The last statement was consistent with Article 13 of the Charter of 1830 and provided the Executive with a general ordaining power in the execution of the laws within the context of the limitations established for this type of competence by Article 13.

It should also be recognized that this constitutional document attempted to limit the authority of the Government by means of the Council of State. In the language of the Constitution: The Council of State, after consultation on projects of law by the Government or upon the initiative of the Assembly, must "prepare the <u>règlements d'administration</u>" and "alone make those regulations for which the National Assembly has given it a special delegation." Finally, "it exercises with regard to administrative decrees all the powers of control which the law has deferred to it."[3] The obvious danger here is the delegation of ordaining powers to a body which is not directly responsible to the Legislature. This was stressed during the Constituent Assembly's consideration

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[1]Article 35 and Article 56 of the Constitution of November 4, 1848. Duguit and Monnier (eds.), <u>Les Constitutions</u>, pp. 237, 240.

[2]Article 49 of the Constitution of November 4, 1848. <u>Ibid</u>., p. 239.

[3]Article 75 of the Constitution of November 4, 1848. <u>Ibid</u>., p. 242.

of Article 75, but the provisions were nevertheless adopted.[1]

The règlement d'administration publique is an ordinance made under special Parliamentary delegation--or invitation, as French constitutional lawyers prefer to call it[2]--in execution of the law. Before being issued, such ordinances were discussed in the full Council of State (le conseil d'Etat entendu). The Constitution of 1848 created two different versions of règlement d'administration publique. One, which plays a major role in French public law to this day, is the pattern of Governmental decision after consultation with the Council of State. The other, which has not survived French constitutional law development and which is unique with this document, is the procedure envisioned in Article 75 (2) wherein the Council of State makes the ordinance itself. This type of regulation is used in the execution of laws; in its application there is no flirtation with the extra-legal.[3]

The Constitution of 1848, in its Article 106, gave constitutional support to a law regulating the forms and the effects of crisis institution known as the state of siege (état de siège). This promise was implemented with the passage of the law of August 9, 1849.

This Constitution united aspects of the Presidential form of government with the responsibility of Ministers to

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[1]Sieghart, p. 178.

[2]Léon Duguit, Traité de droit constitutionnel (2e ed.; Paris: Ancienne Librairie Fontemoing and Company, 1924), Vol. IV, p. 714.

[3]Sieghart, p. 255.

Parliament. Its political weakness lay in the antagonism between a President elected by universal suffrage and a unicameral legislative body composed primarily of legitimists and Orleanists. On May 31, 1850 the Legislature voted a new electoral law which prescribed a three-year municipal domicile for each elector. By this provision at least two and one-half million Frenchmen were deprived of their vote. It was on the basis of this popular issue that Louis Napoleon Bonaparte based the coup d'Etat of December 2, 1851. He dissolved the Legislature and the Council of State, declared a state of siege in some twenty departments, re-established universal suffrage, and called upon the French people to ratify these measures by plebiscite. Later the same day, a proclamation and decree was issued which stated that "the French people wish to maintain the authority of Louis Napoleon Bonaparte and delegate to him the powers necessary to make a Constitution on the bases proposed in his proclamation of December 2, 1851."[1]

The plebiscite showed only 640,737 negative votes in some seven and one-half million votes cast. As Sieghart reports:

> The violation of the Constitution of November 4, 1848 and of the Presidential oath were thus condoned; the President was invested with dictatorial powers comprising, apart from the executive, not only the legislative power which he exercised in the form of décrets-lois,[2] but

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[1]Sieghart, p. 181.

[2]A distinction was made between decrees regulating legislative matters (décrets organiques) and decrees regulating administrative matters (décrets réglementaires). The former were ratified by Article 58 (2) of the Constitution of 1852 and survived in constitutional history under the name décrets-lois. Ibid., p. 256.

also the constituent power, the outcome of which was the Constitution of January 14, 1842.[1]

Louis Napoleon wrote: "When one bears our name and when one is at the head of the government, there are two things one must do: satisfy the interests of the most numerous classes and attach oneself to the upper classes."[2] The politics of this period appeared to have two levels: that of the masses and that of the politicians. The people could provide a solid basis for government, but they could not govern themselves.[3] Therefore, the Second Empire was not, nor did it seek to be, a mere dictatorship of the masses. It strove to combine aristocracy with democracy and to build society in the shape of a pyramid, with the people at the base and the hierarchy of merit at the top. The driving force within it was ambition and worldly honor open to all. Its support was based upon peasants and small-townsmen who were dominated by their mayors and prefects. These circumstances notwithstanding, the Second Empire contained within its bowels the seeds of a more liberal empire. Notables across the land had tasted the pleasures of Parliamentary government under the July Monarchy and were not soon to forget; masses in the large cities and towns had never accepted the Empire; and these cancers were to prove to be the

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[1]Ibid., p. 181.

[2]E. d'Hauterive, Napoléon III et le prince Napoléon, pp. 58-59, quoted in Theodore Zeldin, The Political System of Napoleon III (London: MacMillan and Co., Ltd., 1958), p. 10.

[3]Zeldin, pp. 44-45.

seeds of destruction for authoritarianism. As the seeds grew, disaffections from the banner of the second Napoleon became quite numerous. The Caesarian democrats that remained began to demand that the Leader share his power with the Legislative Assembly. Under the pressure of this reaction, the mayors who had been the fountainhead of government power were refused the support that had been the source of their power. The Government appeared to disown its own. The opposition was given the power of organizing in every commune. Governmental electoral agents were thrown into confusion as were the populace. What actually happened is that the Napoleonic party found it necessary to move toward a more liberal empire. To achieve this goal electoral reforms were introduced and a new constitutional document was created;[1] however, the Government assured its ascendancy by leaving its own agents in the field, though without direct support, and by stifling the opposition press through a system of checks backed by threats of prohibition which constituted a very effective censorship.

The new constitutional document attempted to unite the Presidential and Parliamentary type of government. The crucial point was the question of responsibility. The Emperor and the Ministers were both declared "responsible,"[2] but the problem

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[1] Sénatus-consults fixing the Constitution of the Empire of May 21, 1870. Duguit and Monnier (eds.), Les Constitutions, pp. 309-14.

[2] Article 13 of the Sénatus-consults stated that "L'Empereur est responsable devant le Peuple française, auquel il a toujours

was how the Ministers could be responsible to the Parliament and to the Emperor at the same time. Zeldin is quite correct when he emphasizes that this new document did not intend to establish Parliamentary government in the modern sense and that the correct analogy for comparison is not the English Constitution of the nineteenth century but that of the late seventeenth--when the King ruled as well as reigned and when Ministers had to please the King and Parliament.[1] Under the Constitution of 1852 the Ministers had been merely grandiose civil servants. Now, in order to cement the uncertain alliance between Parliament and Emperor, the Head of State was to choose his Ministers from the leaders enjoying the confidence of Parliament but would not turn the executive authority over to them. This was made clear when it was announced that the Presidency of the Council of Ministers would be retained in his own hands. Napoleon III felt that his responsibility was to the French people. The question of dynasty was placed outside the powers of Parliament and became a matter between the people and their Sovereign. The ultimate appeal on fundamental issues was to the people by plebiscite.

The ordaining power (pouvoir réglementaire) was employed often and extensively under the Second Empire and, on the whole, it remained consistent with previous Constitutions and consti-

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le droit de faire appel." Article 19 added that "L'Empereur nomme et révoque les ministres. Les ministres délibèrent en conseil sous la présidence de l'Empereur. Ils sont responsables." Ibid., p. 311.

[1]Zeldin, The Political System of Napoleon III, p. 153.

tutional usage.[1] The bulk of the ordinances were employed to organize the public services or were utilized in the execution of the laws. Apart from décrets-lois, there were no decrees dealing with matters of police.[2] However, one new type of ordinance was introduced: the Imperial decrees regulating constitutional issues, such as the decree of November 24, 1860, giving to the two Chambers of the Legislature the right to vote the Address, or the decree of February 3, 1861, regulating the relationship of Senate, Corps législatif, and the Emperor. It is significant that these ordinances were issued as simple Imperial decrees despite the authority granted to the Senate by Article 27 (2) of the Constitution of 1852 to regulate by Sénatus-consults "all that has not been anticipated by the Constitution and which is necessary for its functioning.[3] Their validity was not questioned in the time of the Empire though there seems to be little question that they were unconstitutional.[4]

The Second Empire fell with the capitulation at Sedan on September 2, 1870. In truth, it did not fall because of the military disaster alone; nor because of the intimidation of the Senate and the Corps législatif by the Parisian mob; it was inexorably dissolved as a result of its own inadequacies.

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[1]Sieghart, p. 256.

[2]Duguit, Traité . . . IV, p. 686.

[3]Duguit and Monnier (eds.), Les Constitutions, p. 277.

[4]Sieghart, p. 256.

Republican deputies from the Corps législatif, headed by Favre and Gambetta, hastened to constitute a Provisional Government (Gouvernement provisoire de la défense nationale) and to place the Military Governor of Paris, General Trochu, at its head. This choice appeared to be symbolic of the desire for a patriotic union for the public safety. The Provisional Government undertook a dual responsibility when it assumed control of the State: to prosecute the war and to substitute a regime of law (loi) for a regime of fact (fait).[1] On the first point, an armistice convention was signed with Germany, January 28, 1871; on the second, the Provisional Government exercised dictatorial powers until the first meeting of the Bordeaux Assembly, February 12, 1871. Five days after convening, this Assembly appointed Theirs, the conservative leader of the Left-Center and a constitutional monarchist, "Chief of Executive Power of the French Republic."[2] This function he was to exercise with the help and assistance of Ministers appointed by himself and over whom he presided. The exceptional point of Theirs' position was that he was the titular Head of State at the same time he was the leader of a responsible government. He was not a President of the Republic independent of the Assembly but acted under their authority. It was only after the Assembly had moved to Versailles and had witnessed the insurrection of the Commune that it went a step

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[1]Jean-Jacques Chevallier, Histoire des institutions politiques de la France moderne (1789-1945) (Paris: Librairie Dalloz, 1958), p. 297.

[2]Resolution of February 17, 1871. Duguit and Monnier (eds.), Les Constitutions, p. 314.

further in organizing the executive power. The Loi Rivet of August 31, 1871, remarkable insofar as it combines ministerial political responsibility with political responsibility of the President, made Thiers President of the French Republic. The President continued to act under the authority of the Assembly and remained a member of it.

On November 20, 1873, the Assembly passed another provisional constitutional law--the third of the new Republic. It invested General Macmahon with the powers of President of the Republic for a period of seven years and provided for the organization of the Committee of the Assembly made up of thirty members--La Commission des Trente--commissioned to examine the draft of a new Constitution. It is at this point that a separation of powers was achieved. By giving the President a fixed term of office, called the septennat, and by making it independent of the duration of the existing Assembly, executive and legislative authority were divided and the dictatorship of the Assembly was terminated.[1]

After innumerable delays the Republic was definitely established by the acceptance, by a majority of one vote, of the amendment of M. Wallon:

> The President of the Republic is elected by an absolute majority vote of the Senate and the Chamber of Deputies joined together in the National Assembly. He is elected for seven years. He is re-eligible.[2]

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[1]Sieghart, p. 185.

[2]Coubertin, Evolution of France Under the Third Republic (New York: Crowell and Co., 1897), p. 45.

This was, as Finer asserts, the rock upon which the Republic rested.[1] Nonetheless, the powers and the significance of the Presidency were to change and evolve with circumstances, and the President of the Council of Ministers, a position not mentioned in the three basic constitutional documents of the Third Republic, was to become the implementor of the executive power.

Chevallier suggests that the underlying conception of the Presidency of the Third Republic can be expressed in one sentence: the President is "un chef-roi, sauf le nom et la durée."[2] It is true that if one depended upon Articles 3 and 5 of the Constitutional Law of February 25, 1875, relative to the organization of public powers, to the exclusion of all else, one could be persuaded by the logic of Chevallier's reasoning. Article 3 states that:

> The President of the Republic has the initiative of the laws . . . He promulgates the laws . . . He supervises them and insures their execution . . . He has the right to pardon. He commands the armed forces. He appoints all civil and military personnel. He presides at national ceremonies; the envoys and the ambassadors of foreign powers are accredited by him.[3]

Article Five:

> The President of the Republic may, on the advice of the Senate, dissolve the Chamber of Deputies before the expiration of their normal term.[4]

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[1]Herman Finer, The Governments of Greater European Powers (New York: Henry Holt and Co., 1956), p. 308.

[2]Chevallier, p. 312.

[3]Duguit and Monnier (eds.), Les Constitutions, pp. 319-20.

[4]Ibid., p. 320.

There is, however, a small paragraph at the conclusion of Article 3 which should not be neglected: "Each of the acts of the President of the Republic must be countersigned by a Minister."[1] Consequently, the grant of competence is theoretically large but practically quite variable, depending upon a variety of circumstances: the relationship between the President of the Council and the President of the Republic; the capacity and vigor of the holder of the presidential office; the complexities of multiparty government; and the trust or distrust of the executive agency by the voting population.

To understand the politics of the Third Republic, it is necessary to remain cognizant of the fact that in reality it contained no clear-cut separation of powers: that the Executive and Legislative elements both stemmed directly from the people and were designed to be kept in equilibrium by a series of checks and balances. At most there was a separation of functions, but it is undeniable and imperatively important that the seat of national sovereignty lay solely in the National Assembly.

The primacy of the law (loi) had survived but it was severely battered by the expansion of the ordaining power of the Head of State. At this juncture, constitutional doctrine and jurisprudence had come to recognize four different types of ordinances: ordinances made in the execution of laws; ordinances dealing either with the organization of the public

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[1] Ibid.

services or with matters of police; ordinances made upon special parliamentary delegation on matters which are normally dealt with by statute; and colonial ordinances.[1] To these categories must be added a fifth group--decree laws (décrets-lois)--which were exemplified by the overtly unconstitutional ordinances of the First Empire that were accepted by the Cour de cassation; by the decrees of the Provisional Government of 1848 which, as a de facto government, lacked any constitutional basis; and by the decree of Louis Napoleon, issued after the coup d'Etat of 1851 and ratified by the Constitution of 1852.

It is this conflict between the frontiers of ordinance and law--this interweaving of constitutional, quasi-constitutional, and unconstitutional forms--that patterns the background against which we can observe the development and evolution of crisis institutions in late nineteenth and twentieth century France.

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[1]Since the time of the Consulate the Government has exercised wide ordaining powers in the colonies. Under the Second Empire these powers were given a constitutional foundation. Article 27 (1) of the Constitution of 1852 authorized the Senate to make constitutions for the colonies and the Sénatus-consults of May 3, 1854, empowered the Emperor to legislate for the greater part of the colonial empire until a time when a future Sénatus-consults would regulate the whole matter. In lieu of further action, the Sénatus-consults of 1854 remained the constitutional basis for all colonial ordinances issued by the Government. Sieghart, p. 258.

CHAPTER III

PROCEDURES FOR ADMINISTRATIVE ACTION

Viewed in perspective, it is apparent that during the life of the Third Republic the ordaining power of the French Executive was vastly increased until it constituted a formidable source of sub-legislation. In the face of "perpetual emergency"--whether economic, social, or military--and the growing incapacity of Parliament, responsibility for a coherent State policy was placed squarely in the hands of the Executive. It was imperative that this agent secure the tools and produce the energy necessary to defend the Republic against internal as well as external dangers. It was necessary to attempt to increase the authority of the Executive to the extent that it would be able to deal effectively with the problems of the day, without so drastically decreasing the competence of the Legislature and the control of the Judiciary as to undermine the constitutional balance of powers.

An analysis of this development and the implications therefrom should take into consideration the evolution of the ordaining power in France. To reiterate, as early as 1799,[1]

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[1] Supra., pp. 17-18.

the pouvoir réglementaire became a recognized facet of the French public law system. It has become accepted in constitutional usage that the Executive is entrusted with a direct, spontaneous ordaining competence to bring statutory laws passed by competent legislative authority into execution. This authority was vested in the President of the Republic during the Third Republic. By tradition, such authority has been circumscribed, being considered subordinate to the legislative power in that an ordinance was not considered capable of suspending, altering, or repealing existing legislation, nor being employed in any fashion that could be considered contrary to statutory law. At the same time, it was established that this ordaining power was a direct competence of the Executive authority rather than a derived competence resulting from delegation of legislative authority. As such, direct ordinance power in the execution of the laws was an authority of limited scope. Constitutional safeguards evolved against its abuse: Parliamentary control, jurisdiction of the Council of State, and jurisdiction of the Common Law Courts.

In the instance of Parliamentary control, it was immediately apparent that ordinances proclaimed under direct Executive authority need not be sent to the Chambers for approval. If Parliament was dissatisfied with the manner in which the Executive employed the ordaining power, it had the authority to withdraw confidence from the Government and force its resignation. For the Government was responsible to

Parliament not only for its own acts but also for the acts of the President of the Republic, which for this purpose have to be countersigned by a responsible Minister. Also, under the organic laws of the Third Republic there is a penal ministerial responsibility[1] which relates not only to crimes recognized by criminal law but also to any serious abuse of political power. Such penal responsibility was successfully invoked against the Ministers of Charles X as the result of the issuance of the unconstitutional ordinances of July 25, 1830. No doubt, considering the law of July 16, 1875, this type of responsibility could be invoked again in the event of any serious abuse of the ordaining power.

Jurisdiction by the Council of State refers to the surveillance by this administrative tribunal of administrative ordinances. To clarify the extent of this control, it should be recognized that the French constitutional system differentiates between two different aspects of the Executive power: governmental functions and administrative functions. Governmental acts (actes de gouvernement) are considered outside the competence of administrative law. These pertain to domestic matters, as the relationship between the Government and Parliament; security measures such as decrees establishing the state of siege; international affairs, comprising either

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[1] Article 12 of the law of July 16, 1875 provides that: ". . .Les ministres peuvent être mis en accusation par la Chambre des députés, pour crimes commis dans l'exercise de leur fonctions. En ce cas, il sont jugés par le Sénat." Duguit and Monnier (eds.), Les Constitutions, p. 325.

diplomatic relations and the interpretation of diplomatic acts, or acts relating to external security; external war; or colonial affairs. Jurisprudence[1] accepts the necessity for the exercise of independent discretionary powers in these areas of high State policy. Such discretion is not considered to be a threat to the legality of French administration for it offers the great advantage of providing the Government with a necessary minimum of discretionary powers, which makes it possible to subject the remaining administrative ordinances to the close control of the administrative courts. Such a distinction facilitates a prime achievement of French administrative law--the provision to each and every citizen of the privilege of defending his rights before an impartial administrative tribunal applying judicial methods. Consistent with this privilege, all administrative ordinances are subject to challenge before administrative courts.[2]

The right of appeal in administrative matters (recours

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[1]Jurisprudence refers to the "decisions of courts." While there is no formal doctrine of stare decisis in the French legal system, there is a strong and growing tendency on the part of French jurists to follow precedents, especially those of higher courts. "This tendency is based upon various aspects of the judicial esprit de corps, among them the maintenance of professional dignity, the sharing of responsibility for decisions within the judiciary as a whole, the saving of time and research for attention to other matters where no precedent exists, the fulfillment of the expectations of parties who have relied upon previous decisions of the courts, and the avoidance of excessive or prolonged litigation where a uniform line of decisions clarifies doubtful issues." René David and Henry P. de Vries, The French Legal System, pp. 113-21.

[2]Appeals are possible against every administrative decision regardless of whether or not the right is conferred by

contentieux) is divided into two categories: the recours de pleine jurisdiction and the recours en annulation. The recours de pleine jurisdiction is designed to protect the interests of private persons against damages done by administrative acts and to make the administration liable for such damages. This type of suit is usually brought on the occasion of an executory decision and is directed against the administrative activities which result from such a decision. The enforcement of the decision, and the legal consequences which ensue, are administrative facts which can be challenged before an administrative tribunal. The recours de pleine jurisdiction constitutes a general right of action against all administration operations and is the ordinary procedure of administrative litigation. The second and extraordinary process, the recours en annulation, is designed to protect the legal order and to prevent decisions--taken in violation of existing laws--from having effect. The recours en annulation challenges the validity of executory

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statute. "This result was brought about by evolving a very subtle conception of the executory decision which, in short, is construed as the unilateral affirmation of a right which the administration intends to exercise: (1) Each appeal addressed to a public authority must ultimately result in an executory decision because of the provisions of the law of July 17, 1900, which imply such a decision in situations where the administration refuses to act. (Modern development tends to restrict the use of discretionary power, not only with regard to positive acts but also with regard to the fact that the administration can, at its discretion, deny justice by mere inaction. Thus, if the administration, even if it has the discretionary power to do so, does not deal with a claim addressed to the competent authority within four months, a party concerned is entitled to regard its claim as rejected and to bring a plaint before the Council of State under this interpretation of the law of July 17, 1900, Article 3, and (2) each executory decision is open to a recours contentieux." Sieghart, p. 214, note 4, and 216.

decisions and are aimed at annulment of decisions. They raise primarily a question of law. Questions of fact play but a secondary role and claims for damages are not admissible. Consequently, under the competence recours en annulation a plaint, recours pour excès de pouvoir, may be addressed to the Council of State requesting the annulment of an administrative decision considered to be ultra vires.[1] Decisions may be nullified if they lie outside the competence of the agency which makes them;[2] if they violate prescribed forms of administrative procedure; if they constitute a misapplication of power,[3] or if they

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[1]The constitutional foundations of the ultra vires plaints are: (1) "Les réclamations d'incompétence à l'égard des corps administratifs ne sont en aucun cas du ressort des tribunaux, elles doivent être portées au roi, chef de l'administration générale," (Law of October 7, 1900) and (2) "Le conseil d'Etat...statue souverainement...sur les recours en annulation pour excès de pouvoir formes contre les actes des divers autorités administratives," (Ordinance of July 31, 1945, Article 32). Ibid., pp. 217-18.

[2]Annulment by virtue of the incompetence of an administrative agency is based on the assertion that a public authority has made a decision in excess of its powers, that it has usurped the authority of another agency. Examples of this sort of incompetence are decisions taken by the Administration which are within the competence of either the Legislature or the Judiciary; or decisions taken by an inferior rather than a superior authority. However, ultra vires complaints cannot be brought against (a) acts which are not of an administrative nature, though they emanate from an administrative agency, such as acts of Prefects with regard to criminal investigations, or acts of Mayors with regard to the criminal police; (b) acts emanating from an administrative agency which is not included either in the administrative hierarchy or tutelle, such as Acts of Parliament, or decisions taken by a judicial authority; (c) acts which do not have the character of executory decisions, such as some measures of internal administrative discipline; and (d) executory decisions which do not infringe upon any private interest. Sieghart, p. 219.

[3]Decrees may be annulled for misapplication of power if the public authority uses its power for purposes other than

violate the law.[1] The powers of the Council of State with regard to ultra vires plaints consist solely in the right either to dismiss the complaints or to annul the administrative decision which is challenged. There can be no modification or amendment of the act in question because this would be tantamount to taking a new administrative decision, which the Council of State is not entitled to do, although the Council can pronounce a partial annulment only, which leaves the remainder of the act in force.

The control of the Common Law Courts (civil law) is less significant than that of the administrative courts. Any person sued or prosecuted in connection with provisions contained in an administrative ordinance can claim that the ordinance is

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those which had been conferred upon it, notwithstanding the fact that said public authority may have been acting within the scope of its competence, had observed all prescribed forms, and was not violating the law. Such a nullification may be achieved when it is shown to the satisfaction of the Council of State that a public authority seeks a purpose other than the safeguarding of the public interest and the benefiting of the public services. Examples: (1) The Council of State annulled a governmental decree which dissolved a municipal council in order to redress electoral irregularities. It was held that the Government can dissolve a municipal council only for the purpose of securing proper administration for a commune and that the dissolution in question was a misapplication of power. (Recueil de Conseil d'Etat, 1902, p. 55.) (2) The Council of State annulled a decision of General André, the Minister of War, who had excluded a grain dealer from participation for contracts issued by the war office on the grounds that his political and religious opinions were disagreeable to the Minister of War. It was held that the motive involved was without relation either to the contract involved or to the merchant's professional capacity. (Recueil de Conseil d'Etat, 1905, p. 757.) Léon Duguit, Law in the Modern State (New York: B.W. Huebsch, 1919), pp. 188-89.

[1]This type of allegation is directed against any misapplication of a law, whether done with or without intent.

outside the competence of the administrative ordinance power. The court, if it holds the defense to be valid, is entitled to refuse the application of the ordinance to the particular case in question. However, unlike the administrative judicial hierarchy, the Common Law Courts have absolutely no authority to annul administrative ordinances.

A second type of ordinance which should be distinguished from the "direct, spontaneous Executive ordinance" is the règlement d'administration publique,[1] which first appeared in the Constitution of the Year VIII, but did not come into frequent use until the Second Republic.[2] In the Third, Fourth, and Fifth Republics a great majority of the statutory legislation contains a clause requesting their completion by the issuance of a règlement d'administration publique. Whether based upon parliamentary delegation[3] and as a consequence

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The word "law" in this connotation includes ordinances which are binding upon the Administration. The Administration is under an obligation to respect judgments given either by judicial or administrative Tribunals and the violation of a right established by such a judgment can be challenged by a plaint for violation of a law. Sieghart, p. 223.

[1]"Une règle obligatoire, inspirée par le pouvoir exécutif, sur invitation formelle du législateur et prise après avis de l'Assemblée générale du Conseil d'Etat." Gasquet, La nature juridique du règlement d'administration publique, p. 12. Sieghart, p. 262.

[2]Supra., pp. 31-32.

[3]"Le règlement d'administration publique est celui qui procède non des pouvoirs généraux que le Chef de l'Etat tient de la Constitution, mais d'une délégation spéciale qui est faite par une loi determinée, en vue de compléter cette loi, d'éclaircir ses dispositions, de développer les principes

achieving exemption from judicial control[1] or resulting from parliamentary invitation to the President of the Republic to exercise his own competence,[2] the règlement d'administration publique has emerged in the twentieth century as a device whose sole purpose is the completion of statutory law. Its objective is "le prolongement de la loi,"[3] and as such it cannot suspend, amend, or repeal any valid statutory law. In this interpretation, then, the règlement d'administration publique becomes nothing more than a unique form of the Executive ordinance in execution of the law.

A third type of Executive ordinance goes as far back as the Constitution of the Year III. This form, the autonomous ordinance, is issued neither in the execution of statutory laws by the Executive nor as the result of special parliamentary delegation. It has evolved in recognition of the capacity of the Executive to supervise and to regulate its own administrative

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qu'elle a posés, de décide comment elle devra être exécutée." Lafferière, Traité de la jurisprudence administrative, 2e ed. Sieghart, p. 262.

[1]"Grandes compaignes des chemins de fer," Recueil de Conseil d'Etat (December 6, 1907), p. 1913.

[2]According to Esmein the real meaning of the empowering clause was to invite the President of the Republic to exercise his own power and to prescribe a special form in which to exercise it. Thus, the legislator does not create the power but does, in fact, limit it by providing that these ordinances must be submitted to the Council of State. If the règlements d'administration publique are not laws but ordinances, they are liable to controls applicable to administrative ordinances. A. Esmein and H. Nézard, Eléments de droit constitutionnel..., II, pp. 82-86. See also A. Esmein, "De la délégation du pouvoir législatif," Revue politique et parlementaire (1894), p. 200.

[3]Léon Duguit, Traité de droit constitutionnel, IV, p. 7477.

agents. As the Legislature was incapable of coping with the detailed organization of administration, it became necessary for these problems to be dealt with by Executive ordinance. This was achieved in an ad hoc fashion until January 1, 1884, when the law of December 29, 1882, entered into force and provided that the organization as well as any future alterations in the structure of Ministries must be achieved through the issuance of règlements d'administration publique. Since the passage of the law of June 20, 1920, the creation of administrative organization by ordinance is no longer possible as it was henceforth required in the form of statutory law.

Autonomous ordinances also comprehended police matters. From 1923 onward, with the autonomous issuance of a unified Highway Code (Decree of December 31, 1922), the President of the Republic exercised an ordaining power in matters of police competence, which being neither a delegated power nor a power based on Article 3 of the law of February 25, 1875, must be considered to have developed as the result of constitutional usage.[1] The precise limits of the scope of autonomous ordinances in police matters are very difficult to ascertain. Unquestionably, they may be challenged before the Council of State and the Cour de cassation, and it is to the most complicated jurisprudence of these bodies that one must look for definitive limitations. However, it is clear that autonomous

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[1]Duguit, Traité... IV, p. 736.

ordinances may not alter existing laws nor create new penalties.[1]

It was upon these three aspects of the pouvoir réglementaire of the Executive--spontaneous, direct ordinances in execution of the laws, règlements d'administration publique, and autonomous ordinances--together with the state of siege and enabling procedures, that French crisis institutions of pre-1945 vintage were built. In its attempts to cope with World War I, with the economic and social convulsions of the inter-war years, and with World War II, the Governments of France found it necessary to rely upon vigorous expansions of Executive authority. As a foundation for crisis government in World War I, the state of siege was invoked and an ordaining power was claimed from the implications of this procedure. The direct ordaining power in execution of the laws was extended beyond the range of traditional constitutional practice and enabling laws were passed by Parliament providing for Executive authority in areas normally reserved for the legislative power (pouvoir législative).

At the outset of hostilities, the President of the Republic, on behalf of the responsible Government, issued a series of decrees resulting in suspension and direct derogation of statute law. These latitudinous extensions of the authority of the Executive to carry the laws into execution were, from their inception, outside the legal competence of the direct

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[1]Ibid., pp. 737-38.

ordaining power of the President of the Republic on which they were purported to be based. However, despite their rather obvious illegality, once these extraordinary ordinances became a reality of French political life, there was an attempt to legitimatize them. In a notable attempt to equate law (loi) with political practice (pratiquer), the Council of State developed the concept of pouvoir de guerre[1] as legal but pseudo-constitutional basis for extraordinary extensions of Executive competence in an emergency. By the arrêté of July 15, 1915, the Council distinguished between primary and secondary law and allowed the President of the Republic to suspend secondary law, if obedience to it was made impossible by the conduct of the war.[2] However, this distinction was dropped in 1918 as was a previous requirement of parliamentary ratification.[3] It was further acknowledged, in the arrêté of May 14, 1920, that

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[1]The concept of pouvoir de guerre achieves legal stature in the sense that it is the result of positive decisions rendered by the Council of State in its function as an administrative court. It must be considered a pseudo-constitutional concept, however, as it constitutes a most strained interpretation of Article 3 of the Constitutional Law of February 25, 1875, which provides authority to the President of the Republic to execute the laws of the State.

[2]A law of 1839 provided authority to the Government to place General Officers on the retired list at its discretion. A supplementary law of 1912 amended this prerogative with the provision that such power could be exercised only with the opinion of the Superior Council of the War. As it became impossible to convene this body during the early portion of World War I, a decree was issued suspending the provisions of the supplementary law. This decree was upheld by the Council of State. France, Conseil d'Etat, 30 juillet 1915, "Verrier," Recueil, p. 257.

[3]France, Conseil d'Etat, 28 juin 1918, "Heyries," Recueil, p. 651.

the President of the Republic had the authority to take all necessary measures which were indispensable to the execution of the laws and which conformed to the goals of legislation as proposed by the Legislature.[1] This interpretation was circumscribed in the sense that the application of Executive powers so recognized depended directly upon practical political circumstance.[2] As a consequence of this approach, the Council in the aforementioned decision of May 14, 1920, declared valid a decree of November 30, 1917, which restricted the manufacture and sale of bakery products which clearly infringed upon the guarantee of freedom of trade which had been provided as far back as the Constitution of 1791. It approved of governmental control of transportation of grain[3] and guaranteed to the Government the privilege of choosing at will the merchants to be used as intermediates between the State and the civil

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[1]France, Conseil d'Etat, 14 mai 1920, "Syndicat National de la Boulangerie de Paris," Recueil, p. 499. See also, A. Bosc, "Actes de gouvernement et théorie des pouvoirs de guerre," Revue du Droit Public, XLIII (April-June), p. 239.

[2]"En temps de guerre ou de crise grave les pouvoirs accordés par la loi au gouvernement doivent être interprétés de façon extensive, mais portant le Conseil d'Etat n'admet pas la liberté de l'administration dans le choix des moyens de coercition. En cas d'urgence et de péril immédiat, au contraire, le Conseil d'Etat accepte que cette liberté soit plus grande et il reconnaît à l'administration le droit d'user de moyens de coercition plus étendus. La place nous manque pour tenter un parallel plus pousse de la théorie des pouvoirs de guerre et de cette situation d'urgence et de péril grave dans laquelle la jurisprudence permet à l'administration d'user de l'exécution forcée par la voie administrative." Bosc, pp. 256-57.

[3]France, Conseil d'Etat, 4 juin 1924, "Séguier," Recueil, p. 370.

population.[1] In fact, the Council of State, in recognition of the desirability of according great freedom to the Executive in executing the laws, rules in its arrêté of June 24, 1924, that it was not possible for a legislative disposition to oblige the Government to determine in advance the duration of a regulation which it might legally institute.[2]

This predilection in favor of an extension of the direct ordaining power of the President of the Republic in times of emergency was not shared by the Common Law Courts or the majority of French constitutional lawyers. The Cour de cassation took a more conventional view of attempts to increase the competence of the Executive and was quite willing to declare illegal, and refuse obligatory force to, decrees which it considered to be infringements upon the provisions of effective laws.[3] Legalists such as Henry Nézard, the editor of the Esmein treatise, strongly contended that the doctrine of pouvoir de guerre as formulated by the Council of State had no basis in the Constitutional Laws of the Third Republic.[4] Nézard asserted that the Constitutional Law of February 25, 1875 charged the President of the Republic with the execution of the laws--by legal means--and he insisted that, with the exception of budgetary matters which could be dealt with by

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[1]France, Conseil d'Etat, 8 juin 1923, "Sieur Michel," Recueil, p. 472.

[2]France, Conseil d'Etat, 27 juin 1924, "Chambre syndicale des pâtissiers, confiseurs des Alpes-Maritimes," Recueil, p. 380.

[3]A. Esmein and Henry Nézard, Droit Constitutionnel, II, (8th ed.; Paris: Recueil Sirey, 1927), p. 103.

[4]Ibid.

special laws,[1] the doctrine advocated by the Council of State could not be justified short of a general law analogous to Article 14 of the Charter of 1814. This type of authority certainly was not provided for by the fundamental laws of the Third Republic.[2] The Constitutional Laws, in Nézard's interpretation, provided no special powers applicable in emergency situations outside the compass of ordinary procedures. Consequently, in dire crisis, the recourse of the Government was of necessity to illegal processes with legitimation to be sought afterwards in the form of a bill of indemnity or other legalizing procedure.[3] In the doctrinal interpretation of Nézard, the Government of the French Republic may in grave crisis have the duty to act contra legem, though it never has the legal right to do so.[4]

Following this same line of approach, both Nézard and Léon Duguit reject the attempts of various French Governments to deduce an exceptional ordaining power from the law of August 9, 1849, which instituted the modern state of siege. Their contention is that the Government is empowered to apply expressed authority conferred upon it by the state of siege, but that such powers do not in any form include competence to issue general rules in execution of the laws.[5] The state of

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[1] Ibid.

[2] Ibid.

[3] Ibid., pp. 104-05.

[4] Ibid., pp. 103-05; Sieghart, p. 271.

[5] Ibid., pp. 102-03; Duguit, Traité..., III, p. 752.

siege may provide a limited ordaining competence within the scope of its circumscribed and defined statutory authority, but it offers nothing more than this competence to the Executive.

However, in contrast to Nézard, Duguit takes the position that the Government has a right and a duty to issue ordinances contrary to operative law when such ordinances are considered necessary to the defense of established society.[1] In this interpretation it becomes the responsibility of the Courts to enforce Executive authority based on droit de nécessité by sustaining ordinances in modification, suspension, or even abrogation of existing statutes provided that certain conditions are fulfilled.[2] This analysis does not give the Executive carte blanche to extend the direct ordaining power of the President of the Republic in time of crisis. It recognizes the legality of extraordinary procedures in specific emergency situations and condemns the indiscriminate flaunting of legal form which transpired during the First World War. It does not approve of the continual use of extraordinary powers based upon the extension of the ordaining power when a responsible Legislature is in session.[3]

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[1]Duguit, Traité..., III, pp. 752-53.

[2]Ordinances can be issued contra legem only if the following conditions are fulfilled: (1) if there is a state of war or an armed insurrection or a general strike affecting the public services; (2) if Parliament is not assembled and it proves impossible to reassemble it in time to pass the necessary measures; and (3) if the ordinances are submitted to Parliament as soon as possible. Duguit, Traité..., III, p. 755.

[3]Ibid.

There is no question that the competence of the Executive under Article 3 of the Constitutional Law of February 25, 1875, to "surveille et assure l'exécution [des lois]" was expanded out of all proportion to traditional constitutional usage.[1] During the course of the First World War, these expansions of Executive competence proved to be effective if not wholly satisfactory crisis devices. Despite the rationalizations of the Council of State and references to the fact that necessity knows no law,[2] these procedures remained essentially extra-legal--failing to achieve intrinsic legality--though contributing handsomely to the efficiency of war government.

French doctrine[3] was even less willing to accept the concept of delegation of legislative competence to the Executive than it was to approve of extraordinary expansion of the ordaining power of the President of the Republic. The majority of French constitutional lawyers rejected the concept of

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[1]Since the substitution of Article 13 of the Charter of 1830 for Article 14 of the Charter of 1814, predominant constitutional usage has emphasized that ordinances in execution of laws were without authority to violate the existing law.

[2]The law of necessity received a classic statement in Josef Kohler's Not kennt kein Gebot which set forth a philosophical justification of the German invasion of Belgium.

[3]"Doctrine, a term in use since the nineteenth century, signifies the body of opinion on legal matters expressed in books and articles. The word is also used to characterize collectively the persons engaged in this analysis, synthesis, and evaluation of legal source materials, members of the legal profession who devote substantial attention to scholarly work and acquire reputations as authorities." As an organized body of legal opinion, doctrine is in no sense a binding guide to judicial decision. Its persuasive authority is completely dependent upon the regard for legal scholarship in France and the need for critical evaluation in modern case law development. René David and Henry P. De Vries, The French Legal System, pp. 122-26.

delegation of legislative power because they felt that it could not be reconciled with the existence of a rigid constitution which entrusted the legislative power to Parliament and the executive power to the Government. In order to explain the fact of empowering statutes they evolved a variety of theories all built on the assumption that enabling acts do not in reality transfer the legislative power but only extend the ordaining power of the Executive. Thus, they accepted the fact of enabling statutes but denied that the power actually transferred was legislative power--a most ingenious but unsound subterfuge.

Jurisprudence, on the other hand, was quite willing to accept the possibility of delegation and of judicial control. This should not be interpreted to imply that the Council of State considered legislative delegation to the Executive as a constitutional procedure, for this is not a decision which the Council of State or the Cour de cassation is entitled to make, as it is a well-established principle that the French Courts are not entitled to examine the question of constitutionality. Administrative courts are not the guardians of the Constitution--only guardians of the principle of legality within the administration.[1] As a consequence, jurisprudence has never questioned the force of law of decrees issued as a result of enabling statutes. Any decree with a slight connection to the aims laid down in enabling laws have been accepted as

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[1]Sieghart, p. 287.

valid,[1] although ordinances unconnected or in obvious excess of clear-cut limitations of the law have been declared ultra vires.[2]

In defense of the application of these extraordinary procedures, emphasis was placed upon the extension of regulatory powers vested in the President of the Republic[3] rather than upon parliamentary delegation: nevertheless, the reality of the incapacity of Parliament could not be hidden nor fully defended. What the French nation required at this time was viable and, if possible, constitutional crisis institutions capable of supporting vigorous governmental action.

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[1] Ibid., p. 288. See also: France, Cass. crim., 22 fevrier 1939, "Aubert, Gruneberg," Recueil Sirey, 1940, I, p. 1.

[2] Ibid., p. 288. See also: France, Conseil d'Etat, 24 juillet 1945, "Sieur X," Recueil, p. 166.

[3] But effectively utilized by the head of the responsible Government, the President of the Council of Ministers and his Cabinet.

CHAPTER IV

THE STATE OF SIEGE AND WORLD WAR I

It was hoped that a partial answer to the need for vigorous action could be found in the state of siege. At the beginning of World War I, France turned to this classic and most successful of all emergency procedures in the civil law world. It was in the state of siege that France sought the means to contract civil liberties and to adapt the local levels of government to the requirements of national emergency.

In Clinton Rossiter's analysis, it was in this typically French solution to the competing claims of freedom and authority within a constitutional government in crisis "that modern emergency government reaches its peak of institutional and legal perfection."[1] Rossiter emphasized that the "state of siege is eminently a product of history and eminently an institution of law . . . foreseen and methodized in detail by laws of Parliament . . . and yet for all its regularization by law . . . more a product of history than of legislative activity."[2]

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[1]Clinton Rossiter, Constitutional Dictatorship (Princeton: Princeton University Press, 1948), p. 79.

[2]Ibid.

It should be understood that crisis institutions as we know them in France developed after the Revolution of 1789. Before this time, it was "unnecessary to suspend rights . . . that [did] not exist or to augment powers that . . . were already absolute."[1]

As an institution, the state of siege originated as a strictly occasional military device, though it ultimately developed into a civil and political procedure. This conversion began with the law of July 10, 1791, which recognized the state of siege as something more than an ad hoc institution. This law prescribed that "concerning the conservation and classification of military areas . . . all authority with which the civil officers are clothed by the constitution for the maintenance of order . . . will pass to the military commanders"[2] in event of attack. Though clearly a military device, in this transfer of authority from the civil to the military one may find the seed of what we know today as the modern state of siege.[3]

This evolution from a military state of siege (état de siège réel) to a political state of siege (état de siège politique)--l'un qui est un fait, et l'autre qui est un fiction[4]--was given impetus by the law of the tenth Fructidor of

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[1]Ibid., p. 80.

[2]Carette: Lois Annotées, 1st series (1789-1830), p. 121, as quoted in Rossiter, p. 80.

[3]Ibid.

[4]Joseph Barthélemy, "Le droit public en temps de guerre," Revue du Droit Public, XXXII (January-March, 1915), pp. 139-40.

the Year 5 (August 27, 1797), which provided that rebellion as well as foreign invasion could justify the establishment of a state of siege. Based upon this initial distinction, a dichotomy was established and although the political state of siege was grossly abused by both republican[1] and imperial[2] regimes, it emerged as more significant than the military state of siege. The differentiation between the state of siege in its traditional sense (military) and that which is considered a perversion (political) must be understood as simple recognition of the fact that this institution originated as a device appropriate to the defense of a "besieged" area and that, in its evolution, it expanded far beyond the compass of its original premise.

In the political state of siege an open, civil area menaced by invasion or armed rebellion is regarded as besieged, which in fact is a fiction of traditional usage. The premise in the political state of siege is that the Government should have authority in an area comparable to that of a military commander responsible for a beleaguered fortress. The difference between the two situations was explained by the deputy Bardoux before the Chamber of Deputies on April 3, 1878, in the following manner:

> There is the military state of siege and the political state of siege: the former is a fact, the latter is a fiction; the one has for a goal the effectuation by

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[1]Abuse by the Directory as it sought absolute power.

[2]Napoleonic Decree of April 1, 1809, and December 24, 1811; see particularly, France, Journal Officiel de la République française, Débats Parlementaires (April 3, 1878), p. 3890.

> all means, even those contrary to rights of property, of the protection of the honor of the command of a fortified place, and the latter has for its objective the substitution of an exceptional political state for a legal state in order to suppress public liberties.[1]

The Constitution initiating the Second Republic, that of November 4, 1848 (Article 106), promised a fundamental law regulating the forms and effects of the state of siege. When this pledge was redeemed by the passage of the law of August 9, 1849, the distinction between the military state of siege, which was dependent upon laws and decrees handed down from the Empire and Revolutionary times, and the political state of siege, based upon this new legislation, was embedded in the constitutional order of society.

For the Third Republic the effects of the implementation of the political state of siege were regulated by the law of August 9, 1849 and that of April 16, 1916. This institution exhibits three predominant characteristics. First, the military establishment is substituted for the civil power in the exercise of regular police functions. The substitution is a complete one although the civil authority may continue to exercise those powers of which it is not dispossessed by the military. (Article 7 of the law of August 9, 1849.) In essence the Government takes the military as its agent. The result is a system of collaboration between the two authorities. Consequently, arrêtés réglementaires of police, when taken by the military power, are sanctioned in the same manner

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[1] France, Journal Officiel..., Débats Parlementaires (April 3, 1878), p. 3892.

as they would be if they were issued by the civil authority, and the civil authority retains its competence in areas not touched by the military.[1]

Second, based upon Article 9 of the law of August 9, 1849, special and exceptional powers evolve upon the military authority: to make searches by day and by night in the private residences of citizens, to deport liberated convicts and persons not having residence in the areas placed under this special regime, to direct the surrender of arms and munitions and to proceed to search for and to remove them, and to forbid publication and meetings which are judged to be of a nature to incite or to sustain disorder.[2]

Third, the distinction between the military state of siege and the political state of siege is recognized. The military state of siege is applicable only to places under attack and is uniquely designed to protect besieged areas. It is regulated by the aforementioned law of July 10, 1791, and by diverse decrees, notably those of December 24, 1811 and of October 4, 1891. In this type of situation, the military commander is the judge of the events which require the imposition of the military state of siege. He has the authority to apply this institution in situations where he concludes that such imposition is absolutely necessary to the defense of the besieged area.

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[1]Maurice Hauriou, Précise élémentaire de droit constitutionnel (Paris: Recueil Sirey, 1925), p. 166.

[2]Ibid.

The law of August 9, 1849, regulating the political state of siege, did not conform in its organizational aspects with the government established by the constitutional laws of 1875. Consequently, in the spring of 1878 a new law regulating this institution was introduced, debated, modified, and passed in the legislative Chambers. The law of April 3, 1878 did not supersede the titles of the 1849 law which dealt with the effects of this device. It simply brought the old law into conformity with the new constitutional order by detailing procedures for the establishment and termination of the political state of siege which were consistent with the structural forms of the Third Republic. Thus, the two statutes combine to form the legal basis for the political state of siege. The law of August 9, 1849 controls the application of this institution, while the law of April 3, 1878 regulates its organization.

The state of siege, under the terms of the law of 1878, can be declared only in the event of imminent danger--that is, war or internal armed insurrection. In this sense it is a preventive device rather than a repressive one. It must be declared by law for a fixed period of time and applied to a specifically designated area. At the expiration of the stipulated period of application, the institution ceases to exist unless new legislation revives its applicability. (Article 1 of the law of April 3, 1878.) If the Chambers are in session, the effectuation of the institution is by legislative

declaration; but in the event the Legislature is adjourned, the President of the Republic may initiate the political state of siege on the advice of the Council of Ministers. In this circumstance the Chambers may assemble de plein droit two days after the original declaration. (Article 2.) With one most significant exception, the political state of siege cannot, even provisionally, be implemented by the Head of State if the Chamber of Deputies is dissolved. The important exception to this rule is the condition of foreign war. In this extreme circumstance the President of the Republic, on the advice of the Council of Ministers, may declare the political state of siege in operation in areas threatened by the enemy on the condition that the electoral colleges are convoked and the Chambers reassembled within the shortest possible period of time. (Article 3.) It then follows that in the instance of war, the reassembled Chambers may make the ultimate decision as to any further application of the institution.

The technique used to terminate the political state of siege is dependent upon the manner in which the institution is implemented. If the declaration is by law, the Chambers being in session, and the duration of its application being determined by law, it is raised automatically at the expiration of the legally approved period of force, unless a new law is passed prolonging its effect. (Article 1.) On the other hand, in the cases covered by Articles 2 and 3--the Chambers adjourned or the Chamber of Deputies dissolved--the Chambers, as soon as they are reassembled, have the authority to maintain

or to lift the institution. In case of disagreement between the two Chambers, the institution may be concluded de plein droit. (Article 5.)

The effect of the political state of siege is the creation of an exceptional regime based on the law. Under such circumstance certain guarantees of individual liberty may be suspended and the civilian population may be subjected to the jurisdiction of the military courts, where crimes and offenses are involved that threaten the security of the State. Civil courts are powerless under such a regime if local military courts desire to exercise competence. It is well known that before a court-martial, the guarantees that the accused ordinarily enjoys are stringently restricted, the penalties are more severe, and procedure becomes more rapid. The result can be no other than the expansion of the facilities to guarantee public order at the expense of individual liberty.

On the local level the prefect no longer has the primary duty of maintaining order, i.e., responsibility transfers to the commanding military official in each district. The communal mayor no longer issues arrêtés on matters of municipal police. These orders are issued by the local army commandant. Thus, vigorous military authority is substituted for considerations of local politics and public relations.

As has been pointed out,[1] the law authorizing the military to exercise these powers does not oblige them to do so in

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[1] Supra., p. 66.

full.[1] The mayor, as an example, retains the police powers of which he has not been expressly relieved by the military authority.

The practice of World War I shows that under this type of authority the individual domicile is no longer inviolate. Summary searches and seizures become a normal occurence. The freedom of assembly is prohibited in order that the police might move quickly against the professional agitator. The press is supervised, presumably in the national interest. There can be no question but that the political state of siege is a severe regime. It cannot be otherwise, as failure would mean the destruction of the legal order. If the situation is so desperate as to demand the institution of the state of siege, the life of the State would normally hang in the balance. This is sufficient reason for the restriction of individual liberty and the use of summary procedures.

The political state of siege emerged in the twentieth century as an institution of positive law whose objective was

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[1]Only the exceptional powers enumerated on page 66--searches and seizures, deportation, surrender of arms and munitions, prohibition of publications--pertain especially to the military authorities, who may in no case hand over the responsibility for them to the civil authorities. See: "Ministère de la guerre, instruction réglant l'exercise des pouvoirs de police de l'autorité militaire sur le territoire national en état de siège," (October, 1913) as noted in Pierre Renouvin, The Forms of War Government in France (New Haven: Yale University Press, 1927), p. 12.

the defense of the constitutional order (légitime défense de l'Etat). It made absolutely no provision for the suspension of the constitutional order. It was premeditated on the assumption that the legal powers of government are sufficient to meet severe threats to the public order. Consequently, as an institution, this procedure legitimatizes the temporary and selective augmentation of military responsibility according to statutory principles and within the scope of the established regime of legality. It is a legal procedure prepared in advance of difficulty and dedicated to the assurance of order.

Constitutionally, during the regime of the political state of siege the Executive and Legislative powers remain in their normal relationship. There is no fundamental alteration of the organization of the public powers. As defined by law, modification and transference of competence takes place between two branches of the Executive power, i.e., the civil authority and the military authority. The great value of the political state of siege to the practice of emergency government is that it provides a vehicle for the legitimate transfer of selected police and repressive authority to the military under specified circumstances, in defined areas, and for limited periods of time.

It is a simple fact that war and liberty do not go well together. When a sovereign nation is in a crisis situation, the particular demands of the individual tend to recede into the background. Respect for traditional rights become an encumbrance that the State finds most difficult to bear.

Considerate treatment and wide indulgences are a contradiction to a "garrison state" fighting for its life in foreign war or in a nation racked by internal revolt. In particular, war demands strict discipline and prompt obedience. An increase in governmental authority is, by the very nature of the situation, a necessary corollary of major emergencies. De Tocqueville wrote that: "War cannot fail to add enormously to the functions of civil government; almost invariably it concentrates in the hands of the latter the direction of the whole population and the disposal of everything."[1] This may be a well-understood doctrine, but the French constitution-makers of 1875 did not provide for such an eventuality.

> The dispositions included in French law for use at such a time were very sparse and fragmentary; their objective was very limited and they did not attack the main problems of administration and government; they did not modify the normal relations between the Executive and the Legislature.[2]

At the outbreak of World War I, in an attempt to maintain internal order during the chaotic period of general mobilization, France turned to the primary instrument in her crisis arsenal--the political state of siege. On the second of August, 1914, President Poincaré placed the entire French nation under this exceptional regime. At the same time, he convoked the Senate and the Chamber of Deputies into extraordinary session though this was not a constitutional necessity, as the

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[1]Alexis de Tocqueville, Democracy in America (New York: The Appleton and Company, 1904).

[2]Ibid.

Legislature had every right to meet two days after the implementation of the institution.[1] However, such recognition of the Legislature was consistent with the philosophy of cooperation between elements of government inherent in the concept of Parliamentary government and it indicated respect for two significant points: One, that the political state of siege was a legal instrument ultimately responsible to the holder of national sovereignty, the Legislature, and, two, that the Executive is dependent upon the cooperation, indeed, upon the participation and approval, of the Legislature if it expects to create a viable war organization.

On August 5, 1914 a law regulating the organization of the political state of siege was promulgated. It was passed in the precise form stipulated by the Government.[2] In this way France faced up to the emergency and implemented the available crisis institution in the manner deemed expedient by the responsible Executive authority. Ironically, this procedure, dedicated to the defense of the legal order, was implemented

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[1]Article 2 of the law of April 3, 1878. Rossiter, p. 82.

[2]The law of August 5, 1914, regarding the state of siege stipulates that: "The state of siege is declared . . . in 86 French departments, the territory of Belfort, the three departments of Algeria and is hereby maintained for the duration of the war. A decree of the President of the Republic, issued on the advice of the Council of Ministers, can lift the state of siege and, after it has been lifted, reestablish it in all parts of an area. The present law, deliberated upon and adopted by the Senate and the Chamber of Deputies, is to be executed as the law of the State." France, Journal Officiel... (August 6, 1914), p. 7126.

in a fashion inconsistent with prevailing opinion and interpretation regarding the controlling law of April 3, 1878. Three aspects of the August, 1914 implementation of the political state of siege were inconsistent with previously accepted usage: the application of the regime to the totality of Nation; its implementation for the duration of the war; and the grant of authority to the President of the Republic to lift the institution and then to reestablish it if necessary. These were completely outside the purview of the 1878 law. However, it is important to realize that the France of 1914 was not the France of 1849 or of 1878. The war of 1914-1918 tended to be a conflict between nations and peoples involving the totality of the populations rather than dynastic confrontations. New military techniques were employed which involved larger number and greater areas than ever before. With the French nation under direct attack, it was logical, indeed, absolutely necessary, to expand the concept of "imminent danger"[1] to include the entirety of the State.

During this period the military state of siege remained a repressive[2] institution available for the defense of a besieged area, while the political state of siege emerged as a

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[1]Article 1 of the law of April 3, 1878: "The state of siege can only be declared in the event of imminent danger resulting from a foreign war or an armed insurrection . . . " Rossiter, p. 82.

[2]Gaston Jèze, "L'Etat de Siège," Revue du Droit Public, XXXII (October-Décember, 1915), p. 704.

preventive[1] institution available for the defense of a besieged area. It was under the procedures applicable through the institution of the political state of siege that the great portion of France lived from August 2, 1914 until October 12, 1919.

In response to criticism regarding the length of application of the political state of siege, the President of the Council of Ministers, Viviani, told the Chamber of Deputies that:

> So long as there must be between the interior and the front, a constant movement of troops, a whole system of military preparations, of transport of every kind in order to supply the military authorities with what they need, will you tell me how, looking at the matter solely from the outside point of view, I am to set about abolishing the state of siege without real and serious detriment to the national defense?[2]

Nevertheless, the Cabinet decided, on September 1, 1915, to restore to the prefects and mayors of the interior zones all of their normal police functions. As a consequence, commandants in these areas lost the powers they had derived from the law of August 5, 1914,[3] though they did retain the enumerated special competences delegated by the terms of Article 9 of the law of 1849.[4] However, civil authority was again suspended in the department of Loire-Inférieure in July of 1917 in order to prevent spying on the disembarkation of American troops, and

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[1] Ibid.

[2] Renouvin, p. 32.

[3] Supra., p. 73, Note 2.

[4] Supra., p. 66.

the exceptional powers of the military commandants were simultaneously enlarged[1] in Nantes and Saint Nazaire and in nearly all the arrondissements from Bordeaux to Brest, as well as those along the Channel and Mediterranean coast.[2]

At the time of the Armistice, France could be said to be divided into three zones in terms of the application of procedures foreseen by the state of siege. Near the area of combat--the army zone--the Commander-in-Chief exercised all the powers provided by the law of 1849 and the decree of August 10, 1914.[3] The coastal zone was subjected to an "intensified"[4] program under which the military enjoyed special powers spelled out in the decree of July 6, 1917;[5] and the remaining areas--the interior zone--from September 1, 1915 onward operated under a comparatively liberal regime wherein the civil authority resumed the full exercise of its authority.

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[1]Circular of the Minister of Interior of September 1, 1915, and of the Minister of War of September 8, 1915. Renouvin, p. 32.

[2]Renouvin, p. 33.

[3]The decree of August 10, 1914 placed the northeastern departments of France in a state of war (état de guerre); and a second decree, of September 3, 1914, extended this to the entirety of the nation. The major purpose of these decrees was the modification of the procedures of courts-martial in the interior of the country, i.e. a person could be arrested for seditious libel or seditious speech (délit d'opinion) and could be tried within 24 hours after being summoned.

[4]Renouvin, p. 33.

[5]Supra., p. 75 ff.

Despite the fact that regulations issued in the application of the political state of siege tended to have the practical effect of law,[1] it can be said that the state of siege did not of itself provide the French government with any extraordinary powers of decree. In essence, the state of siege remained an institution dedicated to the defense of law. It provided facilities for significant transfers of competence--but transfers within the regime of legality. We conclude that deviations from traditional interpretations do not negate its fundamental usefulness as a primary emergency institution of crisis government.

In judging the efficacy of crisis institutions, one comes face to face with the question of the relationship of such institutions and Parliamentary government. Are the two concepts mutually exclusive? In the last analysis can mixed government--Parliamentary and Cabinet government[2]--cope with a sustained emergency?

Certainly, warfare is one severe test of the strength and adequacy of a political system. The very circumstances of conflict tend to invest the Executive, in relation to the Legislature, with singular authority.

If Parliamentary government is to provide adequate leadership in a wartime crisis, the principal agent of authority must

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[1]Particularly with regard to the application of Article 9 of the law of August 9, 1849.

[2]Supra., p. 10.

be the Executive power. By World War I the day had passed when Parliament could exercise direct tutelage over the administrative agencies of government. In 1914 France looked not to a deliberative Assembly with its interminable delays but to an agency which promised immediate action--the Executive.

On August 4, 1914 the Parliament of France confirmed the Presidential proclamation of August 2 establishing the state of siege; expressed its confidence in the Government; passed legislation to protect citizens in the military service from foreclosure and from dunning from creditors;[1] extended modest assistance to families of members of the armed forces who were in need;[2] authorized the President of the Republic, upon the advice of the Council of State and the Council of Ministers, to decree an increase in the number of bank notes that the Bank of France could issue and to order the opening of supplementary credits to finance the war;[3] and then adjourned. A war of six months or less was expected; the logical repository of the faith and confidence of the Nation was the Executive power; Parliament placed its confidence in the Government and, under its control, in the military might of France; and a successful termination of hostilities was expected in the immediate future. Though some 200 Parliamentarians joined their military

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[1]France, Journal Officiel... (August 6, 1914), p. 7127.

[2]Ibid.

[3]Ibid.

regiments,[1] the legislative session was not closed. It was possible for the Chambers to reassemble again on the summons of their respective Presidents. However, in September, 1914 the situation became so critical that the seat of Government was transferred to Bordeaux and the President of the Republic terminated the session. He cited "circumstances," the urgent needs "more numerous every day," and the presence under the colors of a great many members of Parliament "who had neither the wish nor the ability to leave the ranks."[2] There were protests against the prorogation of the holder of national sovereignty in a time of grave emergency. Such complaints

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[1]There was no adequate legislation setting forth the functions of Parliament during war. Its members were subject to military service. In the interest of preserving the truce between Republicanism and Reaction which the Constitution of 1875 represented, the Chambers had never taken the step of exempting its members from military service. To have done so would have invited the derision of the conservatives and their military allies, who in the best of circumstances had a thinly veiled contempt for "bourgeois politicians." Various half-hearted efforts had been made to confer upon the mobilized deputies a dual role of combatant and honorary legislator, but neither War Minister Georges Boulanger nor such successors as Maurice Berteaux and Louis L. Klotz succeeded in giving definite status to the wartime duties of the deputies. The only clarification of any sort was the decision of Premier Paul Doumer and War Minister Eugène Etienne, stated in the ministerial circular of February, 1906, to grant deputies, in event of war, a period of eight days within which to join their regiments. The implications of this policy were twofold: (1) Parliament was robbed of many of its most vigorous members in a period of great national crisis and (2) Parliamentarians serving in the military returned to Paris when on leave and used closed committee sessions as platforms upon which to criticize military policy. Jere Clemens King, Generals and Politicians (Berkeley: University of California Press, 1951), pp. 16-17.

[2]Renouvin, p. 98.

were based upon reasonably sound legal ground, too, as it could be argued convincingly that the state of siege implied the permanence of legislative sessions.[1] But the violence of war demanded a Government of authority and the Nation seemed willing to do without a Legislature for a period of time. As a result, the Chambers were not reconvened until December 22, 1914, and then the purpose was simply to give sanction to decrees that had been taken previously and to vote provisional credits for the continuation of what was to have been a war of only a few weeks. Ultimately they reassembled de plein droit in January, 1915, as was their constitutional prerogative.

During the fall of 1914 it may have seemed that the Executive governed "alone, without the cooperation or control of the Legislature."[2] In an immediate and direct sense this judgment was not far from the truth. However, it should be recognized that the Chambers approved of, in fact created, a major portion of the facilities available to the Executive in this period of national emergency--this was cooperation. At the same time, a substantial portion of the decrees issued by the Executive required Parliamentary confirmation upon the reassembling of the Chambers--this was control, indirect though it may have been. To its credit, the Viviani regime had no intention of evading the obligations of its "responsibility" to the sovereign Parliament. Nevertheless, the imposition of

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[1] Supra., p. 79, Note 1.

[2] In a nation faced with dire emergency, the first duty of a responsible political authority is to seek out methods adequate to the defense of the legal order.

this exceptional regime suspended the traditional political life of France and the Government was invested, as much on its own authority as by statute, with an authority tantamount to virtual dictatorship. This seeming contradiction--which is actually the problem of the relationship of constitutional dictatorship to constitutional democracy--was achieved by the application of procedures which we label crisis institutions to a representative constitutional democracy.

The convocation of the Senate and the Chamber of Deputies in the singular conditions of the winter of 1915 underlined problems of parliamentary procedure whose solution would determine, to a substantial extent, the role to be played by the Legislature in the 1915-1918 period. The organic procedure of the representative assemblies was modified in an attempt to bring these bodies into harmony with the necessities of the times. First, although Parliament rarely sat for more than eight or nine months a year, the Chambers remained in permanent session after January, 1915, until the closing of the ordinary session in 1920.

Second, the Government now waived the privilege of issuing decrees of prorogation. This may have been an attempt to remain consistent with the implications of the political state of siege, although it seems more likely that the Executive wished to indicate its awareness of the interdependence of administrative and legislative policy.

Third, procedure was speeded up. Legislation of a permanent nature was required and tradition demanded that the

Chambers should carry out some semblance of their regular functions. In 1917 a special procedure was introduced which allowed the Cabinet to require a vote within twenty-four hours of the introduction of a bill if its passage was deemed absolutely necessary in the judgment of the Government. In this way a strong regime, as that headed by Clemenceau, was able to gain the unquestioned legitimacy which only statutory procedure can provide and at the same time to move quickly and with decision.

Fourth, elections were adjourned for the duration of the war. With the country partially occupied, it was impossible to hold elections. When the mandate of one third of the Senate expired in 1915, the only reasonable solution under the circumstances was to extend the mandate. This was accomplished by the law of December 22, 1914. A similar solution was adopted for municipal councillors, and in 1918, when the Chamber of Deputies neared the end of their term, the same solution was applied.

Government and Army were charged with the active conduct of the war and as such they leaned strongly toward the use of arbitrary measures; while Parliament, backed more and more by public opinion as the war became drawn out over the years, provided a check upon these tendencies. The result was a somewhat uneven balance between power and limitations, between dictatorship and democracy, between the demands of war and the demands of democratic tradition.[1] Perhaps it is true that

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[1]Rossiter, p. 107.

"the importance of Parliament in the war government lay more in its well-played role as defender of democracy than in its legislative activities."[1] Defender of democracy, legislator, or both--the role of the Chambers and, consequently, the role of the power of the Executive, underwent substantial modification during the First World War.

In normal conditions the law can be modified only by vote of the Legislative Chambers, and the authority to incur expenditures and to collect taxes is available only under a yearly grant by Parliament. Specifically, these essential functions were seriously compromised during this period.

In the first place, by the laws passed on August 4 and published on August 5, 1914,[2] the Government received from the Chambers the authority to make ordinances upon special parliamentary delegation. This authority was not in the form of general enabling acts but constituted specific delegations of authority for limited purposes. Thus, a law of August 5 provided that:

> . . . during the duration of hostilities, the Government is authorized to take, in the general interest, by decree in Council of Ministers, all the measures necessary to facilitate the performance or suspend the effect of commercial or civil obligations.[3]

The Government, as a result, was given the authority to institute a moratorium by Executive decree. It was authorized

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[1] Ibid.

[2] Supra., pp. 73-74.

[3] France, Journal Officiel... (August 6, 1914), p. 7127.

to open supplementary and extraordinary credits, in the absence of the Chambers, which it deemed necessary for the national defense. There can be no question that this type of activity was outside the realm of regular practice and that it constituted an exceptional expansion by the Cabinet of the right--vested in the President of the Republic--to make ordinances in the execution of the law. Constitutional usage, which contributes significantly to the development of the ordaining power in the execution of the laws, had established that no ordinance issued in completion of a law could alter or even suspend any provision contained in any existing law; in other words, such ordinances have no force of law (loi). It was also acknowledged that no new penalty and no new tax could be established by ordinance, which is just another way of stating that the fundamental rights and freedoms of persons and property can be restricted by formal laws only.[1] Of course, these measures were subject to parliamentary ratification upon the reassembling of the Chambers. However, before ratification they dealt with the subject matter of law without possessing the form of law. It is true that ultimately their validity depended upon a posteriori approval. But this is precisely the point: confirmation by Parliament came after the fact; it followed rather than preceded the application of the provisions of the ordinances. Quite often in this fast-moving period of emergency

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[1]Sieghart, pp. 261-62.

the objectives envisioned by these decrees were capable of achievement before the decrees were submitted to Parliament. Thus, on many occasions the Government presented the authority competent for the passage of legislation with a fait accompli. Under this regime decrees were issued in modification and in derogation of the law. For example, on September 27, 1914, the Government proclaimed a decree forbidding trade with the enemy and on January 7, 1915, a decree was issued prohibiting the sale of absinth and the opening of new premises for the consumption of alcoholic beverages. Perhaps these ordinances were necessary, but whether they were or not, they were in direct derogation of existing law (loi).

Other decrees, without going directly counter to the law, suspended its application. This was true of the decree of September 6, 1914, setting up special and summary courts-martial, and the decree of September 9, 1914, permitting the Government to dispense with the services of General Officers, irrespective of guarantees secured to them by law. Consequently, during the first few months of the war, while Parliamentary government was not suspended, its spirit was temporarily circumvented. This expansion of the regulatory power (pouvoir réglementaire) of the Executive moved the Government further into the area of the competence of Parliament. The perversion of regular procedure in the fall of 1914 and the spring of 1915 could not be completely legitimatized by the subsequent Parliamentary ratification and conversion of these

decrees into law, i.e. the laws of March 30, April 10, and August 3, 1915.

It cannot be denied that, in the multifarious constitutional background of France, precedent can be found for either the modification or the suspension of the law by decree. For example, Article 34 of the law of September 17, 1814, permitted the Government to allow or to suspend by decree the exportation of agricultural products. Decrees issued under this authority became valid upon promulgation but were ultimately subject to Parliamentary ratification--at the present session or, if the Chambers were adjourned, at the succeeding session. This same type of authority was given to various Governments under analogous conditions by the laws of June 15, 1861; March 29, 1887; January 11, 1892; December 17, 1897; and July 12, 1906. Also, the law of March 29, 1910, Article 3, section 8, conferred a similar latitude of discretionary authority upon the Council of Ministers to take appropriate action via decree against foreign nations guilty of interfering with French commerce.[1]

Nevertheless, the fact remains that a substantial portion of the Executive ordinances issued in this period were issued without any particular sanction in statute law or in the Constitutional Laws of the Third Republic. The political state of siege conferred no general authority upon the Government to undertake emergency legislation and the specific delegations

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[1]Barthélemy, p. 557.

by the Legislature to the Cabinet, even if widely construed, were insufficient to cover the Executive activities in the areas of military matters, tariffs, control of raw materials, and food-rationing.

In the first months of World War I, the Government encroached upon the traditional competence of the Legislature through extremely latitudinarian constructions of its regulatory powers supplemented by irregular if not illegal ordinances. Despite the fact that the great majority of them were ratified subsequently by Parliament on the presumption that the Legislature would have taken similar action had it been in session,[1] at the time of issuance many were bereft of any basis in legality with the possible exception of the Executive initiative--what the jurist Barthélemy has termed the "initiative envahissante de l'exécutif."[2]

The essential problem here is that the Government, without receiving the competence pleins pouvoirs,[3] undertook authority in the domain reserved to the legislative power. Not only was the traditional relationship between law and ordinance undermined, but the method of transfer of competence was at best quasi-legal. Nevertheless, the doctrine of necessity

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[1]Rossiter, pp. 113-14.

[2]Ibid., p. 112.

[3]Pleins pouvoirs refer to laws which provisionally enlarge the regulatory power (pouvoir réglementaire). They accord a regulatory authority of an exceptional nature to the Executive--notably the authority to modify or to abridge, by means of decree, laws that are in effect.

(droit de nécessité) is meaningful in situations in which the security of the State is threatened and legal devices prove to be inadequate for the requirements of the constitutional order of established political society. President of the Council, Briand, gave precise expression to this philosophy on the occasion of a debilitating railroad strike in 1910:

> If, in the face of an eventuality which would put the country in danger, the government has not found in the law the means to defend the existence of the nation by safeguarding its frontiers, if it had not been able to assure itself of the dispositions of its railroads, that is to say instruments essential to the defense of the nation--in short, had it been necessary to resort to illegal means, it would have resorted to them; its duty would have been to resort to them.[1]

Briand recognized the necessity of the maintenance of governmental authority in a crisis. In 1910 he was willing to use illegal means if required to protect the integrity of the State. When again President of the Council of Ministers in December, 1916, Briand sought extraordinary powers, but he recognized the value of clothing this authority in a regularized process. On December 14, 1916 Briand demanded urgent consideration of a bill sponsored by the Council of Ministers which would, if passed, authorize the Government:

> to take, by decrees adopted in Council of Ministers, all measures, whether by addition or exception to the laws in force, which shall be called for by the defense of the country, in particular as regards agriculture and industrial production, the equipment of harbors, transport, food supply, hygiene and public health, the sale and distribution of commodities and

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[1]Gustav Mandry, Das Ausnahmerecht in Frankreich (Tubingen: H. Lapp, 1901).

produce, and their consumption.

If any of these decrees involved the opening of a credit, application for it should be made within a week.

To each of these decrees penalties may be attached, not exceeding imprisonment for six months and a fine of 18,000 francs.[1]

Briand's request for pleins pouvoirs was challenged in the Chambers, and the Prime Minister immediately made a calculated withdrawal. He announced that due to a copyist's error the phrase "in particular" had erroneously been allowed to remain, whereas the Government had determined to remove it. Thus, the Government withdrew from the position of demanding "general" enabling authority and limited its request to the sphere detailed in the statute.[2] Nevertheless, the Government bill was much broader in scope than anything the Parliament of the Third Republic had been willing, previously, to vote to the Executive. The Chamber of Deputies made short work of the bill. On December 29, 1916, the committee which considered the bill reported to the Chamber that the "Government is asking for a delegation of legislative power," which, if enacted, will mean "a repudiation of the principles of French public law and a return to a confusion of powers. To delegate the legislative power would be an abuse of the electorate's confidence, and a violation of the constitution."[3]

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[1]Herbert Ginsten, Les Plein Pouvoirs, trans. E. Soderlindh (Paris: Librairie Stock, 1934), p. 19.

[2]Renouvin, p. 106.

[3]France, Journal Officiel..., Annales de la Chambre, Débats (December 13, 1916), p. 2678.

Their conclusion was that the Chamber had no power to cede its prerogatives; it could only do so by a revision of the constitution.[1]

It was pointed out by the rapporteur of the committee that the Government "had been free, for two years, to issue all the decrees it wished: it had issued only 180; during that time the Chamber had adopted 248 bills, and 45 of these had passed all stages within ten days of submission."[2] Consequently, the committee felt that the legislative work had not been inferior in extent to the work of regulation, and the Chamber had fully demonstrated their competence to deliberate and to execute legislation competently and with all speed as the demands of national survival required.

Finally, the deputies were not satisfied with two major constitutional irregularities manifest in the Briand enabling act. First, it was most curious that the Executive agent competent to issue such decrees--the President of the Republic--was not mentioned in the bill;[3] and, secondly, that there was no provision for ratification by the Chambers of decisions taken by the Government under this proposed grant of authority. Decrees so rendered went immediately into force and were not subject to abrogation by Parliament by any means other than by

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[1]Ibid.

[2]Renouvin, p. 106.

[3]Louis Rolland, "Le pouvoir réglementaire du Président de la République en temps de guerre et la loi du 10 février 1918," Revue du Droit Public, XXXV (October-Décember, 1918), p. 547, Note 1.

ordinary legislation.[1] Reaction was overwhelming and the bill was killed in committee by a vote of 23 to 2. As a result, France continued to combat aggression without the questionable benefits of a generalized grant of authority to the Executive. The Legislature did amend its standing orders to admit a "special procedure in case of urgency"[2] but it did not, at this time, embrace the enabling act (pleins pouvoirs) as a crisis instrument.

The Chambers came closest to a renunciation of their legislative capacity a single year later when, in rather direct contradiction to their position of 1916, they honored the Clemenceau Cabinet's request for a general authority to issue decrees regulating the national food supply. So it was that with the passage of the law of February 10, 1918,[3] responsibility

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[1]Tingsten, p. 20.

[2]Under the standing orders adopted by the Chamber of Deputies on January 27, 1917, if the Government declared a bill to be "urgent" that bill would be presented to the appropriate parliamentary committee on the day after its presentation; the committee had five days in which to discuss it and to consider amendments; at the public sitting only the rapporteur, on behalf of the majority of the committee, a speaker selected by the minority, and the movers of amendments that had been rejected in the course of preliminary proceedings, might be heard. As a result, it was no longer possible to improvise new amendments in the course of the discussion. However, in the case of absolute necessity, the Government could demand that a bill be considered and a vote taken within twenty-four hours.

[3]The law of February 10, 1918, regarding National Food Control defined its scope and authority in its first article: "During the duration of the war and the six months which follow the end of hostilities, decrees can be issued to regulate or to suspend, with a view to insuring the national food control, the production, the manufacture, the circulation, the auction,

was placed upon the Head of State[1] to issue decrees upon subject matter which the Parliament had ceased, provisionally, to reserve to itself. Thus, by a comparatively generalized statute law, the Executive moved strongly into the sphere of competence of the Legislature. Clearly there was no attempt at this point to establish the Government as a second Legislature and to equip it with legislative powers, other than provisional specified transfers of competence for limited periods of time, although this law was the most extensive extraordinary grant of competence to this point in the Third Republic. It qualifies as a major enabling statute in that the regulatory power of the Government is provisionally enlarged to the extent that the Executive, in this instance for specified matters and for a prescribed period of time, is allowed to deal by decree with problems normally within the realm of the legislative power, and by implication may modify or abrogate laws that are in effect. In the sense that the authority evolves from law (loi),

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the putting up for sale, the detention or the consumption of articles of food serving to the nourishment of man and of animals. The intentions of the present law is applicable to the decrees rendered concerning the supply of fuel to the civil population . . . The intentions of the present Article will apply equally to the other substances of which purchasing by the State for the needs of the civil population is authorized by the law of April 20, 1916, concerning the taxation of the articles of food and substance. The decrees rendered by the application of the present Article will be subject to the ratification of the Chambers in the month which follows their promulgation." France, Journal Officiel... (February 12, 1918), pp. 1515-16.

[1]By stressing the use of decrees as the implementive device of the law of February 10, 1918, the statute emphasizes that it is only the authority of the President of the Republic

the enabling act must be regarded as a legitimate crisis institution. Despite the aversion of most French jurists to the concept of delegation, for practical purposes it must be recognized that the sovereign French legislature delegated competence to the Executive by the Food Control Law of 1918 and that this transfer of authority was achieved within the regime of legality. True, such events may have been the result of practical necessity and they may have been wiped from the statute books at the end of the war. Nevertheless, this law stands as a guidepost to further development of the enabling act as a crisis device. Compared to the unorganized illegality of the 1914-1915 period, this typeoof procedure offered the practice of emergency government some hope. Its metal would be tested again and again in the coming years, and as its spirit was perverted, it ultimately would make substantial contribution to the destruction of the regime whose defense had been its raison d'être.

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that is extended, not that of the Ministers, prefects, mayors, or any other executive agent. Rolland, "Le Pouvoir Réglementaire Du Président De La République...," p. 565.

CHAPTER V

ENABLING AUTHORITY

As important as enabling statutes became during the World War I era, there was never a complete renunciation by the Chambers of their legislative capacity. A general enabling act was refused to the Briand Government in 1916, and the only major instance of broad delegation during the War was the law of February 10, 1918, which gave the Clemenceau regime an ordinance power in the matter of food supply.

The practice, which was developed in the course of the War, of extending the executive power into the legislative domain established techniques which were followed after the end of hostilities. The first major peacetime example of what might be considered a parliamentary evolution is provided by the law of March 22, 1924. This project of law, which was initiated by the Poincaré Cabinet in January of 1924, demanded from the Legislature the delegation of special plenary powers (pleins pouvoirs spéciaux) to be employed to combat severe economic distress and the imminent collapse of the franc. The Government sought to issue decrees facilitating a reduction of six billion francs in the budgetary deficit and, consequently,

diminishing the sums which had previously been envisioned as necessary for the Government to borrow. These reductions were to be realized in part by a tax increase of approximately twenty percent[1] and in part by administrative reorganization,[2] diminishing governmental expenditures by one billion francs.[3] In the area of administrative reorganization, the Government requested the authority to take, provisionally, and notwithstanding the laws in force, the necessary measures. After five weeks of debate, this project was passed. For our purposes its First Article is significant:

> Some reductions of which the total must not be less than one billion francs will be effected in 1924 in the expenditures of the State.
>
> The Government is authorized, during the four months which follow the promulgation of the present law, to proceed by decrees rendered in Council of State, after having been approved in Council of Ministers; with all the reforms and administrative reorganizations which will bring about the realization of these economies. When the measures thus taken will have necessitated the modification of the laws in force, the decrees must be submitted to the sanction of the Legislature within a period of six months.[4]

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[1]The increase in revenue was expected to be 5 billion francs. Tingsten, p. 23. See, generally, Louis Rolland, "Le project du 17 janvier et la question des décrets-lois," Revue du Droit Public, XLI (1924), p. 42.

[2]A Commission under Louis Marin made an extensive investigation of the administrative organization of the French government and in November of 1923 issued its general report, which envisioned extensive reorganization, particularly the curtailing of the administrative authority of the arrondissements. It was expected that such reorganization would result in savings of some 650 million francs. Tingsten, p. 22.

[3]Rossiter, p. 120.

[4]France, Journal Officiel... (March 23, 1924), p. 2754.

It is interesting that the Government is given a minimum figure for reduction of expenditures but not a maximum. However, the capital point here is that the Government is not circumscribed in the realization of these economies by the laws in force at the time. Explicitly, the Government is delegated the authority to modify or to abrogate, in the form of decrees, laws passed by the Legislature. But, if a decree issued under this statute modifies a law in the legislative domain, the measure must be submitted to the Chambers for ratification within six months of the day of issuance. That such a statute was passed in peacetime is of great importance.

Though circumstances prohibited its implementation, the law of March 22, 1924, established a precedent for parliamentary emergency action in the interwar period. It is remarkable that the French Legislature, only eight years after it had battered down the wartime Briand proposals of 1916 and six years after it passed the more circumscribed act of February 10, 1918, was willing to delegate such competence to the Poincaré Cabinet. On the other hand, there was a great deal of opposition to the legislative facilitation of such action. The Chamber of Deputies adopted the controversial First Article of the law by a vote of 333 to 205, and despite long debate and systematic opposition by the Communists, ultimately passed the bill on February 23, 1924, and sent it to the Senate. In the Upper House the opposition was much more marked than in the Chamber. The Finance Commission announced against the governmental project by a 15 to 3 margin and it was only after

posing the question of confidence that the Government achieved a meager 154-139 majority.[1] In his defense of the request for pleins pouvoirs, Poincaré insisted that this provisional change in the reciprocal relations between the Executive and the Legislature did not constitute any derogation of basic parliamentary forms.[2] In the interpretation of the Government, these procedures were simply a method of giving the Executive a parliamentary mandate to execute the wishes of the people and of the elected representative body by implementing certain provisional measures. The President of the Council assured the Chambers that the right to undertake definitive decisions would remain in the hands of the elected Parliament. The problem as understood by the Cabinet was not just a question of providing a power which the law had not foreseen; it was "a question simply for the Legislature to entrust to the Government, which it controls and which it can always overrule, the right to institute reforms which Parliament would remain free afterwards to accept or to reject."[3] The Government emphasized that it had no intention of usurping power; it [asked] only to exercise the requested authority provisionally and in a restrained domain, with the assent and under the control of Parliament.[4]

Poincaré felt "that in the final analysis it was in the

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[1]Tingsten, p. 25.

[2]Ibid., p. 27.

[3]Ibid.

[4]Ibid.

interest of Parliamentary government that the Chambers accept a temporary restriction of their constitutional rights."[1] He defended his request for special plenary powers upon the logic that exceptional powers were a reinforcement of parliamentarianism which exemplified the vitality and its faculty for adaptation of Parliamentary government.[2] Under such an interpretation it was not necessary to weaken the initiative of the Government or to destroy the spirit of authority,[3] for when necessity commanded, it was within the scope of Parliamentary government to turn to governmental initiative in the quest for responsible authority.

On the other hand, the opposition from the Left, headed by Herriot[4] and Paul-Boncour[5] stressed that there was an essential incompatibility between the Poincaré project and the principles of Parliamentary government. They defended "pure" parliamentarism[6] as the best form of government--the best even

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[1]Otto Kirchheimer, "Decree Powers and Constitutional Law in France Under the Third Republic," American Political Science Review, XXXIV (December, 1940), p. 1104.

[2]Ibid.

[3]Tingsten, pp. 27-28.

[4]France, Journal Officiel..., Chambre des Députés, Débats Parlementaires, Session Ordinaire (1924), p. 338 et suiv. et 500 et suiv. See p. 349 (Levy), p. 367 et suiv. (Deyris), p. 430 (Klotz).

[5]Ibid., p. 486.

[6]In this conception the legislative power (pouvoir législative) devolved upon Parliament, which possessed absolutely no right to transfer its constitutional authority to other organs of State. This interpretation respects the supremacy of the law (loi), vis-a-vis the ordinance power (pouvoir réglementaire).

in extraordinary circumstances. They attacked the rather obvious transfer to the Executive of competence normally pertaining to the legislative power and emphasized that the adoption of such procedures would establish situations tantamount to governmental dictatorship. To be sure, one could realistically contend that the Poincaré legislation was not dictatorship at all, but a necessary and legitimate extension of executive power for defined subject matter and within a limited period of time which was consistent with the principles of Parliamentary government. Notwithstanding, numerous delegates of the Left preferred to interpret this transfer of competence as the initial step in an antidemocratic and antiparliamentary evolution. Ultimately, as the days of July, 1940 vividly attest, they were to be proved correct; and yet, in a nation faced with dire emergency, the first duty of the responsible political authority is to seek out methods adequate to the defense of the legal order. It is quite possible that the very nature of world affairs demanded the application of these extraordinary procedures regardless of their acceptability within the confines of traditional parliamentary political practice.

The tendency of the Executive agency to resort to demands for emergency powers when confronted with a situation which required immediate action and upon which there was insufficient agreement or desire within the Chambers to permit positive action was exemplified again by the Briand-Caillaux proposals

of July, 1926.[1] In the face of continuing economic pressure accentuated by the debacle of the German mark and by the instability evidenced by the French franc, Briand and his Minister of Finance, Caillaux, submitted a plan for financial reform which involved the extensive use of ordinances based upon the delegation of enabling authority from the Legislature to the Executive. Briand, in this case, was as unsuccessful in pushing his requests for pleins pouvoirs spéciaux through the Chambers as he had been in 1916. Nevertheless, within a month, a new Cabinet headed by Poincaré was successful on a more limited scale in obtaining grants of competence from the Parliament. The Poincaré requests became the law of August 3, 1926.[2] In its most important aspects this enabling statute provided for sweeping administrative reforms and for the adjustment of tariffs and duties to the value of the franc. As in

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[1]Article 1 of the Briand-Caillaux project: "Le gouvernement est autorisé, jusqu'au 30 décembre 1926, à prendre, par décrets délibérés en Conseil de ministres, toutes les mesures propres à réaliser le redressement financier et la stabilisation de la monnaie."

[2]Article 1 and 2 of the law of August 3, 1926: "Art. 1. Le gouvernement est autorisé à procéder par décrets jusqu'au 31 décembre 1926, à toutes suppression ou fusions d'emplois, d'etablissements ou de services. Lorsque ces mesures nécessiteront soit des modifications à des organisations, formalités ou procédures fixées par la loi, soit des annulations ou transferts de crédits, elles devront être soumisés à la ratification des Chambres dans un delai de trois mois. Art. 2. Le gouvernement est autorisé à rajuster par décrets à la valeur de la monnaie...: Le tarif des droits...et, d'une façon générale, de tous les droits liquides autrement que sur des sommes et des valeurs; La prix de vente des produits des monopoles fiscaux; Les tarifs des postes, télégraphes et téléphones; Les conditions d'application de ces nouveaux tarifs seront fixées par décrets." France, Journal Officiel... (August 4, 1926), p. 8786.

the law of March 22, 1924, the regime hoped to effect economies by simplifying the administrative machinery. To accomplish such reforms wide use was made of the decree power. A substantial number of sous-préfectures and tribunaux d'arrondissement were abolished by replacing the conseils de préfecture de département with conseils régionaux, and by reorganizing other branches of the administration. The reorganizational powers conferred upon the Cabinet were specifically limited as far as implementation was concerned to a five-month period. Furthermore, if the measures undertaken implied a modification of organizations, procedures, or formalities fixed by law, or annulments or transfer of credits, it was necessary to submit them to Parliament for ratification within a three-month period. The authority conferred to adjust by decree the value of the franc; the price of sale of the products of monopolies; the taxes upon the postal service, telegraph, and telephone service was a permanent power; and decrees issued under this competence were not required to be submitted to the Chambers for approval, though certainly they could be superseded by the passage of ordinary legislation. A great many decrees were issued under the provisions of this law; none were ever ratified by the Chambers and, though for a short period much was accomplished in local governmental reform, the representative Chambers under the pressure of local vested interest repealed practically all of these statutes.[1]

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[1]Rossiter, p. 121.

It is worthwhile to reiterate that the unimplemented law of March 22, 1924, the Briand-Caillaux proposals of July, 1926, and the law of August 3, 1926, constituted rather general acceptance of a practice that would contribute to the destruction of the very regime which they were designed to defend. From this time to the death of the Third Republic, the question demanding solution in both jurisprudence and political practice was not one of the constitutionality and legitimacy of enabling acts. It was simply one of degree and of method. Despite the protestations of such constitutional theorists as Nézard, Esmein, and Hauriou, the enabling procedure had come of age. France, battered by the economic and social conflicts of the 1930's, was to turn again and again to this device. Delegation was to lead, in the last analysis, to abdication. Without the spirit to live, Parliamentary government was to die.

Ordinance powers based on enabling authority became more than a temporary feature of French political practice in 1934, when the Daladier Cabinet inserted an enabling clause[1] into Article 8 of the Budget Act of December 22, 1933. Daladier resigned before applying this clause, but the fact remained that an enabling statute had become part of the permanent legislation of the French nation.

The succeeding Doumergue-Tardieu government of "national

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[1]These provisions were very similar to those envisioned in the Poincaré sponsored law of March 22, 1924. They envisioned administrative reforms and economies in the minimum amount of 300 million francs. Kirchheimer, p. 1106.

unity" attempted to implement deflationary policies of the Bank of France in order to combat the deep depression in which France found herself. Both bureaucracy and labor were so bitterly opposed to such a policy[1] that the Government turned to the enabling procedure as the only possible means for the successful implementation of its program. To this end, under the General Budget Law of February 28, 1934, the Government was authorized "to take all measures necessary to balance the budget."[2] By this procedure it hoped to avert an acrimonious parliamentary floor battle, to issue ordinances itself, and then to seek parliamentary approval. In the short run, the antideflationary forces reigned supreme as the "national unity" government was overthrown, and the subsequent Flandin and Bouisson Cabinets were refused extraordinary authority to pursue the policy line initiated by the Doumergue-Tardieu government. Notwithstanding temporary setbacks, policy of deflation and retrenchment supported by the Executive emerged victorious in June of 1935, when an enabling act intended "to avoid monetary devaluation" authorized the new Laval Ministry to "take until October 31, 1935, all dispositions in order to avoid the devaluation, to fight against speculation, and to

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[1]Rossiter, p. 122.

[2]Article 36 of the General Budget Law of February 28, 1934: "Le Gouvernement est autorisé, jusqu'au 30 juin 1934, à prendre, nonobstant toutes dispositions législatives contraires, par décrets rendus en conseil des ministres et contresignés du président du conseil et du ministre du finances, les mesures d'économie qu'exigera l'équilibre du budget. Ces décrets seront soumis à la ratification des Chambres avant le 31 octobre 1934. Ils auront forcé exécutoire jusqu'à décision du Parlement." France, Journal Officiel..., Débats Parlementaires (March 1, 1934), p. 2021.

defend the franc."[1]

The Laval decrees were issued during a recess period. They introduced a deflationist program which did not respect the principle of the inviolability of private enterprise and went far beyond the limits implied by the economic policy prescribed by the enabling act itself.[2] Ultimately, some 500 decrees were employed as the direct result of this transfer of competence. Public pensions and salaries were lowered; interest on government securities were reduced; rents and utility rates were fixed; various articles of the Code of civil procedure were modified, as was the Code of military justice; laws dealing with public health and sanitary conditions were codified; even the method of nomination of magistrates was altered by Governmental decree.[3] Consequently, operating under a general enabling statute which specified only the purpose and time limit of powers conferred, the Laval government issued ordinances in a great many areas of public life--decrees only indirectly related to the stated objective of the enabling legislation granted to Laval. It is true that the

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[1]Law of June 8, 1935: "...en vue d'eviter la dévaluation de la monnaie, le Sénat et la Chambre des députés autorisant le gouvernement à prendre par décrets, jusqu'au 31 october 1935, toutes dispositions ayant forcé de loi pour lutter contre la spéculation et défendre le franc. Ces décrets, pris en Conseil de ministres, seront soumis à la ratification des Chambres avant le 1er janvier 1936. France, Journal Officiel..., (June 9, 1935), p. 6298.

[2]Rossiter, p. 123.

[3]France, Journal Officiel..., Lois et Décrets (October 31, 1935), pp. 11401-11740.

Doumergue-Tardieu law of February 28, 1934, for the first time expressly granted to the Government the authority to issue ordinances *contra legem* with the validity *ab initio*,[1] but it was here with the Laval legislation of 1935 that the Legislature opened a broad, practically unlimited area to Executive supervision by decree. It is interesting that the debate over the Laval program did not conjure up an impassioned defense of parliamentary principles and rights. "The question debated was not whether decree powers ought to be granted at all, but whether such powers should be granted to [this] specific government and to further [these] specific aims."[2] There is little question that the grant to Laval of "all dispositions in order to avoid devaluation, to fight against speculation, and to defend the franc"[3] constituted a broader-based authority than the Doumergue-Tardieu authorization to "take all measures necessary to balance the budget."[4] The 1934 delegation tended to be limited to the fiscal area, while the application of that of 1935, correctly or incorrectly, encompassed a larger area of the economy. In contrast to the parliamentary treatment of the Poincare ordinances of 1926, the Laval decrees received no serious effective legislative opposition during the life of the Laval Ministry. It

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[1]Sieghart, p. 278.

[2]Kirchheimer, p. 1107.

[3]*Supra*., pp. 103-04.

[4]*Supra*., p. 103, Note 2.

was only with the institution of the Popular Front regime of Léon Blum that the bitter opposition aroused by the so-called "fascistic" practices of the Laval program vented itself in its full fury. The Popular Front of the Left-Center, basing its power upon the result of new elections, was successful in achieving the repeal in 1936 of the bulk of the Laval measures which remained in effect. However, in June of 1937 these "opponents of dictatorship" reversed themselves and sought for themselves enabling authority to devalue the franc, raise taxes, and establish exchange controls in order to cope with new financial difficulties.[1] The Chamber of Deputies complied with the Popular Front demands, but the more conservative Senate rejected the Blum requests and substituted its own version of enabling procedures.[2] Thus chastised, the Blum Ministry resigned.

It is most significant that this request for enabling powers by the Blum Government documents the acceptance by all facets of French politics of the enabling act as a legitimate device of crisis government.

The Popular Front was succeeded by a rather hybrid ministry headed by Chautemps. This arrangement was grounded on Socialist support but contained no Socialists in primary leadership positions. In June of 1937 Chautemps demanded and was granted authority to "assure the repression of attempts to

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[1]France, Journal Officiel..., Chambre des Députés, Débats (1937), p. 2048.

[2]Ibid., p. 695.

undermine the public credit, to fight against speculation, to further economic recovery, price control, and budget balancing, and without control of exchange[1] to defend the gold holdings of the Bank of France."[2] Such decrees were "to be placed before the Parliament for ratification within three months following the promulgation of the act, or, at any rate, at the first extraordinary session of 1937."[3]

For the first time in the history of French enabling legislation, a clause was inserted that expressly forbade a certain form of positive governmental action. To be sure, the law of March 22, 1924 and the enabling clause inserted in Article 8 of the Budget Act of December 22, 1933 had provided for monetary minimums for the consequences of administrative and fiscal reforms, but never before, nor in fact since, has this type of legislation provided such limitations. In this manner the Chautemps delegation was unique.

If one looks back at the progression of enabling legislation passed in the 1924-1937 period, it becomes apparent that increased competence was requested by the Executive, again and again, on the basis of immediate and compelling requirements, principally by the need for fiscal and economic redress. National defense requirements were not a factor up to this point, nor were any demands for structural changes in French economic and labor legislation considered. Such a

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[1]Author's underlining

[2]France. Journal Officiel ..., Chambre des Députés, Débats (1937), p. 2048.

[3]Ibid.

functional approach aimed at the immediate short-range solution of pressing problems[1] was followed during the first months of the Daladier Government, initiated on April 10, 1938.

Two days after receiving approval by the Chambers, this Cabinet was invested with power to take all measures necessary for the national defense and the economic recovery of the nation.[2] This competence was to be terminated at the end of the parliamentary session and not later than July 31, 1938. It should be noted that the decrees which the Daladier Government issued under this authority were in no way restricted to the immediate aims of the parent enabling statute. Although the Legislature remained in session until June 17, 1938, a comparison between the output of the legislative branch and that of the executive clearly indicates that the Chambers were losing a substantial portion of their significance as a legislative body. While the legislative output fell to a very low level, the Daladier Ministry dealt by means of decree with

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[1]Labelled the "compromise line of former years." Kirchheimer, p. 1108.

[2]Loi tendent au redressement financier de 12 août 1938: "Le Gouvernement est autorisé, jusqu'à la clôture de la session ordinaire des Chambres et au plus tard jusqu'au 31 juillet 1938, à prendre, par décrets délibérés en conseil des ministres, les mesures qu'il juge indispensable pour faire face aux dépenses nécessitées par la défense nationale et redresser les finances et l'économie de la nation. Ces décrets seront soumis a la ratification des Chambres au cours de la session extraordinaire et au plus tard le 31 décembre 1938. La presente loi, délibérée et adoptée par le Sénat et par la Chambre des députés, sera executee comme loi de l'Etat." France, Journal Officiel..., Débats Parlementaires (April 14, 1938), p. 4426.

public utility regulations, reorganization of the French Red Cross, reform of local finances, coordination of transportation, customs duties, reorganization of the military hierarchy, housing, agriculture, and the entire defense effort.

Daladier turned away from this "compromise" approach in the late summer and fall of 1938. In the Third Republic the last of the enabling acts which were aimed specifically at the provision of the necessary powers to deal with financial and economic emergencies were passed on October 8, 1938, as the result of repercussions from the European political crisis which upset the French national economy. Under the terms of this second grant to his Ministry, Daladier was empowered to use decrees "in order to effect an immediate recovery in the financial and economic situation of the country."[1] Theoretically, decrees issued in consequence of this delegation were designed "to reconcile the re-establishment of a greater liberty for employers and of the investing public in general with efficient war preparation."[2] By their very nature these two objectives were contradictory and, at the same time, both motives led to a virtual nullification of the Blum social reforms.[3] In industries vital to the national defense, the

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[1]France, Journal Officiel..., Débats Parlementaires (October 2, 1938), p. 1529.

[2]Kirchheimer, p. 1110.

[3]See France, Journal Officiel..., Débats Parlementaires (November 13, 1938), pp. 12855-61; and the English translation in the London Economist of November 19, 1938, p. 363 seq.

Daladier Ministry extended the forty-hour week to fifty hours. In protest against this infringement of what they considered to be their hard-won rights, French labor struck on November 30, 1938. Daladier moved against this dereliction of public responsibility, not through the time-honored state of siege but by means of the law on the general organization of the nation in time of war of July 11, 1938.[1] Under Article 14 of this law,[2] a decree was issued mobilizing all laborers of a public character and requisitioning the railroads for public use.[3] To insure the cooperation of those civilians whose occupations were considered of a public character, the jurisdiction of the military courts was expanded to include crimes of a public nature.[4] Thus, aspects of the state of siege were implemented without the application of the institution itself. As was the tendency of the times, governmental decrees based upon generalized statutory provisions replaced more circumscribed, specialized emergency authority.

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[1]France, Journal Officiel..., Débats Parlementaires (July 13, 1938), pp. 8330-37.

[2]Article 14 of the law of July 11, 1938: "...Peut être également soumis à requisition, chaque individu conservant sa fonction ou son emploi, l'ensemble du personnel faisant partie d'un service ou d'un entreprise considere comme indispensable pour assurer les besoins du pays..." Ibid., p. 8332.

[3]Article 50 of the law of July 11, 1938: "A la mobilisation, ou dans les cas prévus à l'article ler de la présente loi, les divers services de transports, tant en ce qui concerne la satisfaction des besoins des forces armées que celle des besoins du pays, sont centralisés et placés sous l'autorité d'un ministre unique..." Ibid., p. 8336.

[4]See Article 30 of the law of July 11, 1938. Ibid., p. 8334.

New emergency powers were voted to the Daladier regime in March of 1939. In the debate preceding the passage of this third enabling grant to his Government, Daladier failed to offer to Parliament a morsel of hope for return to traditional parliamentary practice. He failed to propose a coordinated program but offered only generalizations stressing the virtues of authoritarian government--independence, rapidity, secrecy of action--as compared with the inadequacies of democratic government.[1] It is probable that Daladier sought a workable crisis alternative to parliamentary incapacity. However, what he achieved was an open flaunting of the Chambers to which he was ultimately responsible. In dignity, respect, self-esteem, and most important in the ability to legislate decisively, French parliamentarianism was on a roller-coaster of decline.

In spite of this attitude, Daladier was successful in gaining majority support within both Chambers. At this late date, as the world raced toward a conflagration, the French Government sought more than the authority to adjust to financial and economic upheavals. It demanded virtually unlimited plenary powers to provide for the defense of the country. In the only operative clause of the third Daladier enabling act, March 19, 1939:

> The Government . . . [was] authorized, until November 30, 1939, to take, by decrees determined in Council of Ministers, the measures necessary for the defense of the country.
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> These decrees are to be submitted to the Chambers for

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[1] Le Temps, March 19, 1939, p. 2.

ratification before December 31, 1939.

The present law, determined and adopted by the Senate and by the Chamber of Deputies, will be executed as the law of the State.[1]

Extensive use was made of this authority especially after the outbreak of war, but this was not the end of legislative grants to the Executive. There remained one major incumbrance upon the Executive agency. The law of March 19, 1939, as had other enabling laws before it, provided only for the transfer of authority within narrow time limits. The Daladier Cabinet, as that of Briand, felt that the exigencies of modern warfare made Governmental competence in the realm of the legislative power a paramount necessity. As a result, the Prime Minister proposed the creation of a permanent basis for the exercise of such powers. By the law of July 11, 1938, Parliament had already provided for the organization of the nation in wartime. In its Article 36,[2] this statute delegated authority for the opening of war credits at a time when the Chambers were not

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[1]France, Journal Officiel..., Débats Parlementaires (March 20, 1939), p. 3646.

[2]Article 36 of the law on the general organization of the nation in time of war of July 11, 1938: Les règles budgétaires normales sont maintenues à la mobilisation ou dans les cas prévus à l'article 1er de la présente loi. En cas d'absence des Chambres, si les besoins de la défense national l'exigent et s'il y a urgence, des crédits supplementaires non compris dans la nomenclature, annexée à la loi de finances et des crédits extraordinaires pourant être ouvert provisoirement, à la suite d'une communication aux commissions des finances du Sénat et de la Chambre des députés, par décrets rendus en conseil d'Etat après avoir été délibérés et approuvés en conseil des ministres. Ces décrets devront être soumis dans le mois à la ratification des Chambres réunies au besoin à cet effet. France, Journal Officiel..., Débats Parlementaires (July 13, 1939), p. 8334.

assembled. Nevertheless, a fourth enabling delegation was granted to Daladier on December 8, 1939, which expanded Executive authority into a wholesale transfer of powers, restricted only in time to the duration of hostilities and in purpose to the immediate necessities of national defense.[1] It is important to note that this clause conferred upon the Government a permanent ordaining power, to be exercised in times of war only, on all matters connected with national defense for which an immediate necessity might arise. Thus, for the first time in the Third Republic the Government received emergency powers which it could invoke at any time at its pleasure as long as hostilities were in progress. The Government was now free to issue decrees on subject matter without being specifically authorized to do so, and it could issue these decrees without the rather narrow time limits of previous enabling acts.

The gradual eclipse of parliamentary legislation had now developed into an absolute, full-blown substitution of Executive decree power for Legislative authority. Significantly, this evolution was essentially a peacetime phenomenon. The enabling acts of 1924 and 1926, confined as they were to rather narrowly limited fields of activity and for short periods of time, had established precedents which in 1934 and 1935 were drawn upon by Doumergue and Laval. Grants to latter Governments, though still tied to concrete objectives

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[1] Law of December 8, 1939, inserted in the law of July 11, 1938: "Pendant la durée des hostilities, les Chambres exercent leur pouvoirs en matière législative et budgetaire comme en temps de paix. Toutefois, en cas de nécessité immédiate, le

of intent, tended in reality toward all-embracing objectives. At the culmination of this development--the four Daladier enabling acts--the specification of limited objectives became a secondary consideration, and the time period for the application of decrees was only a vague generality. Parliamentary incapacity had demanded Executive actions, and the decree based upon generalized enabling legislation became the ultimate vehicle provided by French democracy before World War II. As devices created to sustain Parliamentary government, enabling procedures were to fail, but this may well have been due more to the exigencies of the times than to their incapacity as instruments of crisis government.

The Government of France in 1939-40 was a conscious imitation of the World War I regime.[1] The state of siege was invoked throughout the nation and the civil rights of French citizens were again placed at the mercy of the military authorities. Industry and labor were controlled closely. The Chambers, while having renounced their pretensions as a lawgiving body in the 1937-1939 period, retained and exercised their power of oversight. They were in session for most of this

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gouvernement est autorisé à prendre, par décrets délibérés en Conseil des ministres, les mesures imposées par les exigencies de la defense nationale. Ces décrets sont soumis à la ratification dans un delai d'un mois et, en cas d'absence des Chambres, des leur première réunion." France, Journal Officiel..., Débats Parlementaires (December 9, 1939), p. 1031.

[1]Rossiter, pp. 127-28. See also, Roger Bonnard, "Le droit public et la guerre," Revue du Droit Public, LVI (October-November-December, 1939), p. 549, and Revue du Droit Public, LVII (January-February-March, 1940), p. 90.

period and were clotured only once, October 5 to November 30, 1939, to enable the Government to deal harshly with Communist deputies thus deprived of their parliamentary immunity from arrest.

The method of parliamentary control used was investigation by special Committee and the interpellation of the Government in secret session. On March 19, 1940, the Daladier Cabinet was voted "confidence" by an overwhelming majority, 239-1, but with some 300 abstentions. Daladier resigned, thus documenting the continuance of Cabinet responsibility. Confidence was voted to the succeeding Reynaud Government, and as the war progressed into its last weeks, legislative support of the Government increased. The Chambers did retain ultimate control over the actions of their agents, the Cabinet: yet, for all practical purposes the competence to prepare the nation for conflict and to fight the war was placed in the hands of the Executive agency.

The result was a wholesale propagation of decree-laws by the Government--a procedure which was a pronounced departure from the system followed during the First World War. In the last months before the darkness of German occupation and the blight of Vichy collaboration, France was governed completely by Executive decree. In direct contrast to the experiences of the first war, the Cabinet became the one real source of authority in the Republic.

Consistent with civil law tradition, the Legislature had provided rather systematically and minutely for changes in

government and administration to be effected in time of war.[1] These programs were drawn upon, but essentially what they achieved was the legalization of the extra-legal and blatantly illegal procedures of the 1914-1915 period. As in that era, the decree ruled supreme.

The use of pleins pouvoirs reached a ludicrous extreme on July 9 and 10, 1940. The Chamber of Deputies and the Senate, meeting together as the National Assembly, which alone was vested with the right to amend the Constitution of 1875, passed a constitutional law introduced on behalf of the Pétain Government. In its single Article this amendment specified that:

> The National Assembly gives complete power to the Government of the Republic, under the signature and authority of Marshal Pétain, President of the Council of Ministers, for the purpose of promulgating by one or more acts, the new constitution of the French State. This constitution shall guarantee the rights of Labor, the Family, and the Fatherland. It shall be ratified by the assemblies which it shall create.[2]

This act, of itself, did not in any formal manner terminate the existence of the Third Republic, nor did it attempt to specify the changes which were to be introduced. What the constitutional amendment of July 10, 1940 accomplished was to confer upon the Government by way of a full delegation of powers (pleins pouvoirs) the task of drafting a new constitution.

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[1]"Loi sur l'organization générale de la nation pour la temps de guerre," France, Journal Officiel..., Lois et Décrets (July 13, 1938), pp. 8330-37.

[2]Paul Farmer, Vichy (New York: Columbia University Press, 1955), p. 141.

But there was an essential difference between this delegation and the grants of 1935, 1937, 1938, and 1939, under which Daladier and Reynaud, if not Chautemps and Laval, had availed themselves of "quasi-authoritarian" methods. All previous grants had involved limitations as to subject matter and period of application. Even the most severe of these--that of December 8, 1939--provided broad time restrictions for the duration of hostilities, and some limitation on purpose to the immediate necessities of national defense. Most important, however, was the fact that Parliament, before the debacle at Vichy, had exercised a continual surveillance over governmental activity. This was not true after July 10, 1940. The constitutional amendment of that date transferred full powers to the Government (rei publicae constituendae causa), unlimited in both time and scope.

Thus, the principle of delegation of legislative powers which had been so widely used in the field of ordinary legislation was applied to the transfer of the constituent power (pouvoir constituent)[1] from the National Assembly to the Head

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[1]"By way of imitation and repetition, the unrestricted transfer of the pouvoir constituent to an authoritarian government has become the stereotyped vehicle for substituting authoritarian for constitutional processes of government. The parallel to the transition from the Weimar system to the Hitler regime is too striking to be missed." (See, the Enabling Act of March 24, 1933, Article 2, sentence 1 and the Reconstruction Act of January 30, 1934, Article 4: "The Government of the Reich may enact new constitutional law.") Karl Lowenstein, "The Demise of the French Constitution of 1875," American Political Science Review, XXXIV (October, 1940), pp. 885-86.

and Government of the State. The delegation of constituent power was explicitly given to the Government "under the signature of Marshal Pétain," thus signifying national trust in one "who is believed to be the custodian of the French future."[1] France had not learned that constitutional representative government does not function well "with such a fixation of a general rule of law on definite persons."[2]

Marshal Pétain moved immediately to apply his prerogative to issue organic decrees. On July 11, 1940 he authorized three decrees repealing portions of the Constitutional Laws of the Third Republic and instituting a new framework of government. Constitutional Act Number One merged the two offices of President of the Republic and President of the Council of Ministers into one and designated Marshal Pétain as "Chief of the French State." Constitutional Act Number Two established the general procedures of government that were to prevail until such time as a new constitution should be promulgated. Under its provisions the Chief of the French State assumed the right to appoint all public officers, to have ultimate command of the armed forces, and to issue laws and to conclude treaties under his own signature. Constitutional Act Number Three declared that the Chamber of Deputies and the Senate should "subsist" until the promulgation of the definitive new constitution. They were not to meet again, as the proposed constitution was drawn up

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[1] Ibid.

[2] Ibid.

but never put into force. In fact, the public was never informed of its contents. These three Constitutional Acts, though intended to be only interim measures, were to provide, together with other amendments by decree, the basis of government all through the Vichy period.

Thus, by the grant of totally unlimited pleins pouvoirs, the National Assembly made possible the demise of the constitutional system of the Third Republic. The destruction of republican government was achieved with a consumate, even excessive sense of legality, and in complete accord with the requirements[1] of the constitution which was being destroyed.[2] It was only by its failure to seek ratification by popular vote that the Vichy Government destroyed its relationship with the previous regime and turned itself from a de jure to a de facto Government.

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[1]The Constitutional Laws of the Third Republic were considered the supreme law of the land, capable of being abrogated only by a legislative act of equal rank. ("La constitution écrite etant une loi et même une loi supérieure et même immuable, ne devait jamais pouvoir être abrogée que par une nouvelle loi constitutionnel, rendue dans la forme voulue." A. Esmein and H. Nézard, Elements du droit constitutionnel, 7e ed., I, p. 597. The actual revision procedure fell into two distinct phases: (a) separate resolutions of the Chambers that a revision shall take place; (b) enactment of the revision by the Chambers joined together in the National Assembly by a majorité absolue de voix--that is, a majority of all members voting. (Article 8 of the Law of February 25, 1875.) The law of July 10, 1940 was passed by a 385 to 3 in the Chamber, 225 to 1 in the Senate, and 569 to 80 in the National Assembly. Thus, the procedure followed was fully constitutional.

[2]Lowenstein, p. 894.

The dangers implicit in unrestricted delegation of plenary powers can be clearly seen. By the passage of the law of July 10, 1940, the French Legislature undertook what was tantamount to an act of abdication and created a dictatorship of the Executive by constitutional means. The result was the legal demise of the Third Republic.

The events of the summer of 1940 terminated the second cycle[1] of the constitutional development of the French nation. For the major part of her existence in modern times, France had been ruled by governments restricted in their competence by some type of separation of powers. Unfortunately, all too often the consequence of such diffusion was the enfeeblement of political power available for effective use in defense of the legitimate order of society. Experience indicates that French government, in time of emergency, tends to transfer power to a single agent, an agent which often moves outside of the constitutional framework in the application of its authority. Consequently, in order to sustain legitimate governmental processes, France has faced a chronic need for viable, constitutional crisis institutions capable of implementing vigorous governmental policy in an efficacious manner.

It is apparent that the Third Republic could not find an adequate crisis process. The state of siege proved to be a useful crisis device in both World Wars--a device fundamental to the preparation of the country for hostilities. But, despite the evolution of the political state of siege, this process

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[1] Supra., p. 11.

remained essentially a specialized procedure applicable only in specific circumstances for specified activities. The various extensions of the ordaining power of the Executive were not a satisfactory solution either, as they ultimately moved the Executive outside the realm of legality and constituted a rather complete derogation of parliamentary forms. Plenary powers delegated to the Executive sufficed as long as these grants were provisional and restrictions upon subject matter and period of application were respected; however, limited grants led to broad delegations and then to virtually unrestricted delegations tantamount to abdication of Parliamentary legislative power to Executive decree. A full-fledged constitutional emergency clause such as Article 14 of the Charter of 1814 was not employed. The emergency extensions of the Executive ordaining power came closest to this historic procedure.

Despite their ultimate failure to sustain the representative government, these crisis institutions employed in the Third Republic provide a great deal of valuable experience in the application of crisis government which modern representative institutions, whether Presidential or Parliamentary, should not overlook. It is the fate of governments in our time to be faced with the necessity of applying these or similar techniques. Circumstance demands their use. Crisis government is or must be an integral part of representative institutions. The unhappy agony and death of the Third Republic should not condemn the institutions employed to sustain its life--for institutions are no stronger than the spirit with

which they are implemented. At the same time, institutions provide no cure-all for the ills of political society. They are only forms into which is poured the substance of political life. Institutions, at best, provide structure and method through which can be channelled the effective will of society. Yet, when the continuance of free society depends upon the effective use of crisis government, the selection of crisis weapons becomes a most crucial task indeed. For an important key to success of any representative government is the ability to distinguish between viable crisis institutions and those without merit. The French Third Republic was unable to make this distinction. Whether or not the Republic would have been able to survive if braced by adequate crisis devices is a moot point; what is apparent is that, failing to have viable crisis institutions consistent with its legal order, the Third Republic had less chance of survival than if this area of governmental responsibility had been more adequately provided for.

CHAPTER VI

THE EXPANSION OF REGULATORY AUTHORITY

The Constitution of October 27, 1946, establishing the Fourth Republic, mirrored substantial disenchantment with the practice of crisis government in the Third Republic. This disenchantment was evidenced in its ringing proclamation: "The National Assembly alone shall adopt the laws. It may not delegate this right."[1] A literal reading of this text gives the impression that the Constitution was designed to implement the substantive and material, as well as the formal, supremacy of the law. It appeared that a superior normative authority was vested in the National Assembly and that this competence was not subject to modification, delegation, or transfer. To be sure, such a reaction against the tacit abdication of legislative competence which occurred in the late 1930's might have been expected and could be well understood, considering the inadequacies of French parliamentarism in the face of economic, financial, and social dislocations and war. However, a vigorous parliamentary regime cannot be sustained by legalistic restrictions upon the transfer of authority,

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[1]Article 13 of the Constitution of October 27, 1946.

It must be embedded in a stable consensus, organized in a viable manner, and enunciated by responsible majority coalitions.

Post-World War II France required immediate, positive, and responsible action on the part of government. The achievement of vigorous leadership was possible only in certain circumstances: if the state was totalitarian; if the state was able to produce this "majority coalition" on a relatively sustained basis within an adequate parliamentary system; or, if the state was endowed with and was in a position to utilize workable discretionary authority. France of the Fourth Republic sought competence within the realm of representative Parliamentary government. However, she failed to produce a functioning coherent majority over any period of time or an adequate parliamentary system. Her best hope, therefore, lay in the evolution and development of a clearly defined, yet circumscribed, system of exceptional powers and delegations designed to buttress the deficiencies of the regular process of government.

In fact, Article 13 of the 1946 Constitution did not limit the possibility of the delegation of legislative competences to the Executive through the establishment of the illegality of the delegation of the substantive subject matter of the law to the possessor of the ordinance power. It constituted a puristic statement of the formal relationship of the ordinance and the law as mummified in constitutional tradition. The Article is representative of the reaction against the excesses

of the Third Republic, but it was never intended to limit all law-making functions to the National Assembly. Such a restriction would not square with the reality of political practice, for administrative regulations have always involved limited discretion in the interpretation and application of the law.

The initial portion of Article 13 that the "National Assembly alone shall adopt the laws" can be more properly understood in terms of the relationship between the National Assembly and the Council of the Republic. Though the Legislature was bicameral, the primary and, if necessary, absolute responsibility for the voting of the law was vested in the lower house. The upper house served to provide limitation upon the ultimate responsibility of the National Assembly.

In all phases of the legislative process, the upper house of the Fourth Republic, the Council of the Republic, occupied one of the weakest positions ever assigned to a European second chamber--certainly far weaker than the British House of Lords. The Council was allowed to initiate legislation but such bills were required to be sent initially to the National Assembly where they could be killed or politely returned. Consequently, the initiative of the Council was largely reduced to the suggesting of amendments to legislation initiated in the National Assembly. In the final enactment of legislation, the position of the Council was even weaker. After a measure had passed its first reading in the National Assembly, it was sent to the Council which was given two months to register its opinion--

less,if the Assembly designated, for finance or emergency legislation. If the opinion was favorable or if none was registered in the required time, the measure was forthwith declared "as passed by the Assembly." However, if the opinion of the Council was unfavorable and amendments were proposed, the Assembly was required to give the measure a second reading, either accepting or rejecting the amendments. But the outcome remained the same. The measure became law by the vote of the National Assembly alone.[1] The latter portion of the Article that the National Assembly "may not delegate this right" appears very specific and stern, but in reality it was subjected to a kaleidoscopic variety of interpretations. As a substantive limitation, it was interpreted to mean that any delegation of authority comprehended within the scope of the legislative power was forbidden. As a formal limitation, it was interpreted to mean that the hierarchy of statutes in French public law must be adhered to but that the substantive content of the law was subject to delegation. This substantive limitation would appear to destroy any possibility of legislative delegation even in terms of the interpretation of the law, while the formalistic limitation would protect the supremacy of law in form but would not defend the inviolability of the supremacy of the subject matter recognized as appropriate to the hierarchical category of law.

A good insight into the prevailing attitude toward these

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[1]See Article 20 of the Constitution of October 27, 1946.

restrictions is to be found in the discussions of the two commissions on the Constitution which proceeded with the rejection of the draft constitution of June 2, 1946 and the acceptance of the Constitution of October 27, 1946.

In the Commission on the Constitution for the draft constitution of June 2, 1946, the dangers inherent in the use of a system of decree-laws as employed in the Third Republic came under thorough scrutiny. A substantial number of delegates, particularly those representing the moderate and extreme Left, were adamant that the National Assembly should not be permitted to authorize the Government to undertake decree legislation. For example, the Communist deputy, Calas, proposed that the Council of Ministers should be explicitly forbidden from making any law even provisionally. It shall make only "proclamations conforming to the laws and decrees in application of the laws for ordering or repealing application"[1] of legislation. At the same time, the Socialist party announced its support of a formula which would allow "the National Assembly alone . . . to dispose of the legislative power. She cannot delegate it . . . No law can be modified by decree."[2] Nevertheless, despite these vigorous efforts to paralyze the process of the modification of parliamentary law by decree legislation,

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[1]This formula was extracted from Article 6, Section 1, Chapter IV, Title III of the Constitution of 1791. As quoted in Roger Pinto, "Loi du 17 août 1948 et redressement économique et financier," Revue du Droit Public (October-December, 1948), p. 537.

[2]Ibid.

this First Commission on the Constitution approved a compromise proposal which did not rule out the possibility of decree legislation. The proposal emanating from the closed session of the Commission read: "There can be no laws other than those voted by the Assembly. The Assembly cannot delegate in all, or in part, the right to legislate in its place."[1] This was the unanimous decision of the First Commission; however, as the result of pressure brought to bear in the public sessions of the Constituent Assembly, the wording was ultimately modified in form though not in meaning. The final version declared that: "The National Assembly alone shall adopt the laws. It cannot delegate this right to another agency in all or in part."[2]

The National Assembly enacts legislation. The Council of Ministers through its agents applies the law to existing circumstances. This is normal procedure under the French parliamentary system. This statement is very broad and inexplicit. To get at the inner workings of the system, one must inquire into the degree to which legislation is spelled out in detail by the legislative organ and the degree of discretionary competence available to and employed by the Executive. Article 13 sheds some light on this problem. From the initial meetings of the First Commission on the Constitution, it was clear that

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[1] Ibid., p. 538, Note 3.

[2] Ibid. This constitutes Article 66 of the project of April 19, 1946. See Note 1, page 88.

this provision of the basic document was not intended as a drastic curtailment of executive competence and discretion. To be sure, the wording of the clause was vigorous, and there was the implication that the Council of Ministers proposed and the National Assembly enacted; and, as a consequence, legislative authority could not be delegated or modified by decree. From the outset this simple and, on the surface, direct assertion did not suffice as a working principle upon which to base the procedural relationship of the executive and legislative branches of government. The nuances of administration were too complex for so clear-cut a doctrine. This clause was sufficient to serve only as a starting point. For in the last analysis, the relationship between Parliament and the Executive--between ordinance and law--was to be determined by the progressive interpretation and the resulting dilution of this principle.

In truth, while appearing to follow public opinion in condemning the excesses of the past, the First Commission in actuality offered only a symbolic disapproval of the decree-law procedure. There was no concise statement of condemnation; the focus was shifted to an emphasis upon form rather than content.[1] The First Commission was quite aware that a definitive

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[1]This emphasis upon form rather than content was accentuated by the amendment suggested by the deputy Giraudoux to Article 66 of the project of April 19, 1946 (the preliminary form of Article 13), which stipulated "sont obligatoirement prises formes des lois les mesures relatives aux libertés publique, aux statuts de personnes et les biens, à l'organization des services publics, à l'organization judiciare, aux impôts. Sauf dispositions législatives contraires, toutes autres mesures peuvent être prises par voie de dispositions réglementaires." Ibid., p. 538.

solution to the problem of delegation and the related considerations of the interaction of ordinance and law could not be achieved in the writing of a constitutional document. Therefore, they required respect for the form of the law and chose to leave the determination to political evolution. As the deputy Cot remarked in his presentation to the First Constituent Assembly:

> La question de savoir ce qui est du domaine de la loi et ce qui est du domaine du règlement doit être réglée par la pratique, par la coutume, selon les circonstances... Nous ne pouvons établir cette distinction par une disposition constitutionnelle.[1]

This approach was adopted by the Second Commission on the Constitution which approved the final conclusions of the First Commission on this subject with only one amendment, the words "another agency in all or in part" were removed.[2] The Second Constituent Assembly approved the version as presented by the Second Commission and it became Article 13 of the Constitution of October 27, 1946.

The interpretation given to Article 13 by the Second Constituent Assembly is best exemplified in the answer supplied by the rapporteur of the clause in response to a demand for an analysis of the word "law" as it was to be employed in the aforesaid article. The rapporteur, speaking in response to the

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[1]France, Journal Officiel..., Assemblée Constituent Nationale, Débats (April 12, 1946), pp. 1883-84.

[2]Pinto, p. 538.

challenge of the deputy Ramadier, advised that "it is necessary to understand the word 'law' in the formal sense rather than in the material sense. That is to say, the limit between what is legislative subject matter and what is within the competence of the decree authority can be variable."[1] Thus, it is clear that the Second Commission on the Constitution, with the approval of the Second Constituent Assembly, foresaw no positive material limitation to subject matter that could fall within the competence of the executive agency. Article 13 implied that any authority not constitutionally in possession of the legislative competence was prohibited from creating policy with the value of law. It did not prohibit the delegation of matters normally within the competence of the legislative power to the executive power. Apparently, Article 13 was designed to function as a limitation upon form rather than upon substance or content.

The Council of State sustained this interpretation in its opinion (avis) of February 6, 1953.[2] The Council maintained the traditional system founded upon the concept of legislative determination of the competence of the regulatory power to be a valid system. However, it was recognized that in certain matters the legislative power has the competence to delegate authority to the regulatory power to "modify, abrogate, or to

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[1]Pinto, pp. 570-71.

[2]Juris Classeur Périodique, 1953, III, 17697.

replace legislative dispositions."[1] The Council of State did not object to the simple act of the transfer of competence from the Legislature to the Executive. What it condemned was excessive delegation. "Excess" was defined as the delegation by the Legislature of its constitutional functions: "subject matter that is reserved to the law in virtue of the dispositions of the Constitution," subject matter that is reserved to the legislative competence "by constitutional republican tradition resulting notably from the Preamble of the Constitution and the Declaration of the Rights of Man of 1789, of which the principles have been reaffirmed in the Preamble," and subject matter that was contrary to Article 3 of the 1946 Constitution which granted national sovereignty to the National Assembly.[2] Thus, Article 13 is limitive only in the sense that the National Assembly may not (1) violate the formal hierarchy of the law and (2) delegate competence that has been reserved to the law by the Constitution, by republican tradition, or which would constitute an abandonment of the exercise of the national sovereignty.

France failed to achieve her interdiction solennelle[3] not

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[1] Ibid.

[2] Ibid. See also: Jacques Donnedieu De Vabres, "L'article 13 et les décrets-lois," Recueil Dalloz, Chronique, XXV (1953), p. 137.

[3] René Capitant warned the National Constituent Assembly that the defeat and abdication of responsible government of the Third Republic together with the obvious results of the infamous law of July 10, 1940, made it abundantly clear that it was absolutely necessary for France to abandon the procedures

to employ the practice of decree legislation.[1] It was evident from the outset of the Fourth Republic that neither the excesses to which the enhancement of executive authority was carried in the last years of the Third Republic nor the prohibitions undertaken by Article 13 of the Constitution of October 27, 1946, would be sufficient to deter the expansion and development of the ordinance power in the Fourth Republic. As the politicians turned to the postwar task of creating a viable political organism based upon the specifics and generalities of their constitutional document, they turned, perhaps by necessity, to the expansion of the regulatory authority as one of the most promising areas in which to develop tools adequate to cope with the complex requirements of modern representative government in stress. The development of increased regulatory authority did not lead inevitably to renewed dependence upon exceptional procedures nor to parliamentary incapacity; nevertheless, the tendency was in this direction. Certainly, the failure of postwar

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of enabling legislation instituted in 1924. He insisted that one of the cornerstones of the new constitution must be an interdiction solennelle never again to appeal to the system of decree legislation. France, Journal Officiel..., Assemblée Nationale, Débats (August 9, 1948), p. 5568.

[1]"Decree legislation" which refers to the semantic phraseology, "decree law," has been defined in a variety of ways, each of which hit at the essence of the concept. For example, René Capitant simply referred to "regulation which modifies a law." While President of the Council, René Mayer characterized decree legislation as "a procedure by which the legislature delegates its power to the executive to undertake measures in pursuit of a specified objective." A more extensive statement was given by the Marie government in support of the law of August 17, 1948. In this analysis decree laws were "regulations which embody within their scope the material competence of the legislature in that Parliament enlarges the area of competence of the

France to profit from her interwar experiences offers a negative index to the ability of the French people to profit from past experience and upon this basis of experience, tempered by a realistic evaluation of current circumstances, to build constructively toward the future. Indeed, it can be argued that because France was unable to deal effectively with the competing claims of law and ordinance, she faced the postwar future unprepared to undertake a coherent program for legitimate action when confronted with recurrent parliamentary incapacity and with authoritarian challenge to the established order of society. For a nation destined to live continually with parliamentary "immobilisme"[1] and to face overt revolution,[2] the sustenance

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executive by authorizing it to modify formal laws which are by their nature regulatory (matières réglementaires)." André de Laubadère, "Des 'pleins pouvoirs' aux 'demi-décrets-lois'," Recueil Dalloz, Chronique, XXIV, 1952, pp. 37-38.

[1]The constant turnover of cabinets and the existence of a multitude of political parties and parliamentary groups under the Fourth Republic has obscured the underlying political stability of the system; a stability so profound that many French observers have used the term "immobilisme." Cabinet upheavals during the Fourth Republic, rather than representing distinct modifications of policy, in reality only mirrored shifts in emphasis among the moderate Left, Center, and moderate Right. The existence of a strong Communist Party and other nonparticipating radicals and reactionaries, notably the Poujadists during their ascendancy, condemned the parties of fidelity to the Republic to live together in unhappy compromise. The result was a regime of equivocation and procrastination. Issues of foreign policy, social legislation, colonial relations, education, and constitutional reform were never settled. Fundamentally, this cabinet instability itself was an expression of immobility as more often than not a vote of no-confidence simply resulted in the shake-up of cabinet posts and the retention of essentially the same divided ministry.

[2]The events of May 13, 1958, which brought to power a Committee of Public Safety (Comité de Salut Public) in Algeria, led to the downfall of the government of Pierre Pfimlin and to the investiture of Charles De Gaulle on June 1, 1958.

of life was ultimately to depend more and more upon old, remodeled, and new exceptional techniques: expansion of the regulatory authority, the state of siege, the state of emergency (état d'urgence),[1] and the use of broad-based framework laws (loi-cadre).[2]

Certainly, procedures for expanding the regulatory authority of the Executive became more imaginative and sophisticated during the life of the Fourth Republic. At least four different techniques appropriate to the practical achievement of this expansion can be differentiated.

First, decrees granting substantial discretionary authority to the Executive in modification or abrogation of statutory law became normal procedure under the regimes of the Constituent Assemblies of 1945 and 1946, and such practices were carried over into the Fourth Republic itself. In this first category we might distinguish a process through which the Government received the power to modify or to abrogate the effects of formal laws by means of decrees for specified subject matter and during circumscribed periods of time. For example, the laws of December 12, 1945, and of February 8, 1946, authorized the Government to modify or to reduce credits previously voted in the budget of 1946. The law of December 12, 1945 ordered

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[1]The procedure of the state of emergency (état d'urgence) was promulgated on April 3, 1955 and applied on that date to specified areas in Algeria.

[2]The procedure of framework laws (loi-cadre) was applied frequently in the latter years of the Fourth Republic. Excellent examples are: the law of March 16, 1956 providing for

the Commission of Finance of the National Constituent Assembly, after the adoption of credits, to cooperate with the Minister of Finance and other responsible Ministers in the oversight of the respective chapters of the budget, and in modification of the credits originally opened when circumstance rendered such action necessary. Reform was to be achieved by decree issued in the Council of Ministers in instances in which the Commission of Finance, the Minister of Finance, and the responsible Minister were in agreement.[1] The law of February 8, 1946, which modified and completed the law of December 12, 1945, stipulated that in instances where proposals for modification of credits were presented by the Commission of Finance and approved by the Council of Ministers, implementation might be achieved through decrees taken by the President of the Provisional Government upon the proposal of the Minister of Finance and with the countersignature of the responsible Minister. Consequently, under this modification the direct approval of the Commission of Finance would not be required.[2] As a result, in this period of dislocation, the constituent legislative organ granted to the Provisional Executive the authority to reorganize financial allocations as changing circumstance dictated. Somewhat later a law

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economic and administrative reform in Algeria; the law of June 23, 1956, concerning French overseas territories; and the law of February 5, 1958, concerning institutions in Algeria.

[1]France, Journal Officiel..., Lois et Décrets (December 13, 1945), p. 8246.

[2]France, Journal Officiel..., Lois et Décrets (February 9, 1946), p. 1122.

of October 7, 1946 allowed the establishment by decree of a social security program for mining workers.[1] In defense of this procedure, the Council of State ruled that the "Legislature had intended to confer on the Government the most extended powers, including that of derogating the general regime established by the legislation in force."[2]

This tendency was carried over into the Fourth Republic itself. Under Article 6 of the law of August 17, 1948, the Government was accorded authority to take decrees, rendered in Council of Ministers, after the advice of the Council of State, and upon the report of the Minister of Finance and other interested Ministers, capable of "abrogating, modifying, or replacing, the laws in force."[3] In application of this authority, the Government was empowered by virtue of Article 5, Section I, of the same law to "alleviate the burden of the French economy by means of reduction, suppression, or fusion of the duties, rights, and taxes actually in force."[4] Immediately thereafter, by the law of September 24, 1948, the ordinance authority was broadened further to include the "modification of the rules of

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[1]France, Journal Officiel..., Lois et Décrets (October 8, 1948), pp. 8499-8500.

[2]De Laubadère, p. 35.

[3]France, Journal Officiel..., Lois et Décrets (August 18, 1948), p. 8083. See also, Roger Pinto, "La loi du 17 août 1948 tendent au redressement économique et financier," Revue du Droit Public, LXIV (October-December, 1948), p. 521.

[4]France, Journal Officiel..., Lois et Décrets (August 18, 1948), p. 8083.

collection of taxes pertaining to incomes and salaries."[1] It might also be recalled that as the result of parliamentary authorization the Government took various other discretionary decrees, notably that of November 8, 1948, suppressing the right to tax transferable securities,[2] and that of October 1, 1948, modifying fiscal controls of salaries and wages,[3] the latter visibly exceeding the authorization prescribed by the parliamentary grant of competence, but becoming immediately unassailable before the Council of State because of its incorporation in the law of December 30, 1948. Thus, in the fiscal realm, the early Governments of the Fourth Republic provided striking examples of positive delegations of competence to the Executive to modify formal laws by decree or to derogate their disposition. This technique was also applied through the law of July 11, 1953, which granted special powers to the Government to suspend or to postpone, from October 1, 1953 to January 1, 1955, the financial effect of all legislative dispositions entailing expenditures by the State.[4] This primary technique of enlarging the regulatory power cannot be considered novel or original, for it was employed periodically throughout the Third Republic. It is not outside the confines of Article 13

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[1]France, Journal Officiel..., Lois et Décrets (September 25, 1948), pp. 9426-28.

[2]V. G. Morange, "La réalisation de la réform fiscal par voie réglementaire," Recueil Dalloz, Chronique (1948), p. 177.

[3]Ibid.

[4]René Chapus, "La loi d'habilitation du 11 juillet 1953 et la question des décrets-lois," Revue du Droit Public, LXIX, p. 1005.

of the Constitution as it neither violates the hierarchy of law nor delegates constitutionally-specified legislative competence. The importance of this technique rests in its stature as an unquestionable demonstration of the lack of substantive and material restriction upon the transfer of competences by Article 13 of the Constitution of October 27, 1946.

Second, there was observable in the 1946-1953 period a limited innovation in the methodology of the implementation of the pouvoir réglementaire. Through this technique legislative grants were made to the Executive to modify formal laws by decree in circumstances in which the Parliament did not act itself before a specified date. For example, the law of January 8, 1951, which authorized a program of rearmament and national defense expenditures, also provided in its Article 1, Section II, that the Government present before February 15, 1951, a project of law designed to realize a 25-billion-franc reduction in the national defense budget. This project was to be discussed under the rules of urgency in the Legislature and was to be promulgated into law by March 15, 1951. If the Legislature failed to pass or amend the project, the Government itself was authorized to take the necessary steps required to implement the intent of this law by means of decree to be issued after the deadline of March 15, 1951.[1] The grant to Parliament of a period of grace in which to act positively is

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[1]France, Journal Officiel..., Lois et Décrets (January 9, 1951), pp. 338-40.

imaginative and novel, but such a procedure is in the same spirit as previous enabling legislation. This procedure exhibits skepticism concerning the ability of the Legislature to undertake responsible action. It does no more than provide a period of delay before substituting executive action for legislative ineffectiveness.

A third technique, that of the Government modifying formal laws by decree in matters considered within the realm of the regulatory power (matières réglementaires par nature), finds its source in the delegations to the Blum government in the Third Republic. It was not utilized in the Fourth Republic until August of 1948 when the government of André Marie conferred upon the Minister of Finance and Economic Affairs, Paul Reynaud, the responsibility of presenting to the Legislature a project of law for economic and financial revitalization. Faced with economic deterioration and the necessity of urgent reform and reorganization, the Marie government sought, within the framework of the Constitution, a means of acting quickly and resolutely in a number of diverse areas. The result of these plans was the request for the passage of what was to become the law of August 17, 1948. This law was a statute--brief in text but broad in scope--wherein the Parliament enabled the Executive to proceed with independent discretion toward reform in areas that were by nature within the regulatory competence. With the exception of fiscal reforms,[1] revitalization was to be achieved by the Executive by decrees in areas which

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[1]Article 5 of the law of August 17, 1948, established a special procedure which falls under category four of this enumeration.

were by right within the scope of the pouvoir réglementaire. As the basic text stated, "les textes ayant force de loi, relatifs à ces matières énumérées... seront réputés avoir simplement valeur réglementaire quant au pouvoir du gouvernement de les modifier."[1]

This categorization of administrative authority by subject matter was unique to French constitutional processes, and from the moment of introduction in the National Assembly a deluge of criticism descended, questioning the legality of such procedures. The Commission of Finance of the National Assembly lay aside questions of illegality in its consideration of the bill on the basis that such allegations constituted reflections of political opportunism designed to unjustly limit the powers inherent in and required by the Executive.[2] This defense was brushed aside in debate on the Assembly floor. The posing of the preliminary question led immediately to a discussion of the constitutionality of the proposed legislation. The extreme-Left invoked Article 13 and proclaimed that the Government was proposing decree legislation that was condemned in the Constitution and which was completely unacceptable to the National Assembly.[3] On the other hand, the Government

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[1]France, Journal Officiel..., Lois et Décrets (August 18, 1948), pp. 8082-83. See also, Pinto, pp. 517-18.

[2]France, Journal Officiel..., Assemblée Nationale, Documents, No. 5206, p. 91.

[3]France, Journal Officiel..., Assemblée Nationale, Débats (August 9, 1948), pp. 5520-22.

took the position that the question at point was one of administrative law and that essential legality was not involved. André Marie assured the deputies that the Government was just as opposed to the re-introduction of the system of decree-laws as was the National Assembly and that the intention of the executive agency was only the "distinct establishment of the respective domaines of the Parliament and Government, to suppress the confusion created by vagueness as to the boundaries of the legislative power and the regulatory power, and to put an end to the difficulties that one encounters in attempting to distinguish between that which is in the domain of the Legislature and that which is in the jurisdiction of the Executive."[1] There is some question that the President of the Council encouraged the recalcitrant members with this declaration. For, if by "distinct establishment" he implied that it was within the province of the pouvoir réglementaire to establish a distinct regime by subject matter for the Executive, then he certainly was treading heavily upon the tradition-encrusted principle of the supremacy of the law. For, if there exists a domain exclusive by subject for the regulatory power, then this domain is outside the purvue of the law. In such an instance, regulation is not subordinate to law, and the hierarchy of laws is violated.

In opposition to the assurances of the President of the Council, the eloquent René Capitant dramatically evoked the

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[1] Ibid., pp. 5525-26.

spector of the ill-fated decree-laws of the Third Republic and developed a meaningful argument against "one of the causes of our national defeat and the collapse of republican institutions."[1] He vigorously condemned the concept that subject matter is regulatory by nature (matières réglementaire par nature): ". . . By the terminology that it employs, the Government gives the impression that it is possible to have . . . areas of competence which are constitutionally reserved to the regulatory power, and which, as a consequence, are forbidden to the law (i.e., direct legislative competence) . . . "[2] Law and ordinance are defined by an established hierarchy of law, rather than by any consideration of the subject matter with which they deal. Ordinance (règlement) is uniquely distinguished by its subordination to the law (loi) and does not, indeed cannot, possess an area of competence distinct from the law. Despite the theoretical validity of Capitant's reasoning, the fact remains that the entire history of French administrative practice shows periodic modification of this principle. From time to time the Executive has modified statutory law by decree. Article 13 apparently was not intended as an unequivocable guarantee of the supremacy of law over decree. In this instance it was felt that France required extended executive authority and this authority was found in the development of an essentially regulatory category of content. That this process survived was due as much to the ineptness of the regular regime

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[1]Ibid., pp. 5566-68.

[2]Ibid., p. 5569.

as to the merit of this or the other three categories distinguished in this analysis. In this instance, as is often the fate of the opposition, they reasoned, pleaded, threatened, cajoled, and invoked legality, but did not offer a suitable alternative to the proposals under consideration, and therefore failed to carry the day.

The debate in the Council of the Republic took on a more political tenor than the legalistic discussions in the National Assembly. This was indicated by the Communist Party spokesman, Zyromski, who illuminated the significance of failure to pass the Government bill:

> If we refuse to give our approval to these regulatory decrees, to these special powers, to these measures which are called 'decree-laws'; then one must recognize that one has taken a choice and that this choice is not simply made for legal and constitutional considerations; that it is very clearly a choice that we make to express our lack of confidence in the government presided over by André Marie and which includes Paul Reynaud.[1]

Thus, a vote of confidence as well as the merits of the proposed legislation was involved.

In the caldron from which political decisions emerge, considerations of legal form, political supremacy, immediate circumstance, traditional procedure, and pragmatism all vie for prominence. The result is normally compromise. In this political decision, the law of August 17, 1948, short-term accomodation was achieved between the competing claims of tradition and pragmatism, legality and political considerations.

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[1]France, Journal Officiel..., Conseil de la République, Débats (August 12, 1948), p. 2319.

The ultimate result was, in reality, compromise, innovation, and evolution. For here we have the setting into motion of a development which will lead to acceptance in 1958[1] of a sphere of competence outside the purview of traditional French legal practice. In August of 1948, the necessity of the moment overwhelmed the ability of regular procedures to react with vitality to the pressing problems of the day. This inadequacy gave impetus to the evolution of new procedures--partly borrowed from the past yet distinctly modern because of their subtle yet unique nuances--designed to provide the nation with the adequate tools for competent leadership.

In view of the debatable validity of the concept matières réglementaires par nature and the desire of the Government to conceal what was alleged to be a recourse to the system of decree legislation, the law of August 17, 1948, for economic and financial reform was not constructed in a particularly logical and clear-cut fashion. This rendered analysis quite difficult; however, despite the lack of clarity in this piece of legislation two approaches to the problem of reform can be distinguished.[2] One series of procedure has the character of parliamentary resolutions enjoining the Government to develop concise plans for reform and to deposit these proposals with

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[1]Article 34-37 of the Constitution of October 4, 1958.

[2]Pinto, pp. 520-21.

the National Assembly before a specified date.[1] A second series grants to the Government an enlarged regulatory competence in administrative, economic, and financial subject matter. In all areas except that established by the special regime for fiscal reform under Article 5 the law of August 17, 1948 respected the established procedures for the exercise of the pouvoir réglementaire. Consequently, the two disputed aspects of the law are (1) the validity of the category matières réglementaires par nature and (2) the acceptability of the extraordinary competence made possible by the provisions of Article 5.

Article 6 provided that on the report of the Minister of Finance and Economic Affairs and of other interested Ministers, and after the advice of the Council of State,[2] decrees could be taken by the Council of Ministers[3] which "abridge, modify,

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[1]A general statute for nationalized enterprises before December 31, 1948 (Article 2); for agricultural social security before April 30, 1949 (Article 3); a plan for the modernization of the Union Française before January 1, 1949 (Article 4); a statute for the Agence Française de Presse, for Havas-Publicité and for the Société professionelle des presse, before December 31, 1948 (Article 8). Ibid., p. 521, Note 2.

[2]Though accepting the advice of the Council of State, the government of André Marie rejected the political amendment of M. O'Cottereau which looked toward the creation of a consultative commission for fiscal reform comprised of interested Secretaries of State, Councillors of the Republic, and Deputies of the National Assembly. The President of the Council of Ministers emphasized the position of the Government that the exercise of the compétence réglementaire was within the jurisdiction of the Executive alone in his response. France, Journal Officiel..., Assemblée Nationale, Débats (August 9, 1948), p. 5621.

[3]A question was raised as to the Executive approval necessary for the implementation of these decrees. The original solution was to conform to the traditional practice of signature

or replace the laws in force"[1] in matters having for their nature a regulatory character. In the economic realm the subject matter relevant to the competence of the regulatory power as interpreted by Article 6 was quite broad: the organization, transformation, or merging, as well as the rules of organization for industrial or commercial public enterprises; the direction of the utilization of public resources; the allocation of primary materials and industrial products; the establishment of price and economic controls; and the equalization of exchange--all were considered essentially regulatory matters.[2] But this was by no means a blanket grant of authority to the Executive. True, Article 7 listed administrative reform as a matter relevant to the regulatory competence; however, Article 1 circumscribed this competence by specifying that such reorganization must have as its goal the rendering of a less costly and more efficacious public service. It also forbade the writing of a general statute for the civil service, for the general

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by the President of the Republic, President of the Council, and of the responsible Minister. However, to underline the exceptional nature of the procedure here followed, it should be noted that a modification of this system evolved: non-obligatory decrees required only the signature of the President of the Council, the chief of the regulatory power (titulaire du pouvoir réglementaire)--Article 47 of the Constitution. On the other hand, the President of the Republic who presides over the Council of Ministers (Article 32 of the Constitution) was required to sign obligatory decrees. Pinto, p. 521, Note 3.

[1]France, Journal Officiel..., Lois et Décrets (August 18, 1948), p. 8083.

[2]France, Journal Officiel..., Assemblée Nationale, Débats (August 9, 1948), pp. 5591-92.

organization of national defense, or for the armed forces.[1] In the same manner, the fundamental regulation of radio, television, and the press remained within the exclusive domain of the law.[2] On the other hand, Article 1 authorized the Government to modify and to transfer credits which its reforms rendered indispensable--this within the confines of the total budget and before January 1, 1949.[3] Yet, again, restriction raised its head as the Government was required, in each six-month period, to submit to the scrutiny of the Legislature the budgetary ramifications of its administrative and economic reorganization.[4]

In the financial realm the Government was authorized to regulate the issuance of Treasury loans, the securities market, and to modify the financial position of the State by decree.[5]

Finally, under the unique procedures established by Article 5, the Government, in order to ease the burden of the economy, was empowered to undertake the necessary reduction and limitation of import duties,[6] to simplify the procedure for

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[1]France, Journal Officiel..., Lois et Décrets (August 18, 1948), p. 8083.

[2]Ibid.

[3]Ibid., pp. 8082-83.

[4]Ibid., p. 8082.

[5]Ibid., pp. 8082-83.

[6]Ibid., p. 8083.

collecting income taxes,[1] to remodel existent fiscal codes and texts in order to reduce the multiplicity of taxes, to regulate and normalize their rules of application, to simplify the formalities required of the taxpayer as well as the governmental administrative agency, and to coordinate procedures for fiscal control and litigation.[2] These modifying codes and texts were to be attached to the financial budget for 1948 which was presented to the National Assembly on December 10, 1948. However, these renovations did not require specific parliamentary approval before entering into effect. It was stipulated that if there was no legislative action on the budget before January 1, 1949, the regulatory measures undertaken under Article 5 must go into force as of January 1, 1949, obligatorily. Such decrees could be presented to Parliament after their effectuation and this extraordinary competence could be overridden by a negative opinion of the Legislature. Nevertheless, short of a negative vote of the Legislature the regulations issued under Article 5 stood without further approval; in fact, the silence of the Legislature sufficed to substantiate the executory nature of decrees issued under this authority.[3]

Article 5 of the law of August 17, 1948, may be considered an example of a fourth technique employed to expand the regulatory authority. This technique was characterized by the issuance

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[1] Ibid.

[2] Ibid.

[3] Ibid. While the Government was opposed to all amendments which implied the necessity for a vote of Parliament

of decrees in the modification of formal laws in instances in which the specific and detailed content of the decree was known to the Legislature. With this technique two distinct procedures were possible. In one variation either the Government requested the authorization to implement by decree the text of a project of law pending before the Legislature, or the Legislature enabled the Government to undertake such authority under its own competence.[1] In a second variation the Government was enabled to undertake the writing of decrees in a specified area with the stipulation that such decrees would not enter into force until incorporated into legislation to be presented to the National Assembly. This was precisely the procedure followed in the incorporation of the fiscal reforms decreed by the Marie government on December 9, 1948, in the finance law presented to the National Assembly one day later. This procedure appears to be the most scrupulous of the four analyzed;

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before the entry into force of the fiscal codes allowed under Article 5, it might be noted that in the preliminary consideration of the law of August 17, 1948, the Assembly went contrary to the wishes of the Government and adopted the amendment Meunier which required parliamentary approval of fiscal codes undertaken by ordinance. At the same time, this amendment maintained that codes issued under Article 5 became executory as of January 1, 1949, thus establishing a direct contradiction. It was only after a question of confidence was posed before the National Assembly that the Council of the Republic version, carrying the original Governmental position, was adopted.

[1]This technique was employed by virtue of Article 2 of the Pleven-Mayer project relative to social security. The Government was empowered for a six-month period to implement a project of reform relative to "budget social de la nation" and to enact by decree a number of measures concerning diverse defined and enumerated aspects of "régime de la Sécurité sociale et de l'Assistance publique." De Laubadère, p. 36.

however, if the decrees were allowed to enter into force obligatorily in instances in which the Legislature fails to act before a specified date, it should be recognized that this technique could easily be moved outside the domain of restricted activity.

In order to judge the validity of the charge of "appeal to decree-laws" and to assess the impact of the law of August 17, 1948, on the evolution of the pouvoir réglementaire, it is necessary to recall the outstanding characteristics of the system that developed under the Third Republic. As far as circumstance was concerned, instances in which governments turned to the use of decree legislation were normally situations in which the regular implements for political action were or appeared to be incapable of offering adequate solutions to pressing problems in a number of divergent areas when such solutions were or appeared to be indispensable. In the Third Republic, these decrees were considered actes administratif. They were elaborated in the Council of Ministers and were subject to the advice of the Council of State. Their intent was defined by the laws which established them: administrative and economic reform in 1924, 1926, and1933; financial and economic reorganization in 1934, 1935, 1937, and 1938; and national defense in 1939. Normally, they were required to be submitted to the Chambers for ratification, but in practice quite often this requirement was overlooked and enunciated decrees remained valid and in effect unless otherwise abrogated by competent legislative authority. The duration of delegations and extensions

of power to the Executive depended upon the length of the current legislative session although for the most part these grants ran from two to six months. At the onset of sustained crisis in the last years of the Third Republic, the length of parliamentary sessions was prolonged and consequently the duration of special decree authority was effectively extended.

It is apparent that the law of August 17, 1948, employed many of the procedures used in earlier years. Certainly, the circumstance which rendered this bill necessary was very similar to that which in the past was used as justification for recourse to decree legislation: economic and financial crisis so grave and severe that ordered society could not depend upon unstable parliamentary coalitions for the promulgation of the necessary reforms. In the second place, ordinances taken under this law had the appearance of decree-laws as they have the facility of modifying anterior legislation (dispositions en vigueur),[1] and, again as in the case of decree-laws, the statutory instruments establishing this authority specified the intent of the envisioned ordinances. Thirdly, an overwhelming consistency was continually apparent in a comparison of traditional decree-law procedure and the procedure followed in the

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[1]Two earlier examples are pertinent: before the acceptance of the Constitution of 1946, the Government was authorized to modify certain dispositions having the force of law--the law of February 8, 1946, and the law of October 7, 1946, concerning the organization of local assemblies in the overseas territories. Also, after the effectuation of the Constitution, the law of September 20, 1947, on the status of Algeria enabled the Algerian Assembly to "complete or modify for adaptation to their local circumstances, the laws passed between the entry into force of the Constitution of 1946 and the promulgation of the present law."

enunciation and implementation of the law of August 17, 1948--in all cases, whether politically able to exercise its competence or not, the Parliament remained the ultimate legal authority.

On the other hand, certain inconsistencies may be noticed. In the Third and Fourth Republics, decree-laws were undertaken in Council of Ministers after consultation with the Council of State. But whereas, in the case of decree-laws, deposit with Parliament was not necessarily required, in the case of the law of August 17, 1948, even the special ordinances issued under Article 5 were required to be deposited with the Assembly twenty or more days before their entrance into force. This, theoretically, permitted parliamentary control although we are already aware that if the Legislature refused to act, these decrees went into force obligatorily. Also, the new law failed to employ the limitation traditional to earlier practice--that succeeding Governments may not require of the Legislature the renewal of enabling authority. This did not seem to be a hindrance as the National Assembly remained firm and refused amendments attributing continued competence to succeeding governments.[1] Nevertheless, despite these differences between the classic system of decree-laws and the decrees authorized by the law of August 17, 1948, one comes inevitably to the conclusion that this law marks the return of the regime of delegated legislation to French political life. Clearly, the out-

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[1]France, Journal Officiel..., Assemblée Nationale, Débats (August 9, 1948), pp. 5585-87.

standing innovation of this legislation was the introduction of the concept of the existence of subject matter which is regulatory by nature. To be sure, this notion was quite novel; indeed, it should be recognized as contrary to any previous practice and absolutely foreign to the established system of constitutional law. Neither the Constitution of October 27, 1946, nor any other fundamental document to this time had ever recognized a sphere of competence (compétence naturelle) reserved explicitly to the Executive authority. Had not the Constitution consecrated the revolutionary principle of the supremacy of the law[1] in its declaration that "National sovereignty belongs to the French people . . . The people may exercise it in constitutional matters by the vote of their representatives . . . "[2] and assured its execution by the stipulation that the President of the Council of Ministers "shall insure the execution of the laws."[3] Yet, the concept matières réglementaires par nature was established and was to become an integral part of the French legal system. To be sure, at this point this category was not carried to its logical conclusion. The Government did not attempt to establish a definable and standardized category of competence. Indeed, the President of the Council of Ministers was most anxious to assure the National

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[1]Constitution of 1791: "Il n'y pas en France d'autorité supérieure a celle de la loi."

[2]Article 3 of the Constitution of October 27, 1946. Lionel H. Laing et al., Source Book in European Government, p. 98.

[3]Article 47 of the Constitution of October 27, 1946. Ibid., p. 104.

Assembly that there was no intent on the part of the Government to define arbitrarily the boundaries of Executive and Legislative competences.[1] In practical terms, the enumeration of topics listed in Article 7 of the law of August 17, 1948, was not conducive to the extraction of any sort of general rule upon which standardization could be based. In fact, the only real possibility was the category of public service.[2] However, if this area were to be considered precisely within the confines of matières réglementaires par nature, it would follow that the other enumerated spheres, for example, the establishment of price and economic controls, and the ordering of the utilization of energy and the conditions for the distribution of primary materials and industrial products,[3] must also be considered part of this compétence naturelle. Though possible in

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[1]Andre Marie, President of the Council of Ministers, informed the National Assembly: "En effet en vue de rétablir, dans leurs attributions propres le législatif et l'exécutif, le Gouvernement aurait pu demander au Parliament de renouncer, d'une manière générale a telle matière qui serait traditionallement ou organiquement du domaine réglementaire. Il ne l'a pas fait... Nous allons plus loin. Nous vous demandons de délimiter vous-même, bien entendu, les domaines dans lesquels le pouvoir réglementaire s'exercera d'après le nouvel aménagement propose." France, Journal Officiel..., Assemblée Nationale, Débats (August 8, 1948), p. 5526.

[2]Article 6 of the law of August 17, 1948 stipulated that on the date of the promulgation of the present law in subject matter having by its nature a regulatory character, as determined by Article 7 following, "... pour abroger, modifier ou remplacer les dispositions en vigueur," decrees might be taken in the Council of Ministers after the advice of the Council of State. Article 7 in its enumeration of subject matter relevant to the regulatory competence listed the "Organisation, suppression, transformation, fusion, règles de fonctionnement et controle de l'ensemble des services de l'Etat..." France, Journal Officiel..., Lois et Décrets (August 18, 1948), p. 8083.

[3]Ibid.

form, this would appear to be impossible in practice as these economic reforms had as their objective the modification of parliamentary dispositions by delegated legislation rather than the establishment of a distinct material Executive competence. Moreover, such a category of standardization would require extensive powers of initiative and decision within this area on a permanent basis, and the Government made no attempt at this time to establish such authority. At the same time, the Legislature did not limit itself from interposing its power in these areas in the future and, therefore, the possibility remained that the legislative agency could intervene at its discretion to reduce or to destroy this domain.[1] We conclude, then, that this law marked the establishment of the concept of domain matières réglementaires par nature. A domain with identifiable content insofar as the law of August 17, 1948 extended, but without standardization in the hierarchy of French law. One can be sure that the ultimate effect of this direct affront to the supremacy of the law was not clearly foreseen in the summer of 1948. Its vagueness awaited specification: its further application awaited the demands of crisis.

Such a crisis arose in the early summer of 1953 when the Laniel government, faced with a severe balance of payments deficit and a budgetary imbalance of some 733 billion francs, requested and received from the National Assembly delegations of competence that had since 1948 been successively denied to

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[1] Supra., p. 149.

the Mayer, Reynaud, Mendès-France, Bidault, and Marie regimes. The passage of the Governmental project of July 2, 1953, which became the law of July 11, 1953, extended the application of the law of August 17, 1948, but while enumerating specific subject matter as within the material competence of the regulatory power[1] failed to make a further contribution toward the establishment of a definable category compétence naturelle.[2] This concept was not to come to full fruition until the writing of the Constitution of the Fifth Republic.[3]

From this point forward, one could say without fear of being inaccurate that the process of decree legislation which evolved into a primary process for governmental action in the Third Republic had been transmitted in its full scope without limitative refinement to the Fourth Republic. Varying nuances and innovations had been added, to be sure, but essentially

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[1]"L'organisation administrative des services de la justice et des forces armées; l'organisation, le fonctionnement et le contrôle des sociétés ou organismes français dont les collectivités;...Les règles générales applicables à l'avancement des personnels civils et militaires; les limites d'âge des personnels civils et militaires, des agents des administrations...Les règles concernant la responsabilité des compatables publics et les obligations administratives des ordonnateurs; Les conditions d'emission des emprunts des departements, communes et établissements public." René Chapus, "La loi d'habilitation du 11 juillet 1953 et la question des décrets-lois," Revue du Droit Public, Vol. 69 (1953), p. 1005.

[2]Supra., p. 138.

[3]See Articles 34-37 of the Constitution of the Fifth Republic. Peter Campbell and Brian Chapman, The Constitution of the Fifth Republic: Translation and Commentary (Oxford: Basil Blackwell, 1958), pp. 27-29.

the process of decree legislation upon which France staked her life in 1939 and 1940 had re-emerged by the summer of 1953 and was again available with all its implications to the Government in power. Granted that the Legislature must open the door to this plenitude of power, the significant fact was that the system was available.

Law, in the traditional sense, remained superior to ordinance. It appeared that when faced with crisis for which the regular legislative processes were inadequate, French governments were once again moving toward the employment of arbitrary and relatively unrestricted procedures. To be sure, experience and necessity dictated the delegation of competence to the Executive in emergency situations--but within what limits, for what period of time, and within what scope? France desperately needed a clearly defined program for the expansion of the regulatory power within explicitly defined content, area, and time limitations. Evolution between 1945 and 1953, unfortunately, offered little more than variations upon the traditional patterns established in the Third Republic: (1) authority to modify formal law when Parliament failed to take action within a specified period of time; (2)authority to modify formal laws within a specified period of time and for specified purposes; (3) authority to modify formal laws in instances in which the proposed ordinances have been considered by the Legislature; and (4) authority for the Government to modify formal laws by decree in matters within the material competence of the regulatory power. Only the last provided a positive step toward the

solution of the dichotomy of legislative sovereignty employed by an ineffective and often immobile Legislature and of Executive discretion applied without broadly accepted legitimacy in lieu of parliamentary action. However, it (*matières réglementaire par nature*) was employed with specifically limited content as specified by a particular law rather than as a category of subject matter explicit in content and permanently available to the holder of the regulatory power. Vagueness, limited content, and profound disagreement in the National Assembly concerning the legitimacy of this procedure--all contributed to the nullification of its positive attributes.

France was not able to create a stable government for herself in the Fourth Republic. She had not produced a broad fundamental consensus about the objectives of French society and the nature of French government. Without such an agreement any constitutional structure is shaky at best. France, the Nation, was one thing: France, the State, was another. The two were not accepted as concentric in the minds of many Frenchmen. The Army was fervently loyal to France but not necessarily to the republican government of France. In the mid-1950's treason was in the air. Government after Government strove mightily to solve pressing economic, social, and colonial problems without success. Political France cast about for procedures adequate to the times and found in the expanded *pouvoir réglementaire* a useful but limited technique. New approaches were sought. They were found. They were ingenious. But they failed to sustain the State. In the long run sustenance can only be found in agreement and vigorous action based upon agreement.

CHAPTER VII

THE STATE OF EMERGENCY AND THE LOI-CADRE

The outbreak in November, 1954 of violence in Algeria underlined the inadequacy of exceptional procedures as they had evolved in French administrative practice and provided rationale for the immediate implementation of new departures. The Mendès-France cabinet considered requesting emergency powers to expedite a firm reaction to this insurrection, but this regime did not remain in power for a sufficient period of time to be able to initiate a coherent Algerian program. It remained for the succeeding Faure government to demand the invocation of exceptional institutions in Algeria.

In April, 1955 the Parliament acceded to the demands of the Faure government and legalized the implementation of new emergency techniques--the state of emergency (état d'urgence). This innovation expanded the French crisis arsenal. In a single step France added an overt civil exceptional authority to the traditional and accepted procedures of the state of siege and the expansion of the normal executive regulatory authority.

The Government described the state of emergency as a regime intermediary between regular common law procedures and

the state of siege in which civil powers are transfered to the military agency.[1] As envisioned by the Faure cabinet, this institution was designed to provide an area of discretionary competence available to the Government in response to threats to the public order in instances in which the criterion for the establishment of the state of siege cannot be satisfied or in which the application of this predominantly military regime would be either inappropriate or inconvenient. It was asserted that the state of emergency corresponded to the nature of things. Faure felt that from time to time modern society required the intervention of exceptional authority of a civil nature, and that it was preferable to legislate in a general manner in a period of relative calm than to arrive at crisis situations unprepared to deal effectively with serious threats to the public order. The Government concluded that it was far more appropriate to pass general legislation in the calm of regular circumstance than to depend upon special legislation passed under the duress of immediate danger. The merits of this argument are compelling; however, it is to be doubted that the statute establishing the state of emergency was passed in a period of relative calm or that the principal intent of the parliamentarians was to create a "framework law" applicable to all potential circumstance. This exceptional legislation, as all such pronouncements in modern France,[2] was conceived in

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[1]France, Journal Officiel..., Assemblée Nationale, Débats (March 30, 1955), p. 2130.

[2]The law of August 9, 1849, regulating the application of the state of siege was impregnated by memories of the collapse

response to a specific problem, and in this instance the situation had the disadvantage of being outside the Metropole. Contrary to the elaborate analysis of the rapporteur of the Committee of the Interior of the National Assembly, the state of emergency was conceived by the Faure government as a measure spécifiquement algérienne.[1] It was a measure designed to provide the tools to deal with a particular problem--the maintenance of order in Algeria--that it was applied to France herself in May of 1958 and influenced the Constitution of the Fifth Republic is only testament to the implication of such legislation.

In formal terms the state of emergency (état d'urgence) is a legal regime (situation légal) designed to make exceptional powers available to the administration within the boundaries of the law. Nevertheless, in a legal society which adheres to the principle of the plenitude of parliamentary competence by virtue of its position as the repository of national

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of the July Monarchy and by the demise of the Charter of 1830. Certainly, the commendable performance of General Covaignac in the administration of the "commissioned dictatorship" of June 24, 1848, influenced the willingness of legislators to insert a provision providing for the state of siege in the Constitution of November 4, 1848. As we know, the August 9 law establishing the state of siege was the direct result of this provision. In the same manner, the law of April 3,1878, which modified the 1849 law and established new procedures for the organization of the state of siege, was enacted by deputies who knew the commune and had a first-hand awareness of both the excesses of unrestricted executive authority and the implications of inadequate executive power in crisis situations. In the same way, the law of April 3, 1955, instituting the state of emergency, is inseparable from the events in Algeria.

[1]France, Journal Officiel..., Assemblée Nationale, Débats (March 30, 1955), p. 2130.

sovereignty, this regime is justly considered an exceptional law (loi d'exception), as it permits the administration to move outside its normal realm of competence. Like the state of siege, it presents itself as a conciliation between exceptional necessities required in the defense of order and the fundamental rights of the citizens of the state.[1] For practical purposes, it is a statement of the Government's desire to refrain from having recourse to the state of siege.

The application of extreme measures to defend the public order is not new to legal practice in France. The notion of "imminent peril" is well known to French administrative law and has often been used as the justification for arbitrary police practices by the Council of State. In the case of the state of emergency, the appeal to imminent danger to the public order takes on expanded dimension and significance. For this exceptional procedure, though reserving the declaration of the regime to the legislative authority, allocates absolute discretion to the administration for determining the application of the institution--that is, the degree to which the public order is in danger and the proper legal methods to be employed in the solution of the problem. On the surface the regime would not appear to be beyond the control of the Legislature, for, after all, Parliament is sovereign. It can modify at any moment the conditions for the establishment of the

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[1]Roland Drago, "L'Etat d'urgence (Lois des 3 avril et 7 août 1955) et les liberties publique," Revue du Droit Public, LXXI, pp. 672-73.

state of emergency. Nevertheless, experience indicates that in such matters as these the Legislature tends to exhibit a reluctance to modify established emergency legislation, even though assuredly it has the authority to do so. The continuation of the state of siege through the great diversity of regimes since 1849, with only one modification--that of 1878--is testimony to this tendency. A more compelling argument, however, can be built around a recognition of the reality of the relationship between emergency legislation and the Legislature. The attempt to create permanent emergency institutions is predicated upon an awareness of the need for positive exceptional procedures in a time of crisis. Such procedures are normally employed in situations in which the regular regime of policy formation and application is regarded as being incapable of dealing conclusively with the problem at hand. In such situations it would not be reasonable to expect that a Parliament which has turned to the exceptional in an effort to defend the established order of society would have the fortitude, ability, or capacity to serve as an effective check upon the application of such procedures.

The law of April 3, 1955 is a most unusual document. In one piece of legislation it specifies the area in which the regime may be applied;[1] defines the procedures available and

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[1]In the terms specified in Article 1 of the law of April 3, 1955, the state of emergency may be declared "in all or in part of the metropolitan territory, in Algeria, or in the overseas departments." France, Journal Officiel..., Lois et Décrets (April 7, 1955), p. 3479.

the limitations required; and implements the regime in a selected area.[1] Thus, contrary to regular legislative practice, a general and broadly applicable procedure and its specific application to a particular area was debated and implemented in a single legislative enactment.

The state of emergency was declared for all the territory of Algeria. It is noteworthy that the National Assembly was not willing to curtail the area of declaration of the state of emergency in Algeria. It paid little attention to the amendment initiated by the Moslem deputy Benjelloul, which called for the limitation of the area of declaration to the Aures Mountains which had been the area in which most of the difficulty had occurred. It is clear that from the outset the Legislature was willing to extend the exceptional competence of the Government to rather broad areas so long as it retained an ultimate check upon application in terms of political responsibility.

The state of emergency was viewed with much concern. Many felt that it would result ultimately in a more authoritarian regime than was possible under the state of siege. In the debate on the law of April 3, 1955, both Moslem and Left-wing delegates protested vehemently against what they considered to be the granting of exceptional authority without adequate provisions for defense of individual rights. The Communist deputy, Rosan Girard, personifies this opposition. Girard

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[1]Article 15 of the law of April 3, 1955 states that: "The state of emergency is declared in the territory of Algeria for a period of six months." Ibid., p. 3480.

insisted that this new regime would be more arbitrary than the state of siege, because it departmentalized application and, therefore, was less susceptible to parliamentary oversight. Girard and his cohorts were particularly dubious about the distinction between the declaration (déclaré) of the state of emergency and the application (appliquer) of the regime. It was their contention that the guarantees implicit in the initial stage of the declaration were not carried over to the critical stage of application. Consequently, in the view of these critics, the potentiality for abuse was greater in an unrestricted executive application of exceptional procedures under the state of emergency than under specific delegations to the military in the implementation of the state of siege. However, a comparison of the application and effect of the two regimes will demonstrate that the initial form of the state of emergency was based upon delegations as clear-cut and defined as those employed as justification for the state of siege; and one would expect that the civil authority would be less arbitrary in the application of restraints than the military would be.

At this point a comparison between the provisions of the law of 1878 regulating the organization of the state of siege and the statute establishing the state of emergency becomes relevant. The law of April 3, 1878 stipulated that:

> Only a law can declare the state of siege.
> This law will designate the communes, arrondissements,

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[1]France, Journal Officiel..., Assemblée Nationale, Débats (March 31, 1955), p. 2217.

and departments to which it is to apply. It will fix the period of its duration.

At the expiration of this period the state of siege ceases, automatically, unless a new law shall prolong its effects.

2. In the event the Chambers are adjourned, the President of the Republic can declare the state of siege, on the advice of the Council of Ministers; but then the Chambers meet automatically two days later.

3. In the event the Chamber of Deputies is dissolved, and until elections shall have been entirely completed, the state of siege cannot, even provisionally, be declared by the President of the Republic.

Nevertheless, in the event of foreign war, the President, on the advice of the Council of Ministers, can declare the state of siege in the territories menaced by the enemy, on the condition that he convoke the electoral colleges and reassemble the Chambers in the shortest possible delay.

4. In the event that communications with Algeria are interrupted, the governor can declare all or part of Algeria in a state of siege, under the conditions of this law.

5. In the occasions foreseen by Articles 1 and 2, the Chambers, as soon as they shall have reassembled, shall maintain or lift the state of siege. In the event of disagreement between them, the state of siege is lifted automatically.[1]

In this same spirit, the law of April 3, 1955 provided that there was no way to declare a state of emergency except by law;[2] that this law established the duration of the state of emergency and that it might not be prolonged except by a new law;[3] and that in the case of dissolution of the National

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[1]Rossiter, p. 82.

[2]France, Journal Officiel..., Lois et Décrets (April 7, 1955), p. 3479.

[3]Ibid.

Assembly, the law that had established the state of emergency was to be abrogated de plein droit.[1] If a government resigned or there was a vacancy in the presidency of the Council of Ministers, the incoming government was required to ask Parliament for confirmation of the state of emergency within fifteen days, counted from the day in which the government received the confidence of the National Assembly.[2] The basic distinction, and the one referred to by Rosan Girard,[3] rests upon the requirement of the state of siege that the "law will designate the communes, arrondissements, and departments to which it is to apply"[4] and the state of emergency specification that declaration will be made by law, but that after the broad implementation of the regime, the determination of the districts and the areas within the districts to which the state of emergency will apply is within the competence of the Executive rather than the Legislature.[5]

This disparity of method which might be considered a distinction between legislative application and administrative application is not unrealistic. The proper role of the Legislature in modern society is not and cannot be an intimate direction of affairs concerned with the minutiae of application

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[1]Ibid.

[2]Ibid.

[3]Supra., pp. 165-66.

[4]Rossiter, p. 82. Supra., pp. 166-67.

[5]France, Journal Officiel..., Lois et Décrets (April 7, 1955), p. 3479.

but, rather, must be a broad oversight concerning itself with appropriate objectives and methods. In crisis situations the objective of legislative policy must be the establishment of clear-cut delegations to responsible authority within defined limits of competence and for specified periods of application. Anything more or anything less will tend to destroy the continuity of policy formulation and application so important in periods of stress.

Viable exceptional government demands a forthright description and understanding of competences. The bankruptcy of make-shift arrangements in parliamentary-governmental relations is nowhere better documented than in France's own history during the 1914-1916 period. As Jere Clemons King wrote in her description of this period:

> The a priori method of regulating policy and strategy by assigning the political ends of war to the civilian power, and the forcible achievement of those aims to the military had been abandoned in actual practice. The military at first invaded the government's sphere. Then Parliament encroached upon the power of the government and the command, and finally the government, under Clemenceau, became the dominant factor. This shift in power from the command to Parliament to government was quite unforeseen, but almost inescapable in the circumstances. Pragmatic testing, blind groping, and trial and error took the place of any rule of thumb formula laid down for separate spheres of authority.[1]

The clarification of legislative-executive-military responsibilities was desirable in 1914; it was desirable in 1940; and it was desirable in 1955 as it is today. The contribution of the

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[1]Jere Clemons King, Generals and Politicians (Berkeley: University of California Press, 1951), p. 243.

state of emergency to this objective can only be answered after further analysis.

Since the state of emergency, at least according to the Faure government, was conceived as a moderate device applicable to modern circumstance and a device less authoritarian than the state of siege, it does not seem inappropriate that Parliament should delegate competence for the application of such an institution to a politically responsible government. To be sure, abuse was possible, even probable, in a situation of stress. But such is always the case in crisis. If respect for the rule of law is lost, if those in authority (whether military or civilian), seek unattainable ends through violent means and refuse to enter into constructive compromise, then the result at best can be abuse. At worst it will be anarchy.

In summation, the procedures for the declaration and application of the state of emergency were nothing more than an enunciation in practical terms of the distinction between loi formelle and loi matérielle[1] as recognized by the emerging interpretation of Article 13. The state of emergency is within the formal competence of the Legislature and therefore must be dealt with by the passage of legislation (law of April 3, 1955). However, substantial delegations of the material content of this legislative competence may be extended to the Executive for elaboration by decree. (Article 2 of the law of April 3, 1955: "... In the limits of its declaration, the

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[1] Supra., pp. 131-34.

zones where the state of emergency will be applied are to be established by decree taken in Council of Ministers on the report of the Minister of the Interior.") The legalistic standard, then, is one of form rather than content. It is dangerous but no more illegal than the laws of 1948 and 1953.

As in the case of the organization of the two exceptional regimes, there are certain comparisons which can be made which serve to elaborate and set in perspective the effects of the state of emergency. First of all, it should be noted that the statute regulating the effects of the state of siege[1] stressed the continuation of normal guarantees of constitutional rights except in instances in which they were suspended by law in defense of the constitutional order. The law of April 3, 1955, establishing the state of emergency, did not contain a similar provision, but it would not be amiss to presume that, in view of the emphasis placed upon legality by the state of emergency, such a limitation was, by definition, understood.

The political state of siege, to which the state of emergency is most comparable, permitted three types of consequences: (1) the military authority is partially or totally invested with the police power normally exercised by the civil authority; (2) the regular powers are reinforced by the simultaneous operation of the military authority, the two powers complement each other in situations in which the totality of civil competence is not transferred to the military; (3) military tribunals

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[1]Article 11 of the law of August 9, 1849. Rossiter, p. 82.

are allowed to sit in judgment of nonmilitary offenders whose actions threaten the security of the state. Clearly, the principle upon which the political state of siege was based was the transference of civilian competence to the military authority. As designed and presented by the Faure government, the state of emergency was to be quite different. In the state of emergency, the method was to be the extension and transformation of competences within the scope of the civilian authority. The objectives, nonetheless, were the same--the assurance of the order of established society.

As a result of Article 15 of the law of April 3, 1955, the state of emergency was declared in the three departments of Algier, Oran, and Constantine, under their respective Prefect[1] as well as in the territories of the South under the direct supervision of the Governor-General. As a direct consequence of the declaration, the departmental civil authorities were granted the competence to: (1) prohibit the movement of people and vehicles in the areas and during the hours prescribed by the prefectorial arrêté, (2) institute zones of protection

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[1]"The principal arm of the Government at the grass roots of the policy process is the Prefect (Préfet), a high civil servant, employed by the Ministry of the Interior, who resides in the main town of each département. It is he who is ultimately responsible for all aspects of local government and the execution of national policies locally. Although elected departmental councils (conseils généraux) and township and municipal councils (conseils municipaux) do exist, the serious decisions of local government policy are made by the Prefect in consultation with his ministry or another Paris authority." Samuel H. Beer and Adam B. Ulam (eds.), Patterns of Government (2nd. ed. rev.; New York: Random House, 1962), pp. 449-50.

and security, and (3) to prohibit within these areas of security the right of domicile to all persons who seek to interfere with the normal operation of the public powers.[1]

The authority to prohibit the movement of persons and vehicles is not new to modern France. The regular police authority retains the implicit right to prohibit such circulation. This power is normally vested in the mayor of a commune or in the departmental prefect when circumstance demands such restriction in a number of communes or in the entirety of a department. This is not to say that the Council of State has accepted a general and permanent prohibition of this type to be legal, for this is not the case. It has only accepted this sort of arbitrary restriction in situations which may be legitimately considered to be exceptional. Therefore, in order to guarantee the complete applicability of such authority during the declaration of the state of emergency, it was necessary to include this grant of authority in Article 5, Section 1, of the law of April 3, 1955. It can be well argued that its implementation constitutes grave incumbrances upon the principle of the free movement of citizens (liberté d'aller et venir) and makes possible the application of a curfew, a device

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[1]See the arrêté of the prefect of Constantine of April 17, 1955, fixing the conditions for the movement of persons and vehicles in the arrondissement of Batna and in the commune of Tebessa. (Journal Officiel..., Lois et Décrets, May 3, 1955.) See also the arrêtés of the prefect of Alger of May 5 and 6, 1955, establishing the conditions of movement in the arrondissement of d'Aumale and of Tizi-Ouzou. (Journal Officiel..., Lois et Décrets, May 10, 1955.)

not mentioned by name in the law but which is, nevertheless, the operative method of the prohibitions prescribed.

The authority to institute zones of protection and security, on the contrary, is not an elaboration of competence implicitly available under regular procedure. It is entirely an exceptional grant which does not proceed from any extension of common law practices. The institution of these "zones" facilitate necessary extensions of civil authority, comprising not only the prohibition of domicile (Article 5) and the assignment of residence (Article 6) but also the imposition of punitive measures (Article 13).

The third procedure, the prohibition of domicile, is also an exceptional measure which may be implemented over the totality of the area of the déclaration of the state of emergency which, in this instance, was the entirety of Algeria. All persons "suspected of impeding the functioning of the public powers"[1] were subject to the deprivation of the right of domicile in Algeria--the consequence was the institution of the authority of the Government to deport "suspected" insurrectionists. Legal recourse was available to those so charged but it was necessarily after the fact.

In addition to the implications of the déclaration of the state of emergency, Articles 6 and 8 of the law of April 3, 1955, provided extensions of authority as the result of the

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[1]France, Journal Officiel..., Assemblée Nationale, Débats (March 31, 1955), p. 2217. See also, Drago, p. 682.

application (appliquer) of the exceptional regime to a particular area within the scope of the parliamentary declaration. This application was considered the legal basis for the regulation of the use of public places, the holding of public meetings, the suspension of elections, and the reorganization of civil and military powers within the area of application. Furthermore, if the application was described as aggravé, certain other exceptional measures became available: specifically, residences could be searched by day or night; and the press, radio, motion pictures, and the legitimate theater were subject to censorship. When one adds the authority granted under (1) the parliamentary déclaration of the state of emergency; (2) the governmental application (appliquer) of the regime to a particular area within the scope of the declaration; and (3) the implications of the state of emergency aggravé, it is immediately apparent that, when fully applied, the state of emergency brings to bear under civilian tutelage a coterie of exceptional powers not greatly different in scope from those supplied in Article 9 of the law of August 9, 1849,[1] which details the effect of the state of siege.

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[1]Article 9 of the law of August 9, 1849: "The military authority has the power: (1) to conduct searches by day or night in the homes of citizens; (2) to deport liberated convicts and persons who do not have residence in the areas placed under the state of siege; (3) to direct the surrender of arms and munitions, and to proceed to search for and remove them; (4) to forbid publications and meetings which it judges to be of a nature to incite or to sustain disorder." Rossiter, p. 83.

Nevertheless, in its original design the state of emergency was conceived to be something quite different. Under the state of emergency in its extreme instance, *état d'urgence aggravé*, competence remained with the Minister of the Interior and the Governor-General. This authority could be delegated, but the recipient was an appropriate civil servant rather than a military commander. In the case of the discretionary oversight of domicile (*assignation à résidence*), the competence to assign acceptable places of residence to individuals whose activities were adjudged to be dangerous to the public order was delegated to a Director and Assistant Director of Security appointed by the Minister of Interior.

Responsibility for the control of public meetings and the management of the use of public places rested in actual practice with the appropriate prefect or his delegee. All meetings, entertainments, and amusements which caused the gathering of people came under this tutelage, and while such controls were rather standard in normal times as extensions of the civil authority to regulate traffic, in exceptional times the autocratic use of this authority was, on the one hand, necessary to the preservation of order and, on the other, distinctly detrimental to public liberties. There was so much concern over the latter problem that the primary application of these provisions was held up until after the May, 1955 elections.

In this same vein it should be noted that the regime *aggravé* had a significant effect upon the election process

(élections partielles). An amendment to suspend elections sponsored by the deputies Gautier and Ballanger was defeated in the debate of March 31, 1955, and it was understood at that time that the state of emergency would cease during election time. The unreality of this position was quickly realized, and in the law of August 7, 1955, it was determined that "élections partielles are suspended in the zones where the state of emergency is applied."[1] It was not practical to remove exceptional procedures during an election period and then to reapply them. This would disrupt the continuity of the imposition of an extraordinary regime as well as remove factors necessary to the maintenance of order at a time when maximum stability was most desirable. As elections could not be held properly during an exceptional regime, the National Assembly had no alternative but to suspend elections and recognize that they could not be held in areas in which the state of emergency had been declared and applied.

The état d'urgence aggravé, in the tradition of the state of siege, provided two further exceptional measures: searches of individual domiciles by day or by night and censure of the means of communications.[2] The governmental project providing for this civil authority made this competence applicable to all territory to which the state of emergency had been applied. Searches could be ordered by the regular civil authorities (as

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[1]France, Journal Officiel..., Lois et Décrets (August 14, 1955), p. 8171.

[2]Ibid. (August 7, 1955), p. 3480.

established in Article 8 of the law of April 3, 1955).[1] Consequently, the regular civil authorities were enabled to make searches and seizures at any hour, in any place within the zone established under the state of emergency. Thus, for the first time such authority was conferred upon civilian authority. It had been possible for military authorities to expedite this competence under Article 9 of the law of August 9, 1849,[2] but until April 3, 1955, civil authorities were constitutionally limited by the precedent of Article 76 of the Constitution of the Year VIII, which unequivocably decreed that "the homes of all persons living in French territory are inviolable."[3] The only exceptions permissible during the night were circumstances of fire, flood, or request from inside the house. In the daytime civil authorities could enter for special reasons "determined by law or as a result of orders emanating from public authorities."[4] This precedent had continued as part of French public law as the result of its incorporation into Articles 9 and 16 of the Code of Criminal Instruction and in Article 184 of the Penal Code.[5]

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[1] Ibid.

[2] Article 9 of the law of August 9, 1849: "The military authority has the power to conduct searches by day or by night in the homes of citizens . . . " Rossiter, p. 83.

[3] Article 76 of the Constitution of the Year VIII, Duguit and Monnier, p. 127.

[4] Ibid.

[5] Duguit and Monnier, p. 127.

Thus, this application of the *situation aggravé* emerged as an exception to the established principles of common law.[1]

Under the provision for censorship the responsible civil authorities were enabled to "take all measures to assure the control of the press and of publications of all nature as well as the [censure] of radio broadcasts, of motion picture productions, and of theatrical presentations."[2] This authority was quite comprehensive and arbitrary because the Legislature did not see fit to establish adequate definition of means and ends. Administrative application was not susceptible to the effective judicial control available in normal times. However, these were not normal circumstances. The problem was one of the effective expansion of authority within limits advantageous to the continuity of the state.

On April 21, 1955 the Governor-General of Algeria ordered the responsible officials of newspapers and other publications to submit proofs of their forthcoming issues to the civil authorities for approval. The consequence of the state of emergency was, as a result, the establishment of a preventive censorship quite analogous to that allowed by the laws of 1849 and 1878 but completely unknown to regular civil practice.

Finally, it should be recognized that the practical application of the state of emergency *aggravé* involved positive innovations in administrative, judicial, and military organization.

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[1]Drago, p. 687.

[2]France, *Journal Officiel...*, *Lois et Décrets* (April 7, 1955), p. 3480.

Although the law of April 3, 1955 had nothing to say on this subject, the proclamation applying the regime permitted the creation of new organizational structures designed to coordinate both the use of repressive measures and the legal guarantees of legitimate application. For example, by the arrêté of April 16, 1955, the Governor-General delegated to the sous-préfet (assistant administrator) in the arrondissement of Batna the competence to prepare and to coordinate "all measures necessary to the reestablishment of order . . . and the authority to apply these measures in this zone."[1] This text required that diverse civil and military functions be placed in the hands of the sous-préfet: the consequence being the fusing of civil and military responsibility under the delegee of the central civil authority.[2] However, this procedure was hardly created before it was recast. A decree of April 22, 1955 placed a general officer at the disposal of the Governor-General, and an official communique specified that the purpose of the appointment was the assurance of military cooperation with the civil authority in control of all administrative and security endeavors.[3] Apparently the Government expected that this modification would result in a "strengthening of the civil and military structure"[4] in the department of Constantine. However, this "strengthening"

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[1]France, Journal Officiel..., Lois et Décrets (April 22, 1955), p. 4652.

[2]Drago, p. 686. See also, Le Monde, April 23, 1955, pp. 1-3.

[3]France, Journal Officiel..., Lois et Décrets (April 22, 1955), p. 4166.

[4]Drago, p. 686.

was most curious and paradoxical, for it brought the military agency into direct participation in the employment of the state of emergency. True, the subordinates of the general officer were to only cooperate with the responsible prefects or under-prefects in the zones in which the civil regime had been applied. Nevertheless, in a strife-torn land as Algeria the implications of such cooperation were vast. The professional military leaders did not have the greatest respect for the government of the Republic. They tended to feel that Algeria offered the last best opportunity for France to retain both dignity and destiny and for the Army to retain its future. They were determined that the ignominy of Indo-China should not be repeated. In such a situation the cooperation of the military in the implementation of a supposedly civil institution placed the veracity of the institution itself in grave doubt. Once the military was brought into the picture, the tendency was to revert to dependence upon this more authoritarian element. This is precisely what happened in Algeria during 1955 and 1956. The paradox is quite clear. The great majority of the supporters of the institution of the state of emergency based their enthusiasm upon the assumption that this institution would provide the means for an adequate civil answer to the mushrooming disorder in the overseas province. The move toward cooperation between the civil and the military tended to blur the distinction between the state of emergency and the state of siege. When one considers the rather unencumbered discretionary authority possessed by the administration,

the reservations previously expressed by critics of the state of emergency become more compelling.

To some, the state of emergency appeared to be dictatorial. As the deputy Fayet put it, "In effect the rule of the police is substituted for the rule of law . . . The application will be arbitrary and quite absolute."[1] The Minister of the Interior, the Governor-General in Algeria, can by discretionary measures without operating under the law, destroy individual rights "without the control of any judge, judiciary, or administration."[2] This attitude that the state of emergency would be most arbitrary; that there were no appropriate legal guarantees to legitimate application of exceptional powers by civil authorities; and that individual liberty would be offered up on the pyre of state security, became a popular belief among political skeptics and opportunists. It cannot be doubted that the very nature of an exceptional regime provides legitimate grounds for concern for the preservation of human rights. Events were to prove that such fears were basically justifiable.

Article 7 of the statute instituting the state of emergency provided for the establishment of consultative commissions in the various departments in Algeria in which the regime had been applied. These commissions consisted of prefectoral appointees as well as representatives of the two colleges of citizenry. It was hoped that they could focus attention upon

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[1]France, Journal Officiel..., Assemblée Nationale, Débats (March 31, 1955), p. 2196.

[2]Ibid.

instances of gross injustice and negligence and thus stifle the excesses which tend to come with exceptional procedures. Their authority was nothing more than consultative, and all authority for the determination of appeals rested with the competent authorities. Their achievements were at best moderate and uneven. In some instances, as in the department of Constantine, commissions were not established until three or four months after the application of the state of emergency. As in this instance, claims of abuse began to pile up and in some cases were never reviewed by the appropriate group.[1]

Despite the failure of the consultative commissions, the essential formal legal character of the administrative process in France should not be overlooked. René Mayer told the National Assembly that he knew of no text in the legislation of the Fourth Republic which permitted civil or administrative tribunals (conseils de préfecture, administrative tribunals, or the Conseil d'Etat) to question the discretion involved in the application of civil repressive measures: that there was really no need for such a text because the laws of March 2 and March 17, 1900, which are still in effect, "permitted to all persons who are the objects of an administrative measure the right to attack the administrative competence on the grounds of illegality."[2] Mayer was correct for as long as the civil

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[1]Drago, p. 688, Note 2.

[2]France, Journal Officiel..., Assemblée Nationale, Débats (March 31, 1955), p. 2198.

courts remained in operation, and insofar as they would accept appeals, the exceptional regime remained under judicial limitation. The courts in cassation were quite reluctant to accept cases in this situation, but such was not the case in the administrative law hierarchy; consequently, the most effective method of curtailing indiscriminate perversions of exceptional powers became the appeal by method of excès de pouvoir[1] with the claim of ultra vires.[2]

On the other hand, it should be recognized that this civil crisis institution entailed some attribution of competence to military tribunals. Consistent with Article 8 of the law of August 9, 1849,[3] as interpreted by the law of April 27, 1916, military tribunals, "in case of imminent peril resulting from armed insurrection" were considered competent to deal with non-military matters. However, this exceptional competence was applicable only to crimes and offenses foreseen by the Code of Military Justice and by those articles of the Penal Code which deal with offenses against the public welfare. In principle, this jurisdiction could not be instituted except in time of war (Article 125 of the Code of Military Justice). However, Article 12 of the law of April 3, 1955, as augmented by Article 2 of that of August 7, 1955, extended authority under civil competence to

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[1] Supra., pp. 48-49.

[2] Supra., p. 48, note 1.

[3] Article 8 of the law of August 9, 1849: "The military courts may take jurisdiction over crimes and offenses against the safety of the Republic, against the Constitution, against the public peace and order, whatever be the status of the principal perpetrators and their accomplices." Rossiter, p. 83.

military jurisdiction in a manner comparable with the 1849 and 1916 statutes. Consequently, when the state of emergency was instituted in a zone, the civil authority was empowered "to authorize military jurisdiction to concern itself with crimes and related violations of the law pertaining to the competence of the cour d'assise[1] in the department."[2] Appeals in cassation were suspended. The result, in effect, was the imposition of military tribunals in the place of cassation courts.[3] This modification of judicial protection raised questions concerning the moderate nature of the institution.

After the legislative declaration of the state of emergency, the responsible executive authorities[4] met to determine the line of policy to be followed in the specific areas of application. The immediate result of this conference[5] was the formation of a military command in the department of Constantine under the direction of General Parlange. The ensemble of the security forces in the department (police, gendarmery, Algerian contingents, supplementary staff) were placed at the disposal

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[1]The cour d'assise is a civil tribunal of the first instance. These courts have jurisdiction over all civil cases except those specified in the laws as belonging to other courts. They are appeals courts for the Justices of the Peace and the industrial courts (conseil de prud'hommes) as well as for labor disputes. As there is no distinction between civil and criminal courts in France, they also have jurisdiction in criminal matters.

[2]France, Journal Officiel..., Lois et Décrets (April 7, 1955), p. 3480.

[3]France, Journal Officiel..., Assemblée Nationale, Débats (July 19, 1955), p. 4534.

[4]President of the Council, Minister of Defense, and the Governor-General for Algeria.

[5]The conference met on April 26, 1955.

of the military commander. Civil defense was organized and temporary internment camps were set up despite the expressed condemnation of the National Assembly. Censorship of the press was established and a zone of protection was extended to the south of Constantine to include the mixed communes of Biska and El-Oued.[1] In early May a series of new military measures concerning Algeria were adopted accomplishing: (1) a major increase in the military and gendarmery contingents in Algeria, (2) a re-evaluation of the use of the contingents already available, (3) participation of the Navy in the maintenance of order, (4) the immediate increase of airplanes and helicopters available in Algeria, (5) the recall to active duty of all officers with training in Moslem questions, (6) the immediate employment of supplementary Algerian troops to assist the rural police, and (7) the immediate transfer of police contingents from the Metropole to Algeria.[2]

Certainly, these measures buttressed the civil and military coercive authority; nevertheless, the French colons reacted in an unfavorable manner toward these dispositions. Dissatisfaction was expressed, not because there was substantial use of military forces, but because it was felt that governmental action against the terrorists was inadequate. Jacques Chevallier, the deputy-mayor of Alger, speaking for the Federation of Mayors of Algeria, warned the Government that "moderate" strengthening of the arbitrary power in Algeria was not sufficient

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[1] L'Année Politique (Paris: Presses Universitaires de France, 1955), p. 276.

[2] Ibid., p. 233.

to the task at hand. In the view of this representation of settler opinion, the "fluidity and ubiquity" of the rebels demands "the association of the entire population in an anti-terrorist action."[1] In this spirit the Federation meeting in its general assembly approved a motion declaring:

> . . . Considering the exceptional gravity of the events of which Algeria is the theater . . . , that the establishment of order and of peace cannot be achieved except by particularly firm measures--all, unanimously, the mayors of Algeria affirm their determination to obtain from the government the application of the means capable of obtaining in the least delay and by exceptional measures the restoration of French authority, the dispensor of order and peace.[2]

To implement this intention the Federation of Mayors demanded: the strongest possible punishment (châtiment suprême) for individuals convicted of criminal acts, the severe control of the entirety of the press, the application of the state of emergency in the three departments of Algeria, and the prohibition of the Algerian Communist Party (the refuge of all extremist and separatist elements).[3] For the Federation the task was quite clear. Strong action was required immediately. The Government, through the state of siege and the state of emergency, to say nothing of its control of the armed forces, had the means available to quell rebellion. It was the Government's responsibility to act decisively and with dispatch.

For the Faure government, the situation was much more

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[1] Ibid.

[2] Ibid.

[3] Ibid.

complex. The Government recognized the necessity of tightening security. The introduction of the state of emergency was predicated upon this premise. The same is true of the buildup of military and police forces in May, 1955. Edgar Faure had assured the National Assembly on June 21 that "these repressive measures will be maintained as long as the duration of terrorism."[1] But, at the same time, he had reminded them that the Government had given its approval to a memorandum presented by Jacques Soustelle which condemned any vacillation from the high road of reform oriented toward the gradual political and economic integration of Algeria and the Metropole. Soustelle contended that for France to subordinate reforms in Algeria to the reestablishment of order would be to manifest political weakness which could well be used as a justification for terrorism.[2] However, the immediate problem was the search for appropriate methods for dealing with rising agitation, with the vast unemployment problem, with the distribution of foodstuffs to the needy; and it was to these pressing concerns that the Government turned its immediate concern. The state of emergency

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[1] Ibid., p. 244.

[2] "M. Soustelle déclare, devant le Comité de Coordination pour l'Afrique du Nord, que le terrorism est en régression. La peur s'est atténuée, le contact a été rétabli entre les représentants de l'ordre et les autochtones qui fournissent à nouveau des reseignements. Des groupes de volontaires peuvent être recrutés parmi la population indigene de l'Aurès. Les incendies de récoltes sont peu importants, l'interdiction de fumer et de fréquenter les boutiques européenes n'avait duré que quelques jours. Mais des attentats continuent à se produire et les forces de l'ordre procédent à de nombreuses vérifications d'identité." Ibid., p. 252.

was the order of the day.

In the last days of July, 1955, a marked reduction in violence was achieved; nevertheless, it was necessary to continue the application of the emergency regime. The Government, on July 30, 1955, went to the National Assembly demanding a six-month renewal of exceptional authority. This was granted by large majorities with the passage of the law of August 7, 1955.[1]

The period of relative calm did not last one month. Rather than deterring the insurrectionists, the reimposition of the state of emergency appeared to invigorate the negative reaction to French control. On August 20 the rebels bombed public buildings in the Collo-Philippeville-Constantine-Guelma region, and across the province spasmodic attacks were made upon European residences resulting in numerous deaths. The Government's reaction was the application of the state of emergency to the entirety of Algeria. In the fall of 1955, Edgar Faure tried valiantly to embark upon a coherent policy for the province, but he was alternately hindered by indecision, internal conflict within his cabinet, and parliamentary opposition. At various times the Government declared its support for the gradual

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[1]"The state of emergency . . . is prolonged for a duration of six months . . . " (Article 1). "The appeals en cassation against decisions jurisdictions d'instruction . . . are carried before a military tribunal en cassation established by decree and conforming to Articles 126 and 132 of the Code of Military Justice. . . " (Article 2). "The élections partielles are suspended in the zones where the state of emergency is applied." (Article 4). France, Journal Officiel..., Lois et Décrets (August 14, 1955), p. 8171.

application of the Algerian Statute of 1947,[1] the Soustelle program of integration[2] (which implied the repudation of the 1947 statute), and the consideration of a new charter for

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[1]The statute promulgated on September 20, 1947, known as the "Algerian Statute," contained the traditional formula that: "Algeria constitutes a group of departments endowed with civil personality and financial autonomy," but added the phrase, "and a particular organization." It established a governor-general, a central administration under his direction, a council of government, and a representative Assembly-making Algeria quite different from any other "group of departments" in the French Republic. "Effective equality" was proclaimed among all French citizens. However, the Statute (Articles 30 and 31) established an Algerian Assembly consisting of two separate colleges, each with sixty deputies, and each representing vastly unequal portions of the population (one million Europeans compared to nine million Moslems).

However, inasmuch as a certain number of Moslems were permitted to remain in the first college (63,000 Moslems out of a total of 532,000 registered), there was a possibility that Moslem representation in the first college would join the solid bloc of Moslem deputies in the second college and be in a position to outvote the Europeans. Thus, a safety device was necessary. Article 39 of the Statute provided that, at the request of either the governor-general, the finance committee, or one fourth of the members of the Assembly, votes shall be made by a two-thirds majority of all members--unless there is a simple majority in each of the colleges. The Europeans were thus given a built-in veto over the decisions of the Assembly.

The Statute also proclaimed a number of reforms long demanded by Moslem leaders, including: abolition of the communes mixtes (communes with a majority of natives but administered by an agent of the governor-general), the recognition of Arabic as the official language and the teaching of Arabic at all levels of the educational system, the separation of Church and State for the Moslem religion as for all others, the extension of suffrage to Moslem women, and abolition of military government in all the territories. However, these measures were to become effective only by a vote of the Algerian Assembly--in which the Europeans had a veto. In fact, none of these reforms were ever adopted. Roy C. Macridis and Bernard E. Brown, The De Gaulle Republic (Homewood, Ill.: The Dorsey Press, Inc., 1960), pp. 37-38.

[2]Edgar Faure was greatly influenced by the Soustelle version of "integration." This interpretation recognized the "originality" of Algeria as a province of France and foresaw the need for certain administrative autonomy at local levels.

Algeria providing for greater autonomy.[1]

Faure approved of many of the reforms implicit in the Algerian Statute and embraced it as a cornerstone of his Algerian policy, as had Pierre Mendès-France: yet, he vigorously upheld the Soustelle memorandum on integration and also considered increased authority, perhaps under a federal structure, as a possible alternative. His cabinet was built out of Center and Rightist parties although it was dependent upon Socialist support, despite the fact that the Socialists would not allow their members to participate in the government. It contained

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Nevertheless, it supported the fusion of Algerian industry, currency, and economy with that of France. All citizens of Algeria were to have "equal rights and duties" but the supreme decisions for Algeria were to be made in the Parliament and by the Executive of France. Algeria was to be represented in the Assemblies of France according to her population as any other province. "In other words, instead of one million Europeans confronting a permanent majority of nine million Moslems in Algeria, nine million Moslems in Algeria would face a majority of forty-four million Frenchmen." Ibid., p. 47.

[1]Marc Lauriol, a professor of law at the University of Algiers, and since 1958 a deputy from Algeria, proposed a system of "personal federalism." This approach rejected the classical form of federalism based on division of power between territorial entities. Lauriol influenced the Government with his analysis that the essential problem in Algeria was one of mutual respect and association of two communities that live in the same geographic area. He proposed the creation of a national Parliament consisting of 600 deputies, elected by all French citizens wherever they reside, and a Moslem section of 100 deputies elected by "moslem Frenchmen" who maintain their personal status. The Moslem section would be exclusively sovereign for all matters concerning Moslem law; both sections would deliberate jointly on matters concerning France and Algeria; all other matters would be left to the metropolitan section. The proposal would clearly have protected the rights of the Europeans but it had no appeal to the Moslem leaders. Ibid., p. 46, as interpreted from Marc Lauriol, Le fédéralisme et l'Algérie (Paris, 1957), passim.

five Gaullists (Republican Social and A.R.S.)--an unusually disproportionate number considering their minimal representation (69 and 32) in the National Assembly. It was these ministers that were violently opposed to any concession of self-government to Tunis, Morocco, or Algeria, and who limited the ability of the Faure government to follow a moderate policy of less direct rule by the French yet with permanent inclusion of Morocco and Algeria in the French Union.[1]

Parliamentary intransigence was just as inhibiting of positive action as ministerial indecision or internal conflict within the cabinet. A full-scale debate on Algeria was staged between October 11 and 18. During these discussions the President of the Council presented a series of positive proposals to the legislative body. These included: (1) integration as an alternative to assimilation or separation of Algeria; (2) improved local government and reform of land use; (3) separation of Islamic religion from the State; (4) increased teaching of the Arab language; (5) more truly democratic elections for the Algerian Assembly as a step to improvements, political, economic, social, and administrative; and (6) measures to raise the standard of living.[2] Thus, in essence, Faure embraced the

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[1]During the Moroccan negotiations, the Gaullist Minister of Pensions and Minister of Defense were found to be working at cross-purposes with the Government and were asked to resign. This nearly caused the downfall of the cabinet as the Independent Republicans wanted to withdraw their Minister M. Pinay, the Minister of Finance, but Pinay refused and the Independent Republicans continued their support of the Government. Herman Finer, p. 429.

[2]Ibid., p. 430. See also, L'Année Politique, 1955, pp. 76-78.

reforms promised in the Algerian Statute[1] and wrapped them in the philosophy of "integration."[2] Various deputies of the Assembly suggested alternative proposals for action in the province. Debate raged for three days and the Assembly was nowhere near beginning a discussion of the government proposals. At this point, a frustrated President of the Council demanded a vote of confidence on his program. The Assembly approved the program by a vote of 308 to 254, and records list the vote of confidence as a "new victory for the government;"[3] but closer scrutiny makes this quite questionable. Herman Finer's analysis of considerations which affected the Assembly as it rendered this decision is most illuminating:

> The Gaullists and the Right were still determined to bring down the Government, but the Right and the Moderates were not so united as before, because the Prime Minister, the President of the Republic, and other French notables publicly expressed horror at the spectacle of one more government crisis just before the Saar plebiscite and as France was about to enter the Big Four Geneva conference in November. Moreover, agonized appeals were made to national pride at such a political mess; and those who supported the Prime Minister . . . urged that to support the Government was to support its walkout from the United Nations Assembly, which had voted to put Algerian policy on its agenda. The Communists had to support Russia, which had helped to lead the United Nations Assembly to this tactic, and therefore voted against the Government, which, a week before, they had supported, in order to make their party appear liberal for the elections of 1956. The Socialists,

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[1] Supra., p. 190, Note 1.

[2] Supra., p. 190, Note 2.

[3] L'Année Politique, 1955, p. 77.

> who had supported the Government the week before, [interpellations on his policy and proposed solutions for Morocco] largely by conviction, now voted against it, having calculated that the Right and Moderates would sufficiently support the Government and not wishing, then, to leave the Communist Party with a monopoly of colonial liberalism when the two Left parties should appeal to the workers at the election of 1956.[1]

The government of Edgar Faure was sustained in the vote of confidence of October 18, 1955, but only a most tenuous reasoning could conclude from this formal approval that (1) a majority of the National Assembly supported the Faure program or (2) that the Assembly would cooperate with the Government in the implementation of these proposals. One should not be shocked that extraneous factors affect party positions when a vote of confidence is in question. This is the nature of parliamentary government. Government, whose responsibility is to effectuate a coherent policy, banks its life on the approval of an integral part of this policy--this is a traditional weapon of the Executive. The Legislature is presented with the stark alternative of supporting the program of the cabinet that it has invested with its confidence and charged with executive responsibility or facing the resignation of the policy-making authority. However, cabinet crises are not evil in themselves. They have been described as a normal and even indispensable feature of the French political system.

> It has often been pointed out that the Republic inherited from both the Old Regime and Bonaparte an efficient, highly centralized civil service; in order

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[1]Finer, p. 430.

> to prevent the utilization of the vast power of the bureaucracy for partisan purposes, the National Assembly must impose continuing responsibility upon the political heads of the executive. At the same time, factional groups that would ordinarily compromise their differences within one major party in the United States and Britain work together as separate political parties in a cabinet coalition. Majorities in the Assembly shift according to the issues; the cabinet crisis becomes then a technique of adjustment enabling the Assembly to deal with ad hoc problems. In normal times the French parliamentary system works better than is realized by most of its critics.[1]

After the outbreak of the Algerian rebellion, "normal times" became a continual period of crisis, and relations between parties, Assembly, and Government became quite embittered. Between November, 1954 and May, 1958, five cabinets lost the confidence of the Assembly--Mendès-France in February, 1955; Edgar Faure in December, 1955; Guy Mollet in May, 1957; Bourgès-Maunoury in September, 1957; and Félix Gaillard in April, 1958. The system began to break down with the dismissal of Mendès-France and was in full disarray by the late spring of 1958. Cabinet crisis no longer played its function in the French parliamentary system. "Instead of enabling a new majority to work out a new policy, each crisis made it more difficult for coalitions to be formed on the basis of a specific program."[2]

As the specific instance of the Faure vote of confidence on October 18, 1955 so dramatically indicated, change and vacillation became normal occurrences. The system provided no stable policy-making force. In this kind of situation, it was impossible to know what was the policy of "France" or its Government

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[1]Macridis and Brown, p. 48.

[2]Ibid.

(for the time being) or its Assembly (for what time being?) on Algeria or anything else. The expansion of the pouvoir réglementaire (short of abdication of the Assembly), the application of the state of siege, or the state of emergency offered little assistance to the solution to this massive incompetence. Ultimately, a partial ordering of the policy-making apparatus was to be found in the application of the fourth institution in the French arsenal of emergency institutions--the principle of the loi-cadre or framework law.

The Assembly persisted in its distracted immobilisme during the period between October 18 and November 29, 1955. Five times the Faure government was to demand a vote of confidence and four times it was to be successful--twice on North African policy and twice on proposals to clear the air by an early appeal to the electorate. The latter two votes found Faure sustained by the votes of the Communist Party, which he did not welcome; on the last of these votes, only 191 non-Communist deputies were for him and 247 were against. Then he was harassed by blame for the Saar voting which went against France's policy of internationalization and harassed because he was calling up reservists for service in Algeria. Finally, Faure challenged a fifth vote of confidence on his election proposals and was defeated on November 29, 1955. Two days later, he dissolved the National Assembly, the first time the Executive of France had taken such action in seventy-eight years. Faure remained as Head of the Caretaker Government[1]

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[1]In the original Constitution of the Fourth Republic, Article 52 specified that in case of dissolution: (1) the

through the elections of January 2, 1956, and until the investiture of Guy Mollet[1] on February 1. Despite the heightening of tension between Moslem and colon in Algeria, the Caretaker Government was shorn of its chief emergency weapon during this period as the dissolution of the Assembly put an automatic end to the state of emergency.[2] At a time when maximum security and legality was most desirable, the Caretaker regime had no recourse but to turn to unilateral[3] delegation of broad and

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Cabinet, with the exception of the President of the Council and the Minister of the Interior, shall remain in office to carry out current business; (2) the President of the Republic shall appoint the President of the National Assembly as President of the Council. The latter shall appoint the new Minister of the Interior with the approval of the Secretariat of the National Assembly; (3) General elections shall take place not less than twenty and not more than thirty days after the dissolution. However, under the provisions of the amendments as passed on November 30, 1954, in case of dissolution: (1) the Council of Ministers remains in office; (2) unless the dissolution is preceded by a vote of censure, if so; (3) the President of the Republic names the President of the Assembly, President of the Council of Ministers, and Minister of the Interior. Consequently, as Edgar Faure resigned upon the failure to receive support on a vote of confidence, under the amended rules he was allowed to head the Caretaker regime.

[1]With the intransigeant Communists, Poujadists, and their allies holding 202 of the 635 seats in the National Assembly, it was clear that no government with chance of success could be formed without Socialist support. Consequently, the President of the Republic asked Guy Mollet to form a government which was based on the Republican Front electoral alliance. It received the vote of the National Assembly by a majority of 420 (including Communists) to 71 (Poujadists and Independents) with 83 abstentions (primarily Independents).

[2]L'Année Politique, 1955, p. 309.

[3]Delegation without the participation of the National Assembly.

undefined authority to the Governor-General and the prefects in Algeria--"all powers . . . to take the necessary exceptional measures in the twenty days" (the period between dissolution and the investiture of a new cabinet). During this period the tension between Moslem and colon made it necessary to postpone elections for the Algerian Assembly.[1] This extreme measure was taken by subordinates of a Caretaker executive while the sovereign Legislature was in dissolution. It was not based upon a legitimate delegation of authority from a competent legislative body exerting continual oversight, as might be expected in a representative democracy concerned with the political rights of its citizens. This is not to argue that the Algerian elections should have been held in December, 1955: it is to demonstrate the limitations of an exceptional procedure applied in a parliamentary system which does not make adequate preparation for the period of transfer of power from one regime to another. Though the advantages of explicit limitation of the period of application of an exceptional regime is undoubted, such limitations are ill-conceived if they result in the substitution of broad, poorly defined, direct executive delegations for established exceptional institutions such as the state of emergency during an interregnum.

As France sought a government in Paris in January, 1956, tensions continued to build in Algeria. On the one hand, Moslem leaders demanded French recognition of an Algerian nationality;[2]

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[1] L'Année Politique, 1955, p. 309.

[2] L'Année Politique, 1956, pp. 183-84, 187.

on the other hand, European patriotic organizations violently attacked the moderate Soustelle proposals for "integration." The leaders[1] of the Republican Front suggested "genuine popular consultation through free elections in a single college."[2] This solution had no appeal to either Algerian nationalist or colon. Indeed, Ferhat Abbas was moved to retort that only the F.L.N. (and not some future Algerian Assembly) was qualified to negotiate with France.[3]

The new President of the Council went to Algiers shortly after his investiture with General Catroux, his nominee as successor to Jacques Soustelle as Governor-General of Algeria. Mollet was not cordially received by nationalist elements. While attempting to lay a wreath on the Memorial to the Dead, he was bodily attacked by the Rightist mob who were demonstrating against his person, policies, and the appointment of Catroux. He was "profoundly shaken" and impressed by this "painful manifestation . . . [of] devotion to France, and anguish at being abandoned."[4] Yielding to this outpouring of resentment from the colons, Catroux resigned and immediately Mollet appointed Robert Lacoste as Governor-General of Algeria. On his return to the Metropole from this devastating experience, the President of the Council broadcast an appeal to the rebel leaders asking for a cease-fire and promising free elections within thirty days

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[1]Guy Mollet and Pierre Mendès-France.

[2]L'Année Politique, 1956, p. 187.

[3]Macridis and Brown, p. 55.

[4]L'Année Politique, 1956, p. 187.

after the end of the insurrection. This policy which was labeled the triptyque, as it involved three distinct phases, advocated: cease-fire, elections, and negotiation. As envisioned by Mollet, the cease-fire would lead to the surrender of arms by the rebels; elections would allow the Algerian population to designate representatives in whom they would place their trust in negotiations with the French; and, the negotiations would serve as the framework upon which an Algerian solution could be reached--on the basis of recognition and respect for the Algerian personality, Moslem participation in the determination of the future of the province, the indissoluble union of France and Algeria, political and social democracy, respect for individual rights, and justice under the law.[1] However, it was never clearly specified in what spirit and upon what precise terms the representatives from Paris would "negotiate" with the Moslem elect. From a cynical point of view, the generosity of this offer is comparable to that exhibited by the Soviet Union in arms control negotiations with the United States in which the former offered to discuss control methods after the latter had destroyed her weapons.

The rebel organization, the Front de Libération Nationale,[2] replied that any cease-fire must be preceded by recognition of

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[1]Ibid., pp. 191-92.

[2]The Front de Libération Nationale (F.L.N.) was the political instrument of the Comité Revolutionnaire d'Unité et d'Action (C.R.U.A.) which launched the insurrection. The second element of the C.R.U.A. was the Armée de Libération Nationale (A.L.N.) which organized the militaristic underground movement. Germaine Tillion, France and Algeria (New York: Alfred A. Knopf, 1961), p. 140.

an Algerian government and that it would be the responsibility of this entity, not the French state, to organize elections.[1] Clearly, the Socialist government was caught in the cross-fire between a colonial minority which demanded the defense of privilege at any cost and a growing Moslem insurrection which was beginning to smell the warm blood of nationalism.

It was at this time, in February, 1956, that the rebellion began to spread with alarming swiftness to all levels of the indigenous population. Writing in September of 1957, Germaine Tillion, the distinguished French ethnologist, recounts her analysis of the process:

> In the first phase, young men (their average age between twenty-five and thirty-five), determinedly modern, with a wide experience of secrecy (often eight to ten years in the higher echelons), political training, strict discipline, and a perfect knowledge of their milieu, set off the insurrection and constituted its hierarchic armature. During this initial period, the Moslem masses followed events--with favor, curiosity, anxiety, but somewhat from the outside.
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> In the second phase--after December, 1955--the masses allowed themselves to be led by the nationalist organizations, and after February, 1956 the movement expanded with incredible speed. At the end of this same year (December, 1956) the work was done.
>
> During this second phase, the men in control, the men who act, no longer came only from the revolutionary ranks, isolated from the masses by the secrecy necessary to their action; on the contrary, they represented the entire range of the elite of the Algerian population. From that time, it was futile to suppose that we could shield that population from their influence. And repression would inevitably find itself confronted by a homogeneous society which it is impossible to

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[1] L'Année Politique, 1956, p. 192.

destroy and which it is impossible to spare.[1]

Three years after his confrontation with the nationalists in Algiers, Guy Mollet was to admit that at the time he had not understood the virulence and danger of the right-wing "Algérie Française" groups.[2] By the same token, it can be well argued that French political leadership at this point in history committed the irreparable mistake of failing to realize the "irreversible character of the movement occurring in the silent depths of a nation that no longer had either newspapers or representatives. No doubt, too, they failed to evaluate the extent and scope of the operation they had assumed the responsibility for launching."[3]

The Mollet government was buffeted by storms of reaction both within the province and throughout the Metropole. It was harassed by the conflicting requirements of the various elements of its own governing coalition. It was subjected to the give and take of parliamentary responsibility. Consequently, it is not surprising that the policy of the Mollet cabinet misjudged the situation in Algeria. The Government appeared not to realize the implications of the "virulence" of the right-wing agitation and the "irreversible character" of the movement occurring in the silent depths of the Algerian community. However, it is questionable, even if Mollet and his collaborators

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[1]Tillion, pp. 10-11.

[2]Macridis and Brown, p. 55.

[3]Tillion, p. 11.

had understood these realities, that they would have been able to do more than they did. The bright light of "patriotic" public opinion, the chaos of party division, and the insistent demands of vested interest are very limiting considerations. Perhaps the best that Mollet could do, under the circumstances, was to push with every resource at his command the vague policy of "integration" to which his regime was committed.

The Mollet cabinet was keenly aware that the maintenance of security and order in the province had deteriorated since the automatic termination of the state of emergency in December, 1955[1] and they were desirous of strengthening the authority of departmental and local officials. It was their considered judgment that the reimposition of the state of emergency or the use of the state of siege did not offer responsible officials sufficient latitude to deal with the multifaceted problems with which they were faced. In the Government's view the various aspects of the Algerian problem--economic, social, financial, administrative, judicial, civil police, military--

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[1]Robert Lacoste, the new Governor-General of Algeria, speaking to the National Assembly on March 8, 1956, in defense of the government proposals declared: "Since the dissolution of the Parliament and the automatic termination of the state of emergency in Algeria, the acts of terrorism have considerably increased. One can count 1,803 in January as compared with 1,224 in December. Without the right of search by day and night, the public authority is incapable of controlling the movement of arms and, in the meanwhile, the anxiety which causes the diffusion of arms in the European population as well as in the Moslem population is the most grave that we have confronted. The surveillance of the movement of persons and vehicles is insufficient for effectively slowing down the criminals. If we wish to keep the work of pacification from being sabotaged on all sides by the ultras, it is necessary at least to have a certain control of the press and of the radio." France, Journal Officiel..., Assemblée Nationale, Débats (March 8, 1956), p. 761.

"reciprocally conditioned" one another and were indissolubly intertwined.[1] As a consequence, the cabinet felt that governmental policy must be planned on the basis of planned coordination and, when possible and advisable, simultaneous implementation of policy.

To facilitate governmental direction and synchronization of policy for Algeria, Mollet sought a procedure which would involve the Parliament in the determination of the principles upon which the program would be based, but which would also leave the Executive relatively free to apply the principles to specific situations. He wished to avoid the domination of the Parliament and, at the same time, to stop short of the use of pure enabling legislation. It was very doubtful if the National Assembly would have acquiesced in the granting of enabling legislation in 1956. The President of the Council was dubious of any abandonment of the legislative competence, as was often the case in the use of enabling legislation. As a result, the Government turned to a relic of the Third Republic;[2] the vehicle chosen was the procedure of framework laws, the loi-cadre.

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[1] Ibid.

[2] Lois-cadres were new to the Fourth Republic but they were not novel to the practice of French legislation. The Socialist government considered Léon Blum as the founder of this procedure. However, in actuality it is necessary to go back to the Doumergue government of 1934 to find the origins of this type of law. The first loi-cadre was the law of July 6, 1934 concerning fiscal reform. Reacting to pressure for immediate action on fiscal

In the passage of this type of statute, the Legislature declares the objectives of policy and delegates responsibility to the Executive for the achievement of the goals established in the framework laws. Determination of the necessary and appropriate measures required by the objectives of state rests with the administration and its subsidiary departmental and local organs. Consequently, if the Parliament is willing to pass a government bill in the form of a framework law without major amendment of the draft law, as was the case in March, 1956, the Executive is provided with parliamentary support and commitment to governmental policy and at the same time is granted broad discretion to implement this policy. This was precisely what the President of the Council desired, for he had warned the National Assembly that in voting for the government project of March 16, 1956, they were not only accepting a law,

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matters, the Doumergue cabinet asked for and received the passage of a bill in which, upon the suggestion of the Government, the Parliament poses the principles of reform and fixes the limits in which the Government may apply, thereafter, the principles posed by decree--decrees which ultimately must be approved by the Parliament to have permanent effect. Some 300 decrees were issued as the result of this delegation, with the first having effect within twelve days after the promulgation of the legislation.

On June 6, 1936 Léon Blum demanded similar powers for his regime. In his intervention before the Chamber of Deputies on that day he defined the method of lois-cadres: "It is not, he said, the pleins pouvoirs; the solution to which we limit ourselves . . . consists of presenting short projects to the Chamber, posing the principles and forseeing a sort of extension of the pouvoir réglementaire habituel. We do not demand undefined and indetermined powers. We will not apply a single measure that the Chambers have not explicitly and formally voted, but we ask you, by a necessity which you cannot escape, to bequeath to us, by a sufficient delegation, the choice of method and means of execution." France. Journal Officiel..., Chambre des Députés, Débats (June 28, 1934), p. 1807 and (June 7, 1936), p. 1334.

they were embracing a political program.[1]

Lois-cadres thus present themselves as devices appropriate to the collaboration of the Government and the Parliament in situations in which a serious problem presents itself to the nation demanding immediate and comprehensive reaction on the part of government, in which the Government is able to sustain a relatively stable parliamentary majority in support of the policies, and in which the population recognizes the significance of the danger and is basically disposed to the use of exceptional powers. For the most part, these conditions were satisfied in 1956. The insurrection in Algeria was a problem that dug at the very vitals of the French nation. Whether its termination was ultimately to result in a French solution, a Moslem solution, or a compromise, an answer was a necessary prerequisite for the emergence of France as a major power in the postwar world.[2] Though this retrospective judgment was

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[1]"Le projet qui vous est soumis est une de ces lois-cadres que préconisait déjà Léon Blum: en le votant vous n'adopterez pas simplement une loi, vous vous engagerez dans une politique: c'est pourquoi il ne faut pas qu'il y ait d'ambiguité entre nous." (Guy Mollet to the National Assembly) L'Année Politique, 1956, p. 34.

[2]The Fourth Republic emerged in 1946 into a world in which power had slipped away from Western Europe and was concentrated in the United States and the Soviet Union. In a speech in Bar-le-Duc in 1946, General De Gaulle conceded that these two gigantic powers could not be rivaled by the individual nations of Europe. Yet, he went on to contend that the "old world" could bring about a new equilibrium. "Ancient Europe which, for so many centuries, was the guide of the Universe, can constitute in the heart of a world tending to split in two, the necessary element of compensation and understanding." And of course "ancient Europe" was to be led by the most powerful nation on the continent--France. These were prophetic words for the

probably not held by the majority of French citizens in 1956, there can be little doubt that the seriousness of the problem weighed upon the population. Only the extreme-Left raised their voices in objection to the appeal to exceptional powers.[1] However, the Republican Front coalition, invested by a majority of 420 to 71 with 83 abstentions,[2] was able to maintain majority support in the National Assembly despite the defection of the Mendèsist Radicals,[3] unrest within the Socialist party over Algerian policy, renewed Socialist hostility to the Communists, opposition of the Independents to Tunisian and Morocaan policy, and widespread unhappiness over the tax measures required to finance the war. Support for the Government did begin to ebb in the summer of 1956, but the Suez crisis and Egypt's open declaration in support of the Algerian rebels served to weld political France into a kind of nationalist "sacred union" in defense of the rights of the Motherland. Mollet's position was bolstered by this kind of support. When one adds such other

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destiny of France was ultimately to depend upon its position within the European community rather than its continuance as a colonial power. It is only since the solution of the Algerian question that France has emerged front and center on the world stage as a "major-power" though certainly not a "super-power" in the postwar world.

[1] L'Année Politique, 1955, p. 33.

[2] This large majority included 141 Communist votes. L'Année Politique, 1956, p. 22.

[3] In May of 1956, Mendès-France, in a letter to Mollet, vigorously criticized Government policy in Algeria. He submitted his resignation as Minister without Portfolio, but requested that other Radical ministers remain in the cabinet in order to avert a crisis. Though his stated reasons for departure were

factors as the profound resentment among the mass of the population against the Soviet repression of the Hungarian Revolution and the resulting political isolation of the Communist party, the split within the ranks of the Poujadists resulting from antagonism caused by Poujade's telephone instructions to "his" deputies to vote against military action in Egypt, and the neutralization of Mendès-France by the splintering of the Radical Party, it is apparent that the Mollet regime had a relatively solid basis of support and that its opposition was, for the moment, in disarray. Consequently, the situation was appropriate for the use of lois-cadres as the framework upon which the Government was to build its Algerian program.

Under the loi-cadre of March 16, 1956, the Mollet cabinet was authorized "to take in Algeria all measures relative to investments, public works, housing, agricultural equipment and land tenure, industrial and farm subsidies, labor legislation, social welfare legislation, civil service recruitment, and the reorganization of administrative institutions--notably the reform of local collectives, the regime in the Saharan regions, and the central governmental organisms in general."[1] These powers for "modifying and abridging the existing legislative dispositions" were subject to four procedural restrictions:

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solely policy matters, it is probable that the Minister Without Portfolio resigned in a pique over the failure of Mollet to accord the Quai d'Orsay to him. Ibid., pp. 56-57.

[1]France, Journal Officiel..., Lois et Décrets (March 17, 1956), p. 2591.

(1) they were required to be enacted in meetings of the Council of Ministers; (2) they were to be exercised by the cabinet acting "on the report of the Minister Resident in Algeria and the interested ministers;" (3) they were to be enacted after advice from the Council of State;[1] and (4) the decrees were to take effect immediately after their announcement in the Journal Officiel, but would not become permanent unless submitted to Parliament within a year and ratified by it.[2]

At the same time, exceptional police powers were granted for application in Algeria which did not contain the definition, qualification, and restriction inherent in the Faure law on the state of emergency. The extensively detailed and carefully qualified special powers for the protection of the state were reduced to one inclusive delegation:

> The government shall have at its disposal in Algeria, the most extensive powers to take any exceptional measure required by the circumstances with a view toward the reestablishment of order, the protection of persons and goods and the security of the territory.
>
> When the measures taken by virtue of the preceding clause have the effect of modifying legislation, they will be promulgated by decree decided in a meeting of the full cabinet.[3]

And this grant was enhanced still further by the stipulation that:

> The government can, in any matter, by decree of the full cabinet, acting on the report of the Minister

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[1]Article 1 of the law of March 16, 1956. Ibid.

[2]Article 2 of the law of March 16, 1956. Ibid.

[3]Article 5 of the law of March 16, 1956. Ibid.

> Resident in Algeria and the interested ministers and having heard the opinion of the Council of State, extend to Algeria, with such modifications as are necessary, the laws and decrees in effect in the motherland.[1]

The vagueness and ambiguity apparent in the phrases "any exceptional measure required by the circumstances" (Article 5) and "with such modifications as are necessary" (Article 4) serve to emphasize the meagerness of restraint as compared to the sum of authority granted to the Government by the law of March 16, 1956. For example, under the provisions of Article 5, the Governor-General was immediately provided with a massive delegation of authority which included competence to:

1. Prohibit the movement of persons and vehicles in the places and at the hours fixed in the arrêté;
2. Prescribe all measures controlling the shipment of goods and assuring their preservation;
3. Regulate or prohibit the importation, the exportation, the purchase, the sale, the distribution, the transport or the detention of products, raw materials, or animals;
4. Institute zones in which the continuance of persons is regulated or prohibited;
5. Determine whether or not to assign to a residence under surveillance, all persons whose activities are considered to be dangerous to the public security or order;
6. Prohibit public or private meetings of a nature that may provoke or feed disorder;
7. Order or authorize search or private domicile by day or by night;
8. Take all the measures to control the totality of the means of expression, notably the press and the

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[1] Ibid.

publications of all types as well as telecommunications, radio broadcasts, movie projections, and theatrical presentations;

9. By an immediately executory decision, to transfer, to suspend, or to return to the disposition of the responsible administrative agency, all functionaries or agents of the public service whose activities are distinctly dangerous for security or for the public order;

10. Take all measures of prohibition or of dissolution counter to any society, association, or group whose activities are prejudicial to the security of the province or to the public order;

11. Enable the civil and military authorities, each in that which concerns it, to exercise the powers of requisition foreseen by the law of July 3, 1877, relative to military requisitions, and the law of July 11, 1938, on the organization of the nation in time of war;

12. Adjourn elections by arrêté;

13. Suspend without limitation the continuance of elected local assemblies which impede in some manner the action of the public powers;

14. Provide the governor-general with authority to institute zones in which the responsibility of maintaining order passes to the military authority who exercises the powers of police normally imparted to the civil authorities.[1]

In instances in which the military authority receives a delegation to exercise the powers of police in carrying out the responsibility of maintaining the public order, it is also possible for the Governor-General to grant to the military competence to employ all the authority specified above except the exercise of the civil aspects of the power of requisition as specified in the law of July 11, 1938.[2]

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[1]France, Journal Officiel..., Lois et Décrets (March 19, 1956), pp. 2665-66.

[2]See item 11 above.

Article 5 of the loi-cadre of March 16, 1956, provided competence for the willing Mollet cabinet to reconstruct an ensemble of special security measures available for application in Algeria. Upon comparison with the state of emergency, it is evident that (1) the Mollet government reinstituted a security regime in most ways quite similar to the state of emergency, but that it (2) formally recognized the necessary cooperation of the military establishment with civil security operations in a manner that is distinctly contrary to the philosophy of the civil state of emergency. At the same time, the law of March 16, 1956, was more of a grant of legislative authority to take action in broadly defined areas of competence than an assertion of defined policy to be followed by the Executive. Consequently, it fell short of the theoretical ideal of lois-cadres though it served the valuable service of committing legislative power and support to governmental policy in a time of national crisis without running the risks entailed by decree legislation.

Though 1956 saw the progressive intervention of the military authority in support of and in collaboration with the regular civilian security apparatus, the complex confrontation that developed between military-civilian, revolutionary, and counterrevolutionary forces did not evolve into a "war" in which the combatants on both sides were regarded as "soldiers" but into a holocaust of terror in which the intermingled mass populations became both the battleground of the conflict and the

stakes of victory. The dry timbers of emerging nationalism, frantic colonialism, wounded pride, awakening self-respect, and vested-interest were irrevocably set ablaze by Government execution of two Algerian patriots in June, 1956. For twenty months since the outbreak of hostilities, the regime in Paris had averted recourse to capital punishment in this emotion-charged situation, but the Mollet government allowed itself to be convinced that such methods were necessary to stem the tide of violence. The results were disastrous, in view of the rising Moslem unanimity in the face of French pressure. By this one stroke the Government compromised itself and the institutions of French justice before the entire provincial population and welded the Arab masses to the revolutionary current in a manner that had not been possible previously. The immediate consequence of the ill-advised executions were brutal reprisals. The revolutionaries recruited "death commandos"[1] who dedicated their lives to one violent strike for the nationalist cause. A cycle of events was initiated that was to be repeated again and again--attack, death, reprisal, death. The uneven rhythm--attack, death, reprisal, death--was to become the heartbeat of the insurrection and the death knell of Algérie-Française.

Before June, 1956, cases of torture in Algeria could be

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[1]The "death commandos" were referred to by the Arab population as fiddayin, or as moussebbilin. The former is the plural of the Arab word fedday or "he who purifies." The latter literally means "those whom the caravan abandons on the road." It was first used to refer to patriots who scaled the walls of the Fort-National in 1872. Tillion, p. 145.

cited but were relatively isolated. After the executions and reprisals, "torture became the sinister complement of arrest: terrorism justified torture in some people's eyes, while torture and capital punishment, in other people's eyes, made the most murderous attacks permissible."[1]

Within three months of these events, the first plastic bomb was exploded in Algeria and it was not an Arab bomb but a counterterrorist bomb--a French bomb.[2] Fifty-three persons were killed, 280 made homeless, and the residence of one of the original "death commandos" was destroyed. Officials investigated and reported, "It is thought that the incident figures in the struggle between members of the F.L.N. and the Messalists"[3] (competing Arab factions). No arrests were made. The European press treated it with backpage stories. This placid reaction was not true for the Moslem population. They were stunned; "thereafter they felt that they had been delivered--without defense, without arms, without legal recourse of any kind--to murder pure and simple."[4] On September 30, 1956 the first Algerian bombs were exploded. This time the reaction was sensational. French public opinion demanded the capture of the guilty at any price.[5] The European population of Algeria reacted by demonstrations of mass hysteria--hysteria similar to that exemplified by the Moslem reaction after the detonation

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[1] Ibid., p. 146.

[2] Ibid.

[3] Ibid., p. 147.

[4] Ibid., p. 148.

[5] Ibid., p. 150.

of the first plastic weapon--hysteria that was at once murderous and pathetic and that was to be borne on an on by mercilous and often indiscriminate assassinations, mass bombings, and tortures.[1]

As France strove to combat the progressive anarchy of the situation in Algeria, she had at her disposal the state of siege, the state of emergency, special powers granted under the law of March 16, 1956, procedures of the loi-cadre, extensions of the pouvoir réglementaire, and the possibility of ad hoc exceptional powers outside the realm of established legality. The state of siege had been rejected in April, 1955 in favor of the state of emergency; the state of emergency expired on December 1, 1955, with the demise of the Faure cabinet; at this point ad hoc emergency procedures were rejected in favor of organized approaches to crisis problems; consequently, in the period from March, 1956 to June, 1958, the Government of France relied upon "special powers" and procedures of the loi-cadre to create and to implement policy toward Algeria.

With the spread of terrorism to continental France[2] in the first six months of 1957, the government of Maurice Bourgès-Maunoury demanded the reinstitution of special powers which had

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[1]Ibid., p. 151.

[2]In defense of his government's request for the extension of special powers to continental France, the President of the Council, Bourgès-Maunoury, warned that National Assembly that: " . . . it is not by chance that the efforts of terrorism are directing themselves toward the Metropole. The rebellion has, from the first, attempted to conquer the wastelands. It has spread fear and disorder, but it has not obstructed the French

been available to the Mollet government,[1] and their application to the Metropole as well as to the overseas province. This request, after a heated and lengthy debate in the National Assembly, was passed as a vote of confidence.[2] This law of July 26, 1957 provided for the implementation of these restrictive procedures within metropolitan France in situations in which a direct relationship existed between the Algerian imbroglio and the emerging terrorism on the continent.[3] A similar authority was granted to the Gaillard government upon its ascension to power in November, 1957.[4]

Moslems, in many places, from associating themselves with us and from cultivating their fields. The rebellion has attempted, by perpetual attacks in the cities, in Alger in particular, to create explosions of irreparable ill-will between the two communities. The action of the Army has made this design miscarry. The rebellion has attempted to replace municipal and departmental organization. Despite its efforts, a majority of the communes retain functioning municipal authorities. Day after day, new communes are born into political life and constitute the foundations of the Algeria of today. Put in check on Algerian soil, the rebellion has moved some of its activities to the Metropole." France, Journal Officiel..., Assemblée Nationale, Débats (July 17, 1957), p. 3698.

[1]Supra., p. 210-11.

[2]Confidence was accorded to the Bourgès-Maunoury government on the matter of the renewal of the law of March 16, 1956, and the exceptional measures relative to Algeria by a vote of 280 to 183. France, Journal Officiel..., Assemblée Nationale (July 19, 1957), p. 3790.

[3]Article 6 of the law of July 26, 1957: "Peut être décidée, par décrets pris dans les conditions prévues aux articles 1 et 2 de la loi de mars 16, 1956, la fusion entre les cadres ou corps algériens et les cadres ou corps métropolitains homologues. La présente disposition a valeur interpretative." France, Journal Officiel..., Lois et Décrets (July 28, 1957), p. 7458.

[4]Article unique of the law of November 16, 1957: "Sont reconduites, jusqu'à l'expiration de présent Gouvernement, les

Intertwined with the problem of repression of violence and economic and social reform[1] was the continuing necessity for the development of an acceptable[2] political structure in Algeria. The policy of the Mendès-France and Faure governments had been the gradual but accelerated application of the 1947 statute. After Mollet obtained his grant of broad powers for Algerian reforms, he made a number of structural changes,[3] though on the face of it the special powers bill seemed to authorize only administrative alterations.[4] These changes, however, were regarded as provisional and Mollet's famous

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dispositions de la loi du 16 mars 1956, complétée et modifiée par celles de la loi du 26 juillet 1957." France, Journal Officiel..., Lois et Décrets (November 17, 1957), p. 10682.

[1]Bourgès-Maunoury was enthusiastic about the social and economic achievements made possible by the special powers granted to Mollet in 1956: "The number of lodgings constructed in 1954 was 11,500; in 1956, it was 16,500, an increase of 5,000. A new plan of modernization has been elaborated. The exploitation of natural gas discovered in large quantities permits the implementation of a series of industrial projects which would have not been possible without the discovery of gas: the construction of a plant to refine petroleum in Algers; the construction of an iron works in Bone, a number of developments within the chemical industry, and finally the installation of automobile production in Algers . . . Thanks to the action of the Army, thanks to the confidence of the population, also thanks to the significant cooperation of Moslem agricultural workers, the magnificent agricultural production has continued unencumbered. Thanks to the special powers, which I ask you to regrant in the economic sphere, we can integrate all development within the framework of the law." France, Journal Officiel..., Assemblée Nationale (July 17, 1957), p. 3697.

[2]It is questionable at this point whether or not it was possible to formulate an "acceptable" political structure for Algeria--considering the intransigence of the F.L.N. as well as the political ultra-Right wing in France.

[3]Supra.,pp. 208-09.

[4]Ibid.

triptyque of (1) ceasefire, (2) elections, and (3) negotiations with those elected, was intended to lead to the eventual determination of Algeria's governmental structure. Several times during the Mollet regime, official policy statements explicitly excluded the drafting of another statut octroyée, [1] although this possibility was increasingly being discussed in high political circles as a necessary step toward the solution of the Algerian problem.[2]

With the investiture of the Bourgès-Maunoury cabinet on June 12, 1957, the promulgation of a new fundamental statute, a loi-cadre, became official governmental policy. By investing the new Government, the National Assembly legitimized the principle of the loi-cadre although it would be a gross oversimplification to assert without modification that the National Assembly explicitly approved of such procedures.

In his investiture speech the incoming President of the Council declared:

> The tactics of the rebels is clear. They refuse a cease-fire. Thus they avoid free elections and, thereby, discussion of a statute. At the same time they turn toward international opinion to say that there has been no progress and that French commitments are not being kept . . . We will not be outflanked by this maneuver. We will not allow ourselves to be hindered in the construction of a new Algeria.
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> That is why . . . I have decided to submit as soon as possible a bill for a loi-cadre which will serve

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[1] A statut octroyée is a charter granted unilaterally. L'Année Politique, 1956, pp. 113, 120 and L'Année Politique, 1957, p. 211.

[2] William G. Andrews, p. 74.

> as the basis for the progressive installation of new political structures. This installation will begin at the local level, it will pass next to the departmental level, then to that of the region. Each region will become a provisional political entity.
>
> Beginning with the provinces and their own political organs the structure of the "Algerian ensemble" will be elaborated.
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> When elections become possible the elected representatives of the people will be called to examine this loi-cadre, to adopt it, or to propose the modifications in it which they believe desirable . . .[1]

The loi-cadre constituted the methodology for enunciating the central element of long-range French policy for Algeria--a new political structure for the province. In this instance, however, Parliament did not "upon the suggestion of the Government, . . . pose the principles of reform and fix . . . the limits in which, the Government may apply . . . the principles posed by decree, decrees which ultimately must be approved by the Parliament to have permanent effect."[2] For the Bourgès-Maunoury cabinet found it impossible to agree upon a draft bill without a public display of dissension and, when it finally was able to present a proposal to the Interior committee of the National Assembly, the governmental program was at best a superficial compromise between the rival Socialist and Independent elements within the cabinet. It inspired no confidence on the part of the Interior committee and, after an initial rebuff by that group, the Government publicly admitted its inability to form coherent policy and turned to a

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[1] L'Année Politique, 1957, p. 522.

[2] Supra., p. 204, Note 2.

"round-table conference" of political party leaders in an ill-advised and patently extra-constitutional endeavor to secure agreement upon a program for Algeria. This diversion of public competence from constitutional channels contributed to a striking portrait of a political system in disintegration. A vigorous government, backed by substantial majority support, employing an appropriate crisis institution to order policy, could not be achieved in the last two years of the Fourth Republic.

Initially the Government was deterred in its task of determining the principles upon which an Algerian statute could be based because of a fundamental disagreement between the President of the Council and his Algerian Minister, Robert Lacoste.[1] Other contributing factors were pressures exerted through international politics as the Algerian question was discussed in the forum of the United Nations and the internal pressures resulting from an acrimonious free-for-all that broke out in the Assembly on July 28, 1957, and which subsequently occupied the Government for a nine-day period. Ultimately, a series of conferences between members of the staffs of the Lacoste and Bourgès-Maunoury resulted in a tenuous agreement concerning the broad principles upon which governmental proposals for Algeria could be evolved:

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[1]Robert Lacoste became a symbol of the policy of unrelenting firmness in suppressing the rebellion. He accepted the necessity for some sort of "provisional" statute for the province, but he felt very strongly that such a statute should not lead to independence and that the new governmental organization for Algeria should not be federal. Le Monde, July 9, 1957, p. 4.

> The "Federative Parliament" would invest for the duration of its mandate a "Federative Council" presided over by the Representative of the President of the French Republic, he being the head of the executive.
>
> The proposed bill . . . also set, in a precise manner, the division of functions between the territorial authorities and the French Republic. The latter would keep, in particular, the army, the diplomatic services, general financial questions, civil and criminal justice, administrative litigation, secondary and higher education . . .
>
> The Algerian people would continue to be represented in the French Parliament.[1]

Using this agreement as a point of departure, Bourgès-Maunoury opened cabinet discussion of the loi-cadre on August 23, 1957, more than two months after his investiture. He discovered immediately that, while it was relatively easy to obtain a general "agreement" on somewhat vague principles (broad decentralization, division into regions, common federative institutions), it was most difficult to detail the specific powers to be held by the respective Algerian institutions or to define the tasks which would be entrusted to these institutions.[2] Faced with the dilemma of internal division within his cabinet, Bourgès-Maunoury turned to formal consultations with the heads of political groups not represented in the Government, but whose support was necessary to the passage of this legislation. He found opinion more splintered and disagreement

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[1] Le Monde, August 23, 1957, p. 1.

[2] Le Monde, August 22, 1957, p. 1.

more profound outside the Government than within it. He then turned to the people themselves through a direct radio broadcast, but--perhaps because of the traditional fear among Fourth Republic politicians that direct communication between the Executive and the people smacked of Caesarism--he merely explained his program and the need for its passage rather than using this conversation as a platform for assailing the debilities of party intransigence.

A draft bill was then adopted and a second round of consultations followed. Despite the Premier's agonizing efforts to elaborate a proposal that would attract wide support, basic disagreements remained even within the cabinet, when the draft was submitted to it. The draft bill was sent to the National Assembly and referred to the Interior Committee of that assemblage. The Defense Minister, André Morice, whose opposition to the bill had not been well-concealed previously, failed to appear with the President of the Council and the Minister Resident for Algeria to defend the bill before the Committee. By this single act, he dramatically emphasized the lack of cohesion within the Bourgès-Maunoury cabinet--a cabinet dedicated in terms of policy to the development of a coherent program for Algeria and a cabinet requesting the grant of exceptional authority under a loi-cadre to implement this policy. The committee immediately launched into a bitter debate over the selection of a rapporteur for the bill. Hostility was so

pronounced that the President of the Council withdrew the bill and convoked a meeting "of a certain number of political personalities to seek a rapprochement leading to the formation of a broad national majority on the loi-cadre.[1]

> Thus a new procedure of French parliamentary government was born, marking another long step in the degradation and paralysis of the regime. The cabinet whose composition had always depended on the proper dosage among the majority parties, was now compelled, in order to prevent its own disintegration, to summon fresh and more official party representatives to solve the policy question too difficult for the cabinet itself.[2]

This "round-table conference" met on September 20 and 21, 1957. Its objectives were: (1) the avoidance of the breakup of the Council of Ministers,[3] (2) the provision of time to await the decision of the National Council of the Socialist Party which had not determined its position on the loi-cadre at this time, (3) the rallying to the Government text of those who were hesitant, (4) the attempted modification of the draft bill to make it acceptable to moderate opponents, and (5) the emptying of the text of "details" and the deferring of them to implementing decrees or to subsequent

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[1] Le Monde, September 19, 1957, p. 1.

[2] Andrews, p. 85.

[3] "What, then, can be the utility, the object, and the effectiveness of the 'last conference'?

(1) Its convocation . . . will at least have permitted:

--avoidance of the break up of the Council of Ministers on Wednesday morning. The resignation of M. André Morice would have been followed, not only by that of the three other members of his party in the Government, but also by that of M. Robert Lacoste.

The Minister for Algeria does not agree with the critique and does not share the fears of the Minister of National Defense.

laws.[1] The Conference served only to provide a forum for ineffective compromise between leadership echelons--a compromise that could not be transferred to the floor of the Assembly. The "round-table conference" turned into a tense dialogue between Roger Duchet of the Independents, supported in substance but not always in tactics by Jacques Soustelle and, outside of the conference, by André Morice, the erstwhile Minister of Defense, and Guy Mollet of the Socialists, supported by Joseph Perrin, Paul-Henri Teitgen, and Edgar Faure. The fundamental point of contention was the nature of the "federative" executive. The Independents and Soustelle sought to designate the Minister for Algeria as this officer, but Guy Mollet argued that to have the Minister for Algeria direct the federative council would "prevent him from playing his role as arbiter and would involve directly in all the conflicts among territories.[2]

In an attempt to resolve the conflict, Bourgès-Maunoury proposed that the structure of the federative council be postponed until such time as a special law could be passed providing

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He justifies and defends the draft bill as it was submitted to Parliament. But it is very certain that the resignation of his colleagues would place him in a delicate position in Algeria;. . . Le Monde, September 20, 1957, p. 1.

[1]"The operation would be justified to the extent that the present proposal defines not only a framework but descends to the means; but if it does this it is precisely to satisfy those who wanted to include in it numerous safeguards for French sovereignty. The idea of a 'thinned-out'bill is attractive. It would not resolve the difficulty; it would defer it. It would not settle the conflict; it would prolong it." Le Monde, September 20, 1957, p. 1.

[2]Le Monde, September 22, 1957, p. 1.

for it.[1] The Independents took up this idea and proposed the accomplishment of this organizational problem by means of decree. Guy Mollet accepted this solution, but after a night of meditation the Independent leader, Duchet, rejected this plan advocated by his cohort Teitgen. Duchet felt that the decree procedure was more perilous than that of the law, for no one could foresee what use might be made of it by the government then in power.[2]

There was no solution to the problem of the federal executive. After certain other modifications were made in the draft bill,[3] it was resubmitted to the Assembly accompanied by a "corrective letter" that assuaged the objections of some of the conservative members of the Interior committee. The letter withdrew the designation "legislative" from the territorial assemblies, limited the federal assembly to coordinating functions, and deprived the federative council of the right to choose one of its members to "direct" its operations. The

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[1] Ibid., pp. 1-2.

[2] Ibid., p. 1.

[3] "The attributions conferred by the territorial assemblies on the Federative Assembly must be 'with an aim toward coordination and may not impair the autonomy of the territory.' . . .
The second paragraph of the same article was deleted. It stipulated that Parliament, by means of a law, could transfer to the federative and territorial organs certain attributes reserved to the Republic. . .
The institutions provided can be modified "by concordant resolutions" and not simply "by agreement" of the territorial assemblies, the Federative Assembly, and Parliament. Le Monde, September 24, 1957, p. 1.

clause permitting Parliament to delegate additional powers was stricken and the Legislature was given the primary authority over alterations in the Algerian governmental structure with assent required by the territorial and federative assemblies. Despite these alterations the committee was unable to agree upon amendments to the draft bill and reported it without recommendations, thus allowing the original governmental bill to serve as the basis for discussion in the Assembly.

The techniques employed by Bourgès-Maunoury were to no avail. There was no "national majority" to be found. In such circumstances the exceptional procedure of the loi-cadre offered no solution. The perversion of this technique, into which the Bourgès-Maunoury government had subsided, served only to restate the inadequacy of the immobility of the party structure of the Fourth Republic, rather than to provide a workable exceptional method of decision making. Consequently, when Bourgès-Maunoury staked the life of his government upon a vote of confidence on the loi-cadre for Algeria, he was defeated.[1]

The loi-cadre proved to be a procedure of little applicability in a situation in which there was no national consensus concerning the propriety of a proposed program and no "relatively stable parliamentary majority" in support of governmental

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[1]On the Bourgès-Maunoury question of confidence, the constitutional majority required to refuse confidence was 298. The bill was defeated by a vote of 279 against adoption to 253 for adoption. As a consequence, the Government was not constitutionally required to resign. However, it chose to conform to well-established practice in the Fourth Republic by refusing to remain in office after defeat on a major policy vote.

draft laws designed to institute such a program.

The resignation of the Bourgès-Maunoury cabinet created a month-long governmental crisis which was terminated with the investiture of the previous regime's Radical Minister of France, Félix Gaillard. Gaillard immediately promised a new governmental text of the draft law. This text emphasized that France would not be content to base her policy toward Algeria solely upon the negative repression of terrorism. Gaillard made it quite clear that the Government wished to take positive steps toward an economic, social, and political solution of the Algerian problem within the context of a province indissolubly bound to the Metropole, and consistent with the principle of the coexistence of the two Algerian communities.[1] In pursuit of these objectives the Government defined procedures for an electoral law which would take into account doubts expressed concerning adequate safeguards for the European population in Algeria during the first discussion of the text of the Bourgès-Maunoury draft law before the Parliament. The Gaillard version[2] increased the "guarantees" of the European

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[1] L'Année Politique, 1957, p. 538.

[2] "M. Robert Lacoste and his collaborators have drafted a new loi-cadre . . . The new text retains most of the [previous] one . . . ; in particular it retains the federative organs in Algiers. But M. Lacoste has adopted an idea advanced by M. Soustelle and accepted by M. Guy Mollet: that of the representation of "communities." [Soustelle] proposed the creation of an Assembly of Communities in Algiers and [Mollet] envisioned one in each territory. The new bill satisfies both. It has . . .:

(a) Alongisde the territorial assemblies, consultative assemblies of communities, composed, on a basis of parity, of representatives of the Algerians with Koranic status, of Europeans, and of economic, cultural, and social groups;

community, limited the political rights of the Moslem community, and provided that draft legislation would not go into effect until the restoration of "calm" in Algeria.

The Interior committee was more receptive to the Gaillard draft law than it had been to that of the preceding Government. This was partially the case because many of the committee's objections had resulted in modifications of the original Bourgès-Maunoury draft and partially because the committee was awaiting

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(b) Alongside the federative council in Algiers, itself issued from the territorial assemblies, a federative council of communities with consultative power;

(c) An arbitration procedure between the territorial assemblies, whose function would be comparable to that of legislative assemblies, and the councils of communities, whose role would be comparable to that of the Council of the Republic . . . In case of disagreement, the Minister for Algeria could either implement the decision taken on second reading by the territorial assembly or refer the dispute to the mainland Parliament.

The mechanism . . . is thus heavier and more complicated . . . But . . . it is one of the conditions necessary to win the support of a sufficient number of opponents, and, in particular, of Independents, of whom 41 voted against the [first] bill.

The government also hopes to accomplish this by presenting, simultaneously, a bill for an electoral law. There again the same principles are being retained and especially the single electoral college. But . . . the present bill specifies the . . . form of balloting. In order to ensure "equitable and authentic" representation of communities, it institutes a system of proportional representation . . . Each list would elect as many candidates as the number of times its vote contains a quotient resulting from the division of the total number of voters by the number of seats to be filled. The "remainders" would be distributed at the level of the territory among the groups having presented lists in more than eight constituencies throughout Algeria. Le Monde, November 10-11, 1957, p. 4.

The institution of the "councils of communities" entails, in effect, the deletion of the proposal of the arbitral court . . . The Council of State becomes the only means of recourse.

The councils of the communities . . . will have . . . competence only in the financial domain and over problems concerning the coexistence of the communities. Le Monde, November 13, 1957, p. 4.

its opportunity to sabotage the bill. In a seemingly contradictory manner the committee struck out the phrase limiting the federative organs to "coordinating" functions and provided that the federal council and the territorial assemblies would have executives. It appeared at first that these modifications would strengthen the bill immeasurably. However, the committee then turned and applied the coup de grâce. It required that all territories, rather than a simple majority of them, adhere by consent to the new arrangements before the federative organs could be established. As some of the territories were to have European majorities, the colons were provided with an effective veto over the establishment of federative organs and, in the situation of November, 1957, this rendered the loi-cadre into a loi-cadavre. It was passed, to be sure,[1] but there was no chance whatsoever of winning over the Moslem population to its acceptance. The contribution of the Gaillard government to the redefinition of Algerian policy was to add to this already unrealistic proposal a few qualifications which would afford supplementary guarantees to the European population.

The governing Center coalitions could not agree on a program of genuine internal autonomy, nor on a policy of liberal reforms, nor on war without reforms. They staggered along, faltering for a time but not falling, unable to suppress the

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[1]By the invoking of the question of confidence, the Gaillard government obtained passage of both the organization and electoral bills without further amendment. On November 29, 1957 the loi-cadre was passed, 269 to 200, and the electoral law was passed, 267 to 200.

insurrection that had consumed Algeria, and equally unable to provide policy of internal reform acceptable to the Moslem population. Ultimately, contradictions within the system created a complete immobilism of policy making. The result was a rising wave of nationalism demanding leadership which swept public opinion in early 1958. This nationalistic fervor was the match that ignited the revolutionary situation in existence in Algeria: "a proliferation of conspiratorial groups which had worked the Algerian population to a fever pitch over the danger of being 'abandoned'; a police force and militia in Algeria largely made up of elements of the very population that wished to overthrow the regime; an army profoundly demoralized by the tasks of crushing a rebellion in the absence of clearly defined political objectives; a large number of generals and officers who entered into dissidence; and a Minister of National Defense nourished a plot to destroy the Republic of which he was supposed to be the 'defender'."[1] The consequence was the destruction of the Fourth Republic.

The system was moribund. Faced with the insurrection of May 13, 1958, the outgoing government of Félix Gaillard transfered all civil authority in Algeria to the military commander, General Salan. The value of this transfer is questionable, as it allowed the participants in the Committee of Public Safety to wrap themselves in the mantle of legitimacy. As General Massu insisted on May 14: "I want to avoid bloodshed. I am

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[1]Macridis and Brown, p. 62.

not an insubordinate General . . . There can be no question of creating at Algiers an insurrectional government . . . Power belongs to General Salan and he is the emanation of the government. If the Committee forgets it, it will be dissolved."[1] On May 17 Pierre Pfimlin was granted his request for the institution of the state of emergency in all of metropolitan France for a period of three months.[2] However, the time had passed when either regular procedure or the implementation of legitimate crisis devices could substantially alter the situation. In a test of strength between Army and civilian government, instruments for the transfer of civilian authority to the military constitute a danger rather than a security measure. In such a test, procedures for the development of long-range policy based upon parliamentary majority support and executive implementation are incapable of application. Grants of extended competence to the departmental and local civilian authorities are of no value when the military holds all civilian authority. The crisis institutions available to the Fourth Republic were of little utility in the last days of the May emergency. Legitimate crisis institutions, as vehicles for the assertion of positive policy formulation and application, provide no answer to the internal strife of a legal order directed against itself.

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[1]Merry and Serge Bromberger, Les 13 complots du 13 mai (Paris: Librairie Arthème Fayard, 1959), p. 222.

[2]France, Journal Officiel..., Lois et Décrets (May 17, 1958), p. 4734.

CHAPTER VIII

THE DESTRUCTION OF THE SUPREMACY OF THE LAW

The Algerian insurrection shook the Fourth Republic to its knees. It was a shock (secousse) that was not only the beginning of a catastrophe but also the signal for reorganization (redressement).[1] Reorganization began with the investiture of the De Gaulle government on June 1, 1958. This regime was immediately empowered to prepare a new constitution incorporating the principles of universal suffrage, the separation of legislative and executive powers, the responsibility of the Government to the Parliament, the independence of the judiciary, and an organized relationship between the French Republic and the peoples associated with it.[2] Formal reorganization culminated, at least momentarily, with the ratification, by great majorities, of the Constitution of the Fifth Republic on September 28, 1958.

This Constitution was designed to achieve a "rationalized"

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[1]As predicted by General de Gaulle in his last press conference of June 30, 1955, before his temporary retirement. Le Monde, July 2, 1955, p. 1.

[2]Peter Campbell and Brian Chapman, The Constitution of the Fifth Republic (Oxford: Basil Blackwood, 1958), pp. 27-28.

system in which a precise distribution of powers between the Government and the Parliament would allow avoidance of the disequilibriums of reactionary appeal to arbitrary government and of radical appeal to Assembly government which had plagued France in the past. The President of the Republic was installed as the "arbiter" and "guarantor" of the constitutional system. The judiciary was set apart and usually privileged in order to assure the protection of individuals against the powerful Executive and against the consequences of an accord between him and the legislative Assemblies.

The key element of this reorganization was the relationship between the Executive and the Legislature. In the traditional and classic pattern in existence before the Fifth Republic, the relationship between these two organs had been represented by a legal hierarchy of laws and regulations based upon the supremacy of the Legislature as the possessor of the national sovereignty and the sole source of law (loi). This hierarchic pattern was achieved by the arrangement of texts in a manner parallel to the order of precedence of the issuing legislative or governmental organ. Consequently, under the authority of the constitutional documents of the Third and Fourth Republics it was possible to authoritatively establish an order of precedence for (1) organic statute law, (2) regular statute law, (3) regulatory decrees issued by the President of the Council of Ministers, (4) ministerial regulations issued by the respective heads of departments as part of the process of the elaboration of governmental programs, (5) prefectorial

arrêtés, and (6) municipal arrêtés.[1] The hierarchy was formal (loi formelle) rather than substantive (loi matérielle);[2] nevertheless, the sovereign Legislature possessed a general and unconditional normative power (pouvoir normatif général et inconditionne)[3] which allowed it to intervene in any domain in defense of the principles of the Constitution. Any new legislation passed by the Legislature imposed itself immediately upon all authority invested with the regulatory power and texts emanating from the Executive were susceptible to abrogation, ipso facto, to the degree that their provisions contradicted the prescriptions of the legislative power as embodied in law.[4]

Though the Legislature remained the ultimate source of normative power in France until the passage of the De Gaulle Constitution, the complexity of mid-twentieth century government rendered the traditional system to be less and less adequate. It became clear that a substantive hierarchy in which the Legislature makes the law and is incapable of delegating this right was inappropriate. Experience had demonstrated that in France a representative parliamentary legislature is incapable of determining policy in an absolute manner such as would be required for the operation of an effective substantive hierarchy. Consequently, the recourse in the Third and Fourth

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[1]Georges Morange, "La hiérarchie des textes dans la Constitution du 4 octobre 1958," Recueil Dalloz, Chronique, 1959, p. 21.

[2]Supra., p. 131.

[3]Morange, p. 21.

[4]Ibid.

Republics was to the formalistic supremacy of the law which allowed the possibility of delegation of legislative competence to the Executive for the accomplishment of specified objectives within specific time limitations. It is upon this formalistic hierarchy that the exceptional institutions of the pre-1958 period were based.

Particularly during 1934-1940 and in the 1955-1958 period, the distinction between law and regulation became increasingly blurred. The French juridical system fell into a massive state of confusion and congestion. The parliamentary agenda was overwhelmed by an excessive number of projects of law. Parliament debated and argued, but on occasions of great importance, it tended to render sterile compromises[1] rather than effective policy decisions. At the same time, in the realm of exceptional procedures the Government, quite incongruously, in the case of Algeria found itself relatively free from legislative incumbrances. However, coherent long-range programs depended upon the cooperation of Government and Legislature as well as the maintenance of a stable coalition in support of national policy, and neither of these prerequisites was attainable in the Fourth Republic. Michel Debré explained this dilemma quite

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[1]Edmond Burke claimed that "All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise." ("Speech on Conciliation with America," (1775), in Works, 12 vols., Boston: Little, Brown and Co., 1877, II, p. 169.) Other writers "condemn compromise as rank cowardice and sheer opportunism. A better view, perhaps, would distinguish a lower form that appeases all without satisfying any (of which logrolling is the prototype) from a higher one that fully reconciles the initial differences."

Particularly in the Fourth Republic, the Center parties,

cogently in his presentation of the draft text of the Constitution of 1958 to the Council of State:

> An observer of our parliamentary life could have noted between the wars, but even more since the Liberation, this double deviation of our political organization: a parliament overwhelmed by bills and rushing in disorder toward the multiplication of detailed speeches, but a government treating without parliamentary interference the gravest national problems. The result of these two observations led to a double crisis: the impotence of the State because of the fact that the administration was bound by inexcusable laws, the anger of the nation because of the fact that a partisan coalition placed in the government put before it serious measures decided without having been submitted previously to serious study.[1]

The answer of the Fifth Republic to this dilemma was the reorganization of the relationship between the Parliament and the Government. Four major provisions of a general character determine the nature of this relationship: (1) the incompatibility between the parliamentary mandate and a cabinet post, (2) the manner in which the responsibility of the cabinet before the Parliament comes into play, (3) the distinction between "legislation" and "rule making," and (4) the introduction of the "executive budget."[2]

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hamstrung by violent opposition on the extreme Right and extreme Left, could do little more than achieve the "lower" form of compromise by which none could be satisfied. Dankwart A. Rustow, The Politics of Compromise (Princeton: Princeton University Press, 1955), pp. 231-32.

[1]Michael Debré, "La nouvelle constitution," Revue française de science politique, 1959, pp. 7-29, as reprinted in William G. Andrews (ed.), European Political Institutions (Princeton: D. Van Nostrand Company, 1962), p. 46.

[2]Macridis and Brown, p. 168.

For crisis government the essential relationship is that between "legislation" and "rule making." The Constitution of 1958 provides, in accordance with the canons of Parliamentary government, that the "law is voted by Parliament." Members of Parliament and the Government can introduce bills and amendments. The scope of lawmaking, however, is substantively defined in the constitution (Article 34) to include:

> . . . the regulations concerning:
> civil rights and fundamental guarantees given to the citizens for the exercise of their public liberties; the demands made on citizens and their property in the interest of national defense; nationality, status, and legal capacity of persons, . . .
>
> determination of crimes and offenses and the penalties that they may incur; criminal procedure; amnesty; the creation of new types of jurisdiction and the statute of the judiciary;
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> the basis, the rate, and the methods of collecting taxes of all types; the issuance of currency; . . .
>
> the electoral system of Parliamentary assemblies and the local assemblies; . . .
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> the nationalization of enterprises and the transfer of property of enterprises from the public to the private sector; . . .
>
> the basic principles of:
> the general organization of national defense;
> the free administration of local communities, the extent of their jurisdiction and their resources;
> education;
> property rights, civil and commercial obligations;
> legislation pertaining to employment, unions, and social security.[1]

Parliament was also authorized to declare war (Article 35) and to extend the effect of the state of siege, as decreed by the

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[1]Jean Chatelain, La nouvelle constitution et le régime politique de la France (2nd ed.; Paris: Editions Berger-Levrault, 1959) pp. 369-70.

Council of Ministers, beyond a period of fifteen days (Article 36).

This enumeration of legislative power was limited and could not be enlarged except by an organic law. All other matters "than those that fall within the domain of the law shall be of a regulatory character" (Article 37). Consequently, the normative supremacy of the law was overthrown. The traditional pattern of law as the expression of the general will emanating from the sovereign Parliament and constituting the initial and unconditional legal act was no more. In the hierarchy of statutes established in the Fifth Republic, law was neither substantively nor formalistically supreme. Regulation was no longer the subordinate and conditional act.[1]

Article 37 also stipulated that legislative texts concerning matters within the domain of the law "may be modified by decrees issued after consultation with the Council of State." However, "those legislative texts which may be passed after the present Constitution has become operative shall be modified by decree, only if the Constitutional Council[2] has stated that they

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[1]Supra., p. 132.

[2]In traditional theory and practice, the law of Parliament has been supreme and the machinery for judicial review was rudimentary, with its development considered contrary to the sovereignty of the people as expressed by the Parliament. The Fourth Republic made a feeble attempt to create an organ of judicial review in its Constitutional Committee. But not only was a majority of its members chosen by a partisan vote in the Assembly, thus affecting their independence and objectivity, but also its powers were extremely limited and, in fact, were hardly ever used.

Title VII of the Constitution of the Fifth Republic breaks

have a regulatory character . . . "[1] Thus, past laws dealing with matters that were now beyond the scope of the legislative power could be modified by simple decree. They were "delegalized."[2] Articles 37, 41, and 61 insured the distinction between legislation and rule making by a series of safety devices. If it appears in the course of the legislative procedure that Parliament is considering a bill or an amendment that is outside the domain of law (Article 34) or that is contrary to a delegation that has been granted to the Government by the Parliament

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with this tradition by making the Constitutional Council almost an independent organ of government. It is composed of all former Presidents of the Republic and nine other members, three chosen by each of the Presidents of the two chambers plus the incumbent President of the Republic, who also names one of the members as the presiding official of the Council.

The Council has a number of special powers of surveillance: the assurance of the regularity of the election of the President of the Republic and the members of Parliament; and the procedures used in a referenda; the approval of the rules of procedure adopted by the two houses of Parliament; the determination of the scope of the domain of the law when asked by the Government to strike down a proposed private member bill or deputies' amendments to Government bills; the determination of the scope of the domain of the law when asked by the Government to decide whether a matter that was a subject of legislation before the Fifth Republic now comes within the purview of executive rule making; the nullification of law or treaty that is considered to be incompatible with the Constitution.

It is also the Council that alone decides when the sudden incapacity of the President of the Republic requires his replacement by the President of the Senate, or whether new elections should be called for his permanent replacement. Finally, the Council must be consulted by the President of the Republic on the use of the emergency powers under Article 16, as well as on every measure taken under those powers. Beer and Ulam (eds.), pp. 336-37.

[1]Chatelain, p. 370.

[2]Supra., p. 96.

(Article 38), the Government may declare the "inadmissibility" of such a project of law. "In the case of disagreement between the Government and the President of the Assembly concerned, the Constitutional Council, upon the request of either party, shall rule within a time limit of eight days."[1] If a bill is enacted by Parliament but there are doubts about the jurisdiction of the Legislative Assembly, the President of the Republic, the Premier, or the presidents of the two assemblies, can bring the question before the Constitutional Council before the bill is promulgated.[2] If the bill is passed and promulgated, even then it can be brought before the Constitutional Council on the ground that it deals with a matter that was beyond Parliament's competence.[3] Finally, the Government can modify in the future by simple decree a law passed by the Legislature, provided that the Parliament exceeded its competence in passing it.[4]

The Constitution, in the aforementioned Article 38,[5] provides expressly that all lawmaking power enjoyed by the Parliament may be delegated to the Executive. The system of

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[1]Article 41 of the Constitution of October 4, 1958. Chatelain, p. 371.

[2]Article 61 of the Constitution of October 4, 1958. Ibid., p. 376.

[3]Article 37 of the Constitution of October 4, 1958. Ibid., p. 370.

[4]Ibid.

[5]Supra.,pp. 239-40.

décrets-lois of the Third Republic and analogous practices of the Fourth are thus enshrined in the Constitution of the Fifth Republic. "The Government may, in order to carry out its program, ask Parliament to authorize it, for a limited period, to take through ordinances measures that are normally within the domain of the law."[1] Such ordinances come into force as soon as they are promulgated but they are null and void if a bill for their ratification is not submitted by the Government before Parliament within a prescribed period of time, or if the ratification of the bill is rejected.[2]

Thus, the principle of the separation of executive and legislative power is incorporated in the French constitutional system in a most unique manner. The domain of the legislative power is materially defined and restricted. The regulatory power applies to all other matters and, in the event of parliamentary delegation, ordinances may be issued on subject matter that is normally within the domain of the law. If the Legislature moves outside its field of competence, the Constitutional Council stands ready to define the boundaries of the legitimate sphere of legislative competence. However, if the Executive is purported to have invaded the competence of the Legislature, recourse must be to the Council of State by the plaint of *ultra vires*.[3] Thus, it is strange but true that the administrative courts become the defenders of parliamentary privilege. There

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[1]Chatelain, p. 370.

[2]*Ibid*.

[3]*Supra*., p. 48.

is no way to take an allegation of Executive violation of legislative competence to the Constitutional Council except by passage of law declaring the action to be invalid.

This separation of powers is complicated by the division of the executive authority between the responsible parliamentary executive, the Premier, and the unresponsible "arbiter" of the constitutional system, the President of the Republic. Constitutionally, the Premier and his Ministers are competent to "determine and direct the policy of the nation" (Article 20); "direct the operation of the Government" (Article 21); "be responsible for national defense" (Article 21); and "ensure the execution of the laws" (Article 21). The Premier also has the authority to initiate legislation (Article 39), take appeals to the Constitutional Council (Article 41), demand priority on the agendas of the assemblies (Article 48), propose the other members of the Government (Article 8), and propose constitutional amendments to the President of the Republic (Article 89). He may also dismiss members of his cabinet and replace them with individuals of his own choice. Finally, he coordinates the action of the Government and supervises the execution of decisions. However, both Premiers of the Republic--Michel Debré or Georges Pompidou--have remained staunch defenders of presidential policy. When disagreement has occurred between the President and the Premier, it has been the responsible parliamentary executive that has yielded. The classic example is the resignation of Michel Debré in 1962. Debré resigned after the successful

referendum of April 8, 1962, when the Parliament was not in session; when he had not faced and did not expect to face an adverse vote; when, indeed, he even had an opportunity to increase his parliamentary majority.

Apparently, Debré wanted an election to follow the signing of the Evian Accords[1] in order to substantiate the posture of governmental support as France moved into the post-Algerian era. De Gaulle was opposed, and the disagreement was sufficient to result in Debre's resignation on April 12, 1962.

The presidency of the Fifth Republic is the "keystone of the arch"[2] of the new Republic--both the symbol and the instrument of reinforced executive authority. Beside it the office of the Premier pales somewhat by comparison. The Constitution of the Fifth Republic maintains the irresponsibility of the President, but at the same time it provides him with personal powers that can be exercised solely at his discretion. It provides him with the authority to make decisions concerning all matters related to the Community and allows for a virtual veto power over a large, even if ill-defined, area of policy making.

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[1]On March 18, 1962 the delegates of France and of the rebel F.L.N. movement, meeting in Evian, reached final agreement for an end to the Algerian war. A statement issued by both delegations contained three basic points: (1) a cease-fire was agreed upon and became effective on March 19, 1962; (2) the people of Algeria were to be granted the right of self-determination; and (3) the best solution would be an independent Algeria cooperating with France under stipulated conditions. French Embassy, Press and Information Service (New York), Foreign Affairs, No. 130 (March 18, 1962), p. 1.

[2]Andrews, p. 50.

It is the constitutional responsibility of the President of the Republic to "see that the Constitution is respected" (Article 5); "to ensure, by his arbitration, the regular functioning of the governmental authorities, as well as the continuance of the State" (Article 5); and to be the "guantor of national independence . . ." (Article 5). He appoints the Premier (Article 8); presides over the Council of Ministers (Article 9); promulgates the laws (Article 10); submits bills to referendum (Article 11); after consultation with the Premier and the presidents of the assemblies, declares the dissolution of the National Assembly (Article 12); is commander of the armed forces and presides over the high council and committees of national defense (Article 15). "When the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional governmental authorities is interrupted," it is the responsibility of the President of the Republic to "take the measures commanded by the circumstances . . ." (Article 16). It is also his responsibility to inform the nation of the measures taken by a public message. The Constitutional Council must be consulted with regard to such measures (Article 16). During the period of the imposition of Article 16, the Parliament may meet by right.

Constitutional structures are, at their best, frameworks within which political society can be given birth, can be nurtured, can grow, and can, subsequently, evolve. Within the

Constitution of the Fifth Republic, the evolution of the executive element shows the progressive dominance of the President of the Republic over the office of the Premier. It appears that the President, for the moment at least because of the acquiescence of the Premier, may, if he so wishes, dismiss both the Premier and the individual ministers.[1] Constitutionally, the formation of the cabinet is the responsibility of the Premier selected by the President, for it is the Premier and his cabinet that are collectively responsible to the Parliament. However, it is obvious that during the 1958-1963 period the President participated actively and intervened personally in the formation of both the Debré and Pompidou cabinets and in the selection of cabinet ministers.[2] The President of the Republic has called cabinet meetings, presided over them, and

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[1]The reference here is to the unwillingness of Debré to fight for policy which was counter to that desired by the President of the Republic and refers to his resignation, whether demanded by De Gaulle or not, when a profound policy disagreement occurred. The authority of the President over the cabinet can be documented by De Gaulle's dismissal of Antoine Pinay as Minister of Finance because of his disagreement with presidential foreign policy (January, 1960), and the expulsion of Jacques Soustelle from his position as Minister of State on the order of the President of the Republic. Also, in August, 1961 Louis Joxe became Minister of Algerian Affairs as the personal choice of General de Gaulle.

[2]"The make-up of the Debré and Pompidou cabinets reflects . . . accord with the principles, goals, and methods of De Gaulle's Presidency . . . Although under the Fifth Republic the choice of Ministers still belongs to the Prime Minister constitutionally, the members of the Debré and Pompidou cabinets were chosen in cooperation with De Gaulle." Beer and Ulam (eds.), p. 411.

through his secretariate, prepared the agenda and kept records of the decisions. The Premier "may direct the operation of the Government" but the determination of policy is virtually completely within the jurisdiction of the President of the Republic and his staff.

The separation of powers, then, has resulted in the legal and political separation of the Executive and the Legislature. However, this relationship is profoundly modified by the "rationalization" of the Parliament itself,[1] and by the evolution of the "division" of the executive power toward the subjugation of the office of the Premier to the President of the Republic. The result is that the political system of the Fifth Republic is not "parliamentary." The fundamental criteria of

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[1]A substantial series of innovations were employed in an attempt to insure that the Parliament in the Fifth Republic would be able to carry out its "proper" functions under the Gaullist constitution but that it would be able to do little else. The restriction of the lawmaking functions to substantive matters defined in the constitution is of central importance. The authority of the lower house in the Fourth Republic has been tempered by the strengthening of the Senate in the Fifth; however, the result has been more of a confusion of powers than a clean-cut division. The agenda of the houses is no longer the outcome of interminable debates between the presiding official, the representatives of parliamentary groups, and a government delegate. The Government now determines the order of business. The Parliament can no longer establish its own standing orders. They must be approved by the Constitutional Council before they become effective. The number of parliamentary committees is reduced and their functions are carefully circumscribed. Finally, it is the government text of a bill rather than the committees' amendments and counterproposals, as in the Fourth Republic, which comes before the plenary session of the Assembly, and the Government has the right to reject all amendments and to demand a vote on its own text.

The new procedures do seem to reflect a genuine desire to correct some of the more flagrant abuses of the past, but at the same time, they make deep inroads into the capacity of the

a parliamentary regime is the "responsibility" of the Government to the legislative body. In the Fifth Republic the law-making functions of the Parliament, its ability to question and to scrutinize and to hold the Executive responsible, are narrowly circumscribed. More importantly, it is not the responsible premier that makes policy, but the President. The regime is not "presidential" either. The French President has the power to dissolve the Legislature, to hold a referendum over policy questions, and to legislate in areas outside the defined material competence of the legislative body. He is also the final judge of the meaning of the Constitution. Such powers are not held by any other practicing presidential regime. In fact, the essence of Presidential government is the separation of the executive and the legislative power. Consequently, the political system of France, at this writing, may be best understood as personal rule[1]--personal rule based upon the intervention, the "arbitration," and the guarantee of the President of the Republic.

The reorganization of the essential political and legal relationships in the Fifth Republic necessitated a reordering of the posture of crisis institutions in French constitutional and public law. The restriction of the legislative domain of

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Parliament to operate as a "parliamentary" legislative entity. It is a "régime parlementaire incomplet." Jean Rivero, "La hiérarchie des textes dans la constitution du 4 octobre 1958," Recueil Dalloz, Chronique, 1959, p. 263.

[1]Roy C. Macridis and Bernard E. Brown, Supplement to the De Gaulle Republic (Homewood, Ill.: The Dorsey Press, Inc., 1963), p. 52.

the Parliament (Article 34) and the simultaneous recognition of Parliament's ability to delegate its material competences to the Executive have created a situation in which the procedures of decree-laws and lois-cadres have been included in the constitutional structure. This normalization of former emergency practices is the result of the constitutional recognition of the competence of the responsible Executive to make policy in the areas outside the restrictive domain of the law (Article 37) and to receive from Parliament delegations empowering it to deal by ordinance with matters that are normally within the domain of the law (Article 38).

The state of siege was retained as an applicable emergency weapon capable of use under the initiative of the Council of Ministers, but limited in that "its prorogation beyond twelve days may be authorized only by Parliament."[1] The state of emergency was also retained. It was also initiated by the Council of Ministers and required Parliamentary approval to be implemented for longer than a twelve-day period. However, the state of emergency was not based upon an article of the Constitution as was the state of siege. Rather, it was revived by Executive ordinance[2] to form a part of the "special powers" gathered together by the Debre government in February and March of 1960 to be used as means for a final attempt to pacify Algeria.

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[1]Chatelain, p. 370.

[2]France, Journal Officiel..., Lois et Décrets (April 15, 1960), p. 3584.

To this inheritance of the Third and Fourth Republics, the Fifth has added the distinctive and vaguely defined grant of exceptional powers to the President of the Republic contained in Article 16.[1] Procedures under Article 38 appear to be less severe than those under Article 16; however, in the tormented years preceding the Evian Accords they were each to play a significant role in the evolution of crisis government in the Fifth Republic.

During February, 1960, in the aftermath of the abortive and unsuccessful military coup in Algiers,[2] the Debré government[3] moved to reassert its authority through the imposition of Article 38. Debré warned the National Assembly that France was faced with "civil war"[4] and that the Republic must sustain the

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[1]Supra., p. 241.

[2]The dismissal of General Massu (l'affaire Massu) in January, 1960 triggered a long expected revolt in Algeria. The insurrection lasted one week as the army hesitated and allowed the population to propagandize its and the army's dissatisfaction with the Government's Algerian policy. In the light of the Evian Accords, it is interesting that in his appeasement speech of January 29, 1960, General de Gaulle announced: "the rebel organization . . . maintains that it will cease-fire only if I negotiate with it beforehand, by special prerogative, on the political destiny of Algeria, which will be tantamount to building it up as the only valid representative and to elevating it in advance to being the government of the country. That I will not do." James H. Meisel, The Fall of the Republic (Ann Arbor: University of Michigan Press, 1962), pp. 63-66.

[3]The decision to invoke Article 38 was made after a series of conferences by De Gaulle and Debré with members of the cabinet, the presidents of the two parliamentary chambers, the head of the Constitutional Council, and other civil and military leaders. Parliament was called into extraordinary session to pass the Government bill. Andrews, p. 117.

[4]Debré defined "civil war" as a tragedy in which Frenchmen

national legitimacy as represented in the person and by the policy of General de Gaulle.[1] He asserted that the Government did not have at its disposal the necessary machinery to maintain order, to confront future difficulties, or to insure the success of the policy of the Government.[2] Consequently, it was necessary for the Government to ask the Parliament for the passage of a "special powers" bill to enable the Executive to "legislate" by ordinance within the domain of the legislative power. These ordinances were to be defined in scope, limited in time, and subject to the approval of the President of the Republic.[3] It was also expected that the Government would periodically place before the Parliament for its approval regular bills embodying ordinances that it had issued.[4] The Parliament would retain its legislative power, budgetary authority, right of control, and right to censure the Government.[5] However, in view of the "rationalized" nature of the Parliament and the consequent legislative control of the Government, the retention of normal powers in areas other than those covered by the "special powers" requested by the Government appeared to have little solace for the members of the National Assembly.

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turn against their government. France, Journal Officiel..., Assemblée Nationale, Débats (February 2, 1960), p. 115.

[1] Ibid., p. 116.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid.

Many of these parliamentarians harbored grave doubts about the wisdom of any diminution of the already restricted domain of the law. Nevertheless, under the pressure of events in Algeria and the insistent demands of the Government, which couched its appeal for extended powers in the name of the President of the Republic, the Parliament was unwilling to resist and immediately voted the requests of the Government.[1] Authority was granted to the Government to "carry out its program" (Article 38) by means of the issuance of ordinances designed to implement the "measures necessary for the maintenance of order, the safeguarding of the State and the Constitution, and the pacification and administration of Algeria."[2] Although this bill was originally limited in time of application to one year, it required the ordinances issued under its competence to be presented to the National Assembly before April 1, 1961, and was caduque in that it terminated in the event of the dissolution of the National Assembly; it exceeded the powers accorded in enabling legislation in the Fourth Republic.[3] Broad and undefined powers were granted to the

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[1]The law of February 4, 1960, authorizing the Government to take, by application of Article 38 of the Constitution, certain measures relative to the maintenance of order and the safeguarding of the State was passed in the National Assembly after one day's debate by a vote of 441 to 75 and in the Senate on the same day by 225 to 39. France, Journal Officiel..., Assemblée Nationale, Débats (February 2 and 3, 1960), pp. 129, 150.

[2]France, Journal Officiel..., Lois et Décrets (February 5, 1960), p. 1178.

[3]Though this law contained broader delegations than any enabling legislation in the Fourth Republic, it went no further than the laws of March 19, 1939 and December 8, 1939. Supra.,

Government to "safeguard the State,"[1] but no mention was made of the governmental program whose "execution" these competences were to make possible. There was no definition of the policy limits within which the Government could or could not act. Nor was there any distinction drawn between Algeria and metropolitan France with regard to the application of repressive techniques. Finally, the period of time in which the ordinances issued under this competence were permitted to have valid and legitimate effect without the approval of Parliament was not one or two months as one might expect, but the entire period of the law--until April 1, 1961.

The law of February 4, 1960 definitely augmented and reinforced the personal control of the President of the Republic. The provision that executive ordinances must be signed by the President was actually a requirement of Article 13[2] of the Constitution although such a provision was also incorporated in the enabling act. Certainly this stipulation provided the basis for the close and direct association of De Gaulle with governmental policy and served to reinforce the "personal" control of

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[1]M. Patrice Brocas remarked in the debate on the law of February 4, 1960, that the general authority "pour le sauvegarde de l'Etat" might very well comprehend the entirety of French civil, criminal, and administrative legislation. Consequently, the authority granted to the Government would be quite unlimited. France, Journal Officiel..., Assemblée Nationale, Débats (February 5, 1960), p. 125.

[2]Article 13 of the Constitution of the Fifth Republic: "The President of the Republic shall sign the ordinances and decrees decided upon in the Council of Ministers."

the President of the Republic. In the political atmosphere of the Fifth Republic, the acquiescence of the Head of State in governmental policy signified his approval of such policy. It was not the formal approval of a titular Head of State, but the political approval of the "arbiter" of the constitutional system. It is not insignificant that such approval facilitated the transference of the personal prestige of the President to the Government to a degree sufficient to insure popular approval and the reassurance of the moderately hostile elements of the National Assembly and the Senate. It can well be argued that the violence of reactionary disapproval of the De Gaulle policy for Algeria and the continued hostilities on the part of Algerian nationalist elements, together with continued popular confidence in De Gaulle, ultimately justified for both the public and the majority of the Parliament the resulting increases in the arbitrary power of the executive agency.

The domain of the law as defined by Article 34 is concerned primarily with civil rights and fundamental guarantees; the determination of crimes and misdemeanors; nationality; the fundamental guarantees to civil and military personnel; property rights and civil and commercial obligations; and legislation concerning employment, unions, and social security.[1] Therefore, of necessity, ordinances issued by the Government under the authority of Article 38 in modification of Article 34 must deal with civil and criminal rights. They constitute an expression

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[1]Supra., p. 237.

of policy, but do not provide any further exceptional means for the determination of policy.

As previously noted,[1] the re-establishment of the institution of the state of emergency as an available procedure of crisis government was an initial consequence of this delegation. However, the potential of the implementation of this device was rendered questionable by the transference of selected competences for repression of infractions of the law from the civil to the military authority, thus blunting the potential of an essentially civil crisis institution.

The ordinance of April 18, 1960 granted responsibility to the military for "all crimes against the security of the state, armed rebellion, the instigation of or participation in a criminal mob, and for all crimes and misdemeanors against commerce and manufacturing."[2] It also transfered competence from the civil to the military agency for murders and homicides committed voluntarily, for the banishment and exile of individuals, for the voluntary setting of fires, looting, and in a general manner, all crimes and misdemeanors committing an offense against the national defense."[3] It should be noted that this jurisdiction extended only to violations that were "related to infractions of the law in relation to the events in Algeria since October 30, 1954."[4] Thus, a special category of

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[1] Supra., p. 248.

[2] France, Journal Officiel..., Lois et Décrets (April 24, 1960), p. 3816.

[3] Ibid.

[4] Ibid.

insurrection-related crimes was created and jurisdiction was removed from civilian hands.

The Debré government used this ordinance power to increase the severity of penalties imposed against violators of the order and security of the State when it announced the modification of the Penal Code, the Code of Penal Procedure, and the Code of Military Justice in June, 1960.[1] The result was a necessary strengthening of the repressive structure of the French penal regime; however, a related consequence was a further development of the coercive authority of the military vis-a-vis the civilian competence.

Furthermore, a significant series of lesser penalties relating to offenses that were directly connected with the Algerian situation and detrimental to national defense were created by ordinance between July, 1960 and March, 1961. In order to combat evasions of the military draft, either army or navy or their reserves, penalties of imprisonment of from one to three years and fines ranging from 200 to 100,000 NF. were established for anyone knowingly contributing to such evasion.[2] The burning of vehicles which became so commonplace in Algeria

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[1]The death penalty was prescribed for the major crimes of treason and espionage as well as for the "directors and organizers" of the insurrectional movement in Algeria. Other penalties were increased in severity. For example, crimes previously meriting sentences of from five to ten years were normally placed in a category entailing a ten- to twenty-year sentence. France, Journal Officiel..., Lois et Décrets (June 8, 1960), pp. 5107-19.

[2]France, Journal Officiel..., Lois et Décrets (September 23, 1960), p. 8661; Ibid., February 1, 1961, pp. 1205-06.

during this period was challenged with the certainty of from two to five years' imprisonment and fines ranging from 2,000 to 10,000 NF.[1] Also, the loss of French nationality was prescribed for those who, being employed in the army or in the public service of an organization of which "la France ne fait pas patrie" or more generally, will not resign or terminate this relationship when requested to by an injunction of the French Government.[2] This limitation upon nationality was applicable both to organized insurrection in the cause of nationalist Algeria and to the O.A.S.[3] movement when it was organized in March, 1962.

In the area of civil government, Algerian departmental

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[1]France, Journal Officiel..., Lois et Décrets (February 1, 1961), p. 1205.

[2]France, Journal Officiel..., Lois et Décrets (February 4, 1945), p. 1345.

[3]The Secret Army Organization (O.A.S.) was "formed by military and civilian elements in Algeria when measures of open opposition failed. The Secret Army sought to prevent at all costs the transfer of control from France to the nationalist Provisional Government of Algeria." Interestingly, the O.A.S. sought legitimacy as the representative of the Algerian people. This concept of its relationship to the province is best explained by the testimony of Jean-Marie Le Pen, a deputy to the National Assembly in the trial of General Raoul Salan: The O.A.S. believed in "a secret pact . . . between it and the government" and only attacked when the pact was not honored. "All would have been well had the government only realized that, in stirring up trouble by means of police spies and agents provocateurs, it was producing a civil war between the people of France and the people of its Algerian departments. For the O.A.S. was, to the O.A.S., the Algerian people." (Procès de Raoul Salan, p. 270.) Edgar S. Furniss, Jr., De Gaulle and the French Army (New York: The Twentieth Century Fund, 1964), pp. 27 and 77.

elections were placed directly under the control of a central commission operating under the supervision of the Governor-General in Algeria. Two Algerian representational units were created: a series of Algerian General (Departmental) Councils and four Commissions of Elected Officials (commission d'élus). The General Council elections were the first to be held in Algeria since 1955. At that time the double electoral college system was still in use and as a consequence the two main ethnic groups elected an equal number of council members. However, in February, 1956 the intensification of the nationalist rebellion caused the replacement of these councils by appointed administrative commissions.[1] The single college system and multimember constituencies were adopted for the 1960 elections.[2] The result was an overwhelming victory for De Gaulle policy, with those pledged to the support of the President of the Republic numbering 298 and the Algérie française lists electing only 88 members of councils in the entire province.

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[1] L'Année Politique, 1956, p. 121.

[2] A single electoral college with multimember constituencies was adopted for the election on May 27, 1960. Each party nominated candidates equal in number to the seats to be filled. In 97 of the 113 election districts, all the candidates of the party which won the largest number of votes were elected. In the remaining districts, largely urban, the seats were distributed by proportional representation. Each list in each constituency where Europeans numbered from 3 to 10 percent of the population was required to contain one European candidate and, where they numbered 10 to 20 percent of the population, at least one and as many as one half of the candidates were European. The election returned 301 Moslems and 149 European members in council. France, Press and Information Service (New York), French Affairs, No. 105 (June 22, 1960), pp. 1-3.

To supplement these departmental councils in the Algerian representative hierarchy the Government also used the ordinance power to constitute the Commissions of Elected Officials (commissions d'élu).[1] It is to be remembered that shortly after his ascension to power as the last Prime Minister of the Fourth Republic, General de Gaulle, speaking in Algiers on June 4, 1958 had promised that "from this day forward France considers that there is only one class of citizen in Algeria: there are only Frenchmen, Frenchmen with the same rights and the same duties."[2] He insisted that "for the ten million Frenchmen in Algeria, their voting rights will be comparable to the voting rights of all others. They will elect . . . in a single electoral college, their representatives for the Pouvoirs public in the same manner as all other Frenchmen. With these elected

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[1]There were four categories of members in the Commissions of Elected Officials: (1) sixteen deputies and eight senators representing Algerian constituencies were elected by the respective parliamentary chambers; (2) the chairmen of the thirteen Algerian General Councils were members by right, and the Councils elected 51 others from their groups; (3) twenty mayors or members of the municipal councils were appointed by the Governor-General in Algeria upon the nomination of the respective prefects; and (4) twelve members of the Chambers of Commerce and of Agriculture in Algeria were appointed by the Premier.

The elected and appointed members were grouped into four commissions concerned with (1) local government, (2) administrative decentralization and regionalization, (3) relations between the two communities in Algeria, and (4) rural modernization. France, Journal Officiel..., Lois et Décrets (July 19, 1960), pp. 6581-82.

[2]L'Année Politique, 1958, p. 544.

representatives, we will see how to do what remains . . . I, de Gaulle, to you there, open the door of reconciliation."[1] And in his broadcast of September 16, 1958, when he overtly promised "self-determination" to the Algerian people, he announced that "Next year there will be election of the General Councils, from which will be drawn later great administrative, economic, and social councils, which will deliberate, alongside the Governor-General, on the development of Algeria."[2] Nevertheless, neither the departmental councils or the commissions d'élu were particularly representative of the "ten million Frenchmen in Algeria" referred to on June 4. More than one quarter of the "commissioners" serving on the commissions d'élu were governmental appointees and another 20 percent were designated by the Government-controlled Parliament. The remaining 55 percent emanated from the General Councils in which the supporters of the Government had a 65 percent majority. At the same time, it was readily apparent that the commissions were to be assigned purely consultative functions and that no formal authority was to be granted to them to deal with the future political status of Algeria. It was announced that they were so restricted in order not to predetermine the vote of the Algerian people concerning their future governmental system nor to prejudice the possibility of cease-fire negotiations with the rebels. Considering their somewhat "rigged" nature, the conclusion--that in these instances the ordinance power available

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[1] Ibid.

[2] France, Press and Information Service (New York), Speeches and Press Conference (September 16, 1958), pp. 1-2.

under Article 38 was employed to establish pseudo-representative institutions which could and, under Governmental guidance, would make some contribution to the legitimation of Governmental policy toward Algeria--is not far from the truth.[1]

The ordinance power available under Article 38 as implemented in the law of February 4, 1960 was also used to deal with a variety of other subjects: the reorganization of the police forces in Algeria,[2] the control of prostitution,[3] the application the application of the International Code of Public Sanitation as a measure in the fight against venereal disease,[4] the establishment of procedures to deal with the problem of alcoholism,[5]

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[1]The commissions d'élu reported in January, 1961, and recommended: (1) the granting of substantially more competence to the local governmental units; (2) the weakening of the all-Algerian authority; (3) that three "regions" with "consultative councils" be formed; and (4) that representatives of communal (that is, ethnic) and economic groups be included in the councils at various levels. It is noteworthy that the Government bill for Algeria submitted to the population in the January referendum, though worded very vaguely, conformed closely to the substance of these recommendations. Article 2 of the referendum bill is particularly pertinent: "Until self-determination has been effected . . . decrees taken in Council of Ministers shall arrange for the organization of the public powers of Algeria . . . on the following basis: (a) . . . instituting both an executive organ and deliberative assemblies having jurisdiction over all the Algerian Departments, and appropriate regional and departmental executive organs and deliberative organs and (b) ensuring the cooperation of the communities as well as the guarantees appropriate to each of them; . . . " France, Journal Officiel..., Lois et Décrets (December 9, 1960), p. 11043.

[2]France, Journal Officiel..., Lois et Décrets (August 23, 1960), pp. 7834-35.

[3]France, Journal Officiel..., Lois et Décrets (November 27, 1960), p. 10603.

[4]Ibid., p. 10549.

[5]Ibid., p. 10708.

the regulation of the home distillation of alcohol,[1] and, even, the relocation of former French settlers from Indochina.[2] With the exception of the reorganization of police structures, all of these subjects are only vaguely related to the purposes of the law of February 4, 1960--"the maintenance of order, the safeguarding of the State and the Constitution, and the pacification and administration of Algeria." They constitute excellent examples of the extremely broad and relatively undefined powers that can be made available to the Executive under Article 38. Whether such scope of delegation constitutes abuse of the legislative-executive relationship as established under the Fifth Republic is a matter of opinion. However, regardless of one's interpretation of "abuse," it should be recognized that the parliamentary practice of abandoning procedures for controlling the Government's use of delegated authority in time of crisis, the association of the President of the Republic with governmental ordinances, and the emphasis of the creators of the Fifth Republic upon the responsibility of Government for the initiation and the implementation of policy have all contributed to independence when the Executive is delegated authority within the sphere of competence of Parliament.

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[1]France, Journal Officiel..., Lois et Décrets (August 31, 1960), p. 8039.

[2]The ordinance was issued in order to forestall parliamentary discussion of a private member bill dealing with this same problem and considered to be detrimental psychologically to the morale of the colons in Algeria. France, Journal Officiel..., Lois et Décrets (March 16, 1960), p. 2551.

Under the Fifth Republic the men most influential in policy making--De Gaulle, Debré, and Pompidou, and a substantial majority of their Ministers--have all been partisans of the "administrative tradition in politics."[1]

> Their belief in the existence of an objective national interest has made them see the nation and its problems as submitted to a vast administrative process in which choosing the rationally correct solution is more vital than choosing the one for which there is public or parliamentary consent. None of them were really anti-democratic but they did believe, with De Gaulle, that generating consensus or even consent for a specified policy was usually hopeless in France. When, therefore, the pressure of policy decisions became great, as in times of crisis, their first reflex was to issue an ordinance or decree, and be done with it. If this resulted in the infringement of the parliament's law-making power or in abusing a grant of delegated legislative authority, there was reference to the "safety of the state" or to raison d'état, the ultimate justification of those in the administrative tradition of politics.[2]

The application of Article 38 in the law of February 4, 1960 is an expression of this "administrative tradition." It represents the fusion of exceptional and regular authority--the absorption of the exceptional power to delegate legislative competence by the constitutional framework of the Fifth Republic. This procedure is then the <u>contre-pied</u>[3] of Article 13 of the Constitution of 1946: Article 13 forbidding all formal delegations of authority from the Parliament to the Government and yet recognising the subtleties of procedure by which it was possible in fact to extend the legislative competence to the

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[1]Beer and Ulam (eds.), p. 419.

[2]<u>Ibid</u>., pp. 419-20.

[3]Leo Hamon and Jean Cotteret, "Vie et droit parlementaire," <u>Revue du Droit Public</u>, LXXV (May-June, 1960), p. 653.

benefit of the Executive; Article 38, on the other hand, representing foresight as to the necessity of "supplementary extensions of the competence"[1] of the Executive and legitimating these extensions by constitutional fiat.

In contrast to the application of Article 38 in 1960, Article 16 was not declared until the so-called Generals' Revolt[2] of April 22, 1961 threatened a military coup d'état. In this instance the situation was sufficiently grave that no significant opposition was evidenced against the intention of President de Gaulle to implement his authority under Article 16.[3] The day after the initiation of the rebellion, April 23, 1961, De Gaulle announced:

> Before the misfortune that confronts the country and the threat that faces the Republic, having taken the official advice of the Constitutional Council, of the Prime Minister and the Presidents of the Senate and the National Assembly, I decided to use Article 16

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[1] Ibid.

[2] The nature of the April 22, 1961 uprising is indicated by the first radio broadcast beamed from Algeria to the Metropole. "At nine o'clock, France V, which the mutineers had baptised 'Radio-France', broadcast an 'order' of the insurgent 'military command' instituting a state of siege. Article 5 of this 'order' that individuals having participated directly in the 'enterprise d'abandon' of Algeria and the Sahara were to be arrested and accused before military tribunals which were to be immediately created to consider the crimes committed against the security of the State . . . The military authority will have the singular competence for ordering these arrests." In conclusion the communique declared (Article 7): "The command has determined to attain all of the objectives which it has established for the safety of the State. All resistance will be broken from wherever it comes." This order was signed by the Generals Challe, Salan, Jouhaud, and Zeller. L'Année Politique, 1961, p. 282.

[3] Supra., p. 244.

> of the Constitution. Beginning today I shall take, if need be, directly the measures required by the circumstances . . . [1]

And in a message to the Parliament convened at the opening of its ordinary session on April 25, he stated:

> In conformity with the Constitution . . . I decided to invoke Article 16 and have begun to take the measures necessary for the maintenance of the constitutional organs . . . At the same time the Parliament has convened automatically (de plein droit).
>
> In the present circumstances, I believe that the application of Article 16 ought not to modify the activities of Parliament: the exercise of the legislative power and control. Because of this, the relations between Parliament and the Government will continue to function in the normal conditions except with regard to the measures taken or to be taken by virtue of Article 16. Parliament therefore whose second session opens today will continue its task.[2]

As Article 38 had introduced the ordonnance into the hierarchy of law of the Fifth Republic, Article 16 introduced the décision issued solely under the signature of the President of the Republic. The imposition of this "emergency authority" resulted in the issuance of a series of orders designed to gird France for a prolonged crisis. The state of emergency (état d'urgence) was declared and its duration prolonged until further

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[1] L'Année Politique, 1961, pp. 651-52. The Constitutional Council advised that "considering that in Algeria, some general officers without command and, following them, certain elements of the military are in open rebellion against the constitutional government . . . Considering that because of these acts of subversion . . . the institutions of the Republic find themselves menaced in a manner grave and immediate . . . the conditions exist by the Constitution for the application of its Article 16." France, Journal Officiel..., Lois et Décrets (April 23, 1961), pp. 3876-77.

[2] Ibid., p. 653.

order.[1] Censorship was established for all publications which, in the opinion of the Ministry of Information or the Ministry of the Interior, "in one way or another give support to subversion directed against the authorities or the laws of the Republic."[2] The Government was authorized to put under house arrest or in detention camps (internement administratif) any person who has "participated in subversive activities directed against the authorities of the Republic or who has encouraged such activity."[3] The period of time in which a person could be legally held before being taken before a magistrate for formal accusation was increased from five days to fifteen days.[4] The tenure of civil judges in Algeria was revoked, thus allowing the Government to reappoint judges acceptable to the President of the Republic.[5] The military forces were granted the right of requisition in the entirety of French territory.[6] The legal guarantees of military personnel and of civil servants was suspended, thus making possible their removal from office,

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[1]By the ordinance of April 15, 1960 there was a twelve-day time limit on the imposition of the state of emergency unless its continuance was approved by Parliament. Supra., p. 248.

[2]France, Journal Officiel..., Lois et Décrets (April 28, 1961), p. 3947.

[3]France, Journal Officiel..., Lois et Décrets (April 24, 1961), p. 3876.

[4]Ibid.

[5]France, Journal Officiel..., Lois et Décrets (April 27, 1961), p. 3930.

[6]France, Journal Officiel..., Lois et Décrets (April 24, 1961), p. 3877.

demotion in rank, expulsion from the service on individual orders, or the withholding of their pensions.[1] Finally, a special high military tribunal was instituted to try cases involving the safety of the State and the discipline of the army in situations related to the insurrection in Algeria.[2]

The Executive authority moved decisively and with dispatch against the insurrectionists. Loyalist generals were confirmed in their posts[3] while all others were removed and orders were issued for their arrest.[4] The municipal council of Grand-Alger was removed and replaced by an appointed committee that was amenable to the dictates of the Government in Paris.[5] All daily newspapers in Algeria were suspended although the Journal d'Alger was allowed to resume publication on April 28.[6] Curfews were established at nine o-clock in the evening for all persons.[7] It might also be noted that six commissioners of police were suspended in this period and more than 200 civil servants were arrested.[8] In fact, when the putsch collapsed on April 27, all

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[1]France, Journal Officiel..., Lois et Décrets (April 24, 1961), p. 3876, and (April 25, 1961), p. 3907.

[2]France, Journal Officiel..., Lois et Décrets (April 28, 1961), p. 3947.

[3]L'Année Politique, 1961, p. 292.

[4]Ibid.

[5]Ibid.

[6]Ibid.

[7]Ibid.

[8]Ibid.

the officers of the First Regiment of Parachutists were taken into custody.[1] In all, it was estimated that 16,000 arrests were made for activities contrary to the order of the State and the national defense.[2]

It is frequently argued that Article 38 is appropriate for application in minor crisis situations when the cooperation of the National Assembly is assured and that Article 16 may be properly employed only when the fate of the nation hangs in the balance.[3] However, when comparing the immediate effects of the imposition of Article 38 in 1960 and of Article 16 in 1961, the similarities between the results of the use of these two devices is quite striking. In each instance a substantial limitation was placed upon selected individual liberties (freedom of association, freedom of the press, right of representation), fundamental guarantees to military and civilian personnel were modified or abrogated, the state of emergency was applied, and special judicial competences were arranged for crimes related to the Algerian insurrection. In the case of Article 38 exceptional penalties were introduced to discourage insurrection-related crimes, while in the case of Article 16 internement administratif was established. Despite their dissimilar forms, a major effect of the imposition of Article 38 as well as Article 16 was an enhancement of the power of the President of

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[1] Ibid.

[2] Ibid., p. 293.

[3] Hamon and Cotteret, p. 655.

the Republic--c'est le pouvoir du Chef de l'Etat qui se trouve étendu dans les deux cas.[1]

Nevertheless, the similarity between the recourse to Article 38 and the recourse to Article 16 can be overemphasized. It must be remembered that the effectiveness of Article 38 is limited to the area circumscribed by Article 34, while Article 16 constitutes an exceedingly broad emergency power of the unresponsible Head of State. The latter may be applied at his discretion and is employed until such a time as the President of the Republic deems it appropriate to return to the regular constitutional order. Article 16 is also used to intervene within the competence of the responsible Government, while Article 38 is a method if increasing the authority of this Government. Therefore, in a situation where the two elements of the executive power are not in complete harmony, Article 38 constitutes a device available to the Premier and his cabinet, whereas Article 16 is solely a device available to the President of the Republic.

The long-range implications of Article 16 are undefined, multifaceted, and subject to the judgment of the President of the Republic. This device, as applied in 1961, remained in force for five months.[2] Though the "grave and immediate danger" subsided with the collapse of the Algerian uprising, and the institutions of the Republic including both the Parliament and

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[1]Ibid.

[2]The application of Article 16 was terminated by the Décision of September 29, 1961. France, Journal Officiel..., Lois et Décrets (September 29, 1961), p. 8963.

the courts were allowed to function normally outside of Algeria, the "emergency authority" available under Article 16 remained applicable.

Elections were held during this period. Parliament, which under Article 16 met de plein droit during the period of application of Article 16, was adjourned from May 19 until June 12 in order to let its members attend the departmental elections of June 5 and June 12. Indeed, even a by-election was held for the National Assembly in the 7th district of Seine on these same dates. It is interesting that the election dates for this contest were set by decree issued on May 5,[1] or some nine days after the collapse of the insurrection in Algeria. Consequently, the President of the Republic indicated quite early that his use of Article 16 would not be incumbered by a strict interpretation of the concept of "grave and immediate danger."

The President of the Republic viewed the meetings of Parliament during the imposition of Article 16 to be of an advisory rather than a legislative character. In a letter to the Premier during the agricultural crisis[2] of late August, 1961, De Gaulle emphasized that the intent of the Constitution was to allow the reassembling of the legislative bodies de plein droit under Article 16 "so that the President of the Republic and the

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[1]France, Journal Officiel..., Lois et Décrets (May 6, 1961), p. 4182.

[2]The steady decline of agricultural prices in the summer of 1961 caused substantial unrest among the agricultural population and their pressure group representatives. Though Parliament had adjourned of its own volition on July 22, 1961, it was technically in session for so long as Article 16 remained in effect.

government can call Parliament urgently to assist them."[1] However, the intention was not to allow the Parliament to legislate "unless there are reasons related to the circumstances that endanger directly the nation and the Republic, reasons which most certainly would call for action on the part of the Chief of State and the Government."[2] The emergency power and with it the subordination of Parliament to the Executive was to continue concurrently with the re-institution of the normal functions of government outside of the area dealt with by De Gaulle under Article 16. Consequently, as understood by the President of the Republic, the right to assemble under Article 16 constituted nothing more than the privilege of cooperating with and giving support to the Chief of State in national emergencies. It did not constitute, in any sense, the right to maintain a regulatory oversight over the activities of the Chief of State in the normal sphere of competence of Parliament.

It is true that in September, 1961 the Parliament, meeting against the objection of De Gaulle, introduced legislation endeavoring to fix the prices of agricultural commodities. However, the Premier blocked all bills by invoking Article 37,[3]

There developed an insistent demand for a special meeting of the legislative bodies to consider this problem and to introduce remedial legislation.

[1] L'Année Politique, 1961, pp. 664-65.

[2] Ibid.

[3] Article 37 of the Constitution of the Fifth Republic: "Matters other than those which fall within the domain of the law shall be of a regulatory character . . . " French Embassy, Press and Information Service (New York), The French Constitution, p. 18.

Article 40,[1] and Article 41[2] of the Constitution, claiming that the proposed bills were either beyond the legislative competence of Parliament or that they entailed additional expenditures.[3]

Infuriated by these limitations upon their power the deputies attacked the President of the Republic in name for the first time in the life of the Fifth Republic.[4] The Socialist party introduced a "motion of censure" which, if passed and held to be valid, would have brought down the responsible government in a period of national emergency. However, the President of the Republic would not have had the right to dissolve the Parliament because of their right to sit permanently during the imposition of Article 16. To rule on the receivability of the

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[1]Article 40 of the Constitution of the Fifth Republic: "Bills and amendments introduced by members of Parliament shall not be considered when their adoption would have as a consequence either a diminution of public financial resources or the creation or increase of public expenditures." Ibid., p. 19.

[2]Article 41 of the Constitution of the Fifth Republic: "If it appears in the course of the legislative procedure that a Parliamentary bill or amendment is not within the domain of the law or is contrary to a delegation of authority granted by virtue of Article 38, the Government may declare its inadmissibility.

In case of disagreement between the Government and the President of the assembly concerned, the Constitutional Council, upon the request of either party, shall rule within a time limit of eight days. French Embassy, Press and Information Service (New York), The French Constitution, p. 19.

[3]L'Année Politique, 1961, pp. 113-14.

[4]For example: M. Maurice Bergasse (Independent) condemned "the personal interpretation given by the Chief of State to the presidential powers, which sterilize Parliament, as in 1815, when the King alone had the right to present to the Chambers the laws which they had no other choice but to vote." Ibid., p. 115.

Socialist motion, the Constitutional Council was reconvened in September. It, however, ruled itself incompetent on a "motion of censure" submitted in the National Assembly during the period of application of Article 16.[1] The decision was left up to the President of the National Assembly, Chaban-Delmas. Recognizing the silence of the Constitution on the relationship of the Executive and the Legislature when Article 16 is in force and the position of the President of the Republic as the "arbiter" of the Constitution, Chaban-Delmas concluded that the interpretation of the President of the Republic ought to be conclusive.

The President of the Republic had made it clear in his letter of August 31[2] to Premier Debré that the relationship between Legislature and Executive in periods of the imposition of Article 16 were governed by special criteria established by the necessities of emergency situations. Consequently, Chaban-Delmas ruled that the motion of censure was not receivable in the circumstances of the meeting of Parliament de plein droit under the application of Article 16.[3] Hence, in periods of emergency proclaimed by the President of the Republic and extended under his discretion, the authority of the representative bodies was sterilized by the "personal" interpretation given by De Gaulle to the presidential powers. Article 16 is not a delegation to deal by ordinance with matters within the

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[1]Décision of September 8, 1961. Ibid., p. 670.

[2]Supra., p. 270.

[3]L'Année Politique, 1961, pp. 115-16.

legislative competence. It constitutes a unilateral assumption of legislative competences, when deemed necessary by the President of the Republic, within the constitutional order of the Fifth Republic.

CONCLUSIONS

The "emerging conflict between ordinance and law" has raged through the life of four republics, two empires, three provisional governments, and continues under a fifth republic. Despite the substantial variety of institutional forms utilized, crisis institutions have played a continuing and vital role in the development and evolution of political processes in France. The importance of such devices may be attributed primarily to their direct relationship to the ends of government. Government may be considered the agency through which the nation transacts its business. It constitutes the political edifice of the nation. As such it is prey to political turmoil and is subject to modification and change as circumstance dictates, though the nation may continue indivisible and perpetual. Notwithstanding, it is the function of government to sustain the established order of society and to contribute to the maintenance of the independence and sovereignty of the nation.

Constitutions provide the framework within which the ordered political society operates. The broad outlines established by the constitutional framework are normally filled in

by the passage of organic and statutory laws and by the development of political customs and mores. Nevertheless, in order for the nation to survive, government, whatever its tenor or makeup, must be prepared for, or at least be able to adjust to, the demands of emergency situations. Such preparation and adjustment is extraordinarily difficult, if not impossible, within the framework of the ordinary day-to-day procedures of political action. Extraordinary measures are necessary. The government may provide within its written constitution for an emergency clause of some type, vesting limited or unlimited powers in the hands of a Head of State. It was to this type of emergency power that France turned under the Charter of 1814 and the Constitution of 1958. However, emergencies with which the regular order may not be able to cope vary tremendously as to type of threat and degree of seriousness. Consequently, they demand response at a multiplicity of levels and with a variety of techniques.

Appeal to the primitive, aboriginal power of even a dominant executive does not, of necessity, provide the nation with adequate crisis protection. Government must prepare for a variety of situations of stress. It must use all the regular devices at its disposal to the maximum of their efficiency. It must be aware of the possibilities of protecting the nation by extending the regular political and legal order to the limits of legitimacy. It must prepare viable crisis institutions for the appropriate limitation of individual and organizational liberties when internal insurrection threatens or when

the nation is invaded. Civilian authority may be transferred to the military but only under the most stringent penalties for violation and abuse. In the extreme crisis it may be necessary to vest the Executive with complete decision-making authority for the accomplishment of specified objectives within a limited period of time as determined by the representative Legislature. However, as Clinton Rossiter wrote concerning constitutional dictatorship, it is a cardinal principle that the implementor of the crisis powers must not determine the purposes of application or the length of time in which the power is made available. It must always be remembered that those responsible for the implementation of such powers are the agents of the government in the service of the nation. Their continuing and primary objective must be the defense of the established order of society. In the last analysis, if violations of the constitutional order are necessary, then pragmatism must dominate. The survival of the nation is superior to the maintenance of the constitutional order. In some instances it is only through short-term irregularity that long-range regularity can be achieved and perpetuated.

Crisis institutions as employed in France have ranged from minutely defined procedures such as the state of siege and the state of emergency to devices for the development and implementation of policy comprehended within the concept of enabling legislation--*pleins pouvoirs*, *décrets-lois*, and *lois-cadres*--to illegal extensions of the constitutional order.

Nevertheless, they are all essentially variations upon the same theme: the concentration in the hands of the Executive of powers which, in normal times, would be divided. They seek either the restriction of public liberties and representative rights in periods in which the established order is menaced, or the extension of authority to the Executive which will facilitate the development of coherent policy and its implementation.

These objectives are susceptible to achievement by a variety of techniques. Under the Third and Fourth Republics the most extensively employed was the extension of the regular order within its constitutional or at least its quasi-constitutional limits. An excellent example from the Fourth Republic was the institution of the category matières réglementaire par nature by the Marie government in 1948. The recognition of the existence of such a material competence of the regulatory power was actually superimposed upon the regular order and was accepted as consistent with the premise of the formal supremacy of the law. It permitted executive implementation of a broad discretionary authority in the economic and fiscal realms which had not been available previously. To be sure, the ultimate result was substantial modification of the regular order. However, decisions in matters such as these are almost never made primarily upon considerations of legality and constitutionality. The tendency is for them to emerge as the consequence of the interplay of considerations of immediate circumstance, traditional procedure, and executive-legislative

competition as well as of legal form. As was the case with the Marie financial and economic law of August 17, 1948, the result is normally compromise. Nevertheless, it may well be that the compromise is of a positive nature and that it makes possible evolution toward a more acceptable and competent regular order.

The concept of natural material competences of the regulatory power introduces one to the area of enabling legislation. This category of provisional enlargements of the regulatory power refers to the issuance of regulations of an exceptional nature which may modify, abridge, or replace statutory law itself. There is some question concerning the justification for considering laws passed under the concept of material competences of the regulatory power as enabling laws. The source of their power has been sought in the intrinsic authority of the executive power to issue ordinances rather than in extensions of the legislative power.

There is no question about the status of the Poincaré, Doumergue-Tardieu, Laval, Chautemps, and Daladier decree laws which dominated the interwar years. They constituted direct enabling grants from Parliament. The Poincaré cabinet had argued that these procedures merely constituted a method of providing the Executive with a parliamentary mandate to execute the wishes of the people and of the elected representatives in Parliament by implementing certain provisional measures. It was the governmental contention that the Parliament was assured

the right to undertake definitive decisions and consequently these procedures did not move outside the regular order. The problem was not just a question of providing authority to the Executive which the laws had not foreseen. It was simply a question of the Legislature entrusting the Government, an agency which it controls and can always overrule, with the competence to institute reforms which Parliament would remain free afterwards to accept or to reject. It was, of course, not this simple. The right of the sovereign Parliament to enable the Executive to make regulations capable of modifying and amending statutory law was, at that time, most questionable under any circumstances. If defensible, it was so only under rigidly specified conditions. The responsibility of a Legislature in a parliamentary system is to legislate and to control--if ever so indirectly. It is not to abdicate its competences in times of crisis.

There was little question that the regular order could be extended under the Third Republic. As Europe rushed toward a conflagration in the 1930's, the law of necessity dictated the augmentation of the authority of the French executive power. Certainly extensions in the normal competences of the Government, modifications in the laborious nature of the legislative procedures, and grants of specifically legislative power to the Executive, were all well advised. But such extensions and grants should have been made within reasonable limits of subject and time. The regular order was legally susceptible to extension.

It was not legitimately open to parliamentary abdication of its constitutional obligations to the benefit of the Executive.

In the use of enabling authority the point at which one passes from the extension of the regular order of society to irregular derogation of this order is not subject to absolute and precise definition. Nonetheless, it must be recognized that in its haphazard and ill-conceived struggle for survival, the Third Republic violated the fundamental concepts of its constitutional order and so moved outside the realm of the extension of the regular order into that of irregularity--from constitutionality and pseudo-constitutionality to blatant unconstitutionality. It is argued, one the one hand, that all decree legislation passed in the Third Republic was illegal, and on the other hand, that such regulatory authority was a justifiable extension of the power of the Executive in time of extreme crisis. As a general rule, however, the boundaries within which the regular order might be legitimately extended during the Third and Fourth Republics were circumscribed by the reality of effective parliamentary control. Without the reasonably direct and responsible participation of the Parliament, ordinances of the value of statutory law could only be considered irregular.

A second technique was that of the augmentation of the regular order by either statutory or constitutional creation of permanent emergency institutions designed to provide the administration with extraordinary authority within the boundaries

of the law to restrict civil and representative rights. The objective, of course, was the ultimate protection of such rights. Within this category France has developed the political state of siege and the state of emergency. The essential question that these devices present is one of control. If Parliament is willing to vest organized exceptional competences in the Executive for defense of a portion or all of the civil area against threats to the public order, will it have the fortitude, ability, and capacity to maintain a broad and effective oversight over the application of these instruments? If the Executive transfers civil authority to the military, will it be able to control its delegee and insure the legitimate application of the crisis institution?

The experience of 1914-1918 and 1955-1956 indicates that once a device such as the state of siege or the state of emergency has been called into operation, the Parliament is able to exercise only the broadest of oversights. It must depend upon the Government that it has invested to implement the institution and to exercise restraint. However, in the Third and Fourth Republics, even in the darkest periods of national crisis, the Parliament has been able to maintain the political responsibility of the Government to it. Nevertheless, once a Government is invested in a crisis situation, it tends quickly to become rather autonomous in the implementation of crisis procedures. It should also be noted that requirements for the submission of decrees to Parliament often demanded the type of authority that

does not constitute an effective limitation. Such restrictions are ex post facto in the extreme and it is not to be expected that such control after the fact would often materially affect the possibilities of success or failure of the crisis institution.

The problems encountered in the implementation of the state of siege and the state of emergency forcefully demonstrate the necessity of close cooperation between civil and military authorities in the application of crisis institutions designed to defend the established order by the application of limitations upon civil and representative rights. The state of siege was founded on the principle of the transfer of civilian competences to the military for specific purposes under specified circumstances. Yet in the application of this device, the military assumption of civilian authority is modified by the maintenance of residual competences to deal with matters not directly related to the purposes of the institution by the normal civil police authority. In actuality the state of siege emerges as a device which combines the advantages of civil and military repressive techniques. In a similar manner, the state of emergency, a civil institution, has combined civil and military jurisdictions. The Algerian revolution has demonstrated rather clearly that in situations of prolonged civil disobedience in which the masses of society must live under the constant threat of violence, it is wise to employ both elements of coercive authority available to the Government--civil police

and military authority. An intelligent crisis institution of this type will combine the advantages of each element under the direction of the executive power and will attempt to counterbalance the potential excesses of military commanders and ministers of the Interior.

This, of course, does not answer the problem of military subordination to the civilian authority. In Algeria insubordination was essentially the consequence of disillusionment with inadequate parliamentary government, despondency over repeated colonial reverses, and a deep feeling of obligation to the Algerian population which certain elements of the French military felt were betrayed by the irresponsible politicians of the Fourth Republic and by the policies of the President of the Fifth Republic. In situations in which the military does not completely respect the responsible Government and is itself ideologically and emotionally committed to a position that has been initially supported and then subsequently rejected by the civilian regime, it is to be expected that profound disrespect for the governmental position may develop. If confronted by governmental indecision, such tendencies may explode into violence and insubordination--as exemplified by the Algerian counterrevolution of 1960 and 1961.

A third technique is the implementation of an "emergency powers" clause. This is the ultimate crisis institution. The ordinance power is invested with responsibility for the security of the state under the constitutional order and is limited

only by political and moral considerations. The dangers implicit in the use of such a device are obvious: as Article 48 of the Weimar Constitution demonstrated, the regular order can be destroyed as effectively by the misuse of discretionary constitutional powers as by the employment of illegitimate practices. It is also true that emphasis upon the applicability of an inclusive emergency power may lull the nation into a sense of false security and reduce interest in the development of lesser yet vitally important crisis institutions needed to respond to threats at less than the ultimate level of danger. The Third and Fourth Republics both lacked this weapon in their crisis arsenal. It cannot be denied that the Third was able to achieve tremendous concentration of authority by expansions of the regular constitutional powers and by recourse to unconstitutional delegations to the responsible Government. However, it could not achieve the degree of legitimacy inherent in a compact "emergency power" made available to the Executive under the constitutional system to suspend or alter statutory provisions for the security of the state. The constitutional process provides a residue of legality that cannot be otherwise attained.

A fourth technique is that of irregularity. Irregular processes are not simply tools for the destruction of legality. They have been used frequently and with some success to defend, to sustain, and to create legitimate political forms. Certainly the use of proclamations of the King to specify detailed

regulations for the implementation of statutory laws in the First Republic were blatantly irregular, yet the object was the vitalization of the regular order. The ordinances issued to gird the nation for war in August, 1914 without specific parliamentary authorization were intrinsically illegal as were the virtually unlimited delegations to the Daladier government in 1939, but in each case the crisis procedure was used in defense of the legitimate order.

Provisional regimes by their very nature must depend upon irregular ordinance legislation because of their lack of constitutional foundation. However, they may result in the establishment of a regular order. The Second, Third, and Fourth Republics as legacies of the provisional governments of 1848, 1870-1875, and 1945-1946, respectively, attest to this possibility.

The use of irregular procedures to the abrogation of the constitutional order has, of course, evidenced itself as a recurring dilemma for French politics. There are numerous examples of which, perhaps, the violation of constitutional forms by the first Napoleon and the abdication of the National Assembly to the person of Marshal Pétain are the most flagrant.

The Constitution of the Fifth Republic has established a new relationship between the ordinance and the law. The formal supremacy of the law has been overthrown. There no longer exists a unified hierarchy of law based upon the sovereignty of Parliament. Law, the issue of the representative Legislature,

can now be modified by ordinances decreed by the responsible Government under direct delegated authority constitutionally granted by the Parliament, or by decisions issued by the President of the Republic under emergency competences made available through the discretionary "emergency powers" available to the person of the Chief of State.

A major portion of the coterie of crisis institutions achieved by regular or irregular means in the Third and Fourth Republics have been raised to the constitutional level by the definition and limitation of the sphere of competence of the legislative power and the simultaneous expansion of the jurisdiction of the regulatory power. Enabling procedures have been incorporated in the regular constitutional structure as the result of the principle of the delegation of legislative competences. The extension of the regulatory power to all areas not comprehended within the limited domain of the law now includes jurisdiction considered within the material competence of this power in the Fourth Republic. The state of siege has also been constitutionalized and remains as an applicable crisis institution, although, interestingly, only the insubordinate military leaders of the Generals' Revolt in 1961 have elected to apply it. Finally, the state of emergency as initiated in 1955, has survived as a statutory device and has been implemented under the auspices of parliamentary delegation in 1960 and as a part of the "emergency powers" of the President of the Republic in 1961. It is reasonable to contend that in

many instances the irregular has become the regular. It is absolutely certain that crisis institutions have been enthroned in the constitutional structure of the Fifth Republic.

The political process continues to evolve. The new order moulds and reshapes its posture as it faces the challenges of the day and moves, hopefully, toward maturity and stability. Crisis procedures that were yesterday quasi-legitimate extensions of the regular order are today enshrined in the sanctity of constitutionality. And yet they remain devices for the solution of exceptional problems. They are, however, only institutions--a framework into which political man must pour vitality and content. They can accomplish no more than circumstance and political sagacity will allow them to achieve. Crisis institutions are never a substitute for a responsible majority, respect for minority rights, a spirit of compromise, or the existence of a consensus. They may, if intelligently employed, provide method for the short-term defense of legitimate political society. They cannot sustain an ill-conceived or an essentially unstable political structure.

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