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Raymond Carré de Malberg: The Unknown Inspirer of the Fifth French Republic

Raymond Carré de Malberg – mało znany inspirator V Republiki Francuskiej

SUMMARY

The Fifth French Republic owes its originality and permanence to Charles de Gaulle's constitutional convictions and his determination to reform. However, in the case of France, which intellectual culture presupposes that institutions are shaped by a logical sequence of ideas, also the scientific justification of the political change must have been of great importance. The author of the theoretical rationalization of the Fifth Republic and its institutional revolution within the republican tradition was the forgotten lawyer Raymond Carré de Malberg. Pioneering nature of his writings may not raise any doubts. Carré de Malberg challenged a theory of parliament's sovereignty from the republican perspective, which had an impact on thinking of the juristic elites participating in drafting the Fifth Republic Constitution. Carré de Malberg opened the door of republican tradition wide to the general presidential elections and referendum. He delineated the solution he recommended as the one that was in full accord with the notions and principles of the French Revolution. He applied the legal language to underscore the fact that the republic democratization would allow for the subjectivization of the executive power, restoration of the constituting power of the nation, primacy of the constitution and, consequently, the review of the constitutionality of bills. Carré de Malberg made a breakthrough in the French theory of constitutional law and thus opened up an opportunity for staging a republican institutional revolution that was an act of the founders of the Fifth Republic.

Keywords: Carré de Malberg; the Fifth French Republic; referendum; general presidential elections; review of the constitutionality of bills

The Fifth French Republic owes its originality and permanence to Charles de Gaulle's constitutional convictions and his determination to reform. However, in the case of France, which intellectual culture presupposes that institutions are shaped by a logical sequence of ideas, also the scientific justification of the political change must have been of great importance. The author of the theoretical rationalization of the Fifth Republic and its institutional revolution within the republican tradition was the forgotten lawyer Raymond Carré de Malberg. Indeed, suggestions for necessary constitutional reform had been put forward before by other authors. Noteworthily, Maurice Hauriou espoused popular presidential elections ("people seek executive power and executive power seeks people")[1] and a number of authors, such as Émile Giraud or Marcel Prélot, highlighted the benefits of the referendum institution[2]. Yet those were only marginal remarks and were by no means part of any analysis of the constitutional regulations. None of those authors developed – unlike Carré de Malberg. This article sets out to explore his constitutional thought.

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Raymond Carré de Malberg (1861–1935) was a pre-eminent French jurist and law theoretician (his primary interests included Roman and civil law). In his doctoral dissertation, de Malberg focused on the institution of exception in Roman law, applied in the past French procedure[3]. A shift towards public and constitutional law was related to his personal experience. The family of Carré de Malberg belonged to a tiny minority of the inhabitants of Alsace who refused to take German citizenship and emigrated to France after the Third Reich annexed that country. Raymond Carré de Malberg focused on the legal status of Alsace in the Third Reich and highlighted the advantage the Third Republic had over the monarchist and federal Reich in terms of a range of political liberties.

The outstanding writings of the French constitutionalist – *Contribution à la théorie générale de l'État*[4] and *La loi, expression de la volonté générale*[5] are part of the French and European classic of the legal thought. In his earlier study, Carré

[1] M. Hauriou, *Précis de droit constitutionnel*, Paris 1923, p. 393.

[2] É. Giraud (*Le pouvoir exécutif dans les démocratie d'Europe et l'Atlantique*, Paris 1938, p. 399) contended that referendum made it easier to tackle any issues touchy and germane to the voters without a risk of breaking up the government coalition. M. Prélot (*Manuel politique, le programme du Parti Démocrate Populaire?*, Paris 1928, pp. 58–59) enunciated a view that referendum protects people against the despotism of the lower and upper chamber of the parliament.

[3] R. Carré de Malberg, *Histoire de l'exception en droit romain et dans l'ancienne procédure française*, Paris 1888.

[4] Idem, *Contribution à la théorie générale de l'État*, vol. 1, Paris 1920 ; idem, *Contribution à la théorie générale de l'État*, vol. 2, Paris 1922 (ré-éd. Paris 1962).

[5] Idem, *La loi, expression de la volonté générale*, Paris 1931 (ré-éd. Paris 1984).

de Malberg defined the state as an entity attributed with authority and organized around the superior power. In this perspective, a strong state poses no threat to freedom but on the contrary – preconditions its fruition. In the Carré de Malberg's view, the theory of the state should contribute to the unity of the national authorities. Consequently, he was critical about the idea of the division of powers that – in his view – led to ineffective functioning of the state.

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

> Or we are going to espouse the concept developed by Rousseau and embraced by the revolution, which says that people's will provides the basis for any parliamentary bill and its subject is expression of this will. In such situation, it is no longer possible to settle for the argument that all citizens attend the parliamentary session at the moment the bill is passed since this argument is associated with some mystic vision lacking any connection with reality. Thus, if we really want the bill to be a manifestation of the people's will and if it is this feature of the people's will that we derive its validity from, we must inevitably grant voters some active role in the act of enacting laws[6].

In the conclusions of this work, Carré de Malberg put forward a proposal for political reforms aimed to make the Republic more democratic and liberate from the fetters of parliamentary absolutism. A jurist from Strasbourg espoused an idea of empowering people to put any laws passed by parliament to a referendum and the right for launching a legal initiative[7].

In his last book, published before he died, Carré de Malberg juxtaposed Kelsen's hierarchy of norms with the theory of the hierarchy of public authority organs

[6] *Ibidem*, p. 217 (transl. B. Płonka).

[7] De Malberg's stance is well illustrated here: "A minimum right citizens should have in the legislative process is to challenge any bill passed by the Chamber of Deputies and Senate. If they win a suffcient number of advocates, they should be empowered to vote in a referendum to either adopt or reject a challenged bill. At the same time, it is logical that if the people's will supremacy underpines the concept and the proposed act, a legislative initiative in its democratic understanding should be granted to the people. Otherwise, the supremacy of the people's will would be incomplete as people – independently of the legislative power – would have no right to implement any new laws opposed by the parliament but supported by the majority of citizens" (*ibidem*, p. 219).

shaped according to the rate of closeness of the source of sovereignty[8]. The status of a norm was to be determined by the position of the issuing body, which meant that the norms enacted directly by the people (a sovereign) were of supreme importance.

In the 1930s, in the aftermath of the legal reflection on the political system, Carré de Malberg's writings aroused interest among advocates of political reforms. His writings differed from those recognized as the main current of the studies on the constitutional law, which was strictly dogmatic[9]. In those years he confided in his student, Marcel Waline[10], that by going beyond pure analysis and deciding to enunciate demands for reform he released his intellect from the constraints embedded in the legal dogmatics[11]. This is what aroused Michel Debré and René Capitant's interest in the thought of Carré de Malberg[12]. R. Capitant took over his chair at the University of Strasbourg and implanted his theoretical thought into the Gaullist political doctrine.

In Capitant's view, Carré de Malberg openly criticized Montesquian idea of the division of powers as he asserted that "dividing sovereignty between two organs" is dangerous and "triggers war between them and leads to anarchy"[13]. In his view, division of powers and distribution of sovereignty stands in contradiction to the principle of the unity of state. The Montesquian idea had a historical purport and became outdated when the balanced constitutional monarchy became history. The pre-eminent law theoretician cited a positive example of the British political system where sovereignty was indivisible and resided fully with the parliament that appointed accountable and effective government. At the same time, the British Parliament, as a sovereign state organ, remained under a strict supervision of the nation (sovereign) – the Prime Minister had powers to dissolve parliament, which resulted in the instant resignation of the cabinet and general elections.

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[8] Idem, *Confrontation de la théorie de la formation du droit par degrés avec les idées et les institutions c consacrées par le droit positif français relativement a sa formation*, Paris 1933.

[9] See insights on the history of teaching constitutional law in France in S. Pinon, *Le « nouveau droit constitutionnel » a travers les ages. VII Congres français de droit constitutionnel*, Paris 2008; G. Sacriste, *La République des constitutionnalistes*, Paris 2011.

[10] Marcel Waline (1900–1982) – political scientist and constitutionalist; member of the Institute of France. In the interwar years his publications included *La Notion judiciaire de l'excès de pouvoirs: l'excès de pouvoirs du juge* and *Défense du positivisme juridique*. Vichy opponent during the war; disciple of R. Carré de Malberg. His influence can be traced in the post-war writings of M. Waline: *Les partis contre la République*, Paris 1948 and *L'Individualisme et le droit*, Paris 1945. Appointed by General de Gaulle a member of Conseil supérieur de la magistrature (1958); member of Conseil Constitutionnel, 1962–1971.

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

[12] S. Pinon, *Les réformistes constitutionnels des années trente. Aux origines de la Ve République*, Paris 2003; S. Aromatario, *La pensée politique et constitutionnelle de Michel Debré*, Paris 2006, pp. 28–31.

[13] R. Capitant, *op. cit.*, p. 255, 257.

Yet this is not the pro-British sympathies but an innovative text where he rehabilitated the institution of referendum as a republican one and useful for the state, that ensured Carré de Malberg an enduring place in the history of the French constitutional thought. A demand for referendum as a supplement to the representative democracy can be found in the writings of Marcel Prélot and Émil Giraud, but none of them provided any theoretical rationalization for such institution[14]. On the other hand, Carré de Malberg's article *Deliberations on the Relationship Between Referendum and Parliamentary System* (Pol. *Teoretyczne rozważania o związku referendum z systemem parlamentarnym*) was a real breakthrough in the republican tradition[15] – destroyed the doctrinal principles of the Third Republic through the justification for the parliamentary superiority in the political system and exposed possible political advantages brought by the introduction of the referendum institution.

Raymond Carré de Malberg provided multitudinous arguments to the advocates of an extensive political revision within the framework of republican principles. The author of *Deliberations…* contended that parliament was granted the status of a sovereign through the adoption of the concept of the representative system at the initial stage of the French Revolution. A purport of the then-moulded concept of representation rested in the identification of the people's will with the parliament's will, pursuant to Emmanuel-Joseph Sieyès' view that the nation may express one's opinion solely through its representatives. Carré de Malberg asserted in the analytical part of his text:

> Parliament is a sovereign as, most of all, as a representative of the people's will, has – in a transcendent mode – a power superior to the competences of all other power branches. Parliament is a sovereign with regard to the nation it is representing also because citizens have no capacity to pronounce any other will with respect to the deputies' decisions in any other way than that included in the decisions made by the deputies[16].

According to the fundamental thesis enunciated by Carré de Malberg, only application of the referendum institution as a tool designed for the citizens' direct participation in exercising power may undermine the foundations on which the parliamentary supremacy rests. Reconstruction of the executive power holding a mandate or an idea of the review of the constitutionality of bills as partial regulations will be ineffective as long as the nation is not granted a status of the real

[14] É. Giraud (*op. cit.*, p. 399) contended that referendum made it easier to tackle any issues touchy and germane to the voters without a risk of breaking up the government coalition. M. Prélot (*op. cit.*, pp. 58–59) enunciated a view that referendum protects people against the despotism of the lower and upper chamber of the parliament.

[15] R. Carré de Malberg, *Teoretyczne rozważania na temat związku referendum z systemem parlamentarnym*, [in:] K.M. Ujazdowski, *V Republika Francuska. Idee, konstytucja, interpretacje*, Kraków 2010, p. 129.

[16] *Ibidem*, p. 123.

host of the country. To challenge the absolutist parliamentary power, it was necessary to introduce an actor holding a mandate more powerful than that held by the parliament. Such an actor could only be the nation and its active participation in the process of law enactment.

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

> Were the current political system not transferred, it would lose its exclusiveness and completeness. It would be extended with the institutions combining advantages of parliamentarism and direct democracy. Parliament would no longer be a sovereign, would no longer be in a position to enunciate people's will. Citizens would be granted a right to exercise full legislative power through the civic initiative. On the other hand, decisions taken by the Chamber of Deputies or Senate would no longer be sovereign in any way. They could become binding provided that they were ratified, literally or putatively, through the general vote or in the event when referendum were not required[17].

In the political system that provided for the institution of referendum and verification of the parliament's decisions by the nation, parliament was to lose the status of the superior institution and become – according to Sieyès' category – one of the constituted powers.

> Nation becomes a real sovereign equipped with the legal tools for enacting laws in the final instance, i.e. adjudicating whether the decision made by the Senate and the Chamber of Deputies is in conformity with nation's will. Sovereignty and the will of the general public have become identical and are embedded in the nation[18].

A huge advantage of the text authored by Carré de Malberg is the enunciation of a set of arguments weighing in favour of the institution of referendum, based on the same foundations that gave start to the development of the French parliamentary system. Strasbourgian professor asserted that a reference to the citizens' opinion, which is the governance basis, is the foundation of the parliamentary system. Such reference was manifested in the French Revolution acts on the citizens' right to participate and contribute to enacting laws[19]. Carré de Malberg reminded that expansion of the parliamentary system originated from the reference to the democratic legitimization granted by elections and reference to the citizens' opinion – actually the same arguments that weighed in favour of the development of parliamentary system weigh even more in favour of the direct participation of citizens in exercising the power. Development of the mixed political system, providing for the mechanisms of direct democracy, would be a minimum reform:

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[17] *Ibidem*, p. 124.

[18] *Ibidem*, p. 125.

[19] Article IV of the Declaration of Human and Civil Rights of 1789, [in:] K.M. Ujazdowski, *op. cit.*, p. 258.

Thus, this initial concept showing the main direction and a deep purport of the parliamentary system, which, in the 19th century, was affirmed by calling it the governance based on opinion, means that adding more powers to the people is rational and logical. Obviously, given such assumption, one may conclude that a parliamentary system evolves and its natural destination is – if not a full democracy – at least a blend of direct and representative democracy institutions[20].

Carré de Malberg contended that the parliamentary legitimating powers enhance the chances of introduction of the referendum institution and other forms of direct democracy not just because they refer to the democratic opinion. A specific concept of the bill, found in the primary acts of the French Revolution, is also significant. A bill perceived as an expansion of the general will derived its power from the will pronounced by all citizens directly or indirectly through their representatives. In Carré de Malberg's view, parliament became a sovereign power and established its supremacy when it monopolized expression of the general will through the constitutional settlements. An argument that "parliament has – as a body capable of pronouncing the people's will – a power deriving from this will, i.e. the same power as that of the sovereign"[21] was germane to the development of the parliamentary supremacy. As the parliament's hegemonic power resulted from the reference to the will of all citizens, a legitimization of referendum was even stronger since this is the people's will pronounced directly by citizens and not through their representatives.

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

A surprising contradiction of an idea of the people's sovereignty, it has been used against those who are supposed to pronounce such will. Moreover, it has been used to supersede the nation's will with the parliament's will and exempt the legislature's decisions from any intervention of the nation[22].

In *La loi, expression de la volonté générale*, Carré de Malberg was even tougher for the advocates of the theory of representation substantiating the parliament's superiority. He contended that parliament's monopoly over expression of the people's will actually meant development of the authoritarian system identical in its very essence to the monarchist absolutism[23]. Noteworthily, a contradiction between nation's sovereignty and hostility towards direct forms of power was identified

[20] R. Carré de Malberg, *Teoretyczne rozważania…*, p. 127.
[21] *Ibidem*, p. 129.
[22] *Ibidem*, p. 130.
[23] Idem, *La loi, expression…*, p. 219. Noteworthily, there is a striking affinity between de Malberg's arguments and analyses included in the writings of I. Czuma. See I. Czuma, *Absolutyzm ustrojowy*, Lublin 1934.

by Stanisław Estreicher, with no intention to introduce referendum into Polish constitutional system[24].

Importantly, Carré de Malberg was extremely consistent in his arguments while referring to the ideas of Jean-Jacques Rousseau, who was actually a guiding spirit of Article 6 of the Declaration of Human and Civil Rights and – as an advocate of direct democracy – asserted that the people's will might not be represented due to its essence[25]. Carré de Malberg referred to Rousseau who asserted that there is affinity between adolescence of the nation and adolescence of a human being. In such a perspective, representative democracy is a transition system, typical of a childish form of the existence of nation. This is what he wrote in a reference to the author of *The Social Contract*:

> You may say that, as Rousseau put it, the nation behaves just like an individual. When people are children or adolescents they need caretakers or representatives, a monarch or parliament, to handle their affairs. But when the nation becomes mature, it should be able to independently comprehend the scope of its interests and defend it[26].

Thus, the arguments put forward by Carré de Malberg may by no means be recognized as a polemic to the views of Adhémar Esmein, who cautioned against the ideas of Rousseau and recognized direct democracy as a looming threat to the quality of legislation and the state's policy[27].

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

> Yet let it be remembered that according to the intentions of the founders of a parliamentary system, its real goal was to establish and ensure the advantage of the bourgeoisie over people, which was manifested by the composition of national assemblies, the fact that the electoral system devised during the Revolution definitely favoured bourgeoisie in the parliamentary elections. Consequently, deputies from this social group predominated in both parliament chambers[28].

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

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[24] S. Estreicher, *Suwerenność Sejmu czy suwerenność narodu*, [in:] idem, *O Konstytucji i polityce II Rzeczypospolitej*, ed. A. Wołek, Warszawa 2001, pp. 55–70.

[25] J.-J. Rousseau, *Umowa społeczna*, Warszawa 1966.

[26] R. Carré de Malberg, *Teoretyczne rozważania…*, p. 128.

[27] A. Esmein, *Éléments de droit constitutionnel français et comparé*, Paris 2001.

[28] *Ibidem*, p. 130.

It seems that in Carré de Malberg's view, picturing advantageous effects of the democratization of the republic was as significant as challenging the theoretical underpinnings of the parliamentary hegemony[29]. A French jurist asserted that introduction of the referendum institution enhanced a balance of powers, consolidated executive power, ensured the advantage of the constitution over parliamentary bills, opened a perspective of the review of the constitutionality of bills and restricted the omnipotence of political parties.

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

> The day when the parliament's sovereignty will be subdued to the sovereignty of the nation that was going to make decisions on the enacted laws and the government's actions in the direct vote will mark establishment of the supreme power (so much lacking nowadays), appointed to fulfil a role superior over these two powers. Parliament and government will be then in a position to appeal to the nation so that it would decide about the issues where these institutions are unable to reach a compromise. Thus, the government's power would be consolidated while the parliament's powers curbed but not subdued to the government. Consequently, solely the people would wield binding and superior power[30].

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

> Any democratic constitution that does not provide for executive and legislative competences of the parliament and – instead – establishes the executive power that is, to some extent, independent, will have to establish the people, as a sovereign, the supreme power to regulate relations between the two powers. This is a source of such institutions as the election of the head of executive power by the nation and the right of legislative or executive power, to appeal to the nation when divergences arise between them[31].

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[29] J. Gicquel (*Droit constitutionnel et institutions politiques*, Paris 2001, p. 494) discerns the impact of the Constitution of the Weimar Republic on the thought of Carré de Malberg. Indeed, the insights on the provisions of this Constitution are included in *La loi, expression de la volonté générale*.

[30] R. Carré de Malberg, *Teoretyczne rozważania…*, pp. 133–134.

[31] Idem, *La loi, expression…*, p. 218.

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

> If the introduction of the institution of referendum means that constitution becomes binding by its sovereign endorsement by the nation, even if endorsement is effectuated in a form of the silent consent, it is clear that the constitution is the act of nation from the legal point of view[32].

Thus, neither the initiative on the constitutional change nor passing a new constitution may be the one launched solely by the parliament chambers. A demand for liberating nation's *pouvoir constituant* undermined the foundations of the Third Republic, where parliament chambers were invested with the constituting power. Thus, Carré de Malberg adopted the stance on the issue germane to the French constitutionalism: relations between the constituting power and established powers. A jurist of Strasbourg asserted that even if the parliament is the supreme established power "it is the competences of such power that may be, unlike the sovereign's competences, solely the secondary competences and therefore they are subject to restrictions"[33]. The legislative and judiciary powers had a status of the established powers. This is where explicit criticism of the 1875 constitutional bills on the revision of the constitution is discernible. Carré de Malberg contended that the constitution did not invest parliament with the constituting power as this made it "permanent in relation to this power, which actually exists only owing to the constitution"[34]. Non-encroachment of the parliament's competences is non-reconcilable with the status of the established power. "A single organ may contain antinonymous functions of the author of the constitution and a power established by this constitution. Consequently, this means blocking of the constituting power" – Carré de Malberg asserted[35]. Actually, this was a call for enacting constitution through the referendum and challenging the parliament's monopoly over constitutional revision. It seems that the arguments put forward by the Strasbourg professor corresponded to de Gaulle's intuition when he called a constitutional referendum in 1945.

[32] Idem, *Teoretyczne rozważania…*, p. 134.
[33] Idem, *La loi, expression…*, p. 220.
[34] *Ibidem*.
[35] *Ibidem*.

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

> Situation would be changed dramatically on the day when the nation would become a sole sovereign following the establishment of the referendum institution, and a parliament chamber would only be the body exercising constitutionally specified competences and having capacity to enact the laws solely within the framework determined by those competences. In such event, an idea about the constitutional revision of parliamentary bills would ineluctably emerge or one might even assert that such solution would be necessary since any bill would have to be consistent with laws and effective on condition that it was consistent with the constitution. As regards the nation, its consent for the bill passed by the parliament chambers would not impair the court's actions aimed to review the constitutionality of this bill[36].

A demand for the review of the constitutionality of bills had been enunciated by a number of authors, including Joseph Barthélemy, Maurice Hauriou, Paul Duez and Léon Duguit. The latter one was critical about republican legal tradition, while others failed to supplement the constitutional judiciary system by republican rationalism. Only Carré de Malberg correctly predicted that the relationship between constitutional referendum and constitutional review of parliamentary bills, release of the nation's constituting power, allowed for the restoration of the constitutional primacy. Importantly, even an enfeebled form of the review of the constitutionality of bills, enshrined in the Constitution of the Fourth Republic, could become effective only after the constitutional referendum institution introduced on de Gaulle's initiative in autumn 1945. Undoubtedly, Carré de Malberg may be recognized as an advocate of the review of the constitutionality of bills also in view of his original institutional idea. A Strasbourg professor contended that the review of the constitutionality of bills should be applied based on the constitutionality challenge launched in the court trial, which should be examined by the institution established solely for this purpose[37].

Finally, Carré de Malberg's reasoning was turned against petty party politics manifested by extreme particularization of the parliament. A germane issue in the legal reflection was a role political parties should play in the polity. The authors whose contribution was particularly valuable there include S. Estreicher, B. Gutzéviztch and H. Kelsen[38]. In Carré de Malberg's view, a party predomination was another factor undermining legitimization of the representative parliamentary system.

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[36] Idem, *Teoretyczne rozważania…*, pp. 134–135.

[37] *Ibidem*, p. 135.

[38] See S. Estreicher, *Walka z partyjnictwem*, [in:] idem, *op. cit.*; B. Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel*, Paris 1931; H. Kelsen, *O istocie i wartości demokracji*, Warszawa 1936.

No one can assert that a sovereign power, recognized as competent for the people's will, is limited to the parliament's will, which is actually the political party's will, what is more, the one that has the majority only for the time being. If the people's will is replaced by the party's will in the parliament, this means that the parliament's power is considerably constrained. As the idea of the people's will is subject to moderate or fierce criticism, the idea of the sovereignty of the will of the party that is currently in power becomes a kind of the tyranny. This is simply unacceptable[39].

Carré de Malberg underscored that the value of the referendum verdict is higher than that passed by the parliament members who "rather vote according to the tactics adopted by their party than their own convictions"[40]. In his view, when the nation's will is superior to that of the political parties, a referendum has anti-oligarchic consequences and favours decisions made in accordance with public weal.

Noteworthily, in the 1930s, the idea of direct democracy was subject of interest of the theorists of law. It was then that Kelsen proposed to "develop the referendum institution and retain parliamentary governance"[41]. He called for the introduction of the constitutional referendum and, importantly, a legislative referendum as an option. Moreover, he called for adoption of the people's initiative[42]. Yet, in Kelsen's view, opening to the direct democracy hindered consolidation of the parliamentary system. He justified parliamentary governance by pragmatic reasons and did not deny that calling it the people's representation is a pure fiction. Yet, in his opinion, it is possible to identify the essence of such system and substantiate its value as a specific means of the social technique employed to establish the polity, without referring to the fiction of representation[43]. The author of a normative law concept

[39] R. Carré de Malberg, *Teoretyczne rozważania…*, p. 136.

[40] *Ibidem*, p. 135.

[41] H. Kelsen, *op. cit.*, p. 55.

[42] *Ibidem*.

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

asserted that a parliamentary system inhibits primitive forms of political freedom. Kelsen was not compelled to challenge the principles of parliamentary supremacy and propose any institutions of the direct democracy. Carré de Malberg's point of view was different: he asserted that significance of an idea of the nation's sovereignty in the French polity obliged him to put forward theoretical arguments. Regarding France, a logical sequence of ideas shaped the institutions. Under such conditions, any opening to the direct democracy required reinterpretation of the primary principles of the republican legal tradition.

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

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of the sovereignty of the people trying to define its essence by means of an idea of freedom. From such perspective, a parliamentary system really offered us the advantages it had never brought and actually had never been able to bring before. Despite this, it is possible to define its essence and substantiate its value as a specific means of social technique in establishing the state order without using the fiction of representation. Defining parliamentary system as a necessary compromise between a primitive idea of political freedom and a rule of the division of labour, it is possible to precisely delineate how the parliamentary system reform should be implemented" (*ibidem*, pp. 45–46).

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STRESZCZENIE

Swą oryginalność i trwałość V Republika Francuska zawdzięcza przekonaniom konstytucyjnym Charlesa de Gaulle'a i jego determinacji w przeprowadzaniu reform. Jednakże w przypadku Francji, której kultura umysłowa zakłada, że to logiczna sekwencja idei kształtuje instytucje, istotne znaczenie musiało mieć naukowe uzasadnienie zmiany ustrojowej. Autorem teoretycznej racjonalizacji V Republiki i jej rewolucji instytucjonalnej, w ramach tradycji republikańskiej, był zapomniany prawnik Raymond Carré de Malberg. Prekursorski charakter jego prac nie może budzić wątpliwości. Carré de Malberg z pozycji republikańskich zakwestionował teorię suwerenności parlamentu. Miało to istotny wpływ na myślenie części elit prawniczych, które wzięły udział w pracach nad przygotowaniem projektu Konstytucji V Republiki. Carré de Malberg otworzył szeroko drzwi francuskiej tradycji republikańskiej dla powszechnych wyborów prezydenckich i referendum. Ukazał postulowane przez siebie rozwiązania jako całkowicie zgodne z pojęciami i zasadami rewolucji francuskiej. Językiem prawniczym wskazał na to, że demokratyzacja republiki pozwoli na upodmiotowienie władzy wykonawczej, przywrócenie władzy konstytuującej narodu oraz odbudowę prymatu konstytucji, a w konsekwencji także na kontrolę konstytucyjności ustaw. Carré de Malberg dokonał przełomu we francuskiej teorii prawa konstytucyjnego, tym samym otwierając możliwość dokonania republikańskiej rewolucji instytucjonalnej, która była dziełem twórców V Republiki.

Słowa kluczowe: Carré de Malberg; V Republika Francuska; referendum; powszechne wybory prezedenckie; kontrola konstytucyjności ustaw