Constitutionality of Delegated Legislative Powers to the Executive

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Abstract

The thesis focuses on constitutional standards over delegation of the legislative powers to the executive. In modern industrial states the executive's law-making power is increased. It is regarded as practical and effective way to govern the state without impediments. However, constant practice of the delegation may cause erosion of basic constitutional principles, such as separation of powers, checks and balances and rule of law. Erosion of parliament's rule-making function consists threat against democracy. Thesis enquires those constitutional limits that are protected in case of permitting the legislative delegation.

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1. Introduction

Thesis discusses the problems related to the delegation of the legislative powers to the executive. It was common understanding that the legislature is the exclusive law-maker. However, this is not reality. The modern industrialized states tend to give the executive regulatory powers. Different jurisdictions came up with the idea that parliament may not be only constitutional body empowered with law-making authority. Thesis does not argue that any kind of transferring of law-making power from legislative to the executive shall be prevented. The question is how far Parliament can delegate it law-making duty under the constitution?

Thesis aims to argue constitutional problems to what extent the legislative body can delegate law-making power and what are the accountability tools that may bind the legislature when transfers the power to the executive. The subject of thesis is not to identify tensions between the executive and legislative body but research constitutional boundaries (if there is any) that shall not be crossed by constitutional actors even by their own consent.

Delegation of the legislative powers raises concerns on essential principles and legal order which are inevitable part of democratic society. The first is rule of law. Delegation doctrine itself is about discretionary power of the executive branch. That discretion emerges from vague terms which make difficult for citizen to find out what is demanded from particular vague provisions. The next concerns are related to lack of transparency, accountability and responsibility. Orders of the executive are enacted under executive's procedure which itself is not public. Lack of parliamentary debates makes the governmental orders less transparence. Parliament is obliged to make decisions

which are exposed in law-making power. If parliament withdraws essential, "hard choices" that weakens accountability and responsibility of democratic institutions. [1]

Thesis does not address to the constitutional problems that are related to the independent agencies' rule-making power. Thesis is focused on the allocation of the co-equal branches' powers on the same level of government (horizontal separation). Also, thesis does not include relations of powers between center and local level (vertical separation).

Regulatory powers of the executive branch are exercised to produce rules. The rest of the executive's regulations are enacted through legislative body's authorization. Legislative acts usually entrust the executive branch to adopt new rules or to fill some blank areas of the legislation. Through this process legislative body delegates the power to the executive to legislate. Terminology for delegated legislation in Germany is known as statutory instrument (*Rechtsverordnung*) and in France as the *habilitation* law. These acts which authorize the executive branch to produce rules is called Enabling Act or authorizing Acts.

Thesis focuses on three countries' jurisdiction: the United States, France and Germany. Those of them respectively are regarded as presidential, semi-presidential and parliamentary systems. For enquire of the research question, different models of governance are chosen by purpose. Comparing different systems of constitutional government produces analysis of the constitutional problem from various angle. Allocation of powers between Parliament and the executive essentially differs in those different constitutional designs. What the executive makes the strong (in law-making process) constitutional actor is not only delegating legislative power, but also their "inherited" rule-making power. On the other hand, the regulatory powers of the executive in those

[1]Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism*, (New York: Springer, 2012) 4

comparative jurisdictions mainly differ from each other. From the perspective of different systems of government thesis enquires how the constitutions handle legislative delegation issue.

French system is one of the unique exceptions among others, as the Constitution of France of 1958 (hereinafter: The 1958 Constitution) makes separately residual law-making power for the executive. The 1958 Constitution directly divides the scope of law-making and regulatory-making powers between the executive and Parliament. The most effort of the 1958 Constitution's Founding Fathers was put in division of legislative power between Parliament and the executive. However, Article 38 of the 1958 Constitution stresses possibility to delegate legislative power from parliament to the executive even in case when the executive has wide range of regulatory power.

Design of the Basic Law of the Federal Republic of Germany (hereinafter: The Basic Law) creates parliamentary system. The principle of separation of powers is enshrined in Article 20(2) of the Basic Law: "all state authority… shall be exercised… by specific legislative, executive, and judicial organs."[2] Also, the structure of the government is produced in Article 20(3) of the Basic Law accordingly which: "the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice." At the federal level, executive authority is vested in the federal government which consists Chancellor and the Cabinet. Legislative power is conferred to Parliament (Bundestag; Bundesrat). The Basic Law of Germany directly specifies requirements for delegation of legislative power to the executive (Article 80).

The United States is regarded as a presidential system, however president's constitutional powers to impact on legislative process is less influential than it is in Germany or France. The U.S.

[2]Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London (3th ed. 2012) 152

Legislative power is vested in Congress. The Constitution of the United State is silent about delegation of the legislative power, but Supreme Court created non-delegation doctrine.

Chapter 2 looks at the executive's role in law-making process. Diverse institutional designs reflect different allocation of powers. Constitutions impose key provisions that authorize the executive with law-making power or permits influencing on legislative process. That powers of the executive branch differ from each other in compared jurisdictions. This analysis identifies the intense in light which the executive is involved in law-making process. The main purpose of the chapter is to make introduction what positions the executive actor has when the matter relates creating the law.

Chapter 3 overviews historic experience of the delegation of the legislative powers. Legal provisions or established case law on delegation of the law-making authority have historic roots in comparative jurisdictions. The text of the Constitution of the United States is less informative about the delegating legislative power. However, Federalist Papers refers to the role of the Congress and the executive in governing the State. Federal Papers express fears of Founding Fathers if essential powers are concentrated in one branch that causes tyranny.[3] This chapter refers historical experience of Weimar Constitution and the path that was passed towards Enabling Act. Respective historic events happened in France which resulted in dividing rule-making power between legislative and executive branches under the 1958 Constitution.

Chapter 4 discusses the constitutional overview on delegating the legislative power from legislative branch to the executive. "All legislative Powers herein granted shall be vested in a Congress" under the U.S. Constitution. The Supreme Court of the United States (hereinafter: SCOTUS) established non-delegation doctrine, which in practice allows transferring power from legislative branch to the executive. French Constitution specifies the area within which legislative

[3]The Federalist Papers No.47, see at: http://avalon.law.yale.edu/18th_century/fed47.asp [last visited 23.03.2019]

body can legislate and executive enact regulatory rules. Basic Law of Germany directly allows legislative body to delegate law-making authority to the executive in order "to issue statutory instruments". Thesis produces different examples emerged from the constitutional disputes in context of delegating legislative powers. The Court's challenge is to define the line which may not be crossed by Parliament when delegating law-making power. This chapter enquires whether established standards answer the question to what extent can legislative body delegate law-making power to the executive? Or if the imposed standards are safe guarantees to protect democracy?

2. The Executive's Role in the Legislative Process

The most significant function of Parliament is law-making power. Legislative branch as the representative of the people, enacts legislative acts through the deliberative process relating to the various matters. Legislative acts intend to ensure individual's freedom of rights as well as constrain the executive to prevent arbitrary use of powers.

However, "in contemporary regulatory states most legal rules are produced by the executive branch."[4] In light of the allocation of powers, the executive has several constitutional mechanisms to make a law or at least influence on law-making process. Before concentrating on delegation of the legislative powers, this chapter overviews the role of the executive branch in creating legislation under the constitutional domain within comparative jurisdictions.

2.1. Laws - Faithfully Executed in the United States of America

According to the Constitution of the United States (hereinafter U.S. Constitution) the executive power shall be vested in the President and he shall take care that the laws be faithfully executed.[5]

[4]András Sajó, Renáta Uitz, *The Constitution of Freedom*, (Oxford University Press, 2017) 260
[5] The Constitution of the United States, Article II, Sections 1 and 3.

Unlike systems of government in Germany or France, the executive in the United States has no formal authority to propose legislative initiatives to Congress. Under the U.S. Constitution every bill shall be introduced by a member of Congress.[6] The executive can make informal influence through party politics with members of the Congress.

However, before the bill becomes law, the president has power to block enactment. Woodrow Wilson characterized presidential veto as "formidable weapon" and stated that "the president acts not as the executive, but as a third branch of the legislature."[7]

Article I, Section 7 of the U.S. Constitution establishes procedure for presidential veto. Alexander Hamilton regarded that the executive's veto power is "the qualified negative" and establishes "a salutary check upon the legislative body". Hamilton invokes conferring veto power to the president "to enable him to defend himself" and "to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."[8]

Every bill that passed the House of Representatives and the Senate, it will be presented to the President of the United States for approval. Within ten days the President signs or returns the bill, with his objections, to the chamber in which it was originated. In order to override presidential veto (it is called "regular veto"), the constitution requires votes by two-thirds of both chambers, the Senate and the House of Representatives.[9]

There is also other kind of objection by the president which is called "pocket veto". It occurs when a Congress is in adjournment within ten days when the President does not sign the bill.[10] In such

[6]Mark Tushnet, *The Constitution of the United States of America-A Contextual Analysis*, (Hart Publishing, 2009) 45
[7] Woodrow Wilson, *Congressional Government: A Study in American Politics*, (Boston: Houghton Mifflin, 1885) 52 Richard A. Watson, *The President's Veto Power*, The Annals of the American Academy of Political and Social Science, vol. 499, (Sep. 1988) 36/37
[8] Federalist Papers, No. 73; See at: http://avalon.law.yale.edu/18th_century/fed73.asp [last visited 23.03.2019]
[9] The Constitution of the United States, Article I, Sections 7 [2]
[10] It must be mentioned that if a Congress is at work and the president does not return the bill to one of the Houses, it becomes law even without signature of the president after ten days expires

occasion the President's objection cannot be overridden by a Congress. Until 2019 of March, the U.S. Presidents used veto power 2575 times in total, including 1066 "pocket vetoes". A Congress overrode only 111 of 1509 regular vetoes with respect to the constitution.[11] Only Franklin Roosevelt exercised veto power 635 times, among which only 9 was overridden. That numbers show that the Presidents exercised veto power to make influence on law-making process.

The U.S. Constitution ordains that the President "shall take Care that the Laws be faithfully executed."[12] Academic scholars debate about the question what means "faithfully executed" – does it include law- making by the executive? This question was referred in *the Steel Seizure* case[13]: "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."[14] However, there is one exception when the representative of the executive branch can vote for a bill. The U.S. Constitution empowers the vice-president to cast the deciding vote when the Senate is divided[15] – "a rare but not unknow event."[16]

2.2. Bill Introduced by Federal Government in Germany

The Federal Government of Germany is composed by the Federal Chancellor and the Federal Ministers.[17] Chancellor has strong position in the cabinet, she/he is elected and trusted by the

[11]United States Senate, https://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm [last visited 22.03. 2019]
[12] The Constitution of the United States, Article II, Section 3
[13] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)
[14] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* (Boston: Aspen Publishers, 2005) 363
[15] The Constitution of the United States, Article I, Section 3
[16]Mark Tushnet, *The Constitution of the United States of America-A Contextual Analysis*, (Hart Publishing, Oxford and Portland, Oregon, 2009) 45
[17]The Basic Law, Article 62

majority of the Bundestag and appointed by the President. The Chancellor independently decides composition of the cabinet which finally is appointed by the Federal President.

First indication of rule-making by the Government is enshrined in Article 65 of the Basic Law, accordingly which the Government creates rules for its own proceedings. In light of the federal government's rules of procedure, "the Chancellor has the right to determine the number and jurisdictions of individual departments, an important discretionary authority."[18] The government has great level of institutional independence to establish preferable structure and design for its agenda. Federal ministers' duty and accountability to the Chancellor, agenda of the departments and monitoring of them, coordination of the staff's work or managing the bureaucratic matters subject to the regulation by the executive branch. Rule-making of the procedural rules is not only strong institutional guarantee. The Chancellor represents leading political figure in the country, who determines and is responsible for ensuring general guidelines of policy making.

Article 76 of the Basic Law empowers the Federal Government to make legislative initiatives in the Bundestag and establishes the respective procedure for that. On the first stage bill is tabled in the Bundesrat which produces comments on it. Whether the Bundesrat expresses opinion or not, the bill is transferred to the Bundestag which deliberates and makes decision about the adoption of the Federal Law. After discussion in the Bundestag, the next procedure depends whether the bill requires approval from the Bundesrat or it is sufficient to express its objection.[19] In case of express approval requirement the Bundesrat can block the bill, because it may effect *Länder*.

After the procedures in the Bundesrat and the Bundestag, bill is transferred to the Federal President and needs formal confirmation. The President has veto power but rarely is used.

[18] Saalfeld Thomas, *Germany: Multiple Veto Points, Informal Coordination, and Problems of Hidden Action*, In Delegation and Accountability in Parliamentary Democracies (Kaare Strøm, Wolfgang C. Müller & Torbjörn Bergman eds., Oxford University Press, 2003; Oxford Scholarship Online, 2005) 365

[19] Nigel Foster & Satish Sule, *German Legal System and Laws*, (4th ed. Oxford University Press, 2010) 211

Procedure of the legislative process itself is complicated and requires time. However, if we look to the past history government initiatives are major part of the legislation of Germany. More than 70% of the successful bills originate in the executive.[20] The support of the Bundestag is the reason what makes the government's power effective to influence law-making process. The government has initiated 5, 860 bills, among which 5, 016 have been successful between 1949 and 2008, while 3, 554 bills (adopted: 1, 219) were introduced by the Bundestag and 919 (adopted: 244) by the Bundesrat.[21]

2.3. The Division of Law-making Powers in the Fifth Republic - France

President's powers according to the French Constitution was described by Duverger: "when there is no majority, the President's constitutional powers are weakened. When the President leads a majority, the Prime Minister's constitutional powers are weakened and the president has "almost absolute control" of the legislature. When the President is opposed to the majority (under cohabitation), the prime minister acts as a British-style head of government but the president is still able to use any constitutional powers granted to the institution."[22] Thus, to be on the safe side, strength of the president in France depends on political situation described by Duverger.

Under Article 20(1) of the 1958 Constitution the Government determines and conducts the policy of the Nation. Regarding to this provision, the main decision maker in the executive branch is the Government[23] and the Prime Minister directs the actions of the Government. He is responsible for the implementation of legislation and has respective regulatory power.

[20] Werner Heun, *The Constitution of Germany - A Contextual Analysis*, (Oxford: Hart, 2011) 107
[21] Nigel Foster & Satish Sule, *German Legal System and Laws*, (4th ed. Oxford University Press, 2010) 211
[22] Robert Elgie, *Duverger, Semi-presidentialism and the Supposed French Archetype*, West European Politics, (Routledge, 2009) 257
[23] Sophie Boyron, *The Constitution of France: A Contextual Analysis*, (Hart, Oxford and Portland, Oregon, 2013) 76

One of the innovations in the 1958 Constitution was division law-making powers between parliament and the government. Part V of the 1958 Constitution regulates relations between Parliament and the Government. There is described division of law-making powers between the legislative and the executive branches.

The 1958 Constitution defines field of the competence within which parliament has power for its *lois*[24] and matters outside legislature's competence subject to regulation by the executive. Article 34 of the 1958 Constitution determines the sphere in which Parliament legislates. Article 34 of the 1958 Constitution is not exhaustive and there are several other matters that relate to Parliament's competence to legislate.[25] For example, qualifications of voters (Article 3(4)) judicial guarantees for the freedom of the individual shall be established by statute (Article 66), etc.[26] The preamble of the Constitution of 1958 includes two important documents: Declaration of the Rights of Man of 1789 and the Preamble to the Constitution of 1946. These texts refer to the matters that shall be determined by the legislature.[27]

Article 37 of the 1958 Constitution establishes residuary law-making power for the executive.[28] Article 37 of the 1958 Constitution, empowers the government to make *ordonnances* to regulate matters which are outside the scope of *loi*. However, such division of law-making powers is not always clear and borders between the executive and parliament is blurred. The judiciary decides in each case whether the division of the spheres is in compatible with the constitution.

Article 39 of the 1958 Constitution entitles the Prime Minister to initiate "legislative projects" in Parliament. The Government has essential tool to influence on legislative process regarding

[24] Legislative Act, - enacted by Parliament
[25] Wolfgang C. Müller & Torbjörn Bergman eds., Oxford University Press, 2003; Oxford Scholarship Online, 2005) 327
[26] John Bell, *French Constitutional Law* (Oxford, Clarendon Press, 1992) 88
[27] John Bell, *French Constitutional Law* (Oxford, Clarendon Press, 1992) 88
[28] John Bell, *The Division of Lawmaking Powers: The Revolution that Never Happened*, (Oxford: Oxford University Press, 1995) 78

Articles 44, 45 and 49 of the 1958 Constitution. Article 44 establishes Government's coercive power when Parliament makes amendment in bills of the Government. Article 44(3) is called the "blocked vote": "[…] the chamber either accepts the Government's text or runs the risk of not adopting any text at all".[29] The Government makes Parliament to vote on the text of the bill which were proposed or accepted only by the Government. Article 45 of the 1958 Constitution entitles the Government to apply accelerated procedure in order to reduce time of adopting the bill and reject the amendments by both Houses of Parliament.

Article 49(3) of the 1958 Constitution is also considered as another coercive measure. The Prime Minister may make passing of a Finance Bill and Social Security Financing Bill as issue of vote of confidence. If during 24 hours Parliament does not table a resolution of no-confidence, than the respective bill is considered passed. Article 49(3) of the 1958 Constitution was used 82 times even with other coercive provisions, from 1958 to 2006.[30]

3. Historical Overview of Delegating Legislative Powers to the Executive

Historical development of political conditions in compared jurisdictions paved the way to establish different approaches of delegated legislation. Even the U.S. Constitution does include any provision on delegating the legislative powers, intentions of the Founding Fathers shaped the early case-law of the SCOTUS. The Basic Law specified substantive guarantees to avoid broad delegations, while the 1958 Constitution aimed to entitle the government with effective tools to perform its duties without impediments.

[29] Sophie Boyron, *The Constitution of France: A Contextual Analysis*, ((Hart Publishing, Oxford and Portland, Oregon, 2013) 124

[30] Sophie Boyron, *The Constitution of France: A Contextual Analysis*, ((Hart Publishing, Oxford and Portland, Oregon, 2013) 81

3.1. Nondelegation Doctrine in the United States of America

The U.S. Constitution does not directly establish provisions on delegation of legislative powers. However, many executive orders of the President of the United States begin with the words: "by the authority vested in me as President by the Constitution and the laws of the United States of America". The orders also identify the laws which the president thinks she/he can rely on.

John Locke, who influenced many of the Framers, thought that "the legislative cannot transfer the power of making law to any other hands" because "when the people have said, 'We will submit and be governed by laws made by such men, and in such [constitutional] forms,' nobody else can say other men shall make laws for them."[31]

The Founders of the Constitution "entrusted the lawmaking power to the Congress alone in both good and bad times".[32] Constitutional Convention debates expressed the idea that Congress could not delegate legislative powers. James Madison considered that Article I of the U.S. Constitution prohibited the exercise of legislative power through delegation "The Framers' claim that Article I protects the people from elected officials would have been inconsistent with a Constitution that permitted officials to make law outside the Article I process."[33]

The provisions of the Bill of Rights state: "Congress shall make no law…" Making bind the legislature by fundamental rights raise the argument that law-making power is only Congress's authority. The debates over the Bill of Rights caused to preclude from Article I of the U.S.

[31] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation, (Yale University Press, New Haven and London, 1993) 155-156

[32] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* (Boston: Aspen Publishers, 2005) 363, Youngstown Sheet & Tube Co.Et Al v. Sawyer, 343 U.S. 579 (1952)

[33] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation, (Yale University Press, New Haven and London, 1993) 156

Constitution the delegation of legislative power. The draft proposed by Madison suggested provision which "prohibited any branch the power to exercise the powers of any other branch".[34] However, it was expressed that each branch of the government had its function and additional provision (as safeguard) was not necessary.[35]

The principle of Separation of Powers and Article I, which vests legislative power to Congress became "mortar and brick from which the non-delegation doctrine is construed."[36] However, before imposing nondelegation doctrine the SCOTUS firmly stated that "the legislative power of Congress cannot be delegated."[37] In further cases, the SCOTUS stressed less absolute language that Congress may not delegate powers that "are strictly and exclusively legislative", but it may delegate those powers which it may "rightfully exercise itself."[38]

The Supreme Court of the United States created nondelegation doctrine and invalidated respective provisions of the Federal Law on that ground. During the President Roosevelt's famous first "one hundred days" was designed the legislation (The National Industrial Recovery Act) which aimed to fight against time of Depression. The SCOTUS twice invalidated provisions of those Act on nondelegation grounds. Developments on nondelegation doctrine is discussed in Chapter 4.

3.2. Enabling Act in Germany

Article 80 of the Basic Law states that the Federal Government or Federal Minister may be authorized by a law to issue statutory instruments. Enabling Act shall define the content, purpose

[34] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation, (Yale University Press, New Haven and London, 1993) 156
[35] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation, (Yale University Press, New Haven and London, 1993) 156
[36] Jack Pine, *Constitutionality of the Delegation of Legislative Power to Control Prices, Rents, Wages, and Salaries: The Economic Stabilization Act of 1970*, Chicago-Kent Law Review, Vol. 48 (1971) 279/280
[37] Field v. Clark, 143 U.S. 649, 692 (1892)
[38] Wayman v. Southard, 23. U.S. (10 Wheat.) 1, 41 (1825)

and scope of the authority conferred to the executive. Statutory instruments issued by the executive must contain its legal basis. Safeguards enshrined in Article 80 of the Basic Law comes from the Weimar Republic experience. The President Weimar Republic had discretion to enact regulations without consent of Parliament.[39]

The Weimar Constitution set up Republic of Germany as representative democracy and established system of pure proportional election to compose the Reichstag. Because of the model of the election system parliament was installed by many small parties, which made legislative branch unstable. This election system gave opportunity to Nazi party to take a few seats in Reichstag and then increase to 37 percent of the vote in 1932.

However, there were also other constitutional provisions which made parliament unsteady. According to Article 25 of the Weimar Constitution the President had almost unlimited power and could dissolve the Reichstag at his will. That power was exercised many times by the President which made impossible for the parliament to ensure its function properly. Parliament lost capability to respond challenges presented to the republic. Parliament was difficult for fragmented and many times dissolved parliament to pass laws.

Unable to conduct its functions, the Reichstag delegated broad legislative powers to the executive to issue regulations having the force of law.[40] Hitler's coming to power occurred not only using violence but also by legal means through bypassing Parliament. The adoption of "Law to Remedy the Distress of the People and the Reich" of 24 March 1933 made possible to transfer all legislative powers from legislative body to the executive.[41] The law is also known as Enabling Act (*Ermächtigungsgesetz)* which was short itself and established five Articles. Regarding the act the

[39] Nigel Foster & Satish Sule, *German Legal System and Laws* (Oxford University Press, 2010) 212
[40] Werner Heun, The Constitution of Germany: A Contextual Analysis (Oxford: Hart 2011) 6
[41] See at: https://www.bundestag.de/resource/blob/189778/d0f948962723d454c536d24d43965f87/enabling_act-data.pdf [last visited 20.03.2019]

government (*Reich*) had boundless power to legislate almost in every field of law. The government's law could be contradicted established provisions of the Constitution. The executive's absolute power in law-making process was proved by the fact that the German Government did not even need formal consent from parliament: "in addition to the procedure prescribed by the constitution, laws of the Reich may also be enacted by the government of the Reich."[42] The Weimar Constitution itself did not not contain guarantees against the delegation of legislative powers. After that historical experience, the Basic Law regulated the delegation of legislative authority to the executive by imposing restrictions.

3.3. History of the Legislative Delegation in France

Article 38 of the 1958 Constitution regulates delegation of the legislative powers. Despite the fact that the government has great amount of regulatory powers and mechanisms to influence on the legislative process, the Constitution of the Fifth Republic found necessary to establish the delegation of legislative powers from Parliament to the executive.

In France, political tradition establishes that "the State is the representative of the nation, and thus that Parliament should be a supreme authority since it incarnates that representative character."[43] Delegation of legislative power took long history in France. During Third Republic period practice of the legislative delegation increased despite the fact that 1875 arrangements did not produce express delegationr. The executive made decrees both on basis of the programme and on a broader field. That was practiced on the basis of authorizing statutes. Lack of parliamentary majorities

[42] Law to Remedy the Distress of the People and the Reich" (Mar. 1933), Article 1
[43] John Bell, *The Division of Lawmaking Powers: The Revolution that Never Happened*, (Oxford: Oxford University Press, 1995) 79

caused broad delegation of legislative powers.[44] Such experience triggered the Fourth Republic sought to restrict delegation of legislative powers. Article 13 of the Constitution of 27 October 1946 stated that "The National Assembly alone passes *lois*. It cannot delegate this right." However, Article 7 of the *loi* of 17 August 1948 identified several fields that entitled the executive to make *réglements.*[45] In 1953 the Conseil d'Etat interpreted that parliament could delegate law-making power to the executive, excluding the spheres that related to parliament on the basis of constitutional tradition. But the Conseil imposed standards that delegation shall not be vague and uncertain as to amounted "to the abandonment of national sovereignty."[46]

The Constitution of Fifth Republic is the development of the solutions that was demanded from past constitutional practices. The 1958 Constitution implemented all mechanisms emerged from the past experience. The framers of the 1958 Constitution deemed that Parliament made difficult the work of the government and therefore the functions of law-making divided between these two branches. Dysfunctions of Parliament triggered framers of the 1958 Constitution to empower the executive with law-making power, but also recognized delegation of the reserved legislative powers to the government. Finally, the Constitutional Council was entitled to check constitutionality of the delegations of law-making power.

4. Constitutional Limits on the Delegation of Legislative Power

The delegated legislation became an inevitable constitutional practice in modern regulatory states.

[44] John Bell, *The Division of Lawmaking Powers: The Revolution that Never Happened*, (Oxford: Oxford University Press, 1995) 84
[45] John Bell, *The Division of Lawmaking Powers: The Revolution that Never Happened*, (Oxford: Oxford University Press, 1995) 85
[46] John Bell, *The Division of Lawmaking Powers: The Revolution that Never Happened*, (Oxford: Oxford University Press, 1995) 85

Necessities of modern society caused to become the delegation accepted practice.[47] Complex developments in industry, technology and science triggered the states to become flexible and fast to avoid impediment in economic and social development. Legislative work includes several stages and many participants with various political interests, which make this process less rapid. Parliament has burden to legislate in various fields. Filling the details in the legislation to regulate those matters demand expertise in specific issues. Inquire of those matters take time and resources: "it soon became evident that executive law-making was a question of necessity since the legislator often lacks resources and expertise to regulate all details of a subject matter itself."[48] The executive branch (which usually includes ministers and respective departments) has practical experience and knowledge how to deal with those challenges raised time to time. From those practical reasons, Parliament increasingly delegated law-making powers to the government. The idea that the executive has more expertise to take actions rapidly and be effective to the challenges made the idea desirable regarding delegating of the legislative powers.

The Courts realized that administering the law required exercising some discretion: "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[49]

Hence, the question is not formulated as whether Parliament can delegate legislative power to the executive. The controversy relates to the scope within which the legislature can transfer law-making power to the executive. How far can Parliament transfer its constitutional duty to the executive? What are those boundaries (if there is any) which violates the constitution in case of

[47] Robert C. Sarvis, *Legislative Delegation and Two Conceptions of the Legislative Power*, Pierce L. Rev. Vol.4, No. 2 (2006) 317/344

[48] Georg Haibach, Comitology: A Comparative Analysis of the Separation and Delegation of Legislative Powers, 4 Maastricht J. Eur. & Comp. L. (1997) 373/384

[49] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)

crossing them? Judicial branch had to respond to these questions in U.S., Germany and France. This chapter aims to make comparative analysis with regard to the constitutional standards on delegation of legislative powers.

Delegated legislation raised concerns that both law-making power and execution of law concentrated in one branch. That was considered as threat against constitutional values and liberty. Founding Fathers aimed to prevent tyranny and accepted Montesquieu's theory regarding separation of powers.[50] James Madison stated: "It may be a reflection on human nature, that such devices [checks and balances] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[51] Thus, Madison's concerns were related to the governmental branch which was empowered with more authorities than it is needed for checks and balances.

Legislative power as a restraint on the executive is expressed in the U.S. Constitution. According to Article I of the U.S. Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States." The Congress' power "to make Rules for the Government" is one of the expressions in the U.S Constitution that indicates a restraint on the executive.[52]

The previous cases of the SCOTUS stated position against delegating legislative power. In *Field v. Clark* case, the judgment upheld the challenged Act of Congress which empowered the President

[50] John B. Cheadle, *The Delegation of Legislative Functions*, Yale Law Journal, Vol.27 (1918) 892/893
[51] Federalist Papers, No. 51, see at: http://avalon.law.yale.edu/18th_century/fed51.asp [last visited 23.03.2019]
[52] Robert C. Sarvis, *Legislative Delegation and Two Conceptions of the Legislative Power*, Pierce L. Rev. Vol.4, No. 2 (2006) 317/321; The U.S. Constitution, Article 1, Section 8, cl.14

with discretion to suspend the tariff rates in respective occasions and stated that was not delegation. The SCOTUS emphasized that "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[53] The SCOTUS explained that "the legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depends. To deny this would be to stop the wheels of government."[54] Whether it is playing with the words or not, the U.S. Constitution at practice admitted delegation of legislative powers and ordained standards for such delegations.

The Federal Constitutional Court of Germany (hereinafter: the FCC) restricted the executive by the domain of "Parliamentary reservation" which is essential feature of democracy. Article 80 of the Basic Law admits that certain tasks may be performed by the executive through delegated legislation. However, "essential" matters, *inter alia*, related to the fundamental rights shall be regulated by Parliament.[55] For example, the FCC decided in several cases relating to reforms of the school system, that the individual's enjoyment of basic rights was regarded as "essential matter".[56] The FCC held that matters of "essential" importance must be decided upon by Parliament and cannot be left to delegated legislation.[57]

First guarantee, for ensuring the concept of "Parliamentary reservation", is the requirement regarding citation of its legal basis in the statutory instrument. That essential element was enforced

[53] Field v. Clark, 143 U.S. 649, 692 (1892)
[54] John B. Cheadle, *The Delegation of Legislative Functions*, Yale Law Journal, Vol.27 (1918) 892/904; Locke's Appeal, 72 Pa. 491 (1873)
[55] Nigel Foster & Satish Sule, *German Legal System and Laws*, (4th ed. Oxford University Press, 2010) 180
[56] See Cases: BVerfGe 41, 251; 45, 400; 64, 308
[57] Nigel Foster & Satish Sule, *German Legal System and Laws*, (4th ed. Oxford University Press, 2010) 180

in *Chicken Regulation* Case.[58] The FCC expressly stressed that it is not sufficient to be indicated only enabling statute but must be provided particular enabling provision of that statute authorizing the executive. If such provisions are several, the issuer of the regulation shall indicate each of them.[59] Therefore, if governmental order does not indicate one of the statutory provisions that the FCC considers as legal basis of the order or identifies that matters are regulated without any statutory ground then it contradicts the Basic Law. That requirement standard is differently implied by the SCOTUS. In U.S. the method of inquiring the statutory basis differs from German practice. In particular, the SCOTUS enquires statutory basis not only in the executive's order, but in total legislation. The main aim of the SCOTUS is to find out this legal basis and does not pay much attention whether enabling provisions are directly expressed in the order.[60]

The procedure of legislative delegation in France differs from both U.S. and Germany. Article 38(1) of the 1958 Constitution empowers the Government to ask Parliament authorization, for a fixed period of time, to make measures for implementing its programme. During this limited period of time statutory orders (*ordonnances)* are issued in the Council of Ministers (on the basis of Enabling Act) and will be tabled in Parliament for ratification before the time set by the Enabling Act expires. The statutory order once ratified by Parliament may be amended only by parliamentary Act. The Constitutional Council has jurisdiction to check constitutionality of the Enabling Act; "however, due to the limitations of its jurisdiction it does not have supervision over the *ordonnances* themselves."[61] The *ordonnance* itself may be reviewed by the Council of State.

[58] Chicken Regulation Case, 101 BVerfGe 1 (1999) available at: Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London (3th ed. 2012) 182-184

[59] Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Duke University Press, Durham and London, 2012) 183

[60] See below: Youngstown Sheet & Tube Co.Et Al v. Sawyer, 343 U.S. 579, 585-586 (1952)

[61] András Sajó, Renáta Uitz, *The Constitution of Freedom* (Oxford: Oxford University Press, 2017) 263

Comparing the Basic Law, Article 38 of the 1958 Constitution describes the procedure of delegating the legislative powers but does not specify substantive criteria.

The U.S. Constitution as it was already mentioned, does not provide provision regarding delegation of legislative powers and therefore the text of the U.S Constitution itself does not impose any formal requirement. However, judgment of the SCOTUS in *Youngstown Sheet* case, reflected the idea that orders of the President must be based on Parliamentary Acts. Truman's order amounted to law-making power must stem from an act of Congress.[62] The SCOTUS is not restricted inquiring only the statutes that are mentioned in the presidential order: "there is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied."[63]

Citation requirement is not mere procedural criteria. It gives information to the public about the discretion of the executive. Also, such requirement makes precise how to check the executive and determine whether he abuses conferred powers. In *Chicken Regulation* Case the FCC stressed that precise statutory grounds emerge from the principles of separation of powers, democratic and constitutional state principles. The aim of this requirement is to be identified whether exercised delegated legislative competence by the executive results from the provisions that are cited in the statutory instruments.[64] Hence, these provisions are the legal source to check the executive whether it exercises its powers within the limits. If such requirement is not satisfied it breaches "indispensable element of democracy based on the constitutional state principle"[65] and violates the

[62] Youngstown Sheet & Tube Co.Et Al v. Sawyer, 343 U.S. 579, 585 (1952)
[63] Youngstown Sheet & Tube Co.Et Al v. Sawyer, 343 U.S. 579, 585-586 (1952)
[64] Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London (3th ed. 2012) 183
[65] Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London (3th ed. 2012) 184

Basic Law. Without enabling provision, the courts cannot check the limits within the executive branch is authorized to act. In France, the Constitutional Council does not need much enquire of the citation requirement as the government itself tables Acts in Parliament for ratification.

Identifying parliamentary origin of the executive's order is not the end of constitutional control on delegated legislation. Enabling act or the provision itself is the subject of interest whether it is precise under the requirements of the constitution. If the statute is prescribed in detail that leaves less discretion for the executive in making implementation of it. Broad discretion empowers the executive to act in a manner that exceeds control of Parliament and the constitution. That fear of unlimited power and tyranny of the executive reflected in different principles and line of arguments imposed by the courts.[66]

The FCC stresses that the principle of democracy and the *Rechtsstaatsprinzi* [67]requires that essential matters have to be decided by Parliament.[68] Thus, the FCC forbids the legislature to leave essential elements to the executive for regulation. The authorizing Act must be precise enough in order the citizen learn what is required from him to act.[69] Restriction of delegating legislative powers come from ideas and motives of the principle of rule of law. Delegation itself requires that the law must not be so vague that the citizen could not understand the requirements of the legal norms. In some occasions the consent of the Bundesrat is required for the statutory instruments established by the Federal Government regarding the issues mentioned in Article 80 II of the Basic Law.

[66] For overview of historical experiences see Chapter 3.
[67] Which usually is called rule of law. However, in German context as Nigel Foster & Satish Sule mentioned is not correct term. Nigel Foster & Satish Sule, *German Legal System and Laws*, (4th ed. Oxford University Press, 2010) 178
[68] Nigel Foster & Satish Sule, *German Legal System and Laws*, (4th ed. Oxford University Press, 2010) 212
[69] 7 BV erfGE 282, 302; 58, 257, 277

The FCC determined in some cases unconstitutionality of the delegation, however it is common critics that the Court does not follow clear standards. In more cases the FCC is deferential which is similar approach to the U.S. and French cases.

In 1928 the SCOTUS endorsed that legislative powers may be delegated in certain occasions and ordained respective test to determine whether Congress contradicted the nondelegation doctrine. *J.W. Hampton, Jr. & Co. v. United States* case established "intelligible principle" and upheld the provision which authorized the President to amend tariffs on particular goods.[70] The SCOTUS declared that Congress could delegate discretion to the executive "according to common sense and the inherent necessities of the governmental co-ordination."[71] Such transfer of law-making authority does not amount to "a forbidden delegation of legislative power" when enabling parliamentary act conforms an "intelligible principle".[72]

The questions what kind of power is exercised by the executive or what are the effect of the delegated authority are not responded by an "intelligible principle". The focus of that principle is the scope of the executive's discretion. The SCOTUS must inquire whether parliamentary act imposed adequate requirements to guide the executive.[73] Thus, "intelligible principle" establishes quality of the guidance intended for the executive. The nondelegation doctrine is applied if that guidance does not achieve respective constitution standards. Thus, nondelegation doctrine, despite its name, does not prohibit absolutely all kind of delegations. It prohibits only such delegations that contradicts the constitution.

[70] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)
[71] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406, (1928)
[72] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409, (1928)
[73] Ilan Wurman, *As-Applied Nondelegation,* Texas Law Review, Vol. 96 (2018) 976/980

There are only two cases *Panama Refining* and *Schechter* which the SCOTUS invalidated federal statutes on the nondelegation doctrine ground.[74] The SCOTUS found that the challenged legal provisions produced no guidance to the executive. In both judgements was indicated that lack of standards of the challenged provisions gave the President broad powers.

"In *Panama Refining Co. v. Ryan* case the SCOTUS invalidated a provision of the National Industrial Recovery Act.[75] The SCOTUS stated that "the attempted delegation is plainly void, because the power sought to be delegated is legislative power, yet nowhere in the statute has Congress declared or indicated any policy or standard to guide or limit the President when acting under such delegation."[76] The SCOTUS considered that Congress abandoned whole discretion to the President to decide the matter upon his will and that was not restricted by any parliamentary standard.[77] Therefore, the President's broad discretion without any guidance amounted to the violation of the U.S. Constitution.

Another provision of the National Industrial Recovery Act was held unconstitutional in *Schechter* case, which authorized the President to approve "codes of fair competition".[78] The judgment identifies that "codes of fair competition" involve broader content than "unfair methods of competition" determined under the Federal Trade Commission Act.[79] Thus, the term subjected to the regulation by the executive was broader than those stated in parliamentary act, which itself impacted on major policy of Congress regarded to the "rehabilitation of industry and the industrial

[74] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* (Boston: Aspen Publishers, 2005) 419

[75] Panama Refining Co. v. Ryan, 293 U.S. 388, 389 (1935)
Repealed provision authorized the President to "prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced" in case of violation of permitted quotas.

[76] Panama Refining Co. v. Ryan, 293 U.S. 388, 414 (1935)

[77] Panama Refining Co. v. Ryan, 293 U.S. 388, 418 (1935)

[78] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 496 (1935)

[79] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531 (1935)

recovery."[80] The SCOTUS regarded such broad authority as an "unfettered discretion", which permits the President "to make whatever laws he thinks may be needed or advisable."[81] After 1935, the SCOTUS repeated "intelligible principle" as only requirement that must be satisfied by Congress.[82]

In comparison to U.S. and France, the Basic Law itself sets substantive limits on delegation. Article 80 of the Basic Law requires from Parliament "the content, purpose and scope of the authority" be specified in authorizing act. That requirement was defined in *Emergency Price Control* Case.[83]

The FCC stressed that constitutional state principle requires that legislative acts authorizing the executive to issue orders, shall be well-defined regarding content, subject matter, purpose and scope.[84] The judiciary protects individuals against violation of their rights "only if the courts can review the norm's implementation by the executive agency."[85] Therefore, it is important that statute must define clearly and narrowly limits of the executive authorization in law-making power. On the other hand, the FCC imposed the term "vague blanket provision" which defined as the legal norm that broadly authorizes the executive to issue statutory instruments. Such norms prevent ordinary citizens to foresee state's actions and empowers the executive to set limits on individuals' rights. Eventually, The FCC mentioned that without legislative branch's clear guidelines the executive will make decisions which is related to parliament's competence. That violates the principle of separation of powers.[86]

[80] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 534 (1935)
[81] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935)
[82] Gary Lawson, *Delegation and Original Meaning*, Virginia Law Review, Vol.88, No.2 (2002) pp.327/328-329
[83] Emergency Price Control Case, 8 BVerfGe 274 (1958)
[84] The FCC hold constitutional provision of the Price Control Act which permitted the federal director of economic administration as well as the directors of the highest state administrative agencies to regulate prices in the respective segment of market when it was in a lamentable condition.
[85] Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London (3th ed. 2012) 175-176
[86]Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London (3th ed. 2012) 176

Nondelegation doctrine is rooted on the essential constitutional principle of enumerated powers.[87]Under the U.S. Constitution the executive branch cannot usually exercise legislative powers on their initiative. It may come only from delegated legislation. Very famous "gap-filling" job is very common for the executive branch to exercise its functions.[88] However, if the executive is authorized with wide law-making powers that would be considered as delegation of powers but identified as exercising competence of Congress. For authorizing the power to "fill up the details," was applicable standard in SCOTUS case law. The SCOTUS upheld a statute which required respective manufacturers to have their packages "marked, stamped and branded as the Commissioner of Internal Revenue… shall prescribe."[89] Thus, on the one hand the courts impose particular constitutional standards, but then it is not applied in a proper manner.

Kalkar I case relates the problem whether the provision is sufficiently precise and also the problem of "parliamentary reservation".[90] The principle of "parliamentary reservation" is protected when parliament sets sufficient procedures for "essential matter" that relates to legislature's competence. For example, the FCC stressed that only the legislative branch has obligation and authority to make decisions and set limits for such important occasions, *inter alia*, in cases when basic rights are subjected to governmental regulation. The judgement also questioned whether challenged act was precise.

The FCC considers that main guidelines must be imposed by Parliament. The degree of precision is depended on the nature of the matter and the intensity of the regulation.[91] However, vague term itself does not violate the Basic Law, as it makes possible to carry flexible decisions regarding new

[87] Gary Lawson, *Delegation and Original Meaning*, Virginia Law Review, Vol.88, No.2 (2002) pp.327/334
[88] Gary Lawson, *Delegation and Original Meaning*, Virginia Law Review, Vol.88, No.2 (2002) pp.327/337
[89] In re Kollock, 165 U.S. 526 (1897)
[90] Kalkar I Case, 48 BVerfGE, (1978)
[91] Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 2012) 180

developments in science.[92] Undefined terms subject to interpretation by the legislature, executive and judiciary.[93]

As already mentioned, the FCC determines "essential matter", which according to the case-law is human rights. In U.S. justices argued that delegations by Congress, which affects "fundamental freedoms" of the citizens must be closely scrutinized to make the congressional decisions exercised on meaningful standards.[94] The SCOTUS stressed its opinion with regard to legislative delegation when it affects individual's rights. In such occasion standards of the delegation "must be adequate to pass scrutiny by the accepted tests."[95] The practice of the SCOTUS in such cases is to interpret delegation narrowly in order to prevent constitutional problems.[96]

The FCC does not bind the legislature to predict and draw risks in advance. The executive is deemed as better equipped branch to assess and adjust respective legal measures.[97] However, the FCC put the political responsibility burden on the legislature branch. That approach is also excepted by the SCOTUS, which mentioned several times that Congress's duty is to make hard choices.

The courts cannot predict whether existing industrial means are harmful for individuals. In that kind of uncertain situation, the FCC considered that the courts had not jurisdiction because there are not legal criteria to assess the case. It is the obligation of the legislature to determine dangers in respective times and make decisions in light of the constitutional requirement. Justice Marshal expressed his opinion in Industrial Union Department case, regarding the risks and dangers: "the

[92] Nigel Foster & Satish Sule, *German Legal System and Laws*, (4th ed. Oxford University Press, 2010) 181-182

[93] Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 2012) 180

[94] United States v. Robel, 389 U.S. 258, 269 (1967) (Justice Brennan concurring)

[95] Kent v. Dulles, 357 U.S. 116, 129 (1958)

[96] Kent v. Dulles, 357 U.S. 116 (1958); Schneider v. Smith 390 U.S. 17 (1968)

[97] Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer & Susanna Mancini, *Comparative Constitutionalism: Cases and Materials*, American Casebook Series (St. Paul, MN: West Academic Publishing, 2016) 293-294

critical problem in cases like the ones at bar is scientific uncertainty… The risk at issue has hardly been shown to be insignificant; indeed future research may reveal that the risk is in fact considerable." The justice emphasized the problem that, even evidences was not necessary to make adequate enquire of risks, Congress did not require the executive to wait until sufficient evidences will be revealed. The justice mentioned it is possible that existing evidence is not enough to find out the "significance" of the consequences, however, "such decisions were not intended to be unreviewable."[98] The justice Marshall unlike the FCC's position, considers that in case of absence clear criteria, the executive must be scrutinized to ensure that he acted within the limits set by Congress. Thus, Kalkar I case stressed that the court had no jurisdiction to substitute the political branches decision while respective criteria did not exist.

Economic Authorization case concerned provision which entitled the Government under Article 38 of the 1958 Constitution, to amend or repeal economic legislation regarding prices and competition, within six months from the time of publishing the enabling *loi*.[99] The understanding of the delegation of legislative powers in France is much broader than in U.S. and Germany. In particular, power of amending or repealing acts of Parliament is not delegable to the executive in U.S. or Germany. Also, Procedure determined under Article 38 of the 1958 Constitution is more complex that mere adopting regulations prescribed by Article 37. For that reason, the Council of State usually reviews dispute regarding division of legislative powers between these branches.

The Constitutional Council stated that Article 38(1) requires the Government "to indicate with precision to Parliament the objective of the measures that it proposes to take, and the areas in which

[98] Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer & Susanna Mancini, *Comparative Constitutionalism: Cases and Materials*, American Casebook Series (St. Paul, MN: West Academic Publishing, 2016) 293

[99] Economic Authorization Case on the Law Authorizing Government to Take Diverse Measures Concerning the Economic and Social Order, Constitutional Council of France, 86-207 DC of 25, 26 June, 1986 available at: Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer & Susanna Mancini, *Comparative Constitutionalism: Cases and Materials*, American Casebook Series (St. Paul, MN: West Academic Publishing, 2016) 296-299

they will intervene."[100] The Conseil constitutionnel controls does not permit a delegation that is not sufficiently specific enough.[101] The Constitutional Council makes restriction on provisions of an enabling law in a sense that the Government cannot withdraw "respecting rules and principles of constitutional value."[102] "Principles of constitutional value" is determined by the Constitutional Council and it refers to the values found in the text of the Preamble of the 1946 Constitution and the 1789 Declaration. These "principles" may justify limits on human rights. The Constitutional Council checks whether any provision of enabling act of Parliament violates rules and principles of constitutional value.[103]

The Constitutional Council reviewed the argument regarding insufficiently precision of terms of the authorization. The Conseil stated that it is the Government's obligation to define precisely the objectives of the authorization that is requested to achieve its programme. This burden of precision standard is on the executive. That approach differs from *Panama Refining Co. v. Ryan (U.S.)* or Kalkar I (Germany) cases. The logic behind this difference is justiciable as in France, the government is initiator and author of the scope and content of the subjected of delegation.

The Conseil indicated that the Government was not authorized to amend or repeal the rules in total. The Conseil specified that the Government had only authority regarding "specific provisions of economic legislation relating to the control of combinations, to competition, and to prices, as well as to the punishment of economic offences" contained in particular *ordonnance* and in particular

[100] Constitutional Council of France, 86-207 DC of 25, 26 June, (1986) &13
[101] Sophie Boyron, *The Constitution of France: A Contextual Analysis*, ((Hart Publishing, Oxford and Portland, Oregon, 2013) 119; The Conseil requires the Government to indicate to Parliament the aim of the delegation, see C cons no 2003-473 DC 26 June 2003
[102] Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer & Susanna Mancini, *Comparative Constitutionalism: Cases and Materials*, American Casebook Series (St. Paul, MN: West Academic Publishing, 2016) 297-298
[103] Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer & Susanna Mancini, *Comparative Constitutionalism: Cases and Materials*, American Casebook Series (St. Paul, MN: West Academic Publishing, 2016) 298

provisions on prices.[104] Therefore, the challenged provision did not violate the 1958 Constitution. Delegating authority to the executive in order to repeal or to amend legislation is an unique exception and differs from the concept of delegation established in the U.S. and Germany.

The SCOTUS struck down the act which authorized the President to "cancel in whole" any items of new spending or any "limited tax benefit and imposed that it was no relied on nondelegation doctrine.[105] The SCOTUS stressed firmly that "the statute authorized the President to amend previously enacted legislation by repealing a portion of it, and that there was "no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."[106] Thus, the Court concluded that the Act violated the U.S. Constitution on the basis of the Article which ordains how a bill becomes a law(Article I, Section 7).[107] Thus, the possibility to empower the executive to make amendments in the legislation is not considered as part of the delegation concept in U.S. and Germany. Comparing those jurisdictions, the logic of the 1958 Constitution differs in a manner that the executive is empower with broad regulatory powers (that powers are discussed in chapter 2.2.).

In France, delegation of legislative powers is related to implementation of the Government's programme. Thus, the Constitutional Council defined that precision criteria is required for "programme" that shall be implemented by the executive under delegated legislation. In *Djibouti Elections* case, the new Barre Government decided to modify the constituencies for the elections of representatives to the Chamber of Deputies by ordonnance and sought a delegation of authority

[104] Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer & Susanna Mancini, *Comparative Constitutionalism: Cases and Materials*, American Casebook Series (St. Paul, MN: West Academic Publishing, 2016) 298

[105] Clinton v. City of New York, 547 U.S. 490, 543-548 (1981)

[106] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* (Boston: Aspen Publishers, 2005) 421-422

[107] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* (Boston: Aspen Publishers, 2005) 422

from parliament.[108] The Conseil interpret the word "programme" in article 38 of the 1958 Constitution narrowly than it is meant in Article 49 as political programme of the Government. "Programme" was defined as a specific policy objective presented at the particular time when it is requested under a delegation of power.[109]

The other requirements were stressed in *Enabling Law on Social Measures* case. The Conseil emphasized that challenged delegation was valid in so far as it did not encroach in an area when the Constitution requires an organic law and did not attempt to relinquish the Government from protecting constitutional requirements such as the right to work.[110]

The FCC tried several tests for checking the delegated legislation:(1) foreseeability; (2) autonomous decision-making; (3) Clarity I; (4) program-Formula; (5) Clarity II.[111] Foreseeability criteria establishes that the content of the executive, order must be predictable, on the basis of enabling law. Autonomous decision-making ordains that the boundaries and goals must be determined by the law-maker, who also decides which issues must be handled in the statute. Clarity I firmly stresses that enabling law must be sufficiently clear. Program-Formula means that when the statute "explicitly provides or one can deduce from the law the 'general program' to be attained by the ordinances".[112] Clarity II is distinguished one which states that explicit content, purpose,

[108] CC decision no. 76-72 DC of 12 Jan. 1977, *Djibouti Elections*, Decision 11 available at**:** John Bell, *The Division of Lawmaking Powers: The Revolution that Never Happened*, (Oxford: Oxford University Press, 1995) 103
[109] John Bell, *The Division of Lawmaking Powers: The Revolution that Never Happened*, (Oxford: Oxford University Press, 1995) 104
[110]John Bell, *The Division of Lawmaking Powers: The Revolution that Never Happened*, (Oxford: Oxford University Press, 1995) 104; CC decision no. 81-134 DC of 5 Jan. 1982, *Enabling Law on Social Measures*, AJDA 1982, 85
[111] Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (New York: Springer, 2012) 262-263
[112] Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (New York: Springer, 2012) 263

and scope is not required to be emanated from the enabling provision itself, but it can be determined by historic interpretation and general principles of statutory interpretation.[113]

Academic scholars criticize decisions on delegating the legislative powers as the courts are considered deferential. The court state standards but does not apply straightforwardly.

John Comer attempted to demonstrate impossibility of precision criteria imposed by the different jurisdictions. He stated: "Chief Justice Marshal used the terms "general principles," "great outlines," "important outlines" to express that part of legislation which, in his opinion, could not be delegated. Later the terms "purpose," "criterion," "general provisions," "general rules," "terms of the statute," "predicate," "theory of the Act," "congressional intention," "purely legislative power," "legal principles that control," "policy of the law," objects of the law," "vital provisions," "general scheme," [and] "primary standard"… have been used to express the same idea."[114]

Industrial Union Department case challenged provision that required the Secretary of Labor to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health."[115] Plurality of the Court decided that "reasonably necessary or appropriate" language was demanded from the executive to determine a "significant risk" before making regulation. Justice Rehnquist expressed his opinion in a manner that makes clear the weakness of the court dealing with the cases dealing delegation of legislative powers. Justice imposed that Congress avoided hard choice which was essential for purposes of the Act and also difficult to make a choice based on the legislative compromise: "But that is the very essence of legislative authority under our system. It is the hard

[113] Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (New York: Springer, 2012) 263

[114] Robert C. Sarvis, *Legislative Delegation and Two Conceptions of the Legislative Power*, Pierce L. Rev. Vol.4, No. 2 (2006) 317/347-348; John P. Comer, *Legislative Functions of National Administrative Authorities* (Columbia U. Press 1927) 124

[115] Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980)

choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in legislative process."[116]

Academic scholars raised different problematic issues regarding the delegation. Delegated legislation is determined by the executive proceedings and therefore it is not debated publicly. The concept of delegation makes question about democracy and accountability.[117] David Schoenbrod in *Power Without Responsibility* challenges constitutionality of delegating legislative powers and produced two arguments against delegation: (1) delegation weakens democratic accountability; (2) threats to liberty. Schoenbrod considers that Congress is happy when delegating law-making powers because legislature transfers blame to the executive if some mechanisms do not work and electors become disappointed for some policies. "Delegation allows legislators to claim credit for the benefits which a regulatory statute promises yet escape the blame for the burdens it will impose, because they do not issue the laws needed to achieve those benefits. The public inevitably must suffer regulatory burdens to realize regulatory benefits, but the laws will come from an agency that legislators can then criticize for imposing excessive burdens on their constituents."[118]

It is considered that in reality delegation of legislative powers is benefit of Parliament to avoid making hard choices: "Legislators enhance their power by delegating: they retain the ability to

[116] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, *Constitutional Law* (Boston: Aspen Publishers, 2005) 421

[117] Gary Lawson, *Delegation and Original Meaning*, Virginia Law Review, Vol.88, No.2 (2002) pp.327/332

[118] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation, (Yale University Press, New Haven and London, 1993) 10

influence events by pressuring agencies, while they shed responsibility for the exercise of power by avoiding public votes on hard choices."[119]

Some academic scholars consider that imposing of nondelegation doctrine by the judiciary solves many constitutional problems: "the charge that no workable standard for judging delegations can be formulated is … false."[120] On the other hand, it is considered that the courts in many cases are deferential and standards imposed in the judgments are not quite workable: "judicial enforcement of the nondelegation doctrine would raise serious problems of judicial competence and would greatly magnify the role of the judiciary in overseeing the operation of modern government. Because the relevant questions are ones of degree, the nondelegation doctrine could not be administered in anything like a rule-bound way, and hence the nondelegation doctrine is likely, in practice, to violate its own aspirations to discretion-free law."[121]

Many academics scholars urged about the benefits of nondelegation doctrine and the necessity that the courts should begin imposing it again. The main principle of the nondelegation doctrine is the discretion of the executive. Nondelegation doctrine itself contains debate whether the conferred discretion is broad. John Manning considers that: "Enforcements of the nondelegation doctrine necessarily reduces to the question whether a statute confers too much discretion."[122]

In every case Parliament shall make fundamental decisions and ancillary matters are left to the executive. That opinion is expressed by many scholars and even by judiciary, when the FCC defined essential matter in the realm of parliamentary competence.

[119] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation, (Yale University Press, New Haven and London, 1993) 20
[120] Gary Lawson, *Delegation and Original Meaning*, Virginia Law Review, Vol. 88, No. 2 (2002) 327/395
[121] Cass R. Sunstein, *Nondelegation Canons*, The University of Chicago Law Review, Vol. 67, No. 2 (2000) 315/321
[122] John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 241-242

The courts do not ensure specific tests to identify when and under what circumstances are protected such essential matters as it is the basic rights? The criteria of precision was used many times, but was not identified requirements for limiting the executive's discretion. There is not ordained any sufficient line of arguments that restricts the executive' power when regulating basic rights. Are there any conditions or substance of the rights which relates only to Parliament's competence? The answer to these questions was partly delivered. Precise and straightforward standards not only ensure protecting human rights or prevents abuse of powers by the executive but also makes Parliament adequately accountable branch.

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