

**THE LACK OF POLITICAL RESPONSIBILITY
OF THE FRENCH PRESIDENT UNDER
THE CONSTITUTION OF 1958
AND THE OLD ARTICLE 68***

**LA AUSENCIA DE RESPONSABILIDAD
POLÍTICA DEL PRESIDENTE DE
FRANCIA EN LA CONSTITUCIÓN DE
1958 Y EL ANTIGUO ARTÍCULO 68**

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* For a good overview, consult <http://www.conseil-constitutionnel.fr/dossier/quarante/q14.htm>; R. Ferretti “La responsabilité du Président de la République”, la Gazette des Communes, 10 décembre 2001.

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ABSTRACT

Since 1962 and except in the political context of cohabitation, the French President has become the First leader of the political system, instead of the Government and the prime minister. However, in regard with article 20, 67 and 68 of the Constitution, the Head of State is still not politically responsible. Until the constitutional revision in February 23, 2007, there was only one exception to this principle, the case of “high treason”. “The President of the Republic is responsible for the acts achieved in the performance of his duties only in the event of high treason », said the old article 68. Not only was the procedure exceptional for the Head of State but also the jurisdiction. He could only have been judged in this context by the High Court of Justice. The Constitutional Council widened the principle of the immunity of the Head of State in a controversial decision in 1999 but the “Cour de Cassation” contradicted the Constitutional Council while returning to the traditional principle of temporary immunity in its major decision Breisacher in 2001. In order to calm down many of the politicians and lawyers, the Chirac candidate advanced in his electoral program of 2002 the idea of the meeting of a Commission to think of the criminal status of the Head of State. The old procedure of “high treason” is nowadays dead; the High Court of Justice too. All that has been changed in February 23, 2007 into a new procedure of “dismissal”, in accordance with the conclusions of the “Avril Commission”.

Key words author: Head of State, Lack of Political Responsibility, High Treason, Immunity, Privilege of Procedure, Privilege of Jurisdiction.

Key words plus: French Presidents, Offenses Against the State Safety, Judicial Process.

RESUMEN

Desde 1962, y con excepción en el aspecto político de la cohabitación, el Presidente de Francia se ha convertido en el primer líder del sistema político en oposición al Gobierno y el Primer Ministro. Sin embargo, en concordancia con el artículo 20, 67 y 68 de la Constitución Política, el presidente no es políticamente responsable. Hasta la revisión constitucional del 23 de febrero del 2007, la única excepción a este principio era el caso de la alta traición. El antiguo artículo 68 rezaba: “El Presidente de la República solo es responsable en el ejercicio de sus funciones por los casos de alta traición”. No solo era el procedimiento excepcional para el Presidente, sino la jurisdicción, por lo tanto en este contexto la Corte Suprema de Justicia era la única que lo podría haber juzgado. En 1999 el Consejo Constitucional amplió dicho principio en una debatida decisión, pero la “Cour de Cassation” revocó el fallo en su decisión Breisacher de 2001 volviendo así al principio tradicional de inmunidad temporal. Con el objetivo de tranquilizar a varios políticos y abogados, Jacques Chirac, el candidato presidencial a las elecciones del 2002, incluyó en su campaña la propuesta de una reunión de la Comisión para replantear el estatus criminal del presidente. Hoy en día el procedimiento de alta traición, al igual que la Corte Suprema de Justicia, fueron cambiados con la introducción de un nuevo procedimiento de “dismissal” 23 de febrero del 2007, en concordancia con las conclusiones de la “Avril Commission”.

Palabras clave autor: Presidente de la República, ausencia de responsabilidad política, alta traición, inmunidad, procedimiento especial, jurisdicción especial.

Palabras clave descriptor: presidentes franceses, delitos contra la seguridad del Estado, función judicial.

Sumario: The principle, The procedure followed before the “High Court of Justice” (“Haute Cour de Justice”), The Civil, Criminal and Political Immunity of the Head of State, References.

(...) We ask again the President of the Republic to keep his word and to enter soon on the agenda of the Parliament this bill relating to the penal status of the Head of State. This text, adopted in the Council of Ministers, only waits to be discussed in this hemicycle! Why does the Government refuse that?!

With less than one year to the French presidential elections, the problem of the lack of political responsibility of the Head of State and the question of the penal status of the French President to which it is linked, reappears. The old snake of the sea raises its head out again... It is submitted that it is impossible to benefit any longer the first leader of the French political system of a quasi absolute immunity.

Not only perhaps the French food (snails, oysters, stuffed duck, “foie gras”...), and the personality of the French, but also the French political system is strange. Theoretically,² one lives in France in a parliamentary regime. Article 20 of the Constitution mentions therefore that “*The Government determines and conducts the policy of the Nation*” (...) “*It is responsible before the Parliament*”.³ And it is because the Government and the prime minister at its head have the power, that they are responsible. In consequence, the President is not politically responsible. As the Head of State, he should have only formal powers.

In theory again, our President has been created by CHARLES DE GAULLE and MICHEL DEBRÉ⁴ as a referee or as an arbitrator, above the Government and the Parliament. The problem is that the French President does not have only formal powers, as opposed to the British Queen. He has got some “*pouvoirs propres*”, which are not countersigned by the prime minister and which are very important. The nomination of the prime minister (article 8.1), the dissolution of Parliament (article 12), the use of the exceptional powers or full powers (article 16), the referendum (article 11) are some examples of the eight “*pouvoirs propres*” which the French President has.

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- 1 CHRISTOPHER CARESCHE, Declaration of March 21, 2006, National Assembly Translated from “(...) *Nous demandons à nouveau au Président de la République de tenir parole et d’inscrire prochainement à l’ordre du jour du Parlement ce projet de loi relatif au statut pénal du Chef de l’Etat. Ce texte adopté en Conseil des Ministres, n’attend plus que d’être discuté dans cet hémicycle! Pourquoi le Gouvernement s’y refuse-t-il?*” Déclaration faite à propos de l’examen de l’exception d’irrecevabilité déposée en application de l’article 91, alinéa 4 du Règlement de l’Assemblée Nationale portant sur l’élection du Président de la République (projet de loi organique relatif à l’élection du Président de la République). Compte-rendu de séance du 21 mars 2006, Assemblée Nationale, 177^{ème} séance.
 - 2 That is to say in the French system, the written Constitution of 1958, the source of the sources or the major source. In that respect, it is completely different from the English principle of the Parliament sovereignty and the primacy of statute law.
 - 3 Translated from article 20 of the Constitution “*Le Gouvernement détermine et conduit la politique de la Nation. (...) Il est responsable devant le Parlement (...)*”.
 - 4 Both are considered as the fathers of the Constitution of 1958.

The other problem is that he has become in practice more than a referee, thanks to the “majority fact” (“phénomène majoritaire”) or to the coincidence of the majorities between the executive and the legislative, since the President is elected directly by the people.⁵ Since 1962 and except in the political context of cohabitation, the French President has become the First leader of the political system, instead of the Government and the prime minister. This is particularly true in his “reserved areas”,⁶ such as Justice, Defence and Foreign Affairs. It is less the Constitution than the practice⁷ which has attored him great powers in these fields and even in the time of cohabitation, the President imposes his choices in these matters in such a way than one speaks of veto powers. The President Mitterrand refused, for instance, to appoint J. Lecanuet as the Minister of Foreign Affairs, F. Léotard as the Minister of Defence and M. Dailly as the Minister of Justice, at the start of the first cohabitation in March 16, 1986.

However the principle remains: the French President is not politically responsible while he is in office, except, said old article 68 of the Constitution, for “high treason” (“haute trahison”). What did it mean exactly?

The principle

The “high treason” could be pronounced by the “High Court of Justice” (“Haute Cour de Justice”) which must not be confused with the English “High Court of Justice”. The French court had a qualified jurisdiction to judge the President, since the constitutional revision of July 27, 1993,⁸ and only in the case of “high treason” in agreement with article 68 of the Constitution.⁹ “The President of the Republic is responsible for the acts achieved in the performance of his duties only in the event of high treason. He can be put under charge only by the two assemblies ruling by an identical vote, an open vote and by the majority of the members composing the chamber; he is judged by the High Court of Justice”.¹⁰

5 It was in 1962, when Charles de Gaulle was looking for a greater popular legitimacy.

6 Translated from the French expression “domaines réservés” ou “pré carrés présidentiels”, used for the first time in November 1959 at the congress of the UNR by J. CHABAN-DELMAS.

7 The intervention of the President in these fields has a double justification; the first one is constitutional (article 5° “(...) he guarantees the integrity of the territory”; article 13 “(...) he appoints soldiers”; art. 15 “(...) he is the chief of the armies”), the other one is practical. In fact, De Gaulle had a very personal interest in these matters and all the other Presidents of the Fifth Republic carry on that way.

8 The “Court of Justice of the Republic” (“Cour de Justice de la République”) is from now on qualified to judge the ministers.

9 Moreover, the French “High Court of Justice” was only due to judge the President in case of “high treason”.

10 Translated from article 68 of the Constitution: “Le Président de la République n’est responsable des actes accomplis dans l’exercice de ses fonctions qu’en cas de haute trahison. Il ne peut être mis en accusation que par les deux assemblées statuant par un vote identique au scrutin public et à la majorité absolue des membres les composant; il est jugé par la Haute Cour de Justice.”

One deduces from this an immunity for the Head of State during the exercise of his functions, except in the event of “*high treason*”. The French President was therefore and in principle politically not responsible, except in the event of “*high treason*”. The acts achieved in the exercise of the presidential functions benefited from, except case of “*high treason*”, an absolute and perpetual immunity.

The procedure followed before the “High Court of Justice” (“Haute Cour de Justice”)

This assumption remained exceptional because it adhered –but it was not the only reason– to a very solemn procedure. The indictment (“*mise en accusation*”) was determined by the members of Parliament, with an absolute majority of the members composing each assembly.¹¹ A commission of investigation (“*commission d’instruction*”) made up of the high-ranking magistrates of the “*Cour de Cassation*”¹² had then to consider if the facts against the President, constituted a serious error of judgement made in the performance of his duties.¹³ If so, the commission could send the President before the “*High Court of Justice*”. The “*High Court of Justice*” could finally judge the Head of State. The Court was made up of twenty four members, twelve deputies elected by their peers and twelve senators elected in the same way. Not only was the procedure exceptional for the Head of State but also the jurisdiction.¹⁴ What is the scope now of this immunity?

The civil, criminal and political immunity of the Head of State

Many questions turn around this immunity.

— From where does this immunity come?

In the early constitutions, one wanted to make Heads of State republican monarchs. The political lack of accountability could then be understood with regard to the English maxim “*The King can do no wrong*”. By this mean the English doctrine recalled that the person of the king was inviolate. It follows from a political lack of accountability conferring penal and civil immunity.

— What is the justification of this immunity?

The idea is that to protect the Head of State is to protect the State itself. In the present Constitution, the French President has “*to assure, by his arbitra-*

11 That is called in French the “*résolution de mise en accusation*”.

12 The equivalent of the House of Lords in its civil or criminal division.

13 One finds certain characters of the Anglo-Saxon procedure of “*impeachment*”, having involved once the dismissal of President Johnson in 1868.

14 It is called in French, a “*privilège de juridiction*”.

ment, the normal functioning of public powers as well as the continuity of the State” (article 5° of the Constitution).¹⁵

Moreover, the responsibility is, in any event, endorsed by the prime minister by means of countersignature. In accordance with the Constitution, the prime minister has to countersign the presidential decrees which are taken in the Council of Ministers.¹⁶ Responsibility can finally apply to the prime minister rather than to the President, which does not mean that there is no need for presidential responsibility because the French Head of State has got his own powers – the “*pouvoirs propres*” – which are not precisely countersigned, as we saw before.

In addition, the immunity should preserve the principle of the separation of powers.

— Is it an absolute immunity?

It appears not. All the republican Constitutions settled limits to the lack of accountability of the Head of State. (Austria; Germany; Greece; Italy; Portugal...) In France, the assumption of the “*high treason*” provision appeared in 1848 under the Second Republic¹⁷ and then was developed by the Fourth Republic and by the Fifth Republic.

— Can “*high treason*” be defined?

To give a definition of “*high treason*” is not easy. “*Treason*” exists in French criminal law, but not “*high treason*”. The constitutional history agrees to say, not without inaccuracy however, that “*high treason*” is “*a serious failure of the duties of the presidential role and the respect of the Constitution, that is to say an attack on the higher interests of the country*”. Members of the French doctrine such as G. BURDEAU, L. HAMON and M. TROPER write that “*it is a serious and deliberate violation in circumstances and for intentions which would not have anything to do with the conditions settled by the Constitution*”.¹⁸ The

15 Article 5° of the 1958 Constitution: “*Le Président de la République (...) assure, par son arbitrage, le fonctionnement régulier des pouvoirs publics ainsi que la continuité de l’Etat. Il est le garant de l’indépendance nationale, de l’intégrité du territoire et du respect des traités.*”

16 They are called in the French political system “*décrets délibérés en conseil des Ministres*”.

17 It was written in French like this: “*Toute mesure par laquelle le Président de la République dissout l’Assemblée Nationale, la proroge, ou met obstacle à l’exercice de son mandat, est un crime de haute trahison*”. Article 68 de la Constitution du 4 novembre 1848. Translation: “*All measure by which the President pronounces the dissolution of the National Assembly, prorogues it, or put an end to its mandate, is a crime of high treason*”.

18 Translated from the French “*Une violation à la fois grave et délibérée (...) des circonstances et pour poursuivre des objectifs qui n’auraient rien à voir avec les conditions fixées par la Constitution.*” G. BURDEAU, L. HAMON & M. TROPER “*Droit constitutionnel et Institutions politiques*”, L.G.D.J., 2005, p. 276.

refusal of promulgation of a statute law (article 10 of the Constitution) and the use of the full powers (article 16) in order to organize a putsch might be therefore considered as cases of “*high treason*”.

Finally, in a parliamentary system, one has to distinguish between the presidential acts made during the performance of his duties and which, to be liable to prosecution and judged by the High Court of Justice, were to be constitutive of acts of “*high treason*”, and the other acts linked to his presidential functions which have been of total and absolute immunity.¹⁹ For the acts made apart from his functions, the ordinary law applies and also the ordinary jurisdictions. But the “*The Constitutional Council*” (“*Conseil Constitutionnel*”)²⁰ in its Decision of January 22, 1999 came to revise this diagram and to widen the immunity of the Head of State into a *total immunity*.

The “*Constitutional Council*” widened in an obiter dictum (part of a decision which is not necessary to answer the question posed, in fact the ratification of the Treaty creating the International Criminal Court and its compatibility with the French Constitution) the principle of the immunity of the Head of State. It thus declared, “*throughout its function, its criminal responsibility can be brought only before the High Court of Justice*”. The “*Council*” has meant, then, that the “*High Court of Justice*” was competent for the case of “*high treason*” - which was traditional - but also for all other cases –which was not traditional–. In another word, the “*High Court of Justice*” was competent even for cases, which were not constitutive of “*high treason*”. That was the first widening. The “*Constitutional Council*” concluded finally that the “*crimes and offences which he could have made apart from the performance of his duties would also concern the High Court of Justice*”. The second assumption of the traditional diagram was thus called into question. The “*High Court of Justice*” was responsible for acts made even apart from his functions, said the “*Constitutional Council*” and that represented the second widening. All that amounted to subjecting the Head of State to a “*jurisdiction*” of exception, and this was without reservation.

Thus, fictitious employment of the town hall of Paris and “*HLM of Paris*” cases, discovered and complained against J. Chirac while he was not yet President but Mayor of the capital, would be raised in front of the “*High Court of*

19 That also means in the parliamentary tradition that while the President is in office, he could be sued before ordinary judges and judged under common law for those acts which have nothing to do with presidential functions.

20 It was a new institution in 1958 settled to protect the executive against the legislative, to control the regularity of national elections and to evaluate the conformity of certain norms with regard to the major source, the Constitution.

Justice”, would follow the procedure of old article 68 and would escape the ordinary law. This judicial case orchestrated by the judge E. Halphen, clarified a fraud organized throughout contracts of public markets. Strong suspicions focused on the political destination of the occult sums both collected by the promoter J. Cl. Méry or for fictitious employments. But before the latter death, he had always denied to have profited from an illegal financing of the RPR, the party of J. Chirac at the time. It was necessary to wait for a video included in his testimony and recorded in September 22 and 23, 2000 in the newspaper *Le Monde* to obtain his confession. “*It was only under the orders of Mr Chirac that we worked*”.²¹

— What can one think of this decision?

While sticking to the spirit of the Constitution, the “*Constitutional Council*” perhaps was right. To shake the presidential institution amounts to shaking the State and the political regime. While sticking to the letter of the Constitution or to the strict reading of old article 68, the “*Constitutional Council*” was wrong. The President, apart from his official functions, should become again an ordinary citizen. A large fringe of lawyers and academics has been therefore shocked by the decision of the “*Constitutional Council*”.²²

— Is the decision of the “*Constitutional Council*” however superior?

Article 62 of the Constitution mentions that: “*the decisions of the Constitutional Council bind public powers and all administrative and jurisdictional authorities*”.²³ The problem remains to know what is a “*jurisdictional authority*”. Is it a “*court*” or a “*jurisdiction*”? It is a court but also a jurisdiction... Those who wrote the Constitution should have been more clear on that point by using the expression “*court*”... On one hand, the courts in general and the “*Cour de Cassation*” in particular are probably bound by the decisions of the “*Constitutional Council*”. But on the other hand, the “*Cour de Cassation*” is a sovereign jurisdiction, as the “*Constitutional Council*” is. Therefore, the “*Cour de Cassation*” cannot be bound by the decisions of the “*Constitutional Council*”. The “*Cour de Cassation*” ascertained that in its very important decision “*Breisacher*” of October 10, 2001. The “*Cour de Cassation*” accepted to be bound only by the decision on the text –the Treaty on the International Criminal Court– but not on the obiter dictum –the criminal status of the

21 Translated from the French: “*C’était uniquement sous les ordres de M. Chirac que nous travaillions*”.

22 One of the greatest public law teacher in France, D. ROUSSEAU, thus declared that: “*The decision of the Constitutional Council was judicially possible; it was not the only one possible; it is not judicially speaking very well motivated*”. Translated from: “*La décision du Conseil Constitutionnel était juridiquement possible; elle n’était pas juridiquement la seule possible; elle n’est pas juridiquement la mieux argumentée*”. Pouvoirs n° 92, p. 72.

23 Article 62 de la Constitution “*Les décisions du Conseil Constitutionnel s’imposent aux pouvoirs publics et à toutes les autorités administratives et juridictionnelles*”.

Head of State—. It is what is called in French law, “*l’autorité relative de chose jugée*” or “*une interprétation restrictive de l’autorité de chose jugée*”. On top of this, the two decisions did not have the same scope. The “*Constitutional Council*” had to say if the French President could be brought in front of the International Criminal Court in case of specific crimes; the “*Cour de Cassation*” had to define the criminal status of the French President and whether he could be heard, therefore, as a witness and be sued for any fault committed outside of his functions, in the case of the fictitious employment of the town hall of Paris. The “*Cour de Cassation*” in a very solemn formation (“*Plenary Assembly*”), returned to a more traditional interpretation of the immunity of the French Head of State in a parliamentary regime in its decision *Breisacher*. As a result, it thus called into question the decision of the “*Constitutional Council*”. The “*Cour de Cassation*” contradicted the “*Constitutional Council*” while returning to the traditional principle of temporary immunity. During his functions, the “*Cour de Cassation*” agreed on a criminal inviolability of the French Head of State. He couldn’t be brought, for instance, as a witness or couldn’t be put into indictment (“*mis en examen*”). Before or/and after his functions, the “*High Court of Justice*” was no longer competent. The President could be proceeded against under ordinary law and in front of ordinary jurisdictions. Moreover, the “*Cour de Cassation*”, in the fictitious employment of the town hall of Paris, suspended the prescription of public action, the effluxion of fault through time. It was very important to do so because usually both in civil and criminal French law, faults then have a duration.²⁴ Moreover when one thinks of the term of the President mandate, seven years, and since 2000,²⁵ five years at least, because he can be re-elected as many times as he wants, it was necessary for the “*Cour de Cassation*” to suspend the prescription of the faults. It was also important when one takes into account that the prescription of a “*fine*” in French law (“*contravention*”) is one year, of an “*offence*” or “*crime*” (“*délit*”) is three years, and of a “*murder*” (“*crime*”) is ten.²⁶

In order to calm down many of the politicians and lawyers, the Chirac candidate advanced in his electoral program of 2002 the idea of the meeting of a Commission to think of the criminal status of the Head of State. This “*Commission Avril*” (of the name of its President, Pierre Avril) returned its conclusions on December 12, 2002, and following the decision of the “*Cour*

24 It is known in French law as “*la prescription des fautes*”. One believes that time erases faults and that everything fades with time.

25 Since the constitutional revision of the presidential mandate.

26 For comments on the decision *Breisacher*, see RDP, n° special, “*La VIème République?*” 1/2, 2002. For comments on the controversial article 68, see O. CAMY “*La controverse de l’article 68. Aspects théologiques*”, RDP 2001, p. 811.

de Cassation”, recommended an evolution of the status towards a “dismissal” from office (in French, “*destitution*”). It is necessary to be very careful with the “*destitution*” and not to confuse it with the “*impeachment*”. The Commission would make it possible, in fact, to detach the criminal aspect of the responsibility for the Head of State and to treat it from now on differently to the political responsibility. A project of constitutional revision, mainly inspired by the conclusions of the “*Avril Commission*”, had been adopted by the Council of Ministers in July 2003, but had never been put on the agenda of the Parliament very soon after... in spite of the solemn declarations of both the President J. Chirac and his prime ministers J. P. Raffarin declared in July 15, 2004, that “(...) *It is the intention of the Government, as the President has asked, to put on the agenda of the National Assembly this bill*”²⁷ and D. de Villepin added in March 20 of 2006, “*this commitment would be raised*”,²⁸ It is only in February 23, 2007, that the constitutional revision was adopted.²⁹ The old procedure of “*high treason*” is dead; the “*High Court of Justice*” too. All that has been changed into a new procedure of “*dismissal*”, in accordance with the conclusions of the “*Avril Commission*”.

27 Translated from: “(...) *qu’il est bien dans les intentions du Gouvernement, comme le Président de la République l’a demandé, d’inscrire à l’ordre du jour de l’Assemblée Nationale ce texte*”. Réponse à une lettre de J.M. Ayrault, 15 juillet 2004.

28 Translated from: “*Cet engagement serait tenu*”. Déclaration faite par l’intermédiaire d’un de ses conseillers et publiée dans *Libération* le 21 mars 2006.

29 See P. AUVERT “La réforme de la responsabilité du Président de la République”, RDP, n° 2-2007; F. PACOUD “Le statut du Président de la République issu de la révision constitutionnelle du 23 février 2007”, *Regards sur l’Actualité*, n° 333; M. DE CAZALS “La Vème République face à l’instauration d’une destitution politique inédite du Président de la République-Retour sur la révision du titre IX de la Constitution du 4 octobre 1958”, RFDC, 71, 2007.

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