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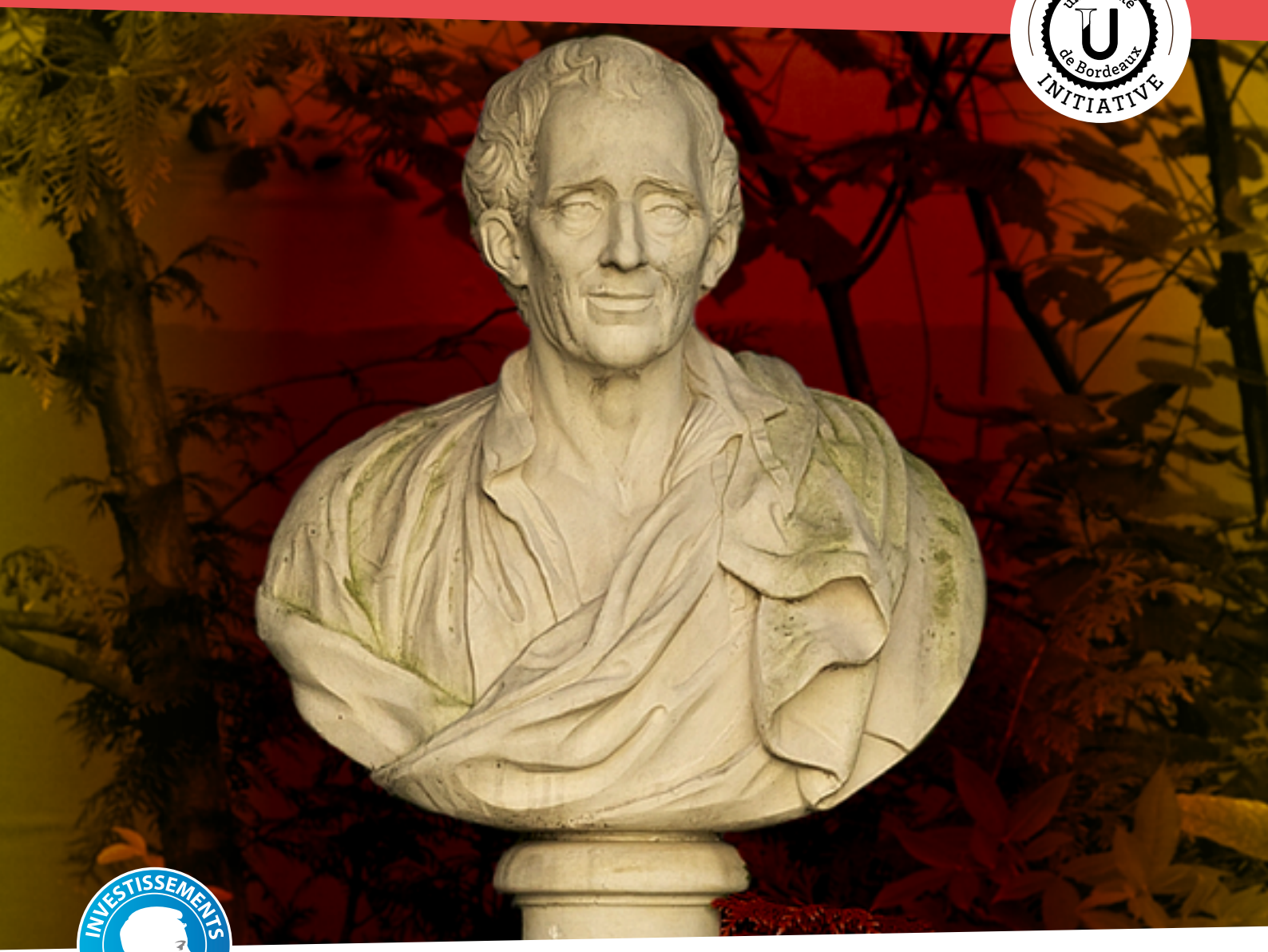

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# Case commentary: Decision n°2014-703 DC of 19 November 2014 – Organic Law implementing Article 68 of the Constitution

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The Constitutional Council decision on the Organic Law implementing Article 68 of the Constitution (1) was long-awaited. It was supposed to be the last piece in the puzzle that is the rules governing the President's liability, the reform of which was essential following the jurisdictional and doctrinal controversy that emerged during Jacques Chirac's seven-year term of office.

The object of the controversy related to Article 68 of the Constitution, the first paragraph of which consists of two sentences. Reading them "together" or "separately" was the foundation of the divergence that pitted the Constitutional Council against the Court of Cassation (2). The issue at stake was of capital importance: either they were to be read as "an inextricable whole" (3), whereby the Head of State would be criminally and civilly liable before ordinary courts for acts not related to his role as President and, *a fortiori*, any such prior acts; or they were to be read "separately", and the Head of State could only be tried, regardless of the political, criminal or civil nature of his actions, for "high treason" by a special court of 24 members in equal number from among their ranks by the National Assembly and the Senate: the *Haute Cour de Justice*. In 1999, reviewing the Treaty establishing the International Criminal Court (4), the Constitutional Council took a separatist approach; the Court of Cassation, in 2001 (5), hearing an appeal against the decision of the Paris Court of Appeal confirming that the examining magistrate had no jurisdiction to question Jacques Chirac as a witness to facts arising prior to his presidential term of office when he was Mayor of Paris, opted for a unitary reading. The latter decision did not, for all that, recognize Chirac as "an ordinary citizen". Admittedly, it was less protective than that of the Constitutional Council in that it did not grant the Head of State jurisdictional privilege (i.e. the *Haute Cour de Justice* for "high treason") during his term(s) of office. Nevertheless, he would not be completely powerless, because the Court of Cassation granted the benefit of jurisdictional immunity during his term, offset by the suspension of limitation and prescription periods until the end of his term of office.

Although both decisions result in the same "common solution" (6), further clarification was required. In 2002, a commission chaired by Pierre Avril was entrusted by President Chirac – who had been re-elected for a second five-year term – with the task of reflecting on the criminal status of the Head of State. The Avril Report (7) recommended an amendment to the Constitution which was not to confuse the judicial and political rationales. This was only implemented on 23 February 2007: Congress confirmed and extended the decision of the Court of Cassation. Articles 67 and 68 forming Title IX of the Constitution were then completely overhauled.

Article 67 grants the Head of State permanent functional immunity as well as temporary civil and criminal immunity. On the basis of the former, even after the end of his term of office, the President is not liable for acts he may have committed in that capacity, subject to two exceptions: firstly, his being found criminally liable by the International Criminal Court, as provided under

Article 53-2 ; and secondly, as provided under Article 68, his removal from office during the term thereof on any grounds other than a breach of his duties patently incompatible with his continuing in office, pronounced by Parliament sitting as the High Court. On the basis of the second exception, the Head of State shall not be required to testify before any French court of law or administrative authority and shall not be the object of any civil proceedings, nor of any preferring of charges, prosecution or investigatory measures. However, on expiry of a period of one month following the transfer of presidential functions, any proceedings and authorities may resume without fear of limitation or prescription, those periods being suspended.

The latter article abolishes both the concept of "high treason", dating back to 1875 (8), which was deemed too imprecise, outdated and ambiguous, and the "*Haute Cour de Justice*" (High Court of Justice, hereinafter referred to as 'High Court'), which had emerged for the first time in 1848 (9), because its political composition did not correspond to its name. This provision, which constitutes an infringement "of the President's prerogatives and the principle of separation of powers" (10), establishes the Court's political responsibility and the procedure for removing the President from office. The first paragraph provides that the President may be removed by Parliament sitting as the High Court, or 577 deputies and 348 senators, in the event of "*a breach of his duties patently incompatible with his continuing in office*" without this expression being more explicit; the other paragraphs set strict procedural rules intended to prevent any deviations. Firstly, timeframes are laid down: once the proposal to convene the High Court has been adopted by one or other of the assemblies, the second has 15 days in which to decide; once convened, the High Court, presided over by the Speaker of the National Assembly, then has one month in which to decide by secret ballot. Next, voting procedures are established: all decisions are taken by a two-thirds majority of the members of the parliamentary body; any delegation of voting rights is prohibited; and only those votes in favour of convening the High Court or removing the President from office are listed. As matters stand (11), Article 68 is not applicable while no provision is made for the conditions under which the debate – unprecedented under the Fifth Republic – can take place between the President and parliamentarians, or for those governing the exercise of the Head of State's right to a defence. To this end, the constituent power entrusts the task of determining the conditions for the application of the Article to an organic law, which itself must compulsorily be referred to the Constitutional Council in the knowledge that, pursuant to Article 61 paragraph 1 and Article 46 paragraph 5, laws of this nature "*shall not be promulgated until the Constitutional Council has declared their conformity with the Constitution*".

So the last piece of the puzzle that is the decision of the Constitutional Council was expected as it ought to have brought to a conclusion a work consisting in three different layers: constitution-organic law-decision of the Constitutional Council. It was also expected because the Organic Law was so long-awaited. The Organic Law implementing Article 68 of the Constitution was only adopted on 22 November 2014, four years after the Bill was originally tabled before the National Assembly on 22 December 2010, seven years after the amendment of the constitutional provision on 23 February 2007, twelve years after the "additional organic items" (12) put forwards by the Avril Report published on 10 December 2002, and fifteen years after the decision handed down by the Constitutional Council on the International Criminal Court.

After all the waiting which no judicial mechanism can guard against, disappointment prevailed. The Council Decision of 19 November 2014 was not to be the final piece of the rules governing the President's liability. Moreover, it appeared incomplete and excessive. The President's

temporary immunity in criminal and civil matters is now considered overly protective, hence the Jospin Commission's initiatives to amend Article 67 (13) followed by a draft constitutional law (14), doomed from the outset owing to the lack of a socialist majority in the Senate. The issue of legal actions brought by the Head of State during his term of office (15) frequently cropped up during Nicolas Sarkozy's term, revealing a Constitution that takes into account the President's status in terms of his "defensive" rather than "offensive" position. Above all, following the decision of 19 November 2014, the removal of the President may be imposed by the High Court. Owing to an omission (III) on the part of the legislature, the Constitutional Council made the application of Article 68 subject to the adoption of an additional piece of legislation: the High Court regulations. However, the current obstacles to the implementation of this procedure are not the only source of disappointment. While confirmation (I) of the political nature of the procedure and the non-judicial nature of the High Court is welcome, the decision handed down by the Constitutional Council – despite the four provisions that it struck down and the three "interpretive reservations" formulated – has barely lifted the restrictions on the mechanism as it was conceived, which still gives "the impression of a long road enclosed within strict timeframes" (16), thus favouring the protection afforded to the President (II).

## I- Confirmation

The Jospin Commission deemed it "*necessary to affirm the exclusively political nature of the procedure*" (17), lifting the ambiguity resulting, not from the intentions of the constituent power, but rather from Article 68 itself. To this end, it argued in favour of a name change for the body responsible for removing the President, preferring one contained in Articles 18 and 89. It would no longer be called "High Court" but rather "Congress".

The legislature also followed that rationale. An Ordinance of 2 January 1959 relating to the High Court of Justice maintained the ambiguity as to the political or criminal nature of the proceedings. All use of judicial and criminal terminology has been banished from the organic Law.

Without having the power to change the name, the Council upheld the approach taken. Any doubt as to the judicial and criminal nature of the proceedings was set aside when the Council affirmed that, apart from the International Criminal Court, "*the President of the Republic shall not be liable before any court for acts performed in that capacity; that the High Court (…) shall not constitute a court tasked with judging the President for offences committed by him in that capacity, but rather a parliamentary assembly with jurisdiction to decide on his removal from office in the event of a breach of his duties patently incompatible with his continuing in office*" (18). A two-fold conclusion can be drawn: the "High Court" is not a court but a parliamentary assembly; "*a breach of his duties patently incompatible with his continuing in office*" is not a crime but an act for which the President's – political, not legal – liability may be incurred. The procedure introduced by Article 68 is thus political and parliamentary in nature.

Such details are not without consequences. Firstly, as regards its political nature, removal from office is neither "*a challenge brought on the basis of civil rights and obligations"* nor "*a criminal charge*". The High Court therefore does not fall within the scope of Article 6 ECHR (19). Secondly, its parliamentary nature: "*the requirement of clarity and sincerity in parliamentary debate*" (20) applies to the procedure and, more specifically, to the proceedings before the High Court, not to mention the fact that no QPC (*questions prioritaires de constitutionnalité*) can be brought before it, as it is not a court of law (21).

This confirmation by the constitutional court – whose title of "Council" endures to this day – is welcome as it compensates for the misleading name of "High Court".

### II– Protection

By affirming, in its initial recitals, that it "*could not allow infringements to the prerogatives of the President of the Republic and the principle of separation of powers other than those expressly provided*" (22) under Article 68, the Council warned that it would protect the Head of State against excesses or abuses on the part of the organic legislature. However, the task of protecting the President against the Council itself was less obvious.

#### Firstly, the protection of parliamentary prerogatives.

First, any instigation of the procedure is subject to the admissibility of the draft resolution resulting in the High Court being convened. The organic legislature instructs the Bureau of the assembly with which the draft resolution was initially filed, to examine the same before it is transmitted to the relevant assembly's *commission des lois* (law commission). Three conditions have been set: the draft resolution must be accompanied by the reasons behind it; it must be signed by one-tenth of the members of the relevant assembly; a parliamentarian may not sign more than one resolution over the course of a given presidential term of office. The Council considered this too restrictive a system. While it considered that parliamentarians do not have an "*individual right to propose that the High Court be convened*" (23) – thus validating the second condition – by contrast, the third condition is "so sweeping as to ignore the scope" (24) of Article 68. Excess or abuse, that limitation of the rights of parliamentarians by the legislature, was thus struck down.

The Council then reconciled the requirements of Article 68 – including the speed of the procedure – with the parliamentarians' control over their work. On the one hand, it ensured that the procedure established by the Organic Law would be carried out "*without prejudice to the provisions of Article 48*". For this purpose, a distinction was made between the first and second assemblies, on condition that the proposal be adopted by the first and then immediately transmitted to the second. Thus, unlike the second, the inclusion of the draft resolution on the first assembly's agenda no later than the thirteenth day after it is tabled, and the vote thereon by no later than the fifteenth day, are no longer automatic. Consequently, there is no requirement that the law commission give its conclusions as to the substantive basis of the proposal or even examine it, or that the first assembly vote on it. Furthermore, the Council ensured that the procedure did not contravene Articles 28 and 29 of the Constitution on Parliamentary sessions. The constituent power made no provision for convening the assemblies, *ipso jure* or specifically to this end, as provided under Articles 16 and 20. The organic legislature is not competent to institute them. However, a default solution had to be found for scenarios (either out of session or at the very end of a session) involving the tabling of a draft resolution or its adoption by the first assembly. Refusing to prohibit the instigation of the procedure during the period preceding the end of the ordinary session, the choice – upheld by the Council – was settled on the inclusion of the draft resolution in the agenda of the assembly concerned at the latest on the first day of the next ordinary session. This solution has a double merit: it does not halt the procedure where the end of the ordinary session is an obstacle, whilst leaving the door open for a special session. However, the second option will depend on presidential good will, the Decree convening Parliament falling within the remit of the President's discretionary power under Article 30.

Finally, the Council ensured the clarity and sincerity of parliamentary debates that would take place in the High Court. It struck down the provision limiting them to a period of 48 hours. That period may be extended, provided that the High Court respects the timeframe of one month from the day on which the decision is made to convene the High Court to rule on the President's removal from office. Similarly the Council ensured that the High Court would have the information necessary for its mission. It therefore ensured that the work of the *ad hoc* commission responsible for gathering that information would not be limited to a period of fifteen days, after which it would have to submit its public report. Its work will therefore continue during the debates between parliamentarians and the President.

Next, the protection of the Head of State.
Firstly, the protection provided by the Council had been anticipated by the legislature. The *ad hoc* commission interceding following the vote by each of the assemblies on the draft resolution has only limited powers with regard to the Head of State. Indeed, it has the same powers as commissions of inquiry, derived from sections II to IV of Article 6 of the Ordinance of 17 November 1958 on the functioning of parliamentary assemblies, except where it involves the President owing to the limits set by the second paragraph of Article 67 of the Constitution. On that basis but also on that of the principle of separation of powers, the Council prohibited the *ad hoc* commission from using its powers in order to reduce the President's speaking time, or that of his representative or the person assisting him when the commission hears them. The initiative to be heard or represented is the President's alone. The advantage: no *contrainte par corps* (enforcement by committal) may be declared against him. The downside: the removal from office may be pronounced without the Head of State being heard or represented before the *ad hoc* commission or the High Court.

Next, the Council examined the conditions under which the President may defend himself before the *ad hoc* commission or the High Court. There is no obstacle to his being represented or assisted by another person. This possibility is welcome, bearing in mind that during the procedure, he remains the President of the Republic. However, the Council rejected the Prime Minister's participation in proceedings before the High Court. Not being provided under Article 68, his presence would have been incongruous under "normal" circumstances as it would in a context of political cohabitation.

Lastly, the protection afforded to the President is strengthened overall, through the compulsory disclosure of the report prepared by the *ad hoc* commission on the one hand, thus ensuring that the necessary parliamentary work be beyond reproach; and, on the other hand, through the sanction resulting from the failure to comply with deadlines, i.e. either the inadmissibility or lapse of the draft resolution, or the removal of the matter from the High Court.

### III. Omission

Two types of omission can be distinguished: those partly remedied by the Council and those that went unmentioned.

Regarding the former, these result from a choice made by the legislature: to entrust the Bureau of the High Court with the power to organise the work of the High Court. But this choice is inconsistent with the principle of separation of powers and the requirement of clarity and sincerity of the debates. Instead of decisions on a case-by-case basis, the Constitutional Council required

the adoption of regulations for the High Court laying down "*rules for proceedings before the High Court which were not provided by the organic legislature*" (25), the information-gathering procedures for the *ad hoc* commission (26), and conditions for speaking time allocated to the President and members of the High Court within that place (27). This position has the disadvantage that it requires the adoption of additional legislation. While this omission is not remedied, the debates before the High Court cannot be opened (28) and the President cannot be removed from office. This position mainly has advantages: assuming that this omission be remedied by a text other than the Organic Law, the Council does not compel the legislature to get back down to work. Moreover, through this, the Council ensures the constitutionality of future provisions knowing that the regulations for the High Court are subject to examination by the Constitutional Council under Article 61 of the Constitution (29).

As regards the latter, these are diverse. They concern, first of all, the grounds for triggering the mechanism under Article 68: "*the breach of his duties patently incompatible with the exercise of his mandate*". Neither the Organic Law nor the Council defines this concept. Only the Avril Report elaborates on this point. The apparent incompatibility with the dignity of the office would be the sole criterion (30). The better to illustrate this, two categories of examples are cited: the first is "*the frequently mentioned cases of murder or other serious crime or other conduct contrary to the dignity of the office*" (31); the second is the "*clear misuse of constitutional prerogatives leading to deadlock between institutions*" (32) which leads to a partial list of presidential acts that could be qualified, under the Fifth Republic, as violations of the Constitution (33). According to the Avril Report, parliamentarians should debate the question of whether the mission derived from Article 5 - regular functioning of government and continuity of the state - has been jeopardised by the President's behaviour (34). In any event, the interpretation given by parliamentarians, at all stages of the procedure, will be decisive as demonstrated by the Icelandic example where the Parliament convened the High Court for the first time, sanctioning ministers in cases of serious misconduct in the performance of their duties. Thus the former Prime Minister of Iceland, Geir H. Haarde, was indicted on one hand for failure to take measures likely to exclude or mitigate the risk of an imminent banking crisis affecting the country's fate and, on the other hand, for non-compliance with constitutional provisions on ministerial meetings, for which he was convicted (35).

Other omissions then concern the powers of the President during or after the procedure. According to the Council, it "*could not allow infringements to the prerogatives of the President of the Republic (...) other than those expressly provided by*" (36) Article 68. It follows that the Head of State retains his discretion to dissolve the National Assembly. He may therefore do so as soon as a draft resolution is tabled to convene the High Court. Similarly, not having provided the same, while the removal from office does not concern a Head of State service a second consecutive term, there is nothing to prevent the ousted president from standing at the next presidential elections and being re-elected. For parliamentarians, the greatest concern with the mechanism under Article 68 remains the fact that they could be overruled by the people.

Consequently, the High Court no longer emerges as the long-awaited "safety valve" (37). However, it would be even worse if, like any former incumbent, a President removed from office were to decide to sit on the Constitutional Council. Responsible for ensuring compliance with the Constitution, the Council could then count among its members, a "sage" who was relieved of his presidential duties for having violated that same Constitution.

## Notes

(1) Cons. const., 19 Nov 2014, n°2014-703 DC, *JORF*, n°272, 25 Nov. 2014, p. 19698 ; A. Levade, « La procédure de destitution du président de la République enfin applicable…Enfin presque », *JCP*, 15 Dec. 2014, n°51, 1299 ; M. Verpeaux, « La destitution du président de la République peut être prononcée ! », *JCPA*, 1 Dec. 2014, n°48, 2335 ; F. Savonitto, « Un Président enfin responsable politiquement. Enfin presque… », *Constitutions*, n°4, 2014, p. 450.

(2) See D. Chagnollaud, « La Cour de cassation et la responsabilité pénale du Chef de l'Etat ou les dominos constitutionnels », *RDP*, 2001, n°6, p. 1613; X. Pretot, « Quand la Cour de Cassation donne une leçon de droit au Conseil constitutionnel. A propos de la responsabilité pénale du Président de la République », *RDP*, 2001, n°6, p. 1625; « Dossier spécial : Statut pénal du Chef de l'Etat », *RDP*, 2003, n°1, p. 53.

(3) G. Carcassonne, « Le Président de la République française et le juge pénal », *in Droit et politique à la croisée des cultures. Mélanges Philippe Ardant*, Paris, LGDJ, 1999, p. 275.

(4) Cons. const., 22 Jan. 1999, n°98-408 DC, *Rec.* p. 29.

(5) Cass., Plén., 10 Oct. 2001, *M. Michel Breisacher*, n°481.

(6) D. Chagnollaud, « La Cour de cassation et la responsabilité pénale du Chef de l'Etat ou les dominos constitutionnels », *loc. cit.*, p. 1620.

(7) *Rapport de la Commission de réflexion sur le statut pénal du Président de la République*, La Documentation française, 2003, 103 p.

(8) *Loi constitutionnelle du 25 février 1875 relative à l'organisation des pouvoirs publics* (Constitutional Law of 25 February 1875 on government organisation), Art. 6

(9) Art. 100 of the Constitution of the French Republic, 4 November 1958.

(10) Cons. const., 19 Nov. 2014, n°2014-703 DC, Recital 8.

(11) O. Pluen, « L'inapplicabilité du nouveau régime de responsabilité du président de la République », *RDP*, 2009, p. 1402.

(12) *Rapport de la Commission de réflexion sur le statut pénal du Président de la République*, *op. cit.*, p. 49-51.

(13) Commission de rénovation et de déontologie de la vie publique, *Pour un renouveau démocratique*, La Documentation française, 2012, p. 66-75.

(14) *Projet de loi constitutionnelle relatif à la responsabilité juridictionnelle du Président de la République et des membres du Gouvernement* (Constitutional Bill on the judicial liability of the President of the Republic and of members of the Government), n°816, lodged with the Speaker of the National Assembly on 14 March 2013.

(15) J. Martinez, « L'action en justice du président de la République : un citoyen comme un autre ? », *RFDC*, 2014, n°99, p. 553.

(16) A. Anziani, *Séance du Sénat*, 21 Oct. 2014.

(17) Commission de rénovation et de déontologie de la vie publique, *Pour un renouveau démocratique*, *op. cit.*, p. 70.

(18) Recital 5.

(19) ECHR, *Paksas v Lithuania*, [GC], Application n°34932/04, 6 January 2011.

(20) Recital 6.

(21) Art. 61-1 of the Constitution.

(22) Recital 8.

(23) Recital 11.

(24) Recital 12.

(25) Recital 25.

(26) Recital 35.

(27) Recital 37.
(28) Recital 41.
(29) Recital 25.
(30) *Rapport de la Commission de réflexion sur le statut pénal du Président de la République*, *op. cit.*, p. 8.
(31) *Ibid.*, p. 36.
(32) *Ibid.*, p. 36.
(33) F. Savonitto, *Les discours constitutionnels sur la « violation de la Constitution » sous la V^e^ République*, LGDJ-Lextenso éditions, t. 141, 2013, p. 316-321.
(34) *Rapport de la Commission de réflexion sur le statut pénal du Président de la République*, *op. cit.*, p. 35-36.
(35) "*In the result, the Court (…) found him guilty (by 9 to 6 judges) on the more formal charge of breaking the constitution by not placing the risk of a banking crisis on the agenda of formal cabinet meetings*" – Venice Commission, *Report on the Relationship between Political and Criminal Ministerial Responsibility*, 11 March 2013, Study n°683/2012, CDL-AD(2013)001, p. 14
(36) Recital 8.
(37) *Rapport de la Commission de réflexion sur le statut pénal du Président de la République*, *op. cit.*, p. 35.