

## Constitutional law

### 1- French presidential election: Nicolas Sarkozy's financial defeat

If every cloud has a silver lining, Nicolas Sarkozy is currently looking for it. May 2012, after a fierce battle to win the French presidential election, the socialist François Hollande finally succeeded his political opponent Nicolas Sarkozy. Today, French people are still saying that this battle was less a victory for Hollande than a vote of sanction against Nicolas Sarkozy. But the defeat might not just have ended there for the former French President and his party: the “UMP” (Union for a Popular Movement).

In 1990 was created in France a commission to monitor the election financing ([the CNCCFP](#)). The decision of this commission gives a right to be refund for the several amounts spent by the party for the election. In January 2013, the Commission published its report on the last 2012 presidential election. Nicolas Sarkozy was the only candidate to oppose the decision of the commission before the *Conseil Constitutionnel* – as article 3 of [the 1962 law](#) on the direct, universal suffrage for the French presidential election mentioned it. Nicolas Sarkozy's complain forced the commission to keep its decision secret until the last judgment of the French *Conseil Constitutionnel*.

On the fourth of July 2013, the French *Conseil Constitutionnel* confirmed the decision of the commission in condemning Nicolas Sarkozy. The wise men – as the members of the Council are called in France – declared that Sarkozy's campaign accounts were false and could be disapproved. Approval gives the candidate and his party – only if he gets more than 5% of the vote – a right to get a refund for expenses incurred during the presidential campaign. The amount each candidate is entitled to is as follow: up to 8 million euros for all candidates achieving at last 5% of the vote and about 11 million euros for the second round. The *Conseil Constitutionnel* estimated the cost of Sarkozy's campaign to 23 million euros. That is 1, 5 million less than what the candidate declared. Unfairness on such a declaration gives no right to be paid off. This is thus 11 million euros that the UMP has just lost. The decision is now available online [here](#). Jean-François Copé, the UMP leader, launched a call to bail out a highly indebted political party. The future of the party depends on the good will of the militants to decide whether their leaders' mistakes can be forgiven or not...

At the same time, another question interesting constitutional law arose. Because of the *Conseil Constitutionnel* decision, Sarkozy decided to resign of his function as... a member of this Council! Former French Presidents are *ipso facto* life members of the *Conseil Constitutionnel* according to article 56 of the 1958 Constitution. This leads to a conflict of interest. How could the former chief of the executive impartially monitor the legislative process? However, no constitutional mechanism exists to resign from this function as a member of this Council. Therefore Nicolas Sarkozy cannot *de jure* resign. However, De Jacques Chirac – former French President – decided *de facto* not to seat at the Council. Only one solution remains for Nicolas Sarkozy if he really wants to resign: using the “Chirac” precedent and... its consequences: no allowances for such a function!

### 2- Shared referendum: a new tool for the citizen to act directly in the institution?

Democracy is often defined as a regime in which the power belongs to the people. This definition could be correct if the people could vote directly on each law, each reform of the Constitution, each international agreement... As this was impossible, the principle of representative democracy was invented to match this ideal with reality. Decisions are thus taken indirectly by representatives and not directly by voters. But some participation mechanisms allow citizens to act directly in the political system.

In France, [article 3](#) of the 1958 Constitution says: “National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum”. Therefore, the power is exercised indirectly by representatives and directly by means of referendum. It is these direct means that we are going to scrutinize in this short study. The 1958 Constitution includes two mechanisms to ask for a popular vote, called a referendum.

The first – and the most famous – one is [article 11](#): “The President of the Republic may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses, published in the “Journal Officiel”, submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto, or which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions”. In this situation, only the executive – the President and his government – has the power to decide whether to ask for a referendum or not. That was the case for instance in 2005 when the French people decided to reject the newly modified European Union treaty by referendum. This decision blocked the institutional reform of the EU because of the rule of unanimity required to change the treaty.

The second mechanism is [article 89](#): “The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution. A Government or a Private Member’s Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum”. This popular vote is the normal procedure to modify the Constitution. This article was used only once in France to change [article 6](#) of the Constitution. In 2000, voters had the choice to diminish from seven to five years the presidential term. French people agreed. Therefore, French Presidents are elected for a 5-years term.

The 2008 reform of the 1958 Constitution introduced a third mechanism to ask for a referendum. A new provision in [article 11](#) says: “A referendum concerning a subject mentioned in the first paragraph may be held upon the initiative of one fifth of the Members of Parliament, supported by one tenth of the voters enrolled on the electoral register. This initiative shall take the form of a Private Member’s Bill and shall not be applied to the repeal of a statutory provision promulgated for less than one year”. Upon the initiative of one fifth of the members of the Parliament – 185 representatives – and the support of one tenth of the

electorate – about 4, 5 millions of voters – a referendum can – in theory – be held in France. But this is only in theory...

This mechanism needs a juridical implementation. 5 years after this constitutional reform this implementation instrument is still missing... The 28<sup>th</sup> of February, 2013, the Senate voted a statutory law on such a mechanism but the National Assembly has still not debated on this topic. Moreover, we still do not know whether this procedure will actually be enforceable. Indeed, the initiative of the referendum is in the hands of Parliament. Therefore, citizens have only a right to support the proposition and not to introduce it. This third mechanism of referendum could have been a chance for the citizen to take is part in the democratic process. But it seems that the French Parliament does not consider as an emergency to give the citizens such a new right.

## **Administrative law**

### **1- Silence by the public administration amounts to a decision of... acquiescence**

A revolution is about to happen in French administrative law. A venerable, well-known principle in France is about to be changed: the rule regarding silence. The administration use administrative acts in its relations with citizens. These acts can be questioned before a court by someone who has an interest to do so. If the public administration does not answer a citizen's question within two months, this "silence" – which means no answer of the administration – amounts to an implicit decision to dismiss this request. The legality of this implicit decision can thus be questioned before the administrative jurisdiction.

Issued in a 1900 statute, this rule has been included in "the rights of the citizens and their relations with the administration" act of April 2000. [Article 21](#) of this act says that "silence kept within two months by the administrative authorities amounts to a decision of dismissal". This mechanism has been created to ease the work of the public administration. Some burning issues for the public administration are hard to justify as a decision of dismissal. Indeed, a 1979 act – on the justifications of administrative acts – forces civil servants to explain their decisions. The mechanism of silence is therefore a good tool for the administration to tackle some contentious issues. At the same time, such a silence paves the way for the citizen to question the decision before a judge which akin to English judicial review.

This principle is about to be overturned by a bill voted by the Senate on 16 July, 2013. The new principle would be the exact opposite: silence kept by the administration amounts to a decision to acquiesce. The bill is available online [here](#). This new logic in the relationship between citizens and public administration has a political aim: nowadays, French public administration is no more an old-fashioned institution which says "no" but a dynamic, modern institution saying "yes". But is this really a true revolution?

Under the 2000 act, many exceptions to the principle of silence already existed. About urbanism and fiscal matters, the implicit silence of administration often amounted to a

decision of acquiescence. Before the 2013 law, more than 400 legal situations derogated to the principle of dismissal. However, even if this principle was not inexistent in French administrative law, the 2013 act – if voted by the National Assembly – is going to deeply changed the rule of the game. It is about to be the rule and not just the exception anymore. The only question remaining is how civil servants will tackle this new point forcing them to answer citizen questions...