1. France

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1. Background and Contextual Introduction

'In recent weeks, our country has been facing the spread of a virus, Covid-19, which has affected several thousand of our compatriots'.[1] It is with these words that French President Emmanuel Macron opened his first televised allocution in relation to the Covid-19 pandemic on Thursday 12 March 2020. In his first allocution – the first of many[2] – related to the pandemic, the French President of the Republic, while announcing a series of measures to combat the spread of the virus, unequivocally affirmed that health was the absolute priority and renewed his faith in science as the guiding principle in the management of the crisis.[3] Since then, the statistics related to the virus confirmed the warning the President of the Republic gave in March 2020 that the pandemic was only starting. As per 24 April 2022, the numbers speak for themselves: 26,802,654 confirmed cases and 145,060 deaths (116,345 in hospital and 28,715 in Ehpad retirement homes).[4] In the course of these two years, various coercive measures and policies have been adopted by the French executive to fight the virus, among which lockdowns, closures, curfew, travel restrictions, obligation to wear masks in public spaces, obligation to hold a sanitary pass, and, for some professions, obligation to be vaccinated.

To adopt these measures, the state of health emergency was declared by the Prime Minister's decree of 16 March 2020 and was translated into the law with the adoption by Parliament of law n° 2020-290 on 23 March 2020.[5] Crucially, with this law, the French Parliament agreed to temporarily delegate its legislative competence to the government; a delegation which allows massive recourse to the *ordonnance* procedure[6] and gives the government a considerable margin of action,[7] as evidenced by the different phases and the various legal increments via which the state of health emergency has been implemented. Although by nature provisional and temporary, this emergency mechanism was regularly extended to

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[1] Elysée, 'Adresse aux Français' (12 March 2020), www.elysee.fr/emmanuel-macron/2020/03/12/adresse-aux-francais. Translation by the authors, the original version reads: 'Depuis quelques semaines, notre pays fait face à la propagation d'un virus, le Covid-19, qui a touché plusieurs milliers de nos compatriotes.'

[2] From March 2020 to November 2021, President Macron gave nine such allocutions.

[3] Elysée, 'Adresse aux Français' (12 March 2020), www.elysee.fr/emmanuel-macron/2020/03/12/adresse-aux-francais, where he stated 'la priorité absolue pour notre Nation sera notre santé. Je ne transigerai sur rien. Un principe nous guide pour définir nos actions, il nous guide depuis le début pour anticiper cette crise puis pour la gérer depuis plusieurs semaines et il doit continuer de le faire : c'est la confiance dans la science'.

[4] See B Deshayes, 'Chiffres du Covid en France : une "forte hausse" des décès rapportée' (*L'Internaute*, 8 July 2022), www.linternaute.com/actualite/guide-vie-quotidienne/2489651-chiffres-covid-cas-morts-le-bilan-du-coronavirus-en-france. The research for this contribution stopped on 19 June 2022, the date of the outcome of the French legislative election.

[5] Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19, *Journal Officiel de la République Française* n° 0072 (24 March 2020).

[6] ibid arts 13 and 38. Functioning as a provisional law enacted by the government pending its ratification by Parliament, an *ordonnance* stands as a statutory instrument issued by the Council of Ministers in an area of primary legislation falling under the remit of Parliament. Failing ratification by Parliament, the 'ordonnance' remains an executive regulation.

[7] This margin of action is abundantly commented upon and often heavily criticised. See, eg 'La fin de la République ?' (*Academia*, 23 March 2020), https://academia.hypotheses.org/21454.

adapt to the sanitary evolution, on the basis of a report by the Health Minister advised by a committee of scientific experts. The legislative mechanism in force allows, nationally the Prime Minister and the Health Minister and locally the public authorities, to take any general and individual police measures that are legally motivated by the prevention of health risks linked to the Covid-19 pandemic and proportionate to these risks.

Brunet usefully depicts the timeframe in which these different measures were brought in, recalling that '[t]he Prime Minister's Decree 2020-260 of 16 March 2020 (...) introduced a general lockdown of the population from 17 to 31 March 2020.'[8] The lockdown

> was extended to 15 April 2020, then 11 May, the date on which a progressive ending of the lockdown began according to sectors activity (...) and regions (...). However, in view of the resumption of the active circulation of the virus after the summer and the 'second wave' of the epidemic, the state-of-emergency regime was once again activated for one month, starting on 17 October 2020. It allowed the introduction of a night curfew policy over a large part of the country. It was not, however, enough to stop the epidemic and a new national lockdown was decreed from 30 October (...) It was to last until 15 December, the date on which a night curfew has been re-imposed.[9]

The lockdown was lifted on 20 June 2021. On 11 November 2021, a law was enacted to fix the end of the state of health emergency to 31 July 2022.[10] During this transition period, the Prime Minister may still limit travels and access to public transports and to certain places, and may also restrict the rights to assemble or demonstrate in public spaces.[11]

Even if unprecedented, the state of health emergency[12] is not a legal oddity and is legally rooted in the theory of exceptional circumstances, which results from the *jurisprudence de principe* of the Conseil d'État.[13] Thus, even if the state of health emergency undeniably establishes an exceptional regime which strengthens the powers of the government while infringing on the rights and freedoms of citizens, it remains a lawful governmental action of legislative origin. This however does not mean that these measures cannot be contested: to the contrary, they can be legally challenged via two procedures before the Conseil d'État to

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[8] S Brunet, 'The Hyper-Executive State of Emergency in France' in M C Kettemann and K Lachmayer (eds), *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19* (Oxford, Hart Publishing, 2022) 202.

[9] ibid 203.

[10] The first law of 31 May 2021 fixed the end of the state of health emergency at 30 September 2021, postponed by a law of 5 August 2021 to 15 November 2021. See Direction de l'information légale et administrative, 'Régime de sortie de crise sanitaire : jusqu'à quand ?' (*Service Public*, 5 July 2022), www.service-public.fr/particuliers/actualites/A14937#:~:text=La%20loi%20portant%20diverses%20dispositions,de%20recourir%20au%20passe%20sanitaire.

[11] Loi n° 2021-1465 du 10 novembre 2021 portant diverses dispositions de vigilance sanitaire, *Journal Officiel de la République Française* n° 0263 (11 November 2021).

[12] Note that the French Constitution, in art 36, only envisages the state of siege rather than the state of emergency.

[13] See CE 28/06/1918 *Heyriès*, Rec. 651; CE 28/02/1919 *Dames Dol et Laurent*, Rec. 208; CE 2/03/1962 *Rubin de Servens et autres*, Rec. 143; CE ass 19/10/1962 *Canal, Robin et Godot*, Rec. 552.

obtain their annulment: the *recours pour excès de pouvoir* (recourse for excess of power) and the *référés administratifs* (administrative summary procedure). In addition, the legal arrangements specific to the state of health emergency may be subject to judicial review before the Conseil constitutionnel.[14]

It is worthwhile reminding here that, in the context of these procedures, what is at stake is not the restrictions to individual freedoms and civil liberties per se. In their great majority, these are not absolute and can be lawfully curtailed 'in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others', to use the language of the European Convention on Human Rights. Rather, what can be judicially challenged is the proportionality of the measures adopted to the targeted goal.[15] In the context of the Covid-19 pandemic, the official objectives of the French executive – President of the Republic as head of state, Prime Minister as head of government, and government – have always been to protect the health of individuals and to stop the spread of the virus '*quoiqu'il en coûte*' ('whatever the cost'). In so doing, the French executive has resorted to a series of coercive measures, all legally framed, to try and achieve a balance between its official objectives and the preservation of as many individual and collective freedoms as possible.

Following the twentieth century's positivist conception of the law, contemporary democracies are based on a system of legal norms formulated by legally competent public authorities which dismiss morality, revelation and the inner nature of things as sources of law. According to legal positivism, the refutation of the coercive value of moral obligations or natural law means that the predictability of legal rules, binding on citizens and enforceable by public powers, is ultimately constituted in relation to the highest rules of the legal order enacted by legally habilitated public authorities. From the legal positivism perspective, the mandatory character of legal rules derives exclusively from the validation of the legal system by itself at the highest normative echelon; the key aspect being that – notwithstanding the fact that social morality and political ideology in the adoption and implementation of legal rules permeate intrinsically any legal system in relation to its historical background – the legal order itself is indifferent to the moral and ideological content of the legal rules it generates, provided that these rules are enacted via the appropriate procedures within the officially authorised system of production of legal norms.[16]

Parliamentary France of the fifth Republic is no exception to this positivist and liberal postulation embodied in its written and codified Constitution. Hence, an academic assessment of the political and legal treatment of the Covid-19 pandemic which ultimately lies in a potent mix of history, science, politics and personalities, needs to focus on the mechanisms of the Constitution and the content of the law, indifferent to any moral judgement so as to

[14] See Constitution of the French Republic of 4 October 1958 (Constitution), art 61-1.
[15] C Le Bri, 'La sauvegarde des libertés en temps de « guerre » contre le coronavirus' *The Conversation* (online, 27 March 2020) theconversation.com/la-sauvegarde-des-libertes-en-temps-de-guerre-contre-le-coronavirus-134913.
[16] ibid.

differentiate clearly what falls within the legal competence and coercive action of the political authorities from what refers to individual moral choices devoid of any direct legal consequences. Captive of the historical, constitutional and political forces of the time in which it operates, the management of the Covid-19 pandemic under the fifth Republic parliamentary regime cannot be separate, both in terms of political declarations and legal procedures and instruments, from the idea that constitutional arrangements, politics and history are determining aspects of behaviour for both the political actors and the citizens.

For all that, since the adoption of the law of 23 March 2020 establishing the state of health emergency, the French population has been confronted with a vast and miscellaneous amount of public announcements, political decisions and legal provisions and, problematically, with a discourse on the part of the executive that is at times inconsistent, unclear, and contradictory. The presidential allocutions have invariably been followed by uncertainties and hesitations and have revealed a rather concerning degree of superficiality in the decision-making. The mask is perhaps one of the most telling illustrations of such confusion, starting with what turned out to be a blatant lie from the then Health Minister Agnès Buzin that any purchase of masks was not necessary since France had a stock of tens of millions of them,[17] to the affirmation by the then government's spokesperson Sibeth Ndiaye that masks were not only not required but in fact potentially counter-productive,[18] to the obligation to wear masks in public spaces and the imposition of a fine in case of breach,[19] all this over a relatively short time span of less than three months. In a similar vein, the French executive has at times showed little cohesion, with for instance the Education Minister affirming that schools will not be closed before being expressly contradicted the very next day by the President of the Republic.[20] Supporters of the President of the Republic and of the government have justified their actions and contradictions by invoking the unprecedented nature of the situation; their detractors have criticised their amateurism and incompetence. Some have even lodged complaints with the specific jurisdiction that is the Cour de justice de la République to seek the establishment of the criminal liability of the Prime Minister and of the government.[21] The question whether the criminal liability of the French executive for its management of the Covid-19 can be engaged is precisely what this contribution seeks to address. The answer

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[17] Editorial,'Contre le coronavirus, Agnès Buzyn juge "inutile" l'achat de masques' *Huffington Post* (online, 27 January 2020), www.huffingtonpost.fr/entry/contre-le-coronavirus-agnes-buzyn-deconseille-lachat-de-masques_fr_5e2e163ec5b6d6767fd6c826.

[18] O Faye, 'Port du masque : le gouvernement amorce un virage à 180 degrés' *Le Monde* (online, 6 April 2020), www.lemonde.fr/politique/article/2020/04/06/port-du-masque-l-executif-amorce-un-virage-a-180-degres_6035698_823448.html.

[19] See, eg Décret n° 2020-860 du 10 juillet 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans les territoires sortis de l'état d'urgence sanitaire et dans ceux où il a été prorogé, *Journal Officiel de la République Française* n° n° 0170 du 11 juillet 2020.

[20] See C Pol, 'Coronavirus : quand Blanquer soutenait que le gouvernement n'avait «jamais envisagé la fermeture totale» des écoles' (*Libération*, 13 March 2020), www.liberation.fr/politiques/2020/03/13/coronavirus-quand-blanquer-soutenait-que-le-gouvernement-n-avait-jamais-envisage-la-fermeture-totale_1781540/.

[21] See, eg J Tilouine, 'Covid-19 : la Cour de justice de la République rejette une série de près de 20 000 plaintes contre le gouvernement' *Le Monde* (online, 24 January 2022), www.lemonde.fr/societe/article/2022/01/24/covid-19-la-cour-de-justice-de-la-republique-rejette-une-serie-de-pres-de-20-000-plaintes-contre-le-gouvernement_6110806_3224.html.

primarily lies not in criminal law but rather in constitutional law which regulates not only the roles and functions of the executive but also its criminal liability regime. The scientific analysis of the political discourse and the law deployed by the French executive during the Covid-19 crisis thus imperatively requires both an accurate understanding of the distribution of powers according to the text of the Constitution, *i.e.* the political *regime*, and a sheer appreciation of the idiosyncratic political interpretation of the political regime by the public authorities and its subsequent constitutional conventions, *i.e.* the political *system*.

The presidential allocutions to the French Nation featuring a deciding head of state is perfectly in line with the preponderant role of the President of the Republic as envisaged by the Constitution of the fifth Republic.[22] In the constitutionally established two-headed executive power required in any parliamentary regime, the specificity of the French rationalised and presidentialised parliamentarism usually gives the perception that the President of the fifth Republic decides while the Prime Minister implements.[23] Yet, and perhaps paradoxically, the former is very much shielded from responsibility while the members of government – including the Prime Minister – are the ones exposed when it comes to criminal liability. It is thus in the light of the Constitution that this chapter will explore the potential criminal liability of the President of the Republic, of the Prime Minister and of the government. In so doing, the question of the criminal qualification of the acts of the French executive will be addressed, with reflection on the key issue of causation and an analysis of both the material and mental elements of the possible criminal charges.

2. Constitutional, Legal and Policy Overview

The political regime set up in the French Constitution is a parliamentary regime, the crucial characteristic of which is to constitutionally organise the superiority of the executive power, and within the executive power, the formal and legal superiority of the President of the Republic over the Prime Minister and the government.

2.1. Overview of and Specific Constitutional and Legal Principles Regarding Criminal Liability of High-Ranking Government/Public Officials

By virtue of article 5 of the Constitution, the President of the Republic is a constitutional arbiter,[24] holder of supreme powers, who remains politically unaccountable before Parliament. Put differently, the President of the Republic holds the very substance of State power. As the guardian of the Constitution, he or she is its political interpreter. This presidential interpretative function finds a double legitimacy: firstly, in the fact that this presidential role as political interpreter of the Constitution is implicitly acknowledged in

[22] See Constitution, www.assemblee-nationale.fr/connaissance/constitution.asp. All English translations of the Constitution are taken from the translation available at: www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf.

[23] On the classification principles related to the fifth République and their challenges, see M-A Cohendet, 'La classification des régimes politiques, un outil pertinent dans une conception instrumentale du droit constitutionnel' in D de Béchillon, V Champeil-Desplats, P Brunet et E Millard (eds), *L'architecture du droit – Mélanges Michel Troper* (Paris, Economica, 2006) 299; E Georgitsi, 'La Spécificité de la Vème République et les classifications: une opposition fausse' (2010) 83 *Revue Française de Droit Constitutionnel* 543.

[24] M-A Cohendet, 'L'Arbitrage du Président de la République' (2009) 52 *Archives de philosophie du droit* 15.

article 5 itself; secondly, save for the application of article 68 on the impeachment of the President of the Republic,[25] by the absence of political control over the exercise by the President of the Republic of his or her political interpretation of the Constitution. Apart from the Conseil constitutionnel's exclusive attribution powers,[26] no other public authority has the power to politically control the conformity of the political interpretation of the Constitution by the President of the Republic.

The supreme presidential arbitral position is reinforced by article 19 of the Constitution which confers on the President of the Republic personal and exclusive constitutional powers, that is, powers exempt from ministerial countersignature.[27] As a corollary to article 5, article 19 establishes the President of the Republic's exclusive legal means by which he or she can carry out his or her arbitration without any legal mechanism of political accountability. By inscribing the legal supremacy of the President of the Republic in the Constitution, article 19 implodes the classic parliamentary logic of balance based on an association between political power and political accountability.

Nevertheless, the established constitutional superiority of the President of the Republic is fortified by an undeniable political legitimacy. Indeed, this leading legal pre-eminence of the President of the Republic within the Constitution finds itself democratically reinforced with the constitutional revision of 6 November 1962, which established his or her election by direct universal suffrage. This revision undeniably consolidated the institutional and legal prevalence of the President of the Republic, giving him or her a democratic political legitimacy rigorously similar to that of the Assemblée Nationale (lower house of Parliament). Strengthened by this political legitimacy, the President of the Republic as supreme political arbiter of the Constitution becomes a very active and prominent political actor; a function aptly embodied by President Macron in the management of the Covid-19 pandemic. Yet, the President of the Republic remains politically unaccountable before Parliament, contrary to the rest of the executive.

The French government derives its political legitimacy from its parliamentary majority. If the President of the Republic is somehow limited by this democratic necessity, he remains the one who has the discretion to appoint the Prime Minister.[28] As with the presidential functions, the French Constitution regulates the role and functions of the government as well as the main legal competences of the Prime Minister in its articles 20 and 21. The numerical disparity in the Constitution between the articles devoted to the President of the Republic and those specifically concerning the government and the Prime Minister is rather telling: while the function of head of government is necessarily and clearly established, this is done rather succinctly. This absence of detailed analysis within the Constitution implicitly but distinctly

[25] See below section 2.2.
[26] See arts 58-60 of the Constitution on the powers of the Conseil constitutionnel with respect to elections and referendums.
[27] This is a new feature of the 1958 Constitution and of the fifth Republic: in the preceding regimes of the third and fourth Republics, Parliament very much dominated the situation.
[28] See Constitution, art 8.

informs the institutional inferiority of the Prime Minister vis-à-vis the President of the Republic.

This constitutional inferiority notwithstanding, the Prime Minister still holds constitutionally important powers: as clearly stipulated in article 21, he or she directs the action of the government. According to parliamentary principles, with governmental power comes political accountability; article 20 could not be clearer, the government:

> Shall be accountable to Parliament in accordance with the terms and procedures set out in articles 49 and 50.[29]

Yet, the specificity of the French fifth Republic's presidentialised parliamentarism means that the practical extent of prime ministerial executive powers is understood primarily in relation to presidential political activity and activism, *i.e.* it is directly linked to the political system within which the executive authorities operate. Indeed, the collegial powers of government, the individual powers of ministers and the personal powers of the Prime Minister can always be potentially limited by the constitutionally recognised legal powers of the President of the Republic. In turn, the activation of presidential powers and the subsequent genesis of governmental decisions thus depend on the alternative influence exerted by the political system in place, whether the system is one of *présidentialisme* – as is has been consistently the case during the pandemic – or one of *cohabitation*.

As it appears obvious that during the pandemic crisis the control of the political discourse and the executive decisions in health matters belong to the President of the Republic, it is crucial to realise that the critical assessment of presidential actions proceeds not only from the original constitutional conformation specific to the rationalised parliamentarism of the fifth Republic, but also derives from its systemic configuration which, on an electoral basis, is conventionally specific to it. This preliminary point is fundamental to distinguish between the political authorship of an executive decision and the political accountability it generates.[30] Indeed, the originality of the fifth Republic stems fundamentally from the consubstantial relationship between the political regime, *i.e.* the text of the Constitution, and the political interpretation of the political regime by political actors, *i.e.* the political systems. What motivates the occurrence of *présidentialisme* or *cohabitation* as political systems is solely the choice of the voters; the text of the Constitution remaining unchanged. Consequently, from a political majority and partisan viewpoint, it is always necessary to measure the political scope of presidential power and the political space reserved for the Prime Minister and the government in the light of the political system that results from the consecutive presidential

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[29] 'Le Gouvernement ... est responsable devant le Parlement dans les conditions et suivant les procédures prévues aux articles 49 et 50', Constitution, art 20. Arts 49 and 50 deal with the different procedures of political accountability, as the embodiment of the *parlementarisme rationalisé* specific to the Constitution of the fifth Republic.

[30] See T Mulier, 'La crise du Covid 19, reflet des anomalies du fonctionnement de la Vème République' (*JP Blog*, 11 June 2020), blog.juspoliticum.com/2020/06/11/la-crise-du-covid-19-reflet-des-anomalies-du-fonctionnement-de-la-ve-republique-par-thibaud-mulier.

and legislative elections; results which can either coincide (*présidentialisme*) or not (*cohabitation*).[31]

Within the framework of *présidentialisme*, there is a stratification of the executive functions in favour of the President of the Republic and thus a legal and political subordination of the Prime Minister to the point that the President of the Republic becomes undoubtedly, although in practice only, the head of government. He or she imposes his or her policies on the Prime Minister who must apply them; the margin of action of the government thus finds itself considerably reduced. In practice, the ministerial countersignature of all presidential acts thus becomes an administrative formality: rather than manifesting a resolutely voluntary process of conjunction of the executive wills, it merely endorses the President of the Republic's decisions. The political power of the President of the Republic in *présidentialisme* is not only constitutionally apparent via the discretionary use of his own powers under article 19 but also conventionally evident via the merely formal nature of the affixing of the ministerial countersignature on presidential acts. For all that, and this is key in the context of the present contribution, the Prime Minister, institutionally inferior and politically subordinated under the *système présidentialiste*, legally assumes political accountability for presidential decisions and is conventionally 'dismissible' at any time by the President of the Republic.[32] Interestingly, the President of the Republic and the Prime Minister may have different political affiliations leading to *cohabitation*, an admittedly tense situation. To mitigate the risk of such *cohabitation* – which has occurred on three occasions prior to 2000 – via a harmonisation of the electoral calendar starting with the presidential election,[33] the constitutional law of 2 October 2000 established the presidential five-year term with the clear intention of favouring *présidentialisme* over *cohabitation*.[34]

Had the pandemic occurred at a time of *cohabitation*, the Prime Minister, as head of government, would have been the deciding power of the executive branch – although he would have clearly remained under the supervision of the President of the Republic who not only presides over the council of Ministers but also, by virtue of constitutional custom, sets

[31] See generally F Hamon and M Troper, *Droit Constitutionnel*, 42nd edn (Paris, L.G.D.J collection Manuels, 2021-2022). On the distinction between 'régime politique' and 'système politique' in French Constitutional Law, see generally M-A Cohendet, *Droit constitutionnel*, 4th edn (Paris, LGDJ-Lextenso, coll. Cours, 2019).

[32] Under art 8 of the Constitution, the termination of the Prime Minister's function legally results from a voluntary and autonomous resignation of the government presented to the President of the Republic by the Prime Minister. In a system of *cohabitation*, the Prime Minister becomes de facto irremovable and regains the political and legal powers attached to his or her office: he or she governs in both law and in practice, which is nothing but his or her role in both parliamentary and constitutional terms.

[33] The constitutional reform establishing the presidential five-year term effectively aims to make the presidential and legislative elections coincide, starting chronologically with the elections of the President of the Republic, thus reducing the political probability of a situation of *cohabitation* without however eliminating its electoral possibility. A *cohabitation* thus remains constitutionally and politically possible, insofar as it is decided democratically by the people on the basis of elections. While not establishing a *cohabitation*, the mixed outcome of the 2022 legislative election failed to give President Macron a full majority.

[34] It should also be noted that the President of the Republic, by application of art 12 of the Constitution, can always dissolve Parliament, thus triggering legislative elections. This is one of his or her personal and exclusive prerogatives under art 19 of the Constitution.

its agenda, regardless of the political system.[35] In a certain sense, and notwithstanding the political implications and complications that a *cohabitation* might generate, this system would potentially have been more in line with the applicable political accountability and criminal liability regimes of the French executive. As detailed below, since the Prime Minister and the government are the ones who bear accountability for the acts of the executive, this accountability might be more legitimately grounded in a *cohabitation* system where the Prime Minister is also the one at the origin of the executive actions.

What remains speculative is how decisive would the supervision of the President of the Republic have been in relation to the management of a national health emergency, such as the Covid-19 pandemic, by a government of *cohabitation*. Everything would have depended on the intensity of the political control the President of the Republic, as both supreme political arbiter and leader of the parliamentary opposition, would have aimed to exercise over the actions of a politically hostile government in a context of extreme crisis. In such a case, the President of the Republic would undoubtedly have to ensure a perilous but potentially politically profitable balance for him or her; on the one hand by knowing how to take advantage of his political unaccountability in relation to a largely autonomous government action (since, politically, it would not have been his or hers) and, on the other hand, by organising a first rank personal political visibility as guardian of the Constitution and arbiter of the regular functioning of public powers. By leaving entirely to a *cohabitation* government the political accountability of a health crisis policy from which he or she is strictly speaking politically detached, the President of the Republic would perhaps have found all his or her future political and electoral interests in magnifying his or her arbitration position and the pre-eminence of his or her constitutional status as the keystone of the institutions by performing calibrated and possibly spectacular political interventions. Consequently, from a methodological point of view, this contribution would have approached from a slightly different angle the institutional positioning and political latitude that the head of state would have given himself or herself in his or her assessment of the management of a severe health crisis by a government acting under a system of *cohabitation* – taking for granted that the visibility of the President of the Republic remains intrinsically part of his or her constitutional function in all political systems.

While it is obvious that during the pandemic the command of the political narrative and of the executive decisions in health matters belongs to the President of the Republic, the particularities of the French political regime – especially when functioning in a *système présidentialiste*[36] – mean that he or she is very much protected from criminal responsibility while the Prime Minister and the ministers, who merely implement the presidential decisions, are the ones likely to be held criminally responsible.

[35] Constitution, art 9. See M-A Cohendet, 'Commentaire des articles 9 et 21 de la Constitution' in F Luchaire, G Conac, X Prétot (eds), *La Constitution de la Vème République* (Paris, Economica, 2009) 370-387 and 604-635.
[36] Due to the coincidental outcomes of the 2017 presidential and legislative elections.

2.2. Scope of Responsibility and Area of Tolerated Risk

The criminal liability of the President of the fifth Republic could be triggered in two distinct scenarios envisaged by articles 67 and 68 of the Constitution which establish the current general liability regime applicable to the sitting President of the Republic.

Article 67 is unequivocal:

> The President of the Republic shall incur no liability by reason of acts carried out in his official capacity, subject to the provisions of Articles 53-2 and 68 hereof.[37]

In other words, the President of the Republic cannot be held criminally liable for the acts committed in the exercise of his or her functions. This principle knows of only two exceptions, as enshrined in articles 53-2 and 68 respectively.[38]

Since the constitutional reform of 23 February 2007,[39] under article 68, the criminal responsibility of the head of state can be activated in case of 'a breach of his duties patently incompatible with his continuing in office'.[40] What exactly can qualify as a breach of duties patently incompatible with presidential functions remains cryptic and, since this procedure has never been used in the fifth Republic, attempting to determine its concrete meaning would be speculative.[41] Yet, this is a key issue in the context of the present contribution as the question necessarily arises whether a criminal offence would characterise such a breach and expose the President of the Republic to removal from office. As will be discussed later, if they were to be criminally qualified, the acts of the executive – including those of the President of the Republic – would most likely fall under the category of involuntary offences against the physical integrity of the person. Would the decisions undertaken by President Macron in the management of the Covid-19 crisis qualify as such offences? In turn, would such offences constitute breaches patently incompatible with his continuing in office? A positive answer to these questions would be absolutely required to trigger the removal from office procedure and engage the criminal liability of the President of the Republic. And even then, a criminal prosecution would most likely collide with the immunity of jurisdiction attached to the acts of the President of the Republic in the exercise of his or her functions, under which the management of the sanitary crisis undoubtedly falls.

Placed in a radically opposite position to that of the President of the Republic whose criminal liability may only be engaged in very restricted circumstances and whose official acts remain

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[37] The original version reads : 'Le Président de la République n'est pas responsable des actes accomplis en cette qualité, sous réserve des dispositions des articles 53-2 et 68.'
[38] Art 53-2 will be addressed in section 2.3.
[39] Loi constitutionnelle n° 2007-238 du 23 février 2007 portant modification du titre IX de la Constitution, *Journal Officiel de la République Française* n° n° 0047 du 24 février 2007.
[40] The original version reads: 'manquement à ses devoirs manifestement incompatible avec l'exercice de son mandat'.
[41] This new concept (of a breach 'patently incompatible…') replaced the former notion of high treason (*haute trahison*), for which former head of state Maréchal Philippe Pétain (tried for the crime against internal security and intelligence with the enemy) was convicted on 15 August 1945.

immune from jurisdiction,[42] the Prime Minister and the government can be held criminally liable for acts performed in the exercise of their functions, even if these acts were decided by the President of the Republic under the present systemic configuration specific to *présidentialisme*. Historically, the scope of criminal responsibility when it comes to members of the government was at the heart of a health scandal that made headline news, namely, the case known as the infected blood case (*affaire du sang contaminé*). The facts date back to 1985 when HIV-infected blood was used for transfusing haemophiliac patients; a use which was known and authorised at the highest governmental level. Faced with the immunity enjoyed by members of government at the time, President François Mitterrand criticised the impossibility to hold them liable.[43] It is thus this health crisis that led to a constitutional reform, the establishment of the Cour de justice de la République and the specification that it could operate retroactively. [44] With this reform, then Prime Minister Laurent Fabius, Social Affairs Minister Georgina Dufoix and Health Minister Edmond Hervé were all made to answer a charge of manslaughter. In its judgment of 9 March 1999, the Cour de justice de la République found Fabius and Dufoix not guilty. Hervé was convicted but the finding of guilt was not accompanied with a sentence.[45] While this was the first case before this court, it is possible that its outcome fueled ongoing contestation of this institution, heavily criticised for being inherently political.[46]

2.3. Impact of Immunities

The members of the French government do not enjoy immunity from prosecution. By contrast, the criminal liability regime of the President of the fifth Republic is a protective regime essentially akin to a privilege of jurisdiction in the name of the principles of the separation of powers and of the continuity of the State. In other words, the absence of criminal responsibility of the President of the Republic must be understood principally as a circumscribed jurisdictional criminal immunity, since it is limited to the duration of the presidential mandate. To be sure, the scope of this criminal immunity has been specified by the Conseil constitutionnel in its decision of 22 January 1999, in which it recalled that:

> By Article 68 of the Constitution, the President of the Republic may not be held liable for acts performed in the exercise of his duties except in the case of high treason; moreover, during his term of office he may be indicted only in the High Court of Justice by the procedure determined by that Article.[47]

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[42] See below section 2.3.

[43] President François Mitterrand declared that 'ministers should be held accountable for their acts' ('les ministres doivent rendre compte de leurs actes'). 'Entretien à l'Elysée avec François Mitterrand' (*Archives Vidéo INA*, 9 November 1992), www.youtube.com/watch?v=akTvsKGNhus.

[44] Constitution, art 68-3.

[45] Arrêt du 9 mars 1999, Cour de justice de la République, N° affaire : 99-001, https://www.courdecassation.fr/files/files/D%C3%A9cisions_CJR/Arret_du_9_mars_1999.pdf.

[46] See below section 2.4.

[47] Conseil constitutionnel, Decision no. 98-408 DC of 22 January 1999, Treaty laying down the Statute of the International Criminal Court, www.conseil-constitutionnel.fr/en/decision/1999/98408DC.htm.

Put differently, the acts performed in the exercise of the presidential functions are immune from criminal jurisdiction, even after the President of the Republic ceases to be in office. For acts performed in a private capacity, the criminal immunity of the President of the Republic, conceived as an absence of criminal responsibility before the ordinary judge during the exercise of his or her functions, is therefore explicitly legally temporary; the prescription of public action being suspended only for the duration of the presidential mandate. This is thus very likely a closed avenue for any complaint linked to the acts of the President of the Republic related to the Covid-19 pandemic since these acts were performed in an official and public capacity.

The only exception to this immunity, expressly mentioned in article 67, features in article 53-2 of the Constitution, which recognises the jurisdiction of the International Criminal Court and which, by accepting the conditions of the Rome Statute, simultaneously accepts the lifting of head of state immunity in cases of genocide, crimes against humanity, war crimes, and aggression.[48] Going into the detail of each of these offences would fall outside the scope of this analysis. Suffice here to note that the management of the Covid-19 pandemic by President Macron obviously falls short of meeting any of the definitional elements of these crimes. While allegations of war crimes or aggression would be fundamentally erroneous since the definitional elements of the crimes – a conflict situation for the former and an aggressive act towards another state for the latter – would not be met, accusations of crimes against humanity or genocide would be equally mistaken. Even worse, they would trivialise the meaning of these atrocities and make a sordid mockery of both the crimes and their victims. Even if the Covid-19 pandemic has generated deaths *en masse*, this does not mean that a crime against humanity or genocide has been perpetrated; calling upon international criminal law in the French context would fundamentally distort its very substance.

Ultimately, both French constitutional criminal law and international criminal law are ill-adapted to the current situation: while the former is overly politicised, the latter is conceptually ill-suited. This means that the possible routes via which the criminal liability of the sitting President of the fifth Republic could be envisaged are actually not available when it comes to his management of the Covid-19 pandemic. He is not only constitutionally unaccountable politically but is also de facto shielded from any form of criminal liability.

2.4. Prosecutorial Matters

If the President of the Republic faces prosecution for 'a breach of his duties patently incompatible with his continuing in office',[49] he or she is answerable to Parliament constituted as a Haute Cour (High Court).[50] As clarified by the Conseil constitutionnel, the

[48] See the Rome Statute of the International Criminal Court (Rome Statute) (Rome, 17 July 1998).
[49] Original version reads: 'manquement à ses devoirs manifestement incompatible avec l'exercice de son mandat'.
[50] The High Court combines members of the National Assembly and of the Senate. It entered into force with the adoption of the organic law of 24 November 2014. See Loi organique n° 2014-1392 du 24 novembre 2014 portant application de l'article 68 de la Constitution, *Journal Officiel de la République Française* n°0272 du 25 novembre 2014.

Haute Cour does *not* constitute a jurisdiction – it is not a criminal court or tribunal – but rather a parliamentary assembly.[51]

By contrast, the current criminal liability regime of ministers stems from the constitutional law of 27 July 1993 and the adoption of articles 68-1, 68-2 and 68-3 in the Constitution. These dispositions established the Cour de justice de la République precisely to exercise jurisdiction over ministers and settle disputes that may arise in relation to the exercise of their functions. As per article 68-2:

> The Court of Justice of the Republic shall consist of fifteen members: twelve Members of Parliament, elected in equal number from among their ranks by the National Assembly and the Senate after each general or partial renewal by election of these Houses, and three judges of the Cour de cassation, one of whom shall preside over the Court of Justice of the Republic.[52]

With this mixed composition, the Constitution expressly opts for a combination of political and ordinary justice. Interestingly for the purposes of the present contribution, the enactment of this constitutional law was directly linked to the previously mentioned infected blood case (*affaire du sang contaminé*). Since its inception, this court has been expressly denounced on the grounds that it continues to embody a form of political justice within which the partisan political logic in the minds of members of Parliament judging their peers risks taking precedence over the objective assessment of a criminal offence. In 2018, a reform aiming at the suppression of the Cour de justice de la République and its replacement with the already existing Cour d'appel de Paris – *i.e.* an ordinary jurisdiction – was initiated. If this reform were to materialise, members of the executive would still not be treated as purely ordinary litigants: to avoid any abusive judicial interference with the ministerial function, a Commission des Requêtes would, as is currently the case, carry out a filtering.[53]

Until then, the Cour de justice de la République remains the judicial formation competent to adjudicate complaints relating to the management of the Covid-19 pandemic by the government. To that effect, article 68-2 specifies that:

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[51] See Conseil constitutionnel, Décision n° 2014-703 DC du 19 novembre 2014, Loi organique portant application de l'article 68 de la Constitution, www.conseil-constitutionnel.fr/decision/2014/2014703DC.htm.

[52] The original version reads: 'La Cour de justice de la République comprend quinze juges : douze parlementaires élus, en leur sein et en nombre égal, par l'Assemblée nationale et par le Sénat après chaque renouvellement général ou partiel de ces assemblées et trois magistrats du siège à la Cour de cassation, dont l'un préside la Cour de justice de la République.'

[53] See Projet de loi constitutionnelle pour un renouveau de la vie démocratique, introduced and then suspended in 2018, www.vie-publique.fr/loi/273301-reforme-constitutionnelle-2019-pour-un-renouveau-de-la-vie-democratique.

> Any person claiming to be a victim of a serious crime or other major offence committed by a member of the Government in the holding of his office may lodge a complaint with a petitions committee.[54]

And indeed, a number of complaints have been lodged in relation to the governmental management of the Covid-19 pandemic.[55] The investigation of complaints is carried out by a complaints commission, which

> shall order the case to be either closed or forwarded to the Chief Public Prosecutor at the Cour de cassation for referral to the Court of Justice of the Republic.[56]

Ultimately, the proceedings before the Cour de justice de la République, if they do occur, risk being politically tainted and, under the current criminal liability regime of the Prime Minister and members of government, such criminal proceedings – not to mention conviction – might prove volatile. Even if not, the fact is that while the criminal liability of the Prime Minister and of the relevant members of government is engaged and recognised, the President of the Republic will remain shielded from criminal prosecution. Throughout the Covid-19 crisis, the successive Prime Ministers, Edouard Philippe and Jean Castex, and Health Ministers, Agnès Buzyn and Olivier Véran, have undoubtedly been visible with regular interventions on television – at one point the Health Minister was intervening on a daily basis to convey the contamination figures and death rate – yet, President Macron is the one deciding the policies to be adopted and the measures to be taken. Even if exposed and visible in the media, the Prime Minister and the Health Minister merely specify or clarify the presidential decisions, which are sometimes in direct contradiction with what they themselves had previously enounced. Thus, although they are active executants with a relatively limited scope of manoeuvre – the presidential decisions always taking precedence, their only option being resignation – they will be the ones against whom charges are brought if criminal prosecutions are initiated.[57]

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[54] The original version reads: 'Toute personne qui se prétend lésée par un crime ou un délit commis par un membre du Gouvernement dans l'exercice de ses fonctions peut porter plainte auprès d'une commission des requêtes.'

[55] By 5 July 2021, over 160 such complaints had been lodged in relation to the Covid-19 pandemic. See 'Cour de justice de la République : quelle est cette juridiction, seule habilitée à juger les ministres en exercice?' (*le dauphiné*, 5 July 2021), www.ledauphine.com/faits-divers-justice/2021/07/05/cour-de-justice-de-la-republique-quelle-est-cette-juridiction-seule-habilitee-a-juger-les-ministres-en-exercice.

[56] Constitution, art 68-2.

[57] For an opinion against the criminal prosecution of the French executive for the management of the Covid-19 crisis, see O Beaud, 'Mal gouverner est-il un crime? Réflexions critiques sur les perquisitions effectuées dans le cadre de l'enquête judiciaire relative aux ministres impliqués dans la gestion de l'épidémie du Coronavirus', (*Blog de Jus Politicum*, 21 October 2020), blog.juspoliticum.com/2020/10/21/mal-gouverner-est-il-un-crime-reflexions-critiques-sur-les-perquisitions-effectuees-dans-le-cadre-de-lenquete-judicaire-relative-aux-ministres-impliques-dans-la-gestion-de-lepidem/. See also Brunet, 'The Hyper-Executive State' (n 8) 210.

3. Causation

3.1. Causation (General Principles)

The causal link between the offender's behaviour and the wrong caused, *i.e.* causation (*lien de causalité*), needs to be established to determine criminal liability.[58] Since a law of 10 July 2000, a distinction was made in French criminal law between direct and indirect causation.[59] Direct causation can be defined as the most proximate cause, and generally stems from a physical contact between the offender and the victim. It is thus unlikely that direct causation could be established in trying to link the decisions of the French executive with the harm caused by the pandemic. By contrast, and by virtue of article 121-3 of the French Code Pénal, indirect causation would be more plausible. Indirect causation exists when:

> Natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen who failed to take steps enabling it to be avoided, are criminally liable where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware.[60]

Interestingly, the scope of this disposition was specified – and admittedly narrowed – by a law of 11 May 2020 which extended the state of health emergency and added article L. 3136-2 to the Code of Public Health according to which:

> Article 121-3 is applicable by taking into consideration the competences, power and means that were at the disposal of the author of the acts in the crisis situation that justified the state of health emergency as well as the nature of his or her missions or functions, notably as local authority or employer.[61]

In establishing causation, Rousseau notes that the French 'criminal jurisprudence is not insensitive to the theory of adequate causation',[62] according to which it is the most likely

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[58] On the attribution of responsibility in French criminal law, see generally F Rousseau, *L'imputation dans la responsabilité pénale* (Paris, Dalloz, 2009).

[59] See Loi n° 2000-647 du 10 juillet 2000 tendant à préciser la définition des délits non intentionnels, *Journal Officiel de la République Française* n°159 (11 July 2000).

[60] All English translations of the French Code pénal are taken from the translation available at : www.legislationline.org/download/id/3316/file/France_Criminal%20Code%20updated%20on%2012-10-2005.pdf. The original version reads: 'les personnes physiques qui n'ont pas causé directement le dommage, mais qui ont créé ou contribué à créer la situation qui a permis la réalisation du dommage ou qui n'ont pas pris les mesures permettant de l'éviter, sont responsables pénalement s'il est établi qu'elles ont, soit violé de façon manifestement délibérée une obligation particulière de prudence ou de sécurité prévue par la loi ou le règlement, soit commis une faute caractérisée et qui exposait autrui à un risque d'une particulière gravité qu'elles ne pouvaient ignorer.'

[61] Translation by the authors. The original version reads: 'L'article 121-3 du code pénal est applicable en tenant compte des compétences, du pouvoir et des moyens dont disposait l'auteur des faits dans la situation de crise ayant justifié l'état d'urgence sanitaire, ainsi que de la nature de ses missions ou de ses fonctions, notamment en tant qu'autorité locale ou employeur.'

[62] See Rousseau, *L'imputation* (n 58) 85. Translation by the authors. The original version reads: 'la jurisprudence pénale n'est pas insensible à la théorie de la causalité adéquate.'

cause that will be retained, notably – although not exclusively – in cases of manslaughter and involuntary offences.[63] He illustrates this argument by reference to two cases in which the victim died in the aftermath of an accident provoked by the defendant which however *should not* have caused the death of the victim and in which the defendant was thus discharged of manslaughter.[64] For Rousseau, resort to adequate causation seems to be a means for the court to establish causation with certainty rather than to distinguish between direct and indirect causation.[65] Whether the decisions – or lack of – on the part of the French executive can be considered as the most probable cause of the harm linked to the Covid-19 pandemic is the exact question the below sections on criminal offences will explore.

3.2. Causation and 'Thin Skull' Scenarios

Under French criminal law, causation need not be exclusive:

> Even if causation is shared by several participants (coactivity), linked to other events (intervention of a third party...) or in connection with a wrongdoing attributable to the victim, the defendant remains entirely responsible, save in the case of force majeure.[66]

Practically speaking, this means that if the actions of the defendant contributed to the wrong caused, the defendant may be held criminally liable: their actions do not need to be the sole and exclusive cause of the harm suffered. With respect to the harm suffered as a result of the alleged ill-management of the Covid-19 pandemic by the French executive, this ill-management – while it still needs to be demonstrated – need not be the exclusive cause of the harm for the members of the French government to be held criminally liable. Yet, as mentioned, first, the ill-management must be proven and second, it must be established as one of the causes of the harm suffered.

3.3. Restricting Causality: Policy and Doctrinal Issues

French criminal law operates a distinction between direct and indirect causation. As Mayaud explains, 'a mere misconduct is sufficient when the harm is direct, while a deliberate or characterised wrongdoing is required when the harm is indirect'.[67] In this instance, direct causation seems to be excluded since there has been no physical contact between the potential offenders – members of the French executive – and the victims who suffered or died from

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[63] See Rousseau, *L'imputation* (n 58) 86.

[64] Such was the outcome in a case where a motorist had slightly wounded a cyclist who later died of a heart attack while trying to follow the vehicle, as well as in a case where the motorist had wounded a pedestrian who later died of a nosocomial infection caught in hospital. See Crim. 25 April 1967, *Bull. crim.* 1967, n°119 and Crim. 5 October 2004, *Bull. crim.* 2004, n°230, cited in Rousseau, *L'imputation* (2009) 85.

[65] Rousseau, *L'imputation* (n 58) 85.

[66] Y Mayaud, *Droit pénal général*, 7th edn (Paris, Presses Universitaires de France, 2021) 360. Translation by the authors. The original version reads: 'En droit pénal, [la causalité] serait-elle commune à plusieurs participants (coactivité), associée à d'autres événements (fait d'un tiers...), voire en rapport avec une faute imputable à la victime elle-même, la responsabilité reste totale pour le prévenu, réserve faite de la force majeure.'

[67] See Mayaud, *Droit pénal général* (n 66) 361. Translation by the authors. The original version reads: 'une simple faute suffit lorsque le dommage est direct, alors qu'une faute délibérée ou caractérisée est exigée en cas de dommage indirect'.

Covid-19. Yet, the theory of indirect causation would still allow for the recognition of their criminal liability if it is shown that they have committed a wrongdoing, for instance by creating, or contributing to create, a situation which allowed the suffering or death of individuals from Covid-19 or that they failed to take the necessary steps to avoid such suffering and death. It would also be necessary to demonstrate that they broke a duty of care or precaution as enshrined in the law in a manifestly deliberate manner or that they have committed a certain misconduct which exposed individuals to serious health risks of which they must have been aware. It is thus in the light of indirect causation that the different available criminal offences need to be approached.

4. The Structure of Homicide Offences and Assault/Aggravated Assault/Serious Bodily Harm Offences

This section will review and consider the possible criminal charges that the successive Prime Ministers and ministers – and, as mentioned earlier, the President of the Republic if such charges qualify as breaches incompatible with his presidential duties – could potentially be facing. Although speculative since the complaints lodged against the Prime Minister and ministers are not readily available, this analysis generates key reflections on the criminal liability of the French executive.

4.1. Murder/Intentional Homicide

The French Penal Code defines murder in a fairly swift manner as:

> The wilful causing of the death of another person.[68]

When 'committed with premeditation', the French Penal Code specifies that murder is assassination.[69] Using any of these two offences to qualify the behaviour of the French executive in its management of the Covid-19 pandemic would be preposterous and defamatory. There is indeed no evidence at all that any members of the French executive willfully caused the death of any person from Covid-19.

Under article 221-5 of the French Penal Code:

> Making an attack against the life of another person by the use or administration of substances liable to cause death constitutes poisoning.[70]

Interestingly, it was this charge that the defendants initially had to face in the previously mentioned *affaire du sang contaminé*; a charge that was subsequently dropped following the Cour de cassation's finding that 'the mental element of the crime of poisoning includes not only the intent to administer a deadly substance but also the intent to kill'.[71] Practically

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[68] French Penal Code, art 221-1. The original version reads: 'Le fait de donner volontairement la mort à autrui constitue un meurtre.'

[69] French Penal Code, art 221-3.

[70] The original version reads: 'Le fait d'attenter à la vie d'autrui par l'emploi ou l'administration de substances de nature à entraîner la mort constitue un empoisonnement.'

[71] Cass. Crim., 2 July 1998, n° 98-80.529, available at : www.legifrance.gouv.fr/juri/id/JURITEXT000007069037/. Translation by the authors. The original version

speaking, this means that it is only if the anti-Covid 19 vaccine was qualified as a deadly substance, if the members of the executive knew of this lethal character, and if they had the intent to kill that the vaccination campaign they orchestrated could be characterised as poisoning. Unless falling for the various conspiracy theories, this hypothesis seems whimsical and highly improbable. Applied to the management of the Covid-19 pandemic, it is here also highly unlikely that such a charge would be applicable due to an impossibility to establish either the intent to administer a deadly substance or the intent to kill on the part of the French executive.

4.2. Culpable Homicide/Manslaughter

In its article 221-6, the French Penal Code defines manslaughter as:

> Causing the death of another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulations.[72]

It is conceivable that certain complaints will invoke the clumsiness and/or negligence of the successive Prime Ministers and Health Ministers, and will underpin their claims with evidence of their ill-preparation, for instance when it came to the poorly managed supply of masks. This was not the sole example of ill-management. In the course of the pandemic, the French executive also decided to reduce the number of hospital beds, thereby increasing the pressure on hospitals and generating delays in the treatment of other diseases, including potentially lethal ones.[73] Showing a clear lack of discernment and insight, the French executive also failed to anticipate the disastrous consequences of the lockdown on the increase of domestic violence.[74]

While one can only acknowledge that, with the Covid-19 pandemic, political decisions are taken in a context of sanitary and scientific uncertainty, it seems clear that caution is required. Yet, the decisions and actions of the executive reveal a high degree of political carelessness. Whether this lack of prudence was prompted by the circumstances, encouraged by media pressure and/or aggravated by the exponential use of social media or stemmed for a combination of these and other factors is open to interpretation. What is more certain is that when the health and life of individuals are endangered by a political lack of vigilance, this failure can become criminal. If the causal link can be established, the offence defined in

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reads: 'l'élément intentionnel du crime d'empoisonnement suppose non seulement l'intention d'administrer une substance mortifère, mais l'intention de tuer.' See also: Cass. crim., 18 juin 2003, n° 02-85.199, *Procureur général près la cour d'appel de Paris et autres*, www.legifrance.gouv.fr/juri/id/JURITEXT000007069442/. See generally Mayaud, *Droit pénal général* (n 66) 305-306.

[72] The original version reads: 'Le fait de causer (…) par maladresse, imprudence, inattention, négligence ou manquement à une obligation de prudence ou de sécurité imposée par la loi ou le règlement, la mort d'autrui constitue un homicide involontaire'.

[73] See, eg 'Olivier Véran tente d'expliquer la fermeture de plus de 5 700 lits à l'hôpital' *Le Monde* (online, 27 October 2021), www.lemonde.fr/societe/article/2021/10/27/difficultes-a-recruter-absenteisme-et-demissions-a-l-origine-de-la-fermeture-des-lits-dans-les-hopitaux-selon-olivier-veran_6100123_3224.html.

[74] See A Taub, 'A New Covid-19 Crisis: Domestic Abuse Rises Worldwide' *The New York Times* (online, 14 April 2020), www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html.

article 221-6 of the French Penal Code – in terms of both its material and moral dimensions – could be established.

4.3. Offences Related to Actions that Cause Serious Bodily Harm (Assault; Grievous Assault; Assault with Intent to Cause Serious Bodily Harm)

Article 222-7 of the French Penal Code criminalises

> acts of violence causing an unintended death.[75]

Article 222-8 specifically envisages the scenario in which these acts are perpetrated

> against a person whose particular vulnerability, due to age, sickness or infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator.[76]

Deprived of the obligation to prove the intent to cause death, this qualification could at first glance appear more appropriate if the actions of the French executive were to be prosecuted – although proving the violence might be close to impossible.

Still, acts of violence that cause bodily harm are criminalised and differentiated by the impact of the outcome on the health of the victim. Article 222-9 of the French Penal Code punishes '[a]cts of violence causing mutilation or permanent disability'[77] while article 222-11 punishes '[a]cts of violence causing a total incapacity to work for more than eight days'.[78] Both dispositions also envisage the specific case of persons of 'particular vulnerability'.[79] In this respect, it is worth noting that article 222-13 punishes '[a]cts of violence causing an incapacity to work of eight days or less or causing no incapacity to work'[80] when committed against particularly vulnerable persons. Here also however, these different acts of violence punishable under French criminal law might be inadequate qualifications since it is hard to conceive how violence on the part of the French executive could be established.

In any event, at the time of writing, it appears that it is another criminal charge that has been brought against one member of the government. Former Health Minister Agnès Buzyn was indeed charged by the Cour de justice de la République in September 2021[81] under article 223-1 of the French Penal Code that criminalises the act of endangering the lives of others.

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[75] The original version reads: 'Les violences ayant entraîné la mort sans intention de la donner'.
[76] The original version reads: 'Sur une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou connue de son auteur'.
[77] The original version reads: **'**Les violences ayant entraîné une mutilation ou une infirmité permanente'.
[78] The original version reads: 'Les violences ayant entraîné une incapacité totale de travail pendant plus de huit jours'.
[79] See French Penal Code, arts 222-10 (2) and 222-12 (2).
[80] The original version reads: 'Les violences ayant entraîné une incapacité de travail inférieure ou égale à huit jours ou n'ayant entraîné aucune incapacité de travail'.
[81] See 'France's former health minister charged over handling of Covid crisis' *The Guardian* (online, 10 September 2021), www.theguardian.com/world/2021/sep/10/frances-former-health-minister-charged-over-handling-of-covid-crisis.

Explicitly requiring a manifest and deliberate violation of an obligation of safety and prudence, this offence is defined as:

> The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the *manifestly deliberate violation of a specific obligation of safety or prudence* imposed by any statute or regulation.[82] (emphasis added)

Three elements are thus cumulatively required for this offence to be established: a 'violation of a specific obligation of safety or prudence' imposed by law; a causal link between this violation and the 'direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability'; and this violation must be 'manifestly deliberate'.[83] According to the case law, a manifestly deliberate violation may be characterised by an 'accumulation of reckless behaviour that may be simultaneous or successive'. [84] Yet, it is precisely this last element of 'manifestly deliberate' that may prove problematic before the Court. Political missteps and mistakes might reflect 'clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence', as per article 221-6, rather than a manifest and deliberate violation of such obligation. Charging Buzyn – or other members of the government – with endangering the lives of others might thus be a step too far.

4.4. Offences Regarding Unborn Foetuses; Interrupting the Course of a (Viable) Pregnancy

The French Penal Code contains a series of dispositions devoted to the protection of the embryo[85] as well as two articles criminalising respectively '[t]he termination of a pregnancy without the consent of the person concerned'[86] and the attempt to terminate a pregnancy without the consent of the person concerned.[87] These offences require an intent to harm the embryo and/or terminate the pregnancy.

The most likely hypothesis in which this characterisation could be envisaged would be the previously dismissed poisoning scenario related to the vaccination campaign.[88] Another hypothesis would be the murder scenario, which as already explained would be equally

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[82] The original version reads: 'Le fait d'exposer directement autrui à un risque immédiat de mort ou de blessures de nature à entraîner une mutilation ou une infirmité permanente par la violation manifestement délibérée d'une obligation particulière de prudence ou de sécurité imposée par la loi ou le règlement'.
[83] See P-H Bovis, 'Mise en danger de la vie d'autrui' (*Village de la Justice*, 6 April 2020), www.village-justice.com/articles/mise-danger-vie-autrui,34539.html.
[84] Vigo Avocats, 'Flash info : les infractions de mise en danger délibérée de la vie d'autrui et de blessures ou homicide involontaires : éléments constitutifs' (30 March 2020), vigo-avocats.com/legal-news/flash-info-les-infractions-de-mise-en-danger-deliberee-de-la-vie-dautrui-et-de-blessures-ou-homicide-involontaires-elements-constitutifs/#_ftn6. In terms of case law they refer to: Crim. 5 janv. 2005, *Gérard X. et a.*, nº 04-82.738 and Crim. 29 juin 2010, nº 09-81.861.
[85] See arts 511-15 to 6511-25-1.
[86] Art 223-10. The original version reads: 'L'interruption de la grossesse sans le consentement de l'intéressée'.
[87] Art 223-11.
[88] See above section 4.1.

inapplicable, even if article 221-4 (3) of the French Penal Code specifically provides for a higher sentencing in cases of murder committed

> against a person whose particular vulnerability, due to age, sickness or infirmity, or to any physical or psychological disability or to *pregnancy*, is apparent or known to the perpetrator.[89] (emphasis added)

Interestingly, this 'particular vulnerability' is also recognised in the case of 'acts of violence causing an unintended death',[90] which do not require proof of the intent to cause death and which could thus potentially provide for a judicial avenue if it is established that the acts of the French executive caused the interruption of the pregnancies.

Another – and admittedly more reasonable – argument could be based on the failures of the hospital system to fully comply with its duty of care (in all of its aspects). Yet, establishing causation between these alleged failures and the behaviour of the French executive would prove arduous, unless it is established that such failures stem directly from the above-mentioned executive decision to reduce hospital beds. As a result, it is highly unlikely that the French executive could be prosecuted for offences regarding unborn fetuses and interruptions of pregnancies.

4.5. Failure to Render Assistance

Under Article 223-6 of the French Penal Code:

> Anyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so
>
> and
>
> anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations[91]

may be charged with failure to offer assistance to a person in danger.

Against the French executive, the plaintiffs could argue that the hesitations in decision-making triggered delays, which in turn endangered the health and life of the population. However, unlike with the qualification of manslaughter, they would here need to prove a failure to act; failure which could constitute indirect causation. In the context of the

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[89] The original version reads: 'Sur une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou connue de son auteur'.

[90] See art 222-8.

[91] The original version reads: 'Quiconque pouvant empêcher par son action immédiate, sans risque pour lui ou pour les tiers, soit un crime, soit un délit contre l'intégrité corporelle de la personne s'abstient volontairement de le faire (…) quiconque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ou pour les tiers, il pouvait lui prêter soit par son action personnelle, soit en provoquant un secours.'

management of the Covid-19 pandemic by the government, the tergiversations and delayed actions coupled with a certain form of voluntary refusals to take action (for example when it came to the government's initial refusal to re-stock masks[92]) could coincide with the qualification of failure to offer assistance to a person in danger. This conclusion is however speculative as existing relevant case law – dealing with individual acts rather than with governmental ones – would not extend to this particular context.

The plaintiffs could also rely on another criminal qualification, that of abstaining from combatting a natural disaster which, as per article 223-7 of the French Penal Code, is characterised when a person

> voluntarily abstains from taking or initiating measures, which involve no risk to himself or to third parties, to combat a natural disaster likely to endanger the safety of others.[93]

With this qualification, the plaintiffs would first need to establish that the Covid-19 is a natural disaster. This might seem fairly straightforward but could open a debate within the courtroom as to the origins of the pandemic, requiring the hearing of scientific experts who might not agree and who might be unable to effectively guide the judges in their determination. The plaintiffs would here also need to demonstrate that the successive Prime Ministers and Health Ministers '*voluntarily* abstained from taking or initiating measures'. This voluntariness would characterise indirect causation, as in the above-mentioned example of the explicit refusal to re-stock masks.

5. Defences, Justifications and Excuses

French criminal law knows of four '*faits justificatifs généraux*': the order of the law; the command of lawful authority, self-defense, and necessity.[94]

5.1. The Order of the Law

Under French criminal law, the order of the law relieves a person from criminal liability when that person

> performs an act prescribed or authorised by legislative or regulatory provisions.[95]

This justification would not be available to the members of the French executive since they are the ones who initiated the impugned legislation and practice.

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[92] See 'Contre le coronavirus, Agnès Buzyn juge "inutile" l'achat de masques' *Huffington Post* (online, 27 January 2020), www.huffingtonpost.fr/entry/contre-le-coronavirus-agnes-buzyn-deconseille-lachat-de-masques_fr_5e2e163ec5b6d6767fd6c826.

[93] The original version reads: 'Quiconque s'abstient volontairement de prendre ou de provoquer les mesures permettant, sans risque pour lui ou pour les tiers, de combattre un sinistre de nature à créer un danger pour la sécurité des personnes.'

[94] See Mayaud, *Droit pénal général* (n 66) 518.

[95] French Penal Code, art 122-4. The original version reads: 'N'est pas pénalement responsable la personne qui accomplit un acte prescrit ou autorisé par des dispositions législatives ou réglementaires.'

5.2. The Command of Lawful Authority

In the same vein, the command of lawful authority can be validly invoked when the person

> performs an action commanded by a lawful authority, unless the action is manifestly unlawful.[96]

Just like the order of the law, this justification is inapplicable in the case at hand since the members of the French executive are the lawful authority.

5.3. Self-Defense

The third objective justification under French criminal law is self-defense, envisaged in article 122-5 of the French Penal Code as:

> A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the attack.
>
> A person is not criminally liable if, to interrupt the commission of a felony or a misdemeanour against property, he performs an act of defence other than wilful murder, where the act is strictly necessary for the intended objective the means used are proportionate to the gravity of the offence.[97]

Article 122-6 specifies that:

> A person is presumed to have acted in a state of self-defence if he performs an action:
>
> i) to repulse at night an entry to an inhabited place committed by breaking in, violence or deception;
>
> ii) to defend himself against the perpetrators of theft or pillage carried out with violence.[98]

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[96] French Penal Code, art 122-4. The original version reads: 'N'est pas pénalement responsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal.'

[97] French Penal Code, art 122-5. The original version reads: 'N'est pas pénalement responsable la personne qui, devant une atteinte injustifiée envers elle-même ou autrui, accomplit, dans le même temps, un acte commandé par la nécessité de la légitime défense d'elle-même ou d'autrui, sauf s'il y a disproportion entre les moyens de défense employés et la gravité de l'atteinte.
N'est pas pénalement responsable la personne qui, pour interrompre l'exécution d'un crime ou d'un délit contre un bien, accomplit un acte de défense, autre qu'un homicide volontaire, lorsque cet acte est strictement nécessaire au but poursuivi dès lors que les moyens employés sont proportionnés à la gravité de l'infraction.'

[98] French Penal Code, art 122-6. The original version reads: 'Est présumé avoir agi en état de légitime défense celui qui accomplit l'acte:
1° Pour repousser, de nuit, l'entrée par effraction, violence ou ruse dans un lieu habité ;
2° Pour se défendre contre les auteurs de vols ou de pillages exécutés avec violence.'

As per these definitions, the only way the executive could claim they acted in self-defence would be for them to demonstrate that Covid-19 was an unjustified attack to which they responded, which seems a rather stretched line of argumentation.

5.4. Necessity

The fourth and last objective justification is necessity, which relieves a person of criminal liability when that person

> if confronted with a present or imminent danger to himself, another person or property, (...) performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat.[99]

This objective justification could potentially be validly invoked by the French executive.

While trying to preserve economic interests as far as it was feasible to do so, to avoid 'greater evil' of economic disaster, hunger and hardship, the French executive – under the direction of the President of the Republic – had one objective: to stop the spread of the virus '*quoiqu'il en coûte*' ('whatever the cost'). This probably explains why, so far, no member of the French government has claimed necessity when facing accusations of ill-management of the pandemic. Rather, faced with these accusations and potential criminal charges, the successive Prime Ministers and members of the government have so far claimed that they have consistently acted in good faith and recalled that their decisions had been taken in accordance with scientific advice.[100] The three successive Health Ministers themselves are physicians and thus scientifically trained and knowledgeable. Their scientific background could thus be invoked as a shield from criminal responsibility. It could however backfire in the sense that, as physicians, they should have exercised their duty of care, as discussed above, with particularly acute diligence.

6. Corporate Criminal Liability

6.1. Overview of Corporate Criminal Liability

Article 121-2 of the French Penal Code is unequivocal:

> Legal persons, *with the exception of the State*, are criminally liable for the offences committed on their account by their organs or representatives.[101]

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[99] French Penal Code, art 122-7. The original version reads: 'N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle- même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace.'

[100] For instance, before the Senate's investigative commission on 23 September 2020, Sibeth Ndiaye – former spokesperson of the government – reaffirmed that she never lied in relation to the masks stock and policies. See G Jacquot, '«À aucun moment, on ne m'a demandé de mentir sur ce qu'était la situation des masques», déclare Sibeth Ndiaye' (*Public Sénat*, 23 September 2020), www.publicsenat.fr/article/parlementaire/a-aucun-moment-on-ne-m-a-demande-de-mentir-sur-ce-qu-etait-la-situation-des.

[101] The original version reads: 'Les personnes morales, à l'exclusion de l'Etat, sont responsables pénalement'.

Yet,

> local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.[102]

Ultimately,

> [t]he criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act.[103]

Under French criminal law therefore, and with the exception of the State, 'Legal persons may incur criminal liability' for all the offences listed in the French Penal Code, including wilful injury to life,[104] and could thus be found responsible for murder, assassination, poisoning, or manslaughter. In the context of the Covid-19 pandemic, it is difficult to identify legal persons which could reasonably be prosecuted for criminal wrongdoings although, as previously mentioned, hospitals could see their criminal responsibility engaged for alleged failures to fulfil their duty of care. Other concerned legal persons could be pharmaceutical companies for possible side effects of the anti-Covid-19 vaccine(s), or the media for alleged misinformation.

6.2. Perpetrator or Accessory

Insofar as the State is immune from criminal prosecution, it cannot be the perpetrator or the accomplice of a crime. Where this question could however arise is with respect to the criminal responsibility of other legal persons, such as those identified in the previous section. If criminal prosecutions were to be engaged against them, their exact role would depend on the particular factual circumstances of each case. This assessment would rely on the dispositions of the French Penal Code which explicitly differentiates between perpetrator and accomplice.

On the one hand it defines the perpetrator as

> the person who: 1° commits the criminally prohibited act; 2° attempts to commit a felony or, in the cases provided for by Statute, a misdemeanour.[105]

On the other hand, the accomplice to a felony or a misdemeanour is

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[102] French Penal Code, art 121-2. The original version reads: 'les collectivités territoriales et leurs groupements ne sont responsables pénalement que des infractions commises dans l'exercice d'activités susceptibles de faire l'objet de conventions de délégation de service public.'

[103] French Penal Code, art 121-2. The original version reads: 'La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes faits'.

[104] French Penal Code, art 221-5-2. The original version reads: 'Les personnes morales déclarées responsables pénalement, dans les conditions prévues par l'article 121-2, des infractions définies à la présente section'.

[105] French Penal Code, art 121-4. The original version reads: 'Est auteur de l'infraction la personne qui : 1° Commet les faits incriminés ; 2° Tente de commettre un crime ou, dans les cas prévus par la loi, un délit.'

> the person who knowingly, by aiding and abetting, facilitates its preparation or commission
>
> or
>
> any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.[106]

Under French criminal law, a distinction is thus drawn between acts with 'tend to prepare, facilitate and realise the offence' and acts 'which, by the simultaneity of action and reciprocate assistance, constitute the perpetration' of the offence, whose authors thus qualify more as co-authors than as accomplices.[107]

7. Forms of Participation

The French Penal Code punishes both the author of the crime or of the attempt to commit the crime and the accomplice. Complicity itself is divided into two forms of participation: aiding and abetting as well as provoking or instructing. Under article 121-7, the aider and abetter who 'facilitates [the] preparation or commission of the offence' is criminally liable,[108] as is someone who 'by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it'.[109] Rousseau notes that this disposition 'solely requires an intentional participation of the accomplice, without mentioning any association with the perpetrator.'[110]

This is however not to say that French criminal law does not encompass the *entente criminelle* understood as:

> A criminal association consist[ing] of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.[111]

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[106] French Penal Code, art 121-7. The original version reads: 'Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation.
Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre.'

[107] See Crim., 17 December 1859, D.P. 1860.1.196. Translation by the authors. Cited in Mayaud, *Droit pénal général* (2021) 483: 'Dans les actes de complicité, il faut distinguer ceux qui, extrinsèques à l'acte, tendent à en préparer, faciliter et réaliser la consommation, de ceux qui, par la simultanéité d'action et l'assistance réciproque, en constituent la perpétration même; il suit que les individus coupables de ces derniers actes sont bien moins des complices que des coauteurs de l'infraction'.

[108] French Penal Code, art 121-7(1).

[109] French Penal Code, art 121-7(2).

[110] Rousseau, *L'imputation* (n 58) 258. Translation by the authors. The original version reads : 'l'article 121-7 exige seulement une participation intentionnelle du complice, sans évoquer une quelconque entente avec l'auteur.'

[111] French Penal Code, art 450-1. The original version reads: 'Constitue une association de malfaiteurs tout groupement formé ou entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un ou plusieurs crimes ou d'un ou plusieurs délits punis d'au moins cinq ans d'emprisonnement.'

As we have previously established, the State cannot be held criminally liable, be it as an author, a co-author, an accomplice or a member of a criminal association while the participation of other legal persons would need to be judicially assessed. In theory, and contrastingly, individual members of the French executive could see their criminal liability engaged for their management of the Covid-19 pandemic either on their own or as part of an association. Regardless of the form of participation, if it was established that a criminal offence was indeed perpetrated, it would be for the Haute Cour (for the President of the Republic), the Cour de justice de la République (for the Prime Minister and the members of the government), or ordinary courts (for legal persons or other natural persons) to qualify the mode of perpetration.

8. Attempt

As per the above, the person who attempts to commit the crime will be considered as the author of the crime. Article 121-5 of the French Penal Code clarifies that

> an attempt is committed where, being demonstrated by a beginning of execution, it was suspended or failed to achieve the desired effect solely through circumstances independent of the perpetrator's will.[112]

In the context of the management of the Covid-19 pandemic, this attempt scenario is difficult to envisage: what would this 'desired effect' be? Since it cannot be reasonably conceived as the death of hundreds of thousands of people, it follows that the qualification of attempt seems irrelevant to the case at hand.

9. Sanctions, Sentencing, Punishment, Reparations and/or Restorative Justice

9.1. General Sentencing Framework for the Crimes under Discussion

Murder is punished with thirty years' imprisonment[113] while assassination is punished by a criminal imprisonment for life.[114] Also punished by criminal imprisonment for life are:

> Murder which precedes, accompanies or follows another felony;[115]
>
> Murder which is intended either to prepare or to facilitate a misdemeanour, or to assist an escape or to ensure the impunity of the misdemeanant or an accomplice to a misdemeanour;[116]

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[112] The original version reads: 'La tentative est constituée dès lors que, manifestée par un commencement d'exécution, elle n'a été suspendue ou n'a manqué son effet qu'en raison de circonstances indépendantes de la volonté de son auteur.'
[113] French Penal Code, art 222-1.
[114] French Penal Code, Art 221-3. The original version reads: 'Le meurtre commis avec préméditation ou guet-apens constitue un assassinat. Il est puni de la réclusion criminelle à perpétuité.'
[115] French Penal Code, Art 221-2. The original version reads: 'Le meurtre qui précède, accompagne ou suit un autre crime est puni de la réclusion criminelle à perpétuité.'
[116] French Penal Code, Art 221-2. The original version reads: 'Le meurtre qui a pour objet soit de préparer ou de faciliter un délit, soit de favoriser la fuite ou d'assurer l'impunité de l'auteur ou du complice d'un délit est puni de la réclusion criminelle à perpétuité.'

> [Murder committed] against a person whose particular vulnerability, due to age, sickness or infirmity, or to any physical or psychological disability or to pregnancy, is apparent or known to the perpetrator.[117]

Poisoning, which also necessitates an intent to kill, is punished by thirty years' criminal imprisonment. It is punished by criminal imprisonment for life where it is committed in any of the circumstances provided for by articles 221-2, 221-3 and 221-4',[118] that is to say when poisoning is a means to commit murder.

The French Penal Code provides for less severe sentences when it comes to non-intentional offences. Manslaughter entails a prison sentence of three or five years and a fine of €45,000 or €75,000, depending on whether the violation of the obligation of safety or prudence was deliberate or not.[119] Acts of violence causing an unintended death are punished by a prison sentence of fifteen years,[120] although this sentence may increase to twenty years of imprisonment if the acts were committed 'against a person whose particular vulnerability, due to age, sickness or infirmity, to a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator'.[121] Acts of violence causing mutilation or permanent disability are punished by ten years' imprisonment and a fine of €150,000[122] and this sentence may increase to fifteen years' imprisonment when committed against particularly vulnerable persons.[123] Acts of violence causing a total incapacity to work for more than eight days are punished by three years' imprisonment and a fine of €45,000;[124] a sentence which might be increased to five years' imprisonment and a fine of €75,000 when committed against particularly vulnerable persons.[125] Finally, acts of violence causing an incapacity to work of eight days or less or causing no incapacity to work are punished by three years' imprisonment and a fine of €45,000 when committed against particularly vulnerable persons.[126]

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[117] French Penal Code, Art 221-4 (3). The original version reads: 'Sur une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou connue de son auteur'.

[118] French Penal Code, Art 221-5. The original version reads: 'L'empoisonnement est puni de trente ans de réclusion criminelle.
Il est puni de la réclusion criminelle à perpétuité lorsqu'il est commis dans l'une des circonstances prévues aux articles 221-2, 221-3 et 221-4.'

[119] See French Penal Code, art 221-6.

[120] See French Penal Code, art 222-7.

[121] French Penal Code, art 222-8 (2). The original version reads: 'Sur une personne dont la particulière vulnérabilité, due à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou connue de son auteur'.

[122] French Penal Code, art 222-9. The original version reads: 'Les violences ayant entraîné une mutilation ou une infirmité permanente sont punies de dix ans d'emprisonnement et de 150 000 euros d'amende.'

[123] French Penal Code, art 222-10 (2).

[124] French Penal Code, art 222-11. The original version reads: 'Les violences ayant entraîné une incapacité totale de travail pendant plus de huit jours'.

[125] French Penal Code, art 222-12 (2).

[126] French Penal Code, art 222-13. The original version reads: 'Les violences ayant entraîné une incapacité de travail inférieure ou égale à huit jours ou n'ayant entraîné aucune incapacité de travail'.

The act of endangering the lives of others is punished by one year's imprisonment and a fine of €15,000.[127]

All the above-listed offences may also incur a whole series of complementary penalties.[128]

With respect to illegal interruptions of pregnancies, both the termination of a pregnancy without the consent of the person concerned and the attempt to forcefully terminate the pregnancy are punished by five years' imprisonment and a fine of €75,000.[129]

Failure to act is also punishable. As per article 223-6 of the French Penal Code, failure to offer assistance to a person in danger is punished by five years' imprisonment and a fine of €75,000. The same penalties apply to anyone who wilfully fails to offer assistance.[130] The penalties are increased to seven years of imprisonment and a fine of €100,000 when the endangered person is a minor of 15 years old.[131] As per article 223-7 of the French Penal Code, abstaining from combatting a natural disaster is punished by two years' imprisonment and a fine of €30,000.[132]

Different forms of participation may also have an influence on sentencing, although – as previously noted – the person who attempts to commit an offence will be considered as the perpetrator and will thus incur the exact same penalties. With respect to criminal associations, the French Penal Code specifies that:

> Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, the participation in a criminal association is punished by ten years' imprisonment and a fine of €150,000. Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of €75,000.[133]

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[127] French Penal Code, art 223-1. The original version reads: 'puni d'un an d'emprisonnement et de 15 000 euros d'amende.'

[128] See French Penal Code, arts 221-8 to 221-11-1.

[129] See French Penal Code, arts 223-10 and 223-11. The original versions read: 'L'interruption de la grossesse sans le consentement de l'intéressée est punie de cinq ans d'emprisonnement et de 75 000 euros d'amende' and 'La tentative du délit prévu à l'article 223-10 est punie des mêmes peines.'

[130] The original version reads: 'Quiconque pouvant empêcher par son action immédiate, sans risque pour lui ou pour les tiers, soit un crime, soit un délit contre l'intégrité corporelle de la personne s'abstient volontairement de le faire est puni de cinq ans d'emprisonnement et de 75 000 euros d'amende.
Sera puni des mêmes peines quiconque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ou pour les tiers, il pouvait lui prêter soit par son action personnelle, soit en provoquant un secours.'

[131] French Penal Code, art 223-6.

[132] The original version reads: 'Quiconque s'abstient volontairement de prendre ou de provoquer les mesures permettant, sans risque pour lui ou pour les tiers, de combattre un sinistre de nature à créer un danger pour la sécurité des personnes est puni de deux ans d'emprisonnement et de 30 000 euros d'amende.'

[133] French Penal Code, art 450-1. The original version reads: 'Lorsque les infractions préparées sont des crimes ou des délits punis de dix ans d'emprisonnement, la participation à une association de malfaiteurs est punie de dix ans d'emprisonnement et de 150 000 euros d'amende.
Lorsque les infractions préparées sont des délits punis d'au moins cinq ans d'emprisonnement, la participation à une association de malfaiteurs est punie de cinq ans d'emprisonnement et de 75 000 euros d'amende.'

Complementary sentences are also provided for,[134] including for legal persons.[135]

Defined as 'one which allows a victim as well as an offender to be actively involved in the resolution of the difficulties resulting from the offence and more particularly in the reparation of any caused harm',[136] a measure of restorative justice necessarily implies an acute exploration of the causes and consequences of the offence and of the ways to address them. In the context of the pandemic, restorative justice would be multi-dimensional and require an extensive self-reflection on the part of those whose criminal responsibility could be engaged.

9.2. Sanctions Specifically for Senior Government/Public Officials

Since the start of the Covid-19 pandemic, President Macron has fully endorsed the role of the President of the Republic as conceived in the Constitution of the fifth Republic. Although he does act in consultation with scientific committees, the Prime Minister and the government, he is undoubtedly the main decision maker. Yet, as this contribution has shown, as President of the Republic, he bears no political accountability before Parliament and is essentially immune from criminal jurisdiction for the acts performed as part of his presidential management of the health crisis generated by Covid-19, except in the highly unlikely situation of removal from office activated in case of 'a breach of his duties patently incompatible with his continuing in office'.[137]

This is not to say that the French executive is fully shielded from criminal liability. The Prime Minister and the ministers are not only politically accountable to Parliament, they could also be held criminally responsible for their actions while in office even if they merely implement the decisions of the President of the Republic. As mentioned, a substantial number of complaints have already been lodged with the Cour de justice de la République to establish the criminal liability of the successive Prime Ministers and Health Ministers in their management of the pandemic. Whether these will be successful cannot be speculated upon at this stage. What is certain however is that the determination of criminal responsibility, if any, must be deprived of all partisan considerations; a neutrality which will admittedly be difficult to reach since all the decisions that have been taken to deal with the Covid-19 pandemic have been taken by the executive power, through the person of the President of the Republic, and have thus been highly political.

Since President Macron promulgated the law of 23 March 2020 establishing the state of health emergency, the French public has been confronted with numerous public announcements and a substantial number of political decisions accompanied by legal

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[134] See French Penal Code, arts 450-3 and 450-5.
[135] See French Penal Code, arts 450-4 and 450-5.
[136] French Code of Criminal Procedure, art 10-1. See generally R Cario and B Sayous, 'Restorative justice in France: some reflections on its current development by the French Institute for Restorative Justice' (2018) 1 *The International Journal of Restorative Justice* 122. Translation by the authors. The original version reads: 'Constitue une mesure de justice restaurative toute mesure permettant à une victime ainsi qu'à l'auteur d'une infraction de participer activement à la résolution des difficultés résultant de l'infraction, et notamment à la réparation des préjudices de toute nature résultant de sa commission.'
[137] See Constitution, art 68. The original version reads: 'manquement à ses devoirs manifestement incompatible avec l'exercice de son mandat'.

provisions, all of which oscillate between the governmental imposition of strict prohibitions and behavioural rules *and* the personal exercise of free will. These political interventions and public actions on the part of the executive present an interesting combination of opposites gradually blurring the differentiation between legal requirements and moral responsibilities. The political treatment of the Covid-19 pandemic in France exposes a fluctuating mix of legal obligations and moral obligations purposely insisting on the responsibility of the individual in the respect of confinement measures.[138] The striking moralisation of the political discourse and its legal implications with emphasis deliberately put on personal conscience and responsibility, which is admittedly not specific to France, generates a new kind of ambiguity in modern democratic societies. Interestingly for the purposes of this contribution, the moralisation of the political discourse necessarily implies a responsibilisation of the individual and the concomitant de-responsibilisation of the political actors initiating the discourse, *i.e.* the President of the Republic, the Prime Minister and the government.

This contribution aimed at showing the real difficulties encountered when trying to determine in the French legal framework, both under constitutional law and criminal law, the moment when defective decision-making and political negligence on the part of the executive will call upon not only their political accountability, but also their criminal responsibility. The issue of the legitimacy of the French constitutional orchestration of the criminal liability regime of the executive power and of the wide functional protection granted to the President of the Republic is at the core of the – currently suspended – reform project of 2018 that contemplates replacing the Cour de justice de la République with the Cour d'appel de Paris.[139] Whether this reform will materialise remains to be seen.

9.3. Corporations and Sentencing

Under article 121-6 of the French Penal Code:

> The accomplice to the offence, in the meaning of article 121-7, is punishable as *a* perpetrator.[140] (emphasis added)

Mayaud emphasises the importance of the term '*a* perpetrator' rather than '*the* perpetrator' as it simplified sentencing and allowed for its adaptability to the criminal responsibility of legal persons which cannot necessarily be subjected to the same type of punishment than natural persons. [141] Articles 131-37 to 131-49 of the French Penal Code list the different penalties that may be imposed to legal persons.

As per article 131-37:

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[138] M Febvre-Issaly, 'Droit, Morale et Epidémie', (*Revue Esprit*, April 2020), esprit.presse.fr/actualites/matthieu-febvre-issaly/droit-morale-et-epidemie-42688.
[139] See Projet de loi constitutionnelle pour un renouveau de la vie démocratique, introduced and then suspended in 2018, www.vie-publique.fr/loi/273301-reforme-constitutionnelle-2019-pour-un-renouveau-de-la-vie-democratique.
[140] The original version reads: 'Sera puni comme auteur le complice de l'infraction, au sens de l'article 121-7.'
[141] See Mayaud, *Droit pénal général* (n 66) 503.

> Penalties for felonies and misdemeanours incurred by legal persons are: 1° a fine; 2° in the cases set out by law, the penalties enumerated under Article 131-39 [and] Article 131-39-2'[142]

Article 131-39 provides for:

> Dissolution (...); prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a maximum period of five years; placement under judicial supervision for a maximum period of five years; permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question; disqualification from public tenders, either permanently or for a maximum period of five years; prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds; prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years; confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it; posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means.[143]

This is in addition to an obligation to be subjected to a compliance programme.[144] Interestingly dissolution and placement under judicial supervision

> do not apply to those public bodies which may incur criminal liability. Nor do they apply to political parties or associations.[145]

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[142] The original version reads: 'Les peines criminelles ou correctionnelles encourues par les personnes morales sont : 1° L'amende ; 2° Dans les cas prévus par la loi, les peines énumérées à l'article 131-39 et la peine prévue à l'article 131-39-2.'

[143] French Penal Code, art 131-39. The original version reads: '1° La dissolution (…) ; 2° L'interdiction, à titre définitif ou pour une durée de cinq ans au plus, d'exercer directement ou indirectement une ou plusieurs activités professionnelles ou sociales ; 3° Le placement, pour une durée de cinq ans au plus, sous surveillance judiciaire ; 4° La fermeture définitive ou pour une durée de cinq ans au plus des établissements ou de l'un ou de plusieurs des établissements de l'entreprise ayant servi à commettre les faits incriminés; 5° L'exclusion des marchés publics à titre définitif ou pour une durée de cinq ans au plus ; 6° L'interdiction, à titre définitif ou pour une durée de cinq ans au plus, de procéder à une offre au public de titres financiers ou de faire admettre ses titres financiers aux négociations sur un marché réglementé ; 7° L'interdiction, pour une durée de cinq ans au plus, d'émettre des chèques autres que ceux qui permettent le retrait de fonds par le tireur auprès du tiré ou ceux qui sont certifiés ou d'utiliser des cartes de paiement ; 8° La peine de confiscation, dans les conditions et selon les modalités prévues à l'article 131-21 ; 9° L'affichage de la décision prononcée ou la diffusion de celle-ci soit par la presse écrite, soit par tout moyen de communication au public par voie électronique ; 10° La confiscation de l'animal ayant été utilisé pour commettre l'infraction ou à l'encontre duquel l'infraction a été commise ; 11° L'interdiction, à titre définitif ou pour une durée de cinq ans au plus, de détenir un animal ; 12° L'interdiction, pour une durée de cinq ans au plus de percevoir toute aide publique attribuée par l'Etat, les collectivités territoriales, leurs établissements ou leurs groupements ainsi que toute aide financière versée par une personne privée chargée d'une mission de service public. La peine complémentaire de confiscation est également encourue de plein droit pour les crimes et pour les délits punis d'une peine d'emprisonnement d'une durée supérieure à un an, à l'exception des délits de presse.'

[144] French Penal Code, art 131-39-2.

Article 131-38 specifies that:

> The maximum amount of a fine applicable to legal persons is five times that which is applicable to natural persons by the law sanctioning the offence. Where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal persons is €1,000,000.[146]

As per article 131-40:

> The penalties incurred by legal persons for petty offences are: 1° a fine; 2° the penalties entailing forfeiture or restriction of rights set out under article 131-42. These penalties do not preclude the imposition of one or more of the additional penalties set out under article 131-43.[147]

Under article 131-41:

> The maximum amount of a fine applicable to legal persons is five times that which is applicable to natural persons by the regulation sanctioning the offence.[148]

As previously stressed, for the purposes of French criminal law, the State is not a legal person. Yet, this does not amount to a full immunity of its representatives – President of the Republic, Prime Minister and members of the government. In the present context of moralisation of the political discourse and penalisation of individual conscience, it seems both logically inevitable and ultimately democratic that the only sanction President Macron could have faced was electoral. This is by no means a new type of political test in the fifth Republic; it is however one that is eminently open to interpretation notably when it comes to evaluating the political strength of the electoral victory. While French voters ultimately enjoy a key sanctioning power, it paradoxically proves impossible to ascertain whether the executive power, represented by President Macron, leading in practice the government and acting in the political context of *présidentialisme*, is perceived – or not – as either *coupable et/ou responsable*.[149] The result of the 2022 presidential election only provides lines of

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[145] French Penal Code, art 131-39. The original version reads: 'Les peines définies aux 1° et 3° ci-dessus ne sont pas applicables aux personnes morales de droit public dont la responsabilité pénale est susceptible d'être engagée. Elles ne sont pas non plus applicables aux partis ou groupements politiques'.

[146] The original version reads: 'Le taux maximum de l'amende applicable aux personnes morales est égal au quintuple de celui prévu pour les personnes physiques par la loi qui réprime l'infraction.
Lorsqu'il s'agit d'un crime pour lequel aucune peine d'amende n'est prévue à l'encontre des personnes physiques, l'amende encourue par les personnes morales est de 1 000 000 euros.'

[147] The original version reads: 'Les peines contraventionnelles encourues par les personnes morales sont :
1° L'amende ; 2° Les peines privatives ou restrictives de droits prévues à l'article 131-42 ; 3° La peine de sanction-réparation prévue par l'article 131-44-1. Ces peines ne sont pas exclusives d'une ou de plusieurs des peines complémentaires prévues à l'article 131-43.'

[148] The original version reads: 'Le taux maximum de l'amende applicable aux personnes morales est égal au quintuple de celui prévu pour les personnes physiques par le règlement qui réprime l'infraction.'

[149] In the course of the proceedings related to the infected blood case, which triggered a radical change in the criminal liability regime of ministers – including the Prime Minister – then Social Affairs minister Georgina Dufoix, who was facing charges of manslaughter, (in)famously said she was 'responsible but not guilty'. We thought it apt to here paraphrase this sentence – yet this is not to say that we are equating the two cases.

thought as to whether, in the light of a fierce and vocal opposition manifested by the mixed outcome of the consecutive legislative election, President Macron's electoral victory was or not a *vote-sanction* reflecting the personal expectations and political assertions of citizens in the wake of the pandemic and of the *'quoiqu'il en coûte'* policy.[150]

[150] D Roman, '« Ils ne mourraient pas tous, mais tous étaient frappés » Le coronavirus, révélateur des ambiguïtés de l'appréhension juridique de la vulnérabilité' (2020) chronique n°15 *Revue des droits et libertés fondamentaux*, www.revuedlf.com/droit-administratif/ils-ne-mouraient-pas-tous-mais-tous-etaient-frappes-le-coronavirus-revelateur-des-ambiguites-de-lapprehension-juridique-de-la-vulnerabilite.