

*Decision n° 2009-595 DC – December 3<sup>rd</sup> 2009*

**Institutional Act pertaining to the Application of Article 61-1 of the Constitution.**

On November 21<sup>st</sup> 2009, the Constitutional Council received a referral from the Prime Minister, pursuant to paragraph 5 of Article 46 and paragraph 1 of Article 61 of the Constitution, with regard to the Institutional Act pertaining to the application of Article 61-1 of the Constitution.

**THE CONSTITUTIONAL COUNCIL**

Having regard to the Constitution as worded pursuant to Constitutional Act n° 2008-724 of July 23<sup>rd</sup> 2008 modernising the Institutions of the 5<sup>th</sup> Republic

Having regard to Ordinance n° 58-1067 of November 7<sup>th</sup> 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to Institutional Act n° 99-209 of March 19<sup>th</sup> 1999 as amended pertaining to New Caledonia;

Having regard to the Code of Administrative Justice;

Having regard to the Code of Courts of Audit;

Having regard to the Code of Judicial Institutions;

Having regard to the Code of Criminal Procedure;

Having heard the Rapporteur;

**ON THE FOLLOWING GROUNDS**

1. The Institutional Act submitted for review by the Constitutional Council was enacted under Article 61-1 of the Constitution and passed in compliance with the rules of procedure provided for by the first three paragraphs of Article 46 of the Constitution

**WITH RESPECT TO THE NORMS OF REFERENCE :**

2. Section 29 of the Constitutional Act of July 23<sup>rd</sup> 2008 referred to above has inserted into the Constitution Article 61-1 which provides: "When during proceedings before a Court of Law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, a referral may be made to the Constitutional Council by the Conseil d'Etat or the Cour de cassation, and the Constitutional Council shall give its ruling within a specified time. – An Institutional Act shall determine the conditions governing the application hereof. Section 30 of said Constitutional Act has inserted a second paragraph into Article 62 of the Constitution whereby "A provision held to be unconstitutional on the basis of Article 61-1 shall be repealed as from the publication of the decision of the Constitutional Council or at a subsequent date as specified by said decision. The Constitutional Council shall determine the conditions in and extent to which the effects of the challenged decision shall be liable to be called into question".

3. Firstly, the Constituent power has thus acknowledged the right for each citizen subjected to the jurisdiction of the courts to argue in support of his claim that a statutory provision infringes the rights and freedoms guaranteed by the Constitution. Secondly, it vests the Conseil d'Etat and the Cour de cassation, the courts at the pinnacle of the two systems of law recognized by the Constitution, with power to decide whether this issue of constitutionality should be

referred to the Constitutional Council. Lastly it vests in the Constitutional Council jurisdiction to rule on such issues and, if need be, to hold that a statutory provision is unconstitutional.

4. The good administration of justice is an objective of constitutional status deriving from Articles 12,15 and 16 of the Declaration of the Rights of Man and the Citizen of 1789. It is up to Parliament, competent, when enacting Institutional Acts, to determine the conditions of application of Article 61-1 of the Constitution, to ensure the attainment of this objective without disregarding the right to make a referral for a priority preliminary ruling as to the constitutionality of any statutory provision.

#### WITH RESPECT TO SECTION 1:

5. Section 1 of the Institutional Act inserts into the Ordinance of November 7<sup>th</sup> 1958 referred to hereinabove a Chapter II bis entitled " On priority preliminary rulings on the issue of constitutionality". This Chapter comprises three parts devoted to the provisions applicable respectively before the courts coming under the supervisory jurisdiction of the Conseil d'Etat or the Cour de cassation, or before the Conseil d'Etat or the Cour de cassation and lastly, before the Constitutional Council.

#### - As regards the provisions applicable before courts under the supervisory jurisdiction of the Conseil d'Etat or the Cour de cassation:

6. Part 1 of Chapter II bis referred to above comprises sections 23-1 to 23-3 pertaining to the provisions applicable to courts coming under the supervisory jurisdiction of the Conseil d'Etat and the Cour de cassation;

#### *As regards Section 23-1 :*

7. Under section 23-1 : "Before Courts coming under the supervisory jurisdiction of the Conseil d'Etat or the Cour de cassation, the argument that a statutory provision infringes the rights and freedoms guaranteed by the Constitution shall, on pain of inadmissibility, be raised in writing and accompanied by a reasoned justification of this argument. Such an argument may be raised for the first time before a Court of Appeal. It cannot be raised by the court *proprio motu*..

"Before a Court coming under the supervisory jurisdiction of the Cour de cassation, when the Public Prosecutor is not a party to these proceedings, the matter shall be brought to his attention once the argument has been raised so that he may make his opinion known.

"If such an argument is raised during a preliminary investigation into a criminal offence, the matter shall be brought before the relevant appellate court.

"Such an argument may not be raised before a Cour d'assises. In the event of appeal against a decision handed down at first instance by a Cour d'assises, it may be raised in writing in a document accompanying the notice of appeal. This document shall be immediately transmitted to the Cour de cassation".

8. Firstly, when requiring that the argument based on the infringement by a statutory provision of the rights and freedoms guaranteed by the Constitution be made in writing in a separate document accompanied by a reasoned justification of this argument, Parliament, when passing the Institutional Act, intended to facilitate the handling of the application for a priority preliminary ruling on the issue of constitutionality and enable the court before which the issue is raised to rule in the shortest possible time so as not to delay proceedings, if this matter is to be transmitted to the Conseil d'Etat or the Cour de cassation.

9. Secondly, the provisions of Article 61-1 of the Constitution required Parliament, when passing the Institutional Act, to reserve for the sole parties to the proceedings the right to contend that a statutory provision infringes the rights and freedoms guaranteed by the Constitution. Consequently the final phrase of paragraph 1 of Section 23-1, which forbids the court to which the matter is referred to raise *proprio motu* the issue of a priority preliminary ruling on the issue of constitutionality, does not fail to comply with the Constitution.

10. Thirdly, paragraph 4 of Section 23-1 forbids the raising of the issue of a priority preliminary ruling on the issue of constitutionality before the Cour d'assises. Such a matter may be raised during the preliminary criminal investigation which precedes the trial of the offender. It may also be raised on the lodging of notice of appeal against a decision handed down by a Cour d'assises at first instance or the lodging of an appeal on a point of law with the Cour de cassation against a decision of a Cour d'assises sitting in appellate jurisdiction, and shall be transmitted immediately to the Cour de cassation. Parliament, when passing the Institutional Act, intended to take into account, in the interests of the good administration of justice, the specific nature of the organisation of the Cour d'assises and trial proceedings in this court. In these conditions, forbidding the raising of the question of an application for a priority preliminary ruling on the issue of constitutionality before the Cour d'assises does not fail to comply with the right recognised by Article 61-1 of the Constitution.

11. In view of the foregoing, section 23-1 of the statute referred for review is not unconstitutional.

- *As regards Section 23-2*

12. Under section 23-2 : "The Court shall rule without delay, giving reasons for its ruling, as to the transmission to the Conseil d'Etat or the Cour de cassation of the application for a priority preliminary ruling on the issue of constitutionality. Such transmission shall require that the following conditions be met :

" 1° The challenged provision is applicable to the litigation or proceedings underway, or is the grounds for said proceedings;

" 2° Said provision has not already been found to be constitutional in the holding of a decision of the Constitutional Council, except in the event of a change of circumstances

" 3° The matter is of a serious nature

"In all events, the court involved must, when confronted firstly with arguments challenging the conformity of a statutory provision with the rights and freedoms guaranteed by the Constitution and secondly with the international commitments entered into by France, rule in priority on the matter of the transmission of the application for a priority preliminary ruling on the issue of constitutionality to the Conseil d'Etat or Cour de cassation.

"The decision to transmit the application shall be sent to the Conseil d'Etat or the Cour de cassation within eight days of the handing down of said decision together with the submissions of the parties. Refusal to transmit the application may only be challenged upon appeal against the decision settling all or part of the litigation involved".

13. Firstly, the three conditions governing the transmission of the application for a priority preliminary ruling on the issue of constitutionality do not fail to comply with Article 61-1 of the Constitution. The condition provided for by 2° of Section 23-2 complies with Article 62 of the Constitution which provides that "No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative bodies and all courts". By reserving the case of a "change of circumstances" this condition makes it possible for

a statutory provision found to be constitutional in the grounds and holding of a decision of the Constitutional Council to be examined anew when this fresh examination is justified by changes which have taken place since the previous decision in the applicable norms of constitutionality or in the circumstances, whether of fact or law, affecting the scope of the challenged statutory provision.

14. Secondly, when requiring that arguments of unconstitutionality be examined in priority to those based on the failure of a statutory provision to comply with international commitments entered into by France, Parliament, when enacting the Institutional Act, intended to ensure compliance with the Constitution and reiterate the place of the latter at the apex of the national legal system. This priority merely results in specifying the order in which the arguments raised before the court to which the matter is referred be examined. It does not restrict the jurisdiction of said court, once the provisions pertaining to the priority preliminary ruling on the issue of constitutionality have been complied with, to ensure the superiority over national laws of legally ratified or approved treaties or agreements and norms of the European Union. It thus does not fail to comply with either Article 55 of the Constitution or Article 88-1 thereof whereby "The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and the Treaty on the Functioning of the European Union, as worded pursuant to the Treaty signed in Lisbon on December 13<sup>th</sup> 2007".

15. Section 23-2 is thus not unconstitutional.

*As regards Section 23-3 :*

16. Section 23-3 provides : "When the application for a priority preliminary ruling is transmitted, the court shall stay its ruling until receipt of the decision of the Conseil d'Etat ou Cour de cassation or, if the matter has been referred to it, the Constitutional Council. The preliminary investigation underway shall not be suspended and the court may order any necessary temporary measures or measures of conservation.

" However there shall be no stay of ruling when the person involved is in custody due to the proceedings underway, nor when the purpose of such proceedings is to discharge a custodial measure.

"The court may also rule without waiting for the decision on the priority preliminary ruling on the issue of constitutionality if statute law or regulations provide that it should give its ruling within a specified time or as a matter of urgency. If the court of first instance rules without waiting for said decision on the priority preliminary ruling and its decision is appealed against, the appellate court shall stay its ruling. It may however not stay its ruling if it is itself required to rule on issues which must be dealt with forthwith.

"Furthermore, if staying the ruling would lead to irremediable or patently excessive consequences as regards the rights of one of the parties, the court deciding to transmit the application for a priority preliminary ruling on the issue of constitutionality may rule on those issues which need to be dealt with forthwith.

"If an appeal on a point of law has been made to the Cour de cassation and the trial judges have handed down their decision without waiting for the decision of the Conseil d'Etat or the Cour de cassation or the Constitutional Council, if the matter has been referred to the latter, the Cour de cassation shall stay its ruling on said appeal pending a ruling on the application for a priority preliminary ruling on the issue of constitutionality. This shall not however be the case when the applicant is deprived of his freedom because of the proceedings underway and statute law provides that the Cour de cassation shall give its ruling within a specified time."

17. These provisions require the court hearing the case to stay its ruling until the decision of the Conseil d'Etat or Cour de cassation or the Constitutional Council, if the matter has been referred to the latter, while reserving those cases where, due to urgency, the nature or circumstances of the case, such a stay of ruling is not possible. In the event of a court ruling on the merits without waiting for the decision of the Conseil d'Etat or Cour de cassation or the Constitutional Council, if the matter has been referred to the latter, the court called upon to hear an appeal or an appeal on a point of law should in principle stay its ruling. Thus to the extent that they preserve the practical effectiveness for the applicant of the application for a priority preliminary ruling on the issue of constitutionality, these provisions, which contribute to the good administration of justice, do not fail to comply with the right recognised in Article 61-1 of the Constitution.

18. However, the last phrase of the last paragraph of section 23-3 may lead to a final decision being handed down in a case concerning which an application has been made to the Constitutional Council for a priority preliminary ruling on the issue of constitutionality before the latter has in fact ruled on this application. In such a case, neither this provision nor the principle of *res judicata* should be allowed to preclude the person involved in these proceedings from bringing fresh proceedings in order for the decision of the Constitutional Court to be taken into account. With this qualification, section 23-3 is not unconstitutional.

As regards the provisions applicable before the Conseil d'Etat and the Cour de cassation.

19. Part 2 of Chapter II bis referred to above comprises sections 23-4 to 23-7 pertaining to the provisions applicable before the Conseil d'Etat and the Cour de cassation

- *As to sections 23-4 and 23-5*

20. Section 23-4 provides : "Within three months of receipt of the transmission provided for in section 23-2 or in the final paragraph of section 23-1, the Conseil d'Etat or the Cour de cassation shall rule on the referral of the application made to the Constitutional Council for a priority preliminary ruling on the issue of constitutionality. This referral shall be made when the conditions provided for in 1° and 2° of Article 23-2 have been met and the issue raised is new or of a serious nature." Section 23-2 provides "The argument based on the infringement by a statutory provision of the rights and freedoms guaranteed by the Constitution may be raised, including for the first time before the Cour de cassation, when a case is being heard by the Conseil d'Etat or the Cour de cassation. Said argument shall be presented, on pain of being inadmissible, in separate and reasoned submissions. It cannot be raised by the court *proprio motu*."

"In all events the Conseil d'Etat or Cour de cassation must, when asked to rule on arguments claiming firstly that a provision infringes the rights and freedoms guaranteed by the Constitution, and secondly that it runs counter to the international commitments entered into by France, rule in priority on the transmitting to the Constitutional Council of the application for a priority preliminary ruling on the issue of constitutionality.

"The Conseil d'Etat or the Cour de cassation shall have a period of three months as from the formal raising of the argument to hand down their decision. The Constitutional Council shall be asked to rule on the application for a priority preliminary ruling on the issue of constitutionality once the conditions provided for in 1° and 2° of section 23-2 have been met and the issue raised is new and of a serious nature.

"When the matter has been referred to the Constitutional Council, the Conseil d'Etat or the Cour de cassation shall stay their ruling until the Constitutional Council has given its decision. This shall not however be the case when the applicant is deprived of his freedom because of the proceedings underway and statute law provides that the Cour de cassation shall

give its ruling within a specified time. If the Conseil d'Etat or the Cour de cassation is required to rule in a matter of urgency, there can be no stay of ruling".

21. Firstly the last phrase of paragraph 1 of Article 23-4 and the last phrase of paragraph 3 of section 23-5 provide that the Constitutional Council shall be asked to rule on the application for a priority preliminary ruling on the issue of constitutionality if "the issue raised is new". By adding this criterion Parliament intended to require that the Constitutional Council be asked to rule on the interpretation of any constitutional provision which it had not yet been asked to rule on. In the other cases, Parliament intended to allow the Conseil d'Etat and the Cour de cassation to determine whether the issue raised was of sufficient interest to warrant referring the application to the Constitutional Council on these grounds. Therefore, an issue raised in an application for a priority preliminary ruling on the issue of constitutionality cannot be new within the meaning of these provisions on the sole grounds that the challenged statutory provision has not yet been examined by the Constitutional Council. This provision is not unconstitutional.

22. Secondly, paragraph 2 of section 23-5 requires that, when an issue of constitutionality is raised for the first time before the Conseil d'Etat or the Cour de cassation, or when the latter examine an appeal brought against a decision handed down in proceedings where a request for the transmission of an application for a priority preliminary ruling was refused, the arguments as to the constitutionality of the impugned provision be examined in priority to those based on failure of a statutory provision to comply with the international commitments of France. On the grounds identical to those set forth in paragraph 14 hereinabove, this provision is not unconstitutional.

23. Thirdly, the two last phrases of the final paragraph of section 23-5 make it possible for a final decision to be handed down in proceedings where the Constitutional Council has been petitioned to make a priority preliminary ruling on the issue of constitutionality without waiting for the ruling of the latter. With the same qualifications as those set forth in paragraph 18 hereinabove, these provisions are not unconstitutional.

24. Fourthly, on grounds identical to those set forth in paragraphs 8,9 13 and 17 hereinabove, the remaining provisions of sections 23-4 and 23-5 are not unconstitutional.

*-As regards section 23-6*

25. Under section 23-6 : "The First President of the Cour de cassation shall receive applications transmitted to the Cour de cassation as provided for in section 23-2 and in the last paragraph of section 23-1. The submissions mentioned in section 23-5, presented with applications addressed to the Cour de cassation, shall also be transmitted to the same.

"The First President shall immediately inform the Chief Public Prosecutor.

"The Cour de cassation shall rule with a Bench presided by the First President and the Presidents of the Chambers and two Judges from each of the Chambers specifically concerned by the application.

"However the First President may, if he feels that the solution to the issue raised is self-evident, refer this matter to a Bench composed of himself, the President of the Chamber specifically concerned and a further Judge from the latter

"For the application of the two foregoing paragraphs, the First President may be replaced by a delegate appointed by him from among the Presidents of the various Chambers of the Cour de cassation. Said Presidents may also be replaced by delegates appointed by them from among judges sitting in said Chambers".

26. These provisions, pertaining to the rules governing the composition of the trial Benches of the Cour de cassation for the examination of those applications for a priority preliminary ruling on the issue of constitutionality transmitted to it or raised before it, are of an institutional nature. They do not fail to comply with any rule or principle of a constitutional nature.

*As regards section 23-7 :*

27. Section 23-7 provides that the Conseil d'Etat or the Cour de cassation shall refer applications to the Constitutional Council by a reasoned decision accompanied by the submissions of the parties. Since the Constitutional Council has no jurisdiction concerning the proceedings at the origin of the making of the application, only the application in writing and the "separate and reasoned" memorandum and the submissions pertaining solely to this application for a priority preliminary ruling on the issue of constitutionality are to be transmitted to the Council. This section also requires that the Constitutional Council be provided with a copy of the reasoned decision at the basis of the refusal of the Conseil d'Etat or Cour de cassation to refer the application to it. When also providing for the automatic transmission of the application to the Constitutional Court in the event of failure by the Conseil d'Etat or the Cour de cassation to rule within the allotted three month period, Parliament, when passing the Institutional Act, implemented the provisions of Article 61-1 of the Constitution which provide that the Conseil d'Etat or the Cour de cassation "shall give its ruling within a specified time". These provisions thus comply with the Constitution.

28. The provisions of sections 23-4 to 23-7 should be interpreted as prescribing before the Conseil d'Etat or the Cour de cassation the implementation of rules of procedure conforming to the requirements of the right to a fair trial, completed, if need be, by methods of application set down by regulations making it possible for these courts to examine the application for a priority preliminary ruling on the issue of constitutionality in the manner provided for in section 4 of the Institutional Act. Subject to this qualification Parliament when passing the Institutional Act did not fail to exercise its powers to the full.

As regards the provisions applicable before the Constitutional Council:

29. Part 3 of Chapter II bis referred to hereinabove comprises sections 23-8 to 23-12 pertaining to the examination by the Constitutional Council of applications for a priority preliminary ruling on the issue of constitutionality.

30. Section 23-8 lists the authorities informed of the referral to the Constitutional Council. Section 23-10 requires the latter to give its ruling within three months and provides for there to be a full hearing of all parties before the Council in addition to the principle that hearings be held in public. Section 23-11 provides that reasons be given for the decisions of the Council and lists the authorities to which notice of said decisions be given. Lastly, section 23-12 provides for an increase in the State contribution to the remuneration under the system of legal aid of those judicial auxiliaries assisting in the making of the application in the manner provided for by regulations when the Constitutional Council is asked to rule on a referral for a priority preliminary ruling on the issue of constitutionality. These provisions do not fail to comply with any constitutional requirement.

31. Section 23-9 provides : " When the Constitutional Council has been asked to rule on an application for a priority preliminary ruling on the issue of constitutionality , the termination for any reason whatsoever of the proceedings in which this issue was raised shall have no effect on the examination of this issue." By thus disconnecting, as from the moment when the matter is referred to the Constitutional Council, the application for a priority preliminary ruling from the proceedings which have given rise to this application, Parliament intended to draw the inferences of the effect of decisions of the Constitutional Council, firstly under paragraph 2 of Article 62 of

the Constitution and secondly under 2° of section 23-2 of the Institutional Act. This section does not fail to comply with any other constitutional requirement.

32. As is shown by the foregoing, subject to the qualifications set forth in paragraphs 18,23 and 28 hereinabove, section 1 is not unconstitutional.

**WITH RESPECT TO SECTION 3 :**

33. Section 3 inserts after the first paragraph of section 107 of the Institutional Act of March 19<sup>th</sup> 1999 referred to above a paragraph whereby : "The provisions of a law of the land may be the object of an application for a priority preliminary ruling on the issue of constitutionality which complies with the rules set out in Articles 23-1 to 23-12 of Ordinance n° 58-1067 of November 7<sup>th</sup> 1958 pertaining to the Institutional Act on the Constitutional Council".

34. Article 77 of the Constitution provides that "certain kinds of decisions taken by the Deliberative Assembly of New Caledonia may be referred to the Constitutional Council for review before publication". Section 99 of the Institutional Act of March 19<sup>th</sup> 1999 referred to hereinabove has defined the field covered by "laws of the land" of New Caledonia and section 107 has conferred upon them "statutory force" in this field. Section 3 referred to hereinabove thus conforms to Article 61-1 of the Constitution which provides that applications for a priority preliminary ruling on the issue of constitutionality shall apply to statutory provisions.

**WITH RESPECT TO THE OTHER PROVISIONS:**

35. Section 2 which inserts into the Code of Administrative Justice, the Code of Judicial Institutions, the Code of Criminal Procedure and the Courts of Audit provisions designed to ensure coordination with the provisions of section 1, does not fail to comply with any constitutional requirement.

36. Section 4 provides that the manner of application of section 1 is to be determined in the conditions provided for by Articles 55 and 56 of the Institutional Ordinance of November 7<sup>th</sup> 1958 referred to hereinabove and also specifies that the internal rules of procedure of the Constitutional Council shall determine the rules of procedure applicable "before it". This reference to a Decree of the Council of Ministers, after consultation of the Constitutional Council and taking the opinion of the Council of State is not unconstitutional.

37. Section 5 fixes the date of the coming into force of the Institutional Act on the first day of the third month after the promulgation thereof. The Institutional Act shall therefore apply to proceedings underway on the date on which it comes into force. However only those applications for a preliminary ruling on the issue of constitutionality made as from this date in writing and in separate and reasoned submissions shall be admissible. This section does not fail to comply with any constitutional requirement.

38. As is show by the foregoing, with the qualifications set out in paragraphs 18, 23 and 28, the Institutional Act pertaining to the application of Article 61-1 of the Constitution is not unconstitutional.

**HELD**

Article 1 - With the qualifications set out in paragraphs 18, 23 and 28, the Institutional Act pertaining to the application of Article 61-1 of the Constitution is not unconstitutional

Article 2 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on December 3rd 2009 and composed of Messrs Jean-Louis DEBRE, President, Guy CANIVET, Jacques CHIRAC, Renaud DENOIX de SAINT MARC and Olivier DUTHEILLET de LAMOTHE, Mrs Jacqueline de GUILLENCHMIDT, Mr Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ.

## PRESS HANDOUT

### Decision n° 2009-595 DC of December 3rd 2009

#### **Institutional Act pertaining to the Application of Article 61-1 of the Constitution**

On December 3<sup>rd</sup> 2009 the Constitutional Council handed down its ruling on the Institutional Act pertaining to the application of Article 61-1 of the Constitution which introduces the " Priority preliminary ruling as to constitutionality".

The referral of this statute to the Council was made by the Prime Minister, as required by Articles 46 and 61 of the Constitution.

Article 61-1 has been inserted into the Constitution by the Constitutional Act of July 23<sup>rd</sup> 2008. It introduces an *a posteriori* review of the constitutionality of statutes which have already come into force.

This reform comprises three parts :

- it enables any citizen coming under the jurisdiction of the courts to argue before a judge that a statutory provision infringes the rights and freedoms guaranteed by the Constitution;
- it vests the Conseil d'Etat and the Cour de cassation with jurisdiction to decide whether this issue should be referred to the Constitutional Council;
- it reserves for the Constitutional Council the power to settle the issue and, if need be, to repeal the statutory provision found to be unconstitutional

The Institutional Act sets out the rules applicable before courts hearing cases on the merits, before the Conseil d'Etat and the Cour de cassation and lastly, before the Constitutional Council.

The Constitutional Council held all this statute to be in accordance with the Constitution, merely adding three qualifications as to interpretation.

The Institutional Act requires that arguments as to constitutionality be addressed in priority to those based on international or European Union law. The Constitutional Council found these provisions to be in compliance with the place of the Constitution at the apex of the French national legal system, without disregarding the international commitments entered into by France.

No application for a priority preliminary ruling as to constitutionality may be made before the Cour d'assises. The Constitutional Council found this provision to be in accordance with the Constitution, as being justified in the interests of the good administration of justice while not depriving the Applicant of the right to raise the issue of a priority preliminary ruling as to constitutionality either prior to trial before the Cour d'assises, throughout the period of the preliminary criminal investigation, or after said trial, by way of appeal.

The Institutional Act provides that the court before which this application is made shall stay proceedings if it transmits the application to the Conseil d'Etat or the Cour de cassation. The Constitutional Council found the rules as to the staying of proceedings and the making of referrals to be in accordance with the Constitution. It merely on two occasions added qualifications to enable the Applicant to be able to benefit, in all cases, from the repeal of the norm carried out subsequent to his application by the Constitutional Council.

This reform will be completed by a Decree in the Council of Ministers issued after consultation with the Constitutional Council and seeking the opinion of the Conseil d'Etat. This Decree shall specify, as and when necessary, the rules of procedure governing the issue of the priority preliminary ruling as to constitutionality before courts of law and administrative courts, in compliance with the requirements of the right to a fair trial. The Constitutional Council made a qualification as to interpretation to this effect.

Finally the Constitutional Council will, in its own internal rules of procedure, lay down those rules applicable to proceedings before it when this issue is raised. The Institutional Act already lays down guidelines for such proceedings, specifying that a full hearing shall be given to all parties and that hearings shall take place in public.

This reform will come into force on the first day of the third month following the publication of the Institutional Act, namely, given the constitutional rules governing the promulgation of statutes, on March 1<sup>st</sup> 2010. It will thus apply to proceedings underway on that date. Only those applications for a preliminary ruling made as from that date in writing in a separate and reasoned submission will be admissible.

## CAHIERS DU CONSEIL CONSTITUTIONNEL

Decision n° 2009-595 DC - December 3<sup>rd</sup> 2009

### **Institutional Act pertaining to the Application of Article 61-1 of the Constitution.**

After two unsuccessful attempts to revise the Constitution in 1990 and 1993, the Constitutional Act n° 2008-724 of July 23<sup>rd</sup> 2008 modernizing the institutions of the French 5<sup>th</sup> Republic has inserted into the Constitution Article 61-1 and amended Article 62 to introduce a special procedure for an *a posteriori* review of the constitutionality of a statute which has come into force.

The Institutional Act pertaining to the application of Article 61-1 of the Constitution is the third Institutional Act implementing Constitutional Act n° 2008-724 of July 23<sup>rd</sup> modernizing the institutions of the 5<sup>th</sup> Republic<sup>1</sup> after Institutional Act n° 2009-38 of January 13<sup>th</sup> 2009 for the application of Article 25 of the Constitution and Institutional Act n° 2009-403 of April 15<sup>th</sup> 2009 pertaining to the application of Articles 34-1, 39 and 44 of the Constitution.<sup>2</sup>

The Institutional Bill on the application of Article 61-1 of the Constitution was deliberated upon in the Council of Ministers on April 3<sup>rd</sup> 2009. It was passed at first reading by the National Assembly on September 14<sup>th</sup> 2009 and by the Senate on October 13<sup>th</sup> 2009, then in identical terms, by the National Assembly in its definitive version on November 24<sup>th</sup>. The Institutional Act was referred to the Constitutional Council by the Prime Minister, in accordance with paragraph 5 of Article 46 and paragraph 1 of Article 61 of the Constitution on November 25<sup>th</sup> 2009.

After having reiterated the applicable norms of reference (Article 61-1 and paragraph 2 of Article 62, and the objective of constitutional status of the good administration of justice deriving from Articles 12, 15 and 16 of the Declaration of the Rights of Man and the Citizen of 1789<sup>3</sup>) the Constitutional Council, in its decision n° 2009-595 DC of December 3<sup>rd</sup> 2009, examined the provisions of the Institutional Act.

It found these provisions constitutional, but made three qualifications, two of which are of similar scope :

- whether the application for a priority preliminary ruling on the issue of constitutionality of a statute has been made before courts coming under the supervisory jurisdiction of the Conseil d'Etat or the Cour de cassation (para 18) or before one or other of these two courts themselves (para.21), the fact that, notwithstanding the exercising by the applicant of all rights of appeal, a final decision may be handed down in proceedings about which the Constitutional Council has been asked to make a priority preliminary ruling on the issue of constitutionality (PPRC) without waiting for the latter to make its ruling is not such as to deprive the party involved in the legal proceedings involved of the right to bring fresh proceedings in which the decision of the Constitutional Council may be taken into account;
- in the absence of any specific procedural requirements governing the examining by the Conseil d'Etat or the Cour de cassation of the application for a priority preliminary ruling on the issue of constitutionality, the provisions of sections 23-3 to 23-7 should be interpreted as prescribing

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<sup>1</sup> In fact the fourth if one takes into account Institutional Act n° 2009-576 of March 5<sup>th</sup> 2009 pertaining to the appointment of the Presidents of the Companies France Télévisions and Radio France and of the company in charge of France's external audiovisual services as worded pursuant to the new wording of Article 13 of the Constitution .

<sup>2</sup> Decisions n°s 2008-572 DC of January 8<sup>th</sup> 2009, *Institutional Act on the application of Article 25 of the Constitution*; 2009-579 DC of April 9<sup>th</sup> 2009, *Institutional Act on the application of Articles 34-1, 39 and 44 of the Constitution*.

<sup>3</sup> Decisions n°s 2009-580 DC of June 10<sup>th</sup> 2009, *Act furthering the Diffusion and Protection of Creation on the Internet* (para.28); 2006-545 DC of December 28<sup>th</sup> 2006, *Act for the Development of Employee Participation and Shareholding and containing various provisions of an economic and social nature* (para.24); n° 2004-510 DC of January 20<sup>th</sup> 2005, *Act pertaining to the jurisdiction of the Tribunal d'instance, Neighbourhood courts and the Tribunal de grande instance* (para.25); n° 2003-484 DC of November 20<sup>th</sup> 2003, *Act pertaining to the Control of Immigration, the Residence of Foreigners in France and Nationality* (para.81); 2002-461 DC of August 29<sup>th</sup> 2002, " *Guideline and Programming Act for Justice*" (para. 24); 2001-451 DC of November 27<sup>th</sup> 2001, *Act to Improve Cover for Agricultural Non-salaried Workers for occupational injuries and illnesses* (para.46)

before the Conseil d'Etat or the Cour de cassation the implementation of rules of procedure conforming to the requirements of the right to a fair trial, it being left to the relevant Decree to introduce such further procedural requirements as may be necessary to this end (para.28)

## **I- The purposes and structure of the Institutional Act**

Article 61-1 of the Constitution, as worded pursuant to section 29 of the Constitutional Act of July 23<sup>rd</sup> 2008 referred to hereinabove, provides :

*"When during proceedings before a Court of Law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, a referral may be made to the Constitutional Council by the Conseil d'Etat or the Cour de cassation, and the Constitutional Council shall give its ruling within a specified time.*

*"An Institutional Act shall determine the conditions governing the application hereof.*

Section 30 of said Constitutional Act has inserted a second paragraph into Article 62 of the Constitution whereby *"A provision held to be unconstitutional on the basis of Article 61-1 shall be repealed as from the publication of the decision of the Constitutional Council or at a subsequent date as specified by said decision. The Constitutional Council shall determine the conditions in and extent to which the effects of the challenged decision shall be liable to be called into question"*.

The purpose of this reform is threefold :

- To vest a new right in a person coming under the jurisdiction of the courts enabling him to avail himself of the rights which are conferred on him by the Constitution;
- To remove unconstitutional provisions from the national legal order;
- To ensure the paramountcy of the Constitutional Council in the national legal order.

Any person may, when legal proceedings are underway, raise the issue that a statutory provision is unconstitutional. An application to this effect may be made before all courts, at every stage of proceedings. It will be referred to the Conseil d'Etat or the Cour de cassation, which shall ensure that all conditions governing such referral have been met. In such is the case, these courts shall refer the application to the Constitutional Council, sole judge of the constitutionality of the impugned statutory provision, vested with the power to repeal the same should circumstances so require.

The Institutional Act, which seeks to achieve the purposes mentioned above, comprises five sections :

- section 1 inserts into title II of Ordinance n° 58-1067 of November 7<sup>th</sup> 1958 Constituting an Institutional Act on the Constitutional Council, a Chapter II bis entitled *"On priority preliminary rulings on the issue of constitutionality"*
- section 2 of the Institutional Act inserts these provisions into the Code of Administrative Justice, the Code of Judicial Institutions, the Code of Criminal Procedure and that of Courts of Audit;
- section 3 pertains to laws of the land of New Caledonia;
- section 4 deals with texts for the application of the Act;

- section 5 provides for the coming into force of the Act on the first day of the third month following the promulgation thereof. A promulgation before December 31<sup>st</sup> 2009 will lead to the Act coming into force on March 1<sup>st</sup> 2010.

## **The provisions of the Institutional Act**

### **A – Section 1**

The new Chapter II bis of the Ordinance of November 7<sup>th</sup> 1958 referred to above, pertaining to "*Priority preliminary rulings on the issue of constitutionality*" is placed in Title II concerning "*The operation of the Constitutional Council*" between Chapters II dealing with "*Rulings as to constitutionality*", and III dealing with "*Review of statutory provisions*". This new Chapter II bis comprises three parts dealing with the provisions applicable respectively before courts under the supervisory jurisdiction of the Conseil d'Etat or the Cour de cassation, before the Conseil d'Etat and the Cour de cassation themselves and lastly, before the Constitutional Council.

#### **1- Provisions applicable before courts coming under the supervisory jurisdiction of the Conseil d'Etat or the Cour de cassation**

The provisions applicable before courts coming under the supervisory jurisdiction of the Conseil d'Etat or the Cour de cassation are found in sections 23-1 to 23-3 inserted into the Institutional Ordinance of November 7<sup>th</sup> 1958 referred to above.

##### **a) Section 23-1 of the Institutional Ordinance of November 7<sup>th</sup> 1958.**

Section 23-1 specifies the courts concerned by Article 61-1, which includes both courts of investigation and trial courts, specialized courts and normal courts of law.

The sole restriction lies in the fact that the court before which such an issue may be raised must come under the supervisory jurisdiction of the Conseil d'Etat or the Cour de cassation. Section 23-1 thus seems to exclude the Tribunal des conflits and the Higher Court of Arbitration. The latter do not come under the supervisory jurisdiction of either the Conseil d'Etat or the Cour de cassation. As regards the Tribunal des conflits, to which issues of rights and freedoms are not referred *per se*, a application for a PPRC may be made before or after the Tribunal des conflits before the court before which the matter was initially raised or the court found to have jurisdiction. As regards the Higher Court of Arbitration <sup>4</sup>, set up by the Act of February 11<sup>th</sup> 1950 pertaining to Collective labour agreements and procedures for settling collective labour disputes, its activity is extremely limited. In all events, the imposing of the filter of the Conseil d'Etat or the Cour de cassation has its foundation in Article 61-1. The Institutional Act could not therefore retain any other criterion.

Section 23-1 lays down a single condition as to admissibility : the application for a PPRC must be in a "*separate written document containing the reasons*" for the application. This requirement, as the Constitutional Council has emphasized in its decision of December 3<sup>rd</sup> 2009, will make it possible to address this issue rapidly and thus ensure that it is dealt with in priority to any other application or plea.

The application for a PPRC is defined as being an '*argument*' by section 23-1. In view of its nature, it is an argument of law. It is a point of law raised by a party in support of his claims. It cannot therefore be either the grounds or the purpose for bringing the proceedings themselves. It is raised to support one of the party's claims and is ancillary thereto until such time as the matter is referred to the Constitutional Council. When confirming that such an application is an argument raised and not a claim *per se*, section 23-1 and section 23-5 specify that an application for a PPRC may be made for the first time in appellate proceedings or in proceedings before the Cour de cassation or the Conseil d'Etat.

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<sup>4</sup> Act n° 50-205 of February 11th 1950 pertaining to collective labour agreements and procedures for settling collective labour disputes and Articles L 2524-7 and following of the Employment Code.

The issue of constitutionality cannot however be raised proprio motu by a judge. As the Constitutional Council notes in its decision n° 2009-595 DC, this institutional provisions derives from the terms of paragraph 1 of Article 61-1 of the Constitution which provides that : "*When during proceedings before a court, it is claimed that...*"

Section 23-1 imposes moreover a special condition as to admissibility : an application for a PPRC cannot be made before a Cour d'assises. This is the reiteration of a provision of the Institutional Bill tabled on March 30<sup>th</sup> 1990 before the National Assembly at the same time as the Constitutional Reform Bill. This is a restriction on the very wide-ranging right to raise an issue recognized by Article 61-1 of the Constitution. However this restriction does not seem to run counter to this Article 61-1. Nothing precludes a party from making an application throughout all pre-trial investigation proceedings prior to the case coming on for trial. Furthermore the Institutional Act provides, in the event of appeal against a decision at first instance handed down by a Cour d'assises, that this application for a priority preliminary ruling on the issue of constitutionality may be made when the party involved lodges an appeal against the decision handed down. A third element should also be taken into consideration, this time concerning the general interest of having questions of law and procedure settled before the opening of a criminal trial. This relates to the good administration of justice which is an objective of constitutional status. For all these reasons the Constitutional Council found that section 23-1 did not fail to comply with requirements of Article 61-1 of the Constitution.

The Constitutional Council thus found section 23-1 constitutional.

**b) Section 23-2 of the Institutional Ordinance of November 7<sup>th</sup> 1958.**

Firstly, section 23-2 does not specify any timeframe within which the judge *a quo* is required to give his ruling. Article 61-1 only imposes a timeframe for the Conseil d'Etat and the Cour de cassation. As regards the judge *a quo*, the Constituent power gave Parliament greater room for manoeuvre when passing Institutional Bills. Parliament was therefore able to chose the words "without delay" which constitute an incitement to rule as quickly as possible without however locking the making of the ruling into a specified timeframe. As the Constitutional Council held in 2003 regarding the time allotted to the Chief President of the Court of Appeal to give his ruling as to the suspensive effect of an appeal brought by the Public Prosecutor, "*without delay*" means "*within the shortest possible time*"<sup>5</sup>. The purpose which the provision seeks to achieve is that the time for examination of the transmission and referral of the application for a PPRC, then the time for examining the actual application should be included in the period of time allotted for preparing the case for trial and not result in extending this period of time.

This shortest possible time would allow, in the hypothesis of "massive litigation", a court asked to rule on an application for a PPRC and informed that the Conseil d'Etat, the Cour de cassation or the Constitutional Council has already been asked to rule on an application for a PPRC calling into question, by the very same argument, the same statutory provision, to wait, before ruling on any transmission of an application, for the transmission of the decision handed down as regards the first application for a PPRC transmitted.

Secondly, there are three cumulative criteria for justifying the transmitting of an application for a PPRC to the Conseil d'Etat or the Cour de cassation.

Firstly, the impugned provision must apply to the litigation or proceedings underway or constitute the ground for such proceedings.

Secondly, the impugned provision must not have previously been found to be constitutional in the grounds and holding of a decision of the Constitutional Council, except in the event of a change of circumstances. As emphasized by the Council in its decision n° 2009-595, this criterion reiterates

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<sup>5</sup> Decision n° 2003-484 DC of November 20<sup>th</sup> 2003, *Act pertaining to the Control of Immigration, the Residence of Foreigners in France and Nationality, para.77*

the authority of the Constitutional Council set out in the final paragraph of Article 62 of the Constitution.

The reference to a finding of conformity with the *Constitution "in the grounds and the holding"* of a decision corresponds to the changing manner in which the Constitutional Council has since 1959 drafted its rulings on ordinary statute law. Requiring the Constitutional Council to have made a declaration of conformity *"in the grounds and the holding"* of its decision for this to be assertable against an application for a PPRC, means that courts are not required to take into account the changes which have occurred in the drafting of such decisions, it being specified that in principle, when the Constitutional Council dismisses in the grounds of its ruling an argument raised against a statutory provision, it finds the latter in its entirety to be in conformity with the Constitution.

The third criterion is that the issue *"be of a serious nature"*. This is designed to avoid wasting time on fanciful applications or those intended to delay proceedings.

As regards the qualification *"a change of circumstances"*, the Constitutional Council has specified that this refers to changes of a general scope (changes in constitutional norms of reference or circumstances of fact or law which affect the scope of the challenged statutory provision) and not the circumstances proper to the case in hand which is at the origin of the proceedings giving rise to the application for a PPRC.

All in all, these three criteria are very close to those contemplated in 1989-1990. They conform to Article 61-1 of the Constitution which provides that an application for a priority preliminary ruling on the issue on unconstitutionality *"may be referred"* to the Constitutional Council by the Conseil d'Etat or the Cour de cassation. This wording gives the Institutional Act the power to determine the criteria of the filter mechanism.

Thirdly, paragraph 5 of section 23-2 provides that *"in all events"* a court must examine the argument based on conformity with the Constitution in priority to any argument as to the conformity of a statute with international commitments entered into by France. For the avoidance of any ambiguity, this provision confirms the priority status of an application for a PPRC.

This is designed to address a threefold concern.

Firstly, in view of the closeness of the constitutional protection of fundamental rights and that deriving from international Conventions on human rights, virtually all of the issues concerning constitutionality could have been dismissed on the grounds that the challenged statute should be struck down because of its failure to comply with commitments entered into under a treaty or international Convention. To allow this would have meant that the reform would rapidly have become an empty shell.

Secondly, introducing an *a posteriori* review of constitutionality is designed to reinforce the principle whereby the Constitutional Council is at the apex of the French national legal order. It has appeared somewhat anomalous that all judges may set aside a national statute on the grounds of failure to comply with international treaties or Conventions, whereas the issue of compliance with the Constitution could not be raised before them. If failure to comply with an international commitment could act as a shield against unconstitutionality, this anomaly would continue to exist.

Lastly, the reform of July 23<sup>rd</sup> 2008 has vested the Constitutional Council, when the issue is referred to it by the Conseil d'Etat or the Cour de cassation, with the power to repeal statutory provisions which run counter to the rights and freedoms guaranteed by the Constitution. This centralization of review of constitutionality, with an *erga omnes* power of repeal of offending provisions, is an important guarantee of legal certainty and coherence in the protection of fundamental rights.

The Constitutional Council has emphasized, in its decision of December 3<sup>rd</sup> 2009, that this priority is " *designed solely to specify the order in which the arguments raised before the court to which the matter is referred are to be examined*". It does not restrict the jurisdiction of Administrative courts and Courts of law to ensure the superiority over national laws of international law or of the law of the European Union. It thus does not fail to comply with either Article 55 of the Constitution or whereby " *Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each Treaty or agreement, to its application by the other party*". Nor does it run counter to Article 88-1 of the Constitution, whereby " *The Republic shall participate in the European Communities and the European Union constituted by States which have freely chosen, by virtue of the treaties which established them, to exercise some of their powers in common*". It should be noted that the Treaty of Lisbon came into effect on December 1<sup>st</sup> 2009 and as such the Constitutional Council cited Article 88-1 as worded subsequent to this event.

Parliament, in its capacity to enact Institutional Acts, has thus enhanced the specificities of the jurisdiction of the courts to review statute law. Firstly, the Constitutional Council has its status as constitutional judge strengthened by Article 61-1 but is not judge of the conformity of statutes with international agreements<sup>6</sup>

Secondly, the Conseil d'Etat and the Cour de cassation are and remain the highest courts vested with the power to rule on compliance of statute law with international agreements.

The Constitutional Council held section 23-2 to be constitutional.

### **c) Section 23-3 of the Institutional Ordinance of November 7<sup>th</sup> 1958.**

Section 23-3 lays down the general principle whereby the transmitting of an application for a PPRC leads to a stay of ruling by the court hearing the case at the origin of this application. It must await the decision of the Conseil d'Etat or the Cour de cassation or the Constitutional Council, if the matter has been referred to the latter.

This principle is however accompanied by a supplementary measure : preliminary investigations underway are not suspended and the courts make take any temporary measures or measures of conservation.

Section 23-3 also provides for two categories of exceptions:

- Firstly, a court may not stay its ruling if statute law or regulations provide that it should give its ruling within a specified time or as a matter of urgency. Certain rules of procedure may indeed require the court of first instance or appellate court to give a ruling within an allotted time.

The judge may also refrain from staying his ruling if this would lead to irremediable or patently excessive consequences as regards the rights of one of the parties. In such cases, the court deciding to transmit the application for a priority preliminary ruling as to constitutionality may rule on those issues which need to be dealt with forthwith.

- Secondly a court may not stay its ruling when the applicant is deprived of his freedom due to the proceedings underway, nor when the purpose of such proceedings is to discharge a custodial measure.

Section 23-3 nevertheless provides that when the judge who has transmitted the application for a PPRC to the Conseil d'Etat or Cour de cassation does not have to stay his ruling, it incumbent upon the appellate court or, alternatively, the Conseil d'Etat or the Cour de cassation to do. As the Constitutional Council stated in its decision of December 3<sup>rd</sup> 2009, these rules, which contribute to the good administration of justice, preserve the practical effectiveness for the applicant of the application for a priority preliminary ruling on the issue of constitutionality. The

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<sup>6</sup> Decision n° 74-54 DC of January 15th 1075 : *Statute pertaining to voluntary interruptions of pregnancy*, para.6

latter is given the opportunity of bringing fresh proceedings in order for the decision of the Constitutional Court to be taken into account.

There is however an exception to this rule before the Cour de cassation : when the applicant is deprived of his freedom because of the proceedings underway and statute law provides that the Cour de cassation shall give its ruling within a specified time, the latter shall give its ruling without waiting for the decision of the Constitutional Council, if the matter has been referred to the latter.

The Constitutional Council in its decision of December 3<sup>rd</sup> 2009, has noted that this exception may cause difficulties since, in theory, it may lead to a final decision being handed down in a case concerning which an application has been made to the Constitutional Council for a priority preliminary ruling as to constitutionality before the latter has in fact ruled on this application.

The Constitutional Council has thus made a qualification to the effect that such a situation should not be allowed to preclude the person involved in these proceedings from bringing fresh proceedings in the event of the ruling of the Constitutional Council finding the challenged statutory provision to be unconstitutional.

## **2- The provisions applicable before the Conseil d'Etat and the Cour de cassation**

These provisions are to be found in sections 23-4 to 23-7 inserted into the Institutional ordinance of November 7<sup>th</sup> 1958 referred to above.

### **a) Sections 23-4 and 23-5 of the Ordinance of November 7<sup>th</sup> 1958.**

Section 23-4, when providing that the Conseil d'Etat or the Cour de cassation shall have a period of three months within which to hand down their decision on an application for a PPRC, complies with the requirements of Article 61-1 of the Constitution whereby these courts shall give their rulings "*within a specified time*".

Section 23-4 also specifies the conditions governing the referral of the application to the Constitutional Council. Two of them are identical to those justifying the transmitting of the application for a PPRC by the judge *a quo* : challenged provision applicable to the litigation involved, provision not previously found to be constitutional by the Constitutional Council.

The third condition is different from that set out in section 23-1 for the judge *a quo*. Here the application will be referred if "*the issue raised is new*" or "*is of a serious nature*".

The first criterion "*is of a serious nature*" is very close to that formulated as regards the judge *a quo* ("*is not without a serious nature*"). The condition here is slightly more demanding. It will enable the Conseil d'Etat and the Cour de cassation to act as filters.

The second criterion is that "*the issue raised is new*". The Council considers that this condition is not to be interpreted as regards the challenged statutory provision (failing which any provision not yet reviewed by the Constitutional Council would be "new") but as regards the constitutional provision with which it is confronted. It thus found that any application for a priority preliminary ruling on the issue of constitutionality relying on a constitutional norm which the Constitutional Council has not as yet been required to interpret may be defined as "new".

In addition the Council held that this new criterion empowers the Conseil d'Etat and the Cour de cassation to determine, on the basis of this alternative test, the need to refer the matter to the Constitutional Council. A statutory provision which is the object of a substantial number of applications for a PPRC and which raises issues which should, in the general interest, be finally resolved by the Constitutional Council may thus be defined as new.

Section 23-5 determines the treatment of applications for PPRC made directly before the Conseil d'Etat or the Cour de cassation.

Paragraph 1 of section 23-5 provides that an application for a PPRC may be made for the first time before the Conseil d'Etat or the Cour de cassation. This section reiterates, and adapts for application before the Conseil d'Etat and the Cour de cassation, several rules applicable before the judge *a quo* : requirement of a separate and reasoned memorandum, issue to be dealt with in priority to pleas as to non compliance with an obligation under an international agreement, time allotted for ruling, criteria for referral to the Constitutional Council, general rule as to the staying of rulings in the event of referral.

The Constitutional Council found that the provisions which were simply the reiteration of the provisions applicable before the judge *a quo* were constitutional and referred to the relevant paragraphs of its decision.

Section 23-5 returns to the difficulty highlighted in section 23-3 as regards exceptions to stays of ruling. There are two of them here : firstly, automatically, "*when the applicant is deprived of his freedom because of the proceedings underway and statute law provides that the Cour de cassation shall give its ruling within a specified time*", and secondly, optionally, "*when the Conseil d'Etat or the Cour de cassation is required to rule in a matter of urgency*"

To deal with this same difficulty, arising from the fact that a final decision in the case at the origin of the application might be handed down before the Constitutional Council has given its ruling as to the application for a PPRC referred to it, the Constitutional Council, in its decision of December 3<sup>rd</sup> 2009, thus reiterated and applied to the two final phrases of the final paragraph of section 23-5, the qualification made as regards section 23-3.

#### **b) Sections 23-6 of the Institutional Ordinance of November 7<sup>th</sup> 1958.**

This section introduces a particular method of proceeding at the Cour de cassation as regards applications for PPRC.

The First President of the Cour de cassation shall receive applications and shall immediately inform the Chief Public Prosecutor. This section creates two different categories of Benches to hear such applications, both of them presided by the First President, a normal Bench composed of the Presidents of the Chambers and two Judges from each of the Chambers specifically concerned by the application and a more restricted Bench in the event of the First President feeling that "*the solution to the issue raised is self-evident.*"

The place of these provisions in the Institutional Act was also addressed. The Constitutional Council found that these provisions, pertaining to the rules governing the composition of the trial Benches of the Cour de cassation for the examination of those applications for a priority preliminary ruling as to constitutionality transmitted to it or raised before it, are of an institutional nature, as are all the other provisions of this Act.

#### **c) Section 23-7 of the Ordinance of November 7<sup>th</sup> 1958.**

Section 23-7 provides that in the event of transmission of an application for a PPRC the Conseil d'Etat or the Cour de cassation shall refer applications to the Constitutional Council by a reasoned decision "*accompanied by the submissions of the parties*". The Constitutional Council validated this provision specifying that the documents involved are the memorandum and submittals of the parties pertaining solely to this application for a priority preliminary ruling as to constitutionality and not the submission and memorandum relating to the proceedings in which these application for a PPRC was made. The Constitutional Council has no jurisdiction over such a case, merely over the application for a PPRC. Furthermore the requirement, at all stages of the proceedings, that an application for a PPRC be made in a separate and reasoned memorandum will ensure that all exchanges of submissions between the parties regarding the application for a PPRC and any subsequent referral of the application to the Constitutional Council be equally separate and distinct.

The Constitutional Council has also validated the provision whereby the Conseil d'Etat or the Cour de cassation shall provide the Constitutional Council with a copy of the reasoned decision at the basis of the refusal of the Conseil d'Etat or Cour de cassation to refer an application to it.

When also providing for the automatic transmission of the application to the Constitutional Court in the event of failure by the Conseil d'Etat or the Cour de cassation to rule within the allotted three month period, Parliament, when passing the Institutional Act, implemented the provisions of Article 61-1 of the Constitution which provide that the Conseil d'Etat or the Cour de cassation "*shall give its ruling within a specified time*". These provisions thus comply with the Constitution.

To sum up, as regards all the provisions applicable before the Conseil d'Etat and the Cour de cassation, the Constitutional Council made a general qualification as to the absence, in the Institutional Act, of specific provisions organising the procedure applicable to these new proceedings. The Council found that this absence did not imply that Parliament had failed to exercise its powers to the full insofar as the provisions of sections 23-4 to 23-7 should be interpreted as prescribing before the Conseil d'Etat or the Cour de cassation the implementation of rules of procedure conforming to the requirements of the right to a fair trial. If need be, it will be up to the Decree to provide such additional rules as may be required.

### **3 – The provisions applicable before the Constitutional Council.**

These provisions are found in sections 23-8 to 23-12 of the Institutional Ordinance of November 7<sup>th</sup> 1958 referred to above.

Section 23-8 ensures that the four highest authorities of the State are informed when an application for a priority preliminary ruling on the issue of constitutionality is made to the Constitutional Council. The latter may, should they so wish, address their remarks to the Council. It also provides, for laws of the land, that the authorities of New Caledonia be informed.

Section 23-9 provides that "*When the Constitutional Council has been asked to rule on an application for a priority preliminary ruling on the issue of constitutionality, the termination for any reason whatsoever of the proceedings in which this issue was raised shall have no effect on the examination of this issue.*" In its decision of December 3<sup>rd</sup> 2009, the Council noted that this provision draws the conclusion from the *erga omnes* effect of decisions of the Constitutional Council which derives, firstly from paragraph 2 of Article 62 of the Constitution and secondly, from 2° of section 23-2 of the Institutional Act.

Section 23-10 firstly gives the Council a period of three months within which to give its ruling. Article 61-1 of the Constitution did not require the Institutional Act to fix such a timeframe. This is however not unconstitutional. Section 23-10 secondly lays down two rules of procedure applicable before the Council. Firstly, the parties shall be allowed to put forward their arguments during a full hearing of all parties, and secondly, hearings will normally be in open court, except for certain cases such as those connected with the protection of public order or the right to privacy.

Section 23-11 requires that reasons be given for the decisions of the Council, and that they be published in the Journal officiel, thus reiterating Section 20 of the Institutional Ordinance of November 7<sup>th</sup> 1958 concerning the Constitutional Council applicable in the framework of the review under Article 61. Furthermore this section 23-11 adapts the giving of notice to rulings under Article 61-1 to include the informing of the parties, the Conseil d'Etat, the Cour de cassation, if need be, the judge *a quo*, the four highest authorities of the State and, also if need be, the Authorities of New Caledonia.

Section 32-12 also provides for an increase in the amount of legal aid when application is made to the Constitutional Council for a PPRC.

These sections have been held to be constitutional.

### **B – Section 3.**

Section 3 of the Institutional Act inserts into section 107 of Institutional Act n° 99-209 of March 19<sup>th</sup> 1999 pertaining to New Caledonia a paragraph making it possible for an application for a PPRC to be made concerning the laws of the land of New Caledonia.

Under Article 61-1 of the Constitution, an application for a PPRC concerns a "*statutory provision*". These terms include "*laws of the land*". Section 107 of the Institutional Act of March 19<sup>th</sup> 1999 referred to above provides that laws of the land have "*force of law*". The Constitutional Council has expressly defined them as being "*statutes*" in its decision n° 99-410 DC of March 15<sup>th</sup> 1999.<sup>7</sup> These laws of the land cannot benefit from any exceptional "constitutional immunity" detrimental to the inhabitants of New Caledonia.

The Institutional Act thus quite rightly applies to laws of the land of New Caledonia and proceeds to carry out the necessary adjustments. This is also the case in section 23-8 as regards information given to the local authorities.

The Constitutional Council thus held section 3 of the Institutional Act to be constitutional.

### **C – Other provisions**

The Council held to be constitutional all the other provisions of the Institutional Act, whether it be section 2 which inserts the provisions concerning the PPRC into the Code of Administrative Justice, the Code of Judicial Institutions, the Code of Criminal Procedure and the Code of Courts of Audit, or section 4 which provides that "*the manner of application of this Institutional Act shall be determined in the conditions provided for in Sections 55 and 56 of Ordinance n° 58-1067 of November 7<sup>th</sup> 1958 constituting an Institutional Act on the Constitutional Council*".

Section 56 of the Institutional Act of 1958 provides that "*the Constitutional Council shall complete by its internal rules of procedure the rules of procedure laid down by Title II hereof*". Section 3 of the Institutional Act pertaining to Article 61-1 thus refers to the internal rules of procedure of the Council. Such internal rules have existed since October 5<sup>th</sup> 1988, being applicable to proceedings as to operations connected with the holding of referenda. In a similar fashion, the code of procedure of May 31<sup>st</sup> 1959 as amended is applicable to proceedings before the Council for litigation as to the election of Members of the National Assembly and Senators. These rules of procedure govern proceedings before the Council. The same will apply for the rule of procedure concerning the application for a PPRC. These rules of procedure will determine these additional rules in the framework laid down by sections 23-10 and 23-11 of the Institutional Act pertaining to Section 61-1 of the Constitution.

Section 4 of the Institutional Act pertaining to Article 61-1 also refers to section 55 of the Institutional Act of 1958, which provides : "*The manner of application of this Ordinance may be specified by a Decree after deliberation in the Council of Ministers, after consultation with the Constitutional Council and seeking the opinion of the Conseil d'Etat.*"

The Council validated the leaving to a Decree the task of specifying the manner of application of the Institutional Act.

The Constitutional Council also held to be constitutional section 5, which provides for the coming into force of the Institutional Act on the first day of the third month following the promulgation of

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<sup>7</sup> Decision n° 99-410 DC of March 15<sup>th</sup> 1999 ,*Institutional Act pertaining to New Caledonia*, para.20.

the Act (namely March 1st 2010 for a promulgation in December 2009). Section 46 of the Constitutional Act of July 23<sup>rd</sup> 2008 referred to above provides that the new Article 61-1 of the Constitution shall come into force in the manner specified by the Institutional Act necessary for its application.

Failing any temporary provisions departing from the normal legal principles governing the coming into force of statutes, the Institutional Act shall be immediately applicable to proceedings underway on the date on which it comes into force. However only those applications for a priority preliminary ruling as to constitutionality made as from this date in writing and in separate and reasoned submissions shall be admissible<sup>8</sup>.

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<sup>8</sup> This commentary was translated from the French by Patricia Kinder-Gest, Professor at the University Paris 2-Panthéon-Assas