ANALYTICAL SYNOPSIS 2004

NOTE TO THE READER

The annual analytical synopsis provides a detailed and indexed overview of the decisions of the French Constitutional Council. The abstracts of the decisions are listed under 15 headings. Reference is not necessarily made to each of the headings each year.

Decisions are identified in different ways depending on the nature of the review:

1 – Decisions reviewing presidential elections or referendums bear the date on which they were delivered without any other specific indication.

2 – Decisions on cases arising from parliamentary elections are referred to by chamber – **AN** (*Assemblée Nationale)* or **Senate –** department and constituency, **e.g. AN, Bouches-du-Rhône, Constituency 2.**

3 – Constitutional review cases are referenced in the following manner: **90-273 DC, 4 May 1990**, where the numbers represent the year of registration (90) and the order of registration on the court docket (273), and the abbreviation designates the type of referral:

DC – Constitutional review;

LP – Law of the country: Following the constitutional revision of 20 June 1998 reintroducing a Title XIII in the Constitution on transitional provisions relating to New Caledonia, Parliament enacted an Institutional Act on 19 March 1999; section 104 provides that a "loi du pays" (law of the country) may be referred to the Constitutional Council prior to promulgation. Decisions relating to them are classified under "LP" (*loi du pays*);

FNR or **L –** Decision relating to the separation of powers, i.e. to the executive or to the legislature;

I or **D –** Decision relating to the situation of a member of Parliament (incompatibility, ineligibility or disqualification).

Other abbreviations occasionally used are:

Ass. CE – Judgement given by the full senate of the Council of State (*Conseil d'Etat*).

Cass – Judgement given by the Court of Cassation

ECJ – Judgment given by the Court of Justice of the European Communities.

A number of expressions in the abstracts have been left in French and italicised, usually because no suitable English equivalent exits. These are elucidated in the Glossary.

CONTENTS

PARLIAMENTARY ASSEMBLIES

RULES APPLYING TO MEMBERS

General

Deputies and Senators are elected by universal suffrage, direct for the former and indirect for the latter, but in Parliament each of them represents the whole Nation and not just the people in their own constituency. Section 4 of the Institutional Act on the autonomous status of French Polynesia must accordingly be interpreted as merely restating that there are to be legislative and Senate elections in French Polynesia, as already provided by the institutional legislature. Qualified interpretation.
(2004-490 DC, 12 February 2004, para 14, p. 41)

Membership of Parliamentary assemblies

Special rules applying to the Senate

Senate electoral college

Given the role conferred on the Senate by article 24 of the Constitution, the rules governing membership of the electoral college laid down by sections L 279 and *seq.* of the Electoral Code cannot be regarded as incompatible with articles 25 and 26 of the International Covenant on Civil and Political Rights.
(2004-3384, 4 November 2004, Senate, Yvelines, para 6, p. 167)

Qualifications for office

Disqualification *ipso jure*

Under sections L 5 and L 44 of the Electoral Code, persons of full age who are subject to guardianship may not be entered on the electoral rolls and may neither vote nor stand for election.

It appears from the documents in the file that the person concerned here was under guardianship by order of the guardianship judge at the Tribunal d'instance dated 28 March 2003, still in force.

It follows that, under section LO 136 of the Electoral Code, applicable to Senators by virtue of section LO 296, that the Constitutional Council must declared the person concerned disqualified *ipso jure* from the office of Senator.
(2004-16 D, 23 December 2004, paras 1 to 4, p. 231)

Incompatibility

Procedure

General procedural rules

Under the fourth paragraph of section LO 151 of the Electoral Code, it is for the Bureau of the National Assembly to determine on the basis of the declaration signed by a Deputy whether the functions he exercises apart from his office as Deputy are compatible with it. In the event of doubts or a challenge, only the Bureau, the Keeper of the Seals, Minister of Justice, or the

Deputy himself may apply to the Constitutional Council for a decision, against which there is no appeal, on the question of incompatibility. An application presented by a mere voter for a ruling by the Constitutional Council on the question of the incompatibility of a Deputy's functions is accordingly inadmissible.
(2004-18 I, 4 November 2004, paras 2 and 3, p. 162)

Any provision declaring an incompatibility, the effect of which is to restrict the exercise of an electoral office, must be strictly interpreted. Such is the case for section LO 146 of the Electoral Code.

To assess the situation of a Member of Parliament in relation to section LO 146, the Constitutional Council must consider the situation at the time of its decision. There is accordingly no need to have regard to circumstances that ceased to exist before it takes its decision.

The information available to the Constitutional Council on the date of its decision does not establish that the person concerned was in a position of incompatibility under the second paragraph of section LO 146 of the Electoral Code, but it will be for the Bureau of the Senate or the Keeper of the Seals, Minister of Justice, to refer the situation to the Council anew if facts or information emerging after this decision so warrant.
(2004-19 I, 23 December 2004, paras 3, 4 and 8, p. 233)

Substantive rules

Parent companies and subsidiaries

Section LO 146(5°) prohibits Members of Parliament from exercising certain functions in companies more than half of whose capital is constituted by holdings by companies to which section LO 146(1º), (2º), (3º) and (4º) apply. But it does not mention the companies that hold the said holdings. It is not for the judge hearing incompatibility cases to amplify the statute.
(2004-19 I, 23 December 2004, para 6, p. 233)

Actual management and exercise of rights attaching to property

The information available to the Constitutional Council does not indicate that on the date of this decision the person concerned directly or via intermediaries manages one or more companies to which section LO 146 applies.
(2004-19 I, 23 December 2004, para 7, p. 233)

Companies or enterprises whose main business is the provision of works, supplies or services for or under the control of central government, a territorial unit or a public establishment

The person concerned exercises functions to which the first paragraph of section LO 146 applies in certain companies, but the investigation has revealed that the section does not apply to those companies. And he does not exercise functions to which the first paragraph of the section applies in companies to which the section applies.
(2004-19 I, 23 December 2004, paras 5 and 7, p. 233)

The categories of persons to whom section LO 146(3°) of the Electoral Code applies must be considered in cumulative terms; and the concept of "principal activity" in that provision must be interpreted as referring to more than 50 % of the company's business (implicit solution).
(2004-19 I, 23 December 2004, paras 5 and 7, p. 233)

ORGANISATION OF PARLIAMENTARY ASSEMBLIES

Special and Standing Committees

Role of Standing Committees

The amended Order 16 of the Rules of Procedure of the Senate, which provides that "Finance Bills shall automatically be referred to the Finance, Budgetary Control and National Accounts

Committee, and Order 22, which specifies that Committee's powers, merely draw the consequences of sections 39 and 57 of Institutional Act 2001-692 of 1 August 2001 and are not unconstitutional.
(2004-495 DC, 18 May 2004, para 5, p. 96)

Information role

Under clause 1 of the resolution referred to the Constitutional Council, the Deputy who acted as rapporteur for a statute or, in his or her absence, another Deputy designated to act in his or her stead, is to present the "relevant committee" with a report on the application of the Act six months after it enters into force. The "relevant committee" can only be a standing committee.

Under clause 2, a Deputy designated by the relevant standing committee is to exercise a similar role as regards the implementation of the conclusions presented to the National Assembly by a committee of inquiry.

The follow-up tasks thus defined are temporary in nature and are confined to a mere information role to help the National Assembly exercise its function of reviewing the policy pursued by the Government, as provided by the Constitution. As regards committees of inquiry, whose findings are in no way mandatory, the report that is presented can never constitute an injunction addressed to the Government.
(2004-493 DC, 26 February 2004, paras 1, 2 and 3, p. 64)

Determining the number of members

Increasing the number of members of special committees

The amended Rule 7 of the rules of Procedure of the Senate, which alters the membership of the standing committees to give effect to Institutional Act 2003-696 of 30 July 2003 by providing for its gradual implementation, in harmony with the increase in the number of Senators at the next three partial renewals of the Senate, is in no way unconstitutional.
(2004-495 DC, 18 May 2004, para 4, p. 96)

Rules for the operation of committees

Committee officers

The amended Rule 13 of the Rules of Procedure of the Senate, which alters the officers of the standing committees and specifies that the number of vice-chairmen and secretaries may be increased "to meet the obligation to ensure that all political groups are represented", is not unconstitutional.
(2004-495 DC, 18 May 2004, para 6, p. 96)

Referral of private members'and Government bills to committees

The amended Rule 16 of the Rules of Procedure of the Senate, which provides that "Finance Bills shall automatically be referred to the Finance, Budgetary Control and National Accounts Committee", merely draws the consequences of section 39 of Institutional Act 2001-692 of 1 August 2001 and is not unconstitutional.
(2004-495 DC, 18 May 2004, para 5, p. 96)

Convening committee meetings

The amendment to Rule 20 of the Rules of Procedure of the Senate, which merely specifies the procedure for convening meetings of standing committees when the Senate is not in session, is not unconstitutional.
(2004-495 DC, 18 May 2004, para 8, p. 96)

Assistance for committee meetings

The amended Rules 15 and 20 of the Rules of Procedure of the Senate provide that Senators who are members of an international Assembly or a special committee may be "excused from attendance of the standing committee of which they are members" and arrange in such cases to be "replaced by another member of the committee". It is legitimate for the Senate, in compliance with article 43 of the Constitution, to amend the rules governing the operation of committees, but only provided there is no breach of the principle stated by article 27 of the Constitution that "... The right to vote of Members of Parliament shall be personal. – An institutional Act may, in exceptional cases, authorize voting by proxy...". Subject to this Qualified interpretation, clause 7 of the resolution is not unconstitutional.
(2004-495 DC, 18 May 2004, para 7, p. 96)

Membership of special committees

The amended Rule 16 of the Rules of Procedure of the Senate, which provides that "Finance Bills shall automatically be referred to the Finance, Budgetary Control and National Accounts Committee", merely draws the consequences of section 39 of Institutional Act 2001-692 of 1 August 2001 and is not unconstitutional.
(2004-495 DC, 18 May 2004, para 5, p. 96)

PARLIAMENTARY PROCEEDINGS

Proceedings between sessions

Meetings of standing committees

The amendment to Rule 20 of the Rules of Procedure of the Senate, which merely specifies the procedure for convening meetings of standing committees when the Senate is not in session, is not unconstitutional.
(2004-495 DC, 18 May 2004, para 8, p. 96)

Exercise of voting rights – voting techniques

Personal vote. Constitution, article 27

Counting of votes and proxies

The amended Rules 15 and 20 of the Rules of Procedure of the Senate provide that Senators who are members of an international Assembly or a special committee may be "excused from attendance of the standing committee of which they are members" and arrange in such cases to be "replaced by another member of the committee". It is legitimate for the Senate, in compliance with article 43 of the Constitution, to amend the rules governing the operation of committees, but only provided there is no breach of the principle stated by article 27 of the Constitution that "... The right to vote of Members of Parliament shall be personal. – An institutional Act may, in exceptional cases, authorize voting by proxy...". Subject to this qualified interpretation, clause 7 of the resolution is not unconstitutional.
(2004-495 DC, 18 May 2004, para 7, p. 96)

Right to initiate legislation – Review of admissibility

Right to initiate legislation

Consultation of Council of State on Government Bills

Section 9 of the Institutional Act on the autonomous status of French Polynesia provides that "consultations... shall take place at the latest before the adoption of the bill at first reading in the first Assembly in which it is presented", but this is subject to compliance with article 39 of the Constitution as regards Government bills which, from the outset, contain provisions relating to the specific organisation of French Polynesia. In such cases, the opinions must have been given implicitly or explicitly before the Council of State gives its opinion.
(2004-490 DC, 12 February 2004, para 20, p. 41)

First reading in the Senate (article 39(2))

Government Bill having the primary purpose of organising territorial units

Condition not met

Given its subject-matter, related to the finances of territorial units, the Bill on the basis of which the Institutional Act was enacted under the third paragraph of article 72-2 of the Constitution was not within the definition of the second paragraph of article 39 of the Constitution, whereby: "... bills having the primary purpose of organising territorial units ... shall be presented in the first instance in the Senate".
(2004-500 DC, 29 July 2004, para 2, p. 116)

Right to amend

Whether amendments are within the instrument being debated

Principles

The combined effect of articles 39, 44 and 45 of the Constitution is that the right to amend may be exercised at all stages of the legislative procedure, subject to the special provisions applicable after the meeting of the Joint Committee. But the resulting additions or amendments to the instrument in the course of the discussion, whatever their number or scope, must not be unrelated to the subject-matter of the Bill before Parliament, for otherwise they would be contrary to the first paragraph of articles 39 and 44 of the Constitution.
(2004-501 DC, 5 August 2004, para 22, p. 134 and 2004-502 DC, 5 August 2004, para 8, p. 141)

Application

Relation to the instrument being debated – Existence

The provisions challenged provide for the regrading of technical personnel of the National Printer in the context of a plan to restore the health and ensure the survival of an enterprise employing more than 1500 people. Given the anticipated direct and indirect effects of the plan, the provisions are not unrelated to the general purpose of Bill which, when tabled in the

National Assembly, already contained employment-related provisions. Section 25 of the Act referred is not unconstitutional.
(2004-502 DC, 5 August 2004, para 9, p. 141)

Relation to the instrument being debated – Absence

Section 47(II) of the Public Electricity and Gas Service Act amends section 7 of the Act of 13 September 1984 as follows: "In the absence of specific provisions in the statutes and regulations governing the establishment, the age limit for Chairmen of Boards, General Managers and Managers of public establishments depending on central government shall be sixty-five".

It is clear from the legislative history that these provisions, which concern the age limit for the managers of all public-sector establishments and corporations, are unrelated to the Bill tabled in the National Assembly, which contained exclusively provisions relating to the public electricity and gas service and electricity and gas enterprises. Section 47(II) is unconstitutional.
(2004-501 DC, 5 August 2004, paras 20 and 23, p. 134)

Voting on ordinary government and private members'bills

Conditions for applying the third paragraph of article 49 of the Constitution

The exercise of the prerogative enjoyed by the Prime Minister under the third paragraph of article 49 of the Constitution is subject to no other conditions than those stated in that provision.

Since it is stated in the record of decisions taken by the Council of Ministers on 21 July 2004, of which an extract was presented in this case, that the Government was presenting a motion of confidence in relation to the Local Freedoms and Responsibilities Bill, the condition imposed by the Constitution for applying the third paragraph of article 49 of the Constitution was respected when the question of confidence was put on 23 July.
(2004-503 DC, 12 August 2004, paras 4 and 5, p. 144)

Voting on government and private members'institutional bills

General procedural rules

The Institutional Act enacted under the third paragraph of article 72-2 of the Constitution to govern the financial autonomy of territorial units was enacted in compliance with the procedural rules in article 46 of the Constitution. Given its subject-matter, related to the finances of territorial units, the Institutional Bill under the third paragraph of article 72-2 of the Constitution was not within the definition of the second paragraph of article 39 of the Constitution, whereby "... bills having the primary purpose of organising territorial units ... shall be presented in the first instance in the Senate". Nor, in view of its nature, was it necessary for the opinion of the assemblies for the overseas units to which article 74 of the Constitution applies to be sought on the Bill. On the other hand, since it was to apply to the provinces of New Caledonia to which Title XIII of the Constitution applies, the prior opinion of the deliberative assembly for New Caledonia should have been sought as required by article 77 of the Constitution.
(2004-500 DC, 29 July 2004, paras 2 and 7, p. 116)

Second and subsequent readings – procedure of the Joint Committee

Text of the Joint Committee not relating to items still under discussion

The provisions relating to the membership and powers of the Higher Council for Energy were not among those still under discussion when the Bill completed its first reading. They were

inserted by the Joint Committee that met at that stage of the passage through Parliament. The second paragraph of article 45 of the Constitution provides that the Joint Committee is "to propose a text on the provisions still under discussion". The provisions were accordingly adopted by an unconstitutional procedure.
(2004-501 DC, 5 August 2004, paras 24 to 26, p. 134)

PARLIAMENTARY REVIEW

Scrutiny of government action

Information for the assemblies from committees

Role of committees

Under clause 1 of the resolution referred to the Constitutional Council, the Deputy who acted as rapporteur for a statute or, in his or her absence, another Deputy designated to act in his or her stead, is to present the "relevant committee" with a report on the application of the Act six months after it enters into force. The "relevant committee" can only be a standing committee.

Under clause 2, a Deputy designated by the relevant standing committee is to exercise a similar role as regards the implementation of the conclusions presented to the National Assembly by a committee of inquiry.

The follow-up tasks thus defined are temporary in nature and are confined to a mere information role to help the National Assembly exercise its function of reviewing the policy pursued by the Government as provided by the Constitution. As regards committees of inquiry, whose findings are in no way mandatory, the report that is presented can never constitute an injunction addressed to the Government.
(2004-493 DC, 26 February 2004, paras 1, 2 and 3, p. 64)

Committees of inquiry

Report on the findings of a committee of inquiry

Under clause 2 of the resolution referred to the Constitutional Council, a Deputy designated by the relevant standing committee is to present a report on the implementation of the conclusions presented to the National Assembly by a committee of inquiry after six months.

The follow-up tasks thus defined are temporary in nature and are confined to a mere information role to help the National Assembly exercise its function of reviewing the policy pursued by the Government as provided by the Constitution. As regards committees of inquiry, whose findings are in no way mandatory, the report that is presented can never constitute an injunction addressed to the Government.
(2004-493 DC, 26 February 2004, paras 2 and 3, p. 64)

Scrutiny of European Union activities

Revision of the Treaties

The question must be considered whether the prerogatives enjoyed by national parliaments under the Treaty referred to the Constitutional Council, which provides for more active involvement in European Union affairs, can be exercised under the current provisions of the Constitution.

Article IV-444, which establishes a simplified procedure for revision of the Treaty, provides for transmission to national parliaments of all initiatives in this respect and provides: "If a national

Parliament makes known its opposition within six months of the date of such notification, the European decision ... shall not be adopted". The right thereby conferred on the French Parliament requires revision of the Constitution if that prerogative is to be exercised.

Article IV-445 establishes a simplified procedure for revision of the Union's internal policies and action. It provides that the European Council, acting by unanimity on a proposal from any Member State, the European Parliament or the Commission, "may adopt a European decision amending all or part of the provisions of Title III of Part III" relating to the Union's internal policies and action, but that such a decision "shall not come into force until it has been approved by the Member States in accordance with their respective constitutional requirements". This reference to the Member States' constitutional requirements means, in the case of France, the legislative authorisation provided for by article 53 of the Constitution.
(2004-505 DC, 19 November 2004, paras 36 to 38 and 41, p. 173)

Principle of subsidiarity

The question must be considered whether the prerogatives enjoyed by national parliaments under the Treaty referred to the Constitutional Council, which provide for more active involvement in European Union affairs, can be exercised under the current provisions of the Constitution.

The power conferred on the French Parliament, following the respective procedures of each of its two Houses, to issue a reasoned opinion or bring an action in the Court of Justice in reviewing compliance with the principle of subsidiarity, requires revision of the Constitution if that prerogative is to be exercised.
(2004-505 DC, 19 November 2004, paras 37, 39 to 41, p. 173)

JUDICIAL AUTHORITY AND THE COURTS

COURTS

Jurisdiction

Jurisdiction of the administrative courts

Application

"Statutes of the country" in French Polynesia

There are no constitutional principles or rules requiring the trial court to be in all cases the court ruling on the judicial review. Section 179 of the Institutional Act on the autonomous status of French Polynesia empowers the Council of State, acting on a question referred for a preliminary ruling by a trial court, to rule by way of exception on the legality of "statutes of the country". This procedure triggers the eighth paragraph of article 74 of the Constitution, whereby such acts are subject to judicial review.
(2004-490 DC, 12 February 2004, para 112, p. 41)

Organisation of the courts and procedure

Organisation of the ordinary courts

Prosecution Service

Section 63 of the Act referred inserts the following section 30 in the Code of Criminal Procedure: "The Minister of Justice shall conduct the policy in matters of prosecution

determined by the Government. It shall ensure that it is applied in a consistent manner throughout the Republic. – To that end it shall address general prosecution instructions to the members of the Prosecution Service. – It may report to the General State Counsel on criminal offences that come to its intention and order him, by means of written instructions recorded in the case file, to commence proceedings or cause them to be commenced or to address to the relevant court such written applications as the Minister shall consider appropriate".

Under article 20 of the Constitution, the Government shall determine and conduct the policy of the Nation, notably in prosecution matters. Section 5 of the Ordinance of 22 December 1958 on the status of the *magistrature* places the judges belonging to the Prosecution Service under the authority of the Minister of Justice. The new section 30 of the Code of Criminal Procedure, which defines and confines the conditions in which such authority is exercised, is contrary neither to the French concept of the separation of powers nor to the principle that the judicial authority includes both the judges on the bench and the judges belonging to the Prosecution Service, nor any other constitutional principle or rule.
(2004-492 DC, 2 March 2004, paras 96 to 98, p. 66)

POWER TO ENACT LAWS AND POWER TO MAKE REGULATIONS

GENERAL

Scope and limits of power to enact laws

Power to determine what is appropriate subject only to constitutionality

General will

Article 6 of the Declaration of Human and Civic Rights of 1789 provides: "The Law is the expression of the general will." It follows from this article, as from all other relevant constitutional rules, that, subject to specific provisions of the Constitution, a statute must lay down rules and must accordingly have prescriptive status.
(2004-500 DC, 29 July 2004, para 12, p. 116)

Failure to exercise full powers available

No failure

Article 34 of the Constitution provides: "Statutes shall determine the fundamental principles of... social security". These fundamental principles include the rule that each insured person must pay a flat-rate charge for certain procedures and consultations covered by the health-care insurance scheme, and the exceptions from it. But rules for the application of this principle are within the powers of the authority empowered to make regulations, provided they do not distort their scope. It follows that, by delegating to the authority empowered to make regulations the decision as to the amount of the flat-rate charge payable by persons covered by the health-care insurance scheme, the legislature did not violate article 34 of the Constitution.
(2004-504 DC, 12 August 2004, para 20, p. 153)

Section 28 of the Finance Act for 2005 establishes a professional tax credit covered by central government for taxable persons in employment areas classified each year until 2009 by regulation as being "in major difficulties on account of delocations".

By specifying that the new measure is to apply in "employment areas", the legislature referred to an existing concept defined by the National Statistics Institute and Economic Studies as "a

geographical area within which most of the active population live and work" and used by that Institute and the Ministry of Employment to establish a list of 348 areas in metropolitan France. The statistical criteria used by the legislature accordingly designate eligible areas on the basis of these criteria and the powers of the authority empowered to make regulations are bound by them in each annual determination. The legislature did not fail to exercise its powers.

The legislature has authorised the Government to lay down an additional list covering areas in which "ongoing industrial restructuring operations are liable to adversely affect the employment situation on a durable basis". The "ongoing industrial restructuring" criterion will be assessed on the basis of aspects such as the existence redeployment plans, the number of dismissals and the impact on local sub-contractors. The legislature has accordingly defined with adequate precision the additional areas that will be eligible for the measure.
(2004-511 DC, 29 December 2004, paras 17, 19 and 20, p. 236)

Basis of assessment to social security contributions

Article 34 of the Constitution provides: "Statutes shall determine the fundamental principles of... employment law". The eighth paragraph of the Preamble to the Constitution of 27 October 1946 provides: "All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place". And article 34 of the Constitution provides that statutes shall determine the rules concerning "the base, rates and methods of collection of taxes of all types" and the "fundamental principles... of social security".

It is legitimate for the legislature, having defined rights and obligations regarding employment conditions and industrial relations, to leave it up to employers and employed persons or their representative organisations to specify, by way of collective bargaining, the practical rules for applying the provisions it has enacted on employment law. It is also legitimate for it to provide that in the absence of a collective bargaining agreement, such practical rules will be established by Decree.

Such is the case for the determination of the respective proportions of salaries and other components of remuneration on the conditions and within the limits set by the legislature. It was accordingly legitimate for the legislature, and no breach of its powers, to apply these principles to professional sportsmen for promotion campaigns not requiring their physical presence and not involving the live retransmission of events.
(2004-507 DC, 9 December 2004, paras 10 to 15, p. 219)

Cases of failure to exercise full powers available

Rights and freedoms

Section 9 (3°) of the Act of 6 January 1978 could allow a body corporate governed by private law, acting as appointed representative for serveral other bodies corporate who were the victims of criminal offences – or who consider that they were the victims or who believe that they could be the victims – to gather a large quantity of personal data relating to offences, convictions and supervisory measures. It was therefore capable of having such consequences as to affect the right to respect for privacy and the fundamental guarantees secured for the citizen regarding the exercise of public freedoms. It must therefore come with the proper specific guarantees meeting the requirements of article 34 of the Constitution.

Regarding the subject-matter and conditions of the powers conferred, the provision gives no details. It is ambiguous as to the offences to which the term "fraud" applies. It does not answer the question how far data can be shared or transferred or whether they can include persons who are simply suspected of being potential offenders. It is silent on the limits that might be imposed on he preservation of reference to convictions. It follows from article 34 of the Constitution that all these details cannot be provided solely by authorisations given by the National Commission for Data-processing and Freedom. In the circumstances, particularly of the subject-matter, it was not legitimate for the legislature to merely lay down a general rule of principle, which is what the provision, interpreted in the light of the legislative, does, leaving

it entirely for future statutes to determine how it will be applied. The new section 9(3°) of the Act of 6 January 1978 is accordingly vitiated by failure to exercise powers to the full.
(2004-499 DC, 29 July 2004, paras 9, 11 and 12, p. 126)

Repeal or amendment of earlier statutes

Amendment of earlier statutes

General rules

It is always legitimate for the legislature, acting within the limits of its powers, to amend earlier statutes or to repeal them and replace them by other provisions, provided in so doing it does not deprive constitutional requirements of their statutory guarantees.
(2004-499 DC, 29 July 2004, para 3, p. 126)

Matters to be determined by institutional act or by ordinary statute

Matters to be determined by institutional act

Under article 74 of the Constitution, the following are all institutional matters: the conditions in which laws and regulations are applicable in French Polynesia, the powers of that territorial unit, the powers of its institutions and the rules governing their organisation and operation, the rules governing the election of its decision-making Assembly, the conditions for the consultation of its institutions on government and private-members'bills, draft ordinances and decrees containing provisions of specific concern to the unit, and the ratification or approval of international agreements in matters within its powers, the specific judicial review by the Council of State of certain categories of acts of the decision-making Assembly, the conditions in which the decision-making Assembly may amend a statute after the entry into force of the autonomous status of French Polynesia in matters within its powers, measures justified by local needs for the benefit of its population as regards employment, the exercise of occupations and protection of the land, and the conditions in which the territorial unit may, subject to central government review, participate in the exercise of powers retained by central government.

Matters that are indissociable from the foregoing matters are also institutional, and in particular, as regards the operation of the institutions of French Polynesia, the rules governing the validity of their decisions and procedures for the exercise of central government review of those institutions.
(2004-490 DC, 12 February 2004, paras 10 and 11, p. 41)

Provisions of an ordinary statute included in an institutional act

Section 6 of the Institutional Act on the autonomous status of French Polynesia relates to the self-government of the communes of French Polynesia, which for the purposes of article 74 of the Constitution are not institutions of the territorial unit of French Polynesia. It is therefore a provision of an ordinary statute.
(2004-490 DC, 12 February 2004, para 15,p. 41)

The powers of the communes of French Polynesia, which are not institutions of French Polynesia for the purposes of article 74 of the Constitution, are matters to be governed by ordinary statutes under article 72 of the Constitution. Section 43(I) of the Institutional Act on the autonomous status of French Polynesia, which determines the powers of those communes, accordingly has the status of an ordinary statute.
(2004-490 DC, 12 February 2004, para 60, p. 41)

Section 57 of the Institutional Act on the autonomous status of French Polynesia governs the use of French, Tahitian and the other Polynesian languages in French Polynesia. The matters to which article 74 of the Constitution include the first paragraph of section 57, which, by declaring that French is the official language of French Polynesia, affects the rules for the operation of that territorial unit. The same applies to the fourth and sixth paragraphs, which

spell out the powers of the territorial unit in relation to the teaching of Polynesian languages. The rest of the section is in the area reserved for ordinary statutes.
(2004-490 DC, 12 February 2004, para 68, p. 41)

Section 58 of the Institutional Act on the autonomous status of French Polynesia establishes a board of experts in land tenure; the rules governing its membership and operation are to be determined by the Assembly for French Polynesia, and it is to be consulted both by that Assembly and by the representative of the State. Under the fourth paragraph, the college is to "propose to the general Assembly of the judiciary at the Court of Appeal personalities who are qualified for approval as assessors at courts dealing with property questions or as court experts". This paragraph, which concerns the organisation of the courts, is out of place in an institutional act.
(2004-490 DC, 12 February 2004, para 71, p. 41)

Clarity of legislation and constitutionality

The legislature is obliged by article 34 of the Constitution, and by the principle that offences and penalties must be defined by statute, to determine itself the scope of criminal legislation and to define offences in sufficiently clear and precise terms. The purpose of this is not only to preclude arbitrary sentencing but also to avoid excessive rigour in the search for offenders.
(2004-492 DC, 2 March 2004, para 5, p. 66)

The legislature must exercise to the full the powers that it enjoys under article 34 of the Constitution. The principle of the clarity of legislation, declared by the same article, and the constitutional objective of the intelligibility and accessibility of legislation under articles 4, 5, 6 and 16 of the Declaration of Human and Civic Rights of 1789, require it to adopt provisions that are sufficiently precise and unequivocal forms of words.

Sections 41 and 42 of the Social Dialogue Act make the relationship between the different collective agreements more complex, but they clarify the definition of the relationships between the different negotiating levels. The legislature, which wished to act on the common position adopted by the social partners on 16 July 2001, therefore did not violate the requirement for intelligibility and clarity in legislation.
(2004-494 DC, 29 April 2004, paras 10 and 14, p. 91)

In providing that a Decree is to specify the cases in which the Telecommunications Regulatory Authority may establish a "multi-annual framework" for charges for the universal electronic communications service, which consists of setting tariff objectives to be attained within a specified period, the legislature did not violate the principle of clarity of legislation.
(2004-497 DC, 1 July 2004, para 5, p. 107)

It is for the legislature to exercise to the full the powers conferred on it by the Constitution, and in particular article 34. The principle of clarity of legislation, which flows from that article, and the constitutional objective of the intelligibility and accessibility of legislation, which flows from articles 4, 5, 6 and 16 of the Declaration of 1789, require it to adopt provisions that are sufficiently precise and expressed in unambiguous forms of words to protect those to whom the statute applies against unconstitutional interpretations and arbitrary decisions, without leaving it to administrative or judicial authorities to lay down rules that under the Constitution may be laid down only by statute.

The condition provided for by article 4 of the Institutional Act, relating to the guarantee that territorial units will enjoy self-government, is not only tautological but also, being unclear as to where it applies, complies neither with the principle of clarity of legislation nor with the requirement for precision that article 72-2 of the Constitution imposes on the institutional legislature.
(2004-500 DC, 29 July 2004, paras 13 and 15, p. 116)

Prescriptive nature of statutes and constitutionality

Article 6 of the Declaration of Human and Civic Rights of 1789 provides: "The Law is the expression of the general will." It follows from this article, as from all other relevant constitutional rules, that, subject to specific provisions of the Constitution, a statute must lay down rules and must accordingly have prescriptive status.
(2004-500 DC, 29 July 2004, para 12, p. 116)

Governmental and administrative organisation

Distribution of state powers between various bodies

Principle of power to make regulations

Under article 21 of the Constitution and subject to article 13, the Prime Minister exercises the power to make regulations at national level. These provisions do not preclude the legislature from empowering another central government authority than the Prime Minister to lay down rules to implement a statute, provided the empowerment concerns only measures of limited scope in terms of application and content.
(2004-497 DC, 1 July 2004, para 6, p. 107 and 2004-504 DC, 12 August 2004, para 40, p. 153)

Application of the principle

Section 13 of the Electronic Communications Act merely provides that a Decree issued after the opinion of the Council of State will specify rules for the exercise of powers conferred on the Telecommunications Regulatory Authority to review the charges for the universal service by section L 36-7(5°) of the Postal and Electronic Communications Code. These powers are limited in scope in terms of application and content.
(2004-497 DC, 1 July 2004, para 7, p. 107)

Decisions by the National Union of health-care insurance funds regarding contributions by insured persons for services will be taken within limits set by Decree. Sections 41, 53 and 55 of the Health-care Insurance Act confer on the bodies concerned or those in charge of them a decision-making power that is limited in scope in terms of application and content. Article 21 of the Constitution is not violated.
(2004-504 DC, 12 August 2004, para 41, p. 153)

Power of Government to enact by ordinance measures to be determined by statute

Use of article 38

Urgency is one of the grounds on which the Government can rely in order to use article 38 of the Constitution. In the present case the overload on Parliament's agenda precludes the timely attainment of the Government programme for simplification and codification of the law.
(2004-506 DC, 2 December 2004, para 5, p. 211)

Article 38 of the Constitution excepts from the delegation only such matters as the Constitution reserves for institutional acts, finance acts and social security (finance) acts.
(2004-506 DC, 2 December 2004, para 6, p. 211)

Compliance with constitutional principles

An enabling act may have neither the object not the effect of releasing the Government, in the exercise of the powers conferred on it under article 38 of the Constitution, from compliance with constitutional rules and principles.
(2004-506 DC, 2 December 2004, para 7, p. 211)

Presentation of enabling bill and voting on it

Obligations of the Government – Information for Parliament

Article 38 of the Constitution requires the Government to give Parliament, in support of its request, a precise statement of the purpose of the measures which it proposes to take by

ordinance and their subject-matter. But it does not require it to inform Parliament of the content of the ordinances which it will issue in the exercise of the empowerment.
(2004-506 DC, 2 December 2004, para 4, p. 211)

Ratification of ordinances

Implicit ratification

Ratification in whole or in part of an ordinance issued on the basis of an enabling act enacted under article 38 of the Constitution may be done by means of a statute which, without having the ratification as its direct object, necessarily entails it.

As the Council of State noted in its decision of 29 October 2004, section 153 of the Act of 9 August 2004 implicitly ratified sections 3, 4, 6, 7, 9, 21, 22, 26, 27 and 28 of the Ordinance of 17 June 2004. The Simplification of Law Act merely restates the ratification of those sections without changing their content or amplifying them or affecting their scope. The conditions in which they can validly be challenged for unconstitutionality in the Constitutional Council are accordingly not met.
(2004-506 DC, 2 December 2004, paras 11 and 13, p. 211)

Examination of ratification bill

The objection that the Ordinance ratified exceeded the limits of the empowerment is inoperative against a ratification act.
(2004-506 DC, 2 December 2004, paras 25 and 36, p. 211)

Experimentations provided for by statute or regulation (article 37-1 of the Constitution)

Principles

Article 37-1 of the Constitution provides: "Statutes and regulations may contain provisions enacted on an experimental basis for limited purposes and duration."

Subject to articles 7, 16 and 89 of the Constitution, there is nothing to preclude the constituent assembly from inserting in the Constitution new provisions which derogate from constitutional rules or principles in circumstances to which they relate. Such is the case of article 37-1 of the Constitution, inserted at the constitutional revision of 28 March 2003, which empowers Parliament to authorise experimental provisions, with a view to their subsequent general application, which derogate from the principle of equality before the law in respect of a limited subject-matter and for a limited period. But the legislature must determine the subject-matter and the conditions in sufficiently precise terms and must not violate other constitutional requirements.
(2004-503 DC, 12 August 2004, paras 8 and 9, p. 144)

The fourth paragraph of article 72 of the Constitution does not preclude statutes containing, experimental provisions based on article 37-1 of the Constitution concern territorial units. (Implicit solution)
(2004-503 DC, 12 August 2004, paras 8 to 14, p. 144)

Experimentation by territorial units

Economic affairs and employment

In adopting experimental provisions whereby regions that have produced a "regional economic development scheme" may, by way of delegation from central government, enjoy appropriations corresponding to certain former corporate aid schemes, the legislature determined the subject-matter and the conditions of the relevant experimentations in sufficiently

precise terms. These provisions do not violate other constitutional requirements. They are accordingly constitutional.
(2004-503 DC, 12 August 2004, paras 10 and 14, p. 144)

In adopting experimental provisions whereby "the central government may entrust to the regions or to the territorial unit of Corsica if they so request, or to other territorial units, their associations or public-interest associations if the former do not wish to take part in an experimentation, the function of management authority and payment authority for programmes covered by the European Community's economic and social cohesion policy for the period 2000-2006", the legislature determined the subject-matter and the conditions of the relevant experimentations in sufficiently precise terms. These provisions do not violate other constitutional requirements. They are accordingly constitutional.
(2004-503 DC, 12 August 2004, paras 11 and 14, p. 144)

Public health and social affairs

In adopting experimental provisions whereby regions which so request may participate on an experimental basis in the financing and establishment of health-care facilities, the legislature determined the subject-matter and the conditions of the relevant experimentations in sufficiently precise terms. These provisions do not violate other constitutional requirements. They are accordingly constitutional.
(2004-503 DC, 12 August 2004, paras 12 and 14, p. 144)

Education

In adopting experimental provisions whereby public establishments for cooperation between communes or one or more communes may set up public establishments of primary education on an experimental basis for a period of no more than five years, the legislature determined the subject-matter and the conditions of the relevant experimentations in sufficiently precise terms. These provisions do not violate other constitutional requirements. They are accordingly constitutional.
(2004-503 DC, 12 August 2004, paras 13 and 14, p. 144)

DISTRIBUTION OF POWERS IN SPECIFIC MATTERS

Civic rights, guarantees of public freedoms

It is for the legislature, under article 34 of the Constitution, to determine rules concerning civic rights and the fundamental guarantees granted to citizens for the exercise of their public liberties. It must also reconcile respect for privacy and other constitutional requirements relating to the preservation of public order.
(2004-499 DC, 29 July 2004, para 4, p. 126)

Public finance – taxation

Taxation

Article 34 of the Constitution provides: "Statutes shall determine the rules concerning... the base, rates and methods of collection of taxes of all types...". It is for the legislature, when establishing a tax, to determine freely the basis of assessment in compliance with constitutional principles and rules. In particular, to satisfy the principle of equality, it must based its decision on rational and objective criteria.
(2004-504 DC, 12 August 2004, para 45, p. 153)

Public establishments

Concept of category of public establishments

Criteria: new case-law

Local public education establishments

Public establishments of primary education to be set up on an experimental basis by public establishments for cooperation between communes or one or more communes and whose organisation and operation will be governed by rules determined by a Decree issued after the opinion of the council of State will not constitute a new category of public establishments for the purposes of article 34 of the Constitution. It was accordingly legitimate for the legislature to leave the rules governing their organisation and operation to be determined by Decree.
(2004-503 DC, 12 August 2004, para 13, p. 144)

Ownership, rights in rem, civil and commercial obligations

Fundamental principles of the regime governing ownership and obligations

Prices

The purpose of controls on the charges for the universal electronic communications service is to enforce the objectives provided for by section L 35-1 of the Code of Postal and Electronic Communications. By leaving it for a Decree to determine the situations in which the Telecommunications Regulatory Authority may use one of the three control procedures which it has itself established, the legislature has not acted *ultra vires*. Moreover, in providing for the possibility of a "multi-annual framework", which consists of setting tariff objectives to be attained within a specified period, it did not violate the principle of clarity of legislation.
(2004-497 DC, 1 July 2004, paras 4 and 5, p. 107)

Fundamental principles of the regime civil and commercial obligations

Retirement savings schemes

Under article 34 of the Constitution, the establishment of an individual retirement savings scheme supported by tax incentives and allowing all natural persons to accede to an insurance contract concluded by a grouping responsible for setting up and managing the scheme and an insurance company, a provident institution or a mutual association, are within the powers of the legislature. By contrast, provided the relevant rules in the legislative domain are not distorted, the choice of the name of the scheme and of the grouping are within the powers of the authority empowered to make regulations. It follows that the terms "individual retirement savings scheme (or schemes)" and "individual retirement savings grouping (or groupings)" mentioned in the application are matters for the authority empowered to make regulations.
(2004-196 L, 12 February 2004, paras 1 and 2, p. 37)

Labour and trade union law

Collective bargaining

The eighth paragraph of the Preamble to the Constitution of 27 October 1946 reads: "All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place", but article 34 of the Constitution classifies the fundamental principles of labour law among the

matters to be determined by statute. It is accordingly for the legislature, in compliance with the principle declared by the eighth paragraph of the Preamble, to determine the conditions and guarantees for its implementation.

It is legitimate for the legislature, on the basis of these principles, after determining the rights and obligations relevant to conditions of work and industrial relations, to leave it for employers and employed persons or their representative organisations to specify, in particular through collective bargaining, the detailed rules for the application of the rules it adopts. The legislature may, in particular, leave it up to the social partners to determine the relationship between the various collective bargaining agreements that they conclude for individual firms or industries in general, within the contours set by the legislation. But where the legislature authorises a collective agreement to depart from a rule laid down by its own legislation and defined as enjoying public-order status, it must define the scope and conditions of the derogation very precisely.
(2004-494 DC, 29 April 2004, paras 7 and 8, p. 91)

Article 34 of the Constitution provides: "Statutes shall determine the fundamental principles of... employment law". The eighth paragraph of the Preamble to the Constitution of 27 October 1946 provides: "All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place". And article 34 of the Constitution provides that statutes shall determine the rules concerning "the base, rates and methods of collection of taxes of all types" and the "fundamental principles... of social security".

It is legitimate for the legislature, having defined rights and obligations regarding employment conditions and industrial relations, to leave it up to employers and employed persons or their representative organisations to specify, by way of collective bargaining, the practical rules for applying the provisions it has enacted on employment law. It is also legitimate for it to provide that in the absence of a collective bargaining agreement, such practical rules will be established by Decree.

Such is the case for the determination of the respective proportions of salaries and other components of remuneration on the conditions and within the limits set by the legislature. It was accordingly legitimate for the legislature, and no breach of its powers, to apply these principles to professional sportsmen for promotion campaigns not requiring their physical presence and not involving the live retransmission of events.
(2004-507 DC, 9 December 2004, paras 10 to 15, p. 219)

Social security – fundamental principles

Principles applicable to each of the schemes

Nature of eligibility

Retirement pensions

The very existence of invalidity and retirement pensions and the conditions of eligibility for them are to be classified among the fundamental principles of social security which are matters to be determined by statute. One of the matters to be determined by statute is the principle that the period of contributions needed to qualify for a full pension depends on parameters such as life expectancy at the time of eligibility for the full pension. But it is for the authority empowered to make regulations, without distorting those conditions, to specify the quantitative factors such as the age of recipients and the minimum insurance period.
(2004-197 L, 10 June 2004, paras 1 to 3, p. 99)

Calculation of benefits

Participation by insured persons

Article 34 of the Constitution provides: "Statutes shall determine the fundamental principles of... social security". These fundamental principles include the rule that each insured person

must pay a flat-rate charge for certain procedures and consultations covered by the health-care insurance scheme, and the exceptions from it. But rules for the application of this principle are within the powers of the authority empowered to make regulations, provided they do not distort their scope. It follows that, by delegating to the authority empowered to make regulations the decision as to the amount of the flat-rate charge payable by persons covered by the health-care insurance scheme, the legislature did not violate article 34 of the Constitution.
(2004-504 DC, 12 August 2004, para 20, p. 153)

Article 34 of the Constitution provides: "Statutes shall determine the fundamental principles of... social security".

The combined effect of sections 41, 53 and 55 of the Health-care Insurance Act is that the prerogatives enjoyed by the National Health-care Insurance Fund and its Director-General are defined in sufficiently precise terms for the purposes of article 34 of the Constitution. They have neither the object nor the effect of conferring on the latter powers beyond those conferred on the Fund by statute or regulation.

While the rule that each insured person must pay a flat-rate charge for certain procedures and consultations covered by the health-care insurance scheme, the rule providing for a surcharge for certain procedures in the event of direct consultation of a doctor other than the family doctor and the exceptions from these rules are matters for statute under article 34 of the Constitution it is for the authority empowered to make regulations to determine the amount of flat-rate charge and of the surcharge.
(2004-504 DC, 12 August 2004, paras 37 to 39, p. 153)

CONSTITUTIONAL COUNCIL AND CONSTITUTIONAL REVIEW

SCOPE OF CONSTITUTIONAL REVIEW

Jurisdiction of Constitutional Council

Case of Acts promulgated

Case law arising from Decision 85–187 DC

The constitutionality of a promulgated statute may be validly challenged only when legislative provisions amending its content, amplifying it or modifying its scope are reviewed. It is not therefore possible to challenge the sections of the Ordinance of 17 June 2004, implicitly ratified by a subsequent statute and whose ratification was simply confirmed by the Simplification of Law Act, which made only a formal correction to the Ordinance without amending its content, amplifying it or modifying its scope.
(2004-506 DC, 2 December 2004, paras 9 to 13, p. 211)

REFERENCES TO CONSTITUTIONAL COUNCIL – ADMISSIBILITY – WITHDRAWAL OF CASE – INOPERATIVE ARGUMENTS AND ARGUMENTS NOT SUPPORTED BY THE FACTS

Inoperative arguments and arguments not supported by the facts

Inoperative arguments

The purpose of registering sexual offenders in a computerised register of such offenders is to prevent repeat offences and facilitate the identification of offenders. It follows that such

registration is not a penalty but a police measure. The plea that the principle that penalties must be necessary, declared by article 8 of the Declaration of 1789, has been violated is accordingly inoperative.
(2004-492 DC, 2 March 2004, para 74, p. 66)

Sections 41 and 42 of the Social Dialogue Act do not have the object and cannot have the effect of allowing provisions of agreements to derogate from provisions of statutes or regulations. The plea that these sections deprive a constitutional requirement of its statutory guarantee is accordingly inoperative.
(2004-494 DC, 29 April 2004, para 17, p. 91)

Section 1 of the E-commerce Trust Act, which specifies the concept of e-mail, merely defines a technical process. It cannot affect the legal rules governing private correspondence. Where there is a dispute as to the private nature of e-mail, the decision will be for the relevant court to take.

The authors of the referral cannot therefore validly argue that the foregoing provisions are vitiated by failure to exercise legislative powers to the full or that they violate respect for privacy contrary to article 2 of the Declaration of Human and Civic Rights of 1789.
(2004-496 DC, 10 June 2004, paras 2 to 4, p. 101)

Article 88-1 of the Constitution reads: "The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common". The transposal of a Community directive accordingly meets a constitutional obligation that can only be excluded by a specific express constitutional provision to contrary effect. In the absence of such a provision, it is for the Community court alone, acting on a request for a preliminary ruling, to review compliance by a Community directive with the powers conferred by the Treaties and the fundamental rights secured by article 6 of the Treaty on European Union.

The pleas entered against legislative provisions that merely draw the necessary consequences of precise and unconditional provisions of a directive on which it is not for the Constitutional Council to pass judgment are accordingly inoperative.
(2004-496 DC, 10 June 2004, paras 7 and 9, p. 101 and 2004-497 DC, 1 July 2004, paras 18 and 19, p. 107)

The objection that the Ordinance ratified exceeded the limits of the empowerment is inoperative against a ratification act.
(2004-506 DC, 2 December 2004, paras 25 and 36, p. 211)

The principle that public bodies are prohibited from going to arbitration is legislative and not constitutional. A challenge to it is accordingly inoperative in the Constitutional Council.
(2004-506 DC, 2 December 2004, para 32, p. 211)

The argument based on violation of the principle of pluralism of ideas and opinion is inoperative against legislative provisions relating to sports competitions.
(2004-507 DC, 9 December 2004, para 24, p. 219)

Arguments not supported by the facts

The earlier provisions of the Act of 6 January 1978 being silent on the matter, persons questioned by the National Commission for Data-processing and Freedom were already subject to professional secrecy. The argument based on the insertion of a reference to professional secrecy in the new act is accordingly not supported by the facts.
(2004-499 DC, 29 July 2004, para 17, p. 126)

Arguments based on the allegation that section 1 of the Professional Sport Act generates inequality of treatment between sportsmen and women and between sports clubs are not supported by the facts.
(2004-507 DC, 9 December 2004, paras 7 and 8, p. 219)

Parameters followed

Declaration of Human and Civic Rights

Freedom declared by article 2 of the Declaration of Human and Civic Rights

It is for the legislature to reconcile the prevention of breaches of public order and the detection of offenders, two functions that are necessary for the protection of constitutional rights and principles, with the exercise of freedoms secured by the Constitution. These include the freedom to come and go, the inviolability of the home, the secrecy of correspondence and respect for privacy, protected by articles 2 and 4 of the 1789 Declaration, and individual freedom, which article 66 of the Constitution requires the judicial authority to monitor.
(2004-492 DC, 2 March 2004, para 4, p. 66)

The freedom declared by article 2 of the 1789 Declaration implies respect for privacy.

It is for the legislature, under article 34 of the Constitution, to lay down rules concerning the fundamental guarantees enjoyed by citizens for the exercise of public freedoms. In particular it must reconcile the prevention of breaches of public order and the detection of offenders, two functions that are necessary for the protection of constitutional rights and principles, with respect for privacy and the other freedoms secured by the Constitution.
(2004-492 DC, 2 March 2004, paras 75 and 76, p. 66)

Article 2 of the Declaration of Human and Civic Rights of 1789 provides: "The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are Liberty, Property, Safety and Resistance to Oppression." The freedom declared by this article implies respect for privacy.
(2004-499 DC, 29 July 2004, para 2, p. 126)

The freedom declared by article 2 of the Declaration of Human and Civic Rights of 1789 implies the right to respect for privacy. This right demands that there be special vigilance in gathering and processing personal medical data. But it is for the legislature to reconcile the right to respect for privacy and the constitutional requirements relating to health protection, which entails coordination of health-care and the prevention of useless or dangerous prescriptions, with the financial equilibrium of the social security system.
(2004-504 DC, 12 August 2004, para 5, p. 153)

Freedom declared by article 4 of the Declaration of Human and Civic Rights

The legislature cannot allow contracts lawfully concluded to be jeopardised in a manner not warranted by an adequate general interest consideration. In the absence of such considerations, the requirements of articles 4 and 16 of the 1789 Declaration would be violated, as would, in the case of collective bargaining agreements, the eighth paragraph of the Preamble to the 1946 Constitution.
(2004-490 DC, 12 February 2004, para 93, p. 41)

Equality (article 6)

The principle of equality does not preclude the legislature from issuing measures to stimulate employment by granting special assistance or benefits, applying objective criteria depending on the object pursued.
(2004-502 DC, 5 August 2004, para 4, p. 141)

The fairness of sports competitions is a corollary of the principle of equality.
(2004-507 DC, 9 December 2004, paras 25 to 27, p. 219)

Principle that offences and penalties must be defined by statute (article 8)

The legislature is obliged by article 34 of the Constitution, and by the principle that offences and penalties must be defined by statute, to determine itself the scope of criminal legislation

and to define offences in sufficiently clear and precise terms. The purpose of this is not only to preclude arbitrary sentencing but also to avoid excessive rigour in the search for offenders.
(2004-492 DC, 2 March 2004, para 5, p. 66)

Presumption of innocence (article 9)

Although it follows from article 9 of the 1789 Declaration that nobody is required to denounce himself, neither that provision nor any other constitutional rule precludes the free acknowledgement of guilt.
(2004-492 DC, 2 March 2004, para 110, p. 66)

Freedom to express ideas and opinions (article 11)

Article 11 of the Declaration of 1789 provides: "The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law." Pluralism of ideas and opinions is in itself a constitutional objective. Respect for its expression is a condition of democracy.
(2004-497 DC, 1 July 2004, para 23, p. 107)

Equality of public burden–sharing (article 13)

The principle of equality does not preclude the legislature from issuing measures to stimulate employment by granting special assistance or benefits, applying objective criteria depending on the object pursued.
(2004-502 DC, 5 August 2004, para 4, p. 141)

Guaranteeing rights (article 16)

It follows from articles 6, 7, 8, 9 and 16 of the 1789 Declaration and from article 66 of the Constitution that, while the legislature can provide for special measures of investigation to establish particularly serious and complex criminal offences, to gather the evidence and to detect the offenders, such measures must always be conducted in full respect for the prerogatives of the judicial authority as guardian of individual freedom, and the resultant restrictions on rights secured by the Constitution must be necessary for the ascertainment of the truth and proportionate to the seriousness and complexity of the offences and must not generate unwarranted forms of discrimination. It is for the judicial authority to ensure compliance with these principles, which are restated in the introductory article of the Code of Criminal Procedure, when the special criminal procedures established by the Act are applied. Qualified interpretation.
(2004-492 DC, 2 March 2004, para 6, p. 66)

Preamble to the Constitution of 27 October 1946 – Principles

Principles – Application and implementation

Collective determination of working conditions (eighth paragraph)

The eighth paragraph of the Preamble to the Constitution of 27 October 1946 reads: "All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place", but article 34 of the Constitution classifies the fundamental principles of labour law among the matters to be determined by statute. It is accordingly for the legislature, in compliance with the principle declared by the eighth paragraph of the Preamble, to determine the conditions and guarantees for its implementation.
(2004-494 DC, 29 April 2004, para 7, p. 91)

Right to a decent standard of living (eleventh paragraph)

The effect of the principles declared in the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution is that the possibility for everybody of enjoying decent housing is a constitutional objective. It is for the legislature to determine the powers of the central government and territorial units in giving effect to this objective. But it must ensure by means of appropriate provisions that there are no serious breaches of equality.
(2004-503 DC, 12 August 2004, paras 21 to 23, p. 144)

Protection of health and material security guaranteed for children and mothers (eleventh paragraph)

The eleventh paragraph of the Preamble to the 1946 Constitution provides that the Nation "shall guarantee to all, notably to children, mothers and elderly workers, protection of their health ...." The freedom declared by article 2 of the Declaration of Human and Civic Rights of 1789 implies the right to respect for privacy. This right demands that there be special vigilance in gathering and processing personal medical data. But it is for the legislature to reconcile the right to respect for privacy and the constitutional requirements relating to health protection, which entails coordination of health-care and the prevention of useless or dangerous prescriptions, with the financial equilibrium of the social security system.
(2004-504 DC, 12 August 2004, paras 4 and 5, p. 153)

It is not clear from the information available to the Constitutional Council that, while there was a serious risk that health-care insurance expenditure would exceed the national expenditure target set for 2005 by more than 0.75 %, the nature and scale of the measures to restore the situation that were to be taken under the provisions inserted in the Social Security Code by the Health-care Insurance Act of 13 August 2004 would have been such as to jeopardise the attainment of the requirements of the eleventh paragraph of the Preamble to the 1946 Constitution relating to health protection.
(2004-508 DC, 16 December 2004, para 14, p. 225)

Right to rest and leisure (11th paragraph)

Under the eleventh paragraph of the Preamble to the 1946 Constitution, the Nation "... shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure...". It is always legitimate for the legislature, acting in matters reserved for it by article 34 of the la Constitution, to adopt new rules for the attainment of reconciliation of constitutional requirements, which it alone has the power to determine. But the exercise cannot have the effect of depriving constitutional requirements of their statutory guarantees.

In the present case, section 43 of the Social Dialogue Act does not allow collective bargaining agreements to depart from public order rules governing safety and health at work. Neither the maximum weekly duration of working time nor the definition of night worker in sections L 212-7 and L 213-2 of the Employment Code is concerned by the extension of the scope of negotiation within firms. The purpose and conditions of the new possibilities for departing from the working-time rules, and in particular the right to rest, are defined with sufficient precision. It follows that section 43 does not deprive constitutional requirements of their statutory guarantees.
(2004-494 DC, 29 April 2004, paras 16 and 18, p. 91)

Nationalisations and transfers of ownership of enterprises from the public to the private sector

By preserving in the newly-formed companies the public-service tasks entrusted the public corporations Electricité de France and Gaz de France by the Acts of 8 April 1946, 10 February 2000 and 3 January 2003, the legislature has confirmed their national public-service status. In accordance with the Preamble to the 1946 Constitution, which requires that all property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society, it has ensured that the central government or other public-sector enterprises or bodies will have a majority holding in the capital in these

companies. This majority holding can be relinquished only by statute. The argument based on violation of these constitutional rules cannot therefore be entertained.
(2004-501 DC, 5 August 2004, para 14, p. 134)

Fundamental principles recognised by the laws of the Republic

Principles recognised

Diminished liability of minors and appropriate criminal treatment

The diminished criminal liability of minors on the basis of their age, and the need to pursue the educational and moral advancement of juvenile delinquents by means of measures appropriate for their age and personality, ordered by a specialised court or in accordance with appropriate procedures, have always been recognised by the laws of the Republic since the beginning of the twentieth century. These principles are expressed in, among other things, the Criminal Majority of Children Act of 12 April 1906, the Children's Courts Act of 22 July 1912 and the Juvenile Delinquency Ordinance of 2 February 1945.
(2004-492 DC, 2 March 2004, para 37, p. 66)

Principles not recognised

Principle of favourable treatment

The principle that a statute can authorise collective labour agreements to depart from statutes and regulations or from broader-based agreements only in terms that are more favourable to employed persons does not flow from any legislative provisions predating the 1946 Constitution, and particularly not from the Act of 24 June 1936. It cannot therefore be regarded as a fundamental principle recognised by the laws of the Republic for the purposes of the Preamble to the 1946 Constitution. But it is a fundamental principle of labour law for the purposes of article 34 of the Constitution, and it is for the legislature to determine its content and scope.
(2004-494 DC, 29 April 2004, para 9, p. 91)

Grounds for non-punitive decisions

Constitutional rules and principles do not of themselves require administrative authorities to give reasons for their decisions if they do not impose punitive sanctions.
(2004-497 DC, 1 July 2004, para 14, p. 107)

Principles of constitutional value stated in articles of the Constitution

Principle of the indivisibility of the Republic

French Polynesia is an integral part of the French Republic.
(2004-3389/3400, 25 November 2004, Senate, French nationals residing abroad, para 4, p. 189)

Decentralised organisation of the Republic

The effect of the principles declared in the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution and in articles 1 and 34 of the Constitution is that the possibility for everybody of enjoying decent housing is a constitutional objective. It is for the legislature to determine the powers of the central government and territorial units in giving effect to this objective. But it must ensure by means of appropriate provisions that there are no serious breaches of equality.
(2004-503 DC, 12 August 2004, paras 21 to 23, p. 144)

Principle of secularity

The first paragraph of article II-70 of the Treaty establishing a Constitution for Europe recognises that everyone has the right, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance, but the explanations by the presidium state that the right secured by this article has the same meaning and scope as the right secured by article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is subject to the same restrictions, based on public security, the protection of law and order, public health and morality, and the protection of other people's rights and freedom. Article 9 of the Convention has been applied by the European Court of Human Rights in a long line of cases, and most recently in decision No 4774/98 of 29 June 2004, in harmony with the constitutional tradition of each Member State. The Court has acknowledged the principle of secularity that is part of many national constitutional traditions, and it leaves states with extensive room for discretion in determining the most appropriate measures in their national traditions to reconcile freedom of worship with the principle of secularity. It is accordingly compatible with article 1 of the Constitution, whereby "France is a secular ... Republic" and nobody may rely on his religious beliefs to avoid the application of common rules governing relations between public authorities and individuals.
(2004-505 DC, 19 November 2004, para 18, p. 173)

Individual freedom

It follows from articles 6, 7, 8, 9 and 16 of the 1789 Declaration and from article 66 of the Constitution that, while the legislature can provide for special measures of investigation to establish particularly serious and complex criminal offences, to gather the evidence and to detect the offenders, such measures must always be conducted in full respect for the prerogatives of the judicial authority as guardian of individual freedom, and the resultant restrictions on rights secured by the Constitution must be necessary for the ascertainment of the truth and proportionate to the seriousness and complexity of the offences and must not generate unwarranted forms of discrimination. It is for the judicial authority to ensure compliance with these principles, which are restated in the introductory article of the Code of Criminal Procedure, when the special criminal procedures established by the Act are applied. Qualified interpretation.
(2004-492 DC, 2 March 2004, para 6, p. 66)

French language

Article 2 of the Constitution provides: "The language of the Republic shall be French". Section 57 of the Institutional Act on the autonomous status of French Polynesia provides for the Tahitian and other Polynesian languages to be taught "in normal school hours in pre-primary, primary and secondary schools and in establishments of higher education", but this teaching cannot be compulsory either for pupils and students or for teachers. Nor may it have the effect of releasing pupils from the rights and obligations applicable to all users of establishments providing the public education service or associated with that service. Subject to these qualified interpretations, section 57 is contrary neither to article 2 not to any other provision of the Constitution.
(2004-490 DC, 12 February 2004, paras 69 and 70, p. 41)

Article 88-1: participation by the Republic in the European Communities and in the European Union

Article 88-1 of the Constitution reads: "The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common". The transposal of a Community directive accordingly meets a constitutional obligation that can only be excluded by a specific express constitutional provision to contrary effect in the Constitution. In the absence of such a provision, it is for the Community court alone, acting on a request for a preliminary ruling, to review compliance by a Community directive with the

powers conferred by the Treaties and the fundamental rights secured by article 6 of the Treaty on European Union.

The pleas entered against legislative provisions that merely draw the necessary consequences of precise and unconditional provisions of a directive on which it is not for the Constitutional Council to pass judgment are accordingly inoperative.
(2004-496 DC, 10 June 2004, paras 7 and 9, p. 101; 2004-499 DC, 29 July 2004, paras 7 and 8, p. 126)

But arguments against provisions of an article that do not merely draw the necessary consequences of the precise and unconditional provisions of a directive are not inoperative.
(2004-497 DC, 1 July 2004, paras 18 to 20, p. 107)

Article 11 of the Declaration of 1789, relating to the freedom of expression, is not an express provision of the Constitution, but that freedom is also secured by article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and as a general principle of Community law.

An argument based on violation of freedom of expression by legislative provisions that merely draw the necessary consequences of the precise and unconditional provisions of a directive on which it is not for the Constitutional Council to rule cannot accordingly be validly presented in the Constitutional Council.
(2004-498 DC, 29 July 2004, para 4, p. 122)

Article 88-1 of the Constitution provides: "The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common." The constituent authority thereby confirmed the existence of a Community legal order that is integrated in the domestic legal order and distinct from the international legal order.

Article I-1 of the Treaty replaces the organisations established by the earlier Treaties by a single organisation, the European Union, enjoying legal personality under article I-7, but it is clear from the general scheme of the Treaty, and in particular from articles I-5 and I-6, read together, that it changes neither the nature of the European Union nor the scope of the principle of the primacy of Union law that flows, as held by the Constitutional Council in its decisions of 10 June and 1 and 29 July 2004, from article 88-1 of the Constitution. Article I-6 of the Treaty referred to the Constitutional Council, providing that "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States", requires no revision of the Constitution.
(2004-505 DC, 19 November 2004, paras 11 to 13, p. 173)

Objectives of constitutional status

Objectives recognised

Detecting offenders

It is for the legislature to reconcile the prevention of breaches of public order and the detection of offenders, two functions that are necessary for the protection of constitutional rights and principles, with the exercise of freedoms secured by the Constitution. These include the freedom to come and go, the inviolability of the home, the secrecy of correspondence and respect for privacy, protected by articles 2 and 4 of the 1789 Declaration, and individual freedom, which article 66 of the Constitution requires the judicial authority to monitor.
(2004-492 DC, 2 March 2004, para 4, p. 66)

Pluralism

It is legitimate for the legislature, when laying down electoral rules, to adopt arrangements to promote the emergence of a stable and coherent majority, but any rule which in relation to that objective adversely affected between voters or candidates to a disproportionate extent would violate the principle of pluralism of ideas and opinions, which is one of the foundations of democracy.
(2004-490 DC, 12 February 2004, para 84, p. 41)

Pluralism of ideas and opinions is in itself a constitutional objective. Respect for its expression is a condition of democracy.
(2004-497 DC, 1 July 2004, para 23, p. 107)

Availability of decent housing for everybody

The effect of the principles declared in the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution is that it is a constitutional objective that decent housing should be available for everybody.
(2004-503 DC, 12 August 2004, para 21, p. 144)

Under articles 1 and 34 of the Constitution and the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution it is for the legislature to determine the powers of the central government and territorial units in giving effect to the constitutional objective that decent housing should be available for everybody. But it must ensure by means of appropriate provisions that there are no serious breaches of equality.
(2004-503 DC, 12 August 2004, paras 21 to 23, p. 144)

Accessibility and intelligibility of statutes

The legislature must exercise to the full the powers that it enjoys under article 34 of the Constitution. The principle of the clarity of legislation, declared by the same article, and the constitutional objective of the intelligibility and accessibility of legislation under articles 4, 5, 6 and 16 of the Declaration of Human and Civic Rights of 1789, require it to adopt provisions that are sufficiently precise and unequivocal forms of words.

Sections 41 and 42 of the Social Dialogue Act make the relationship between the different collective agreements more complex, but they clarify the definition of the relationships between the different negotiating levels. The legislature, which wished to act on the common position adopted by the social partners on 16 July 2001, therefore did not violate the requirement for intelligibility and clarity in legislation.
(2004-494 DC, 29 April 2004, paras 10 and 14, p. 91)

It is for the legislature to exercise to the full the powers conferred on it by the Constitution and in particular article 34. The principle of clarity of legislation, which flows from that article, and the constitutional objective of the intelligibility and accessibility of legislation, which flows from articles 4, 5, 6 and 16 of the Declaration of 1789, require it to adopt provisions that are sufficiently precise and expressed in unambiguous forms of words.

The Act referred recasts the data protection legislation in order to adapt to the evolution of techniques and practice and to draw the consequences of a Community directive. It gives a precise definition of the new procedural and substantive rules that are now applicable.
(2004-499 DC, 29 July 2004, paras 29 and 30, p. 126)

It is for the legislature to exercise to the full the powers conferred on it by the Constitution and in particular article 34. The principle of clarity of legislation, which flows from that article, and the constitutional objective of the intelligibility and accessibility of legislation, which flows from articles 4, 5, 6 and 16 of the Declaration of 1789, require it to adopt provisions that are sufficiently precise and expressed in unambiguous forms of words to protect those to whom the statute applies against unconstitutional interpretations and arbitrary decisions, without leaving it to administrative or judicial authorities to lay down rules that under the Constitution may be laid down only by statute.

The condition provided for by article 4 of the Institutional Act, relating to the guarantee that territorial units will enjoy self-government, is not only tautological but also, being unclear as to where it applies, complies neither with the principle of clarity of legislation nor with the requirement for precision that article 72-2 of the Constitution imposes on the institutional legislature.
(2004-500 DC, 29 July 2004, paras 13 and 15, p. 116)

It is for the legislature to exercise to the full the powers conferred on it by the Constitution and in particular article 34. The principle of clarity of legislation, which flows from that article, and the constitutional objective of the intelligibility and accessibility of legislation, which flows from articles 4, 5, 6 and 16 of the Declaration of 1789, require it to adopt provisions that are

sufficiently precise and expressed in unambiguous forms of words to protect those to whom the statute applies against unconstitutional interpretations and arbitrary decisions, without leaving it to administrative or judicial authorities to lay down rules that under the Constitution may be laid down only by statute.
(2004-503 DC, 12 August 2004, para 29, p. 144)

The simplification and ongoing codification of the law meet the constitutional objective of accessibility and intelligibility of statutes.
(2004-506 DC, 2 December 2004, para 5, p. 211)

Financial equilibrium of the social security system

It is for the legislature to reconcile the right to respect for privacy and the constitutional requirements relating to health protection, which entails coordination of health-care and the prevention of useless or dangerous prescriptions, with the financial equilibrium of the social security system.

The purposes served by section 3(I) of the Health-care Insurance Act, which provides for the establishment of a medical file containing personal data, are to improve the quality of health care and to reduce the financial disequilibrium of the health-care insurance scheme. Given these purposes and the guarantees offered by the section, the legislature has reconciled the various constitutional requirements in play in a manner that is not manifestly unbalanced.
(2004-504 DC, 12 August 2004, paras 5 and 8, p. 153)

Principles deriving from more than one provision

Constitutional principles relating to the performance of public service tasks

The fact that enterprises entrusted with public service tasks have not concluded contracts with the central government has no impact on the obligation to comply with the principles of equality and continuity that are inherent in the public service.
(2004-501 DC, 5 August 2004, para 6, p. 134)

Principle of the continuity of public services

The fact that enterprises entrusted with public service tasks have not concluded contracts with the central government has no impact on the obligation to comply with the principles of and continuity that are inherent in the public service.
(2004-501 DC, 5 August 2004, para 6, p. 134)

The purpose of section 4 of the Public Electricity and Gas Service Act is to ensure security of supplies and quality of service in times of over consumption or under-production of electricity, by giving certain users an incentive to reduce their consumption and obliging producers to supply the grid manager with whatever power they have but are not using. Far from jeopardising the continuity of the public service, the purpose of these provisions is to guarantee it. The argument accordingly fails on the facts.
(2004-501 DC, 5 August 2004, para 10, p. 134)

Principle of public hearings in criminal cases

The combined effect of articles 6, 8, 9 and 16 of the 1789 Declaration is that, in the absence of specific circumstances requiring proceedings to be held *in camera*, the trial of a criminal case that might result in deprivation of liberty must be heard in public.
(2004-492 DC, 2 March 2004, para 117, p. 66)

Principle of the prescriptive nature of statutes

Article 6 of the Declaration of Human and Civic Rights of 1789 provides: "The Law is the expression of the general will." It follows from this article, as from all other relevant constitu-

tional rules, that, subject to specific provisions of the Constitution, a statute must lay down rules and must accordingly have prescriptive status.
(2004-500 DC, 29 July 2004, para 12, p. 116)

Parameters not recognized and material not taken into account

Parameters not recognised for constitutional review of statutes

Principle of two-tier proceedings

The principle of two-tier proceedings is not in itself of constitutional status.
(2004-491 DC, 12 February 2004, para 4, p. 60)

Principle that public bodies are prohibited from going to arbitration

The principle that public bodies are prohibited from going to arbitration is legislative and not constitutional.
(2004-506 DC, 2 December 2004, para 32, p. 211)

Questions reserved

Principle of the free choice of medical practitioner

The provisions challenged, relating to the "family doctor", do not preclude the freedom of persons insured by the social security system to choose their medical practitioner, and the Constitutional Council accordingly observes that the argument fails on the facts. The council therefore does not rule on the question whether the principle of the free choice of medical practitioner is of constitutional status.
(2004-504 DC, 12 August 2004, paras 10 and 11, p. 153)

MEANING AND SCOPE OF THE DECISION

Provisions not of prescriptive nature

The designation as "overseas country" has no legal effect. It is accordingly not unconstitutional.
(2004-490 DC, 12 February 2004, para 13, p. 41)

Article 6 of the Declaration of Human and Civic Rights of 1789 provides: "The Law is the expression of the general will." It follows from this article, as from all other relevant constitutional rules, that, subject to specific provisions of the Constitution, a statute must lay down rules and must accordingly have prescriptive status.
(2004-500 DC, 29 July 2004, para 12, p. 116)

Qualified interpretations

Examples of *interprétations neutralisantes*

Law of public and social finance

In referring to the equilibrium provided for by the "multi-annual financial framework for health-care insurance expenditure", for which health-care insurance funds are each year to

propose implementing measures, the legislature's purpose was to refer to "prospective trends" that are to be annexed to the Finance Bill under section 50 of the Institutional Act of 1 August 2001 relating to Finance Acts in connection with the "report on the economic, social and financial situation and outlook".

But article 34 of the Constitution provides: "Social security finance Acts shall determine the general conditions for the financial balance of social security and, in the light of their revenue forecasts, shall determine expenditure targets in the manner and with the reservations specified in an Institutional Act". It follows that if the Institutional Act of 22 July 1996 relating to Social Security (Finance) Acts is not amended, the "multi-annual financial framework" provided for by the provision challenged cannot be approved by a Social Security (Finance) Act.
(2004-504 DC, 12 August 2004, paras 32 and 33, p. 153)

Law applicable to territorial units

Section 56 of the Institutional Act on the autonomous status of French Polynesia requires the assent of the Assembly of French Polynesia for the determination of the matters to be dealt with initially by the communes of French Polynesia. But to avoid establishing a power for one territorial unit to supervise another, the assent must be to the withdrawal of specified matters from the purview of French Polynesia and their transfer to the communes and not to those already belonging to the communes. Subject to this qualified interpretation, section 56 is not unconstitutional.
(2004-490 DC, 12 February 2004, para 66, p. 41)

Overseas

Deputies and Senators are elected by universal suffrage, direct for the former and indirect for the latter, but in Parliament each of them represents the whole Nation and not just the people in their own constituency. Section 4 of the Institutional Act on the autonomous status of French Polynesia must accordingly be interpreted as merely restating that there are to be legislative and senate elections in French Polynesia, as already provided by the institutional legislature.
(2004-490 DC, 12 February 2004, para 14, p. 41)

The enumeration of legislative provisions and regulations which, by way of exception from the principle of legislative speciality, are automatically applicable in French Polynesia cannot be interpreted as excluding other instruments which, by reason of the subject-matter, are necessarily to be valid throughout the territory of the Republic.
(2004-490 DC, 12 February 2004, para 18, p. 41)

Section 13 of the Institutional Act on the autonomous status of French Polynesia provides: "The authorities of French Polynesia shall have power to act in all matters not reserved for central government by section 14, subject to the powers conferred on or exercised by the communes under this Institutional Act", but, as section 43 of the same Institutional Act makes clear, this is without prejudice to the powers reserved for the communes by existing statutes and regulations.
(2004-490 DC, 12 February 2004, para 24, p. 41)

Section 15 of the Institutional Act on the autonomous status of French Polynesia empowers French Polynesia to "establish representations to any state or to one of its territorial entities or a territory recognised by the French Republic or to any international organisation of which France is a member or to any international organisation in the Pacific", but this power, not hitherto enjoyed by French Polynesia, cannot mean that such representations have diplomatic status, as that would encroach on a matter reserved exclusively for central government.
(2004-490 DC, 12 February 2004, para 27, p. 41)

In the absence of presentation for authorisation by the Assembly of French Polynesia, the power conferred on the President of French Polynesia to "negotiate and sign decentralised cooperation conventions" on behalf of French Polynesia cannot relate to matters within the powers of that Assembly without violating the prerogatives enjoyed by the deliberative assemblies of territorial units under the third paragraph of article 72 of the Constitution, whereby "These units shall be self-governing through elected councils ...". The decentralised coopera-

tion conventions to which section 17 therefore, in the absence of assent given by the decision-making Assembly, can relate only to matters within the powers conferred on the Council of Ministers of French Polynesia.
(2004-490 DC, 12 February 2004, para 29, p. 41)

The remainder of the final paragraph of section 32(I) of the Institutional Act on the autonomous status of French Polynesia, whereby "the decrees mentioned in the second paragraph of section 32(I) shall lapse if they have not been ratified by statute" must be interpreted as prohibiting the entry into force of instruments known as "statutes of the country" in matters within the legislative powers of central government, as long as the decree approving them in whole or in part have not been ratified by Parliament.
(2004-490 DC, 12 February 2004, para 49, p. 41)

Section 33 of the Institutional Act on the autonomous status of French Polynesia envisages a situation in which the government of French Polynesia might have the power to issue residence cards for foreign nationals. It provides that in such cases the High Commissioner of the Republic will have the power to oppose their issue. This provision must be interpreted in the light of section 32(IV), which provides in general terms that individual decisions taken in the context of French Polynesia's participation in the exercise of central government powers is subject to hierarchical review by the High Commissioner of the Republic. Such hierarchical review would apply both the issue of a residence card and to refusals to issue one.
(2004-490 DC, 12 February 2004, para 51, p. 41)

Section 44 of the Institutional Act on the autonomous status of French Polynesia provides that "in communes where no waste treatment service is supplied by French Polynesia, the communes or the public establishments for intercommunal cooperation may be authorised by French Polynesia to prescribe or may be obliged to accept the connection of private waste outlets effluents not meeting the criteria for host watercourses to treatment networks or plants which they construct or operate". These provisions do not have the object and cannot have the effect of establishing supervision by French Polynesia over the communes'exercise of the power referred to in section 43(9). Subject to this qualified interpretation, they are not contrary to the fifth paragraph of article 72 of the Constitution.
(2004-490 DC, 12 February 2004, para 61, p. 41)

Criminal law

The sole purpose of the challenged provisions of section 6 of the E-commerce Trust Act is to exclude the civil and criminal liability of hosts in the two situations considered there. They cannot have the effect of making a host liable where he has not withdrawn information denounced as illegal by a third party if the illegality is not manifest or withdrawal has not been ordered by a court. Subject to this qualified interpretation, they merely draw the necessary consequences of precise and unconditional provisions of a directive on which it is not for the Constitutional Council to pass judgment. The pleas presented by the applicants to the Constitutional Council cannot be validly entertained.
(2004-496 DC, 10 June 2004, para 9, p. 101)

Criminal procedure

By requiring the State Counsel to be informed of the classification as offences of facts warranting the deferment of the first intervention by an advocate where a person is held for questioning, the legislature necessarily intended that that judicial officer should review the classification. The initial assessment of the criminal investigation police officer regarding the deferment of the intervention of an advocate while the person is held for questioning is accordingly subject to judicial review and cannot determine the subsequent course of proceedings.
(2004-492 DC, 2 March 2004, para 33, p. 66)

The concept of "immediate risk that significant evidence or clues will disappear", that can justify searches of premises including residential premises and seizure of evidence taking place even at night, in the course of investigations into offences within the scope of the new section 706-73 of the Code of Criminal Procedure, must be interpreted as allowing the examining judge to order these operations only if they cannot be conducted at other times.
(2004-492 DC, 2 March 2004, para 56, p. 66)

By confining to recordings that are useful for the ascertainment of the truth the content of reports describing or transcribing images or sounds that can be recorded where the need for information concerning a criminal offence within the scope of the new section 706-73 of the Code of Criminal Procedure so justify, the legislature necessarily intended that the sequences of private life not related to the offences should never remain in the file for the criminal proceedings.
(2004-492 DC, 2 March 2004, para 65, p. 66)

Rules of procedure of the assemblies

As regards committees of inquiry, whose findings are in no way mandatory, the report that is to be presented after six months by the Deputy designated to that end by the relevant standing committee can never constitute an injunction addressed to the Government.
(2004-493 DC, 26 February 2004, para 3, p. 64)

The amended Rules 15 and 20 of the Rules of Procedure of the Senate provide that Senators who are members of an international Assembly or a special committee may be "excused from attendance of the standing committee of which they are members" and arrange in such cases to be "replaced by another member of the committee". It is legitimate for the Senate, in compliance with article 43 of the Constitution, to amend the rules governing the operation of committees, but only provided there is no breach of the principle stated by article 27 of the Constitution that "... The right to vote of Members of Parliament shall be personal. – An institutional Act may, in exceptional cases, authorize voting by proxy...". Subject to this qualified interpretation, clause 7 of the resolution is not unconstitutional.
(2004-495 DC, 18 May 2004, para 7, p. 96)

Defence rights

The new section 9 of the Act of 6 January 1978, as amended following the declaration of unconstitutionality of the provision allowing bodies corporate that are victims of offences or act on behalf of such victims to process personal data relating to offences, convictions and enforcement measures under certain conditions, cannot be interpreted as rendering ineffective the right to take action in the courts enjoyed by all natural and legal persons in relation to offences of which they have been the victim. Subject to this reservation, it is not unconstitutional.
(2004-499 DC, 29 July 2004, para 14, p. 126)

Examples of mandatory interpretation

Rights and freedoms

It is clear from the very wording of section 140 of the Institutional Act on the autonomous status of French Polynesia that the application of "statutes of the country" to contracts in course of performance will be possible only where "justified by the general interest". It will be for the Council of State to check whether the general interest consideration is present and sufficient. Subject to this qualified interpretation, the final paragraph of section 140 does not unconstitutionally violate the scheme of contracts lawfully entered into.
(2004-490 DC, 12 February 2004, para 94, p. 41)

Social law

The amount of the surcharge payable by the insured person under section 7 of the Act referred should be set at such a level as to avoid jeopardising the requirements of the eleventh paragraph of the Preamble to the 1946 Constitution. And any excess over normal fees within the meaning of section L 162-5(18°) of the Social Security Code as amended by section 8 of the Act referred should comply with section L 162-2-1 of that Code, which requires doctors in their procedures and prescriptions to observe "the greatest economy compatible with quality, safety

and efficiency of treatment". Subject to these two reservations, the provisions challenged are not contrary to the eleventh paragraph of the Preamble to the 1946 Constitution.
(2004-504 DC, 12 August 2004, para 13, p. 153)

The amount of the flat-rate charge for procedures and consultations covered by the health-care insurance scheme must be set at such a level that it does not jeopardise the requirements of the eleventh paragraph of the Preamble to the 1946 Constitution.
(2004-504 DC, 12 August 2004, para 19, p. 153)

Criminal procedure

It is clear from the general scheme of the Code of Criminal Procedure relating to the procedure for prior recognition of guilt that the President of the Tribunal de Grande Instance can decline to approve the proposed sentence of the victim's statements cast new light on the conditions in which the offence was committed or the offender's personality. Subject to this qualified interpretation, the challenged provisions do not violate the principle of separation of the prosecution and trial authorities.
(2004-492 DC, 2 March 2004, para 107, p. 66)

It follows from articles 6, 7, 8, 9 and 16 of the 1789 Declaration and from article 66 of the Constitution that, while the legislature can provide for special measures of investigation to establish particularly serious and complex criminal offences, to gather the evidence and to detect the offenders, such measures must always be conducted in full respect for the prerogatives of the judicial authority as guardian of individual freedom, and the resultant restrictions on rights secured by the Constitution must be necessary for the ascertainment of the truth and proportionate to the seriousness and complexity of the offences and must not generate unwarranted forms of discrimination. It is for the judicial authority to ensure compliance with these principles, which are restated in the introductory article of the Code of Criminal Procedure, when the special criminal procedures established by the Act are applied.
(2004-492 DC, 2 March 2004, para 6, p. 66)

Theft committed by an organised gang is among the offences mentioned in the new section 706-73 of the Code of Criminal Procedure warranting special procedural rules, but this applies only where the facts are serious enough to justify departures from the rules of criminal procedure in section 1 of the Act to adapt criminal justice to the development of crime. Otherwise, these procedures would impose a form of rigour not demanded by article 9 of the 1789 Declaration. It will be for the judicial authority to assess whether facts of such seriousness exist for the purposes of the Act.
(2004-492 DC, 2 March 2004, para 17, p. 66)

The offence of assisting the illegal residence of a foreign national in France committed by an organised gang is among the offences mentioned in the new section 706-73 of the Code of Criminal Procedure warranting special procedural rules, but this cannot concern humanitarian organisations assisting foreign nationals. Moreover, the principle stated by section 121-3 of that Code that there can be no offence without the intention to commit it applies to the classification of such offence.
(2004-492 DC, 2 March 2004, para 18, p. 66)

Territorial units

Section 52 of the Institutional Act relates to the intercommunal equalisation fund which receives a quota of the direct and indirect taxes and duties raised for the general budget of French Polynesia. It thus gives effect to the final paragraph of article 72-2 of the Constitution, which provides: "Equalisation mechanisms to promote equality between territorial units shall be provided for by statute". The resources are allocated by a committee between communes in proportion to their population and the burdens they bear. It is provided that this committee is to allocate a financial package to groups of communes for investment operations or to cover operating expenditure of interest to several communes. Neither the decree issued in the Council of State to determine rules for the application of section 52, nor the financial package to be allocated by the intercommunal equalisation fund may violate the objective of equality mentioned in the final paragraph of article 72-2 of the Constitution. Subject to this qualified interpretation, section 52 is not unconstitutional.
(2004-490 DC, 12 February 2004, para 65, p. 41)

In providing that the report sent by the Government to secure the financial autonomy of territorial units will present, for each category of units, not only the share of own resources in overall resources but also the manner of its calculation, the institutional legislature necessarily wished Parliament to be in a position to ascertain that share for each territorial unit and to evaluate its capacity for self-government.

Provisions to secure that autonomy are without prejudice to the possibility for the Constitutional Council to censure legislative instruments that have the effect of jeopardising the decisive importance of the share of own resources of a category of territorial units.
(2004-500 DC, 29 July 2004, para 20, p. 116)

Section 9 of the Institutional Act on the autonomous status of French Polynesia provides that "consultations... shall take place at the latest before the adoption of the bill at first reading in the first Assembly in which it is presented", but this is subject to compliance with article 39 of the Constitution as regards Government bills which from the outset contain provisions relating to the specific organisation of French Polynesia. In such cases the opinions must have been given implicitly or explicitly before the Council of State gives its opinion.
(2004-490 DC, 12 February 2004, para 20, p. 41)

By making a general reference to "the forms provided for by the second paragraph of article 72-4", the seventh paragraph of article 73 must be interpreted as making applicable to the consultations for which it provides all the formalities set out in the paragraph to which it refers.

It follows that the provisions of the new Rule 69 bis of the Rules of Procedure of the Senate, which spell out the detailed rules for qui examining parliamentary motions on the basis of article 72-4 of the Constitution, must be interpreted as applying also to motions based on the final paragraph of article 73 of the Constitution.
(2004-495 DC, 18 May 2004, para 3, p. 96)

French language

Article 2 of the Constitution provides: "The language of the Republic shall be French". Section 57 of the Institutional Act on the autonomous status of French Polynesia provides for the Tahitian and other Polynesian languages to be taught "in normal school hours in pre-primary, primary and secondary schools and in establishments of higher education", but this teaching cannot be compulsory either for pupils and students or for teachers. Nor may it have the effect of releasing pupils from the rights and obligations applicable to all users of establishments providing the public education service or associated with that service. Subject to these qualified interpretations, section 57 is contrary neither to article 2 not to any other provision of the Constitution.
(2004-490 DC, 12 February 2004, para 70, p. 41)

Severability of provisions declared unconstitutional

Inseverability of one section of a statute from other sections

Different provisions of a single section inseverable

Censure in part

Having declared unconstitutional the second paragraph of section 6(V) of the E-commerce Trust Act, the Constitutional Council must censure part of the first paragraph of the same section on the grounds that it is inseverable from the foregoing provisions.
(2004-496 DC, 10 June 2004, para 16, p. 101)

EFFECTS OF DECISIONS OF THE CONSTITUTIONAL COUNCIL

Hypothesis that enforceability of an earlier decision is argued

Leading cases

The authority of decisions 99-409 DC and 99-410 DC of 15 March 1999, whereby the Constitutional Council held that the provincial assemblies are among the institutions of New Caledonia and the rules governing their organisation and operation are to be determined by the Institutional Act provided for article 77 of the Constitution, is valid in relation to the Institutional Act enacted under the third paragraph of article 72-2 of the Constitution relating to the financial autonomy of territorial units.
(2004-500 DC, 29 July 2004, para 6, p. 116)

Scope of earlier decisions

Authority of interpretations

A qualified interpretation by the Constitutional Council has the authority that is conferred on its decisions by article 62 of the Constitution. That authority is therefore not confined to the instant case but extends to that which is interpreted (implicit solution). The provisions of the Ordinance of 17 June 2004 on partnership contracts ratified by the Simplification of Law Act are not contrary to the qualified interpretation given by the Constitutional Council regarding section 6 of the Act of 6 July 2003 empowering the Government to simplify the law.
(2004-506 DC, 2 December 2004, paras 17 to 22, p. 211)

RIGHTS AND LIBERTIES

PUBLIC LIBERTIES – GENERAL

Self–government of territorial units

The provisions of the Ordinance of 17 June 2004, the sole purpose of which is to ensure that an option by a territorial unit to use a partnership contract rather than managing works itself has no impact on the eligibility of expenditure on supplies under such contract for the VAT compensation fund, are not contrary to the constitutional requirements inherent in equality in relation to public procurement and the sound use of public funds, nor the self-government of territorial units.
(2004-506 DC, 2 December 2004, para 37, p. 211)

PROTECTION OF INDIVIDUAL FREEDOM BY THE COURTS

Police custody. Renewal of permitted period

General

The provisions of the new section 706-88 of the Code of Criminal Procedure, which allow a person to be held for questioning for up to ninety-six hours, do not excessively violate

individual freedom, since the scope of these provisions extends to investigations into specific offences imposing special investigations on account of their seriousness and complexity, the extended period allowed for holding for questioning is subject to a reasoned written opinion from a judge, to whom the suspect must be presented, medical checks on the person held are provided for, the general rules of the Code of Criminal Procedure providing for judicial review where persons are held for questioning are applicable, and the provisions challenged are drafted in sufficiently clear and precise terms to avert the risk of arbitrary action. In particular, the foreseeable remaining duration of the investigations, which can justify holding a person for questioning for an additional forty-eight hours instead of the previous twice twenty-four hours, should always require a reasoned written opinion from the judge of freedoms and detention or the examining judge.
(2004-492 DC, 2 March 2004, paras 23 to 27, p. 66)

Minors held for questioning

There is no unjustified discrimination in the difference of treatment established by the legislature where it makes the application to minors of the new section 706-88 of the Code of Criminal Procedure, relating to the extended period allowed for holding for questioning, subject to the dual requirement that they be at least sixteen years old and that there be one or more plausible reasons for suspecting that adults may be involved in the commission of the alleged offence. The legislature intended to secure the proper conduct of investigations into offences imposing special investigations on account of their seriousness and complexity and to protect minors from the risk of reprisals from the adults involved.
(2004-492 DC, 2 March 2004, para 38, p. 66)

The application to minors aged over sixteen years of the new section 706-88 of the Code of Criminal Procedure relating to the extended period allowed for holding for questioning does not violate the constitutional requirements as to the protection of minors in the courts, since there is no departure from the protective provisions of the Ordinance of 2 February 1945, and in particular section 4.
(2004-492 DC, 2 March 2004, para 39, p. 66)

Detention pending trial

The new provisions of section 137-4 of the Code of Criminal Procedure allowing State Counsel to apply direct to the judge of freedoms and detention do not affect that judge's powers as regards remand in custody. Article 66 of the Constitution is not violated.
(2004-492 DC, 2 March 2004, para 120, p. 66)

Search procedures

Proper procedural guarantees

The new sections 706-89 to 706-94 of the Code of Criminal Procedure and section 14(II) of the Act referred, which amend the rules governing searches in business and residential premises and seizure of evidence at night in the course of *flagrante delicto*, preliminary and judicial investigations, do not excessively violate the principle of the inviolability of the home.

Flagrante delicto investigations: given the requirements of public order and the search for offenders, it was legitimate for the legislature to provide for the possibility of carrying out searches in business and residential premises and seizure of evidence at night where a criminal offence has been committed in the context of an organised gang (new section 706-89), provided the authorisation to act is issued by a judicial authority and is accompanied by appropriate procedural guarantees. The legislature has provided that the judge of freedoms and detention is the judicial authority empowered to authorise such operations and has required a written reasoned decision specifying the offence of which evidence is sought, the address of the place concerned and the points of fact and of law justifying the need for them. It has also provided that these operations will be under the control of the judge authorising

them, who can visit the place where they are conducted to ensure compliance with the relevant statutory requirements, and has specified that they may have no other purpose than detecting and establishing offences, otherwise they will be void. While section 77(II) of the Act referred further provides that the duration of the *flagrante delicto* investigation, which is basically limited to eight days, may be extended once "if the investigations needed to ascertain the truth in relation to a criminal offence punishable by imprisonment for five years or more cannot be deferred", this decision is taken by State Counsel and presupposes that any interruption in the activities of the investigating police officers would be deleterious to the investigation.

Preliminary investigations: it was also legitimate for the legislature to provide for the possibility in the course of preliminary investigations of carrying out searches in business and residential premises and seizure of evidence without the consent of the person in whose premises they take place if this is needed to ascertain the truth in relation to a criminal offence punishable by imprisonment for five years or more even at night in the case of investigations into offence committed by organised gangs for the purposes of the new section 706-73, provided always that residential premises may not be concerned (new section 706-90, and section 76 as amended by section 14(II) of the Act referred). It has provided for the appropriate procedural guarantees by providing that the operations may be conducted on the premises of the person concerned without that person's consent only on a decision by the judge of freedoms and detention at the Tribunal de Grande Instance, given on application by State Counsel, that they must be justified by the need to detect offenders where the offence is punishable by imprisonment for five years or more, and that at night they may be conducted only in non-residential premises and on a decision by the same judge for one of the offences enumerated in section 706-73.

Judicial investigations: it was legitimate for the legislature to provide for the possibility, at night, in the course of an investigation relating to facts within the scope of section 706-73, of searches in business and residential premises and seizure of evidence, provided that except in certain emergency situations residential premises were excluded (new section 706-91). It has provided for the appropriate procedural guarantees by reserving these provisions for the detection of offences mentioned in section 706-73 and subjecting them to authorisation by an examining judge. The concept of "immediate risk that significant evidence or clues will disappear", that can justify searches of premises including residential premises and seizure of evidence taking place even at night, must be interpreted as allowing the examining judge to order these operations only if they cannot be conducted at other times.
(2004-492 DC, 2 March 2004, paras 41 to 56, p. 66)

RIGHTS OF REDRESS – DEFENCE RIGHTS

General

The execution of the final stage of a prison sentence in the form of day release, external placement, electronic surveillance or leave to exit is a measure that is in favour of the prisoner and requires his consent. In the event of an objection by State Counsel, the prisoner can make his views known. The material provisions accordingly violate neither the constitutional principle of respect for defence rights nor the right to effective judicial redress under article 16 of the 1789 Declaration.
(2004-492 DC, 2 March 2004, para 125, p. 66)

The new section 9 of the Act of 6 January 1978, as amended following the declaration of unconstitutionality of the provision allowing bodies corporate that are victims of offences or act on behalf of such victims to process personal data relating to offences, convictions and enforcement measures under certain conditions, cannot be interpreted as rendering ineffective the right to take action in the courts enjoyed by all natural and legal persons in relation to offences of which they have been the victim. Subject to this reservation, it is not unconstitutional.
(2004-499 DC, 29 July 2004, para 14, p. 126)

The scope of article II-107 of the Treaty establishing a Constitution for Europe, relating to the right to legal action and to an impartial court, is broader than article 6 of the European

Convention on Human Rights since it does not apply only to determination of civil rights and obligations or of any criminal charge. But the presidium explanations make clear that the publicity of court proceedings can be subject to the restrictions provided for by that article of the Convention. For instance, "... the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
(2004-505 DC, 19 November 2004, para 19, p. 173)

Administrative procedure

Constitutional rules and principles do not of themselves require administrative authorities to give reasons for their decisions if they do not impose punitive sanctions.

In any event the legislature did not abolish the obligation to give reasons for decisions rejecting applications under section 32 of the Act of 30 September 1986. The sole effect of the section challenged is to allow rejection decisions to be grounded on one or more of the criteria set out in the summary report. It merely adapts the formal requirements concerning the statement of reasons to the specific needs of the procedures for allocating radio resources. The argument that abolishing the obligation to give reasons deprives the constitutional requirement for a right of appeal of its statutory protection accordingly fails on the facts.
(2004-497 DC, 1 July 2004, paras 14 and 15, p. 107)

PRINCIPLES OF CRIMINAL LAW

Principles of necessity and proportionality in criminal procedure

Principle of necessity

Seriousness and complexity of offences

The difficulty of apprehending the perpetrators of the offences mentioned in the new section 706-73 of the Code of Criminal Procedure justifying special rules of procedure flows from the existence of a gang or network whose identification, knowledge and dismantling pose complex problems.

The offences to which the section applies are mostly such as to seriously threaten the safety, dignity or life of individual persons. Such is the case of extortion and destruction, degradation and deterioration as defined by the Criminal Code.

The offences that are not necessarily offences against the person include theft where classified as a serious offence. But theft committed by an organised gang is among the offences mentioned in the new section 706-73 of the Code of Criminal Procedure warranting special procedural rules, but this applies only where the facts are serious enough to justify departures from the rules of criminal procedure in section 1 of the Act to adapt criminal justice to the development of crime. Otherwise, these procedures would impose a form of rigour not demanded by article 9 of the 1789 Declaration. It will be for the judicial authority to assess whether facts of such seriousness exist for the purposes of the Act.

The offence of assisting the illegal residence of a foreign national in France committed by an organised gang cannot concern humanitarian organisations assisting foreign nationals. Moreover, the principle stated by section 121-3 of that Code that there can be no offence without the intention to commit it applies to the classification of such offence.
(2004-492 DC, 2 March 2004, paras 15 to 19, p. 66)

Principle that offences and penalties must be defined by statute

Scope

Police measures

The purpose of registering sexual offenders in a computerised register of such offenders is to prevent repeat offences and facilitate the identification of offenders. It follows that such registration is not a penalty but a police measure. The plea that the principle that penalties must be necessary, declared by article 8 of the Declaration of 1789, has been violated is accordingly inoperative.
(2004-492 DC, 2 March 2004, para 74, p. 66)

Specific definition of offences and penalties

Specific definition of offences; requirement met

The concept of organised gang was already present in French criminal legislation as an aggravating circumstance, and relevant where suspects were held for questioning or remanded in custody. The case law of the criminal courts has added a volume of useful factors for defining the aggravating circumstance of membership of an organised gang, which presupposes premeditation of offences and a structured organisation of offenders. The United Nations Convention against Transnational Crime, which France has ratified, has adopted a very similar definition.

It follows that the offences determined by the legislature are defined in terms that are sufficiently clear and precise to meet the principle that offences must be defined by statute. In particular, the concept of "organised gang" defined by section 1362-17 of the Criminal Code as "any group formed or agreement reached for the purposes of preparing one or more criminal offences, materialised in the form of one or more practical acts", which distinguishes it from the concepts of meeting or joint action, is neither obscure nor ambiguous.
(2004-492 DC, 2 March 2004, paras 13 and 14, p. 66)

Prohibition on cumulative sentencing

Cumulative sentencing

Article II-110 of the Treaty establishing a Constitution for Europe provides "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law", but the very terms of the article and the presidium explanations make it clear that this applies exclusively to the criminal law and not to administrative or disciplinary proceedings. Moreover, the reference to the concept of identical offences rather than to identical facts leaves the French courts free, subject to the principle of the proportionality of penalties, to punish the crimes against the fundamental interests of the nation to which Title One of Book IV of the Criminal Code applies, given the specific components of those offences and the specific interests at stake.
(2004-505 DC, 19 November 2004, para 20, p. 173)

Presumption of innocence

No violation

Although it follows from article 9 of the 1789 Declaration that nobody is required to denounce himself, neither that provision nor any other constitutional rule precludes the free acknowledgement of guilt.

The judge hearing the case is bound neither by the proposal made by the State Counsel nor by the fact that the accused accepts it. It is for him to ensure that the accused has freely and sincerely acknowledged that he committed the offences and to check that such is truly the case. If he makes an order approving the confession, he must record that the accused, in the presence of his advocate, has acknowledged the facts of which he is accused and accepts in full knowledge the penalty or penalties proposed by State Counsel. The court must accordingly verify not only the reality of the accused's consent but also his sincerity. Lastly, in the event of a refusal to accept the confession, the new section 495-14 of the Code of Criminal Procedure provides that the record of the hearing on the prior acknowledgement of guilt may not be laid before the examining court or the trial court and that neither the prosecution nor the parties may plead statements made or documents submitted in the course of proceedings.
(2004-492 DC, 2 March 2004, paras 110 and 111, p. 66)

Right to a fair trial

The advocate, whose assistance is compulsory, will be present throughout the proceedings for the hearing of the prior acknowledgment of guilt. In particular, he will be present when the accused acknowledges the facts, receives the State Counsel's proposal as to sentencing and accepts or rejects it and, if he accepts, he appears before the President of the Tribunal de Grande Instance. The advocate will be free to communicate with his client and to consult the case file immediately. The accused will be informed that he may apply for an extra ten days before giving or withholding his acceptance of the State Counsel's proposal. Even when he has given his consent at the approval proceeding, he will still have ten days to enter an appeal against sentence. In view of all the guarantees given by the Act, the provisions challenged do not violate the right to a fair trial.
(2004-492 DC, 2 March 2004, para 108, p. 66)

Trials to be in public

The combined effect of articles 6, 8, 9 and 16 of the 1789 Declaration is that, in the absence of specific circumstances requiring proceedings to be held *in camera*, the trial of a criminal case that might result in deprivation of liberty must be heard in public.

The decision by the President of the Tribunal de Grande Instance to approve or disapprove the sentence proposed by the prosecution and accepted by the accused is a decision of a court. The approval can consist of deprivation of liberty for one year. The fact that the hearing at which the President of the Tribunal de Grande Instance give his ruling on the proposal from the Prosecution Service is not public, even where no specific circumstances require the hearing to be *in camera*, is contrary to the constitutional requirements described above. The words "in chambers" at the end of the first sentence of the second paragraph of the new section 495-9 of the Code of Criminal Procedure must accordingly be declared unconstitutional.
(2004-492 DC, 2 March 2004, paras 117 and 118, p. 66)

Natural justice in the criminal law

Principle

It is legitimate for the legislature, which is empowered to determine the rules of criminal procedure by article 34 of the Constitution, to provide for rules of procedure that differ according to the facts, the situations and the persons to whom they apply, provided the differences are not based on unjustified forms of discrimination and litigants enjoy equal guarantees, in particular as regards respect for defence rights.
(2004-492 DC, 2 March 2004, para 30, p. 66)

The right of a person held for questioning to consult an advocate is a defence right.
(2004-492 DC, 2 March 2004, para 31, p. 66)

No violation of natural justice

The provisions of the Act referred that set at forty-eight hours the first intervention by the advocate for certain of the offences enumerated in the new section 706-73 of the Code of Criminal Procedure do not unjustifiably violate either individual freedom or natural justice or the prerogatives of the judicial authority. For most of those offences, the period is already set at thirty-six hours by section 63-4 of the Code of Criminal Procedure. Moreover, even if the new period, justified by the seriousness and complexity of the relevant offences, modifies the rules for the exercise of defence rights, it does not jeopardise the principle.

But by requiring the State Counsel to be informed of the classification as offences of facts warranting the deferment of the first intervention by an advocate where a person is held for questioning, the legislature necessarily intended that that judicial officer should review the classification. The initial assessment of the criminal investigation police officer regarding the deferment of the intervention of an advocate while the person is held for questioning is accordingly subject to judicial review and cannot determine the subsequent course of proceedings.
(2004-492 DC, 2 March 2004, paras 32 to 34, p. 66)

The advocate, whose assistance is compulsory, will be present throughout the proceedings for the hearing of the prior acknowledgment of guilt. In particular, he will be present when the accused acknowledges the facts, receives the State Counsel's proposal as to sentencing and accepts or rejects it and, if he accepts, he appears before the President of the Tribunal de Grande Instance. The advocate will be free to communicate with his client and to consult the case file immediately. The accused will be informed that he may apply for an extra ten days before giving or withholding his acceptance of the State Counsel's proposal. Even when he has given his consent at the approval proceeding, he will still have ten days to enter an appeal against sentence. In view of all the guarantees given by the Act, the provisions challenged do not violate the right to a fair trial.
(2004-492 DC, 2 March 2004, para 108, p. 66)

The execution of the final stage of a prison sentence in the form of day release, external placement, electronic surveillance or leave to exit is a measure that is in favour of the prisoner and requires his consent. In the event of an objection by State Counsel, the prisoner can make his views known. The material provisions accordingly violate neither the constitutional principle of respect for defence rights nor the right to effective judicial redress under article 16 of the 1789 Declaration.
(2004-492 DC, 2 March 2004, para 125, p. 66)

Nullity

The special procedures defined by section 1 of the Act referred being such as to seriously affect the exercise of rights and freedoms protected by the Constitution, the judicial authority can authorise their use only where it is necessary to do so for the detection of perpetrators of particularly serious and complex offences, which is itself essential for the protection of constitutional principles and rights. To decide to implement one of these procedures, the judicial authority must have one or more plausible reasons to suspect that the facts constitute one of the offences enumerated in the new section 706-73 of the Code of Criminal Procedure.

Consequently, although it was legitimate for the legislature to exempt from annulment acts of investigation in cases where the aggravating circumstance of membership of an organised gang appeared to be present on the date when they were authorised, it could not exempt in general terms acts that were authorised contrary to those requirements. The new section 706-104 of the Code of Criminal Procedure must therefore be declared unconstitutional.
(2004-492 DC, 2 March 2004, paras 67 to 71, p. 66)

Principle of separation of prosecuting and trial authorities

If, after a prior acknowledgement of guilt, the sentence is proposed by the Prosecution Service and accepted by the offender, only the President of the Tribunal de Grande Instance can approve the proposal. To that end he must check the legal classification of the facts and

consider whether the sentence is justified in relation to the circumstances of the offence and the personality of the offender. He may withhold approval if he considers that the nature of the facts, the personality of the offender, the situation of the victim or the interests of society justify an ordinary criminal trial without jury. It is clear from the general scheme of the Code of Criminal Procedure relating to the procedure for prior recognition of guilt that the President of the Tribunal de Grande Instance can decline to approve the proposed sentence of the victim's statements cast new light on the conditions in which the offence was committed or the offender's personality. Subject to this qualified interpretation, the challenged provisions do not violate the principle of separation of the prosecution and trial authorities.
(2004-492 DC, 2 March 2004, paras 106 and 107, p. 66)

Specific features of criminal justice in relation to minors

Principles applicable

The diminished criminal liability of minors on the basis of their age, and the need to pursue the educational and moral advancement of juvenile delinquents by means of measures appropriate for their age and personality, ordered by a specialised court or in accordance with appropriate procedures, have always been recognised by the laws of the Republic since the beginning of the twentieth century. These principles are expressed in, among other things, the Criminal Majority of Children Act of 12 April 1906, the Children's Courts Act of 22 July 1912 and the Juvenile Delinquency Ordinance of 2 February 1945.
(2004-492 DC, 2 March 2004, para 37, p. 66)

Execution of penalties

Adjustment of the end of prison terms

There are no constitutional principles or rules prohibiting the legislature from entrusting to authorities other than the court the task of determining certain rules for the application of the end of prison terms and describing them as "measures of judicial administration". While the Act allows the director of prison, insertion and probation services to implement such a measure where, having proposed it to the sentencing review judge, he has heard no reaction after three weeks, the measure must none the less be notified to the prosecutor and to the sentencing review judge prior to implementation. The prosecutor will be able to appeal with suspensory effect. The sentencing review judge, who is not deprived of his powers under sections 712-4 *et seq.* of the Code of Criminal Procedure, will be able to rescind it in accordance with section 723-26. The relevant provisions are accordingly not contrary to the constitutional prerogatives of the ordinary courts as regards sentencing and implementation.
(2004-492 DC, 2 March 2004, para 124, p. 66)

Prescription

In itself, taking account of differences in the accessibility of a message over time, depending whether it is published as hard copy or electronically, is not contrary to the principle of equality. But the difference in the rules applying as regards the right of reply and prescription under the provisions challenged manifestly exceeds what is necessary to take account of the specific situation of messages available exclusively on electronic media.
(2004-496 DC, 10 June 2004, para 14, p. 101)

RIGHT TO LIFE AND PHYSICAL HEALTH AND SAFETY, HEALTH PROTECTION

Health protection

Applications

Contribution by insured persons

The amount of the surcharge payable by the insured person under section 7 of the health-care insurance Act should be set at such a level as to avoid jeopardising the requirements of the eleventh paragraph of the Preamble to the 1946 Constitution. And any excess over normal fees within the meaning of section L 162-5(18°) of the Social Security Code as amended by section 8 of the same Act should comply with section L 162-2-1 of that Code, which requires doctors in their procedures and prescriptions to observe "the greatest economy compatible with quality, safety and efficiency of treatment". Subject to these two reservations, the provisions challenged are not contrary to the eleventh paragraph of the Preamble to the 1946 Constitution.
(2004-504 DC, 12 August 2004, para 13, p. 153)

The amount of the flat-rate charge for procedures and consultations covered by the health-care insurance scheme must be set at such a level that it does not jeopardise the requirements of the eleventh paragraph of the Preamble to the 1946 Constitution. Reservation.
(2004-504 DC, 12 August 2004, para 19, p. 153)

Bioethics

Section 17 of the bioethics Act inserts in the Intellectual Property Code sections L 611-18 and L 613-2-1 relating to the conditions for issuing patents for inventions that are technical applications of a function of a human bodily organ.

These provisions merely draw the necessary consequences of the precise and unconditional provisions of article 5 of European Parliament and Council Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, as interpreted by the Court of Justice of the European Communities, on which it is not for the Constitutional Council to rule in the absence of specific provisions to contrary effect in the Constitution.
(2004-498 DC, 29 July 2004, para 7, p. 122)

RESPECT FOR PRIVACY

Electoral rolls

It is clear from the very terms of section 4 of the Decree of 30 August 2001, which establishes the "index file of successful and unsuccessful candidates", that information about the addresses and telephone numbers of people in the file may not be communicated to third parties. The refusal to act on the request by a candidate for election to the Senate for the contact details of members of the electoral college recorded in that file is accordingly not vitiated by irregularity.
(2004-3390/3395/3397, 2 December 2004, Senate, Guadeloupe, para 2, p. 206)

Data files

Computerised register of sex offenders

The purpose of registering sexual offenders in a computerised register of such offenders under section 706-47 reinstated in the Code of Criminal Procedure by section 47 of the Act to

adapt the administration of justice to the evolution of crime is to prevent repeat offences and facilitate the identification of offenders. It follows that such registration is not a penalty but a police measure. The authors of the referral cannot therefore validly argue that the principle that penalties must be necessary, declared by article 8 of the Declaration of 1789, has been violated.
(2004-492 DC, 2 March 2004, para 74, p. 66)

Given the guarantees offered by the conditions for using and consulting the computerised register of sex offenders and by the fact that the judicial authority has the power to enter and remove personal data, and given the seriousness of the offences justifying the entry of personal data in the register infractions and the frequency of repeat offences in this area, section 48 of the Act to adapt criminal justice to the development of crime is such as to reconcile respect for privacy and the protection of public order in a manner that is not manifestly unbalanced.

Likewise, given the grounds allowed for consultation of the register by administrative authorities and restrictions and rules imposed thereon, the section does not excessively violate either respect for privacy or the requirements of article 9 of the 1789 Declaration.
(2004-492 DC, 2 March 2004, paras 87 and 88, p. 66)

The seriousness of the offence which underlies the obligation for persons convicted of a sex offence punishable by ten years'imprisonment, to report personally to the police or gendarmerie, is an objective and rational criterion directly related to the purpose of the computerised register of sex offenders.

The obligation for persons in the register to periodically register their home address is not a penalty but a police measure to prevent repeat offences and facilitate the identification of offenders. The very object of the register makes it necessary to check the address of such persons on a continuous basis. The responsibility incumbent on them to allow the checks is not an undue harshness for the purposes of article 9 of the 1789 Declaration.
(2004-492 DC, 2 March 2004, paras 89 to 91, p. 66)

The adaptations to the rules governing the computerised register of sex offenders in favour of juvenile delinquents are inspired by the need to constantly pursue their educational and moral advancement. They are not contrary to the fundamental principles recognised by the laws of the Republic regarding criminal justice in relation to minors.
(2004-492 DC, 2 March 2004, paras 92 to 95, p. 66)

Private data-files on offences

The new section 9(4°) of the Act of 6 January 1978 allows companies that charge and manage copyright and rights akin to copyright, referred to in section L 321-1 of the Intellectual Property Code, and the professional organisations referred to in section L 331-1 of that Code, to implement data-processing techniques in relation to offences, convictions and security measures. Its aim is to combat the new counterfeiting techniques that are developing on the Internet. It thus corresponds to the general-interest objective of safeguarding intellectual property and cultural creativity. The data they gather can be processed under section L 34-1 of the Postal and Electronic Communications Code on a name-by-name basis and relate to judicial proceedings, and data may be cross-referenced with other information that may not be stored for more than one year. The establishment of the relevant processes requires authorisation from the National Commission for Data-processing and Freedom under the new section 25(I)(3°) of the Act of 6 January 1978. Given the scale of these guarantees and the objective pursued, the provision challenged is such as to reconcile respect for privacy and other rights and freedoms in a manner which is not manifestly unbalanced.
(2004-499 DC, 29 July 2004, para 9 and 13, p. 126)

Section 2 of the Act referred amends section 9 of the Act of 6 January 1978 to provide that "personal data relating to offences, convictions and enforcement measures may be processed only by:... – 3° Bodies corporate that are victims of offences or act for such victims, for the sole purposes of preventing and combating fraud and compensating for losses sustained, on the conditions determined by statute".

Given the potential scale of the personal data to be covered by the new section 9(3°) of the Act of 6 January 1978 and the type of data to be processed, the provision could have an impact on respect for privacy and the fundamental guarantees for citizens in the exercise of public

freedoms. It must therefore come with the proper specific guarantees meeting the requirements of article 34 of the Constitution.

Regarding the subject-matter and conditions of the powers conferred, the provision gives no details. It is ambiguous as to the offences to which the term "fraud" applies. It does not answer the question how far data can be shared or transferred or whether they can include persons who are simply suspected of being potential offenders. It is silent on the limits that might be imposed on the storage of references to convictions. It follows from article 34 of the Constitution that all these details cannot be provided solely by authorisations given by the National Commission for Data-processing and Freedom. In the circumstances, particularly of the subject-matter, it was not legitimate for the legislature to merely lay down a general rule of principle, which is what the provision, interpreted in the light of the legislative, does, leaving it entirely for future statutes to determine how it will be applied. The new section 9(3°) of the Act of 6 January 1978 is accordingly vitiated by failure to exercise powers to the full.
(2004-499 DC, 29 July 2004, paras 9, 11 and 12, p. 126)

Procedure

A person responsible for data-processing who designates a data-protection correspondent is released from the reporting obligations provided for by the Act of 6 January 1978.

Given the range of precautions provided for by the Act, particularly as to the qualification, role and independence of the correspondent, this release from the reporting obligations does not deprive any constitutional requirements of their statutory protection.
(2004-499 DC, 29 July 2004, paras 21 to 23, p. 126)

The provisions challenged, which apply only to the authorisation of data-processing techniques related to public order, merely substitute for the assent of the Council of State in the event of a negative opinion from the National Commission for Data-processing and Freedom a Ministerial Order issued after the Commission has given and published its reasoned opinion. The legislature has provided that the Commission's opinion will be published together with the authorising Order. These provisions accordingly do not deprive the right to privacy of its statutory guaranties and are contrary to no constitutional principles or rules.
(2004-499 DC, 29 July 2004, paras 26 and 27, p. 126)

Social security

The freedom declared by article 2 of the Declaration of Human and Civic Rights of 1789 implies the right to respect for privacy. This right demands that there be special vigilance in gathering and processing personal medical data. But it is for the legislature to reconcile the right to respect for privacy and the constitutional requirements relating to health protection, which entails coordination of health-care and the prevention of useless or dangerous prescriptions, with the financial equilibrium of the social security system.

The purposes served by section 3(I) of the Health-care Insurance Act, which provides for the establishment of a medical file containing personal data, are to improve the quality of health care and to reduce the financial disequilibrium of the health-care insurance scheme. Given these purposes and the guarantees offered by the section, the legislature has reconciled the various constitutional requirements at issue in a manner that is not manifestly unbalanced.
(2004-504 DC, 12 August 2004, paras 5, 7 and 8, p. 153)

Inviolability of the home

Searches

The new sections 706-89 to 706-94 of the Code of Criminal Procedure and section 14(II) of the Act referred, which amend the rules governing searches in business and residential premises and seizure of evidence at night in the course of *flagrante delicto*, preliminary and judicial investigations, do not excessively violate the principle of the inviolability of the home.

Flagrante delicto investigations: given the requirements of public order and the search for offenders, it was legitimate for the legislature to provide for the possibility of carrying out searches in business and residential premises and seizure of evidence at night where a criminal offence has been committed in the context of an organised gang (new section 706-89), provided the authorisation to act is issued by a judicial authority and is accompanied by appropriate procedural guarantees. The legislature has provided that the judge of freedoms and detention is the judicial authority empowered to authorise such operations and has required a written reasoned decision specifying the offence of which evidence is sought, the address of the place concerned and the points of fact and of law justifying the need for them. It has also provided that these operations will be under the control of the judge authorising them, who can visit the place where they are conducted to ensure compliance with the relevant statutory requirements, and has specified that they may have no other purpose than detecting and establishing offences, otherwise they will be void. While section 77(II) of the Act referred further provides that the duration of the *flagrante delicto* investigation, which is basically limited to eight days, may be extended once "if the investigations needed to ascertain the truth in relation to a criminal offence punishable by imprisonment for five years or more cannot be deferred", this decision is taken by State Counsel and presupposes that any interruption in the activities of the investigating police officers would be deleterious to the investigation.

Preliminary investigations: it was also legitimate for the legislature to provide for the possibility in the course of preliminary investigations of carrying out searches in business and residential premises and seizure of evidence without the consent of the person in whose premises they take place if this is needed to ascertain the truth in relation to a criminal offence punishable by imprisonment for five years or more even at night in the case of investigations into offence committed by organised gangs for the purposes of the new section 706-73, provided always that residential premises may not be concerned (new section 706-90, and section 76 as amended by section 14(II) of the Act referred). It has provided for the appropriate procedural guarantees by providing that the operations may be conducted on the premises of the person concerned without that person's consent only on a decision by the judge of freedoms and detention at the Tribunal de Grande Instance, given on application by State Counsel, that they must be justified by the need to detect offenders where the offence is punishable by imprisonment for five years or more, and that at night they may be conducted only in non-residential premises and on a decision by the same judge for one of the offences enumerated in section 706-73.

Judicial investigations: it was legitimate for the legislature to provide for the possibility, at night, in the course of an investigation relating to facts within the scope of section 706-73, of searches in business and residential premises and seizure of evidence, provided that except in certain emergency situations residential premises were excluded (new section 706-91). It has provided for the appropriate procedural guarantees by reserving these provisions for the detection of offences mentioned in section 706-73 and subjecting them to authorisation by an examining judge. The concept of "immediate risk that significant evidence or clues will disappear", that can justify searches of premises including residential premises and seizure of evidence taking place even at night, must be interpreted as allowing the examining judge to order these operations only if they cannot be conducted at other times.
(2004-492 DC, 2 March 2004, paras 41 to 56, p. 66)

Interceptions of correspondence

The new section 706-95 of the Code of Criminal Procedure, which provides that, if the needs of a *flagrante delicto* or prior investigation into an offence to which section 706-73 applies so require, the judge of freedoms and detention at the *Tribunal de Grande Instance* may, on application by State Counsel, authorise the interception, recording and transcription of correspondence via telecommunications, do not excessively affect either the confidentiality of private life or any other constitutional principle.

These provisions, which apply only for the detection of perpetrators of serious offences, must be required by the needs of the investigation and authorised by the judge of freedoms and detention at the *Tribunal de Grande Instance*, on application by State Counsel. The authorisation is given for no more than fifteen days and renewable once only, subject to review by the judge of freedoms and detention. And the procedural guarantees required for the use of such

procedures in the course of the judicial investigation into other types of offences remain applicable.
(2004-492 DC, 2 March 2004, paras 57 to 61, p. 66)

Sound and image recordings

The new section 706-96 of the Code of Criminal Procedure, relating to the installation of technical facilities for the capture, transcription, transmission and recording of words spoken by one or more persons on a private or confidential in public or private places or vehicles or the image of one or more persons in a private place, without their consent, is not unconstitutional.

The detection of the perpetrators of the offences enumerated in section 706-73 justifies the installation of such facilities, provided the authorisation for their use is issued by the judicial authority and appropriate procedural guarantees are provided for. In the present case, the measures challenged can be taken only after an information has been opened and provided that they meet its needs. The legislature has designated the examining judge or, at his request, the judge of freedoms and detention, as the authority empowered to order the use of such procedures. It requires a reasoned written decision specifying the offence of which evidence is sought. It has provided that the authorisation of the relevant judicial authority will be valid for no more than four months and renewable only on the same terms as to form and duration. These operations are subject to review by the judge who authorised them. And a report is to be made on all these operations, the recordings are to be kept under seal and they are to be destroyed at the expiry of the statutory limitation period for prosecutions.

But by confining to recordings that are useful for the ascertainment of the truth the content of reports describing or transcribing images or sounds that can be recorded where the need for information concerning a criminal offence, the legislature necessarily intended that the sequences of private life not related to the offences should never remain in the file for the criminal proceedings.
(2004-492 DC, 2 March 2004, paras 62 to 66, p. 66)

Professional secrecy

The earlier provisions of the Act of 6 January 1978 being silent on the matter, persons questioned by the National Commission for Data-processing and Freedom were already subject to professional secrecy. The argument based on the insertion of a reference to professional secrecy in the new act is accordingly not supported by the facts.

Moreover, the unwarranted reliance on professional secrecy could constitute a barrier punishable under the new section 51 of the Act of 6 January 1978.
(2004-499 DC, 29 July 2004, paras 17 and 18, p. 126)

Medical secrecy

The freedom declared by article 2 of the Declaration of Human and Civic Rights of 1789 implies the right to respect for privacy. This right demands that there be special vigilance in gathering and processing personal medical data. But it is for the legislature to reconcile the right to respect for privacy and the constitutional requirements relating to health protection, which entails coordination of health-care and the prevention of useless or dangerous prescriptions, with the financial equilibrium of the social security system.

The purposes served by section 3(I) of the Health-care Insurance Act, which provides for the establishment of a medical file containing personal data, are to improve the quality of health care and to reduce the financial disequilibrium of the health-care insurance scheme. Given these purposes and the guarantees offered by the section, the legislature has reconciled the various constitutional requirements in play in a manner that is not manifestly unbalanced.
(2004-504 DC, 12 August 2004, paras 5, 7 and 8, p. 153)

Audiovisual media

Objective of pluralism

Objective

Pluralism of ideas and opinions is in itself a constitutional objective. Respect for its expression is a condition of democracy.
(2004-497 DC, 1 July 2004, para 23,p. 107)

Objective not violated

The provisions challenged, which provide that "local disconnections" by television services enjoying a national authorisation to broadcast in clear, which may only be exceptional and require authorisation from the Higher Council for Audiovisual Media, can include advertising messages provided they are "broadcast throughout the national territory", will not have the effect of jeopardising the advertising resources of local media in such a way as to endanger pluralism in the exercise of freedom of communication. The argument must be rejected.
(2004-497 DC, 1 July 2004, para 11, p. 107)

It was legitimate for the legislature to adapt to technical progress the rules that restrict the concentration of broadcasters, in particular in order to promote the development of local and digital television services. It merely took into account the diversification of broadcasting vectors to authorise certain forms of cumulative activity that no longer needed to be prohibited and to adjust certain thresholds. The issue of broadcasting licences by the Higher Council for Audiovisual Media remains subject to the requirement of pluralism. The legislature thus exercised its discretion without depriving the constitutional objective of pluralism of ideas and opinions of its statutory guarantees. The arguments must be rejected.
(2004-497 DC, 1 July 2004, para 24, p. 107)

Electronic communication

Section 1 of the E-commerce Trust Act, which specifies the concept of e-mail, merely defines a technical process. It cannot affect the legal rules governing private correspondence. Where there is a dispute as to the private nature of e-mail, the decision will be for the relevant court to take.
(2004-496 DC, 10 June 2004, paras 2 to 4, p. 101)

Hosts liability

The sole purpose of the challenged provisions of section 6 of the E-commerce Trust Act is to exclude the civil and criminal liability of hosts in the two situations considered there. They cannot have the effect of making a host liable where he has not withdrawn information denounced as illegal by a third party if the illegality is not manifest or withdrawal has not been ordered by a court. Subject to this qualified interpretation, they merely draw the necessary consequences of precise and unconditional provisions of a directive on which it is not for the Constitutional Council to pass judgment are accordingly inoperative. The pleas presented by the applicants to the Constitutional Council cannot be validly entertained.
(2004-496 DC, 10 June 2004, para 9, p. 101)

Right of reply

In itself, taking account of differences in the accessibility of a message over time, depending whether it is published as hard copy or electronically, is not contrary to the principle of equality. But the difference in the rules applying as regards the right of reply and prescription

under the provisions challenged manifestly exceeds what is necessary to take account of the specific situation of messages available exclusively on electronic media.
(2004-496 DC, 10 June 2004, paras 14 and 15, p. 101)

Prescription

In itself, taking account of differences in the accessibility of a message over time, depending whether it is published as hard copy or electronically, is not contrary to the principle of equality. But the difference in the rules applying as regards the right of reply and prescription under the provisions challenged manifestly exceeds what is necessary to take account of the specific situation of messages available exclusively on electronic media. (*Cf.* 87-232 DC, 7 January 1988, paras 40 to 42, p. 17)
(2004-496 DC, 10 June 2004, paras 14 to 16, p. 101)

FREEDOM OF ENTERPRISE AND FREEDOM OF TRADE AND INDUSTRY

Freedom of enterprise

Applications

Audiovisual media

In opening up a right of access to decoders and electronic programme guides for television broadcasters "on fair, reasonable and non-discriminatory terms" without creating new obligations on distributors as to carrying and marketing programmes, the legislature's purpose was to reconcile freedom of enterprise and freedom of contract with the general interest in the possibility for broadcasters to enjoy access to distributors'decoders, which promotes diversity of programme supply and freedom of choice for users. The reconciliation is vitiated by no manifest imbalance, does not jeopardise freedom of expression and, given the limited extent of the technical constraints on the relevant operators, distorts neither freedom of enterprise nor freedom of contract.
(2004-497 DC, 1 July 2004, para 20, p. 107)

Freedom of contract

The legislature cannot allow contracts lawfully concluded to be jeopardised in a manner not warranted by an adequate general interest consideration. In the absence of such considerations, the requirements of articles 4 and 16 of the 1789 Declaration would be violated, as would, in the case of collective bargaining agreements, the eighth paragraph of the Preamble to the 1946 Constitution.

It is clear from the very terms of section 140 of the Institutional Act on the autonomous status of French Polynesia that the application of "statutes of the country" to current contracts will be possible only "where the general interest justifies this". It will be for the Council of State to verify the existence and adequacy of the relevant general interest consideration.
(2004-490 DC, 12 February 2004, paras 93 and 94, p. 41)

Free competition

Given the specific features of the situations in which the conclusion of a partnership contract is justified, the set of measures provided for by the Ordinance of 17 June 2004 for small and medium-sized businesses and one-man firms secures respect for the principle of equality. In any event, there are no provisions in the Ordinance that preclude a small or medium-sized business from applying for the award of a partnership contract, possibly in the context of a consortium.

Likewise, given the specific features of the situations in which the conclusion of a partnership contract is justified, secures respect for principle of equality by helping to preserve the specific function of construction works management and architectural quality, the set of measures provided for by the Ordinance.

It follows that the principle of equality in relation to public procurement is not violated by the provisions challenged.
(2004-506 DC, 2 December 2004, paras 26 to 30, p. 211)

PARTICIPATION OF WORKERS IN COLLECTIVE DETERMINATION OF WORKING CONDITIONS AND MANAGEMENT OF THE FIRM

Collective bargaining

Agreements to derogate

Section 43(I) (2°), (4°) and (14°) of the Social Dialogue Act refers to enterprise agreements for the detailed rules for the application of certain legislative provisions of the Employment Code, but the other provisions of that section allow enterprise agreements to derogate from legislative provisions with public order status relating to severance allowances and working hours. However, the legislature has defined in precise terms the subject matter of these derogations and determined itself, or left it be determined by the authority empowered to make regulations, the conditions for their implementation. The agreements must not be opposed by the trade unions with a majority of members in the firms or must be signed by them as provided by section 37 of the Act referred. The plea that article 34 of the Constitution is violated is accordingly rejected.
(2004-494 DC, 29 April 2004, para 13, p. 91)

Relationship between collective bargaining agreements

Sections 41 and 42 of the Social Dialogue Act have neither the object nor the effect of modifying the relationship between the legislation or regulations and collective bargaining agreements on the one hand and the relationship between collective bargaining agreements and employment contracts. They merely govern the relationship between the various collective bargaining agreements in order to give the lower-ranking agreements the possibility of departing from a higher-ranking agreement, provided the signatories to the latter have not excluded the possibility of doing so. The agreements must not be opposed by the trade unions with a majority of members in the firms or must be signed by them as provided by section 37 of the Act referred, as the case may be. The possibility for an enterprise agreement of derogating from a higher-ranking agreement is excluded as regards minimum wages, gradings and collective guarantees in the context of mutualisation of certain risks and vocational training funds. And the new provisions do not have retroactive effect, as is clear from section 45 of the Act. Given all these guarantees, the legislature has not acted *ultra vires*.
(2004-494 DC, 29 April 2004, para 12, p. 91)

ADVERSARY NATURE OF CERTAIN PROCEDURES

Defence rights outside the criminal law

Social security

The penalty that may be imposed by the director of a local health-care insurance body under section L 162-1-14 of the new Social Security Code may be ordered, in the case of health-care professionals, insured persons, employers on health care establishments, only after the person

concerned has been given the opportunity to make his views known in writing or orally. The principle of defence rights is accordingly not violated. Moreover, the persons concerned will be able to take action in the administrative courts to challenge the penalty.
(2004-504 DC, 12 August 2004, para 27, p. 153)

PROPERTY RIGHTS

Violations of property rights

Although it is legitimate for section 19 of the Institutional Act on the autonomous status of French Polynesia to exclude from the declaration procedure transfers of ownership to persons "providing evidence of a sufficient period of residence in French Polynesia" or "providing evidence of a sufficient period of marriage, cohabitation or civil solidarity pact with a person" providing evidence of such a period of residence, but it was not legitimate for it, without violating the concept of population within the meaning of articles 72-3 and 74 of the Constitution, to extend the exclusion to "persons having French nationality" "born in French Polynesia" or "one of whose parents was born in French Polynesia". The fourth, sixth and seventh paragraphs of section 19 of the Institutional Act are according unconstitutional.
(2004-490 DC, 12 February 2004, paras 33 to 35, p. 41)

No violation

Property used for a public service

The Act relating to the public electricity and gas service and electricity and gas companies entrusted the public electricity distribution network, the density of which is determined by section 12 of the Act of 10 February 2000, to a single management company in which the capital is wholly publicly owned. Sections 14 and 15 of the latter Act require the management company to maintain and develop the network, and it may not transfer assets or facilities required for its operation, safety or security. The transfer of facilities composing the network to a singly management company will jeopardise neither the continuity of the public service nor the assets of the State. The argument that the Act referred effects an indirect privatisation and despoils the nation's assets accordingly fails on the facts.
(2004-501 DC, 5 August 2004, paras 15 and 16, p. 134)

PRINCIPLE OF EQUALITY

EQUALITY BEFORE THE LAW

Principle

The principle of equality does not preclude the legislature from issuing measures to stimulate employment by granting special assistance or benefits, applying objective criteria depending on the object pursued.
(2004-502 DC, 5 August 2004, para 4, p. 141)

Under articles 1 and 34 of the Constitution and the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution, it is for the legislature to determine the powers of the central government and territorial units in giving effect to this objective. But it must ensure by means of appropriate provisions that there are no serious breaches of equality.
(2004-503 DC, 12 August 2004, paras 21 to 23, p. 144)

In accordance with article II-112(4) of the Treaty establishing a Constitution for Europe, insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, "those rights shall be interpreted in harmony with those traditions." Articles 1 to 3 of the Constitution, which preclude collective rights being enjoyed by any group defined in terms of origins, culture, language or belief, are accordingly respected.
(2004-505 DC, 19 November 2004, para 16, p. 173)

The principle of equality does not preclude the legislature from treating different situations in different ways or from departing from equality for reasons in the general interest, provided, in both cases, the resultant difference of treatment is directly related to the purpose of the statute generating it.
(2004-507 DC, 9 December 2004, para 5, p. 219; 2004-511 DC, 29 December 2004, para 11, p. 236)

The fairness of sports competitions is a corollary of the principle of equality.
(2004-507 DC, 9 December 2004, paras 25 to 27, p. 219)

Respect for principle of equality: absence of injustified discrimination

Construction and housing

Social housing

In amending section L 441-1 of the Construction and Housing Code to empower the representative of the central government in the department to enter into agreements delegating to the mayor or, with his consent, to the chairman of a public establishment for cooperation between communes with housing responsibilities, some or all of his rights to reserve accommodation belonging to social housing bodies, the legislature did not violate the constitutional objective set by the tenth and eleventh paragraphs of the 1946 Preamble and determined adequate conditions to avert the risk of serious breaches of equality in the possibilities for less well-off persons to enjoy decent housing.
(2004-503 DC, 12 August 2004, paras 24 and 27, p. 144)

In transferring the management of the housing solidarity fund to the department and in determining the conditions for the grant of assistance from that fund in precise terms, the legislature did not violate the constitutional objective set by the tenth and eleventh paragraphs of the 1946 Preamble and determined adequate conditions to avert the risk of serious breaches of equality in the possibilities for less well-off persons to enjoy decent housing.
(2004-503 DC, 12 August 2004, paras 25 and 27, p. 144)

In giving communes or public establishments for cooperation between communes that so request the responsibility for construction, reconstruction, extension, major repairs and fitting-out of students'residences that remain under the management of regional university and school facilities centres, the legislature did not violate the constitutional objective set by the tenth and eleventh paragraphs of the 1946 Preamble and determined adequate conditions to avert the risk of serious breaches of equality in the possibilities for less well-off persons to enjoy decent housing.
(2004-503 DC, 12 August 2004, paras 26 and 27, p. 144)

Social law

Social security

Since the obligation to select a family doctor is incumbent on all people insured by the social security system, the argument that equality is violated must be rejected.
(2004-504 DC, 12 August 2004, para 12, p. 153)

It is legitimate for the legislature to satisfy the constitutional requirement for financial equilibrium in social security by having people insured by the social security system pay a

flat-rate contribution for procedures and consultations covered by the health-care insurance. In introducing a flat-rate contribution, the legislature did not violate the principle of equality.
(2004-504 DC, 12 August 2004, para 18, p. 153)

Under the provisions governing its membership, the commission consulted on penalties awarded against health-care professionals, insured persons, employers and health-care establishments by definition includes representatives of people insured by the social security system. The argument that, in the absence of representatives of people insured by the social security system on that commission, equality is breached to the detriment of insured persons facing penalties accordingly fails on the facts.
(2004-504 DC, 12 August 2004, para 26, p. 153)

Miscellaneous applications

Sport

It was legitimate for the legislature to take account of the specific features of the remuneration of professional sportsmen by providing that a portion of their remuneration corresponding to the marketing of the collective image of the team to which they belong should not be regarded as a wage. It was accordingly legitimate to provide that this portion should be taxed in the category of non-commercial profits and be assessable only to the generalised social contribution and the contribution for the reimbursement of the social debt. Its intention thereby was to pursue the general-interest objective of improving the competitiveness of French professional sport. Section 1 of the Professional Sport Act accordingly does not violate the principle of equality between wage-earners.
(2004-507 DC, 9 December 2004, para 6, p. 219)

Section 1 of the Professional Sport Act is intended to apply to all professional sportsmen and women belonging to the same club. To avoid reducing their social rights, in particular as regards pensions, the measure challenged relates only to remuneration in excess of a threshold "which may not be lower than twice the ceiling set by decree under section L 241-3 of the Social Security Code". The argument based on violation of the principle of equality between professional sportsmen and women accordingly fails on the facts.
(2004-507 DC, 9 December 2004, para 7, p. 219)

The argument that sports associations are excluded from the measure established by section 1 of the Professional Sport Act fails on the facts. Section 11 of the Act of 16 July 1984 provides that a sports association that habitually participates in the organisation of sports events at which the public pays for admittance and receives revenue in excess of a threshold set by decree issued after the opinion of the Council of State or employs sportsmen and women whose total remuneration is in excess of an amount set by decree issued after the opinion of the Council of State must form a commercial company to manage such activities. A sports association that does not meet these conditions may form such a company to manage such activities.
(2004-507 DC, 9 December 2004, para 8, p. 219)

It was legitimate for the legislature to exempt professional sport from the contribution provided for by section L 931-20 of the Employment Code. That contribution was introduced by the Act of 12 July 1990 to finance training leave and to dissuade employers who enter into contracts of limited duration from using precarious employment statuses. The reason why there is no training leave is that professional sport does not lend itself to this kind of activity, as the main need is for learning a fresh occupation at the end of the sports career. The conclusion of contracts of limited duration is inherent in the nature of professional sport, as confirmed by section L 122-1-1(3°) and section D. 121-2 of the Employment Code.
(2004-507 DC, 9 December 2004, paras 18 to 21, p. 219)

It was legitimate for the legislature, in compliance with the principle of equality, to facilitate the financing of sports companies and allow them access to comparable resources to their competitors in Europe.

By allowing one and the same person to have minority holdings in several such companies, provided he or she does not exercise control within the meaning of section L 233-16 of the Commercial Code over several companies in the same discipline, and by maintaining the

second paragraph of section 15-1 of the Act of 16 July 1984 on the organisation and promotion of physical and sporting activities, which makes it a punishable offence for any private shareholder in a sports company to make a loan to another company in the same discipline or to stand as guarantor or indemnity, the legislature took adequate precautions to ensure the fairness of sports competitions. In so doing, it respected the principle of equality.
(2004-507 DC, 9 December 2004, paras 25 to 27, p. 219)

Respect for principle of equality: difference of treatment justified by different situations

Social law

Pensions legislation

In providing, in certain enterprises, for a flat-rate reduction in the aggregate wage and salary bill used as a basis for distributing the burden of "past special rights" in the special retirement insurance scheme for the electricity and gas industries, the legislature's purpose was to address their specific situation. The enterprises concerned are not eligible for the contribution introduced by section 18 of the Act referred for activities of transporting and distributing electricity and natural gas. The conditions in which they were required to sell their production in the past did not enable them to establish sufficient reserves. Far from violating the principle of equality, the purpose of the provisions challenged is to correct a difference in situation.
(2004-501 DC, 5 August 2004, para 19, p. 134)

Public enterprises

Public service tasks in electricity and gas are mainly performed by Electricité de France and Gaz de France. Other operators are not in the same situation.
(2004-501 DC, 5 August 2004, para 4, p. 134)

Taxation

Business tax

The business tax credit benefit introduced by section 22 of the Finance Act for 2005 is available to enterprises which, having transferred their business in whole or in part outside the European Economic Area between 1 January 1999 and 22 September 2004, relocate it back to France between 1 January 2005 and 31 December 2006.

In reserving the benefit of the business tax credit to enterprises which transferred their business outside the European Economic Area, the legislature merely acted on the requirements of Community law relating to the free movement of persons, services and capital.
(2004-511 DC, 29 December 2004, paras 9, 11 and 14, p. 236)

Section 22 of the Finance Act for 2005 introduces a business tax credit for enterprises which, having transferred their business in whole or in part outside the European Economic Area between 1 January 1999 and 22 September 2004, relocate it back to France between 1 January 2005 and 31 December 2006. In excluding various activities from the new scheme, the legislature's purpose was to comply with France's Community and international obligations.
(2004-511 DC, 29 December 2004, paras 9, 11 and 15, p. 236)

Section 28 of the Finance Act for 2005 establishes a business tax credit covered by central government for taxable persons in employment areas classified each year until 2009 by regulation as being "in major difficulties on account of delocations". Taxable persons are liable to repay the tax credit if, during the period for which it applies or within five years thereafter, they transfer outside the European Economic Area jobs which generated entitlement to it.

In confining the penalty to cases where the transfer is outside the European Economic Area, the legislature's purpose was to comply with France's Community obligations, in particular

under Title III of the Treaty establishing the European Community, relating to the free movement of persons, services and capital. It accordingly did not violate the principle of equality.
(2004-511 DC, 29 December 2004, paras 17 and 21, p. 236)

Public service contracts

The Public Electricity and Gas Service Act provides that the objectives and implementation of the public service tasks assigned to Electricité de France and Gaz de France "shall be covered" by a contract with the central government. It further provides that the central government "may" conclude contracts with other electricity and gas enterprises performing public service tasks to spell those tasks out.

Public service tasks in electricity and gas are mainly performed by Electricité de France and Gaz de France. Other operators are not in the same situation.

As regards these other operators, the decision by public authorities whether or not to conclude a contract with the central government to govern the performance of public service tasks must be based on rational, objective criteria. On particular, the central government will have regard to the size of the enterprises and the tasks entrusted to them.
(2004-501 DC, 5 August 2004, paras 2, 4 and 5, p. 134)

Considerations of general interest justifying difference of treatment

Economic interventionism

Employment aids

The principle of equality does not preclude the legislature from issuing measures to stimulate employment by granting special assistance or benefits, applying objective criteria depending on the object pursued.

The purpose of employment aids for employers of manpower in hotels, cafés and restaurants, given the specific difficulties in recruiting staff, is to improve the level of wages and salaries so as to make a highly labour-intensive industry more attractive. The aids are directly related to the legislature's general-interest objective in terms of employment.
(2004-502 DC, 5 August 2004, paras 4 and 5, p. 141)

Applications

Taxation

The purpose of section 22 of the Finance Act for is to promote the repatriation of jobs transferred outside France, for the general benefit of the national economy and to combat unemployment. The measure accordingly pursues a general-interest objective.

The business tax credit benefit introduced by section 22 of the Finance Act for 2005 is available to enterprises which, having transferred their business in whole or in part outside the European Economic Area between 1 January 1999 and 22 September 2004, relocate it back to France between 1 January 2005 and 31 December 2006. It requires ministerial approval and a commitment to preserve the jobs created or the investments made for at least five years after the new relocation. The tax credit must be repaid if that commitment is not kept. In excluding enterprises which transfer their business from a different part of the national territory and newly-established enterprises, the legislature acted on the basis of rational and objective criteria to determine the beneficiaries of the measure.
(2004-511 DC, 29 December 2004, paras 9, 11 to 13, p. 236)

Criminal procedure

There is no unjustified discrimination in the difference of treatment established by the legislature where it makes the application to minors of the new section 706-88 of the Code of Criminal Procedure, relating to the extended period allowed for holding for questioning, subject to the dual requirement that they be at least sixteen years old and that there be one or more plausible reasons for suspecting that adults may be involved in the commission of the alleged offence. The legislature intended to secure the proper conduct of investigations into offences imposing special investigations on account of their seriousness and complexity and to protect minors from the risk of reprisals from the adults involved.
(2004-492 DC, 2 March 2004, para 38, p. 66)

Access to public procurement

Given the specific features of the situations in which the conclusion of a partnership contract is justified, the set of measures provided for by the Ordinance of 17 June 2004 for small and medium-sized businesses and one-man firms secures respect for the principle of equality. In any event, there are no provisions in the Ordinance that preclude a small or medium-sized business from applying for the award of a partnership contract, possibly in the context of a consortium.

Likewise, given the specific features of the situations in which the conclusion of a partnership contract is justified, the set of measures provided for by the Ordinance secures respect for principle of equality by helping to preserve the specific function of construction works management and architectural quality.

It follows that the principle of equality in relation to public procurement is not violated by the provisions challenged.
(2004-506 DC, 2 December 2004, paras 26 to 30, p. 211)

The provisions of the Ordinance of 17 June 2004, the sole purpose of which is to ensure that an option by a territorial unit to use a partnership contract rather than managing works itself has no impact on the eligibility of expenditure on supplies under such contract for the VAT compensation fund, are not contrary to the constitutional requirements inherent in equality in relation to public procurement and the sound use of public funds, nor the self-government of territorial units.
(2004-506 DC, 2 December 2004, para 37, p. 211)

Breach of principle of equality

Electronic communication

The principle of equality does not preclude different rules being applied to different situations, provided the difference of treatment is directly related to the objective pursued by the Act establishing it.

In itself, taking account of differences in the accessibility of a message over time, depending whether it is published as hard copy or electronically, is not contrary to the principle of equality. But the difference in the rules applying as regards the right of reply and prescription under the provisions challenged manifestly exceeds what is necessary to take account of the specific situation of messages available exclusively on electronic media.
(2004-496 DC, 10 June 2004, paras 13 and 14, p. 101)

Territorial units

The gaps between the needs for technical staff and manual and service staff in secondary schools and the staff actually available are more serious in certain academies in Metropolitan France than in certain academies overseas. The gaps are not therefore "specific characteristics and constraints" within the meaning of article 73 of the Constitution that would defer the entry into force of the Act in the overseas departments and regions. Section 203 of the Local

Freedoms and Responsibilities Act is accordingly contrary to the principle of equality between territorial units.
(2004-503 DC, 12 August 2004, paras 16 to 18, p. 144)

Taxation

Direct and indirect taxes

Section 28 of the Finance Act for 2005 establishes a business tax credit covered by central government for taxable persons in employment areas classified each year until 2009 by regulation as being "in major difficulties on account of delocations". The legislature has authorised the Government to lay down an additional list covering areas in which "ongoing industrial restructuring operations are liable to adversely affect the employment situation on a durable basis".

The legislature could not, without violating its own avowed objective, provide that no more than ten such areas would be eligible each year. By setting such a maximum, which, if it were reached in the course of the year, would preclude the benefit of the measure for areas undergoing restructuring operations on a similar scale to those already declared eligible, or even more serious than them, the legislature has established a difference of treatment that is not justified in relation to the objective pursued.
(2004-511 DC, 29 December 2004, paras 17, 20 and 22, p. 236)

EQUALITY BEFORE THE COURTS

Judiciary

Litigants

Equal guarantees for litigants

Equality of accused persons and rights of persons joining civil actions to criminal prosecutions

The provisions governing the procedure for the hearing of the prior acknowledgement of guilt do not proceed on the basis of unjustified discrimination between accused persons depending whether they do or do not acknowledge their guilt. In both cases, defence rights and the presumption of innocence are respected.

The new section 495-13 of the Code of Criminal Procedure guarantees the rights of the victim, whether or not they have been identified prior to the approval hearing and whether or not they have been present at that hearing. Their rights to join civil proceedings to the criminal prosecution will be safeguarded in any event. Their civil interests will be secured either by an Order of the President of the Tribunal de Grande Instance at the approval hearing or by a judgment given by the criminal court thereafter.
(2004-492 DC, 2 March 2004, paras 113 to 116, p. 66)

Defence rights

It is legitimate for the legislature, which is empowered to determine the rules of criminal procedure by article 34 of the Constitution, to provide for rules of procedure that differ according to the facts, the situations and the persons to whom they apply, provided the differences are not based on unjustified forms of discrimination and litigants enjoy equal guarantees, in particular as regards respect for defence rights.
(2004-492 DC, 2 March 2004, para 30, p. 66)

Detention pending trial

The possibility allowed to State Counsel to apply direct to the judge of freedoms and detention for an order for remand which the examining judge considers unjustified is linked to the question of urgency and based on objective and rational criteria inspired by a general interest consideration directly related to the objective pursued by the Act. The resultant difference of treatment between persons whose remand is applied for does not therefore proceed from an unjustified form of discrimination.
(2004-492 DC, 2 March 2004, para 121, p. 66)

EQUALITY OF PUBLIC BURDEN–SHARING

Equality before the tax law

Principle

Article 34 of the Constitution provides: "Statutes shall determine the rules concerning... the base, rates and methods of collection of taxes of all types...". It is for the legislature, when establishing a tax, to determine freely the basis of assessment in compliance with constitutional principles and rules. In particular, to satisfy the principle of equality, it must base its decision on rational, objective criteria.
(2004-504 DC, 12 August 2004, para 45, p. 153)

The principle of equality does not preclude the legislature from providing tax incentives on general-interest grounds.
(2004-511 DC, 29 December 2004, para 40, p. 236)

Tax schemes

Tax reliefs

The principle of equality does not preclude the legislature from providing tax incentives on general-interest grounds.

The purpose of the income-tax relief for employing domestic staff is to combat unemployment by developing the employment of domestic staff. It also aims to combat undocumented jobs and to lighten the burden on the budget of families bringing up young children or caring for the elderly. And it seeks to improve the quality of life for families by making it easier for such people to stay in the family home, supporting their schooling and helping with household running costs.

The relief is given at 50 % of the amount of expenditure actually borne, subject to a ceiling that was previously €10 000. By raising the ceiling to €12 000 and increasing it in line with family burdens, though never beyond €15 000, the legislature's purpose was to extend the scope of the measure and match it more closely to its general-interest objectives. Section 87 of the Finance Act for 2005 accordingly does not seriously violate equality of public burden-sharing.
(2004-511 DC, 29 December 2004, paras 38 to 42, p. 236)

The rules laid down by sections 3, 7 and 20 of the Health-care Insurance Act, applying to the personal medical file, the intervention of the family doctor and the flat-rate contribution, meet constitutional requirements relating both to health protection and to the financial equilibrium of the social security system. By providing that the measure applies only where the supplementary health-care insurance bodies do not cover health-care expenditure incurred contrary to these rules, the legislature acted on the basis of rational and objective criteria directly related to the requirements that it was seeking to meet. It has accordingly not violated the principle of equality.
(2004-504 DC, 12 August 2004, para 46, p. 153)

Social security contributions on different kinds of income

Basis of assessment

Under article 34 of the Constitution, where the legislature introduces a tax, it is free to determine the rate, in compliance with constitutional principles and rules.

In uniformly cutting from 5 % to 3 % the reduction representing professional expenditure for employed people on the gross amount of income on which the social security contribution is assessed, the legislature's purpose was to respond to recent reforms in the deduction of professional expenditure and knowledge of incomes, in order to align the real situations of employed and self employed people. It did not accordingly seriously violate equality of public burden-sharing.
(2004-504 DC, 12 August 2004, paras 51 and 52, p. 153)

ELECTIONS

ELECTORATE, ELIGIBILITY, PRE-ELECTORAL PROCESS

Eligibility

Persons under guardianship

Under sections L 5 and L 44 of the Electoral Code, persons of full age who are subject to guardianship may not be entered on the electoral rolls and may neither vote nor stand for election.

A Senator subject to guardianship by order of the guardianships judge is accordingly ineligible. The Constitutional Council must declared the person concerned disqualified *ipso jure* from the office of Senator.
(2004-16 D, 23 December 2004, paras 1 to 4, p. 231)

Entry on electoral rolls

No need to apply section L7 of the Electoral Code

The offences of violating freedom of access and equality of candidates for public contracts for which Ms M. was convicted related to the signing of a contract to be performed by means of order forms. They were committed in May 1994, prior to the entry into force of the Act of 19 January 1995 which inserted section L7 in the Electoral Code, whereby persons convicted of certain offences may not be entered on the electoral roll for a period of five years following the date on which the conviction became final. Since the two contract renewals in April 1995 and May 1996 were not regarded as the subject of an offence by the judgment, that section is not applicable to Ms M.
(2004-3390/3395/3397, 2 December 2004, Senate, Guadeloupe, paras 7 to 11, p. 206)

Pre-election process

Data-files on successful candidates

It is clear from the very terms of section 4 of the Decree of 30 August 2001, which establishes the "index file of successful and unsuccessful candidates" that information about the addresses

and telephone numbers of people in the file may not be communicated to third parties. The refusal to act on the request by a candidate for election to the Senate for the contact details of members of the electoral college recorded in that file is accordingly not vitiated by irregularity.
(2004-3390/3395/3397, 2 December 2004, Senate, Guadeloupe, para 2, p. 206)

Candidatures

Refusal to declare candidature

Mr D. alleges that there was a refusal to register his candidature for the second ballot because his replacement was not physically present, but there is no firm evidence in support of the allegation, which is not borne out by the investigation. The argument fails on the facts.
(2004-3390/3395/3397, 2 December 2004, Senate, Guadeloupe, para 3, p. 206)

Candidatures for second ballot

It is up to candidates at a Senate election to decide whether or not to maintain their candidature after the first ballot.
(2004-3382/3383/3394, 4 November 2004, Senate, Vaucluse, para 5, p. 164)

CAMPAIGN ADVERTISING

Advertising methods

Circulars

Political affiliation mentioned on manifesto

There are no provisions in statute or regulation applicable to the election of Deputies to preclude a candidate stating on his manifesto and ballot papers that he is supported by the "departmental majority".
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 19, p. 201)

Press

Political statement by a newspaper

The press is free to report on an election campaign as it sees fit. According to the documents in the file, the article published by a regional daily reported on the election campaign of several candidates and mentioned, in particular, that the applicant had held a public meeting. The fact that the local press reported several sporting, cultural or trade events which the successful candidate had attended does not in itself constitute an abuse in campaign advertising in favour of that candidate.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, paras 15, p. 201)

Paid inserts or advertisements in newspapers

It has not been proved either that only the website created by the successful candidate was announced in a regional daily or that the other candidates were unable to have information disseminated about their sites.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 15, p. 201)

Miscellaneous irregularities

Given the content of the first issue, dated April 2004, of the magazine published by the departmental tourism committee and the gap between the number of votes cast for each of the candidates, the distribution of that issue in June 2004, however tardy, cannot have affected the fairness of the ballot.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 16, p. 201)

Municipal publications

The interview with the chairman of an urban community, who was standing at the Senate elections, published three months before the ballot in the community's quarterly newsletter, cannot, given its content, be regarded as campaign advertising. The second paragraph of section L 52-8 of the Electoral Code was not violated.
(2004-3388, 25 November 2004, Senate, Savoie, paras 2 and 4, p. 187)

Election meetings

The two events organised by the urban community whose Chairman was standing at the Senate elections in the week preceding the ballot when new urban transport measures were put in place in the context of a national public transport week, and to which only the relevant elected officers were invited, did not constitute campaign advertising in favour of the successful candidate. The second paragraph of section L 52-8 of the Electoral Code was not violated.
(2004-3388, 25 November 2004, Senate, Savoie, paras 3 and 4, p. 187)

Radio and television

Section L 167-1 of the Electoral Code relating to the use of public-service radio and television broadcasting services by parties and associations concerns only the campaign for general elections and is not applicable to a bye-election. The applicant accordingly cannot validly argue that the commission provided for by the Decree 9 January 1978, implementing that section, was not set up. The applicant further argues that a report broadcast on 24 June 2004 by the France 3 regional television station reveals that there was unequal treatment between candidates at the first ballot, but the investigation does not show that the broadcast can be regarded as constituting discriminatory treatment such as to deprive the candidates of the possibility of standing at the second ballot and thus distorting the outcome of the ballot.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 14, p. 201)

Internet

Section 5 of the Act of 7 June 1982 on the Assembly for French Citizens Residing Abroad, which regulates campaign advertising abroad, and section L 49 of the Electoral Code, which prohibits certain forms of advertising on the day before and the day of the ballot, were not made applicable to the election of Senators representing French citizens residing abroad. Allegations that, contrary to these provisions, a website intended primarily for French citizens residing abroad, was accessible on the day of the ballot and that e-mails were sent out on the day of the ballot, stating that the Democratic Association of French citizens residing abroad supported the list headed by Mr Y, are accordingly inoperative.

Nor, in the circumstances of the case, can these facts be regarded as abuse in campaign advertising such as to affect the fairness of the ballot.
(2004-3389/3400, 25 November 2004, Senate, French citizens residing abroad, paras 2 and 3, p. 189)

Letters

Dispatch or distribution of letters on behalf of candidates

Letters from members of Parliament

The letter sent to voters in the constituency by the outgoing Deputy on 10 May 2004 in support of the candidature of the successful candidate did not, in the circumstances of the case, given its content, exert such pressure as to affect the outcome of the first ballot.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 17, p. 201)

Pamphlets

No irregularities

Content not exceeding the limits of electoral polemics

The distribution of a document during the second ballot, calling on voters to cast their vote for certain candidates, was not prohibited as a matter of principle for Senate elections by any provision of statute or regulation. Moreover, given the terms of this document, which did not exceed the limits of electoral polemics, its distribution cannot be regarded as having constituted a manœuvre such as to affect the fairness of the ballot.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 8, p. 192)

The applicant argues that it was not possible to reply to the pamphlet distributed in the commune of Le Puy-en-Velay the day before the second ballot, but the investigation reveals that the pamphlet added nothing new to the electoral debate. Even if the allegation was found to be true, the distribution contrary to section L 165 of the Electoral Code did not affect the outcome of the ballot.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 18, p. 201)

Prohibition of gifts from bodies corporate by the second paragraph of section L 52-8 of the Electoral Code

The prohibition on gifts from bodies corporate to support the financing of election campaigns, provided for by the second paragraph of section L 52-8 of the Electoral Code, is applicable to the election of Senators by virtue of section L 308-1 of the same Code.

The meeting entitled "First meeting of mayors and chairmen of associations of communes with the department", held on 18 September 2004, was devoted entirely to presentation of the new policy guidelines of the department council and an exchange of views on relations between the department and the communes. However open to criticism the decision to organise such an event one week before the day of the ballot, when the chairman of the department council was standing at the Senate election, it did not affect the outcome of the ballot, given the subject-matter and the gap between the votes cast. The expenditure incurred by the department cannot be regarded as a campaign contribution. Travelling by the newly-elected chairman of the department council in several communes of the department from May 2004 onwards did not constitute an election advertising campaign.

The breakfast organised on the day of the ballot by the Departmental Union of Socialist and Republican elected representatives was not financed by the department of Seine-Maritime.

The applicant cannot successfully argue that the department of Seine-Maritime contributed to the financing of the campaign.
(2004-3387, 25 November 2004, Senate, Seine-Maritime, paras 1 to 4, p. 185)

The prohibition on bodies corporate other than political parties or associations making gifts or supplying goods, services or other direct or indirect benefits at prices below market prices, provided for by the second paragraph of section L 52-8 of the Electoral Code, is applicable to the election of Senators by virtue of section L 308-1. Violation of these provisions by a candidate or a list of candidates can warrant annulment of the election where, in the circumstances of the case, the effect has been to violate equality between candidates and to affect the fairness of the Senate election. In the present case, the successful candidate did not receive prohibited befits in kind.
(2004-3388, 25 November 2004, Senate, Savoie, paras 1 to 4, p. 187 and 2004-3391, 25 November 2004, Senate, Saône-et-Loire, paras 1 to 3, p. 192)

Pressure – intervention – manœuvres

Nature of pressure, intervention or manœuvres

Use of appropriations voted for official authorities

Miscellaneous

The insertion of a photograph representing two candidates beside the former prefect, no longer exercising the function in the department, in the brochure presenting the programme of candidates at the Senate elections, was neither such as to make their candidatures in any way official nor such as to affect the fairness of the ballot.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 4, p. 192)

Candidate's use of official functions

The fact that in his campaign documents a candidate at the Senate elections mentioned his status as founder chairman of a joint union which he had indeed founded and whose chair he had vacated shortly before the day of the ballot did not constitute a manœuvre such as to affect the fairness of the ballot.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 5, p. 192)

Manœuvres or interventions relating to candidates'political situation

Selections

The applicant submits that a candidate unwarrantedly enjoyed the support of the departmental federation of a political party. The material in the file on the case shows that the chairman of the federation indeed called on voters to cast their votes for him. This fact therefore did not distort the outcome of the ballot.
(2004-3382/3383/3394, 4 November 2004, Senate, Vaucluse, para 6, p. 164)

It is for the electoral court to check whether manœuvres were such as to deceive the electorate as to the reality of a candidate's selection by a political party, but not to check whether the selection was valid in terms of the party's constitutional documents and operating rules.

Since it is clear from the material in the file that the applicant was not among the candidates presented by the party of which he is a member for the election of Senators for his department and voters were not deceived as to the identity of the candidates selected by that party, the argument that his selection was contrary to the rules of the party cannot be validly presented to challenge the outcome of the ballot.
(2004-3398, 25 November 2004, Senate, Yonne, paras 2 and 3, p. 199)

Support

Given the number of votes cast for each of the candidates, the fact that one of them wrongly claimed to be supported by the President of the Senate, who was able to deny the claim in good time, did not distort the outcome of the ballot.
(2004-3382/3383/3394, 4 November 2004, Senate, Vaucluse, para 6, p. 164)

ELECTORAL OPERATIONS

Organisation of the ballot

Composition of electoral offices

Exercise of functions by members of electoral offices

The fact that the chairman of the bureau of the electoral office, in his status as head of a court, had previously signed an agreement with the then chairman of the departmental council, now

a candidate at the election challenged here, concerning the operation of the "departmental legal aid committee", of which the territorial unit is a member, was inherent in the institutional relations that this member of the judiciary necessarily entertained by reason of his functions. It is not evidence of personal relations between the judge and the successful candidate.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 15, p. 192)

Proceedings during the ballot

Providing voters with ballot papers and envelopes

Ballot papers

Under section R 157 of the Electoral Code, at the second ballot in departments applying the majority voting system, the campaign advertising commission is required to provide voters with blank ballot papers. But under section R 161 candidates may of their own motion provide pre-printed ballot papers. The fact that in the present case the blank ballot papers were replaced by printed ballot papers provided by the candidates did not affect the fairness of the ballot as voters were able to cast their vote by placing several ballot papers in the envelope after deleting the name of certain candidates.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 9, p. 192)

Signatures on register

Signatures

The registers of signatures in two out of the six wards were not signed by the members of the bureau of the electoral college, contrary to section R 164 of the Electoral Code, but this does in itself mean that the corresponding votes are vitiated by irregularity.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 4, p. 196)

Purely material omission

The number of signatures is not recorded on the registers of signatures, but it is recorded in the records signed by the members of the bureau.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 4, p. 196)

Miscellaneous

A voter was allowed to vote even though there was already a signature opposite his name in the register, but a space near to it was empty. It follows that there is no evidence that the voter voted twice.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 3, p. 196)

Miscellaneous incidents

The fact that three voters voted in a ward other than the one in which they were registered had no effect on the outcome of the ballot since it has been shown that these voters voted only once.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 2, p. 196)

Sorting and counting

Counting votes

Organisation of counting

Ballot papers declared void were counted and examined by the bureau of the polling station in the absence of the candidates or their delegates and the voters, but this did not have the

effect of vitiating the ballot on grounds of irregularity since none of them was prevented from attending and overseeing the count. Moreover, after examining the reports from the individual wards and the ballot papers provisionally declared void by the ward bureaux, the bureau of the electoral college briefed the candidates' delegates on their activities, giving them the opportunity to examine the documents and to record their objections, if any, in the report.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 12, p. 192)

Under section L 65 there must be at least four scrutinisers for the count, but the members of the polling station can take part in these operations if there are otherwise not enough scrutinisers. Consequently, the fact the members of a polling station designated only two scrutinisers does not suffice to prove that the actual number of scrutinisers was below the number required by section L 65.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 6, p. 196)

Validity of ballot papers

Statements

Section R 155 of the Electoral Code requires ballot papers in departments where the majority voting techniques applies to bear, after the name of the candidate, a reference to his or her "replacement", with the replacement's name, but the fact that a candidate's ballot papers bore a reference to his alternate rather than his replacement had no effect on the fairness of the ballot.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 7, p. 192)

Establishment of records and annexes thereto

Tally sheets

The applicant submits that, in one of the polling stations, the name on each ballot paper was not recorded on the tally sheets immediately after a scrutiniser had taken the ballot paper out of the envelope, but the documents in the file do not reveal that this violation of section L 65 of the Electoral Code had the object or the effect of facilitating fraud.

Nor do the documents in the file show that the preparation of only one tally sheet per counting table in one of the polling stations had that object or effect.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 5, p. 196)

The tally sheets for all the polling stations bore the signatures of scrutinisers, but the fact that certain scrutinisers did not sign them had no effect on the fairness of the ballot.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 7, p. 196)

Records

A report was not signed by all the members of a polling station, and another report bore the signatures of the members of the polling station plus another signature, but this had no effect on the fairness of the ballot.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 8, p. 196)

The fact that the bureau of the electoral college made no comments concerning the void ballot papers annexed to the reports from the ward polling stations does not constitute an irregularity.

The handwritten correction to the report had the sole purpose of rectifying a mistake.

The order in which the four successful candidates are mentioned on the report has no effect on the outcome of the ballot.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 10, p. 196)

General count

The objection that an excessive period of time elapsed between the count in the polling stations and the centralisation and counting at the bureau of the electoral college fails on the facts.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 9, p. 196)

The investigation reveals that voters were unable to attend the centralisation, counting and proclamation operations at the centralising office, but the report shows that these operations took place in the presence of representatives of the lists of candidates, who entered no observations.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 11, p. 196)

SENATE ELECTIONS

Pre-election process

Lists of Senate electors

Designation of delegates

The argument that the municipal councils did not have time to designate their representatives fails on the facts since the decree summoning them for 2 July 2004 was published in the *Journal officiel* on 18 June 2004.
(2004-3384, 4 November 2004, Senate, Yvelines, para 5, p. 167)

Table of Senate electors

Section R 146 of the Electoral Code provides that the table of Senate electors is to be prepared by the prefect and made public within four days following the election of delegates and their alternates, but the fact that the time-limit was exceeded by one day had no effect on the outcome of the ballot.
(2004-3384, 4 November 2004, Senate, Yvelines, para 3, p. 167)

When adopting the table of Senate electors, the prefect merely compiles the names of the Senate electors in a single document. His powers are limited in this respect. The argument that the sub-prefect who adopted the table for the department of Yvelines had not received delegated powers to do so is accordingly inoperative.
(2004-3384, 4 November 2004, Senate, Yvelines, para 4, p. 167)

Signatures on register

The investigation reveals that Mr B., as a municipal councillor, was an automatic delegate. Notwithstanding the omission of his name on the register, it was for him to vote in place of the municipal councillor who had resigned and whom he replaced.
(2004-3392, 2 December 2004, Senate, Haute-Saône, para 2, p. 209)

Campaign advertising

Campaign advertising material

Pamphlets

The distribution of a document during the second ballot, calling on voters to cast their vote for certain candidates, was not prohibited as a matter of principle for Senate elections by any provision of statute or regulation. Moreover, given the terms of this document, which did not exceed the limits of electoral polemics, its distribution cannot be regarded as having constituted a manœuvre such as to affect the fairness of the ballot.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 8, p. 192)

Meetings

Given the number of votes cast for each of the candidates, the fact that a public meeting was organised contrary to section L 306 of the Electoral Code had no effect on the outcome of the ballot.
(2004-3382/3383/3394, 4 November 2004, Senate, Vaucluse, paras 2 and 3, p. 164)

The two events organised by the urban community whose Chairman was standing at the Senate elections in the week preceding the ballot when new urban transport measures were put in place in the context of a national public transport week, and to which only the relevant elected officers were invited, did not constitute campaign advertising in favour of the successful candidate. The second paragraph of section L 52-8 of the Electoral Code was not violated.
(2004-3388, 25 November 2004, Senate, Savoie, paras 3 and 4, p. 187)

Electoral operations

Composition of electoral offices

Exercise of functions by members of electoral offices

The fact that the chairman of the bureau of the electoral office, in his status as head of a court, had previously signed an agreement with the then chairman of the departmental council, now a candidate at the election challenged here, concerning the operation of the "departmental legal aid committee", of which the territorial unit is a member, was inherent in the institutional relations that this member of the judiciary necessarily entertained by reason of his functions. It is not evidence of personal relations between the judge and the successful candidate.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 15, p. 192)

Proceedings during the ballot

Access to voting room

Section R 166 of the Electoral Code, whereby access to voting rooms is reserved for members of the bureau of the electoral college, the Senate electors that the college comprises, the candidates and their representatives does not engender discrimination against other voters in the constituency not justified by the nature of the ballot.
(2004-3384, 4 November 2004, Senate, Yvelines, para 2, p. 167 and 2004-3399, 4 November 2004, Senate, Paris, para 2, p. 171)

Providing voters with ballot papers and envelopes

Under section R 157 of the Electoral Code, at the second ballot in departments applying the majority voting system, the campaign advertising commission is required to provide voters with blank ballot papers. But under section R 161 candidates may of their own motion provide pre-printed ballot papers. The fact that in the present case the blank ballot papers were replaced by printed ballot papers provided by the candidates did not affect the fairness of the ballot as voters were able to cast their vote by placing several ballot papers in the envelope after deleting the name of certain candidates.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 9, p. 192)

Delegates unable to attend – Alternates

The supporting documents certifying that two delegates for municipal councils were unable to attend were not annexed to the reports from the polling stations that allowed their alternates to vote in their stead, but the investigation reveals that the supporting documents, which are in the case file, were presented by the alternates at the polling station.
(2004-3393, 25 November 2004, Senate, Haut-Rhin, para 1, p. 196)

Supporting documents

The supporting document presented on the day of the ballot did not provide absolute proof of inability to attend. The mayor's certification of the accident sustained by the delegate did not have to be accompanied by a medical certificate. (implicit solution)
(2004-3381/3396, 25 November 2004, Senate, Bas-Rhin, paras 2, 4 to 7, p. 182)

The investigation reveals that Mr D., who was the alternate for the delegate for the commune, showed the bureau of the polling station a document whereby the delegate evidenced his inability to attend the ballot. This document, which was annexed to the report, entitled him to take part in the ballot.
(2004-3392, 2 December 2004, Senate, Haute-Saône, para 4, p. 209)

Order of precedence of alternates

Under the fourth paragraph of section L 288 of the Electoral Code, in communes with less than 3 500 inhabitants, where the election of delegates and the election of their alternates proceed separately, by majority vote: "The order of the alternates shall be determined by the numbers of votes casts for them...". Under the third paragraph of section L 289 of that Code, in communes with 3 500 inhabitants or more, where alternates are elected at the same time as full delegates by the list-based proportional representation technique: "The order of the alternates shall depend in the order in which they are presented". Under the fourth paragraph of the same section, where a delegate is unable to act, "the alternate from the same list placed immediately after the last delegate elected shall replace him".

It follows that the report declaring the results for the election of delegates for municipal councils and their alternates determines the order of alternates and that, in communes with 3 500 inhabitants or more, the order is determined for each list of candidates elected as delegates and alternates. Where a delegate entered on a register provided for by sections L 314-1 and R. 162 of the Code is unable to vote, the first alternate in the order determined by sections L 288 and L 289 and not appearing on the register votes in his stead, unless he is himself unable to vote.
(2004-3381/3396, 25 November 2004, Senate, Bas-Rhin, paras 4 and 5, p. 182)

The investigation reveals that, for three municipal councils, a delegate who was entered on the register but was unable to vote was replaced by an alternate other than the one who should have been called in accordance with the order determined by the report on the election, without there being any reason to believe the proper alternates were unable to vote.

In the circumstances of the case, and given in particular the number, composition and title of the lists of candidates for the functions of delegates in the three communes, the votes cast by the alternates improperly designated might have been cast for a list other than the list that would have been chosen by the alternates who should have been called. Three votes should accordingly be deducted by way of hypothesis from the total cast for the list headed by Mr R., who was given the last seat, and they should be added to the total cast for the list headed by Mr H. The effect is to change the distribution of seats. The electoral operations that are challenged should accordingly be annulled in their entirety.
(2004-3381/3396, 25 November 2004, Senate, Bas-Rhin, paras 6 and 7, p. 182)

The investigation reveals that Mr P. was designated as first alternate for the commune's delegates. He was therefore entitled to replace the delegate who died on the preceding 19 August. His vote is not vitiated by irregularity.
(2004-3392, 2 December 2004, Senate, Haute-Saône, para 3, p. 209)

Sorting

Sorting ballot papers

Validity of ballot papers

Two ballot papers provisionally declared void by a section of the electoral college at the first ballot were validated by the bureau of the electoral college, but in any event, given the gap in

the votes cast, this had no effect on the outcome of the first ballot following which the candidate was declared elected.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 13, p. 192)

Reports

Section 32 of the Ordinance of 7 November 1958 provides: "The reports of the counting committees... shall be available to persons entered on the electoral rolls... for ten days". Violation of this provision, even if it were to be established, would not in itself be such as to influence the fairness and regularity of the election. The argument that the circular issued by the Minister of the Interior on 12 July 2004 was contrary to section 32 of the Ordinance of 7 November 1958 is accordingly inoperative.
(2004-3384, 4 November 2004, Senate, Yvelines, para 1, p. 167 and 2004-3399, 4 November 2004, Senate, Paris, para 1, p. 171)

LITIGATION

Jurisdiction of the Constitutional Council

Review and validity of instruments organising elections

Decree calling the election

In exercising its function of reviewing the regularity of elections of Deputies and Senators under article 59 of the Constitution, the Constitutional Council may exceptionally rule on applications relating to future elections if declaring them inadmissible might seriously jeopardise the effectiveness of its review of the election of Deputies and Senators, vitiate the electoral operations in general or jeopardise the proper functioning of public authorities. These conditions are satisfied by Decree 2004-556 of 17 June 2004 summoning the electoral colleges for the election of Senators.

The purpose of this Decree, which mentions "the resignation of Ms Brigitte Luypaert, Senator for the Orne" in its preamble, was to summon the electoral college for the department only to fill the seat of Senator that had fallen vacant following that resignation. The argument that section 1, by mentioning the department of Orne without further specification, entailed the replacement of the two Senators for the department, accordingly fails on the facts.
(Hauchemaille, 5 July 2004, paras 1 to 3, p. 114)

Matters outside the jurisdiction of the Constitutional Council

Non-recoverable costs

Section L 761-1 of the Code of Administrative Justice, relating to the reimbursement of expenditure incurred in producing a defence pleading, is not applicable in the Constitutional Council.
(2004-3387, 25 November 2004, Senate, Seine-Maritime, para 5, p. 185)

Lodging of application

Status of applicant

The second paragraph of section LO 180 of the Electoral Code, applicable to the election of Senators representing French nationals residing abroad by virtue of section 4 of the Institutional Act of 17 June 1983, provides: "The right to challenge an election is enjoyed by all

persons entered on the electoral roll for the constituency in which the election was held and to all persons presented as candidates". For the election of Senators representing French nationals residing abroad, the electoral rolls for the constituency cover the voters referred to in section 2 of the Act of 7 June 1982, who elect the Senate electoral college referred to in section 13 of the Ordinance of 4 February 1959. It is common ground that Mr H., residing in French Polynesia, which is an integral part of the French Republic, is not on any of these electoral rolls and has not presented a candidature. His application is accordingly inadmissible and must be rejected.
(2004-3389/3400, 25 November 2004, Senate, French nationals residing abroad, para 4, p. 189)

Submissions and arguments

Arguments

Challenge to legality

The argument that the circular issued by the Minister of the Interior on 12 July 2004 was contrary to section 32 of the Ordinance of 7 November 1958, on the notification of reports by the counting committees, is inoperative since, even if it were to be confirmed, that would not in itself be such as to influence the fairness and regularity of the election.
(2004-3384, 4 November 2004, Senate, Yvelines, para 1, p. 167)

The argument that Section R 166 of the Electoral Code, whereby access to voting rooms is reserved for members of the bureau of the electoral college, the Senate electors that the college comprises, the candidates and their representatives, is contrary to the principle of equality is unfounded. The section does not engender discrimination against other voters in the constituency not justified by the nature of the ballot.
(2004-3384, 4 November 2004, Senate, Yvelines, para 2, p. 167)

Section R 146 of the Electoral Code provides that the table of Senate electors is to be prepared by the prefect and made public within four days following the election of delegates and their alternates, but the fact that the time-limit was exceeded by one day had no effect on the outcome of the ballot.
(2004-3384, 4 November 2004, Senate, Yvelines, para 3, p. 167)

When adopting the table of Senate electors, the prefect merely compiles the names of the Senate electors in a single document. His powers are limited in this respect. The argument that the sub-prefect who adopted the table for the department of Yvelines had not received delegated powers to do so is accordingly inoperative.
(2004-3384, 4 November 2004, Senate, Yvelines, para 4, p. 167)

Given the role conferred on the Senate by article 24 of the Constitution, the rules governing membership of the electoral college laid down by sections L 279 and *seq.* of the Electoral Code cannot be regarded as incompatible with articles 25 and 26 of the International Covenant on Civil and Political Rights.
(2004-3384, 4 November 2004, Senate, Yvelines, para 6, p. 167)

The argument that the circular issued by the Minister of the Interior on 12 July 2004 was contrary to section 32 of the Ordinance of 7 November 1958, on the notification of reports by the counting committees, is inoperative since, even if it were to be confirmed, that would not in itself be such as to influence the fairness and regularity of the election.
(2004-3399, 4 November 2004, Senate, Paris, para 1, p. 171)

The argument that Section R 166 of the Electoral Code, whereby access to voting rooms is reserved for members of the bureau of the electoral college, the Senate electors that the college comprises, the candidates and their representatives, is contrary to the principle of equality is unfounded. The section does not engender discrimination against other voters in the constituency not justified by the nature of the ballot.
(2004-3399, 4 November 2004, Senate, Paris, para 2, p. 171)

Arguments not sufficiently precise

The applicant alleges that certain expenditure items were omitted, but it is up to him to provide evidence of the omission, which was not observed by the Campaign Accounts and Political Funding Committee and was not confirmed by the investigation.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 4, p. 201)

Arguments based on alleged violations of the Electoral Code that are not supported by particulars enabling them to be examined must be rejected.
(2004-3390/3395/3397, 2 December 2004, Senate, Guadeloupe, para 6, p. 206)

Arguments unsupported by evidence

The applicant's arguments and the particulars in support of them do not suffice to prove that expenditure relating to the use of computerised lists of names was under-estimated or that certain expenditure on this item was omitted.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 5, p. 201)

Inoperative arguments

An applicant cannot validly rely on an alleged violation of section L 295 of the Electoral Code, which only concerns departments where the election is by proportional representation, in relation to the election of Senators in a department applying the majority voting technique.
(2004-3390/3395/3397, 2 December 2004, Senate, Guadeloupe, para 5, p. 206)

Judicial investigation

General powers

Rejection without prior adversarial judicial investigation

The applications concerned a Senate election and alleged a violation of section L 306 of the Electoral Code (presence at an electoral meeting of a person who was neither a candidate nor a grand elector) and the wrongful use of political support. These factors cannot have influenced the outcome of the ballot, given the gap between the numbers of votes cast. They are rejected without investigation on the basis of section 38 of the Ordinance of 7 November 1958.
(2004-3382/3383/3394, 4 November 2004, Senate, Vaucluse, paras 2 to 7, p. 164)

An application based solely on allegations of illegality is rejected without investigation as being inoperative, unsupported by the facts or manifestly unfounded.
(2004-3384, 4 November 2004, Senate, Yvelines, paras 1 to 6, p. 167)

Applications that are too imprecise for the electoral court to be able to examine them are rejected without investigation as inadmissible, on the basis of the second paragraph of section 38 of the Ordinance of 7 November 1958.
(2004-3385/3386, 4 November 2004, Senate, Hauts-de-Seine/Rhône, para 1, p. 169)

An application based solely on inoperative allegations of illegality is rejected without investigation.
(2004-3399, 4 November 2004, Senate, Paris, paras 1 and 2, p. 171)

An application that merely makes general allegations and presents no precise arguments cannot be validly relied on to challenge electoral operations.
(2004-3381/3396, 25 November 2004, Senate, Bas-Rhin, para 3, p. 182)

Assessment of facts by Constitutional Council

Irregularities not affecting the outcome

The insertion, in the brochure presenting the programme of candidates at the Senate elections, of a photograph, taken from the Senate web site, without the payment of a copyright fee, did not

constitute a financial grant such as to affect the equality between candidates and the fairness of the ballot.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 3, p. 192)

Irregularities not affecting the outcome on account of the specific composition of the Senate electoral college

Given the specific composition of the Senate electoral college, the fact that certain Senate electors were invited to lunch at the candidate's expense, even if it is found to be true, cannot constitute a manœuvre such as to affect the fairness of the ballot.
(2004-3391, 25 November 2004, Senate, Saône-et-Loire, para 2, p. 192)

Irregularities without influence on the outcome of the ballot given the gap in the numbers of votes cast

Campaign advertising

Given the number of votes cast for each of the candidates, the fact that a public meeting was organised contrary to section L 306 of the Electoral Code had no effect on the outcome of the ballot.
(2004-3382/3383/3394, 4 November 2004, Senate, Vaucluse, paras 2 and 3, p. 164)

Given the number of votes cast for each of the candidates, the fact that one of them wrongly claimed to be supported by the President of the Senate, who was able to deny the claim in good time, did not distort the outcome of the ballot.
(2004-3382/3383/3394, 4 November 2004, Senate, Vaucluse, para 6, p. 164)

Irregularities entailing rectification

Annulment of the election

The investigation reveals that, for three municipal councils, a delegate who was entered on the register but was unable to vote was replaced by an alternate other than the one who should have been called in accordance with the order determined by the report on the election, without there being any reason to believe the proper alternates were unable to vote.

In the circumstances of the case, and given in particular the number, composition and title of the lists of candidates for the functions of delegates in the three communes, the votes cast by the alternates improperly designated might have been cast for a list other than the list that would have been chosen by the alternates who should have been called. Three votes should accordingly be deducted by way of hypothesis from the total cast for the list headed by Mr R., who was given the last seat, and they should be added to the total cast for the list headed by Mr H. The effect is to change the distribution of seats. The electoral operations that are challenged should accordingly be annulled in their entirety.
(2004-3381/3396, 25 November 2004, Senate, Bas-Rhin, paras 6 and 7, p. 182)

CAMPAIGN ACCOUNTS

Contents of accounts

Expenditure

Expenses required to be recorded in the account

The fact that the outgoing Deputy had access to a computerised copy of the electoral rolls for all the communes in the constituency and to a database listing all the elected members of

municipal councils in those communes does not in itself suffice to prove that the newly elected Deputy used all the data. The vouchers presented by the successful candidate show that he incurred expenditure in obtaining the data from certain communes. The applicant's arguments and the particulars in support of them do not suffice to prove that expenditure relating to the use of computerised lists of names was under-estimated or that certain expenditure on this item was omitted.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 5, p. 201)

The cost of a flyer posted at places provided for by section L 51 of the Electoral Code and of inserting in the press the article mentioning the address of the website set up by the successful candidate was not recorded in the campaign accounts even though it was an expense incurred for his direct benefit and with his agreement within the meaning of section L 52-12 of the Electoral Code. But the investigation does not show that incorporating this expenditure, when the total expenditure declared by the candidate is below the € 3 830 limit set by section L 52-11 of the Electoral Code, would take it above that limit.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 10, p. 201)

Expenses not required to be recorded in the account

The cost of broadcasting a report on the France 3 regional television station, of publishing an article in a daily to report on the candidates'election campaigns, of local press reports on several sports, cultural or trade events attended by the successful candidate or the distribution of the first issue of the brochure published by the departmental tourism committee, whose chairman is the candidate's alternate, did not constitute expenses incurred for his direct benefit and with his agreement with a view to his election
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 3, p. 201)

The applicant has not proved that in his campaign the successful candidate had the use of the telephone line used for his headquarters by the outgoing Deputy, who was also president of the department council. Neither the cost of that line nor the remuneration of the member of staff of the department who answered calls need to be recorded in the campaign accounts.
(2004-3380, 2 December 2004, AN, Haute-Loire, Constituency 1, para 8, p. 201)

Expenses paid direct (section L. 52-4)

Expenses paid in full by the candidate although a financial agent had been appointed. Ineligibility.
(2004-3379, 12 February 2004, AN, Martinique, Constituency 3, paras 1 and 2, p. 39)

PUBLIC AND SOCIAL FINANCE

FINANCE ACTS

Content and presentation of finance bills

Provisions that may be made in a Finance Act

Allocations for territorial units

The reform of the general operating allocation is not confined to amending the rules for the distribution of each allocation. By substantially amending their structure, it establishes different mechanisms to offset the harmful effects that applying it might have had on certain territorial units. These offsetting mechanisms consist in particular of revenue guarantees

borne by the central government. Sections 47 to 49 of the Finance Act for 2005, which affect the determination of the resources and burdens of the central government, are accordingly not out of place in a Finance Act. (NB: decision given while the Ordinance of 2 January 1959 was still in operation; section 34 (II, 7°, c) of the Institutional Act of 1 August 2001 applies with effect from 1 January 2005).
(2004-511 DC, 29 December 2004, para 28, p. 236)

Provisions that may be not made in a Finance Act

Advisory body

Under the provisions of the Ordinance of 2 January 1959 laying down the Institutional Act relating to Finance Acts still in force and the provisions of the Act of 1 August 2001 laying down the Institutional Act relating to Finance Acts already in force, the only provisions that may be made in Finance Acts are provisions which concern the determination of the resources and burdens of the central government, cash-flow operations, information for and review by Parliament as regards the management of the public finances, the financial liability of staff of the public services, and the creation or transformation of jobs or taxation.

The section which replaces the "Conseil des impôts", at the Court of Auditors, by a "Conseil des prélèvements obligatoires" and determines its tasks, membership, operating rules and prerogatives, is out of place in a Finance Act. For the purposes of section 1 of the Ordinance of 2 January 1959, it cannot be regarded as a provision concerning "the information of and review by Parliament as regards the management of the public finances", since, although it may help to organise those functions, they were not conceived to achieve that purpose. Nor is it within any of the other categories that belong a Finance Act.
(2004-511 DC, 29 December 2004, paras 43 to 46, p. 236)

Provisions relating to expenditure

New expenditure as a result of legislative measures adopted in the course of the year

In the absence of express provisions to the contrary, section L 131-7 of the Social Security Code requires all exemptions from social security contributions to be offset by central government payments to the relevant schemes, and the legislature must draw the consequences in the Finance Act and the Social Security (Finance) Act.
(2004-508 DC, 16 December 2004, para 8, p. 225)

Accuracy of the budget

Section 32 of the Institutional Act of 1 August 2001, applicable since 1 January 2002, provides: "Finance Acts shall accurately present all the resources and burdens of the central government. Their accuracy shall be assessed in the light of the information available and the forecasts that can reasonably be derived from it". The accuracy of the Finance Act for the year is assessed on the basis of the absence of any intention to distort the major lines of the equilibrium.

Revenue forecasts must be established in advance by the Government in the light of the information available when the Finance Bill is tabled. The Government must inform Parliament if new circumstances in law or in fact arise that may change them while the Bill is under discussion, and make the necessary corrections. It is for the legislature, when adopting the forecasts, to take account of all the data available to it which can affect the balancing item. But the revenue forecasts are inevitably subject to the factors for change that affect any other forecasts and the uncertainties of economic trends.

On the expenditure side, it is legitimate for the Government to provide for placing in reserve, at the beginning of the financial year, a small proportion of the appropriations opened in order to cover possible deteriorations in the equilibrium of the budget. Parliament's vote on

the ceilings for the major categories of expenditure and the appropriations made available to Ministers does not place them under an obligation to spend the appropriations in their entirety. And the expenditure authorisations do not preclude the Government's prerogatives under article 20 of the Constitution regarding implementation of the Finance Act.

Moreover, the announcement that sums are to be placed in the reserve indicates neither that certain expenditure items have been under-estimated by the corresponding amount nor that the corresponding appropriations will be cancelled in irregular conditions. The management measures to be put into effect in the course of the financial year must comply with the requirements of the Institutional Act of 1 August 2001. In particular, section 14, which has been applicable since 1 January 2002, provides for the possibility of cancelling an appropriation by decree only to "prevent any deterioration of the budgetary equilibrium determined by the last Finance Act relating to the relevant year" or where the appropriation "no longer serves a purpose". It also requires the relevant committees of the National Assembly and the Senate to be informed of any cancellation decree before it is published and before "any act of whatever kind having the object or effect of making the appropriations unavailable".
(2004-511 DC, 29 December 2004, paras 3 to 8, p. 236)

SOCIAL SECURITY (FINANCE) ACTS

Content and presentation of Social Security (Finance) Acts

Provisions that may not be made in a Social Security (Finance) Act

Measures not such as to affect the general conditions of financial equilibrium

Given its slight financial impact on the revenue of the compulsory basic social security schemes, section 7 of the Social Security (Finance) Act, which prohibits "the sale, distribution or free supply of packets of less than twenty cigarettes", in place of the previous nineteen, does not significantly affect the equilibrium of such schemes. It is declared unconstitutional.
(2004-508 DC, 16 December 2004, paras 19 and 21, p. 225)

Given its slight financial impact on the revenue of the compulsory basic social security schemes, section 11 of the Social Security (Finance) Act, which provides that the Minister responsible for social security will each year review by decree the procedural costs that a person responsible for an accident must pay the health-care insurance fund in addition to reimbursing the costs incurred by the victim, does not significantly affect the equilibrium of such schemes. It is declared unconstitutional.
(2004-508 DC, 16 December 2004, paras 19 and 21, p. 225)

Given its slight financial impact on the revenue of the compulsory basic social security schemes, section 52 of the Social Security (Finance) Act, which increases the premium provided for by section L 531-2 of the Social Security Code in the event of adoption, does not significantly affect the equilibrium of such schemes. It is declared unconstitutional.
(2004-508 DC, 16 December 2004, paras 19 and 21, p. 225)

Given its slight financial impact on the revenue of the compulsory basic social security schemes, section 58 of the Social Security (Finance) Act, which allows persons who have acted as head of farm or of a farming enterprise before reaching majority, without having paid contributions to the old-age insurance scheme, to purchase certain additional reckonable years, does not significantly affect the equilibrium of such schemes. It is declared unconstitutional.
(2004-508 DC, 16 December 2004, paras 19 and 21, p. 225)

Section 44 of the Social Security (Finance) Act, which amplifies the Employment Code to suspend contracts of employment where "confinement takes place more than six weeks prior to the scheduled date and requires the child's postnatal hospitalisation", does not affect the equilibrium of such schemes. It is declared unconstitutional.
(2004-508 DC, 16 December 2004, paras 19 and 21, p. 225)

Presentation of a report

Section 21 of the Social Security (Finance) Act, which provides that "the Government shall present to Parliament, no later than 31 December 2005, a report on the financing of telemedicine", has neither the object nor the effect of improving Parliament's review of the implementation of Social Security (Finance) Acts. It is declared unconstitutional.
(2004-508 DC, 16 December 2004, paras 20 and 21, p. 225)

Miscellaneous

Article 34 of the Constitution provides: "Social security finance Acts shall determine the general conditions for the financial balance of social security and, in the light of their revenue forecasts, shall determine expenditure targets in the manner and with the reservations specified in an Institutional Act".

It follows that if the Institutional Act of 22 July 1996 relating to Social Security (Finance) Acts is not amended, the "multi-annual financial framework" provided for by the provision challenged cannot be approved by a Social Security (Finance) Act.
(2004-504 DC, 12 August 2004, para 33, p. 153)

Accuracy of the Social Security (Finance) Act

Accuracy of the forecasts entered in the Social Security (Finance) Act

The accuracy of the revenue forecasts for the compulsory basic social security schemes established by the Social Security (Finance) Act for 2005 must be assessed in the light of three principles.

First, the forecasts mentioned in section LO 111-3(I)(2°) of the Social Security Code must be established in advance by the Government in the light of the information available when the Finance Bill is tabled. The Government must inform Parliament if new circumstances in law or in fact arise that may change them while the Bill is under discussion, and make the necessary corrections.

Second, it is for the legislature, when adopting the forecasts, to take account of all the data available to it which can affect the revenue of the compulsory basic schemes and the bodies set up to help finance them.

Third, the revenue forecasts are inevitably subject to the factors for change that affect any other forecasts and the uncertainties of economic trends.

In the light of these criteria, the arrangements for covering the measures for exemption from social security contributions applicable to the "future-oriented contracts" introduced by section 29 of the Social Cohesion Programming Bill do not make the Act referred inaccurate. It is true that, in the absence of express provisions to the contrary, section L 131-7 of the Social Security Code requires all exemptions from social security contributions to be offset by central government payments to the relevant schemes, and the legislature must draw the consequences in the Finance Act and the Social Security (Finance) Act. But the legislature expressly excluded the application of section L 131-7 to future-oriented contracts. Its intention to do so was manifested for the first time in a text laid before Parliament only on 1 December 2004, whereas the Joint Committee had already sat to consider the Social Security (Finance) Act for 2005, but this is not open to criticism. The Act referred had not yet been finally adopted. And the Government's intention of not offsetting the social security contributions exemption that went with the future-oriented contracts had been stated before the first reading of the Social Cohesion Programming Bill and the Social Security (Finance) Bill.
(2004-508 DC, 16 December 2004, paras 2 to 10, p. 225)

The national health-care insurance expenditure target was set for 2005 on the basis of the revised 2004 objective in the light of the trend in health-care expenditure and the measures to restore financial equilibrium and to reorganise finances provided for by, among others, the Health-care Insurance Act of 13 August 2004. Given the variables inherent in the exercise, the evaluation is not vitiated by any manifest error.
(2004-508 DC, 16 December 2004, para 12, p. 225)

Consistency between Social Security (Finance) Act and Finance Act being debated by Parliament

In the absence of express provisions to the contrary, section L 131-7 of the Social Security Code requires all exemptions from social security contributions to be offset by central government payments to the relevant schemes, and the legislature must draw the consequences in the Finance Act and the Social Security (Finance) Act.
(2004-508 DC, 16 December 2004, para 8, p. 225)

GOVERNMENT

POWERS SPECIFIC TO THE GOVERNMENT

Determination and conduct of the policy of the Nation (art. 20)

Under article 20 of the Constitution, the Government shall determine and conduct the policy of the Nation, notably in prosecution matters.
(2004-492 DC, 2 March 2004, para 98, p. 66)

PRIME MINISTER

Legislative initiative

Injunctions to the Prime Minister

The proposals concerning the trend of their burdens and products for the year ahead that the National Health-care Insurance Funds are now required to send to the Minister responsible for social security and to Parliament are not binding on the public authorities. The objection based on violation of the first paragraph of article 39 of the Constitution, which provides: "The Prime Minister and Members of Parliament alike shall have the right to initiate statutes", must accordingly be rejected.
(2004-504 DC, 12 August 2004, para 31, p. 153)

Continuity of Government action

Conditions for implementing the third paragraph of article 49 of the Constitution

The exercise of the prerogative enjoyed by the Prime Minister under the third paragraph of article 49 of the Constitution is subject to no other conditions than those stated in that provision.

Since it is stated in the record of decisions taken by the Council of Ministers on 21 July 2004, of which an extract was presented in this case, that the Government was putting the question of confidence in relation to the Local Freedoms and Responsibilities Bill, the condition imposed by the Constitution for applying the third paragraph of article 49 of the Constitution was respected when the question of confidence was put on 23 July.
(2004-503 DC, 12 August 2004, paras 4 and 5, p. 144)

REVISION OF THE CONSTITUTION

POWERS OF THE CONSTITUENT ASSEMBLY

Application

Subject to articles 7, 16 and 89 of the Constitution, there is nothing to preclude the constituent assembly from inserting in the Constitution new provisions which derogate from constitutional rules or principles in circumstances to which they relate. Such is the case of article 37-1 of the Constitution, inserted at the constitutional revision of 28 March 2003, which empowers Parliament to authorise experimental provisions, with a view to their subsequent general application, which derogate from the principle of equality before the law in respect of a limited subject-matter and for a limited period. But the legislature must determine the subject-matter and the conditions in sufficiently precise terms and must not violate other constitutional requirements.
(2004-503 DC, 12 August 2004, para 9, p. 144)

DECENTRALISED ORGANISATION OF THE REPUBLIC

GENERAL PRINCIPLES

Self-government of territorial units

Principle

The provisions of the Ordinance of 17 June 2004, the sole purpose of which is to ensure that an option by a territorial unit to use a partnership contract rather than managing works itself has no impact on the eligibility of expenditure on supplies under such contract for the VAT compensation fund, are not contrary to the constitutional requirements inherent in equality in relation to public procurement and the sound use of public funds, nor the self-government of territorial units.
(2004-506 DC, 2 December 2004, para 37, p. 211)

Elected Council

In the absence of presentation for authorisation by the Assembly of French Polynesia, the power conferred on the President of French Polynesia to "negotiate and sign decentralised cooperation conventions" on behalf of French Polynesia cannot relate to matters within the powers of that Assembly without violating the prerogatives enjoyed by the deliberative assemblies of territorial units under the third paragraph of article 72 of the Constitution, whereby "These units shall be self-governing through elected councils ...". The decentralised cooperation conventions to which section 17 therefore, in the absence of assent given by the decision-making Assembly, can relate only to matters within the powers conferred on the Council of Ministers of French Polynesia. Qualified interpretation.
(2004-490 DC, 12 February 2004, para 29, p. 41)

Local democracy

Electoral system

It is legitimate for the legislature, when laying down electoral rules, to adopt arrangements to promote the emergence of a stable and coherent majority, but any rule which in relation to

that objectify adversely affected between votes or candidates to a disproportionate extent would violate the principle of pluralism of ideas and opinions, which is one of the foundations of democracy.

In the present case, the proportional representation adopted by the Institutional Act is modulated in each of the six constituencies in French Polynesia to allow the constitution of a stable and coherent majority by a majority premium of one third of the seats and a threshold of 3 % of the votes cast for a list to be eligible for the allocation of seats. These rules do not violate the pluralism of ideas and opinions in a manner which is manifestly excessive in view of the objective pursued.
(2004-490 DC, 12 February 2004, paras 84 and 85, p. 41)

Rights of petition

Section 158 of the Institutional Act provides for the conditions in which any question within the powers of the Assembly of French Polynesia may be referred to it by petition.

This section gives effect to the first paragraph of article 72-1 of the Constitution without violating that article or any other constitutional principle or rule.
(2004-490 DC, 12 February 2004, para 100, p. 41)

Local referendum

Section 159 of the Institutional Act determines the conditions for the organisation of local decision-making referendums by the Assembly and the Council of Ministers of French Polynesia. Under section 159(I) the only formality required for the organisation of a local referendum is an initiative of the executive body there, both where a draft or proposal from the Assembly of French Polynesia and where a draft regulation within the powers of the Council of Ministers is concerned.

Regarding drafts or proposals from the Assembly, the exclusive power of initiative for referendums enjoyed by the Council of Ministers of French Polynesia violates the prerogatives conferred on the elected councils of territorial units by the combined provisions of the second paragraph of article 72-1 and the third paragraph of article 72 of the Constitution.

Moreover, the Institutional Act of 1 August 2003 on local referendums, enacted on the basis of article 72-1 of the Constitution, applies to all the territorial units covered by title XII of the Constitution. There can be no derogation from the rules of the ordinary law, in compliance with the principle of equality of all citizens before the law, except to adapt them to specific local needs. Section LO 1112-1, inserted in the General Code of Territorial units by the Institutional Act of 1 August 2003, gives the decision-making Assembly of a territorial unit the possibility of "putting to a local referendum any draft instrument to regulate a matter within the powers of that unit" without making that power subject to the sole initiative of the executive. Such a limitation is not justified by a specific local need in French Polynesia.
(2004-490 DC, 12 February 2004, paras 101 to 104, p. 41)

Cooperation between territorial units

Lead authority and prohibition on supervision of one by another (article 72(5))

Prohibition of power of supervision

Section 44 of the Institutional Act on the autonomous status of French Polynesia provides that "in communes where no waste treatment service is supplied by French Polynesia, the communes or the public establishments for intercommunal cooperation may be authorised by French Polynesia to prescribe or may be obliged to accept the connection of private waste outlets effluents not meeting the criteria for host watercourses to treatment networks or plants which they construct or operate". These provisions do not have the object and cannot have the effect of establishing supervision by French Polynesia over the communes'exercise of the

power referred to in section 43(9). Subject to this qualified interpretation, they are not contrary to the fifth paragraph of article 72 of the Constitution.
(2004-490 DC, 12 February 2004, para 61, p. 41)

Section 56 of the Institutional Act on the autonomous status of French Polynesia requires the assent of the Assembly of French Polynesia for the determination of the matters to be dealt with initially by the communes of French Polynesia. But to avoid establishing a power for one territorial unit to supervise another, the assent must be to the withdrawal of specified matters from the purview of French Polynesia and their transfer to the communes and not to those already belonging to the communes. Subject to this qualified interpretation, section 56 is not unconstitutional.
(2004-490 DC, 12 February 2004, para 66, p. 41)

Role of central government

Review of legality

The last paragraph of article 72 of the Constitution provides: "In the territorial units of the Republic, the State representative, representing each of the Members of the Government, shall be responsible for national interests, administrative supervision and the observance of the law."

There is no constitutional requirement that the enforceability of instruments of territorial units always depend on transmission to the State representative. The rights proclaimed by article 16 of the 1789 Declaration are duly guaranteed since, apart from the possibility of a challenge in the administrative courts, the State representative has the power to review for legality. It is for the legislature to put the State representative in a position to perform the tasks entrusted to him by the last paragraph of article 72 of the Constitution in all circumstances, in particular by following emergency procedures.

Sections 171 to 173 of the Institutional Act on the autonomous status of French Polynesia relate to the review of the legality of instruments adopted in the name of French Polynesia, with the exception of those mentioned in section 140. Section 171 lists the instruments that must be transmitted to the High Commissioner of the Republic as a condition of enforceability. Sections 172 and 173 determine rules in accordance with which the High Commissioner may refer instruments of French Polynesia to the administrative courts and have them suspended. Given all the precautions taken, these sections do not violate the constitutional requirements considered above.
(2004-490 DC, 12 February 2004, paras 109 to 111, p. 41)

POWERS OF TERRITORIAL UNITS

Local experimentation (fourth paragraph of article 72)

The fourth paragraph of article 72 of the Constitution does not preclude statutes containing, experimental provisions based on article 37-1 of the Constitution concern territorial units. (Implicit solution)
(2004-503 DC, 12 August 2004, paras 8 to 14, p. 144)

Specific powers

In adopting sections 18, 22, 28, 73, 91 and 163 of the Local Freedoms and Responsibilities Act, the legislature described in sufficiently clear, precise and intelligible terms the transfers of powers in relation to roads, aerodromes, vocational training for paramedical occupations, joint action in education and culture and police powers. It violated neither its own powers

under article 34 of the Constitution nor the requirements for intelligibility and clarity of statutes.
(2004-503 DC, 12 August 2004, paras 30 to 36, p. 144)

Public establishments of primary education to be set up on an experimental basis by public establishments for cooperation between communes or one or more communes and whose organisation and operation will be governed by rules determined by a Decree issued in the Council of State will not constitute a new categories of public establishments for the purposes of article 34 of the Constitution. It was accordingly legitimate for the legislature to leave the rules governing their organisation and operation to be determined by Decree.
(2004-503 DC, 12 August 2004, para 13, p. 144)

In adopting experimental provisions whereby public establishments for cooperation between communes or one or more communes may set up public establishments of primary education on an experimental basis for a period of no more than five years, the legislature determined the subject-matter and the conditions of the relevant experimentations in sufficiently precise terms. These provisions do not violate other constitutional requirements. They are accordingly constitutional.
(2004-503 DC, 12 August 2004, paras 13 and 14, p. 144)

Health and social protection

In adopting experimental provisions whereby regions which so request may participate on an experimental in the financing and establishment of health-care facilities, the legislature determined the subject-matter and the conditions of the relevant experimentations in sufficiently precise terms. These provisions do not violate other constitutional requirements. They are accordingly constitutional.
(2004-503 DC, 12 August 2004, paras 12 and 14, p. 144)

Economic affairs and employment

In adopting experimental provisions whereby regions that have produced a "regional economic development scheme" may, by way of delegation from central government, enjoy appropriations corresponding to certain former corporate aid schemes, the legislature determined the subject-matter and the conditions of the relevant experimentations in sufficiently precise terms. These provisions do not violate other constitutional requirements. They are accordingly constitutional.
(2004-503 DC, 12 August 2004, paras 10 and 14, p. 144)

In adopting experimental provisions whereby "the central government may entrust to the regions or to the territorial unit of Corsica if they so request, or to other territorial units, their associations or public-interest associations if the former do not wish to take part in an experimentation, the function of management authority and payment authority for programmes covered by the European Community's economic and social cohesion policy for the period 2000-2006", the legislature determined the subject-matter and the conditions of the relevant experimentations in sufficiently precise terms. These provisions do not violate other constitutional requirements. They are accordingly constitutional.
(2004-503 DC, 12 August 2004, paras 11 and 14, p. 144)

FINANCES OF TERRITORIAL UNITS

Resources (second and third paragraphs of article 72-2)

Own resources

The third paragraph of article 72-2 of the Constitution makes the institutional legislature responsible for determining "for each category of territorial unit" the decisive share that own resources represent in the total. The institutional legislature has determined three categories

–communes, departments and regions. It has treated special status units, particularly overseas, in the same way for the purposes of this Act. In so doing, it has not distorted the provisions of article 72-2 of the Constitution.
(2004-500 DC, 29 July 2004, paras 4 and 5, p. 116)

The purpose of section 5 of the Institutional Act, which recasts section LO 1114-4 of the General Code of Territorial Units, is to secure the long-term financial autonomy of the territorial units. By providing that the report sent by the Government is to present, for each category of territorial unit, not only the decisive share that own resources represent in the total but also the method of calculation, the institutional legislature necessarily intended Parliament to be able to be aware of the share for each territorial unit and to evaluate its capacity for self-government. Qualified interpretation.

These provisions are also without prejudice to the possibility for the Constitutional Council to criticise statutes which jeopardise the decisive share that own resources represent in the total for a category of territorial unit. Qualified interpretation.
(2004-500 DC, 29 July 2004, paras 19 to 21, p. 116)

Section 28 of the Finance Act for 2005 introduces a business tax credit for taxable persons in employment areas classified each year until 2009 by regulation as being "in major difficulties on account of delocations". By specifying that the credit is "covered" by central government, the legislature has ensured that the new measures will be neutral in their impact on the tax revenues of territorial units, as also on the share of own resources in their overall resources. The argument based on violation of article 72-2 of the Constitution accordingly fails on the facts.
(2004-511 DC, 29 December 2004, para 25, p. 236)

Concept of decisive share

By providing that "the conditions for the implementation of the [decisive share] rule shall be determined by institutional act", the third paragraph of article 72-2 of the Constitution necessarily, as the Constitutional Council held in its decision of 29 December 2003, conferred on the institutional legislature the power to determine the minimum share to be accounted for in each category of territorial units.
(2004-500 DC, 29 July 2004, para 14, p. 116)

The condition set by section LO 1114-3 of the General Code of Territorial Units relating to the minimum threshold may be regarded as adequate to satisfy the obligation incumbent on the Institutional Act, as regards the decisive share, under the third paragraph of article 72-2 of the Constitution.

The definition of the aggregate resources of categories of territorial units used to calculate the share of own resources does not exceed the scope of the empowerment given to the institutional legislature by the same provision.
(2004-500 DC, 29 July 2004, paras 16 and 17, p. 116)

Taxes of all kinds

The combined effect of the first three paragraphs of article 72-2 of the Constitution is that tax receipts within the category of own resources of territorial units within the meaning of article 72-2 of the Constitution include the proceeds of taxes of all kinds impositions not only where units are authorised by statute to determine the basis of assessment and the rate but also where the rate or a local share of the basis of assessment is determined for each unit by the statute.
(2004-500 DC, 29 July 2004, paras 8 to 10, p. 116)

Contributions from central government and other units

To allocate the minimum operating allocation between non-urban departments, the legislature has maintained the criterion of the length of the road network and replaced the concept of tax potential by the broader concept of financial potential. To allocate the urban equalisation allocation, it has adopted a summary index of resources and burdens determined by the combined effect of several criteria which it has set forth, namely, in addition to the financial

potential, the number of recipients of housing assistance and the minimum integration income, and the average per capita income. In taking special account of burdens borne by rural departments by way of land management and the burdens borne by urban departments by way of social difficulties, the legislature's exercise of its discretion was not vitiated by manifest error.
(2004-511 DC, 29 December 2004, paras 30 and 31, p. 236)

Transfer, creation and extension of powers (fourth paragraph of article 72-2)

The fourth paragraph of article 72-2 of the Constitution provides: "Whenever powers are transferred between central government and the territorial units, resources equivalent to those which were devoted to the exercise of those powers shall be transferred also. Wherever the effect of powers newly created or extended is to increase the expenditure to be borne by territorial units, resources determined by statute shall be allocated." If the regional proceeds of the domestic tax on the consumption of petroleum products were to fall, it would be for the central government to maintain a level of resources equivalent to what it devoted to the exercise of the relevant powers before their transfer.

Section 52 of the Finance Act for 2005 does not finally determine the share of the domestic tax on the consumption of petroleum products accruing to each of the regions. It leaves it for the Finance Act for each year to determine that share in accordance with the right to compensation given by section 119 of the Local Freedoms and Responsibilities Act of 13 August 2004. The argument that it fails to respect the right to compensation under the fourth paragraph of article 72-2 of the Constitution accordingly fails on the facts.
(2004-511 DC, 29 December 2004, paras 35 to 37, p. 236)

Equalisation (fifth paragraph of article 72-2)

Section 52 of the Institutional Act relates to the intercommunal equalisation fund which receives a quota of the direct and indirect taxes and duties raised for the general budget of French Polynesia. It thus gives effect to the final paragraph of article 72-2 of the Constitution, which provides: "Equalisation mechanisms to promote equality between territorial units shall be provided for by statute". The resources are allocated by a committee between communes in proportion to their population and the burdens they bear. It is provided that this committee is to allocate a financial package to groups of communes for investment operations or to cover operating expenditure of interest to several communes. Neither the decree issued after the opinion of the Council of State to determine rules for the application of section 52, nor the financial package to be allocated by the intercommunal equalisation fund may violate the objective of equality mentioned in the final paragraph of article 72-2 of the Constitution. Subject to this qualified interpretation, section 52 is not unconstitutional.
(2004-490 DC, 12 February 2004, para 65, p. 41)

The last paragraph of article 72-2 of the Constitution provides: "Equalisation mechanisms to promote equality between territorial units shall be provided for by statute." It is legitimate for the legislature to implement financial equalisation between units by grouping them in categories, provided the categories are defined on the basis of rational and objective criteria. By distinguishing between urban departments and other departments and defining them as those with a population density in excess of 100 inhabitants per square kilometre and an urbanisation rate in excess of 65 %, the legislature has adopted rational and objective criteria.
(2004-511 DC, 29 December 2004, para 29, p. 236)

ORGANISATION OF TERRITORIAL UNITS OF THE REPUBLIC

Common rules applying to all territorial units

Public procurement

The provisions of the Ordinance of 17 June 2004, the sole purpose of which is to ensure that an option by a territorial unit to use a partnership contract rather than managing works itself

has no impact on the eligibility of expenditure on supplies under such contract for the VAT compensation fund, are not contrary to the constitutional requirements inherent in equality in relation to public procurement and the sound use of public funds, nor the self-government of territorial units.
(2004-506 DC, 2 December 2004, para 37, p. 211)

Public and private domains

Section 56 of the Institutional Act on the autonomous status of French Polynesia requires the assent of the Assembly of French Polynesia for the determination of the matters to be dealt with initially by the communes of French Polynesia. But to avoid establishing a power for one territorial unit to supervise another, the assent must be to the withdrawal of specified matters from the purview of French Polynesia and their transfer to the communes and not to those already belonging to the communes. Subject to this qualified interpretation, section 56 is not unconstitutional.
(2004-490 DC, 12 February 2004, para 66, p. 41)

Ordinary units

Communes

Section 6 of the Institutional Act on the autonomous status of French Polynesia relates to the self-government of the communes of French Polynesia, which for the purposes of article 74 of the Constitution, are not institutions of the territorial unit of French Polynesia. It is therefore a provision of an ordinary statute.
(2004-490 DC, 12 February 2004, para 15, p. 41)

The powers of the communes of French Polynesia, which are not institutions of French Polynesia for the purposes of article 74 of the Constitution, are matters to be governed by ordinary statutes under article 72 of the Constitution. Section 43(I) of the Institutional Act on the autonomous status of French Polynesia, which determines the powers of those communes, accordingly has the status of an ordinary statute.
(2004-490 DC, 12 February 2004, para 60, p. 41)

French Southern and Antarctic Territories (fourth paragraph of article 72-3)

The fact that the Institutional Act enacted under the third paragraph of article 72-2 of the Constitution relating to the financial autonomy of territorial units does not apply to French Southern and Antarctic Territories is not unconstitutional (implicit solution).
(2004-500 DC, 29 July 2004, paras 4 and 5, p. 116)

Overseas departments and regions (article 73)

Common rules

Principle of legislative adaptation (first and second paragraphs of article 73)

The gaps between the needs for technical staff and manual and service staff in secondary schools and the staff actually available are more serious in certain academies in Metropolitan France than in certain academies overseas. The gaps are not therefore "specific characteristics and constraints" within the meaning of article 73 of the Constitution that would defer the entry into force of the Act in the overseas departments and regions. Section 203 of the Local Freedoms and Responsibilities Act is accordingly contrary to the principle of equality between territorial units.
(2004-503 DC, 12 August 2004, paras 17 and 18, p. 144)

Creation of a single unit or a single Assembly (seventh paragraph of article 73)

By making a general reference to "the forms provided for by the second paragraph of article 72-4", the seventh paragraph of article 73 must be interpreted as making applicable to the consultations for which it provides all the formalities set out in the paragraph to which it refers.

These include not only the requirement that the consultation be decided on by the President of the Republic on a proposal from the Government when Parliament is in session or on a joint proposal from the two assemblies, published in the Journal officiel, but also the requirement that, where the consultation is organised on a proposal from the Government, the Government must make a statement followed by debate in each of the assemblies.

The new Rule 39 of the Rules of Procedure of the Senate, which provides that the Government must make a statement followed by debate in the Senate where, on its proposal, the President of the Republic decides "to consult the electorate in an overseas territorial unit on a change to the institutional scheme provided for by... the final paragraph of article 73 of the Constitution" is accordingly constitutional.

It follows that the provisions of the new Rule 69 bis of the Rules of Procedure of the Senate, which spell out the detailed rules for qui examining parliamentary motions on the basis of article 72-4 of the Constitution, must be interpreted as applying also to motions based on the final paragraph of article 73 of the Constitution, proposing that the President of the Republic consult the electorate in an overseas territorial unit on a question concerning its organisation, its powers or its legislative procedures. Qualified interpretation.
(2004-495 DC, 18 May 2004, paras 1 to 3, p. 96)

Changeover from the scheme of article 73 to article 74 (article 72-4)

The new Rule 39 of the Rules of Procedure of the Senate, which provides that the Government must make a statement followed by debate in the Senate where, on its proposal, the President of the Republic decides "to consult the electorate in an overseas territorial unit on a change to the institutional scheme provided for by the first paragraph of article 72-4 of the Constitution" is constitutional.

The new Rule 69 bis of the Rules of Procedure of the Senate, which spells out the detailed rules for qui examining parliamentary motions on the basis of article 72-4 of the Constitution, proposing that the President of the Republic consult the electorate in an overseas territorial unit on a question concerning its organisation, its powers or its legislative procedures is likewise constitutional.
(2004-495 DC, 18 May 2004, paras 1 to 3, p. 96)

Overseas territorial units governed by article 74

Common rules

Principle of legislative speciality (third paragraph of article 74)

Section 7 of the Institutional Act on the autonomous status of French Polynesia establishes the principle that "in matters that are within the powers of central government, provisions of statutes and regulations shall be applicable in French Polynesia if they expressly so provide". It enumerates the legislative provisions and regulations which, by way of exception from this principle, are automatically applicable in French Polynesia. But the enumeration cannot be interpreted as excluding other instruments which, by reason of the subject-matter, are necessarily to be valid throughout the territory of the Republic. Qualified interpretation.
(2004-490 DC, 12 February 2004, para 18, p. 41)

Shared powers (fourth paragraph of article 74)

Section 13 of the Institutional Act on the autonomous status of French Polynesia provides: "The authorities of French Polynesia shall have power to act in all matters not reserved for

central government by section 14, subject to the powers conferred on or exercised by the communes under this Institutional Act", but, as section 43 of the same Institutional Act makes clear, this is without prejudice to the powers reserved for the communes by existing statutes and regulations. Qualified interpretation.
(2004-490 DC, 12 February 2004, para 24, p. 41)

Section 14(4°) of the Institutional Act on the autonomous status of French Polynesia exempts from the powers of central government "hydrocarbons in liquid and gas form", but that is without prejudice to the prerogatives of central government in matters of security and defence, as provided by section 27(3°) of the Institutional Act.
(2004-490 DC, 12 February 2004, para 25, p. 41)

Section 15 of the Institutional Act on the autonomous status of French Polynesia empowers French Polynesia to "establish representations to any state or to one of its territorial entities or a territory recognised by the French Republic or to any international organisation of which France is a member or to any international organisation in the Pacific", but this power, not hitherto enjoyed by French Polynesia, cannot mean that such representations have diplomatic status, as that would encroach on a matter reserved exclusively for central government. Qualified interpretation.
(2004-490 DC, 12 February 2004, para 27, p. 41)

Section 16 of the Institutional Act on the autonomous status of French Polynesia empowers the President of French Polynesia to negotiate and sign instruments described as "administrative arrangements" in compliance with international agreements with the administrative authorities of any state or territory in the Pacific to promote the economic, social and cultural development of French Polynesia. This covers agreements of limited or technical scope made necessary by the implementation of other international agreements. This section, which confirms powers already conferred in French Polynesia by section 41 of the Institutional Act of 12 April 1996, subjects the negotiation, signature, ratification and approval of such agreements to the rules of procedure laid down by section 39 of the Institutional Act or by the constitutional provisions recited earlier in the section. It is accordingly not unconstitutional.
(2004-490 DC, 12 February 2004, para 28, p. 41)

The powers over criminal law conferred on French Polynesia by sections 20, 21 and 22 of the Institutional Act on the autonomous status of French Polynesia relate, with the exception administrative penalties, to matters whose transfer is prohibited by the fourth paragraph of article 74 where the powers were not already exercised by the overseas territorial unit. In the present case, they were already exercised by French Polynesia under sections 31, 62 and 63 of the Institutional Act of 12 April 1996. They do not affect the essential conditions for the exercise of public freedoms, given the reference to the limits set by comparable legislation applicable in metropolitan France and, as regards the provisions determining terms of imprisonment, the prior approval of such provisions by the legislature. These sections accordingly do not violate equality before the criminal law and are constitutional.
(2004-490 DC, 12 February 2004, paras 36 to 39, p. 41)

Section 30 of the Institutional Act on the autonomous status of French Polynesia empowers French Polynesia to "acquire holdings in the capital of private-sector companies managing a public or general interest service" and to "acquire holdings in the capital of commercial companies on general interest grounds". The holdings must be authorised by the Council of Ministers, under section 91(24°), within the limit of the budgetary allocations voted by the Assembly of French Polynesia. It is also provided that they "will be covered by an annual report annexed to the administrative accounts of French Polynesia examined each year". Apart from the challenge procedures available under the ordinary law, the Assembly of French Polynesia will be able to verify the existence of the general interest ground for acquiring the holding and its effects on concurrence. Section 30 is accordingly not unconstitutional.
(2004-490 DC, 12 February 2004, para 41, p. 41)

The twelfth paragraph (11°) of section 90 of the Institutional Act provides that the Council of Ministers of French Polynesia may lay down rules applicable to the security of traffic "in inland and territorial waters...".

Under the combined provisions of the fourth paragraph of article 73 and the fourth paragraph of article 74 of the Constitution, the transfer of powers from central government to overseas territorial units may not concern "public security and public order", unless they already exercised such powers. Sections 5, 6 (6°) and 27 (11°) of the Institutional Act of 12

April 1996 confers powers on the authorities of French Polynesia in matters of safety of traffic and navigation only in inland waters.

The words "and territorial" in the twelfth paragraph (11°) of section 90 are accordingly unconstitutional.
(2004-490 DC, 12 February 2004, para 77, p. 41)

The fourteenth paragraph (13°) of section 90 of the Institutional Act provides that the Council of Ministers of French Polynesia may lay down rules applicable to "the material conditions for operating registers of births, marriages and deaths and providing public access to them".

These conditions concern the status and capacity of persons, which are among the matters which under the combined provisions of the fourth paragraph of article 73 and the fourth paragraph of article 74 of the Constitution cannot be transferred from central government to overseas territorial units.

It was legitimate for the Institutional Act to provide for the participation of French Polynesia in keeping registers of births, marriages and deaths and providing public access to them on the basis of the penultimate paragraph of article 74 of the Constitution, but only subject to review by central government, which is not provided for here.

The fourteenth paragraph (13°) of section 90 is accordingly unconstitutional.
(2004-490 DC, 12 February 2004, para 78, p. 41)

Consultation procedure (sixth paragraph of article 74)

The standing commission may issue opinions on government or private-members'bills introducing, amending or repealing provisions specific to French Polynesia when the Assembly of French Polynesia is not in session, but only if the commission has been empowered so to act by the Assembly and the relevant instruments concern only such questions as are reserved by the Constitution for the Institutional Act on the status of the territory.
(2004-490 DC, 12 February 2004, para 19, p. 41)

Section 9 of the Institutional Act on the autonomous status of French Polynesia provides that "consultations... shall take place at the latest before the adoption of the bill at first reading in the first Assembly in which it is presented", but this is subject to compliance with article 39 of the Constitution as regards Government bills which from the outset contain provisions relating to the specific organisation of French Polynesia. In such cases the opinions must have been given implicitly or explicitly before the Council of State gives its opinion.
(2004-490 DC, 12 February 2004, para 20, p. 41)

The nature of the institutional bill presented under the third paragraph of article 72-2 of the Constitution, relating to the financial autonomy of territorial units, was such that it was not necessary to seek the opinion of the overseas units to which article 74 of the Constitution applies.
(2004-500 DC, 29 July 2004, para 2, p. 116)

Special rules for autonomous territorial units

Under article 74 of the Constitution, the following are all institutional matters: the conditions in which laws and regulations are applicable in French Polynesia, the powers of that territorial unit, the powers of its institutions and the rules governing their organisation and operation, the rules governing the election of its decision-making Assembly, the conditions for the consultation of its institutions on government and private-members'bills, draft ordinances and decrees containing provisions of specific concern to the unit, and the ratification or approval of international agreements in matters within its powers, the specific judicial review by the Council of State of certain categories of acts of the decision-making Assembly, the conditions in which the decision-making Assembly may amend a statute after the entry into force of the autonomous status of French Polynesia in matters within its powers, measures justified by local needs for the benefit of its population as regards employment, the exercise of occupations and protection of the land, and the conditions in which the territorial unit may, subject to central government review, participate in the exercise of powers retained by central government.

Provisions that are inseverable from those referred to above which, in relation to the operation of the institutions of French Polynesia, lay down rules determining their decision-making

procedures and the manner in which the central government supervises these institutions are also institutional.

The other aspects of the specific organisation of French Polynesia are out of place in an institutional act by virtue of article 74 of the Constitution.
(2004-490 DC, 12 February 2004, paras 10 to 12, p. 41)

Principle of autonomy of French Polynesia (seventh paragraph of article 74)

The designation as "overseas country" has no legal effect. It is accordingly not unconstitutional.
(2004-490 DC, 12 February 2004, para 13, p. 41)

French Polynesia is an integral part of the French Republic.
(2004-3389/3400, 25 November 2004, Senate, French nationals residing abroad, para 4, p. 189)

Instruments subject to specific judicial review (eighth paragraph of article 74)

The President of French Polynesia is responsible for directing operation of the Government, "promulgating" the instruments provided for by section 140 of the Institutional Act and known as "statutes of the country", signing instruments discussed in the Council of Ministers and giving effect to the deliberations of the Assembly of French Polynesia and its standing commission.

The distinction formally established by the Institutional Act between the instruments provided for by section 140 known as "statutes of the country" and "deliberations" does not have the effect of depriving "statutes of the country" of their status of administrative instruments. Like the other instruments adopted by the Assembly of French Polynesia, they are the result of deliberations in that Assembly. They must comply with the general principles of law and the international commitments applicable in French Polynesia.

The promulgation of "statutes of the country" must be interpreted as meaning the operation whereby, by placing his signature, the President of French Polynesia certifies that they are enforceable.
(2004-490 DC, 12 February 2004, paras 75 and 90, p. 41)

There are no constitutional principles or rules requiring the trial court to be in all cases the court ruling on the judicial review. Section 179 of the Institutional Act on the autonomous status of French Polynesia empowers the Council of State, acting on a question referred for a preliminary ruling by a trial court, to rule by way of exception on the legality of "statutes of the country". This procedure triggers the eighth paragraph of article 74 of the Constitution, whereby such acts are subject to judicial review.
(2004-490 DC, 12 February 2004, para 112, p. 41)

Procedure for downgrading by the Constitutional Council (ninth paragraph of article 74)

Section 12 of the Institutional Act on the autonomous status of French Polynesia defining the procedure whereby the Constitutional Council confirms that a statute has been enacted in matters within the powers of French Polynesia after the entry into force of the status is constitutional.
(2004-490 DC, 12 February 2004, para 22, p. 41)

Measures justified by local needs in favour of the population (tenth paragraph of article 74)

The effect of article 1, the first paragraph of article 72-3 and the tenth paragraph of article 74 of the Constitution is that people for whom measures justified by local needs can be taken in matters of access to employment, rights of establishment for occupational purposes and protection of landed assets can only be defined as combining persons providing evidence of an adequate period of residence in the relevant overseas territorial unit.
(2004-490 DC, 12 February 2004, paras 30 and 31, p. 41)

Section 18 of the Institutional Act on the autonomous status of French Polynesia determines the conditions to be met if French Polynesia envisages taking measures to promote access to an occupation, whether in an employed or a self-employed capacity, "for the benefit of persons

providing evidence of a sufficient period of marriage, cohabitation or civil solidarity pact with a person" providing evidence of such a period of residence. The section provides in particular that "the measures taken under this section must, for each type of occupational activity and each sector of activity, be justified by objective criteria directly related to the needs for support or promotion of local employment". It is accordingly not unconstitutional.
(2004-490 DC, 12 February 2004, para 32, p. 41)

The first paragraph of section 19 of the Institutional Act on the autonomous status of French Polynesia gives French Polynesia the possibility of establishing a scheme of *inter vivos* declaration of transfers of real estate, except for donations in the direct or collateral line up to the fourth degree. The second paragraph further provides for a right of pre-emption that can be exercised by the Council of Ministers of French Polynesia within two months following the declaration, "with a view to preserving land ownership for the cultural heritage of the population of French Polynesia and its identity, and to safeguard or highlight areas of natural beauty". The third to ninth paragraphs exempt transfers to certain persons from these provisions.

Although it was legitimate for section 19 of the Institutional Act on the autonomous status of French Polynesia to exclude from the declaration procedure transfers of ownership to persons "providing evidence of a sufficient period of residence in French Polynesia" or "providing evidence of a sufficient period of marriage, cohabitation or civil solidarity pact with a person" providing evidence of such a period of residence, but it was not legitimate for it, without violating the concept of population within the meaning of articles 72-3 and 74 of the Constitution, to extend the exclusion to "persons having French nationality" "born in French Polynesia" or "one of whose parents was born in French Polynesia". The fourth, sixth and seventh paragraphs of section 19 of the Institutional Act are according unconstitutional.
(2004-490 DC, 12 February 2004, paras 33 to 35, p. 41)

Participation in central government powers (eleventh paragraph of article 74)

Under the eleventh paragraph of article 74 of the Constitution, article 16 of the 1789 Declaration and articles 3, 21 and 34 of the Constitution, the possibility for an overseas territorial unit enjoying autonomous status to enact rules in matters which, by virtue of constitutional or institutional provisions, remain reserved for central government can only be given by means of prior agreement from the central government authority which in normal circumstances exercises the relevant powers. In the absence of such prior agreement, the rules enacted by the territorial unit may remain valid until the central government authority opposes them in the exercise of its review function.
(2004-490 DC, 12 February 2004, paras 42 to 45, p. 41)

Section 32(I) of the Institutional Act on the autonomous status of French Polynesia would allow the Assembly of French Polynesia to enact rules in matters reserved for central government without obtaining the prior authorisation of Parliament. The adoption of a mere decree cannot empower the territorial unit to amend, for a period of up to eighteen months, provisions that remain reserved for central government and most of which affect the sovereignty of the state or the exercise of public freedoms. The words "within eighteen months of their signing" in Section 32(I) of the Institutional Act must accordingly be declared unconstitutional.

The remainder of the final paragraph of section 32(I) of the Institutional Act on the autonomous status of French Polynesia, whereby "the decrees mentioned in the second paragraph of section 32(I) shall lapse if they have not been ratified by statute" must be interpreted as prohibiting the entry into force of instruments known as "statutes of the country" in matters within the legislative powers of central government, as long as the decree approving them in whole or in pat have not been ratified by Parliament. Qualified interpretation.
(2004-490 DC, 12 February 2004, paras 46 to 49, p. 41)

Section 32(II) of the Institutional Act on the autonomous status of French Polynesia lays down the procedure for adoption of orders of the Council of Ministers of French Polynesia in the matters reserved for regulations mentioned in section 31 that are within the powers of central

government. It makes the entry into force of these orders subject to the prior adoption of an approval decree. It is accordingly constitutional.
(2004-490 DC, 12 February 2004, para 50, p. 41)

Section 33 of the Institutional Act on the autonomous status of French Polynesia envisages a situation in which the government of French Polynesia might have the power to issue residence cards for foreign nationals. It provides that in such cases the High Commissioner of the Republic will have the power to oppose their issue. This provision must be interpreted in the light of section 32(IV), which provides in general terms that individual decisions taken in the context of French Polynesia's participation in the exercise of central government powers is subject to hierarchical review by the High Commissioner of the Republic. Such hierarchical review would apply both the issue of a residence card and to refusals to issue one. Qualified interpretation.
(2004-490 DC, 12 February 2004, para 51, p. 41)

The first paragraph of section 35 of the Institutional Act on the autonomous status of French Polynesia provides that the instruments provided for by section 140 and known as "statutes of the country" can contain provisions allowing duly empowered personnel of French Polynesia operating under oath to detect and establish offences against such statutes, but only "subject to the same limits and conditions" as are determined by comparable legislation applicable to the relevant matters in metropolitan France, and in particular subject to judicial review. Given this reference, these provisions do not affect the essential conditions for the exercise of public freedoms and reconcile the obligation to reserve criminal procedure for central government as required by articles 73 and 74 of the Constitution with the need to give French Polynesia the power to enact such rules of criminal procedure as are the necessary adjunct of its general powers.
(2004-490 DC, 12 February 2004, para 52, p. 41)

Sections 34, 36 and 37 of the Institutional Act on the autonomous status of French Polynesia, which allow French Polynesia to share in the exercise of powers that remain reserved for central government, provide in effective and precise terms for central government review.
(2004-490 DC, 12 February 2004, paras 53 to 56, p. 41)

It was legitimate for the legislature, without violating either the exercise of national sovereignty or the prerogatives of central government, to authorise the President of French Polynesia to negotiate and sign agreements. The President of French Polynesia must have received from the authorities of the Republic the requisite powers to negotiate an agreement in matters reserved for central government or have informed such authorities, which may object, of his intention of negotiating an agreement in matters reserved for French Polynesia. The signing of an agreement, whether it concern matters reserved for central government or for French Polynesia, must be expressly authorised by the authorities of the Republic. Moreover, such agreements remain subject to the procedures provided for by articles 52 and 53 of the Constitution. Sections 38 to 42 are accordingly constitutional.
(2004-490 DC, 12 February 2004, para 58, p. 41)

It was legitimate for the Institutional Act to provide for the participation of French Polynesia in keeping registers of births, marriages and deaths and providing public access to them on the basis of the penultimate paragraph of article 74 of the Constitution, but only subject to review by central government, which is not provided for here. The fourteenth paragraph (13°) of section 90 is accordingly unconstitutional.
(2004-490 DC, 12 February 2004, para 78, p. 41)

Other rules (twelfth paragraph of article 74)

It was legitimate for the legislature, given the role of the Assembly of French Polynesia within the institutions of that overseas territorial unit enjoying autonomous status, to provide that disputes concerning certain forms of instrument would be within the direct review powers of the Council of State. Such instruments are cognate with the instruments provided for by section 140 and known as "statutes of the country", which are subject to the originating and appellate jurisdiction of the Council of State. Moreover, the relevant provisions merely draw the necessary consequences of provisions in the Institutional Act on the autonomous status of French Polynesia.
(2004-491 DC, 12 February 2004, paras 2, 3, 5 and 6, p. 60)

Section 29 of the Act to amplify the autonomous status of French Polynesia, relating to casinos and gambling, does not transfer powers in matters of criminal law to French Polynesia contrary to the combined provisions of the fourth paragraph of article 73 and the fourth paragraph of article 74 of the Constitution. Section 28 of the Institutional Act of 12 April 1996 already empowers the government of French Polynesia to authorise the opening of clubs and casinos. And section 24 of the Institutional Act on the status of French Polynesia, which has neither the object nor the effect of extending the powers of French Polynesia in matters of criminal law, confers on the Assembly the power to lay down rules applicable to casinos and gambling clubs, lotteries, raffles and bets only subject to the rules concerning review and penalties laid down by central government.
(2004-491 DC, 12 February 2004, paras 8, 12 to 14, p. 60)

TRANSITIONAL PROVISIONS RELATING TO NEW CALEDONIA (article 77)

Institutions of New Caledonia

Provincial assemblies

By decisions 99-409 DC and 99-410 DC of 15 March 1999, the Constitutional Council held that the provincial assemblies are among the institutions of New Caledonia and the rules governing their organisation and operation are to be determined by the Institutional Act provided for article 77 of the Constitution is valid in relation to the Institutional Act enacted under the third paragraph of article 72-2 of the Constitution relating to the financial autonomy of territorial units. It follows that, while the provinces of New Caledonia are territorial units of the Republic, they are none the less governed by Title XIII of the Constitution. Article 72-2 of the Constitution is accordingly not fully applicable to them.

It was legitimate for the institutional legislature, empowered to act by article 77 of the Constitution, to extend to the institutions of New Caledonia the provisions of Title XII applicable to all the other territorial units of the Republic, but only subject to the dual condition that the extension is not contrary to the broad lines of the agreement signed at Nouméa on 5 May 1998, on which Title XIII of the Constitution confers constitutional status, and that it receive the prior opinion of the deliberative assembly for New Caledonia as required by article 77 of the Constitution. There was no such consultation. The words "the provinces of New Caledonia," in section LO 1114-1(3°) of the General Code of Territorial Units are accordingly unconstitutional.
(2004-500 DC, 29 July 2004, paras 6 and 7, p. 116)

TREATIES AND INTERNATIONAL AGREEMENTS – INTERNATIONAL LAW

INTRODUCTION OF TREATIES AND AGREEMENTS INTO DOMESTIC LAW

Identification of a treaty or agreement

Agreements that may be subject to constitutional review

It is clear from the provisions of the Treaty referred to the Constitutional Council, entitled "Treaty establishing a Constitution for Europe", and in particular the provisions relating to its entry into force, revision and the possibility of denouncing it, that it is still an international

treaty signed by the states that signed the Treaty establishing the European Community and the Treaty on European Union. In particular, there are no constitutional observations to be made on the title of the Treaty. It is clear from article I-5, relating to relations between the Union and the Member States, that there is no impact on the existence of the French Constitution and its place at the apex of the domestic legal order.
(2004-505 DC, 19 November 2004, paras 9 and 10, p. 173)

Reference to Constitutional Council

Parameters for constitutional review

By the Preamble to the 1958 Constitution, the French people solemnly proclaimed their "attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946." Article 3 of the Declaration of Human and Civic Rights states that "The source of all sovereignty lies essentially in the Nation". The first paragraph of article 3 of the 1958 Constitution provides that "National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum."

The fourteenth paragraph of the Preamble to the 1946 Constitution provides that the French Republic "shall conform to the rules of public international law", and the fifteenth paragraph states that, "Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace".

Article 53 of the 1958 Constitution, like article 27 of the 1946 Constitution, refers to the existence of "treaties or agreements relating to international organisation", which may be ratified or approved by the President of the Republic only by virtue of an Act of Parliament.

The French Republic participates in the European Communities and the European Union on the basis of Title XV of the Constitution. In particular, article 88-1 provides: "The French Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common."

These constitutional provisions enable France to participate in the creation and development of a permanent European organisation having legal personality and enjoying decision-making powers as a result of transfers of powers by the Member States. But where the commitments entered into to that end contain a clause contrary to the Constitution, jeopardise the rights and freedoms secured by the Constitution or jeopardise the essential conditions for the exercise of national sovereignty, the authorisation to ratify them requires a constitutional revision.
(2004-505 DC, 19 November 2004, paras 1 to 8, p. 173)

Need for revision of the Constitution

Transfer of powers

A constitutional revision is required for the clauses of the Treaty establishing a Constitution for Europe which transfer to the European Union powers affecting the essential conditions for the exercise of national sovereignty in matters or in accordance with procedures other than those provided for by article 88-2 of the Constitution as amended at the time of the constitutional revisions of 25 June 1992, 25 January 1999 and 25 March 2003. Such is the case of provisions of the Treaty which, notwithstanding the principle of subsidiarity, transfer to the European Union and bring within the "ordinary legislative procedure", whereby European laws and framework laws are to be adopted jointly, on a proposal from the Commission alone, by the Council, acting by a qualified majority, and the European Parliament, powers inherent in the exercise of national sovereignty, in particular in relation to border controls, judicial cooperation in civil matters and judicial cooperation in criminal matters.
(2004-505 DC, 19 November 2004, paras 23 to 27, p. 173)

A constitutional revision is required for the clauses of the Treaty establishing a Constitution for Europe which, notwithstanding the principle of subsidiarity, transfer to the European Union powers affecting the essential conditions for the exercise of national sovereignty in matters or in accordance with procedures other than those provided for by article 88-2 of the Constitution as amended at the time of the constitutional revisions of 25 June 1992, 25 January 1999 and 25 March 2003. Such is the case, given the scope of the provision for the exercise national sovereignty, of the article relating to the establishment of a European Public Prosecutor, empowered to prosecute the perpetrators of offences affecting the Union's financial interests financiers and to conduct proceedings in the French courts to that end.
(2004-505 DC, 19 November 2004, paras 23 to 25 and 28, p. 173)

Changeover to qualified majority voting

A constitutional revision is required for the clauses of the Treaty establishing a Constitution for Europe which transfer to the European Union powers affecting the essential conditions for the exercise of national sovereignty in matters or in accordance with procedures other than those provided for by article 88-2 of the Constitution as amended at the time of the constitutional revisions of 25 June 1992, 25 January 1999 and 25 March 2003. Such is the case of any provision of the Treaty which, notwithstanding the principle of subsidiarity, in a matter inherent in the exercise of national sovereignty but also covered by powers enjoyed by the Union or the Community, amends the applicable decision-making rules by providing for the qualified majority rule in place of the unanimity in the Council, thus depriving France of the ability to block them. Such is the case in particular, in relation to judicial cooperation in criminal matters, of Eurojust, Europol and Union actions or positions decided on the basis of a proposal from the EU Minister for Foreign Affairs.
(2004-505 DC, 19 November 2004, paras 23 to 25, 29 and 30, p. 173)

Decision-making role of European Parliament

A constitutional revision is required for the clauses of the Treaty establishing a Constitution for Europe which transfer to the European Union powers affecting the essential conditions for the exercise of national sovereignty in matters or in accordance with procedures other than those provided for by article 88-2 of the Constitution as amended at the time of the constitutional revisions of 25 June 1992, 25 January 1999 and 25 March 2003. Such is the case of any provision of the Treaty which, notwithstanding the principle of subsidiarity, in a matter inherent in the exercise of national sovereignty but also covered by powers enjoyed by the Union or the Community, amends the applicable decision-making rules by providing for a decision-making function for the European Parliament, which is not an emanation of national sovereignty. Such is the case in particular of the measures necessary for the use of the euro and the introduction of enhanced cooperation in the Union.
(2004-505 DC, 19 November 2004, paras 23 to 25, 29 and 31, p. 173)

Prerogatives of national parliaments

The question must be considered whether the prerogatives enjoyed by national parliaments under the Treaty referred to the Constitutional Council, which provide for more active involvement in European Union affairs, can be exercised under the current provisions of the Constitution.

The power conferred on the French Parliament to oppose Treaty amendments in accordance with the simplified procedure of article IV-444, requires revision of the Constitution if that prerogative is to be exercised. The same applies to the power conferred on the French Parliament, following the respective procedures of each of its two Houses, to issue a reasoned opinion or bring an action in the Court of Justice in reviewing compliance with the principle of subsidiarity.
(2004-505 DC, 19 November 2004, paras 37 to 41, p. 173)

Power of initiative

A constitutional revision is required for the clauses of the Treaty establishing a Constitution for Europe which transfer to the European Union powers affecting the essential conditions for the

exercise of national sovereignty in matters or in accordance with procedures other than those provided for by article 88-2 of the Constitution as amended at the time of the constitutional revisions of 25 June 1992, 25 January 1999 and 25 March 2003. Such is the case of any provision of the Treaty which, notwithstanding the principle of subsidiarity, in a matter inherent in the exercise of national sovereignty but also covered by powers enjoyed by the Union or the Community, amends the applicable decision-making rules by depriving France of all right of initiative, for example by replacing the individual right of initiative enjoyed by each of the Member States under the earlier treaties by a joint initiative of a quarter of the Member States for a draft common European act in matters relating to the area of freedom, security and justice (Eurojust, judicial cooperation).
(2004-505 DC, 19 November 2004, paras 23 to 25, 29 and 32, p. 173)

***Passerelles* clauses**

A constitutional revision is required for the clauses of the Treaty establishing a Constitution for Europe which transfer to the European Union powers affecting the essential conditions for the exercise of national sovereignty in matters or in accordance with procedures other than those provided for by article 88-2 of the Constitution as amended at the time of the constitutional revisions of 25 June 1992, 25 January 1999 and 25 March 2003. Such is the case of any treaty provision, termed a "*passerelle* clause" by the negotiators, which, notwithstanding the principle of subsidiarity, in a matter inherent in the exercise of national sovereignty, enables the unanimity rule in the European Council or the Council to be replaced by majority voting. Such amendments will not, when the time comes, require any act of national ratification or approval such as to permit constitutional review on the basis of article 54 or the second paragraph of article 61 of the Constitution. Such is the case of *passerelle* clauses provided for in respect of measures relating to family law that have a transnational impact and for minimum rules relating to criminal procedure and the definition and repression of particularly serious criminal offences with a cross-border dimension. Such is the case also of the general *passerelle* clause enabling decisions relating to the common foreign and security policy, the scope of which is no longer limited by the Treaty, to be taken by the Council, acting by a qualified majority if the European Council unanimously so decides without national ratification.
(2004-505 DC, 19 November 2004, paras 23 to 25, 33 and 34, p. 173)

No need for revision of the Constitution

Primacy

Article 88-1 of the Constitution provides: "The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common." The constituent authority thereby confirmed the existence of a Community legal order that is integrated in the domestic legal order and distinct from the international legal order.

Article I-1 of the Treaty provides: "Reflecting the will of the citizens and states of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it."

Article I-5 requires the Union to respect, the Member States national identity "inherent in their fundamental structures, political and constitutional".

Article I-6 provides: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States". As a result of a declaration annexed to the Treaty, this article does not confer on the primacy principle a greater scape that enjoyed hitherto.

Article I-1 of the Treaty replaces the organisations established by the earlier Treaties by a single organisation, the European Union, enjoying legal personality under article I-7, but it is clear from the general scheme of the Treaty, and in particular from articles I-5 and I-6, read together, that it changes neither the nature of the European Union nor the scope of the principle of the

primacy of Union law that flows, as held by the Constitutional Council in its decisions of 10 June and 1 and 29 July 2004, from article 88-1 of the Constitution. Article I-6 of the Treaty referred to the Constitutional Council, providing that "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States", requires no revision of the Constitution.
(2004-505 DC, 19 November 2004, paras 11 to 13, p. 173)

Charter of Fundamental Rights

The Charter does not require revision of the Constitution either because of the content of its articles or because of its effects on the essential conditions for the exercise of national sovereignty.

The Charter is limited in scope. Under article II-111 of the Treaty establishing a Constitution for Europe, and with the exception of articles II-101 to II-104, which concern only "the institutions, bodies, offices and agencies of the Union", the Charter is addressed to the Member States "when they are implementing Union law" and "only" then. It has no impact on the powers of the Union. Under article II-112(5), in addition to the "rights" that may be relied on directly in the courts, it contains "principles" which constitute objectives that may be invoked only against general instruments relating to their implementation.

Under article II-112(4), where this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, "those rights shall be interpreted in harmony with those traditions". Articles 1 to 3 of the Constitution, whereby no collective rights may be conferred on any group whatsoever, defined on the basis of a community of origin, culture, language or belief, are accordingly respected.

In particular, article II-70, relating to the right to manifest religion or belief in public, is not unconstitutional. In the "declarations" annexed to the Charter (which have the same legal status as the Treaty), the right referred to in article II-70 has the same meaning and scope as the right secured by article 9 of the European Convention on Human Rights. The European Court of Human Rights interprets that article in harmony with the constitutional tradition of each Member State. Noting the principle of secularity that is in several national constitutional traditions, it leaves the Member States extensive discretion to determine the most appropriate measures to reconcile religious freedom with the principle of secularity in accordance with their national traditions.

Nor is article II-107, relating to the right to legal action and to an impartial court, unconstitutional. The presidium explanations make clear that the publicity of court proceedings can be subject to the restrictions provided for by article 6 of the European Convention on Human Rights.

The same applies to Article II-110, relating to the "*Non bis in idem*" principle, which applies exclusively to the criminal law and not to administrative or disciplinary procedures. Moreover, the reference to the concept of identical offences rather than to identical facts leaves the French courts free, subject to the principle of the proportionality of penalties, to punish the crimes against the fundamental interests of the Nation to which Title One of Book IV of the Criminal Code applies, given the specific components of those offences and the specific interests at stake.

The general limitation clause in article II-112(1) provides: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." The presidium explanations state that the "general interests recognised by the Union" include the interests secured by article I-5, whereby the Union respects "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security".
(2004-505 DC, 19 November 2004, paras 14 to 22, p. 173)

Treaties not open to challenge once incorporated into domestic law

Application to Community secondary legislation

Article 88-1 of the Constitution reads: "The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common". The transposal of a Community directive accordingly meets a constitutional obligation that can only be excluded by a specific express provision to contrary effect in the Constitution. In the absence of such a provision, it is for the Community court alone, acting on a request for a preliminary ruling, to review compliance by a Community directive with the powers conferred by the Treaties and the fundamental rights secured by article 6 of the Treaty on European Union.

The pleas entered against legislative provisions that merely draw the necessary consequences of precise and unconditional provisions of a directive on which it is not for the Constitutional Council to pass judgment are accordingly inoperative.
(2004-496 DC, 10 June 2004, paras 7 and 9, p. 101)

Pleas challenging the same section which do not merely draw the necessary consequences of the unconditional and precise provisions of a Community directive are not inoperative.
(2004-497 DC, 1 July 2004, paras 18 to 20, p. 107)

Article 11 of the Declaration of 1789, relating to freedom of expression, is not a specific express provision of the Constitution, since that freedom is also secured by article 10 of the European Convention on Human Rights and Fundamental Freedoms as a general principle of Community law.

A plea alleging violation of the freedom of expression by legislative provisions that merely draw the necessary consequences of the unconditional and precise provisions of a Community directive on which it is not for the Constitutional Council to rule cannot therefore be validly presented in the Constitutional Council.
(2004-498 DC, 29 July 2004, paras 4 and 7, p. 122)

Likewise, a plea alleging violation of the right to respect for privacy and challenging provisions that merely draw the necessary consequences of the unconditional and precise provisions of a Community directive on which it is not for the Constitutional Council to rule cannot be validly presented in the Constitutional Council.
(2004-499 DC, 29 July 2004, paras 7 and 8, p. 126)

Predominance of treaties over statutes and administrative instruments

Treaties and the electoral courts

Given the role conferred on the Senate by article 24 of the Constitution, the rules governing membership of the electoral college laid down by sections L 279 and *seq.* of the Electoral Code cannot be regarded as incompatible with articles 25 and 26 of the International Covenant on Civil and Political Rights.
(2004-3384, 4 November 2004, Senate, Yvelines, para 6, p. 167)

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GLOSSARY

Clause passerelle : The Constitution for Europe provides for so-called "bridging" provisions (*clauses passerelles)* aimed at extending the scope of qualified-majority voting and the ordinary legislative procedure.

Interprétation neutralisante : Interpretation by the Constitutional Council that makes the law consistent with the Constitution.

Magistrats : Members of the judicial courts who mainly include those in charge of rendering justice (*magistrats du siège)*, those demanding it in the name of the state *(procureurs* or *substituts généraux* and *parquet*, state counsel) or those investigating criminal cases *(juges d'instruction*, investigating judges).

Magistrature : Body of *magistrats* practising in the scope of the Judicial authority.

Tribunal de grande instance : First degree judicial court within the jurisdiction of a C*our d'appel.*