ANALYTICAL SYNOPSIS 2010

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 16 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 referenda 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 House – **AN** (*Assemblée Nationale)* or **Senate –** department and constituency, **e.g. AN, Bouches-du-Rhône, 2nd Constituency.**

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;

QPC – Priority Preliminary rulings on the issue of constitutionality;

LP – Law of the land: 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 land) 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 Parliament;

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

Other abbreviations occasionally used are:

Ass. CE – Judgment delivered by the Council of State (*Conseil d'Etat*) in plenary sitting.

Cass – Judgment delivered by the Court of Cassation

ECJ – Judgment delivered 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 explained in the Glossary.

CONTENTS

CONSTITUTIONAL NORMS OF REFERENCE

DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN OF AUGUST 26th 1789

Article 2

Right to privacy

The liberty proclaimed by Article 2 of the Declaration implies the right to privacy.
(2010-25 QPC, September 16th 2010, para. 6 p. 220)

Right to property

The right to property is one of the rights of man enshrined by Articles 2 and 17 of the Declaration of 1789. In the absence of any deprivation of the right to property, Article 2 of the Declaration nevertheless provides that any restriction imposed on the exercising of said right must be justified on grounds of general interest and proportionate to the purpose it is sought to achieve.
(2010-60 QPC, November 12th 2010, para. 3, p. 321)

Article 4

Freedom of enterprise

Parliament is at liberty to impose restrictions on freedom of enterprise, which derives from Article 4 of the Declaration of the Rights of Man and the Citizen of 1789, when such restrictions are connected with constitutional requirements or justified on grounds of general interest, provided that such restrictions do not constitute any disproportionate infringement as regards the purpose it is sought to achieve
(2010-55 QPC, October 18th 2010, para. 4 p. 291)

Article 6

The Law as the expression of the general will

Normativity of the Law

Article 6 of the Declaration of 1789 proclaims: "The law is the expression of the general will". It derives from this Article as from all other norms of constitutional status pertaining to the purpose of the law that, subject to specific provisions set out by the Constitution, the purpose of the law is to lay down rules and hence is to be given normative scope.
(2010-605 DC, May 12th 2010, para. 28, p. 78)

Equality before the Law

Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims that the law "shall be the same for all, whether it protects or punishes". The principle of equality does not preclude Parliament from treating different situations in different ways, nor from departing from the principle of equality for reasons of general interest provided that, in each case, the

resulting different treatment is directly connected with the purpose sought to be achieved by the statute which introduces said different treatment
(2010-3 QPC, May 28th 2010, para. 3 p. 97)

The principle of equality before Criminal law, as deriving from Article 6 of the Declaration of the Rights of Man and the Citizen of 1789, does not preclude differentiating between acts of a different nature.
(2010-612 DC, August 5th 2010, para. 6 p. 198)

The principle of equality of treatment in the advancement of the career of public agents belonging to the same body derives from Article 6 of the Declaration of 1789
(2010-20/21 QPC, August 6th 2010, para. 20 p. 203)

Equality in matters of access to employment in the public service

The principle of equal access to employment in the public service derives from Article 6 of the Declaration of 1789
(2010-20/21 QPC, August 6th 2010, para. 7 p. 203)

Article 8

Necessity of punishments

Not applying the new criminal statute, which is of a more lenient nature, to offences committed under the previous statute means allowing the Judge to impose penalties provided for by said previous statute which, in the opinion of Parliament, are no longer necessary. Therefore, except when the previous harsher penalty is inherent in the rules which the new statute replaces, the principle of the necessity of punishments implies that the more lenient criminal statute be immediately applicable to offences committed before its coming into force and not having been the object of any *res judicata* decision.
(2010-74 QPC, December 3rd 2010, para. 3, p. 361)

Article 9 – Presumption of innocence and undue harshness

Presumption of innocence

Review of provisions pertaining to the National DNA database as regards compliance with the presumption of innocence guaranteed by Article 9 of the Declaration of 1789.
(2010-25 QPC, September 16th 2010, paras. 8 and 17, p. 220)

Undue harshness

It is the task of Parliament to reconcile on the one hand the need to prevent breaches of the peace and to seek out offenders, both of which are essential for the safeguard of rights and principles of constitutional value, with on the other hand the need to ensure the exercising of constitutionally guaranteed freedoms, which include the right to privacy, protected by Article 2 of the Declaration of 1789, respect for the presumption of innocence, the principle of the dignity of the human being, together with the freedom of the individual, which Article 66 of the Constitution places under the protection of the Judicial Authority.
(2010-25 QPC, September 16th 2010, para. 11, p. 220)

Article 11 – Free communication of ideas and opinions

Article 11 of the Declaration of 1789 proclaims: "The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may therefore speak, write

and publish freely, except in such cases of abuse of this freedom as shall be determined by law". Freedom of expression and communication is all the more precious since the exercising thereof is a condition of democracy and one of the guarantees of respect for other rights and freedoms. Any restrictions on the exercising of this freedom should be necessary, adapted and proportionate to the purpose it is sought to achieve.
(2010-3 QPC, May 28th 2010, para. 6, p. 97)

Article 13 – Public burden sharing

Equality before public burden sharing

Article 13 of the Declaration of the Rights of Man and the Citizen proclaims: "For the maintenance of the forces of law and order and administrative expenses a general tax is indispensable and shall be equally borne by all citizens in proportion to their ability to pay the same". Under Article 34 of the Constitution it is up to Parliament to determine, taking into account constitutional principles and the nature of each tax, to lay down the rules for appraising the ability of each citizen to pay taxes. In particular, to comply with the principle of equality, this appraisal must be based on objective and rational criteria in view of the purpose it is sought to achieve. This appraisal must not however lead to any clear infringement of the principle of equality before public burden sharing.
(2010-605 DC, May 12th 2010, para. 39 p. 78)

The principle of equality before public burden sharing and the protection of the right to property, which does not concern merely the property of private individuals but also the property of the State and other public entities, derive firstly from Article 6 and 13 of the Declaration of the Rights of Man and the Citizen of 1789 and secondly from Articles 2 and 17 thereof. These principles preclude the disposal or encumbering of the property of public bodies to the benefit of persons engaged in the furthering of private interests without the furnishing of appropriate consideration taking into account the true value of said property.
(2010-67/86 QPC, December 17th, para. 3 p. 403)

Objective of fighting tax evasion

The absence of any suspensive redress against the order authorizing the visit of agents from the Tax Administration is intended to ensure the implementation of the objective of constitutional status which is the fight against tax evasion.
(2010-19/27 QPC, July 30th 2010, para. 9, p. 190)

Article 155A of the General Tax Code which provides, in specified listed cases, for the taxation of payment for services supplied in France by a person who has his domicile or place of residence in said country, when such payment has been made, for the purpose of avoiding taxation, to a person having his domicile or place of residence abroad, is intended to ensure the implementation of the objective of constitutional status of fighting tax avoidance, which derives from the objective of fighting tax evasion.
(2010-70 QPC, November 26th 2010, para. 4, p. 340)

Article 14

Public contribution and the role of Parliament

The provisions of Article 14 of the Declaration of 1789 have been implemented by Article 34 of the Constitution and do not institute a right or freedom which may be raised during court proceedings in support of an application for a priority preliminary ruling on the issue of constitutionality on the basis of Article 61-1 of the Constitution.
(2010-5 QPC, June 18th 2010, para. 4, p. 114)

Article 17

The right to property is one of the rights of man enshrined by Articles 2 and 17 of the Declaration of 1789
(2010-60 QPC, November 12th 2010, para. 3, p. 321)

Combination of several provisions of the Declaration of 1789

Guarantees of the right to property (Articles 2 and 17)

The principle of equality before public burden sharing and the protection of the right to property, which does not concern merely the property of private individuals but also the property of the State and other public entities, derive firstly from Article 6 and 13 of the Declaration of the Rights of Man and the Citizen of 1789 and secondly from Articles 2 and 17 thereof. These principles preclude the disposal or encumbering of the property of public bodies to the benefit of persons engaged in the furthering of private interests without the furnishing of appropriate consideration taking into account the true value of said property.
(2010-67/86 QPC, December 17th, para. 3 p. 403)

PRINCIPLES AFFIRMED BY THE PREAMBLE TO THE CONSTITUTION OF 1946

Paragraph 1: Principle of safeguarding the dignity of the human being

The safeguarding of the human being against all forms of enslavement and degradation is one of these rights and constitutes a principle of constitutional status. It is therefore incumbent upon Parliament, competent under Article 34 of the Constitution to determine the rules governing criminal law and procedure, to lay down the conditions and manner of investigations and preliminary judicial inquiries with due respect for the dignity of the human being.
(2010-25 QPC, September 16th 2010, para. 7, p. 220)

Paragraph 11

Right to suitable means of existence, protection of health and material security

Right to social protection

When introducing a system of social insurance for occupational injuries and diseases, Act nº 56-2426 of October 30th 1946 implemented the requirements deriving from paragraph 11 of the Preamble to the Constitution of October 27th 1946
(2010-8 QPC, June 18th 2010, para. 11, p. 117)

Policy of national solidarity in favour of retired workers

The constitutional requirement deriving from paragraph 11 of the Preamble of 1946 implies the implementation of a policy of national solidarity in favour of retired workers. Parliament is at liberty, to comply with this requirement, to choose the manner it deems best suited to this purpose. In particular it is at liberty, when enacting statutes under the powers vested in it by Article 34 of the Constitutional, to amend previous statutes or repeal the same by replacing them by other provisions. It is also at liberty, to achieve or reconcile objectives of constitutional status, to determine new methods of which it is free to determine the appropriateness.

However the exercising of such powers must not result in depriving constitutional requirements of statutory guarantees.
(2010-617 DC, November 9th 2010, paras 7 and 8, p. 310)

Right to the protection of health

Under paragraph 11 of the Preamble of 1946, the Nation "shall guarantee to all, in particular to children, mothers and elderly workers, the protection of health, material security, rest and leisure". Parliament is at all times at liberty, when acting within its powers, to amend or repeal previous statutes, replacing them, if need be, by other provisions so long as, when exercising the powers vested in it, Parliament does not deprive constitutional requirements of statutory guarantees.
(2010-605 DC, May 12th 2010, para. 33, p. 78)

FUNDAMENTAL PRINCIPLES RECOGNIZED BY THE LAWS OF THE REPUBLIC

Principles retained

Guarantee of the independence of University Professors

The guarantee of the independence of Teachers-Researchers derives from a fundamental principle recognized by the laws of the Republic. If the principle of the independence of Teachers-Researchers implies that Professors and Senior Lecturers are associated with the choosing of their peers it does not require that all persons participating in the selection process be themselves Teachers-Researchers of the same rank as that of the position to be filled.
(2010-20/21 QPC, August 6th 2010, para. 6, p. 203)

Freedom of Association

Freedom of association is one of the fundamental principles recognized by the laws of the Republic and solemnly reaffirmed by the Preamble to the Constitution. Under the principle of freedom of association Associations may be constituted freely and may be publicized under the sole condition of a prior declaration to this effect. Thus, except for measures which may be taken with respect to certain specific categories of Associations, the setting up of Associations, even when they may seem to be void or have an unlawful object, cannot be subject to any prior intervention of administrative or judicial authorities as a prerequisite of validity.
(2010-3 QPC, May 28th 2010, para. 9 p. 97)

Principles not retained

So-called « general jurisdiction » clause of Territorial Communities

Section 48 of the Act of August 10th 1871 which specified that the General Council "shall deliberate on all objects of departmental interest which are referred to it, either by a recommendation of the Prefect or on the initiative of one of its members" was not aimed at and did not result in introducing a "general clause" vesting the Department with a general power to deal with any matter connected with the territory thereof. It thus could not have given rise to a fundamental principle recognized by the laws of the Republic guaranteeing such power.
(2010-618 DC, December 9th 2010, paras. 52 to 54, p. 367)

Others

There is no fundamental principle recognized by the laws of the Republic encompassing the three principles which, according to the parties making the referral for review, govern betting and gambling: "prohibition, exclusivity, exception".

It is not disputed that the Act of June 2nd 1891 designed to regulate the authorization and organization of horse racing prohibited betting on such races and that of April 18th 1924 amending section 2 of the Act of May 21st1836 prohibiting lotteries confirmed the principle of the prohibition of lotteries introduced by a statute of 1836. These statutes have however never been given the status of absolute rules but have constantly been accompanied by substantial exceptions and departures. In addition Parliament also introduced further departures from these rules by the Act of June 15th 1907 which regulated gambling in casinos and clubs in thermal, seaside and health resorts, and by section 136 of the Finance Act of May 31st 1933 authorizing the Government to set up the National Lottery.
(2010-605DC, May 12th 2010 paras. 5 to 7, p. 78)

CONSTITUTION OF OCTOBER 4th 1958

Preamble and Article 1

Principle whereby the law must promote parity (in political, professional and social matters) (Article 1 paragraph 2 – former Article 3 paragraph 5)

Parity in political matters

Neither Article 1 of the Constitution, allowing statute law to promote the equal access of women and men to political and elective office, nor Article 4 thereof, providing that political parties and groups shall contribute to the exercise of suffrage and contribute to the implementation of this objective of parity preclude statute law from providing for a modulation of the financial assistance granted to such parties or groups. However, to conform to the principle of equality, this modulation must comply with rational and objective criteria. The criteria retained by Parliament must not lead to failure to comply with the requirement that statutes shall guarantee the expression of diverse schools of thought and opinions.
(2010-618 DC, December 9th 2010, para. 61, p. 367)

Parity in professional or social matters

Section 7 of the Institutional Act on the Economic, Social and Environmental Council intended to promote the membership of women of said institution conforms to paragraph 2 of Article 1 of the Constitution whereby: "Statutes shall promote equal access by women and men to elective offices and positions of professional and social responsibility".
(2010-608 DC, June 24th 2010, para. 6, p. 124)

Title II – The President of the Republic

Article 13 – Power of appointment

Application of the consultation procedure provided for in the final paragraph of Article 13 of the Constitution for the appointment to posts and offices specified in the Schedule to the Institutional Act provided for by said paragraph.
(2010-609 DC, July 12th 2010, paras 2 to 5, p. 143)

It is the task of Parliament, and not of an Institutional Act, including when the members of the Constitutional Council, of the High Council of the Judiciary and the Defender of Rights are

involved, to appoint the relevant committees in each House to give an opinion on the recommendations for appointment made by the President of the Republic pursuant to paragraph 5 of Article 13 of the Constitution.
(2010-609 DC, July 12th 2010, paras 3 and 5, p. 143)

Title V – On relations between the Government and Parliament

Rules of constitutional status pertaining to legislative proceedings (Articles 42 to 45)

Monitoring of improper manners of proceeding.

The parties making the referral argue that sections of the statute reforming Territorial Communities have been adopted in an improper manner of proceeding which fails to comply firstly with the conditions laid down in Article 39 of the Constitution which require consultation with the Council of State, tabling in priority before the Senate of Bills dealing with the organization of Territorial Communities and the presentation of an impact study and secondly with the principles of clarity and accuracy of Parliamentary debate. Tabling by way of amendment provisions found elsewhere and under another form in another Bill is not *per se* an improper manner of proceeding once such provisions are connected with the Bill in which they are tabled.
(2010-618 DC, December 9th 2010, paras. 2,8 and 9, p. 367)

Work of the Joint Committee

The parties making the referral contend that a section was enacted contrary to the requirements laid down in Article 45 of the Constitution which require the Joint Committee to agree upon a common text based on provisions still under debate. In the case under review, the text passed by the Joint Committee shows that this section was duly agreed upon by said Committee. The Constitutional Council does not review the various stages of voting during meetings of the Joint Committee.
(2010-618 DC, December 9th 2010, paras. 2, 5 and 10, p. 367)

Role of the *Cour des comptes* (Audit Office) (Article 47-2, paragraph 1)

Review of an Institutional Act pertaining to the management of the social debt pursuant to paragraph 1 of Article 47-2 of the Constitution
(2010-616 DC, November 10th 2010, para. 1 p. 317)

Title VII – The Constitutional Council

A posteriori review of the constitutionality of statutes – Application for a priority preliminary ruling on the issue of constitutionality (Article 61-1)

Paragraph 1 of Article 61-1 of the Constitution provides: "When during proceedings before a Court of Law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, a referral may be made to the Constitutional Council by the Conseil d'Etat or the *Cour de cassation*, and the Constitutional Council shall give its ruling within a specified time". The argument of the failure by Parliament to exercise fully the powers vested in it may only be raised in support of an application for a priority preliminary ruling on the issue of constitutionality when a constitutionally guaranteed right or freedom is called into question.
(2010-5 QPC, June 18th 2010, para. 3, p. 114)

Title XI – The Economic, Social and Environmental Council

First application of the final paragraph of Article 69 of the Constitution whereby: " A referral may be made to the Economic, Social and Environmental Council in the manner determined by an Institutional Act. After examining said referral it shall inform the Government and Parliament of the action it recommends with respect to the matter in question".
(2010-608 DC, June 24th 2010, para. 3, p. 124)

Title XV – The European Communities and the European Union

Principle of participation of the Republic in the European Communities and the European Union. (Article 88-1)

Constitutional requirement of the transposition of Community Directives

In the absence of any calling into question of a rule or principle inherent in the constitutional identity of France, the Constitutional Council has no jurisdiction to review the conformity with constitutionally guaranteed rights and freedoms (Article 61-1 of the Constitution) of provisions which merely draw the necessary consequences from unqualified and precise provisions of a European Union Directive. In such a case, it is incumbent upon the European Union Judge, in the event of a request for a preliminary ruling, to review the compliance of said Directive with the fundamental rights guaranteed by Article 6 of the Treaty on European Union.
(2010-79 QPC, December 17th 2010, para. 3, p. 406)

OBJECTIVES OF CONSTITUTIONAL STATUS

Retained

Safeguarding public policy

In view of the purposes which it sought to achieve in the combat against the harmful consequences of illegal online betting and gambling by creating a legal opportunity to indulge in such pastimes under the supervision of the State, Parliament has enacted measures to ensure a reconciliation which is not patently disproportionate between the principle of the freedom of enterprise and the objective of constitutional status of the safeguarding of public policy. To this end, it has laid down the requirement that organising online gambling shall require prior approval. It has created an independent administrative body, the Online Gambling Regulatory Authority, in charge of granting official approval to new operators, enforcing compliance by the latter with their obligations and combating illegal operators. It has laid down measures designed to prevent addiction, protect vulnerable members of the public, combat money laundering and guarantee the authenticity of sporting matches and games. It has chosen not to open access to approved operators to games of chance. It has also regulated advertising in favour of legal gambling while imposing criminal penalties on those offering illegal gambling.
(2010-605 DC, May 12th 2010, para. 25, p. 78)

When enacting section 2 of Act n° 83-628 of July 12th 1983 as amended pertaining to gambling, Parliament intended to restrict the use of slot machines to events or premises which require prior approval and organise the control of the manufacturing, trade in and operation of such machines. In view of the purpose which it sought to achieve, Parliament has enacted measures to ensure a reconciliation which is not patently disproportionate between the principle of the freedom of enterprise and the objective of constitutional status of the safeguarding of public policy.
(2010-55 QPC, October 18th 2010, para. 6, p. 291)

Parliamentary debate expressly shows that the supervision of the organization of horse racing and betting on such races by the Act of June 2nd 1891 designed to regulate the authorization and operation of horse racing was introduced firstly to enhance the quality of horses and finance horse breeding and secondly to put an end to "abuses and scandals" connected with the excessive development of horse racing and combat addition to betting and gambling. In view of the purposes sought to be achieved, the challenged provisions are such as to ensure a reconciliation which is not patently disproportionate between the principle of the freedom of enterprise and the objective of constitutional status of the safeguarding of public policy.
(2010-73 QPC, December 3rd 2010, para. 13, p. 356)

Seeking out offenders

Although seeking out offenders is necessary to protect principles of constitutional status, this does not mean that French Courts should be recognized as having jurisdiction over crimes committed abroad and involving a foreign victim when the offender, a foreign National, is in France.
(2010-612 DC, August 5th 2010, para. 12, p. 198)

Diversity of schools of thought and opinions

The objective of constitutional status of the diversity of schools of thought and opinions, which applies in political life and the media, is inoperative as regards the constitutionality of a statutory provision pertaining to the representation of Family Associations vis-à-vis Public Authorities (cf in sporting matters decision nº 2004-507 DC, December 9th 2004, Journal officiel December 16th 2004, p. 21290, para. 24, Rec. nº 219)
(2010-3 QPC, May 28th 2010, para. 8, p. 97)

Fighting tax evasion

It is the task of an Institutional Act, when apportioning between the State and Communities governed by Article 74 of the Constitution the power to establish, calculate and collect taxes of all kinds, to provide for provisions contributing to the implementation of the objective of constitutional status of the fight against tax evasion which derives from Article 13 of the Declaration of the Rights of Man and the Citizen of 1789.
(2009-597 DC, January 21st 2010, para. 2, p. 47; 2009-598 DC, January 21st 2010,para. 2, p. 50)

The accredited management and tax certification centres have been set up to provide their members with technical assistance in keeping accounts and ensure better knowledge of non salaried income in order to implement the objective of constitutional status of fighting tax avoidance, which derives from the objective of constitutional status of fighting tax evasion.
(2010-16 QPC, July 23rd 2010, para. 6 p. 164)

Article 155A of the General Tax Code which provides, in specified listed cases, for the taxation of payment for services supplied in France by a person who has his domicile or place of residence in said country, when such payment has been made, for the purpose of avoiding taxation, to a person having his domicile or place of residence abroad, is intended to ensure the implementation of the objective of constitutional status of fighting tax avoidance, which derives from the objective of fighting tax evasion.
(2010-70 QPC, November 26th 2010, para. 4, p. 340)

OTHER CONSTITUTIONAL PRINCIPLES RESULTING FROM THE COMBINATION OF SEVERAL PROVISIONS

Principle of representation for the election of the National Assembly

These provisions of Articles 1, 3 and 24 of the Constitution show that the National Assembly, which is elected by direct universal suffrage, must be elected on an essentially demographic

basis providing for a distribution of the number of seats and the drawing of boundaries of constituencies which best comply with the principle of equality before suffrage. Although Parliament may take into account considerations of general interest which may affect the scope of this general rule, this may only be done to a limited extent.
(2010-602 DC, February 18th 2010, paras 12 and 13, p. 64)

Principle of normativity of the law

Article 6 of the Declaration of 1789 proclaims: "The law is the expression of the general will". It derives from this Article as well as from all other norms of constitutional status pertaining to the purpose of the law that, subject to specific provisions set out by the Constitution, the purpose of the law is to lay down rules and hence it is to be given normative scope.
(2010-605 DC, May 12th 2010, para. 28, p. 78)

NORMS OF REFERENCE NOT RETAINED AND ELEMENTS NOT TAKEN INTO ACCOUNT

Norms of reference not retained for reviewing the constitutionality of statutes.

Rules of Procedure of a House of Parliament

The Rules of Procedure of the Houses of Parliament are not in themselves of constitutional status and as such the alleged failure to comply with the provisions of Article 49 paragraph 13 of the Rules of Procedure of the National Assembly cannot *per se* render legislative proceedings unconstitutional.
(2010-602 DC, February 18th 2010, paras 5 and 6, p. 64)

INSTITUTIONAL NORMS

PROCEDURE FOR DRAFTING INSTITUTIONAL ACTS

Consultation procedure

Consultation of overseas Territorial Communities

In accordance with Article 74 of the Constitution and Article L.O 6213-3 of the General Code of Territorial Communities, the Institutional Bill pertaining to Saint-Barthélemy was deliberated upon by the Territorial Council of this Community before deliberation by the Senate, before which it was initially tabled.
(2009-597 DC, January 21st 2010, para. 1, p. 47; 2009-598 DC, January 21st 2010, para. 1 p. 50).

Parliamentary procedure

Institutional Act pertaining to the Senate

The Institutional Act extending the term of office of members of the High Council of the Judiciary was enacted in compliance with the rules of procedure provided for by the first three paragraphs of Article 46 of the Constitution. It thus does not pertain to the Senate.
(2010-606 DC, May 20th 2010, para. 1, p. 87)

The Institutional Act pertaining to the application of paragraph 5 of Article 13 of the Constitution does not pertain to the Senate. It could therefore not be passed at the final reading by the National Assembly without failure to comply with the provisions of paragraph 4 of Article 46 of the Constitution.
(2010-609 DC, July 12th 2010, para. 1 p. 143)

SCOPE OF INSTITUTIONAL ACTS

Institutional and other norms

Distinction Institutional Act/Ordinary Acts

Provisions coming under the scope of an Institutional Act

The forthcoming agreement between the State and the Community of Saint-Barthelémy designed to prevent double taxation and combat tax avoidance and evasion shall be approved by an Institutional Act since it affects tax powers transferred to this Community by the Institutional Act enacted pursuant to Article 74 of the Constitution. Furthermore, these provisions shall not aim at nor result in restricting the exercising of the powers vested in Institutional Acts by Article 74 of the Constitution, in particular in the event of said agreement not making it possible to combat tax avoidance efficiently.
(2009-597 DC, January 21st 2010, para. 5, p. 47)

Parliament is vested with the power, though an Institutional Act, to terminate the institutional status of Mayotte under Article 74 of the Constitution prior to its passage to a status coming under Article 73. Parliament shall be competent, though ordinary statutes, to enact legislation concerning Mayotte once the *Département* of Mayotte has come into being.
(2010-619 DC, December 2nd 2010, para. 4, p. 353)

Provisions of an ordinary statutory nature included in an Institutional Act- Downgrading

Section 3 of the Institutional Act pertaining to the application of Article 65 of the Constitution inserts into Institutional Act n° 94-100 of February 5th 1994 pertaining to the High Council of the Judiciary a section 5-2 which provides that, for the implementation of the procedure provided for in the final paragraph of Article 13 of the Constitution, the appointment of qualified persons shall be submitted "to the Standing committee of each House competent in matters of judicial organization". When referring to the relevant Standing committee of each House, the Institutional Act has laid down rules coming under the scope of ordinary statutory provisions".
(2010-611 DC, July 19th 2010, para. 6, p. 148)

The new wording of paragraph I of Article 3 of the Ordinance of January 24th 1996 which derives from section 3 of the Institutional Act pertaining to the management of the social debt modified the composition of the Board of Administration of the Caisse d'amortissement de la dette sociale (Social Security Debt Repayment Fund). By their contents these provisions fall outside the scope of the Institutional Act as defined by Article 34 and 47-1 of the Constitution. They are normal statutory provisions.
(2010-616 DC, November 10th 2010, para. 6, p. 317).

The final paragraph of section 3 of the Institutional Act pertaining to the Department of Mayotte, which increases from 19 to 23 the number of elected General Councillors, comes under the scope of normal statute law. Downgrading.
(2010-619 DC, December 2nd 2010, para. 5 p. 353)

Encroaching of ordinary statute law on fields reserved for Institutional Acts – No jurisdiction

Solely an Institutional Act may determine the contents of the Social Security Financing Act or that of the Schedules thereof.
(2010-620 DC, December 16th 2010, paras. 21 and 22, p. 394)

CONSTITUTIONAL FOUNDATIONS OF INSTITUTIONAL ACTS

Article 13 – Appointment to posts or offices

Institutional Act pertaining to the application of paragraph 5 of Article 13 of the Constitution
(2010-609 DC, July 12th 2010, para. 2, p. 143).

Article 27 – Voting rights of Members of Parliament

Institutional Act pertaining to the application of paragraph 5 of Article 13 of the Constitution
(2010-609 DC, July 12th 2010, para. 6, p. 143).

Article 34 – Preserve of Statute law

Institutional Act pertaining to the management of the social debt
(2010-616 DC, November 10thth 2010, para. 1, p. 317).

Article 47-1 – Social Security Financing Acts

Institutional Act pertaining to the management of the social debt
(2010-616 DC, November 10th 2010, para. 1, p. 317).

Article 47-2 – Role of the *Cour des Comptes* (Audit Office)

Institutional Act pertaining to the management of the social debt
(2010-616 DC, November 10th 2010, para. 1, p. 317).

Article 64 – Status of Judges of the Courts of Law

Institutional Act pertaining to age limits for Judges of the Courts of Law
(2010-615 DC, November 9th 2010, para. 1, p. 308).

Article 65 – High Council of the Judiciary

Institutional Act nº 2010-541 of May 25th 2010 extending the term of office of members of the High Council of the Judiciary
(2010-606 DC, May 20th 2010, paras 1 and 2 p. 87).

Institutional Act nº 2010-830 of July 22nd 2010 pertaining to the application of Article 65 of the Constitution
(2010-611 DC, July 19th 2010, paras 1 to 4 p. 148).

Articles 69 and 71 – Economic, Social and Environmental Council

Institutional Act nº 2010-704 of June 28th 2010 pertaining to the Economic, Social and Environmental Council
(2010-608 DC, June 24th 2010, paras 3 and 5 p. 124).

Article 72-1 – Local Referendum

Institutional Act pertaining to the Département of Mayotte
(2010-619 DC, December 2nd 2010, paras 1 and 3 p. 353).

Article 72-2 – Revenue of Territorial Communities

Institutional Act pertaining to the Département of Mayotte
(2010-619 DC, December 2nd 2010, paras 1 and 3 p. 353).

Article 73 – Empowerment to adapt statutes in overseas territories

Institutional Act pertaining to the Département of Mayotte
(2010-619 DC, December 2nd 2010, paras 1 and 3 p. 353).

STATUTORY AND REGULATORY NORMS OF REFERENCE

CONDITIONS GOVERNING RECOURSE TO STATUTE LAW

Elections

The parties making the referral argue that the enactment of the statute referred for review organising the concomitance of the renewal of General Councillors and Regional Councillors prior to the passing of provisions pertaining to the status, powers and manner of election of the "Territorial Councillors" likely to replace the General Councillors and the Regional Councillors infringes the principle of the "Sovereign power of the Houses of Parliament". The statute referred for review is not intended to create "Territorial Councillors". Neither does it result in compelling Parliament to enact provisions connected therewith in the future. Dismissal.
(2010-603 DC, February 11th 2010, paras 6 and 7, p. 58)

Categories of statutes

Distinction between categories of statutes

Distinction Ordinary Act/Institutional Act

Under indent 1 of paragraph II of Section 7 of the Institutional Act of August 1st 2001: " Credits shall be specified by programme or by appropriation". Under indent 6 of paragraph 1 of the same section: "A programme shall regroup credits designed to implement an action or a coherent set of actions within one single Ministry to which have been assigned precise objectives, defined in terms of general interest, together with the expected results thereof which same shall be the object of an evaluation".

Section 9 of the Institutional Act pertaining to the application of Article 65 of the Constitution rewords section 12 of the Institutional Act nº 94-100 of February 5th 1994 pertaining to the High Council of the Judiciary upon which it confers "budgetary autonomy". When enacting this Institutional Act Parliament, without failing to comply with the Constitution, intended to leave it to the Finance Act to introduce a programme making it possible to regroup in a coherent manner the credits allocated to this Council. In these conditions the challenged provisions are not unconstitutional.
(2010-611 DC, July 19th 2010, para. 13, p. 148)

SCOPE AND LIMITS OF THE POWER TO ENACT STATUTES

Coming into force of a statute

Powers of Parliament

Section 32 of the statute pertaining to the business concern known as La Poste (the Post Office) fixes at March 1st 2010 the coming into force of Title I thereof pertaining to La Poste and amending Act nº 90-568 of July 2nd 1990 as amended pertaining to the organising of the public service of the Post Office and France Télécom. Section 33 thereof fixes at January 1st 2011 the coming into force of Title II thereof pertaining to the provisions designed to transpose Directive 2008/6/EC of the European Parliament and the Council of February 20th2008 amending Directive 97/67/EC concerning the full accomplishment of the Community internal market in the field of postal services. The parties making the referral argue that by fixing the date of the coming into force of Title I, Parliament anticipated the obligations arising from the coming into force of certain provisions of Directive 2008/6/EC. They petition the Constitutional Council to postpone the coming into force of the provisions of Title I on January 1st 2011. Insofar as the provisions of Title I are not intended to transpose the provisions of the abovementioned Directive, the argument is inoperative.
(2010-601 DC, February 4th 2010, paras 14 to 16, p. 53)

Failure to exercise full powers

Case of failure to exercise full powers

Public Finance and Tax law

New tax system

Section 105 of the Finance Act for 2011 reduces by 10 % the tax benefits arising from the tax reductions and credits included, under b of 2º of Articles 200-0 A of the General Tax Code, in the scope of the overall capping of certain tax benefits relating to income tax. The measures provided for by Article 199 undecies C, 199 sexdecises and 2000 quarter B of the same Code and pertaining respectively to tax reduction granted for investments in social housing in overseas territories and for monies paid for the employment of domestic staff and tax credits for young child care costs do not come under the scope of this reduction. The parties making the referral contend that Parliament failed to exercise its powers to the full when leaving it to regulations to fix the rate of the ceiling of the various tax reductions and credits covered by section 105. Paragraph I of section 105 provides: "the rate of tax reductions or credits, the ceiling of the annual deductible tax reduction or credit and the ceiling of allowable tax reductions or credits expressed in euros or in percentage of income, as provided for in the General Tax Code for the taxing of income for 2011, are multiplied by 0.9" and the results of such operations rounded off at the lower figure. It also provides that the same operations will take place when several tax benefits are subject to a common ceiling and that the rate used to calculate any possible cancellation of tax credits and reductions is the rate applied for the calculation of the same tax credits and reductions. Paragraph II of section 105 of the statute referred for review provides that the rule used to calculate the application of the general reduction of 10 % is that in force on January 1st 2011. Paragraph VI of the same section had reduced the rate of tax reduction provided for in Article 199 septvicies of the same Code. Thus by limiting the intervention of the regulatory power to the introduction in the General Tax Code of the "mathematical translation of the rates and amounts which result from the application " of the general reduction of 10 %, Parliament did not fail to exercise its powers to the full.
(2010-622 DC, December 28th 2010, paras 20 to 23, p. 416)

Territorial Communities

Town Planning

Indent e of 2º of Article L 332-6-1 of the Town Planning Code allows Communes to require builders, by a stipulation included in the planning permission, to assign part of their land free of charge to said Communes. It vests in the public community the widest power of appraisal as to the application of this provision and does not specify the public use to which the land thus assigned should be put. No other statutory provision introduces guarantees making it possible to ensure no infringement of Article 17 of the Declaration of 1789. Parliament has thus failed to exercise its powers to the full.

Finding of unconstitutionality
(2010-33 QPC, September 22nd 2010, para. 4, p. 245)

Other rights and freedoms

Internet

Article L.45 of the Postal and Electronic Communications Code vests bodies appointed by the Minister in charge of electronic communications with the task of assigning and managing domain names "of first level internet domain addresses corresponding to the national territory". It merely provides that the assigning by said bodies of a domain name is carried out "in the general interest, under publicised non discriminatory rules designed to ensure compliance by the applicant with intellectual property rights". This article then leaves it to a Decree issued after consultation with the Conseil d'Etat to specify the conditions of application of this provision. Although Parliament has thus protected intellectual property rights, it has entirely delegated the power to supervise the conditions in which domain names are assigned, refused or withdrawn. No other statutory provision offers guarantees ensuring the absence of any infringement of freedom of enterprise and Article 11 of the Declaration of 1789. Parliament thus failed to exercise its powers to the full. Article 45 of the Postal and Electronic Communications Code must thus be held to unconstitutional.
(2010-45 QPC, October 6th 2010, para. 6 p. 270)

No failure to exercise full powers

Parliament has exercised its powers to the full

The parties making the referral with regard to section 12 of the statute reforming Territorial Communities which inserts into Title I of Book II of the General Code of Territorial Communities a Chapter VII which comprises Articles L 5217-1 to L 5217-19, allowing Communes and Public Establishments of Inter-Communal cooperation to create on their own initiative metropoles likely to automatically be able to exercise the powers vested in *Départements* and Regions, argue that Parliament has failed to exercise the powers which are vested in it by Articles 34 and 72 of the Constitution. In particular they argue that it allegedly omitted firstly to specify the conditions governing the transmission of property placed at the disposal of the metropole and owned by Territorial Communities and Public Established of Inter-communal Cooperation whose powers have been automatically transferred to metropoles, and secondly to refer to Article L 1321-4 of the same Code.

Firstly Parliament has made the creation of a metropole dependent upon the intervention of the regulatory power by a Decree. It has provided that the Deliberative Assemblies of the *Département* or the Region shall be consulted by the representative of the State and will have a period of four months within which to reply. It also has, in Article L 5217-4, in addition to the power transferred to Communes, drawn up a list of the powers of *Départements* and Regions automatically transferred to the metropole together with a list of those powers as may be transferred by agreement with the *Départements* or Regions.

Secondly, according to the first three paragraphs of Article 5217-6, for the exercising of the powers automatically transferred to the metropole, real estate and chattels and attached rights

vested in Territorial Communities and Public Establishments concerned shall be automatically placed at the disposal of the metropole and, no later than the year following the first meeting of the Council of the latter, the property thereof shall be transferred to the same. Under paragraph 4 of said Article, these transfers shall be carried out by an amicable agreement between the parties involved, or failing that, by a Decree issued after consultation with the Council of State after taking cognizance of the opinion of a Consultative Committee comprising the Mayors of the Communes involved, the President of the General Council, the President of the Regional Council and the Presidents of the deliberative body of Public Establishments of Inter-Communal cooperation vested with the power to levy taxes. Under paragraph 5 of the same Article these transfers shall be carried out free of charge and shall not give rise to the payment of any indemnity, levy, tax, salary or fees. Under the two final paragraphs of this Article, the metropole shall replace the other Territorial Communities and, if need be, the Public Establishments which have been replaced or whose perimeter has been reduced as regards all the rights and obligations attached to the property and more generally for the exercising of all the powers vested automatically in the metropole. Moreover Article L 1321-4 of the same Code merely provides for the intervention of statute law to define the conditions in which the property of a Territorial Community placed at the disposal of another Community may be transferred in full ownership to the Community having the benefit thereof. Parliament has thus laid down in a precise manner the conditions in which property of the Territorial Communities and Public Establishments involved are transferred to the metropole.

Parliament has thus not failed to exercise the powers vested in it.
(2010-618 DC, December 9th 2010, paras 42 to 46, p. 367)

Reference to a previous statutory provision

The parties making the referral argue that, in the framework of the transformation of the Post Office (La Poste) into a Public Limited Company, the system of the distribution of free shares to the agents of the Post Office has not been sufficiently defined. The conditions governing the distribution of such shares are defined by reference, with necessary adaptations, to the provisions of Articles L 225-197-1 to L 225-197-5 of the Commercial Code. Parliament has therefore not failed to exercise the powers vested in it.
(2010-601 DC, February 4th 2010, paras 2,5 and 6, p. 53)

Repeal or amendment of statutes

Under Article 34 of the Constitution: "Statutes shall determine the basic principles.. of social security". Parliament is always at liberty, when enacting statutes in the field the Constitution makes the preserve of Parliament, to enact new provisions of which it is free to decide the opportuneness and to amend previous statutes or repeal the same by replacing them, if need be, by other provisions as long as the exercising of such powers does not lead to depriving requirements of a constitutional nature of statutory guarantees.
(2010-68 QPC, November 19th 2010, para. 5, p. 330)

DELEGATED POWER TO ENACT LAWS

Ordinances under Article 38

Conditions governing recourse to Article 38

Carrying out of a programme

Contents of Ordinances

Although Article 38 of the Constitution requires the Government to indicate in precise terms to Parliament, to justify its request for authorization to take measures by Ordinance, the

purpose it is sought to achieve and the field of intervention of said Ordinances, the Government is not under any duty to inform Parliament of the terms of the Ordinances it intends to issue under the authorization requested.

The authorization granted to the Government by section 87 of the statute reforming Territorial Communities is designed to adapt Chapter I of Title I of this statute to the overseas *Départements* and Regions under paragraph 1 of Article 73 of the Constitution. In view of this purpose this authorization is defined with sufficient clarity to comply with the requirements of Article 38 of the Constitution. It does not exempt the Government, when exercising the powers vested in it, from compliance with rules and values of constitutional status. Hence it is not unconstitutional.
(2010-618 DC, December 9th 2010, paras 69 and 70, p. 367)

POWER TO MAKE REGULATIONS

National power to make regulations – Competent Authorities

Distribution of the powers of the State between various Authorities

The provisions of Act n° 72-619 of July 5th 1972 setting up and organising Regions and of Act n° 82-213 of March 2nd 1982 as amended pertaining to the rights and freedoms of Communes, *Départements* and Regions and which are designed to distribute the territorial powers of the State between the Prefect of the Region and the Prefect of the *Département* do not call into question either the fundamental principles of the self-government of Territorial Communities, their powers and their revenue, which are the preserve of statute law pursuant to Articles 34, 72, and 72-2 of the Constitution, nor any other principle or rule which the Constitution makes the preserve of statute law. They are therefore of a regulatory nature.
(2010-219 L, February 11th 2010, para. 1 p. 62)

Various consultations

Bodies whose opinion is not binding upon any Public Authority (see Title 14: Independent Authorities)

The attaching of the Advisory Committee on Gambling to the Prime Minister's Office does not call into question any principles or rules which the Constitution makes the preserve of statute law. Thus the words " to the Prime Minister's Office" and "by the services of the Prime Minister" are of a regulatory nature.
(2010-221 L, December 14th 2010, para. 1, p. 392)

CONDITIONS FOR THE IMPLEMENTATION OF ARTICLES 37 PARAGRAPH 2 AND ARTICLE 41 OF THE CONSTITUTION

Article 37, paragraph 2 (Procedure for downgrading of a statutory provision to a regulation)

No case for review

Withdrawal of referral for review

In view of the withdrawal by the Prime Minister of his referral for a ruling, there is no case to review a referral for downgrading as to the legal status of the words "as from this date" in the

final indent of paragraph III of section 10 of the Guideline and Programming Act of January 21st 1995 dealing with security.
(2010-222 L, December 28th 2010, para. 1, p. 431)

DISTRIBUTION OF POWERS BY SUBJECT MATTER

Guarantees of Civil Liberties

Guarantees offered by Courts of Law

Administrative proceedings

Under Article 34 of the Constitution, statute law shall determine in particular "the rules concerning ....the fundamental guarantees granted to citizens for the exercising of their civil liberties... the setting up of new categories of courts..". The provisions of the procedure applicable before Administrative Courts come under the scope of the regulatory power once they do not call into question any of the matters which Article 34 of the Constitution or other rules or principles of constitutional status make the preserve of Parliament. Article 37 of the Constitution, whereby "matters other than those coming under the scope of statute law shall be matters for regulation" does not result in exempting the regulatory power from compliance with constitutional requirements.
(2010-54 QPC, October 14th 2010, para. 3, p. 289)

Criminal Law. Minor and Major Offences, Criminal proceedings, Amnesty, Courts of law and the status of the Judiciary

Determination of offences and punishments

Competent Authority in matters of minor offences

Article 131-21 of the Criminal Code provides for the existence of an additional penalty applicable, pursuant to the law, to certain crimes and major offences and, pursuant to the Decree, to certain minor offences. The existence of such a penalty does not *per se* fail to comply with the principle of the necessity of punishments. Where the punishment of minor offences is concerned, it is up to the regulatory power, exercising the powers vested in it by Article 37 of the Constitution and under the jurisdiction of the relevant Courts, to fix, in compliance with the requirements of Article 8 of the Declaration of 1789, the penalties applicable to the minor offences which it defines. Article 131-21 of the Criminal Code does not exempt the regulatory power from compliance with such requirements. The Constitutional Council has no jurisdiction to appraise the conformity of Article R 413-14-1 of the Highway Code with these requirements.
(2010-66 QPC, November 26th 2010, paras 3 and 5, p. 334)

Criminal proceedings

Under Article 34 of the Constitution, it is incumbent upon Parliament to determine the scope of Criminal law. Where criminal procedure is concerned, this requirement is of particular importance to avoid undue harshness when seeking to apprehend offenders.
(2010 QPC-25, September 16th 2010, paras 9 and 10, p. 220)

Under Article 34 of the Constitution, it is incumbent upon Parliament to determine the scope of Criminal law in matters of Customs and Excise offences. Where criminal procedure is concerned, this requirement is of particular importance to avoid undue harshness when seeking to apprehend offenders.
(2010- 32 QPC, September 22nd 2010, para. 4, p. 241)

Courts of Law

Rules governing the organization of the court system not within the scope of statute law

The detached Chamber of the Court of Appeal of Fort-de-France sitting in Guyane is not a court system within the meaning of Article 34 of the Constitution. The provisions of Articles 712-1 and 712-3 of the Code of Criminal Procedure, submitted for review by the Constitutional Council, merely firstly specify the name of the Court of Appeal in the territory in which the Penalty Enforcement Court of Guyane is situated and secondly, indicate which Benches of this Court have jurisdiction to hear appeals from decisions of said Court and the Penalty Enforcement Judge. Such provisions neither call into question the setting up of new court regimes nor criminal procedure, nor any other rule or principle which the Constitution makes the preserve of statute law. They are therefore of a regulatory nature.
(2010-220 L, October 14th 2010, para. 2, p. 281).

Under Article 34 of the Constitution, statute law shall determine in particular " the rules concerning ....the fundamental guarantees granted to citizens for the exercising of their civil liberties... the setting up of new categories of courts..". The provisions of the procedure applicable before Administrative Courts come under the scope of the regulatory power once they do not call into question any of the matters which Article 34 of the Constitution or other rules or principles of constitutional status make the preserve of Parliament
(2010-54 QPC, October 14th 2010, para. 3, p. 289)

Basis, rate and manner of collection of all types of taxes and currency issuing systems

Public revenues

Mandatory levies

All kinds of taxes – Qualification.

By a decision dated July 27th 2009 the Council of State held that ""when approving the stipulations of the agreements of October 30th and December 14th 1940, the contents of which have been recalled above, the statute of April 30th 1941 must be considered not as having approved reciprocal obligations which the parties to the agreements may have freely entered into, but as having imposed upon the Compagnie agricole de la Crau, without the conferment of any benefit in return, the obligation to pay the State, for an unlimited period of time, a mandatory levy in the nature of a tax.."

Contrary to what is affirmed by the Prime Minister, the disputed provisions must be considered as introducing not a contractual obligation but a tax falling into the category of all kinds of taxes within the meaning of Article 34 of the Constitution.
(2010-52 QPC, October 14th 2010, paras 3 and 5, p. 283)

System for electing Members of Parliament and Local Assemblies

Local Assemblies

Parliament, competent under Article 34 of the Constitution to determine the rules governing the system for electing members of Local Assemblies, may determine the length of the term of office of the elected persons composing the deliberative body of a Territorial Community. However when exercising this power, Parliament must comply with principles of a constitutional nature which imply in particular that voters are called upon to exercise their right to vote at reasonable intervals.
(2010-603 DC, February 11th 2010, para. 12, p. 58)

Ownership, real rights and civil and commercial obligations

Fundamental principles of ownership

Development, Town Planning, Construction, Roads

Miscellaneous

Indent e of 2º of Article L 332-6-1 of the Town Planning Code allows Communes to require builders, by a stipulation included in the planning permission, to assign part of their land free of charge to said Communes. It vests in the public community the widest power of appraisal as to the application of this provision and does not specify the public use to which the land thus assigned should be put. No other statutory provision introduces guarantees making it possible to ensure no infringement of Article 17 of the Declaration of 1789. Parliament has thus failed to exercise its powers to the full. Finding of unconstitutionality
(2010-33 QPC, September 22nd 2010, para. 4, p. 245)

Fundamental principles of civil and commercial obligations

Scope of application of principles

Among the fundamental principles of civil and commercial obligations are those which call into question the very existence of said obligations.
(2010-45 QPC, October 6th 2010, para 4, p. 270)

Miscellaneous

Internet Domain Names

Article L.45 of the Postal and Electronic Communications Code vests bodies appointed by the Minister in charge of electronic communications with the task of assigning and managing domain names "of first level internet domain addresses corresponding to the national territory". It merely provides that the assigning by said bodies of a domain name is carried out "in the general interest, under publicised non discriminatory rules designed to ensure compliance by the applicant with intellectual property rights". This article then leaves it to a Decree issued after consultation with the Conseil d'Etat to specify the conditions of application of this provision. Although Parliament has thus protected intellectual property rights, it has entirely delegated the power to supervise the conditions in which domain names are assigned, refused or withdrawn. No other statutory provision offers guarantees ensuring the absence of any infringement of freedom of enterprise and Article 11 of the Declaration of 1789. Parliament thus failed to exercise its powers to the full. Article 45 of the Postal and Electronic Communications Code must thus be held to unconstitutional.
(2010-45 QPC, October 6th 2010, para. 6, p. 270)

RIGHTS AND FREEDOMS

MEANING OF '" CONSTITUTIONALLY GUARANTEED RIGHTS AND FREEDOMS" (Art 61-1)

Declaration of the Rights of Man and the Citizen of 1789

Article 1

The principle of equality proclaimed by Article 1 of the Declaration of 1789 is one of the rights and freedoms guaranteed by the Constitution, within the meaning of Article 61-1 thereof.
(2010-13 QPC, July 9th 2010, para. 4, p. 139)

Article 2

1 of Article 273 of the General Tax Code, when leaving it to a Decree issued after consultation of the Council of State to determine the timeframe for the making of deductions to which persons subject to value added tax are entitled does not infringe the right to property guaranteed by Article 2 and 17 of the Declaration of 1789.
(2010-5 QPC, June 18th 2010, para. 5, p. 114)

The right to privacy is one of the rights and freedoms which the Constitution guarantees and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-25 QPC, September 16th 2010, paras 6 and 16, p. 220)

Freedom of the individual, in this case the freedom to come and go and the right to privacy, are among the rights and freedoms which the Constitution guarantees and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-71 QPC, November 26th, 2010, para. 16, p. 343)

Article 4

The principle of liability, which derives from Article 4 of the Declaration of 1789, may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality. (review of Article L 114-5 of the Family and Social Welfare Code)
(2010-2 QPC, June 11th 2010, para. 11, p. 105)

When responding to an application for a priority preliminary ruling on the issue of constitutionality with respect to the system of compensation of persons sustaining occupational injuries, the Council examined this issue from the point of view of the liability which derives from Article 4 of the Declaration of 1789.
(2010-8 QPC, June 18th 2010, paras 10 to 18, p. 117)

Freedom of enterprise which derives from Article 4 of the Declaration of 1789 can be raised on the basis of Article 61-1 of the Constitution
(2010-55, QPC, October 18th 2010, para. 4, p. 291)

Article 6

The principle of equality before the law (Art 6 of the Declaration of 1789) is one of the rights and freedoms guaranteed by the Constitution, within the meaning of Article 61-1.
(210-1 QPC, May 28th 2010, para. 8, p. 91: 2010-3 QPC, May 28th 2010, para. 3, p. 97; 2010-2 QPC, June 11th 2010, paras 5 and 8, p. 105); 2010-4/17 QPC, July 22nd 2010, para 18, p. 156)

When responding to an application for a priority preliminary ruling on the issue of constitutionality with respect to the system of compensation of persons sustaining occupational injuries, the Council examined this issue from the point of view of the principle of equality before the law.
(2010-8 QPC, June 18th 2010, paras 9 and 15, p. 117)

The principle of equality before justice, guaranteed by Articles 6 and 16 of the Declaration of 1789, may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-15/23, QPC, July 23rd 2010, para. 4, p. 161)

The principles of equality before the law and equality of access to employment in the public service are rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-76 QPC, December 3rd 2010, para. 5, p. 364)

Article 7

The principle of the legality of criminal procedure which derives from Article 7 of the Declaration of 1789 is one of the rights and freedoms guaranteed by the Constitution and may

be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-14/22 QPC, July 30th 2010, para. 21, p. 179)

Article 8

The principle of the tailoring of punishments which derives from Article 8 of the Declaration of 1789 is one of the rights and freedoms guaranteed by the Constitution. Implicitly the principle of the necessity of punishments, of which the principle of the tailoring of punishments is an illustration, is also one of the rights and freedoms guaranteed by the Constitution
(2010-6/7 QPC, June 11th 2010, para. 4, p. 111)

The principle of the tailoring of punishments, which derives from Article 8 of the Declaration of 1789, is one of the rights and freedoms guaranteed by the Constitution, and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-40 QPC, September 29th 2010, para. 3, p. 255; 2010-41 QPC, September 29th 2010, para. 3, p. 257)

The principle of the necessity of punishments, proclaimed by Article 8 of the Declaration of 1789, is one of the rights and freedoms guaranteed by the Constitution, and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-66 QPC, November 26th 2010, para. 4, p. 334)

Article 9

The principle of the prohibition of all undue harshness in the seeking out of offenders, which derives from Article 9 of the Declaration of 1789, is one of the rights and freedoms guaranteed by the Constitution, and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-14/22 QPC, July 30th 2010, para. 21, p. 179)

The principles of respect for the presumption of innocence and the prohibition of all undue harshness in measures of criminal procedure are among the rights and freedoms guaranteed by the Constitution, and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-25 QPC, September 16th 2010, paras 8, 11, 18 and 19, p. 220)

The principle of respect for the presumption of innocence is one of the rights and freedoms guaranteed by the Constitution, and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-69 QPC, November 26th 2010, para. 4, p. 388; 2010-80 QPC, December 17th 2010, paras 3 and 5, p. 409)

Article 11

The free communication of ideas and opinions is one of the rights and freedoms guaranteed by the Constitution, and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality within the meaning of Article 61-1 thereof.
(2010-3 QPC, May 28th 2010, para. 6, p. 97)

Article 13

The principle of equality before public burden sharing is one of the rights and freedoms guaranteed by the Constitution, and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality within the meaning of Article 61-1 thereof.
(2010-11 QPC, July 9th 2010, para. 4, p. 136; 2010-16 QPC, July 23rd 2010, para. 4, p. 164)

Article 16

Legal certainty, which derives from Article 16 of the Declaration of 1789, may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality

(review of provisions making fresh rules governing the right of a child born handicapped to bring legal proceedings applicable to cases not yet at the res judicata stage at the date of the coming into force thereof, of the conditions governing the incurring of liability by healthcare professionals and healthcare establishments towards the parents of such a child and the forms of injury giving a right to compensation when such liability is incurred).
(2010-2 QPC, June 11th 2010, paras 21 to 23, p. 105)

The principle of the independence of the courts, which derives from Article 16 of the Declaration of the Rights of Man and the Citizen of 1789, may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-10 QPC, July 2nd 2010, para. 3, p. 131)

The guarantee of rights proclaimed by Article 16 of the Declaration of 1789 may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality (modification of the overseas temporary retirement indemnity)
(2010-4/17 QPC, July 22nd 2010, paras 14 to 16, p. 156)

The principle of equality before justice may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-15/23 QPC, July 23rd 2010, para. 4, p. 161)

The rights of the defence, guaranteed by Article 16 of the Declaration of 1789, are among the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-14/22 QPC, July 30th 2010, para. 21, p. 179)

The right to an effective judicial remedy, which derives from Article 16 of the Declaration of 1789, is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-19/27 QPC, July 30th 2010, para. 6, p. 190; 2010-38 QPC, September 29th 2010, para. 3, p. 252; 2010-69 QPC, November 26th 2010,para. 4, p. 388)

Legal certainty, which derives from Article 16 of the Declaration of 1789, may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality (review of provisions validating levies of which the basis, methods of collection and control were wrongly fixed by regulations).
(2010-53 QPC, October 14th 2010, para. 4, p. 256)

The right to an effective judicial remedy is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-71 QPC, November 26th 2010, para. 33, p. 343)

The principle of the independence of the courts, is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-76 QPC, December 3rd 2010, para. 8, p. 364)

The requirements of Article 16 of the Declaration of 1789, which imply that the rights of all parties be equally balanced, may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-78 QPC, December 10th 2010, para. 7, p. 387)

Respect for the rights of the defence, which implies in particular just and fair proceedings guaranteeing that the rights of the parties be equally balanced, is one is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-62 QPC, December 17th 2010, para. 3, p. 400)

Article 17

The right to property, guaranteed by Article 17 of the Declaration of 1789 is one is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-26 QPC, September 17th 2010, para. 6, p. 229; 2010-43 QPC, October 6th 2010, para. 3, p. 268)

The right to property, guaranteed by Articles 2 and 17 of the Declaration of 1789 is one is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-60 QPC, November 12th 2010, para. 3, p. 321)

Preamble of 1946

Dignity of the Human Being

The dignity of the human being is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-14/22 QPC, July 30th 2010, paras 19 and 20, p. 179)

Although seeking out offenders is necessary to protect principles of constitutional status, this does not mean that French Courts should be recognized as having jurisdiction over crimes committed abroad and involving a foreign victim when the offender, a foreign National, is in France. Respect for the dignity of the human being, which derives from the preamble to the Constitution of 1946, does not impose any such jurisdiction.
(2010-612 DC, August 5th 2010, para. 12, p. 198)

Respect for the dignity of the human being is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-25 QPC, September 16th 2010, paras 7, 13 and 14, p. 220; 2010-80 QPC, December 17th 2010, paras 3 and 9, p. 408)

Freedom to belong to a Trade Union (paragraph 6)

Paragraph 6 of the Preamble to the Constitution of October 27th 1946 which guarantees the freedom to belong to a Trade Union may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-42 QPC, October 7th 2010, para. 4 p. 278; 2010-68 QPC, November 19th 2010, para. 6, P. 330)

Principle of participation of workers in the management of companies (paragraph 8)

Paragraph 8 of the Preamble of the Constitution of October 27th 1946 which guarantees the rights of workers to participate, through their representatives, in the collective determination of their working conditions and the management of their companies, may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-42 QPC, October 7th 2010, para. 4, p. 278)

Right to lead a normal family life

The right to lead a normal family life, which derives from paragraph 10 of the Preamble to the Constitution of 1946 may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality
(2010-39 QPC, October 6th 2010, para. 7, p. 264)

Fundamental Principles Recognized by the Laws of the Republic

Freedom of Association

Freedom of association (a fundamental principle recognized by the laws of the Republic) is one of the rights and freedoms guaranteed by the Constitution within the meaning of Article 61-1 thereof.
(2010-3 QPC, May 28th 2010, para. 9, p. 97)

Constitution of October 4th 1958.

Paragraph 1 of Article 61-1 of the Constitution provides: "When during proceedings before a Court of Law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, a referral may be made to the Constitutional Council by the Conseil d'Etat or the *Cour de cassation*, and the Constitutional Council shall give its ruling within a specified time". The argument of the failure by Parliament to exercise fully the powers vested in it may only be raised in support of an application for a priority preliminary ruling on the issue of constitutionality when a constitutionally guaranteed right or freedom is called into question.
(2010-5 QPC, June 18th 2010, para. 3, p. 114)

Article 1

The principle of equality proclaimed by Article 1 of the Constitution is one of the rights and freedoms guaranteed by the Constitution within the meaning of Article 61-1 thereof.
(2010-13 QPC, July 9th 2010, para. 4, p. 139)

Article 34

Failure by Parliament to exercise fully the powers vested in it may only be raised in support of an application for a priority preliminary ruling on the issue of constitutionality when a constitutionally guaranteed right or freedom is called into question. This is the case with Article 34 whereby: " Statutes shall determine the rules concerning ...the base, rates and method of collection of all types of taxes.. "
(2010-5 QPC, June 18th 2010, para. 4, p. 114)

Although failure by Parliament to exercise fully the powers vested in it may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality when a constitutionally guaranteed right or freedom is called into question, this argument cannot be raised against a statutory provision existing prior to the Constitution of October 4th 1958.
(2010-28 QPC, September 17th 2010, para. 9, p. 233); 2010-73 QPC, December 3rd 2010, para. 9, p. 356)

Failure by Parliament to exercise fully the powers vested in it may only be raised in support of an application for a priority preliminary ruling on the issue of constitutionality when a constitutionally guaranteed right or freedom is called into question.
(2010-33 QPC, September 22nd 2010, para. 2, p. 245)

Failure by Parliament to exercise fully the powers vested in it may only be raised in support of an application for a priority preliminary ruling on the issue of constitutionality when a constitutionally guaranteed right or freedom is called into question.

In the current state of the means of communication and the generalised development of online public communication services and the substantial part played by such services in economic and social life, in particularly for those whose business is carried on online, supervision, both as regards private individuals and commercial concerns, of the choice and use of internet domain names affects intellectual property rights, freedom of communication and freedom of enterprise.
(2010-45 QPC, October 6th 2010, paras 3 and 5, p. 270)

Article 66

The principle of the Judicial Authority guardian of the freedom of the individual is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-14/22 QPC, July 30th 2010, paras 22 and 26, p. 179)

The principle whereby the Judicial Authority is the guardian of the freedom of the individual is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-25 QPC, September 16th 2010, paras 10 to 12, p. 220).

Article 66 of the Constitution is one of the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-71 QPC, November 26th 2010, paras 14 and 16, p. 343)

The prohibition of any arbitrary detention and the principle whereby the Judicial authority is the guardian of the freedom of the individual, deriving from Article 66 of the Constitution, are among the rights and freedoms guaranteed by the Constitution and may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-80 QPC, December 17th 2010, paras 3,4,10 to 12, p. 408)

Article 72

Self-government of Territorial Communities is one of the rights and freedoms guaranteed by the Constitution.
(2010-12 QPC, July 2nd 2010, para. 4, p. 134)

Article 72-2

Financial autonomy of Territorial Communities, as defined by Article 72-2 of the Constitution, is one of the rights and freedoms guaranteed by the Constitution.
(2010-56 QPC, October 18th 2010, paras 4 and 6, p. 295)

Objectives of constitutional status

Diversity of schools of thought and opinions

The Constitutional Council qualifies its response to the question of whether objectives of constitutional status are among the rights and freedoms guaranteed by the Constitution, within the meaning of Article 61-1 thereof. In the case under review, it finds the argument based on failure to comply with the objective of constitutional status of the diversity of schools of thought and opinions is in all events inoperative.
(2010-3 QPC, May 28th 2010 para. 8, p. 97)

Norms of reference or elements not taken into account

Compliance with the constitutional requirement of the transposition of Directives is not one of the "rights and freedoms guaranteed by the Constitution" and thus cannot be raised in the framework of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-605 DC, May 12th 2010, para. 19, p. 78)

The authorization thus conferred on Parliament under the final phrase of paragraph 3 of Article 72-1 of the Constitution whereby: "Voters may also be consulted on changes to boundaries of Territorial Communities in the conditions provided for by statute" does not in any event constitute a right or freedom which may be raised to support an application for a priority preliminary ruling on the issue of constitutionality on the grounds of Article 61-1 of the Constitution
(2010-12 QPC, July 2nd 2010, para. 3, p. 134)

The Constitutional Council does not rule as to whether or not national sovereignty is among the rights and freedoms guaranteed by the Constitution. It merely finds that in all events the decision to proceed to merge Communes following a consultation of voters does not call into question either the definition of national sovereignty nor the conditions governing the exercising thereof.
(2010-12 QPC, July 2nd 2010, para 5, p. 134)

The argument based on failure to comply with the procedure for enacting a statute cannot be raised in support of an application for a priority preliminary ruling on the issue of constitutionality under Article 61-1 of the Constitution.
(2010-4/17 QPC, July 22nd 2010, para. 7, p. 156)

Failure to comply with the objective of constitutional status ofr intelligibility and accessibility of the law, which derives from Articles 4,5,6 and 16 of the Declaration of the Rights of Man and the Citizen of 1789, cannot *per se* be raised in support of an application for a priority preliminary ruling on the issue of constitutionality under Article 61-1 of the Constitution.
(2010-4/17 QPC, July 22nd 2010, para. 9, p. 156)

An argument based on the lack of compatibility of a statutory provision with the international commitments of France cannot be deemed to constitute an argument as to unconstitutionality. It is therefore not incumbent upon the Constitutional Council, called upon to rule on an application under Article 61-1 of the Constitution, to review the compatibility of the challenged provisions with the international commitments of France. Such an argument comes under the jurisdiction of the Courts of Law and Administrative Courts.
(2010-4/17 QPC, July 22nd 2010, para. 11, p. 156)

As held by the Constitutional Council in its decision nº 83-160 DC of July 19th 1983, the tax agreement between France and New Caledonia is covered by rules of purely national law. It does not have any constitutional status. Hence, failure to comply with the same cannot be raised in the framework of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-4/17 QPC, July 22nd 2010, para. 13,p. 156)

The provisions of Article 14 of the Declaration of 1789 have been implemented by Article 34 of the Constitution and do not constitute a right or freedom which may be raised before a court in support of an application for a priority preliminary ruling on the issue of constitutionality under Article 61-1 of the Constitution.
(2010-19/27 QPC, July 30th 2010, para. 16, p. 190)

Although failure by Parliament to exercise fully the powers vested in it may be raised in support of an application for a priority preliminary ruling on the issue of constitutionality when a constitutionally guaranteed right or freedom is called into question, this argument cannot be raised against a statutory provision existing prior to the Constitution of October 4th 1958.
(2010-28 QPC, September 17th 2010, para. 9, p. 233; 2010-73 QPC, December 3rd 2010, para. 9, p. 356)

Although the final paragraph of Article 72-2 of the Constitution providing that "equalization mechanisms intended to promote equality between Territorial Communities" is designed to reconcile the principle of freedom with that of equality by introducing mechanisms for financial equalization, failure to comply with the same cannot *per se* be raised in support of an application for a priority preliminary ruling on the issue of constitutionality under Article 61-1 of the Constitution.
(2010-29/37 QPC, September 22nd 2010, para. 5, p. 248)

Failure to comply with the objective of constitutional status of the good administration of justice, which derives from Articles 12, 15 and 16 of the Declaration of the Rights of Man and the Citizen of 1789, cannot *per se*, be raised in support of an application for a priority preliminary ruling on the issue of constitutionality under Article 61-1 of the Constitution.
(2010-77 QPC, December 10th 2010, para. 3, p. 384)

GENERAL PRINCIPLES APPLICABLE TO RIGHTS AND FREEDOMS GUARANTEED BY THE CONSTITUTION

Guarantee of rights

Rights of the Defence

The manner of composition of Benches sitting in courts of trial has no effect on the duty to respect the rights of the defence. The argument based on the infringement of these rights by paragraph 1 of Article L 222-1 of the Code of Administrative Justice is thus dismissed.
(2010-54 QPC, October 14th 2010, para. 5, p. 289)

Right of redress

Administrative procedures

Section 164 of Act n° 2008-776 of August 4th 2008 has inserted into the procedure provided for by Article L.16 B of the Book of Tax Procedures additional guarantees for persons concerned by such searches by giving them the faculty of lodging with the President of the Court of appeal an appeal against the order authorizing the search by the Tax authorities and also against the carrying out of such searches.

Firstly, indent 15 of paragraph II of Article L.16 B of the Book of Tax Procedures provides that the order is verbally notified *in situ* when the search takes place. If it cannot be notified to the occupant of the premises or the representative thereof, it shall be notified by registered mail return receipt requested or, failing that, notice thereof shall be served by a Bailiff. Indent 17 of this Article provides that "the time allotted for and the manner of appeal" are indicated in the order.

Secondly, although the challenged provisions provide that the order authorizing the search is executory "upon sole presentation of the record thereof", and that the appeal does not have any suspensive effect, these provisions, which are indispensable to ensure the effectiveness of the search and designed to ensure the implementation of the objective of constitutional status which is the fight against tax evasion, do not infringe the right of the Applicant to obtain, if need be, the setting aside of the results of such operations. The argument based on the infringement of the right to an effective judicial remedy, which derives from Article 16 of the Declaration of 1789 must therefore be dismissed.
(2010-19/27 QPC, July 30th 2010, paras 8 and 9, p. 190)

Article 16 of the Declaration of the Rights of Man and the Citizen of 1789 guarantees the right of persons to apply for an effective judicial remedy.

The provisions of the agreement entered into by the Government of the French Republic and the Government of Romania pertaining to cooperation for the protection of isolated Romania minors on the territory of the French Republic have introduced a procedure of re-accompanying the minor back to his home country at the request of the Romanian Authorities. The authorization to re-accompany the minor is given in France by the Public Prosecutors Office in charge of minors or by the Children's judge if the matter has been referred to him. When the decision has been taken by the Public Prosecutor's Office in charge of minors, neither the challenged provisions, nor any provision of national law confers upon the minor the right to appeal against this measure intended to have the minor leave French territory and return to Romania. These provisions therefore fail to comply with the requirement that the persons involved have the right to an effective judicial remedy.

Censure of the statute authorizing the ratification of the agreement.
(2010-614 DC, November 4th 2010, paras 4 and 5, p. 305)

Civil proceedings

Article L 351 of the Public Health Code provides that any person placed under hospital confinement without his consent or retained in any institution of whatsoever kind has the right to apply to the President of the *Tribunal de grande instance* at any time for the termination of this confinement carried out without his consent. The right to apply to this judge is also vested in any person who may intervene in the interests of the persons hospitalised.

However, insofar as this is a measure of a custodial nature, the right to an effective judicial remedy requires that a judge from a court of law be required to rule on the request for immediate release within the shortest possible time taking into consideration the possible need to collect additional information on the state of health of the person confined to hospital.
(2010-71 QPC, November 26th 2010, paras 38 and 39, p. 343)

Legal certainty

Adversely affecting a legally acquired situation

Article 16 of the Declaration of 1789 proclaims "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution". Parliament may, at any time, acting in matters under its jurisdiction, amend or repeal previous statutes by replacing them, if need be, by other provisions. It cannot however deprive rules and principles of constitutional status of statutory guarantees. It would in particular fail to have due regard for the guarantee of rights proclaimed in Article 16 of the Declaration of 1789 if it were to pass measures adversely affecting situations recognized by law without any sufficient justification of general interest.

The capping and reducing of the temporary retirement indemnity introduced by paragraphs III and IV or section 137 of the Act of December 30th 2008 do not affect the amount of the civil or military retirement pension. They merely concern an ancillary element of this pension, variable depending on the place of residence of the retiree. They only came into effect on January 1st 2009. They are not of a retrospective nature and do not affect a legally acquired situation in a manner contrary to the guarantee of rights proclaimed by Article 16 of the Declaration of 1789.
(2010-4/17 QPC, July 22nd 2010, paras. 14,15 and 17, p. 156).

Parliament would fail to comply with the guaranteeing of rights as proclaimed by Article 16 of the Declaration of 1789 if it were to adversely affect legally acquired situations without justifying such measures on grounds of sufficient general interest.

1° and 3° of paragraph IV of section 164 of Act n° 2008-776 of August 4th 2008 confer upon certain taxpayers subjected to searches or seizures prior to the coming into force of said statute the right to appeal against the order authorizing said search or make an objection to the manner in which said operations were carried out. They therefore grant such persons a retrospective right to avail themselves of the new channels of appeal provided for by Article L 16.B of the Book of Tax Procedures. They do not therefore adversely affect any lawfully acquired situation in conditions such as to infringe the guarantee of rights as proclaimed by Article 16 of the Declaration of 1789.
(2010-19/27 QPC, July 30th 2010, paras 17 and 19, p. 190)

Other retrospective measure

Conditions of retroactiveness

Article 16 of the Declaration of 1789 proclaims "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution"

Although Parliament may retrospectively modify a legal rule or validate an administrative instrument or an instrument of private law, this is on condition that such a measure is taken for purposes of general interest and respects court decisions which have become *res judicata*, together with the principle of non retrospectiveness of penalties and punishments. The instrument modified or validated must not infringe any rules or principle of constitutional status, unless the purpose which it is sought to achieve in the general interest is itself of constitutional status. Lastly the scope of the modification or validation must be strictly defined

The capping and reducing of the temporary retirement indemnity introduced by paragraphs III and IV or section 137 of the Act of December 30th 2008 do not affect the amount of the civil or military retirement pension. They merely concern an ancillary element of this pension, variable depending on the place of residence of the retiree. They only came into effect on January 1st 2009. They are not of a retrospective nature and do not affect a legally acquired situation in a manner contrary to the guarantee of rights proclaimed by Article 16 of the Declaration of 1789.
(2010-4/17 QPC, July 22nd 2010, paras. 14, 16 and 17, p. 156).

In the case under review, 1° and 3° of paragraph IV of section 164 of Act n° 2008-776 of August 4th 2008 confer upon certain taxpayers subjected to searches or seizures prior to the coming into force of said statute the right to appeal against the order authorizing said search or make

an objection to the manner in which said operations were carried out. They therefore grant such persons a retrospective right to avail themselves of the new channels of appeal provided for by Article L 16.B of the Book of Tax Procedures. They do not therefore adversely affect any lawfully acquired situation in conditions such as to infringe the guarantee of rights as proclaimed by Article 16 of the Declaration of 1789.
(2010-19/27 QPC, July 30th 2010, paras 18 and 19, p. 190)

Statutory validation

— Principles

Although Parliament may retrospectively modify a legal rule or validate an administrative instrument or an instrument of private law, this is on condition that such a measure is taken for purposes of general interest and respects court decisions which have become *res judicata*, together with the principle of non retrospectiveness of penalties and punishments. The instrument modified or validated must not infringe any rules or principle of constitutional status, unless the purpose which it is sought to achieve in the general interest is itself of constitutional status. Lastly the scope of the modification or validation must be strictly defined.
(2010-29/37 QPC, September 22nd 2010, para. 10, p. 248; 2010-53 QPC, October 14th 2010, para. 4, p. 256; 2010-78 QPC December 10th 2010, paras 3 and 4, p. 387)

— Grounds of sufficient general interest

Although paragraph II of section 103 of the Act of December 30th 2008 prohibits Communes from claiming, on the basis of the lack of jurisdiction of the regulatory power, that they have sustained injury corresponding to certain expenditure they are required to bear, paragraph III thereof introduces a lump-sum grant intended to compensate for such expenditure. Furthermore, these provisions, which draw the conclusions of decisions of the Council of State (Conseil d'Etat) whereby Parliament alone has the power to indirectly require Communes to bear expenditure normally borne by the State, grant the compensation for the injury sustained not only to Communes which have instituted litigation but also all those which have had to bear such expenditure. In view of the difficulty in assessing the latter, the challenged provisions do not fix any specific indemnification the amount of which would be flawed by a patent error of appraisal. They do not deprive any constitutional requirement of statutory guarantees. In view of the financial relationship existing between the State and Territorial Communities, they meet a need of sufficient general interest.
(2010-29/37 QPC, September 22nd 2010, paras 11 and 12, p. 248)

The provisions of paragraph III of section 27 of Act nº 2009-888 of July 22nd 2009 on developing and modernising tourist services validate levies on the proceeds of gambling insofar as they are challenged on the grounds that the base and methods of collection and monitoring thereof have been fixed by regulations. The changing of the name of the levies on gambling to all kinds of taxes was set out in the Finance Bill for 2009 tabled before the National Assembly on September 26th 2008 and enacted in Act nº 2008-1425 of December 27th 2008 being the Finance Act for 2009. When enacting the challenged provisions, Parliament drew the conclusions from the statutory basis given to such levies following their definition as being all kinds of taxes. It thus intended to prevent any litigation connected with the making of said definition likely to lead to an infringement of the principle of equality before public burden sharing between persons under a duty to pay such levies. It also intended to prevent the development of litigation, on grounds connected with the jurisdiction of the regulatory power, which in view of the amounts involved, might have entailed for the State and other beneficiaries of the proceeds in question, consequences of a most harmful nature. Lastly, in the absence of validation, the repayment to Casinos of taxes which the latter are required to hand over to the State under fundamental rules of taxation might constitute unjust enrichment to the benefit of said Casinos.
(2010-53 QPC, October 14th 2010 para. 5, p. 256)

— No failure to show due regard for a principle of constitutional status

The provisions of paragraph III of section 27 of Act nº 2009-888 of July 22nd 2009 on developing and modernising tourist services validate levies on the proceeds of gambling

insofar as they are challenged on the grounds that the base and methods of collection and monitoring thereof have been fixed by regulations. They cannot give rise to any retrospective penalty. They thus show due regard for the principle of non retrospectiveness of punishments and penalties guaranteed by Article 8 of the Declaration of 1789. The changing of the name of the levies on gambling to all kinds of taxes was set out in the Finance Bill for 2009 tabled before the National Assembly on September 26th 2008 and enacted in Act nº 2008-1425 of December 27th 2008 being the Finance Act for 2009. When enacting the challenged provisions, Parliament drew the conclusions from the statutory basis given to such levies following their definition as being all kinds of taxes. It thus intended to prevent any litigation connected with the making of said definition likely to lead to an infringement of the principle of equality before public burden sharing between persons under a duty to pay such levies. It also intended to prevent the development of litigation, on grounds connected with the jurisdiction of the regulatory power, which in view of the amounts involved, might have entailed for the State and other beneficiaries of the proceeds in question, consequences of a most harmful nature. Lastly, in the absence of validation, the repayment to Casinos of taxes which the latter are required to hand over to the State under fundamental rules of taxation might constitute unjust enrichment to the benefit of said Casinos.
(2010-53 QPC, October 14th 2010 para. 5, p. 256)

Following the decision of the Council of State dated July 7th 2004, paragraph I of section 43 of the Act of December 30th 2004 restored for the future the principle of the non adjustment of the balance sheet for the first non time-barred financial year. This shall apply, under paragraphs II and III of the same section, to financial years closed as from January 1st 2005 and to taxes imposed as from said date. Paragraph IV however validates taxes assessed as from said date, together with decisions taken on complaints about taxation insofar as the taxpayer challenges them on this point. Parliament thus reserved for the State the faculty of relying on the abovementioned case law for taxes imposed prior to January 1st 2005.

The consequence of the challenged validation is to retrospectively deprive the taxpayer alone of the benefit of the case law deriving from the decision of the Council of State dated July 4th 2004. Such an infringement of the balancing of the rights of the parties fails to comply with the requirements of Article 16 of the Declaration of 1789. Hence, and without it being necessary to review the other arguments raised, paragraph IV of section 43 of the Act of December 30th 2004 runs counter to the rights and freedoms guaranteed by the Constitution.
(2010-78 QPC, December 10th 2010, paras 5 to 7, p. 387)

Scope of validation

The provisions of paragraph III of section 27 of Act nº 2009-888 of July 22nd 2009 on developing and modernising tourist services validate levies on the proceeds of gambling insofar as they are challenged on the grounds that the base and methods of collection and monitoring thereof have been fixed by regulations. They cannot give rise to any retrospective penalty. They thus show due regard for the principle of non retrospectiveness of punishments and penalties guaranteed by Article 8 of the Declaration of 1789. The changing of the name of the levies on gambling to all kinds of taxes was set out in the Finance Bill for 2009 tabled before the National Assembly on September 26th 2008 and enacted in Act nº 2008-1425 of December 27th 2008 being the Finance Act for 2009. When enacting the challenged provisions, Parliament drew the conclusions from the statutory basis given to such levies following their definition as being all kinds of taxes. It thus intended to prevent any litigation connected with the making of said definition likely to lead to an infringement of the principle of equality before public burden sharing between persons under a duty to pay such levies. It also intended to prevent the development of litigation, on grounds connected with the jurisdiction of the regulatory power, which in view of the amounts involved, might have entailed for the State and other beneficiaries of the proceeds in question, consequences of a most harmful nature. Lastly, in the absence of validation, the repayment to Casinos of taxes which the latter are required to hand over to the State under fundamental rules of taxation might constitute unjust enrichment to the benefit of said Casinos.
(2010-53 QPC, October 14th 2010 paras 4 and 5, p. 256)

Application of the law timewise

Review of the temporary legal provisions making new rules in tort irrevocably applicable to cases which have not been the object of a *res judicata* decision. The Council applies its case law as to the retrospective nature of statute law: if Parliament may modify retrospectively a legal rule or validate an administrative decision or an instrument of private law, this may only be done if it seeks to achieve a purpose in the general interest and complies with decisions which have become *res judicata* and the principle that punishments and penalties shall not be retrospective and lastly, the scope of the modification or the validation must be strictly defined.
(2010-2 QPC, June 11th 2010, paras 21 and 22, p. 105)

Paragraph I of section 1 of the Act nº 2002-303 of March 4th 2002 came into force on March 7th 2002. Parliament made this applicable to proceedings which at said date have not been the object of decision which has become *res judicata*. These provisions concern the right of a child born with a disability to bring proceedings, to the conditions governing the incurring of liability by healthcare professionals and healthcare establishment towards the parents of such a child, together with forms of injury giving rise to compensation when such liability is incurred.

If the grounds of general interest referred to above may justify applying fresh rules to future proceedings concerning legal situations which arose prior to the coming into effect of said rules, they cannot justify such major modifications to the rights of persons who have, prior to said date, commenced legal proceedings to obtain compensation for injury sustained by them. Censure
(2010-2 QPC, June 11th 2010, para. 23, p. 105)

The levy on the financial potential of bodies offering low cost housing is only introduced as from January 1st 2011. If it is calculated on the average of the financial potential of the five previous financial years, this is in order to take into account the average length of an investment cycle in this line of business. It does not have any retrospective effect. The argument based on the adverse effect on a legally acquired situation is unsupported by the facts.
(2010-622 DC, December 28th 2010, para. 46, p. 416)

Stability of legal norms

Article L 45 of the Postal and Electronic Communication Code concerning the assignment of domain names on the Internet is held to infringe rights and freedoms guaranteed by the Constitution. However, in view of the number of domain names which have been assigned under the provisions this same Article, immediate repeal thereof would have patently disproportionate consequences for legal certainty. Repeal of said Article must therefore be postponed until July 1st 2011 in order to allow Parliament to remedy the failure to exercise its powers to the full as ascertained by the Council. Regulatory measures implemented on the basis of said Article shall have no basis in law solely as from said date. No other measures taken under these same provisions shall be challenged on the grounds of the unconstitutionality ascertained herein.
(2010-45 QPC, October 6th 2010, para. 7, p. 270)

Freedom and liability

Affirmation of the principle

From Article 4 of the Declaration of 1789 derives the principle that any person who causes injury to another is under a duty to compensate for such injury. The possibility of bringing proceedings based on such liability implements this constitutional requirement. However, this does not preclude Parliament, in the general interest, from deciding the circumstances in which such liability may be incurred. It may therefore, on such grounds, accompany this principle by exceptions or limitations on condition that this does not have any disproportionately adverse effect on the rights of injured parties to obtain compensation or on the right to effective redress before a court of law which derives from Article 16 of the Declaration.
(2010-2 QPC, June 11th 2010, para. 11, p. 105; 2010-8 QPC, June 18th 2010, para. 10 p. 117)

Applications

Under the terms of the first two paragraphs of Article L.114-5 of the Family and Social Welfare Code, nothing precludes a child from claiming compensation from healthcare professionals and healthcare establishments when the negligence claimed has solely prevented the mother, with full knowledge of the facts, from exercising her right to terminate the pregnancy. Healthcare professionals and healthcare establishments remain liable for the consequences of their negligence in all other cases. Thus paragraph 1 of Article L.114-5 does not exonerate healthcare professionals and healthcare establishments from all liability.
(2010-2 QPC, June 11th 2010, para. 6, p. 105)

Paragraph 3 of Article L.114-5 of the Family and Social Welfare Code does not exonerate healthcare professionals and healthcare establishments from all liability insofar as they are still required to compensate for injury other than that including the specific expenditure incurred throughout the lifetime of a child as a result of the disability from which he suffers.
(2010-2 QPC, June 11th 2010, para. 13, p. 105)

Paragraph 3 of Article L 114-5 of the Family and Social Welfare Code requires that there be manifest negligence in order for the liability of a healthcare professional or a healthcare establishment to be incurred towards the parents of a child born with a disability which was not detected during pregnancy, Parliament intended to take into consideration the difficulties inherent in making prenatal diagnoses in view of the state of medical knowledge and techniques available at the time of such diagnoses. To this end, it has excluded recourse to mere presumptions or deductions as a basis for a claim. The concept of "manifest negligence" is not the same thing as recklessness. Thus, in view of the purpose it is sought to achieve, the narrowing of the requirements which must be met for the incurring of liability by healthcare professionals and healthcare establishments is not disproportionate.
(2010-2 QPC, June 11th 2010, para. 12 p. 105)

Paragraph 3 of Article L.114-5 of the Family and Social Welfare Code provides that when the liability of a healthcare professional or a healthcare establishment is incurred towards the parents of a child born with a disability which was not detected during pregnancy, the injury for which they are required to compensate does not include the specific expenditure incurred throughout the lifetime of a child as a result of the disability from which he suffers. The limitation placed on the injury giving rise to compensation decided by Parliament is not disproportionate in view of the purposes sought to be achieved.

Firstly, the challenged provision does not exonerate healthcare professionals and healthcare establishments from all liability: they are still required to compensate the parents for other injury.

Secondly, Parliamentary is guided by grounds of general interest. Firstly, to ensure the assuming of expenditure for all persons suffering from a disability by a system which does not introduce any distinction based on the technical conditions in which the disability may be detected before birth, nor on the choice which the mother might have made subsequent to such a diagnosis. By thus deciding that the specific expenditure incurred throughout the lifetime of child due to his disability cannot constitute injury giving rise to compensation when the negligence claimed is not at the origin of the disability, Parliament took into account ethnic and social considerations which are the preserve of its power of appraisal.

Secondly, the challenged provisions are designed to respond to the difficulties encountered by healthcare professionals and healthcare establishments when taking out insurance in economically acceptable conditions in view of the amount of damages which may be awarded to compensate fully for any disability which might arise. Parliament also took into account the consequences for the cost of health insurance of the changing nature of medical liability. These provisions are thus intended to guarantee the financial equilibrium and the good organization of the healthcare system.

Thirdly, there is no infringement of the principle of equality insofar as the difference between the systems of compensation corresponds to a difference arising from the origin of the disability.

Fourthly, compensation for expenditure occurred throughout a child's lifetime due to his disability is a matter for national solidarity. To this end, it therefore introduced the additional disability allowance introduced by Act nº 2005-102 of February 11th 2005, which completes the

normal social welfare system, composed of flat rate benefits, by a system of compensation tailored to the needs of the disabled person.
(2010-2 QPC, June 11th 2010, paras 13 to 18, p. 105)

The provisions of Title IV of the Social Security Code on occupational injuries confer upon the injured party or the beneficiaries thereof entitlement to compensation for the damage sustained due to an occupational injury or disease and, in the event of litigation, redress before the Social Security Tribunals without suppressing the right of said injured party to bring proceedings against the employer in the event of an inexcusable or intentional fault. In order to reconcile the right of parties who have sustained injury by reason of a fault with the implementation of the requirement deriving from paragraph 11 of the Preamble of 1946, Parliament was at liberty to introduce by Article L 431-1 and following of the Social Security Code a specific system of compensation replacing in part the liability of the employer.
(2010-8 QPC, June 18th 2010, para. 14, p. 117)

The provisions of Title II of Book IV of the Social Security Code guarantee the automatic nature, rapidity and security of compensation for occupational injuries and diseases. They also take into account the burden represented by all the benefits allocated. Thus, in the absence of any inexcusable fault on the part of the employer, the flat rate compensation for the loss of wages or incapacity, the exclusion of certain types of injury and the impossibility for the injured party or the beneficiaries thereof to institute proceedings against the employer do not constitute disproportionate restrictions as regards the objectives of general interest which it is sought to achieve.
(2010-8 QPC, June 18th 2010, para. 16, p. 117)

When the occupational injury or disease is due to the inexcusable fault of the employer, the injured party or, in the event of the death of the latter, the beneficiaries thereof shall receive an increase in the indemnities due. Under Article L 452-2 of the Social Security Code, the increase in the lump sum or the annuity awarded on the basis of the reduced capacity of the injured party cannot exceed the amount of the lump sum or the amount of wages. In view of the objectives of general interest which Parliament seeks to achieve, the capping of this indemnity designed to compensate for the loss of wages resulting from the incapacity does not constitute a disproportionate restriction of the rights of persons suffering from occupational injuries or diseases.
(2010-8 QPC, June 18th 2010, para. 17, p. 117)

Independently of the increase in the compensation granted to the party sustaining the occupational injury, the latter or, in the event of the death of the latter, the beneficiaries thereof, may claim compensation from the employer before the Social Security Tribunal for certain heads of claim listed in Article L 452-3 of the Social Security Code. In the presence of an inexcusable fault on the part of the employer, these provisions cannot, without constituting a disproportionate infringement of the rights of those who have sustained injury due to the faults of another, preclude these same persons from claiming before the same Tribunals compensation from the employer for all types of injury not covered by Book IV of the Social Security Code. Qualification.
(2010-8 QPC, June 18th 2010, para. 18, p. 117)

The issuing of national identity cards and passports has placed an additional financial burden on Communes. Parliament has however fixed for all Communes and not merely those which have instituted litigation but also all those which have had to bear such expenditure, a lump sum grant. It intended to compensate in an equal manner for the consequences of the Decree which had improperly required Communes to meet expenses which should have been assumed by the State. It did not introduce any disproportionate restrictions as regards the objectives of general interest which it sought to attain. In view of the amount involved, it has not imposed any unconstitutional limitation on the principle of liability which derives from Article 4 of the Declaration of 1789.
(2010-29/37 QPC, September 22nd 2010, para. 8, p. 248)

DIGNITY OF THE HUMAN BEING

Principle

The Preamble to the Constitution of 1946 has reaffirmed that all human beings, irrespective of race, religion or creed, possess certain sacred and inalienable rights. The protection of the dignity of the human being from all types of enslavement and debasement is to be counted among these rights and is a principle of constitutional status.
(2010-71 QPC, November 26th 2010, para. 28, p. 343)

Applications

Bioethics and genetics

Under paragraph 1 of Article 706-54 of the Code of Criminal Procedure, the National DNA Database has been set up to solely to facilitate the identification and the search for persons who have committed certain offences. To this end, paragraph 5 of this Article provides: "DNA markers kept on the database may only be taken from segments of non coding deoxyribonucleic acid, except for the segment corresponding to the sex marker". The challenged provision thus does not authorize the examination of the genetic features of persons who have been subjected to the taking of such samples but merely makes it possible to identify them by genetic markers. Dismissal of the argument of infringement of the dignity of the human being.
(2010-25 QPC, September 16th 2010, paras 14 and 15, p. 220)

Deprival of freedom

It is incumbent upon the Judicial Authorities and those of the Police Criminal Investigation Department to ensure that in all circumstances the remanding of persons in police custody for questioning is carried out with due respect for the dignity of the human being. It is moreover incumbent upon the competent Judicial Authorities, in the framework of the powers vested in them by the Code of Criminal Procedure, and if need be, on the basis of the criminal offences provided for to this end, to prevent and punish behaviour which adversely affects the dignity of the person remanded in police custody and order compensation for injury sustained by reason of such behaviour. Any possible failure to fully comply with this requirement when applying the statutory provisions referred to hereinabove does not *per se* render said provisions unconstitutional. Although Parliament is at liberty to amend the same, Articles 62, 63, 63-1, 63-4 paragraphs 1 to 6, and 77 of the Code of Criminal Procedure submitted for review by the Constitutional Council do not adversely affect the dignity of the human being.
(2010-14/22 QPC, July 30th 2010, paras 19 and 20 p. 179)

It is incumbent upon Healthcare professionals and the Judicial and Administrative Authorities, when carrying out their tasks and when exercising their respective powers, to ensure due regard at all times for the dignity of persons committed to hospital without their consent. The second phrase of paragraph 1 of Article L 326-3 of the Public Health Code reminds them of this requirement. It is also incumbent upon Public Health Authorities within the framework of the powers vested in them by the Public Health Code and, if need be, on the basis of the criminal offences provided for failure to comply with such requirements, to prevent and punish behaviour which infringes the dignity of the person confined to hospital without his consent and to order compensation for injury sustained by reason thereof. Any possible failure to have due regard for this requirement in the abovementioned statutory provisions does not *per se* mean that such provisions are unconstitutional.
(2010-71 QPC, November 26th 2010, para. 29, p. 343)

Article 803-3 of the Code of Criminal Procedure makes it possible to retain a person to be presented before a judge for a maximum of twenty hours between the ending of the period of

remand in police custody for questioning and the actual presentation of said person before a judge.

It is incumbent upon the Judicial Authorities to ensure that this deprivation of freedom of the persons remanded is at all times carried out with due respect for the dignity of the human being. It is thus incumbent upon said Authorities to ensure that the premises of the courts in which said persons are retained are adapted and maintained in conditions which ensure due regard for said principle. Possible failure to comply with this requirement in the application of the statutory provisions referred to above does not *per se* mean that such provisions are unconstitutional.
(2010-80 QPC, December 17th 2010, para. 9, p. 408)

RIGHT TO LIFE AND PHYSICAL INTEGRITY, PROTECTION OF HEALTH (For the protection of public health see below Other social rights and principles).

Voluntary interruption of pregnancy

After the handing down by the *Cour de cassation* of decision nº 99-13701 of November 17th 2000, Parliament felt that, when the negligence of a healthcare professional or a healthcare establishment has solely prevented the mother, with full knowledge of the facts, from exercising her right to terminate the pregnancy, the child has no rightful interest to claim compensation for the consequences of such negligence. When laying down such a principle, Parliament merely exercised the powers which the Constitution recognizes as being vested in it without adversely affecting the principle of liability or the right to an effective judicial remedy before a court of law.
(2010-2 QPC, June 11th 2010, para. 7, p. 105)

Parliamentary debate on Act nº 2002-303 of March 4th 2002 shows that the challenged provisions are designed to ensure the assuming of expenditure for all persons suffering from a disability by a system which does not introduce any distinction based on the technical conditions in which the disability may be detected before birth, nor on the choice which the mother might have made subsequent to such a diagnosis. By thus deciding that the specific expenditure incurred throughout the lifetime of child due to his disability cannot constitute injury giving rise to compensation when the negligence claimed is not at the origin of the disability, but merely prevented the mother, with full knowledge of all the facts, from exercising her right to terminate the pregnancy, Parliament took into account ethnic and social considerations which are the preserve of its power of appraisal.
(2010-2 QPC, June 11th 2010, para. 14, p. 105)

Taking of samples

Non intrusive samples

The biological sample referred to in paras 2 and 3 of Article 706-54 of the Code of Criminal Procedure cannot be taken without the agreement of the person concerned. Under indent 4 of paragraph I of Article 706-56, when it is not possible to take a biological sample from a person the identification of his/her DNA marker may be made from biological material which has naturally become separated from his/her body. In all events, taking a biological sample does not entail any internal bodily intrusion, neither does it involve any painful, intrusive process which constitutes an infringement of the dignity of the human being. Dismissal of argument based on the failure to have due regard for the principle of the inviolability of the human body.
(2010-25 QPC, September 16th 2010, paras 13 and 15, p. 220)

Consent to receive healthcare and right to refuse all treatment

Parliament felt that a person suffering from mental illness making it either impossible to obtain his consent despite his condition requiring constant surveillance in hospital or else

endangering the safety of others or constituting a serious threat to public order cannot refuse the care which such disorders require. In all events, the guarantees which accompany involuntary confinement in hospital make it possible to take into account the opinion of the person involved as to his treatment. When enacting Article L 326-3 of the Public Health Code, Parliament took measures ensuring, between the protection of health and the safeguarding of public order on the one hand, and that of freedom of the individual protected by Article 2 of the Declaration of 1789 on the other, a reconciliation which is not patently disproportionate.
(2010-71 QPC, November 26th 2010, para. 32, p. 343)

RIGHT TO PRIVACY
(see also below Rights of Foreigners and Political Asylum, Freedom of the Individual and Personal Freedom)

Affirmation of constitutional status

The liberty proclaimed by Article 2 of the Declaration of the Rights of Man and the Citizen of 1789 implies due regard for privacy.
(2010-604 DC, February 25th 2010, para. 21, p. 70)

Processing data of a personal nature
(see also Title 15, Independent Authorities)

Police and court records

National DNA Database.

The National DNA database is placed under the supervision of the National Commission on Data Processing and Individual Liberties under the provisions and in the manner set out in the Act of January 6th 1978. Under the provisions of Article 706-54 it is also placed under the supervision of a judge.

It has been set up for the purpose of facilitating the search for and the identification of persons committing certain offences and centralises solely traces and markers concerning these offences. Entries on the database concern, in addition to persons convicted of committing said offences, persons concerning whom there exists serious and concurring evidence that they have committed one of such offences. Where the latter are concerned, DNA markers obtained in the framework of an investigation or preliminary judicial inquiry are entered on this database on the decision of a CID Police officer acting either on his own initiative or at the request of the Public Prosecutor or an Investigating Magistrate. Provision has also been made by Parliament for the removal of such DNA markers when their retaining no longer appears necessary in view of the purposes which said database seeks to achieve. In the event of refusal by the Public Prosecutor to remove such markers from said database, the person concerned may apply to the Freedom and Detention Judge, whose decision may be appealed against before the President of the *Chambre de l'Instruction*.

Lastly, under section 39 of the Act of January 6th 1978 referred to above, all persons have a right of direct access to data concerning them.

In view of the foregoing, these provisions are such as to ensure a reconciliation which is not patently disproportionate between the right to privacy and the safeguarding of law and order.
(2010-25 QPC, September 16th 2010, para. 16, p. 220)

Entry on the National DNA database of DNA markers of persons convicted of committing certain particular offences and those of persons concerning whom there exists serious or concurring evidence that they are likely to have committed one of such offences is necessary for identifying and searching for persons who have committed such crimes or major offences.

The final paragraph of Article 706-54 leaves it to a Decree to determine in particular the length of time such markers may be retained. It is therefore incumbent upon those vested with the power to make regulations to make this period of retention of such personal data proportionate to the nature and seriousness of said offences and the purpose which the database seeks to achieve, while adapting these provisions to the specificities of offences committed by minors. With this qualification leaving such measures to be determined by a Decree does not run counter to Article 9 of the Declaration of 1789.
(2010-25 QPC, September 16th 2010, para. 18, p. 220)

Under paragraph 3 of Article 706-54 of the Code of Criminal Procedure, CID Police officers may also, either on their own initiative or at the request of the Public Prosecutor or an Investigating Magistrate, compare DNA markers of any person concerning whom there exist plausible reasons to suspect that said person has committed a crime or major offence with existing entries on the database, without however entering said DNA marker on the database. The expression "crime or major offence" employed by Parliament is to be understood as referring to the offences listed by Article 706-55. With this qualification para 3 of Article 706-54 of the Code of Criminal Procedure does not run counter to the prohibition of any undue harshness.
(2010-25 QPC, September 16th 2010, para. 19, p. 220)

Under Article 706-55, the National DNA database centralises DNA traces and markers concerning a specific and precise list of crimes and major offences. In addition to offences against the fundamental interests of the Nation, all these offences are against the safety and security of persons and property, pertain to acts of commission of said offences or of profiting therefrom. Except for the offence provided for in paragraph 2 of Article 322-1 of the Criminal Code, all these offences carry prison sentences. For all these offences, comparisons carried out with DNA traces or markers already entered on the database are likely to assist in identifying and searching for persons committing said offences. The list set out in Article 706-55 is thus commensurate with the purpose which Parliament has sought to achieve and this Article does not submit those involved to any treatment of undue harshness
(2010-25 QPC, September 16th 2010, para. 22, p. 220)

Video surveillance, sound recording and filming

It is incumbent upon Parliament to ensure a reconciliation between due regard for privacy and other constitutional requirements, such as the seeking out of offenders and the prevention of offences against public order. When permitting, in a situation which does not come under the scope of section 10 of the Security Guideline and Programming Act of January 21st 1995, the transmission to the police and national gendarmerie and to municipal police forces images filmed by video surveillance systems in parts of buildings used for housing which are not open to the public without providing for the guarantees needed to ensure the protection of the privacy of persons living in such buildings or visiting said buildings, Parliament has failed to ensure the necessary reconciliation between the constitutional requirements referred to above. Unconstitutional
(2010-604 DC, February 25th 2010, paras 20 to 23, p. 70)

RIGHT TO LEAD A NORMAL FAMILY LIFE

Principle

The right to lead a normal family life derives from paragraph 10 of the Preamble to the Constitution of 1946
(2010-39 QPC, October 6th 2010, para. 7, p. 264)

Scope of the principle

Article 365 of the Civil Code, in the interpretation given to it by an unbroken line of precedent of the *Cour de cassation*, prevents a minor child from establishing a second bond of filiation with

the common law spouse or partner of his/her father or mother through the mechanism of a simple adoption. This provision however in no way prevents the parent of a minor child from co-habiting with a person or entering into a civil partnership with any person of his/her choosing. Neither does it prevent said parent from having his/her common law spouse or partner participate in the upbringing and education of the child. The right to lead a normal family life does not imply that the relationship between a child and the person who co-habits with the father or mother of said child carries any entitlement to the creation of an adoptive bond between said person and said child. The argument whereby Article 365 of the Civil Code infringes the right to lead a normal family life must thus be dismissed.
(2010-39 QPC, October 6th 2010, para. 8, p. 264)

RIGHT TO PROPERTY

Principle

Basis of the right to property

Property is among the rights of man enshrined by Articles 2 and 17 of the Declaration of 1789.

It is incumbent upon Parliament, vested under Article 34 of the Constitution with the power to lay down the basic principles of ownership and rights *in rem*, to determine the manner in which rights of owners of adjoining properties should be reconciled.
(2010-60 QPC, November 12th 2010, paras 3 and 4, p. 321)

Scope of application of the protection of the right to property

Holders of the right to property

Article 131-21 of the Criminal Code, which introduces the additional penalty of confiscation, preserves the right to property of third parties of good faith. It does not run counter to the right to property.

The argument contending that the penalty of confiscation infringes the right to property of the convicted person is inoperative. The necessity of punishments is assessed in the light of Article 8 of the Declaration of 1789 (implied solution).
(2010-66 QPC, November 26th 2010, paras 4 and 7, p. 334)

The principle of equality before the law and public burden sharing, which concerns not only the private property of individuals but also the property of the State and other public entities, derives firstly from Articles 6 and 13 of the Declaration of 1789 and secondly from Articles 2 and 17 thereof. The right to due regard for property guaranteed by said provisions does not preclude Parliament from transferring free of charge property in the public domain between public entities.
(2010-618 DC, December 9th 2010, para. 44, p. 367)

Scope of application

Ownership of real estate.

It is incumbent upon Parliament, vested under Article 34 of the Constitution with the power to lay down the basic principles of ownership and rights *in rem*, to determine the manner in which rights of owners of adjoining properties should be reconciled. The joint ownership of dividing walls is one of the measures designed to ensure such reconciliation
(2010-60 QPC, November 12th 2010, para. 4, p. 321)

Debts

Provisions constituting an impediment to the right of creditors to recover debts owed to them on the property of their debtors are to be deemed to constitute an infringement of the right to property of creditors guaranteed by Articles 2 and 4 of the Declaration of the Rights of Man and the Citizen of 1789.
(2010-607 DC, June 10th 2010, para. 9, p. 101)

Protection against measures running counter to the right to property

Statutory guarantees

Infringement of the right to property

Indent e of 2° of Article L 332-6-1 of the Town Planning Code allows Communes to require builders, by a stipulation included in the planning permission, to assign part of their land free of charge to said Communes. It vests in the public community the widest power of appraisal as to the application of this provision and does not specify the public use to which the land thus assigned should be put. No other statutory provision introduces guarantees making it possible to ensure no infringement of Article 17 of the Declaration of 1789. Parliament has thus failed to exercise its powers to the full. Finding of unconstitutionality
(2010-33 QPC, September 22nd 2010, para. 4, p. 245)

Section 53 of the Act of November 24th 2009 pertaining to lifelong guidance and continuous training has withdrawn from the National Association for Professional Training of Adults part of the public service missions which it carried out in order to ensure the conformity of the same with competition rules under European Union law. The disputed section 54 of the same statute transfers to said Association property placed at its disposal by the State.

Firstly, the challenged provision transfers to the National Association for Professional Training of Adults, free of charge and subject to no conditions or obligations, real estate belonging to the State. Secondly neither this provision nor any other provision applicable to the transfer of the real estate involved makes it possible to guarantee that said real estate shall continue to be used for the public service missions which this Association shall continue to perform under 3° of Article L 5311-2 of the Employment Code. The challenged provision therefore fails to comply with the constitutional requirement of protection of public property.
(2010-67/86 QPC, December 17th 2010, paras 4 and 5.p. 403)

No infringement of the right to property.

Article L 318-3 of the Town Planning Code allows the Administrative authority to transfer to the public communal domain the ownership of private roads opened to public traffic. Such a transfer is dependent, under the supervision of the Administrative judge, upon the opening of such roads to general traffic, said opening being consequent upon the exclusive consent of the owner thereof to agree to public use of his property and thereby doing to waive his right of purely private use. Parliament intended to draw the necessary conclusions from this state of affairs by allowing the Administrative authority to confer upon these private roads opened to public traffic a legal status in conformity with the use to which they are put. This transfer releases the owners of said roads from all obligation and makes the public community solely responsible for all the maintenance, conservation and possible development thereof. Parliament has moreover not excluded all compensation in the exceptional case of the transfer of ownership of said property entailing for the owner thereof a special and exorbitant outlay, out of all proportion with the objective of general interest which it is sought to achieve. In such conditions, Articles L 318-3 of the Town Planning Code does not run counter to Article 17 of the Declaration of 1789.
(2010-43 QPC, October 6th 2010, para. 4, p. 268)

The compulsory access to a dividing wall provided for by Article 661 of the Civil Code is reserved for the own of the property adjoining the wall and dependent upon the refunding to the initial owner thereof of half the cost of said wall or the portion thereof which is to become

an adjoining wall and one half of the value of the ground on which said wall has been built. Failing agreement between the parties, these basic conditions shall be ascertained by the Court which shall fix the amount to be refunded. In view of these guarantees covering the substantive basis of such refunding and the procedure pertaining thereto, the restriction placed on the right to property by the challenged provisions is not of such a serious nature that it distorts the meaning and the scope of said right.
(2010-60 QPC, November 12th 2010, para. 6, p. 321).

Protection against deprivation of the right to property

Meaning of deprivation of property

Although pursuant to Article 661 of the Civil Code, the owner of a dividing wall may be required to make it an adjoining wall either wholly or in part at the request of the owner of the adjoining land, this provision merely makes the exclusive right of the owner of the wall an undivided interest therein and said owner shall, within the limits of the common use laid down by Article 653 and following of the Civil Code, continue to exercise over said property all the attributions of the right of ownership. Therefore, in the absence of any deprivation of said right, the access to an adjoining wall authorized by said provision does not come under the scope of Article 17 of the Declaration of 1789.
(2010-60 QPC, November 12th 2010, para. 5, p. 321)

Public necessity for deprivation of property

Article 17 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims: " Since the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and fair and prior indemnity has been paid". In order to comply with these constitutional requirements, statute law can authorize the expropriation of real estate or real property rights solely for the carrying out of an operation of which the public interest has been legally ascertained.
(2010-26 QPC, September 17th 2010, para. 6, p. 229)

Payment of a fair and prior indemnity

Principle

Article 17 of the Declaration of the Rights of Man and the Citizen proclaims: " Since the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and fair and prior indemnity has been paid". The entering into possession by the expropriating party must be dependent upon the prior payment of said indemnity. In order to be fair said indemnity must cover the entire direct injury, both material and certain, caused by the expropriation. In the event of disagreement as to the fixing of the amount of said indemnity, the expropriated party must have at his disposal an appropriate means of judicial redress.

However, the granting by the expropriating community of an advance representing the amount of the indemnity due is not incompatible with compliance with such requirements if the mechanism involved meets imperative needs in the general interest and is accompanied by the guarantee of the rights of the owners involved.
(2010-26 QPC, September 17th 2010, paras. 6 and 7, p. 229)

Applications

The granting by the expropriating community of an advance representing the amount of the indemnity due is not incompatible with compliance with such requirements if the mechanism involved meets imperative needs in the general interest and is accompanied by the guarantee of the rights of the owners involved

Firstly, Sections 13, 14, 17 and 18 of the Act of July 10th 1970 are designed to put an end as soon as possible to the use of premises or housing presenting a danger for the health or safety of the occupiers thereof which meets the requirements of imperative needs in the general interest justifying the departure from the rule of the prior payment of an indemnity.

Secondly, it can be seen from the information given to the owner, the audi alteram partem nature of the proceedings involved, the channels of appeal against acts carried out during the administrative phase of the expropriation proceedings, the payment, prior to the entry into possession, of the advance of an amount at least equal to the assessment of the value thereof by the State Public Real Estate and Land Management Board (service des domaines), the intervention of the judge called upon to oversee said expropriation in the event failure by the parties to reach agreement that the departure from the rule of prior indemnity is accompanied by the guarantee of the rights of the owners involved. Furthermore, when specifying that the value of the property "shall be assessed, in view of the fact that it the premises and installations which have been expropriated are unfit for habitation, on the basis of the land alone", paragraph 2 of section 18 merely draws the conclusions from the declaration of irremediable unfitness for habitation.
(2010-26 QPC, September 17th 2010, paras 8 and 9, p. 229)

Review of infringements of the exercising of the right to property

Principle of reconciliation with objectives of general interest

In the absence of any deprivation of the right to property, Article 2 of the Declaration nevertheless proclaims that any restriction imposed on the exercising of said right must be justified on grounds of general interest and proportionate to the purpose it is sought to achieve.
(2010-60 QPC, November 12th 2010, para. 3, p. 321)

No unconstitutional infringement of the right to property

Pursuant to paragraphs 6 to 8 of Article L 526-12 of the Commercial Code, the declaration of the appropriation of property removes the property in question from property pledged as security to personal creditors of the businessman and the personal property from property pledged as security to his business creditors. Although Parliament was at liberty to make such a declaration assertable against creditors whose rights predated the filing of such a declaration, this is on condition that said creditors be personally informed of the declaration of appropriation and of their right to lodge an objection to the same. With this qualification, paragraph 2 of Article L 526-12 of the Commercial Code does not adversely affect the exercising of the right to property of creditors guaranteed by Article 2 and 4 of the Declaration of 1789.
(2010-607 DC, June 10th 2010, para. 9, p. 101)

1 of Article 273 of the General Tax Code, when leaving it to a Decree issued after consultation of the Council of State to determine the timeframe for the making of deductions to which persons subject to value added tax are entitled does not infringe the right to property guaranteed by Article 2 and 17 of the Declaration of 1789.
(2010-5 QPC, June 18th 2010, para. 5, p. 114)

The system of co-ownership of walls separating adjoining properties determines an economic method of enclosing and building pieces of real estate and a rational use of space, while apportioning the rights of neighbours on the basis of the limits of their property. The compulsory access to a dividing wall provided for by Article 661 of the Civil Code is an necessary element of this system and meets a need in the general interest. It is proportionate to the purpose which Parliament has sought to achieve. It is reserved for the owner of the property adjoining the wall and dependent upon the refunding to the initial owner thereof of one half the cost of said wall or the portion thereof which is to become an adjoining wall and one half of the value of the ground on which said wall has been built. Failing agreement between the parties, these basic conditions shall be ascertained by the Court which shall fix the amount to be refunded. In view of these guarantees covering the substantive basis of such

refunding and the procedure pertaining thereto, the restriction placed on the right to property by the challenged provisions is not of such a serious nature that it distorts the meaning and the scope of said right.

As is shown by the foregoing the adverse effect on the exercising of the right to property by Article 661 of the Civil Code does not fail to comply with Article 2 of the Declaration of 1789.
(2010-60 QPC, November 12th 2010, paras 6 and 7, p. 321).

CONSTITUTIONAL RIGHTS OF WORKERS

Collective rights of workers

Freedom to enter into collective bargaining. (Paragraph 8 of the Preamble to the Constitution of 1946)

Determining practical means of implementing a statute.

Parliament is at liberty, when laying down the conditions for the implementation of the right of workers to participate through their representatives in the determination of their working conditions and the management of their companies, to define the criteria for the representativeness of Trade Union organizations.
(2010-42 QPC, October 7th 2010, para. 6, p. 278)

Freedom to join a Trade Union (Article 6 of the Preamble to the Constitution of 1946)

Individual freedom to join a Trade Union

Freedom to join the Trade Union of one's choice, provided for by paragraph 6 of the Preamble to the Constitution of 1946, does not require that all Trade Unions be considered as being representative irregardless of their following.
(2010-42 QPC, October 7th 2010, para. 6, p. 278)

Under paragraph 6 of the Preamble to the Constitution of 1946, "All men may defend their rights and interests though Trade Union action and join the Union of their choice".

Paragraph 2 of Article L 4031-2 of the Public Health Code does not prevent healthcare professionals from freely setting up a Trade Union organization or freely joining the Union of their choice.
(2010-68 QPC, November 19th 2010, paras 6 and 7, p. 330)

Collective freedom to join a Trade Union

Parliament was at liberty, when laying down the conditions for the implementation of the right of workers to participate through their representatives in the determination of their working conditions and the management of their companies, to define the criteria for the representativeness of Trade Union organizations. Article L 2122-2 of the Employment Code is designed to ensure that collective bargaining is carried out by organizations whose representativeness is based in particular on the result of professional elections. Parliament also intended to avoid dispersion of Trade Union representation. When fixing the threshold of the representativeness of Trade Unions at 10 % of the votes cast in the first round of voting at the latest professional elections irregardless of the number of persons voting, Parliament has not failed to show due regard for the principles set out in paragraphs 6 and 8 of the Preamble of 1946.
(2010-42 QPC, October 7th 2010, para. 6, p. 278)

Freedom of action of a Trade Union

When requiring representative Trade Unions to choose in priority their delegate from among the candidates having obtained at least 10 % of the votes cast during the first round of the latest

professional elections, Article L 2143-3 associates workers in the designation of persons recognized as being best suited to defend their interests in the company and enter into negotiations on their account. When enacting this section, Parliament did not fail to show due regard for the principle of Trade Union freedom set out in paragraph 6 of the Preamble to the Constitution of 1946.
(2010-63/64/65 QPC, November 12th 2010, para. 9, p. 326)

Under paragraph 6 of the Preamble to the Constitution of 1946, "All men may defend their rights and interests though Trade Union action and join the Union of their choice".

Parliament has based the system of representativeness of Trade Unions of healthcare professionals and the entering into of national agreements on the following of such organizations as demonstrated in elections to regional Unions of healthcare professionals. When taking into account the results of such elections, it intended to establish a link between these Unions and organizations authorized to participate in bargaining for national agreements. When reserving the presenting of lists of candidates to those Trade Union organizations which have at least two years'standing, and have been present on national territory in at least half of the Departments and half of the Regions, it intended to avoid dispersion of Trade Union representation at national level. It did not infringe either the principle of equality or that of Trade Union freedom.
(2010-68 QPC, November 19th 2010, paras 6 and 8, p. 330)

Principle of participation of workers in the management of companies (paragraph 8 of the Preamble to the Constitution of 1946)

Representativeness of Trade Unions and Institutions representing workers

Parliament was at liberty, when laying down the conditions for the implementation of the right of workers to participate through their representatives in the determination of their working conditions and the management of their companies, to define the criteria for the representativeness of Trade Union organizations. Article L 2122-2 of the Employment Code is designed to ensure that collective bargaining is carried out by organizations whose representativeness is based in particular on the result of professional elections. Parliament also intended to avoid dispersion of Trade Union representation. When fixing the threshold of the representativeness of Trade Unions at 10 % of the votes cast in the first round of voting at the latest professional elections irregardless of the number of persons voting, Parliament has not failed to show due regard for the principles set out in paragraphs 6 and 8 of the Preamble of 1946.
(2010-42 QPC, October 7th 2010, para. 6, p. 278)

OTHER SOCIAL RIGHTS AND PRINCIPLES

Right to social protection (paragraph 11 of the Preamble to the Constitution of 1946)

Scope

Illness

When introducing a system of social insurance for occupational injuries and diseases, the Act of October 30th 1946 implemented the requirements deriving from paragraph 11 of the Preamble to the Constitution of October 27th 1946.

Article L 451-1 and following of the Social Security Code confer upon the injured party or the beneficiaries thereof entitlement to compensation for the damage sustained due to an occupational injury or disease and, in the event of litigation, redress before the Social Security Tribunals without suppressing the right of said injured party to bring proceedings against the employer in the event of an inexcusable or intentional fault. In order to reconcile the right of

parties who have sustained injury by reason of a fault with the implementation of the requirement deriving from paragraph 11 of the Preamble of 1946, Parliament was at liberty to introduce by Article L 431-1 and following of the Social Security Code a specific system of compensation replacing in part the liability of the employer.
(2010-8 QPC, June 18th 2010, paras 11 and 14, p. 117)

The challenged provisions of section 186 of the Finance Act for 2011 are intended to verify the conditions in which State medical aid is granted prior to the State agreeing to bear the high cost of hospital care. They thus aim to avoid the assuming of the cost of expensive care for persons who no longer meet the requirements to benefit from such assistance. The approval procedure applies solely to programmed healthcare given to adults. It is up to the power making regulations, vested with the power to lay down the approval procedure, to provide for a timeframe compatible with the right to protection of health. In these conditions Parliament has enacted measures such as ensure a reconciliation which is not disproportionate between constitutional requirements, proper use of public funds and the fight against fraud on the one hand and the right to the protection of health on the other hand.
(2010-622 DC, December 28th 2010, para. 35, p. 416)

Section 188 of the Finance Act for 2011 introduces a 30 euro registration fee, payment of which is required for access to State medical aid. This fee is not a condition for access to emergency treatment under Article L 254-1 of the Family and Social Welfare Code. In view of the amount of said fee it does not fail to comply with the constitutional requirements of paragraph 11 of the Preamble of 1946.
(2010-622 DC, December 28th 2010, para. 36, p. 416)

Old age

When enacting the statute referred for review, Parliament wished to preserve the system of a retirement pension regime based on the principle of redistribution, which is confronted with substantial funding difficulties. It took into particular account enhanced life expectancy. One of the measures taken has been to raise the statutory retirement age of workers in both public and private sectors to age 62, with implementation on a progressive basis though to 2018. Parliament has maintained or provided for the possibility of early retirement for persons who have had a long working-life, or have a rate of occupational disability determined by regulations, for persons who have been exposed to "harsh working conditions" and are permanently unable to work, for the disabled or persons exposed to asbestos. When so doing, it has taken measures designed to guarantee the security of elderly workers in accordance with the preamble of 1946. These measures are not inappropriate for the purpose which Parliament has sought to achieve.
(2010-617 DC, November 9th 2010, para. 9, p. 310)

Principle of protection of public health

Basis

Arising from Paragraph 11 of the Preamble to the Constitution of 1946

Under paragraph 11 of the Preamble of 1946, the Nation guarantees to all the protection of health. Article 34 of the Constitution provides that statute law shall determine the fundamental guarantees granted to citizens for the exercising of their civil liberties. Parliament is at all times at liberty, when acting within its powers, to amend or repeal previous statutes, replacing them, if need be, by other provisions so long as, when exercising the powers vested in it, Parliament does not deprive constitutional requirements of statutory guarantees.
(2010-71 QPC, November 26th 2010, para. 15, p. 343)

Applications

Fight against the addiction to gambling

Parliament did not deprive of statutory guarantees the requirements set forth in paragraph 11 of the Preamble of 1946 when enacting provisions requiring betting and gambling operators

firstly to refuse participation by persons who have been banned from such activities and secondly to take preventive measures designed to prevent and combat addiction, forbidding minors from taking part in betting and gambling, prohibiting advertising for such activities intended for minors and putting operators under a duty to encourage promotion of "responsible betting and gambling", and prohibiting gambling on credit.
(2010-605 DC, May 12th 2010, para. 34, p. 78)

Mental health

It is incumbent upon Parliament to ensure the reconciliation between firstly the protection of the health of persons suffering from mental illness and the protection of public order necessary for the safeguarding of rights and principles of constitutional status and secondly the exercising of constitutionally guaranteed freedoms
(2010-71 QPC, November 26th 2010, para. 16, p. 343)

Parliament felt that a person suffering from mental illness making it either impossible to obtain his consent despite his condition requiring constant surveillance in hospital or else endangering the safety of others or constituting a serious threat to public order cannot refuse the care which such problems necessitate. In all events, the guarantees which accompany involuntary confinement in hospital make it possible to take into account the opinion of the person involved as to his treatment. When enacting Article L326-3 of the Public Health Code, Parliament took measures ensuring, between the protection of health and the safeguarding of public order on the one hand, and that of freedom of the individual protected by Article 2 of the Declaration of 1789 on the other, a reconciliation which is not patently disproportionate.
(2010-71 QPC, November 26th 2010, para. 32, p. 343)

RIGHT OF FOREIGNERS AND RIGHT OF ASYLUM

Expulsion of Foreigners

Expulsion, refusal of entry, escorting to the border and prohibition on sojourning on French territory.

Under Article 20-4 of the Ordinance of February 2nd 1945, no prohibition on sojourning on French territory can be issued against a minor. The argument contending that Article 431-27 of the Criminal Code, which provides for such measures for persons found guilty of the offence provided for in Article 431-25, infringes the right to lead a normal family life and the fundamental principle recognized by the laws of the Republic whereby the criminal liability of a minor is attenuated because of his age must therefore be dismissed.
(2010-604 DC, February 25th 2010, paras 33 to 35,p. 70)

FREEDOM OF ASSOCIATION

Legal rules governing setting up of Associations

Freedom of association is one of the fundamental principles recognized by the laws of the Republic and solemnly reaffirmed by the Preamble to the Constitution. Under the principle of freedom of association, Associations may be constituted freely and may be publicized under the sole condition of a prior declaration to this effect. Thus, except for measures which may be taken with respect to certain specific categories of Associations, the setting up of Associations, even when they may seem to be void or have an unlawful object, cannot be subject to any prior intervention of administrative or judicial authorities as a prerequisite of validity.

The Families Associations provided for by Article L.211-1 of the Family and Social Welfare Code may be freely set up under the Act of July 1st 1901 referred to hereinabove. They are free to join or not to join the National Union or Departmental Unions of Families Associations in the conditions laid down by Articles L 211-4 and L 211-5 of the same Code. They are also at liberty to group together in the manner they see fit. Paragraph 3 of Article L 211-3 of the said Code does not therefore infringe the freedom of association.
(2010-3 QPC, May 28th 2010, paras 9 and 10, p. 97)

FREEDOM OF EXPRESSION

Principles

Scope of this freedom

Fundamental freedom

Firstly, Article 11 of the Declaration of 1789 proclaims: "The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may therefore speak, write and publish freely, except in such cases of abuse of this freedom as shall be determined by law". Freedom of expression and communication is all the more precious since the exercising thereof is a condition of democracy and one of the guarantees of respect for other rights and freedoms. Any restrictions on the exercising of this freedom should be necessary, adapted and proportionate to the purpose it is sought to achieve.
(2010-3 QPC, May 28th 2010, para. 6, p. 97)

Freedom of expression and communications (non-media)

Freedom to write, speak and print freely

Article L 326-3 of the Public Health Code recognizes the right for persons suffering from mental illness who have been the object of a measure of hospital confinement to send and receive mail "in all events". The use of other means of communication, (in particular the right to telephone) is governed by the general principle set forth in paragraph 1 of said Article whereby when a person has been confined to hospital without his consent "restrictions on the exercising of the individual freedoms of said person shall be limited to those necessitated by his state of health and the pursuit of his treatment ". These provisions do not constitute any disproportionate infringement of the exercising of constitutionally guaranteed rights".
(2010-71 QPC, November 26th 2010, para. 31, p. 343)

Right of collective expression of ideas and opinions

Parliament is at liberty to provide for new offences and fix the penalties applicable thereto. When doing so, it is however incumbent upon Parliament to ensure the reconciliation of requirements of public policy and the guarantee of constitutionally protected rights including the right of collective expression of ideas and opinions.

The ingredients of the new major offence of participating in a gang for the purpose of committing acts of violence, provided for by Article 222-14-2 of the Criminal Code, have been defined in terms which are neither obscure nor ambiguous. They are not such *per se* as to adversely affect the right of collective expression of ideas and opinions.
(2010-604 DC, February 25th 2010, paras 4 and 9, p. 70)

Associations

Although paragraph 3 of Article L 211-3 of the Family and Social Welfare Code requires the Public Authorities to recognize the representativeness of the National Union and Departmen-

tal Unions of Families Associations, the same Public Authorities may take into account the interests and positions defended by Families Associations. The challenged provision does therefore not infringe the freedom of such Associations to make known the positions which they defend. The argument based on infringement of freedom of expression of Associations is therefore without foundation.
(2010-3 QPC, May 28th 2010, para. 7, p. 97)

The objective of constitutional status of the diversity of schools of thought and opinions which applies to political life and the media, is inoperative when concerning the constitutionality of a statutory provision pertaining to the representation of Families Associations vis-à-vis Public Authorities (cf in sporting matters decision n° 2004-507 DC, December 9th 2004, Journal officiel December 16th 2004, p. 21290, para. 24, Rec.p.219)
(2010-3 QPC, May 28th 2010, para. 8,p. 97)

FREEDOM OF THE INDIVIDUAL

Affirmation of constitutional status

Article 66 of the Constitution provides: " No one shall be arbitrarily detained – The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute. When exercising the powers vested in it, Parliament may lay down different manners of intervention of the Judicial Authority depending on the nature and scope of the measures affecting the freedom of the individual which it intends to enact.
(2010-71 QPC, November 26th 2010, para. 14, p. 343)

Protection of the freedom of the individual by the Judicial Authority

Meaning of Judicial Authority

Prosecutors

The Judicial Authority is composed of trial judges and prosecutors. The intervention of a trial judge is required for any extension of the period of remand beyond 48 hours. Before the end of this period the manner in which the remand is proceeded with is placed under the supervision of the Public Prosecutor who may decide, if need be, to extend the same by a further 24 hours. Under Articles 63 and 77 of the Code of Criminal Procedure, the Public Prosecutor is informed of the remand as from the commencement thereof. He may at any time order that the person remanded be released or brought before him. It is incumbent upon him to decide whether continuing to remand a person in police custody and, if need be, the extension of the period of such remand, are necessary for the purposes of the investigation and proportionate to the seriousness of the acts which the person on remand is suspected of having committed. The argument based on failure to comply with the terms of Article 66 of the Constitution must thus be dismissed.
(2010-14/22 QPC, July 30th 2010, para. 26, p. 179)

Although the Judicial Authority is composed of trial judges and prosecutors, the intervention of a trial judge is required for extending the period of remand in police custody for questioning beyond 48 hours. The deprivation of freedom introduced by Article 803-3 of the Code of Criminal Procedure after the extension of a period of remand by the Public Prosecutor would therefore fail to comply with the constitutional protection of the freedom of the individual if the person remanded were not effectively brought before a trial judge before the expiry of the period of 20 hours provided for by said Article.
(2010-80 QPC, December 17th 2010, para. 11, p. 408)

Separation of powers

Police from the Criminal Investigation Department and Administrative Police

Although Parliament may provide for special measures of investigation for the purpose of ascertaining the commission of crimes and major offences of a particularly serious nature, collecting evidence and seeking to apprehend persons committing such offences, such measures must be carried out in compliance with the prerogatives of the Judicial Authority, guardian under Article 66 of the Constitution of the freedom of the individual. This means that any restrictions which may be placed on constitutionally guaranteed rights and freedoms must be necessary to determine the truth, proportionate to the seriousness and complexity of the offences committed and must not introduce any unjustified discriminations.

If, in the cases provided for in paras 2 and 3 of Article 706-54 of the Code of Criminal Procedure, a CID Police officer may on his own initiative decide to take a biological sample for comparison with the database or for entry on said database, such an act, which is necessarily carried out in the framework of an investigation or a preliminary judicial inquiry, is placed under the supervision of the Public Prosecutor or the Investigating Magistrate who oversee this sample-taking in accordance with the provisions of the Code of Criminal Procedure. The DNA markers may be removed from the database on the instructions of the Public Prosecutor. Lastly, the database is placed under the supervision of a judge. Hence the argument based on failure to comply with Article 66 of the Constitution must be dismissed.
(2010-25 QPC, September 16th 2010, paras 11 and 12, p. 220)

Review of measures infringing the freedom of the individual

Exclusive juridiction of the Judicial Authority

Although Article 66 of the Constitution requires that any deprivation of freedom be placed under the supervision of the Judicial Authority, it does not require that referral be made to the latter prior to the taking of any custodial measure. The provisions of Article L 331-1 of the Public Health Code which leave it to the Director of a hospital to decide whether to admit a person to hospital at the request of a third party after having checked that said request complies with the provisions of Article L.333 or L 333-2 of said Code do not fail to comply with the requirements arising under Article 66 of the Constitution.
(2010-71 QPC, November 26th 2010, para. 20, p. 343)

The freedom of the individual can only be considered as being safeguarded if the judge intervenes in the shortest possible time
(2010-71 QPC, November 26th 2010, para. 20, p. 343)

When the freedom of the individual is called into question (involuntary hospital confinement), the right to an effective judicial remedy requires that a judge from a court of law be required to rule on the request for immediate release within the shortest possible time.
(2010-71 QPC, November 26th 2010, para. 38, p. 343)

Remand in police custody for questioning

Article 64 of the Code of Criminal procedure, which merely requires the CID police officer to record the manner in which the remand is proceeded with, does not fail to comply with any constitutionally guaranteed right or freedom.
(2010-30/34/35/47/48/49/50 QPC, August 6th 2010, para. 3 and 4, p. 215)

Informing the Judicial Authority

Under Articles 63 and 77 of the Code of Criminal Procedure, the Public Prosecutor is informed of the remand as from the commencement thereof. He may at any time order that the person remanded be released or brought before him. It is incumbent upon him to decide whether continuing to remand a person in police custody and, if need be, the extension of the

period of such remand, are necessary for the purposes of the investigation and proportionate to the seriousness of the acts which the person on remand is suspected of having committed. The argument based on failure to comply with the terms of Article 66 of the Constitution must thus be dismissed.
(2010-14/22 QPC, July 30th 2010, para. 26, p. 179)

Extension of time

The intervention of a trial judge is required for any extension of the period of remand beyond 48 hours. Before the end of this period it is up to Public Prosecutor to decide whether continuing to remand a person in police custody and, if need be, the extension of the period of such remand, are necessary for the purposes of the investigation and proportionate to the seriousness of the acts which the person on remand is suspected of having committed. The argument based on failure to comply with the terms of Article 66 of the Constitution must thus be dismissed.
(2010-14/22 QPC, July 30th 2010, para. 26, p. 179)

Paragraphs 7 to 10 of Article 706-88 of the Code of Criminal Procedure make it possible to extend the overall length of the period of remand in police custody for questioning to a total of 6 days for crimes or major offences constituting acts of terrorism, by allowing for two further 24 hour extensions. Such an extension is decided by the Freedom and Detention Judge who shall duly verify that the specific conditions laid down by these provisions have been met. In these conditions these provisions do not fail to comply with the provisions of Article 66 of the Constitution which entrust the Judicial authority with the task of protecting the freedom of the individual.
(2010-31 QPC, September 22nd 2010, para. 5, p. 237)

Article 803-3 of the Code of Criminal Procedure makes it possible to retain a person remanded for a maximum of 20 hours between the end of the period of remand in police custody for questioning and the actual bringing of said person before a judge.

Such an extension is only authorized when it is impossible for said person to be brought before a judge on the same day. When reserving recourse to such a measure for "cases of necessity'Parliament intended, in the interests of the good administration of justice, to respond to material constraints resulting in particular from the time when the period of remand comes to an end or the number of persons remanded. Although it is the task of the relevant authorities, acting under the supervision of the courts, to justify the circumstances necessitating the recourse to this exceptional method of constraint, failure to comply with this requirement does not render the challenged provisions unconstitutional.

The deprivation of freedom introduced by the challenged provision is strictly limited to twenty hours following the ending of the remand in police custody for questioning. It does not apply when the period of remand has lasted more than 72 hours under Article 706-88 of the Code of Criminal Procedure. Paragraphs 2 and 3 of Article 803-3 guarantee the right of the person remanded to having something to eat, to inform a relative, to be examined by a Doctor and to speak at any time with an Attorney. It requires the keeping of a special register indicating in particular the identity of the persons remanded, the time of their arrival and of their being brought before a judge.

In view of the foregoing, Parliament, as regards the conditions, limits and guarantees which accompany this measure, has enacted provisions such as to ensure the reconciliation of the objective of the good administration of justice and the principle whereby no one shall be subjected to undue harshness.
(2010-80 QPC, December 17th 2010, paras 6 to 8, p. 408)

Article 803-3 of the Code of Criminal Procedure makes it possible to retain a person remanded for a maximum of 20 hours between the end of the period of remand in police custody for questioning and the actual bringing of said person before a judge

This Article merely places the monitoring of the premises where the person is remanded under the authority of the Public Prosecutor. Protection of freedom of the individual by the Judicial Authority would however not be guaranteed if the judge before whom the person remanded is to be brought were not in a position to immediately decide whether such remand

is opportune. This judge must therefore be informed without delay of the arrival of the person remanded on the premises of the court. First qualification.

Although the Judicial Authority is composed of trial judges and prosecutors, the intervention of a trial judge is required for extending the period of remand in police custody for questioning beyond 48 hours. The deprivation of freedom introduced by Article 803-3 of the Code of Criminal Procedure after the extension of a period of remand by the Public Prosecutor would therefore fail to comply with the constitutional protection of the freedom of the individual if the person remanded were not effectively brought before a trial judge before the expiry of the period of 20 hours provided for by said Article. Second qualification
(2010-80 QPC, December 17th 2010, paras 10 and 11, p. 408)

Pre-trial detention

Procedure in matters of pre-trial detention

Article 148 of the Code of Criminal Procedure provides that an application for release of a person held in pre-trial detention who is the object of a preliminary judicial criminal investigation shall be examined by the Freedom and Detention Judge after a written procedure without any hearing of all the parties. If the absence of such a hearing of all the parties is justified in the interests of the good administration of justice, the necessary balancing of the rights of the parties nevertheless precludes the Freedom and Detention Judge from refusing such an application without the applicant or his Attorney having the opportunity to take cognizance of the opinion of the Investigating Magistrate and the charges preferred by the Prosecution. Qualification.
(2010-62 QPC, December 17th 2010, paras. 4 to 7, p. 400

Although Parliament may provide for different rules of procedure depending on the facts, situations and persons involved, this is on condition that such differences are not based on unwarranted distinctions and that all persons likely to be brought before the courts have the benefit of equal guarantees.

The Code of Criminal Procedure provides that decisions handed down by courts in matters of pre-trial detention may, at the request of the person detained or the Prosecution, be reviewed by the *Chambre de l'Instruction* as regards the necessity and legality of such a custodial measure.

The second phrase of paragraph 1 of Article 207 of the Code of Criminal Procedure departs from the principle whereby the *Chambre de l'Instruction* sees its jurisdiction brought to an end by its decision on the appeal brought against a order concerning pre-trial detention. In certain cases, it allows the *Chambre de l'Instruction* to hold that it alone has jurisdiction to rule in such a matter, under a system departing from normal procedures, for the remaining investigation procedure.

These provisions vest the *Chambre de l'Instruction* with the discretionary power to deprive a person who is the object of a preliminary judicial criminal investigation, throughout the duration of said investigation, of the guarantees provided for by Articles 144-1 and 147 of the Code of Criminal Procedure which require the Investigating Magistrate or the Freedom and Detention judge to order the immediate release of the person concerned once the statutory conditions of such detention are no longer met, of those provided by Article 148 of the same Code for the review of applications for release at first instance and the right to a system of duality of courts existing for all decisions as to pre-trial detention.

Any possible divergence between the respective positions of courts of first instance and courts of appeal concerning the subsequent necessity of the detention of the person under a preliminary judicial criminal investigation cannot justify such an infringement of the rights vested by law in each person placed in pre-trial detention. The second and third phrases of paragraph 1 of Article 207 of the Code of Criminal Procedure run counter to Articles 6 and 16 of the Declaration of 1789.
(2010-81 QPC, December 17th 2010, paras 4 to 7), p. 412

Hospital confinement of mentally ill persons without their consent

Hospital confinement of a mentally ill person without the consent of the latter must show due regard for the principle, deriving from Article 66 of the Constitution, whereby the freedom of

the individual should not be restricted with undue harshness. It is incumbent upon Parliament to ensure the reconciliation between firstly the protection of the health of mentally ill persons and the protection of public order necessary for the safeguarding of rights and principles of constitutional status and secondly the exercising of constitutionally guaranteed freedoms. Among the latter are to be found the freedom to come and go and respect for privacy, protected by Articles 2 and 4 of the Declaration of the Rights of Man and the Citizen of 1789 and freedom of the individual which Article 66 of the Constitutions entrusts to the protection of the Judicial Authority. Any infringements of these freedoms must be adapted, necessary and proportionate to the objectives sought to be achieved.
(2010-71 QPC, November 26th 2010, para. 16, p. 343)

Article L 333 of the Public Health Code provides that a mentally ill person cannot be confined to hospital without his consent, at the request of a third party, unless his illness makes it impossible for him to give his consent and his condition necessitates immediate care accompanied by constant supervision in hospital surroundings.

This same Article lays down the procedural guarantees attached to the conditions in which the necessity of hospital confinement may be ascertained.

When enacting Articles L.333, L 333-2 and L 3333-4 of the Public Health Code, Parliament laid down the substantive conditions and procedural guarantees such as to ensure that hospital confinement of a person without the consent of the latter, at the request of a third party, may only be proceeded with in cases where it is adapted, necessary and proportionate to the state of the mentally ill person.
(2010-71 QPC, November 26th 2010, paras 17 to 19, p. 343)

Although Article 66 of the Constitution requires that any deprivation of freedom be placed under the supervision of the Judicial Authority, it does not require that referral be made to the latter prior to the taking of any custodial measure. The provisions of Article L 331-1 of the Public Health Code which leave it to the Director of a hospital to decide whether to admit a person to hospital at the request of a third party after having checked that said request complies with the provisions of Article L.333 or L 333-2 of said Code do not fail to comply with the requirements arising under Article 66 of the Constitution.
(2010-71 QPC, November 26th 2010, para. 20, p. 343)

Although paragraph 2 of Article L 332-3 of the Public Health Code, currently Article L 3222-5 thereof, entrusts the Departmental Psychiatric Hospitals Committee with the task of "examining the situation of persons confined to hospital due to mental illness from the point of view of respect for individual freedoms", this Committee is of an administrative nature. It does not authorize the maintaining of such hospital confinement and is only required to examine the situation of persons who have already been confined in hospital for more than three months.

The freedom of the individual can only be considered as being safeguarded if the judge intervenes in the shortest possible time. However medical grounds and therapeutic purposes which justify depriving mentally ill persons confined to hospital of their freedom without their consent may be taken into consideration when fixing this timeframe. When providing that hospital confinement without consent may be maintained for longer than 15 days without the intervention of a court of law, the provisions of Article L.337 fail to comply with the requirements of Article 66 of the Constitution. Furthermore, neither the obligation imposed on certain judges from courts of law to periodically visit institutions treating mentally ill persons as in-patients nor the judicial redress available to such persons in order to have measures of hospital confinement struck down or terminate the same are sufficient to comply with such requirements.

As shown by the foregoing, no statutory provision subjects the maintaining in hospital confinement of a person, without the consent of the latter, pursuant to Article L 337 of the Public Health Code, to a court of law in conditions complying with the requirements of Article 66 of the Constitution.
(2010-71 QPC, November 26th 2010, paras 24 to 26, p. 343)

Article L 351 of the Public Health Code provides that any person placed under hospital confinement without his consent or retained in any institution of whatsoever kind has the right to apply to the President of the *Tribunal de grande instance* at any time for the termination of this confinement carried out without his consent. The right to apply to this judge is also vested in any person who may intervene in the interests of the person confined.

However, insofar as this is a measure of a custodial nature, the right to an effective judicial remedy requires that a judge from a court of law be required to rule on the request for immediate release within the shortest possible time taking into consideration the possible need to collect additional information on the state of health of the person confined.
(2010-71 QPC, November 26th 2010, paras 38 and 39, p. 343)

PERSONAL FREEDOM

Personal freedom and Administrative Police

Under Article 34 of the Constitution statutes shall determine the rules concerning the fundamental guarantees granted to citizens for the exercise of their civil liberties. As part of this task, it is the duty of Parliament to achieve the necessary reconciliation between the protection of freedoms and the safeguarding of law and order without which there can be no effective guarantee of the exercising of individual freedoms.

The administrative police measures likely to affect the exercising of constitutionally guaranteed freedoms, including the freedom to come and go, an element of the freedom of the individual protected by Articles 2 and 4 of the Declaration of 1789, must be justified by the need to safeguard public law and order and be proportionate to this purpose.

The forced eviction of mobile homes and caravans introduced by the challenged provisions can only be carried out by the representative of the State in the event of unauthorized parking likely to adversely affect the health, safety and tranquillity of the public. It can only be proceeded with at the request of the Mayor, the owner of the land or the licensee thereof and can only be carried out after formally notifying the occupants that they are required to quit the piece of land in question. Said occupants have a period of at least twenty-four hours from the notification of the order to quit within which to spontaneously evacuate the land which they are illegally occupying. This procedure does not apply to persons who own the land on which they have parked vehicles, nor those persons holding a permit granted under Article 443-1 of the Town Planning Code, nor those parking on an equipped site in the conditions provided for in Article L 443-3 of the same Code. The notice to quit may be appealed against before the Administrative Court and such appeal will suspend eviction pending the hearing thereof. In view of all the conditions and guarantees which Parliament has introduced and in view of the purpose which it seeks to achieve, Parliament has passed measures ensuring a reconciliation which is not patently unbalanced between the need to safeguard public law and order and other rights and freedoms.
(2010-13 QPC, July 9th 2010, paras 7 to 9, p. 139)

In view of the purposes which it is sought to achieve and taking into account the penalty introduced for non-compliance with the rule laid down by law, Parliament has enacted provisions which ensure a reconciliation which is not disproportionate between safeguarding public order and guaranteeing constitutionally protected rights. However, prohibiting the concealing of the face in public cannot, without adversely affecting Article 10 of the Declaration of 1789, result in restricting the exercising of religious freedom in places of worship open to the public. Qualification.
(2010-613 DC, October 7th 2010, para. 5, p. 276)

FREEDOM AND LAW WITH RESPECT TO TEACHING

Universities

Independence of Professors

The guarantee of the independence of Teachers-Researchers derives from a fundamental principle recognized by the laws of the Republic. If the principle of the independence of

Teachers-Researchers implies that Professors and Senior Lecturers are associated with the choosing of their peers it does not require that all persons participating in the selection process be themselves Teachers-Researchers of the same rank as that of the position to be filled.

Paragraph 2 of 4° of Article L.712 of the Education Code and Article L 952-6-1 thereof associate Professors and Senior Lecturers with the choosing of their peers and thus do not adversely affect the independence of Teachers-Researchers
(2010-20/21 QPC, August 6th 2010, paras 6, 8 and 14, p. 203)

Under Article L 712-2 of the Education Code, no appointment can be made if the President of the University gives a duly reasoned opinion unfavourable to such appointment. Subject to the statutory provisions pertaining to the first appointment of persons recruited by the national Agregation competitive examination for Higher Education, the President thus disposes of a "power of veto". This power shall apply to all staff, including Teachers-Researchers, under Article L 952-6-1 of the same Code. The President of the University may thus oppose any recruitment, transfer or secondment of applicants whose merits have previously been recognized by a Selection Committee.

The principle of independence of Teachers-Researchers precludes the President of the University basing his appraisal on grounds other than the administration of the University and in particular on the scientific qualification of the applicants retained after the selection procedure. With this qualification, the "power of veto" of the President, insofar as it applies to the recruitment, transfer or secondment of Teachers-Researchers, does not infringe the principle of independence of Teachers-Researchers.
(2010-20/21 QPC, August 6th 2010, paras 15 and 16, p. 203)

ECONOMIC FREEDOMS

Freedom of enterprise

Power of Parliament

Parliament is at liberty to impose on freedom of enterprise, which derives from Article 4 of the Declaration of the Rights of Man and the Citizen of 1789, restrictions connected with constitutional requirements or justified in the general interest, on condition that they do not lead to any disproportionate adverse effects as regards the purpose it is sought to achieve.
(2010-605 DC, May 12th 2010, para. 24, p. 78)

Reconciliation of the principle

Parliamentary debate expressly shows that the supervision of the organization of horse racing and betting on such races by the Act of June 2nd 1891 designed to regulate the authorization and operation of horse racing was introduced firstly to enhance the quality of horses and finance horse breeding and secondly to put an end to "abuses and scandals" connected with the excessive development of horse racing and combat addition to betting and gambling. In view of the purposes sought to be achieved, the challenged provisions are such as to ensure a reconciliation which is not patently disproportionate between the principle of the freedom of enterprise and the objective of constitutional status of the safeguarding of public policy.
(2010-73 QPC, December 3rd 2010, para. 13, p. 356)

With public policy

Parliament is at liberty to impose on freedom of enterprise restrictions connected with constitutional requirements or justified in the general interest, on condition that they do not lead to any disproportionate adverse effects as regards the purpose it is sought to achieve. Parliament wished to combat the harmful consequences of online betting and gambling by

creating a legal opportunity to indulge in such pastimes under the supervision of the State and so enacted measures to ensure a reconciliation which is not patently disproportionate between the principle of the freedom of enterprise and the objective of constitutional status of the safeguarding of public policy. To this end, it has laid down the requirement that organising online gambling shall require prior approval. It has created an independent administrative body, the Online Gambling Regulatory Authority, in charge of granting official approval to new operators, enforcing compliance by the latter with their obligations and combating illegal operators. It has laid down measures designed to prevent addiction, protect vulnerable members of the public, combat money laundering and guarantee the authenticity of sporting matches and games. It has chosen not to open access to approved operators to games of chance. It has also regulated advertising in favour of legal gambling while imposing criminal penalties on those offering illegal gambling.
(2010-605 DC, May 12th 2010, paras 24 and 25, p. 78)

When enacting section 2 of Act n° 83-628 of July 12th 1983 as amended pertaining to gambling, Parliament intended to restrict the use of slot machines to events or premises which require prior approval and organise the control of the manufacturing, trade in and operation of such machines. It has introduced public monitoring of such activities. By so doing, it intended to ensure the integrity, security and reliability of gaming operations, ensure the transparency of their operation, prevent any exploitation of games of chance or skill for fraudulent or criminal ends and combat money laundering. It also sought to combat addiction. In view of the purpose which it sought to achieve, Parliament has enacted measures to ensure a reconciliation which is not patently disproportionate between the principle of the freedom of enterprise and the objective of constitutional status of the safeguarding of public policy. The challenged statutory provisions do not infringe the principle of freedom of enterprise.
(2010-55 QPC, October 18th 2010, para. 6, p. 291)

NATIONALISATIONS AND TRANSFER OF BUSINESSES FROM THE PUBLIC TO THE PRIVATE SECTOR

Transfer of Businesses from the public sector to the private sector

Power of Parliament

Principles

The statute pertaining to the business entity La Poste (The Post Office) provides for the transformation of the latter into a Public Limited Company. It provides that "this transformation shall not result in the calling into question of the La Poste's mission of national public service" and specifies that "the capital of said Company shall be held by the State, the majority shareholder, and by other legal entities of public law, except for that part of the capital which may be held under the staff shareholding scheme". The parties making the referral contend that this section of the statute, by permitting the transfer of La Poste to the private sector infringes paragraph 9 of the Preamble to the Constitution of 1946. The statute is however not aimed at neither does it result in transferring La Poste to the private sector. The argument is therefore dismissed.
(2010-601 DC, February 4th 2010, paras 2 to 4, p. 53)

PRINCIPLES OF CRIMINAL LAW AND CRIMINAL PROCEDURE

Scope of application of the principles of Article 8 of the Declaration of 1789

Penalty in the nature of a punishment

Incapacities

The prohibition of entry of the name of the offender on the electoral roll laid down by Article L.7 of the Electoral Code is intended in particular to inflict a heavier punishment for certain acts when committed by persons vested with public authority, in charge of a public service mission or holders of elective public office. This punishment imposes an incapacity for holding elective public office for a period of five years. It is thus a measure which constitutes a punishment.
(2010-6/7 QPC, June 11th 2010, para 5, p. 111)

Measures which are not in the nature of a punishment

Other measures which are not in the nature of a punishment

1° and 3° of paragraph IV of section 64 of Act n° 2008-776 of August 4th 2008 which allow certain taxpayers the benefit of new channels of appeal provided for by Article L 16 B of the Book of Tax Procedures do not institute any incrimination or any punishment. The argument based on non-compliance with the principle of no retrospective effect of a harsher criminal law must therefore be dismissed.
(2010-19/27 QPC, July 30th 2010, cons.15, p. 190)

Article 155A of the General Tax Code which provides, in specified listed cases, for the taxation of payment for services supplied in France by a person who has his domicile or place of residence in said country, when such payment has been made, for the purpose of avoiding taxation, to a person having his domicile or place of residence abroad, does not introduce any penalty or punishment. The argument based on infringement of the principle of the necessity of punishments must therefore be dismissed. The same holds good for the argument based on failure to show due regard for the rights of the defence
(2010-70 QPC, November 26th 2010, para. 5, p. 340)

Principle of the legality of offences and punishments

Power of Parliament

Principle

Parliament is at liberty to provide for new offences and fix the penalties applicable thereto. When doing so, it is however incumbent upon Parliament to comply with the requirements deriving from Articles 8 and 9 of the Declaration of the Rights of Man and the Citizen of 1789.
(2010-604 DC, February 25th 2010, para. 4, p. 70)

Article 34 of the Constitution and the principle of the legality of offences and punishments deriving from Article 8 of the Declaration of 1789 put Parliament under a duty to specify the scope of application of criminal law and to define crimes and major offences in terms which are sufficiently clear and precise. Compliance with this requirement is necessary not only to exclude any arbitrariness in the handing down of punishments but also to avoid any undue harshness when seeking out offenders.
(2010-604 DC, February 25th 2010, para. 8, p. 70)

Applications

No failure by Parliament to exercise its full powers

When introducing Article 222-14-2 of the Criminal Code which punishes intentional participation in a group for the purpose of committing acts of violence, Parliament intended to penalize preparations for the commission of acts of violence against persons, destruction of or damage to property which persons who have come together in a group intend to commit. To this end, this new charge borrows the from definition of aggravating circumstances of organised crime provided for by Article 132-71 of the Criminal Code the terms "group" and "preparation, as shown by one or more material facts". These terms are also to be found in the ingredients of the offence of consorting with criminals provided for by Article 450-1 of the Criminal Code. It is added that, to be convicted, the offender must have participated "knowingly" in the group. It is also specified that the participation ascertained is "with a view to preparing" the commission of certain specified offences. The major offence is thus defined in terms which are sufficiently clear and precise and does not fail to show due regard for with the principle of the principle of legality of offences.
(2010-604, February 25th 2010, para. 9, p. 70)

The offence provided for by Article 431-22 of the Criminal Code is only committed if a person enters or remains within the perimeter of a teaching establishment without authorization or permission for the sole purpose of disturbing the tranquillity or interfering with the smooth running thereof. It has thus been defined with sufficient precision to comply with the principle of legality of offences and punishments.
(2010-604 DC, February 25th 2010, para. 27, p. 70)

Principles of necessity and proportionality

Nature of review by the Constitutional Council

Review of patent error of appraisal

Under Article 34 of the Constitution: "Statutes shall determine the rules concerning... the determination of crimes and major offences and the penalties they carry".

Article 61 of the Constitution does not vest the Constitutional Council with any general power of appraisal and decision-making similar to that enjoyed by Parliament, merely with the power to rule as to the conformity with the Constitution of statutes referred to it for review. Although the necessity of punishments which accompany the commission of offences comes under the power of appraisal of Parliament, it is incumbent upon the Constitutional Council to ensure that there is no patent disproportion between the offence concerned and the punishment incurred.
(2010-604 DC, February 25th 2010, para. 14, p. 70)

Article 61-1 of the Constitution does not vest the Constitutional Council with any general power of appraisal and decision-making similar to that enjoyed by Parliament, merely with the power to rule as to the conformity with the Constitution of statutes referred to it for review. Although the necessity of punishments which accompany the commission of offences comes under the power of appraisal of Parliament, it is incumbent upon the Constitutional Council to ensure that there is no patent disproportion between the offence concerned and the punishment incurred.
(2010-66 QPC, November 26th 2010, para. 4, p. 334)

No failure to show due regard for the principles of necessity and proportionality of punishment

Determination of offences and punishments

When punishing by a term of imprisonment of one year and a fine of 15 000 euros intentional participation in a group for the purpose of committing acts of violence against persons, or damage to property, Parliament has not introduced a patently disproportionate punishment.

The introduction of this new offence is intended to penalize participation in certain acts of preparation of offences, in particular acts of violence against persons, the seriousness of which may only be supposed at this stage. The argument that Parliament has not varied the punishment incurred on the basis of circumstances which are only hypothetical therefore is without foundation.

The manner in which this criminal offence is punished is not aimed at nor does in result in departing from the principle of the tailoring of punishments left to the judge in accordance with Article 8 of the Declaration of 1789. Dismissal of the argument based on infringement of the principle of necessity and proportionality of punishments.
(2010-604 DC, February 25th 2010, paras 15 to 17, p. 70)

The punishment incurred, under Articles 431-22 and 431-23 of the Criminal Code by a person who enters or remains within the perimeter of a teaching establishment without authorization or permission for the sole purpose of disturbing the tranquillity or interfering with the smooth running thereof is not patently disproportionate with the new charge.
(2010-604 DC, February 25th 2010, para. 29, p. 70)

Article 131-21 of the Criminal Code provides for the existence of an additional penalty applicable, pursuant to the law, to certain crimes and major offences and, pursuant to the Decree, to certain minor offences. The existence of such a penalty does not *per se* fail to comply with the principle of the necessity of punishments.
(2010-66 QPC, November 26th 2010, para. 5, p. 334)

The second phrase of paragraph 1 of Article 131-21 of the Criminal Code provides that the punishment of confiscation of the property which served to commit the offence or is the direct or indirect proceeds thereof shall be incurred automatically in the event of a crime or major offence punishable by a term of imprisonment longer than one year, except for press offences.

Paragraph 5 thereof provides that the punishment of confiscation of property of which the convicted offender cannot explain the origin shall also be incurred in the event of a crime or major offence having procured a direct or indirect profit and punishable by a term of at least five years'imprisonment.

Paragraph 7 thereof provides for the mandatory confiscation of items described as dangerous or hazardous by statute or regulation and of which the possession is unlawful.

In view of the seriousness of the offences to which it applies and the property which may be involved, the punishment of confiscation of property introduced by these provisions are not patently disproportionate.
(2010-66 QPC, November 26th 2010, para. 6, p. 334)

Criminal Procedure

Paragraph 1 of Article 689-11 of the Code of Criminal Procedure recognises the jurisdiction of French courts with respect to any person who "has been guilty of" the commission of one of the crimes coming under the jurisdiction of the International Criminal Court. This wording is neither aimed at nor does it result in requiring that the person involved should have already been found guilty by a French or foreign court. Neither does it presume the guilt of said person, the finding of guilt being left to the French courts to decide. It therefore does not fail to comply with the principle of the necessity of punishments which derives from Article 8 of the Declaration of 1789 nor with the presumption of innocence guaranteed by Article 9 thereof.
(2010-612 DC, August 5th 2010, para 11, p. 198)

With two qualifications as to interpretation (see Qualifications –Criminal procedure – Code of Criminal Procedure) Articles 706-54, 706-55 and 706-56 of the Code of Criminal Procedure which introduce the National DNA Database (FNAEG) and govern the conditions in which it is constituted and may be consulted do not introduce any undue harshness as regards Article 9 of the Declaration of 1789 (see Rights and Freedoms – Right to privacy – Processing of data of a personal nature – Police and Court files – FNAEG)
(2010-25 QPC, September 16th 2010, paras 12 to 26, p. 220)

Failure to show due regard for the principles of necessity and proportionality of punishments

The prohibition of entry of the name of the offender on the electoral roll laid down by Article L.7 of the Electoral Code is a punishment which automatically accompanies various criminal convictions without the judge who decides on such measures having to expressly impose the same. He cannot vary the length of the period involved. Even if the offender may, in the conditions set out in paragraph 2 of Article 132-21 of the Criminal Code, see all or part of this prohibition immediately lifted, this possibility is not as such sufficient to ensure compliance with the requirements which derive from the principle of the tailoring of punishments. Article L.7 of the Electoral Code thus fails to show due regard for this principle and must be held to be unconstitutional.
(2010-6/7 QPC, June 11th 2010, para. 5, p. 111)

Principle of *non bis in idem* (no double jeopardy)

The introduction of Article 222-14-2 of the Criminal Code is neither aimed at nor does it result in a person being prosecuted for an offence for which he has already been acquitted or convicted by a decision which has become *res judicata*.

Dismissal "in all events" of the argument whereby the new offence of participation in a group for the purpose of committing acts of violence constitutes a dual incrimination for one and the same offence: it has neither the same scope, nor the same definition, nor the same purpose as the major offences of consorting with criminals, provided for by Article 450-1 of the Criminal Code, or unlawful gatherings, provided for Articles 431-3 and following of said Code. Attempted deliberate acts of violence against persons is not punishable. Insofar as this new offence is intended to penalize acts carried out in preparation of the commission of certain offences, it deals with activities distinct from major offences committed with aggravating circumstances of being committed by a group of persons, in an organized criminal gang or by ambush.
(2010-604 DC, February 25th 2010, paras 5 and 5, p. 70)

The principle of the necessity of punishments does not preclude Parliament from providing that certain acts may constitute different offences.
(2010-604 DC, February 25th 2010, paras 6 and 28, p. 70)

Dismissal "in all events" of the argument whereby the new Article 421-22 of the Criminal Code constitutes a dual incrimination for one and the same offence. As defined by this Article, this offence cannot be confused with offences of acts of violence or damage to property committed in schools.
(2010-604 DC, February 25th 2010, para. 28, p. 70)

Non-automaticity of punishments

The penalties set forth in Article 222-14-2 of the Criminal Code, which is intended to punish participation in a group for the purpose of committing acts of violence, are neither aimed at nor do they result in departing from the principle of the tailoring of punishments left to the judge in accordance with Article 8 of the Declaration of 1789.
(2010-604 DC, February 25th 2010, para. 17, p. 70)

Joining of the principle of non-automaticity of punishments to that of the tailoring of punishments, which itself is a component of the principle of the necessity of punishments. The prohibition of entry of the name of the offender on the electoral roll laid down by Article L.7 of the Electoral Code is a punishment which automatically accompanies various criminal convictions without the judge who decides on such measures having to expressly impose the same. He cannot vary the length of the period involved. Even if the offender may, in the conditions set out in paragraph 2 of Article 132-21 of the Criminal Code, see all or part of this prohibition immediately lifted, this possibility is not as such sufficient to ensure compliance with the requirements which derive from the principle of the tailoring of punishments. Article L.7 of the Electoral Code thus fails to show due regard for this principle and must be held to be unconstitutional.
(2010-6/7 QPC, June 11th 2010, para. 5, p. 111)

The principle of the tailoring of punishments, which derives from Article 8 of the Declaration of 1789, implies that the punishment consisting in revoking a driving licence can only be imposed if it has been expressly ordered by a judge, taking into account the particular circumstances of each case. This does not however preclude Parliament from laying down rules intended to effectively punish driving offences.

When introducing a mandatory punishment directly connected with reprehensible behaviour when driving a motor vehicle, Article L 234-13 of the Highway Code seeks, in order to guarantee road safety, to improve prevention and strengthen the penalties handed down for driving under the influence of alcohol and thus endangering the safety and persons and property.

Although in accordance with the provisions of Article L 234-13 of the Highway Code, the judge who finds an accused guilty of committing such offences as a repeat offender is under a duty to revoke the offender's driving licence and impose a ban on applying for a new driving licence, he may also, in addition to the provisions of the Criminal Code concerning waivers and lifting of penalties, limit the duration of said ban to a maximum of three years. In these conditions the judge has not been deprived of the power to tailor punishments.
(2010-40 QPC, September 29th 2010, paras 3 to 5, p. 255)

The principle of the tailoring of punishments implies that the penalty consisting in the publication of a judgment may only be applied if it has been expressly ordered by a judge, taking into account the particular circumstances of each case.

When introducing a mandatory punishment directly connected with offences committed by means of advertising, Article 121-4 of the Consumer Code is intended to strength the penalties handed down for the offences of misleading advertising and inform the public of the commission of such offences. The judge who finds a person guilty of misleading advertising is under a duty to order the publication of the conviction. However, in addition to the provisions of the Criminal Code concerning the waiving of penalties, it is up to the judge, under Article 131-35 of the Criminal Code, to determine the manner of said publication. He may thus vary the manner and duration of said publication. In these conditions the judge has not been deprived of the power to tailor punishments.
(2010-41 QPC, September 29th 2010, paras 3 to 5, p. 257)

Retrospectiveness of the less harsh criminal law

Not applying the new criminal statute, which is of a more lenient nature, to offences committed under the previous statute means allowing the Judge to impose penalties provided for by said previous statute which, in the opinion of Parliament, are no longer necessary. Therefore, except when the previous harsher penalty is inherent in the rules which the new statute replaces, the principle of the necessity of punishments proclaimed by Article 8 of the Declaration of 1789 implies that the more lenient criminal statute be immediately applicable to offences committed before its coming into force and not having been the object of any *res judicata* decision. The first phrase of paragraph 1 of Article 442-2 of the Commercial Code punishes "the resale or announcing of the resale by a tradesman of a product at a price lower than its effective purchase price". Paragraphs I to III of section 47 of Act nº 2005-882 of August 2nd 2005 in favour or small and medium-sized businesses provide for new methods of determining the effective purchase price which result in lowering the threshold of selling at a loss. The previous definition of this threshold was inherent in previous economic statutory provisions deriving in particular from Act nº 96-588 of July 1st 1996 on fair dealing and balance in commercial relations. Thus when providing that paragraphs I to III of section 47 shall not come into force immediately, paragraph IV of this same section has not infringed the principle of the necessity of punishments proclaimed in Article 8 of the Declaration of 1789.
(2010-74 QPC, December 3rd 2010, paras 3 and 4, p. 361)

Principle of tailoring of punishments

Constitutional status

Joining to Article 8 of the Declaration of 1789

The prohibition of entry of the name of the offender on the electoral roll laid down by Article L.7 of the Electoral Code is a punishment which automatically accompanies various criminal convictions without the judge who decides on such measures having to expressly impose the same. He cannot vary the length of the period involved. Even if the offender may, in the conditions set out in paragraph 2 of Article 132-21 of the Criminal Code, see all or part of this prohibition immediately lifted, this possibility is not as such sufficient to ensure compliance with the requirements which derive from the principle of the tailoring of punishments. Article L.7 of the Electoral Code thus fails to show due regard for this principle and must be held to be unconstitutional.
(2010-6/7 QPC, June 11th 2010, para. 5, p. 111)

The principle of the tailoring of punishments, which derives from Article 8 of the Declaration of 1789, implies that the punishment consisting in revoking a driving licence can only be imposed if it has been expressly ordered by a judge, taking into account the particular circumstances of each case.
(2010-40 QPC, September 29th 2010, para. 3, p. 255; 2010-41 QPC, September 29th 2010, para. 3, p. 257)

The principle of the tailoring of punishments which derives from Article 8 of the Declaration of 1789 implies that the punishment consisting in the publication of judgments in the press and their posting on notice boards or designated premises cannot be imposed unless a judge has expressly ordered the same, taking into account the specific circumstances of the case under review.

By introducing a mandatory punishment of the publication of judgments concerning tax evasion in the press and the publicising of the same by their posting on notice boards and designated premises, the challenged provision is designed to assist in combating such an offence by ensuring that convictions are given the widest possible publicity.

The Judge who finds a taxpayer guilty of the offence of tax evasion is required to order the publication of said judgment in the *Journal officiel* and the posting of the same on official notice boards and designated premises. He cannot modify the length of time of such posting on notice boards or designated premises, which is fixed at a mandatory three months. Neither can he intervene to modify the manner in which such posting of judgments is to be effected, namely on official notice boards of the Commune in which the taxpayer involved resides, and on the outside door of the building or professional premises occupied by said taxpayer or taxpayers. Although the Judge is at liberty to decide whether the judgment be published in its entirety or by way of extracts thereof, this faculty cannot alone ensure compliance with the requirements which derive from the principle of the tailoring of punishments. Paragraph 4 of Article 1741 of the General Tax Code must thus be held to be unconstitutional.
2010-72/75/82 QPC, December 10th 2010, paras 3 to 5, p. 382)

Criminal justice applicable to minors

Review of measures specific to criminal justice applicable to minors

Review under Article 9 of the Declaration of 1789

It is incumbent upon those vested with the power to make regulations to make the period of retention in the National DNA database of personal data proportionate to the nature and seriousness of said offences and the purpose which the database seeks to achieve, while adapting these provisions to the specificities of offences committed by minors. With this qualification leaving such measures to be determined by a Decree does not run counter to Article 9 of the Declaration of 1789.
(2010-25 QPC, September 16th 2010, para. 18, p. 220)

Criminal liability

Principe of criminal liability

Articles 8 and 9 of the Declaration of 1789 give rise to the principle whereby a person may be punished solely for those acts which he has committed.
(2010-604 DC, February 25th 2010, para. 11, p. 70)

The aggravating circumstance of being in possession of a weapon provided for by Article 431-25 of the Criminal Code applies solely to the person in possession of said weapon. It does not therefore introduce any collective liability.
(2010-604 DC, February 25th 2010, paras 31 and 32, p. 70)

Mens rea of an offence

Principle

In cases of crimes and major offences, guilt cannot be based on the sole material imputability of acts incurring criminal punishments. The definition of an offence must therefore include not only the *actus reus* but also the *mens rea*, irrespective of whether or not the latter is intentional.
(2010-604 DC, February 25th 2010, para. 11, p. 70)

New Article 222-14-2 of the Criminal Code punishes a person who deliberately participates in a group. It must be proved that this was done for the purpose of committing acts of violence against persons or property, on condition that the preparation of said offences is demonstrated by one or more material acts committed by the offender himself or known to him. In such conditions the challenged provision does not introduce any criminal liability for acts committed by third parties. It does not run counter to the principle whereby there can be no crime or major offence without the existence of *mens rea*. It neither creates a presumption of guilt nor reverses the burden of proof. It does therefore not infringe the presumption of innocence nor adversely affect the rights of the defence.
(2010-604 DC, February 25th 2010, para. 12, p. 70)

Presumption of innocence

Application

The taking of a biological sample for entry on the National DNA Database, as provided for by para 2 of Article 706-54 of the Criminal Code, of DNA markers of persons concerning whom there exists serious and concurring evidence that they are likely to have committed certain offences and the taking of a biological sample for comparison purposes, provided for by para 3 of Article 706-54, which may be carried out on any person concerning whom there exist plausible reasons for suspecting that said person has committed one of these same crimes or major offences, do not *per se* constitute any finding or presumption of guilt. They may on the contrary prove the innocence of persons from whom such samples are taken. The duty to submit to the taking of such a sample, accompanied by criminal penalties for refusal, does not *per se* imply any finding of guilt and does not run counter to the rule whereby no person can be required to incriminate himself. Hence these provisions do not infringe the presumption of innocence.
(2010-25 QPC, September 16th 2010, para. 17, p. 220)

The principle of the presumption of innocence, proclaimed by Article 9 of the Declaration of 1789, does not preclude the Judicial Authority from imposing on any person, concerning whom there exists serious and concurring evidence that said person is likely to have participated in certain crimes or major offences, restrictive or custodial measures prior to said person being found guilty by a court of law. However such measures must be imposed in proceedings which show due regard for the rights of the defence and appear necessary to ascertain the truth, to ensure that the person concerned remains at the disposal of the Judicial Authorities, to ensure the protection of said person, the protection of third parties or the safeguarding of public order.
(2010-80 QPC, December 17th 2010, para. 5, p. 408)

Principle of the prohibition of presumptions of guilt in criminal matters

Parliament may not in principle introduce any presumption of guilt in criminal matters.
(2010-604 DC, February 25th 2010, para. 11, p. 70)

Paragraph 1 of Article 689-11 of the Code of Criminal Procedure recognises the jurisdiction of French courts with respect to any person who "has been guilty of" the commission of one of the crimes coming under the jurisdiction of the International Criminal Court. This wording is neither aimed at nor does in result in requiring that the person involved should have already been found guilty by a French or foreign court. Neither does it presume the guilt of said person, the finding of guilt being left to the French courts to decide. It therefore does not fail to comply with the principle of the necessity of punishments which derives from Article 8 of the Declaration of 1789 nor with the presumption of innocence guaranteed by Article 9 thereof.
(2010-612 DC, August 5th 2010, para 11, p. 198)

Due regard for the rights of the defence, the right to a fair trial and effective judicial redress in criminal matters

Article 16 of the Declaration of the Rights of Man and the Citizen of 1789 guarantees the rights of persons concerned to exercise their right to effective judicial redress and due regard for the rights of the defence which implies in particular the existence of fair and equitable proceedings guaranteeing that the rights of the parties shall be fairly balanced.
(2010-62 QPC, December 17th 2010, para. 3, p. 400)

Power of Parliament

It is incumbent upon Parliament to ensure a reconciliation between the prevention of offences against public order and the seeking out of offenders, both necessary for the safeguarding of rights and freedoms of constitutional status and the exercising of constitutionally guaranteed freedoms. Among the latter are to be found due regard for the presumption of innocence, the safeguarding of the dignity of the human being and freedom of the individual which Article 66 of the Constitutions places under the protection of the Judicial Authority.
(2010-80 QPC, December 17th 2010, para. 4, p. 408)

Scope of application of the principle

No provision of the Act of June 2nd 1891 designed to regulate the authorization and operation of horse racing and which lays down a system of approval for those wishing to organise horse racing precludes the applicant whose application is refused from challenging said refusal under normal rules of law before the Administrative judge.
(2010-73 QPC, December 3rd 2010, para. 12, p. 356)

Administrative penalties (see also Title 15 Independent Authorities)

Provisions not failing to have due regard for the rights of the defence.

Articles 114-16 of the Social Security Code and L 8271-8-1 of the Employment Code merely organise and facilitate the communication to social welfare bodies and bodies collecting social welfare contributions of information concerning offences which have been recorded in the field of the fight against undeclared labour. They do not preclude the application of statutory or regulatory provisions introducing an audi alteram partem procedure in the event of an adjustment procedure of the base of said contributions after ascertainment of the undeclared labour. Neither do they introduce any presumption of guilt nor do they prevent the party involved from objecting to said adjustment before a court of law. They do not therefore fail to show due regard for the rights of the defence.
(2010-69 QPC, November 26th 2010, para. 5, p. 388)

Review of all of criminal procedure

Since 1993, certain changes in the rules of criminal procedure and the manner in which the latter has been implemented have led to ever more frequent recourse to the remanding of persons in police custody for questioning and modified the balance of the powers and rights laid down by the Code of Criminal Procedure

The proportion of cases undergoing a preliminary judicial criminal investigation has constantly decreased and the practice of "real time" handling of criminal matters has been generalized. This practice has led to the decision of the Prosecuting authorities being taken on the basis of the report of the CID Police officer before the end of the period of remand. Although these new methods of deciding whether to bring prosecutions have made it possible to ensure a swifter and more varied response to issues raised, in accordance with the objective of a good administration of justice, the fact nevertheless remains that, even in proceedings involving complex or particularly serious occurrences, a person is henceforth often tried on the sole basis of evidence obtained before the expiry of the period of remand in police custody, in particular on the basis of confessions made during this period of time. Remanding suspected offenders in police custody for questioning has thus often become the main phase of the putting together of the case for the prosecution on the basis of which the person remanded will be tried in court.

In addition, numerous statutory reforms of Article 16 of the Code of Criminal Procedure, which fixes the list of persons having the status of CID Police officer, have led to a reduction in the requirements governing the attribution of the status of CID Police officer. Between 1993 and 2009 the number of personnel having such status rose from 25 000 to 53 000.

These changes have contributed to making remand in police custody for questioning something of a commonplace, including for minor offences. They have given greater importance to the outcome of police investigations in putting together the case for the prosecution on the basis of which a person will be tried in court. More than 790 000 decisions to remand persons in police custody for questioning were taken in 2009.

These changes do not *per se* fail to comply with any constitutional requirement. Remanding persons in police custody for questioning is a measure of constraint necessary for certain operations of the Police Criminal Investigation Department. These changes must however be accompanied by suitable guarantees as regards recourse to such remands and the manner in which they are proceeded with and such as to ensure the protection of the rights of the defence.
(2010-14/22 QPC, July 30th 2010, paras 15 to 18 and 25, p. 179)

Provisions connected with investigation and preliminary judicial criminal investigations

Investigation

With two qualifications as to interpretation (see Qualifications –Criminal procedure – Code of Criminal Procedure) Articles 706-54, 706-55 and 706-56 of the Code of Criminal Procedure which introduce the National DNA Database (FNAEG) and govern the conditions in which it is constituted and may be consulted do not introduce any undue harshness as regards Article 9 of the Declaration of 1789 (see Rights and Freedoms – Right to privacy – Processing of data of a personal nature – Police and Court files – FNAEG)
(2010-25 QPC, September 16th 2010, paras 12 to 26, p. 220)

1° of Article 323 of the Customs & Excise Code vests Customs & Excise agents and agents of any other Administration with the power to ascertain the commission of offences under C&E Statutes and regulations. 2° of this same Article allows them to seize all items liable to be confiscated, to retain all documents pertaining to the items seized and to seize as a preventive measure all items intended to ensure the payment of such penalties as may be imposed. These provisions do not infringe any constitutionally guaranteed right or freedom.
(2010-32 QPC, September 22nd 2010, para. 6, p. 241)

Remand in police custody for questioning

The Judicial Authority is composed of trial judges and prosecutors. The intervention of a trial judge is required for any extension of the period of remand beyond 48 hours. Before the end

of this period the manner in which the remand is proceeded with is placed under the supervision of the Public Prosecutor who may decide, if need be, to extend the same by a further 24 hours. Under Articles 63 and 77 of the Code of Criminal Procedure, the Public Prosecutor is informed of the remand as from the commencement thereof. He may at any time order that the person remanded be released or brought before him. It is incumbent upon him to decide whether continuing to remand a person in police custody and, if need be, the extension of the period of such remand, are necessary for the purposes of the investigation and proportionate to the seriousness of the acts which the person on remand is suspected of having committed. The argument based on failure to comply with the terms of Article 66 of the Constitution must thus be dismissed.
(2010-14/22 QPC, July 30th 2010, para. 26, p. 179)

Since 1993, certain changes in the rules of criminal procedure and the manner in which the latter has been implemented have contributed to making remand in police custody for questioning something of a commonplace, including for minor offences

They have given greater importance to the outcome of police investigations in putting together the case for the prosecution on the basis of which a person will be tried in court. More than 790 000 decisions to remand persons in police custody for questioning were taken in 2009.

These changes do not *per se* fail to comply with any constitutional requirement. Remanding persons in police custody for questioning is a measure of constraint necessary for certain operations of the Police Criminal Investigation Department. These changes must however be accompanied by suitable guarantees as regards recourse to such remands and the manner in which they are proceeded with and such as to ensure the protection of the rights of the defence.
(2010-14/22 QPC, July 30th 2010, paras 15 to 18 and 25, p. 179)

Firstly under Articles 63 and 77 of the Code of Criminal Procedure any person suspected of committing an offence may be remanded in police custody for questioning by a CID Police officer for a period of 24 hours irregardless of the seriousness of the acts warranting recourse to this measure. Any remand in police custody may be extended for a further 24 hours without this measure being restricted to offences of a more serious nature.

Secondly, the combined provisions of Articles 62 and 63 of the same Code authorize the questioning of a person remanded in police custody. Article 63-4 does not allow the person undergoing questioning, and held against his will, to have the benefit of effective assistance from a lawyer. Such a restriction on the rights of the defence is imposed in a general manner without any consideration of particular circumstances likely to justify the same, in order to collect or conserve evidence or ensure the protection of persons. The person remanded in police custody is moreover not informed of his right to remain silent.

In such conditions, Articles 62, 63, 63-1, 63-4 paragraphs 1 to 6 and Article 77 of the Code of Criminal Procedure do not offer suitable guarantees as to the use made of remands in police custody, taking into account the changes recalled hereinabove. The reconciling on the one hand of the need to prevent breaches of the peace and to seek out offenders with, on the other hand, the need to ensure the exercising of constitutionally guaranteed freedoms cannot be considered to be balanced. Hence these provisions fail to comply with Articles 9 and 16 of the Declaration of 1789 and must therefore be held to be unconstitutional
(2010-14/22 QPC, July 30th 2010 paras 27 to 29, p. 179)

Paragraphs 7 to 10 of Article 706-88 of the Code of Criminal Procedure make it possible to extend the overall length of the period of remand in custody for police questioning to a total of 6 days for crimes or major offences constituting acts of terrorism, by allowing for two further 24 hour extensions. Parliamentary debate showed that such a departure may only be authorized to prevent the commission of a terrorist act in France or abroad, the imminence of which has been established by elements obtained in the framework of the investigation or the remanding in custody for police questioning or through international cooperation. Such measures may thus only be exceptionally implemented to protect the safety and security of persons and property against an imminent terrorist threat which has been specifically identified. They are decided by the Freedom and Detention Judge who shall duly verify that the specific conditions laid down by these provisions have been met. In these conditions and in view of the guarantees laid down by Parliament these provisions comply with the principle,

deriving from Article 9 of the Declaration of the Rights of Man and the Citizen of 1789, whereby the freedom of the individual may not be restricted in any unnecessarily harsh manner, and Article 66 of the Constitution which entrusts the Judicial authority with the task of protecting the freedom of the individual. These provisions do not infringe any other constitutionally guaranteed right or freedom.
(2010-31 QPC, September 22nd 2010, para. 5, p. 237)

3º of Article 323 of the Customs & Excise Code allows agents to "retain offenders" when such persons have been caught in the act of committing an offence. This provision applies to all C&E offences irrespective of the seriousness thereof. It authorizes the questioning of a person who has been retained by C&E agents. Article 336 of the same Code provides: "formal C&E records drawn up by two C&E agents or agents of any other Administration shall be conclusive. unless otherwise proved, as regards the accuracy and the authenticity of admissions and statements which they record". 3º of Article 323 does not allow the person retained against his will to have the benefit of the effective assistance of a lawyer while undergoing questioning. Such a restriction of the rights of the defence is imposed in a general manner without taking into consideration particular circumstances likely to justify the same in order to collect or keep evidence or ensure the protection of people. The person retained by C&E agents is not informed of his right to remain silent.
(2010-32 QPC, September 22nd 2010, para. 7, p. 241)

Article 803-3 of the Code of Criminal Procedure makes it possible to retain a person remanded for a maximum of 20 hours between the end of the period of remand in police custody for questioning and the actual bringing of said person before a judge

This Article merely places the monitoring of the premises where the person is remanded under the authority of the Public Prosecutor. Protection of freedom of the individual by the Judicial Authority would however not be guaranteed if the judge before whom the person remanded is to be brought was not in a position to immediately decide whether such remand is opportune. This judge must therefore be informed without delay of the arrival of the person remanded on the premises of the court. First qualification.

Although the Judicial Authority is composed of trial judges and prosecutors, the intervention of a trial judge is required for extending the period of remand in police custody for questioning beyond 48 hours. The deprivation of freedom introduced by Article 803-3 of the Code of Criminal Procedure after the extension of a period of remand by the Public Prosecutor would therefore fail to comply with the constitutional protection of the freedom of the individual if the person remanded were not effectively brought before a trial judge before the expiry of the period of 20 hours provided for by said Article. Second qualification
(2010-80 QPC, December 17th 2010, paras 10 and 11, p. 408)

Preliminary judicial criminal investigation

Article 148 of the Code of Criminal Procedure guarantees any person held in pre-trial detention the right to apply for his release at any time and to see this application examined in the shortest possible time by the Investigating Magistrate or, as may be, the Freedom and Detention Judge. This Article provides that when the Investigating Magistrate does not grant this application for release, said application shall be transmitted to the Freedom and Detention Judge who will decide on the basis of said request, the reasoned opinion of the Investigating Magistrate and the charges preferred by the Public Prosecutor. This request for release is thus examined under a procedure which does not allow for a full hearing of all parties.

In view of the audi alteram partem nature of the proceedings provided for by Articles 145 of the Code of Civil Procedure (at the time of placement in pre-trial detention), Articles 145-1 and 145-2 (on extension of pre-trial detention) and Article 199 thereof (when the appeal is examined by the *Chambre de l'Instruction*) and the frequency with which applications for release may be made, Article 148 of the Code of Criminal Procedure ensures a reconciliation which is not disproportionate between the objective of constitutional value which is the good administration of justice and the requirements deriving from Article 16 of the Declaration of 1789.

However the necessary balancing of the rights of the parties nevertheless precludes the Freedom and Detention Judge from refusing such an application without the applicant or his

Attorney having the opportunity to take cognizance of the opinion of the Investigating Magistrate and the charges preferred by the Prosecution. Qualification.
(2010-62 QPC, December 17th 2010, paras. 4 to 7, p. 400)

Although Parliament may provide for different rules of procedure depending on the facts, situations and persons involved, this is on condition that such differences are not based on unwarranted distinctions and that all persons likely to be brought before the courts have the benefit of equal guarantees.

The Code of Criminal Procedure provides that decisions handed down by courts in matters of pre-trial detention may, at the request of the person detained or the Prosecution, be reviewed by the *Chambre de l'Instruction* as regards the necessity and legality of such a custodial measure.

The second phrase of paragraph 1 of Article 207 of the Code of Criminal Procedure departs from the principle whereby the *Chambre de l'Instruction* sees its jurisdiction brought to an end by its decision on the appeal brought against a order concerning pre-trial detention. In certain cases, it allows the *Chambre de l'Instruction* to hold that it alone has jurisdiction to rule in such a matter, under a system departing from normal procedures, for the remaining investigation procedure.

These provisions vest the *Chambre de l'Instruction* with the discretionary power to deprive a person who is the object of a preliminary judicial criminal investigation, throughout the duration of said investigation, of the guarantees provided for by Articles 144-1 and 147 of the Code of Criminal Procedure which require the Investigating Magistrate or the Freedom and Detention judge to order the immediate release of the person concerned once the statutory conditions of such detention are no longer met, of those provided by Article 148 of the same Code for the review of applications for release at first instance and the right to a system of duality of courts existing for all decisions as to pre-trial detention.

Any possible divergence between the respective positions of courts of first instance and courts of appeal concerning the subsequent necessity of the detention of the person under a preliminary judicial criminal investigation cannot justify such an infringement of the rights vested by law in each person placed in pre-trial detention. The second and third phrases of paragraph 1 of Article 207 of the Code of Criminal Procedure run counter to Articles 6 and 16 of the Declaration of 1789.
(2010-81 QPC, December 17th 2010, paras 4 to 7), p. 412

Provisions pertaining to prosecution and alternatives to prosecution

Procedures departing from normal practice and requiring the consent of the person involved

Lump sum fine

The final paragraph of Article 529-10 of the Code of Criminal Procedure provides that the official from the Public Prosecutor's Office shall verify whether the conditions of admissibility of the request for exoneration from a lump sum fine or a claim against an increased lump sum fine have been met. The right to an effective judicial remedy requires that the decision of the Public Prosecutor's Office holding the request inadmissible may be challenged before the neighbourhood court. The same holds good for the decision holding a request for an exoneration inadmissible when such a decision results in the conversion of the sum deposited into a lump sum fine. With this qualification the power vested in the official from the Public Prosecutor's Office to hold a request for exoneration or a claim inadmissible does not fail to show due regard for Article 16 of the Declaration of 1789.
(2010-38 QPC, September 29th 2010, para. 7, p. 252)

Appearance after prior admission of guilt

Article 495-15-1 of the Code of Criminal Procedure, inserted by section 129 of the Act of May 12th 2009, merely authorizes the Public Prosecutor to at one and the same time summon a person under the procedure of appearance on prior admission of guilt and also serve a summons on said person under Article 390-1 of the Code of Criminal Procedure. In itself this manner of proceeding in not such as to adversely affect the rights of the defence. The

exercising of the rights of the defence is in particular guaranteed, in the procedure of appearance after prior admission of guilt, by Article 495-8 and 495-9 of the Code of Criminal Procedure and before the *Tribunal correctionnel* by the provisions of section IV of Chapter I and Title II of Book II of the same Code dealing with proceedings before said court.
(2010-77 QPC, December 10th 2010, para. 6, p. 384)

When after an appearance after prior admission of guilt, the person involved does not agree to the penalty proposed by the Public Prosecutor or when the President of the *Tribunal de Grande Instance* or the judge to whom he has delegated this task has not approved the proposition and subsequently the accused appears before the *Tribunal correctionnel* following the summons received under Article 495-15-1, Article 495-14 precludes the transmission to said court of trial of the record of formalities complied with under Articles 495-8 to 495-13 during the appearance after prior admission of guilt. This same Article also prohibits the Public Prosecutor's Office and the parties from referring before said court of trial to statements made or documents transmitted during the proceedings of appearance after prior admission of guilt.

It is therefore incumbent upon the Public Prosecutor, when acting under the provisions of Article 495-15-1, to ensure that the summons to appear served under Article 390-1 be served sufficiently in advance to guarantee that on the date fixed for the appearance of the accused before the *Tribunal correctionnel* the proceedings of appearance after prior admission of guilt have proved unsuccessful or the penalties proposed have been approved. Article 495-15-1 of the Code of Criminal Procedure does therefore not infringe the constitutional principle of the presumption of innocence deriving from Article 9 of the Declaration of 1789.
(2010-77 QPC, December 10th 2010, para. 7, p. 384)

Guarantee resulting from court intervention

Review of the necessary rigour of acts of criminal procedures

Although Parliament may provide for special measures of investigation for the purpose of ascertaining the commission of crimes and major offences of a particularly serious nature, collecting evidence and seeking to apprehend persons committing such offences, such measures must be carried out in compliance with the prerogatives of the Judicial Authority, guardian under Article 66 of the Constitution of the freedom of the individual. This means that any restrictions which may be placed on constitutionally guaranteed rights and freedoms must be necessary to determine the truth, proportionate to the seriousness and complexity of the offences committed and must not introduce any unjustified discriminations.

Although in the cases provided for in paras 2 and 3 of Article 706-54, a CID Police officer may on his own initiative decide to take a biological sample for comparison with the National DNA database or for entry on said database, such an act, which is necessarily carried out in the framework of an investigation or a preliminary judicial criminal investigation, is placed under the supervision of the Public Prosecutor or the Investigating Magistrate who oversee this sample-taking in accordance with the provisions of the Code of Criminal Procedure. The DNA markers may be removed from the database on the instructions of the Public Prosecutor. Lastly, the database is placed under the supervision of a judge. Hence the argument based on failure to comply with Article 66 of the Constitution must be dismissed.
(2010-25 QPC, September 16th 2010, paras 11 and 12, p. 220)

EQUALITY

EQUALITY BEFORE THE LAW

Principle

Although in general the principle of equality requires that persons in the same situation be treated in the same manner, nothing requires Parliament to treat differently persons in different situations.
(2010-617 DC, November 9th 2010, para. 11, p. 310)

Prohibited discriminations

The combined provisions of sections 9 and 9-1 of the Act pertaining to the Reception and Accommodation of Travelling Communities which introduce procedures of formal notice to quit and forced eviction are applicable to "persons known as Travelling communities.. whose normal mode of accommodation is composed of mobile homes or caravans ...." and who "have no fixed place of abode or residence of longer than six months duration in a Member State of the European Union". The abovementioned provisions are based on a difference between the situation of such persons, irrespective of their origins, who have chosen to live in mobile homes or caravans and adopt an itinerant lifestyle and those persons who have opted to live in a sedentary, settled manner. The distinction thus imposed is based on objective and rational criteria directly connected with the purpose which Parliament sought to achieve, namely to ensure that such Travelling communities are accommodated in conditions compatible with maintaining public law and order and the rights of third parties. They do not introduce any discrimination based on any ethnic origin and hence do not run counter to the principle of equality proclaimed by Article 1 of the Declaration of 1789 and the Constitution of 1958.
(2010-13 QPC, July 9th 2010, paras 4 and 6, p. 139)

The provisions of section 1 of the Act reforming Territorial communities, qui provides that Territorial Councillors shall be elected by a two round simple majority system do not *per se* adversely affect the objective of equal access for woman and men to elective offices and posts set out in Article 1 of the Constitution. Neither do they infringe the principle of equality before the law
(2010-618 DC, December 9th 2010, paras 32 and 34).

Due regard for principle of equality: no unjustified discrimination

Civil Law

Status and capacity of persons

When maintaining the principle whereby the possibility of adoption by a couple is reserved for spouses, Parliament, when exercising the powers vested in it by Article 34 of the Constitution, felt that the difference in situation between married couples and unmarried couples justified a difference in treatment as to the creating of adoptive bonds with minor children. It is not incumbent upon the Constitutional Council to substitute its own appraisal for that of Parliament as to the consequences which should be drawn in the case under review, from the particular situation of children brought up by two persons of the same sex. Hence the argument based on the infringement of Article 6 of the Declaration of 1789 must be dismissed.
(2010-39 QPC, October 6th 2010, para. 9, p. 264)

Law of the environment

Section 64 of the Finance Act for 2011 reintegrates into the Code of the Environment Article L 229-10 which provides for the issuing of greenhouse gas quotas against payment in 2011 and 2012. IV of this section 64 provides for its coming into force on June 30th 2011. The wording of this section shows that the issuing of quotas against payment is only provided for 'for the years 2011 and 2012". The argument based on the infringement of the principle of equality between companies which were granted their quotas for 2010 free of charge and those which have not yet received their quotas although their installations were operated in 2010 is unsupported by the facts.
(2010- 622 DC, December 28th 2010, paras 12 to 15, p. 416)

Tax law

For the computation of income tax, c of 1 of Article 195 of the General Tax Code, grants, under certain conditions, an additional half share of the family share system to holders of a pension provided for by the provisions of the Code of Military Pensions for Disabled Veterans and War Victims or Their Widows. In testimony of the gratitude of the French Republic, Parliament intended to grant such a measure to these persons without any differentiation based on nationality. When reserving such a measure for these persons it took into consideration their specific position and fulfilled an objective in the general interest directly connected with the statute. Dismissal
(2010-11 QPC, July 9th 2010, para. 5, p. 136)

The difference in treatment between married couples and persons living as cohabiting couples was already held to be constitutional by the Constitutional Council in its decision nº 81-133 DC of December 30th 1981, the provisions of paragraph 2 of section 3 of the Finance Act for 1982 were inserted by identical wording into paragraph 2 of Article 885E of the General Tax Code
(2010-44 QPC, September 29th 2010, paras 8 and 9, p. 259)

When introducing a tax on commercial premises (ex–help tax for small businesses and craft industries), Parliament intended to encourage a balanced development of trade. To this end, it chose to tax retail businesses with a significant surface area. When enacting the challenged provisions, it intended to apply this tax to an integrated whole of businesses of which the cumulated area exceeded a certain threshold. It made this integration dependent firstly on the ownership of the business, possession of its capital or a substantial holding in said capital by a single person, under the form of direct or indirect control within the meaning of Article L 233-3 and L 233-4 of the Commercial Code and secondly to the operating of one single trade name. Independent businesses which contractually share the operation of a trade name without their capital being directly or indirectly controlled by one and the same person are in a different situation from the point of view of the statute. Parliament was thus at liberty to apply the tax differently to commercial surface areas which are in a different situation. When providing for this twofold condition, it based its appraisal on objective and rational criteria. There is therefore no blatant infringement of the principle of equality before public burden sharing.
(2010-58 QPC, October 18th 2010, para. 5, p. 302)

Criminal law and Criminal procedure

Under Article 113-2 and following of the Criminal Code French criminal law is applicable to any crime committed on the territory of the Republic and any crime committed abroad on condition that the victim be a French National.

Article 689-11 of the Code of Criminal Procedure is intended solely to extend the jurisdiction of French criminal courts to certain crimes committed abroad by persons of foreign nationality on victims who are themselves foreigners. When setting out in this Article the conditions governing the exercising of said jurisdiction, Parliament used the power vested in it without infringing the principle of equality before the law and justice.
(2010-612 DC, August 5th 2010, para 14, p. 198)

Social law

Employment law and Trade Union law

The statute pertaining to the La Poste (The Post Office) generalises the employment by the latter of contractual agents under the system of collective bargaining agreements. It does not however subject it to the provisions of the Employment Code pertaining to Works councils, staff delegates and Trade Union delegates, which apply to the staff of any Public Limited Company. The staff of La Poste comprises both civil servants and contractual agents of public and private law. Notwithstanding the transformation of La Poste into a Public Limited Company, these different legal statuses of its employees remain. The argument based on the infringement of the principle of equality before the law by the maintaining of a specific system of representation and consultation must therefore be dismissed.
(2010-601 DC, February 4th 2010, paras 8 to 13, p. 53)

Retirement

For the computation of income tax, c of 1 of Article 195 of the General Tax Code, grants, under certain conditions, an additional half share of the family share system to holders of a pension provided for by the provisions of the Code of Military Pensions for Disabled Veterans and War Victims or Their Widows. In testimony of the gratitude of the French Republic, Parliament intended to grant such a measure to these persons without any differentiation based on nationality. When reserving such a measure for these persons it took into consideration their specific position and fulfilled an objective in the general interest directly connected with the statute. Dismissal
(2010-11 QPC, July 9th 2010, paras 1 and 5, p. 136)

Pursuant to Section 21 of the Institutional Act of March 19th 1999, enacted on the basis of Article 77 of the Constitution, the State is vested with powers with respect to the civil service of the State. Under section 22 of the same Institutional Act, New Caledonia is vested with power with respect to the civil service of New Caledonia. The argument based on the infringement of the equality between retired civil servants of the State residing in New Caledonia and those of the Territorial civil service of New Caledonia must therefore be dismissed.
(2010- 4/17 QPC, July 22nd, para. 21, p. 156)

Parliament has maintained for persons in both public and private sectors who have had a long working-life the possibility of retiring before age 60. To this extent the contention based on an infringement of the principle of equality due to the raising of the retirement age to 62 is unsupported by the facts. As for the remainder, where a retirement pension system based on redistribution is concerned, Parliament was at liberty to lay down a minimum retirement age without infringing the principle of equality.
(2010-617 DC, November 9th 2010, para. 12, p. 310)

Parliament has laid down identical rules for women and men. Sections 20, 21 and 28 of the statute referred for review maintain the benefit of retirement on a full pension at 65 years, irrespective of the length of time the retiree has paid retirement contributions, for the parent of three or more children who is aged over fifty five and has interrupted his/her career to look after one of said children. Sections 20, 21, 23 and 28 do the same for a person who has interrupted his/her professional activity to take care of a handicapped child or a member of his/her family as family helper. Raising the age for benefiting from a full pension to 67 does not infringe the principle of equality between women and men.
(2010-617 DC, November 9th 2010, para. 19, p. 310)

Social Security

Firstly, when defining the system of a limited liability professional practice company (Act nº 90-1258 of December 31st 1990) Parliament intended to offer non-salaried persons practicing one of the liberal professions the possibility of choosing a manner of practicing their profession which introduces a necessary link between this professional practice, the control of the capital of the company and the holding of corporate office while authorizing for certain professions access to the capital of the company by natural persons or legal entities not working within the company. The majority shareholding members thus acquire the possibility

of paying the income from the business of said companies either as remuneration or as dividends or as interest on advances or loans from shareholders.

Secondly, by including in the base for computing social contributions part of the dividends and proceeds of interest on advances and loans from shareholders coming from the business of a limited liability professional practice company and received by the non-salaried non farm-worker, the spouse or civil partnership partner thereof or their minor non emancipated children, Parliament intended to discourage the paying of dividends motivated by the desire to have revenue produced by the business of the company avoid the payment of social contributions. It thus sought to avert detrimental financial consequences for the social health and welfare systems involved. It also intended to put an end to diverging case law on the definition of the social contributions paid by majority shareholding members of a limited liability professional practice company and by so doing avoid an increase in disputes on this matter. Thus when reserving the extension of the inclusion in the base for computation of social contributions of dividends paid by a limited liability professional practice company, Parliament took into consideration the specific status of non salaried workers members of such companies and responded to an objective in the general interest directly connected with the purpose of the statute. When limiting the scope of the dividends subjected to social contributions to those representing a significant part of company capital and share premiums and money paid as interest on advances or loans from shareholders into accounts held by those involved, it defined objective and rational criteria. The resulting definition of the scope of the base for computation of social contributions does not create any patent infringement of equality before public burden sharing. Dismissal of arguments based on non compliance with the principle of equality.
(2010-24 QPC, August 6th 2010, paras 7 to 10, p. 209)

The provisions of Articles 142-4 and L 142-5 of the Social Security Code vests mainly in "the most representative employer and employee organizations" the power to put forward candidates for the position of assessor at the Social Security Tribunal. They merely enable persons belonging to said organizations to appoint such assessors or put them forward for appointment. They do not introduce any difference in treatment between workers belonging to Trade Unions and those not belonging.
(2010-76 QPC, December 3rd, 2010, para. 6, p. 364)

Economic Law

Organization of betting on horse racing

The Act of June 2nd 1891 designed to regulate the authorization and operation of horse racing does not in itself introduce any difference in treatment insofar as it provides for one single body of regulations applicable to all racing companies.
(2010-73 QPC, December 3rd 2010, para. 11, p. 356)

Due regard for the principle of equality: difference in treatment justified by a difference in situation

Article L 4031-1 of the Public Health code provides that in each Region and the Territorial Community of Corsica, a Regional Union of healthcare professionals shall bring together, for each profession, the representatives of healthcare professionals acting as independent professional practitioners. Under Article L 4031-3 of the same Code, these Regional Unions have authority to contribute to the organization and development of the offer of health care at regional level and to carry out the assignments given to them by national agreements entered into between the Health insurance systems and organizations of health care professionals. Under Article L 162-14-1-2 of the Social Security Code, these agreements may only be signed by those representative organizations at national level which have obtained, in elections held by Regional Unions of health care professionals, at least 30 % of the votes cast at national level. These professionals covered by such agreements are, as regards the purpose of the statute, in a different situation from that of professionals not covered by such agreements. Therefore,

when reserving the capacity of voter solely to health care professionals covered by the agreements, Parliament has not infringed the principle of equality.
(2010-68 QPC, November 19th 2010, para. 4, p. 330)

Associations

In view of the rules governing their formation, running, composition and the missions which the law confers upon them, the National Union and the Departmental Unions of Families Associations are not in the same situation as that of Families Associations which may join them. The argument based on failure to comply with the principle of equality must therefore be dismissed.
(2010-3 QPC, May 28th 2010, paras 4 and 5, p. 97)

Territorial Communities

Metropoles

The parties making the referral argue that when enacting section 12 of the Act reforming Territorial Communities Parliament infringed the principle of equality between communes authorized to create metropoles able to exercise powers vested in *Départements* and Regions and these two categories of Territorial communities. Parliament has reserved the possibility of obtaining the status of metropole to Public Establishments of Inter-communal cooperation which, situated outside the Greater Paris Region, form, at the date of the creation of said metropole, a whole of over 500 000 inhabitants and the urban Communities set up by section 3 of the Act of December 31st 1966. It thus sought to further " a project of planning and economic, ecological, educational, cultural and social development of their territory", in order to rise to the economic challenges and social needs which are found in this type of urban area. The argument based on failure to comply with the principle of equality before the law must be dismissed.
(2010-618 DC, December 9th 2010, paras 48 to 50, p. 367)

Criminal law and Criminal procedure

The principle of equality before Criminal law, as it derives from Article 6 of the Declaration of the Rights of Man and the Citizen of 1789, does not preclude the differentiating by Criminal law between different types of behaviour.

War crimes and Crimes against humanity are of different natures. Hence, when increasing from ten to thirty years the period after which prosecution for war crimes becomes time-barred, whereas crimes against humanity can never be time-barred under Article 213-5 of the Criminal code, Parliament did not fail to comply with the principle of equality.
(2010-612 DC, August 5th 2010, paras 6 and 7, p. 198)

Civil Law

Law of tort

Paragraphs 1 and 3 of Article L 114-5 of the Family and Social Welfare Code introduce specific rules governing the incurring of liability by professionals of health care establishments in the event of the birth of a handicapped child. The difference introduced corresponds to whether or not medical negligence is at the origin of the handicap. Hence, no infringement of the principle of equality.
(2010-2 QPC, June 11th 2010, paras 8 and 16, p. 105)

Tax Law

The scale of the tax on wages takes into account the difference of situation between tax payers who are not in the same sectors of business. Parliament was thus at liberty to differently impose such taxes on the employees of businesses who are not in the same situation.
(2010-28 QPC, September 17th 2010, paras 6 to 8, p. 233)

With respect to the levy on the financial potential of low rental housing bodies, bodies or companies belonging to a group and those who do not belong to a group are in a different situation from the point of view of accounting and taxation, insofar as solely the former may present consolidated accounts. Furthermore, Parliament sought to encourage the grouping together of such bodies and companies in order to strengthen their means of financing and develop the building of social housing. Thus when introducing a system of option in favour of bodies which belong to a group and specifying that the option chosen is valid for a period of five years, Parliament has not infringed the principle of equality.
(2010-622 DC, December 28th 2010, para. 47, p. 416)

Social Law

Employment Law and Trade Union Law

In view of the particular situation of the salaried employee acting in the course of his professional employment, the departure from the normal legal principle of tortious liability as a result of the rules concerning benefits and compensation paid by social security under the provisions of the Social Security Code referred to above is directly connected with the objective of compensating for occupational injuries and diseases as set out in Book IV of said Code
(2010-8 QPC, June 18th 2010, para. 15, p. 117)

Trade Unions which, under their terms of association, have authority to represent certain categories of workers and who are affiliated to a national Trade Union inter-professional category confederation are not in the same situation as the other Trade Unions. When providing that for Trade Unions representing categories of workers the threshold of 10 % is calculated in the sole colleges in which they have authority to put forward candidates, Article L 2122-2 of the Employment Code has introduced a difference in treatment directly connected with the purpose which the statute seeks to achieve. The argument based on failure to show due regard for Article 6 of the Declaration of 1789 must be dismissed.
(2010-42 QPC, October 7th 2010, para. 7, p. 278)

Legislation on retirement pensions

Parliament is at liberty to base the difference in treatment on the place of residence when proceeding to upgrade civil and military retirement pensions paid to pension holders residing outside France.
(2010-1 QPC, May 28th 2010, para. 9, p. 91)

Holders of civil and military State pensions who have chosen to take up residence on the territory of overseas Territorial Communities eligible for a temporary retirement indemnity, to return to the said Communities or to remain there after serving overseas, are in a different situation from those State civil servants who are under a duty to reside in the place of their employment. Furthermore Parliament was at liberty to feel, without failing to show due regard for the principle of equality, that although it is in the general interest to encourage civil servants from mainland France to serve in French overseas territories, the fact that retired civil servants may choose to remain in or to move to such overseas territories does not present any such interest.
(2010-4/17 QPC, July 22nd 2010, para. 19, p. 156)

Persons who are unfit for work and who have been exposed to "harsh working conditions" during their working life are not in the same situation as persons who have not been exposed to such conditions. There has thus not been any infringement of the principle of equality.
(2010-617 DC, November 9th 2010, para. 14, p. 310)

Social Security

Firstly, when defining the system of a limited liability professional practice company (Act nº 90-1258 of December 31st 1990) Parliament intended to offer non-salaried persons practicing one of the liberal professions the possibility of choosing a manner of practicing their profession which introduces a necessary link between this professional practice, the control of the capital of the company and the holding of corporate office while authorizing for certain

professions access to the capital of the company by natural persons or legal entities not working within the company. The majority shareholding members thus acquire the possibility of paying the income from the business of said companies either as remuneration or as dividends or as interest on advances or loans from shareholders.

Secondly, by including in the base for computing social contributions part of the dividends and proceeds of interest on advances and loans from shareholders coming from the business of a limited liability professional practice company and received by the non-salaried non farm-worker, the spouse or civil partnership partner thereof or their minor non emancipated children, Parliament intended to discourage the paying of dividends motivated by the desire to have revenue produced by the business of the company avoid the payment of social contributions. It thus sought to avert detrimental financial consequences for the social health and welfare systems involved. It also intended to put an end to diverging case law on the definition of the social contributions paid by majority shareholding members of a limited liability professional practice company and by so doing avoid an increase in disputes on this matter. Thus when reserving the extension of the inclusion in the base for computation of social contributions of dividends paid by a limited liability professional practice company, Parliament took into consideration the specific status of non salaried workers members of such companies and responded to an objective in the general interest directly connected with the purpose of the statute. When limiting the scope of the dividends subjected to social contributions to those representing a significant part of company capital and share premiums and money paid as interest on advances or loans from shareholders into accounts held by those involved, it defined objective and rational criteria. The resulting definition of the scope of the base for computation of social contributions does not create any patent infringement of equality before public burden sharing. Dismissal of arguments based on non compliance with the principle of equality.
(2010-24 QPC, August 6th 2010, paras 7 to 10, p. 209)

The exoneration from employers'contributions provided for by Article L 241-10 of the Social Security Code is intended to encourage the maintaining in their homes of care-dependent elderly persons. The granting of the benefit of this exoneration on the basis of the private status of the home of the person receiving such aid is directly connected with the purpose this Article seeks to achieve. The provisions of section 14 of the Social Security Financing Act for 2011, which reiterate this purpose, do not infringe the principle of equality before the law.
(2010-620 DC, December 16th 2010, para. 15, p. 394)

Administrative police

The provisions of sections 9 and 9-1 of the Act of July 5th 2005 pertaining to the Reception and Accommodation of Travelling Communities which introduce procedures of formal notice to quit and forced eviction are applicable to "persons known as Travelling communities.. whose normal mode of accommodation is composed of mobile homes or caravans ...." and who "have no fixed place of abode or residence of longer than six months duration in a Member State of the European Union". The abovementioned provisions are based on a difference between the situation of such persons, irrespective of their origins, who have chosen to live in mobile homes or caravans and adopt an itinerant lifestyle and those persons who have opted to live in a sedentary, settled manner. The distinction thus imposed is based on objective and rational criteria directly connected with the purpose which Parliament sought to achieve, namely to ensure that such Travelling communities are accommodated in conditions compatible with maintaining public law and order and the rights of third parties. They do not run counter to the principle of equality proclaimed by Article 6 of the Declaration of 1789
(2010-13 QPC, July 9th 2010, paras 5 and 6, p. 139)

Conditions of general interest justifying a difference in treatment

When recognising the representativeness of the National Union and Departmental Unions of Families Associations, Parliament intended to ensure official representation vis-à-vis the Public Authorities by an Association introduced by the statute bringing together all Families Associations wishing to join the same. When so doing, it sought to achieve a purpose in the general

interest. The argument based on infringement of the principle of equality must thus be dismissed.
(2010-3 QPC, May 28th 2010, paras 4 and 5, p. 97)

Tax Law

For the computation of income tax, c of 1 of Article 195 of the General Tax Code, grants, under certain conditions, an additional half share of the family share system to holders of a pension provided for by the provisions of the Code of Military Pensions for Disabled Veterans and War Victims or Their Widows. In testimony of the gratitude of the French Republic, Parliament intended to grant such a measure to these persons without any differentiation based on nationality. When reserving such a measure for these persons it took into consideration their specific position and fulfilled an objective in the general interest directly connected with the statute.
(2010-11 QPC, July 9th 2010, para. 5, p. 136)

When exonerating businesses which have opted for the "micro-social regime" provided for by Article L 131-6-8 of the Social Security Code from payment of the real property tax for a period of two years as from the year following their formation, section 137 of the Finance Act for 2011 intended to encourage the setting up and development of very small businesses by lessening their tax burden. Taking into account the criteria and ceiling of the turnover referred to by said Article L 131-6-8, Parliament based its decision on objective and rational criteria directly connected with the purpose of the statute. The resulting benefit, which is limited in time, does not introduce any patent infringement of equality before public burden sharing.
(2010-622 DC, December 28th 2010, para. 29, p. 416)

Social Law

Liberal Professions

When including in the base for computing social contributions part of the dividends and proceeds of interest on advances and loans from shareholders coming from the business of a limited liability professional practice company and received by the non-salaried non farm-worker, the spouse or civil partnership partner thereof or their minor non emancipated children, Parliament intended to discourage the paying of dividends motivated by the desire to have revenue produced by the business of the company avoid the payment of social contributions. It thus sought to avert detrimental financial consequences for the social health and welfare systems involved. It also intended to put an end to diverging case law on the definition of the social contributions paid by majority shareholding members of a limited liability professional practice company and by so doing avoid an increase in disputes on this matter. Thus when reserving the extension of the inclusion in the base for computation of social contributions of dividends paid by a limited liability professional practice company, Parliament took into consideration the specific status of non salaried workers members of such companies and responded to an objective in the general interest directly connected with the purpose of the statute. Dismissal of arguments based on non compliance with the principle of equality.
(2010-24 QPC, August 6th 2010, paras 7 to 10, p. 209)

Retirement

For the computation of income tax, c of 1 of Article 195 of the General Tax Code, grants, under certain conditions, an additional half share of the family share system to holders of a pension provided for by the provisions of the Code of Military Pensions for Disabled Veterans and War Victims or Their Widows. In testimony of the gratitude of the French Republic, Parliament intended to grant such a measure to these persons without any differentiation based on nationality. When reserving such a measure for these persons it took into consideration their specific position and fulfilled an objective in the general interest directly connected with the statute. Dismissal
(2010-11 QPC, July 9th 2010, para. 5, p. 136)

Military disability pensions and pensions for war victims are intended to compensate for the injury sustained by members of the armed forces, civil victims of war or victims of terrorism. In such cases Parliament was free, without failing to show due regard for the principle of equality, to maintain for the holders of such pensions a benefit which it suppressed or restricted for holders of civil or military retirement pensions.
(2010-4/17 QPC, July 22nd 2010, para 20 p. 156)

Infringement of the principle of equality

Social Law

The combined provisions of section 26 of Act nº 81-734 of August 3rd 1981 and section 68 of the Act of December 30th 2002 are intended to guarantee holders of civil or military retirement pensions, in accordance with their actual place of residence abroad when they became entitled to such pensions, living conditions reflecting the dignity of the office in which they served the State. When providing for revaluation conditions different from those provided for by the Code of Civil and Military Retirement Pensions, they continue to apply different treatment from that applicable to French Nationals residing in the same foreign country. Although Parliament was at liberty to base the difference in treatment on the place of residence when taking into account differences in purchasing power, it could not, in view of the purpose of the statute, establish a difference based on nationality between those holding a civil or military retirement pension paid out of the budget of the State or State Public Establishments and residing in the same foreign country. To this extent these statutory provisions infringe the principle of equality. Unconstitutional.
(2010-1 QPC, May 28th 2010, para. 9, p. 91)

The provisions of paragraph 3 of Article 253 bis of the Code of Military Pensions for Disabled Veterans and War Victims are intended, as an expression of the gratitude of the French Republic, to grant the veterans'card to members of the French back-up troops which served during the Algerian was and the fighting in Tunisia and Morocco. In view of the purpose of this statute Parliament was not at liberty to introduce for the granting of such a card a difference in treatment on the basis of nationality or place of residence between the members of sad troops. The requirements as to nationality and place of residence laid down by paragraph 3 of Article 253 bis of the abovementioned Code thus infringe the principle of equality.
(2010-18 QPC, July 23rd 2010, para. 4, p. 167)

Foreign Nationals

The combined provisions of section 26 of Act nº 81-734 of August 3rd 1981 and section 68 of the Act of December 30th 2002 are intended to guarantee holders of civil or military retirement pensions, in accordance with their actual place of residence abroad when they became entitled to such pensions, living conditions reflecting the dignity of the office in which they served the State. When providing for revaluation conditions different from those provided for by the Code of Civil and Military Retirement Pensions, they continue to apply different treatment from that applicable to French Nationals residing in the same foreign country. Although Parliament was at liberty to base the difference in treatment on the place of residence when taking into account differences in purchasing power, it could not, in view of the purpose of the statute, establish a difference based on nationality between those holding a civil or military retirement pension paid out of the budget of the State or State Public Establishments and residing in the same foreign country. To this extent these statutory provisions infringe the principle of equality. Unconstitutional.
(2010-1 QPC, May 28th 2010, para. 9, p. 91)

The provisions of paragraph 3 of Article 253 bis of the Code of Military Pensions for Disabled Veterans and War Victims are intended, as an expression of the gratitude of the French Republic, to grant the veterans'card to members of the French back-up troops which served during the Algerian war and the fighting in Tunisia and Morocco. In view of the purpose of this statute Parliament was not at liberty to introduce for the granting of such a card a difference in

treatment on the basis of nationality or place of residence between the members of sad troops. The requirements as to nationality and place of residence laid down by paragraph 3 of Article 253 bis of the abovementioned Code thus infringe the principle of equality.
(2010-18 QPC, July 23rd 2010, para. 4, p. 167)

EQUALITY BEFORE JUSTICE

Equality and Rights – Guarantees of citizens coming under the jurisdictions of the courts

Equality and rules of procedure

Rights of the defence

Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims that the law " shall be the same for all, whether it protects or punishes". Article 16 thereof proclaims "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution". Although Parliament may provide for different rules of procedure depending on the facts, situations and persons involved, this is on condition that such differences are not based on unwarranted distinctions and that all persons likely to be brought before the courts have the benefit of equal guarantees, in particular with respect to due regard for the principles of the rights of the defence, which implies in particular just and fair proceedings guaranteeing that the rights of the parties be equally balanced.
(2010-612 DC, August 5th 2010, para. 13, p. 198)

Pre-trial detention

Although Parliament may provide for different rules of procedure depending on the facts, situations and persons involved, this is on condition that such differences are not based on unwarranted distinctions and that all persons likely to be brought before the courts have the benefit of equal guarantees.

The Code of Criminal Procedure provides that decisions handed down by courts in matters of pre-trial detention may, at the request of the person detained or the Prosecution, be reviewed by the *Chambre de l'Instruction* as regards the necessity and legality of such a custodial measure.

The second phrase of paragraph 1 of Article 207 of the Code of Criminal Procedure departs from the principle whereby the *Chambre de l'Instruction* sees its jurisdiction brought to an end by its decision on the appeal brought against a order concerning pre-trial detention. In certain cases, it allows the *Chambre de l'Instruction* to hold that it alone has jurisdiction to rule in such a matter, under a system departing from normal procedures, for the remaining investigation procedure.

These provisions vest the *Chambre de l'Instruction* with the discretionary power to deprive a person who is the object of a preliminary judicial criminal investigation, throughout the duration of said investigation, of the guarantees provided for by Articles 144-1 and 147 of the Code of Criminal Procedure which require the Investigating Magistrate or the Freedom and Detention judge to order the immediate release of the person concerned once the statutory conditions of such detention are no longer met, of those provided by Article 148 of the same Code for the review of applications for release at first instance and the right to a system of duality of courts existing for all decisions as to pre-trial detention.

Any possible divergence between the respective positions of courts of first instance and courts of appeal concerning the subsequent necessity of the detention of the person under a preliminary judicial criminal investigation cannot justify such an infringement of the rights vested by law in each person placed in pre-trial detention. The second and third phrases of paragraph 1 of Article 207 of the Code of Criminal procedure run counter to Articles 6 and 16 of the Declaration of 1789.
(2010-81 QPC, December 17th 2010, paras 4 to 7), p. 412

Tax procedures

Fight against tax evasion

Article 155A of the General Tax Code which provides, in specified listed cases, for the taxation of payment for services supplied in France by a person who has his domicile or place of residence in said country, when such payment has been made, for the purpose of avoiding taxation, to a person having his domicile or place of residence abroad, is intended to ensure the implementation of the objective of constitutional status of fighting tax avoidance, which derives from the objective of fighting tax evasion. In the event of the person domiciled or having his place of residence abroad paying in France all or part of the money owed to the French taxpayer for the services supplied by the latter, the challenged provisions cannot be considered at subjecting said taxpayer to a double taxation for the one and the same tax. With this qualification, Article 155A does not constitute any patent infringement of the principle of equality before public burden sharing.
(2010-70 QPC, November 26th 2010, para. 4, p. 340)

Equality of the accused and rights of civil claimants

Due regard for the rights of the defence and the presumption of innocence

The civil claimant is not in the same situation as the person under a preliminary judicial criminal investigation or the Public Prosecutor's Office. However Article 575 of the Code of Criminal Procedure, in the absence of any appeal lodged by the Public Prosecutor, deprives the civil claimant of the possibility of having the *Cour de cassation* set aside the incorrect application of the law by the decisions of the *Chambre de l'Instruction* ruling on the commission of an offence, the definition of the acts at the origin of the prosecution and the legality of proceedings. By thus depriving a party of the effective exercising of the rights guaranteed by the Code of Criminal Procedure before the court in charge of supervising the preliminary judicial criminal investigation, this provision constitutes an unjustified restriction of the rights of the defence. Censure.
(2010/15-23 QPC, July 23rd 2010, para. 8, p. 161)

Courts

Composition and jurisdiction

Sole judge

Paragraph 1 of Article L 222-1 of the Code of Administrative Justice lays down the principle whereby trial judges of Administrative Courts and Appellate Administrative Courts sit as a Bench of several judges, while leaving it to those vested with the power to make regulations to specify the exceptions " stemming from the object of the litigation or the nature of the questions put before the court". It does not authorize it to fix categories of matters or questions to be heard which are not based on objective criteria. In these conditions it does not infringe the principle of equality before justice.
(2010-54 QPC, October 14th 2010, para. 4, p. 289)

EQUALITY BEFORE PUBLIC BURDEN SHARING

Meaning of the principle

Forbidding of excessive distinctions

Article 13 of the Declaration of the Rights of Man and the Citizen proclaims: "For the maintenance of the forces of law and order and administrative expenses a general tax is

indispensable and shall be equally borne by all citizens in proportion to their ability to pay the same". Under Article 34 of the Constitution it is up to Parliament to determine, taking into account constitutional principles and the nature of each tax, to lay down the rules for appraising the ability of each citizen to pay taxes. In particular, to comply with the principle of equality, this appraisal must be based on objective and rational criteria in view of the purpose it is sought to achieve. This appraisal must not however lead to any clear infringement of the principle of equality before public burden sharing.
(2010-605 DC, May 12th 2010, para. 39, p. 78)

Scope of application of the principle

Purpose of legislation

Granting of benefits

1° of 7 of Article 158 of the General Tax Code, as worded pursuant to 4° of paragraph I of section 76 of the Act of December 30th 2005, provides for an increase of 25 % in professional income when this income is earned by taxpayers who do not belong to an accredited management and tax certification centre. These centres have been set up to provide their members with technical assistance in keeping accounts and ensure better knowledge of non salaried income in order to implement the objective of constitutional status of fighting tax avoidance, which derives from the objective of constitutional status of fighting tax evasion. As held by the Constitutional Council in its decision n° 89-268 DC of December 29th 1989, Parliament, taking into account the specificity of the legal regime of persons belonging to an accredited centre, was at liberty to encourage membership of such a centre by granting tax benefits, in particular a reduction, before January 1st 2006, of 20 % of imposable profits. The increase, as from January 1st 2006, of 25 % of the imposable tax base of non-members was introduced as part of an overall reform of income tax which concerned all taxpayers. This measure is the counterpart, arithmetically equivalent, of the suppression of the reduction of 20 % granted, prior to this tax reform, to members of an accredited management and tax certification centre. The difference in treatment between members and non members remains justified in the same manner as the previous regime and thus does not constitute any patent infringement of equality before public burden sharing.
(2010-16 QPC, July 23rd 2010, paras 5 to 7, p. 164)

Section 105 of the Finance Act for 2011 reduces by 10 % the tax benefits arising from the tax reductions and credits included, under b of 2° of Article 200-0 A of the General Tax Code, in the scope of the overall capping of certain tax benefits relating to income tax. This 10 % reduction does not apply to the measures provided for by Article 199 undecies C, 199 sexdecies and 200 quarter B of the same Code and pertaining respectively to tax reduction granted for investments in social housing in overseas territories and for monies paid for the employment of domestic staff and tax credits for young child care costs. The parties making the referral contend that Parliament has infringed the principle of equality before public burden sharing when excluding from this overall reduction of tax benefits the tax reductions and credits provided for by Article 199 undecies C, 199 sexdecies and 200 quarter B of the same Code. When enacting section 105 Parliament intended to reduce the cost of "tax expenditure". At the same time it did not wish to render less attractive the incentiveness of the tax reductions and credits intended to encourage job creation and availability of social housing in French overseas territories. Thus when excluding from the scope of the overall measure of reduction of tax benefits provided for in b of 2° of Article 200-0 of the same Code the measures provided for by Article 199 undecies C, 199 sexdecies and 200 quarter B of the same Code, it introduced a difference in treatment directly connected with the purposes it sought to achieve.
(2010-622 DC, December 28th 2010, paras 20,21 and 24 p. 416)

Equality in matters of all kinds of taxation

Tax benefits, reductions, credits.

Section 105 of the Finance Act for 2011 reduces by 10 % the tax benefits arising from the tax reductions and credits included, under b of 2º of Article 200-0 A of the General Tax Code, in the scope of the overall capping of certain tax benefits relating to income tax. This 10 % reduction does not apply to the measures provided for by Article 199 undecies C, 199 sexdecies and 200 quarter B of the same Code and pertaining respectively to tax reduction granted for investments in social housing in overseas territories and for monies paid for the employment of domestic staff and tax credits for young child care costs. The parties making the referral contend that Parliament has infringed the principle of equality before public burden sharing when excluding from this overall reduction of tax benefits the tax reductions and credits provided for by Article 199 undecies C, 199 sexdecies and 200 quarter B of the same Code. When enacting section 105 Parliament intended to reduce the cost of "tax expenditure". At the same time it did not wish to render less attractive the incentiveness of the tax reductions and credits intended to encourage job creation and availability of social housing in French overseas territories. Thus when excluding from the scope of the overall measure of reduction of tax benefits provided for in b of 2º of Article 200-0 of the same Code the measures provided for by Article 199 undecies C, 199 sexdecies and 200 quarter B of the same Code, it introduced a difference in treatment directly connected with the purposes it sought to achieve.
(2010-622 DC, December 28th 2010, paras 20,21 and 24 p. 416)

Real property tax on businesses.

When exonerating businesses which have opted for the "micro-social regime" provided for by Article L 131-6-8 of the Social Security Code from payment of the real property tax for a period of two years as from the year following their formation, section 137 of the Finance Act for 2011 intended to encourage the setting up and development of very small businesses by lessening their tax burden. Taking into account the criteria and ceiling of the turnover referred to by said Article L 131-6-8, Parliament based its decision on objective and rational criteria directly connected with the purpose of the statute. The resulting benefit, which is limited in time, does not introduce any patent infringement of equality before public burden sharing.
(2010-622 DC, December 28th 2010 paras 26 to 30,p. 416)

Wealth tax (IGF and ISF)

The difference in treatment as regards the wealth tax between married couples and couples officially living as cohabiting couples on the one hand and couples not officially living as cohabiting couples on the other hand was held to be constitutional by the Constitutional Council in its decision nº 81-133 DC of December 30th 1981. The wording of the provisions of paragraph 2 of Article 885E of the General Tax Code is identical to that of paragraph 2 of section 3 of the Finance Act for 1982.
(2010-44 QPC, September 29th 2010, paras 8 and 9, p. 259)

The tax base for computing the wealth tax (ISF), as determined in paragraph 1 of Article 885 E of the General Tax Code, comprises all property and assets, rights and valuable benefits belonging to the taxable household, whether or not the same generate income. This tax comes under the scope of "all kinds of taxes", referred to in Article 34 of the Constitution, which vests Parliament with the task of determining the rules governing the base, rate and manner of collection of such taxes, subject to compliance with principles and rules of constitutional status. The wealth tax is not a tax on income. When introducing a wealth tax Parliament intended to harness the ability to pay taxes arising from the possession of property, assets and rights. The taking into account of such ability to pay taxes does not imply that solely assets generating income are part of the tax base for computing the wealth tax. The argument based on the infringement of Article 13 of the Declaration by this tax base is therefore to be dismissed.
(2010-44 QPC, September 29th 2010, paras 10 and 11, p. 259)

The Applicants contend that, contrary to the method used for computing income tax, where a family share system applies, the provisions of Article 885 U do not take into account in the

same conditions the ability of taxpayers to pay income tax and the wealth tax. The wealth tax is a tax applied on a progressive tax rate schedule. Furthermore Parliament has provided for various deductions, exemptions or reductions concerning, in particular, the place of main residence. When creating the wealth tax Parliament considered that the composition of the household did not have the same relevance where computation of the wealth tax is concerned as it does regarding the computation of income tax. It retained the principle of one taxation per household without taking into account any family share system. When taking into account by other methods the ability of the taxpayer to pay it has not failed to comply with the requirements of Article 13 of the Declaration of 1789, which does not make any reference to a family share system. The argument based on the lack of any family share system used to compute the wealth tax must therefore be dismissed
(2010-44 QPC, September 29th 2010, paras 12 to 14, p. 259)

Tax on profits (of companies)

A specific agricultural company is subject to an additional tax levy of 25 % of its overall net profits under a statute of 1941. This difference in treatment as regards the tax on profits levied on other agricultural companies is not based on objective and rational criteria. It is therefore a patent infringement of the principle of equality before public burden sharing. Section 1 of the Act of April 30th 1941 which approves this levy, is unconstitutional.
(2010-52 QPC, October 14th 2010, para. 8, p. 283)

Article 155A of the General Tax Code which provides, in specified listed cases, for the taxation of payment for services supplied in France by a person who has his domicile or place of residence in said country, when such payment has been made, for the purpose of avoiding taxation, to a person having his domicile or place of residence abroad, is intended to ensure the implementation of the objective of constitutional status of fighting tax avoidance, which derives from the objective of fighting tax evasion. In the event of the person domiciled or having his place of residence abroad paying in France all or part of the money owed to the French taxpayer for the services supplied by the latter, the challenged provisions cannot be considered at subjecting said taxpayer to a double taxation for the one and the same tax. With this qualification, Article 155A does not constitute any patent infringement of the principle of equality before public burden sharing.
(2010-70 QPC, November 26th 2010, para. 4, p. 340)

Individual Income tax

For the computation of income tax, c of 1 of Article 195 of the General Tax Code, grants, under certain conditions, an additional half share of the family share system to holders of a pension provided for by the provisions of the Code of Military Pensions for Disabled Veterans and War Victims or Their Widows. In testimony of the gratitude of the French Republic, Parliament intended to grant such a measure to these persons without any differentiation based on nationality. When reserving such a measure for these persons it took into consideration their specific position and fulfilled an objective in the general interest directly connected with the statute. Dismissal
(2010-11 QPC, July 9th 2010, para. 5, p. 136)

1° of 7 of Article 158 of the General Tax Code, as worded pursuant to 4° of paragraph I of section 76 of the Act of December 30th 2005, provides for an increase of 25 % in professional income when this income is earned by taxpayers who do not belong to an accredited management and tax certification centre. These centres have been set up to provide their members with technical assistance in keeping accounts and ensure better knowledge of non salaried income in order to implement the objective of constitutional status of fighting tax avoidance, which derives from the objective of constitutional status of fighting tax evasion. As held by the Constitutional Council in its decision n° 89-268 DC of December 29th 1989, Parliament, taking into account the specificity of the legal regime of persons belonging to an accredited centre, was at liberty to encourage membership of such a centre by granting tax benefits, in particular a reduction, before January 1st 2006, to 20 % of imposable profits. The increase, as from January 1st 2006, of 25 % of the imposable tax base of non-members was introduced as part of an overall reform of income tax which concerned all taxpayers. This measure is the counterpart, arithmetically equivalent, of the suppression of the reduction of

20 % granted, prior to this tax reform, to members of an accredited management and tax certification centre. The difference in treatment between members and non members remains justified in the same manner as the previous regime and thus does not constitute any patent infringement of equality before public burden sharing.
(2010-16 QPC, July 23rd 2010, paras 5 to 7, p. 164)

The Applicants contend that, contrary to the method used for computing income tax, where a family share system applies, the provisions of Article 885 U do not take into account in the same conditions the ability of taxpayers to pay income tax and the wealth tax. The wealth tax is a tax applied on a progressive tax rate schedule. Furthermore Parliament has provided for various deductions, exemptions or reductions concerning, in particular, the place of main residence. When creating the wealth tax Parliament considered that the composition of the household did not have the same relevance where computation of the wealth tax is concerned as it does regarding the computation of income tax. It retained the principle of one taxation per household without taking into account any family share system. When taking into account by other methods the ability of the taxpayer to pay it has not failed to comply with the requirements of Article 13 of the Declaration of 1789, which does not make any reference to a family share system. The argument based on the lack of any family share system used to compute the wealth tax must therefore be dismissed
(2010-44 QPC, September 29th 2010, paras 12 to 14, p. 259)

Article 155A of the General Tax Code which provides, in specified listed cases, for the taxation of payment for services supplied in France by a person who has his domicile or place of residence in said country, when such payment has been made, for the purpose of avoiding taxation, to a person having his domicile or place of residence abroad, is intended to ensure the implementation of the objective of constitutional status of fighting tax avoidance, which derives from the objective of fighting tax evasion. In the event of the person domiciled or having his place of residence abroad paying in France all or part of the money owed to the French taxpayer for the services supplied by the latter, the challenged provisions cannot be considered at subjecting said taxpayer to a double taxation for the one and the same tax. With this qualification, Article 155A does not constitute any patent infringement of the principle of equality before public burden sharing.
(2010-70 QPC, November 26th 2010, para. 4, p. 340)

Levy on financial potential. (HLM –Low cost housing)

Firstly, this new tax concerns all low cost housing bodies which have property for rent. The same applies to semi-public companies as regards rental housing and hostel residences which belong to them and are covered by agreements or, in French overseas *Départements*, built, purchased or enhanced with the financial assistance of the State. When defining the categories of the bodies involved which, in particular due to their field of business and the manner in which they do business, present characteristics which differentiate them from other companies, Parliament based its decision on objective and rational criteria directly connected with the purpose it sought to achieve.

Secondly, Parliament has fixed the overall amount of the levy on the financial potential at 175 million euros. It defined this potential as corresponding to the difference between long term resources and long term use thereof. In particular it specified that long term resources do not include future subsidies nor own funds needed to guarantee access to ownership. It also excluded financial products of certain construction companies. It fixed a progressive scale for the computation of the average contribution per unit of housing. It provided that the levy due by each body for a given year shall not exceed a ceiling equal to 8 % of rents, other incoming payments and certain financial products. It specified that this rate of 8 % shall be decreased by the average rate of growth over the last five financial years of the number of housing units on which the body holds real property rights except for social housing acquired from another body. It decided that the levy shall not be made if the amount concerned is less than 10 000 euros or, if at the date when said levy falls due, the body is the object of a balance recovery plan of the Caisse de garantie du logement locatif social or a consolidation plan or has benefited from the same during the five years preceding said date. In view of these provisions taken as a whole, neither the fixing of the base of said taxation, which represents the ability to pay of

these bodies, nor the fixing of the amount of said taxation may be considered as being a patent infringement of equality before public burden sharing.
(2010-622 DC, December 28th 2010, paras 44 and 45, p. 416)

General tax on polluting activities

When introducing a general tax on polluting activities, Parliament intended to integrate the amount thereof in the cost of polluting products or activities, in order to reduce the consumption of the former and limit the development of the latter. It has therefore subjected to this tax businesses which operate installations which stock household waste and those which eliminate special industrial waste. It has not however subjected to this same tax, with respect to storage of inert waste, businesses operating installations specially designed to receive such waste. The provisions of I of paragraph I of Articles 266 sexies and I of Article 266 septies of the Customs and Excise Code, as worded pursuant to Act nº 99-1140 of December 29th 1999, namely the Social Security Financing Act for 2000, cannot be interpreted, without infringing the principle of equality before public burden sharing, as applying to all quantities of inert waste referred to by said provisions.
(2010-57 QPC, October 18th 2010, para. 5, p. 299)

Value added tax

Under Article 231 of the General Tax Code the base of the tax on wages comprises a part of the wages paid by the employer, determined by applying to all the wages the ratio for the same year between the turnover not subject to value added tax and total turnover. The rule whereby value added tax on wages only concerns businesses exonerated from value added tax or not subject to such tax as regards at least 90 % of their turnover does not transform this tax into a tax on turnover. The tax on wages and value added tax, which do not have the same characteristics, are two distinct taxes.
(2010-28 QPC, September 17th 2010, para. 6, p. 233)

Tax on gambling and betting

Provisions introducing new levies on gambling and betting do not run counter to the principle of equality before public burden sharing. Any person participating in the same betting or gambling activities shall be taxed in the same conditions. The difference between taxation of betting on horse racing or sporting events and casino games, which are of a different nature, does not introduce any difference in treatment between persons indulging in such activities in the same conditions. It does not constitute any patent infringement of equality before public burden sharing. The same holds good for poker played in casinos and online poker, which also have different characteristics.
(2010-605 DC, May 12th 2010, para. 40, p. 78)

Tax on wages

Under Article 231 of the General Tax Code the base of the tax on wages comprises a part of the wages paid by the employer, determined by applying to all the wages the ratio for the same year between the turnover not subject to value added tax and total turnover. The rule whereby value added tax on wages only concerns businesses exonerated from value added tax or not subject to such tax as regards at least 90 % of their turnover does not transform this tax into a tax on turnover. The tax on wages and value added tax, which do not have the same characteristics, are two distinct taxes. The amount of the tax on wages is calculated on a progressive scale applied to the taxable total wage bill. These rules of taxation are the same for all business in the same sector of business.

The wage tax scale takes into account the difference in situation between taxpayers who are not in the same sectors of business. Parliament was thus able to introduce different tax bases for the wage tax on employees who are not in the same situation. When retaining the wage bill of businesses as the criteria for determining the ability of said businesses to pay taxes, Parliament did not commit any manifest error of appraisal.
(2010-28 QPC, September 17th 2010, paras. 6 to 8, p. 233).

Tax on TV services

Distributors of TV services who are also the producers of such services are, as regards the integration of these two activities, in a particular economic situation likely to facilitate their development. When taking this particularity into account to increase the tax on distribution of television services generating above a certain annual threshold of receipts for this category of distributors, Parliament has introduced between said distributors and distributors who are not also producers a different treatment directly connected with the purpose which the statute seeks to achieve.
(2010-622 DC, December 28th 2010, para. 10, p. 416)

Tax on commercial premises

When introducing a tax on commercial premises (ex–help tax for small businesses and craft industries), Parliament intended to encourage a balanced development of trade. To this end, it chose to tax retail businesses with a significant surface area. When enacting the challenged provisions, it intended to apply this tax to an integrated whole of businesses of which the cumulated area exceeded a certain threshold. It made this integration dependent firstly on the ownership of the business, possession of its capital or a substantial holding in said capital by a single person, under the form of direct or indirect control within the meaning of Article L 233-3 and L 233-4 of the Commercial Code and secondly to the operating of one single trade name. Independent businesses which contractually share the operation of a trade name without their capital being directly or indirectly controlled by one and the same person are in a different situation from the point of view of the statute. Parliament was thus at liberty to apply the tax differently to commercial surface areas which are in a different situation. When providing for this two fold condition, it based its appraisal on objective and rational criteria. There is therefore no blatant infringement of the principle of equality before public burden sharing.
(2010-58 QPC, October 18th 2010, para. 5, p. 302)

Equality in fields other than all kinds of taxation

Social law

The principle of equality before public burden sharing applies to social contributions paid by the members of the liberal professions.
(2010-24 QPC, August 6th 2010, para. 6, p. 209)

Review of the principle – Conditions of review

Scope of the power to enact laws

Determination of the purpose it is sought to achieve.

Incitation

Without infringing the principle of equality before public burden sharing and to encourage membership of accredited management and tax certification centres set up to provide their members with technical assistance in keeping accounts and ensure better knowledge of non salaried income in order to implement the objective of constitutional status of fighting tax avoidance, Parliament was at liberty to grant members of such centres a tax benefit. As the Constitutional Council held in its in its decision n° 89-268 DC of December 29th 1989, Parliament granted this benefit in the form of a reduction of 20 % of taxable profits. Parliament was also at liberty to achieve this purpose by providing for an increase of 25 % in professional income of those taxpayers choosing not to join such a centre, as part of an overall reform of income tax which concerned all taxpayers and which suppressed the reduction of

20 % granted, prior to this tax reform, to members of an accredited management and tax certification centre.
(2010-16 QPC, July 23rd 2010, paras 5 to 7, p. 164)

By including in the base for computing social contributions part of the dividends and proceeds of interest on advances and loans from shareholders coming from the business of a limited liability professional practice company and received by the non-salaried non farm-worker, the spouse or civil partnership partner thereof or their minor non emancipated children, Parliament intended to discourage the paying of dividends motivated by the desire to have revenue produced by the business of the company avoid the payment of social contributions. It thus sought to avert detrimental financial consequences for the social health and welfare systems involved. It also intended to put an end to diverging case law on the definition of the social contributions paid by majority shareholding members of a limited liability professional practice company and by so doing avoid an increase in disputes on this matter.
(2010-24 QPC, August 6th 2010, paras 8 and 9, p. 209)

Review of the principle – carrying out of said review

Adequacy of statutory provisions

Proportionality as regards the ability of taxpayers to pay taxes (confiscatory tax)

The tax base for computing the wealth tax (ISF), as determined in paragraph 1 of Article 885 E of the General Tax Code, comprises all property and assets, rights and valuable benefits belonging to the taxable household, whether or not the same generate income. This tax comes under the scope of "all kinds of taxes", referred to in Article 34 of the Constitution, which vests Parliament with the task of determining the rules governing the base, rate and manner of collection of such taxes, subject to compliance with principles and rules of constitutional status. The wealth tax is not a tax on income. When introducing a wealth tax Parliament intended to harness the ability to pay taxes arising from the possession of property, assets and rights. The taking into account of such ability to pay taxes does not imply that solely assets generating income are part of the tax base for computing the wealth tax. The argument based on the infringement of Article 13 of the Declaration by this tax base is therefore to be dismissed.
(2010-44 QPC, September 29th 2010, paras 10 and 11, p. 259)

Article 155A of the General Tax Code which provides, in specified listed cases, for the taxation of payment for services supplied in France by a person who has his domicile or place of residence in said country, when such payment has been made, for the purpose of avoiding taxation, to a person having his domicile or place of residence abroad, is intended to ensure the implementation of the objective of constitutional status of fighting tax avoidance, which derives from the objective of fighting tax evasion. In the event of the person domiciled or having his place of residence abroad paying in France all or part of the money owed to the French taxpayer for the services supplied by the latter, the challenged provisions cannot be considered at subjecting said taxpayer to a double taxation for the one and the same tax. With this qualification, Article 155A does not constitute any patent infringement of the principle of equality before public burden sharing.
(2010-70 QPC, November 26th 2010, para. 4, p. 340)

Proportionality as regards the purpose of Parliament

Without infringing the principle of equality before public burden sharing and to encourage membership of accredited management and tax certification centres set up to provide their members with technical assistance in keeping accounts and ensure better knowledge of non salaried income in order to implement the objective of constitutional status of fighting tax avoidance, Parliament was at liberty to grant members of such centres a tax benefit. As the Constitutional Council held in its in its decision nº 89-268 DC of December 29th 1989, Parliament granted this benefit in the form of a reduction of 20 % of taxable profits. Parliament was also at liberty to achieve this purpose by providing for an increase of 25 % in

professional income of those taxpayers choosing not to join such a centre, as part of an overall reform of income tax which concerned all taxpayers and which suppressed the reduction of 20 % granted, prior to this tax reform, to members of an accredited management and tax certification centre.
(2010-16 QPC, July 23rd 2010, paras 5 to 7, p. 164)

When reserving the extension of the inclusion in the base for computation of social contributions of dividends paid by a limited liability professional practice company, Parliament took into consideration the specific status of non salaried workers members of such companies and responded to an objective in the general interest directly connected with the purpose of the statute. When limiting the scope of the dividends subjected to social contributions to those representing a significant part of company capital and share premiums and money paid as interest on advances or loans from shareholders into accounts held by those involved, it defined objective and rational criteria. The resulting definition of the scope of the base for computation of social contributions does not create any patent infringement of equality before public burden sharing. Dismissal of arguments based on non compliance with the principle of equality.
(2010-24 QPC, August 6th 2010, para. 9, p. 209)

Paragraph I of section 35 of the Finance Act for 2011 amends the Cinema and Animated Image Code to increase by 2.2 points the rate of the tax on television services due, for the fraction of annual receipts above 530 million euros, for a distributor in the event of said distributor also being a producer of television services. The parties making the referral argue that this introduces, as regards the principle of equality before public burden sharing, an unjustified difference in treatment in the taxing of the activities of distribution of television services depending on whether or not these activities are carried on by distributors who are also producers. Distributors of TV services who are also the producers of such services are, as regards the integration of these two activities, in a particular economic situation likely to facilitate their development. When taking this particularity into account to increase the tax on distribution of television services generating above a certain annual threshold of receipts for this category of distributors, Parliament has introduced between said distributors and distributors who are not also producers a difference in treatment directly connected with the purpose which the statute seeks to achieve.
(2010-622 DC, December 28th 2010, paras 7 to 11, p. 416)

EQUALITY IN PUBLIC EMPLOYMENT

Equal access to public employment

Rules of recruitment for public employment

The principle of equal access to public posts derives from Article 6 of the Declaration of the Rights of Man and the Citizen of 1789.

Insofar as all Teacher-Researcher applicants for recruitment, transfer or secondment are governed by the same rules, paragraph 2 of 4º of Article L 712-2 of the Education Code and Article L 952-6-1 of the same Code do not infringe the principle of equality.
(2010-20/21 QPC, August 6th 2010, paras 7 to 14, p. 203).

Recruitment without competitive examination

The composition of the Social Security Tribunal corresponds to the joint method of management of social security and the specific jurisdiction of this Tribunal over general social security litigation. Persons appointed to sit as Assessor are there to give the Tribunal the benefit of their professional experience and skill. The power vested in representative professional organisations to put forward candidates for such a position is directly connected with the purpose of the statute. In view of the purposes which Parliament seeks to achieve it has not failed to show due regard for the principal of equal access to public posts.
(2010-76 QPC, December 3rd 2010, para. 7, p. 364)

Equality of treatment in the progress of the career of civil servants

Due regard for the principle.

The principle of equal treatment in the progress of the career of civil servants belonging to the same category of civil servants derives from Article 6 of the Declaration of 1789.

In order to strengthen the autonomy of Universities, Article L 954-1 of the Education Code merely authorizes the Board of Administration to define " the general principles of the apportionment of teaching and research duties of Teachers-Researchers between teaching, research and other tasks which may be entrusted to said personnel" Under Article L 952-3 of the same Code, these other tasks consist in "spreading knowledge and liaison with the economic, cultural and social environment", "international cooperation" and "administration and management of the establishment". In all events, Article L 954-1 referred to above provides that the power thus vested in the Board of Administration shall be exercised "with due regard for existing regulations applicable to said persons". Such provisions derive both from the general regulations governing civil servants and the particular status of Teachers-Researchers provided for by a Decree issued after consultation of the Council of State. The power of the Board of Administration does thus not *per se* adversely affect the principle of independence of Teachers-Researchers nor the principle of equality of civil servants belonging to the same category.
(2010-20/21 QPC, August 6th 2010, paras 20/21, p. 203)

Article L 712-8 of the Education Code restricts the implementation of the power referred to above to the Board of Administration of Universities which are vested with the extended responsibilities and powers provided for by Title III of the Act nº 2007-1199 of August 10th 2007 in budgetary matters and the management of human resources. The "general principles of apportionment of service duties" between Teachers-Researchers may thus vary from one University to another. However section 49 of the Act of August 10th 2007 provides that all Universities shall, no later than 5 years from the publication thereof, i.e before August 12th 2012, be vested with extended responsibilities and powers. The different treatment which may provisionally arise as a result of the challenged provision is based on objective and rational criteria. The argument based on the infringement of the equality of treatment between civil services belonging to the same category must therefore be dismissed.
(2010-20/21 QPC, August 6th 2010, para. 22, p. 203)

PUBLIC FINANCE

BUDGETARY AND TAX PRINCIPLES

Principle of universality

Contents

Principle of non allocation

The Members of Parliament making the referral argue that the Supplementary Finance Act for 2010 has failed to comply with institutional provisions pertaining to the use of the surplus of the proceeds of all kinds of taxes levied for the benefit of the State. The rule of the allocation of the surplus was introduced in 2005 in the Institutional Act of August 1st 2001 pertaining to Finance Acts in order to improve the management of the State's finances and upgrade information given to Parliament. These surpluses are those which are likely to be ascertained

at the end of a financial year by deducting from the proceeds of all kinds of taxes levied for the benefit of the State the total provided for by the initial Finance Act. This does not adversely affect the power of Parliament to decide during a financial year upon new tax measures or to open additional credits during the year in a Supplementary Finance Act. Under paragraph IV of section 67 of the Act of December 30th 2009 being the Finance Act for 2010: " For 2010, the possible surpluses mentioned in 10° of I of section 34 of Institutional Act n° 2001-692 of August 1st 2001 pertaining to Finance Acts shall be used in their entirety to reduce the budget deficit. – Such surpluses shall be ascertained if, for the year 2010, the total proceeds of all kinds of taxes levied for the benefit of the State net of tax refunds and rebates, revised in the latest Supplementary Finance Act for 2010, or, failing that, in the Finance Bill for 2011, is, under unchanged statute law, greater than the assessment given in table A mentioned in I hereof". As regards the Finance Act for 2010 as amended by the Supplementary Finance Acts of March 9th 2010, May 7th 2010 and June 7th 2010, no surplus of the proceeds of all kinds of taxes was ascertained in the statute referred for review, namely the last Supplementary Finance Act of 2010. The argument based on the failure to comply with the institutional provisions pertaining to the allocation of possible surpluses is unsupported by the facts.
(2010-623 DC, December 28th 2010, paras 1 to 5, p. 428)

Principle of speciality

Finance Act

System of the Institutional Act pertaining to Finance Acts of 2001

Under sub-paragraph 1 of paragraph II of section 7 of the Institutional Act of August 1st 2001: " Credits shall be specified by programme or appropriation". Under sub-paragraph 6 of paragraph I of this same section " A programme shall regroup all credits designed to implement an action or a coherent whole of actions under the aegis of a single Ministry and which are intended to achieve specific objectives, defined in terms of purposes in the general interest, together with the expected results and subjected to assessment".

Section 9 of the Institutional Act pertaining to the application of Article 65 of the Constitution rewords section 12 of Institutional Act n° 94-100 of February 5th 1994 pertaining to the High Council of the Judiciary (CSM) upon which it confers "budgetary autonomy". Parliament, without failing to show due regard for the Constitution, intended to leave it to the Finance Act to set up a programme making it possible to group together in a coherent fashion the credits allocated to this body. In these conditions, it is not unconstitutional.
(2010-611 DC, July 19th 2010, para. 13, p. 148)

Section 82 of the Finance Act for 2011 empowers Ministers, under the general budget, to authorize commitments and payment credits for 2011, in accordance with the apportionment per assignment given in Table B appended to the statute referred for review. This Table takes into account the transfer of 4 million euros of commitment and payment credit authorisations, made by an amendment, from the assignment "Secondary schooling" of the programme " Support of the national education policy" to the programme "Private teaching in primary and secondary education". The parties making the referral contend that this transfer of commitments and payment credits create "an infringement of the equality of treatment between public and private teaching bodies". It is not incumbent upon the Constitutional Council which is not vested with any general power of appraisal and decision-making similar to that enjoyed by Parliament, to appraise the amount of commitment and payment credit authorizations enacted by Parliament. This argument must therefore be dismissed.
(2010-622 DC, December 28th 2010, paras 16 to 19, p. 416)

Principle of equilibrium

Social Security Financing Act

Section 1 of the Institutional Act pertaining to the management of the social debt provides that the Social Security Financing Act shall provide for all the financial resources allocated to the

repayment of the social debt until the final term thereof. The Constitutional Council will therefore be in a position to verify that said resources are sufficient to ensure that said term shall not be exceeded. Furthermore the provisions are to be combined with those of paragraph 1 of 2° of C of paragraph I of Article L.O of the Social Security Code, which provides that the Social Security Financing Act "shall determine for the forthcoming year, in an accurate manner, the general conditions of the financial equilibrium of social security taking into account in particular the general economic conditions and the foreseeable outlook " and that "this equilibrium shall be defined taking into account the economic, financial and social data set out in the report provided for in section 50 of Institutional Act n° 2001-692 of August 1st 2001 pertaining to Finance Acts". Social Security Financing Acts cannot therefore lead, by a transfer without compensation to the benefit of the Caisse d'amortissement des recettes of revenue allocated to the social security regimes and to bodies contributing to the funding thereof, to a deterioration of the general conditions of the financial equilibrium of social security for the forthcoming year.
(2010-616 DC, November 10th 2010, paras 4 and 5, p. 317)

Under the provisions of paragraph 1 of 2° of C of paragraph I of Article L.O 111-3 of the Social Security Code combined with those of Article 4 bis of Ordinance n° 96-50 of January 24th 1966 pertaining to the repayment of the social debt, Social Security Financing Acts cannot lead, by a transfer without compensation to the benefit of the Caisse d'amortissement des recettes of revenue allocated to the social security regimes and to bodies contributing to the funding thereof, to a deterioration of the general conditions of the financial equilibrium of social security for the forthcoming year.

Firstly, section 9 of the Social Security Financing Act for 2011 allocates to the funding of the repayment of the social debt by the Caisse d'Amortissement de la dette sociale (CADES) (Social Security Debt Repayment Fund) for the years 2009, 2010 and 2011 the proceeds of the 0.28 additional point of the generalised social contribution, initially allocated to the Caisse nationale d'allocations familiales (National Family Allowance Fund). It allocates to the funding by the CADES of the debt transferred for the years 2011 to 2018 part of the levies on investments and property referred to in Articles L 245-14 and L 245-15 of the Social Security Code corresponding to a rate of 1.3 % together with an annual payment by the Retirement pension reserve fund of 2.1 billion euros between 2011 and 2024.

Secondly, section 9 of the statue referred for review provides that the revenue of the Caisse national des allocations familiales (National Family Allowance Fund) shall henceforth include the proceeds of the tax referred to in paragraph 2 of 2° bis of Article 1001 of the General Tax Code, the levy resulting from the change of the rules regarding tax on social levies on the part in euros of life insurance contracts in units of account together with the exceptional tax on monies placed on capitalisation reserves of insurance companies. Sections 21,22 and 23 of the Finance Act for 2011 definitively enacted by Parliament on the evening prior to the decision of the Constitutional Council confirms this allocation and specifies the same.

These provisions enable the Caisse nationale d'allocations familiales, by its being allocated new revenue, to be compensated for the revenue allocated to the Caisse d'amortissement. The argument based on the failure of the provisions of the Social Security Financing Act for 2011 to comply with the objective of financial equilibrium of social security must therefore be dismissed.
(2010-620 DC, December 16th 2010 paras 6,8 to 10, p. 394)

Under the provisions of Article 4 bis of Ordinance n° 96-50 of January 24th 1996 pertaining to the management of the social debt the Social Security Financing Act shall provide for all the financial resources allocated to the repayment of the social debt until the final term thereof and it shall be incumbent upon the Constitutional Council to verify that said resources are sufficient to ensure that said term shall not be exceeded. The Constitutional Council has found that section 9 the Social Security Financing Act for 2011 statute fixes the date of the term of the repayment of the social date at 2025 and provides for the transfer of resources needed to ensure that said term be respected: 0.28 additional point of the generalised social contribution, part of the levies on investments and property together with an annual payment by the Retirement pension reserve fund of 2.1 billion euros.

These provisions make it possible to provide for all the resources allocated to the repayment of the social debt until the term provided for the latter. The argument based on the failure of the

Social Security Financing Act for 2011 to comply with the objective of financial equilibrium of social security must therefore be dismissed.
(2010-620 DC, December 16th 2010, paras 5,7,8 and 10 p. 394)

Principle of accuracy

Finance Act

System of the Institutional Act pertaining to Finance Acts of 2001

Section 82 of the Finance Act for 2011 empowers Ministers, under the general budget, to authorize commitments and payment credits for 2011, in accordance with the apportionment per assignment given in Table B appended to the statute referred for review. This Table takes into account the transfer of 4 million euros of commitment and payment credit authorisations, made by an amendment, from the assignment "Secondary schooling" of the programme " Support of the national education policy" to the programme "Private teaching in primary and secondary education". The parties making the referral contend that this transfer of commitments and payment credits create "an infringement of the equality of treatment between public and private teaching bodies". It is not incumbent upon the Constitutional Council which is not vested with any general power of appraisal and decision-making similar to that enjoyed by Parliament, to appraise the amount of commitment and payment credit authorisations enacted by Parliament. This argument must therefore be dismissed.
(2010-622 DC, December 28th 2010, paras 16 to 19, p. 416)

EXAMINATION PROCEDURE

Documents appended to Government Bills

Social Security Financing Act

2° of section 2 of the Institutional Act pertaining to the management of the social debt amends Article L.O 111-4 of the Social Security Code to complete the information given to Parliament on the attainment and the "construction" for the forthcoming year of the national objective of health insurance expenditure, on the multi-annual forecasts of the growth of the latter, on the revenue and expenditure of social security bodies and regimes, on the property situation of these bodies and regimes and the justification of the measures concerning the transfer of public assets to the Caisse d'amortissement de la dette sociale or the realisation of public assets to the benefit of said Caisse. 3° and 4° of section 2 of the Institutional Act amend by coordination Articles L.O 111-16 and L.O 111-7 of the same Code. These provisions are not unconstitutional.
(2010-616 DC, November 10th 2010, para. 11, p. 317)

Structure of the statute

Division between parts one and two of the Finance Act

Section 21 of the Finance Act for 2011 subjects, as from January 1st 2011, supplementary health insurance contracts known as "solidarity and responsibility" to the special tax on insurance contracts, the proceeds of which are allocated to the Caisse national d'allocations familiales. (National Family Allowance Fund). Section 22 firstly amends the rules governing social contributions of the part in euros in life insurance contracts in units of account, and secondly, allocates to the same Caisse nationale the proceeds of the additional social contributions

resulting from this amendment. Section 35 amends the system of the tax on producers and distributors of television services allocated to the National Cinema and Animated Image Centre and provides for an exceptional levy in 2011 to the benefit of the general budget of the State on the proceeds of the resources allocated to this same National Centre. The parties making the referral challenge the inclusion of these three sections in Part I of the Finance Act. In view of the increase in resources which it introduces for the benefit of the State in 2011, section 35 is rightly found in Part I of the Finance Act. However section 21 and 22 are not in their right place. However regrettable this may be, the insertion of these two sections in Part I of the Finance Act does not result, in the case under review, in unconstitutionally infringing the principle of clarity and accuracy of Parliamentary debate concerning the enacting of said sections. Neither has said inclusion changed the conditions in which the overall guidelines of the budget equilibrium were adopted. Dismissal of the argument based on the improper manner of enactment of said sections.
(2010-622 DC, December 28th 2010, paras 2 to 5, p. 416)

Creation of an assignment within the State budget

Structure of assignments

It is not incumbent upon the Constitutional Council which is not vested with any general power of appraisal and decision-making similar to that enjoyed by Parliament, to appraise the amount of commitment and payment credit authorisations enacted by Parliament.
(2010-622 DC, December 28th 2010, paras 16 to 19, p. 416)

PERIMETER OF STATUTE LAW
(See also Title III Statutory and Regulatory Norms of Reference – Conditions for recourse to Statute law)

Perimeter of Institutional Acts pertaining to Finance Acts and Social Security Financing Acts

The new wording of paragraph I of Article 3 of the Ordinance of January 24th 1996 which derives from section 3 of the Institutional Act pertaining to the management of the social debt changes the composition of the Board of Administration of the Caisse d'amortissement de la dette sociale. These provisions, by reason of their contents, are outside the scope of the Institutional Act as defined by Articles 34 and 47-1 of the Constitution. They are therefore normal statutes.
(2010-616 DC, November 10th 2010, para. 6, p. 317)

Solely an Institutional Act may determine the contents of the Social Security Financing Act or the appendices thereof.

Paragraph V of section 13 of the Social Security Financing Act for 2011 provides that the Schedule provided for in 5° of paragraph III of Article L.O 111-4 of the Social Security Code shall include a comparative financial balance sheet, broken down by various branches, concerning the measures reducing social contributions and the consequences thereof. Sections 73 to 76 are intended to specify the contents of the quality and efficiency programme provided for, as regards the sickness branch, in 1° of paragraph II of the same article L.O 111-4. Section 86 thereof provides that the amount of the national allocation for the funding of general interest assignments and assistance for the entering into of contracts by healthcare establishments is fixed each year by the Social Security Financing Act. These provisions, which are designed to fix the contents of the Social Security Financing Act and of the Schedules thereof, were thus enacted in proceedings which were unconstitutional.
(2010-620 DC, December 16th 2010, paras 21 and 22, p. 394)

Perimeter of statute law

Indents a) and c) of 1° of section 2 of the Institutional Act pertaining to the management of the social debt amend paragraph V of Article L.O 111-3 of the Social Security Code to extend

the optional scope of Social Security Financing Acts to provisions pertaining to the "base, rate and manner of collection of contributions" of the compulsory basic regimes and to provisions pertaining to bodies contributing to the 'amortisation of their debt or the reserving of revenue to their benefit". Indent b) of 1) of section 2 amends paragraph VIII of Article L.O 111-3 to provide that the *Cour des Comptes* (Audit Court) shall give its opinion on the coherence of the table setting out, for the last closed financial year, of the property situation of the compulsory basic regimes and bodies contributing to the funding thereof, to amortisation of their debt or the reserving of revenue to their benefit. Lastly indent d) of 1° of section 2 amends the C of paragraph V of Article L.O 111-3 to extend the optional scope of the Financing Acts to provisions pertaining to the management of risks by compulsory basic regimes, assignments, organisation or internal management of said regimes and bodies contributing to their funding, the amortisation of their debt or the reserving of revenue to their benefit" if they affect the financial equilibrium of these regimes and bodies.

When making the extension of the optional scope of Financing Acts as regards expenditure dependent upon "effects on the financial equilibrium" of compulsory regimes and of bodies contributing to the funding thereof, Parliament when enacting the Institutional Act failed to comply with paragraph 19 of Article 34 of the Constitution which restricts " in the conditions and with the reservations provided for by an Institutional Act" the scope of Financing Acts and the determination of the "general conditions" of the financial equilibrium of social security. The provisions of d) of 1° of section 2 of the Institutional Act are thus held to be unconstitutional.
(2010-616 DC, November 10th 2010, paras 8 and 9, p. 317)

Exclusive preserve

Finance Act

Section 9 of the Institutional Act pertaining to the application of Article 65 of the Constitution rewords section 12 of Institutional Act n° 94-100 of February 5th 1994 pertaining to the High Council of the Judiciary (CSM) upon which it confers "budgetary autonomy". Parliament, without failing to show due regard for the Constitution, intended to leave it to the Finance Act to set up a programme making it possible to group together in a coherent fashion the credits allocated to this body. In these conditions, it is not unconstitutional.
(2010-611 DC, July 19th 2010, para. 13, p. 148)

Optional field

Under 7° of paragraph II of section 34 of the Institutional Act of August 1st 2001 on Finance Acts, the year Finance Act may " include provisions pertaining to the base, rate and manner of collection of all kinds of taxes which do not affect budgetary equilibrium". The amendment of Article L 423-14 of the Building and Housing Code is mainly designed to introduce such a tax, namely a levy on the financial potential of bodies offering low cost housing or mixed economy enterprises involved in building and managing low cost housing. It is therefore rightly found in a Finance Act
(2010-622 DC, December 28th 2010, para. 42, p. 416)

Prohibited field: « cavaliers » (provisions foreign to the field of Finance Acts)

Finance Act.

The Institutional Act pertaining to Finance Acts

Section 115 of the Finance Act for 2011 provides that, for civil servants and non tenured agents, periods of leave for health reasons do not carry any entitlement to rest time connected with the exceeding of the length of the normal working year. Contrary to what is contended to

the parties making the referral, these provisions directly affect the expenditure of the State budget. They are therefore rightly found in a Finance Act
(2010-622 DC, December 28th 2010, para. 6, p. 416)

The following provisions have been held to have no place in the Finance Act 2011 since they were enacted in proceedings which were unconstitutional:

– paragraph V of section 41 of the statute referred for review pertaining to the transmission of information between Ministerial departments for the drafting of surveys or reports;

– section 43 amending Article L 112-11 of the Monetary and Financial Code to provide a framework for inter-bank commissions received for transactions paid for by bank cards;

– section 150 placing the Government under a duty to deliver to Parliament a report on the management of human resources in "national museums";

– section 166 amending the Act of September 30th 1986 to provide for the possibility of the entering into of a new contract between the State and public audiovisual companies or bodies when a new president is appointed in said companies or bodies;

– section 196 amending the Act of March 5th 2007 to extend the period of time during which court appointed guardians of legally incapacitated adults are required to comply with new provisions pertaining to their accreditation;

– Section 197 providing for a report to Parliament on the state of supply and demand as regards accompaniment and accommodation in medico-social establishments and services looking after handicapped persons aged over 40.
(2010-622 DC, December 28th 2010; paras 49 to 55, p. 416)

Section 92 of the fourth Supplementary Finance Act for 2010 provides for the manner of distribution of the remaining assets after the dissolution of a public housing body. This is outside the scope of Finance Acts as provided for by the Institutional Act of August 1st 2001 pertaining to Finance Acts. This section was enacted in proceedings which were unconstitutional.
(2010-623 DC, December 28th 2010, para. 6, p. 428)

Social Security Financing Act

Institutional Act pertaining to Financing Acts as amended in 2005.

Section 51 of the Social Security Financing Act for 2011 fixes the date of coming into force of the obligation for Health insurance funds to supply information on fees charged. Sections 56 and 57 merely specify that the regional health care organisation plan must encourage the development of methods of care other than hospitalisation and organise home dialysis programmes. Section 58 deals with the manner of computation of licences for pharmacies. Section 67 authorizes experimentation of " birthing houses". Section 71 introduces the obligation for the health insurance scheme to publish annually comparative data on the assessment of the relevance of health care by regions. Section 105 authorizes experiments in annualisation of the working time of hospital practitioners working on a part-time basis in overseas Communities.

Section 106 deals with the sharing of adoption leave between the mother and father. Section 107 restricts, for the benefit of the *Département*, the amount of family allowances a family may receive when a child is in the care of the Child Welfare Service. Section 111 introduces a obligation to provide annual information on self-employed workers health care regimes in matters of additional contributions. Section 113 strengthens the role of the National Social Security Funds in matters of professional training within the various branches of social security. These provisions are of no effect or of too indirect effect on the expenditure of the compulsory basic regimes or bodies contributing to the funding thereof. They therefore have no place in a Social Security Financing Act.
(2010-620 DC, December 16th 2010, paras 17 and 18, p. 394)

Section 69 of the Social Security Financing Act for 2011 provides that the report made to Parliament on the results of general interest assignments and assistance for the contractualisation of health care establishments shall specify the amounts of financial assistance granted to said establishments in the framework of the statutory and regulatory obligations incumbent

upon them. Section 83 thereof provides for the handing to Parliament of a report on the differences in the financial burdens resulting from said specific statutory and regulatory obligations together with a report on the accreditation process for collective agreements in the social and medico-social sector as provided for under Article L 314-6 of the Family and Social Welfare Code. These provisions are not designed to improve the information given to Parliament and its ability to monitor the application of Social Security Financing Acts. They therefore have no place in a Social Security Financing Act.
(2010-620 DC, December 16th 2010, paras 19 and 20, p. 394)

PUBLIC CONTRIBUTIONS

Allocation

According to paragraph 2 of section 2 of the Institutional Act of August 1st 2001, combined with the provisions of sections 34,36 and 51 thereof, statute law can only directly allocate to a third party all kinds of taxes "for public service assignments entrusted to the latter" and on the threefold condition that the collecting of said taxes be authorized by the Finance Act for the year involved, that, when these taxes are levied for the benefit of the State, said allocation be made in a Finance Act and lastly that the Finance Bill for the year involved be accompanied by an Explanatory Schedule concerning the list and evaluation of said taxes. The Caisse de garantie du logement locatif social (The Low Cost Rental Housing Guarantee Fund) manages a fund which contributes to the development and improvement of low cost social housing belonging to low cost housing bodies and mixed economy enterprises and to urban renovation. Allocating the levy on the financial potential of low cost housing bodies does not fail to comply with these provisions.
(2010-622 DC, December 28th 2010, para. 43, p. 416)

INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW

RATIFICATION OF APPROVAL OF INTERNATIONAL TREATIES AND CONVENTIONS

Characteristics of *a priori* constitutional review

Basis of review

Indirect review (Article 61, paragraph 2)

The Constitutional Council has received a referral from more than 60 Members of Parliament for review of the statute authorizing the approval of the agreement signed in Bucarest on February 1st 2007 between the Government of the French Republic and the Government of Romania pertaining to cooperation for the protection of isolated Romanian minors on the territory of the French Republic and their return to their home country and to the fight against networks seeking to exploit minors.

The Constitutional Council finds that, insofar as Article 4 of said Convention infringes the right to an effective judicial remedy guaranteed by Article 16 of the Declaration of 1789, the statute authorizing said approval fails to comply with the Constitution.
(2010-614 DC, November 4th 2010, paras 1 to 6, p. 305)

Review of conformity with the Constitution

Need for a revision of the Constitution

Measures contrary to the Constitution or constitutionally guaranteed rights and freedoms

Article 16 of the Declaration of 1789

The provisions of the agreement entered into by the Government of the French Republic and the Government of Romania pertaining to cooperation for the protection of isolated Romania minors on the territory of the French Republic have introduced a procedure of re-accompanying the minor back to his home country at the request of the Romanian Authorities. The authorization to re-accompany the minor is given in France by the Public Prosecutors Office in charge of minors or by the Children's judge if the matter has been referred to him. When the decision has been taken by the Public Prosecutor's Office in charge of minors, neither the challenged provisions, nor any provision of national law confers upon the minor the right to appeal against this measure intended to have the minor leave French territory and return to Romania. These provisions therefore fail to comply with the requirement that the persons involved have access to an effective judicial remedy.

Censure of the statute authorizing the ratification of the agreement.
(2010-614 DC, November 4th 2010, paras 3 to 5, p. 305)

INTERNATIONAL AGREEMENTS AND TREATIES CURRENTLY IN FORCE

Primacy of Treaties and Agreements (Article 55)

Duty of those vested with the powers to make regulations, of Administrative Authorities and Courts of law to comply with International Treaties and Agreements

The argument based on the incompatibility of a statutory provision with the international and European commitments of France comes under the jurisdiction of the Courts of Law and Administrative Courts. The authority attached to the decision of the Constitutional Council under Article 62 of the Constitution does not restrict the jurisdiction of Courts of law and Administrative Courts to ensure that such commitments shall prevail over a statutory provision which is incompatible with the same, even when the said provision has been held to be constitutional.

Under the terms of section 23-3 of the Ordinance of November 7th 1958 the judge who transmits an application for a priority preliminary ruling on the issue of constitutionality may firstly hand down his decision without waiting for the ruling on the application for a priority preliminary ruling on the issue of constitutionality if statute law or regulations provide that he shall give his ruling within a specific time or as a matter of urgency. He may also take all and any conservatory measures as may be necessary. He may thus immediately suspend any effect of the statute incompatible with the law of the European Union, ensure the preservation of the rights vested in persons coming under the jurisdiction of the courts by international and European commitments entered into by France and ensure the full effectiveness of the forthcoming decision of the court. Neither Article 61-1 of the Constitution nor Articles 23-1 and following of the Ordinance of November 7th 1958 preclude a judge, asked to rule in litigation in which the argument of incompatibility with European Union law is raised, from doing, at any time, all and everything necessary to prevent the application in the case under review of statutory provisions impeding the full effectiveness of the norms and standards of the European Union.

Article 61-1 of the Constitution and sections 23-1 and following of the Ordinance of November 7th 1958 do not deprive Courts of law or Administrative Courts, including when they are requested to transmit an application for a priority preliminary ruling on the issue of constitu-

tionality, of the freedom, or, when their decisions cannot be appealed against in domestic law, of their duty to refer to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.
(2010-605 DC, May 12th 2010, paras 12 to 15, p. 78)

Jurisdiction of the Constitutional Council

No jurisdiction to review the conformity of statutes with Conventions

Although the provisions of Article 55 of the Constitution confer upon Treaties, in the conditions which they determine, primacy over domestic statutes, they neither require nor imply that compliance with this principle must be ensured in the framework of a review of the conformity of statutes with the Constitution.

Furthermore, to implement the right recognized by Article 61-1 of the Constitution for any person coming under the jurisdiction of the courts to argue that a statutory provisions infringes rights and freedoms guaranteed by the Constitution, paragraph 5 of Section 23-2 of the Ordinance of November 7th 1958 referred to hereinabove and paragraph 2 of section 23-5 thereof specify the articulation between the review of statutes for the purpose of verifying their conformity with the Constitution, which is incumbent upon the Constitutional Council, and the review of their compatibility with the international and European commitments of France, which is incumbent upon the Courts of law and Administrative courts. The argument based on the incompatibility of a statutory provision with the international and European commitments of France cannot therefore be deemed to constitute an argument as to unconstitutionality.

In the foregoing conditions, it is not incumbent upon the Constitutional Council, under a referral made pursuant to Article 61 or 61-1 of the Constitution, to review the compatibility of a statute with international and European commitments entered into by France.
(2010-605 DC, May 12th 2010, paras 10,11 and 16, p. 78)

Under Article 55 of the Constitution " Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament subject, with respect to each agreement or Treaty, to its application by the other party".

Although these provisions confer on Treaties, in the conditions which they define, prevailing authority over statute law, they neither require not imply that compliance with said principle be assured in the framework of the review of constitutionality of statute law. The same holds good for Article 53-2 of the Constitution which provides " The Republic may recognize the jurisdiction of the International Criminal Court as provided for by the Treaty signed on July 18th 1998".

In the foregoing conditions and notwithstanding the reference to the Convention concerning the International Criminal Court inserted into the Constitution, it is not incumbent upon the Constitutional Council, under an application made pursuant to Article 61 of the Constitution, to review the compatibility of the statute referred for review with said Convention. This task comes under the jurisdiction of the Courts of law and Administrative Courts.
(2010-612 DC, August 5th 2010, paras 4 and 5, p. 198)

Paragraph 2 of Article 689-11 of the Code of Criminal Procedure applicable to crimes coming under the jurisdiction of the International Criminal Court, requires the Public Prosecutor, before bringing a prosecution, to verify with said Court that the latter does not intend to exercise its jurisdiction and that no other international court of with jurisdiction to try the accused has requested the handing over of the latter and no other State has requested the extradition of said person. When enacting these provisions, Parliament did not fail to comply with any constitutional requirement. It is not incumbent upon the Constitutional Council to review the compatibility of a statute with the provisions of a Treaty or international agreement.
(2010-612 DC, August 5th 2010, para. 15, p. 198)

ISSUES SPECIFIC TO EUROPEAN COMMUNITY LAW

Hierarchy of norms

Authority of European Community Law

The authority attached to decisions of the Constitutional Council under Article 62 of the Constitution does not restrict the jurisdiction of Courts of law and Administrative Courts to ensure that European commitments of France shall prevail over a statutory provision which is incompatible with the same, even when the said provision has been held to be constitutional.

Under the terms of section 23-3 of the Ordinance of November 7th 1958 the judge who transmits an application for a priority preliminary ruling on the issue of constitutionality may firstly hand down his decision without waiting for the ruling on the application for a priority preliminary ruling on the issue of constitutionality if statute law or regulations provide that he shall give his ruling within a specific time or as a matter of urgency. He may also take all and any conservatory measures as may be necessary. He may thus immediately suspend any effect of the statute incompatible with the law of the European Union, ensure the preservation of the rights vested in persons coming under the jurisdiction of the courts by international and European commitments entered into by France and ensure the full effectiveness of the forthcoming decision of the court. Neither Article 61-1 of the Constitution nor Articles 23-1 and following of the Ordinance of November 7th 1958 preclude a judge, asked to rule in litigation in which the argument of incompatibility with European Union law is raised, from doing, at any time, all and everything necessary to prevent the application in the case under review of statutory provisions impeding the full effectiveness of the norms and standards of the European Union.

Article 61-1 of the Constitution and sections 23-1 and following of the Ordinance of November 7th 1958 do not deprive Courts of law or Administrative Courts, including when they are requested to transmit an application for a priority preliminary ruling on the issue of constitutionality, of the freedom, or, when their decisions cannot be appealed against in domestic law, of their duty to refer to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.
(2010-605 DC, May 12th 2010, paras 13 to 15, p. 78)

Notwithstanding the reference in the Constitution to the Treaty signed in Lisbon on December 13th 2007, it is not the task of the Constitutional Council to review the compatibility of a statute with the provisions of this Treaty.
(2010-605 DC, May 12th 2010, para. 16, p. 78)

Statutes transposing EC Directives

Concept of transposing statute

The Act pertaining to the Opening up to Competition and the Regulation of Online Betting and Gambling is not designed to transpose a Directive.
(2010-605 DC, May 12th 2010, para. 20, p. 78)

Absence of any review of constitutionality of a transposing statute

In the absence of any calling into question of a rule or principle inherent in the constitutional identity of France, the Constitutional Council has no jurisdiction to review the conformity with constitutionally guaranteed rights and freedoms (Article 61-1 of the Constitution) of provisions which merely draw the necessary consequences from unqualified and precise provisions of a European Union Directive. In such a case, it is incumbent upon the European Union Judge, in the event of a request for a preliminary ruling, to review the compliance of said

Directive with the fundamental rights guaranteed by Article 6 of the Treaty on European Union.
(2010-79 QPC, December 17th, para. 3, p. 406)

Safeguard clause

The Constitutional Council has jurisdiction to review the conformity with constitutionally guaranteed rights and freedoms of provisions which merely draw the necessary consequences from unqualified and precise provisions of a European Union Directive solely when a rule or principle inherent in the constitutional identity of France is called into question.
(2010-79 QPC, December 17th 2010, para. 3, p. 406)

Applications

The provisions of Article L 712-2 of the Code on the entry and sojourning of foreigners and the right of asylum (CESEDA) merely draw the requisite conclusions from unqualified and precise provisions of a Directive (2004/83/CE of the Council dated April 29th 2004 on minimum standards for the qualification and status of third country Nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted) which do not call into question any rule or principle inherent in the constitutional identity of France. It is therefore not incumbent upon the Constitutional Council to review the application for a priority preliminary ruling on the issue of constitutionality as regards the provisions of the CESEDA.
(2010-79 QPC, December 17th 2010, para. 4, p. 406)

Review of the requirement of proper transposition

Conditions of review

Article 88-1 of the Constitution provides: "The Republic shall participate in the European Union constituted by States which have freely chosen, by virtue of the Treaty on European Union and the Treaty on the Functioning of the European Union as worded pursuant to the Treaty signed in Lisbon on December 13th 2007, to exercise some of their powers in common". The transposing into domestic law of a Community Directive thus derives from a constitutional requirement.

It is incumbent upon the Constitutional Council, when referral is made in the conditions provided for by Article 61 of the Constitution with respect to a statute designed to transpose into domestic law a Community Directive, to ensure compliance with this requirement. However the review which it carries out to this end is subject to a twofold restriction: firstly the transposition of a Directive cannot run counter to a rule or principle inherent in the constitutional identity of France unless the Constituent power has agreed to the same. Secondly, insofar as it is required to give its ruling before the promulgation of the statute in the timeframe provided for by Article 61 of the Constitution, the Constitutional Council cannot refer the matter to the European Court of Justice on the basis of Article 267 of the Treaty on the Functioning of the European Union. Therefore it can rule unconstitutional under Article 88-1 of the Constitution solely a statutory provision which is patently incompatible with the Directive it purports to transpose. In all events, it is incumbent upon Courts of law and Administrative Courts to review the compatibility of a statute with European commitments entered into by France and, if need be, to make a reference for a preliminary ruling to the European Court of Justice.

Compliance with the constitutional requirement of transposition of Directives is not one of the "rights and freedoms guaranteed by the Constitution" and thus cannot be raised in the framework of an application for a priority preliminary ruling on the issue of constitutionality.
(2010-605 DC, May 12th 2010, paras 17 to 19, p. 78)

ELECTIONS

PRINCIPLES OF ELECTORAL LAW

Rights and freedoms of voters

Equality between voters

Principle of demographic equilibrium

Election of Members of the National Assembly and Senators.

— Independent Committee provided for by Article 25 of the Constitution

According to the parties making the referral for review, the lack of any new consultation of the Committee provided for in Article 25 of the Constitution as regards the draft Ordinance put before the Council of Ministers, after the Government had introduced amendments to the draft put before it, means that the proceedings leading to the adopting of said Ordinance are flawed by unconstitutionality. The said Committee was consulted on a draft Ordinance on the distribution of seats and the drawing of constituency boundaries for the election of Members of the National Assembly. It was thus in a position to give its opinion on the manner of distribution of seats retained by the Government and on each of the constituencies of which the boundaries were redrawn by the draft put to the Council of Ministers. The argument based on failure to comply with Article 25 of the Constitution must therefore be dismissed.
(2010-602 DC, February 18th 2010, paras 2 to 4, p. 64)

The method known as " la tranche" (segments) seemed to the Committee provided for in Article 25 of the Constitution "to be that best adapted to combining a rule of calculation based on exclusively demographic criteria with an approach taking also in consideration historical and human reality". According to the Committee "the choice of methods based more closely on proportional representation would have led to a marked increase on the number of *Départements* electing one single Member to the National Assembly".
(2010-602 DC, February 18th 2010, para. 14, p. 64)

It is incumbent upon the Committee provided for by Article 25 of the Constitution to verify whether the drawing of boundaries of constituencies has been done in the fairest possible manner and to make recommendations to this end.
(2010-602 DC, February 18th 2010, para. 20, p. 64)

— Distribution of seats

Parliament has retained for the new distribution of seats of Members of the National Assembly, as it did in 1986 for Members of the National Assembly and in 2003 for Senators, the system of distribution by segments. When applying this method it strove to markedly reduce the demographic inequalities found in the previous distribution. It only took limited account of imperative reasons in the general interest which led it to depart from demographic criteria. It did not therefore fail to comply with the constitutional requirements arising from Articles 1, 3 and 24 of the Constitution.
(2010-602 DC, February 18th 2010, para. 15, p. 64)

Members of the National Assembly elected in French overseas territories governed by Article 74 of the Constitution must be elected on essentially demographic bases. No imperative reasons in the general interest require that an Overseas Community constitute at least one electoral constituency. The sole exception to this would be if a territory with a very small population were situated at some considerable distance from an Overseas *Département* or Community. In the case under review, although the population of the constituency regrouping the territories of the Communities of Saint-Barthélemy and Saint-Martin is small, Parliament

was at liberty to take into account the geographical location and specific status of these Communities.
(2010-602 DC, February 18th 2010, paras 17 and 18, p. 64)

— Drawing of constituency boundaries and differences in representation

In the case of electoral constituencies of French Nationals living abroad, substantial demographic differences resulting from Ordinance nº 2009-935 of July 29th 2009 pertaining to the distribution of seats and drawing of boundaries for the election of Members of the National Assembly are justified by the need to constitute two coherent geographical constituencies on the American continent and also by the difficulty in increasing the 11th constituency which already regroups Central and Eastern Asia and the Pacific and Oceania.
(2010-602 DC, February 18th 2010, para. 21, p. 64)

As regards the drawing of electoral constituency boundaries on national territory, Ordinance nº 2009-935 of July 29th 2009 pertaining to the distribution of seats and drawing of boundaries for the election of Members of the National Assembly of which the ratifying statute has been referred for review by the Constitutional Council provides that, unless warranted by geographical considerations, these constituencies shall be composed of an uninterrupted territorial area. The Canton limits have, generally speaking, been respected. The territory of geographically interrupted Cantons and Cantons of more than 40 000 inhabitants has only been distributed among several constituencies in a small number of cases. The differences in population between constituencies have been reduced in a manner which ensures enhanced regard for the principle of equality before suffrage.

Irrespective of the debatable nature of the grounds in the general interest raised to justify the drawing of boundaries of several constituencies, in particular in the *Départements* of Moselle and the Tarn, it does not seem, taking into account the progress made in the new drawing of boundaries and the variety and complexity of local situations giving rise to different solutions in compliance with the same demographic rule, that this redrawing of boundaries patently fails to comply with the principle of equality before suffrage.
(2010-602 DC, February 18th 2010, paras 22 and 23, p. 64)

Election of Territorial Councillors

When addressing the argument based on the infringement of the principle of equality before suffrage of the provisions fixing the distribution of Territorial Councillors by *Département*, the Constitutional Council reiterated the principle whereby the deliberative body of a *Department* or Region of the Republic must be elected on an essentially demographic basis with a distribution of seats and a drawing of boundaries complying as faithfully as possible with the principle of equality before suffrage. Although this does not mean that the distribution of seats must necessarily be proportionate to the population of each *Département* or Region nor that other imperative reasons of general interest cannot be taken into consideration, such considerations can only play a limited part in the process.

After having validated the proposal of a minimum of 15 Territorial Councillors by *Département* and dismissed the argument whereby there should be no great departure from the number of Cantons fixed prior to the reform, the Constitutional Council held the fixing of the number of Territorial Councillors in six Departments to be unconstitutional in view of a difference with the regional average of over 20 %.
(2010-618 DC, December 9th 2010, paras 38 to 41, p. 367)

Principle of equality of representation

Rules governing elections – distribution of seats

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(2010-618 DC, December 9th 2010, paras 38 to 41, p. 367)

Equality of sexes and parity

Paragraph 2 of Article 1 of the Constitution is neither aimed at nor results in stripping Parliament of the power conferred upon it by Article 34 of the Constitution to determine the system for electing members of the Houses of Parliament and Assemblies. The provisions of section 1 of the Act reforming Territorial Communities, which provides that Territorial Councillors shall be elected by a two round simple majority system do not *per se* adversely affect the objective of equal access for woman and men to elective offices and posts set out in Article 1 of the Constitution. Neither do they infringe the principle of equality before the law
(2010-618 DC, December 9th 2010, para 34, p. 367).

Exercising the right to vote

Frequency of the exercising of the right to vote

Reasonable intervals

Parliament, vested by Article 34 of the Constitution with the power to determine the rules concerning elections to Local Assemblies may, when so doing, fix the term of office of the elected members composing the deliberative body of a Territorial Community. However when exercising this power, it must comply with principles of a constitutional nature, which imply in particular that voters are called upon to exercise their right to vote at reasonable intervals.
(2010-603 DC, February 11th 2010, para. 12, p. 58)

Concurrent elections

When reducing from six to four years the term of office of the Regional Councillors to be elected in 2010 and from six to three years that of the General Councillors to be elected in 2011, the statute organising the concurrence of the renewals of General Councils and Regional Councils, enacted in January 2010, does not adversely affect any current term of elective office. Parliament intended that these new terms of office would terminate concurrently bearing in mind the future reform. Although the latter depends on statutes which have not yet been promulgated or even enacted, Parliament was right, to ensure compliance with the requirements of clarity and fairness with respect to the election of Regional Councillors in 2010 and General Councillors in 2011 to modify the length of said term of office prior to said elections.

It thus sought to achieve a purpose in the general interest. For the same reasons it was not required to make such a modification dependent upon the coming into force of the contemplated reform.

The concurrent nature of these elections may furthermore by justified by the purpose of encouraging a greater turnout of voters for each of these elections.
(2010-603 DC, February 11th 2010 para. 14, p. 58)

Section 3 of the Institutional Act pertaining to the *Département* of Mayotte repeals, as from the first meeting following the partial renewal of the Deliberate Assembly of this Departmental Community of Mayotte in 2011, the institutional provisions of the Electoral Code based on Article 74 of the Constitution. It maintains the rules currently in force for said renewal while

reducing to three years the term of office of the General Councillors to be elected in 2011. This reduction does not adversely affect the length of current terms of office and is designed to allow for the same complete renewal of the General Council of Mayotte in 2014 as that of the General and Regional Councils in mainland France and French overseas territories
(2010-619 DC, December 2nd 2010, para. 5, p. 353)

Capacity to exercise the right to vote

Electoral incapacity

The prohibition of entry of the name of the offender on the electoral roll laid down by Article L.7 of the Electoral Code is intended in particular to inflict a heavier punishment for certain acts when committed by persons vested with public authority, in charge of a public service mission or holders of elective public office. This punishment imposes an incapacity for holding elective public office for a period of five years. It is thus a measure which constitutes a punishment. This punishment which deprives the offender of the right to vote automatically accompanies various criminal convictions without the judge who decides on such measures having to expressly impose the same. He cannot vary the length of the period involved. Even if the offender may, in the conditions set out in paragraph 2 of Article 132-21 of the Criminal Code, see all or part of this prohibition immediately lifted, this possibility is not as such sufficient to ensure compliance with the requirements which derive from the principle of the tailoring of punishments. Article L.7 of the Electoral Code thus fails to comply with this principle as must he held to be unconstitutional. The repeal of said Article L.7 will enable those involved to ask for their name to be entered on the electoral roll in the conditions provided by statute.
(2010-6/7 QPC, June 11th 2010, paras 5 and 6, p. 111)

Freedom of the voter

Freedom of the ballot

The freedom of the ballot does not preclude Parliament from having a elected politician carry out his term of office in two different Territorial Assemblies.
(2010-618 DC, December 9th 2010, para. 26, p. 367)

Rights and freedoms of political parties and organisations

Parity

Neither Article 1 of the Constitution, allowing statute law to promote the equal access of women and men to political and elective office, nor Article 4 thereof, providing that political parties and groups shall contribute to the exercise of suffrage and contribute to the implementation of this objective of parity preclude statute law from providing for a modulation of the financial assistance granted to such parties or groups. However, to conform to the principle of equality, this modulation must comply with rational and objective criteria. The criteria retained by Parliament must not lead to failure to comply with the requirement that statutes shall guarantee the expression of diverse schools of thought and opinions.
(2010-618 DC, December 9th 2010, para. 61, p. 367)

Equality between political parties and groups

Under new section 9-1 of the Act of March 11th 1988, part of public aid is reserved for political parties and groups having put forward candidates obtaining not less than 1 % of votes cast in at least 350 Cantons spread over at least 15 *Départements*. Another part is reserved for parties on the basis of the number of elected Territorial Councillors. Moreover section 9-1 of the same

statute provides that, for the whole of a Region, the percentage of reduction in public aid for failure to comply with the objective of equal access to elective posts, calculated by *Département*, shall be that of the *Département* in which the imbalance in the number of candidates by gender is the greatest.

Parliament has decided to no longer calculate the amount of public aid given to political parties and groups on the basis of the sole results of Parliamentary elections. In order to calculate the modulating of aid granted for the election of Territorial Councillors, it has adopted a method suitable for a two round simple majority system and for the election of Councillors sitting in the Assemblies of two Territorial Communities and designed to ensure a more homogeneous compliance throughout all the *Départements* in a Region with the objective set out in Article 1 of the Constitution. The choices which it has made are based on objective and rational criteria. The challenged provisions, which are intended to incite political parties to put forward candidates of both sexes in all the *Départements* in the Region, does not adversely affect equality before suffrage.
(2010-618 DC, December 9th 2010, paras 62 and 64, p. 367)

Accuracy, fairness and dignity of the ballot

Principle of clarity and fairness of consultation

The statute organising the concurrent renewal of General Councils and Regional Councils reduces from six to four years the term of office of the Regional Councillors to be elected in 2010 and from six to three years that of the General Councillors to be elected in 2011. Parliament intended that these new terms of office would terminate concurrently bearing in mind the future reform. Although the latter depends on statutes which have not yet been promulgated or even enacted, Parliament was right, to ensure compliance with the requirements of clarity and fairness with respect to the election of Regional Councillors in 2010 and General Councillors in 2011 to modify the length of said term of office prior to said elections.

It thus sought to achieve a purpose in the general interest.
(2010-603 DC, February 11th 2010 para. 14, p. 58)

The organisation of the ballot for the election in each Canton of an elected person called upon to sit on both the General Council and the Regional Council does not fail to comply with the twofold requirement of clarity and fairness of the ballot.
(2010-618 DC, December 9th 2010, para. 26, p. 367)

PARLIAMENTARY ELECTIONS

Candidates

Declaration of standing as a candidate

Admissibility of declaration

Refusal

Article L. 157 of the Electoral Code, applicable to the election of Members of the National Assembly, provides "Declarations of persons standing as candidates shall be deposited in two copies at the Prefecture no later than 6 p.m on the fourth Friday preceding the date of the ballot". Under Article R 98 thereof: "Declarations of persons standing as candidates for election to the National Assembly shall be received in Prefectures, for the first round of the ballot, as from the fourth Monday preceding the date of the ballot...".

Since the election for a Member of the National Assembly was convened on July 4th 2010, declarations of persons standing as candidates could be deposited from Monday June 7th until Friday June 11th 2010 at 6 p.m under the foregoing provisions. A declaration deposited on June 17th 2010 was therefore inadmissible.
(2010-4537, July 29th 2010, paras 1 to 3, p. 177)

Electoral campaign – Campaign literature

Pamphlets

Irregularities retained as grounds for holding the election to be null and void.

The investigation has show that, on the evening before the second round of voting, a pamphlet signed by the Mayor affirming in particular that the representatives of the "Greens" in Parliament had voted in favour of the statute on the environment known as "Grenelle I", a fact which was "the best reason for trusting the representatives of the Parliamentary majority to deal with issues connected with the environment". However the Members of Parliament belonging to the same political movement abstained from voting when this statute was before the National Assembly and did not take part in voting in the Senate. This pamphlet, to which the party making the referral was unable to respond in good time, was a manœuvre designed to confuse voters. In view of the fact that one single vote separated the two candidates, the challenged election should be held to be null and void.
(2009-4534, May 20th 2010, para. 3, p. 89)

Financing

Keeping of campaign accounts

Duty to file campaign accounts

No filing of campaign accounts

No filing of campaign accounts or an attestation of no expenditure or revenue drawn up by a financial agent. Ineligibility
(2010-4536, July 29th 2010, paras 1 to 3, p. 175)

Requirements concerning filing of accounts

No certification of accounts by a Chartered Accredited Accountant: ineligibility

A candidate filed with the National Committee for Campaign Accounts and Political Financing a campaign account not showing any revenue or expenditure. However, the investigation has shown that the candidate had received donations and incurred expenditure for the purpose of the election, beyond those of the official campaign, a fact which he admitted during the audi alteram partem proceedings before the Committee. The campaign account should have been certified by a Chartered Accredited Accountant. Although the candidate speaks of the difficulties encountered in finding a Chartered Accountant, demonstrates his good faith and produces before the Constitutional Council a campaign account duly certified by a Chartered Accountant, these circumstances are not such as to preclude the application of the provisions of Article 52-12 which were not complied with in the case under review. The Committee was thus right to refuse the campaign account. Ineligibility in accordance with the provisions of Article L.O of the Electoral Code for a period of one year as from the date of the decision.
(2010-4325, July 29th 2010, para. 3, p. 173)

Electoral operations

Sorting and counting of the votes

Number of signatures on list of voters different from that of envelopes and ballot papers found in the ballot box

Case law subsequent to the Parliamentary elections of 1988.

When raising an argument based on the difference between the number of ballot papers and envelopes found in the ballot box and the number of signatures on the voting lists in certain polling stations, the party making the referral petitioned the Constitutional Council to review all the counting of votes cast in the polling stations involved. It is incumbent upon the Constitutional Council, in view of the very small difference in the number of votes cast, to examine the signed list of voters of these polling stations and proceed to make the necessary corrections. This examination shows that, in the polling stations involved, for the second round of the ballot there is a difference of three units between the number of signatures on the signed list of voters and the number of envelopes found in the ballot box. Three additional votes must thus be deducted from the number of votes cast in favour of the candidate coming out on top.
(2009-4534, May 20th 2010, para. 2, p. 89)

Number of envelopes different from number of ballot papers

Observations written on the record of voting operations show that, after sorting, one ballot paper more than the number of envelopes corresponding to votes cast other than blank and spoiled votes was found and that the persons in charge of the polling station decided, to make up for this difference, to reduce by one the number of empty envelopes initially counted together with the number of the same envelopes appended to the record. Such a difference can only result from the presence, in one of the envelops considered as corresponding to a vote properly cast, of two ballot papers, without it being possible to determine whether these two ballot papers were identical, in which case one vote has been wrongly counted twice in favour of one candidate, or different candidates, in which cast one vote has wrongly been credited to each of the two candidates. In these circumstances, one vote must be deducted from the votes cast for the candidate coming out on top.
(2009-4534, May 20th 2010, para. 1, p. 89)

Litigation –Admissibility

Filing of referral

Capacity of person making the referral

Any person who has met with a refusal to register his/her candidacy is entitled to contest this refusal. (implied solution). (cf decision nº 68-511 of October 11th 1968, A.N Hauts-de-Seine, 3rd constit., p. 72)
(2010-4537, July 29th 2010, para. 3, p. 177)

Litigation – Judicial investigation

Procedural incidents, specific referrals, no case for ruling

No case for ruling.

A referral was made for the rectification of a material error concerning a decision of the Constitutional Council which held an election to Parliament to be null and void. A fresh

election had taken place and the result had become final due to the dismissal of referral nº 2010-4537 on the same day. No case for ruling. (cf CE, December 22nd 1967, nº 70753, Leb. P. 529)
(2009-4534R, July 29th 2010, para. 1, p. 171)

Litigation – Channels for review

A referral was made for the rectification of a material error concerning a decision of the Constitutional Council which held an election to Parliament to be null and void. A fresh election had taken place and the result had become final due to the dismissal of referral nº 2010-4537 on the same day. No case for ruling. (cf CE, December 22nd 1967, nº 70753, Leb. P. 529)
(2009-4534R, July 29th 2010, para. 1, p. 171)

PARLIAMENT

OFFICE OF MEMBER OF PARLIAMENT

Incompatibilities

Concurrent holding of such office with another public office

Non elective public office

Membership of the Economic, Social and Environmental Council (L.O 139)

Section 8 of the Institutional Act pertaining to the Economic, Social and Environmental Council completes Article 7-1 of Ordinance nº 58-1360 of December 29th 1958 to provide that the office of Senator is incompatible with membership of the Social, Economic and Environmental Council. This incompatibility already arises from the combination of Article 7-1 referred to above with Articles L.O 139 and L.O 297 of the Electoral Code. The Constitutional Council held these provisions to be constitutional in its decisions nº 85-205 DC of December 28th 1985 and 2000-427 of March 30th 2000. No case for proceeding to a fresh review of this incompatibility.
(2010-608 DC, June 24th 2010, para. 2, p. 124)

Concurrent holding of office with activities in the private sector

Real Estate Companies (L.O 146, 4º)

As is shown by the Memorandum of Association of the company of which the Senator contemplates sitting on the Supervisory Board said company comes under the scope of the provisions of 4º of Article L.O 146 of the Electoral Code. This position is therefore incompatible with office as Senator pursuant to the combined provisions of Articles L.O 146, L.O 147 and L.O 297 of the same Code.
(2010-281, December 14th 2010, para. 5, p. 390)

Holding of Parliamentary Office

End of Parliamentary Office

Automatic removal from office

No case for ruling on the referral from the Minister of Justice, Keeper of the Seals, for finding of the automatic removal from office of a Senator following a decision of the *Cour de cassation*

which set aside a decision of a Court of appeal which had ordered he be subject to an additional year of ineligibility. Since the *Cour de cassation* referred the case and the parties to another Court of appeal the Constitutional Council reiterated that, if need be, it was incumbent upon the Authorities referred to in Article L.O 136 of the Electoral Code to make a fresh referral to the Constitutional Council once proceedings had become *res judicata*.
(2009-21 D 2, July 29th 2010, paras 1 and 2, p. 169)

ORGANISATION OF THE HOUSES OF PARLIAMENT AND THE WORK THEREOF

Composition and organisation of Parliament

Composition of the Senate

Body of voters for election to the Senate

Under Article 24 of the Constitution, the Senate, insofar as it "ensures the representation of the Territorial Communities of the Republic" must be elected by a body of voters which is itself elected by these Communities. This body of voters must be essentially composed of members of Deliberative Assemblies of Territorial Communities. Although all categories of Territorial Communities must be represented, this requirement does not necessitate any differentiation between persons elected to Assemblies of *Départements* and those of Regions in the body of voters electing Senators.
(2010-618 DC, December 9th 2010, para. 28, p. 367)

Organisation of work

Agenda

Section 10 of the Institutional Act pertaining to the Economic, Social and Environmental Council provides that after a period of four years and then every ten years the Government shall provide Parliament, after consultation with the Economic, Social and Environmental Council, with a report updating the composition of said Council. It provides that this report shall be debated by Parliament. Firstly, when making this debate on the report dependent on prior consultation with the Economic, Social and Environmental Council it fails to show due regard for the powers of the latter as defined by Articles 69 and 70 of the Constitution. Secondly, when requiring debate by Parliament on this report it fails to comply with the manner of drawing up the agenda of the Houses of Parliament as determined by Article 48 of the Constitution. It is therefore unconstitutional.
(2010-608 DC, June 24th 2010, para. 10, p. 124)

LEGISLATIVE PROCEEDINGS

Initiative

Government Bills

Conditions for tabling

Prior consultation of the *Conseil d'Etat*

Under paragraph 2 of Article 39 of the Constitution consultation of the Conseil d'Etat and discussion in the Council of Ministers is required solely for Government Bills before they are

tabled before the first House called upon to debate them. This requirement does not apply to amendments. In the case under review, the sections of the statue of which the enactment proceedings are challenged on the grounds that they were flawed since no prior consultation of the *Conseil d'Etat* had taken place, were introduced by way of amendments. The argument based on failure to comply with Article 39 is thus inoperative.
(2010-618 DC, December 9th 2010, paras 3, 7 and 8, p. 367)

Priority of the Senate

The Bill at the origin of the Institutional Act pertaining to the *Département* of Mayotte was tabled at first reading in the Senate as required by paragraph 2 of Article 39 of the Constitution.
(2010-619 DC, December 2nd 2010, para. 1, p. 353)

Paragraph 2 of Article 39 of the Constitution requires that " Without prejudice to the first paragraph of Article 44, Bills dealing primarily with the organisation of Territorial Communities shall be tabled first in the Senate". In the case under review, the sections of the statute of which the enactment proceedings are challenged on the grounds that they were flawed since they had not first been tabled in the Senate, were introduced by way of amendment in the National Assembly. The argument based on failure to comply with Article 39 is thus inoperative.
(2010-618 DC, December 9th 2010, paras 3,7 and 8, p. 367)

Conditions for tabling: explanation of grounds, impact studies

Although paragraph 3 of Article 39 of the Constitution and sections 8 and 11 of Institutional Act nº 2009-403 of April 15th 2009 pertaining to the application of Articles 34-1, 39 and 44 of the Constitution require that Government Bills not referred to in section 11 be the object of an impact study, they do not preclude an impact study being common to various Government Bills seeking to achieve a similar purpose.
(2010-603 DC, February 11th 2010, paras 3 to 5, p. 58)

Section 3 of the Institutional Act pertaining to the Economic, Social and Environmental Council completes section 8 of the Institutional Act of April 15th 2009 pertaining to the application of Articles 34-1, 39 and 44 of the Constitution in order to specify that the contents of an impact study appended to a Bill must set out "if need be, the follow up given by the Government to the opinion of the Economic, Social and Environmental Council". It is therefore held to be constitutional with the same qualifications as those set out by the Constitutional Council in paragraphs 15 and 17 of decision nº 2009-579 DC of April 9th 2009.
(2010-608 DC, June 24th 2010, paras 11 and 12, p. 124)

Under paragraph 3 of Article 39 of the Constitution: "The presentation of Government Bills tabled before the National Assembly or the Senate shall comply with the conditions determined by an Institutional Act". Under section 8 of Institutional Act nº 2009-403 of April 15th 2009: "Government Bills shall be the object of an impact study. The documents containing the findings of said impact study shall be appended to Government Bills when they are transmitted to the *Conseil d'Etat*". In the case under review, the sections of the statute of which the enactment proceedings are challenged on the grounds that they were flawed since they had not been the object of an impact study, were introduced by way of amendment. The argument based on failure to comply with the requirement to present an impact study was thus inoperative.
(2010-618 DC, December 9th 2010, paras 4,7 and 8, p. 367)

Private Members'Bills

Conditions for tabling.

In accordance with Article 74 of the Constitution and Article L.O 6213-3 of the General Code of Territorial Communities the Private Member's Institutional Bill pertaining to Saint-Barthélemy was the object of a deliberation by the Territorial Council of this Community before the deliberation by the Senate, before which it was first tabled.
(2009-597 DC, January 21st 2010, para. 1, p. 47)

In accordance with Article 74 of the Constitution and Article L.O 6213-3 of the General Code of Territorial Communities the Private Member's Institutional Bill pertaining to Saint-Martin was the object of a deliberation by the Territorial Council of this Community before the deliberation by the Senate, before which it was first tabled.
(2009-598 DC, January 21st 2010, para. 1, p. 50)

Consideration of Bills in Committee

Meetings

Publicity of work

The members of the National Assembly making the referral contend that the combination of the meeting "behind closed doors" of the Committee to which the Bill was referred and the predetermined timeframe for Parliamentary debate, as defined by Article 49 paragraphs 5 to 13 of the Rules of procedure of the National Assembly, infringed the constitutional requirements of clarity and accuracy of Parliamentary debate. These requirements, which also apply to work in Committee, entail the keeping of a precise record of interventions before said Committees, of the grounds for amendments proposed to provisions under consideration and of the votes cast. In the case under review, a precise record has been kept of all the work done by the Committee.
(2010-617 DC, November 9th 2010, paras 2 and 3, p. 310)

Organising debate

Speaking time

The parties making the referral challenge the refusal at second reading by the President of the National Assembly, before recourse to paragraph 3 of Article 44 of the Constitution, to apply paragraph 13 of Article 49 of the Rules of procedure of said House, applicable when the time allotted for consideration of a Bill is predetermined and whereby " Each M.P. may take the floor for a period of five minutes at the end of the vote on the last clause of the Bill under consideration in order to give a personal explanation of his vote". The Rules of procedure of the Houses of Parliament do not *per se* have constitutional status and the contended failure to comply with the abovementioned provisions of said Rules of procedure cannot as such render the legislative proceedings unconstitutional.
(2010-602 DC, February 18th 2010, paras 5 and 6, p. 64)

Suspension of a sitting

None of the provisions of the Rules of procedure of the National Assembly preclude the President of the sitting from suspending the sitting during explanations of voting.
(2010-605 DC, May 12th 2010, para. 4, p. 78)

Closure of debate

The members of the National Assembly making the referral contend that the combination of the meeting "behind closed doors" of the Committee to which the Bill was referred and the predetermined timeframe for Parliamentary debate, as defined by Article 49 paragraphs 5 to 13 of the Rules of procedure of the National Assembly, infringed the constitutional requirements of clarity and accuracy of Parliamentary debate. The failure to comply with the provisions of paragraph 13 of Article 49 of these same Rules of procedure whereby "Each M.P. may take the floor for a period of five minutes at the end of the vote on the last clause of the Bill under consideration in order to give a personal explanation of his vote. The time given

over to such explanations of voting shall not be deducted from the overall time shared between the groups" is also alleged to be unconstitutional. Firstly, the requirements of clarity and accuracy of Parliamentary debate, which also apply to work in Committee, entail the keeping of a precise record of interventions before said Committees, of the grounds for amendments proposed to provisions under consideration and of the votes cast. In the case under review, a precise record has been kept of all the work done by the Committee. Secondly, the Rules of procedure of the Houses of Parliament do not *per se* have constitutional status. The alleged failure to comply with the provisions of paragraph 13 of Article 49 of said Rules of procedure cannot as such render the legislative proceedings unconstitutional. In the case under review, the decision of the President of the National Assembly to interrupt explanations of personal voting has not failed to comply with the requirements of clarity and accuracy of Parliamentary debate.
(2010-617 DC, November 9th 2010, paras 2 and 4, p. 310)

Right of amendment

Admissibility

Admissibility at first reading

Direct connection with the Bill under debate.

The Bill reforming Territorial Communities comprised five Titles when it was tabled before the Senate, the first House called upon to debate it. Title I included provisions concerning the renovation of the exercising of local democracy and provided in particular for the creation of Territorial Councillors called upon to sit on General Councils and Regional Councils. Title II was intended to adapt structures to the diversity of territories, by introducing metropoles and metropolitan poles by creating a new system of the merging of Communes and defining the manner in which *Départements* or Regions could be grouped together. Title III was designed to encourage and simplify intercommunality. Title IV e dealt with the "clarification of the powers of Territorial Communities", while Title V laid down the manner and timeframe for the coming into force of the statute. Section I of the statute referred for review determined the method of election of Territorial Councillors. Section 6 provides that the number of Councillors of each *Département* and Region shall be fixed by an appended Chart. Section 73 sets out the general principles applicable to the sharing out of powers between Territorial Communities and the framework for cross-financing. These sections are directly connected with the provisions which appear in the Bill reforming Territorial Communities. The same holds good for section 2 which increases the number of votes required for a candidate for a seat on the General Council to be able to stand in the second round of the ballot.
(2010-618 DC, December 9th 2010, paras 6 to 8, 10, p. 367)

No indirect connection

The Bill pertaining to the Limited Liability Sole Trader (EIRL) comprised six sections when it was tabled before the National Assembly, the first House called upon to debate it. It amended the Commercial Code, the General Tax Code, the Book of Tax Procedures and the Social Security Code to create the legal, tax and social regime applicable to the EIRL. Section 9, inserted into the Bill by an amendment passed at first reading by the Senate on April 8th 2010, amended Ordinance nº 2005-722 of June 29th 2005 to change the status of the public establishment OSEO and lay down the manner of creation of the Public Limited Company OSEO. In the conditions provided for in Article 38 of the Constitution, section 13, passed in the same conditions as section 9, empowered the Government to issue by Ordinance the statutory provisions necessary for the transposition of a Directive concerning the exercising of the rights of shareholders of listed companies. Moreover, section 12, inserted into the Bill at first reading by the National Assembly, amended Articles L.112-2 and L 112-3 of the Monetary and Financial Code together with Articles L.145-34 and L 145-38 of the Commercial Code to reform the system of index-linking of certain rents. These provisions did not have any direct

connection with those contained in the Bill. Nothing in the preparatory work or debate of Parliament showed that they were even indirectly connected with this Bill. They were thus enacted in proceedings which run counter to Article 45 of the Constitution.
(2010-607 DC, June 10th 2010, paras 3 to 6, p. 101)

Sections 63,65,66,68,69,70,71,72 and 75 of the Act to Reform Retirement Pensions inserted into the Bill via amendments passed at first reading by the National Assembly, pertain respectively to the reform of Safety and Health at work services, the administration of Inter-company Safety and Health at work services and the drafting by said services of a long term service project, to departures via collective agreements from the rules governing medical inspections of certain categories of workers, to the monitoring of contracts by the Board of Administration of the Inter-company Health and Safety at work service, to the role of the Director of the Inter-company Health and Safety at work service and to the conditions of organization and operation of the Health and Safety at work service in the field of agriculture. Sections 64,67,73 and 74, inserted into the Bill by amendments passed at first reading by the Senate, are designed respectively to specify the manner in which exchanges of information between the Health and Safety at work doctor and the employer are to be organized, to define the interplay between the Project Committee set up by section 66 and the Medico-technical Committee of the Inter company Health and Safety at work service, to adapt the organization of these services to the farming sector and to proceed to insert into the Employment Code various coordinating drafting measures connected with the enactment of some of these provisions. These provisions are not connected, albeit indirectly, with those which appeared in the Bill to Reform Retirement Pensions.
(2010-617 DC, November 9th 2010, paras 23 and 24, p. 310)

Voting

Explanation of voting

The parties making the referral challenge the refusal at second reading by the President of the National Assembly, before recourse to paragraph 3 of Article 44 of the Constitution, to apply paragraph 13 of Article 49 of the Rules of procedure of said House, applicable when the timeframe allotted for consideration of a Bill is predetermined and whereby " Each M.P. may take the floor for a period of five minutes at the end of the vote on the last clause of the Bill under consideration in order to give a personal explanation of his vote". The Rules of procedure of the Houses of Parliament do not *per se* have constitutional status and the contended failure to comply with the abovementioned provisions of said Rules of procedure cannot as such render the legislative proceedings unconstitutional.
(2010-602 DC, February 18th 2010, paras 5 and 6, p. 64)

None of the provisions of the Rules of procedure of the National Assembly preclude the President of the sitting from suspending the sitting during explanations of voting.
(2010-605 DC, May 12th 2010, para. 4, p. 78)

The Rules of procedure of the Houses of Parliament do not *per se* have constitutional status. The alleged failure to comply with the provisions of paragraph 13 of Article 49 of said Rules of procedure whereby each M.P. may take the floor for a period of five minutes at the end of the vote on the last clause of the Bill under consideration in order to give a personal explanation of his vote without the time given over to such explanations of voting being deducted from the overall time shared between the groups cannot as such render the legislative proceedings unconstitutional. In the case under review, the decision of the President of the National Assembly to interrupt explanations of personal voting has not failed to comply with the requirements of clarity and accuracy of Parliamentary debate.
(2010-617 DC, November 9th 2010, para. 4, p. 310)

Exercising of the right to vote in person: Article 27 of the Constitution

Institutional Act

The constituent power laid down the principle in Article 27 of the Constitution whereby the right to vote of Members of Parliament be exercised in person and that, otherwise than in

exceptional cases provided for by the Institutional Act, no proxy voting be allowed. When so doing, it necessarily empowered the Institutional Act to define the cases in which all proxy voting is forbidden. Parliament when enacting the Institutional Act was thus at liberty to provide that "there shall be no proxy voting in voting to determine the opinion of the relevant Standing Committee of each House on a recommendation for appointment under the procedure provided for in paragraph 5 of Article 13 of the Constitution".
(2010-609 DC, July 12th 2010, paras 6 and 7, p. 143)

Methods of voting

Recourse to paragraph 3 of Article 44 of the Constitution (Recourse to a single vote on all or part of the text under debate)

The parties making the referral for review contend that in the National Assembly, during consideration of the statute organising the concurrent renewals of General Councillors and Regional Councillors the Government had recourse to the provisions of paragraph 3 of Article 44 of the Constitution providing for a single vote on all or part of the text under debate and thus failed to comply with the requirements of clarity and accuracy of Parliamentary debate. Parliamentary work and debate show that the application of these provisions did not adversely affect the clarity and accuracy of Parliamentary debate and did not fail to comply with any other requirements of constitutional status.
(2010-603 DC, February 11th 2010, paras 8 and 9, p. 58)

The parties making the referral for review challenge the "unfair recourse" by the Government to the provisions of paragraph 3 of Article 44 of the Constitution. Parliamentary work and debate show that the Government applied this provision in a manner which conforms to the Constitution.
(2010-602 DC, February 18th 2010, paras 7 and 8, p. 64)

Successive readings and promulgation

Urgency and accelerated procedure

Application of the accelerated procedure for an Institutional Bill: due regard for the period of 15 days between the tabling of the Bill and deliberation by the Senate, before which it was first tabled.
(2009-597 DC, January 21st 2010, para. 1, p. 47; 2009-598 DC, January 21st 2010 para. 1, p. 50)

Joint Committee

Recourse to the Joint Committee and request to the National Assembly to proceed to a final vote

By way of departure from paragraph 1 of Article 42 of the Constitution, debate on the Private Member's Bill before the National Assembly called upon to proceed to a final vote concerns the text put before this House and not the text of the Committee. Implied solution
(2010-609 DC, July 12th 2010, para. 1, p. 143)

Text of the Joint Committee not involving provisions still under debate

The parties making the referral for review contend that section 2 of the Act reforming Territorial Communities was enacted in proceedings which failed to comply with the requirements laid down in Article 45 of the Constitution which firstly require a connection albeit indirect between an amendment passed at first reading and the text tabled or transmitted and secondly the adopting by the Joint Committee of a common text on the basis of provisions still under debate. The text adopted by the Joint Committee shows that these provisions had been

agreed upon. The arguments based on failure to comply with Article 45 of the Constitution must thus be dismissed.
(2010-618 DC, December 9th 2010, paras 2,5 and 10, p. 367)

Specific procedures

Institutional Acts

Institutional Act pertaining to the Senate.

The Institutional Act pertaining to the application of paragraph 5 of Article 13 of the Constitution does not pertain to the Senate. It could thus be passed at final reading by the National Assembly without any failure to comply with the provisions of paragraph 4 of Article 46 of the Constitution.
(2010-609 DC, July 12th 2010, para. 1, p. 143)

Proceedings subjected to a timeframe

The parties making the referral challenge the refusal at second reading by the President of the National Assembly, before recourse to paragraph 3 of Article 44 of the Constitution, to apply paragraph 13 of Article 49 of the Rules of procedure of said House, applicable when the timeframe allotted for consideration of a Bill is predetermined and whereby " Each M.P. may take the floor for a period of five minutes at the end of the vote on the last clause of the Bill under consideration in order to give a personal explanation of his vote". The Rules of procedure of the Houses of Parliament do not *per se* have constitutional status and the contended failure to comply with the abovementioned provisions of said Rules of procedure cannot as such render the legislative proceedings unconstitutional.
(2010-602 DC, February 18th 2010, paras 5 and 6, p. 64)

The members of the National Assembly making the referral contend that the combination of the meeting "behind closed doors" of the Committee to which the Bill was referred and the predetermined timeframe for Parliamentary debate, as defined by Article 49 paragraphs 5 to 13 of the Rules of procedure of the National Assembly, infringed the constitutional requirements of clarity and accuracy of Parliamentary debate and failed to comply with the provisions of paragraph 13 of Article 49 of these same Rules of procedure whereby " Each M.P. may take the floor for a period of five minutes at the end of the vote on the last clause of the Bill under consideration in order to give a personal explanation of his vote. The time given over to such explanations of voting shall not be deducted from the overall time shared between the groups" The Rules of procedure of the Houses of Parliament do not *per se* have constitutional status. The alleged failure to comply with the provisions of paragraph 13 of Article 49 of said Rules of procedure cannot as such render the legislative proceedings unconstitutional. In the case under review, the decision of the President of the National Assembly to interrupt explanations of personal voting has not failed to comply with the requirements of clarity and accuracy of Parliamentary debate.
(2010-617 DC, November 9th 2010, paras 2 and 4, p. 310)

Quality of a statute

Principle of clarity and accuracy of Parliamentary debate

The parties making the referral for review contend that in the National Assembly, during consideration of the statute organising the concurrent renewals of General Councillors and Regional Councillors the Government had recourse to the provisions of paragraph 3 of Article 44 of the Constitution providing for a single vote on all or part of the text under debate and thus failed to comply with the requirements of clarity and accuracy of Parliamentary debate. Parliamentary work and debate show that the application of these provisions did not

adversely affect the clarity and accuracy of Parliamentary debate and did not fail to comply with any other requirements of constitutional status.
(2010-603 DC, February 11th 2010, paras 8 and 9, p. 58)

The parties making the referral argue that when suspending proceedings in public sitting after having announced that voting would take place on the motion for a preliminary rejection at second reading, the President of the National Assembly failed to comply with the regulations of the House and the requirements of clarity and accuracy of Parliamentary debate. The records of parliamentary proceedings show that the President of the sitting had not announced that voting had commenced prior to deciding to suspend the sitting during explanations on voting. The Rules of procedure of the Houses of Parliament do not *per se* have constitutional status and in all events no provision of the Rules of the National Assembly precludes the President of the National Assembly from suspending the sitting of the House during explanations on forthcoming voting on a motion. The argument raised must therefore be dismissed.
(2010-605 DC, May 12th 2010, paras 3 and 4, p. 78)

Sections 9 (status and organisation of OSEO), 12 (reform of the index-linking of certain rents) and 13 (empowering the Government to issue by Ordinance the statutory provisions necessary for the transposition of a Directive concerning the exercising of the rights of shareholders of listed companies) did not have any direct connection with those contained in the Bill. Nothing in the preparatory work or debate of Parliament showed that they were even indirectly connected with this Bill. They were thus enacted in proceedings which run counter to Article 45 of the Constitution. In addition they were enacted in a manner which failed to comply with the requirements of clarity and accuracy of Parliamentary debate.
(2010-607 DC, June 10th 2010, paras 3 to 6, p. 101)

The members of the National Assembly making the referral contend that the combination of the meeting "behind closed doors" of the Committee to which the Bill was referred and the predetermined timeframe for Parliamentary debate, as defined by Article 49 paragraphs 5 to 13 of the Rules of procedure of the National Assembly, infringed the constitutional requirements of clarity and accuracy of Parliamentary debate and failed to comply with the provisions of paragraph 13 of Article 49 of these same Rules of procedure whereby " Each M.P. may take the floor for a period of five minutes at the end of the vote on the last clause of the Bill under consideration in order to give a personal explanation of his vote. The time given over to such explanations of voting shall not be deducted from the overall time shared between the groups". Firstly, the requirements of clarity and accuracy of Parliamentary debate, which also apply to work in Committee, entail the keeping of a precise record of interventions before said Committees, of the grounds for amendments proposed to provisions under consideration and of the votes cast. In the case under review, a precise record has been kept of all the work done by the Committee. Secondly, the Rules of procedure of the Houses of Parliament do not *per se* have constitutional status. The alleged failure to comply with the provisions of paragraph 13 of Article 49 of said Rules of procedure cannot as such render the legislative proceedings unconstitutional. In the case under review, the decision of the President of the National Assembly to interrupt explanations of personal voting has not failed to comply with the requirements of clarity and accuracy of Parliamentary debate.
(2010-617 DC, November 9th 2010, paras 2 and 4, p. 310)

The parties making the referral argue that sections 1, 6 and 73 of the statute reforming Territorial Communities have been adopted in an improper manner of proceeding which fails to comply with the principles of clarity and accuracy of Parliamentary debate. Parliamentary work and debate show that the proceedings in which these provisions were enacted did not adversely affect the clarity and accuracy of Parliamentary debate and did not fail to comply with any other requirement of constitutional status.
(2010-618 DC, December 9th 2010, paras.2 and 9, p. 367)

Requirement that statute law be precise

Requirement deriving from the principle of the legality of offences and punishments (Article 8 of the Declaration of 1789)

Article 34 of the Constitution and the principle of the legality of offences and punishments which derives from Article 8 of the Declaration of the Rights of Man and the Citizen of 1789

put Parliament under a duty to specify the scope of the criminal law and to define crimes and major offences in sufficiently precise and clear terms to exclude any arbitrariness. The provisions pertaining to criminal punishments contained in the Act of June 2nd 1891 designed to regulate the authorization and operation of horse racing are sufficiently precise and hence do not fail to comply with said requirements.
(2010-73 QPC, December 3rd 2010, para. 10, p. 356)

Requirement that statute law be of normative scope

Article 6 of the Declaration of 1789 proclaims: "The Law is the expression of the general will". It derives from this Article as from all other norms of constitutional status pertaining to the purpose of the law that, subject to specific provisions set out by the Constitution, the purpose of the law is to lay down rules and hence it is to be given normative scope. A provision which removes betting and gambling from the normal law governing of freedom of enterprise is not devoid of normative scope.
(2010-605 DC, May 12th 2010, paras 27 to 29, p. 78).

POWERS OF REVIEW AND ASSESSMENT

Review of appointments

Parliament was at liberty to feel that, in view of their importance in guaranteeing rights and freedoms and their role in the economic and social life of the Nation, the posts listed in the Schedule to the Institutional Act submitted for review by the Constitutional Council came under the procedure provided for by paragraph 5 of Article 13 of the Constitution. The Constitutional Council merely reviews this list to ascertain that it contains no patent errors.
(2010-609 DC, July 12th 2010 para. 4, p. 143)

Parliament when enacting an Institutional Act provided that "there shall be no proxy voting in voting to determine the opinion of the relevant Standing Committee of each House on a recommendation for appointment under the procedure provided for in paragraph 5 of Article 13 of the Constitution". When thus specifying a case in which Members of Parliament are not authorized to delegate their right to vote, Parliament did not fail to comply with Article 27 of the Constitution with respect to Institutional Acts.
(2010-609 DC, July 12th 2010, paras 6 and 7, p. 143)

Parliament was at liberty, without failing to show due regard for the powers reserved for Institutional Acts, including when members of the Constitutional Council, the High Council of the Judiciary and the Defender of Rights are concerned, to appoint the relevant Committee of each House to give its opinion on the recommendations made by the President of the Republic on the basis of paragraph 5 of Article 13 of the Constitution.
(2010-610 DC, July 12th 2010, paras 3 and 5, p. 146)

Parliament was at liberty to provide that when a vote takes place in Committee under paragraph 5 of Article 13 of the Constitution, the votes cast shall be counted at the same time in both Houses of Parliament.
(2010-610 DC, July 12th 2010, para. 6, p. 146)

CONSTITUTIONAL COUNCIL AND NORMS OF REFERENCE

STATUS OF MEMBERS OF CONSTITUTIONAL COUNCIL

Appointed Members

Parliament was at liberty, without failing to show due regard for the powers of an Institutional Act, including when the members of the Constitutional Council are involved, to appoint the

relevant committees in each House to give an opinion on the recommendations for appointment made by the President of the Republic pursuant to paragraph 5 of Article 13 of the Constitution. The appointment of the relevant Committees is part of the internal organisation of the Houses of Parliament.
(2010-609 DC, July 12th 2010, para 5, p. 143)

SCOPE OF REVIEW OF CONSTITUTIONALITY

No jurisdiction of the Constitutional Council

Regulations

Article 131-21 of the Criminal Code provides for the existence of an additional penalty applicable, pursuant to the law, to certain crimes and major offences and, pursuant to the Decree, to certain minor offences. Where the punishment of minor offences is concerned, it is up to the regulatory power, exercising the powers vested in it by Article 37 of the Constitution and under the jurisdiction of the relevant Courts, to fix, in compliance with the requirements of Article 8 of the Declaration of 1789, the penalties applicable to the minor offences which it defines. Article 131-21 of the Criminal Code does not exempt the regulatory power from compliance with such requirements. The Constitutional Council has no jurisdiction to appraise the conformity of Article R 413-14-1 of the Highway Code with the principle of the necessity of offences..
(2010-66 QPC, November 26th 2010, para 5, p. 334)

ADMISSIBILITY OF REFERRALS FOR REVIEW (Article 61 of the Constitution)

Effect of referral for review

Review of unchallenged provisions of the statute referred for review

When reviewing the statute pertaining to the Limited Liability Sole Trader, the Council proprio motu reviewed Article L 526-12 of the Commercial Code and held it to be constitutional subject to a qualification as to interpretation.
(2010-607 DC, June 10th 2010 paras 7 to 9, p. 101)

ARGUMENTS RAISED (*A priori* review of statutes –Article 61 of the Constitution)

Inoperative arguments or arguments unsupported by the facts

Section 64 of the Finance Act for 2011 reintegrates into the Code of the Environment Article L 229-10 which provides for the issuing of greenhouse gas quotas against payment in 2011 and 2012. IV of this section 64 provides for its coming into force on June 30th 2011. The wording of this section shows that the issuing of quotas against payment is only provided "for the years 2011 and 2012". The argument based on the infringement of the principle of equality between companies which were granted their quotas for 2010 free of charge and those which have not

yet received their quotas although their installations were operated in 2010 is unsupported by the facts.
(2010- 622 DC, December 28th 2010, paras 12 to 15, p. 416)

Inoperative arguments (examples)

Inoperative request for the postponing of the coming into effect of provisions not designed to transpose a Directive on the date of the coming into effect of said Directive. (provisions transforming the Post Office (La Poste) into a Public Limited Company).
(2010-601 DC, February 4th 2010, paras 14,16 and 17, p. 53)

The parties making the referral for review challenge the enactment of three sections of the statute referred for review pertaining to the reform of Territorial Communities insofar as they fail to comply with the requirements of Article 39 of the Constitution which require prior consultation of the *Conseil d'Etat*, tabling in priority before the Senate of Bills dealing with the organization of Territorial Communities and the presentation of an impact study. These sections were introduced by way of amendment. The argument of failure to comply with the requirements pertaining to Government Bills is thus inoperative.
(2010-618 DC, December 9th 2010, paras 2 and 8, p. 367)

Arguments unsupported by the facts (examples)

The parties making the referral argue that when suspending proceedings in public sitting after having announced that voting would take place on the motion for a preliminary rejection at second reading, the President of the National Assembly failed to comply with the regulations of the House and the requirements of clarity and accuracy of Parliamentary debate. The records of parliamentary proceedings show that the President of the sitting had not announced that voting had commenced prior to deciding to suspend the sitting during explanations on voting. The Rules of procedure of the Houses of Parliament do not *per se* have constitutional status and in all events no provision of the Rules of the National Assembly precludes the President of the National Assembly from suspending the sitting of the House during explanations on forthcoming voting on a motion. The argument raised must therefore be dismissed.
(2010-605 DC, May 12th 2010, paras 3 and 4, p. 78)

The Members of Parliament making the referral argue that the Supplementary Finance Act for 2010 has failed to comply with institutional provisions pertaining to the use of the surplus of the proceeds of all kinds of taxes levied for the benefit of the State. As regards the Finance Act for 2010 as amended by the Supplementary Finance Acts of March 9th 2010, May 7th 2010 and June 7th 2010, no surplus of the proceeds of all kinds of taxes was ascertained in the statute referred for review, namely the last Supplementary Finance Act of 2010. The argument based on the failure to comply with the institutional provisions pertaining to the allocation of possible surpluses is unsupported by the facts.
(2010-623 DC, December 28th 2010, para. 5, p. 428)

APPLICATION FOR A PRIORITY PRELIMINARY RULING ON THE ISSUE OF CONSTITUTIONALITY

Procedure applicable before Courts of law and Administrative Courts

Priority nature of the application

To implement the right recognized by Article 61-1 of the Constitution for any person coming under the jurisdiction of the courts to argue that a statutory provisions infringes rights and freedoms guaranteed by the Constitution, paragraph 5 of Section 23-2 of the Ordinance of

November 7th 1958 referred to hereinabove and paragraph 2 of section 23-5 thereof specify the articulation between the review of statutes for the purpose of verifying their conformity with the Constitution, which is incumbent upon the Constitutional Council, and the review of their compatibility with the international and European commitments of France, which is incumbent upon the Courts of law and Administrative courts. The argument based on the incompatibility of a statutory provision with the international and European commitments of France cannot therefore be deemed to constitute an argument as to unconstitutionality.
(2010-605 DC, May 12th 2010, para. 11, p. 78)

Under the terms of section 23-3 of the Ordinance of November 7th 1958 referred to hereinabove the judge who transmits an application for a priority preliminary ruling on the issue of constitutionality, which must be heard within a strictly delimited period of time, may firstly hand down his decision without waiting for the ruling on the application for a priority preliminary ruling on the issue of constitutionality if statute law or regulations provide that he shall give his ruling within a specific time or as a matter of urgency; secondly he may also take all and any conservatory measures as may be necessary. He may thus immediately suspend any effect of the statute incompatible with the law of the European Union, ensure the preservation of the rights vested in persons coming under the jurisdiction of the courts by international and European commitments entered into by France and ensure the full effectiveness of the forthcoming decision of the court. Neither Article 61-1 of the Constitution nor Articles 23-1 and following of the Ordinance of November 7th 1958 referred to hereinabove preclude a judge, asked to rule in litigation in which the argument of incompatibility with European Union law is raised, from doing, at any time, all and everything necessary to prevent the application in the case in hand of statutory provisions impeding the full effectiveness of the norms and standards of the European Union with respect to the litigation underway.

Article 61-1 of the Constitution and sections 23-1 and following of the Ordinance of November 7th 1958 do not deprive Courts of law or Administrative Courts, including when they are requested to transmit an application for a priority preliminary ruling on the issue of constitutionality, of the freedom, or, when their decisions cannot be appealed against in domestic law, of their duty to refer to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.
(2010-605 DC, May 12th 2010, paras 14 and 15, p. 78)

Specific rules governing the transmission or referral of an application for a priority preliminary ruling on the issue of constitutionality to the Constitutional Council

Statutory provision and interpretation

When applying for a priority preliminary ruling on the issue of constitutionality any person coming under the jurisdiction of the courts has the right to challenge the constitutionality of the interpretation which an unbroken line of precedent has given to the provision which is challenged as running counter to constitutionally guaranteed rights and freedoms.

Article 365 of the Civil Code lays down the rules of attribution of parental authority as regards a minor who has been the object of a simple adoption. Since a decision of February 20th 2007, the *Cour de cassation* has constantly found that when the biological father or mother intends to continue to raise the child, the transfer of parental authority which would result from the adoption by the common law spouse or partner of the biological parent runs counter to the interests of the child and thus is an obstacle to the making of such an adoption order. The constitutionality of Article 365 of the Civil Code must therefore be examined not insofar as it introduces a distinction between children with respect to parental authority depending on whether they are adopted by the common law spouse or partner of their biological parent but insofar as it prohibits in principle the adoption of the minor child by the common law spouse or partner of the parent of said child.
(2010-39 QPC, October 6th 2010 paras 2 and 3, p. 264)

Article 61-1 of the Constitution recognises that each citizen subject to the jurisdiction of the courts is entitled to have the court examine the argument whereby a statutory provision

infringes constitutionally guaranteed rights and freedoms. Sections 23-2 and 23-5 of the Ordinance of November 7th 1958 referred to above set out the conditions in which an application for a priority preliminary ruling on the issue of constitutionality is to be transmitted by the said court to the *Conseil d'Etat* or the *Cour de cassation* and submitted for review by the Constitutional Council. These provisions provide in particular that the challenged statutory provisions must be "applicable to the litigation or proceedings underway". When applying for a priority preliminary ruling on the issue of constitutionality any person coming under the jurisdiction of the courts has the right to challenge the constitutionality of the interpretation which an unbroken line of precedent has given to the challenged provision.
(2010-39 QPC, October 6th 2010, para. 2, p. 264)

By a decision dated July 27th 2009 the Council of State held that "when approving the stipulations of the agreements of October 30th and December 14th 1940, the contents of which have been recalled above, the statute of April 30th 1941 must be considered not as having approved reciprocal obligations which the parties to the agreements may have freely entered into, but as having imposed upon the Compagnie agricole de la Crau, without the conferment of any benefit in return, the obligation to pay the State, for an unlimited period of time, a mandatory levy of a tax nature."

Contrary to what is affirmed by the Prime Minister, the disputed provisions must be considered as introducing not a contractual obligation but a tax of all kinds within the meaning of Article 34 of the Constitution.
(2010-52 QPC, October 14th 2010, paras 3 to 5, p. 283)

Applicable to litigation or proceedings underway or grounds for proceedings

It is not incumbent upon the Constitutional Council, when ruling on an application for a priority preliminary ruling on the issue of constitutionality, to call into question the decision whereby the *Conseil d'Etat* or the *Cour de cassation* has found, pursuant to section 23-5 of the Ordinance of November 7th 1958, that a provision was or was not applicable to the case in hand or the proceedings or was or was not the grounds for the proceedings.
(2010-1 QPC, May 28th 2010, para. 6, p. 91)

The Conseil d'Etat found that the provisions concerned by the application for a priority preliminary ruling on the issue of constitutionality were applicable to the litigation in question. The Constitutional Council does not verify this condition, notwithstanding the fact that said provisions are no longer in force.
(2010-16 QPC, July 23rd 2010, para. 2, p. 164)

The application for a priority preliminary ruling on the issue of constitutionality must be regarded as concerning the provisions applicable to the litigation in the course of which this application was made. In the case under review, the Constitutional Council is asked to review Article 796-55 as currently worded, and Articles 706-54 and 706-56 as worded prior to Act nº 2010-242 of March 10th 2010.
(2010-25 QPC, September 16th 2010, paras 1 to 4, p. 220)

Article 61-1 of the Constitution recognises that each citizen subject to the jurisdiction of the courts is entitled to have the court examine the argument whereby a statutory provision infringes constitutionally guaranteed rights and freedoms. Sections 23-2 and 23-5 of the Ordinance of November 7th 1958 referred to above set out the conditions in which an application for a priority preliminary ruling on the issue of constitutionality is to be transmitted by the said court to the *Conseil d'Etat* or the *Cour de cassation* and submitted for review by the Constitutional Council. These provisions provide in particular that the challenged statutory provisions must be "applicable to the litigation or proceedings underway". When applying for a priority preliminary ruling on the issue of constitutionality any person coming under the jurisdiction of the courts has the right to challenge the constitutionality of the effective scope which an unbroken line of precedent has given to the interpretation of the challenged provision.
(2010-39 QPC, October 6th 2010, para. 2, p. 264)

Having received a referral for a review of 8 Articles of the Public Health Code which have been recodified by Ordinance nº 2000-548 of June 15th 2000, the Council considers that the referral

relates to the wording of said Articles applicable to the litigation underway, i.e prior to the date of the coming into force of said Ordinance.
(2010-71 QPC, November 26th 2010, para. 1, p. 343)

It is not incumbent upon the Constitutional Council, called upon to rule on an application for a priority preliminary ruling on the issue of constitutionality, to call into question a decision whereby the Conseil d'Etat or the *Cour de cassation* held, pursuant to Section 23-5 of the Ordinance of November 7th 1958, that a provision was or was not applicable to the case in hand or the proceedings underway or was or was not the grounds for the proceedings.

The submittals of the Applicant petitioning the Constitutional Council to rule as to the conformity with the Constitution of the provisions of the Public Health Code pertaining to involuntary hospital confinement must therefore be dismissed insofar as these provisions do not appear in the application forwarded to the Constitutional Council by the Conseil d'Etat.
(2010-71 QPC, November 26th 2010, paras 11 and 12 p. 343)

The *Cour de cassation* transmitted for review by the Constitutional Council the Act of June 2nd 1891 designed to regulate the authorization and operation of horse racing as worded at the time it was referred to the judge a quo. The Constitutional Council has specified that this wording was prior to that of May 13th 2010, date of the coming into force of Act nº 2010-476 pertaining to the Opening up to Competition and the Regulation of Online Betting and Gambling.
(2010-73 QPC, December 3rd 2010, para. 1 p. 356)

No previous ruling by the Constitutional Council (1º of section 23-2 of the Ordinance of 7/11/1958)

An application for a priority preliminary ruling on the issue of constitutionality has been made to the Council under the provisions of Article 61 of the Constitution with respect to the Act of February 25th 2008. The Applicants contend that the provisions of section 1 of said statute are unconstitutional. In paragraphs 2 and following of its decision of February 21st 2008, the Constitutional Council paid particular attention to this section which inserts in particular Article 706-53-21 into the Code of Criminal Procedure. Paragraph 2 of the holding of said decision found section 1 of this statute to be in conformity with the Constitution. Subsequently, Article 706-53-21 of the Code of Criminal Procedure, which has since become Article 706-53-22 thereof, was found to be constitutional in the grounds and holding of a decision of the Constitutional Council within the meaning of Section 23-2 of Ordinance nº 58-1067 of November 7th 1958.

In the absence of any change of circumstances, it is not incumbent upon the Constitutional Council to examine the application for a priority preliminary ruling referred to hereinabove.
(2010-9 QPC, July 2nd 2010 paras 3 to 5, p. 128)

By its decision nº 2010-14/22 QPC of July 30th 2010, the Constitutional Council held Articles 63-1 and paragraphs 1 to 6 of Article 63-4 together with Article 77 of the Code of Criminal Procedure to be unconstitutional and added that it was not incumbent upon the Council to rule on paragraph 7 of Article 63-4 of said Code. There is hence no case for ruling on the application for a priority preliminary ruling on the issue of constitutionality concerning said Articles.
(2010-31 QPC, September 22nd 2010, para. 1, p. 237)

The first six paragraphs of Article 706-88 of the Code of Criminal Procedure originate from section 1 of Act nº 2004-204 of March 9th 2004. In paragraphs 21 to 27 of its decision nº 2004-492 DC of March 2nd 2004, the Constitutional Council looked closely at Article 706-88. It found that these provisions did not constitute any excessive infringement of the freedom of the individual. Paragraph 2 of the holding of said decision held these provisions to be constitutional. The first 6 paragraphs of Article 706-88 of the Code of Criminal Procedure have thus been held to be constitutional in the grounds and holding of a decision of the Constitutional Council. In the absence of any change in circumstances since the decision of March 2nd 2004 as regards the fight against organized crime it is not incumbent upon the Constitutional Council to review these provisions afresh.
(2010-31 QPC, September 22nd 2010, paras 3 and 4, p. 237)

The four final paragraphs of Article 706-88 of the Code of Criminal Procedure were added by section 17 of Act nº 2006-64 of January 23rd 2006. In its decision nº 2005-532 of January 19th 2006, the Constitutional Council did not examine paragraphs 7 to 10 of Article 706-88 which make it possible, by a further twenty-hour period renewable once, to extend the overall length of the period of remand in custody for police questioning to a total of 6 days for crimes or major offences constituting acts of terrorism. The application for a priority preliminary ruling on the issue of constitutionality as regards said paragraphs is thus admissible.
(2010-31 QPC, September 22nd 2010, paras 3 and 5, p. 237)

The placing in the same category, for the purposes of the wealth tax, of persons living as cohabiting couples and married couples derives from paragraph 2 of Article 885E. The wording of the latter is identical to that of paragraph 2 of section 3 of the Finance Act of 1982. In paragraphs 4 and following of its decision nº 81-133 DC of December 30th 1981, the Constitutional Council reviewed said section in particular. Paragraph 2 of the holding of this decision found section 3 to be constitutional. If the Act of November 15th 1999 has amended Article 885 A of the same Code to include partners in a Civil partnership (PACS) in those categories of persons subject to joint taxation for purposes of the wealth tax, as is the case with married couples and cohabiting couples, this amendment does not involve a change of circumstances within the meaning of Article 23-5 of the Ordinance of November 7th 1958 referred to above. Thus, in the absence of any change of circumstances since the handing down of said decision by the Council regarding the subjecting to the wealth tax of cohabiting couples it is not incumbent upon the Constitutional Council to proceed to carry out a further review of paragraph 2 of Article 885 E.
(2010-44 QPC, September 29th 2010, paras 8 and 9, p. 259)

Serious nature or difficulty of the issue raised

As held by the Constitutional Council in decision nº 2010-605 DC of May 12th 2010 on the Act pertaining to the Opening up to Competition and the Regulation of Online Betting and Gambling, the constituent power, when enacting Article 61-1 of the Constitution, recognized the right for any person coming under the jurisdiction of the courts to argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution. The subsequent modification or repeal of the challenged provisions does not as such cancel out any possible infringement of said rights and freedoms. It does not cause the procedure introduced by the constituent power to lose its effectiveness. It cannot *per se* preclude the transmission of the application to the Constitutional Council on the grounds of the absence of any serious nature of said application.
(2010-16 QPC, July 23rd 2010, para. 2, p. 164; 2010-55 QPC, October 18th 2010, para. 2, p. 291)

Procedure applicable before the Constitutional Council

The two applications transmitted by the *Cour de cassation* both concern the same statutory provision (Article L.7 of the Electoral Code) and as such they will be joined together and will be the object of one single decision.
(2010-6/7 QPC, June 11th 2010, para. 1, p. 111)

Intervening observations

For the second time, after decision nº 2010-42 QPC, the Constitutional Council referred to intervening observations, considering that the party making said observations has "locus standi" to intervene. In the case under review, the Française des Jeux was directly implicated by the parties making the application, which disputed the monopoly of said company over slot machines. This company intervened to explain that under no circumstances did it operate, nor was it entitled to operate such machines. The Constitutional Council availed itself of this intervention to implicitly dismiss the argument (by not including the name of the Française des Jeux in the list of companies likely to operate such machines). In the same decision the Constitutional Council held, when referring to the submittals of the Attorney and the latter's

intervention during the hearing, that a party to an appeal on a point of law before the *Cour de cassation* could put submittals to the Constitutional Council, notwithstanding the fact that it had not signed the application for the priority preliminary ruling on the issue of constitutionality.
(2010-55 QPC, October 18th 2010, para. 5, p. 291)

Determination of the provision referred to the Constitutional Council

The *Cour de cassation* transmitted to the Constitutional Council an application for a priority preliminary ruling on the issue of constitutionality concerning Article 207 of the Code of Criminal Procedure. The application concerns solely the faculty for the *Chambre de l'Instruction* to reserve for itself cases involving pre-trial detention.

The Constitutional Council finds that the application concerns the first paragraph of Article 207 of the Code of Criminal Procedure.
(2010-81 QOC, December 17th 2010, paras 2 and 3, p. 412)

Meaning and scope of a decision

No case for ruling

No case for ruling on Articles 62, 63, 63-1 and 63-4, paragraphs 1 to 6, of the Code of Criminal Procedure, held to be unconstitutional by decision n° 2010-14/22 QPC of July 30th 2010. Confirmation of no case for ruling as regards paragraph 7 of Article 63-4 of the same Code and Article 706-73 thereof, held to be constitutional by the Council in decision n° 2004-492 DC of March 2nd 2004. (cf decision n° 2010-14/22 QPC of July 30th 2010, para. 13)
(2010-30/34/35/47/48/49/50 QPC, August 6th 2010, para. 2, p. 215)

No case for ruling on Article 575 of the Code of Criminal Procedure, held to be unconstitutional by decision n° 2010-15/23 QPC of July 23rd 2010.
(2010-36/46 QPC, August 6th 2010, para. 2, p. 213)

No case for ruling on 1° and 3° of paragraph IV or section 164 of the Act of August 4th 2008 modernising the economy, found to be constitutional by decision 2010-19/27 QPC of July 30th 2010.
(2010-51 QPC, August 6th 2010, para. 1, p. 218)

The Constitutional Council has already, in decision n° 81-133 DC of December 30th 1981, held the provisions of paragraph 2 of section 3 of the Finance Act for 1982, reproduced in identical terms in paragraph 2 of Article 885E of the General Tax Code, to be constitutional. No change in circumstances justifies the Council reviewing afresh the conformity of said provisions with constitutionally guaranteed rights and freedoms. No case for ruling
(2010-44 QPC, September 29th 2010, paras 8 and 9, p. 259)

No case for ruling on paragraphs II and III of section 103 of the Supplementary Finance Act of December 30th 2008 held to be constitutional by the Council in its decision n° 2010-29/37 QPC of September 22nd 2010 (Issuing of National identity cards and passports).
(2010-59 QPC, October 6th 2010, para. 1, p. 274)

By its decision n° 2010-25 of September 16th 2010, the Constitutional Council held Article 706-56 of the Code of Criminal Procedure to be constitutional. There is therefore no need to rule on the application for a priority preliminary ruling on the issue of constitutionality concerning this Article.
(2010-61 QPC, November 12th 2010, para. 1, p. 324)

By its decision n° 2010-42 QPC of October 7th 2010, the Constitutional Council held to be constitutional Article L 2122-2 of the Employment Code which introduces specific rules for calculating the following of Trade Unions of certain categories of workers. There is thus no case for a fresh review of the constitutionality of said Article.
(2010-63/64/65 QPC, November 12th 2010, para 8, p. 326)

REVIEW OF CONSTITUTIONALITY

Nature of review

Power of appraisal vested in the Constitutional Council

The Constitution does not vest the Constitutional Council with any general power of appraisal and decision-making similar to that enjoyed by Parliament. It is therefore not incumbent upon it to seek to determine whether the constituency boundaries drawn for the election of Members of the National Assembly have been drawn as fairly as possible. Unlike the Committee provided for in Article 25 of the Constitution and the Conseil d'Etat, which may be called upon to do so when exercising its administrative jurisdiction, it is not incumbent upon the Constitutional Council to make recommendations in such matters.
(2010-602 DC, February 18th 2010, para. 20, p. 64)

Section 1 of the Institutional Act pertaining to the management of the social debt provides that the Social Security Financing Act shall provide for all the financial resources allocated to the repayment of the social debt until the final term thereof. The Constitutional Council will therefore be in a position to verify that said resources are sufficient to ensure that said term shall not be exceeded.
(2010-616 DC, November 10th 2010, para. 4, p. 317)

Under the provisions of Article 4 bis of Ordinance nº 96-50 of January 24th 1996 pertaining to the management of the social debt the Social Security Financing Act shall provide for all the financial resources allocated to the repayment of the social debt until the final term thereof and it shall be incumbent upon the Constitutional Council to verify that said resources are sufficient to ensure that said term shall not be exceeded. The Constitutional Council has found that section 9 the Social Security Financing Act for 2011 statute fixes the date of the term of the repayment of the social debt at 2025 and provides for the transfer of resources needed to ensure that said term be respected: 0.28 additional point of the generalised social contribution, part of the levies on investments and property together with an annual payment by the Retirement pension reserve fund of 2.1 billion euros.
(2010-620 DC, December 16th 2010, paras 5, 7 and 8 p. 394)

Conditions for taking into account extrinsic elements of a statute

Reference to Parliamentary debate and preliminary studies

The Constitutional Council held that three sections of the Bill pertaining to the Limited Liability Sole Trader, inserted at first reading, were not directly connected with the initial Bill. It consulted preliminary studies and Parliamentary debate to ascertain that they were devoid of any indirect connection with this Bill. Enactment proceedings unconstitutional.
(2010-607 DC, June 10th 2010, para. 6, p. 101)

Parliamentary debate on Act nº 2002-303 of March 4th 2002 shows that Article L 114-5 of the Family and Social Welfare Code is designed to ensure the assuming of expenditure for all persons suffering from a disability by a system which does not introduce any distinction based on the technical conditions in which the disability may be detected before birth, nor on the choice which the mother might have made subsequent to such a diagnosis. By thus deciding that the specific expenditure incurred throughout the lifetime of child due to his disability cannot constitute injury giving rise to compensation when the negligence claimed is not at the origin of the disability, Parliament took into account ethnic and social considerations which are the preserve of its power of appraisal.
(2010-2 QPC, June 11th 2010, para. 14, p. 105)

In order to review the constitutionality of paragraphs 7 to 10 of Article 706-88 of the Code of Criminal Procedure which have been inserted by section 17 of Act nº 2006-64 of January 23rd 2006 and which make it possible to extend the overall length of the period of remand in

custody for police questioning to a total of 6 days for crimes or major offences constituting acts of terrorism, the Constitutional Council referred to Parliamentary debate on the statute at the time of the enactment thereof.
(2010-31 QPC, September 22nd 2010, para. 5, p. 237)

When reviewing the Act prohibiting the concealing of the face in public, the Constitutional Council referred to the intention of Parliament.
(2010-613 DC, October 7th 2010, para. 4, p. 276)

Extent of review

Acknowledged limits of the discretionary power of Parliament

State of knowledge and techniques

When requiring that there be manifest negligence in order for the liability of a healthcare professional or a healthcare establishment to be incurred towards the parents of a child born with a disability which was not detected during pregnancy, Parliament intended to take into consideration the difficulties inherent in making prenatal diagnoses in view of the state of medical knowledge and techniques available at the time of such diagnoses. To this end, it has excluded recourse to mere presumptions or deductions as a basis for a claim. The concept of 'manifest negligence'is not the same thing as "recklessness". Thus, in view of the purpose it is sought to achieve, the narrowing of the requirements which must be met for the incurring of liability by healthcare professionals and healthcare establishments is not disproportionate.
(2010-2 QPC, June 11th 2010, para. 12 p. 105)

Thoroughness of review

Restricted review

Review of patent error

With regard to the determining of the length of the term of office of elected persons composing the deliberative body of a Territorial Community, the Constitutional Council reiterates that it is not vested with any general power of appraisal and decision-making similar to that enjoyed by Parliament. It is therefore not incumbent upon it to seek to determine whether the purpose Parliament sought to achieve could be attained by other means when the means retained are not patently unsuited to achieving said purpose.
(2010-603 DC, February 11th 2010, para. 13, p. 58)

Irrespective of the debatable nature of the grounds in the general interest raised to justify the drawing of boundaries of several constituencies by Ordinance nº 2009-935 of July 29th 2009 pertaining to the distribution of seats and the redrawing of constituencies for election of Members of the National Assembly, in particular in the *Départements* of Moselle and the Tarn, it does not seem, taking into account the progress made in the new drawing of boundaries and the variety and complexity of local situations giving rise to different solutions in compliance with the same demographic rule, that this redrawing of boundaries patently fails to comply with the principle of equality before suffrage.
(2010-602 DC, February 18th 2010, para 23, p. 64)

Parliament was at liberty to feel that, in view of their importance in guaranteeing rights and freedoms and their role in the economic and social life of the Nation, the posts listed in the Schedule to the Institutional Act submitted for review by the Constitutional Council came under the procedure provided for by paragraph 5 of Article 13 of the Constitution. The Constitutional Council merely reviews this list to ascertain that it contains no patent errors.
(2010-609 DC, July 12th 2010 para. 4, p. 143)

In view of the purposes which it is sought to achieve and taking into account the penalty introduced for non-compliance with the rule laid down by law, Parliament has enacted

provisions which ensure a conciliation which is not disproportionate between safeguarding public order and guaranteeing constitutionally protected rights.
(2010-613 DC, October 7th 2010, para. 5, p. 276)

Normal review

To review the conformity with the Constitution of Articles of the Public Health Code which organise hospital confinement of a person at the request of a third party, the Constitutional council has fully reviewed the proportionality achieved by Parliament in the reconciliation between the protection of persons suffering from mental illness and the prevention of offences against public order needed to safeguard rights and freedoms of constitutional status and the exercising of constitutionally guaranteed freedoms.
(2010-71 QPC, November 26th, 2010 paras 16 to 20, p. 343)

MEANING AND SCOPE OF DECISIONS

Injunctions to Parliament

In order to preserve the usefulness of this decision for cases pending, it is incumbent upon Parliament to provide for an application of the new provisions to such cases as are pending at the date of this decision in order to remedy the ascertained unconstitutionality within the time allotted by the Council.
(2010-1 QPC, May 28th 2010, para. 12, p. 91)

By Decrees dated November 17th 2009, the President of the Republic decided to consult the voters of Guyane and Martinique on the creation of a single Community exercising the powers devolved to the *Département* and the Region while still being governed by Article 73 of the Constitution. The majority of voters in these two Communities, consulted on January 24th 2010, voted in favour of this creation. In these conditions Parliament could refrain from fixing the number of Territorial Councillors in Guyane and Martinique without failing to comply with either the principle of specific legislative identity referred to in paragraph 1 of Article 73 of the Constitution or the principle of equality between Territorial Communities. However between now and 2014 it will be incumbent upon Parliament either to set up these single Communities or to fix the number of elected members sitting in the General and Regional Councils of these overseas *Départements* and Regions.
(2010-618 DC, December 9th 2010, para. 37, p. 367)

Whether provisions found to be unconstitutional are severable or not

Inseverability of unconstitutional provisions from all or part of the rest of the statute

Inseverability within a single section (examples)

Total censure

Asked to review the fixing of the number of Territorial Councillors by the Chart appended to the statute reforming Territorial Communities pursuant to section 6 of said statute, the Constitutional Council held the fixing of the number of Territorial Councillors to be unconstitutional in 6 *Départements*. Section 6 and the Chart appended to the statute, which constitute inseverable provisions, must therefore be held to be unconstitutional.
(2010-618 DC, December 9th 2010, para. 41, p. 367)

Consequential censure

The repeal of section 26 of Supplementary Finance Act for 1981 nº 81-734 of August 3rd 1981 and section 68 of Supplementary Finance Act for 2002 nº 2002-1576 of December 30th 2002

results in excluding Algerian Nationals from the scope of the provisions of section 100 of the Finance Act for 2007 n° 2006-1666 of December 21st 2006. This leads to a difference in treatment based on nationality between holders of veterans' disability pensions and retirement pensions depending on whether or not they are Algerian Nationals or Nationals of other countries belonging to the French Union or the Community or placed under French protectorate or trusteeship. This difference is unjustified as regards the statute which is designed to re-establish equality between benefits paid to veterans, whether they be French or foreign Nationals. Section 100 of the Act of December 21st 2006 must also be found to infringe the principle of equality.
(2010-1 QPC, May 28th 2010, para. 10, p. 91)

Scope of decisions in time

In the framework of an *a posteriori* review (Article 61-1)

In order to enable Parliament to remedy the ascertained unconstitutionality, the repeal of the provisions held to be unconstitutional is fixed at a date after publication of the decision. However in order to preserve the usefulness of this decision for cases pending, it is incumbent firstly upon courts to stay their ruling until said date in cases of which the outcome depends upon the application of provisions held to be unconstitutional and secondly it is incumbent upon Parliament to provide for an application of the new provisions to cases at the date of the decision.
(2010-1 QPC, May 28th 2010, para. 12, p. 91)

The Constitutional Council has specified the effects of the repeal which it has ordered: the repeal of Article L.7 of the Electoral Code will enable those involved, as from the date of this decision, to ask for their name to be entered immediately on the electoral roll in the conditions provided by statute.
(2010-6/7 QPC, June 11th 2010, para. 6, p. 111)

The Council holds unconstitutional Article 90 of the Merchant Navy Disciplinary and Criminal Code which provides for the Bench of Maritime Commercial Courts. The Council specifies that said repeal shall apply to all offences not having been the object of a final judgment on the date of the publication of its decision. As from said date, to exercise the jurisdiction which is vested in them by the Merchant Navy Disciplinary and Criminal Code, Maritime Commercial Courts shall sit with a Bench composed in similar fashion to that of ordinary courts of criminal jurisdiction.
(2010-10 QPC, July 2nd 2010, para. 5, p. 131)

The repeal of Article 575 of the Code of Criminal Procedure shall apply to all preliminary judicial criminal investigations which have not come to an end at the date of the publication of the decision holding said Article to be unconstitutional.
(2010-15/23 QPC, July 23rd 2010, para. 9, p. 161)

The Constitutional Council postpones until July 1st 2011 the repeal of Articles 62, 63, 63-1, 63-2 paragraphs 1 to 6 and Article 77 of the Code of Criminal Procedure which apply to remand in police custody for questioning.

The Conseil Constitutional reiterates firstly that it is not vested with any power of appraisal similar to that vested in Parliament. It is therefore not incumbent upon it to indicate the amendments to the rules of criminal procedure required to remedy the unconstitutional nature of the impugned provisions. Secondly, if in principle a finding of unconstitutionality must inure to the benefit of the party making the application for a priority preliminary ruling on the issue of constitutionality, the immediate repeal of the challenged provisions would fail to comply with the objective of preventing breaches of the peace and seeking out offenders and entail patently disproportionate consequences. The repeal of said provisions must therefore be postponed until July 1st 2011 in order to allow Parliament to remedy the unconstitutional nature thereof. Measures taken prior to this date under provisions found to be unconstitutional shall not be challenged on the grounds of said unconstitutionality.
(2010-14/22 QPC, July 30th 2010, para. 30, p. 179)

After having held unconstitutional the provisions of 3° of Article 323 of the Customs and Excise Code pertaining to retention for questioning, the Constitutional Council reiterates that it is not vested with any power of appraisal similar to that vested in Parliament. It is not incumbent upon the Council to indicate the amendments to the rules of Customs & Excise procedure for dealing with offenders needed to remedy this ascertained unconstitutionality. Although in principle a finding of unconstitutionality must inure to the benefit of the party applying for a priority preliminary ruling on the issue of constitutionality, the immediate repeal of the challenged provisions would fail to comply with the objectives of preventing breaches of the peace and seeking out offenders and would entail patently disproportionate consequences. Repeal of said Article must therefore be postponed until July 1st 2011 in order to allow Parliament to remedy this unconstitutionality. No measures taken under these same provisions shall be challenged on the grounds of the unconstitutionality ascertained herein.
(2010-32 QPC, September 22nd 2010, para. 9, p. 241)

Repeal

Repeal on the date of the publication of the decision

The Constitutional Council has found the second and third phrases of Article 207 of the Code of Criminal Procedure to be unconstitutional. On the basis of Article 62 of the Constitution, it holds that this finding of unconstitutionality shall take effect as of the date of publication of this decision. As from said date decisions whereby a *Chambre de l'Instruction* has reserved jurisdiction to rule on requests for release and, as needs be, to extend periods of pre-trial detention shall cease to be effective. The same holds good for measures of judicial supervision and placing under house arrest with electronic monitoring.
(2010-81 QPC, December 17th 2010, para. 8, p. 412)

Postponed repeal

The Constitutional Council has found that Article L 337 of the Public Health Code, subsequently become Article L 3212-7 to be unconstitutional.

Although in principle a finding of unconstitutionality must inure to the benefit of the party applying for a priority preliminary ruling on the issue of constitutionality, the immediate repeal of the Article L 337 of the Public Health Code, since become Article L 3212-7, would fail to comply with the objectives of protection of health and preventing offences against public order and would entail patently disproportionate consequences. Repeal of said Article must therefore be postponed until August 1st 2011 in order to allow Parliament to remedy this unconstitutionality. Prior to said date no measures of hospital confinement taken under these same provisions shall be challenged on the grounds of the unconstitutionality ascertained herein.
(2010-71 QPC, November 26th 2010, paras 26 and 41, p. 343)

Qualification

Asked to review Article 148 of the Code of Criminal Procedure which provides that an application for release of a person who is the object of a preliminary criminal investigation held in pre-trial detention shall be examined by the Freedom and Detention Judge after a written procedure without any hearing of all the parties, the Constitutional Council held that the necessary balancing of the rights of the parties nevertheless precludes the Freedom and Detention Judge from refusing such an application without the applicant or his Attorney having the opportunity to take cognizance of the opinion of the Investigating Magistrate and the charges preferred by the Prosecution. With this qualification as to interpretation Article 148 of the Code of Criminal Procedure does not fail to comply with the requirements of Article 16 of the Declaration of 1789.

The Constitutional Council specifies for the first time that this qualification shall apply to applications for release made as from the date of the publication of its decision.
(2010-62 QPC, December 17th 2010, para. 7, p. 400)

Effects of the repealed provision

The Constitutional Council is not vested with any general power of appraisal similar to that vested in Parliament. It is not incumbent upon the Council to indicate the fundamental principles of civil and commercial obligations which should be retained in order to remedy this ascertained unconstitutionality. However, in view of the number of domain names which have been assigned under the provisions of Article 45 of the Postal and Electronic Communications Code, immediate repeal thereof would have patently disproportionate consequences for legal certainty. Repeal of said Article must therefore be postponed until July 1st 2011 in order to allow Parliament to remedy the failure to exercise its powers to the full as ascertained by the Council. Regulatory measures implemented on the basis of said Article shall have no basis in law solely as from said date. No other measures taken under these same provisions shall be challenged on the grounds of the unconstitutionality ascertained herein.
(2010-45 QPC, October 6th 2010, para. 7, p. 270)

Calling into question of effects

— Proceedings underway

The finding of unconstitutionality regarding indent e of 2° of Article L 332-6-1 of the Town Planning Code on the assignment of land free of charge shall take effect as of the publication of the decision 2010-33 QPC. It may be raised in proceedings underway at said date and of which the outcome depends on the application of the provisions held to be unconstitutional.
(2010-33 QPC, September 22nd 2010, para. 5, p. 245)

The finding of unconstitutionality of paragraph IV of section 43 of Supplementary Finance Act for 2004 n° 2004-1485 of December pertaining to the non-adjustment of the opening balance sheet of the first non time-barred financial year shall take effect as of the publication of said decision. It may be raised in proceedings underway at said date and of which the outcome depends on the application of the provisions held to be unconstitutional.
(2010-78 QPC, December 10th 2010, para. 8, p. 387)

Authority of decisions of the Constitutional Council

Possible opposing of *res judicata*

Referrals for review as to norms of reference

Referrals for review as to the admissibility of Government Bills (Article 39, new paragraph 4)

Section 8 of the Institutional Act pertaining to the Economic, Social and Environmental Council completes Article 7-1 of Ordinance n° 58-1360 of December 29th 1958 to provide that the office of Senator is incompatible with membership of the Social, Economic and Environmental Council. This incompatibility already arises from the combination of Article 7-1 referred to above with Articles L.O 139 and L.O 297 of the Electoral Code. The Constitutional Council held these provisions to be constitutional in its decisions n° 85-205 DC of December 28th 1985 and 2000-427 of March 30th 2000. No case for proceeding to a fresh review of this incompatibility.
(2010-608 DC, June 24th 2010, para. 2, p. 124)

Referrals for review under Article 61-1 (a posteriori review)

An application for a priority preliminary ruling on the issue of constitutionality has been made to the Constitutional Council regarding Article 706-53-21 of the Code of Criminal Procedure.

An application for a priority preliminary ruling on the issue of constitutionality has been made to the Council under the provisions of Article 61 of the Constitution with respect to the Act of February 25th 2008. The Applicants contend that the provisions of section 1 of said statute are

unconstitutional. In paragraphs 2 and following of its decision of February 21st 2008 referred to above, the Constitutional Council paid particular attention to this section which inserts in particular comprised Article 706-53-21 into the Code of Criminal Procedure. Paragraph 2 of the holding of said decision found section 1 of this statute to be in conformity with the Constitution. Subsequently, Article 706-53-21 of the Code of Criminal Procedure, which has since become Article 706-53-22 thereof, was found to be constitutional in the grounds and holding of a decision of the Constitutional Council within the meaning of Section 23-2 of Ordinance nº 58-1067 of November 7th 1958.

In the absence of any change of circumstances, it is not incumbent upon the Constitutional Council to examine the application for a priority preliminary ruling referred to hereinabove.
(2010-9 QPC, July 2nd 2010 paras 3 to 5, p. 128)

An application for a priority preliminary ruling on the issue of constitutionality has been made to the Council under the provisions of Article 61 of the Constitution with respect to Act nº 2004-204 of March 9th 2004. The Applicants contend that the provisions of sections 1 and 14 of said statute are unconstitutional. In paragraphs 2 and following of its decision nº 2004-492 DC of March 2nd 2004, the Constitutional Council looked closely at section 1 of the statute under review, which "inserts into Book IV of the Code of Criminal Procedure a title XXV "Procedure applicable to organized crime" and included Article 706-73 of the Criminal Code. In particular in paragraphs 21 and following of the same decision it examined the provisions pertaining to remand in police custody for questioning and, among said provisions, paragraph I of Section 14 from which derives paragraph 7 of Article 63-4 of the Code of Criminal Procedure. Paragraph 2 of the holding of the decision of the Council held sections 1 and 14 of said statute to be constitutional. Thus paragraph 7 of Article 63-4 and Article 706-73 of the Code of Criminal Procedure have already been held to be constitutional in the grounds and holding of a decision of the Constitutional Council. In the absence of any change in circumstances, since the decision of March 2nd 2004 referred to above, as regards the fight against organized crime, it is not incumbent upon the Constitutional Council to proceed to a fresh review of said provisions.
(2010-14/22 QPC, July 30th 2010, paras 12 and 13, p. 179)

The Constitutional Council, in its decision nº 81-133 of December 30th 1981, held that the provisions of section 3 of the Finance Act for 1982, inserted with identical wording into paragraph 2 of Article 885E of the General Tax Code, were constitutional. In the absence of any change of circumstances since the handing down of said decision by the Council it is not incumbent upon the latter to proceed to carry out a fresh review of the conformity of said provisions with constitutionally guaranteed rights and freedoms.
(2010-44 QPC, September 29th 2010, paras 8 and 9, p. 259)

As held by the Constitutional Council in its decision nº 2010-42 QPC of October 7th 2010, Parliament, when defining the criteria of representitiveness of Trade Union by fixing the threshold at 10 % of votes cast during the first round of the latest professional elections, irrespective of the number of voters, did not fail to show due regard for the principles set out in paragraphs 6 and 8 of the Preamble to the Constitution of 1946. Articles L 2121-1 and L 2122-1 of the Employment Code are not unconstitutional.
(2010-63/64/65 QPC, November 12th 2010, para. 7, p. 326)

In cases where there is no opposition of *res judicata*

Change of circumstances

It its decision nº 93-326 of August 11th 1993 the Constitutional Council did not specifically examine Articles 63, 63-1, 63-4 and 77 of the Code of Criminal Procedure. It did however find that the amendments made to said Articles by the provisions referred for review were constitutional. These Articles of the Code of Criminal Procedure were subsequently amended on several occasions after the Act of August 24th 1993 referred to above. In comparison with the provisions examined by the Constitutional Council in its decision of August 11th 1993, the provisions which are currently challenged offer better supervision of recourse to remanding in police custody and enhanced protection of the rights of persons remanded.

Since 1993, certain changes in the rules of criminal procedure and the manner in which the latter has been implemented have led to ever more frequent recourse to the remanding of

persons in police custody for questioning and modified the balance of the powers and rights laid down by the Code of Criminal Procedure

The proportion of cases undergoing a preliminary judicial criminal investigation has constantly decreased and the practice of "real time" handling of criminal matters has been generalized. This practice has led to the decision of the Prosecuting authorities being taken on the basis of the report of the CID Police officer before the end of the period of remand. Even in proceedings involving complex or particularly serious occurrences, a person is henceforth often tried on the sole basis of evidence obtained before the expiry of the period of remand in police custody, in particular on the basis of confessions made during this period of time. Remanding suspected offenders in police custody for questioning has thus often become the main phase of the putting together of the case for the prosecution on the basis of which the person remanded will be tried in court.

In addition, numerous statutory reforms of Article 16 of the Code of Criminal Procedure, which fixes the list of persons having the status of CID Police officer, have led to a reduction in the requirements governing the attribution of the status of CID Police officer. Between 1993 and 2009 the number of personnel having such status rose from 25 000 to 53 000.

These changes have contributed to making remand in police custody for questioning something of a commonplace, including for minor offences. They have given greater importance to the outcome of police investigations in putting together the case for the prosecution on the basis of which a person will be tried in court. More than 790 000 decisions to remand persons in police custody for questioning were taken in 2009. These changes in fact and law justify a review of the constitutionality of the challenged provisions.
(2010-14/22 QPC, July 30th 2010, paras 14 to 18, p. 179)

Scope of previous decisions

Res judicata

The authority attached to decisions of the Constitutional Council under Article 62 of the Constitution does not restrict the jurisdiction of Courts of law and Administrative Courts to ensure that such international commitments shall prevail over a statutory provision which is incompatible with the same, even when the said provision has been held to be constitutional.
(2010-605 DC, May 12th 2010, para. 13, p. 78)

Article L.16 B of the Book of Tax Procedures originates from section 94 of Act nº 84-1208 of December 29th 1984. This section was especially reviewed and held to be constitutional by the Constitutional Council in paragraphs 33 to 35 of its decision of December 29th 1984. Subsequent to its insertion in the Book of Tax Procedures, it was amended by section 108 of Act nº 89-935 of December 29th 1989, VI of section 49 of Act nº 2000-516 of June 15th 2000 and I of section 164 of Act nº 2008-776 of August 4th 2008

Section 108 of the Act of December 29th 1989 was especially reviewed by the Constitutional Council and held to be constitutional in paragraphs 91 to 100 of its decision nº 89-268 of December 29th 1989. Section 49 of the Act of June 15th 2000 and section 164 of the Act of August 4th 2008 are not unconstitutional.

In the absence of any change of circumstance, it is not incumbent on the Constitutional Council to examine arguments raised against provisions which it has already held to be constitutional in its decisions referred to hereinabove. The arguments based on infringement of the right to property, of the inviolability of the home or failure to comply with Article 66 of the Constitution, which refer to provisions already held to be constitutional, must therefore be dismissed.
(2010-19/27 QPC, July 30th 2010, paras 4,5 and 10, p. 190)

Grounds given by reference to another decision

Section 21 of the Institutional Act pertaining to the application of Article 65 of the Constitution amends Article 43 of Ordinance nº 58-1270 of December 22nd 1958 which defines a "disciplinary offence" as "any failure by a Judge to perform the duties of his office, to act in an honourable, sensitive and dignified manner". 1º of section 43 provides that " the deliberate

and serious failure by a Judge to comply with a rule of procedure constituting a fundamental guarantee of the rights of the parties as ascertained by a *res judicata* decision of a Court of law shall constitute a failure by said Judge to perform the duties incumbent upon him". This definition complies with the constitutional requirements reiterated in paragraph 7 of the decision of the Constitutional Council nº 227-551 DC of March 1st 2007.
(2010-611 DC, July 19th 2010, para. 24, p. 148)

The accredited management and tax certification centres have been set up to provide their members with technical assistance in keeping accounts and ensure better knowledge of non salaried income in order to implement the objective of constitutional status of fighting tax avoidance, which derives from the objective of constitutional status of fighting tax evasion. As the Constitutional Council held in its decision nº 89-268 DC of December 29th 1989, Parliament, taking into account the specific nature of the legal regime of persons adhering to said accredited management and tax certificate centres, was at liberty to encourage membership of such centres by granting tax rebates, in particular a deduction, before January 1st 2006, corresponding to 20 % of taxable profits. Parliament was also at liberty to achieve this purpose by providing for an increase of 25 % in professional income of those taxpayers choosing not to join such a centre, as part of an overall reform of income tax which concerned all taxpayers and which suppressed the reduction of 20 % granted, prior to this tax reform, to members of an accredited management and tax certification centre.
(2010-16 QPC, July 23rd 2010, paras 6 and 7, p. 164)

COURTS OF LAW AND JUDICIAL AUTHORITY

COURTS OF LAW AND SEPARATION OF POWERS

A dual system of Courts and jurisdiction

The Constitutional Council recognises a dual system of Courts and jurisdiction at the pinnacle of which are the *Conseil d'Etat* and the *Cour de cassation*.
(2010-71 QPC, November 26th 2010, para. 35, p. 343)

Independence of Justice and Courts

Principle

Court of law

The principle of independence is inseparable from the holding of judicial office and derives from Article 16 of the Declaration of 1789.

Of the five members of the Maritime Commercial Court, two, or three members if the accused is not a sailor, are either Navy officers or civil servants or contractual employees of the State, all employed by the State and thus under the authority of the Government. Even though Article 90 of the Merchant Navy Disciplinary and Criminal Code precludes the inclusion on the Bench of a Director of Maritime Affairs involved in the bringing of proceedings or in the investigation of the case in hand, neither this Article nor any other statutory provision applicable to this Court offers appropriate guarantees such as to comply with the requirements of independence.
(2010-10 QPC, July 2nd 2010 paras 3 and 4, p. 131)

Under Articles 64 and 65 of the Constitution and Article 16 of the Declaration of 1789 the independence of the High Council of the Judiciary (CSM) contributes to the independence of the Judicial Authority.
(2010-611 DC, July 19th 2010, para. 5, p. 148)

The principle of independence is inseparable from the holding of judicial office

The Social Security Tribunal (TASS) is a civil court presided over by a Judge from the *Tribunal de grande Instance*. His two Assessors (assistant judges) are appointed by the Chief Justice of the Court of Appeal after consultation with the President of the Tribunal, from a list drawn up by the competent Authorities of the State mainly on the recommendation of representatives of professional organizations. It is incumbent upon the Chief Justice, at the end of this procedure for selecting candidates, to appoint the Assessors who have the skills and abilities to hold this office. These Assessors are not subject to the authority of the professional organizations which have put forward their name for appointment. Article L 144-1 of the Social Security Code lays down the guarantees of morality and independence of Assessors. In addition, the composition of this Tribunal ensures a balanced representation of employees and employers. The rules governing the composition of the TASS do not therefore fail to comply with the requirements of independence and impartiality which derive from Article 16 of the Declaration of 1789
(2010-76 QPC, December 3rd 2010 paras 8 and 9, p. 364)

Right to an effective judicial remedy

Application to legal proceedings

Although in the current state of the law, Courts of law have no jurisdiction to appraise the compliance with due process and the administrative decision leading to involuntary hospital confinement, the dual system of Courts and jurisdiction does not restrict their jurisdiction to assess the need for deprival of freedom in a given case.

Article L 351 of the Public Health Code provides that any person placed under hospital confinement without his consent or retained in any institution of whatsoever kind has the right to apply to the President of the *Tribunal de grande instance* at any time for the termination of this involuntary confinement. The right to apply to this judge is also vested in any person who may intervene in the interests of the persons hospitalised.

However, insofar as this is a measure of a custodial nature, the right to an effective judicial remedy requires that a judge from a Court of law be required to rule on the request for immediate release within the shortest possible time taking into consideration the possible need to collect additional information on the state of health of the person confined.
(2010-71 QPC, November 26th 2010, paras 33 to 40, p. 343)

STATUS OF MEMBERS OF THE JUDICIARY

Constitutional principles pertaining to status

Independence of judicial bodies

Of the five members of the Maritime Commercial Court, two, or three members if the accused is not a sailor, are either Navy officers or civil servants or contractual employees of the State, all employed by the State and thus under the authority of the Government. Even though Article 90 of the Merchant Navy Disciplinary and Criminal Code precludes the inclusion on the Bench of a Director of Maritime Affairs involved in the bringing of proceedings or in the investigation of the case in hand, neither this Article nor any other statutory provision applicable to this Court offers appropriate guarantees such as to comply with the requirements of independence.
(2010-10 QPC, July 2nd 2010 para. 4, p. 131)

Principles specific to the Judicial Authority

Unity of the Judiciary

Although the Judicial Authority is composed of trial judges and prosecutors, the intervention of a trial judge is required for extending the period of remand in police custody for questioning beyond 48 hours. The deprivation of freedom introduced by Article 803-3 of the Code of Criminal Procedure after the extension of a period of remand by the Public Prosecutor would therefore fail to comply with the constitutional protection of the freedom of the individual if the person remanded were not effectively brought before a trial judge before the expiry of the period of 20 hours provided for by said Article.
(2010-80 QPC, December 17th 2010, para. 11, p. 408)

Career progress

Administrative posts

Retirement, cessation of duties.

Section 1 of the Institutional Act pertaining to the age limits of members of the Judiciary raises this limit from 65 to 67 years of age for those members of the Judiciary born after 1956. Section 2 thereof applies this limit progressively to members of the Judiciary born between 1951 and 1956. Section 3 of the statute thus adjusts the system of voluntary remaining in post of Judges who have reached the age limit. These provisions are not unconstitutional.
(2010-615 DC, November 9th 2010, para. 2, p. 308)

Liability of members of the Judiciary

Liability for performance of duties as Trial judge

Section 21 of the Institutional Act pertaining to the application of Article 65 of the Constitution amends Article 43 of Ordinance nº 58-1270 of December 22nd 1958 which defines a "disciplinary offence" as "any failure by a Judge to perform the duties of his office, to act in an honourable, sensitive and dignified manner". 1º of section 43 provides that "the deliberate and serious failure by a Judge to comply with a rule of procedure constituting a fundamental guarantee of the rights of the parties as ascertained by a *res judicata* decision of a Court of law shall constitute a failure by said Judge to perform the duties incumbent upon him". This definition complies with the constitutional requirements reiterated in paragraph 7 of the decision of the Constitutional Council nº 227-551 DC of March 1st 2007.
(2010-611 DC, July 19th 2010, para. 24, p. 148)

ORGANISATION OF COURTS

Composition

Specialised Courts and Tribunals

Professional Tribunals

The composition of the Social Security Tribunal (TASS) corresponds to the joint manner of management of social security and the specific jurisdiction of said Tribunal to deal with

general litigation involving social security. Persons appointed to sit on this Tribunal are there to contribute their professional skills and abilities. The recognition of the power of representative professional organisations to put forward persons for appointment is directly connected with the purpose of the statute. In view of the purposes which Parliament has sought to achieve this does not fail to comply with the principle of equal access to public posts.

Firstly, the Social Security Tribunal (TASS) is a civil court presided over by a Judge from the *Tribunal de grande Instance*. His two Assessors (assistant judges) are appointed by the Chief Justice of the Court of Appeal after consultation with the President of the Tribunal, from a list drawn up by the competent Authorities of the State mainly on the recommendation of representatives of professional organizations. It is incumbent upon the Chief Justice, at the end of this procedure for selecting candidates, to appoint the Assessors who have the skills and abilities to hold this office. These Assessors are not subject to the authority of the professional organizations which have put forward their name for appointment. Article L 144-1 of the Social Security Code lays down the guarantees of morality and independence of Assessors. In addition, the composition of this Tribunal ensures a balanced representation of employees and employers. The rules governing the composition of the TASS do not therefore fail to comply with the requirements of independence and impartiality which derive from Article 16 of the Declaration of 1789.
(2010-76 QPC, December 3rd 2010 paras 7 and 9, p. 364)

Jurisdiction

Jurisdiction of Administrative courts

Reserving of jurisdiction for Administrative courts.

The Constitution recognizes a dual system of courts at the pinnacle of which are the *Conseil d'Etat* and the *Cour de cassation*. Among the "fundamental principles recognized by the laws of the Republic" is that whereby, except for matters reserved by their nature for the Courts of law, the setting aside in whole or part of decisions taken in the exercising of the public prerogatives vested in them by Authorities exercising executive power, their agents, Territorial Communities of the Republic or public bodies placed under their authority or control shall come under the final jurisdiction of Administrative courts.
(2010-71 QPC, November 26th 2010, para. 35, p. 343)

Regrouping of proceedings

When the application of a specific statutory provision or regulation might give rise to various proceedings which, under the normal rules governing jurisdiction, would be brought before both Courts of law and Administrative courts, Parliament is at liberty, in the interests of a good administration of justice, to unify rules of jurisdiction within the court most likely to be called upon to hear such proceedings.
(2010-71 QPC, November 26th 2010, para. 36, p. 343)

HIGH COUNCIL OF THE JUDICIARY (CSM)

Principles and organization

Under Articles 64 and 65 of the Constitution and Article 16 of the Declaration of 1789 the independence of the High Council of the Judiciary (CSM) contributes to the independence of the Judicial Authority.
(2010-611 DC, July 19th 2010, para. 5, p. 148)

When vesting the High Council of the Judiciary with "budgetary autonomy" Parliament when enacting the Institutional Act intended, without failing to comply with the Constitution, to

leave it to the Finance Act to set up a programme making it possible to regroup the credits allocated to said Council in a coherent manner.
(2010-611 DC, July 19th 2010, para. 13, p. 148)

When allowing the High Council of the Judiciary in plenary sitting to rule on issues pertaining to the professional ethics of members of the Judiciary without having been asked to do so by the Minister of Justice, section 17 of the Institutional Act pertaining to the application of Article 65 of the Constitution fails to comply with paragraph 8 of Article 65 thereof.
(2010-611 DC, July 19th 2010 para. 15, p. 148)

Subject to the requirements of impartiality likely to require their recusal, the members of the High Council of the Judiciary, the list of which is fixed by Article 65 of the Constitution, are vested by said Article with the right and duty to participate in the work and deliberations of said Council. When requiring that the disciplinary sections of the HCJ may only sit with a Bench comprising as many members of the Judiciary as non members, section 15 of the Institutional Act pertaining to the application of Article 65 of the Constitution leads to the exclusion of certain members of the HCJ from said deliberations in the event of other members being absent. Censure
(2010-611 DC, July 19th 2010, para. 14, p. 148)

Composition

Appointment of members of the HCJ

The sole section of the Institutional Act extends the term of office of the members of the High Council of the Judiciary until the expiry of a period of six months following the promulgation of the Institutional Act enacted for the application of Article 65 of the Constitution as worded pursuant to Constitutional Act nº 2008-724 of July 23rd 2008 and at the latest until January 31st 2011. This extension of the term of office of four years provided for by section 6 of Institutional Act nº 94-100 of February 5th 1994, which is limited and of a temporary and exceptional nature, is not unconstitutional.
(2010-606 DC, May 20th 2010, para. 2, p. 87)

Section 5-2 of Institutional Act nº 94-100 of February 5th 1994 is designed to promote the place of women on the High Council of the Judiciary on the basis of paragraph 2 of Article 1 of the Constitution whereby "Statutes shall promote equal access by women and men to elective offices and posts, as well as to positions of professional and social responsibility".
(2010-611 DC, July 19th 2010, para. 6, p. 148)

Section 5-2 of Institutional Act nº 94-100of February 5th 1994 provides that for the implementation of the procedure provided for in the final paragraph of Article 13 of the Constitution, appointments of qualified persons shall be submitted "to the relevant Standing Committee of each House of Parliament competent in matters of judicial organisation". These provisions are constitutional. However when specifying the relevant Standing Committee of each House, section 5-2 of the Institutional Acts laid down rules which are the preserve of ordinary statute law".
(2010-611 DC, July 19th 2010, para. 6 p. 148)

Status of members of the High Council of the Judiciary

When requiring that all members of the High Council of the Judiciary carry out their task in compliance with the requirements of independence, impartiality, integrity and dignity, new section 10-1 of Institutional Act nº 94-100 of February 5th 1994 intended to ensure that all the members of said Council, whether or not members of the Judiciary, be subject to the same obligations of professional ethics.
(2010-611 DC, July 19th 2010, para. 9, p. 148)

When vesting the High Council of the Judiciary with the power to rule on any possible failure by any of its members to perform his/her obligations or to rule, in cases of difficulty, or any recusal, sections 10-1 and 10-2 of Institutional Act nº 94-100 of February 5th 1994 necessarily

mean that the member of the Council under scrutiny cannot participate in the corresponding deliberation.
(2010-611 DC, July 19th 2010, para. 10, p. 148)

Except for the rules applicable to the member of the High Council of the Judiciary appointed in the capacity of Attorney, sections 10-1 and 10-2 of Institutional Act nº 94-100 of February 5th 1994 leave it to the members of said Council and, as the case may be, to the Council itself to decide in which cases a member shall refrain from participating in the work and decision-taking of said Council.

However under Article 65 of the Constitution the principle of the independence and impartiality of the members of the HCJ constitutes a guarantee of the independence of this body. It therefore precludes the Chief Justice or the Chief Public Prosecutor of the *Cour de cassation*, and all and any other high-ranking judges who are members of said Council, from deliberating or carrying out acts preparatory to the giving of opinions or taking of decisions either concerning appointments to posts in the courts under their direction or concerning judges in post in their courts. The principle of the independence of the members of the HCJ also precludes the Chief Justice or the Chief Public Prosecutor of the *Cour de cassation* from participating in decisions or opinions concerning members of the Judiciary who have previously been members of the HCJ under their presidency. With these qualifications, sections 10-1 and 10-2 referred to above are not unconstitutional.
(2010-611 DC, July 19th 2010 paras 11 and 12, p. 148)

Section 14 of the Institutional Act pertaining to the application of Article 65 of the Constitution rewords section 18 of Institutional Act nº 94-100 of February 5th 1994. It introduces within the High Council of the Judiciary Committees of admission in charge of examining complaints which parties to court proceedings lodge with the HCJ. When requiring that the members of these Committees cannot sit on the HCJ in disciplinary proceedings when the HCJ is asked to rule on a case forwarded it to it by the Admission Committee on which they sit or when the HCJ is asked to rule on facts identical to those raised by a party whose complaint was found inadmissible by the Committee, Parliament when enacting the Institutional Act sought to ensure the impartiality of the members of the HCJ when the latter sits to hear disciplinary proceedings.
(2010-611 DC, July 19th 2010, para. 18, p. 148)

No application of the principle of equal representation of both sexes

Section 3 of the Institutional Act pertaining to the application of Article 65 of the Constitution inserts into Institutional Act nº 94-100 of February 5th 1994 a section 5-2 designed to promote the place of women on the High Council of the Judiciary on the basis of paragraph 2 of Article 1 of the Constitution whereby "Statutes shall promote equal access by women and men to elective offices and posts, as well as to positions of professional and social responsibility". In view of this amendment of the Constitution by the Constitutional Act of July 23rd 2008, the Constitutional Council departs from its case law as set out in paragraph 58 of its decision nº 2001-DC of June 19th 2001
(2010-611 DC, July 19th 2010, para. 6, p. 148)

Appointment of Members of the Judiciary

Opinion of the High Council of the Judiciary.

Section 20 of the Institutional Act pertaining to the application of Article 65 of the Constitution rewords Article 38-1 of Ordinance nº 58-1270 of December 22nd 1958 pertaining to Chief Public Prosecutors. It provides that the latter are to be appointed to a post outside the hierarchy of the Public Prosecutor's Office of the *Cour de cassation*. It maintains the rule whereby persons appointed shall not hold said office for more than 7 years and determines the posts to which they may be appointed when this term of office has ended.

These provisions which draw the conclusions for the extension of the powers of the HCJ to give an opinion on the appointments of Chief Public Prosecutors are constitutional. (see previous case law now overruled: decision n° 2007-551 of March 1st 2007 para. 18)
(2010-611 DC, July 19th 2010, para. 23, p. 148)

Discipline of Members of the Judiciary.

Lodging of complaints with the High Council of the Judiciary by parties involved in legal proceedings

Sections 25 and 32 of the Institutional Act pertaining to the application of Article 65 of the Constitution insert into Ordinance n° 58-1270 of December 22nd 1958 provisions which set out the conditions of admissibility of complaints lodged with the HCJ by persons involved in legal proceedings. In principle the complaint is inadmissible if it concerns a judge who is still hearing said proceedings. However this will not be the case if "taking into account the nature of the proceedings and the seriousness of the alleged breach of duty, the Admission Committee is of the opinion that it must be investigated on the merits".

No constitutional requirement precludes a complaint lodged by a party to legal proceedings likely to involved disciplinary proceedings against a judge from being held to be admissible even when said judge or the Public Prosecutor's Office under whose authority he is placed is still hearing the proceedings which are the object of the lodging of the complaint. However in such cases, it is incumbent upon Parliament, when enacting Institutional Acts, to enact suitable guarantees that recourse to such a procedure does not adversely affect the impartiality of the judges called to account or their independence as regards the parties to the proceedings and does not fail to comply with the objective of constitutional status of the good administration of justice. In the case under review, this is not the case.

Firstly, these provisions fix, as sole criteria of admissibility, "the nature of the proceedings" and the "seriousness of the alleged breach of duty". They thus delegate to the Admission Committees the power to decide in which proceedings and in which cases the complaint of a party to legal proceedings in which the judge involved is still hearing said proceedings may be held admissible.

Secondly, they allow said Committees to hear the judge object of the complaint whereas under paragraph 1 of Article 51 of the Ordinance of December 22nd 1958 and paragraph 18 of Article 63 thereof, said judge is entitled to consult the file against him and the documents of the investigation only when the case has been officially referred to the HCJ.

Thirdly, the period after which the complaint ceases to be admissible, provided for by paragraph 4 of Article 50-4 of this same Ordinance and paragraph 8 of Article 63, does not begin to run until the proceedings have ended and the decision of the Admissions Committee as to the complaint lodged is not subject to any specific timeframe.
(2010-611 DC, July 19th 2010, paras 21 and 22, p. 148)

ECONOMIC, SOCIAL AND ENVIRONMENTAL COUNCIL

ORGANISATION

Composition

Section 7 of the Institutional Act pertaining to the Economic, Social and Environmental Council modifies the composition of the latter within the limits laid down by Article 71 of the

Constitution in order in particular to provide seats on the Council for persons involved in the protection of nature and the environment. It also seeks to promote the place of women within this body on the basis of paragraph 2 of Article 1 of the Constitution. Section 9 thereof limits membership of said Council to two successive terms of office and completes the provisions pertaining to the replacement of said persons in the event of their seats falling vacant. These provisions are constitutional.
(2010-608 DC, June 24th 2010, paras 5 to 7).

STATUS OF MEMBERS

Incompatibilities

Section 8 of the Institutional Act pertaining to the Economic, Social and Environmental Council completes Article 7-1 of Ordinance nº 58-1360 of December 29th 1958 to provide that the office of Senator is incompatible with membership of the Social, Economic and Environmental Council. This incompatibility already arises from the combination of Article 7-1 referred to above with Articles L.O 139 and L.O 297 of the Electoral Code. The Constitutional Council held these provisions to be constitutional in its decisions nº 85-205 DC of December 28th 1985 and 2000-427 of March 30th 2000. No case for proceeding to a fresh review of this incompatibility.
(2010-608 DC, June 24th 2010, para. 2, p. 124)

POWERS AND DUTIES

Mandatory consultation

Section 10 of the Institutional Act pertaining to the Economic, Social and Environmental Council provides that after a period of four years and then every ten years the Government shall provide Parliament, after consultation with the Economic, Social and Environmental Council, with a report updating the composition of said Council. It provides that this report shall be debated by Parliament. Firstly, when making this debate on the report dependent on prior consultation with the Economic, Social and Environmental Council it fails to show due regard for the powers of the latter as defined by Articles 69 and 70 of the Constitution. Secondly, when requiring debate by Parliament on this report it fails to comply with the manner of drawing up the agenda of the Houses of Parliament as determined by Article 48 of the Constitution. It is therefore unconstitutional.
(2010-608 DC, June 24th 2010, para. 10, p. 124)

Consultation by way of petition

Under the final paragraph of Article 69 of the Constitution: "A referral may be made to the Economic, Social and Environmental Council by way of petition in the manner determined by an Institutional Act. After consideration of the petition it shall inform the Government and Parliament of the action it proposes to take in response to said petition".

Section 5 of the Institutional Act pertaining to the Economic, Social and Environmental Council inserts into Ordinance nº 58-1360 of December 29th 1958 Article 4-1 which organises the right of petition provided for by the abovementioned provisions. This Article requires in particular that the petition involves an economic, social or environmental issue, be drafted in the French Language, signed by at least 500 000 adults, French Nationals or French residents, that it be held to be admissible by the Bureau of the Economic, Social and Environmental Council, that it then be the object of an opinion in plenary Assembly within one year and lastly,

that this opinion be addressed to the Prime Minister, the President of the National Assembly and the President of the Senate and be published in the Journal officiel. These provisions are not unconstitutional.
(2010-608 DC, June 24th 2010 paras 3 and 4, p. 124)

DECENTRALISED ORGANISATION OF THE REPUBLIC

GENERAL PRINCIPLES

Self-government of Territorial Communities

No infringement of this principle

The decision to merge Communes is not an act adversely affecting the self-government of Territorial Communities.
(2010-12 QPC, July 2nd 2010, para. 4, p. 134)

The issuing of national identity cards has entailed, for Communes, an increase in the expenditure they have to bear. However Parliament has fixed for all Communes, and not only those which have brought proceedings, a lump-sum payment. It intended to thus compensate in an egalitarian manner for the consequences of the Decree which improperly had Communes bear expenditure which should have been borne by the State. It did not introduce any disproportionate restrictions as regards the objectives in the general interest which it sought to achieve. In view of the amounts involved, the provisions which it has enacted do not result in any undermining of the self-government of said Communities.
(2010-29/37 QPC, September 22nd 2010, para. 8, p. 248)

When passing the measure of individualised social accompaniment for fragile persons or persons in difficulty, Parliament merely adapted the conditions of the normal legal powers governing social assistance which has been provided by *Départements* since the Act of July 22nd 1983 and which has been specified in greater detail by Article L 121-1 of the Family and Social Welfare Code and so doing did not adversely affect the self-government of Territorial Communities.
(Q2010-56 QPC, October 18th 2010, para. 6, p. 295)

The parties making the referral with regard to section 12 of the statute reforming Territorial Communities which inserts into Title I of Book II of the General Code of Territorial Communities a Chapter VII which comprises Articles L 5217-1 to L 5217-19, allowing Communes and Public Establishments of Inter-Communal cooperation to create on their own initiative metropoles likely to automatically be able to exercise the powers vested in *Départements* and Regions, argue that Parliament has failed to exercise to the full the powers which are vested in it by Articles 34 and 72 of the Constitution and failed to comply with the principle of self-government of Territorial Communities. Parliament has made the creation of a metropole dependent upon the intervention of the regulatory power by a Decree. It has provided that the Deliberative Assemblies of the *Département* or the Region shall be consulted by the representative of the State and will have a period of four months within which to reply. It also has, in Article L 5217-4, in addition to the power transferred to Communes, drawn up a list of the powers of *Départements* and Regions automatically transferred to the metropole together with a list of those powers as may be transferred by agreement with the *Départements* or Regions. It has thus not failed to exercise to the full the powers vested in it and, implicitly but necessarily, has not infringed the principle of self-government of Territorial Communities.
(2010-618 DC, December 9th 2010, paras 43 and 45, p. 367)

Section 5 of the Act reforming Territorial Communities has created Territorial Councillors who sit on both General Councils and Regional Councils. The provisions of this section do not

result in the creation of any new category of Communities resulting from a merger of the Regions and *Départements*. They thus do not adversely effect the existence of the Region or the *Département* or the distinction between these two Communities.

They do not vest the Region with the power to substitute its own decisions for those of the *Département* or to oppose the latter or control the exercising of its powers. They do therefore not introduce any administrative supervision by the Region of the *Département*.

Although the principle whereby Territorial Communities are self-governing by elected Councils implies that every Community has a Deliberative Assembly vested with actual powers, it does not preclude persons elected on the occasion of one single ballot from sitting in two Territorial Assemblies.

The challenged provisions do not therefore fail to comply with the principle of self-government of Territorial Communities.
(2010-618 DC, December 9th 2010 paras 21 to 23, p. 367)

Section 73 of the Act reforming Territorial Communities provides that, if the General Council, like the Regional Council for the Region, settles by its deliberations the affairs of the *Département*, this rule is only applied " in the areas of competence duly determined by statute law". It adds however that the General Council and the Regional Council may, by a specially reasoned deliberation,respectively concern themselves with any matter of interest to the *Département* or the Region when statute law has not conferred competence for the same on any other public body. In these conditions the Constitutional Council has dismissed the arguments that the suppression of the clause of "general competence" of the *Départements* and Regions has adversely affected the principle of self-government of Territorial Communities.
(2010-618 DC, December 9th 2010, paras 52,53 and 55, p. 367)

Local democracy

Status and term of office of elected local politicians

Neither the principle of self-government of Territorial Communities not the freedom of the ballot preclude Parliament from having a elected politician carry out his term of office in two different Territorial Assemblies.
(2010-618 DC, December 9th 2010, paras 23 and 26, p. 367)

Methods of voting

Paragraph 2 of Article 1 of the Constitution is neither aimed at nor results in stripping Parliament of the power conferred upon it by Article 34 of the Constitution to determine the system for electing members of the Houses of Parliament and Assemblies. The provisions of section 1 of the Act reforming Territorial Communities, which provides that Territorial Councillors shall be elected by a two round simple majority system do not *per se* adversely affect the objective of equal access for woman and men to elective offices and posts set out in Article 1 of the Constitution. Neither do they infringe the principle of equality before the law
(2010-618 DC, December 9th 2010, para 34, p. 367).

Equality before suffrage

When addressing the argument based on the infringement of the principle of equality before suffrage of the provisions fixing the distribution of Territorial Councillors by *Département*, the Constitutional Council reiterated the principle whereby the deliberative body of a *Département* or Region of the Republic must be elected on an essentially demographic basis with a distribution of seats and a drawing of boundaries complying as faithfully as possible with the principle of equality before suffrage. Although this does not mean that the distribution of seats must necessarily be proportionate to the population of each *Département* or Region nor that other imperative reasons of general interest cannot be taken into consideration, such considerations can only play a limited part in the process.

After having validated the proposal of a minimum of 15 Territorial Councillors by *Département* and dismissed the argument whereby there should be no great departure from the number of Cantons fixed prior to the reform, the Constitutional Council held the fixing of the number of Territorial Councillors in six Departments to be unconstitutional in view of a difference with the regional average of over 20 %.
(2010-618 DC, December 9th 2010, paras 38 to 41, p. 367)

Other consultations

The authorization thus conferred on Parliament under the final phrase of paragraph 3 of Article 72-1 of the Constitution whereby: "Voters may also be consulted on changes to boundaries of Territorial Communities in the conditions provided for by statute" does not constitute a right or freedom which may be raised to support an application for a priority preliminary ruling on the issue of constitutionality under Article 61-1 of the Constitution
(2010-12 QPC, July 2nd 2010, para. 3, p. 134)

Cooperation of Territorial Communities

Leading Community and prohibition on vesting any Community with power over another

Prohibition on one Community exercising authority over another

The provisions which create the position of Territorial Councillor called upon to sit on both General and Regional Councils do not vest the Region with the power to substitute its own decisions for those of the *Département* or to oppose the latter or control the exercising of its powers. They do therefore not introduced any administrative supervision by the Region of the *Département*.
(2010-618 DC, December 9th 2010 paras 22, p. 367)

POWERS OF TERRITORIAL COMMUNITIES

Distribution and transfer of powers

The powers vested in Mayors to issue national identity cards and passports are exercised in the name of the State and not that of the Communes. The argument based on the infringement of the provisions of Article 72-2 of the Constitution which concern solely powers exercised by Territorial Communities is thus inoperative.
(2010-29/37 QPC, September 22nd 2010, p. 248)

Section 73 of the Act reforming Territorial Communities provides that, if the General Council, like the Regional Council for the Region, settles by its deliberations the affairs of the *Département*, this rule is only applied " in the areas of competence duly determined by statute law". It adds however that the General Council and the Regional Council may, by a specially reasoned deliberation, respectively concern themselves with any matter of interest to the *Département* or the Region when statute law has not conferred competence for the same on any other public body. In these conditions the Constitutional Council has dismissed the arguments that the suppression of the clause of "general competence" of the *Départements* and Regions has adversely affected the principle of self-government of Territorial Communities.
(2010-618 DC, December 9th 2010, paras 52,53 and 55, p. 367)

Principle of subsidiarity (Article 72, paragraph 2)

Section 73 of the Act reforming Territorial Communities provides that, if the General Council, like the Regional Council for the Region, settles by its deliberations the affairs of the

Département, this rule is only applied " in the areas of competence duly determined by statute law". It adds however that the General Council and the Regional Council may, by a specially reasoned deliberation, respectively concern themselves with any matter of interest to the *Département* or the Region when statute law has not conferred competence for the same on any other public body. In these conditions the Constitutional Council has dismissed the arguments that the suppression of the clause of "general competence" of the *Départements* and Regions had failed to comply with Article 72, paragraph 2 of the Constitution whereby Territorial Communities "shall take decisions in all matters coming under powers that can best be exercised at their level".
(2010-618 DC, paras 52,53 and 55, p. 367)

Specific powers

Sanitary and social matters

Départements have been vested with normal legal powers in matters of social assistance since the Act of July 22nd 1983. This was specified by Article L 121-1 of the Family and Social Welfare Code.
(2010-56 QPC, October 1_th 2010, paras 5 and 6, p. 295)

FINANCES OF TERRITORIAL COMMUNITIES

Financial compensation for transfers, creation and extension of powers

Creation and extension of powers

When organising a system of individualised social accompaniment for fragile persons or persons in difficulty who already receive benefits, Parliament intended to reinforce the subsidiarity of legal measures in comparison with administrative measures of aid and assistance for such persons. It did not create any new benefit. It merely adapted the conditions of the normal legal powers governing social assistance which has been provided by *Départements* since the Act of July 22nd 1983 and which has been specified in greater detail by Article L 121-1 of the Family and Social Welfare Code. It did not carry out any transfer to *Département* of powers vested in the State neither created nor extended such powers. Hence when passing section 13 of the Act of March 5th 2007 which introduces personalised social accompaniment and section 46 which provides for a report of the implementation of this measure, particularly from a financial standpoint, Parliament did not fail to comply with paragraph 4 of Article 72-2 of the Constitution.
(2010-56 QPC, October 18th 2010, para. 6, p. 295)

Equalization mechanism (Article 72-2, paragraph 5)

Although the final paragraph of Article 72-2 of the Constitution providing that "Equalization mechanisms intended to promote equality between Territorial Communities shall be provided for by statute" is designed to reconcile the principle of freedom with that of equality by setting up mechanisms of financial equalization, failure to comply with this provision cannot *per se* be raised in support of an application for a priority preliminary ruling on the issue of constitutionality on the basis of Article 61-1 of the Constitution.
(2010-29/37 QPC, September 22nd 2010, para. 5, p. 248)

ORGANISATION OF TERRITORIAL COMMUNITIES

Overseas *Départements* and Regions (Article 73)

Common rules

Principle of adaptation of statutes (Article 73, paragraphs 1 and 2)

The authorisation given to the Government by section 87 of the Act reforming Territorial Communities is designed to permit the adaptation of Chapter 1 of Title I of this statute in overseas *Départements* and Regions pursuant to paragraph one of Article 73 of the Constitutution. In view of this purpose, this authorisation has been defined in sufficiently clear terms to comply with the requirements of Article 38 of the Constitution.
(2010-618 DC, December 9th 2010, para. 70)

Authorisation to intervene in fields which are the preserve of statute law (Article 73 paragraphs 3 to 6)

Section 1 of the Institutional Act pertaining to the *Département* of Mayotte is also designed to implement the amendment, by the Constitutional Act of July 23rd 2008, of the second and third paragraphs of Article 73 of the Constitution in order to allow overseas *Départements* and regions to be authorized by regulation to adapt locally regulatory provisions pertaining to Article 37 of the Constitution and, if need be, to lay down said provisions. It is not unconstitutional.
(2010-619 DC, December 2nd 2010, para. 3, p. 353)

Creation of a single Territorial Community or a single Assembly (Article 73, paragraph 7)

Section 5 of the Act reforming Territorial Communities which has introduced the post of Territorial Councillor is not aimed at nor does it result in setting up a single Assembly in overseas regions. In particular although the General Councils and the Regional Councils are composed of the same elected members, these Assemblies constitute distinct Assemblies vested with specific powers and governed by different rules of operation and organisation. The argument based on failure to comply with the final paragraph of Article 73 of the Constitution must therefore be dismissed.
(2010-618 DC, December 9th 2010, para. 30, p. 367)

By Decrees dated November 17th 2009, the President of the Republic decided to consult the voters of Guyane and Martinique on the creation of a single Community exercising the powers devolved to the *Département* and the Region while still being governed by Article 73 of the Constitution. The majority of voters in these two Communities, consulted on January 24th 2010, voted in favour of this creation. In these conditions Parliament could refrain from fixing the number of Territorial Councillors in Guyane and Martinique without failing to comply with either the principle of specific legislative identity referred to in paragraph 1 of Article 73 of the Constitution or the principle of equality between Territorial Communities. However between now and 2014 it will be incumbent upon Parliament either to set up these single Communities or to fix the number of elected members sitting in the General and Regional Councils of these overseas *Départements* and Regions.
(2010-618 DC, December 9th 2010, para. 37, p. 367)

Single Communities

Under Article L.O of the General Code of Territorial Communities, which has become Article L.O 3511-1 under 8° of section 1 of the Institutional Act pertaining to the *Département* of Mayotte, the *Département* of the Community of Mayotte, of which the status has been determined by an Institutional Act in accordance with Article 74 of the Constitution, shall become a Community governed by Article 73 of the Constitution and be known as "the *Département* of Mayotte" as from the first meeting following the partial renewal of its deliberative Assembly in

2011. It shall henceforth be self-governing, as provided for by Article 72 of the Constitution, " in the conditions provided for by statute".
(2010-619 DC, December 2nd 2010, para. 2, p. 353)

By Decrees dated November 17th 2009, the President of the Republic decided to consult the voters of Guyane and Martinique on the creation of a single Community exercising the powers devolved to the *Département* and the Region while still being governed by Article 73 of the Constitution. The majority of voters in these two Communities, consulted on January 24th 2010, voted in favour of this creation. In these conditions Parliament could refrain from fixing the number of Territorial Councillors in Guyane and Martinique without failing to comply with either the principle of specific legislative identity referred to in paragraph 1 of Article 73 of the Constitution or the principle of equality between Territorial Communities. However between now and 2014 it will be incumbent upon Parliament either to set up these single Communities or to fix the number of elected members sitting in the General and Regional Councils of these overseas *Départements* and Regions.
(2010-618 DC, December 9th 2010, para. 37, p. 367)

Overseas Communities governed by Article 74

Common rules

Sharing of powers (Article 74 paragraph 4)

Powers in matters of taxation

It is the task of Parliament enacting Institutional Acts, when it shares out between the State and Communities governed by Article 74 of the Constitution the power to establish, calculate and collect all kinds of taxes, to provided for provisions contributing to the attainment of the purpose of constitutional status which is the fight against tax evasion which derives from Article 14 of the Declaration of the Rights of Man and the Citizen of 1789.
(2009-597 DC, January 21st 2010, para. 2 p. 47)

It is the task of Parliament enacting Institutional Acts, when it shares out between the State and Communities governed by Article 74 of the Constitution the power to establish, calculate and collect all kinds of taxes, to provided for provisions contributing to the attainment of the purpose of constitutional status which is the fight against tax evasion which derives from Article 14 of the Declaration of the Rights of Man and the Citizen of 1789.
(2009-598 DC, January 21st 2010, para. 2 p. 50)

TRANSITIONAL PROVISIONS PERTAINING TO NEW CALEDONIA (Article 77)

Transfer of powers

Civil service of New Caledonia

Pursuant to Section 21 of the Institutional Act of March 19th 1999, enacted on the basis of Article 77 of the Constitution, the State is vested with powers with respect to the civil service of the State. Under section 22 of the same Institutional Act, New Caledonia is vested with powers with respect to the civil service of New Caledonia. The argument based on the infringement of the equality between retired civil servants of the State residing in New Caledonia and those of the Territorial civil service of New Caledonia must therefore be dismissed.
(2010- 4/17, QPC, July 22nd, para. 21, p. 156)

QUALIFIED INTERPRETATIONS

ECONOMIC LAW

Commercial Code

Pursuant to paragraphs 6 to 8 of Article L 526-12 of the Commercial Code, the declaration of the appropriation of property removes the property in question from property pledged as security to personal creditors of the businessman and the personal property from property pledged as security to his business creditors. Although Parliament was at liberty to make such a declaration assertable against creditors whose rights predated the filing of such a declaration, this is on condition that said creditors be personally informed of the declaration of appropriation and of their right to lodge an objection to the same. With this qualification, paragraph 2 of Article L 526-12 of the Commercial Code does not adversely affect the exercising of the right to property of creditors guaranteed by Article 2 and 4 of the Declaration of 1789.
(2010-607 DC, June 10th 2010, para. 9, p. 101)

PARLIAMENTARY LAW

Section 3 of the Institutional Act pertaining to the Economic, Social and Environmental Council completes section 8 of the Institutional Act of April 15th 2009 pertaining to the application of Articles 34-1, 39 and 44 of the Constitution in order to specify that the contents of an impact study appended to a Bill must set out " if need be, the follow up given by the Government to the opinion of the Economic, Social and Environmental Council". It is therefore held to be constitutional with the same qualifications as those set forth by the Constitutional Council in paragraphs 15 and 17 of decision nº 2009-579 DC of April 9th 2009.
(2010-608 DC, June 24th 2010, paras 11 and 12, p. 124)

SOCIAL LAW

Article L 452-3 of the Social Security Code (Application for a priority preliminary ruling on the issue of constitutionality)

Independently of the increase in the compensation granted to the party sustaining the occupational injury, the latter or, in the event of the death of the latter, the beneficiaries thereof, may claim compensation from the employer before the Social Security Tribunal for certain heads of claim listed in Article L 452-3 of the Social Security Code. In the presence of an inexcusable fault on the part of the employer, these provisions cannot, without constituting a disproportionate infringement of the rights of those who have sustained injury due to the faults of another, preclude these same persons from claiming before the same Tribunals compensation from the employer for all types of injury not covered by Book IV of the Social Security Code. Qualification.
(2010-8 QPC, June 18th 2010, para. 18, p. 117)

Article L. 351 of the Public Health Code, since become Article L 3211-12 (Application for a priority preliminary ruling on the issue of constitutionality)

Article L 351 of the Public Health Code provides that any person placed under hospital confinement without his consent or retained in any institution of whatsoever kind has the right

to apply to the President of the *Tribunal de grande instance* at any time for the termination of this confinement carried out without his consent. The right to apply to this judge is also vested in any person who may intervene in the interests of the persons hospitalised.

However, insofar as this is a measure of a custodial nature, the right to an effective judicial remedy requires that a judge from a court of law be required to rule on the request for immediate release within the shortest possible time taking into consideration the possible need to collect additional information on the state of health of the person confined.
(2010-71 QPC, November 26th 2010, paras 38 and 39, p. 343)

EDUCATION LAW

Act on Freedoms and Responsibilities of Universities (nº 2007-1199 of August 10th 2007)

The principle of independence of Teachers-Researchers precludes the President of the University basing his appraisal on grounds other than the administration of the University and in particular on the scientific qualification of the applicants retained after the selection procedure. With this qualification, the "power of veto" of the President, insofar as it applies to the recruitment, transfer or secondment of Teachers-Researchers, does not infringe the principle of independence of Teachers-Researchers.
(2010-20/21 QPC, August 6th 2010, paras 15 and 16, p. 203)

LAW OF TERRITORIAL COMMUNITIES

Institutional Act pertaining to the Institutional Act amending Book III of Part 6 of the General Code of Territorial Communities pertaining to Saint-Martin (nº 2010-92 of January 25th 2010)

The forthcoming agreement between the State and the Community of Saint-Martin in order to prevent double taxation and fight against tax evasion and tax avoidance shall be approved by an Institutional Act insofar as it affects the powers in matters of taxation transferred to this Community by an Institutional Act enacted on the basis of Article 74 of the Constitution. In addition the provisions thereof shall not be aimed at nor result in restricting the exercising of the powers vested in Parliament by Article 74 of the Constitution when enacting Institutional Acts, in particular when said agreement does not make it possible to fight tax avoidance in an effective manner.
(2009-598 DC, January 21st 2010, para. 5, p. 50)

The implementation of the new rules in matters of taxation applicable to the Community of Saint-Martin shall be carried out in due compliance with 2º of paragraph I of Article L.O 6314-4 of the General Code of Territorial Communities which provides: "The Community of Saint-Martin shall transmit to the State all and any information useful for the application of regulations concerning all kinds of taxes"
(2009-598 DC, January 21st 2010, para. 6, p. 50)

Institutional Act designed to allow Saint-Barthélemy to tax income from local sources of persons residing in Saint-Barthélemy for less than five years (nº 2010-93 of January 25th 2010)

The forthcoming agreement between the State and the Community of Saint-Barthélemy in order to prevent double taxation and fight against tax evasion and tax avoidance shall be

approved by an Institutional Act insofar as it affects the powers in matters of taxation transferred to this Community by an Institutional Act enacted on the basis of Article 74 of the Constitution. In addition the provisions thereof shall not be aimed at nor result in restricting the exercising of the powers vested in Parliament by Article 74 of the Constitution when enacting Institutional Acts, in particular when said agreement does not make it possible to fight tax avoidance in an effective manner.
(2009-597 DC, January 21st 2010, para. 5, p. 47)

The implementation of the new rules in matters of taxation applicable to the Community of Saint-Barthélemy shall be carried out in due compliance with 2° of paragraph I of Article L.O 6314-4 of the General Code of Territorial Communities which provides: "The Community of Saint-Barthélemy shall transmit to the State all and any information useful for the application of regulations concerning all kinds of taxes"
(2009-597 DC, January 21st 2010, para. 6, p. 47)

LAW OF PUBLIC AND SOCIAL FINANCE

General Tax Code

Double taxation (Article 155A)

As regards the application of Article 155A of the General Tax Code in the event of a person domiciled or resident abroad paying to a taxpayer in France all or part of the payment for the services supplied by the latter, the challenged provisions cannot be considered at subjecting said taxpayer to a double taxation for the one and the same tax. With this qualification, Article 155A does not constitute any patent infringement of the principle of equality before public burden sharing.
(2010-70 QPC, November 26th 2010, para. 4, p. 340)

Social Security Financing Act for 2000 (n° 99-1140 of December 29th 1999 – General tax on polluting activities)

When introducing a general tax on polluting activities, Parliament intended to integrate the amount thereof in the cost of polluting products or activities, in order to reduce the consumption of the former and limit the development of the latter. It has therefore subjected to this tax businesses which operate installations which stock household waste and those which eliminate special industrial waste. It has not however subjected to this same tax, with respect to storage of inert waste, businesses operating installations specially designed to receive such waste. The provisions of I of paragraph I of Articles 266 sexies and I of Article 266 septies of the Customs and Excise Code, as worded pursuant to Act n° 99-1140 of December 29th 1999, namely the Social Security Financing Act for 2000, cannot be interpreted, without infringing the principle of equality before public burden sharing, as applying to all quantities of inert waste referred to by said provisions.
(2010-57 QPC, October 18th 2010, para. 5, p. 299)

Institutional Act pertaining to the management of the social debt (n° 2010-1380 of November 13th 2010)

The provisions of Article 4 bis of Ordinance n° 96-50 of January 24th 1996 pertaining to the reimbursement of the social debt are to be combined with those of paragraph 1 of 2° of C of paragraph I of Article L.O of the Social Security Code, which provides that the Social Security Financing Act "shall determine for the forthcoming year, in an accurate manner, the general conditions of the financial equilibrium of social security taking into account in particular the

general economic conditions and the foreseeable outlook " and that "this equilibrium shall be defined taking into account the economic, financial and social data set out in the report provided for in section 50 of Institutional Act nº 2001-692 of August 1st 2001 pertaining to Finance Acts". Social Security Financing Acts cannot therefore lead, by a transfer without compensation to the benefit of the Caisse d'amortissement des recettes of revenue allocated to the social security regimes and to bodies contributing to the funding thereof, to a deterioration of the general conditions of the financial equilibrium of social security for the forthcoming year.
(2010-616 DC, November 10th 2010, para. 5, p. 317)

JUSTICE

High Council of the Judiciary (Institutional Act nº 94-100 of February 5th 1994)

Except for the rules applicable to the member of the High Council of the Judiciary appointed in the capacity of Attorney, sections 10-1 and 10-2 of Institutional Act nº 94-100 of February 5th 1994 leave it to the members of said Council and, as the case may be, to the Council itself to decide in which cases a member shall refrain from participating in the work and decision-taking of said Council.

However under Article 65 of the Constitution the principle of the independence and impartiality of the members of the HCJ constitutes a guarantee of the independence of this body. It therefore precludes the Chief Justice or the Chief Public Prosecutor of the *Cour de cassation*, and all and any other high-ranking judges who are members of said Council, from deliberating or carrying out acts preparatory to the giving of opinions or taking of decisions either concerning appointments to posts in the courts under their direction or concerning judges in post in their courts. The principle of the independence of the members of the HCJ also precludes the Chief Justice or the Chief Public Prosecutor of the *Cour de cassation* from participating in decisions or opinions concerning members of the Judiciary who have previously been members of the HCJ under their presidency. With these qualifications, sections 10-1 and 10-2 referred to above are not unconstitutional.
(2010-611 DC, July 19th 2010 paras 11 and 12, p. 148)

PUBLIC ORDER AND CRIMINAL LAW

Act prohibiting the concealing of the face in public (Act nº 2010-1192 of October 11th 2010)

In view of the purposes which it is sought to achieve and taking into account the penalty introduced for non-compliance with the rule laid down by law, Parliament has enacted provisions which ensure a conciliation which is not disproportionate between safeguarding public order and guaranteeing constitutionally protected rights. However, prohibiting the concealing of the face in public cannot, without adversely affecting Article 10 of the Declaration, result in restricting the exercising of religious freedom in places of worship open to the public. With this qualification, sections 1 to 3 of the statute referred for review are not unconstitutional.
(2010-613 DC, October 7th 2010, para. 5, p. 276)

CRIMINAL PROCEDURE

Code of Criminal Procedure

Article 148 (Freedom and Detention Judge)

Article 148 of the Code of Criminal Procedure provides that an application for release made by a person held in pre-trial detention during a preliminary judicial criminal investigation shall be considered by the Freedom and Detention judge on the basis of written documents without any hearing of all parties. Although the lack of said hearing of all parties is justified in the interests of the good administration of justice, the necessary balancing of the rights of the parties nevertheless precludes the Freedom and Detention Judge from refusing such an application without the applicant or his Attorney having the opportunity to take cognizance of the opinion of the Investigating Magistrate and the charges preferred by the Prosecution.

With this qualification as to interpretation, applicable to applications for release made as from the publication of decision n° 2010-62 QPC of December 17th 2020, Article 148 of the Code of Criminal procedure does not fail to comply with the requirements of Article 16 of the Declaration of 1789.
(2010-62 QPC, December 17th 2010, para. 7, p. 400)

Article 706-54 (FNAEG: National DNA Database)

The final paragraph of Article 706-54 of the Code of Criminal Procedure leaves it to a Decree to determine in particular the length of time such markers entered on the National DNA Database may be retained. It is therefore incumbent upon those vested with the power to make regulations to make this period of retention of such personal data proportionate to the nature and seriousness of said offences and the purpose which the database seeks to achieve, while adapting these provisions to the specificities of offences committed by minors. With this qualification leaving such measures to be determined by a Decree does not run counter to Article 9 of the Declaration of 1789.
(2010-25 QPC, September 16th 2010, para. 18, p. 220)

Under paragraph 3 of Article 706-54, CID Police officers may also, either on their own initiative or at the request of the Public Prosecutor or an Investigating Magistrate, compare DNA markers of any person concerning whom there exist plausible reasons to suspect that said person has committed a crime or major offence with existing entries on the database, without however entering said DNA marker on the database. The expression "crime or major offence" employed by Parliament is to be understood as referring to the offences listed by Article 706-55. With this qualification paragraph 3 of Article 706-54 of the Code of Criminal Procedure does not run counter to Article 9 of the Declaration of 1789.
(2010-25 QPC, September 16th 2010, para. 19, p. 220)

Article 529-10 (Lump sum fine)

The final paragraph of Section 529 of the Code of Criminal Procedure provides that the official from the Public Prosecutor's Office shall check whether the conditions of admissibility of the request for exoneration from payment of a lump sum fine or against an increase in the amount of a lump sum fine have been met. The right to an effective judicial remedy requires that any decision by the Public Prosecutor's Office that said request is inadmissible may be challenged before a Neighbourhood court

The same holds good for the decision finding a request for exoneration inadmissible when said decision results in converting the sum of money deposited into payment of the lump sum fine. With this qualification the powers vested in the official from the Public Prosecutor's office to hold a request for exoneration or a claim against a fine inadmissible do not fail to comply with Article 16 of the Declaration of 1789.
(2010-38 QPC, September 29th 2010, para. 7, p. 252)

Article 803-3 (Placing at the disposal of justice)

Article 803-3 of the Code of Criminal Procedure merely places the surveillance of the premises in which the person is retained under the control of the Public Prosecutor. The protection of the freedom of the individual by the Judicial Authority would not however be ensured if the judge before whom the person retained is called to appear were not in a position to give an immediate opinion as to the opportuneness of said retention. The judge must therefore be informed without delay of the arrival on the premises of the court of the person retained.

Furthermore, the Judicial Authority is composed of trial judges and prosecutors. The intervention of a trial judge is required for any extension of the period of remand beyond 48 hours. The deprivation of freedom introduced by Article 803-3 of the Code of Criminal Procedure after the extension of a period of remand by the Public Prosecutor would therefore fail to comply with the constitutional protection of the freedom of the individual if the person remanded were not effectively brought before a trial judge before the expiry of the period of 20 hours provided for by said Article.
(2010-80 QPC, December 17th 2010, paras 10 and 11, p. 408)

Article 803-3 of the Code of Criminal Procedure makes it possible to retain a person in custody for a maximum period of twenty hours between the end of the period of remand in custody for police questioning and the person actually being brought before a judge. Said Article merely places the surveillance of the premises in which the person is retained under the control of the Public Prosecutor. The protection of the freedom of the individual by the Judicial Authority would not however be ensured if the judge before whom the person retained is to appear were not in a position to give an immediate opinion as to the opportuneness of said remand. The judge must therefore be informed without delay of the arrival on the premises of the court of the person remanded.

Although the Judicial Authority is composed of trial judges and prosecutors, the intervention of a trial judge is required for any extension of the period of remand beyond 48 hours. The deprivation of freedom introduced by Article 803-3 of the Code of Criminal Procedure after the extension of a period of remand by the Public Prosecutor would therefore fail to comply with the constitutional protection of the freedom of the individual if the person remanded were not effectively brought before a trial judge before the expiry of the period of 20 hours provided for by said Article. Second qualification
(2010-80 QPC, December 17th 2010, paras 10 and 11, p. 408)