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Interview

The Constitutional Council stayed the course amid the coronavirus tempest, consistently protecting fundamental freedoms

Laurent Fabius, President of the Constitutional Council

30

Decisions

Ex ante constitutional review

36

Priority preliminary rulings on the issue of constitutionality

62

The roots of the priority preliminary ruling on the issue of constitutionality 16

Robert Badinter, President of the Constitutional Council from 1986 to 1995, Minister of Justice from 1981 to 1986

A look back at the QPC 20

Anne Levade, Professor at Panthéon-Sorbonne University (Paris I), President of the French Association of Constitutional Law

Bertrand Mathieu, Professor of Law, President Emeritus of the French Association of Constitutional Law

QPC 2020: A collective outlook on the citizen's prerogative

26

Nicole Maestracci, Member of the Constitutional Council, Chair of the QPC 2020 Technical Committee

SHARING THE MAJOR CONSTITUTIONAL DEBATES



Toward a Sustainable
Future: Environmental
Jurisprudence from
France's Constitutional
Council Breaks New
Ground

Towards a constitutional litigation framework providing for indemnification 108

Mathieu Disant, Professor of Law at Panthéon-Sorbonne University (Paris I)

Daniel C. Esty, Professor at Yale Law School

110

CHANGES AT THE COUNCIL



Continuity in the Constitutional Council's operations during the public health crisis

120

INTERNATIONAL RELATIONS



Interview

Papa Oumar Sakho, President of the Constitutional Council of Senegal

122

Marta Cartabia, President of the Italian Constitutional Court

128

Laurent Fabius

President of the Constitutional Council



INTERVIEW

The Constitutional Council stayed the course amid the coronavirus tempest, consistently protecting fundamental freedoms

In 2020, the health crisis arising from the COVID-19 pandemic has plunged the world into a human tragedy unprecedented since the Second World War, disrupting the exercise of our fundamental freedoms. How did the Constitutional Council weather this singular period?

By remaining true to its course: protecting freedoms.

They say that the key measurement of the strength of a fundamental law is its ability to help a society overcome hard times. The Constitution of 1958 rose to the challenge of the health crisis, once again demonstrating its resilience in critical situations. Even at the height of the crisis, the rule of law never broke down and the Constitutional Council continued to fulfil its role as guardian of the Constitution. Looking back, it is clear that the Council proved up to the task.

We see a striking analogy with events during the "security state of emergency" instituted in response to the terrorist attacks of 2015: the effectiveness of constitutional review was guaranteed to a large extent by the priority preliminary ruling on the issue of constitutionality (QPC).

Initially, public authorities refrained from seizing the Constitutional Council to review the law instituting a public health state of emergency. Only when Parliament voted to extend the law was the matter referred to us, via the direct channel, by the President of the Republic. the President of the Senate and the parliamentary opposition. Nonetheless. through the QPC, the Council was petitioned very early on to address the major issues raised by implementation of the initial public health state of emergency in terms of public freedoms. The Council thus had to rule on the timetable for municipal elections, the criminal offences instituted to prosecute failure to comply with the lockdown rules, as well as the particular rules for pre-trial detention provided for under the public health state of emergency.

Didn't the urgency of the health crisis compel the Council to stray from its established course of protecting liberties?

No. There was no "eclipse of fundamental rights" during this period; these rights enjoyed the same level of protection as at any other time. Throughout the health crisis, the Constitutional Council continued to fulfil its role, defending fundamental freedoms. We set out rules to govern the processing of personal medical data for tracing purposes, as well as lockdown and isolation measures. In particular, we stressed that pre-trial detention during the lockdown period could not be extended without a court order.

Of course, the Council itself had to alter its functioning to take account of the health constraints. I made sure that the body continued operating in conditions that would best preserve everyone's health. We held QPC public hearings and deliberation sessions in the Grand Salon of the Montpensier wing. Lawyers who so desired had the possibility of participating via videoconference. We had to limit public access to hearings – our internal rules of procedure so allow – but these restrictions posed few difficulties as we broadcast our hearings on our website.

While these practical solutions proved useful and even necessary under the circumstances, experience shows that there is no substitute for "face-to-face" dialogue. We therefore reinstated our rule that arguments must be heard directly, without videoconferencing, once it became possible to do so without endangering health. When it comes

to discussions within the College itself, including between sessions, we remain strongly attached to face-to-face meetings, which we endeavour to cultivate as an art form.

Commentators have noted that the Constitutional Council's endorsement of the measures implemented upon termination of the public heath state of emergency was highly nuanced. How would you present this decision?

Called upon to review certain provisions of the act organising the termination of the public health state of emergency, we paid close attention, in accordance with our established case law, to ensuring a proper balance in Parliament's approach to reconciling the constitutional requirement of protecting health with respect for fundamental rights and freedoms. This mechanism could only be deemed constitutional if subject to a set of conditions, in particular that potential restrictions on individual freedom

be limited in time (they are terminated without delay when no longer necessary) and in geographic scope (they may only be enacted in areas where the virus is actively circulating), and that they be intended solely to protect health.

On several points, the Council firmly specified how public authorities and the competent courts must interpret the law. For instance, this legislation could in

"THROUGHOUT THE HEALTH CRISIS, THE CONSTITUTIONAL COUNCIL CONTINUED TO FULFIL ITS ROLE, DEFENDING FUNDAMENTAL FREEDOMS »

no case serve as a framework for a general lockdown measure such as that which the public health state of emergency made possible. Constitutional review is an abstract exercise by its very nature. However, faced with this type of measure, assessments of the choices made by Parliament must obviously take into account the very particular dynamics of a health crisis linked to a pandemic, which is difficult to compare with security-based risks, for example.

Other decisions by the Council, such as those rejecting several provisions of the law aimed at combating online hate speech and the law establishing security measures to apply to the perpetrators of terrorist offences at the completion of their sentence, were also quite consequential.

Besides the health crisis, many other issues examining respect for fundamental freedoms have mobilised the Council in recent months. The two laws that you mention dealt with freedoms that are essential to our democratic order. In contrast to the cursory interpretation of these decisions made by some parties, the rulings themselves in no way challenge legislators' prerogative to fight dissemination of hateful content on the Internet or to impose security measures on the perpetrators of terrorist offences upon their release from prison. However, in accordance with the Constitution, the Council is responsible for ensuring that the methods adopted for this purpose are at once necessary. appropriate and proportionate to the objectives pursued. We have made this clear. It is up to Parliament to draw the relevant conclusions.

This year marks the 10th anniversary of the QPC. What is your assessment of the implementation of this new right granted to citizens involved in a trial to contest the application of a law that they consider incompatible with key legal principles?

Ten years in the life of a judicial procedure is a relatively short period of time, but it is enough for an initial serious assessment. For the QPC, which I like to call the "citizen's prerogative", this past decade has been quite intense.

From the outset, we must keep in mind the radical change it represented in our historically "legicentric" society. As of 2010, citizens have been entitled to challenge any statute passed by Parliament by invoking the

supreme law of the land in our country: the Constitution. The QPC marked an important step towards greater respect for our fundamental rights. For example, the right to legal counsel while in police custody, protection of public liberties during a state of emergency, the need to consider the principle of

fraternity in humanitarian aid, the constitutional requirement of acting in the best interests of a child, not to mention the affirmation that protection of the environment, the common heritage of all mankind, constitutes a constitutionally valid objective: all these advances have been brought about thanks to the QPC and the Constitutional Council. This "citizen's prerogative" stands out as a procedure that enables everyone to help keep our legacy of fundamental and universal freedoms in line with the times.

The QPC has matured considerably over the past ten years. Two recent examples point to its potential as a multiplying agent to uphold the fundamental principles of law.

The Council of State handed down a decision in December 2019 in which it recognised a principle of government liability for laws declared unconstitutional. This ruling opened a new chapter for constitutionalism while honing the effects of the QPC. Since then, whenever it has been called upon to review a case, the Constitutional Council has, in practice, almost systematically opted to allow implementation of this compensation mechanism.

"THE QPC MARKED AN IMPORTANT STEP TOWARDS GREATER RESPECT FOR OUR FUNDAMENTAL RIGHTS "

In another QPC ruling handed down in May 2020, confirmed and clarified in July 2020, the Constitutional Council reversed its case law, bringing unratified ordinances into the ambit of the Council's protection of fundamental rights and freedoms as of the expiry of the enabling period. Without calling into question other means of appeal

based on separate grounds, and without in any way affecting the role of Parliament, the only institution entitled, via express ratification, to endow ordinances with the force of statute law as of their signing, the innovation we set out consolidates review of nonratified ordinances that affect citizens'

"THANKS TO THE QPC, THE CONSTITUTION APPEARS MORE LIKE A LIVING LEGACY AT THE SERVICE OF CITIZENS "

rights and freedoms. The Constitutional Council is thus the arbiter of constitutionality in all legislative matters.

Thanks to the QPC, the Constitution appears more like a living legacy at the service of citizens. This conclusion comes out clearly in the extensive academic research programme we initiated, in the context of the ten-year anniversary of the procedure, to establish a transparent legal and sociological assessment of the QPC. The results of this research are published in a special issue of our journal, Titre VII. They were discussed at a seminar held at the Council. attended by more than 50 researchers, all members of the College, and the members of the QPC 2020 Technical Committee chaired by our colleague Nicole Maestracci. This event was an opportunity to assess both the significant progress achieved thanks to the QPC, and the continued room for improvement in the procedure. Periodic evaluations must now be carried out so that we may, together with all those who have an interest in the success of the QPC, ensure that the progress thus achieved when it comes to protecting the rights and freedoms guaranteed by our Constitution is indeed genuine.

Is citizens' knowledge of the QPC commensurate with the protection it can offer them?

The QPC is a revolution, but rather a "velvet revolution". Looking ahead to the ten-year anniversary of this citizen's prerogative, we wanted to gauge public

opinion with regard to the procedure. We commissioned a survey among one thousand people. The results showed that more than 80% of respondents see the QPC in a positive light, as a step forward for citizens. However, they remain largely unfamiliar with the procedure. To promote awareness of the QPC among a wider audience, we decided to organise a major event in November 2020 in

the form of a web-based broadcast bringing together people involved in the QPC, representatives of the executive branch, members of Parliament, presidents of supreme courts, lawyers and citizens.

Calls for constitutional amendments, an increasing number of appeals, etc. many of the initiatives proposed by citizens to strengthen environmental protection have a legal focus. How did the Constitutional Council find itself involved in this momentum of environmental activism?

As the guardian of the fundamental principles of law, this year the Council enshrined environmental protection as a new constitutionally valid objective. Going against the current with regard to decisions handed down by the supreme courts of other countries, we recognised the extraterritorial dimension of this objective by designating the environment the "common heritage of all mankind". With this dimension in mind, we validated the law prohibiting the export of pesticides on the grounds of their toxicity, even though such poisons may be authorised in other countries.



This environmental dispute will undoubtedly grow more intense.

What are the other significant decisions of the past year?

I note an increased role for labour law in constitutional litigation. In the area of collective bargaining, the Council recognised for the first time the principle of freedom of contract, while regulating the powers of the Minister of Labour in this area. We also addressed key issues in the field of higher education, handing down an unprecedented interpretation affirming that the constitutional require-

ment of free access to education applies to higher education. At the same time, we specified that this requirement does not preclude the levying of modest tuition fees, taking into account the financial capacity of students, where appropriate. With regard to "Parcoursup", we affirmed the existence of a constitutional right of access to administrative documents and considered that each institution of higher education must report on the criteria according to which applications are examined. Many important decisions were taken this year in the area of individual freedoms. In particular, the

Council had to clarify the scope of the principle that "no one shall be arbitrarily detained". We judged that Parliament could not authorise the continuation of isolation or restraint measures in psychiatric care settings beyond a certain period in the absence of oversight by the courts. We pointed out that the public health state of emergency did not allow the extension of pre-trial detention without a court order. Lastly, I would like to mention the modernisation of our case law on "legislative riders": while emphasising that this review in no way anticipates judgements regarding the constitutionality of the content of such provisions, we now recall the initial scope of each bill, and then demonstrate, for each provision struck down, why it must be regarded as having no direct or even indirect link with the spirit of the law.

What lessons can you draw from the initial application of the Shared Initiative Referendum (SIR) procedure, which led to heated debates in 2019?

After having monitored the entire process, as is our duty, we found that the bill to prevent the privatisation of Groupe ADP (formerly Aéroports de Paris) had not obtained the support of at least one-tenth of registered voters. Then, as we do for elections and referendums, we

made a point of commenting on the first implementation of this procedure. The electronic system for collecting support yielded reliable results. Nonetheless, we found that the procedure also suffered from shortcomings and a number of flaws, while raising certain questions: for example, the non-ergonomic design of the dedicated site, which was often

perceived as being complex, not very intuitive and insufficiently suited to a consultation intended for a wide audience. Another issue was the absence of provisions relating to the organisation of a public debate or audiovisual information campaign. Several improvements were recommended, such as examining the desirability of designing a public information system.

As soon as you took office, you sought to deepen relations between the Constitutional Council and the outside world. How was this policy expressed in 2020?

The College as a whole shares my conviction that the rule of law grows stronger as supreme courts adopt a global perspective.

We now take every opportunity to meet our fellow citizens, in schools, universities and other venues. Since 2019, the Constitutional Council has regularly

"WE CANNOT STRESS STRONGLY ENOUGH
THAT THE END - COMBATING THE CRISIS DOES NOT JUSTIFY THE MEANS - ATTACKING
THE FUNDAMENTAL PRINCIPLES OF LAW
THAT HOLD OUR SOCIETIES TOGETHER.
CONSTITUTIONAL JUDGES, KEEP WATCH! »

organised sessions outside of Paris. This year we held public QPC hearings in Pau and later in Lyon, during which we enjoyed in-depth exchanges with magistrates, lawyers, law professors and students. I have consistently been delighted with the welcome extended to us and the original initiatives that these events inspire, such as the work of the students

at Lyon Law School who took up the challenge of drafting decisions, constructively and on a volunteer basis, and who thus came to appreciate the complexity of the task. We will once again hold select hearings in different French cities once the health situation permits.

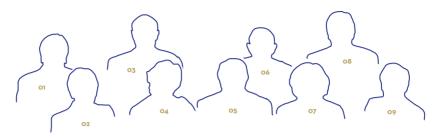
We maintain a continuous dialogue - verbal and non-verbal - with our foreign counterparts. Verbally, through regular exchanges, such as the seminar on "Global Constitutionalism" organised each September by Yale University, which brings together presidents and members of supreme courts for several days to discuss the current challenges of constitutional justice. This year's virtual seminar was an opportunity to share experiences regarding the health crisis and the climate emergency. Through these compared visions, each participant's legal reasoning is strengthened by an understanding of the arguments embraced by other legal professionals. We also engage in wordless dialogue, attentive to foreign trends and practices regarding the protection of fundamental freedoms. In this respect, we observe that the health crisis has served to "disinhibit" certain political leaders, who have taken advantage of the pandemic to weaken the rule of law. Faced with such behaviour, we cannot stress strongly enough that the end - combating the crisis - does not justify the means - attacking the fundamental principles of law that hold our societies together. Constitutional judges, keep watch!

What is your reaction to the ruling handed down by the Karlsruhe Constitutional Court on 5 May 2020 challenging the constitutionality of the European Central Bank's policy of repurchasing public securities?

ladmit to being somewhat perplexed. What is the impact of the Constitutional Court's decision on European financial mechanisms? How can we prevent

countries from challenging the European legal order by taking advantage of a loophole? These questions must be answered.

Since 2007. the Constitutional Council has asserted that the Constitution recognises "the existence of a Community legal order integrated into domestic law and distinct from international law". While the Council's case law ensures the protection of France's constitutional identity in terms reminiscent of the "Solange" case law on which our German colleagues rely. the harmonious nature of this integration is also one of the mainstavs of our case law, as evidenced by what we consider to be the constitutional requirement to transpose directives. Especially in times of crisis - economic, security-based, health-based - which are liable to fan the flames of national egocentrism, we must not forget that the strength of the European Union lies in the community of law, including through shared protection of fundamental rights. This remains one of our most precious assets.



MEMBERS AS AT 1 SEPTEMBER 2020

- 01_François Pillet
- 02_Dominique Lottin
- 03_Alain Juppé
- 04_Claire Bazy Malaurie
- 05_Laurent Fabius, President
- 06_Jacques Mézard

- 07_Nicole Maestracci
- 08_Michel Pinault
- 09_Corinne Luquiens

Former presidents of the French Republic are automatically lifetime members of the Constitutional Council. Currently, only former President Valéry Giscard d'Estaing sits at the Council.



A COLLEGIAL BODY

All decisions within the Constitutional Council are taken by a NINE-MEMBER college, known as the "Sages". "Sages"

Three
are appointed
by the President of
the Republic,
three by the President of
the National Assembly
and three by the
President of the
Senate.

They are appointed for NINE-YEAR terms.

The President of the Republic selects the President of the Council from among these NINE MEMBERS, one-third of whom are appointed EVERY THREE YEARS.

Several principles come together to ensure the body's independence:

Non-renewable terms.

An obligation to exercise reserve.

A rule barring members from holding any elected office or practising any other occupation.

Any citizen enjoying civil and political rights may serve on the Constitutional Council. In practice, seats are attributed to figures recognised for their expertise.

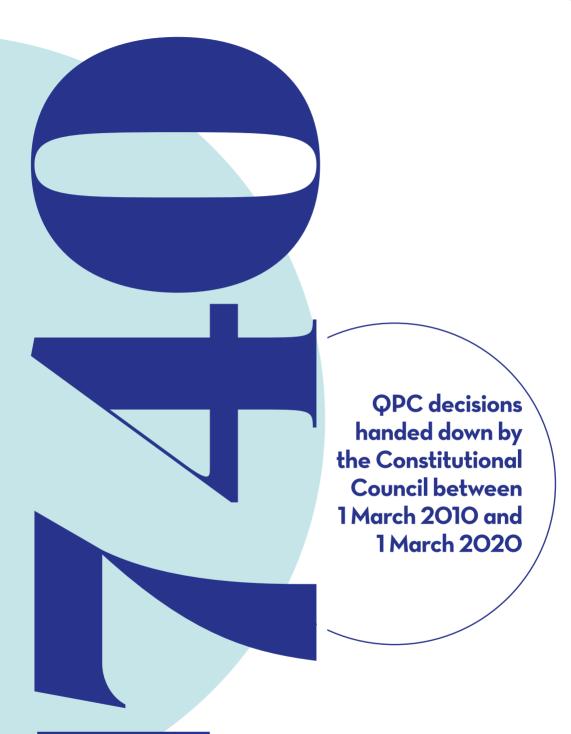
The composition of the Council is moving toward gender equality.

The Constitutional Council is a collegial body: all rulings are handed down in plenary session. A quorum of seven members is required for rulings, and decisions are taken by majority vote. Members may disagree on any given topic: in the event of a tie, the President holds a casting vote.

The OPC celebrates

Instituted by the constitutional revision of 2008, the priority preliminary ruling on the issue of constitutionality, known as the OPC (question prioritaire de constitutionnalité), came into force on 1 March 2010. Since then, the Council is no longer seized solely by political authorities before a law is promulgated: any citizen involved in a lawsuit can challenge the law applied in his or her case by invoking the Constitution, the supreme law of the land in our country. The 10-year anniversary of the QPC is an opportunity to draw up an initial assessment of this "citizen's prerogative" which has led to remarkable progress in the exercise of fundamental rights common to all.

years



QPC 2020 SPECIAL REPORT

To mark this anniversary, the Constitutional Council is enriching its website with a special video programme in which all Council stakeholders look back on the past decade and consider what the future has in store for this procedure. The video will be available on the website of the Constitutional Council as of late November.

Robert Badinter

President of the Constitutional Council from 1986 to 1995 Minister of Justice from 1981 to 1986



PERSPECTIVE

The roots of the priority preliminary ruling on the issue of constitutionality

n 1989, bicentennial of the Declaration of the Rights of Man and of the Citizen, I published an article in *Le Monde*¹ in which I denounced the ambiguity faced by people subject to trial in France. Since October 1981, they have been entitled to bring cases before the European Court of Human Rights in Strasbourg by invoking inconsistency of a law with the European Convention for the Protection of Fundamental Rights and Freedoms. On the other hand, they were denied access to the Constitutional Council in Paris, where the violation of their fundamental rights could be established.

This institutional imbalance, which made French citizens fully-fledged participants with regard to the Convention but mere spectators with regard to the French Constitution, could no longer continue. It had to be remedied by introducing an "exception of unconstitutionality" into French law.

As President of the Republic, François Mitterrand was no fan of constitutional review. He preferred parliamentary primacy to judicial oversight. I undertook to convince him by pointing out that we had before us a unique opportunity: while our country celebrated the bicentennial of the Declaration of Human Rights, he could tell citizens that, thanks to the exception of unconstitutionality and the opening of constitutional jurisdiction to those subject to it, every citizen could demand respect for his or her fundamental rights and freedoms. The political aspect of the argument intrigued him - especially as he was convinced that the Senate would oppose this draft constitutional amendment out of hostility towards the left-wing majority.

I therefore set to work with the first President of the Court of Cassation, Pierre Drai, the Vice-President of the Council of State, Marceau Long, and Bruno Genevois, Secretary General of the Constitutional Council, to draw up the procedure for the exception of unconstitutionality. We created a complex screening procedure.

As Dean Georges Vedel pointed out, this measure was not intended to impede access to the Constitutional Council, but was necessary to prevent the body from being overwhelmed by proceedings initiated by members of the public. Moreover, in my opinion, involving the nation's highest courts in this screening procedure was a way of instilling throughout the French judiciary the culture of respect for fundamental rights on which the American justice system and those of many European countries are based.

And so it was: the draft constitutional amendment creating the exception of unconstitutionality was approved in 1990 by the National Assembly, with a left-wing majority². Amongst the opponents at the time were two young and energetic deputies - Nicolas Sarkozy and François Fillon.

The bill was rejected by the Senate, which had a right-wing majority, but we obviously could not stop there.

In 1993, the Vedel Committee for institutional reform pronounced in favour of the exception of unconstitutionality. It is true that this Committee included some of the most active promoters of this initiative, particularly professors Guy Carcassonne and Olivier Duhamel. A new draft constitutional amendment was thus introduced in the Senate. However, the exception of unconstitutionality did not appear in the constitutional law adopted in 1993³...

Fortunately, attitudes evolved over time, and we know what happened next. In 2007, the Balladur Committee was formed. Édouard Balladur, after having fought against judicial review in 1993 as Prime Minister for a split government (left-wing President with a right-wing majority in Parliament), came to the conclusion that it was preposterous to grant French citizens access to judicial review of the European Convention for the Protection of Fundamental Rights and Freedoms while denying them the same access regarding the French Constitution.

The time had come, and the rest is parliamentary history. The fact remains that 20 years were lost because Parliament, particularly the Senate, was hostile to any initiative strengthening the powers of the Constitutional Council.

¹ Le Monde, 3 March 1989.

² Draft constitutional law of 30 March 1990, N° 1203, adopted by the National Assembly on 25 April 1990 (1st reading) and 21 June 1990 (2nd reading).

³ Constitutional Law N° 93-952 of 27 July 1993.

10 years of QPC in numbers

Data for the period from 1 March 2010 to 1 March 2020

- SINCE THE ESTABLISHMENT OF THE QPC -

In total, the Constitutional Council has handed down 740 QPC DECISIONS.

The average time frame for handing down a decision is **74 DAYS**.

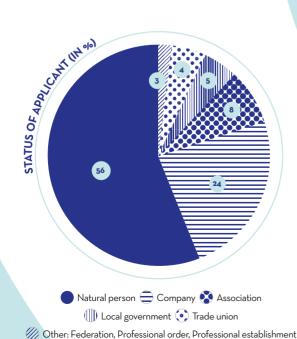
On average, **2 QPC** decisions are rendered by the Constitutional Council **EACH WEEK**.

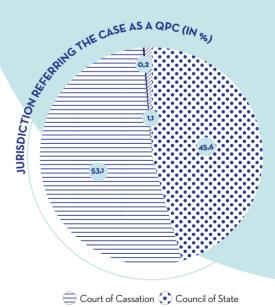
QPC procedures account for approximately 80% OF CONSTITUTIONAL COUNCIL RULINGS.

Nearly 1/3 OF PROVISIONS reviewed are judged UNCONSTITUTIONAL (total or partial unconstitutionality with or without deferred effect).

- NUMBER OF DECISIONS RENDERED BY YEAR -

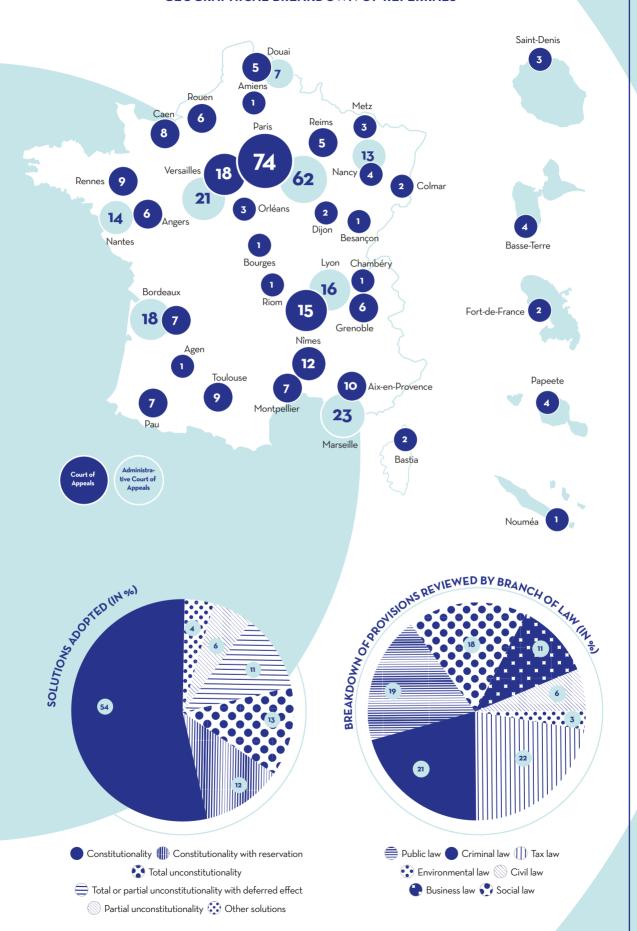






Ex officio rectification 🕢 Other cases

- GEOGRAPHICAL BREAKDOWN OF REFERRALS -





Anne Levade

Professor at Panthéon-Sorbonne University (Paris I) President of the French Association of Constitutional Law



A LOOK BACK

AT THE

OPC



Bertrand Mathieu

Professor of Law
President Emeritus of
the French Association of
Constitutional Law

t all started one morning in July 2008. A few hours before the first meeting of the Balladur Committee, the constitutional experts sitting on the Committee met in a café on Place de l'Alma at the invitation of Guy Carcassonne. The initial discussions focussed on topics that appeared essential and, unsurprisingly, one garnered unanimous agreement: the introduction of an ex post judicial review mechanism. Our reasons may have diverged, but in the end we all agreed to join forces. That was the crux of the matter, because the subject would not generate an immediate consensus in the Committee.

We then had to agree upon the form such a mechanism would take. Due to the need for legal certainty, the option of diffuse review by trial judges was quickly ruled out. On the other hand, a screening procedure had to be put in place to prevent the Council from being overwhelmed. President Debré put forth the idea of entrusting the Council with review of treaties and other international agreements. This proposal played its role as a "scarecrow", but was not explored in any depth.

That was the first step. On 29 October, the Balladur Committee recommended in its report that "a new right be granted to those subject to trial: the 'exception of unconstitutionality'".

The battle was not yet won. The Élysée Palace had already made it clear that the issue was to be considered! However, the future Article 61-1 was adopted with little resistance. Then came the most technical – and thus delicate – stage: the draft organic law relating to application. The political obstacles removed, it was time to face the legal obstacles.

The thorniest was of course the link with judicial review of international agreements, which served as the justification for according priority status to the preliminary ruling on the issue of constitutionality. In the end, it took two and a half years for the QPC to enter into force; ten years later, it is time to take stock.

The authors of these words share an initial - positive - observation. The QPC is a success: the public have adopted it, the Council has been transformed, and the Constitution irrigates all branches of law, including parliamentary debates.

For the rest, the nuanced nature of the topic dictates that each of us should take up the pen in his or her own name.

BM — Certain developments raise questions.

Firstly, the question of whether the Council will be able to resist the temptation to legislate from the bench like the European Court of Human Rights.

Secondly, the relationship between the Constitutional Council and Parliament. By modulating the effects over time of decisions to repeal provisions, by temporarily substituting a new provision for that judged unconstitutional (N° 2010-10 QPC) and by indicating to legislators the path to follow (N° 2019-827 QPC), the Council encroaches on the work and agenda of Parliament. This can go even further, e.g. when the Council of State infers that the national government holds liability for an unconstitutional legislative provision (CE 24 December 2019 No 425981). In reality, while this reform was necessary, the fears of those who saw it as a new phase in the decline of law and a weakening of political institutions vis-àvis the judiciary were not entirely unfounded.

AL — Strictly speaking, I am not worried about the future of the QPC because it seems to me that two major challenges have already been met.

The first concerned the consequences of its priority status. After the momentary tension between the judges responsible for screening and the Constitutional Council, we have seen that the former have managed to adapt, while the latter has found new ways of establishing a dialogue with the Court of Justice by using the preliminary ruling procedure. This is perfectly normal: the two types of review do not overlap. It will be interesting to see whether the Council eventually considers it useful to request an opinion from the Court in Strasbourg.

The second was the ex ante review, which some people said was doomed to disappear. This is not the case, and I am happy to note that the QPC has even strengthened this procedure.

Pau and Lyon,

two new destinations for Constitutional Council hearings outside the capital

n February 2019, the Council sat on the Metz Court of Appeals, followed in May by hearings in the Administrative Court of Appeals in Nantes.

On 6 November 2019, the Constitutional Council held a public hearing at the Pau Court of Appeals. Subsequently, on 4 March 2020, it moved to the premises of the Administrative Court of Appeals in Lyon,

Two cases focussing on tax issues (priority preliminary rulings on the issue of constitutionality N° 2019-812 and 2019-813) were on the agenda of the hearing held at the Pau Court of Appeals. Onlookers in attendance at the Lyon Administrative Court of Appeals attended the review of provisions from the Commercial Code and the Labour Code (QPC N° 2019-830 and 2019-831).

Hundreds of citizens from Pau and Lyon were present in the courtrooms and broadcasting rooms set up for the occasion to witness the adversarial exchanges between the claimants, the intervenors and the Government representative, as well as the discussions prompted by questions to the parties from the Council members.

As Laurent Fabius, President of the Constitutional Council, points out, these extramural hearings are all the more justified as "the priority preliminary ruling on the issue of constitutionality – which is celebrating a decade of existence this year – is everyone's concern as it is open to anyone involved in a trial".

By moving outside the walls of the Palais-Royal, the Council's nine members give more citizens the chance to discover the reality of constitutional justice in the courts of appeal or administrative courts of appeal close to their homes.

These "travelling" hearings are also an opportunity for the President and members of the Council to meet the magistrates and lawyers of the local jurisdiction, who are liable to raise QPCs in the course of any legal proceedings.

Eager to broaden the Council's travels through personal interactions with professors and students in the Council's host cities, President Fabius

Since February 2019, the
Constitutional Council has
regularly held select public
hearings addressing priority
preliminary rulings on the issue of
constitutionality (QPC) outside of
Paris. Two hearings "outside the
walls of the Palais-Royal" were
organised in 2020.





Watch the video of the Constitutional Council's trips to Pau and Lyon

bit.ly/qpcpaulyon

has chosen to come to these cities a second time in order to present the decisions rendered in the intervening period by the Constitutional Council on the cases heard. His addresses, at Pau Law School on 15 November 2019 and at Lyon III University on 12 March 2020, allowed for more in-depth discussions with students regarding the role and missions of the Constitutional Council and the work of its members.

In Lyon, a group of students even had the opportunity to submit to President Fabius, before the start of his lecture, the decisions they themselves had written on the cases heard the previous week. This exercise, which was conducive to fruitful exchanges, offered an opportunity for President Fabius to explain the Constitutional Council's QPC case law in a small, interactive setting.

4 March 2020

Public QPC hearing at the Lyon Administrative Court of Appeals

On 4 March

2020 at 10.56 am, the TGV from Paris entered Lyon Part-Dieu station with President Laurent Fabius on board, accompanied by the eight other members of the Constitutional Council, as well as the Secretary General and staff. After Metz, Nantes and Pau, it was time for Lyon, capital of the Gauls, to be the setting for the fourth hearing of the Constitutional Council outside of Paris. This choice makes perfect sense considering that two members of the Lyon Administrative Court of Appeals have served in the Constitutional Council's Legal Department, one from 2001 to 2011 and the other from 2011 to 2014. What an honour! But what a challenge too.

The honour was primarily

bestowed on the administra-

tive and judicial magistrates of Lyon, who had the chance to dialogue freely and easily with the President and members of the Council regarding the institution, the priority preliminary ruling on the issue of constitutionality, rights and freedoms, etc. This would have been inconceivable some fifteen years ago, when the Constitution, hidden behind the loi-écran doctrine whereby judges could base their decisions solely on statute law, was almost absent from the courts, and the Constitutional Council looked more like a regulator of public authorities than a court in itself. As for the challenge, it was particularly present in the afternoon hearing. Would anyone show up in the middle of school holidays? Would they understand the significance of the QPC?

Régis Fraisse

President of the Lyon

Administrative Court of Appeals

By all accounts, the event was a success!

The three large courtrooms set aside for the occasion, two of which were equipped for live broadcasts, were filled to capacity and could not accommodate all the people eager to attend this exceptional hearing. Of particular note was the presence of students who had undertaken to compose draft decisions to be compared with the official decisions that President Fabius was to make public the following week before several

hundred students and professors at Jean Moulin Lyon III University.

As for the QPCs listed, they were easily understandable to an audience that heard them for the first time at the hearing: one related to commercial operating permits to judge whether the obligation to take into account the impact of development projects on city centres unduly infringed on freedom of enterprise, while the other concerned labour courts, the issue being whether limiting the competence of

trade union advocates to the jurisdiction of a given region violates the principle of equality before the law, the rights of the defence and the right to effective judicial remedy. 5.34 pm: The TGV left Part-Dieu station for Paris. but there remains a shared impression that such hearings. which allow citizens outside the capital to meet their constitutional decision-makers and contribute to dialogue between judges, should



Conference by Laurent Fabius at Lyon Law School

A special opportunity for dialogue with students





Thanks go out to Pascale Deumier and Philippe Blacher, Professors at Lyon III University

Law School

The Constitutional Council's meeting at Jean Moulin University (Lyon III) Law School, with Dean Hervé de Gaudemar, was an opportunity for students to develop greater insight into the constitutional process. Familiar with the Council's case law, which they have been working on since their first year, many students enrolled in undergraduate, master and doctorate programmes attended the event in two lecture halls. They were able to deepen their knowledge of constitutional litigation by listening to and interacting with President Fabius. The President particularly highlighted three points:

the central role of parties to the proceedings; the importance of oral arguments during the hearing; and the specific implications of the QPC. An explanation of QPC decisions handed down served to complement academic learning by putting issues of constitutionality into context.

The event was also an opportunity for some students to better understand the constraints and difficulties of exercising judicial judgement and drafting a constitutional decision. In fact, some 40 students, supervised by professors Pascale Deumier and Philippe Blachèr, took part in an exercise consisting in writing draft decisions on the two cases presented at the Lyon hearing (QPC 830 and 831). This group, composed of volunteers from a variety of programmes - Master 1 ("Judicial Culture"; "Legal Profes-

sions": "Public Law"), Master 2 ("Fundamental Public Law") and Institutes of Legal Studies ("Preparation for the National School for the Judiciary"), explored the preparatory work on the contested provisions, examined the relevant constitutional case law. attended the hearings at the invitation of the Lyon Administrative Court of Appeals, deliberated on the meaning of their decisions and then took part in the difficult exercise of drafting. Their draft decisions were sent to the Constitutional Council, where they were read by President Fabius who offered students a precise and personalised analysis of their work during a dedicated meeting prior to his lecture at the Law School. The students were struck by the fact that constitutional judges do not decide on the continued application of a law with a simple "yes" or "no";

they sometimes prefer to render intermediate decisions that complement the wording of the law through "interpretive reservations". As such, in one of the two cases, the Constitutional Council did not strike down the law: instead, it simply supplemented the provision in order to place employees defended by lawyers and those defended by trade unions on an equal footing. In so doing, the Council does not merely carry out review - i.e. assess the relationship between the law and the Constitution by means of interpretation - but also gives concrete form to legislative standards, providing a detailed response to a legal problem raised by a



Amandine Brunet

Student at the Institute of Legal Studies at Lyon III University Law School



As a law student, it is not always easy to find the time or the means to travel to Rue de Montpensier in Paris to attend the hearings of the Constitu-

tional Council. However, it is essential to understand the role and functioning of this body, insofar as every citizen involved in a trial has been able to seize the Council - under certain conditions - since the priority preliminary ruling on the issue of constitutionality came into force ten years ago.

Holding a hearing on two QPCs in Lyon was a wonderful opportunity to observe the legal debates closely, but also to better understand the underlying issues.

Before this hearing, I was given the chance to conduct research and coordinate students to draw up one of the two draft decisions, which were then submitted to the Constitutional Council. Although I had come to a decision based on my research, the oral arguments of the applicants' lawyers and the position expressed by the government representative enriched my thinking. The experience of playing the role of a Council member made me realise how important it is to consider the full impact of each QPC decision on economic and social life.

The feedback provided by President Laurent Fabius on our draft decisions during his visit to the Lyon III Law School was very instructive and I am very grateful to him. I encourage students to attend the hearings both at the Palais-Royal and outside of Paris.

NNUAL REPORT 2020

Nicole Maestracci

Member of the Constitutional Council
Chair of the QPC 2020 Technical
Committee



QPC 2020: A COLLECTIVE OUTLOOK ON THE CITIZEN'S PREROGATIVE

Looking ahead to the 10th anniversary of the priority preliminary ruling on the issue of constitutionality, two years ago the Constitutional Council initiated a wide-ranging research programme aimed at establishing a transparent legal and sociological assessment of the QPC. Below is a look back on this initiative, which examined both the reality behind the implementation of the QPC and how it is perceived by the various stakeholders concerned.

en years is too short a time to truly take stock of a reform, but it is long enough to say whether the reform in question has met the expectations of its advocates. In creating the QPC, the essential objective of the 2008 constitution revision was to grant citizens a new right, the right to challenge the constitutionality of a legislative provision already in force.

Indeed, it should be recalled that prior to this reform, citizens were excluded from constitutional review. Only the highest government authorities or 60 members of Parliament could refer a matter to the Constitutional Council and they could only do so before a law was promulgated. As for citizens seeking recognition of a fundamental right or freedom, they could refer the matter to the European Court of Human Rights, but lacked access to the Constitutional Council.

The primary ambition of the QPC 2020 programme launched by the Constitutional Council in early 2019 was therefore to understand, beyond any purely quantitative assessment, the changes introduced by this reform for citizens, judges and lawyers. The question was whether and to what extent the initial objectives had been achieved. Finally, it was

necessary to identify the difficulties or obstacles, whether material, cultural or procedural, that had hindered the development and effectiveness of the QPC.

The second part of the call for research projects called for an assessment of the state of case law in certain disputes. It aimed to verify whether the fact of examining a matter of living law, the conditions of application of which were known, had made it possible to carry out a more detailed and concrete assessment of possible violations of fundamental rights.

To answer these questions, the Constitutional Council wanted to seek out an external, independent and academic perspective. The call for projects was therefore addressed not only to legal experts but also to sociologists, politicians and economists, taking a multidisciplinary approach that was not necessarily easy to implement.

Researchers were also asked to take a comparative approach. Since France was one of the last countries to make an exception of unconstitutionality available to citizens taking part in a trial, it was particularly useful to compare this assessment with that of other European constitutional courts.

A Technical Committee, which I had the honour and pleasure of chairing, was set up to select, evaluate and follow up on projects. The diversity of the skills called upon, as well as the experience and availability of the members of this committee, made it possible to work abundantly and efficiently in a very tight time frame.

Of the 30 projects submitted, 16 were selected. The committee held several meetings and met with all the teams halfway through the process. In addition, the project rapporteurs were often in contact with the teams up until the drafting of the final reports.

The Constitutional Council's different departments also made sure that the teams had access to all the documents, files and statistical data necessary for their research.

The research papers were submitted in January 2020 and discussed at a closed seminar held on 5 March at the premises of the Constitutional Council, which brought together the 16 teams, the Technical Committee and the nine members

of the Constitutional Council. The debates proved to be open, free and exciting.

The summaries of each paper discussed were published in a special issue of the journal *Titre VII* devoted to the QPC 2020 initiative. The final reports are available on the website of the Constitutional Council.

Nearly 2 Presearchers involved in the QPC 2020 programme

It is no easy task to encapsulate the main lessons of such rich and thorough research in a few words. These papers made it possible to establish solid results, while also identifying several uncertainties. This work did not claim to be exhaustive; on the contrary, it aimed to shift the focus and open up new perspectives.

First of all, it served to identify gaps in our knowledge due to a lack of accessible data. While the system for observing the case law of the Constitutional Council and the institutions responsible for screening is satisfactory and easily accessible, the same cannot be said

of other courts, particularly trial and appeals courts, which remain a blind spot for the QPC. Neither the number of referrals nor their outcome is known. The two regional studies that examined the attitude of magistrates towards the QPC noted substantial disparities depending on individual courts, magistrates and disputes.

The research then sought to identify the profiles and motivations of applicants and intervenors. While all those subject to trial seem to see the QPC as a step forward, it is clear that some have embraced it more than others.

As such, the most vulnerable and/ or modest citizens have difficulty calling on the Constitutional Council unless they are accompanied and supported by a stakeholder pursuing a concordant strategy.

Generally speaking, applicants are rarely ordinary citizens, with the exception of cases dealing with tax issues. On the other hand, the QPC has attracted a massive number of stakeholders. In 45% of QPCs, interest groups have intervened in one way or another. They sometimes appear as the principal applicant in cases alleging abuse of power regarding the implementing act of the contested law. In such cases, the applicants artificially create a dispute in order to gain access to the Constitutional Council. However, they have most often participated in support of an individual's application, in the form of an intervention or sponsorship, to obtain a decision in line with their strategic objectives.

A number of obstacles to the use of the QPC have been identified, which I shall simply list without claiming to be exhaustive. First of all, the cost of the QPC procedure appears to be a serious barrier, at least for some litigants. Secondly, the choice of this procedure is not self-evident for litigants who do not fully appreciate the potential of constitutional review compared with other national or European remedies. Finally, uncertainty as to the direct advantage for the applicant of a provision potentially being struck down weighs heavily when it comes to balancing the costs and benefits of such a procedure. From that point of view, the motivations on the basis of which the Council modulates the effects of its decisions are generally

THIS WORK DID NOT CLAIM TO BE EXHAUSTIVE; ON THE CONTRARY, IT AIMED TO SHIFT THE FOCUS AND OPEN UP NEW PERSPECTIVES

considered insufficient and are not always understood.

With respect to lawyers, research shows that while they have a positive image of the QPC, involvement in the procedure remains irregular. Paris-based lawyers, and more particularly lawyers for the Council of

State or Court of Cassation, appear to be better armed and more present. This situation can also be explained by the fact that the QPC remains a highly marginal activity for most law firms.

Lawyers' strategies vary according to the type of litigation, but generally speaking, the question of useful effect comes up as an essential component in the decision to use this procedure. Moreover, it is often the case that lawyers, at the same time as they file a QPC case, explore judicial review of international agreements, which they consider more appropriate to obtain an immediate remedy.

The research also highlights the diversity of the objectives pursued by the parties. Indeed, appeals do not focus solely on obtaining the repeal of a law. They may also seek clarification and amendment of the case law of supreme courts. From this perspective, the QPC may appear to lawyers as the surest and fastest way to obtain satisfaction. The QPC may also be aimed at an objective specific to the associative, professional or economic environment concerned, with a focus on internal or external communication.

One final question is raised repeatedly in many of the studies: the difficulty of reconciling the abstract nature of constitutional review and the difficulties arising from the concrete application of the law. This is what some researchers have called the "tangibility deficit". This phenomenon appears particularly when it comes to adapting the material consequences of a potential decision to strike down a provision. However, from a broader standpoint, the question concerns the fact that the introduction of the QPC has not profoundly, or at least explicitly, modified the abstract nature of constitutional review. Nonetheless, a citizen filing a QPC is motivated by a concrete problem arising from a provision that applies to him or her, and a constitutional review procedure that deals with a matter of "living law" cannot by definition be entirely abstract. This difficult task of reconciling the dual nature of review in the context of the QPC - at once abstract and concrete - inspires a complex reflection that is far from complete.

I have only touched on the points that appear essential to me. There are many others that deserve our attention, in particular

TITRE VII SPECIAL ISSUE, "QPC 2020 - 10 YEARS OF THE CITIZEN'S PREROGATIVE"

Summaries of the work carried out under the QPC 2020 programme are published in a dedicated issue of the journal *Titre VII*, available as of October 2020 on the website of the Constitutional Council.





bit.ly/titrevii

the issue of strengthening the adversarial nature of the procedure, especially by including expert testimony or amicus curiae briefs, and that of presenting the reasoning behind decisions in greater detail, as well as the everlasting question of continuing professional education for judges and lawyers.

This work opens up many reflections and perspectives for the Constitutional Council itself, but also for all parties involved in QPCs. They also offer the prospect of continued research and the organisation of regular, free and stimulating dialogue between the members of the Council and the academic world.

In conclusion, I would once again like to thank the members of the Technical Committee who nourished and enlightened this work thanks to their complete availability. My thanks also go to all the research teams who carried out exciting work in an extremely short time frame.





Watch the video of the seminar of 5 March 2020

bit.ly/seminaireqpc

Environmental protection, mobility, taxation, municipal elections, fight against online hate speech and terrorism, free higher education, and of course the unprecedented COVID-19 health crisis... again this year, the scope of the issues addressed by the Constitutional Council was extremely broad. Whether through the shared initiative referendum (SIR), ex ante (DC) and ex post (QPC) constitutional review, the Council ruled on a multitude of subjects at the heart of French civic and political life.

DECISIONS IN 2019-2020

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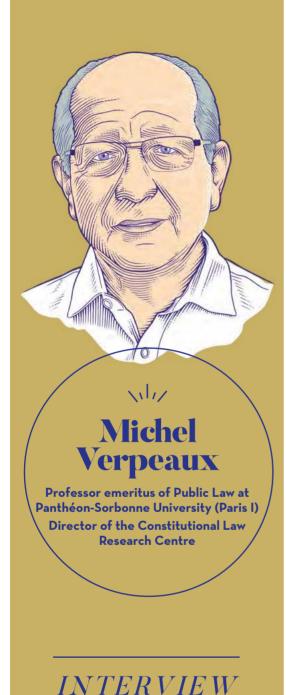
STNETHOS

Page 32 / Shared Initiative Referendum

Page 36 / Ex ante constitutional review

Page 62 / Priority preliminary rulings on the issue of constitutionality

Page 102 / Other categories of decisions



Shared Initiative Referendum

SIR: a new acronym in the Constitutional Council nomenclature

WHAT IS THE SIR?

These three letters refer to the Shared Initiative Referendum (Référendum d'Initiative Partagée or RIP in French) established by the constitutional revision of 2008. This process may be applied to a bill sponsored by at least one-fifth of the members of the French Parliament, deputies and senators combined, i.e. 185 parliamentarians, excluding representatives in the European Parliament. The proposal must subsequently be supported by one-tenth of French voters. Hence the adjective "shared" to distinguish it from the CIR, or Citizen Initiated Referendum (Référendum d'Initiative Citoyenne or RIC in French).

This new procedure was introduced in Article 11 by the revision of 23 July 2008, supplemented by the Organic Law of 6 December 2013, certain provisions of which were incorporated into the Ordinance on the Constitutional Council of 7 November 1958. These two acts conferred new powers on the Constitutional Council.

WHAT IS THE ROLE OF THE CONSTITUTIONAL COUNCIL?

Decision N° 2019-1 RIP of 9 May 2019 was issued concerning the bill aimed at affirming the status of national public service for the operation of Paris airports. This bill was intended to counter Law N° 2019-486 of 22 May 2019,

known as "PACTE", on business growth and transformation, and this aspect was validated by the Constitutional Council through a DC decision issued on 16 May 2019, i.e. after the SIR decision. In the latter, the Council considered that the proposal had indeed received the support required from parliamentarians. It also determined the number of expressions of voter support necessary (4,717,396). The signature collection period was then opened from midnight on 12 June to midnight on 12 March 2020. Incidentally, if the closing date had fallen during the lockdown order, would it have been necessary to extend the 9-month period provided for in the organic law of 6 December 2013?

At the parliamentary stage of the initiative, the Constitutional Council must, via preventive review, verify fulfilment of the conditions set out in paragraphs 3 and 6 of Article 11 of the Constitution, ensuring that no provision

of the bill is unconstitutional. This is a new form of ex ante review and not one of the conditions regarding control of referendum operations provided for in Article 60 of the Constitution. It is also a new case of mandatory review by the Constitutional Council provided for in paragraph 1 of Article 61, amended in 2008 to this effect. This new category of decision is nevertheless subject to the conditions of genuine litigation and must satisfy the requirements of an adversarial debate, even if the

notion of parties is even more delicate to determine in the case of SIR decisions than for DC decisions. In formal terms, it is similar to decisions dealing with unequivocal constitutional disputes, whether DC or QPC decisions.

After this initial stage, the Council was granted the authority, via the organic law, to ensure the validity of operations to collect support for a bill. It can examine and rule on all complaints from any registered voter.

WHY DID THE CONSTITUTIONAL COUNCIL ISSUE SEVERAL DECISIONS?

Following this decision N° 1, and during the signature collection phase, the Council initially announced two decisions, N° 2019-1-1 RIP of 10 September 2019, Mr Paul Cassia, and N° 2019-1-2 RIP of 15 October 2019, Mr Christian Sautter. With these two decisions, the Constitutional Council included in its control of signature

collection operations the complaints regarding publication and updating of the number of expressions of support collected, as well as those regarding the adoption of measures to provide voters with truthful information. After a few uneventful months, on 12 March 2020 the Constitutional Council announced five other decisions, N° 2019-1-3 to N° 2019-1-7, on referral from various voters.

On 26 March 2020, by a penultimate decision in this series, N° 2019-1-8 RIP, the Constitutional Council noted the official and authenticated number of signatures collected over the nine-month period, thereby comparing the figure that had to be reached with the number that was indeed reached, i.e. 1,093,030 registered voters in favour of the bill. The body thus drew the objective conclusion that the bill had not received the support of at least one-tenth of registered voters. This "decision",

AS IN THE OTHER ELECTORAL OBSERVATIONS, THE COUNCIL ALSO WISHED TO MAKE RECOMMENDATIONS AS TO NECESSARY CHANGES, PARTICULARLY WITH REGARD TO THE UNSATISFACTORY CONDITIONS IN WHICH THE "ELECTORAL CAMPAIGN" WAS CONDUCTED

listed as such in the Official Journal and on the Council's website, is in reality a simple statement of the number of supporters of the proposed law. The Council did not in fact "decide" anything, it merely noted the figure.

The Council wanted to conclude this series of decisions by Decision N° 2019-1-9 RIP of 18 June 2020, entitled Observations of the Constitutional Council (on the operations of gathering support for the bill aimed at affirming the status of national public service for the operation of Paris airports). Following the example of its Observations on the legislative elections of 11 and 18 June 2017 (see ELEC Decision N° 2019-28 of 21 February 2019), the Council took stock of the difficulties involved in managing the electronic support collection system, as well as those relating to the impossibility of anonymous support, which may have had the effect of dissuading voters. As in the other Electoral

//...

Observations, the Council also wished to make recommendations as to necessary changes, particularly with regard to the unsatisfactory conditions in which the "electoral campaign" was conducted. Although it is not an election, the process of gathering support must be accompanied by democratic safeguards.

WHAT IS THE FUTURE OF THE SIR?

It would have been logical for the Groupe ADP airport operating company to move one step further towards privatisation, as provided for in the law of 22 May 2019. Indeed, that undertaking was suspended, as it were, by the start of the Shared Initiative Referendum procedure. The deteriorated economic situation and the coronavirus crisis are likely to make such an operation very difficult, despite the failure of the proposed law.

In 2019, in an effort to resolve the "yellow vests" crisis, the President of the Republic declared a desire to "go further" on the SIR by simplifying the rules and by allowing the initiative to originate from a petition signed by one million citizens.

To do so, a constitutional revision will be necessary. The proposed constitutional law for the revitalisation of democratic life, introduced on 29 August 2019, inserted a new Title XI entitled "Citizen participation" which includes a new Article 69 strongly inspired by the paragraphs of the current Article 11 relating to the SIR, but subject to less restrictive conditions than the wording applicable since 2008 (initiative originating from one-tenth of parliamentarians and one million registered voters). Regardless of uncertainties regarding the success of this amendment, this new provision will require another organic law specifying the powers of the Constitutional Council.

Shared Initiative Referendum – Taking stock of the initial implementation

Over the past year, part of the business of the Constitutional Council concerned monitoring initiatives to gather support for the bill introduced pursuant to paragraph 3 of Article 11 of the Constitution, aimed at affirming the status of national public service for the operation of Paris airports.

n particular, this activity included the examination of appeals by the Constitutional Council, as well as the processing of complaints by the panel provided for in paragraph 3 of Article 45-4 of Order N° 58-1067 of 7 November 1958 on the Constitutional Council Organisation Act, chaired by Mr. Jean Massot, Honorary Section President at the Council of State.

At the end of the signature collection period, the Constitutional Council noted, in its Decision N° 2019-1-8 RIP of 26 March 2020, that the bill had received the support of 1,093,030 registered voters, and had consequently fallen short of the requirement to garner the support of at least one-tenth of the French electorate.

Following this initial – and partial – implementation of the Shared Initiative Referendum procedure, the Constitutional Council considered it necessary, as per the practice followed in electoral and referendum matters.

to provide observations via its

Decision N° 2019-1-9 RIP of 18 June 2020. In so doing, it called for several improvements and put forth potential developments.

> It confirmed that the nearly 100% electronic procedure for collecting



Read the Decision N° 2019-1-9 RIP online

bit.ly/201919rip

support, organised in 2013 through an organic act of Parliament, produced reliable results. In particular, preliminary verification of the registration of internet users in the Single Electoral Register (*Répertoire Électoral Unique* or *REU*), by means of a dedicated electronic form, made it possible to ensure that individuals expressing their support were in fact registered voters. Moreover, monitoring operations identified very few attempts at identity theft.

However, the Constitutional Council stressed that this electronic procedure for collecting support also suffered from certain shortcomings and a number of flaws, starting with the overall non-ergonomic design of the dedicated website, which was often perceived as being complex, not very intuitive and insufficiently suited to a consultation intended for a wide audience. Nonetheless, the gap between the number of signatures recorded and the threshold of one-tenth of the electorate was significant enough to maintain that the obstacles that may have prevented some voters from expressing their support for the bill had no impact on the outcome of the procedure. It is possible, however, that these difficulties may have contributed to a loss of confidence in the procedure and discouraged some voters from participating. The Council therefore made several proposals to improve this electronic system.

Evoking further reflections and possible developments with regard to the issues raised, the Constitutional Council noted that some voters sympathetic to a bill may be discouraged from expressing their support by the extremely high number of signatures required (around 4.7 million) and by the fact that, even if this number were attained, a referendum would remain merely hypothetical (an examination of the bill by the two Assemblies is sufficient to end the procedure).

Finally, while the absence of provisions for the organisation of a public debate or a media campaign on a bill introduced under Article 11 of the Constitution did not lead to irregularities in the case in question, it may nevertheless have generated some misunderstanding and dissatisfaction. As such, the desirability of designing a public information system should therefore be considered. implementation of the SIR procedure

Omonths period for gathering public support (13 June 2019 - 12 March 2020)

1,093,030 voter signatures collected

95% of signatures deemed valid

submitted in town halls or

consulates abroad

4,243
complaints
from voters



declarations of partial unconstitutionality

paragraphs: the longest decision this year

DECISIONS IN 2019 2020

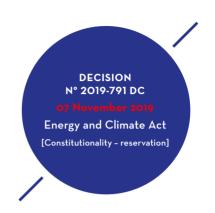
Ex ante constitutional review

Since its creation in 1958, the Constitutional Council has worked to verify the constitutionality of laws passed by Parliament prior to promulgation of said laws by the President of the Republic. As part of this procedure, known as *ex ante* review, the Council issues a "Decision of Constitutionality" (DC). While organic laws are automatically examined by the Constitutional Council, so-called "ordinary" laws are only examined if referred to the body. This can be done by the President of the Republic, the Prime Minister, the President of either parliamentary assembly, 60 deputies or 60 senators. The following pages provide an overview of the DCs that marked the period from September 2019 to August 2020.

ANNUAL REPORT 2020

ENERGY AND CLIMATE ACT

Certain provisions of Article 62 of the Energy and Climate Act partially reforming the mechanism for "regulated access to historical nuclear electricity" (ARENH) were referred to the Constitutional Council.



he disputed provisions provided for an increase to one hundred fifty terawatt-hours, from one hundred terawatt-hours currently, of the maximum volume of historical nuclear generated electricity that Électricité de

France (EDF) may be required to offer annually for sale to other electricity suppliers at a price determined by decree. These provisions were criticised, in particular, for forcing EDF to sell up to 150 terawatt-hours per year of historical nuclear generated electricity to other electricity suppliers at a price determined by decree, in disregard of the principle of freedom of enterprise.

In deciding this case, the Constitutional Council applied its case law on freedom

of enterprise, which derives from Article 4 of the Declaration of the Rights of Man and of the Citizen of 1789. According to this case law, Parliament is entitled to impose limitations on freedom of enterprise, which derives from Article 4 of the Declaration of the Rights of Man and of the Citizen of 1789, provided that such limitations are linked to constitutional requirements or justified by the general interest, and that the resulting constraints are not disproportionate with regard to the objective pursued.

The Constitutional Council ruled that the disputed measure, although an infringement

of EDF's freedom of enterprise, is justified by the general interest. Indeed, EDF has a monopoly on the production of nuclear generated electricity in France. The obligation imposed on it to offer for sale to other electricity suppliers a historic volume of nuclear electricity at a fixed price is intended, in the context of the initiative to introduce competition into the electricity supply market, to ensure that all suppliers and their customers benefit from the

competitiveness of the French nuclear fleet. By raising the maximum volume of electricity to 150 terawatt-hours, legislators intended to avoid a situation in which suppliers, without access to the volume of nuclear energy needed to serve their customers, would be forced to purchase more expensive electricity on the market, thereby increasing prices for end

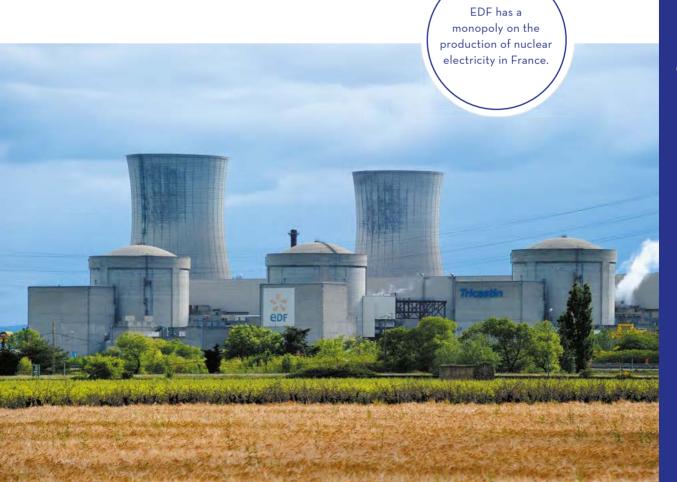
THE CONSTITUTIONAL
COUNCIL RULED
THAT THE DISPUTED
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ENTERPRISE, IS JUSTIFIED
BY THE GENERAL
INTEREST

consumers. As such, by seeking to ensure the competitive operation of the electricity market and guarantee price stability on that market, Parliament was deemed to have pursued an objective of general interest.

The Constitutional Council then noted the various safeguards introduced by legislators to limit the curtailment of EDF's entrepreneurial freedom.

With regard to the rules for determining the price of historical nuclear electricity to be sold by EDF to other electricity suppliers, the Constitutional Council noted that, pending adoption of the decree establishing the methods for determining said price, the transitional mechanism set out by the law in question provides that, in order to revise the price, the Ministers responsible for energy and the economy may take into account, inter alia, changes in the consumer price index and changes in the maximum overall volume of historical nuclear electricity that may be sold. However, the Council considered that these provisions, which do not provide for any other method of determining the price, cannot, without disproportionately infringing on freedom of enterprise, authorise the Ministers for Energy and the Economy to set a price without taking sufficient account of the economic conditions for the production of electricity by nuclear power plants.

Subject to this interpretative reservation, the Constitutional Council found the contested provisions to be constitutional. """"





ANNUAL REPORT 2020

MOBILITY ORIENTATION ACT

The Constitutional Council was called upon to review several provisions of the Mobility Orientation Act. In particular, it struck down those relating to the social responsibility charters of electronic platforms, while clarifying its case law regarding Article 1 of the Charter for the Environment and modernising the way it monitors legislative riders.

DECISION N° 2019-794 DC Mobility Orientation Act [Partial unconstitutionality]

mong the provisions referred to the Council was Article 44, which sets out the conditions under which a platform operator whose activity consists in connecting people electronically with a view to providing chauffeured transport services or goods delivery by means of two- or three-wheeled vehicles, may draw up a charter specifying the conditions and procedures for exercising its social responsibility. Once it has drawn up such a charter, the platform may, after consulting the self-employed persons with whom it has dealings, refer the matter to the administrative authority for approval. In the event of approval, the establishment of the charter and the fulfilment of the commitments it provides for shall not constitute the existence of a legal subordinate relationship between the platform and the workers. Any dispute relating

to such approval shall fall within the jurisdiction of the Tribunal de Grande Instance.

The Constitutional Council recalled that it is incumbent on Parliament to exercise in full the jurisdiction conferred on it by the Constitution, and in particular Article 34, without attributing to private persons the

THE CONSTITUTIONAL COUNCIL SUBJECTED THE FORWARD-LOOKING PROVISIONS CONTAINED IN THE LAW TO AN UNPRECEDENTED REVIEW WITH REGARD TO ARTICLE 1 OF THE CHARTER FOR THE **ENVIRONMENT**

task of laying down rules that, pursuant to the Constitution, may be determined only by law. Determining the scope of application of labour law and, in particular, the essential characteristics of employment contracts, is one of the fundamental principles of the Labour Code, and as such falls within the scope of the law.

In light of these constitutional requirements, the Constitutional Council noted that, although in principle workers enjoying a commercial relationship with a platform which has drawn up a charter exercise their activity independently in the context of said relationship, the court is responsible, in accordance with the Labour Code, for reclassifying said dealings as an employment contract where they are in fact characterised by the existence of a legal relationship of subordination. The contested provisions were intended to prevent

> such reclassification when it is based on compliance with commitments made by the platform and when the charter has been approved.

> Those commitments

may cover both the rights granted to workers by the platform and the obligations to which the former are subject, these last being unilaterally defined

in the charter. In particular, the charter must specify "the quality of service expected, the methods and implementation of control of the activity by the platform and the circumstances that may lead to a termination of the commercial relations between the platform and the worker". The charter may thus concern rights and obligations liable to constitute indications of a relationship of subordination between the worker and the platform.

At the same time, when the platform submits a request for approval of its charter, the government is solely responsible for verifying compliance with specific provisions of the Labour Code.

The Constitutional Council inferred from this that the contested provisions allowed platform operators themselves to set down

in the charter aspects of their relationship with self-employed workers that could not lead the court to recognise the existence of a legal relationship of subordination and, consequently, the existence of an employment contract. They thus allow platform operators to lay down rules which are a matter of law and, consequently, infringe on the scope of the law. The Constitutional Council therefore struck down

the wording "and respect of the commitments undertaken by the platform in the matters listed in items 1 to 8 of this Article" appearing in paragraph 39 of Article 44.

Furthermore, the Constitutional Council subjected the forward-looking provisions contained in the law to an unprecedented review with regard to Article 1 of the Charter for the Environment.

Recalling that pursuant to Article 1 of the Environment Charter, "Everyone has the right to live in a balanced and healthy environment", it ruled that the objectives attributed by law to government action could not contravene this constitutional requirement. However, the Constitutional Council does not have a general

power of construal and decision of the same nature as that of Parliament. It cannot judge the appropriateness of the objectives attributed to government action by Parliament, provided that such objectives are not manifestly incompatible with the implementation of this constitutional requirement.

Through this review, the Council held, inter alia, that the objective set out for government action by Article 73 of the law, i.e. bringing about complete decarbonisation of the land transport sector by 2050, was not manifestly incompatible with the requirements of Article 1 of the Charter for the Environment.

Finally, this decision by the Constitutional Council broke new ground with respect to review of "legislative riders", provisions that are unrelated to the primary provisions of the bill,

> and thus have no place in the law in question. The body further clarified the reasoning traditionally followed in application of Article 45 of the Constitution.

> After recalling the provisions of this article, it stated that "it is the role of the Constitutional Council to declare provisions introduced in breach of this procedural rule to be contrary to the Constitution. In this case, the Constitutional

Council shall not comment on the conformity of the content of these provisions with other constitutional requirements". It recalls the initial scope of the bill, before demonstrating, for each provision struck down, why it must be regarded as having no direct or even indirect link with the spirit of the law. The observations submitted to the Constitutional Council by the Government on these issues are now also made public on the Constitutional Council's website, where they serve to support of its decision.

WHAT IS A LEGISLATIVE

RIDER? A rider is a provision inserted into a bill by an amendment that violates Article 45 of the Constitution by being insufficiently linked to the subject matter of the bill in question. The Constitutional Council may strike down legislative riders on its own initiative, even if they are not mentioned by legislators when requesting review of the bill.

SOCIAL SECURITY FINANCING ACT

With its Decision N° 2019-795 DC of 20 December 2019, the Constitutional Council ruled on several articles of the Social Security Financing Act for 2020.

DECISION
N° 2019-795 DC
20 December 2019
Social Security
Financing Act
[Partial unconstitutionality reservation]

he Constitutional Council struck down Article 8 of this law, which aimed, from 2021 onwards, to neutralise certain effects of the "bonus-penalty" system in the calculation of the general reductions in social security payroll taxes payable by employers, leading to a modulation of unemployment insurance contribution rates depending in particular on the number of short-term employment contracts.

The Constitutional Council ruled that employers' unemployment insurance contributions do not fall within the scope of social security financing laws. Far from being inseparable from the overall reform introducing a reduction in certain social contributions in return for an increase in the CSG (Contribution Sociale Généralisée a social security contribution levied on virtually all sources of income) provided for in the 2018 Finance Act, employers' unemployment insurance contributions were instead an addition to a reform of unemployment insurance resulting from the Law of 5 September 2018 on citizens' freedom to choose their professional future. The effects of the "bonus-penalty" system on social security revenue were too indirect to constitute grounds for inclusion in the Social Security Financing Act.

The Constitutional Council admitted, subject to a reservation of interpretation, the constitutionality of Article 23 instituting a contribution to be paid by operators of certain health devices.

The basis for calculating this contribution due by companies operating certain medical devices is defined as the amount reimbursed by the national health insurance scheme during one year in respect of the medical devices in question, minus the discounts granted by the operators. The total amount of the contribution is equal to the difference between this base and a maximum amount determined by law. The contribution payable by each operator concerned shall be calculated in proportion to the amount reimbursed in respect of the medical devices it operates.

In light of the requirement to take account of taxpayers' capacity to contribute, following from the principle of equality vis-à-vis government encumbrances guaranteed by Article 13 of the Declaration of the Rights of Man and of the Citizen of 1789, the Constitutional Council ruled that the amount reimbursed cannot be interpreted as including the surcharge paid by the national health insurance scheme to health establishments when the latter have paid the operator a price lower than the approved rate. This increase is in fact unrelated to the contributory capacity of the operators of medical devices, since the price they are paid does not include this surcharge.

The Constitutional Council deemed Article 81 of the law in question to be consistent with the Constitution. By way of derogation from the provisions of ordinary law, the article sets the revaluation of certain benefits and pensions

provided by the basic compulsory social security schemes at 0.3% for the year 2020, while maintaining this revaluation at the level of inflation for pensions provided to insured persons whose

total pensions provided by both the basic compulsory oldage and invalidity insurance schemes and the compulsory supplementary schemes are less than or equal to €2,000 per month.

The Constitutional Council noted in this respect that, by introducing this differential revaluation of certain benefits and pensions provided by the basic compulsory schemes, Parliament intended

both to limit social expenditure and to preserve the purchasing power of the majority of retirees and beneficiaries of invalidity pensions. By adopting a threshold of €2,000 for the total amount of pensions, Parliament acted in accordance with its objectives, exempting 77% of insured persons from the exceptional sub-inflation revaluation introduced by the reform and shifting the financial burden of contributing to balancing public accounts to the remaining insured persons who receive pensions above this amount.

It ruled that this differential revaluation, the effect of which is passed on from year to year, permanently modifies the relative levels of benefits paid to each insured person, alleviating the burden on three-quarters of retirees and recipients of disability pensions, and shifting it to the remaining quarter. The consequences of this policy thus affect the contributory nature of the old-age and disability insurance schemes.

However, in view of its exceptional and limited nature, the disputed differential revaluation system is based on objective and rational criteria relating to the purpose of the law and does not create a clear breach of equality vis-à-vis government encumbrances.



THE DISPUTED

DIFFERENTIAL

REVALUATION SYSTEM

IS BASED ON OBJECTIVE

AND RATIONAL CRITERIA

RELATING TO THE

PURPOSE

ANNUAL REPORT 2020

FINANCE ACT FOR 2020

By this decision, running 147 paragraphs, the Constitutional Council ruled on the Finance Act for 2020, which had been referred to the body through three appeals, the first two submitted by more than 60 deputies and the last by more than 60 senators.

DECISION
N° 2019-796 DC
27 December 2019
Finance Act for 2020
[Partial unconstitutionality]

alled upon to review several articles of the Finance Act for 2020, the Constitutional Council laid down a precise interpretation of the provisions authorising tax and customs administrations, on a trial basis, to collect and utilise data made public on social networks and the sites of platform operators, for the purpose of investigating offences and breaches of tax and customs regulations.

The Constitutional Council recalled that Parliament is responsible for ensuring that the constitutionally valid objective of combating tax fraud and tax evasion is pursued without violating the right to privacy. Parliament is also responsible for laying down rules

concerning the fundamental guarantees to which citizens are entitled regarding the exercise of public freedoms. On this basis, legislators are empowered to lay down rules reconciling the pursuit of the constitutionally valid objective of combating tax fraud and tax evasion with the exercise of freedom of communication, speech, writing and printing. Freedom of expression and communication, speech are communication.

nication is all the more precious since it stands out as a prerequisite for democracy, safeguarding respect for other rights and freedoms. To be valid, limitations on the exercise of this freedom must be necessary, appropriate and proportionate to the objective pursued.

In light of the constitutional framework thus specified, the Constitutional Council ruled that, by authorising the government to utilise com-

puterised and automated means making it possible to collect large volumes of data relating to a large number of persons, published on online public communication services in an undifferentiated manner, and to exploit these data through aggregation, cross-checking and correlation, the contested provisions constitute a violation

of the right to privacy. Insofar as they are liable to discourage or lead to restrictions on the use of such services, they also violate the exercise of freedom of expression and communication.

As regards the aims of the contested measure, however, it noted that, by adopting the contested provisions, Parliament sought to strengthen oversight by tax and customs administrations, thereby

PARLIAMENT IS RESPONSIBLE
FOR ENSURING THAT THE
CONSTITUTIONALLY VALID
OBJECTIVE OF COMBATING
TAX FRAUD AND TAX EVASION IS
PURSUED WITHOUT VIOLATING
THE RIGHT TO PRIVACY

pursuing a constitutionally valid objective of combating tax fraud and tax evasion.

The Constitutional Council then examined

all the safeguards established by the law in question in order to set out parameters for the implementation of these measures and to limit the risk of invasion of privacy and violation of freedom of expression and communication. It thus set out the conditions governing use of this mechanism.

In particular, it noted that data liable to be collect-

ed and utilised must meet certain cumulative conditions. The content in question must be freely accessible on an online public communication service managed by one of the abovementioned platforms, thus excluding content accessible only after entering a password or registering on a specific site. Furthermore,

> such content must be unequivocally made public by the users of those sites. The Constitutional Council stressed that, consequently, only content relating to the person having deliberately disclosed it may be collected and utilised. Data revealing a person's supposed racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union

membership, genetic and biometric data, and data concerning life, health or sexual orientation may not be utilised for the purpose of investigating offences or breaches.

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THE RESULTING

LIMITATION OF FREEDOM

OF EXPRESSION AND

COMMUNICATION IS

NECESSARY. APPROPRIATE

AND PROPORTIONATE TO

THE OBJECTIVES PURSUED



It held that, in order to ensure the proportionality of data processing with regard to the purposes pursued, at the time of both creation

and use of said data, the regulatory authority must ensure, under court supervision, that algorithms used for processing make it possible to collect and store only data strictly necessary for those purposes. The competent authorities

THE CONSTITUTIONALITY OF THE PROGRAMME MAY BE RE-EXAMINED ON THE BASIS OF THIS EVALUATION

must also ensure, in compliance with the aforementioned guarantees and under the supervision of the competent court, that the collection, recording, storage, consultation, communication, contestation and rectification of data processed in the context of the relevant procedures will be carried out in an appropriate manner and in proportion to the objec-

tive pursued.

In light of these concerns, the Constitutional Council ruled that, regarding a specific set of offences or breaches, the law provides the contested mechanism with safeguards capable of ensuring an adequate balance between the right to privacy and the constitutionally valid objective of combating tax fraud and tax evasion, subject to compliance with these conditions. It thus follows that

the resulting limitation of freedom of expression and communication is necessary, appropriate and proportionate to the objectives pursued.

At the same time, the Constitutional Council struck down the provisions allowing for automated collection and use of data to investigate infringements punishable by a 40% surcharge for failure to file a tax return within thirty days of receipt of formal notice. In such a situation, government authorities, having sent taxpayers formal notice to file the return, are already aware of a violation of tax law, thus making use of the automated personal data collection

system unnecessary. As such, by allowing implementation of such a mechanism for the simple investigation of such an offence, these provisions

constituted a violation of the right to privacy and freedom of expression and communication which cannot be regarded as proportionate to the objective pursued.

Finally, the Constitutional Council emphasised that, when it comes to assessing the advisability

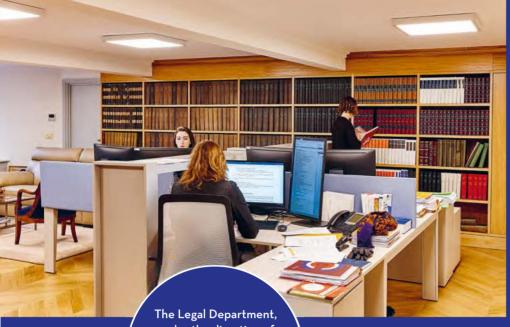
of maintaining the programme in question after the three-year trial period set out by law, Parliament will be responsible for evaluating the programme and drawing the relevant conclusions regarding its effectiveness in combating tax fraud and tax evasion, particularly in light of the resulting violations of the aforementioned rights

and freedoms and compliance with the aforementioned conditions. The constitutionality of the programme may be re-examined on the basis of this evaluation.

CONSTITUTIONAL REVIEW OF FINANCE LAWS

Each year, the Finance Act determines government revenue and expenditure. Although examination is not automatic, finance acts are systematically referred to the Constitutional Council by the parliamentary opposition. The Council applies expedited procedures in reviewing these acts.

The members of the Constitutional Council



under the direction of the Secretary General, assists the College in preparing and drafting all its decisions.



PUBLIC HEALTH STATE OF EMERGENCY

The Constitutional Council validated several provisions of the law extending the public health state of emergency. However, with regard to the processing of personal data of a medical nature for "tracing" purposes, the Council pronounced two partial rejections and three interpretative reservations. Concerning quarantine and isolation measures, it pronounced one interpretative reservation and one rejection.

DECISION N° 2020-800 DC

Act extending and supplementing the provisions of the public health state of emergency

> [Partial unconstitutionality reservation]

he law extending the public health state of emergency and supplementing its provisions, adopted on Saturday, 9 May 2020, was referred to the Constitutional Council that evening by the President of the Republic and the President of the Senate, pursuant to Article 61 of

the Constitution. The Council subsequently received two parliamentary referrals concerning this text on the afternoon of Sunday, 10 May. On Monday, 11 May, the Constitutional Council handed down its 88-paragraph decision on these four referrals.

With regard to the conditions for incurring criminal liability in the event of a health disaster, the Constitutional

Council ruled that the provisions of Article 1, paragraph II, of the law in question are similar to those of ordinary law and apply in the same way to any person who has committed an act liable to constitute an unintentional criminal offence in the crisis situation that justified the public health state of emergency. Consequently, they do

not violate the principle of equality before criminal law, nor are they undermined by negative

With regard to the status of public health state of emergency, the Constitutional Council ruled that the Constitution does not preclude legislators from establishing such a system. In

PARLIAMENT WAS

PURSUING THE

CONSTITUTIONALLY

VALID OBJECTIVE OF

PROTECTING HEALTH

this context, it is incumbent on Parliament to ensure that the constitutionally valid objective of protecting health is reconciled with respect for the rights and freedoms recognised for all those residing within French borders. These rights and freedoms include freedom of movement, which is a component of personal freedom protected by Articles 2 and 4 of the Declaration of 1789, the right

to privacy, which derives from Article 2, freedom of enterprise, which derives from Article 4, and the right to collective expression of ideas and opinions, which derives from Article 11 of the same Declaration.

In light of these requirements, the Council deemed Parliament to have reconciled these

incompetence.

ANNUAL REPORT 2020



constitutional requirements in a balanced way by adopting the measures authorising the Prime Minister to regulate or prohibit the movement of persons and vehicles and to regulate access to means of transport and the conditions for the use thereof, as well as to order the temporary closure and regulate the opening of establishments open to the public and places of assembly. With regard to such places, the Council noted in particular that they did not extend to residential premises.

Having examined the system of quarantine applicable to persons liable to be affected by the disease at the root of the health disaster that led to the declaration of the public health state of emergency, and the system for placing and maintaining affected persons in isolation for an initial period of 14 days, renewable for a maximum period of one month, the Constitutional Council found that measures involving complete isolation, which implies a ban on "any and all exit", constitute a deprivation of liberty. The same applies to rules requiring the person concerned to remain in his or her home or place of accommodation for a period of more than 12 hours per day.

On the basis of Article 66 of the Constitution and in accordance with established case law, the

Constitutional Council recalled that individual liberty, the protection of which is entrusted to the judiciary, must not be encumbered by unnecessary rigour. Limitations on the exercise of this freedom must be appropriate, necessary and proportionate to the objectives pursued.

In its assessment of the proportionality of the limitations on individual freedom resulting from those measures, the Council noted in particular that, by seeking through the provisions in question to ensure that persons to whom they apply are isolated from the rest of the population by subjecting them, where necessary, to complete isolation so as to prevent the spread of the disease, Parliament was pursuing the constitutionally valid objective of protecting health.

As for the scope of application of the measures, they may only apply to persons having travelled during the previous month in an area where the infection is actively circulating and who enter or are already present in France, arrive in Corsica or in one of the areas mentioned in Article 72-3 of the Constitution.

Considering the safeguards Parliament introduced into the system governing these measures, the Council noted, in particular, that should a person be placed in isolation, the decision, which



is subject to a medical diagnosis of infection, can only be taken on the basis of a medical certificate. The measures in question may be extended beyond a period of 14 days only following a medical opinion establishing the need for such an extension.

The Council held that the law under review set out conditions to ensure that these measures are implemented only in cases where they are appropriate, necessary and proportionate to the condition of the persons affected or liable to be affected by the

disease at the root of the health disaster.

However, with regard to the control of these measures, the Constitutional Council recalled that individual freedom can only be considered as being respected if a judge intervenes as soon as possible.

However, while the provisions contained in paragraph II of Article L. 3131-17 of the Public Health Code provide that quarantine or isolation measures prohibiting the person concerned from leaving the place of quarantine or isolation may not continue beyond a period of 14 days without the authorisation of the liberty and custody judge, appointed beforehand by the prefect, no systematic intervention by a judicial judge is provided for in other cases.

The Constitutional Council therefore held, via an interpretative reservation, that these provisions cannot, without disregarding the requirements of Article 66 of the Constitution, permit the extension of quarantine or isolation measures requiring the person concerned to remain in his or her home or place of accommodation for more than 12 hours a day without the authorisation of a judicial judge.

The Constitutional Council also struck down Article 13 of the law in question for violating individual freedom. As of the entry into force of the law under review, the article sets 1 June 2020 as the deadline for repealing the legal regime currently in force for quarantine and solitary confinement measures in the event of a health emergency.

With regard to the information system intended to allow the processing of data to "trace" persons affected by COVID-19 and those who have been in contact with them, the Constitutional Council recalled that it follows from the constitutional right to privacy that the collection, recording, storage, consultation and communication of personal data must be justified by an objective

> in the public interest and implemented in an appropriate manner proportionate to this objective. It also ruled for the first time that, where personal data of a medical nature are involved, particular vigilance must be observed in the conduct of such operations and in determining

BEING RESPECTED IF A JUDGE

the modalities thereof.

INDIVIDUAL FREEDOM CAN

ONLY BE CONSIDERED AS

INTERVENES AS SOON AS

POSSIBLE

In light of the constitutional framework thus specified, the Council noted that the contested provisions authorise the processing and sharing of personal data relating to the health of persons suffering from COVID-19 and persons in contact with them, without the consent of the persons concerned, in the context of an ad hoc information system and a remodelling of existing health data information systems. In so doing, these provisions violate the right to privacy.

However, the Constitutional Council considered that, by adopting the contested provisions, Parliament intended to strengthen the means at the government's disposal to combat the COVID-19 epidemic by identifying the chains of contamination. Legislators were thus pursuing the constitutionally valid objective of protecting health.

To rule on the appropriate and proportional nature of the contested provisions vis-à-vis the objective pursued, the Council noted that the collection, processing and sharing of the aforementioned personal data may be implemented only to the extent strictly necessary for four specified purposes.

Moreover, Parliament restricted the scope of the personal health data that may be collected, processed and shared to data relating solely to virological or serological status with regard to COVID-19 or to the diagnostic and medical imaging evidence specified by decree of the Council of State following advisement of the High Council on Public Health.

The Constitutional Council nonetheless formulated an initial interpretative reservation by ruling that the requirement for deleting the name, registration number in the national identification directory of natural persons, and address of the persons concerned in sections of the data processing procedure intended for epidemiological surveillance and research regarding the virus must also extend to the telephone or electronic contact details of said persons. Failure to delete said data would constitute a violation of privacy.

With regard to the categories of persons who may have access to such personal data without the consent of the person concerned, the Council considered that, while the list is particularly extensive, the broad nature of this group is necessary due to the number of procedures involved in organising collection of the information needed to combat the spread of the epidemic.

However, the Constitutional Council struck down the second sentence of paragraph III of Article 11, judging that the provision in question

violates the right to privacy by including in this group organisations that provide social support for the persons concerned. The Constitutional Council noted that, for social support that is not directly related to the fight against the epidemic, there is no reason why access to the personal data processed in the information sys-

tem should not be subject to the consent of the persons concerned.

In its overall assessment, the Constitutional Council also took account of the provisions specifying that the staff of these organisations are not authorised to communicate the identification data of an infected person, without his or her express consent, to persons having come into contact with him or her. Furthermore, and on a more general level, these agents are bound by professional secrecy and as such may not, under penalty of the offence provided for in Article 226-13 of the Criminal Code, disclose to third parties information of which they become aware through the mechanism in question.

Via a second interpretative reservation, the Council ruled that the regulatory authority will be responsible for setting out data collection, processing and sharing procedures that ensure the strict confidentiality of the information concerned and, in particular, a specific clearance mechanism, within each organisation, for the agents involved in the implementation of the information system and the traceability of access to said system.

With a third interpretative reservation, subcontractors to carry out their tasks in the context of the system under review, said subcontracsubcontractors must comply with the requirements of necessity and confidentiality referred

The Constitutional Council also took into

account Parliament's inclusion of a sunset clause for this mechanism, which may not apply longer than strictly necessary to combat the spread of the COVID-19 epidemic or, at the latest, more than six months after the end of the public health state of emergency declared by the law of 23 March 2020. In addition, any personal

data collected, whether medical or not, must be deleted three months after collection.

it ruled that although Parliament authorised organisations contributing to the system to use tors act on behalf and under the responsibility of the organisations themselves. To be consistent with respect for the right to privacy, any use of to in this decision.

WHERE PERSONAL DATA

OF A MEDICAL NATURE ARE

INVOLVED, PARTICULAR

VIGILANCE MUST BE OBSERVED

IN THE CONDUCT OF SUCH

OPERATIONS

ONLINE HATE SPEECH

While reaffirming that the Constitution allows Parliament to punish

abuses of freedom of expression and communication, the Constitutional Council struck down provisions of the law aimed at combating online hate speech, citing limitations on freedom of expression that are not appropriate, necessary and proportionate.

DECISION
N° 2020-801 DC
08 June 2020
Act to combat online hate
speech
[Partial unconstitutionality]

ore than 60 senators referred this law to the Constitutional Council, which struck down two sets of provisions contained in Article 1, the language of which establishes new rules obligating various categories of operators of online communication services to withdraw certain online content.

Ιn considering these provisions, the Constitutional Council recalled that, according to Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789: "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall

be responsible for such abuses of this freedom as shall be defined by law". It inferred from these provisions that, in the present state of the media and in view of the widespread development of online public communication services and the importance of these services for participation in democratic life and expression of ideas and opinions, this right implies freedom of access to and expression via these services.

The Constitutional Council further recalled that, on the basis of Article 34 of the Constitution, Parliament may set out rules concerning the exercise of the right of free

communication and the liberty to speak, write and print. Parliament is also empowered to enact provisions designed to inhibit abuses of the exercise of freedom of expression and communication that are detrimental to public order and the rights of third parties. Nevertheless, freedom of expression and communication is all the more precious since it stands out as a prereq-

uisite for democracy, safeguarding respect for other rights and freedoms. It follows that limitations on the exercise of this freedom must be necessary, appropriate and proportionate to the objective pursued.

THE CONSTITUTIONAL
COUNCIL RULED THAT
PARLIAMENT HAD LIMITED
FREEDOM OF EXPRESSION
AND COMMUNICATION IN
A MANNER THAT WAS NOT
APPROPRIATE, NECESSARY
AND PROPORTIONATE TO THE
OBJECTIVE PURSUED

The Constitutional Council handed down an unprecedented ruled that the dissemination of pornographic images depicting minors, as well as calls to commit terrorist acts or glorifying such acts, constitute abuses of freedom of expression and communication that seriously undermine public order and the rights of third parties.

In light of the constitutional framework thus defined, the Constitutional Council struck down Article 1, paragraph I, of the law under review, which allows the administrative authority to require hosts or publishers of an online communication service to remove certain content associated with terrorism or child pornography and, in the event of failure to comply with this obligation, provides for a penalty of one year's imprisonment and a fine of €250,000.

As mentioned above, the Constitutional Council ruled in unprecedented terms that the dissemination of pornographic images depicting minors, as well as calls to commit terrorist acts or glorifying such acts, constitute abuses of freedom of expression and communication that seriously undermine public order and the rights of third parties.

By requiring publishers and hosts, at the request of the government, to withdraw content that the latter considers contrary to Articles 227-23 and 421-2-5 of the Criminal Code, Parliament sought to inhibit such abuses.

However, under the terms of the contested provisions, determination of the unlawful nature of the content in question was not based on its manifest nature, but rather on the sole assessment of the government. In addition, filing an appeal to contest the request for withdrawal was not suspensive and the one-hour period within which the publisher or host must remove or make inaccessible the content in question did not offer the possibility of obtaining a decision from a judge before taking the required action. Finally, a host or publisher fail-

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ing to comply with the request within the aforementioned period could be sentenced to one year's imprisonment and a fine of $\ensuremath{\in} 250,000$.

On these grounds, the Constitutional Council ruled that Parliament had limited freedom of expression and communication in a manner that was not appropriate, necessary and proportionate to the objective pursued.

The Constitutional Council also struck down Article 1, paragraph II, of the law in question requiring certain online platform operators, subject to prosecution, to remove or make inaccessible within 24 hours content that is manifestly unlawful due to a hateful or sexual nature.

The Constitutional Council noted that, in adopting these provisions, Parliament sought to prevent actions that gravely disturb public order and to avoid the dissemination of statements glorifying such acts. It thus intended to inhibit abuses of the exercise of freedom of expression that undermine public order and the rights of third parties.

However, the obligation to withdraw was imposed on the operator once illegal content had been reported, along with the identity of the person reporting the content, the location of said content and the legal grounds on which it was considered manifestly unlawful. The obligation was not subject to the prior intervention of a judge or to any other condition. Consequently, to avoid the risk of criminal sanctions, the operator was required to examine all reported content, regardless of the number of such cases.

Second, while online platform operators were required to remove only manifestly unlawful content, legislators had inserted into the law numerous criminal qualifications justifying the removal of such content. Consequently, review of said content necessarily extended beyond the reason cited upon reporting. The operator was obligated to examine reported content with regard to all such potential offences, even though the legal elements inherent in some such offences may be of a highly technical nature or, in the case of press offences in particular, call for an in-depth evaluation in light of the context in which the content in question was formulated or disseminated.

Third, Parliament obliged online platform operators to fulfil their obligation to withdraw within 24 hours, a particularly short time limit in view of the abovementioned difficulties in assessing the manifest unlawfulness of the content reported and the risk of numerous potentially unfounded reports.

Fourth, although it is clear from parliamentary documents that legislators intended to provide, in the final item of paragraph I of the new Article 6-2, grounds for exonerating online platform operators from liability, the language used did not allow for an unequivocal determination of the scope of this clause, citing that "the intentional nature of the offence ... may result from the absence of proportionate and necessary examination of the content notified". No other specific grounds for exemption from liability were foreseen, e.g. a large number of simultaneous reports that would be difficult or impossible to process within the required time-frame.

Finally, failure to comply with the obligation to remove or make inaccessible manifestly unlawful content was punishable by a fine of €250,000. In addition, the penalty was incurred for each failure to withdraw, rather than for repeated offences.

On the basis of all these elements, the Constitutional Council concluded that, given the difficulties in assessing the manifestly unlawful nature of the content reported within the prescribed period, the fact that the penalty was incurred as of the first failure to comply and the absence of specific grounds for exemption from liability, the contested provisions could only encourage online platform operators to withdraw all content reported to them, whether or not it was manifestly unlawful. They therefore infringed the exercise of freedom of expression and communication in a manner that was not necessary, appropriate and proportionate.

As a consequence of these two rejections, the other provisions of the law intended to accompany the implementation of these obligations to withdraw, i.e. Articles 3, 4, 5, 7, 8 and 9 of the law under review, were also struck down.

The work of the members of the Constitutional Council is supported by several departments grouped together in a General



TERMINATION OF THE PUBLIC HEALTH STATE OF EMERGENCY

The Constitutional Council clarified and validated certain provisions of the law organising the termination of the national health emergency.

DECISION N° 2020-803 DC

09 July 2020

Act organising the termination of the public health state of emergency

[Constitutionality]

oncerning the possibility granted to the Prime Minister by Article 1, paragraph I, sub-paragraph 1 to regulate or prohibit, under certain conditions, the movement of persons and vehicles as well as public transport, the Constitutional Council recalled that it is incumbent on Parliament to ensure that the constitutionally valid objective of protecting health is reconciled with respect for the rights and freedoms recognised for all those residing within French borders. These rights and freedoms include freedom of movement, which is a component of personal freedom

is a component of personal freedom protected by Articles 2 and 4 of the Declaration of 1789.

In light of this constitutional framework, the Constitutional Council ruled that, since the movement of persons and vehicles is a vector for the spread of the COVID-19 epidemic, Parliament intended to empower public authorities to take measures to restrict movement, particularly in areas where the virus

is actively circulating, in order to limit the health risks associated with the epidemic. Legislators were thus pursuing the constitutionally valid objective of protecting health.

The Council noted that the measures to be taken by the Prime Minister may only apply to the period from 11 July to 30 October 2020,

for which Parliament considered that there remained a significant risk of the epidemic spreading. It would not be appropriate for the Constitutional Council, which does not have a general power of construal and decision of the same nature as that of Parliament, to call into question legislators' assessment of that risk, provided that such assessment is not manifestly ill-suited to the present situation, as per the information currently available.

Analysing the safeguards provided for in the law, the Constitutional Council noted that, under Article 1, paragraph I, subparagraph 1,

LEGISLATORS WERE

THUS PURSUING THE

CONSTITUTIONALLY

VALID OBJECTIVE

OF PROTECTING

HEALTH

the contested measures may be taken only in the interests of public health and for the sole purpose of combating the spread of the COVID-19 epidemic. According to paragraph III of the same article, they must be strictly proportionate to the health risks involved and appropriate to the circumstances of time and place. They shall be terminated without delay when no longer necessary.

In accordance with paragraph IV, these measures may be subject to a petition for suspension or a petition for protection of fundamental liberties before the administrative court.

In addition, movement of persons and vehicles, as well as access to collective passenger transport, may only be prohibited in territories where



the virus has been seen to be circulating actively. The Constitutional Council further ruled that rules prohibiting movement of persons cannot be construed as a ban on said persons leaving their homes or immediate neighbourhood. Lastly, no measures that may be adopted pursuant to the contested provisions may apply to travel that is strictly essential for family, professional and health reasons.

From all of the above, the Constitutional Council judged that, in adopting the contested provisions, Parliament reconciled the abovementioned constitutional requirements in a balanced manner.

With regard to the possibility granted to the Prime Minister by Article 1, paragraph I, 2°, subparagraph 2, to order the temporary closure of certain categories of places of assembly and establishments open to the public and, by paragraph I, sub-paragraph 3, to regulate gatherings of persons, meetings and activities taking place on public land and in places open to the public, the Constitutional Council recalled that, under the terms of Article 11 of the Declaration of 1789: "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly,

speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law". Freedom of expression and communication, which serves as the foundation for the right to collective expression of ideas and opinions, is all the more precious since it stands out as a prerequisite for democracy, safeguarding respect for other rights and freedoms. It follows that limitations on the exercise of this freedom, and the associated right, must be necessary, appropriate and proportionate to the objective pursued.

On these grounds, the Council ruled that the power conferred on the Prime Minister to order the temporary closure of certain categories of places of assembly and establishments open to the public is contingent upon the activities taking place on said premises making it impossible, by their very nature, to guarantee implementation of measures liable to counter risks of propagation of the virus. Such closures may also be ordered when the establishments concerned are located in certain parts of the country where the virus is seen to be actively circulating. In either case, the sole legitimate purpose of such temporary closures is to address the increased risk of contamination arising from public use of such premises.

These measures therefore fulfil the constitutionally valid objective of protecting health. In addition, temporary closure measures apply only to sites or establishments that are accessible to the public. They do not apply to residential premises or parts of establishments that are not intended to be publicly accessible. Moreover, they are also subject to the same conditions and safeguards as those applicable to the regulation or prohibition of movement of persons and vehicles.

As for the power conferred by the disputed provisions to regulate gatherings, activities or meetings, the Constitutional Council ruled that this authority is intended to determine the conditions under which such events must be held in order to limit the spread of the epidemic.

It noted that gatherings, activities or meetings taking place on public land and in places

open to the public present a greater risk of contributing to the spread of the epidemic by bringing together a large number of people, sometimes from far away, who are not ordinarily in contact. Such regulation therefore meets the constitutionally valid objective of protecting health. Furthermore, Parliament did not authorise the Prime Minister to substitute a system of prior authorisa-

tion for the declaratory system that applies to organisation of events on public land. In addition, the regulatory measures adopted by the Prime Minister are subject to the same conditions and safeguards as the measures referred to above and, in particular, may only be based on grounds relating to the interests of public health and solely for the purpose of combating the spread of the COVID-19 epidemic.

On all these grounds, the Constitutional Council ruled that the limitations imposed by Parliament on the right to collective expression of ideas and opinions fulfilled the conditions of being necessary, appropriate and proportionate to the constitutionally valid objective of protecting health.

Lastly, with regard to the fact that repeated violation of these regulations or prohibitions

constitute a criminal offence, the Constitutional Council recalled that Article 34 of the Constitution, as well as the principle of legality of offences and penalties based on Article 8 of the Declaration of 1789, oblige Parliament itself to set out the scope of application of criminal law and to define crimes and offences in terms sufficiently clear and precise as to preclude arbitrary application.

It noted in this respect that Article 1, paragraphs I and II of the Act authorise the regulatory authority to take certain regulatory or prohibitory measures, from 11 July 2020 to 30 October 2020, in the interest of public health and for the sole purpose of combating the spread of the COVID-19 epidemic. Article 1, paragraph III nonetheless requires that such measures be strictly proportionate to the health risks involved and

appropriate to the circumstances of time and place, and that they be terminated without delay when they are no longer necessary. Finally, it follows from the fourth paragraph of Article L. 3136-1 of the Public Health Code that a violation of such regulations or prohibitions constitutes an offence only when preceded by three other violations of the same obligation or prohibition committed within the previous 30 days.

The Constitutional Council ruled that Parliament had adequately determined the scope of the obligations and prohibitions that may be enacted by the regulatory authority and the conditions under which failure to comply therewith constitutes an offence. On these grounds, it dismissed the complaint alleging disregard for the principle of legality of offences and penalties.

THE LIMITATIONS IMPOSED
BY PARLIAMENT ON THE
RIGHT TO COLLECTIVE
EXPRESSION OF IDEAS AND
OPINIONS FULFILLED THE
CONDITIONS OF BEING
NECESSARY, APPROPRIATE
AND PROPORTIONATE





Since 13 March 1959, the Constitutional Council has occupied the Montpensier wing of the Palais-Royal.



SECURITY MEASURES TO APPLY TO THE PERPETRATORS OF TERRORIST OFFENCES

The Act creating a security measure aimed at subjecting the perpetrators of terrorist offences, as soon as they leave detention, to obligations and prohibitions in order to prevent them from re-offending was referred to the Constitutional Council.

DECISION N°2020-805 DC

August 2020

Act establishing security measures to apply to the perpetrators of terrorist offences at the completion of their sentence

[Partial unconstitutionality]

he Constitutional Council, when considering the Act establishing security measures to be applied to the perpetrators of terrorist offences at the end of their sentence, observed that the objective of combating terrorism is part of the constitutionally valid objective of preventing breaches of public order and ruled that it is open to the Parliament to provide, under certain conditions, for security measures based on the high level of risk posed by the perpetrator of a terrorist act and aimed at preventing the recurrence of such offences. The Council nevertheless struck down certain provisions of this Act as being contrary to the requirements arising from Articles 2, 4 and 9 of the Constitution.

The President of the National Assembly, firstly, and secondly, more than sixty senators and more than sixty deputies had referred to the Council Article 1 of the Act creating a security measure aimed at subjecting the perpetrators of terrorist offences, as soon as they leave detention, to certain obligations and prohibitions in order to prevent them from re-offending.

In examining these provisions, the Constitutional Council ruled in unprecedented terms that terrorism seriously disrupts public order through intimidation or terror. It noted that the objective of combating terrorism is part of the constitutionally valid objective of preventing breaches of public order.

In analysing the nature of the measure adopted by the Parliament, the Constitutional Council noted that, though this measure is imposed in consideration of a criminal conviction and follows the completion of the sentence, it is not decided by the trial court at the time the sentence is handed down, but rather at the end of the sentence, by the regional court with competence to order the continued detention of individuals after their sentence has been served. It is based not on the guilt of the convicted person, but on the high level of risk they pose, as assessed, at the time that it is decided upon, by the regional court exercising that specific competence. Its purpose is to prevent and deter recidivism. This measure is accordingly neither a punishment nor a sanction having the character of a punishment.

However, although it is not punitive in nature, it must comply with the principle, enshrined in Articles 2, 4 and 9 of the Declaration of 1789, that personal liberty may not be constrained by any unnecessary strictures. It is incumbent upon Parliament to ensure that the prevention of breaches of public order is balanced against the exercise of constitutionally guaranteed rights and

freedoms. These include the freedom to come and go, a component of individual freedom; the right to respect for personal privacy that is protected by Article 2 of the Declaration of 1789; and the right to lead a normal family life pursuant to the tenth paragraph of the Preamble to the Constitution of 27 October 1946. Any interference with the exercise of these rights and freedoms must be appropriate, necessary and proportionate to the objective of prevention being pursued.

With reference to the constitutional framework thus set out, the Constitutional Council ruled that, through the provisions in question, Parliament intended, as it was entitled to do, to combat terrorism and prevent the commission of acts constituting a serious threat to public order. It pursued the constitutionally valid objective of preventing breaches of public order.

However, although Parliament is free to enact security measures based on the high level of risk posed by the perpetrator of a terrorist act, as assessed on the basis of objective factors, and aimed at preventing the recurrence of such offences, this power is subject to the proviso that there is no available measure that is less prejudicial to the constitutionally guaranteed rights and freedoms and is sufficient to prevent the commission of such acts, and that the conditions for implementing such measures and their duration are appropriate and proportionate to the objective pursued. Compliance with this requirement is all the more necessary where the person has already served his or her sentence.

In this respect the Council noted, as a first observation, that the contested measure makes it possible to impose, cumulatively if necessary, various obligations or prohibitions which infringe the freedom to come and go, the right to respect for personal privacy and the right to lead a normal family life. This applies in particular to the obligation to take up residence in a specific place; the obligation to report periodically to the police or gendarmerie units, up to three times a week; the prohibition on engaging in certain activities; the prohibition on associating with certain persons or appearing in certain places, categories of places or areas; and the obligation to comply with conditions relating to health, social, educational or psychological care.

Secondly, the duration of the security measure increases its harshness. While the contested

measure may be imposed for a period of one year, it may be extended for a further period of up to five or, in some cases, ten years. If the person was a minor at the time of the commission of the offence, these maximum periods are set at three and five years respectively. The maximum periods are applied in consideration of the penalty that may be imposed, regardless of the quantum of the sentence actually handed down.

Thirdly, on the one hand, although the contested measure can only be ordered against a person convicted of a terrorist offence, it can be applied if the person was sentenced to a custodial sentence of five years or more, or three years if the offence was committed by a repeat offender. On the other hand, it may be imposed even if the sentence was partially suspended. Thus, it follows from the contested provisions that the security measure may be imposed if the minimum custodial part of the sentence is at of at least three months' duration, even though the sentencing court did not consider it appropriate to rule that the suspended part of the sentence could take the form of probation or a probationary suspension, notwithstanding the fact that these measures are designed to ensure that the person is monitored after his or her term of imprisonment.

Fourthly, the measure can only be imposed on the grounds of the level of risk the person poses, as characterised, in particular, by the very high probability that he or she will re-offend. However, while the security measure can only be imposed after a prison sentence has been served, there is no requirement that, while serving their sentences, the person concerned should have been afforded access to measures conducive to their reintegration into society.

Finally, extensions of the security measure may be approved under the same criteria as the initial decision, without there being any requirement that the level of risk the person poses be corroborated by new or additional information.

In the light of all these grounds, the Constitutional Council inferred that the contested provisions failed to comply with the aforementioned constitutional requirements. It declared Article 1 of the referred Act and, consequently, Articles 2 and 4 thereof, which were inseparable from it, to be in breach of the Constitution.

interpretative reservations

QPC referrals from 1 September 2019 to 31 August 2020

branches of law reviewed: tax law, criminal law, public law, social law, business law, civil law, environmental law

DECISIONS IN 2019 2020



Priority preliminary rulings on the issue of constitutionality

Since 2010, the Constitutional Council has been empowered to review laws that have already entered into force. This mechanism, known as the "priority preliminary ruling on the issue of constitutionality" (QPC), is carried out at the initiative of members of the public. In the course of a trial, a person may seek to verify that the law that applies to his or her own case is consistent with the Constitution. Depending on the nature of the dispute, the request is brought before the Court of Cassation or the Council of State, which decides whether or not to refer it to the Constitutional Council. If the provisions reviewed are deemed unconstitutional, they are "struck down". As such, they permanently cease to apply. Overview of QPCs from September 2019 to August 2020.

TAXATION OF PALM OIL

Seized by the Council of State through the QPC, the Constitutional Council ruled that Parliament was empowered, without violating the Constitution, to exclude palm oil from an advantageous tax regime intended for biofuels.

DECISION N° 2019-808 QPC

Total Raffinage France [Inclusion of palm-oil-based biofuels in the scope of the steering tax on the incorporation of biofuels]

[Constitutionality]

he Constitutional Council was called upon, in the context of a priority preliminary ruling on the issue of constitutionality, to judge whether the language of the final paragraph of section B-2 of paragraph V of Article 266 quindecies of the Customs Code was consistent with the rights and freedoms guaranteed by the Constitution. The provisions in question were introduced by the Finance Act for 2019, i.e. Law N° 2018-1317 of 28 December 2018.

These provisions seek to encourage companies producing or importing fuels to incorporate a minimum quantity of biofuels, via a reduction in the amount of the tax levied in proportion to the share of biofuels incorporated. However, they prohibit fuels derived from

palm oil from being considered as biofuels, offering no possibility of demonstrating that the oil in question was produced under conditions precluding the risk of an indirect increase in greenhouse gas emissions. Consequently, the energy generated from this raw material is not taken into account in the proportion of renewable energy, and as such does not allow for a reduction in taxes.

The applicant company criticised the law for setting out an overarching exclusion, with no house gases.

On the basis of Article 13 of the Declaration of the Rights of Man and of the

PARLIAMENT

INTENDED TO COMBAT

GREENHOUSE GAS

EMISSIONS WORLDWIDE

Citizen of 1789 and Article 34 of the Constitution, the Constitutional Council recalled that Parliament is responsible for determining the rules according to which contributory capacity is to be assessed, in accordance with constitutional principles and

taking into account the characteristics of each tax. In particular, to ensure compliance with the principle of equality, it must base its assessment on objective and rational criteria related to the objectives pursued. This assessment must not, however, lead to a clear breach of equality vis-à-vis government encumbrances.

In light of this constitutional framework, the Constitutional Council noted that, by instituting

possibility of demonstrating that certain methods of palm oil cultivation were not harmful to the environment, and for establishing an unjustified difference in treatment between palmoil-based fuels and those produced from other oilseed plants, the production of which does not necessarily emit a lesser amount of green-

ANNUAL REPORT 2020



the steering tax on the incorporation of biofuels, Parliament intended to combat greenhouse gas emissions worldwide. In this respect, it sought to reduce both direct emissions, particularly from fossil fuels, and indirect emissions caused by replacing food crops with other crops intended for biofuel production, thus leading to the exploitation of carbon-rich non-agricultural land, such as forests or peat bogs, for food purposes.

Citing the strong growth of the palm oil industry and the significant expansion of worldwide surface area devoted to palm oil production - particularly on carbon-rich land, thus leading to deforestation and the draining of peat bogs - the Council considered that, as per the current state of knowledge, Parliament's assessment of the environmental consequences arising from the cultivation of the raw organic materials in question was not manifestly improper with regard to the general interest objective pursued, i.e. environmental protection.

As such, the Constitutional Council concluded that, by excluding from the calculation of the tax any possibility of demonstrating that palm oil could be produced under conditions that prevent the risk of an indirect increase in greenhouse gas emissions, Parliament had adopted objective and rational criteria related to the aim pursued, as per the current state of knowledge and the conditions in which palm oil is cultivated in the world. On these grounds, the Council dismissed the complaint alleging disregard for the principle of equality vis-à-vis govern-

FREE ACCESS TO PUBLIC HIGHER EDUCATION

INTERPRETATION. THE

CONSTITUTIONAL

COUNCIL CONCLUDED

FROM PARAGRAPH 13

OF THE PREAMBLE TO

THE CONSTITUTION OF

27 OCTOBER 1946 THAT

THE CONSTITUTIONAL

REQUIREMENT OF FREE

ACCESS TO EDUCATION

APPLIES TO PUBLIC HIGHER

EDUCATION

Ruling on the constitutionality of paragraph 3 of Article 48 of the Finance Act for 1951 (Law N° 51-598 of 24 May 1951), the Constitutional Council ruled on the requirement that public higher education be free for all.

DECISION N° 2019-809 QPC

11 October 2019

Union nationale des étudiants en droit, gestion, AES, sciences économiques, politiques et sociales et αl. [Tuition fees for access to public institutions of higher education]

[Constitutionality]

ccording to the provisions referred by the Council of State, the rates and procedures for collecting registration, tuition, testing, competitive examination and diploma

fees in public institutions may be set by decree.

The applicant associations argued that these provisions violated paragraph 13 of the Preamble to the 1946 Constitution. In particular, they argued that the principle of free public education, which they considered as arising from that paragraph, precluded the charging of fees for access to higher education.

With a new and unprecedented interpretation, the Constitutional Council concluded from paragraph 13 of the Preamble to the Constitution of 27 October 1946 that the constitutional

requirement of free access to education applies to public higher education. Nonetheless, for this tested provisions with these constitutional requirements, the Constitutional Council noted that the provisions in question merely provide that the regulatory power shall determine the annual amounts of fees collected by public higher education institutions and paid by students. It held that the competent ministers are responsible, under judicial supervision, for setting the amounts of these fees in compliance with the requirements of free public higher education and equal access to education.

On these grounds, it dismissed the complaints alleging failure to comply with the

constitutional requirements of free public education and equal access to education.

level of education, the requirement does not prethe rates clude the levying of modest tuition fees, taking
into account the financial capacity of students,
where appropriate.

With regard to the compliance of the contested provisions with these

WITH A NEW AND

UNPRECEDENTED

Level of education, the requirement does not preclude the levying of modest tuition fees, taking
into account the financial capacity of students,
where appropriate.

Constitutional requirements,
the Constitutional Council



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LIABILITY OF AIR CARRIERS IN THE EVENT OF **ILLEGAL ENTRY** INTO THE **COUNTRY**

DECISION N° 2019-810 QPC

Air France [Liability of air carriers in the event of arrival in France of a foreign national not in possession of the documents necessary to enter the country]

[Constitutionality]

Called upon to review a QPC relating to Articles

L. 625-1 and L. 625-5 of the Code of Entry and Residence of Foreigners and the Right of Asylum, the Constitutional Council ruled that a specific aspect of the penalty system applied to air carriers transporting into French territory a foreign national who is not a citizen of a European Union Member State and who does not possess the required travel document and, where applicable, visa, is constitutional.

THE APPLICANT THUS

CONSIDERED THAT THE

PROVISIONS IN QUESTION

SERVED TO DELEGATE TO

THE CARRIER PERFORMANCE

OF INSPECTION OPERATIONS

INCUMBENT SOLELY ON

PUBLIC AUTHORITIES

he provisions in question were referred to the Constitutional Council by the Council of State on 31 July 2019. The first imposes a fine on any air carrier that transports into French territory a foreign nation-

al who is not a citizen of a European Union Member State and who does not possess the travel document and, where applicable, visa required by applicable law. The second provides that this fine shall be waived in particular where the carrier establishes that the required documents were presented at the time of boarding and did not contain any manifest irregularity.

These provisions were criticised for allowing an air carrier to be penalised even when

time of boarding and where the irregularity affecting them had not been detected by the competent government services when said documents were issued. The applicant thus considered that the provisions in ques-

> tion served to delegate to the carrier performance of inspection operations incumbent solely on public authorities, in violation of Article 12 of the Declaration of the Rights of Man and of the Citizen of 1789.

> As this system of penalties for air carriers stems from European law, the Constitutional Council

had to determine the nature of its review in order to respond to the question raised. It noted in that regard that the contested

it had verified the travel documents at the



provisions, specific to national law, were not a simple transcription of unconditional and precise provisions contained in the Directive of 28 June 2001. Consequently, the body was fully competent to rule on their constitutionality.

In response to the allegation that the provisions violated Article 12 of the Declaration of 1789, from which stems the prohibition to delegate to private persons general administrative police powers inherent in the exercise of "government authority" necessary to safeguard rights, the Constitutional Council ruled that the manifest irregularities which, in application of the contested provisions and under penalty of a fine, the carrier is responsible for detecting when verifying the required documents at the time of boarding, are those likely to appear during a regular careful examination of said documents by an agent of the company.

It concluded that, in introducing this obligation, Parliament did not intend to involve air carriers in the inspection of these documents as carried out by government agents upon their issue and at the time of entry of the foreigner into country.

The Constitutional Council also rejected complaints alleging violations of the principles of proportionality and individualisation of penalties, the principle that no one may be punished except for his or her own acts, and the principle of equality before the law, and ruled that the provisions of Article L. 625-5, paragraph 2 of the Code of Entry and Residence of Foreigners and the Right of Asylum is constitutional.

REPRESENTATIVENESS IN EUROPEAN ELECTIONS

Called upon to review Article 3 of
the Law of 7 July 1977 on the election
of representatives to the European
Parliament, the Constitutional Council
ruled that Parliament had not violated the
Constitution by providing that seats in the
European Parliament are only allocated
to lists having obtained at least 5% of the
votes cast.

DECISION
N° 2019-811 QPC
25 October 2019
Ms Fairouz H. et
al. [Threshold of
representativeness
applicable to European
elections]
[Constitutionality]

n 1 August 2019, the Council of State referred to the Constitutional Council a priority issue of constitutionality concerning the conformity of this article, as per the wording contained in the Law of 25 June 2018, with the rights and freedoms guaranteed by the Constitution.

These provisions define the conditions under which the representatives of European Union cit-

izens residing in France are elected to the European Parliament. They stipulate that these elections take place, within the framework of a single national constituency, by party-list proportional representation ballot, according to the rule of the highest average. Seats are only allocated to lists having obtained at least 5% of the votes cast.

The applicants contested this 5% threshold of representativeness. In their view, it was unjustified, particularly since the election of a limited number of MEPs in France alone was

insufficient to fulfil the objective of ensuring a stable and consistent majority in the European Parliament. Moreover, this threshold would have disproportionate consequences insofar as it would prevent broad-based political movements from gaining access to the European Parliament and would deprive a large number of voters of any representation at the European level. The applicants alleged a violation of the principles of equal suffrage and pluralism of currents of ideas and opinions.

The Constitutional Council recalled that, as per the principle of equal suffrage guaranteed by paragraph 3 of Article 3 of the Constitution and Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789, as well the principle of pluralism of cur-

rents of ideas and opinions guar-

anteed by Article 4 of the Constitution, although the French lawmaking body is empowered, when defining electoral rules, to set forth modalities tending to favour the establishment of stable and

THE APPLICANTS
CONTESTED THIS
5% THRESHOLD OF
REPRESENTATIVENESS

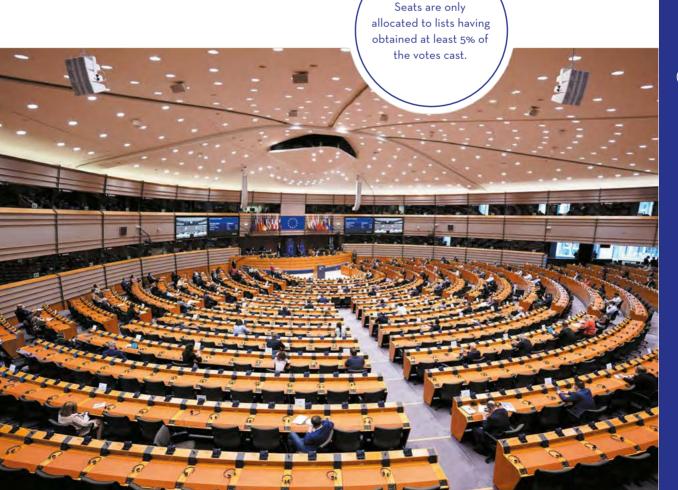
coherent majorities, any rule which, in view of this objective, disproportionately affects equality between voters or candidates, would constitute a violation of the principle of pluralism of currents of ideas and opinions.

It noted that, by establishing a threshold for allocation of seats in the European Parliament, legislators pursued a twofold objective regarding participation of the French Republic in the European Union as provided for in Article 88-1 of the Constitution. On the one hand, they sought to promote representation in the European Parliament of the main currents of ideas and opinions expressed in France, thereby strengthening the influence of such ideas and opinions within the body, while contributing to the emergence and consolidation of European political groups of significant size. In so doing, they sought to avoid a fragmentation of representation that would be detrimental to the smooth functioning of the European Parliament. The Constitutional Council concluded that, although no single Member State could single-handedly achieve such an objective,

legislators were justified in choosing election arrangements that would favour the formation of majorities enabling the European Parliament to exercise its legislative, budgetary and supervisory powers.

Recalling that the Constitutional Council is not competent to examine whether the objective set by the French lawmaking body could have been achieved by other means, provided that the arrangements chosen are not manifestly ill-suited to the objective pursued, the Constitutional Council ruled that by setting the threshold for allocation of seats in the European Parliament at 5% of the votes cast, legislators adopted a system that does not disproportionately affect equal suffrage and does not unduly undermine pluralism of currents of ideas and opinions.

This 5% threshold of representativeness is therefore constitutional.



RESTRUCTURING OF PROFESSIONAL BRANCHES

In the context of a QPC relating to the restructuring of professional branches, the Constitutional Council defined the powers of the Minister of Labour in this area, specifying the scope of contractual freedom with respect to collective bargaining.

DECISION
N° 2019-816 QPC

Fédération nationale des syndicats du spectacle, du cinéma, de l'audiovisuel et de l'action culturelle CGT *et al.* [Restructuring of professional branches]

> [Partial unconstitutionality - reservation]

he provisions referred to the body on 2 October 2019 by the Council of State were those of paragraphs I and V of Article L. 2261-32 of the Labour Code, the wording of which was set out in Law N° 2018-771 of 5 September 2018 on citizens' freedom to choose their professional future, and Articles L. 2261-33 and L. 2261-34 of the same Code, the wording

of which was set out in Law N° 2016-1088 of 8 August 2016 on labour, the modernisation of social dialogue and securing career paths.

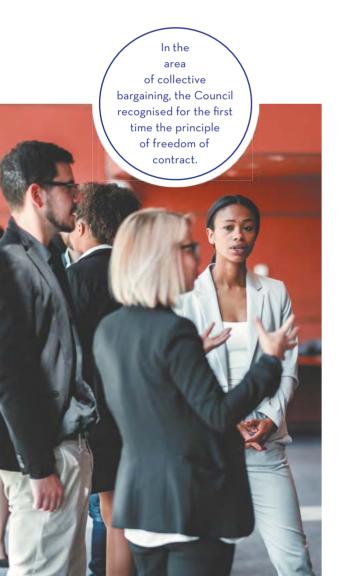
These provisions allow the Minister of Labour to integrate the scope of collective agreements of a professional branch with that of another branch characterised by similar social and economic conditions. This procedure may be initiated, in particular, when the branch to be merged has fewer than 5,000 employees, THE CONSTITUTIONAL
COUNCIL RULED, IN AN
UNPRECEDENTED WAY, THAT
FREEDOM OF CONTRACT IN
MATTERS OF COLLECTIVE
BARGAINING DERIVES FROM
PARAGRAPHS 6 AND 8 OF
THE PREAMBLE TO THE
CONSTITUTION OF 1946
AND ARTICLE 4 OF THE
DECLARATION OF 1789

when it covers only select geographical regions or localities, or if the standing joint committee for negotiation and interpretation competent in that branch has not been established or does not meet. The procedure can also be used "to merge several branches so as to enhance the coherence of the scope of collective agreements".

The trade unions and employers' organisations with negotiating powers in the merged

sectors are then invited to initiate negotiations with a view to reaching an agreement, within five years, instituting common provisions to replace the collective agreement provisions governing equivalent situations in the merged sectors. Failing such an agreement, the branch resulting from the merger shall be governed solely by the provisions of the collective agreement applicable to the merging branch. Representative employee and employers' organisations in

In reviewing the provisions relating to the powers of the Minister of Labour to restructure professional branches, the Constitutional Council ruled, in an unprecedented way, that freedom of contract in matters of collective bargaining derives from paragraphs 6 and 8 of the Preamble to the Constitution of 1946 and Article 4 of the Declaration of 1789. Parliament is empowered to impose limitations on this freedom in accordance with constitutional requirements or where justified by the general interest, provided that the infringements resulting from such limitations are not disproportionate with regard to the objective pursued.



The Council noted that the contested provisions infringe this freedom, insofar as social partners who wish to negotiate a replacement agreement are obliged to do so within the professional and geographical scope determined by the merger order issued by the Minister of Labour. Moreover, they are also required to adopt common stipulations to govern equivalent situations within the new branch.

However, the Constitutional Council ruled that, in adopting these provisions, Parliament sought to remedy the fragmentation of professional branches, with the aim of strengthening social dialogue within these branches and empowering them with resources commensurate with the powers granted them by law. These powers particularly include setting out select working and employment conditions for employees and the guarantees applicable thereto, as well as regulating competition between companies. In so doing, Parliament pursued an objective of general interest.

In order to avoid criticisms levelled in the majority of cases where it is possible to merge branches, the Council noted the various safeguards and conditions provided for by the law, in particular the requirement that any restructuring undertaken, under the supervision of the administrative court, take account of the general interest served by restructuring the branches in question. Furthermore, the merger of branches cannot be decided without first inviting the organisations and persons concerned to submit their comments.

However, the Constitutional Council rejected the provision allowing the Minister of Labour to "merge several branches so as to enhance the coherence of the scope of collective agreements". It held that Parliament had not determined the criteria by which such coherence could be assessed, thus leaving excessive latitude to ministerial authority in assessing the grounds liable to justify the merger. Parliament thus misjudged the extent of its jurisdiction in conditions affecting freedom of contract.

With regard to the effects of the restructuring on the provisions of the collective agreement of the merged branch, the Constitutional Council pointed out that Parliament could not, without contravening the requirements arising from Articles 4 and 16 of the Declaration of 1789, interfere with legally concluded contracts unless such action was justified by sufficient reasons of general interest.

It noted that these constitutional requirements are infringed by the provisions automatically terminating the application of the collective agreement for the merged branch should negotiations not lead to the acceptance of a replacement agreement within five years of the effective date of the merger.

Nevertheless, the Council judged that Parliament's intention in adopting these provi-

sions was to ensure the effectiveness of the merger, in the event of absence or failure of collective bargaining, by imposing a unified status for employees and companies in the new branch. Consequently, and in view of the general interest objec-

tive mentioned above, rendering ineffective those provisions of the collective agreement of the merged branch which, rather than governing situations specific to branch in question, govern instead situations equivalent to those governed by the collective agreement of the merging branch, does not constitute a breach of the right to maintain legally concluded agreements.

However, by way of an initial interpretative reservation, the Constitutional Council ruled that these same provisions could not, without unduly infringing the right to maintain legally concluded agreements, automatically terminate the application of the provisions of the collective agreement of the merged branch which govern situations specific to that branch.

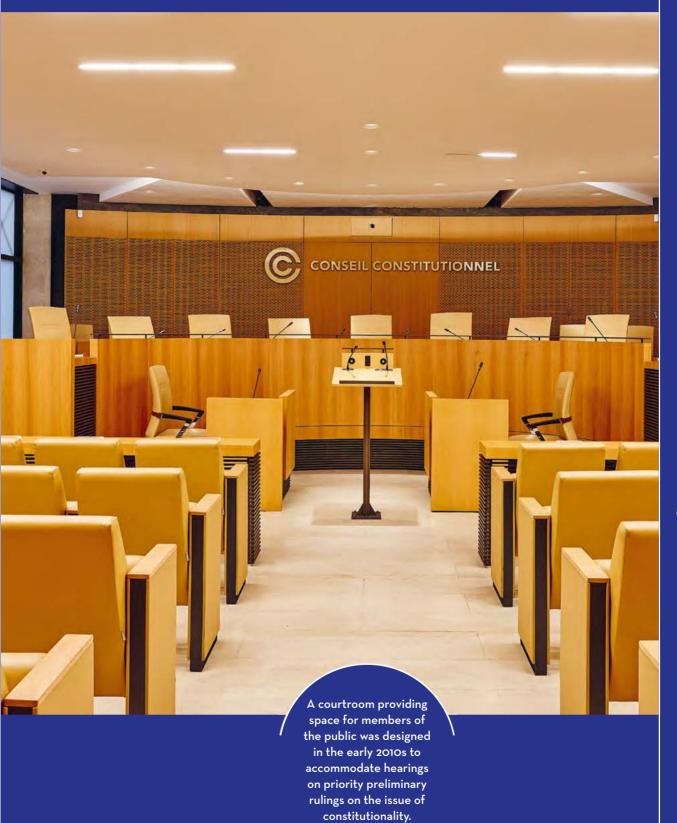
Finally, with regard to the effects of the restructuring of branches on the representativeness of social partners, the Constitutional Council noted that denying the representative employee trade union organisations in the former branches the possibility of signing the replacement agreement or a new branch agreement when said organisations have lost their representative status in the new branch does not infringe contractual freedom and the right to maintain legally concluded agreements. The same applies to the right of employers' organisations having lost their representative status to oppose the extension of the replacement agreement.

However, in the specific case where the representative organisations in each of the merged branches have initiated negotiations on the replacement agreement within five years and before the recomposition of representative bodies following the merger, the contested provisions could result in the exclusion from the negotiations then in progress of those organisations that no longer meet the criteria for representativeness following the recomposition. The Council therefore ruled, via a second interpretative reservation, that these provisions could not, without infring-

ing contractual freedom, be construed as preventing employers' and employee organisations having lost their representative status at the level of the new branch after the recomposition of representative bodies following the merger, from con-

tinuing to participate in the discussions on the replacement agreement. Such organisations may nonetheless be denied the right to sign, oppose or oppose the potential extension of said agreement.

PARLIAMENT THUS
MISJUDGED THE EXTENT
OF ITS JURISDICTION IN
CONDITIONS AFFECTING
FREEDOM OF CONTRACT



RECORDING OF THE HEARINGS OF ADMINISTRATIVE OR JUDICIAL COURTS

Reviewing on a QPC referred by the Council of State, the Constitutional Council ruled that Parliament could, without violating the Constitution, prohibit the use of photographic, sound or audiovisual recording devices during hearings of administrative or judicial courts.

DECISION N° 2019-817 QPC Ms Claire L. [General ban on video or audio recording of the hearings of administrative or judicial courts] [Constitutionality]

he provisions covered by this QPC were those of Article 38 ter of the Law of 29 July 1881 on freedom of the press. They prohibit any person, under penalty of a fine, from using any photographic, sound or audiovisual recording device, as of the start of a hearing of an administrative or judicial

court, and from transferring or publishing any recording or document obtained in violation of this ban.

These provisions were criticised in particular for infringing freedom of expression and communication. The applicants claimed that advances in recording techniques and the police power of the presiding judge are sufficient to ensure

the orderly functioning of the proceedings, the protection of individual rights and the impartiality of magistrates.

The Constitutional Council recalled, on the basis of Article 11 of the Declaration of the Rights of Man and of the Citizen, that freedom of expression and communication is all the more precious since it stands out as a prerequisite for democracy, safeguarding respect for other rights and freedoms. Limitations on the exercise of this freedom must be necessary,

appropriate and proportionate to the objective pursued.

In the constitutional framework thus specified, the Council pointed out that by introducing the contested ban, Parliament intended to guarantee the orderly functioning of the proceedings, preventing the risks of disruption associated with the use of these devices. In so doing, it

pursued the constitutionally valid objective of proper administration of justice. A further objective of the ban was a desire to avoid any

THESE PROVISIONS

WERE CRITICISED

IN PARTICULAR FOR

INFRINGING FREEDOM

OF EXPRESSION AND

COMMUNICATION



prejudice that the broadcasting of images or recordings from the hearings might cause with

respect to the right to privacy of the parties and other participants in the proceedings, the safety of judicial actors and, in criminal matters, the presumption of innocence of the accused.

The Constitutional Council also noted that, while it is possible to use audio and video recording devices that do not in themselves disrupt the proceedings, the ban on using such devices during hearings prevents the dissemination of images or recordings which may in turn constitute a disruption.

Moreover, developments in the field of communications could increase the attention such dissemination is liable to attract, thus heightening the risk that the aforementioned interests could be compromised. Finally, the ban arising from the contested provisions, which could be subject to excep-

tions, does not prevent spectators attending the hearings, and in particular journalists, from reporting on the proceedings by any other means, including during the proceedings themselves, subject to the police power of the presiding judge.

For all of these reasons, the Constitutional Council ruled that the infringement of the contested provisions on the exercise of freedom of expression and communication is necessary, appropriate and

proportionate to the objectives pursued. """.

THE HEARINGS MIGHT CAUSE PREJUDICE TO THE RIGHT TO PRIVACY OF THE PARTIES, THE SAFETY OF JUDICIAL ACTORS AND THE PRESUMPTION OF

INNOCENCE

THE BROADCASTING OF

PHYTOPHARMACEUTICAL PRODUCTS

PROTECTION OF THE

ENVIRONMENT AS THE

COMMON HERITAGE

OF ALL MANKIND

CONSTITUTES A

CONSTITUTIONALLY

VALID OBJECTIVE

Ruling on a QPC relating to the ban on production, storage and circulation of certain phytopharmaceutical products, the Constitutional Council confirmed the constitutionally valid objective of protecting the environment, the common heritage of mankind.

DECISION N° 2019-823 OPC

31 January 2020

Union des industries de la protection des plantes [Ban on the production, storage and movement of certain phytopharmaceutical products]

[Constitutionality]

he provisions addressed in the QPC, referred to the Constitutional Council on 7 November 2019 by the Council of State, concerned paragraph IV of Article L. 253-8 of the Rural and Maritime Fishing Code, the wording of which was set out in Law N° 2018-938 of 30 October 2018 on balanced trade relations in the agricultural and food sector and healthy,

sustainable and accessible food for all. They prohibit the production, storage and circulation in France of phytosanitary products containing active substances not approved by the European Union due to their effects on human health, animal health or the environment. They thus impede not only the sale of such products in France but also the export thereof.

The products in question include, in particular, herbicides, fungicides, insecticides and acaricides.

The Union des industries de la protection des plantes, joined by the Union française des semenciers, argued that the severity of the consequences resulting from the export ban introduced by these provisions for producing or exporting companies constituted a breach of freedom of enterprise. The applicant claimed that such a ban was unrelated to the objective of protecting health and the environment insofar as importing countries which authorise these products will not stop using them, choosing instead to obtain their

supplies from competitors of French companies.

The Constitutional Council first recalled that freedom of enterprise derives from Article 4 of the Declaration of the Rights of Man and of the Citizen of 1789.

In unprecedented terms, it then ruled that, based on the preamble to the Charter for the Environment, protection of the environment as the

common heritage of all mankind constitutes a constitutionally valid objective. This aspect of its decision is explicitly based on the wording of the preamble to the Charter, according to which "the future and the very existence of mankind are inseparable from its natural environment ... the environment is the common heritage of all mankind ... care must be taken to safeguard the environment along with the other fundamental interests of the Nation ... in order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardise the abil-

ity of future generations and other peoples to meet their own needs".

It also recalled the constitutionally valid objective of protecting health, as per the eleventh paragraph of the Preamble to the 1946 Constitution.

Based on these various constitutional provisions, the Constitutional Council concluded, for the first time, that Parliament is responsible for reconciling the constitutionally valid objectives of environ-

mental and health protection with the exercise of entrepreneurial freedom. As such, Parliament may take into account the potential impact activities carried out in France may have on the environment in other parts of the world.

In light of the constitutional framework thus expressed, the Constitutional Council noted that, in adopting the contested legislative provisions, Parliament sought to prevent potential damage to human health and the environment resulting from dissemination of the active substances contained in the products in question, the toxicity of which had been established in the context of the European approval procedure for active substances. It pointed out in this regard that the Constitutional Council does not have a general power of construal and decision of the same nature as that of Parliament. As such, in light of the current state of knowledge, it would not be appropriate for the Council to call into question the provisions thus adopted by Parliament.

The Constitutional Council deemed that Parliament's intention in adopting the contested provisions was to prevent companies established in France from participating in the sale of such products anywhere in the world, and thus indirectly contributing to the resulting harm to human health and the environment. Consequently, despite the fact that the production and marketing of such products were likely to be authorised outside the European Union, the limitation on freedom of enterprise imposed by the contested provisions was well in line with the constitutionally valid

PARLIAMENT MAY TAKE

INTO ACCOUNT THE

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ACTIVITIES CARRIED OUT

IN FRANCE MAY HAVE

ON THE ENVIRONMENT

IN OTHER PARTS OF THE

WORLD

objectives of protecting health and the environment.

The Constitutional Council further noted that, by differing until 1 January 2022 the entry into force of the ban on the production, storage and circulation of phytosanitary products containing unapproved active substances, Parliament gave the companies subject to the ban a period of just over three years to adapt their business accordingly.

From all of the above, the Constitutional Council concluded that, by adopting the contested provisions, Parliament reconciled, in a manner that was not judged manifestly unbalanced, freedom of enterprise and the constitutionally valid objectives of protecting heath and the environment.

The contested provisions were thus



ANNUAL REPORT 2020

JUDICIAL REHABILITATION

Called upon to review a law relating to judicial rehabilitation, the Constitutional Council validated the provisions in question, but stressed that Parliament would be justified in instituting legal proceedings to restore the honour of a person sentenced to death for the benefit of that person's successors.

DECISION N° 2019-827 QPC

28 February 2020

Mr Gérard F. [Conditions of admissibility of requests for judicial rehabilitation for persons sentenced to death]

[Constitutionality]

n 11 December 2019, the Court of Cassation referred to the Constitutional Council a priority issue of constitutionality concerning compliance of Articles 785 and 786 of the Code of Criminal Procedure, relating to the judicial rehabilitation procedure, with the rights and freedoms guaranteed by the Constitution.

Judicial rehabilitation aims to promote reintegration of a person convicted of a crim-

inal offence. It removes all disqualifications and incapacities resulting from a criminal conviction and prohibits any person who, in the performance of his or her duties, becomes aware of the existence of such disqualifications and incapacities, from mentioning them. However, it does not automatically expunge the sentence, which may continue to be taken into

account by judicial authorities in the event of future prosecutions, for the application of penalties associated with repeat offences.

According to Article 786 of the Code of Criminal Procedure, a request for judicial

rehabilitation for persons convicted of a criminal offence may only be submitted after a period of five years. This period runs from the expiry of the sentence, whether executed or time-barred, except in the special case provided for in Article 789 of the same Code, where the person convicted has, since commission of the offence "rendered distinguished service to the country". In this case, he or she may be rehabilitated without any conditions as to time or execution of the sentence.

The applicant argued that, by making the admissibility of an application for judicial rehabilitation conditional on compliance with a probationary period of five years as from the expiry of the sentence, the provisions in question deprived the relatives of a person sentenced to death, and whose sentence had been carried out, of the possibility of submitting such a request on his

or her behalf in the year of his or her death. He further argued that this difference in treatment between persons sentenced to death and whose sentence has been carried out, and those sentenced to other criminal penalties or

JUDICIAL
REHABILITATION
AIMS TO PROMOTE
REINTEGRATION OF A
PERSON CONVICTED OF
A CRIMINAL OFFENCE

pardoned by the President of the Republic, violated the principles of equality before the

law and the courts, as well as the principle of proportionality of penalties.

In particular, the Constitutional Council recalled, as per Articles 6 and 16 of the Declaration of the Rights of Man and of the Citizen of 1789, that while Parliament may provide for different rules of procedure depending on the facts, situations and persons to which they apply, such differences must not be based on unjustified distinctions, and that all citizens must enjoy equal guarantees.

In light of this constitutional framework, it noted that the contested provisions prevent a request for judicial rehabilitation from being submitted by a person sentenced to death and whose sentence has been carried out. They also prevent such a request from being submitted by relatives of such a person in the year of his or her death, in accordance with the first paragraph of Article 785 of the Code of Criminal Procedure.

By imposing a five-year probationary period following the execution of the sentence, Parliament intended to make the benefit of rehabilitation conditional on the conduct of the person convicted, once the sentence imposed no longer applied. In this respect, it follows from established case law of the Court of Cassation that judicial rehabilitation may only be granted to persons who, after having been convicted and served their sentence, have proved themselves worthy, through good behaviour during the probationary period, of being restored to the integrity of their former state. As a result, those sentenced to death and executed were unable to fulfil the conditions laid down by law. Thus, the difference in treatment resulting from the contested provisions is based on a difference in circumstances and is directly related to the purpose of the law.

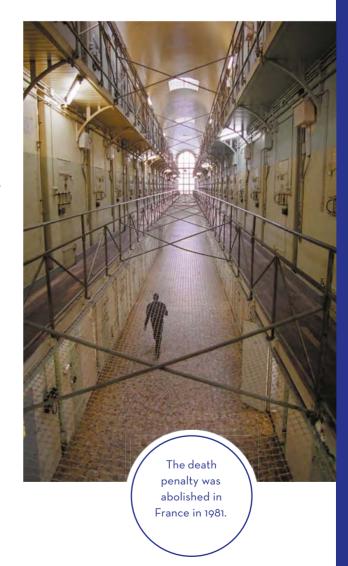
However, the Constitutional Council pointed out that, after the abolition of the death penalty by the Law of 9 October 1981, Parliament introduced Article 66-1 into the Constitution via the Constitutional Law of 23 February 2007,

according to which "No one may be sentenced to the death penalty". Under these conditions,

Parliament would therefore be justified in instituting legal proceedings, open to the successors of a person sentenced to death and whose sentence has been carried out, to restore his or her honour on the basis of evidence of redemption.

On these grounds, the Constitutional Council dismissed the criticism that the principles of equality before the law and the courts had been disregarded and found the contested provisions to be constitutional.

THE DIFFERENCE IN
TREATMENT RESULTING
FROM THE CONTESTED
PROVISIONS IS BASED
ON A DIFFERENCE IN
CIRCUMSTANCES AND
IS DIRECTLY RELATED
TO THE PURPOSE OF
THE LAW



LOCAL PARCOURSUP ALGORITHMS

Confirming the existence of a constitutional right of access to administrative documents, the Constitutional Council ruled that each higher education institution must report on the criteria according to which Parcoursup applications were examined.

DECISION N° 2020-834 QPC

03 April 2020

Union nationale des étudiants de France [Communicability and public disclosure of algorithms used by higher education institutions to examine undergraduate enrolment applications]

[Constitutionality - reservation]

n 16 January 2020, the Council of State referred to the Constitutional Council a priority issue of constitutionality relating to the compli-

ance of the last paragraph of Article L. 612-3, paragraph I of the Code of Education with the rights and freedoms guaranteed by the Constitution. The wording of the contested provisions was set out in Law N° 2018-166 of 8 March 2018 on orientation and success for students in higher education.

Under the terms of the Code of Education, enrolment in initial undergraduate programmes in public institutions of higher education is preceded by a nationwide pre-enrolment procedure during which candidates are informed of the characteristics

of each programme. These characteristics are covered by a "national framework" established

by order of the Minister of Higher Education. They may be supplemented by individual institutions to take account of the specific features of their programmes.

Regarding access to non-selective pro-

grammes, the law provides for a mechanism for selecting applicants when the number of applications exceeds the capacity of the programmes requested. In this case, enrolment is decided by the head of the institution based on the coherence between applicants' educational goals, skills and knowledge, and the characteristics of the programme. The head of the institution takes these decisions on the basis of proposals submitted by application examination committees set up within the institution for each of the programmes offered. Each com-

mittee sets out its own criteria and procedures for examining applications, in accordance with

THE MAIN CRITICISM OF
THESE PROVISIONS WAS
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ACCESS TO INFORMATION
CONCERNING THE
CRITERIA AND
PROCEDURES FOR
EXAMINING APPLICATIONS
FOR ENROLMENT IN
UNDERGRADUATE

PROGRAMMES

the general criteria established by the institution.

The provisions of the Code of Education addressed by the QPC stipulate that applicants

may obtain information on the criteria and procedures implemented by the institutions for examining applications, as well as the pedagogical reasons justifying a negative decision with regard to their application. At the same time, they exclude application of two articles of the Code of Relations

between Government and the Public relating to communication and public disclosure of algorithmic processing used as an exclusive or partial basis for an individual administrative decision. According to established case law of the Council of State, the provisions in question thus reserve access to administrative documents relating to algorithmic processing methods that may be used by higher education institutions for the

PARLIAMENT SOUGHT TO

MAINTAIN THE SECRECY

OF THE DELIBERATIONS OF

TEACHING STAFF WITHIN

THE INSTITUTIONS

examination of applications, to applicants who request such access, once the decision concerning them has been taken. Moreover, only information relating to the criteria and procedures for examining their application may be disclosed. As such, third parties may not request communication of these cri-

teria and procedures, nor may applicants themselves before a decision has been taken concerning their application.

The main criticism of these provisions was that they restrict access to information concerning the criteria and procedures for examining applications for enrolment in undergraduate programmes. They were denounced as contravening the right to communication of administrative documents, arising from Article 15 of the Declaration of the Rights of Man and of the Citizen of 1789, in that they would exclude any access, by applicants or third parties, to the algorithms institutions may utilise to process applications for enrolment formulated on the digital platform known as "Parcoursup". The Union nationale des étudiants de France claimed that such an exclusion was justified neither by the secrecy of the deliberations of admissions committees, nor by any other reason.

The Constitutional Council ruled, for the first time, that the right of access to administrative documents is guaranteed by Article 15 of the Declaration of the Rights of Man and of the Citizen of 1789. Parliament is empowered to impose limitations on this right in accordance with constitutional requirements or where justified by the general interest, provided that the infringements resulting from such limitations are not disproportionate with regard to the objective pursued.

In light of the constitutional framework thus explained, the Council noted that, through the contested provisions, Parliament considered the determination of these criteria and procedures for examining applications, where algorithmic processing is utilised, to be indissociable



from the assessment made of each application. Consequently, by restricting access to the administrative documents specifying these criteria and procedures, Parliament sought to maintain the secrecy of the deliberations of teaching staff within the institutions with a view to ensuring their independence and the authority of their decisions. In so doing, it pursued an objective of general interest.

Moreover, the nationwide pre-enrolment procedure is not entirely automated, particularly in that it sets out the conditions under which institutions examine enrolment applications. Institutions are entitled, but not required, to use algorithmic processing to carry out this examination. Furthermore, when such methods are utilised, decisions taken with regard to each application cannot be based exclusively on an

algorithm. On the contrary, they require an assessment of the merits of each application by the admissions committee, and then by the head of the establishment.

The Constitutional Council also noted that candidates have access to information on the skills and knowledge expected for successful completion of the

programme, as set out at the national level and supplemented by each institution. They also have access to the general criteria governing the examination of applications by admissions committees. Although the law does not specifically provide for access to this information by third parties, it is not classified. The administrative documents relating to the skills and knowledge expected and the general criteria may therefore be communicated to those persons who request them, under the conditions of ordinary law provided for by the Code of Relations between Government and the Public.

In addition, the contested provisions stipulate that applicants may obtain from the institution, upon request, information relating to the criteria and procedures for examining their applications once a decision has been taken in their regard, as well as the pedagogical reasons justifying a rejection. They may thus be informed of the ranking and weighting of the various general criteria

established by the institutions, as well as specifications and additions to these general criteria for the examination of applications. The right of communication provided for by these provisions may also extend to information on the criteria used by any algorithmic processing mechanisms utilised by admissions committees.

However, the Constitutional Council noted that this right of communication only benefits applicants themselves. Once the nationwide pre-enrolment procedure has been completed, the lack of third-party access to any information relating to the criteria and procedures for examining the applications accepted by the institutions would constitute an infringement of the right guaranteed by Article 15 of the Declaration of 1789. Such infringement would moreover be disproportionate with regard to

the general interest objective pursued, grounded in the will to maintain the secrecy of the deliberations of teaching staff. The Council therefore held that the contested provisions could not, without infringing the right of access to administrative documents, be interpreted as exempting each institution, at the end of the nationwide

pre-enrolment procedure and with due respect for applicants' privacy, from disclosing the criteria according to which the applications were examined and specifying, if applicable, the extent to which algorithmic processing was used to carry out that examination. Where appropriate, such information may be disclosed in the form of a report.

Subject to the interpretative reservation thus set out, the Constitutional Council ruled that the limitations imposed by the contested provisions on the exercise of the right of access to administrative documents arising from Article 15 of the Declaration of 1789 are justified by an objective of general interest and proportionate to that objective. It accordingly dismissed the complaint alleging violation of that article and declared the provisions in question to be constitutional.

THE CONSTITUTIONAL COUNCIL NOTED THAT THIS RIGHT OF COMMUNICATION ONLY BENEFITS APPLICANTS THEMSELVES



the Constitutional Council's QPC hearings were held in the Grand Salon of the Montpensier wing.



OPERATION OF AN ELECTRICITY GENERATION FACILITY

The priority issue of constitutionality submitted to the Constitutional Council concerned Article L. 311-5 of the Energy Code, as amended by Ordinance N° 2011-504 of 9 May 2011 codifying the legislative section of said Code.

DECISION
N° 2020-843
QPC
28 May 2020
Force 5 [Authorisation
to operate an electricity
generation facility]

[Temporary
unconstitutionality]

uling on a QPC referred by the Council of State, the Constitutional Council ruled that the decision authorising the operation of an electricity generation facility constitutes a public decision likely to affect the environment, within the meaning of

Article 7 of the Charter for the Environment. Furthermore, it ruled in unprecedented terms that the provisions of an ordinance must be regarded as provisions of law if, after the period of enablement, they may be amended solely by an Act of Parliament in those areas governed by statute law.

According to Article L. 311-1 of the Energy Code, as amended by the same ordinance, operation of an electric-

ity generation facility is subject to a government permit issued to the operator having applied for such authorisation or who is designated following a call for tenders. In its decision to grant this permit, the government takes into account several criteria as set out in Article L. 311-5, the article concerned by the QPC.

According to the applicant association, the administrative decision authorising operation of an electricity generation facility had a direct

and significant impact on the environment. Consequently, by failing to provide for a mechanism allowing for public participation in the preparation of this decision, Parliament failed to take into account the scope of its jurisdiction and Article 7 of the Charter for the Environment.

The Constitutional Council pointed out that, according to Article 7 of the Charter for the Environment:

"Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in

THE CONSTITUTIONAL
COUNCIL REVIEWED
COMPLIANCE OF THE
CONTESTED PROVISIONS
WITH THE REQUIREMENTS
OF ARTICLE 7 OF THE
CHARTER FOR THE
ENVIRONMENT

the possession of public bodies and to participate in the public decision-taking process likely to affect the environment". Since the entry into force of this Charter, it has been incumbent on Parliament and, within the framework defined by law, on government authorities to determine, in accordance with the principles thus set out, the manner in which these provisions are to be implemented.

The Council recognised that, under the terms of Article L. 311-5 of the Energy Code, when deciding whether to issue a permit for operation of an electricity generation facility, the government authority takes into account, in particular, the "choice of sites" for the facili-

ty, the resulting consequences on "land use" and "use of the public domain", the "energy efficiency" of the facility and the compatibility of the project with "environmental protection". According to established case law of the Council of State, the government permit thus issued designates not only the holder of the permit but also the method of production and the authorised

capacity, as well as the location of the facility.

The Constitutional Council inferred from this case law that the decision authorising operation of an electricity production facility on the basis of Article L. 311-5 constitutes a public decision having an impact on the environment within the meaning of Article 7 of the Charter for the Environment. In this respect, the fact that the actual location of the facility may require further government decisions following issuance of the permit is irrelevant.

Accordingly, the Constitutional Council reviewed compliance of the contested provisions with the requirements of Article 7 of the Charter for the Environment. It noted that, prior to the Ordinance of 5 August 2013 on the implementation of the principle of public participation set out in Article 7 of the Charter for the Environment, there existed no provision ensuring implementation of this principle for the preparation of the public decisions provided for in Article L. 311-5 of the Energy Code. The Ordinance of 5 August 2013 subsequently inserted into the Environmental Code Article L. 120-1-1, applicable as from 1 September 2013 to individual decisions by public authorities with an impact on the environment which do not fall under a category of decisions for which specific legislative provisions have provided for public participation. This article requires that the draft decision or, where the decision is taken on request, the application file, be made available to the public by electronic means. It then allows the public to submit comments, by electronic means, within a period of not less than fifteen days from the date of publication.

The Constitutional Council noted that although Article L. 120-1-1 was introduced

IN UNPRECEDENTED

TERMS, THE COUNCIL

JUDGED THAT, AS OF THAT

DATE, THE PROVISIONS OF

THE ORDINANCE MUST BE

REGARDED AS LEGISLATIVE

PROVISIONS

by ordinance, as per the final paragraph of Article 38 of the Constitution, said ordinance could be amended solely by an Act of Parliament in those areas governed by statute law,

visions. The conditions and limits of the public participation procedure provided for in Article L. 120-1-1 are thus "provided for by law" within the meaning of Article 7 of the Environmental

On all these grounds, the Constitutional Council ruled that the provisions, in their contested wording as applicable from 1 June 2011 to 18 August 2015, must be declared unconstitutional until 31 August 2013, but constitutional as of 1 September 2013. Initiatives to challenge the measures adopted prior to 1 September 2013 on the basis of provisions declared unconstitutional before that date would have manifestly excessive consequences. Subsequently, these measures cannot be challenged on the basis of such unconstitutionality.

as of the expiry of the enabling period set at 1 September 2013. In unprecedented terms, the Council judged that, as of that date, the provisions of the ordinance must

be regarded as legislative pro-

ANNUAL REPORT 2020

MUNICIPAL ELECTIONS TIMETABLE

Ruling on a QPC referred to it by the Council of State on 26 May 2020, the Constitutional Council approved the deferral of the second round of municipal elections, while laying down ground-rules for adjustments in arrangements for electoral operations.

DECISION
N° 2020-849 QPC
17 June 2020
Mr Daniel D. et al.
[Changes to the municipal elections timetable]
[Constitutionality]

he Council had before it a QPC on the constitutionality of the rights and freedoms guaranteed by the Constitution in paragraphs I, III and IV of Article 19 of the 23 March 2020 Public Health Emergency Act (COVID-19 Epidemic Act).

The exceptional circumstances relating to the COVID-19 epidemic led to the suspension

of electoral operations after the first round of municipal elections was held on Sunday, 15 March 2020, and the postponement of the second round, initially scheduled for 22 March 2020, until June 2020 at the latest, under the proviso that the health situation allows the organisation of electoral operations. Should this condition not be met, it is foreseen that voters from municipalities whose municipal councils were not elected in full at the end of the

first round would be asked to return for both rounds of voting, under arrangements to be set out in a new law. In either of these scenarios, the lawful election of the municipal councillors who were elected in the first round on 15 March 2020 would stand.

The applicants and other parties addressing the Council on the issues argued that these provisions, adopted after the first round of the municipal elections, postponed the second round to an undetermined date which could be set by the regulatory authority as late as the end of June. In their view, on the one hand, Parliament could not disrupt an electoral process that was under way and should therefore

have annulled the results of the 15 March 2020 ballot for the purpose of holding fresh municipal elections. On the other hand, by allowing the second round to take place more than three months after the first round, when the tworound ballot was supposed to constitute an indivisible block, the legislator had set an unreasonably long deadline. Finally, it was argued that, by enabling the second round to be held during the health

crisis caused by the COVID-19 epidemic, Parliament created the conditions for a high level of voter abstention. This had, they maintained, resulted in a breach of the principles of integrity of the electoral process and voter equality.

THE APPLICANTS
MAINTAINED THAT
THIS HAD RESULTED
IN A BREACH OF
THE PRINCIPLES OF
INTEGRITY OF THE
ELECTORAL PROCESS
AND VOTER EQUALITY

It was further argued that these provisions had the effect of ratifying the results of the first round of the municipal elections, without regard to any challenges that were currently

pending before the Electoral Court, and that this was a violation of the separation of powers and the guarantee of rights.

The Council recalled that, according to the third paragraph of Article 3 of the Constitution, the right to vote "shall always be universal, equal and confidential". This underlies the principle of the integrity of the voting process.

Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen provides that the law "must be the same for all, whether it protects or punishes". This provision and the third

paragraph of Article 3 of the Constitution establish the principle of voter equality.

Parliament which is empowered under Article 34 of the Constitution to lay down rules

for local assembly elections, may, in this role, determine the term of office of the elected representatives who make up the deliberative body of a local authority. However, in the exercise of this responsibility, it must comply with constitutional principles, and these principles specifically require that voters must be called upon to exercise their right to vote, guaranteed

by Article 3 of the Constitution, at reasonable intervals.

With regard to the constitutional requirements that have just been presented, the Council

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THE COUNCIL RECALLED

THAT [...] THE RIGHT TO

VOTE "SHALL ALWAYS BE

UNIVERSAL. EQUAL AND

CONFIDENTIAL"

ruled that, although the contested provisions do call into question the unity of the electoral process, they make it possible, contrary to a cancellation of the first round, to preserve the results of the vote in the first round. However, unless it disregards the requirements resulting from Article 3 of the Constitution, Parliament can only authorise such a modification of the electoral process if that modification is justified by a consideration of overriding public interest and if the procedures it has adopted do not result in a violation of the right to vote, the principle of fair voting or voter equality.

Applying this analytical test to the contested provisions, the Council noted that, by adopting

them when the choice had been made, before it intervened, to proceed with the first round of voting, Parliament intended to ensure that the holding of the second round (initially scheduled for 22 March 2020), and the electoral campaign that was to precede it, did not contribute to the further spread of the COVID-19 epidemic, in a public health setting that had necessitated the imposition of lockdown measures. These provisions are therefore justified by an overriding public interest consideration.

The Council then examined the modalities which Parliament approved in order to avoid any violation of the right to vote, the principle of fair voting or voter equality.

It noted, in the first place, that Parliament stipulated that the second round of municipal elections should take place no later than June 2020. The time limit thus set for staging the second round was, at the time of its adoption, appropriate having regard to the seriousness of the public health situation and the uncertainty surrounding the spread of the epidemic.

Secondly, Parliament required the regulatory authority to set the date of the second round by

a decree of the Council of Ministers to be issued no later than 27 May 2020. It has made this determination subject to the condition that the health situation allowed it, taking into account in particular the analysis of the Committee of Scientists provided for in Article L. 3131-19 of the Public Health Code.

Thirdly, although the applicants and certain other parties addressing the Council on these issues argued that, because of the COVID-19 epidemic, staging the second round before the end of June 2020 would be likely to affect voter turnout, the Council noted that this ballot could only be held if the public health situation allowed it. Consequently, the contested provisions do not

in themselves encourage voter abstention. It will be for the Electoral Court, if the matter is referred to it, to assess whether or not, in the particular circumstances of the case, the level of abstention may or may not have adversely affected the integrity of the electoral process.

Lastly, the Council noted that several measures to revamp the electoral law help to ensuredespite the time between the two rounds of votingequality between candidates during the campaign, that the electoral process is not disrupted and that the ballot is con-

ducted in a fair manner. In particular, in order to preserve the unity of the electorate between the two rounds, Executive Order N° 2020-390 of 1 April 2020 provides that, with some exceptions, the second round of voting initially set for 22 March 2020 shall be based on the electoral rolls and supplementary electoral rolls that were compiled for the first round.

In addition, subparagraphs 6 and 7 of paragraph XII of Article 19 of the Act of 23 March 2020 provide that, by derogation from the Electoral Code, the applicable election expenditure ceilings may be increased by decree and that part of the campaign expenses incurred for the

WHAT IS MEANT BY "LEGISLATIVE COMPLIANCE WITH THE CONSTITUTION"?

In assessing whether laws are consistent with the Constitution, the Constitutional Council checks that the provisions in question comply not only with the rules of the Constitution of the 5th Republic adopted in 1958, but also with the principles contained in the so-called "constitutionality corpus": the 1789 Declaration of the Rights of Man and of the Citizen, the Preamble to the Constitution of 1946, and the Environmental Charter of 2004.

second round initially set for 22 March 2020 may be reimbursed. These provisions help to ensure there is equality between candidates during the election campaign.

Finally, in order to ensure that voters were able to contest the results of the first round despite the suspension of the vote, they were allowed access, by derogation from the third paragraph of Article L. 68 of the Electoral Code, to the polling stations' registration lists from the entry into force of the decree convening the second round until the expiry of the deadline for lodging appeals.

Taking all these reasons into account, the Council ruled that the postponement of the second round of the municipal elections until June 2020 at the latest does not undermine the right to vote, the principle of fairness of the voting process or the principle of equality before the vote.

With regard to the criticisms of the provisions which allow the municipal councillors elected in the first round held on 15 March 2020 to

The



FORCIBLE ISOLATION OR RESTRAINT MEASURES IN PSYCHIATRIC HOSPITALS

In a ruling on a QPC referred to it by the Court of Cassation (First Civil Chamber), the Constitutional Council held that, having regard to the requirements of Article 66 of the Constitution, Parliament could not authorise the continuation of isolation or restraint measures in psychiatric care settings beyond a certain period in the absence of oversight by the courts.

DECISION N° 2020-844 QPC

Mr Éric G. [Monitoring of forcible isolation or restraint measures in a psychiatric care setting]

[Total unconstitutionality - deferred effect]

his QPC concerned compatibility with the rights and freedoms guaranteed by the Constitution under Article L. 3222-5-1 of the Public Health Code, as amended by Act N° 2016-41 of 26 January 2016 on the modernisation of our health system.

These provisions lay down the framework in which, in relation to involuntary admissions to a psychiatric care facility, a person who has been hospitalised may be isolated by being placed in a locked room or restrained by means of immobilisation measures.

The applicant and the other parties associated with the referral challenged those provisions, as interpreted by the Court of Cassation, claiming that they violated the individual freedom that is protected by Article 66 of the Constitution insofar as they did not provide for systematic judicial oversight of the isolation and restraint measures employed in psychiatric care facilities, or for any remedy in favour of the person subjected to such measures.

The Council noted that, under the terms of Article 66 of the Constitution, "No one shall be arbitrarily detained. – The Judicial Authority,

guardian of the freedom of the individual, shall ensure compliance with this principle as provided by statute."

Freedom of the individual, the protection of which is the responsibility of the judicial authority, may not be obstructed by any unnecessary strictures. Any restrictions on the exercise of this freedom must be appropriate, necessary and proportionate to the objectives pursued.

In the light of the constitutional requirements that have just been restated, the Council ruled that isolation and restraint measures are not necessarily applied during a hospitalisation without consent and are therefore not a direct consequence of the hospitalisation. They may be ordered without the person's consent. As a result, isolation and restraint constitute a deprivation of liberty.

The Council noted that the decision to place a person who is under psychiatric care in isolation, or to restrain them, without their consent may only be taken by a psychiatrist for a limited period when such measures constitute the only available means of preventing immediate or imminent harm to that person or to others. The use of such measures must in

those circumstances be subject to strict supervision for which the treating facility must employ health professionals appointed for that purpose. Furthermore, any health care facility providing psychiatric care without patient consent must, on the one hand, ensure the traceability of isolation or restraint measures by keeping a register which, in relation to each measure, records the name of the psychiatrist who takes the decision,

the time and date of the measure, its duration and the names of the health professionals who oversaw its implementation. This register must be made available on request to the Departmental Psychiatric Treatment Committee, the Controller-General of Places of Deprivation of Liberty or his/her delegates, and/or to Members of Parliament. Moreover, the health care facility must produce an annual report specifying the practices governing the isolation or restraint of patients, the policy which places limits on the use of those practices and the assessment made of the implementation of that policy. This

report must be sent to the facility's Client and Patient Committee and its Supervisory Board for review.

The Council concluded that, in adopting these provisions, Parliament established substantive conditions and procedural guarantees that ensure that placement in solitary confinement or restraint while in psychiatric care without consent is used only in cases where such measures are appropriate, necessary and proportionate to the condition of the person concerned.

The Council further ruled that, while Article 66 of the Constitution requires that any deprivation of liberty be placed under the oversight of the judicial authority, it does not require that the judicial authority be notified prior to the use of any measure of deprivation of liberty. Therefore, the contested provisions, to the extent that they permit solitary confinement or restraint in psychiatric care without consent, do not violate Article 66 of the Constitution.

On the other hand, individual liberty can only be deemed to be safeguarded if the courts intervene as expeditiously as possible. While Parliament has provided that the use of isolation and restraint may be ordered by a psychiatrist only for a limited time, it has not set that limit or

> laid down the conditions under which the continuation of such measures is subject to review by the courts. The Council deduced from this that there is no legislative provision that subjects the continuation of solitary confinement or restraint to the jurisdiction of a court in circumstances that satisfy the requirements of Article 66 of the Constitution.

For these reasons. the Council found the contested provisions to be inconsistent with the Constitution. Since the immediate repeal of the provisions declared to be inconsistent with the Constitution would entail

manifestly excessive consequences, inasmuch as it would preclude any possibility of solitary confinement or restraint of persons involuntarily admitted to psychiatric care, the date of their repeal was deferred to 31 December 2020. """

TO STRIKE DOWN IMMEDIATELY OR TO DEFER?

Under paragraph 2 of Article 62 of the Constitution, an annulment which is ordered in the context of a QPC decision takes effect either on publication of the Constitutional Council's decision or on a later date stipulated in that decision.

The Council may decide to postpone the effect of an annulment order if an immediate annulment is likely to cause manifestly excessive effects or create a legal vacuum.

However, in more than two thirds of cases, the Council rules in favour of immediate annulment, in particular when it is not possible to allow any unconstitutional provision(s) to remain in force, even temporarily.

POSSESSION OF MATERIAL CONDONING TERRORISM

The Constitutional Council rules that the offence of possession of material condoning terrorism constitutes an unnecessary, inappropriate, and disproportionate infringement of freedom of expression and communication.

DECISION N° 2020-845 QPC

19 June 202

Mr Théo S. [Possession of material condoning terrorism]

[Constitutionality - reservation]

QPC referred to the Constitutional Council on 25 March 2020 by the Court of Cassation (Criminal Chamber) concerned the constitutionality of the rights and freedoms which the Constitution guarantees "through the combined effect" of Article 321-1 of the Criminal Code and Article 421-2-5 of the same Code.

In a Decision of 7 January 2020 (Criminal Chamber, N° 19-80.136) and in the judgment referring the case back to a court of appeal, the Court of Cassation held that the provisions of Articles 321-1 and 421-2-5 of the Criminal Code embrace the fact of knowingly possessing files or documents which condone acts of terrorism, when such handling is accompanied by adherence to the ideology expressed in those

files or documents. It thus recognised the existence of an offence of possession of material condoning acts of terrorism.

This offence provides for a five-year prison term and a 375,000-euro fine for knowingly possessing files or documents which condone those acts while adhering to the ideology expressed

in such material. In accordance with Article 321-4, the applicable sanction is seven years of imprisonment and a fine of 100,000 euros and a fine of 100,000 euros where possession of the "condoning material" occurs in the aggravating circumstance of use of a public on-line communication medium. The sanction provided under Article 321-2 of the same Code rises to ten years

of imprisonment and a fine of 750,000 euros where the act of possession is of an habitual nature or is committed by an organised group.

The applicant and the association joined in the referral argued that the legislative provisions identified in the referral, as interpreted by the Court of Cassation, infringed freedom of expression and communication and the principles relating to the legality, necessity and proportionality of offences and

penalties. Inasmuch as there is no substantial and fundamental difference between accessing a terrorist website and downloading or storing the content of such sites on a digital medium, there was, they argued, nothing to distinguish this offence of "possession" from the offence of habitual accessing of terrorist websites,

PARLIAMENT
CONFERRED NUMEROUS
POWERS ON THE
ADMINISTRATIVE
AUTHORITIES TO ENABLE
THEM TO PREVENT THE
COMMISSION OF SUCH
ACTS

the latter having been deemed by the Council, in its decisions of 10 February 2017 and 15 December 2017, to be contrary to freedom of communication.

In its decision, the Council noted that, under Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen, "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."

On the basis of Article 34 of the Constitution, it is open to Parliament to enact rules that reconcile the pursuit of the objective of combat-

THE CONSTITUTIONAL

COUNCIL CONCLUDES

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INAPPROPRIATE, AND

DISPROPORTIONATE

INFRINGEMENT

OF FREEDOM OF

EXPRESSION AND

COMMUNICATION

ing incitement and provocation to engage in terrorism, an objective which is part of the constitutionally valid aim of safeguarding law and order and preventing offences, with the exercise of the right to freedom of communication and the freedom to speak, write and print. However, freedom of expression and communication is all the more valuable by virtue of the fact that it is a requisite condition of democracy and among the guarantees of other rights and freedoms. Any infringements of the exercise of this freedom must be necessary, appropriate, and proportionate to the objective pursued.

In the light of the aforementioned constitutional requirements, the Council notes that the purpose of the offence of possession of material which condones terrorism is both to prevent the public dissemination of dangerous ideas and statements related to terrorism and to prevent the indoctrination of individuals who might repeat such statements or commit terrorist acts.

With regard to the necessity of the provisions that were thus interpreted, the Council noted (as it had in its decisions of 10 February and 15 December 2017) that the legislation covers a number of offences other than the criminalisation provisions that were the subject of the challenge, as well as number of specific criminal procedure provisions designed to prevent the commission of acts of terrorism. Also, Parliament conferred numerous powers on the administrative authorities to enable them to prevent the commission of such acts. Those provisions are referred to in the Council's decision.

The Constitutional Council concludes that, leaving to one side the offence that was the subject of the challenge, the administrative and judicial authorities had numerous prerogatives at their disposal, enabling them not only to combat the public dissemination of material condoning acts of terrorism and to punish individuals committing those acts, but also to monitor an individual who accesses or collects these messages, to

> detain and question them and to punish them if such accessing or collection is accompanied by conduct revealing terrorist intent, even before this intent has reached the stage of being

> With regard to the requirements of appropriateness and proportionality that apply where infringements of freedom of expression and communication are at issue, the Council ruled, on the one hand, that, while the public condoning of acts of terrorism encourages the widespread dissemination of dangerous ideas and statements, the possession of files or documents condoning those acts constitutes public condoning only if it subsequently gives rise

to further public dissemination. On the other hand, the laying of criminal charges against a person found to be in possession of material condoning acts of terrorism does not require that person intends to commit terrorist acts or condones such acts.

Consistent with the Court of Cassation's interpretation, the prosecution of this offence requires evidence of adherence, on the part of the person found to be in possession of the files or documents condoning terrorist acts, to the ideology expressed therein; neither such adherence nor the possession of those files or documents condoning terrorist acts can, however, on

put into effect.



The Constitutional Council concludes that, even if an intention to commit or condone terrorist acts has not been proven, the mere possession of files or documents condoning acts of terrorism may constitute the offence of possession of material condoning such acts, an offence which, depending on each case, provides for terms of imprisonment of up to five, seven or ten years.

Based on all these considerations, the Constitutional Council concludes that the offence of possession of material condoning acts of terrorism is an unnecessary, inappropriate, and disproportionate infringement of freedom of expression and communication. The Council accordingly records an interpretative reservation to the effect that the provisions that were referred to it may not be interpreted as being capable of punishing such an offence.

INTERPRETATIVE RESERVATIONS

When a constitutional review has been concluded, the Constitutional Council may declare the provisions that were referred to it to be consistent with the Constitution, or it may strike them down, in whole or in part. It may also record interpretative reservations: these generally entail eliminating any possible interpretations which would be at odds with the Constitution or providing clarifying details as to how the law should be applied. The Council records an interpretation of a provision only if it is needed to explain the basis on which the provision in question complies with the Constitution.





Level 4 of the

REPEATED LOCKDOWN **VIOLATIONS**

Ruling on a QPC referred to it on 14 May 2020 by the Court of Cassation, the Constitutional Council ruled that the provisions which punish the repeated violation of lockdown orders, exceptions to which may only be made by the regulatory authorities if they are strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place, are constitutional.

DECISION N° 2020-846-847-848 OPC M. Oussman G. et αl. [Repeated lockdown violations1 [Constitutionality]

he Constitutional Council was asked to consider a QPC concerning the constitutionality of the rights and freedoms which the Constitution guarantees "under the

provisions of paragraph 4 of Article L .3136-1 of the Public Health Code, which punish any violation of the prohibitions or obligations arising from the enforcement of subparagraph 2 of Article L.3131-15 of that Code".

Paragraph 3 of Article L.3136-1 provides for summary penalties for any violation of the prohibitions or obligations arising from the enforcement of Articles L.3131-1 and L.3131-15 to L.3131-17 of the Public Health Code. These prohibitions include, in subparagraph 2 of Article L.3131-15, a pro-

hibition on leaving one's home other than for purposes that are strictly essential to family or health needs. That prohibition may be ordered by the Prime Minister in the context of a public

The provisions that were challenged provide for punishment of any violation of the prohibi-

> 30 days, three other infringement notices for such violations had already been issued. In that event, the violation carries a punishment of six months of imprisonment and a fine of 3,750 euros.

> The applicants and other parties addressing the Council on the issues argued, in particular, that these provisions infringed the principal of the legality of offences and punishments. They maintained that Parliament had left it to the regulatory authorities to specify the constituent elements of the offence which are punishable

under those provisions, since it authorised those authorities to determine the circumstances in which a person may leave his or her home and

health emergency. tion on leaving one's home if, in the preceding

THE APPLICANTS

AND OTHER PARTIES

ADDRESSING THE

COUNCIL ON THE ISSUES

ARGUED, IN PARTICULAR,

THAT THESE PROVISIONS

INFRINGED THE

PRINCIPAL OF THE

LEGALITY OF OFFENCES

AND PUNISHMENTS

the conditions under which compliance with that prohibition is monitored. They also argued that there was a lack of clarity with regard to the issuing of infringement notices and that the terms "family or health needs" were too vague. Two applicants further argued that, because of the vagueness of the provisions, a single unau-

thorised departure from one's home could result in several infringement notices being issued.

The Council noted that, under Article 8 of the 1789 Declaration of the Rights of Man and of the Citizen, "The law shall provide only for such punishments as are strictly and obviously necessary, and no one shall suffer punishment except by virtue of a law passed and promulgated before the commission of the offence, and legally enforced." According to Article 34 of the Constitution: "The law shall determine the rules concerning... serious

crimes and other offences and the penalties they carry". Article 34 of the Constitution and the principle of the legality of offences and punishments require Parliament to determine, itself, the scope of the criminal law and to define major crimes and other offences in terms that are sufficiently clear and precise as to preclude the occurrence of arbitrary decisions and measures.

With regard to the constitutional requirements just mentioned, the Council noted that the offence referred to it for examination punishes a violation of the ban on leaving one's place of residence when it is committed in circumstances where, in the previous 30 days, infringement notices for three other violations of the ban had already been issued. The Council found that neither the concept of "issuing infringement notices" (in French, verbalisation), which refers to the drawing up of a report of offence, nor the reference to "travel that is strictly necessary for family and health needs" is imprecise or unclear. Moreover, by including, as a constituent element of the offence, the fact that the person had previously received infringement notices "on more than three occasions", Parliament did not adopt

imprecise provisions. In particular, these provisions do not allow any single departure from one's home, which constitutes a single violation of the ban on going out, to incur more than one infringement notice.

The Council further ruled that, by adopting the contested provisions, Parliament had, on

the one hand, punished violations of the ban on going out, which can be enforced when a public health emergency is declared, and, on the other hand, had spelled out the essential elements of the ban. Indeed. Parliament has provided two exceptions to the ban, for trips that are strictly necessary for family and health needs. It held that, while it appears from the preparatory work that the Parliament did not rule out the possibility that the regulatory authorities might provide for other exceptions, these can, in accordance with the last par-

accordance with the last paragraph of Article L. 3131-15, only be aimed at ensuring that the prohibition is strictly proportionate to the health risks that may be incurred and appropriate to the circumstances of the time and place. Furthermore, the Parliament has provided that the offence is only constituted if the violation of the ban on going out is committed when, in the preceding 30 days, three other violations have already been recorded in infringement notices. The Council thus held that the Parliament had sufficiently determined the scope of the obligation and the conditions under which failure to comply with it constitutes an offence.

On these grounds, the Constitutional Council dismissed the complaint that the principle of legality of offences and penalties had been contravened. It also dismissed the other complaints against these provisions and found these provisions to be in accordance with the Constitution.

THE COUNCIL
THUS HELD THAT
THE PARLIAMENT
HAD SUFFICIENTLY
DETERMINED THE SCOPE
OF THE OBLIGATION
AND THE CONDITIONS
UNDER WHICH FAILURE
TO COMPLY WITH
IT CONSTITUTES AN

OFFENCE

EXTENSION OF PRE-TRIAL DETENTION

Ruling on two QPCs referred to it on 27 May 2020 by the Court of Cassation, the Council was asked to examine the constitutionality of the rights and freedoms which the Constitution guarantees under subparagraph 2 of paragraph 1 of Article 11 of the 23 March 2020 Public Health Emergency (COVID-19 Epidemic) Act and under point d) of the same subparagraph.

DECISION
N° 2020-851-852
QPC
3 July 2020
Mr Sofiane A. et al.
[Authority to extend the period of pre-trial detention in the context of a public health emergency]
[Constitutionality]

he contested provisions empowered the Government to take, by means of an Executive Order, measures by which it could amend the rules relating to the conduct and duration of pre-trial detention for the sole purpose of limiting the spread of the COVID-19 epidemic, in order to allow, on the one hand, for longer delays during the investigation and in hearings, for a period commensurate with that of ordinary law and not exceeding three months in misdemeanour matters and six months on appeal or in criminal matters; and, secondly, the extension of these measures solely on the basis of written submissions from the public prosecutor's office and the written observations of the person and his or her lawyer.

The applicants and others addressing the Council in this matter contended, inter alia, that these provisions were contrary to the requirements of Article 66 of the Constitution and to the rights of the defence by allowing Executive Orders issued on the basis of this Enabling Act to

provide for an automatic extension of all remand orders expiring during public health state of emergency, without such extension being subject to the intervention of the courts.

The Council noted that paragraph 1 of Article 38 of the Constitution requires the Government to justify any request it might submit to the Parliament by providing it with precise information regarding the objective of any measures it proposes to take via Executive Orders, and the area of application of those measures. At the same time, it noted that this paragraph does not compel the Government to advise the Parliament of the terms of the Executive Orders it will issue by virtue of such authorisation. The provisions of an Enabling Act may not, either of themselves or through the consequences necessarily arising from them, infringe a constitutionally valid rule or principle. Moreover, they may not have either the objective or the effect of relieving the Government, in exercising any powers granted to it by Article 38 of the Constitution, of the requirement to comply with constitutionally valid rules and principles.

Under Article 61-1 of the Constitution: "Where, in the course of proceedings in progress before a court, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Council of State or the Court of Cassation to the Constitutional Council, which shall give its ruling within a specified period". Consequently, the Constitutional Council can only be seized, on the basis of Article 61-1, of claims that the provisions of an Enabling Act which, by themselves or by the consequences that necessarily flow from them, violate the rights and freedoms guaranteed by the Constitution.

On another point, the Constitutional Council may only be seized, on the basis of the same Article 61-1, of legislative provisions. However, while the second paragraph of Article 38 of the Constitution provides that the procedure for granting the Government authority

THE CONSTITUTIONAL

COUNCIL DISMISSED

THE CLAIM THAT

THE ENABLING ACT

BREACHED THOSE

REQUIREMENTS

to issue Executive Orders ends, in principle, with their submission to Parliament for express ratification, it stipulates that such Orders enter into force immediately upon their publication. Moreover, in accordance with the same paragraph, once a ratification bill has been tabled before Parliament before the date set by the Enabling Act, Executive Orders remain

in force even if Parliament has not expressly decided on their ratification. Finally, under the last paragraph of Article 38 of the Constitution, after the expiry of the period of authorisation fixed by law, the provisions of an Executive Order issued on the basis thereof may only be amended by law in matters that fall within the legislative domain.

The provisions of an Executive Order acquire the status of legislation from the time of signature when they are ratified by Parliament; they must, however, once the time limit for the authorisation has expired, and in matters that fall within the legislative domain, be regarded as legislative provisions within the meaning of Article 61-1 of the Constitution. Their compliance with the rights and freedoms that are guaranteed by the Constitution may accordingly be challenged by way of a QPC.

In light of the constitutional requirements just referred to, and Article 66 of the Constitution, which confirm that individual freedom may only be regarded as protected if the courts intervene at the earliest possible opportunity, the Council pointed out that the contested provisions of the Enabling Act did not preclude every intervention by a court in connection with the extension of a pre-trial detention order which was approaching its expiry date during the period of enforcement of a state of public health emergency. The Council accordingly concluded that these provisions did not, either in and of themselves or through any consequences necessarily resulting from them, breach the requirements of Article 66 of the Constitution which called for the earliest possible intervention by the courts in cases involving deprivation of liberty. The Council added that the unconstitutionality that was alleged by the applicants could only result

The Council noted that the provisions of an Enabling Act may not have either the objective or the effect of relieving the Government, in exercising any powers granted to it by Article 38 of the Constitution, of the requirement to comply with constitutionally valid rules and principles, specifically the

requirements stemming from Article 66 of the Constitution with regard to the modalities of a court's intervention in cases of extension of a pre-trial detention measure.

For these reasons, the Constitutional Council dismissed the claim that the Enabling Act breached those requirements. It also dismissed the other complaints made in relation to the contested provisions and held that the latter were in compliance with the Constitution. ////

from the Executive Order issued on the basis of those provisions.

ANNUAL REPORT 2020

Other categories of decisions

In addition to the decisions it delivered by way of ex ante and ex post constitutional reviews and within the framework of the Shared Initiative Referendum, the Constitutional Council handed down the following decisions between October 2019 and September 2020.

On the basis of paragraph 2 of Article 38 of the Constitution and upon referral by the Prime Minister, the Constitutional Council took eight decisions known as Reclassifying Decisions (designated by the letter L, the issue which the Constitutional Council is asked to decide in such referrals being that of the legislative nature of the provisions submitted to it for assessment), bearing the numbers 2019-279 L to 2020-286 L.

In four of these referrals, the Council acceded fully to the request for reclassification. It granted only partial approval in the other referrals. In particular, by its Decision N° 2020-286 L of 2 July 2020 – The legal nature of certain provisions of paragraph IX of Article 6 of Amended 2020 Finance Act N° 2020-289 of 23 March 2020, the Council saw the need to clarify the scope of the Parliament's competence in compiling and presenting information for its own consideration on measures relating to the management of the nation's finances, having regard to the terms of the 1 August 2001 Organic Law N° 2001-692 on Budgetary Legislation.

decision relating to the category referred to as AUTR Decisions – "Other Texts and Decisions". By that decision, N° 2019-2 AUTR of 24 October 2019, *Request by Mr Jean Lassalle and others*, the Constitutional Council noted that its jurisdiction was strictly delineated by the Constitution. That jurisdiction can be clarified and supplemented by means of an Organic Law only if the principles laid down in the Constitution are complied with. The Council cannot be called upon to rule in cases other than those that are expressly provided for by the Constitution or the Organic Law.

The Council thus rejected a request from the National Assembly Members who, as applicants, sought a finding of unconstitutionality with regard to the decision of the 10 September 2019 Conference of Chairpersons of the National Assembly, a decision pertaining to the allocation of speaking time for the examination of the Bioethics Bill; it being noted that neither the Constitution, nor any provision of an Organic Law adopted pursuant to the Constitution, gives the Constitutional Council jurisdiction to rule on an application of this kind.

Organisational Decisions (referred to, for this reason, as ORGA Decisions). One of them concerned the appointment of deputy rapporteurs on the basis of Article 36 of Executive Order N° 58-1067 of 7 November 1958, as amended, which set out the Organic Law on the Constitutional Council (Decision N°2019-145 ORGA of 7 November 2019). The other dealt with the appointment of members of the unit foreshadowed in the third paragraph of Article 45-4 of Executive Order N° 58-1067 of 7 November 1958, as amended, which set out the Organic Law on the Constitutional Council (Decision N°2019-146 ORGA of 5 December 2019).

As a living, accessible institution, the Constitutional Council never relents in its scrutiny of the law or its efforts to advance the law through its own jurisprudence, in a manner that is in line with social developments and in compliance with basic freedoms. The Council is committed to sharing the outcomes of its work with a wide audience; since 2018 it has thus been releasing the six-monthly journal, *Titre* VII, an online publication which may be downloaded entirely free of charge. The following pages of this Report seek to shed light on some topical issues which, via two quite different sets of themes, enrich the discourse about the theory and practice of constitutional justice.

SHARING THE MAJOR CONSTITUTIONAL DEBATES



Toward a Sustainable Future: Environmental Jurisprudence from France's Constitutional Council Breaks New Ground

ountries across the world have emerged from the COVID-19 pandemic with a commitment to "build back better", which for many means more sustainably. President Macron has called for France to develop an economy that will be stronger and more sovereign but also more ecolog-

ical and committed to a spirit of solidarity. Likewise, the European Union has launched a series of policy initiatives dubbed the Green Deal that make action on climate change and the rebuilding of the economy on a sustainable basis top priorities. But nowhere is the commitment to environmental protection as a foundation for 21st century society more clear than in the emerging sustainability jurisprudence of the French Constitutional Council.

Three recent cases put the Council into a global leadership position in terms of recognition of what might be called the sustainability imperative. Most notably, in its decision in the January 2020 UIPP vs. Prime Minister case, the Council upheld legislation banning the export by French companies of pesticides that contain active ingredients deemed harmful to the environment and therefore forbidden from sale in France. In rejecting a challenge which argued that the export ban violated the fundamental legal protection of free enterprise enshrined in Article 4 of the 1789 Declaration of Human and Citizen Rights, the Council asserted in unequivocal terms that protection of the environment "constitutes an objective of constitutional value." In doing so, the Council invoked the "protection of health" found in the Preamble to the French Constitution of 1946 and the logic of the 2004 Charter for the Environment, which declares: "The future and very existence of mankind are inextricably linked with the natural environment: The environment is the common heritage of all mankind; . . . Care must be taken to safeguard the environment along with the other fundamental interests of the Nation; ... to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardise the ability of future generations and other peoples to meet their own needs."

This decision reflects two fundamental principles that could become the bedrock on which judicial support for a sustainable future gets built. First, the *UIPP* decision puts environmental principles into the highest echelon of French constitutional protections - trumping in this case even the long-enshrined right of free enterprise and establishing sustainability as a fundamental goal so important that other constitutional rights may be limited in order to uphold it. Second, the Constitutional Council's willingness to view environmental harm beyond France as a sufficient justification for the export ban makes the sustainability imperative

enunciated within French law one of universal application and gives force to the idea that environment rights must be understood as global in scope, reflecting the Charter's broad view of the environment as "the common heritage of all mankind".

The UIPP case reinforces the Constitutional Council's October 2019 decision in Total vs. Prime Minister which upheld legislation that excluded palm-oil-based biofuel from favorable tax treatment because of worries that palm cultivation leads to deforestation and thus increased greenhouse gas emissions. In rejecting the constitutional challenge brought by the oil company Total, the Council made clear that the priority put on climate change action (including indirect emissions caused by land clearing for palm plantations) by the legislature's decision to treat palm oil less favorably than other biofuels without looking into the spe-

cific environmental impacts of each form of palm cultivation was a reasonable exercise of legislative discretion.

The Total case again demonstrates the sweeping view of sustainability embedded in the Council's new jurisprudence which gives legislators considerable latitude to determine when environmental obligations can take precedence over other constitutional objectives. As in the UIPP case, the Total decision reflects a perspective on sus-

tainability as a top-tier societal value and one of global scope such that environmental harms anywhere may be considered an appropriate concern of the French government.

Any doubts about the Constitutional Council's willingness to push the boundaries of its review in advancing a commitment to sustainability and cross-checking the French government's fulfillment of its constitutional obligation to environmental protection should be further dispelled by the December 2019 Mobility Orientation Act decision. In this matter, the Council for the first time substantively reviewed the sufficiency of a programming law related to the reduction of greenhouse gas emissions in the land transport sector. While the Council ultimately concluded that the decarbonization plan set forth was not "manifestly inadequate," the mere fact that this regulation was scrutinized against the standard of the Charter for the Environment signals that a new sustainability jurisprudence has emerged and environmental principles in France will be protected henceforth with greater vigor.

The French judiciary has thus become a driving force for a sustainable future in general and action on climate change in particular. Along with the widely discussed Urgenda case in the Netherlands, courts in Ecuador, Columbia, Pakistan, Britain, Nigeria, and the Philippines have likewise issued decisions holding both governments and private parties to account for violating environmental principles or falling short of sustainability requirements. But judges and justices in other nations, including most notably the United States, have been more circumspect in their approach to these issues. For example, in the Juliana case in Oregon, the trial court held that the youth plaintiffs had met the burden of demonstrating injury from climate change and could proceed with their legal

action to have their rights against government inaction vindicated. But the Appeals Court above reversed this decision and dismissed the case, noting that the only remedy lay with the legislative or executive branches of government – a conclusion that reflects the lack of any mention of the environment in the U.S. Constitution.

Against this backdrop, the sustainability leadership of the French Constitutional Council stands out all the

more. The Council's clear perspective on the need to move toward a sustainable future and willingness to articulate environmental principles - and thus promote action to combat climate change - has blazed a trail that other courts in other countries will surely follow. Perhaps more importantly, the global scope of the environment that the Council has highlighted as being of concern may have important implications over time in terms of responsibility for extraterritorial harm as well as effects on the Global Commons. Indeed, the UIPP decision could mean that the duty of the State to ensure the protection of the environment at the national level becomes a global responsibility, which implies that consideration must be given to the damage that activities carried out within the national territory may cause to the environment worldwide.



ENVIRONMENT RIGHTS MUST BE UNDERSTOOD AS GLOBAL IN SCOPE





Towards a constitutional litigation framework providing for indemnification

rench constitutional litigation now has an indemnity component. By opening up the possibility of obtaining compensation for harm or losses resulting from a law that is inconsistent with the Constitution, a new stage in constitutionalism has been reached.

The solution was long overdue. In different forms and legal systems, several foreign jurisdictions - Belgium, Spain and Portugal, for example - have recognised this accountability as an induced effect of the ex

post constitutionality review; others have rejected it, notably Italy, even though the issue is currently being revisited in that country. In fact, comparative experience proves that a more extensive review of constitutionality does not necessarily entail an increase in this accountability, particularly as the latter may be curbed by restrictive conditions of commitment, as is the case in Germany. It all depends on the function attributed to accountability, which differs from one system to another, and on the understanding of the relationship between the State and the individual that underlies it.

The shift was as predictable as it was inevitable. In this day and age, however questionable the mechanisms may be, a Parliament that is no longer infallible must be accountable. Even if the legal frameworks of the solutions are not the same, it would have been difficult not to accept, in the realm of constitutional norms, what has been accepted as a contradiction to international commitments since the famous "Gardedieu" jurisprudence of 2007. The recognition of this new heading of accountability is also the culmination of the line of reasoning, enshrined for half a century in administrative case law, according to which any illegality is likely to trigger the liability of the public authorities.

Ignorance of the Constitution is thus equated with the worst form of illegality, without worrying about the fact that legislation is thus reduced to a mere execution of the Constitution - which, in various ways, it clearly is not. This "anti-legality" is stripped of any afflictive or moral connotation; it can only be objectively wrong, in the sense of "legal fault" that Hauriou alluded to almost a century ago, and Jèze after him, or of the legislative defect evoked by the German theory of "Legislative Unrecht". With the shift from invalidity to liability for laws that are unconstitutional. this construction delivers blow after blow, dispatching the already tired principle of Parliamentary unaccountability.

The symbol is a potent one, but there is no reason for applicants to get their hopes up. Compensation for loss or harm is subject to strict conditions, particularly because the direct cause of the loss or harm must be identified, not in the law as such, but in the application of unconstitutional law. In practice, not all grounds of unconstitutionality will allow the action for liability to be pursued. It will not be easy, particularly for the courts which

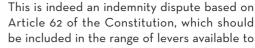
will have to apply this case law, to draw the necessary conclusions from a decision of unconstitutionality in compensation matters.

While such a luxury or even prestige item is naturally a source of pride for the professionals who are pleased with the thought that they have it "in stock", it will remain difficult to access

The new legal remedy is based on a subtle balance. The particularity of the regime of liability arising from unconstitutional law is that it is based on a distinction between the office of the agency responsible for assessing standards (the Constitutional Council) and the agency responsible for assessing liability (the administrative judge). The competence of the former in the field of legal disputes does not invalidate

the competence of the latter in the field of liability. However, in view of the Constitutional Council's monopoly on the constitutionality review of laws, which the Constitution reserves to the Constitutional Council, it is impossible for the administrative judge to determine for itself the event giving rise to liability where a breach of the Constitution by the law has occurred. A declaration of unconstitutionality by the Constitutional Council is a necessary and sufficient condition for its identification.

Consequently, this case law and the way in which the Constitutional Council itself deals with this new area of State accountability undeniably give an additional dimension to the QPC procedure. Action for damages is possible only within the limits set by a decision of the Constitutional Council, which derives from the Constitution (Article 62-2) the power to stipulate the effects in a temporal sense of the declaration of unconstitutionality and can therefore always decide to close off or restrict the route to any claim for compensation. While the possibility of triggering such liability is the principle (N° 2019-828/829 QPC of 28 February 2020), the Constitutional Council may freely limit, neutralise, qualify or impose as it deems necessary any compensation claims that may be based on the unconstitutionality of the law.



the Constitutional Council to draw the appropriate conclusions from the unconstitutionality that it alone can pronounce.

The Constitutional Council must now take stock of its determinations of unconstitutionality in terms of the conditions

COUNCIL ITSELF DEALS under which this liability is WITH THIS NEW AREA incurred and, even though OF STATE ACCOUNTABILITY this poses a real methodological challenge, it must also consider the compensation consequences of QPC cases. This is now a DIMENSION TO THE major parameter, and where necessary an adjustment variable, in the implementation of the power to modulate the effects of unconstitutionality. At the risk of absolving the Parliament

and leaving the idea that citizens sometimes have a legal duty to put up with an unconstitutional law.



THIS CASE LAW

AND THE WAY IN WHICH

THE CONSTITUTIONAL

UNDENIABLY GIVE

AN ADDITIONAL

QPC PROCEDURE





In order to carry out its responsibilities in the best possible way, the Constitutional Council is constantly seeking ways to improve its internal procedures. In 2020, faced with the COVID-19 epidemic, it introduced innovations in its operations so as to ensure that there was no disruption to its jurisdictional work. It also embarked on an ambitious energy-saving and sustainable development initiative.

CHANGES AT THE COUNCIL



CONSTITUTIONAL COUNCIL KEY FIGURES

- THE GENERAL SECRETARIAT OF THE CONSTITUTIONAL COUNCIL - STAFFING -

As at 31 December 2019, the staff of the General Secretariat of the Constitutional Council stood at **70 individuals**, a total of 57.31 full-time equivalents. The number of staff remained constant from one year to the next.

The largest share of staff members are assigned to:

the Administrative and Financial Department



the Legal Department



The proportion of contract staff, which has traditionally been high in the Constitutional Council, remains higher than that of seconded officials (67% of the total staff against 33%) but it has fallen from the 74% figure reached in 2018.



The rate of access to training, i.e. the number of staff members who have completed at least one training course, as a proportion of total staff numbers as at 31 December 2019, is 75.71%, up from 71.4% in 2018. This reflects the increased efforts that the Constitutional Council has directed to this area over the past two years.

- THE CONSTITUTIONAL COUNCIL ON THE INTERNET AND SOCIAL MEDIA -

Between 1 September 2019 and 31 August 2020,

the Constitutional Council's Internet site received, on average





As at 31 August 2020





131,7



followers

VISITOR NUMBERS

On 21 and 22 September 2019, during the 35th staging of the European Heritage Days, more than

10,000 people visited the Palais-Royal and were able to go behind the scenes of the Constitutional Council, the Council of State and the Ministry of Culture.

1,602

people (school groups, students, legal professionals, members of the general public) visited the Constitutional Council between 1 September 2019 and 13 March 2020. They included

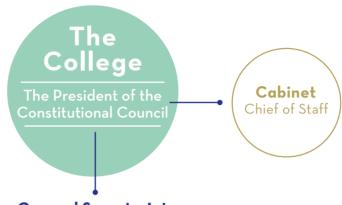
150

international visitors.

The admission of visitors had to be suspended from Spring 2020 as a result of the public health situation.

Ö

THE OPERATIONS OF THE CONSTITUTIONAL COUNCIL



General Secretariat

The Secretary General

who, other than in his juridical functions, is supported by the Deputy Secretary General, the head of the Administrative and Financial Department.

LEGAL DEPARTMENT •

This Department assists, under the direction of the Secretary General, in the essential tasks of the Constitutional Council, providing high-level support to the President and other Members in the preparation and drafting of all its decisions. A registry is attached to the Legal Department.

DOCUMENTATION AND A INVESTIGATION ASSISTANCE DEPARTMENT

It assists all the other departments and the College in the processing of litigation files, by providing legal research and disseminating monitoring reports. It manages and promotes the Constitutional Council's documentary holdings, through a library and a digital catalogue.

COMMUNICATION DEPARTMENT

This department is responsible for promoting the institution's image and influence. It puts the Council's activities on public view through the production of various communication media, the staging of events and the use of its digital tools. It is also responsible for relations with the press.

EXTERNAL RELATIONS DEPARTMENT

This Department is responsible for the Council's relations with foreign courts, universities and other institutions, and for certain of the Council's publications. It also acts as the general secretariat for the Association of Francophone Constitutional Courts, the ACCF (Association des Cours constitutionnelles francophones).

INFORMATION TECHNOLOGY DEPARTMENT

This department is responsible for the design and management of the Council's digital transformation projects. It is required to provide the most helpful service possible to all Members and staff of the Constitutional Council in the handling of digital tools.

ADMINISTRATIVE AND FINANCIAL SERVICES DEPARTMENT

This department is responsible for the administrative management of Members and staff, the preparation and implementation of the budget, members' secretariat requirements, logistics, building maintenance, works, the safety and security of persons and property, and general stewardship.

ANNUAL REPORT 2020

Continuity in the Constitutional Council's operations during the public health crisis

t would have been unthinkable to allow any disruption to the Constitutional Council's ongoing performance of its jurisdictional tasks and, in practice, the Council's legal activity continued at a steady pace during the period in question. Thus, from mid-March to the end of May 2020, it handed down 16 decisions. including rulings on the QPCs referred to it immediately before the crisis began. Decisions were issued very expeditiously, in particular Decision N° 2020-800 DC on the law extending the state of public health emergency and supplementing its provisions, which was handed down on 11 May, in response to four referrals received on 9 May and as late as 2 p.m. on 10 May.

President Fabius personally ensured that work could continue under conditions that best safeguarded the health of all Members and staff.

In order to ensure compliance with the physical distancing directives, the QPC public hearings and Council deliberation sessions during the period were held in the large function room in the Montpensier wing. The rules of procedure for the hearings before the Constitutional Council were used, whereby limits were placed on the number of members of the public in the room, with audio-visual broadcasts of the hearings being provided continuously throughout the period. Lawyers were given the opportunity

Like
all public
and private sector
organisations, the
Constitutional Council has
had to adjust the practical
aspects of the way it goes
about its work in order to
meet the challenges
of the COVID-19
epidemic.

to appear via videoconference. Special precautions were taken to provide participants with hydro-alcoholic gel and masks.

For its internal operations, the Constitutional Council was able to turn to secure remote working solutions that had been rolled out in previous years by its IT department. In addition to the Council Members themselves, a large portion of the staff of the General Secretariat have thus been provided with tablets. These have enabled the departments to operate by means of teleworking, while work meetings held on the Council's premises were avoided for several weeks. The Council's headquarters remained open without interruption, with the Secretary General and his deputy operating in situ to coordinate the work of the various General

Secretariat departments. The Republican Guard continued to provide security services at the premises.

Staff working conditions throughout the period were the subject of regular discussions with staff representatives.





THE COUNCIL'S LEGAL



The Constitutional Council's approach to energy savings and sustainable development

his ambitious plan rests on five axes: namely, improving the energy performance of the building occupied by the Council; improving the Council's energy performance in its day-to-day operations; promoting sustainable mobility; reducing waste; and promoting biodiversity. The first objective of this plan is to work towards a 25% reduction in the Council's overall energy consumption.

The implementation of the plan is being monitored, under the authority of the Secretary General, by a Sustainable Development Steering Committee comprising representatives from the various General Secretariat departments.

Among the initiatives that have been successfully completed since the adoption of the plan despite the suspension of its implementation in the spring due to the health crisis, mention should be made of the replacement of almost all of the Council's lighting fixtures with latest-generation LED lights. This initiative may achieve electricity savings by a factor of 3 to 5, depending on the lighting sources concerned.

The Council's practice of purchasing plastic utensils was discontinued at the beginning of 2020. Six drinking fountains have been installed on the various floors of the Council building, providing cold, hot and sparkling water to all.

In the
summer
of 2019, at the
instigation of President
Fabius, the College
approved an Energy Savings
and Sustainable Development
Action Plan for the
Constitutional Council,
for the period 20192022.

Glass bottles, glasses, cups and spoons were issued to members and staff at the end of the lockdown phase. Extra carafes and glasses are available in the meeting rooms, for use by visitors.

The vehicles previously used for members' shared transport needs were replaced by two hybrid vehicles in the summer of 2020. The Council has funded the installation of electric charging stations in the car park of the Louvre Museum to facilitate their recharging.

At the beginning of the summer of 2020, two beehives were installed on the roofs of the Constitutional Council.

In addition to these initial concrete results, preparatory work for larger-scale projects has progressed, in particular to improve the overall thermal management of the building with a view to saving energy.





Head of the Administrative and Financial Services Department and Deputy Secretary General of the Constitutional

Since 2019, under the leadership of the President of the Constitutional Council, the General Secretariat has been implementing the Energy Savings and Sustainable Development Action Plan, which is one of the priorities for the coming years.

To this end, the Secretary General wished to prioritise a number of measures to be implemented as soon as possible. He decided to enlist the support of all the women and men of the Constitutional Council by conducting a workshop in the autumn of 2019 to present the initiative. Discussions during the workshop were rich and fruitful.

A steering committee comprising representatives from each department meets every two months to oversee the implementation of the various measures. The first results can already be seen in terms of the energy performance of the building. with the widespread use of LED light bulbs. With regard to waste management, the installation of drinking fountains has made it possible to eliminate single-use plastics. Finally, two beehives have been installed on the roofs of the

Constitutional Council, thus promoting biodiversity. The next areas to be addressed include sustainable mobility, eco-responsible behaviour, and energy consumption monitoring.

This participative approach creates a genuine dynamic, guaranteeing the rapid implementation of the five axes of the plan and the adoption of new eco-friendly practices to meet the challenges of environmental protection. On the strength of the arrangements that have been put in place, the Constitutional Council is approaching this ecological transition with composure, knowing that our collective effort is worth more than the sum of all our individual efforts."



ANNUAL REPORT 2020

EVENTS

The
11th
annual Salon
du Livre
Juridique
(Legal Book
Fair)

12 OCTOBER 2019 The 11th annual Salon du Livre Juridique (Legal Book Fair), which was held in the Constitutional Council's premises on 12 October 2019, was as in previous years, a highly successful event.

With more than 1,600 visitors, this event, which was jointly hosted by the Club des Juristes and the Council, gave legal professionals and students the opportunity to meet prominent legal experts and authors and to have their works autographed.

The day was enlivened by a number of events. A treasure hunt enabled the lucky winners to claim numerous prizes, while at the same time exploring the legal publishers' stands and the works on display in a game-oriented atmosphere. And, as is the case every year, lucky draws were held in the morning and the afternoon for students to win packs of books that would be useful throughout their years of study.



In addition, this fair is an occasion for the awarding of prizes for legal books and legal practice.

This year, Olivier Beaud's book, La République injuriée, histoires des offenses au Chef de l'État de la IIIº à la Ve République (The reviled Republic, stories of offences against the Head of State from the 3rd Republic to the 5th Republic) received the legal book prize from Claire Bazy Malaurie, a member of the Constitutional Council, and François Sureau, President of the Jury. The legal practice book prize was awarded to Lionel Ascensi for Droit et pratique des saisies et confiscations pénales 2019/2020 (The law and practice of criminal seizures and confiscations 2019/2020).



A richly illustrated book on the Constitutional Council

SEPTEMBER 2020

n September 2020, a richly illustrated book on the Constitutional Council was published by Les Éditions du patrimoine. Entitled Le Conseil constitutionnel au Palais-Royal (The Constitutional Council at the Palais-Royal), this book covers both the history and the present-day life of the institution, in text and images. The Constitutional Council was established in 1958 by the Constitution of the 5th Republic and, since that time, has had its headquarters in the Montpensier wing of the Palais-Royal.

The first part of the book looks at the architectural harmony of the Palais-Royal which, in addition to the Constitutional Council, houses the Council of State, the Ministry of Culture and the Comédie-Française. In this way, it helps people to appreciate the impact that history has on those who work there. The second part

of the book acquaints us with the functions and operations of the Constitutional Council by explaining the full extent of its powers: monitoring the extent to which laws comply with the Constitution; assessing the regularity of national polls such as the presidential election and the legislative and senatorial elections; and monitoring the integrity of referendum exercises. The book sets out details of the Council's composition, its organisational structure and the different types of decisions it issues, including the decisions taken since 2010 in the framework of the procedure known as the priority preliminary ruling on the issue of constitutionality (QPC).



he Découvrons
notre Constitution
(Discovering our Constitution)
competition, which was
launched in 2016, aims to raise
awareness among pupils, from primary to high
school, as to the rights and freedoms that are
guaranteed by the Constitution and the key
principles on which the Republic is based.

In order to give the contestants total freedom with regard to both form and content, no subject is prescribed and any medium may be used. The work can be based on the text of the 1958 Constitution itself, or on the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble to the 1946 Constitution or the 2004 Environment Charter. Pupils can express themselves through a text, a report, a film, a poster, an artistic creation or a website.

In view of the nationwide measures taken in response to the COVID-19 epidemic, the national jury, comprising members of the Constitutional Council and members of the Directorate-General for School Education, met as a restricted committee on Tuesday, 30 June

2020 to select the best projects for the 2019-2020 school year. The winners included the Year 6 "Juno" class from the Moulin Blanc secondary school in Saint-Amand-les-Eaux (Lille school district) for its video entitled Découvrons le préambule de la Constitution du 27 octobre 1946 (Let's discover the Preamble to the Constitution of 27 October 1946). A group of 3rd year pupils at the Jean Rostand secondary school in La Rochefoucauld-en-Angoumois (Poitiers school district) were awarded a prize for their video clip Même Avenir (A Shared Future). The members of the jury also gave a special commendation to the Educational Unit for Newly Arrived Non-Native French Speaking Pupils at the Henri de Toulouse-Lautrec secondary school (Toulouse school district) for its project entitled Au nom de la loi, j'écris ton nom, Constitution (In the name of the law, I write your name, Constitution). A prize was also awarded to a final year class of the La Croix Blanche secondary school in Bondues (Lille school district) for its comic strip entitled Dessine-moi la Constitution (Draw me the Constitution).

MS DOMINIQUE LOTTIN MET WITH PUPILS FROM THE LA CROIX BLANCHE SECONDARY SCHOOL IN BONDUES

Ms Dominique Lottin was welcomed to the school by the Principal, Mr Mazars, and Mr Henry, a school inspector representing the Chief Education Officer of the Lille school district, Ms Valérie Cabuil. Addressing some 140 final year pupils, Ms Lottin began by presenting an overview of the constitutional principles on which the Republic is based and the work undertaken by the Constitutional Council.

She then conducted a workshop with 10 pupils who were designing a project to be entered in the *Découvrons notre Constitution* competition. This workshop enabled the pupils to further their understanding of the rights and freedoms that are guaranteed by the Constitution and to direct questions to Ms Lottin about the ways in which constitutional reviews are carried out.





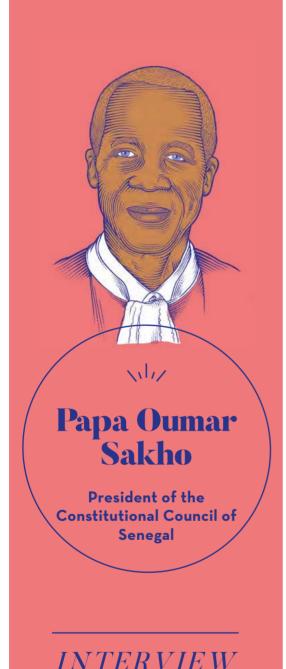


Watch the video online bit.ly/rencontrelyceens

As a member of numerous international bodies, the Constitutional Council participates in an intense dialogue between constitutional courts. Again this year, the President and members of the Council met several times with their counterparts around the world. These interactions enable the Council to constantly benefit from the experience of foreign courts. This chapter provides an overview of these exchanges, which are essential for the protection of fundamental rights.

INTERNATIONAL RELATIONS

— (T) —



IT IS IMPOSSIBLE, MR PRESIDENT, TO DISCUSS 2020 WITHOUT THINKING ABOUT THE COVID-19 PANDEMIC. HOW WAS THIS SITUATION EXPERIENCED AT THE CONSTITUTIONAL COUNCIL OF SENEGAL?

Senegal wasn't spared by the pandemic. There was a rapid increase in the number of individuals who tested positive for the coronavirus.

At the Constitutional Council, all our actions were based on the principle of precaution. From the very first positive test result, and even before state of emergency was declared, we postponed some planned events, particularly the seminar on "The exception of unconstitutionality". We cancelled others, for example the meeting of the Board of the Association of Francophone Constitutional Courts, the ACCF (Association des Cours constitutionnelles francophones), which Senegal had been due to host on 29 and 30 March 2020.

So far as the Constitutional Council's internal operations were concerned, we used telework methods wherever possible.

YOU'VE JUST MENTIONED THE BOARD MEETING OF THE ASSOCIATION OF CONSTITUTIONAL COURTS IN FRANCOPHONE COUNTRIES. WHAT POSITION DOES SENEGAL OCCUPY ON THE BOARD?

At the 8th Triennial Congress of the Association des Cours constitutionnelles des Pays ayant en partage l'usage du français, the ACCPUF, which was renamed the Association des Cours constitutionnelles francophones (ACCF) at that Congress, the Constitutional Council of Senegal was unanimously elected to the position of Vice-President of our association.

The Constitutional Council of Senegal is set to host and chair the next ACCF Congress, in 2022. We have already begun preparations for this important meeting.

IS THE CONSTITUTIONAL COUNCIL OF SENEGAL INVOLVED IN ANY COOPERATIVE ARRANGEMENTS APART FROM THE ACCF?

The Constitutional Council of Senegal is a founding member of the Conference of Constitutional Jurisdictions of Africa (CCJA), the African space of constitutional justice desired by the African Heads of State.

Our institution also has close ties with similar jurisdictions such as the French Constitutional Council. Beyond their common membership of the ACCF, these two institutions have always enjoyed friendly, cooperative relations. Two

members of our recently created Research and Documentation Department carried out a working visit to the French Constitutional Council in order to immerse themselves in its rich, extensive experience in the field of constitutionality review, in particular with regard to priority preliminary rulings on the issue of constitutionality. I would like to take this opportunity to reiterate my thanks to President Laurent Fabius.

YOU REFERRED TO PRIORITY PRELIMINARY RUL-INGS ON THE ISSUE OF CONSTITUTIONALITY. DO YOU EMPLOY THIS METHOD OF REVIEWING THE CONSTITUTIONALITY OF LEGISLATION?

When the Constitutional Council was created in 1992, the Senegalese Parliament set up, alongside the ex ante review that already existed, an ex post review in the form of what is known as the "exception of unconstitutionality". Through this type of review, access to the constitutional court is open to the ordinary citizen, since it is possible for a litigant, when the settlement of a dispute is subject to an assessment of the constitutionality of the provisions of a law or the terms of an international agreement, to raise an objection of the grounds of unconstitutionality before the Supreme Court or a court of appeal.

In view of the very general terms used by the Parliament to state the requirements for the initiation of this ex post review procedure, it may be inferred that any litigant who intends to raise this exception does not have to allege an infringement of a fundamental right; it is sufficient for him or her to show that the law applicable to his or her dispute is at odds with the Constitution.

PERSONS APPEARING BEFORE THE COURTS IN FRANCE SEEM TO HAVE A CERTAIN PARTIALITY FOR THE QPC. CAN THE SAME BE SAID, WITH REGARD TO THE "EXCEPTION OF UNCONSTITU-TIONALITY", OF PERSONS APPEARING BEFORE THE COURTS IN SENEGAL?

Referrals to the Constitutional Council by way of "exception of unconstitutionality" are still very rare. That is definitely why the scope of application of the "exception of unconstitutionality" was extended when the Constitution was revised in 2016. The "exception" (which could initially be raised only before the Council of State or the Court of Cassation and, since the reform of 2008, before the Supreme Court) can, in fact, now be raised before the appeal courts. Nevertheless, despite the adoption of this less restrictive approach, there has been no noticeable increase in referrals. In view of this situation, the Constitutional Council has undertaken a number of initiatives, aimed, in particular, at the Bar Association, by conducting information seminars.

It should be noted, in the same vein, that the Constitutional Council, in its desire to reach out to the academic world, has set up a prize for a thesis on subjects falling within its field of competence.

HAS THE SENEGALESE CONSTITUTIONAL COUNCIL HAD OCCASION TO RULE ON ANY SOCIETAL ISSUES?

One might reasonably have expected the Constitutional Council to receive frequent referrals in this period when managing the COVID-19 pandemic has led to measures which restrict people's freedoms. That hasn't occurred. There have been no appeals against the restrictions during this public health emergency.

THE CURRENT SCENE IN SENEGAL IS DOMINATED BY THE DEBATE ON WHAT SOME PEOPLE REGARD AS THE PRIVATISATION OF THE PUBLIC MARITIME DOMAIN AND ASSAULTS ON THE ENVIRONMENT CAUSED BY UNCONTROLLED CONSTRUCTION ON THE COAST. DOES THE CONSTITUTIONAL COUNCIL HAVE A ROLE TO PLAY IN DEALING WITH THESE PROBLEMS?

Since the revision of the Constitution in 2016, the Senegalese Parliament has introduced new rights for the citizenry. These include rights over natural resources, which must be developed in a manner that guarantees transparency and environmental sustainability; the right to a healthy environment: and the right to require State and local authorities to preserve the country's land-related heritage. A law that infringed any of these rights could be struck down by the Constitutional Council.

WHAT LIES AHEAD, MR PRESIDENT, FOR THE **CONSTITUTIONAL COUNCIL?**

On the domestic front, the Council will, of course, in addition to its traditional tasks, continue its awareness-raising activities in order to increase citizens' sense of ownership of the Constitution.

At the international level, the Council will continue or initiate efforts to promote bilateral cooperation and work to raise the profile of the cooperating organisations of which it is a



JAPAN

The 10th Franco-Japanese Law Days were held in Tokyo from 16 to 18 September 2019, organised by the Société de législation comparée (the Society for Comparative Law) in partnership with the Société franco-japonaise de la science juridique (the Franco-Japanese Society for Legal Science). Academics and legal practitioners from both countries engaged in an exchange of views on the "balance of interests". Ms Nicole Maestracci, a member of the Constitutional Council who was invited to this symposium, spoke on "The temporal effects of the declaration of unconstitutionality by the Constitutional Council".



GERMANY

In the framework of the regular dialogue with the Karlsruhe Court, two meetings between Laurent Fabius, President of the Constitutional Council, and Andreas Vosskuhle, President of the Federal Constitutional Court, took place in the past year. The presidents of the two courts took part in the solemn ceremony marking the start of the academic year, held on 18 October 2019 at the Faculty of Law of Humboldt University in Berlin. They later exchanged views in Paris at a conference-debate hosted on 5 February 2020 by the Franco-German Committee of the Paris Bar on "Contemporary challenges of constitutional justice".

Andreas Vosskuhle was succeeded as President of the Karlsruhe Court by Stephan

Harbarth on 15 May 2020. On 18 November 2019, a few months before his

election, Mr Harbarth, in his capacity as Vice-President of the German Court, had been received by President Fabius at the Constitutional

Council.





A video of the conferencedebate may be found on the Constitutional Council's website

bit.ly/fabiusvosskuhle



CAMBODIA

On 28 and 29 October 2019, at the invitation of the Constitutional Council of the Kingdom of Cambodia, the Association of Francophone Constitutional Courts held its board meeting in Siem Reap under the chairmanship of Richard Wagner, the Association's new President and Chief Justice of Canada. Corinne Luquiens represented the French Constitutional Council, which is an ex officio member of the Association's board. Discussions focused on an assessment of recent activities, new orientations for the Association and the scheduling of upcoming meetings.



AUSTRIA

On 16 January 2020, President Fabius welcomed Mr Christoph Grabenwarter to the Constitutional Council. Mr Grabenwarter, who was then the Vice-President of the Austrian Constitutional Court and was subsequently appointed as President in February 2020, availed himself of this bilateral meeting to revitalise cooperative ties with the French Council and invite President Fabius to the celebrations marking the 100th anniversary of the Austrian Court, scheduled to take place in Vienna in the autumn of 2020.



TURKEY

During a stay in Paris, the President of the Turkish Constitutional Court, Mr Zühtü Arslan, was received by President Fabius at the Constitutional Council on 30 January 2020. Re-elected as President of the Turkish Court in 2019, President Arslan sought to become acquainted with the workings of the Constitutional Council. This meeting also afforded an opportunity to share experiences on the time limits for handing down judgments within the two courts and on the ex ante constitutional review, a mechanism that was introduced in Turkey in 2017 in the wake of a constitutional reform.



SLOVAKIA

A delegation from the Slovak Constitutional Court, led by the President of that Court, Mr Ivan Fiačan, was received by President Fabius in the Constitutional Council on 19 February 2020. The meeting was arranged following the renewal of the bench of the Slovak Court in October 2019, and in response to Mr Fiačan's interest in initiating cooperation with France. Discussions between the two presidents focused on the workings of their institutions and their growing role in the defence of fundamental rights and freedoms.

THE ASSOCIATION OF FRANCOPHONE CONSTITUTIONAL COURTS

The Association of Francophone Constitutional Courts (ACCF), which was established in 1997 at the initiative of the French Constitutional Council, brings together 48 Constitutional Courts and analogous institutions from Africa, Europe, the Americas and Asia. The Supreme Court of Canada is chairing the Association until 2022, at which time it will pass the baton to Papa Oumar Sakho, President of the Constitutional Council of Senegal. The ACCF, whose aim is to promote the further development of the rule of law. arranges regular meetings between its members in order to foster the sharing of ideas and experiences. It also organises training and carries out legal and technical cooperation activities.

Against this background, Canadian Chief Justice Richard Wagner, the current President of the Association, has ensured that his three-year program gives priority to the outreach activities undertaken by the Courts and the Association's influence at an international level.



From left to right: Mr Linos-Alexandre Sicilianos, President of the European Court of Human Rights until May 2020, Ms Chantal Arens, President of the Court of Cassation, Mr Bruno Lasserre, Vice-President of the Council of State, Mr Laurent Fabius, President of the Constitutional Council, and Mr François Molins, General Prosecutor of the Court of Cassation.



Conference of Presidents of Supreme Courts of the Council of Europe

his con-

ference.

which was

co-hosted

On 12 and 13
September 2019, a
conference of Presidents
of Supreme Courts of Member
States of the Council of Europe
was held in Paris, in the context
of the French presidency of the
Committee of Ministers of
the Council of Europe.

12 AND 13

SEPTEMBER 2019

by the Constitutional
Council, the Council
of State and the Court
of Cassation, in collaboration with the Ministry
for Europe and Foreign Affairs,
brought together several representatives of the Supreme Courts of all the Member

Focusing on dialogue between judges, the conference was structured around three themes: the right to an effective remedy before an independent and impartial judge, the relationship between national courts and the European Court of Human Rights, and freedom of expression in the context of the protection of private and family life.

The first of these themes was dealt with in a workshop which was conducted in the

Constitutional Council's premises on the afternoon of Thursday 12 October and was chaired by a member of the Council, Ms Nicole Maestracci. Another member of the Council, Mr Michel Pinault, served as the Rapporteur-General for the workshop. Mr Linos-Alexandre Sicilianos, President (until May 2020) of the European Court of Human Rights, honoured this workshop with his presence.

While not disregarding the different features of individual national legal systems, this conference made it possible to reach some consensus views on the interpretation of the European Convention on Human Rights. It was an opportunity to reaffirm the importance of the role and cooperation of national supreme courts, among themselves and with the European Court of Human Rights.

The gathering closed on Friday 13 September with presentations by the Minister of Justice, Ms Nicole Belloubet, and the Secretary General of the Council of Europe, Mr Thorbjørn Jagland.

his informal network, which was set up in 1999, comprises the Portuguese Constitutional Court, the Spanish Constitutional Tribunal, the Italian Constitutional Court and, since 2017, the French Constitutional Council. It aims to meet on a yearly basis to discuss a legal subject of shared interest as well as recent developments in case law. This third meeting was hosted by the Portuguese Constitutional Court and focused on one of the major themes currently facing constitutional courts: "Constitutional justice in an age of technological change". The first topic to be discussed was "Genetics, the individual and the family". Mr Michel Pinault gave a presentation on "end of life" issues, with special focus on the ways in which the law deals with euthanasia and assisted suicide.

In a second phase of the meeting, each of the constitutional courts gave a presentation on an emblematic decision it had handed down on "privacy and social control". During this session, Ms Corinne Luquiens outlined the issues that had been considered in Constitutional Council Decision No 2018-765 DC of 12 June 2018 on the Personal Data Protection Act, namely the need to address the impact of new digital practices and the harmonisation of standards that apply at the European level.

The discussions made it possible, through a comparative approach, to highlight the obligation common to the four constitutional courts: the obligation to guarantee the protection of fundamental rights while taking account of

> Mr Laurent Fabius, President of the Constitutional Council, together with Council members Ms Corinne Luquiens and Mr Michel Pinault, took part in the 3rd "quadrilateral" meeting of the Romance-language Constitutional Courts which was held in Lisbon from 10 to 12 October 2019.

3rd meeting of the Romancelanguage Constitutional Courts, Lishon

In the foreground, presidents of the courts (from left to right): Giorgio Lattanzi, Italy; Juan José González Rivas, Spain; Manuel da Costa Andrade, Portugal; Laurent Fabius, France.









THE NOTION OF THE REPUBLIC IN THE ITALIAN CONSTITUTION

taly is a democratic Republic." Those are the opening words of Article 1 of the Italian Constitution. The

Republic was born before its Basic Charter was adopted: the founding act of the Italian Republic was the referendum of 2 June 1946, when the Italian people were asked to vote directly on the choice between the monarchy and the Republic. It chose the latter.

Elections for the Constituent Assembly were held on the same day, and one of its tasks would be to draft the Constitution. It began work on 25 June 1946, bound by the requirement to carry out the will of the people, as expressed through the referendum.

A choice was thus made between a monarchy and a republic, and only afterwards was the Constitution drafted.

How did this situation come about? How can one explain this sequence of events?

The explanation lies partly in the context of the transition that followed the fall of the fascist regime, during the so-called "lieutenancy" period that lasted about two years (from June 1944 to May 1946). It was then that Vittorio Emanuele III, who had reigned during the two decades of fascism, agreed to hand over all powers to his son Umberto, while retaining his royal title.

A first lieutenancy decree, Decree No 151 of 1944, entrusted the Constituent Assembly with any decision regarding the future constitutional system of the Italian State. However, in view

of the imminent elections, another lieutenancy decree, Decree No 98 of 1946, had established that it would be up to the people to decide, by means of a referendum, on the institutional form of the State (republic or monarchy).

This was the most delicate and controversial choice of all the institutional issues. It was a choice that divided the population and the political forces themselves, which nevertheless acknowledged that the sovereign who reigned during the Fascist period had exercised "objective responsibilities", as Enrico De Nicola, provisional head of state during the constituent period, put it.

This led to the decision to leave the last word to the Italian people. The chosen mode of voting, universal suffrage, included women, who thus participated in a political consultation for the very first time.

In the referendum held on 2 June, the majority chose the Republic. At its sitting of 26 June 1946, the President of the Constituent Assembly confined himself to formally taking note of the advice received from the Court of Cassation concerning the result of the popular consultation, which "solemnly enshrined the form of republican government, a form which had been chosen by the Italian people through an act of sovereign will". Immediately afterwards, and by a large majority, the Constituent Assembly elected Enrico De Nicola as the provisional Head of State.

The historical and institutional context of this pro-Republic choice also explains the special legal regime of the republican principle, one which is subject to special guarantees and is

shielded from the power of constitutional revision.

The word "Republic" is the defining, essential element of the text of the Italian Constitution. Indeed, it appears in the first and last sentences of the Fundamental Charter, drawing an ideal arc that encompasses and unifies the entire constitutional architecture.

As noted above, Article 1 begins with the affirmation that "Italy is a democratic Republic", while the concluding Article of the Constitution, Article 139, states that "the republican form cannot be subject to constitutional revision".

The republican form thus serves to define Italy's constitutional identity. That is why it is deemed to be a definitive, irreversible choice, inscribed in an "eternity clause", as it is termed in other systems. Legally speaking, this means that the republican form cannot be changed, not even through a constitutional revision. The Republic having been established by an act of the constituent power, it cannot be modified by any of the constituted powers: the republican principle is considered to be a "supreme principle".

From the time of the first authoritative commentaries, the constitutional notion of the republican form has been inseparable from the democratic form of government, as Article 1, which speaks of the "democratic Republic", makes clear. It follows that the guarantee of inviolability extends to the adjective "democratic", which describes the form of the State. From a historical point of view, in Italy, the Republic and democracy were born at the same time.

The Italian Constitutional Court has developed a similar interpretative approach. In its case law, it has affirmed and reiterated on several occasions that "the Italian Constitution contains certain supreme principles that cannot be subverted or modified in their essential content, even by constitutional revision laws". The first of these limits to constitutional revision is specifically the republican principle, as provided for in Article 139. However, it is also necessary to include the principles that "belong to the essence of the supreme values on which the Italian Constitution is based" (as stated in Decision No 1146 of 1988), at the very forefront of which is the democratic principle, followed by the principle of equality and the inviolable rights of the individual, for example.

But what is meant by the word "Republic"? What do we understand by "republican form"?

Republic is a term charged with history and endowed with great semantic richness. The Italian Constitution itself uses the term in several different meanings.

The first, and narrowest, meaning of the concept of Republic, relates to the characteristics of the Head of State. In this first sense, the Republic is the form of State that is opposed to the monarchy, not only in the recent history of Italy, but also, since ancient times, in many political communities.

"THE REPUBLICAN FORM THUS SERVES TO DEFINE ITALY'S CONSTITUTIONAL IDENTITY"

As we can read in the first pages of the Prince of Machiavelli: "All States (...) are republics or principalities".

In a Republic, the Head of State derives his legitimacy from the elective principle and his term of office is a temporary one; whereas in a monarchy, accession to the throne is, as a rule, hereditary and the king holds this office for life. In Italy, in accordance with this first and most limited sense, the Head of State is a President who is elected by the two chambers meeting in a joint session, along with the representatives of the Regions. The President remains in office for a period of seven years, as provided for in Articles 83 and 85 of the Constitution.

Nevertheless, the Constitution uses the word "Republic" in a second, broader sense, referring to all the public authorities that make up the entire system.

Article 114 of the Constitution states: "The Republic is made up of Municipalities, Provinces, Metropolitan Cities, Regions and the State". This formulation echoes the fundamental principle contained in Article 5, which states that "the Republic, one and indivisible, recognises and promotes local autonomy". From this perspective, the Republic and the State cannot be understood as being one and the same thing. The Republic is a broader and richer subject comprising the central and peripheral workings of the State along with other subjects, including those that are endowed with autonomy.

There is a sense of harmonious agreement to the notion of Republic in the Italian Constitution. That is why the text of the Constitution provides for spaces of autonomy, both local and functional, that are strewn with procedures and connections which foster unification.

Recently, in Decision No 118 of 2015, the Constitutional Court noted that "the unity of the Republic is one of those elements so essential to constitutional order that they are excluded from the power of constitutional revision". At the same time, and in the same decision, the Court stressed that "the republican order is based on principles that include social and institutional pluralism and territorial autonomy, as well as receptiveness to supranational integration and international order; but such principles must be developed solely and exclusively within the framework of the Republic".

It is to this varied assortment of public subjects - made up of the Government and the Regions, Agencies and Municipalities, Ministries and local authorities - that the Constitution entrusts the duty to achieve a wide range of social objectives drawing on those set out in the second paragraph of Article 3, according to which "it is the duty of

"REPUBLIC IS A TERM CHARGED WITH HISTORY AND ENDOWED WITH GREAT **SEMANTIC RICHNESS"**

the Republic to remove obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the effective participation of all workers in the political, economic and social fabric of the country".

It was precisely when this Article was approved, on 24 March 1947, that the Constituent Assembly decided on the choice of the most appropriate terminology and rejected an amendment designed to replace the term "Republic" with "State". In so doing it stressed that these were not two equivalent words, since the word "Republic" was intended to refer to "all the activities and functions of the State as such, as well as of the Regions and other public authorities".

And in an even broader sense, the word "Republic" refers to the entire political community, which includes both the State-individual relationship and the State-community relationship. At the root of any organised institutional form is first and foremost a social and political community, which is in and of itself a foundational element. In this sense, the idea of the Republic is informed by Cicero's definition of res publica as res populi (De re publica I, 39): everything that concerns the life of the people belongs to the public sphere. Cicero adds a significant clarification: "the term 'people' does not mean an assemblage of men somehow grouped together in a herd, but rather a large group of men bound together by their adherence to the same law and by a certain community of interests".

It is to this model of life of a shared republican identity that the Italian Constitution refers, when it recognises the inviolable rights of each person and at the same time requires each person not only to respect the laws, but also to fulfil the duty of fidelity to the Republic (Article 54) and, above all, to carry out the duties of political, economic and social solidarity (Article 2).

A Constitution in which the people are not only the object of political decisions that concern the life of the community, but also play a part in their adoption and are the authors of

> these decisions. A Constitution in which the people are distinguished by their plural character, through the social and political structures in which the personality of each person is developed and through which citizens can "by democratic means, contribute to the determination of national policy" (Article 49).

Associations (Article 18), linguistic minorities (Article 6), religious denominations (Articles 7 and 8), families (Article 29), schools and universities (Articles 33 and 34), trade unions (Article 39), political parties (Article 49), cooperatives (Article 45), enterprises (Article 41), are all recognised by the Constitutions as part of the social fabric, contributing to society as a whole.

The life of the Republic that springs from the fabric of the Constitution is very much like what Tocqueville described in his travels in America: a social body without respite, in a state of effervescence both in political life and in civil society, involved in a continuous movement, where "all men march at the same time towards the same goal; but not everyone is obliged to march there in on the same path".



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