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**Laurent Fabius,
President
of the Constitutional
Council**
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— Interview —

Strengthening bonds around the rule of law in response to crises and far-reaching transformations

Has the Constitutional Council experienced a particularly intense workflow over the past year?

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LAURENT FABIOUS. Yes indeed. 2021 is not over yet, but we already know that it will stand out as a particularly active period for the Constitutional Council. For the past year, we have been receiving referrals via the priority preliminary ruling on the issue of constitutionality (QPC) at a steady rate, after the slight ebb observed in 2020 with the onset of the health crisis. Moreover, direct referrals never stopped, even during this past summer. In July and August of this year, we handed down decisions on important laws: the “bioethics” law, the law on intelligence and prevention of terrorism, a new health law, the law reaffirming respect for the principles of the Republic, commonly known as the “separatism act”, as well as the “climate” law. We also had to decide on the admissibility of a referendum initiative concerning

public hospitals. With 101 decisions rendered in the first eight months of 2021, we have already exceeded last year's total. Three main factors help explain this intense rhythm: the forthcoming end of the legislative term which, as is often the case, prompts Parliament to increase the number of bills voted; the public health and security situation; and also a growing desire on the part of litigants and the competent authorities to obtain a ruling from the Council on the constitutionality of key laws before they enter into force, which is clearly advantageous in terms of legal certainty. At the same time, we have initiated preparatory measures to carry out monitoring operations for the 2022 presidential election.

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Among the decisions handed down recently, the judgement surrounding the expansion of the "health pass" was eagerly awaited, including abroad where this issue has yet to be adjudicated by other courts. How did you approach this legislation?

L.F. By applying the Constitution and only the Constitution, as is our duty. I often point out, along with the College as a whole, that we do not have general powers of construal and decision of the same nature as those of Parliament. After a thorough review of the criticism regarding the health pass, we felt that expansion of this instrument for a specified period should be accepted insofar as the legislation instituting it succeeded in reconciling the various constitutional requirements in a balanced manner, namely the dual objectives of protecting public health while safeguarding individual rights. We clarified the requirements of the Constitution when it comes to addressing matters such as access to healthcare or exercise of political, religious or trade union activities. On the other hand, we deemed unconstitutional, and therefore struck down, the provision providing for early termination of certain employment

contracts upon failure by the employees in question to present the health pass. Likewise, we nullified measures imposing "automatic" isolation, which constituted deprivation of liberty without an examination of the situation of each individual concerned.

Confronted with a health threat that calls for rapid and appropriate responses, in recent months the Council has regularly had to rule within very tight deadlines. Does this affect your assessment?

L.F. The Constitutional Council's ability to rule quickly is one of its characteristics. Even without taking into account the particular urgency of some cases, the deadlines imposed for our rulings are short: three months for QPCs, and one month or even one week for *ex ante* reviews. The ruling of 5 August 2021 on the expansion of the "health pass", which runs 125 paragraphs, was handed down in 10 days. But regardless of the time limit for our decisions, we exercise the same rigour in examining the provisions referred to us.

Nonetheless, I believe that the proliferation of emergency legislation over the past several years, particularly in the fields of public health and security, fully justifies the debate, recently initiated by the Council of State, on the conditions under which such laws are referred to the Constitutional Council. In my view, instituting automatic review by the Constitutional Council of emergency legislation or the extension thereof, insofar as such review is carried out rapidly, would signal a step forward for the rule of law.

The past year has also been marked by heated debate on the law known as the "Comprehensive Security Act", several provisions of which were struck down by the Constitutional Council, in particular Article 52 creating an offence of provocative identification of police officers. What is the overall philosophy behind your ruling?

L.F. Our ruling was based on the need to strike a balance between the objective of preserving public order and the protection of freedoms. It in no way affects the government's ability to prevent and respond to disorder. With regard to our decision to strike down Article 52, we reminded Parliament of the constitutional requirement that the meaning and scope of any





new criminal offence must be defined in clear and precise terms. As for the use of surveillance drones by law enforcement agencies, our ruling does not underestimate the potential effectiveness of such practices to prevent breaches of public order or to identify the perpetrators of offences. Rather, it calls on Parliament to regulate the use of such technologies so as to safeguard the right to privacy.

Your ruling of August 2021 on the anti-terrorism law elicited fewer reactions than the previous ruling handed down in August 2020. How do you explain this change in perception?

L.F. On this point, our reliance on case law is perfectly consistent. Perhaps it is better understood today, giving rise to a sort of silent dialogue between the Constitutional Council and Parliament. On the issue of security measures applicable to persons convicted of terrorism, we have obviously never been naive. We validated the principle in 2020; on the other hand, the methods instituted at the time to implement this principle were flawed to the point of unconstitutionality. We evidently gave legislators latitude to remedy these constitutional defects, and so they have. In August 2021, the Council thus validated the new version of the provisions on the creation of security measures, as referred for review. Displaying the same consistency, we ruled that measures implemented

by public authorities for administrative monitoring and surveillance may not apply for longer than twelve months. In short, the constitutionally valid objective of combating terrorism must not be impeded, provided that it complies fully with the rule of law.

You chose the theme “The rule of law in times of crisis” for *La Nuit du droit* (Law Night) at the Constitutional Council, held on 4 October 2021 with the participation of prestigious guests. What is the goal of this event?

L.F. Attacks on the rule of law are on the rise all over the world today, even in long-standing European democracies. Some take the form of verbal criticism, others border on coups, and even seemingly benign forms can quickly degenerate.

For an institution such as ours, at the very heart of the rule of law, it is essential to understand the causes and effects of current setbacks and to disseminate as broadly as possible not only our observations, but also the remedies that should be applied. With this same objective in mind, the Constitutional Council, together with the Council of State and the Court of Cassation, will convene a conference of the Supreme Courts of the European Union in Paris on 21 February 2022 to address the topic of the rule of law. This event will take place in the context of the French Presidency of the European Union.

One thing is certain: any deviation from the principles of rule of law thrusts humanity into a wall of injustice. In an age of ever-escalating security, health and ecological crises, as well as profound changes within our societies, any constructive response must involve strengthening bonds around the rule of law. Separation of powers, an independent judiciary and respect for the principle of legality are all indispensable guiding principles for our troubled times. Citizens as a whole must recognise and believe in these principles if we are to face the crises of our age. Furthermore, the argument that a particular legislature or government need not respect the rule of law on the grounds that the legitimacy of elected representatives prevails over that of independent constitutional judges is demagogic and dangerous.

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The ruling on the “health pass” made many people aware of the concrete effect of the Constitutional Council’s decisions on their daily lives. Can you cite other recent examples?

L.F. Actually, most of our rulings concern citizens’ freedoms, since our unwavering mission is to protect liberties. One example is our decision of 31 May 2020 to disallow the transfer of individuals’ telephone and e-mail contact details to the national health system database created to manage the Covid-19 epidemic, in order to safeguard the right to privacy. Another example: the Council struck down the statutory prohibition for elderly individuals to make formal gifts or bequests to home care workers on the basis of an irrefutable presumption of vulnerability grounded solely in such persons receiving assistance from a third party. Another QPC decision concerned many of our fellow citizens: we struck down provisions that made

the right to contest parking tickets conditional on prior payment of associated fines, in terms that disregarded the right to an effective legal remedy. These are just a few examples among others: the decisions of the Constitutional Council do not belong to a sort of celestial empyrean.

What other important rulings of the past year can you recall that focused on protecting freedoms?

L.F. There are many. In particular, I would like to mention a ruling that reiterated a decision handed down last year, recalling 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 also recalled that the public health state of emergency did not allow the extension of pre-trial detention without a court order.

Another step forward worth highlighting is that our case law protecting the presumption of innocence has been enriched with four rulings specifying the scope of the right to remain silent at different stages of the criminal procedure: before the liberty and custody judge in the event of an immediate appearance, before the investigating chamber for indictees, before the judicial youth protection service for minors, and before the courts having received an application for release from judicial supervision or detention. Henceforth, in each of these situations, the individual concerned must systematically be informed that anything he or she says may subsequently be used in the course of the proceedings.

What about the environment?

L.F. These issues are referred to the Constitutional Council more frequently today than in the past, which makes sense considering their growing urgency. Leaving aside the ruling on the “climate” law, in which we did not rule on the substance of the bill, thus leaving the door open for a subsequent QPC, the Council took a new step forward with regard to the Charter for the Environment by ruling that any limitations imposed by Parliament on the right to live in a balanced and healthy environment, as enshrined in Article 1 of the Charter, must be linked to constitutional requirements or justified by an objective of general interest and proportionate to that objective.



You often stress the need to provide more and better information on the activity of the Constitutional Council.

L.F. Yes, I believe that comprehensive and objective information, intended for both specialised audiences and the general public, is part of our role in ensuring the proper functioning of democracy. This contributes to a spirit of openness within the Council. Along with granting the body more of the attributions of a court of law, for which we still have work to do, this openness is one of the major objectives I set out for my presidency.

In addition to the initiatives already in place to reach a wider audience that goes beyond specialists, I am very much counting on the new “QPC Platform” project we are launching, and which I hope will be operational before the end of 2022. The idea is to make all the decisions handed down by any French court in the framework of the QPC procedure, be they positive or negative, accessible on the Internet. Until now, we have had only a partial view of the workings

of this important procedure, because we are often unaware of the initial rulings by lower courts. The top of the pyramid is well known and accessible, but the same is not true for the bottom. Better knowledge would be valuable to obtain an accurate view of what I like to call the “citizen’s prerogative”. With the help of both branches of the judiciary, as well as the firm support of the Chief President of the Court of Cassation, the Vice-President of the Council of State and the Ministry of Justice, which I have asked to incorporate “QPC” metadata into the open data approach, we will provide this holistic view at the end of next year.

Information on our activities must also reach the widest possible audience. With this in mind, I hope that we will soon be able to resume our hearings outside of Paris, a rewarding and highly successful initiative that has been suspended due to Covid-19. By meeting people in different French regions, and thanks to the attention generated by local media coverage, we reach a diverse audience ranging from court



practitioners, professors and students to the general public, who are thus better informed about the genuine role and functioning of the Constitutional Council.

We still have work to do in this area. For example, how often do we read or hear the expression “the opinion of the Constitutional Council”? The Council does not publish “opinions”, it hands down “rulings”: it is not the same thing. In short, to use a common expression from the world of diplomacy and... sports, “there is still room for improvement”.

More generally, when you hear comments about your rulings, do you feel that they are always well understood?

L.F. I will leave aside criticisms inspired – as is sometimes the case – by ideological or political biases: they are regrettable but likely inevitable. As for other comments, those made in good faith, I feel that our rulings are generally well understood, even if we sometimes see baffling misinterpretations in how they are presented. I will cite two examples.

Our innovative decision concerning judicial review of unratified ordinances: while this logically implies an incentive for Parliament to better keep track of these ordinances, some commentators have wrongly asserted that it deprives Parliament of its prerogatives.

Information on our activities must reach the widest possible audience.

Similarly, while our decision on regional languages expressly recognises their importance and cites the article of the Constitution that affirms this view, some saw the ruling as a condemnation of regional languages. We merely recalled a basic fact: education in France cannot completely disregard the French language, which the Constitution enshrines as “the language of the Republic”.

Are your rulings always applied properly?

L.F. They have to be. When we make a decision, it is binding on everyone, as provided for in Article 62 of the Constitution. However,

twice in recent months, public authorities have not drawn the full conclusions from our rulings. When the provisions in question came back to us, we struck them down once again, reiterating our interpretation as grounded in the Constitution. In some cases, the issue revolves less around a divergence of opinion as the speed with which our rulings are taken into account. When we defer the effects of the nullification of a law in the context of the QPC procedure, to allow Parliament to modify the legislation as appropriate, the deadline we determine is also binding. It is therefore regrettable that the necessary measures regarding deplorable conditions of detention, to cite but one example, were not implemented within the timeframe we set, particularly since this is a major issue.

What about constitutional amendments?

L.F. The amendment procedure is set out in Article 89 of our Constitution. Based on experience, certain amendments may be useful. However, although modifying the Constitution is not impossible – indeed, 24 amendments have been adopted in the 63 years since the 1958 Constitution entered into force – it appears increasingly difficult. No amendment has been adopted since 2008. There are many reasons for this, which I will not address in detail. In any case, history seems to have shown that, considering the conditions set out in Article 89, a constitutional revision is undoubtedly less problematic in particular political contexts such as the beginning of a presidential and legislative term. It is not for me to comment on the advisability of any particular substantive revision. However, within the immediate scope of the Constitutional Council, at least two changes to the body of the Constitution seem justified. On the one hand, the repeal of the automatic appointment of “former Presidents of the Republic” as lifelong members of the Council, as provided for in Article 56. This provision, which might conceivably have made sense in 1958 as a way to supplement the pensions of former presidents, no longer has any justification in the “new” Constitutional Council, which has since evolved into a true constitutional court. Moreover, no former President currently sits on the Council, and I note that there is now a consensus on the very principle underlying this reform.

In addition, as I mentioned earlier, the rule of law could be improved by ensuring that the

Constitutional Council systematically and rapidly review laws declaring or extending a state of emergency.

A little history. 2021 marks the 50th anniversary of the “Freedom of Association” ruling. In what way did this decision mark a turning point?

L.F. The “Freedom of Association” ruling of 16 July 1971 is indeed one of the “landmark decisions” that you learn about as a first-year law student and never forget. Why? Because it is seen as the decision that extended the constitutional standards of reference to include the “constitutional corpus”, made up not only of the body of the 1958 Constitution, but also the declarations of rights mentioned in the preamble and the principles of constitutional value. Moreover, by proclaiming the constitutional value of freedom of association, the Council handed down a decision the relevance and importance of which can still be seen 50 years later. For example, protecting this freedom was the basis for our ruling of 13 August 2021 setting out the conditions under which public subsidies may be revoked when an association fails to comply with its “contract of republican commitment”, as well as the conditions regulating government-imposed suspension of the activities of associations.

I would also like to take the opportunity to mention another great step forward for the rule of law in France – an event that is attracting new attention with current commemorations – the law abolishing the death penalty that was enacted 40 years ago, on 9 October 1981. My friend and predecessor Robert Badinter, then Minister of Justice, championed this legislation, which was enshrined as constitutional law at the beginning of this century through the introduction of Article 66-1.

Looking to the future, what do you expect to be the highlights of 2022 for the Constitutional Council?

L.F. You know that nothing is ever absolutely certain in this field. However, going beyond our usual activities of *ex ante* and *ex post* constitutional review, two moments will undoubtedly stand out.

First, of course, the presidential election. As provided for in the Constitution, we have begun the task of ensuring that the election of the President of the Republic is properly conducted. This process will continue in the com-

When we make a decision, it is binding on everyone, as provided for in Article 62 of the Constitution.

ing months as we inspect sponsorships and oversee the voting procedure, scheduled to take place on 10 and 24 April 2022. Finally, I will have the honour of announcing the results. In order to allow the public to keep track of this process, the Constitutional Council will roll out a dedicated website and mobile application.

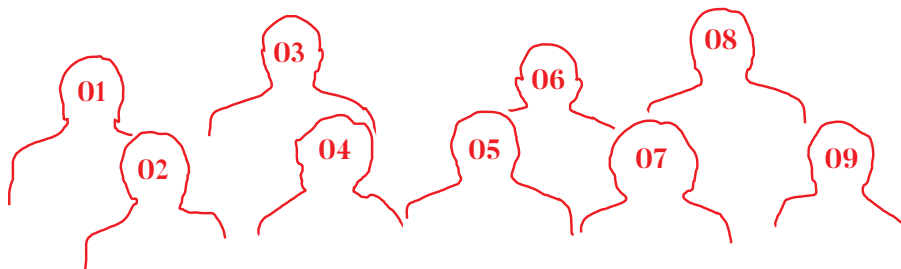
Before that, the partial triennial renewal of our College will take place. Three of our members are leaving office in March 2022: Claire Bazy Malaurie, Nicole Maestracci and Dominique Lottin. All three express themselves very freely in this annual report, and all three have served as accomplished “Sages”, devoted to respect for the Constitution and the prominence of our institution. I give them my heartfelt thanks. Three new members will be joining us. It is not for me to make recommendations regarding appointments. I would simply stress that the current gender equality within our College (excluding the Presidency) is one of its key strengths.





Composition of the College

Members as at
1 September 2021



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



A collegial body

9
“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.

All decisions within the Constitutional Council are taken by a **nine-member** college, known as the “Sages”.

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.


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

An obligation to exercise reserve.

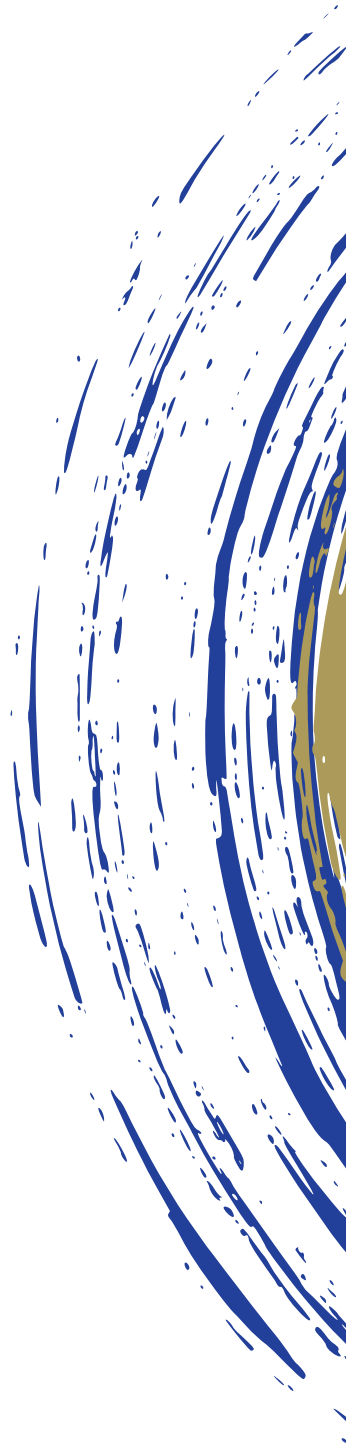
A rule barring members from holding any elected office or practising any other occupation.

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.



In March 2022, three members of the Constitutional Council will leave office: Claire Bazy Malaurie, Nicole Maestracci and Dominique Lottin. Their individual statements illustrate the missions entrusted to the “Sages”, as well as developments within the Constitutional Council in recent years and the institution’s role in the French legal landscape.





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Our years
at Rue de
Montpensier
—



Claire Bazy Malaurie



“I would cite three terms that seem to encapsulate life within the institution: diversity, high standards and collegiality.”

Key dates

31 August 2010

Appointed by the President of the National Assembly (re-appointed on 12 February 2013)

7 September 2010

Sworn in before the President of the Republic, and took the oath a second time on 14 March 2013

“Nearly 12 years at the Council... In addition to its remarkable length (fully in line with the Constitution, I might add!), this term of office has enabled me to experience the creation of the priority preliminary ruling on the issue of constitutionality, which transformed the Council into a fully-fledged court, shedding new light on an institution that, while undeniably prestigious, had long been inaccessible to ordinary citizens. Others will build on this metamorphosis, which for all intents and purposes dates from 2010. Some will criticise the institution, often relying on conceptual comparisons without the insight that comes from working at the Council. I wish to share my own experience, taking advantage of the invitation extended to all members whose term of office is coming to an end to participate in the drafting of this annual report.

Obviously, I need not stress the importance of the mission to which everyone in this institution is dedicated: protecting democracy, fundamental rights and the rule of law. Every day brings proof that vigilance is called for. There are those who think we never do enough. They should be reminded that we only address the questions put to us, and that these past eleven years of *ex post* judicial review, in addition to an unabating stream of *ex ante* review procedures, have allowed for in-depth scrutiny

into many aspects of substance and method, a broadened scope of action, and sometimes welcome changes in case law.

To respond in more concrete terms to perfectly legitimate curiosity, I would cite three terms that seem to encapsulate life within the institution: diversity, high standards and collegiality. Diversity, because no area of law eludes the Council's scrutiny. The body of law known as constitutional law touches on every aspect of our lives: it is no longer the law of political institutions that most of us learn about in law school. Unsurprisingly, tax law has kept us very busy, and criminal law seems to have risen to first place in recent years in terms of the number of referrals. Naturally, all aspects of public law, as well as the body of law known as "private" also come before us, in all their expressions recorded in the thousands of pages making up our legal codes. High standards, reflected in the objective of applying a common set of rules, respectful of all citizens and as consistent as possible with society's needs. For members, adhering to these high standards means fully grasping the principles and methods of review specific to constitutional law, but also, for each new case, gaining insight into the history of the rule in question, its scope and, when applicable, interpretations and rulings by other courts, at both national and European level. The enormous amount of monitoring and analysis carried out on each case by staff, including the most accomplished legal experts within the Council, is not only remarkable but indispensable given the deadlines within which we have to hand down our rulings. Thanks to them, we can work quickly, even if addressing the sheer number of *ex ante* referrals in the space of one month at best, is a true tour de force. The succinct nature of our decisions may not reflect this challenge, but a lack of stylistic panache should not be seen to suggest a lack of research and analysis. Preparatory briefs are distributed to all members, not only the project rapporteur. The fact that we do not each have our own assistant – a particularity in the legal world that our counterparts often mention – highlights the collegial functioning of the institution, which is in fact one of the Council's great strengths. Of course, everyone is free to do their own research, drawing on the abundant literature provided by staff members familiar with our

needs, as well as the highly detailed analyses provided by the Legal Department. Members can thus develop their own reasoning, alone in their office or in the third-floor corridor adjoining the members' chambers, an exceptional venue for dialogue and debate. Pooling research and analysis prior to deliberation in no way detracts from the richness of the oral debate on the draft decision during the deliberation session; indeed, it allows us to focus on comparing and contrasting our perspectives in order to arrive at reasoned decisions that are often consensual. Having experienced diverse configurations of our College, I can affirm the importance – I would even say the necessity – of a Constitutional Council bringing together individuals with varied professional backgrounds and experiences, all devoted to the public good, the *res publica* of our ancestors. Whatever the origin of their appointment – and many are tempted to pigeonhole members according to their political views, real or alleged – the essential qualities I have noticed in every member of the Council (and forgive me if I attribute to myself as well the defining characteristics of my colleagues) are open-mindedness and a concern for the daily lives and the future of their fellow citizens. So, yes, the messages conveyed by our rulings may seem too complex or too simplistic, while for us the preparatory work may feel monotonous. But personally, I will certainly look back fondly on all these years of stimulating debates, and even the criticisms I have heard or read, however they may have struck me at the time!



Online extras

Find Claire Bazy Malaurie's contribution to the special report "Citizens Calling on the Constitutional Council – the QPC".

urlr.me/Gkcyx





Nicole Maestracci



“In an ever-more uncertain world, the role of constitutional courts, and the Constitutional Council in particular, is destined to become increasingly central and increasingly disputed.”

Key dates

12 February 2013

Appointed by the President of the Republic

14 March 2013

Sworn in before the President of the Republic

“I have spent nine exhilarating years at the Constitutional Council in a context of palpable fragility of the rule of law, which makes the role of constitutional judge all the more demanding. As I prepare to leave the Council, I would like to share some personal reflections. They are necessarily subjective, incomplete and debatable, and undoubtedly marked by my experience as a courtroom judge. But they are also the fruit of numerous exchanges with the academic world, the other French high courts and other constitutional courts in Europe and elsewhere. In this respect, the research programme initiated to mark the 10th anniversary of the QPC has served to highlight the strengths and weaknesses of the French constitutional review system and to conceptualise some prospects for its development.

The first thing that struck me upon arriving at the Constitutional Council in 2013, three years after the entry into force of the QPC, was seeing an institution in transition. We know that the Constitutional Council, unlike its neighbouring constitutional courts, was not a court at its inception. Moreover, it is still not referred to as such. It was designed in 1958 as a political institution intended to protect the executive from interference by Parliament. Its transformation into a court only began with the entry into force of the QPC, which instituted most of the requirements

of due process: respect for the adversarial system, rights of the defence, debates accessible to the public, etc. Despite this decisive reform, the Council remains marked by the conditions of its birth. As a result, a perfectly judicial procedure, that of the QPC, coexists with a more rudimentary, more secretive and less adversarial one, that of constitutional review of laws prior to enactment. The first difficulty stems from that coexistence. Of course, it is not for me to pass judgement on the advisability of maintaining *ex ante* constitutional review, even if it is relevant to recall that such a procedure does not exist in any other country. However, this twofold procedure, of which only one type respects the requirements of due process, instils a certain confusion as to the judicial nature of the review performed and makes it difficult for laypersons to understand the scope of our decisions. In the likely event that these two procedures continue to coexist, perhaps it is time – even if the conditions of referral immediately following the adoption of laws by Parliament make this exercise difficult – to consider rules that would better guarantee respect for the adversarial system and the public nature of debates.

The second difficulty is linked to the composition of the Council, which continues to attract recurrent criticism. We shall briefly address *ex officio* membership of former Presidents of the Republic. In an institution that is morphing into a court, such participation no longer makes sense. A consensus has arisen to abolish such automatic membership, and it will surely be done with the next constitutional revision. The issue of the criteria for appointment of the nine members is more complex. The Constitution merely sets out the appointment procedure without determining any requirements in terms of training or experience. Moreover, the constitutional revision of 2008, which subjects candidates for appointment to a possible parliamentary veto, has not silenced critics. These criticisms mainly point to the absence of any requirement in terms of legal training and the fact that some members have a political rather than a legal background. Responding to these criticisms is a particularly delicate exercise. The appointment procedure

still indisputably bears the hallmarks of an institution that has yet to become a fully-fledged court. Nonetheless, an examination of the appointment mechanisms in other supreme courts clearly shows that there is no ideal system. The executive and legislative branches of government generally play a decisive, albeit varying, role in the appointment process: nowhere are appointments free of political considerations. On the other hand, most countries require a certain amount of legal experience. In France, there is no such requirement, even though in practice most appointees are well versed in the law. Even if such a condition were implemented, would it be enough to enhance the legitimacy of the Council? I cannot say. It takes more than legal expertise to be a good judge. Judges must of course have in-depth knowledge and understanding of legal reasoning. They must be able to let go of their

***It takes more
than legal
expertise to be
a good judge.***

personal convictions and biases upon entering the courtroom. But above all, they must also have profound insight into the world in which they fulfil their duties. They must understand the complexity of individual and collective human behaviour and take an interest in the human, economic and social concerns surrounding their decisions. Finally, they must be able to see beyond the matter at hand in order to gauge the impact of their decisions on future disputes. A College made up of diverse profiles ensures that these requirements are met. Provided that members share a common foundation in terms of legal culture, it would be possible to further broaden and more clearly assert this diversity by integrating other requirements, in particular gender parity or a variety of professional backgrounds. However, such a development would only strengthen the Council's legitimacy if it were accompanied by a degree of transparency, i.e. by the appointing authorities clearly elucidating the criteria that led them to make a particular appointment. Such transparency would make it possible to eliminate some of the misunderstandings, and even mistrust, that rightly or wrongly surround the appointment process. It would also highlight a shared vision of the qualities expected of a constitutional judge.

The third difficulty concerns our model of constitutional review, which has remained abstract, even for QPCs, in a context of concrete, flesh-and-blood disputes involving human passions or economic and social conflicts. An abstract review process was justified for *ex ante* review of laws that had yet to be applied, but today the Council is also tasked with examining matters of living law. It must therefore address legislation that has come under criticism not only because of intrinsic flaws, but also because of how it is implemented in real life and the tangible harm it may cause for the people concerned.

As such, in hearing after hearing since 2010, we have seen real life gradually permeate debates around the Constitution. This development has been encouraged by the existence of adversarial hearings, which are often attended not only by the litigant or litigants having lodged the application, but also by the various stakeholders and legal entities

with an interest in changing – or maintaining – the law in question. These hearings are also recorded and broadcast in real time. In this regard, the Constitutional Council has shown itself to be quite pioneering. Looking at some of the hearings, we see that arguments and debates primarily revolve around the concrete consequences of the provisions in question. For each QPC, constitutional judges also endeavour to understand the context of the law being challenged. They review figures and research reports, as well as parliamentary or administrative reports. They ensure that their decisions are compatible with those rendered by the European Court of Human Rights, which adopts a concrete approach to judicial review. This focus on tangible impacts is even more evident when it comes to determining the long-term effects of a decision to strike down a provision. All of these factors necessarily influence the verdicts rendered by constitutional judges. This aspect of their analysis must go beyond a *stricto sensu* reading of the law.

Of course, this does not mean replacing an abstract review with a concrete review. That is the task of the judicial and administrative

As such, in hearing after hearing since 2010, we have seen real life gradually permeate debates around the Constitution.

courts. Rather, it is a question of taking more explicit account of the concrete elements of the judicial debate in our decisions. In this regard, I would cite two possible paths for development. The first would be to enrich the adversarial debates at hearings by inviting *amici curiae*, sources of information or expertise, to express themselves on certain highly controversial subjects or topics on which the judges do not feel sufficiently informed. Public debates in which judges and the parties could ask questions would thus take on a new dimension. This would be a relatively cumbersome procedure due to the demands linked to consultation with

the parties within a very short period of time, and as such could be limited to QPCs, where the stakes are particularly high. The second option would be to introduce a paragraph at the beginning of each decision listing the concrete elements (reports, research, statistics, comparative law) on which the Council based its decision.

I do not underestimate the difficulties that such a proposal would entail, considering the choice made in 2010 to model the QPC procedure on that for *ex ante* review, thus maintaining a thoroughly abstract examination. A different choice could have been made, with a degree of concrete reflection given the nature of the QPC. Developments over the last 10 years indicate that such a shift in focus is bound to come about. Indeed, litigants and citizens in general are increasingly eager to understand the reasoning behind judges' decisions. They want to know the premisses underpinning verdicts, and this demand is legitimate, even if it clashes with our tradition of brief and abstract reasoning. As such, decent respect for the opinions of our fellow citizens would warrant informing them of the considerations that influence our decisions, even those that go beyond purely legal reasoning.

Finally, I would like to mention the difficulty for laypersons to fully grasp the issues at stake in the constitutional debate, in a context where the state of applicable law has become extremely complex. Secret deliberations, combined with our tradition of succinct drafting, make it impossible to reflect divergent points

of view. Nevertheless, we could make our rulings clearer and more accessible by presenting the contending views, and perhaps illustrating these views through concrete examples. This is one reason why I have always been in favour of allowing members to express separate opinions, be they concurring or dissenting. I am aware of the arguments advanced by those who disagree, and they should not be dismissed out of hand. However, they appear more compelling for *ex ante* review than for QPCs. After nine years, I am convinced that the benefits outweigh the disadvantages. Only by publishing separate opinions can we provide true insight into the issues, arguments, and scope of our rulings. The commentary drafted and published by the General Secretariat cannot fulfil this function, as by its very nature it does not reflect the tenor of deliberations. Publishing separate opinions would not require disclosing the breakdown of votes, although I personally would not object to such information being known¹. Furthermore, I do not see how it would undermine the independence of judges. On the contrary, it seems to me that, far from weakening their legitimacy, such a reform would significantly strengthen it. It would allow for a better understanding of the terms and issues of the deliberation while preserving the legal purity of the decision. It would make people aware of the multiplicity of sources that inform each ruling, the entanglement of overlapping standards, case law precedents, technical constraints, visions of reality, emotions in the face of individual or collective stories, as well as a concern for equity. It would help make the judicial debate lively and intelligible, including for laypersons, i.e. for all citizens who, in the course of their lives, now or in the future, need to safeguard fundamental rights for themselves or for others about whom they are concerned in any capacity.

*

The review exercised by the Constitutional Council can only be analysed from a long-term perspective. From this standpoint, nine years is a short time. Consequently, the developments I have just mentioned, some of which seem inevitable, will necessarily occur slowly. Therefore, although the Council has embarked on an inexorable path to becoming a fully-fledged court, this transformation is not yet complete. Certain factors that I see as non-negotiable are holding back progress. This is the case, for example,

with the extraordinarily short time limits for rulings, which do not exist anywhere else. These deadlines make it difficult to carry out a sufficiently thorough investigation and debate, despite the outstanding expertise and effectiveness of the Legal Department that assists us. But in a context where justice is traditionally considered too slow, short time limits are popular, and the associated disadvantages have not been seriously discussed. Other changes would be easier to implement, particularly the idea of recruiting a larger number of legal professionals so that each member could have one or more assistants, as is the case in all comparable constitutional courts.

I chose to share these thoughts because I am aware that in an ever-more uncertain world, the role of constitutional courts, and the Constitutional Council in particular, is destined to become increasingly central and increasingly disputed. It is therefore essential to further strengthen its legitimacy among a broad public, and I am convinced that the best way to do so is to accelerate, or even complete, the transition currently underway, transforming the Council into a recognised court of law.

¹ The European Court of Human Rights allows separate opinions to be expressed while guaranteeing the secrecy of deliberations.



Online extras

Find Nicole Mastracci's remarks during the dialogue seminar on researchers' reports organised in the context of the QPC 2020 programme.

urlr.me/sxC3J





Dominique Lottin

“This four-and-a-half-year term has been particularly dense and immensely rich.”

“In March 2022, three women will be leaving the Constitutional Council. My term of office will have been shorter than that of my friends and colleagues Claire Bazy Malaurie and Nicole Maestracci, since I entered the institution to replace the eminent jurist Nicole Belloubet, who was named Minister of Justice a few months before my appointment. This four-and-a-half-year term has been particularly dense and immensely rich.

On Rue Montpensier, I no longer wear the black or red robes I donned for more than 35 years during my career as a magistrate. Nevertheless,

Key dates

25 October 2017

Appointed by the President of the Senate

6 November 2017

Sworn in before the President of the Republic



I am committed to bringing the pragmatic and human approach of judges to the Council, and to support its gradual transformation into a court of law. Moreover, even though it is a formidable challenge, I endeavour to give my colleagues a more accurate view of the judicial institution, its operating methods and its constraints. However, to become a “Sage”, a common expression that nonetheless seems somewhat inconsistent with developments of recent years, I have had to perfect my knowledge of constitutional and administrative law. At the same time, in order to ensure a “balanced reconciliation” of fundamental rights and objectives of general interest, I have tried to contribute to preserving the imperatives of government efficiency while respecting the choices of legislators, the sole arbiters of the wisdom of the measures adopted, always with due regard for the constitutional principles that underpin our democracy and the expectations of our fellow citizens.

In this pursuit, I have benefited from the experience of the other members of the Council, be they jurists, elected officials, senior civil servants or former politicians and statesmen, it being stressed that the majority of them have combined these vocations in the course of their distinguished careers. I can attest that, while none of them has renounced their convictions, in their role as constitutional judges, they are free of all partisan reflexes and resist any urge to “legislate from the bench”. Our informal debates, like our formal deliberations – even the most heated – are always conducted in a spirit of cordiality and respect, guided

by a commitment to fulfil the missions entrusted to us to the best of our ability. I cannot mention our work without paying tribute to the excellence of the Council's Legal Department, headed by a Secretary General of outstanding dedication and competence without whom we could not carry out our work within the tight deadlines imposed upon us.

In this respect, the Constitutional Council differs from its European counterparts in that it delivers all its decisions within the time limits set out by the Constitution, i.e. one month, or even one week in the case of *ex ante* review, and three months in the case of priority preliminary rulings on the issue of constitutionality. Even if this requirement is sometimes a source of tension, it is essential in order to avoid dilatory appeals or bringing government and legislative action to a standstill. I would like to add that for members to fully carry out their duties, it would be helpful to be able to rely on dedicated assistants, individually chosen by each member for the duration of his or her term. I do not wish to imply that the Council's legal experts are not willing to fulfil these responsibilities, but due to their often very busy schedules, they are not always available to respond to our requests. This assistance would be all the more valuable as Council members do not specialise in any particular field. Indeed, while this practice has the distinct advantage of keeping each of us alert to the Council's many and varied domains of competence, it requires an even greater investment when the President assigns us the position of rapporteur on topics with which we have limited familiarity, sometimes preventing us from carrying out a truly in-depth examination of the dossiers presented by other members.

From this point of view, I have observed that legislative inflation, as well as the increasing number of QPCs, have considerably broadened the purview of the Constitutional Council's competences and increased its workload. For the past 10 years, the Constitutional Council has issued an average of 100 rulings per year, not to mention decisions on electoral disputes, verification of campaign spending, as well as shared initiative referenda. In addition to traditional procedures relating to criminal law and tax law, which continue to account for the majority of cases, there are those revolving around social welfare law, the right to – and freedom of – education, environmental law, competition law, cases centred on freedom of expression and opinion, the fight against terrorism, regulations governing web-based dissemination of

information, government use of algorithms or videoconferencing, to mention only the most recent cases referred to the Council.

In addressing these cases, I appreciate that dialogue between national and European judges is indispensable. Granted, the Council does not judge cases on the merits and does not exercise judicial review of international agreements. Nonetheless, in its assessment of respect for fundamental rights, it does indeed take account of the case law of national and European supreme courts. This ongoing dialogue, although often wordless, is essential to promote the emergence of principles common to all European democracies and to avoid disputes relating to case law, which could be highly damaging. In this respect, even though the health crisis has made interaction more difficult in recent months, I have appreciated the frequent exchanges with our foreign counterparts and with judges representing both branches of the judiciary, as well as our participation in numerous academic conferences.

These discussions are sometimes critical of our practices, both in substantive terms and regarding the Council's procedure, sometimes considered insufficiently adversarial, and the drafting of our rulings, often considered too succinct. Yet such criticism inspires thoughtful reflection and impels us to make slight adjustments in an attempt to improve our operating methods. I hope I have been able to contribute to these initiatives, in full awareness that the Council's greatest challenge is undoubtedly to better acquaint our fellow citizens with the institution and the essential role it plays in the workings of government and the preservation of our rights and freedoms. I have no doubt that my colleagues and the new members soon to be joining them will rise to this challenge.

As I leave the Council in a few months' time, I am thankful for the honour and opportunity I have been given to participate in this collective endeavour, sparing no effort within the institution to ensure respect for our democratic values as set out in the Constitution of the Fifth Republic.



Online extras

Find Dominique Lottin's address to teachers and students of the Institution de la Croix Blanche in Bondues (Nord), in the framework of the *Découvrons notre Constitution* (Discovering our Constitution) competition.

urlr.me/XpHMf





The QPC 2020 programme, the *Découvrons notre Constitution* competition, a thesis prize, and a meeting in Karlsruhe... Once again, the Constitutional Council has sought to promote constitutional culture through various projects this year, while deepening dialogue with students, professors, jurists, and the heads of foreign constitutional courts.

**This year
at the
Council**

The “citizen’s prerogative” comes to the small screen

ON 26 NOVEMBER 2020, TO COMMEMORATE 10 YEARS OF THE QPC (*QUESTION PRIORITAIRE DE CONSTITUTIONALITÉ*, OR PRIORITY PRELIMINARY RULINGS ON THE ISSUE OF CONSTITUTIONALITY), THE CONSTITUTIONAL COUNCIL PRODUCED A PROGRAMME-EVENT IN PARTNERSHIP WITH LCP-AN (*LA CHAÎNE PARLEMENTAIRE DE L’ASSEMBLÉE NATIONALE*, THE PARLIAMENTARY CHANNEL - NATIONAL ASSEMBLY). THE PROGRAMME ALLOWED KEY ACTORS OF THIS “VELVET REVOLUTION” - THAT IS TO SAY THE QPC - TO REVISIT THE FIRST TEN YEARS, RETURNING TO ITS GENESIS, AND TO CONSIDER THE FUTURE OF THE “CITIZEN’S PREROGATIVE”. LOOKING BACK AT THE PROGRAMME, WE HEAR FROM CÉCILE CASEAU-ROCHE AND STÉPHANIE GRAYOT-DIRX, CO-DIRECTORS OF THE MASTER’S DEGREE IN PROCEDURAL LAW AT THE UNIVERSITÉ DE BOURGOGNE, AND FROM MATHIEU ROSA AND BAPTISTE BON, STUDENTS OF THIS MASTER’S DEGREE.

Cécile
Caseau-Roche
and Stéphanie
Grayot-Dirx

Co-directors of the master’s degree in procedural law at the Université de Bourgogne

An educational celebration to instil a “constitutional reflex”

For the QPC’s tenth anniversary, the Constitutional Council wished to research its evolution, inviting participation from the professional community outside the halls of the Council, with a call for interdisciplinary projects employing an empirical and comparative approach. In addition to this specialist endeavour - while considering difficulties due to the global health crisis - the Council also launched an unprecedented communication operation aimed at a much wider audience than merely the research community, culminating in the staging of a full-scale television programme entitled “QPC 2020: Ten Years of the Citizen’s Prerogative”, celebrating the anniversary of this “truly astounding democratic tool”.

Initiated by the Constitutional Council President and moderated by two media professionals, the programme was broadcast on LCP-AN and later released on the Council’s website and an online video platform, making the programme still accessible and viewable today. Lasting two hours and ten minutes, it is based on various sequences spanning the present, past and future in turn, with a succession of prestigious guests, including some foreigners, with interviews, round tables, flashbacks, statistics and even a vox-pop! During this programme, Mr Fabius advocated for lawyers to be better trained on the QPC and for citizens to



Through several round tables, the programme proposes to reflect on the challenges of the QPC.

be made more aware of its existence, among other possible improvements mentioned.

This programme provides lecturers with innovative teaching material for courses, tutorials and seminars in which the Constitutional Council's role is examined. Thanks to a chaptered version, any easily identified part can be used as material for university lessons in both undergraduate curricula and continuing education. Well-chosen excerpts – whether they concern sources of law and their evolution, a conversation between judges or the QPC procedure – can perfectly illustrate certain points, thus further stimulating the mind and forming a lasting impression. For continuing education, this programme once again proves it can offer interesting material, be it for lawyers or non-professional judges who might encounter a QPC.

Beyond that, this resource could also be used by primary and secondary school teachers, as part of civics or ethics courses; interviews with leading figures from the most distinguished institutions would provide an alternative way of discovering the “citizen’s prerogative”. With this improved training, tomorrow’s legal professionals can also act as good QPC ambassadors to the citizens of today.

Moreover, the programme’s online availability is consistent with the Constitutional Council’s stated objectives: accessibility and intelligibility of the law. This feature is necessary; although legal professionals have embraced the QPC, it remains relatively unknown to the average citizen. Yet, one of the QPC’s main objectives was to make citizens more aware of the Constitution. However, while it does improve the protection of constitutional rights and freedoms in France by covering entire sections of legislation that have escaped the Council’s *ex ante* review, there is still room for improvement. This undoubtedly presumes that citizens, and more specifically litigants, are better informed about the existence of this procedure. In this respect, it should be noted that the desire to communicate with the public is



Online extras

Watch the entire “QPC 2020: Ten Years of the Citizen’s Prerogative” programme online, or select sections by chapter.
urlr.me/wSsv1



clear, as symbolised through use of the expression “citizen’s prerogative”, rather than “priority preliminary rulings on the issue of constitutionality”, which is certainly a more precise technical designation, though perhaps too obscure.

The QPC – this “velvet revolution” – has led to a profound upheaval among sources of domestic law and in the relationship between the Constitutional Council, the Council of State and the Court of Cassation, and has ultimately contributed to redefining the law itself. This anniversary provides an opportunity to measure how far we have come. All that remains now is to state a twofold wish: that the QPC continues to develop in its dedication to rights and freedoms, and that the Constitutional Council has the means to carry this out.

The programme opened with an interview given by President Laurent Fabius.



Their opinions...

Mathieu Rosa and Baptiste Bon,
Master 2 students in procedural law
at the Université de Bourgogne

The programme “QPC 2020: Ten Years of the Citizen’s Prerogative” was presented to us by Mr Laurent Neyret, sponsor of our Master 2 class in procedural law at the *Université de Bourgogne*, during one of several rich virtual exchanges that marked our 2020-2021 academic year.

Thanks to its wide distribution and easy access, we could watch and rewatch the various professional speakers interviewed. Consequently, we were given the opportunity to work on different aspects of the QPC, from the idea itself to the QPC’s future, not to mention the effects it has on both private and public law. This resource was particularly appreciated during the health crisis, when students could not always access university libraries.

Though this constitutional mechanism is not unknown to holders of a law degree, this audiovisual medium allows us to study the subject in breadth and depth. Be it the QPC’s genesis, the institutional consequences of establishing it, or its subsequent prospects, the connection established between ideas developed in this programme and our university education has enriched our thinking on this mechanism, on society and, more broadly, on the rule of law. This operation seems to us to concern all citizens, particularly law students who must take an interest in the “citizen’s prerogative”. We encourage everyone to watch the programme attentively. Indeed, other institutions would do well to develop similar resources!

A fruitful partnership with the French Ministry of National Education

THE CONSTITUTIONAL COUNCIL AND THE MINISTRY OF NATIONAL EDUCATION LAUNCHED IN 2016 THE *DÉCOUVRONS NOTRE CONSTITUTION* (DISCOVERING OUR CONSTITUTION) COMPETITION, WHICH HAS CONTINUED TO GROW IN 2021 WITH THE INAUGURATION OF A NEW EVENT, THE *FÊTE DE LA CONSTITUTION* (CONSTITUTION WEEK). THESE TWO UNMISSABLE OCCASIONS RAISE AWARENESS OF CONSTITUTIONAL PRINCIPLES IN STUDENTS OF ALL AGES.

A look back on the 5th edition of the Découvrons notre Constitution competition

For the fifth consecutive year, primary, secondary and high schools were invited to participate in the *Découvrons notre Constitution* (Discovering our Constitution) competition. Launched in 2016 by the Constitutional Council in partnership with the Ministry of National Education, Youth and Sports, this project allows students of all grades to think and work collectively while gaining a better understanding of major constitutional principles. Despite limitations caused by the health crises, nearly thirty schools participated in the fifth edition. Virtual meetings were organised throughout the year between Council members and various classes involved in the competition, providing concrete insight into the Constitutional Council's missions. These meetings were deeply appreciated, both by students and Council members, and provided an opportunity to demonstrate general knowledge gained in the classroom while discussing the rights and freedoms protected under the Constitution.

This edition's competition schedule was rearranged to allow for more time to organise an academic long-list. Unlike in previous years,

juries first met in school districts before conveying the best works to the national jury.

Assembled in Paris on 23 June 2021, the jury awarded prizes for the following works:

— **Primary school category:** the year 7 class and students in the UPE2A unit (newly arrived students from foreign languages communities) at Toulouse-Lautrec secondary school in Toulouse (Toulouse school district), for their project *The Constitution Is Not So Complicated*, composed of a video documentary and a song. A special mention was given to the year 5 class at Jules Ferry 2 in Savigny-sur-Orge (in Versailles school district), for their video documentary *Ozobot and the Charter for the Environment*.

— **Secondary school category:** the year 9 and 10 classes at Émile Zola secondary school in Fouquierès-Lès-Lens (Lille school district), for their project *The Declaration of the Rights of Man and of the Citizen, A Comic*.

— **High school category:** the year 13 Berlin class at Scheurer Kestner high school in Thann (Strasbourg school district), for their board game *Who will come in 1st in the 5th Republic?*

A special mention was awarded to the year 13 class at Marcelin Berthelot high school in Saint-Maur-des-Fossés for their project *The Constitutional Council in the Service of Freedoms? Legal remarks in the form of doctrines by year 13 students specialising in law*.

For the anniversary of the Constitution, the winning classes will be awarded at the Council by the President of the Constitutional Council and the Minister of National Education, Youth and Sports.

The award ceremony from a previous year's competition.



Studying the Constitution: new pedagogical resources available to teachers

Building on the *Découvrons notre Constitution* competition, the Constitutional Council and the Ministry of National Education, Youth and Sports are launching a new programme to promote awareness around major constitutional principles in school classrooms: the *Fête de la Constitution* (Constitution Week), set to take place for the first time between 28 September and 4 October, 2021, during the anniversary of the enactment of the Constitution of the Fifth Republic.

It aims to develop constitutional awareness among young generations, enabling schools and establishments to carry out various projects with the support of external leading figures, constitutional law professors, lawyers, law students, partner associations, etc.

To help teachers prepare for this educational week, the Constitutional Council has created a set of resources in conjunction with the Ministry of National Education, Youth and Sport, which were made available on the Éduscol website last spring.

This set of resources is grouped into seven major cross-disciplinary subjects divided into sub-themes:

- The concept behind the Constitution (definition, writing and revision, hierarchy of constitutional norms).

- Sovereignty and organisation of powers (elections, separation of powers, decentralisation).

- Principles of the Republic (rights and freedoms, equality and fight against discrimination, secularism, fraternity).

- Digital technology (rights and freedoms, de-materialisation and digitalisation).

- Health and the human body (health risks, sexuality, abortion, bioethics).

- Environment (preservation and valorisation of the environment, common heritage of humankind, responsibility in the face of environmental risk and damage).

- Economy (economic rights and freedoms, labour relations).

Over 40 thematic sections are available, including an introduction to relevant legal concepts and an introduction to the Constitutional Council's main decisions appearing in the resources.

Thus, these resources aim to provide teachers with useful teaching materials across several disciplines (law and major contemporary world issues, economics and management, ethics and civic education, history-geography, philosophy, etc.) and to assist them in carrying out cross-disciplinary projects.



Online extras

Discover resources promoting constitutional study on the Éduscol website, offered by the Constitutional Council and the Ministry of National Education.

urlr.me/sxY37



School district chief education officers meet at the Constitutional Council

Every month, on the initiative of the Ministry of National Education, Youth and Sport, the chief education officers of each school district and certain administrative chairs meet for a full day. This gives them the opportunity to discuss major school and university affairs (chief education officers are chancellors of the universities), and to work on implementing the minister's policies. During the *Fête de la Constitution*, inaugurated at the end of September 2021, one such meeting was held at the Constitutional Council. It focused on the importance of studying the Constitution at an early age in school. The Ministry took this opportunity to present the educational resources designed for teachers to the chief education officers.

Preparation for the upcoming presidential election

As the current presidential term draws to a close, the Constitutional Council was called upon to review measures designed to modernise the legal framework for the presidential election.

In Decision No. 2021-815 DC of 25 March 2021, it ruled on the organic law setting out various measures related to the election of the President of the Republic, referred for review by the Prime Minister in accordance with the paragraph 5 of Article 46 and paragraph 1 of Article 61 of the Constitution.

In particular, the Constitutional Council upheld the following:

- the provisions of said organic law stipulating that candidates in the presidential election must ensure that their campaign materials are accessible to people with disabilities;
- the addition of the Presidents of the Executive Councils of Corsica and Martinique, as well as the vice-presidents of the consular councils, to the categories of citizens entitled to present a candidate for the election of President of the Republic;
- the organic provisions setting out the procedures according to which prisoners, pre-trial detainees and persons serving a sentence not entailing suspension of voting rights may vote in presidential elections by post, via a sealed envelope;
- the obligation for candidates in the upcoming presidential election to issue a receipt for each campaign donation by means of a teleservice implemented by the National Commission for Campaign Accounts and Political Financing, and to file their campaign accounts with the Commission by electronic means using this teleservice;

– the obligation, in the context of the upcoming presidential election, for campaigns to make known the margin of error for any poll published or disseminated that was conducted under their responsibility, specifying, if applicable, that said polls were conducted via random sampling.

In parallel, the Constitutional Council was consulted by the Prime Minister, pursuant to the combined provisions of paragraph III of Article 3 of Law No. 62-1292 of 6 November 1962, as amended, on the election of the President of the Republic by universal suffrage, and Article 46 of Ordinance No. 58-1067 of 7 November 1958, as amended, on the Constitutional Council Organisation Act, regarding a draft decree amending Decree No. 2001-213 of 8 March 2001 implementing Law No. 62-1292 of 6 November 1962 on the election of the President of the Republic by universal suffrage and Decree No. 2005-1613 of 22 December 2005 implementing Organic Law No. 76-97 of 31 January 1976 on consular electoral rolls and voting by French citizens residing outside of France for the election of the President of the Republic.

It was also consulted by the National Commission for Campaign Accounts and Political Financing on a draft handbook for presidential candidates and their agents.

Lastly, in preparation for its own monitoring operations for the upcoming presidential election scheduled for 10 and 24 April 2022, the Constitutional Council is currently completing a number of digital projects, including the roll-out of a website dedicated to the election, which will make it possible to monitor, among other data, the number of sponsorships collected by candidates, as validated by the Constitutional Council.



2021 Thesis Award

3 June 2021

The jury of the 25th Constitutional Council Thesis Award met on 3 June 2021.

Chaired by Mr Laurent Fabius, President of the Constitutional Council, it was composed of Ms Claire Bazy Malaurie and Mr Jacques Mézard, members of the Constitutional Council, Professors Agnès Roblot-Troizier, Aurore Gaillet and Guillaume Tusseau, as well as the Secretary General of the Constitutional Council.

The jury granted the Constitutional Council's 2021 Thesis Award to Mr Thibaut Larrourou for his thesis entitled "*Question prioritaire de constitutionnalité et contrôle de conventionnalité*" ("Priority Preliminary Ruling on the Issue of Constitutionality and Judicial Review of International Agreements"), defended on 4 December 2020 at the Université Jean-Monnet-Saint-Étienne, under the supervision of Professor Baptiste Bonnet.

With the support of the Constitutional Council, the work will be published in autumn 2021 in the "*Bibliothèque constitutionnelle et de science politique*" collection, administered by LGDJ-Lextenso. As part of a partnership established between the Constitutional Council and the Cultural Meeting Centre of the Château de Goutelas (Marcoux, Département of Loire), the winner will be offered a residency in the "Library of Legal Humanism".

"I am particularly proud to know that my thesis will be seen beyond the frontiers of academia, prompting judges and lawyers to reflect on, and perhaps take steps to refine, some of their practices."

Thibaut Larrourou, winner of the 2021 Thesis Award



Online extras

Watch the interview with Thibaut Larrourou, winner of the 2021 Thesis Award.
urlr.me/ZVStC



The Constitutional Council boutique is open for business

15 December 2020

The Constitutional Council boutique was launched on 15 December 2020. This opening reflects the policy instituted as of 2016 by the institution and its President to raise awareness among all citizens regarding the significance of the Constitution in the life of our democracy, as well as the role played by the Council itself.

The Constitutional Council and the Réunion des Musées Nationaux-Grand Palais, which runs the boutique, entrusted to artist Pascale Brun d'Arre the task of designing a line of blue-white-red products, in reference to the French flag, featuring allusions to the Constitution. This exclusive line of products comprises objects made in France.



Online extras

Visit the Constitutional Council's online boutique.
urlr.me/s3NbK



International relations

Constitutional links between Paris and Karlsruhe

DESPITE THE DIFFICULTIES ARISING FROM THE HEALTH SITUATION AROUND THE WORLD, THE CONSTITUTIONAL COUNCIL HAS MAINTAINED CLOSE TIES WITH FOREIGN CONSTITUTIONAL COURTS. HERE IS A LOOK BACK AT A FRUITFUL MEETING WITH THE GERMAN FEDERAL CONSTITUTIONAL COURT.

Since taking office in 2016, President Fabius has repeatedly stressed the essential nature of exchanges between constitutional courts. These institutions face common issues that transcend borders, be they socially related matters such as bioethics or the legislative framework for new digital technologies and artificial intelligence, the existential challenges posed by the preservation of the environment or the delicate question of protecting fundamental rights in a context of terrorist threats.

The constitutional courts of the member states of the European Union and the Council of Europe also share ideas on the relationship between their respective fundamental standards and European law, as well as on the interaction between their national legal systems and supranational institutions such as the European Court of Human Rights and the Court of Justice of the European Union.

The Constitutional Council has a particularly close and long-standing relationship with the German Federal Constitutional Court, which occupies a prominent place among European constitutional courts considering the scope of the powers conferred on it by the Basic Law of 1949, as well as its rich and abundant case law.

In October 2016, the full College of the Constitutional Council visited the Federal

Constitutional Court's headquarters in Karlsruhe at the invitation of its President, Professor Andreas Vosskuhle. In December 2017 in Paris, President Fabius hosted a large delegation from the Federal Constitutional Court, led by Mr Vosskuhle.

Regular meetings between Presidents Fabius and Vosskuhle perpetuate the tradition of dialogue between the two courts. In October 2018, President Vosskuhle was among the figures invited to the Constitutional Council to celebrate the 60th anniversary of the 1958 Constitution, with the President of the Republic in attendance. In October 2019, the presidents of the two bodies also took part in the formal ceremony for the start of the academic year at the Humboldt University's Faculty of Law in Berlin, followed by a conference-debate organised in February 2020 in Paris by the Franco-German Commission of the Paris Bar. The following month, on 18 November 2019, President Fabius hosted Mr Stephan Harbarth, then Vice-President of the Court, at the Constitutional Council. Mr Harbarth became the new President of the German institution on 15 May 2020.

As the Covid-19 pandemic did not allow for a working seminar in plenary session in 2020, the Constitutional Council took advantage of the improved health situation to travel to Karlsruhe from 28 June to 1 July 2021, at the invitation of President Harbarth.

This meeting was particularly meaningful, as it marked the resumption of international activity for both courts.

Three working sessions, organised by the Court in the Bundesverfassungsgericht building, offered the French and German constitutional judges the opportunity to discuss topics including:

— **Protection of the environment** (speakers: Ms Gabriele Britz, judge at the Constitutional Court, and Mr Alain Juppé, member of the Constitutional Council). These debates particularly addressed the Constitutional Council's ruling No. 2019-823 QPC, enshrining environmental protection as a constitutionally valid objective, as well as the



Bundesverfassungsgericht's decision of 24 March 2021 giving rise to an objective duty for the German government to respect the rights of future generations.

— **Multi-level cooperation among European courts** (speakers: Ms Christine Langenfeld, judge at the Constitutional Court, and Mr Michel Pinault, member of the Constitutional Council). This working session focused on the effects of the Bundesverfassungsgericht's PSPP judgement and the Constitutional Council's case law on secondary legislation of the European Union.

— **Management of the Covid-19 epidemic** (speakers: Mr Andreas Paulus, judge at the Constitutional Court, and Ms Dominique Lottin, member of the Constitutional Council). Discussions on this point illustrated that the two courts were obliged to rule on compliance with their respective constitutional reference standards of various measures adopted by public authorities to fight the epidemic.

The participants appreciated the quality of the contributions. Discussions were rich and continued outside of the working sessions themselves.

With a view to further encouraging and strengthening their privileged relationship, both the Constitutional Council and the Federal Constitutional Court are actively pursuing a policy of translating their rulings. A German version of the Constitutional Council's website can be accessed at the following address: conseil-constitutionnel.fr/de

The Support Departments of the two institutions endeavour to alert judges to important decisions from Paris or Karlsruhe, respectively.

Finally, exchanges between the two bodies also involve staff specialised in supporting members to render their decisions: the Legal Department of the Constitutional Council met with clerks of the Bundesverfassungsgericht judges for two working sessions, in Paris in June 2017, and in Karlsruhe in

October 2018. Some German clerks also had the opportunity to study at the Constitutional Council in October 2018. A new meeting is planned for 2022.

9th Conference of Heads of Institutions of the Association of Francophone Constitutional Courts

On Tuesday, 25 May 2021, President Laurent Fabius and Ms Corinne Luquiens participated in the 9th Conference of Heads of Institutions of the Association of Francophone Constitutional Courts, the ACCF (*Association des Cours constitutionnelles francophones*).

Bringing together nearly 100 figures representing the association's 48 member courts, this virtual event invited participants to debate the theme of "collegiality" through two round table discussions: one devoted to "practices and methods of deliberation" and the second to "collegiality vs. individual opinions".

In his opening address, President Laurent Fabius reminded the audience of the inestimable value of dialogue among the courts in the context of the health crisis.

In the first round table, Ms Corinne Luquiens spoke about "the deliberation methods of the French Constitutional Council".

Led by a moderator, each working session explored the different ways in which ACCF institutions - including the Constitutional Council, which is an *ex officio* member - take account of the need for collegiality in their internal organisation, their working methods and their deliberation procedures.

Although collegiality is generally regulated by formal rules, practices and traditions within the courts play an important role in determining the precise forms of this cooperation. The debates also highlighted that, while Francophone courts may diverge in their approaches, they all see collegiality as one of the factors guaranteeing judicial independence.



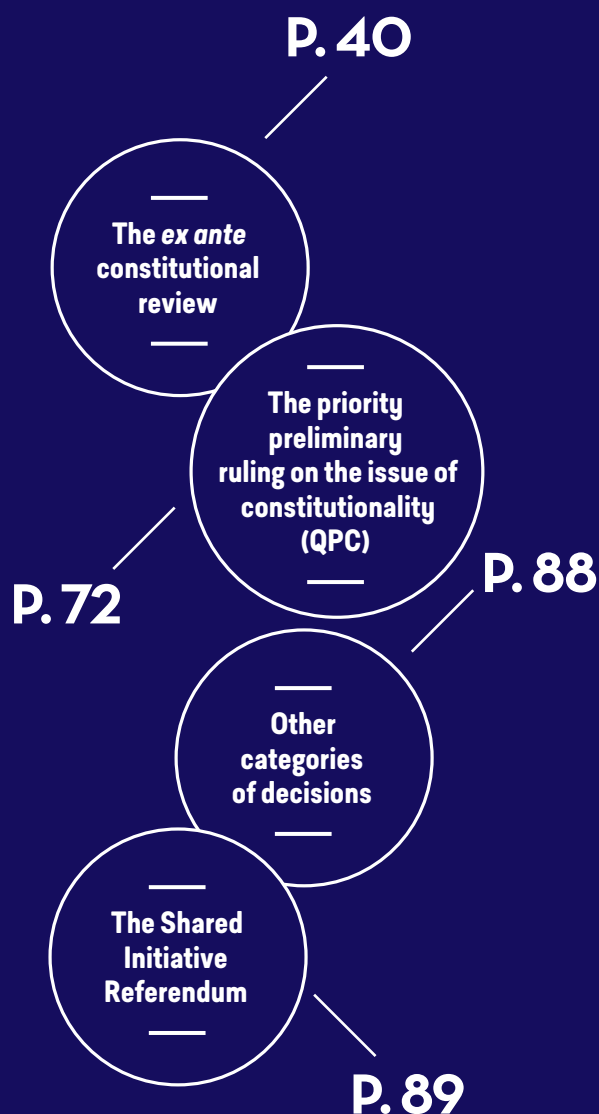
Online extras

Visit the ACCF website.
accf-francophonie.org



2021

Reviewing the consistency of laws with the Constitution - a role which lies at the very heart of the Constitutional Council's operations - can take place either before their promulgation, through the *ex ante* review process, or after their entry into force, by means of the priority preliminary ruling on the issue of constitutionality. Once again, the issues which the Council dealt with this year in that framework were very varied: a public health crisis, environmental protection, higher education, the maintenance of public order, conditions of detention, etc. The following pages provide an overview of the decisions that stood out in 2020-2021.



The Council's decisions

Since its creation in 1958, the Constitutional Council has monitored the constitutionality of laws passed by Parliament in advance of their promulgation by the President of the Republic. Within the framework of this so-called *ex ante* review, the Council issues a “decision on constitutional conformity” (DC). While organic laws are automatically submitted to the Council ahead of their promulgation, so-called ordinary laws may be submitted by the President of the Republic, the Prime Minister, the President of the National Assembly or the Senate or 60 deputies or 60 senators.

Here is a selection of the DCs that were submitted to the Council between September 2020 and August 2021.

The *ex ante* constitutional review

DC
referrals
between
1 September
2020 and 31
August 2021

31

findings of
constitutionality

9

1

finding
of total non-
constitutionality

9

findings of
partial non-
constitutionality

The public health crisis



Decision No. 2020-808 DC of 13 November 2020

Act authorising the extension of the public health state of emergency and providing for various measures to manage the public health crisis



Decision No. 2021-819 DC of 31 May 2021

Act on the management of the recovery from the public health crisis



Decision No. 2021-824 DC of 5 August 2021

Act on the management of the recovery from the public health crisis

Following on from the initial decisions it was called upon to take in March 2020, the Constitutional Council was asked on three occasions to review laws that amended the legislative framework for managing the crisis brought about by the Covid-19 epidemic. In the first two cases, the Prime Minister asked it to rule pursuant to the emergency procedure provided for in the third paragraph of Article 61 of the Constitution.

* In its Decision No. 2020-808 DC of 13 November 2020 on the law authorising the extension of the public health state of emergency and taking various measures to manage the health

The Constitutional Council noted that the Constitution did not preclude Parliament from declaring a public health state of emergency. Parliament is responsible, in this context, for ensuring that the constitutional objective of protecting public health is reconciled with the need to respect the rights and freedoms of all those residing on the territory of the Republic.

In the light of these constitutional requirements, the Council noted first of all that there were no grounds for challenging Parliament's assessment that, on the one hand, the Covid-19 epidemic was spreading at a fast rate, thereby contributing, in view of the health system's current capacity to care for patients, to a public health disaster which, in view of its nature and seriousness, jeopardised the health of the population; and that, on the other hand, this state of affairs was likely to last for at least the next four months. It held that this assessment, which was supported by the opinions of 19 and 26 October 2020 of the scientific committee provided for in Article L. 3131-19 of the Public Health Code, was not manifestly inadequate in view of the situation prevailing throughout France.

The Constitutional Council then noted that the measures provided for in the framework of the public health state of emergency may in any event only be

The Constitutional Council noted that the Constitution did not preclude Parliament from declaring a public health state of emergency.

crisis, the Constitutional Council, having been asked to do so by more than sixty deputies and more than sixty senators, had to rule on the extension, until 16 February 2021, of the public health state of emergency declared by the Decree of 14 October 2020.



taken for the purpose of safeguarding public health. They must be strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place. They must be discontinued without delay once they are no longer deemed necessary. The courts are responsible for ensuring that such measures are appropriate, necessary and proportionate to the purpose they serve.

Finally, it noted that, when the public health situation so permits, the public health state of emergency must be terminated by decree in the Council of Ministers ahead of the deadline set by the law.

For all these reasons, the Constitutional Council ruled that Parliament was empowered, without contravening any constitutional requirement, to extend the public health state of emergency until 16 February 2021.

* Then, in its Decision No. 2021-819 DC of 31 May 2021, the Constitutional Council ruled on several provisions of the Act on the management of the exit from the public health crisis, referred for review by more than sixty deputies.

Among the provisions that were challenged by the petitioning deputies were those that allowed the Prime Minister, throughout the period from 2 June to 30 September 2021, to make access to certain places, establishments or events involving large gatherings of people for leisure activities or trade fairs or shows subject to the presentation of either a virological screening test report that does not indicate Covid-19 infection, or proof of Covid-19 vaccination status, or a certificate confirming the individual's recovery following a Covid-19 infection.

The Constitutional Council ruled that, by allowing access to certain places, establishments or events involving large gatherings of people to be made subject to a condition, Parliament intended to limit the application of the contested provisions to cases where a large number of people might be expected to be present in a particular place at the same time. Furthermore, Parliament stipulated that this regulation must be applied "taking into account a level of density that is compatible with the characteristics of the places, establishments or events concerned, including outdoors, in order to

ensure the implementation of measures to prevent the risk of the virus spreading”. The Constitutional Council ruled that it is therefore up to the regulatory authority to take into account the actual conditions under which the members of the public are admitted. Consequently, by confining the application of the contested provisions to cases of large gatherings of people, Parliament, which was not required to determine a minimum numerical threshold, did not exceed its jurisdiction.

Moreover, the concept of leisure activity, which excludes political, trade union or religious activity, is neither unclear nor ambiguous.

Parliament is responsible, in this context, for ensuring that the constitutional objective of protecting public health is reconciled with the need to respect the rights and freedoms of all those residing on the territory of the Republic.

On the basis of all of these reasons, the Constitutional Council concluded that the claims that the constitutional objective of accessibility and intelligibility of the law had been breached, and that Parliament had failed to appreciate the extent of its powers and responsibilities, had to be dismissed.

* Finally, in its Decision No. 2021-824 DC of 5 August 2021, the Constitutional Council ruled on several provisions of a new Act on the management of the public health crisis, which had been referred to it by the Prime Minister and through an application lodged by more than sixty deputies, as well as through two other applications, each from more than sixty senators.

The provisions that were challenged included, in Article 1 of the Act under review, those extending the scope of application of the “health pass” by providing that the Prime Minister may make

public access to certain places, establishments, services or events where certain activities take place subject to the presentation of either a virological screening test report that does not indicate Covid-19 infection, or proof of Covid-19 vaccination status, or a certificate confirming the individual’s recovery following a Covid-19 infection, and that, as of 30 August 2021, such a measure can be made applicable to persons who work in such places, establishments, services or events.

One of the criticisms of these provisions was that access to department stores, shopping centres and public transport was subject to the presentation of this pass, and that this would serve no useful purpose in the fight against the epidemic. It was argued that, in addition, these provisions would have disproportionate effects in relation to the objective pursued, resulting in a breach of freedom of movement, of the right to privacy and of the right to collective expression of ideas and opinions.

The Constitutional Council pointed out that it is up to Parliament to reconcile the constitutional objective of safeguarding public health with the need to respect constitutionally guaranteed rights and freedoms. These rights and freedoms include freedom of movement, a component of personal freedom protected by Articles 2 and 4 of the 1789 Declaration, the right to privacy guaranteed by the same article, and the right, under Article 11 of the Declaration, to the collective expression of ideas and opinions.

By that yardstick, the Constitutional Council ruled that the contested provisions, which are capable of restricting access to certain places, infringe freedom of movement and, insofar as they are likely to place limits on the freedom of assembly, also infringe the right of collective expression of ideas and opinions.

Firstly, however, Parliament took the view that, given the scientific knowledge available to it, the risks of circulation of the Covid-19 virus are greatly reduced between persons who have been vaccinated, have recovered or have just

undergone a screening test with a negative result. By adopting the contested provisions, Parliament intended to enable government authorities to take measures to limit the spread of the Covid-19 epidemic. It thus pursued the constitutional objective of safeguarding public health.

Secondly, these measures may be ordered only for the period from the entry into force of the Act referred to in the present case until 15 November 2021, during which period Parliament considered that there was a significant risk of the epidemic spreading because of the appearance of new and more contagious variants of the virus.

Thirdly, Parliament limited their application to places where, by its very nature, the activity carried out presents a particular risk of spreading the virus. In addition, Parliament provided several guarantees in relation to the application of these measures. Thus, with regard to their application to medical and social

services and establishments, Parliament only required the presentation of a “health pass” for persons accompanying or visiting persons admitted to these services and establishments, as well as for those admitted for prearranged care. Thus, this measure, which applies only in emergencies, does not have the effect of limiting access to care. With regard to their application to department stores and shopping centres, it stipulated that the measures must guarantee access to essential goods and services and to the means of transport available within the area covered by these shops and centres. In the case of long-distance travel by interregional public transport, Parliament excluded the application of these measures “in the event of an emergency that makes it impossible to obtain the required proof”. Furthermore, as the Constitutional Council ruled in its Decision of 31 May 2021 mentioned above, the notion of “leisure activity” excludes, *inter alia*, political, trade



union or religious activity. The contested measures must be strictly proportionate to the public health risks involved and appropriate to the circumstances of time and place. They shall be discontinued without delay when they are no longer required.

Fourthly, the contested provisions provide that the obligations imposed on the public may be fulfilled by the presentation of proof of vaccination status, a virological screening test report that does not indicate Covid-19 infection, or a certificate of recovery from an infection. Thus, these provisions do not in any way introduce either an obligation to provide care or an obligation to vaccinate. In addition, Parliament has provided for the determination by a decree, issued after consultation with the *Haute Autorité de santé* (French National

a manner that does not allow the “nature of the document held” to be ascertained and must be accompanied by the presentation of identity documents only when these are required by law enforcement officials.

Based on all of these reasons, the Constitutional Council concluded that the contested provisions ensure an appropriate level of balance between the aforementioned constitutional requirements.

On the other hand, the Constitutional Council struck down the provisions of Article 1 of the Act in question, which stipulate that the fixed-term or assignment contract of an employee who does not present the proof, certificate or test results required to obtain the “health pass” may be terminated before its scheduled end date, at the employer’s initiative.

According to Article 6 of the 1789 Declaration, the law “must be the same for all, whether it protects or punishes”. The principle of equality does not preclude Parliament from applying different rules to different situations; nor does it preclude it from overriding that principle for reasons pertaining to the common good, provided that, in either case, the resulting difference in the way people are treated is directly related to the purpose of the law establishing it.

In this respect, the Constitutional Council noted the preparatory work showing that Parliament sought to ensure that failure to comply with the obligation to present the above-mentioned supporting documents, certificates and results could not constitute valid grounds for the dismissal of an employee appointed under an open-ended contract.

It ruled that employees on open-ended contracts and those on fixed-term or assignment contracts are in different legal situations. However, by introducing an obligation to present a “health pass” for employees working in certain places and establishments, Parliament intended to limit the spread of the Covid-19 epidemic. In reality, all employees, whether they are

The Constitutional Council struck down the provisions of Article 1 of the Act in question, which stipulate that the fixed-term or assignment contract of an employee who does not present the proof, certificate or test results required to obtain the “health pass” may be terminated before its scheduled end date, at the employer’s initiative.

Authority for Health), of the cases of medical contraindication that preclude vaccination, and the issuing to the persons concerned of a document that can be presented in places, services or establishments where the presentation of a “health pass” will be required.

Fifthly, the right to verify the possession of a document required for access to a place, establishment, service or event can only be exercised by law enforcement officials or by the operators of such places, establishments, services or events. Furthermore, the presentation of these documents must be carried out in



Online extras

What is an *ex ante* constitutional review? Which laws may be examined under this kind of review? Who can request such a review by the Constitutional Council? How long does the Council have to hand down a decision? Watch the Constitutional Council's video on the *ex ante* constitutional review to find out more about this procedure.

urlr.me/FLYwC



on open-ended contracts, fixed-term contracts or assignment contracts, are exposed to the same risk of contamination or transmission of the virus.

Consequently, by providing that failure to present a “health pass” constitutes grounds for early termination of fixed-term or assignment contracts only, Parliament instituted a difference in the manner in which employees are treated depending on the nature of their employment contracts, which is unrelated to the objective pursued.

The Constitutional Council also struck down Article 9 of the Act that had been referred to it, which created an isolation measure applicable by law to persons testing positive for Covid-19.

It pointed out that, under the terms of Article 66 of the Constitution: “No one may be arbitrarily detained. - The judicial authority, the guardian of individual freedom, shall ensure respect for this principle under the conditions laid down by law”. Individual freedom, the protection of which is entrusted to the courts, cannot be obstructed by unnecessary strictures. Any infringement of this freedom must be appropriate, necessary and proportionate to the objectives pursued.

In this respect, it noted that the contested provisions provided that, until 15 November 2021 and for the sole purpose of combating the spread of the Covid-19 epidemic, any person testing

positive for Covid-19 was required to be placed in isolation for a non-extendable period of ten days during which that person was forbidden to leave his or her place of residence, on pain of criminal sanction.

The Constitutional Council ruled that since isolation is applied except between 10 a.m. and noon, in cases of emergency or for strictly necessary journeys, it constitutes a deprivation of liberty.

In adopting these provisions, Parliament pursued the constitutional objective of safeguarding public health.

However, the contested provisions provide that, on pain of criminal sanction, any person who is notified of a positive Covid-19 test result is obliged to be placed in isolation for a period of ten days, without any assessment being made of his or her personal situation.

On the one hand, a person is made aware of this obligation only through the information provided at the time of the test. On the other hand, the objective pursued by the contested provisions is not such as to justify that such a measure involving deprivation of liberty be applied without an individual decision based on an assessment by the administrative or judicial authority.

The Constitutional Council ruled that, as a result, even though a person placed in isolation may request retrospective adjustment of the conditions of his or her isolation placement or from the representative of the State in the department, or his or her release from isolation by a liberty and custody judge (*juge des libertés et de la détention* in French, a judge empowered to grant or refuse release from custody), the contested provisions do not guarantee that the measure of deprivation of liberty established by the provisions in question is necessary, appropriate and proportionate. •

Environmental protection



**Decision No. 2020-809 DC
of 10 December 2020**

**Act on the conditions for placing certain plant protection
products on the market in the event of a health hazard for
sugar beet**

In its Decision No. 2020-809 DC of 10 December 2020, ruling on a referral lodged by more than sixty deputies and more than sixty senators, the Constitutional Council delivered its opinion on the Act relating to the conditions for placing certain plant protection products on the market in the event of a health hazard for sugar beet. The Constitutional Council ruled that the possibility of derogating from the ban on the use of plant protection

consistency with several articles of the Charter for the Environment, the Act in question being one which introduces a derogation from the ban on the use of plant protection products containing one or more active substances of the neonicotinoid family, specified by decree, and of seeds treated with these products.

In ground-breaking terms, the Constitutional Council ruled, with regard to Articles 1, 2 and 6 of the Charter for the Environment, that, while it is open to Parliament, acting within its sphere of competence, to amend previous texts or to repeal them, substituting other provisions where appropriate, it must take into account, in particular, its duty (as stated in Article 2 of the Charter for the Environment) to contribute to the protection and improvement of the environment and cannot remove legal guarantees from the right to live in a balanced environment that is compatible with a healthy life, as enshrined in Article 1 of the Charter for the Environment.

Any limitations imposed by Parliament on the exercise of this right must be linked to constitutional requirements or justified on grounds pertaining to the common good, and must be

Parliament must take into account, in particular, its duty to contribute to the protection and improvement of the environment, as stated in Article 2 of the Charter for the Environment.

products containing neonicotinoids was consistent with the Constitution, taking into account all the guarantees attached to it and in particular the fact that its application was only allowed until 1 July 2023.

Both appeals focused on the provisions of Article 1 of this Act and their

proportionate to the objective pursued.

With regard to the constitutional framework thus specified, the Constitutional Council noted that these products affect biodiversity (in particular, pollinating insects and birds), have an impact on water and soil quality and entail risks for human health.

Parliament having provided for the possibility of allowing, by way of exception, certain uses of these products, the Constitutional Council noted that it had, however, initially limited the application of these provisions to the processing of sugar beet. As can be seen from the preparatory work, Parliament thus intended to deal with the serious dangers threatening the cultivation of these plants, because of widespread infestations of viral-disease-carrying aphids, and consequently to protect the agricultural and industrial enterprises in

this sector and their production capacities. In so doing, it acted in the public interest.

Secondly, the contested provisions only allow for derogations from the ban on the use of the products in question on a transitional basis, until such time as alternative solutions can be developed. This possibility is available only until 1 July 2023.

Thirdly, this derogation can only be activated by a joint order of the Ministers of Agriculture and Environment, issued after the opinion of a specially created supervisory board, and under the conditions provided for in Article 53 of the European Regulation of 21 October 2009, applicable to emergency situations in the field of plant protection. This Article 53 only allows for a “limited and controlled use” of the products in question, within the framework of an authorisation issued for a period not exceeding 120 days, provided that this use is justified by “particular circumstances” and that it is justified “by reason of a danger which cannot be controlled by other reasonable means”.

Lastly, on the one hand, by referring to “the use of seeds treated with products” containing the substances in question, the contested provisions only authorise treatments applied directly to the seeds, while excluding any spraying: this is likely to limit the risks of dispersal of those substances.

Moreover, when such a treatment is applied, the sowing, planting and replanting of plants that are attractive to pollinating insects are temporarily prohibited, in order to reduce the exposure of these insects to the residues of the products used.

Having regard to all the guarantees they provide and, in particular, the fact that they are applicable only until 1 July 2023, the Constitutional Council deemed the contested provisions to be consistent with the Constitution. •



Research and higher education



**Decision No. 2020-810 DC
of 21 December 2020**

**Act on research programming for the years 2021 to 2030
and on various measures pertaining to research and higher
education**

In its Decision No. 2020-810 DC of 21 December 2020, following a referral lodged by more than sixty deputies and more than sixty senators, the Constitutional Council ruled on the Act on research programming for the years 2021 to 2030 and on various measures pertaining to research and higher education. It ruled that several provisions of this Act were consistent with the Constitution, but qualified one of them and struck down two of them as “legislative riders”.

In particular, the petitioning deputies and senators challenged Article 4 of

within the corps of higher education teaching staff, when such recruitment meets a specific need linked to the scientific strategy of the latter or to its international attractiveness, in fields of research for which it can demonstrate this need.

The Constitutional Council referred to the principle of equal access of citizens to public sector employment as set out in Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen, as well as the fundamental principle recognised by the laws of the Republic of the independence of teacher-researchers (*enseignants-chercheurs* in French).

On this occasion it held that, while the rule that the merits of candidates for a position as professor or lecturer must be assessed by a national body constitutes a legal guarantee of the principle of independence of teacher-researchers, it cannot of itself be regarded as one of the fundamental principles recognised by the laws of the Republic, as mentioned in the first paragraph of the Preamble to the 1946 Constitution.

On the issues of substance, it noted, firstly, that the recruitment procedure established by the contested provisions is preceded by a public call for applications. In order to guarantee the

The Constitutional Council ruled that the contested provisions do not contravene the principle of equal access to public sector employment.

the Act, which envisages a new recruitment channel for university teaching staff. This provision allows the Minister responsible for higher education to authorise a public research or higher education establishment to recruit a person as a contractual employee under public law and award that person tenure



quality of the recruitment, only persons holding a doctorate or an equivalent degree are eligible to apply.

Secondly, the three stages of the recruitment and tenure procedure established by the contested provisions are designed to ensure an objective assessment (with input from peers) of the merits of candidates for a teaching post.

At the conclusion of this assessment procedure, the person concerned is granted tenure by decree of the President of the Republic, on the recommendation of the head of the institution. In an interpretative reservation, the Constitutional Council nevertheless ruled that the principle of independence of teacher-researchers precludes the head of the institution from refusing, for reasons unrelated to the administration of the university and, in particular, for reasons that are related to the scientific qualification of the person concerned, to propose for tenure a candidate who has received a favourable opinion from the tenure committee. The head of the institution cannot, on any grounds whatsoever, recommend for tenure a candidate who has received an unfavourable opinion from the tenure commission.

Based on all these considerations, the Constitutional Council ruled that the contested provisions do not con-

travene the principle of equal access to public sector employment or, subject to this interpretation, the principle of the independence of teacher-researchers.

The Constitutional Council also upheld the applicants' challenge to Article 38 of the Act instituting an offence of trespassing on the premises of an institution of higher education, finding that it had been adopted under an improper procedure.

It noted that, introduced at first reading by way of amendment, these provisions were not linked, even indirectly, to any of the provisions that appeared in the bill tabled before the National Assembly. Consequently, without prejudging the consistency of the content of this article with other constitutional requirements, it struck it down as having been adopted in violation of Article 45 of the Constitution, i.e. as a "legislative rider". •

Standing Orders of the Parliamentary Assemblies



Decision No. 2021-814 DC of 1 April 2021

A resolution amending the Standing Orders of the National Assembly with regard to the management of parliamentary business in times of crisis



Decision No 2021-820 DC of 1 July 2021

A resolution aimed at improving the following-up of ordinances, revamping the right of petition, strengthening the oversight powers of the Senate, making better use of public sitting times and promoting gender equality

The Constitutional Council was asked by both parliamentary Assemblies, in the first half of 2021, to review amendments to their Standing Orders.

In its Decision No. 2021-814 DC of 1 April 2021, the Constitutional Council ruled that, while the parliamentary assemblies may adapt their standing orders to ensure the continuity of their work in crisis situations, it is on condition that these adaptations be sufficiently precise as to enable the Council to review their constitutionality.

The President of the National Assembly had referred to the Council a resolution whose sole article provided

that, in the event of “exceptional circumstances of such a nature as might have a significant effect on the conditions of participation, deliberation or voting”, the Conference of Presidents could temporarily modify the arrangements for participation, deliberation and voting by members at committee meetings and in public sittings, if necessary by using remote working tools, taking into account the political configuration of the Assembly in question. The Conference of Presidents was to decide every two weeks whether to confirm or amend the decisions thus adopted.

The Constitutional Council noted that it is required, pursuant to the first paragraph of Article 61 of the Constitution, to rule on the constitutionality of the Standing Orders of the Assemblies before they are made operational.

On this basis it held that, in order to ensure the essential continuity of their work, the Assemblies are free to include in their Standing Orders derogating

The Constitutional Council noted that it is required to rule on the constitutionality of the Standing Orders of the Assemblies before they are made operational.

provisions that may be implemented temporarily by decision of their authorities, when those authorities find that exceptional circumstances significantly disrupt the circumstances in which members of Parliament can participate in committee meetings and public sittings, deliberate and vote. These derogating provisions must, like those that apply in normal times, be reviewed by the Constitutional Council before they are applied, so that it can ensure that they are constitutional.

The resolution submitted to the Constitutional Council for review allowed the Conference of Presidents, in exceptional circumstances, to adopt any rule temporarily deviating from the provisions of the Standing Orders in order to modify the arrangements for members' participation, deliberation and voting at committee meetings and in public sittings. With the sole exception of the remark stating that, where appropriate, they may involve the use of remote working tools, these accommodations were neither limited nor specified by the resolution, which merely stipulated that they must comply with the principle of personal voting and the requirements of clarity and truthfulness of parliamentary debate, which are binding in any event.

The Constitutional Council therefore considered that it was unable to assess the scope of the accommodations permitted by this resolution in order to undertake the review of the constitutionality of the rules governing the workings of the National Assembly that is required of it by the first paragraph of Article 61 of the Constitution. It accordingly declared this resolution to be unconstitutional.

Then, in its Decision No. 2021-820 DC of 1 July 2021, the Constitutional Council validated a resolution amending the Senate's Standing Orders while attaching a neutralising interpretation to one of its articles and interpretative reservations to several other articles.

Among the provisions of this resolution aimed at improving the following-up of ordinances, Article 2 provided that at the beginning of each ordinary session, and then no later than the following 1 March, or after the formation of the Government, the latter shall inform the Conference of Presidents "of the draft bills for the ratification of ordinances that have been published on the basis of Article 38 of the Constitution and for which it intends to request that they be placed on the Senate's agenda during the session".





The Constitutional Council ruled that these provisions do not prevent the Government from exercising its prerogatives under the first paragraph of Article 48 of the Constitution. In particular, the information that may be given by the Government in this way, which is only indicative, is not binding on it in the exercise of these prerogatives.

With regard to the provisions of this same article stipulating that the

The Constitutional Council validated a resolution amending the Senate's Standing Orders while attaching a neutralising interpretation to one of its articles and interpretative reservations to several other articles.

Government is to inform the Conference of Presidents of the ordinances that it plans to publish during the six-month period, the Constitutional Council noted that this information is intended to assist the Senate in monitoring the authorisations that Parliament has granted in application of Article 38 of the Constitution and the inclusion in the agenda of the bills ratifying the ordinances. Consequently, this information contributes to the implementation of the first paragraph of Article 24 of the Constitution, according to which "Parliament shall pass statutes. It shall monitor the action of the Government. It shall assess public policies". By way of a counterbalancing interpretation, however, the Constitutional Council ruled that the information that may be given by the Government on the provisional timetable for the publication of these ordinances, which is only indicative, does not bind the Government in the exercise of its powers under Article 38 of the Constitution.

With regard to various provisions designed to limit speaking time in public sittings, the Constitutional Council noted, by way of interpretative reservations, that it is up to the President of the sitting to apply these various time limits and that it is the responsibility of the Conference of Presidents to organise, where appropriate, the speeches of senators while ensuring that the requirements of clarity and truthfulness of parliamentary debate are adhered to.

With regard to Article 12 of the resolution creating a motion not to examine a bill tabled pursuant to the third paragraph of Article 11 of the Constitution (in the framework of the so-called "Shared Initiative Referendum" procedure), the Council ruled that the sole purpose of these provisions is to guarantee the effectiveness of the right of each Assembly to ensure that a referendum is held by refusing to examine such a bill. They do not prevent the bill from being placed on the Senate's agenda again following the adoption of such a motion and from being the subject of such a motion at that time. •

Freedom and the maintenance of public order



**Decision No. 2021-817 DC
of 20 May 2021**

**Act for a comprehensive system of security which
safeguards freedoms**

In its Decision No. 2021-817 DC of 20 May 2021, the Constitutional Council ruled on the Act for a comprehensive system of security which safeguards freedoms, which had been referred to it by more than sixty deputies and more than sixty senators. The Prime Minister had also asked the Constitutional Council to rule on the constitutionality of Article 52.

The Constitutional Council validated fifteen of the twenty-two articles of the Act, but qualified four of them with interpretative reservations and struck down seven of them in whole or in part. It also struck down five other provisions that it deemed to be “legislative riders”.

The Constitutional Council struck down several provisions of the Act for a comprehensive system of security which safeguards freedoms.

Among the provisions which were declared to be constitutional are the following:

- Article 4 of the Act in question, which extends to all sporting, recrea-

tional and cultural events the option for municipal police officers to visually inspect and search luggage and perform pat-down body searches. In an interpretative reservation, the Constitutional Council ruled in this respect that, while it was open to Parliament not to lay down criteria for the manner in which pat-downs and baggage searches for entry to sporting, recreational or cultural events are to be carried out, these checks assigned by law to public authority agents can only be carried out on the basis of criteria that exclude any form or discrimination whatsoever.

- the provisions of Article 29 expanding the circumstances in which private security personnel may carry out surveillance missions on public thoroughfares for the purposes of preventing acts of terrorism targeting assets which they are required to guard. In an interpretative reservation, the Constitutional Council ruled that this mobile surveillance role could not, without breaching the requirements of Article 12 of the 1789 Declaration of the Rights of Man and of the Citizen, extend beyond the immediate vicinity of the assets being guarded by private security personnel;

– the provisions of Article 40 which, under certain conditions, extend the area covered by images taken by video-surveillance systems on public thoroughfares to which municipal police officers as well as certain agents of the City of Paris may have access. In an interpretative reservation, the Constitutional Council ruled that these provisions could not allow them to access images taken by video-surveillance systems that were not deployed within the boundaries of the municipality or intermunicipal area in which they carried out their duties;

– Article 45 on the use of individual cameras by national police officers, members of the national gendarmerie and municipal police officers. In rejecting the claim that the right to privacy had been infringed, the Council took

into account the fact that the reasons for the use of these cameras precluded their use on a widespread and arbitrary basis. Similarly, it noted that the circumstances likely to pose an obstacle to the receipt of information by the persons filmed include only those cases where such provision of information is made impossible for reasons that are purely material and independent of the reasons for the surveillance. In an interpretative reservation, the Constitutional Council also ruled that, with regard to the constitutional requirement concerning the rights of the defence and the right to a fair trial, these provisions could only be interpreted, without contravening the rights of the defence and the right to a fair trial, as implying that the entire contents of the recordings made, as well as the traceability of all incidents of access to their contents, must be maintained until they are erased;

On the other hand, the Constitutional Council declared the following to be contrary to the Constitution:

– Article 1 of the Act under review, which, on an experimental basis and for a period of five years, allows municipal police officers and rural wardens of certain municipalities and inter-municipal cooperation establishments to exercise judicial police powers in matters relating to misdemeanours (*délits*).

The Constitutional Council noted in this regard that, under Article 66 of the Constitution, the judicial police must be placed under the direction and control of the judicial authority. This requirement would not be met if general powers of criminal or misdemeanour investigation were conferred on officers who, being under the supervision of the municipal authorities, are not placed at the disposal of judicial police officers or persons offering equivalent legal safeguards.

In this connection, the Constitutional Council noted that, while reports and records drawn up by municipal police officers and rural wardens are



sent to the Public Prosecutor without delay, via municipal police commanders and heads of municipal police departments, Parliament has not ensured that the Public Prosecutor has direct and effective control over the municipal police commanders and heads of municipal police departments. In particular, contrary to what the Code of Criminal Procedure provides in respect of judicial police officers, and notwithstanding his powers of direction over municipal police commanders and heads of municipal police departments, there is no provision for (a) the Public Prosecutor to issue instructions to municipal police commanders and directors, (b) any obligation for those officers to keep him informed without delay of offences of which they are aware, (c) any involvement of the judicial authority in administrative investigations relating to their behaviour, or (d) their appraisal by the Public Prosecutor. On the

The Constitutional Council validated fifteen of the twenty-two articles of the Act, but qualified four of them with interpretative reservations and struck down seven of them in whole or in part.

other hand, although municipal police commanders and heads of municipal police departments must undergo training and pass a technical examination in accordance with procedures determined by decree in the Council of State in order to be authorised to carry out their judicial police duties, there is no provision for them to present legal safeguards that are equivalent to those that are required of those who serve as judicial police officers.

The Constitutional Council determined that, by granting such wide-ranging powers to municipal police officers and rural wardens, without placing those individuals at the

disposal of judicial police officers or persons offering equivalent guarantees, Parliament had failed to comply with Article 66 of the Constitution;

– Article 41 authorising the video-surveillance of persons held in isolation rooms in administrative detention centres and those in police custody, under certain conditions and for certain purposes.

The Constitutional Council noted in particular that the contested provisions allow the head of the agency responsible for the security of the premises to decide to place a person detained or placed in police custody under video-surveillance if there are reasonable grounds for believing that they could attempt to escape or might pose a threat to themselves or to others. Moreover, such a decision is valid for a period of forty-eight hours. It can be extended only on the decision of the head of the department responsible for the security of the premises, and only if the Public Prosecutor is informed, for the duration of the police custody or placement in an isolation room in an administrative detention centre. However, a person may be held in police custody for up to six days, and there is no time limit on the duration of a person's placement in an isolation room in an administrative detention centre.

The Constitutional Council concluded that Parliament had not ensured a sufficient degree of balance between, on the one hand, the constitutional objectives of preventing breaches of public order and tracking down the perpetrators of offences, and, on the other hand, the right to privacy;

– Article 48 allowing internal security forces and certain emergency services to capture, record and transmit images by means of on-board cameras in their vehicles, aircraft, boats and other means of transport, with the exception of aircraft travelling without a person on board.

In this respect, the Council noted, on the one hand, that these provisions



Online extras

In order to assess the conformity of laws with the Constitution, the Constitutional Council verifies that the provisions in question respect the principles contained in the “*bloc de constitutionnalité*”, the constitutional corpus. What are the texts referred to? Has this block of texts evolved since the 1958 Constitution? Explanations can be found in the Constitutional Council's video on the constitutionality corpus.

urlr.me/FLYwC



provide that the on-board cameras fitted to the aforementioned means of transport may capture, record and transmit images within the vehicles, on any public thoroughfare or in places open to the public, including, where applicable, the interior of buildings and their entrances. On the other hand, in addition to the general information to be provided to the public by the Minister of the Interior, the only specific information that Parliament has provided for, for the benefit of the public, entails the affixing of signs when vehicles are equipped with cameras. As this latter information is not given when “circumstances preclude it” or when it “would be at odds with the objectives pursued”, the Council observed that such exceptions make it possible to engage in broad departures from this obligation to provide information and, more particularly, in the area of criminal investigations, since such information is most often at odds with the objective of finding the perpetrators of offences and identifying those offences.

It also found that the contested provisions can be used to prevent incidents in the course of operations, to facilitate the recording of offences and the prosecution of offenders through the collection of evidence, to ensure the safety of gatherings of people on public thoroughfares or in places open to the public, to facilitate the surveillance of coastlines, inland waters and border areas, as well as rescue and fire-fighting operations, and to regulate transport flows.

Finally, the Council considered, on the one hand, that while those same

provisions authorise the use of these on-board cameras only for the time strictly necessary to carry out a particular operation, Parliament itself had not set any maximum limit to that time, nor any limit to the area within which such surveillance may take place. On the other hand, the decision to use on-board cameras is the sole responsibility of the agents of the internal security forces and the emergency services. It is not subject to any authorisation, and is not even required to be notified to any other authority.

For these reasons, the Constitutional Council ruled that Parliament had not ensured a sufficient degree of balance between the constitutional objectives of preventing breaches of public order and tracking down the perpetrators of offences, and the right to privacy;

- paragraph I of Article 52 provided for a five-year prison sentence and a fine of 75,000 euros for “incitement, with the clear aim of causing physical or psychological harm, to identify a member of the national police, a member of the national gendarmerie or a member of a municipal police when these personnel are acting in the context of a police operation, or a customs officer when he or she is in the course of an operation”.

The Constitutional Council noted that, according to Article 34 of the Constitution: “The law shall frame the rules concerning ... the determination of major crimes (“*crimes*”) and other offences (“*délits*”) and the penalties that apply to them”. Parliament has an obligation under Article 34 of the Constitution, as well as under the principle of the lawfulness of offences and penalties enshrined in Article 8 of the Declaration of 1789, to determine the scope of application of the criminal law and to define crimes and offences in terms that are sufficiently clear and precise as to preclude arbitrariness.

In this regard, it noted that the disputed offence punishes incitement to identify a national police officer, a



member of the national gendarmerie or an agent of the municipal police “when these personnel are acting in the context of a police operation” and to identify a customs officer “when he or she is in the course of an operation”. Parliament made this last requirement a constituent element of the offence. It was therefore up to Parliament to clearly define its scope. However, these provisions do not make it possible to determine whether Parliament intended to punish incitement to identify a member of the police force only when it is committed at the time when that member is “in the course of an operation” or whether it intended to more broadly punish incitement to identify officers who have taken part

in an operation, without, moreover, defining the notion of operation. On the other hand, since Parliament had not determined whether the manifest intention to harm the physical safety of a police officer was to be determined independently of the mere incitement to identification, the contested provisions created uncertainty as to the scope of the intention required of the perpetrator of the offence.

The Constitutional Council concluded that Parliament had not sufficiently defined the constituent elements of the contested offence. Consequently, paragraph I of Article 52 failed to uphold the principle of the lawfulness of offences and penalties. •

Regional languages



**Decision No. 2021-818 DC
of 21 May 2021**

**Act on Heritage Protection and Promotion
of Regional Languages**

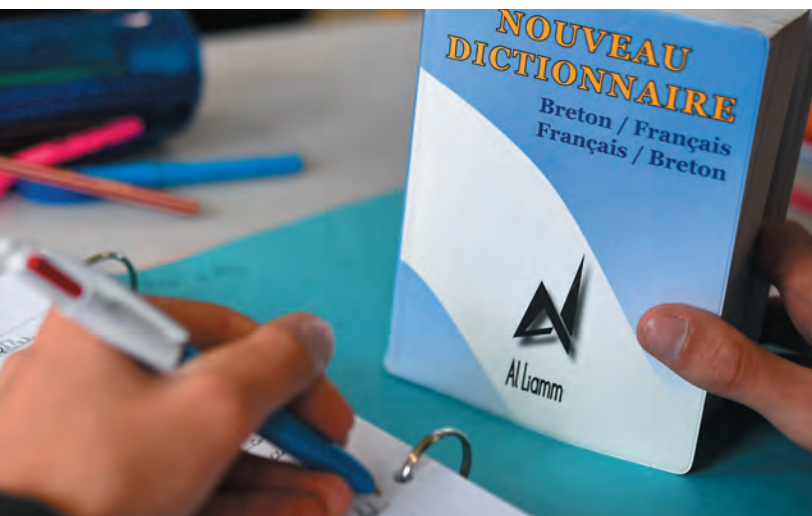
In its Decision No. 2021-818 DC of 21 May 2021, the Constitutional Council ruled on the Act on Heritage Protection and Promotion of Regional Languages, which had been referred to it by more than sixty deputies. It validated the provisions relating to the financial responsibility of municipalities for the schooling of children taught in regional languages, but struck down those relating to the “immersive teaching” of these languages and the use of diacritical signs in civil status documents.

The only article challenged by the petitioning deputies was Article 6 of the Act under review, which amends the

provisions of Article L. 442-5-1 of the Education Code relating to the arrangements concerning a municipality’s financial contribution towards the schooling of a child residing within its area of jurisdiction in a private primary school located within the area of another municipality and providing regional language instruction. The contested provisions provide that the financial contribution towards the schooling of children in private primary schools that have entered into a partnership contract and offer regional language teaching is subject to an agreement between the commune of residence and the educational establishment located within the area of another commune, if the commune of residence does not have a school that offers regional language teaching.

In ruling on its constitutionality, the Constitutional Council stressed that, under the terms of Article 2 of the Constitution, “The language of the Republic is French”. This provision does not prevent the State and local authorities, as a means of contributing to the protection and promotion of regional languages, from providing assistance to associations that pursue this objective.

In regard to the constitutional framework thus re-stated, the Constitutional Council noted, on the one hand, that the contested provisions do not have the effect of imposing the use of a language other than French on a legal entity governed by public law or on a person governed



by private law in the exercise of a public service role. Nor do they have the effect of allowing individuals to assert a right to use a language other than French in their dealings with the authorities and public services, or of compelling them to use such a language. On the other hand, the mere fact of providing, under the conditions set out in the contested provisions, for a municipality to help finance the schooling of a pupil residing in its area of jurisdiction and wishing to attend a primary school that has entered into a partnership contract and is located in the area of another municipality, on the grounds that it provides regional language teaching within the meaning of paragraph 2 of Article L. 312-10, does not constitute an infringement of the first subparagraph of Article 2 of the Constitution.

The Constitutional Council also pointed out that, under the terms of Article 75-1 of the Constitution, “Regional languages are part of France’s heritage”.

The Constitutional Council also examined two other provisions of the Act in question on its own initiative.

Firstly, it ruled on Article 4, which extends the forms in which optional regional language teaching may be offered as part of the public education curriculum. It provides that this teaching may be offered in the form of immersive teaching in the regional language, without in any way compromising a good knowledge of the French language.

The Constitutional Council noted that, under the provisions of Article 2 of the Constitution, the use of French is mandatory for legal entities governed by public law and persons governed by private law in the exercise of a public service role. Private individuals may not assert a right to use a language other than French in their dealings with the authorities and public services, nor may they be forced to use such a language.

The Constitutional Council noted that, under the provisions of Article 2 of the Constitution, the use of French is mandatory for legal entities governed by public law and persons governed by private law in the exercise of a public service role. Private individuals may not assert a right to use a language other than French in their dealings with the authorities and public services, nor may they be forced to use such a language. It also pointed out that, under the terms of Article 75-1 of the Constitution, “Regional languages are part of France’s heritage”. Thus, although, regional languages may be taught in establishments that are providing public education in order to contribute to their protection and promotion, it is on condition that these establishments comply with the aforementioned requirements of Article 2 of the Constitution.

In this respect, the Constitutional Council noted that the preparatory work for the Act referred to above clearly showed that immersive teaching of a regional language is a method that does not simply teach that language but uses it as the main language of instruction and as a language of communication within the school.

It therefore concluded that, by providing that the teaching of a regional language may take the form of immersive teaching, Article 4 of the Act in question violates Article 2 of the Constitution.

Secondly, it ruled on Article 9 of the Act, which authorises the use of diacritical marks for regional languages in civil status documents.

The Constitutional Council ruled that, by providing that entries in civil status records may be written with diacritical marks other than those used for writing the French language, these provisions acknowledge that individuals have a right to use a language other than French in their dealings with the authorities and public services. Consequently, they fail to meet the aforementioned requirements of Article 2 of the Constitution. •

Bioethics



**Decision No. 2021-821 DC
of 29 July 2021**

Bioethics Act

In its Decision No. 2021-821 DC of 29 July 2021, the Constitutional Council ruled on the Bioethics Act, which had been referred to it by more than sixty deputies. It validated several of its provisions, confirming that the legal prohibition of eugenic practices tends to ensure that the constitutional principle of safeguarding human dignity is complied with.

Among the provisions that the petitioning deputies had challenged were those of Article 20 of the Act at issue, which modified the legal framework governing research on the human embryo and embryonic stem cells, so that research on the human embryo or

emphasising from the very outset that: “In the aftermath of the victory won by free peoples over regimes that attempted to enslave and degrade the individual human being, the French people once again proclaim that every human being, without distinction as to race, religion or belief, possesses inalienable and sacred rights”. It follows that safeguarding the dignity of the human person against all forms of enslavement and degradation is a principle of constitutional value.

In this context it held that, by providing for a new research purpose, the contested provisions did not constitute a departure from the prohibition on eugenic practices aimed at organising the selection of persons, a prohibition which, under Article 16-4 of the Civil Code, is intended to ensure respect for the principle of safeguarding the dignity of the human person and which Article L. 2151-5 and Article L. 2151-6 of the Public Health Code make applicable to any research involving the human embryo or embryonic stem cells.

The petitioning deputies also challenged Article 23 of the Act under review, which rewrote the second paragraph of Article L. 2151-2 of the Public Health Code concerning research on the human embryo, according to which “The creation of transgenic or chimeric embryos is prohibited”, and replaced it with a paragraph worded as follows: “The modification of a human embryo by adding cells of other species is prohibited”.

The contested provisions did not constitute a departure from the prohibition on eugenic practices aimed at organising the selection of persons.

embryonic stem cells could henceforth be carried out not only for medical purposes, but also with a view to “improving knowledge of human biology”.

In response to the criticisms of these provisions by the petitioning deputies, the Constitutional Council noted that the Preamble to the 1946 Constitution reaffirmed and proclaimed constitutional rights, freedoms and principles,



issued by the Biomedicine Agency and that this authorisation may only be issued after the Agency has verified that the scientific relevance of the research has been established, that it has a medical purpose or is intended to improve knowledge of human biology and that it cannot be carried out, in the light of current scientific knowledge, without using human embryos. The project and the conditions of implementation of the research protocol must also have particular regard to the fundamental principles set out in Articles 16 to 16-8 of the Civil Code.

Moreover, it is clear from the preparatory work of the Act under review that the contested provisions, which relate solely to research on the human embryo, are not intended to modify the legal framework applicable to the insertion of human cells into an animal embryo, which is otherwise defined by Articles 20 and 21 of the Act under review.

The Constitutional Council concluded from the foregoing that the complaint that the principle of safeguarding the dignity of the human person had been infringed had to be dismissed. •

The Constitutional Council stated that it is open to Parliament, acting within its area of competence, to adopt new provisions whose appropriateness it is responsible for assessing and to amend previous texts or repeal them by substituting other provisions, where appropriate, provided that, in exercising this power, it does not remove legal guarantees from constitutional requirements, which include, in particular, respect for the constitutional principle of safeguarding the dignity of the human person.

It held that the contested provisions lift the ban on the creation of transgenic embryos, i.e. embryos in whose genome one or more exogenous DNA sequences have been added. They also provide that the addition of cells from other species to the human embryo is prohibited.

It then ruled that the contested provisions allow the creation of transgenic embryos only in the context of embryo research that is subject to effective safeguards, listing in this respect several safeguards provided for in the Public Health Code. One of these is contained in paragraph I of Article L. 2151-5 of the Public Health Code, which states that no research on the human embryo may be undertaken without an authorisation

Combating terrorism



Decision No. 2021-822 DC of 30 July 2021

Act on Intelligence and the
Prevention of Terrorist Acts

In its Decision No. 2021-822 DC of 30 July 2021, the Constitutional Council ruled on the Act on Intelligence and the Prevention of Terrorist Acts, which had been referred to it in two applications by more than sixty senators each. It validated the creation of a judicial measure regarding the prevention of terrorist recidivism and perpetrators' re-entry into society and but struck down certain provisions relating to individual administrative monitoring and surveillance measures.

One of the contested provisions was Article 4, which amended the provisions of the Internal Security Code relating to individual administrative monitoring and surveillance measures.

The Constitutional Council struck down certain provisions relating to individual administrative monitoring and surveillance measures.

The first objection concerned the introduction, by way of paragraph I of this Article 4, of a new subparagraph in Article L. 228-2 of the Internal Security Code.

It had the effect of allowing the Minister of the Interior, as a means of preventing the commission of acts of terrorism, to prohibit a person from entering certain places, in addition to the power which, in its current wording, Article L. 228-2 confers on the Minister of the Interior to prohibit that person from travelling outside a specific geographical area, which may not be smaller than the area of the commune, in cases where the person's behaviour constitutes a particularly serious threat to the public security and order in connection with the risk of an act of terrorism being committed.

The Constitutional Council ruled in particular that, given its purpose, this ban on entering certain places, which can only involve a place where such an event is occurring, cannot include the home of the person concerned; it therefore dismissed the complaint that the right to privacy had been infringed.

Another objection was raised to the provisions of paragraph I of Article 4, which inserted a new subparagraph into Articles L. 228-2, L. 228-4 and L. 228-5 of the Internal Security Code, whose effect was to allow the maximum duration of the various individual administrative monitoring and surveillance measures to be extended to twenty-four months when they are imposed on persons who

have been sentenced to a non-suspended custodial sentence for terrorist offences. Both appeals argued that these provisions infringed freedom of movement, the right to privacy and the right to lead a normal family life.

The Constitutional Council noted that Parliament is responsible for ensuring that the constitutional objective of preventing breaches of public order is properly balanced against freedom of movement, a component of personal freedom protected by Articles 2 and 4 of the Declaration of 1789, the right to privacy and the right to lead a normal family life, which is enshrined in the tenth paragraph of the Preamble of the Constitution of 27 October 1946.

On this basis, it ruled that, in adopting these provisions, Parliament had pursued the objective of combating terrorism, which is part of the constitutional objective of preventing breaches of public order. Examining the nature of the obligations and prohibitions that may be imposed under Articles L. 228-2, L. 224-4 and L. 228-5, the Constitutional Council ruled that, in view of their stringent nature, and as it had ruled for measures provided for under Articles L. 228-2 and L. 228-5 in its Decisions No. 2017-691 QPC of 16 February 2018 and No. 2017-695 QPC of 29 March 2018, these measures cannot, without contravening the aforementioned constitutional requirements, exceed a total cumulative duration of twelve months, irrespective of whether or not they are continuous. Consequently, by providing that the total cumulative duration of the obligations and prohibitions provided for in Articles L. 228-2, L. 228-4 and L. 228-5 may last up to twenty-four months, Parliament has not struck a balance between, on the one hand, the constitutional objective of preventing breaches of public order and, on the other, freedom of movement, the right to privacy and the right to lead a normal family life.

A further contested provision was Article 6 of the Act, which instituted a judicial measure aimed at preventing recidivist terrorist offences and at reintegrating perpetrators of terrorist offences into the community. The use of this measure was

to be decided at the end of their sentence, taking into account the particular level of risk posed by offenders, in order to subject them to certain obligations with a view to preventing recidivism and facilitating their reintegration.

One of the two appeals claimed that these provisions did not precisely define the conditions under which the level of risk posed by the person subject to this measure would be assessed, and thus did not provide “sufficient legal guarantees” for its implementation, thereby disproportionately infringing freedom of movement, the right to privacy and the right to lead a normal family life.

The Constitutional Council ruled that, although not punitive in nature, this measure must respect the principle enshrined in Articles 2, 4 and 9 of the Declaration of 1789, according to which personal freedom may not be obstructed by any unnecessary constraint. It is the responsibility of Parliament to ensure a balance between, on the one hand, the prevention of breaches of public order and, on the other hand, the exercise of constitutionally guaranteed rights and freedoms. These include freedom of movement, the right to privacy and the right to lead a normal family life. Interference with the exercise of these rights and freedoms must be appropriate, necessary and proportionate to the preventative objective pursued.

Analysing the nature of the obligations or prohibitions that could be imposed under this measure, including those that could be imposed cumulatively, the Constitutional Council ruled that they constitute an infringement of freedom of movement, the right to privacy and the right to lead a normal family life.

However, the Constitutional Council also ruled that, in adopting these provisions, Parliament had been guided by the objective of combating terrorism. Examining the entire legal framework governing this judicial measure, in terms of its scope, the conditions under which it is imposed and in particular its duration, it concluded that the contested provisions did not constitute a breach of freedom of movement, the right to privacy or the right to lead a normal family life. •

Respect for the principles of the Republic



**Decision No. 2021-823 DC
of 13 August 2021**

**Act to promote respect for the
principles of the Republic**

In its Decision No. 2021-823 DC of 13 August 2021, the Constitutional Council ruled on the Act to promote respect for the principles of the Republic, which had been referred to it through two applications each lodged by more than sixty deputies, as well as through another application lodged by more than sixty senators. The Council struck down two of the Act's seven articles and entered interpretative reservations on two others.

The Constitutional Council noted that freedom of association is one of the fundamental principles recognised by the laws of the Republic and solemnly reaffirmed by the Preamble to the Constitution.

Among the contested provisions was Article 12 of the Act, which stipulates that any association or foundation applying for a public subsidy must sign a contract of commitment to the Republic and that, in addition, the authority or agency concerned must refuse the subsidy, or withdraw it, if the aims of the association or foundation, its activities

or the manner in which they are carried out are unlawful or incompatible with the contract of commitment to the Republic.

In particular, one of the appeals argued that the vagueness of the obligations that these associations must undertake to respect was such as to give the competent authorities an arbitrary power of assessment to allocate public subsidies (or demand reimbursement) in the event of non-compliance with the contract of commitment. According to the petitioning deputies, this resulted in an infringement of freedom of association, in particular.

The Constitutional Council noted that freedom of association is one of the fundamental principles recognised by the laws of the Republic and solemnly reaffirmed by the Preamble to the Constitution. By virtue of this principle, associations may be freely formed and may be made public subject only to the filing of a prior notification.

In this respect, the Constitutional Council ruled that the obligation for an association to sign a contract of commitment to the Republic when applying for a public subsidy has neither the purpose nor the effect of regulating the conditions under which it is established and carries out its activities. The Council noted that, under the terms of the contested provisions, in the event of

a breach of the contract of commitment, the public subsidy is withdrawn at the conclusion of a procedure in which all parties are heard, on the basis of a decision supported by a statement reasons by the authority or body, and that a period of six months is allowed for the association to return the funds that have been paid to it. It ruled, with an interpretative reservation, that this withdrawal could not, without disproportionate infringement of the freedom of association, entail the reimbursement of sums paid in respect of a period prior to the breach of the commitment contract.

One of the appeals also challenged Article 16 of the Act, relating to the cases in which an association or *de facto* grouping may be dissolved by an administrative decision and allows its activities to be suspended as a precautionary measure.

The Council examined the provisions allowing the Minister of the Interior to suspend the activities of an association or *de facto* grouping that is the subject of dissolution proceedings on the basis of Article L. 212-1 of the Internal Security Code in an emergency and as a precautionary measure, for a maximum period of three months, which may be extended once. It ruled that these provisions were in breach of freedom of association.

By enabling the Minister of the Interior to take such a decision for a period of up to six months pending a decision to dissolve the association, the purpose of these provisions is to suspend the activities of an association that has not yet been shown to be a serious threat to public order. The preparatory work also shows that the suspension decision is intended to give the competent authorities the time they need to investigate a matter involving dissolution.

The Constitutional Council held that, for this reason, by allowing such a decision to be taken, without any condition other than urgency, Parliament had infringed freedom of association in a way that was not necessary, appropriate and proportionate. It struck down these provisions.

The Constitutional Council also had before it Article 49 of the Act under review, which revised the conditions

under which compulsory education could be provided in the home. According to these provisions, compulsory education may, by way of an exemption from the rule that it must be dispensed in public or private establishments or schools, be provided in the family by the parents or by any person of their choice, subject to an authorisation being issued by the State authority which has responsibility in respect of education.

Provided that no reasons other than the best interests of the child are put forward, this authorisation may be granted either because of the child's state of health or disability, or because of the child's intensive sporting or artistic activities, or because of the family's itinerancy in France or the geographical distance from any public school. The authorisation may also be granted where there is a situation which is specific to the child and constitutes justification for the educational proposal.

Two of the appeals contended, in particular, that these provisions failed to uphold the fundamental principle recognised by the laws of the Republic concerning freedom of education, of which home schooling has been a component since it was first recognised through the Act of 28 March 1882. Making the option of home schooling subject to a system of prior authorisation instead of a simple notification system was, it was argued, unnecessary since the objective pursued was not clearly defined and it was always possible for the administrative authority to carry out retrospective monitoring of home schooling. These provisions were also challenged on the ground that they did not provide for a request for authorisation for home schooling to be based on political, religious or philosophical convictions. This would have resulted in an infringement of freedom of opinion and freedom of conscience. Moreover, the administrative authority would be afforded too much discretion in granting or refusing permission for home schooling.

The Constitutional Council held that, by providing that 'primary education is compulsory ... it may be dispensed either

in primary or secondary educational establishments, or in public or free schools, or in the home, by the father of the family himself or by any person he chooses', Article 4 of the Act of 28 March 1882 on primary education made home schooling only one of the ways in which compulsory education was made available. It thus did not make home schooling a component of the fundamental principle of freedom of education recognised by the laws of the Republic. The Council concluded that the complaint alleging infringement of the freedom of education must be dismissed.

Article 4 of the Act of 28 March 1882 on primary education made home schooling only one of the ways in which compulsory education was made available.

In reviewing the provisions of Article 49, which provide that authorisation for home schooling is granted on the basis of there being "a situation which is specific to the child and constitutes justification for the educational proposal, provided that the persons responsible for the child can demonstrate the capacity of the person or persons in charge of the child's education", the Constitutional Council ruled that, on the one hand, by making authorisation conditional upon verification that the person in charge of the child has the 'capacity to instruct', these provisions were intended to require the administrative authority to ensure

that this person was equipped to enable the child to acquire the common foundation of knowledge, skills and culture defined in Article L. 122-1-1 of the Education Code with regard to the knowledge and skills expected at the end of each cycle of compulsory education. On the other hand, by providing that this authorisation is granted on the basis of "the existence of a situation which is specific to the child and constitutes justification for the educational proposal", Parliament intended the administrative authority to ensure that the proposed home schooling includes the essential elements of teaching and pedagogy that are appropriate to the child's abilities and pace of learning.

By way of an interpretative reservation, the Constitutional Council ruled that it would be up to the regulatory authority, under the supervision of the courts, to determine the procedures for authorising home schooling in accordance with these criteria, and that the competent administrative authorities would be required to base their decision solely on these criteria, which preclude any form of discrimination whatsoever.

By virtue of all these reasons, it ruled that the contested provisions were not voided on the grounds of lack of jurisdiction and did not contravene the constitutional objective of accessibility and intelligibility of the law. Moreover, while the contested provisions provide that authorisation for family instruction may be granted on the basis that no grounds other than the best interests of the child may be relied upon, they have neither the aim nor the effect of violating the freedom of conscience or opinion of persons who submit a proposal for home schooling. •

CONSEIL CONSTITUTIONNEL



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Fifty years ago: the Decision on “Freedom of Association”

“

We learned just one hour ago that the Constitutional Council decided that there is no such thing as a limit to the freedom of association. It rejected Article 3 of the Association Act that the National Assembly adopted in June, declaring it to be unconstitutional.” That is how the 8 p.m. news broadcast on France Inter opened on 16 July 1971. When asked about the reasons for the decision, Dean Vedel gave his analysis on air: “Why was the Act struck down? It’s difficult to say because I don’t have the text of the decision in front of me but, most probably, the Council accepted, in the first place, the argument that the President of the Senate had advanced in support of his appeal, namely that Article 4 of the Constitution guarantees the freedom to form political parties and that, as a result, this first step towards prior checking, which had been planned by the Government and adopted by the National Assembly, constituted an encroachment on that freedom. It’s also

possible that the Constitutional Council has accepted the objection regarding the infringement of the freedom of association, a freedom which, while not included in the Declaration of the Rights of Man and of the Citizen, is undoubtedly one of the principles of the Republic enshrined in the 1946 Constitution and in the 1958 Preamble, which incorporated its wording.”

These comments, which were made in the immediate wake of the announcement, clearly express the importance and the startling effect of Decision No. 71-44 DC. For the first time, the constitutional authority found itself obliged to openly criticise Parliament, and in particular the Government, whose Minister of the Interior, Raymond Marcellin, was behind the reform of the Associations Act. Hitherto docile vis-à-vis the executive (playing the role of “watch-dog”), the Constitutional Council now stepped back and was willing to fully

The Constitutional Council, “defender of freedoms”.

3 Key Dates

1 January 1901

Adoption of the
“Contract of Association
Act”

Juin 1971

Vote on the “Act
Supplementing the
Provisions of Articles 5
and 7 of the Contract of
Association Act of 1 July
1901”

16 July 1971

Decision No. 71-44 DC
handed down by the
Constitutional Council

exercise its prerogatives as guardian of the Constitution. The newspaper *Le Monde* informed the general public of this, with the headline: “The Constitutional Council puts a brake on state power and asserts its independence” (19 July 1971). The constitutional authority settled, as a matter of law, the political conflict which, in June 1971, in both Parliament and in the press, pitted the defenders of freedom of association (e.g. Robert Badinter, *Le Monde*, 30 June 1971) against the Government, which was taking action against subversive associations. By rejecting the system of prior authorisation required by the Government’s bill amending the 1901 Act and referring to the major republican principles of constitutional law, the Constitutional Council positioned itself as a “defender of freedoms” (Jacques Robert, *Le Monde*, 10 July 1971), finding in this stance a democratic legitimacy that had previously been called into question. It did not matter that the ruling was only partial (since two articles of the Act were declared unconstitutional while “the other provisions of the said bill are declared to be in conformity with the Constitution”) or that the effects of the ruling were of little legal significance: the only thing the media remembered about this episode was the rebuff meted out to the Minister of the Interior.

It is, however, apparent from the recitals of the Freedom of Association decision and the minutes of the deliberations, which have now been made public, that the drafting did not proceed as one might have expected. The final draft does not tally with the one prepared by the rapporteur François Goguel (who supported the view that the Act was constitutional). Moreover, there is no record of who drafted the decision that was adopted at the end of the session... without any particular discussion, especially on the question of the legal value of the preamble to the Constitution! The deliberations focus on technical issues (parliamentary

law, prior control of associations by the courts) and do not dwell on the overarching principles. The prescriptiveness of the Preamble is hardly touched upon at all. The subject, moreover, does not cause any disagreement among the members of the Council, since it is not the first time that a decision has made reference to it; the Decision of 19 June 1970 on the Treaty of Luxembourg begins with the following citation: “Having regard to the Constitution, and in particular its Preamble and Articles 53, 54 and 62” (Decision No. 70-39 DC). In the Decision of 16 July 1971, the Preamble is mentioned in the citations and in Recital 2 (“among the fundamental principles recognised by the laws of the Republic and solemnly reaffirmed by the Preamble to the Constitution is the principle of freedom of association”). Commentators saw this as the entrenchment of a so-called constitutional corpus (*bloc de constitutionnalité*), an expression that Dean Favoreu made more widely used by equating it with the constitutional standards which comprise the 1958 text, the declarations of rights in the preamble and the principles of constitutional value.

With the Freedom of Association Decision, the constitutionality review was now seen as a jurisdictional technique for settling constitutional disputes between the ruling party and the opposition. This judgment therefore paved the way for, and legitimised, the 1974 reform (which introduced the possibility of referral by 60 deputies or 60 senators). It also demonstrated (and, for the first time, in such an explicit manner) that by enforcing compliance with the Constitution through its ‘jurisdictional sanction’ (Léo Hamon, 1959) each time it conducted a constitutional review, the Constitutional Council made the will of the political representatives subordinate to the will of the French people, as set out in the declarations of rights. This seminal decision led the Council, a few years later, to proclaim, in the words of Dean Vedel, that: “An Act that is passed expresses the will of the people only when it is in compliance with the Constitution” (Decision No. 85-197 DC of 23 August 1985).

Since 2010, it has been possible to refer laws that have already come into force to the Constitutional Council. This is done through the mechanism of the "priority preliminary ruling on the issue of constitutionality" (*question prioritaire de constitutionnalité* or QPC in French), which allows any individual to lodge a referral. In the context of a lawsuit, a person can challenge the constitutionality of the law that applies to his or her case. 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 it will be referred to the Constitutional Council. If the provisions referred for review are determined to be inconsistent with the Constitution, they are "censured", i.e. struck down. They are thus deemed to be null and void.

An overview of some of the key QPCs of the period from September 2020 to August 2021.

The priority preliminary ruling on the issue of constitutionality

QPC
referrals
between
1 September
2020 and
31 August
2021

83

declarations of
non-compliance
with the
Constitution

35

8

interpretative
reservations

Car parking



Decision No. 2020-855 QPC of 9 September 2020

Requirement for pre-payment of flat-rate post-parking fees
as a prerequisite for disputing them

In its Decision No. 2020-855 QPC of 9 September 2020, the Constitutional Council deemed to be unconstitutional the provisions stipulating that flat-rate post-parking fees may only be disputed, regardless of the circumstances, if they have been paid in advance.

The Council of State had referred to the Council a QPC relating to the compatibility of Article L. 2333-87-5 of the General Local Authorities Code with the rights and freedoms guaranteed under the Constitution, in the version of that article which was introduced by Ordinance No. 2015-401 of 9 April 2015 relating to the management, collection and challenging of the flat-rate post-parking fee provided for in Article L. 2333-87 of the General Local Authorities Code.

The General Local Authorities Code provides that a municipal council or the decision-making body of an

Intercommunal Co-operation Agency or a Joint Association responsible for Local Transport Matters can institute a parking fee, for which it determines the schedule of charges. This fee must be paid by the driver as soon as the vehicle is parked. Failure to do so may result in the issuing of a parking fine, which may be increased if not paid on time. Individual decisions relating to these charges and increases may be appealed to the Parking Fee Disputes Committee.

The contested provisions made the acceptance of any such appeal conditional on prior payment of the disputed parking charge, including any increase in the charge. The applicant contended that they did so without provision for any exception. In this respect, the applicant argued that the right to an effective legal remedy had been denied.

The Constitutional Council held that Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789 provides that the right of the individuals concerned to an effective remedy before a court must not be materially impaired.

With regard to this constitutional requirement, the Constitutional Council noted that, by requiring that the flat-rate fee and any additional amount be paid before they can be disputed before the court, Parliament intended, in the interests of the proper administration of justice, to prevent the possibility of dilatory

There was no legislative provision guaranteeing that the amount to be paid to appeal against post-parking charges, and any increase in them, would not be excessively high.



appeals in exclusively pecuniary type of proceedings likely to affect a very large number of people.

However, in the first place, although, in accordance with Article L. 2333-87 of the General Local Authorities Code, the amount of the post-parking charge may not exceed that of the fee due, there was no legislative provision guaranteeing that the amount to be paid to appeal against post-parking charges, and any increase in them, would not be excessively high.

Secondly, Parliament had not provided for any exceptions to the requirement that the lump sums and surcharges

be paid in advance, taking into account special circumstances or the particular situation of certain taxpayers.

The Constitutional Council concluded from all the above that Parliament had not provided the guarantees required to ensure that the requirement of prior payment did not substantially affect the right to an effective judicial remedy. For these reasons, it declared the contested provisions to be unconstitutional and made it clear that this declaration of unconstitutionality was applicable to all cases that had not been finalised as at the date of its decision. •



Online extras

What is the priority preliminary ruling on the issue of constitutionality (QPC)? When was it introduced? What are the various procedural stages it involves? All the answers can be found in the Constitutional Council's video on the "citizen's prerogative".

urlr.me/5GQ2P



Unacceptable conditions of detention



**Decision No. 2020-858/859 QPC
of 2 October 2020**

Detainees' conditions of incarceration



**Decision No. 2021-898 QPC
of 16 April 2021**

Detainees' conditions of incarceration II

In its Decision No. 2020-858/859 QPC of 2 October 2020, the Constitutional Council ruled that it is Parliament's responsibility to ensure that persons placed in pre-trial detention be able to apply to a judge for an order to remedy conditions of detention that violate their dignity as human beings.

The Court of Cassation had referred to the Council two QPCs relating to Articles 137-3, 144 and 144-1 of the Code of Criminal Procedure, which deal with pre-trial detention, and their compliance with the rights and freedoms guaranteed under the Constitution.

It was argued that these provisions were voided on the grounds of lack of jurisdiction, since they did not require the court to remedy conditions of pre-trial detention that were contrary to human dignity, and thus failed to uphold the principle of human dignity, the principle of prohibition of inhuman and degrading treatment, individual freedom, the right to an effective judicial remedy and the right to privacy.

In addressing this question, the Constitutional Council had to deal with a preliminary question, insofar as, after referring the QPC to the Constitutional Council, the Court of Cassation had had to rule on the provisions under review and had interpreted them in the light of the European Convention for the Protection of Human Rights and

Fundamental Freedoms. It was thus up to the Constitutional Council to determine whether or not it should rely on such an interpretation of the provisions that had been referred to it.

In this respect, the Council inferred from the constitutional and organic provisions governing the QPC that a court that is asked to rule on the merits of such a question cannot, in order to refute its merits, rely on the interpretation of the contested legislative provision that is required by its conformity with France's international commitments, whether this interpretation is reached at the same time as the decision that the Council is handing down or was reached beforehand. Nor is it for the Constitutional Council to take account of such an interpretation in order to conclude that it is consistent with the rights and freedoms that are guaranteed by the Constitution. On the other hand, these same requirements in no way preclude a challenge, in the context of a QPC, to the actual scope that such an interpretation confers on a legislative provision, if the alleged unconstitutionality does indeed stem from this interpretation.

Consequently, the Constitutional Council determined that, in this case, it was required to rule on the contested provisions independently of the interpretation made by the Court of Cassation in its referral judgments in order to make them compatible with the requirements

arising from the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As regards the constitutional framework at stake in this case, the Constitutional Council noted that the Preamble to the 1946 Constitution states that safeguarding the dignity of the individual against all forms of enslavement and degradation is a principle of constitutional value.

Furthermore, under Article 9 of the 1789 Declaration of the Rights of Man and of the Citizen, “Every man being presumed innocent until proven guilty, if it is deemed necessary to arrest him, any rigour that is not necessary to secure his person must be severely punished by law”.

Finally, it follows from Article 16 of the Declaration of 1789 that the right of affected persons to an effective remedy before a court must not be substantially impaired.

From these various constitutional requirements, the Constitutional Council concluded that it is the responsibility of the judicial and administrative authorities to ensure that the deprivation of liberty of persons held in pre-trial detention must, in all circumstances, be carried out with respect for the dignity of the individual. It is also the responsibility of the competent authorities and courts to prevent and punish conduct that violates the dignity of persons held in pre-trial detention and to order compensation for any harm suffered. Finally, it is the responsibility of Parliament to ensure that persons remanded in custody have the possibility of applying to a court to seek an order to rectify conditions of detention that are contrary to human dignity.

With regard to these constitutional requirements, the Council noted, firstly, that while a person placed in pre-trial detention and exposed to conditions of detention that are not in keeping with human dignity may refer the matter to an administrative court in summary proceedings, on the basis of Articles L. 521-2 or L. 521-3 of the Administrative Justice Code, the measures that this court is likely to order in this context, which may

depend on the administration’s ability to implement them effectively and very promptly, do not guarantee, in all circumstances, that the unacceptable conditions of detention will be rectified.

Secondly, the Council noted in particular that although, by virtue of Article 148 of the Code of Criminal Procedure, a person placed in pre-trial detention may at any time make an application for release, the courts are only obliged to act on such an application in the cases provided for in the second paragraph of Article 144-1 of that same Code. On the other hand, although Article 147-1 of the Code authorises the courts to order the release of a person placed in pre-trial detention, it is only in the event that a medical expert establishes that the person concerned is suffering from a life-threatening condition or that continued detention will prejudice his or her physical or mental health. Consequently, no appeal to the judicial courts enables an accused person to have the violation of his or her dignity, resulting from the conditions of his or her pre-trial detention, brought to an end.

For these reasons, the Constitutional Council ruled that, independently of the liability actions that could be brought on the grounds of unacceptable conditions of detention, the second paragraph of Article 144-1 of the Code of Criminal Procedure failed to meet the aforementioned constitutional requirements. It therefore declared them to be unconstitutional.

Noting that the immediate repeal of the provisions deemed to be unconstitutional would have manifestly excessive consequences, in that it would prevent the release of persons placed in pre-trial detention when such detention is no longer justified or exceeds a reasonable period, the Council deferred the date of this repeal to 1 March 2021.

It should be borne in mind that, on similar grounds, the Constitutional Council, in its Decision No. 2021-898 QPC of 16 April 2021, struck down the provisions of Article 707 of the Code of Criminal Procedure applicable to convicted persons who are serving a custodial sentence. •

The right to remain silent at different stages of criminal proceedings



Decision No. 2020-886 QPC of 4 March 2021

Informing the accused of his or her right to remain silent when brought before a liberty and custody judge in the event of an immediate appearance



Decision No. 2021-894 QPC of 9 April 2021

Informing minors of their right to remain silent when they are interviewed by the Judicial Youth Protection Service



Decision No. 2021-895/901/902/903 QPC of 9 April 2021

Informing a person under investigation of his or her right to remain silent when appearing before the Investigation Chamber



Decision No. 2021-920 QPC of 18 June 2021

Informing the accused of his or her right to remain silent before a court which is considering an application for that person's release from judicial supervision or release from custody

Between March and June 2021, the Constitutional Council worked on a request from the Criminal Division of the Court of Cassation to clarify the scope of the constitutional principle that no one is obliged to testify against themselves, from which the right to remain silent is derived.

In its Decision No. 2020-886 of 4 March 2021, it ruled that, unless the accused person has been informed of his or her right to remain silent, the provisions concerning the presentation of that person before a liberty and custody judge (*juge des libertés et de la détention* in French, a judge empowered to grant or refuse release from custody) in the context of an immediate appearance were unconstitutional.

It was asked to rule on a QPC concerning the consistency of Article 396 of the Code of Criminal Procedure with the rights and freedoms that are guaranteed under the Constitution.

Pursuant to Article 395 of the Code of Criminal Procedure, the Public Prosecutor may refer a case to a criminal court under the immediate appearance procedure applying to certain offences, if the Prosecutor is satisfied that the charges are of sufficient gravity and that the case is ready for trial. The accused is then held until his or her appearance, which must take place on the same day. If, however, it is impossible for the court to meet on that day and if the Public Prosecutor considers that the circumstances of the case warrant pre-trial detention, Article 396 of the same Code allows the Prosecutor to bring the accused before the liberty and custody judge, so that an order validating such detention may be obtained until the accused's appearance before the criminal court, which must take place no later than the third working day following the initial hearing. Under the contested

provisions, the liberty and custody judge rules on the Public Prosecutor's request for pre-trial detention after having heard any submissions from the accused or his or her lawyer.

The Constitutional Council noted that, according to Article 9 of the 1789 Declaration of the Rights of Man and of the Citizen: "Every man being presumed innocent until proven guilty, if it is deemed necessary to arrest him, any rigour that is not necessary to secure his person must be severely punished by law". The result is the principle that no one is obliged to testify against himself or herself, from which the right to remain silent is derived.

In the light of this constitutional framework, the Constitutional Council noted firstly that while, under the contested provisions, the liberty and custody judge has sole responsibility for assessing whether pre-trial detention is warranted, he or she can only decide on such a measure of deprivation of liberty, which must be applied only in exceptional cases, by means of an order supported by a statement of reasons. The order must, moreover, set out the legal and factual considerations on which it is based by reference to one of the reasons comprehensively listed in points 1 to 6 of Article 144 of the Code of Criminal Procedure. Thus, the role entrusted to the liberty and custody judge under Article 396 of that Code may require

accused may be induced to acknowledge the offences with which he or she is charged. Moreover, the very fact that the judge invites the accused to make a statement may lead the accused to believe that he or she does not have the right to remain silent. However, while the decision of the liberty and custody judge has no impact on the scope of the referral to the criminal court, in particular as regards the wording of the charges, any statements made by the accused are likely to be brought to the attention of the court if they are recorded in the order of the liberty and custody judge or in the record of the court appearance.

Based on these two sets of reasons, the Constitutional Council found that, by not specifying that the accused brought before the liberty and custody judge must be informed of his or her right to remain silent, the contested provisions infringed this right. It therefore declared them to be unconstitutional.

On similar grounds, in its Decision No. 2021-895/901/902/903 QPC of 9 April 2021, it struck down the provisions of Article 199 of the Code of Criminal Procedure on the grounds that they did not specify that the accused must be informed of his or her right to remain silent when appearing before the investigating chamber.

Then, in its Decision No. 2021-894 QPC of 9 April 2021, it struck down the provisions of Article 12 of Ordinance No. 45-174 of 2 February 1945 on juvenile delinquency on the grounds that they did not specify that minors must be informed of their right to remain silent when being interviewed by the Judicial Youth Protection Service.

And finally, in its Decision No. 2021-920 QPC of 18 June 2021, it struck down the provisions of Article 148-2 of the Code of Criminal Procedure on the grounds that they did not specify that the accused must be informed of his or her right to remain silent when appearing before a court which is to rule on an application for release from judicial supervision or release from custody. •

The Constitutional Council found that, by not specifying that the accused brought before the bail judge must be informed of his or her right to remain silent, the contested provisions infringed this right.

him or her to make an assessment of the actions identified as charges by the Public Prosecutor in the referral.

Secondly, when called upon by the liberty and custody judge to make any statement he or she wishes to make, the

Automatic extension of pre-trial detention



**Decision No. 2020-878/879 QPC
of 29 January 2021**

**Automatic extension of pre-trial detention in the
context of a public health emergency**

In its Decision No. 2020-878/879 QPC of 29 January 2021, the Constitutional Council struck down the provisions of an ordinance which, by operation of law, had extended pre-trial detentions during the early stages of the public health emergency.

The Constitutional Council had been asked by the Court of Cassation to rule on Ordinance No. 2020-303 of 25 March 2020 adapting the rules of criminal procedure on the basis of Emergency Act No. 2020-290 of 23 March 2020 to deal with the Covid-19 epidemic, and specifically on the consistency of Article 16 of that ordinance with the rights and freedoms that are guaranteed under the Constitution.

These provisions had authorised the automatic extension of pre-trial detention, during and after the investigation, for varying lengths of time depending on the sentence that could be imposed. They were to apply to pre-trial detentions that were underway or commencing between 26 March 2020 and the end of the public health emergency. However, the Act of 11 May 2020 extending the state of public health emergency inserted Article 16-1 into the Ordinance of 25 March 2020, thus putting an end to the application of these provisions for pre-trial detentions that were due to expire as of 11 May 2020. The contested provisions thus applied only to pre-trial detentions which were due to expire between 26 March and 11 May 2020. Article 16-1 also provided that detentions extended for a period of six months under the provisions of Article 16 had to be confirmed by a decision of liberty and custody judge within three months of their extension.

The applicants, with the support of the other parties to the appeal, argued that these provisions infringed Article 66 of the Constitution by extending, without the systematic and speedy involvement of a judge, all pre-trial detentions that had expired during the public health emergency, even though such a measure



was neither necessary nor proportionate to the objective of protecting public health.

The Constitutional Council observed, on the basis of Article 66 of the Constitution, that individual freedom, the protection of which is entrusted to the judicial authority, may not be obstructed by unnecessary restrictions. Any infringement of this freedom must be appropriate, necessary and proportionate to the objectives pursued. It may only be deemed to be safeguarded if a court can become involved within the shortest possible time.

Against the background of this constitutional framework, the Constitutional Council noted that the contested provisions aimed to ensure that the difficulties arising in the day-to-day running of the justice system because of the emergency public health measures taken to combat the spread of the Covid-19 epidemic did not result in the release of persons placed in pre-trial detention, before investigations could be completed or hearings organised. The provisions thus aimed to achieve the constitutional objective of safeguarding public order and tracking down the perpetrators of offences.

However, the Constitutional Council noted, firstly, that these provisions automatically kept in detention all persons whose pre-trial detention, previously decided by the courts, had to be terminated because it had reached its maximum duration or because its possible extension required a new decision by a judge.

The Constitutional Council ruled that there was no reason to wait for the declaration of unconstitutionality to take effect.

It also pointed out that these detentions were extended for periods of two or three months in cases involving misdemeanours and minor crimes (*délits*) and six months in more serious criminal cases (*crimes*). It noted, furthermore, that while the contested provisions provided

for the possibility, during the period of continued detention that they introduced, of the competent court ordering release at any time, either ex officio or at the request of the Public Prosecutor's Office or the detainee, they did not provide for any systematic involvement of the judiciary during that period. As for Article 16-1 of the Order of 23 March 2020, it provided for the submission to the courts, within a period of three months of their extension under the contested provisions, of only those pre-trial detentions that had been extended for a period of six months.

The Constitutional Council concluded that the contested provisions automatically maintained persons in pre-trial detention without the assessment of the need for such maintenance being subject to review by a court within a short period.

The Constitutional Council ruled that the objective pursued by the contested provisions was not such as to warrant the assessment of the need for continued detention being systematically removed from the control of the courts during such periods. It specified that, furthermore, the intervention of the courts could, if necessary, be covered by procedural arrangements.

On the basis of all these reasons, the Constitutional Council concluded that the contested provisions infringed Article 66 of the Constitution. It therefore declared them to be unconstitutional.

Noting that these provisions were no longer applicable, the Constitutional Council ruled that there was no reason to wait for the declaration of unconstitutionality to take effect. The provisions in question were therefore immediately repealed. As regards the effects of these provisions, the Council considered that any reconsideration of the measures that were taken on the basis of these provisions would be contrary to the constitutional objectives of safeguarding public order and tracking down the perpetrators of offences, and would thus have manifestly excessive consequences. It therefore ruled that these measures could not be challenged on the basis of their unconstitutionality. •

The protection of vulnerable persons



**Decision No. 2020-888 QPC
of 12 March 2021**

Benefits granted to carers of vulnerable persons

In its Decision No. 2020-888 QPC of 12 March 2021, the Constitutional Council struck down provisions limiting the ability of all elderly or disabled people receiving home help to freely dispose of their assets, on the grounds that the provisions in question disproportionately encroach on the right to property.

The Constitutional Council had been asked by the Court of Cassation on 18 December 2020 to rule, as to its consistency with the rights and freedoms guaranteed by the Constitution, on Article L. 116-4 of the Code of Social Action and Families, in the version resulting from Ordinance No. 2016-131 of 10 February 2016 on the reform of contract law, the general regime and proof of obligations.

Under Article L. 7231-1 of the Labour Code, personal services include assistance to the elderly, the disabled or other persons who need personal help

in their homes or mobility assistance to remain in their homes. The contested provisions prohibited managers and employees or volunteers of companies providing such services, as well as persons directly employed by those they assist, from receiving gifts or bequests from the latter. This prohibition applied only to benefits bestowed during the time the donor was receiving assistance. It did not apply to any bonus payments for services rendered or, in the absence of direct heirs, to relatives up to the fourth degree of kinship.

It was claimed that these provisions prohibit elderly people from bestowing rewards on those who provide them with paid personal services in the home. Drafted in general terms, without taking into account the legal capacity of the persons concerned or whether or not they are affected by any particular form of vulnerability, this prohibition would have infringed their right to freely dispose of their assets. It was argued that this constituted an infringement of the right to property.

The Constitutional Council emphasised that it is open to Parliament to impose limits on the exercising of the right of private individuals to own property, a right protected by Article 2 of the 1789 Declaration of the Rights of Man

It was claimed that these provisions prohibit elderly people from bestowing rewards on those who provide them with paid personal services in the home.



and of the Citizen, on the basis of constitutional requirements or on grounds of public interest, provided that this does not entail disproportionate restrictions in relation to the objective pursued.

In the light of this constitutional framework, the Court noted that, to the extent of the contested prohibition, the provisions under review would adversely affect the elderly, the disabled or those requiring personal assistance in their homes or mobility assistance to remain at home by restricting their ability to dispose freely of their assets. Since the right to freely dispose of one's assets is an element of the right to property, the contested provisions infringed this right.

The Constitutional Council held that, by introducing the contested prohibition, Parliament intended to uphold the protection of persons who, in its view, having regard to their condition and their need for assistance to help them remain in their own home, were placed in a particularly vulnerable situation, leaving them at risk of part of their assets being taken over by those providing them with that assistance. Parliament thus pursued an aim that was in the public interest.

However, the Constitutional Council noted, firstly, that the mere fact that the persons to whom assistance is provided are elderly, disabled or in another situation requiring this assistance to help them remain in their own home cannot be taken to mean that their capacity to consent is impaired. Furthermore, personal services as defined in Article L. 7231-1 of the Labour Code cover a multitude of tasks that may be carried out for varying lengths of time or with varying degrees of frequency. The mere fact that these tasks are carried out in the homes of the persons concerned and that they help them to stay in their own homes is not sufficient to establish, in all cases, that the persons assisted are vulnerable vis-à-vis those who provide this assistance.

Secondly, the prohibition instituted by the contested provisions applied even in cases where it could be proved that the donor was not vulnerable or dependent on the person assisting them.

On all these grounds, the Constitutional Council ruled that the contested general prohibition infringed the right to property in a way that was disproportionate to the objective pursued. It therefore declared it to be unconstitutional.

The declaration of unconstitutionality was issued with immediate effect, as of the date of publication of the Council's decision. It is applicable to all cases still pending as of that date. •

The protection of individual freedom



**Decision No. 2021-912/913/914 QPC
of 4 June 2021**

**Oversight of isolation or restraint measures in the
context of involuntary psychiatric care**

In its Decision No. 2021-912/913/914 QPC of 4 June 2021, the Constitutional Council once again ruled that Parliament could not, having regard to the requirements of Article 66 of the Constitution, authorise the keeping of persons in isolation or in restraint in a psychiatric facility beyond a certain time without the systematic intervention of a judge.

On 2 April 2021, the Constitutional Council was asked by the Court of Cassation to consider three QPCs on the provisions of the Public Health Code relating to the conditions under which persons placed in full-time hospitalisation without their consent may be subject to isolation and restraint measures.

Paragraph II of Article L. 3222-5-1 of the Public Health Code sets out the duration of implementation of these measures. Pursuant to the first subparagraph of this paragraph, a seclusion measure may be taken by a psychiatrist for a maximum period of twelve hours and be renewed, if the patient's state of health so requires, for periods of twelve hours, up to a total duration of forty-eight hours. Pursuant to the second subparagraph of the same paragraph, a restraint measure may be employed as part of an isolation measure for a maximum period of

six hours. If the patient's state of health so requires, it may also be extended for periods of six hours, up to a maximum total duration of twenty-four hours.

The contested provisions of the third subparagraph of the same paragraph authorised the doctor to extend an isolation or restraint measure, in exceptional circumstances, beyond the total duration of forty-eight hours and twenty-four hours.

These provisions were adopted under Act No. 2020-1576 of 14 December 2020 on the financing of social security for 2021. They had been passed by Parliament in order to address the consequences of Decision No. 2020-844 QPC of 19 June 2020, in which the Constitutional Council had struck down the legal framework governing isolation and restraint in psychiatric facilities on the grounds that such measures, which deprive patients of their liberty, were neither limited in time nor subject to systematic review by a judge beyond a certain period.

These provisions were challenged as being in breach of Article 66 of the Constitution on the grounds that, in the event of the continuation of isolation and restraint measures beyond the maximum periods provided for by Parliament, they

were limited to a requirement that a liberty and custody judge (*juge des libertés et de la détention*, a judge empowered to grant or refuse release from custody) be informed and that persons subject to these measures or their relatives be able to refer the matter to the judge, without providing for any systematic review of these measures by the latter. The result would have been that these measures could have been implemented over long periods without any judicial review.

In examining these criticisms, the Constitutional Council recalled that, under Article 66 of the Constitution, “No one may be arbitrarily detained. – The judicial authority, as a guardian of individual freedom, shall ensure respect for this principle under the conditions laid down by law”. Freedom of the individual can only be deemed to be safeguarded if the judge is able to act within the shortest possible time.

The isolation and restraint measures that may be decided upon in the context of full-time, involuntary hospitalisation constitute a deprivation of liberty.

In the light of this constitutional framework, the Constitutional Council noted, as it had ruled in its Decision No. 2020-844 QPC of 19 June 2020, that the isolation and restraint measures that may be decided upon in the context of full-time, involuntary hospitalisation constitute a deprivation of liberty.

A doctor may, however, decide to extend these measures beyond the maximum periods provided for by Parliament, without there being any limit as to the number of such extensions. In this case, the contested provisions stipulate, on the one hand, that the doctor is required to provide immediate notice of his or her decision to the liberty and custody judge, who may take action at his or her own initiative to terminate the extension. On the other hand, they provide that the doctor must inform the person who is

the subject of the isolation or restraint measure, as well as the other persons mentioned in Article L. 3211-12 of the Public Health Code, and they may also refer the matter to the judge, requesting that the measure be lifted. It follows that, yet again, Parliament did not provide for the systematic involvement of a judge in cases where a person is kept in isolation or in restraint for longer than a certain period, as required by Article 66 of the Constitution.

The Constitutional Council consequently ruled that the third subparagraph of paragraph II of Article L. 3222-5-1 of the Public Health Code and, consequently, the sixth subparagraph of the same paragraph were inconsistent with the Constitution. Since any immediate repeal of the provisions declared to be inconsistent with the Constitution would have led to manifestly excessive consequences, it ruled that the legal effects should be postponed until 31 December 2021. The measures taken before that date in application of the provisions declared to be inconsistent with the Constitution cannot be challenged on the basis of this unconstitutionality. •

Environment



Decision No. 2021-891 QPC of 19 March 2021

Involvement of the public in the drafting of
departmental commitment charters relating to
the use of plant protection products

In its Decision No. 2021-891 QPC of 19 March 2021, the Constitutional Council ruled that the procedures adopted by Parliament for drawing up departmental commitment charters relating to the use of plant protection products were contrary to Article 7 of the Charter for the Environment.

On 4 January 2021, the Council of State asked the Council to rule on the consistency of paragraph III of Article L. 253-8 of the Rural and Maritime Fishing Code with the rights and freedoms that are guaranteed under the Constitution.

In the course of applying these provisions, the use of plant protection products (with the exception of certain low-risk products) in close proximity to buildings is subject to the need to take measures to protect their occupants. These measures are defined by users of these products in a charter of obligations at departmental level. Under the contested provisions, these charters must be the subject of prior consultation with the persons living near areas that may be treated with a

plant protection product, or their representatives.

The applicants argued that these provisions failed to comply with Article 7 of the Charter for the Environment, relating to public participation in the preparation of any government decisions which have an impact on the environment. In particular, they argued that Parliament had not specified in sufficient detail the requirements for consultation prior to the drafting of the charters in which users of plant protection products undertake to adopt certain measures to ensure the protection of local residents. They also contended that Parliament had made it possible for this consultation process to involve not each of the local residents in question, but only their representatives.

With regard to the applicable constitutional framework, the Constitutional Council noted in particular that, according to Article 7 of the Charter for the Environment: “Any person has the right, under the conditions and within the limits defined by law, to access information relating to the environment that is held by government authorities and to be involved in the preparation of government decisions affecting the environment”. Since the entry into force of this Charter, it has been the responsibility of Parliament and, within the framework laid down by the law, of the administrative authorities to determine, in compliance with the principles thus set out,

The use of plant protection products in close proximity to buildings is subject to the need to take measures to protect their occupants.



the procedures for implementing these provisions.

In this respect, the Constitutional Council observed, firstly, that, in the absence of protective measures or in the interests of public health, the administrative authority may restrict or prohibit the use of plant protection products. As a result, when the authority is satisfied that the measures proposed in the draft charter are capable of protecting residents in the zone where the products in question are applied, it approves the draft charter. This approval then allows users to apply the products under the conditions set out in the charter. On the other hand, where the administrative authority considers these measures to be inadequate, it will restrict or prohibit such application. Consequently, the commitment charters must necessarily be the subject of a decision by the administrative authority before they can have legal effect.

The Constitutional Council also noted that since they govern the conditions of use of plant protection products near homes, and since such products have implications for biodiversity and human health, these charters have a direct and significant impact on the environment.

It concluded from the above that the departmental commitment charters approved by the administrative authority constitute public decisions having an

impact on the environment within the meaning of Article 7 of the Charter for the Environment.

Secondly, the Constitutional Council noted that, through the provisions at issue, Parliament provided for a specific procedure to allow for participation by the public. The subsidiary public participation procedure provided for in Article L. 123-19-1 of the Environment Code is therefore not applicable to the drafting of these charters. However, on the one hand, the disputed provisions merely state that consultation shall be conducted at departmental level, without defining any of the other conditions and restrictions under which the public can exercise its right to take part in the drafting of commitment charters. On the other hand, allowing the consultation to be held only with representatives of people living near areas that are likely to be treated with plant protection products does not meet the requirements of participation by “any person” imposed by Article 7 of the Charter for the Environment.

For these reasons, the Council ruled that the contested provisions fail to meet the constitutional requirements resulting from that article. It therefore declared them to be unconstitutional. This declaration of unconstitutionality is applicable to all cases still pending as at the date of publication of the decision. •

Other categories of decisions



Between October 2020 and September 2021, in addition to the decisions it handed down through the *ex ante* and *ex post* constitutionality review processes, the Council issued several dozen other decisions, including one in the context of the Shared Initiative Referendum procedure.

In electoral matters, it issued 38 “SEN” decisions on the elections to the Senate, thus completing the processing of the litigation arising from the September 2020 Senate elections. In addition, it issued one decision on a parliamentary by-election.

In several of these cases, the Constitutional Council applied the new approaches arising from its Decision No. 2020-147 ORGA of 17 September 2020 amending the regulations applicable to the procedure followed in matters before the Council concerning the election of deputies and senators. This decision amended Article 8 of those regulations by enabling the President of the Constitutional Council to directly task the Council with the examination of applications for review for which a prior adversarial investigation is not compulsory, either because those applications are inadmissible or because they only contain objections which would clearly not have an influence on the results of the election.

In its Decision No. 2020-29 ELEC of 17 September 2020, the Constitutional Council had also rejected a request for the withdrawal or amendment of Annex 1 to the guidebook for candidates in the Senate elections of 27 September 2020. It took the view that the criteria which would

allow it, on an exceptional basis, to give a ruling before the results of the elections were announced had not been met.

On the basis of the second paragraph of Article 38 of the Constitution and following a referral from the Prime Minister, the Constitutional Council issued nine so-called reclassification decisions bearing the numbers 2020-287 L to 2020-295 L. (Such questions are designated by the letter L, as the issue that the Constitutional Council must rule on in the context of these referrals revolves around the legislative nature of the provisions submitted to it.)

In most of these cases, it upheld in its entirety the request for reclassification. On the other hand, it only partially allowed the request in its Decision No. 2021-292 L of 15 April 2021 which concerned the legal nature of certain provisions of Articles 11, 12 and 12-1 of Act No. 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions.

The Constitutional Council was asked to review the provisions of this Act, which stipulate that, with some exceptions, any person wishing to become a lawyer must hold at least a master's degree in law or a diploma or degree recognised as equivalent for the practice of the profession by a joint order of the Minister of Justice and the Minister responsible for universities. The Constitutional Council ruled that the requirement of a minimal qualification in law as a condition of access to the legal profession ensures that candidates are capable of carrying out the tasks of assisting and representing people in

court, thereby guaranteeing that people's defence rights will be observed. In so doing, these provisions constitute fundamental guarantees granted to citizens for the exercise of public freedoms. They are thus considered to be of a legislative nature.

The Constitutional Council partially rejected, in its Decision No. 2021-7 LP of 1 April 2021, a local law relating to the New Caledonian civil service. It ruled that its provisions allowing New Caledonian civil service employers, by way of a derogation, to fill a permanent post by recruiting a contractual employee on an open-ended basis, provided that the candidate thus recruited had previously held an open-ended contract for a job in the public or private sector in a field of activity related to that of the post to be filled, created, in the context of open-ended recruitment by the civil service employer, a disparity in treatment between candidates who had held such

a contract with their previous employer and other candidates. However, a candidate's suitability for a civil service position or his or her ability to meet the administration's need for this position does not depend on whether or not the contract between that candidate and his or her previous private or public sector employers was open-ended. The differential treatment was therefore not based on a distinction in circumstances related to the purpose of the law. Nor was it based on a public interest rationale. It was thus in breach of the principle of equality before the law.

Finally, at the request of the President of the National Assembly, the Constitutional Council ruled, in its Decision No. 2021-42 I of 8 July 2021, on the position of Mr. Bernard Bouley with regard to the rules covering parliamentary conflicts of interest. •

The Shared Initiative Referendum

Decision No. 2021-2 RIP of 6 August 2021

Bill for a Programming Act to guarantee universal access to a quality public hospital service

In its Decision No. 2021-2 RIP of 6 August 2021, the Constitutional Council ruled, pursuant to the fourth paragraph of Article 11 and the first paragraph of Article 61 of the Constitution, on an initiative presented under the so-called Shared Initiative Referendum (*Référendum d'Initiative Partagée* or RIP in French) procedure, in the form of the draft bill to guarantee universal access to a quality public hospital service, which had been signed by 200 deputies and senators.

As is stipulated in Article 45-2 of Ordinance No. 58-1067 of 7 November 1958 on the Constitutional Council, the Council had to be satisfied firstly that the bill was presented by at least one fifth of the members of Parliament; secondly, that its subject matter complied with the conditions set out in the third and sixth paragraphs of Article 11 of the Constitution; and, lastly, that none of the provisions of the bill was at variance with the Constitution.

The Constitutional Council noted that the bill had been presented by more than one fifth of the members of Parliament on the date of registration of the referral to the Constitutional Council. It also determined that, since the purpose of the bill was

to “set the objectives of State action to guarantee universal access to public hospitals”, it fell within the scope of one of the purposes mentioned in the first paragraph of Article 11 of the Constitution. Moreover, at the time the referral was lodged, the purpose of this bill was not to repeal a legislative provision that had been in force for less than a year, and no bill on the same subject had been submitted to a referendum in the previous two years.

However, under Article 21 of the Constitution and subject to Article 13, the Prime Minister exercises regulatory powers at national level. These provisions do not authorise Parliament to require the assent of another State authority in order for the Prime Minister to exercise his regulatory powers. In this respect, the Constitutional Council declared that Article 7 of the bill, which makes the exercise of the Prime Minister's regulatory power subject to the assent of the *Conférence nationale de santé* (National Health Conference), is in breach of the Constitution.

Consequently, the bill does not meet the condition set out in Article 45-2 of the Ordinance of 7 November 1958.





Whether through staff training, welcoming interns, or implementing an ambitious sustainable development initiative, the Constitutional Council constantly seeks to improve its organisation to best carry out its missions. Discover some of the changes at the Council in 2020-2021 through these photos and figures.

**Changes
at the
Council**

Constitutional Council Key Figures

The General Secretariat of the Constitutional Council - Staffing

As at 31 December 2020, headcount at the General Secretariat of the Constitutional Council had risen to 74 in-person staff, a total of 68.2 full-time equivalents. This slight increase in a year allowed us to enhance resources dedicated to the Shared Initiative Referendum procedure and to monitor the presidential election.

Most staff are assigned to the **Administrative and Financial Services Department (40.5%)** and the **Legal Department (21%)**.

The proportion of contract staff, traditionally high in the Constitutional Council, remains higher than that of seconded officials (74% of total staff compared to 26%).

The rate of access to training, i.e. the proportion of staff members who have attended at least one training course in relation to the total number of staff, represented 27.03%, on 31 December 2020. While the rate has fallen due to the health crisis, every effort has been made to facilitate distance learning.

The Constitutional Council on the Internet and social media

Between 1 September 2020 and 31 August 2021

The Constitutional Council's website received, on average

415,185
VISITS PER MONTH

151,249
VIEWS OF THE
ONLINE
TITRE VII JOURNAL

13,840
VISITS
PER DAY

As at 9 September 2021

35,547
FOLLOWERS
ON FACEBOOK

157,287
FOLLOWERS
ON TWITTER



Online extras

The Constitutional Council was established by the Constitution of the Fifth Republic, on 4 October 1958. A regulator of public authorities and a court of various competences, it is particularly responsible for monitoring the extent to which the law complies with the Constitution. Watch this video to discover the role and function of this institution.

urlr.me/Scr3X



The Council is active in training interns

Between
200
and 300
applications
every year

The Constitutional Council has long received and overseen interns and young lawyers-in-training. It also regularly welcomes other young students to train in the Administrative and Financial Services Department, in catering, in the Information Technology Department and the External Relations Department.

Since the 1970s, the Documentation and Investigation Assistance Department (SDAI) has held a continuous intern recruitment and initiation process within its regular operations, one which included students on block-release training. As noted in the doctrine, these interns are “chosen from among the best students” (according to Toulouse professor Henry Roussillon, in his book *Le Conseil constitutionnel*, Dalloz, Connaissance du droit). Many former interns have since become law professors, prominent jurists, and staff members of ministers’ offices.

The Council website’s recruitment page provides all the necessary practical information on intern training and is accessible through a link at the bottom of all French pages of the site. Depending on the year, the SDAI receives between 200 and 300 applications. The selection criteria are demanding, due to the nature of the work accepted interns must carry out. Among the most motivated students, about ten join us each year for three to six months. Contingent on current parliamentary or institutional affairs, interns assist lawyers in preparing materials to investigate litigation files, in all research intended for the President and members of the Constitutional Council, and in the various departments of the General Secretariat. They receive advanced training in legal documentary research methods, especially in parliamentary monitoring, and are trained in the mysteries of legislative drafting and the delights of consolidation.

“An incredible experience, like nothing else, my internship at the Constitutional Council confirmed without a doubt my passion for public law and enriched my life through this new experience. And what an experience! My internship at the Council seems very valuable to my legal training and my professional future, as it allowed me to master the institution’s work methods.”



Moyabè Casmir Lamboni, Master 2 in public business law, Université Paris-Saclay, intern from 15 September 2020 to 31 January 2021

“Through daily, enriching study of parliamentary work, I managed to acquire in-depth knowledge of the legislative procedure, while sharpening my legal research skills to serve the decision-making process. It was such a pleasure to intern in a warm, welcoming department that was always ready to help us!”



Timothée Foret, Master 2 in public law, research and competition, Université Paris-Saclay, intern from 6 April to 6 July 2021



Online extras

Visit the Constitutional Council’s website for more information on recruiting interns.

urlr.me/HbGYQ





Sustainable development at the Constitutional Council

Having eliminated all plastic kitchenware, one of the noteworthy actions of 2020, the Constitutional Council continued implementation of energy-saving and sustainable development plans this year. Most notably, an urban vegetable garden consisting of four planters was installed on the roof of the Constitutional Council.

The artisanal planters were made from French chestnut trees from the Sarthe region, with the help of a permaculture company chosen for proposing an environmental approach

based on techniques drawn from applied research in agronomic science. Automatic watering is carried out via a water reserve made from recycled materials. Lastly, a 50-litre stainless steel rainwater collection tank was installed to limit water usage.

After installing these planters in the spring, the Constitutional Council facilities management staff worked with the company to determine a selection of plants. Members of the staff of the General Secretariat in charge of the vegetable garden received special training.





Titre VII, the Constitutional Council's free online publication

Entirely accessible on the Constitutional Council's website and increasingly consulted, *Titre VII* allows readers to immerse themselves each semester in major constitutional debates and to become familiar with doctrinal thought on various topics covered. They will also find columns on comparative law and jurisprudence.

This year, the journal has tackled themes of legal security (No. 5 – October 2020 issue) and on the constitutional rights of foreign nationals (No. 6 – April 2021 issue).



Online extras

Titre VII is entirely available online on the Constitutional Council's website (in French).

[urlr.me/dwZCD](https://www.urlr.me/dwZCD)



As part of the 2021 edition of La Nuit du droit (Law Night), organised in many regions of France on the anniversary of the Constitution, the 4 October, the Constitutional Council devoted one evening to the crucial theme “The rule of law in the face of crises”. Hosted by Patrick Cohen, this evening brought together several prominent personalities, including Svetlana Tikhanovskaya, Nobel Peace Prize winner Denis Mukwege, Didier Reynders, Cynthia Fleury and Denis Podalydès. In the following accounts, Denis Mukwege and Cynthia Fleury give us a better understanding of the rule of law and the root causes of violations committed against it.

The rule of law in the face of crises

La Nuit du droit

—
**at the Constitutional Council,
4 October 2021**
—



Online extras

More information on
nuitdudroit-2021.conseil-constitutionnel.fr



CYNTHIA FLEURY



Professor of
Humanities and
Health at the
Conservatoire National
des Arts et Métiers

1.

We are living in a time when the rule of law is increasingly challenged, including across Europe. How do you explain this?

There is a confluence of phenomena: the global centre of economic growth has shifted in the past few decades under the effects of globalisation. Focusing on the archetype of “Westernised” countries, we see that power relations have become strained due to the rise of other socio-economic models which use a form of social dumping to propel growth. Tocqueville defined democracy as the gradual development of equal conditions. Yet many studies, admittedly reflecting a regulatory vision of economics (Stiglitz, Krugman, Piketty, Zucman, etc.), point to a re-emergence of unequal conditions as a driving force in the evolution of societies, with gaping divides between urban and exurban areas, and even within cities themselves. Families face tremendous difficulties

due to the increased support they must offer their children, who in turn face greater obstacles to enter the job market (starting a career has become much more costly: employers now demand more advanced academic degrees, as well as greater mobility and adaptability, while candidates must lower their expectations in terms of traditional forms of social protection, etc.). Furthermore,

“vulnerable seniors” are living longer and becoming dependent on families to provide care. These developments lead to substantial economic

insecurity, and although such insecurity accounts only very partially for the phenomena at work, it constitutes an initial layer of perceived precarity which could lead to a disproportionate rejection of democracy. The second layer builds on the foundations we have

All major political challenges are transnational

been establishing for more than twenty years, namely: the crisis of democracy in and of itself, in a globalised world that threatens national sovereignty – or even in an “accelerated” world that does not afford the political sphere the time necessary to build the *Polis* – not to mention a world of soaring demographics, whether it be internal or external to a given country. Let us not forget that the question of “numbers” is never a comfortable one when it comes to democracy, rekindling its entropic dimension, that of the “tyranny of the majority” (Tocqueville), the tyranny of the prevailing opinion and feeling (Mill), or the relationship between democracy and totalitarianism (Arendt). We know that we have yet to find the right mix to envision “continuous” democracy (Dominique Rousseau), a system capable of combining representative democracy (by improving its representativeness) and participatory democracy (by improving its effectiveness and legitimacy). Were this equation to be

resolved, it would ultimately bring about renewed institutional confidence in democracy. However, this exercise has become global: events beyond a country’s borders may have a more profound impact on a country than what occurs within the country itself. This is not only counterintuitive but extremely difficult to channel, control and regulate. All major political challenges are transnational: climate change and environmental issues, the question of immigration, internal displacement and climate refugees, regulating the financial sector, regulating multinational tech giants, etc. In *The Social Contract*, after defining democracy as a system suited for a “people of gods” – asserting that humans could not properly establish such a government – Rousseau breaks it down into several non-negotiable criteria: a small territory, little income inequality, cultural homogeneity, and “no luxury”. Few would claim today that these conditions are a realistic basis for establishing the social rule of law.

2.

Citizens may see the rule of law as something rather theoretical. In concrete terms, what is at stake for individuals and for society?

Put very simply, the rule of law provides a battery of ways and means that, taken together, are themselves the conditions for acquiring rights: free education, pluralism in the media and political parties, freedom of thought, the many institutions that ensure the sustainability of these tools, their means of operation, etc. But while all this may seem to endure “spontaneously” or “mechanically”, that is not the case. This perception of automaticity masks the true process, rooted in a delicate balance between the commitments of citizens and individuals, and the functioning of these institutions. In my work, I continually try go back to this initial,

The rule of law is meaningless without the “irreplaceability” of individuals

clear-cut Möbius strip: the rule of law is meaningless without the “irreplaceability” of individuals and the quality of their process of subjectification or individuation, which itself stems in part from the viability of democratic mechanisms. I am fond of the “capability” approach found in the writings of authors such as Sen, Ostrom, Nussbaum, etc. Sen defines a democracy grounded in capabilities as a system which allows citizens to transform rights into concrete freedoms, increasing “life choices”. Personally, I would say that the capability approach allows us, or should allow us, to transform the material resources offered by democracy into existential

resources. In other words, these tools should help us bring about sublimation, transform our individual and collective lives, and take action in and on the world, for ourselves and for others. In concrete terms, democracy remains

to this day the least “unjust” political solution, as well as the least unequal and the least totalitarian, giving the greatest number of people the “power” to transform the world and steer its future evolution.

3.

Managing successive crises, from security to health, has resulted in what you call an “clash of freedoms”. What do you mean by this?

Democracy is constituted and structured around major clashes, which are entirely legitimate and desirable. To put it in an over-generalised, binary way, so-called positive and negative conceptions of freedom regularly come up against each other, striking the proper balance between individual and public freedoms. Any major moment of crisis will trigger this clash. There are, of course, other clashes: those of historians, or the manner in which historical works orient present generations’ view of the past by dissecting it in a scientific manner. I call this a clash of historians, not a clash of memory (which also exists, and would be a sort of laymen’s version of the academic clash, although different in nature), because historians may defend or reject the legitimacy of so-called memory laws, for example, in the name of their historical discipline. There exist other structural clashes, such as those focused on reasonableness and legality – in other words, how democracy implies the possibility of

redefining what is legal on the basis of contemporary views of what is reasonable. Here one is reminded of the role of civil disobedience, what Sen called the “incompleteness of justice theory”. We must respect these clashes since they allow for greater reflexivity in our political decision-making. However,

no one can deny – and Plato himself was the first to denounce the sophistic instrumentalisation of speech in democracy – that democratic principles can be exploited, and that it is never easy to differentiate between legitimate and spurious controversy. That said, the pandemic has led to an indisputable surge in “exceptional”

It is the duty of institutions, especially the Constitutional Council, to guarantee that such states of emergency do not overreach their stated aims

measures that are by nature oppressive, and we must be doubly vigilant not to trivialise these states of exception and emergency, which make it possible to push aside certain principles of the rule of law. It is the duty of institutions, especially the Constitutional Council, to guarantee that such states of emergency do not overreach their stated aims.

DENIS MUKWEGE



—
Gynaecologist,
Nobel Peace Prize
2018
—

1.

Why are justice and reparations an integral part of the healing process for victims of sexual violence?

Impunity prevents victims of the most serious crimes from rebuilding their lives with dignity. We have seen this clearly in the healing process of female survivors of sexual assault who we have been assisting for over 20 years at the Panzi Hospital. Until justice is served, their healing process cannot be completed, despite our holistic treatment with its medical, psychological, and socio-economic components.

I have been travelling the world for many years to meet survivors, and everywhere we go to meet with women and girls – sometimes men, too, who have been sexually abused – we find the same language, the same devastation regarding acts of violence that leave someone barely hanging on to life though they feel it has been taken. “It was as if I had been killed”, victims tell us.

In this context, justice and reparations represent a recognition of the violence suffered, and so send an opposing message: “You are a human being, you have been the victim of an atrocity, but it is not your fault, your voice has been heard, and society will assist you while you find your way back to life”.

Yet we know very well that only a small minority of sexual assault victims have access to justice and finally obtain reparations for the violence suffered through formal judicial measures, due to many legal and nonlegal obstacles.

When the State fails to protect and provide justice to victims, we believe that the human community has the moral and legal obligation to act, since survivors plead for truth and public recognition of atrocities they have suffered, and these survivors have the

right to be compensated and rehabilitated.

In this spirit, we advocated for the creation of the Global Survivor Fund, which answers a need for solidarity and responsibility. Developed for and with survivors and launched in 2019 with France's support, the fund furthers efforts to fight impunity for sexual crimes, though it is not intended to

replace the desire for justice sought for survivors of sexual violence.

Its goal is to raise financial resources for programmes and projects for reparations, reintegration and rehabilitation, while providing technical assistance to document and disseminate good practices, and lastly, to bring about appeals so that decision-makers and duty-bearers finally face up to their responsibilities.

2.

How is impunity an obstacle to peace and security in the Democratic Republic of the Congo (DRC)?

For more than 25 years, the daily lives of the majority of Congolese people have been marked by mass atrocities. These atrocities have been committed by Congolese and foreign political and non-political actors amidst a climate of widespread impunity, which has undermined citizens' confidence in institutions and the rule of law.

Diverse UN Security Council resolutions have highlighted the fact that the impunity enjoyed by those allegedly responsible for the most serious crimes remains one of the primary obstacles in establishing peace and stability in the DRC. It also largely explains reoccurring cycles of violence and the perpetuation of mass atrocities to this day in Eastern provinces with ongoing conflict, particularly in Ituri and in the Kivus.

However, various peace agreements have systematically sacrificed justice on the altar of a peace, the dividends of which never reach Eastern Congo. Manoeuvring from crisis to crisis, politicians and mediators have given in to the temptation of selling off justice in exchange for conflict-resolution promises, neglecting to address root causes of the

violence, and in particular, this culture of impunity, prioritising short-term stability over lasting peace.

Aiming to put an end to the violence, these political efforts have instead planted seeds of instability and a culture of impunity, incorporating members of Congolese and foreign rebel army groups into the Republic's security and defence forces in accordance with an inclusivity principle laid down in the peace agreements.

Those meant to protect civilians and the territory – the army, police, intelligence services – have often become a source of threat to the population and the nation, bringing disastrous consequences along with civil protection.

Various peace agreements have systematically sacrificed justice on the altar of a peace, the dividends of which never reach Eastern Congo

Underfunded and bungled Disarmament, Demobilisation and Reintegration processes, along with policies of "mixing" and "intermingling" militia within security and defence forces – often including promotions – have instilled insubordination within institutions even at the highest level of the State.

This situation has privileged a system that legitimises violence and crime as a means to gaining power, thus forfeiting any chance of establishing lasting peace.

3.

Will the road to peace in the DRC occur through justice?

We are convinced that the road to lasting peace in the DRC will be built through justice and be as retributive as it will be restorative. Political and security-based solutions have largely failed to protect civilians and stabilise the DRC, despite the presence of one of the largest UN peacekeeping missions for over 20 years.

For this reason, we are tirelessly advocating for the implementation of UN Mapping Report recommendations, to address the most serious violations of human rights and international humanitarian law committed in the DRC between 1993 and 2003, one of the most tragic periods in the country's modern history.

Published in 2010 by the Office of the United Nations High Commissioner for Human Rights, this report advises the use of all transitional justice measures to ensure that the victims' rights to justice, truth, reparations and guarantees of non-repetition are respected. This imperative for justice represents an indispensable prerequisite to break the cycle of violence and impunity, and a *sine qua non* causation for moving forward down the road to sustainable development and lasting peace.

Therefore, we urge the Congolese authorities to adopt a national holistic strategy for transitional justice without

delay, using the support of its privileged partners, including the European Union and France.

This strategy should involve compatible judicial and non-judicial measures which take into account the high-level of involvement of third-party countries in the international and internationalised armed conflicts that have ravaged the DRC. Lastly, it must include a strong gender dimension, given the massive, methodical and systematic acts of sexual violence perpetrated by all warring groups as a weapon of war and strategy of terror.

In addition to the establishment of reparation programmes and truth-seeking research measures, our plea for transitional justice focuses primarily on the need to adopt institutional reforms

to ensure the non-repetition of atrocities, which should include a civil service clean-up operation and a thorough reform of the security and justice sectors in the DRC.

Lastly, the time has come to estab-

lish an International Criminal Court for the DRC, and to install specialised mixed chambers, to bring to justice those responsible for mass crimes committed in the DRC, because the fight against impunity is an indispensable, preliminary factor in reconciliation and the restoration of peace.

The fight against impunity is an indispensable, preliminary factor in reconciliation and the restoration of peace

SEPTEMBER 2021

**Document published by the Constitutional Council
2, rue de Montpensier 75001 Paris**

**Publication Director: Laurent Fabius
Editorial coordination: Sylvie Vormus, Florence Badin
Design and production: Agence Cito
Translation: Corporate Editions
Printing: Frazier**

**Photo credits: Eric Feferberg / AFP Photo (p. 2, p. 4, p. 7, p. 9),
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