2022

ANNUAL REPORT
FRENCH CONSTITUTIONAL COUNCIL

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Interview

Laurent Fabius

President of the Constitutional Council

What were the defining moments for the Constitutional Council in 2022?

2022 was an extremely busy year for the Constitutional Council. Ensuring that the presidential election was properly conducted required several months of attention and efforts on the part of my colleagues and myself. Naturally, we continued to exercise the full range of our other responsibilities throughout this period.
It is worth noting that the Council recorded its 1,000th QPC this year, a milestone that attests to the success of this approach barely a decade after its entry into force.
In March 2022, the College welcomed three new members and bid farewell to three sitting members upon the expiration of their term. Claire Bazy Malaurie, Dominique Lottin and Nicole Maestracci, all of whom have done remarkable work, were replaced by Jacqueline Gourault, Véronique Malbec and François Séners. I would like to pay special tribute to the memory of Nicole Maestracci, who passed away just weeks after leaving the Council. Throughout her life, she devoted her expertise and experience to the cause of justice, both as an institution and a value in itself.

From your perspective, can any particular lessons be drawn from the conduct of the presidential election?

Lessons were indeed learnt, and they appear below in the activity report. One in particular deserves to be highlighted: for a democracy like ours to function, responsibility for the presidential election must lie with a strong and sound institution. In France, this function is performed by the Constitutional Council. We worked throughout 2021 to prepare monitoring operations. At the beginning of 2022, our activity focused on verifying the validity of sponsorships. After each round of voting and before I officially declared the results, we ruled very quickly – within three days – on all electoral disputes. At each step in the process, we pursue a single overarching objective: to ensure the smooth running of the presidential election. Such was the case. The Council kept its distance from the controversy surrounding the anonymity of sponsorships, which subsided once the period for collecting signatures was over. In our assessment of the election, we emphasised that any potential reform in this regard would ideally take place as far in advance as possible ahead of the next election. We also thought it important to draw attention to possible improvements within the existing system, particularly regarding voting conditions for French citizens living abroad.

> “The Council recorded its 1,000th QPC this year, a milestone that attests to the success of this approach.”

What about the legislative elections?

The Council received 99 appeals concerning the results of the legislative elections, which we processed as quickly as possible. As a matter of priority, we examined the admissibility of these appeals in a very short timeframe – less than a month – and were thus able to reject those – 27 – that were clearly unfounded or inadmissible. The others are ruled on with all deliberate haste, following an adversarial procedure in which we take into account the decisions of the National Commission for Campaign Accounts and Political Financing.

During the inauguration ceremony of the President of the Republic, you spoke of "democratic malaise" in France. What did you mean by that?

Yes, I intentionally used that strong expression. Record abstention rates during elections, multiple challenges to the conduct and decisions of political leaders, a climate of dissatisfaction that often goes so far as violence towards our institutions and their representatives: this is the reality, and it is cause for concern. There are many reasons for this state of affairs. Some are linked to broad-based phenomena such as attempts to apply predominantly national solutions to increasingly international problems, or serious threats to the environment, public health crises and even the shadow of war, the severity

> "Democracy must be continuous, multiform and deliberative, in short, a living thing."

of inequalities, growing individualisation further exacerbated by the rise of social networks, etc. Other issues are particularly visible in France, such as the feeling that national elected representatives cannot solve the major problems facing the population, as well as the long-standing habit of stifling Parliament.

The solutions to this "democratic malaise", which is nothing new, are a matter for political debate, but two things are sure in my mind. On the one hand, it must not be left unaddressed: democracy cannot be reduced to going to the polls once every five years to choose a figure to lead the Republic, and then placing all our faith in that one person, regardless of his or her qualities. Democracy must be continuous, multiform and deliberative, in short, a living thing. On the other hand, we must bear in mind that in 2023 the Constitution of the Fifth Republic will set the absolute record for institutional longevity in the history of our country: 65 years. Throughout that time, it has proven itself to be flexible and adaptable – with 24 revisions – in highly diverse circumstances. This is an advantage that should not be overlooked. All in all, even if there are various interpretations of the causes behind this democratic malaise and how best to solve the problem, in my view it must be recognised as a reality and addressed as such.

There is talk on many sides about the need for institutional reform. Some people call for more frequent referenda. What is your view on this issue?

The highest levels of government have expressed a willingness to discuss this issue and take concrete action. There are at least two approaches under consideration. For some, agreement must be reached on all the necessary provisions before the legal process of reform can begin. Others doubt that such a global consensus can be attained, and therefore think it more reasonable to focus on a handful of useful, albeit perhaps less ambitious aspects. That decision is obviously not mine to take. I would, however, like to stress that, whatever the approach, one reform concerning the Constitutional Council would be beneficial, namely the rule that provides for *ex officio* membership of former Presidents of the Republic. This entitlement is no longer justified and appears antithetical to the image of independence that members of the Council must project. I would like to take this opportunity to remind you that, apart from the referendum procedures provided for in Article 11 of our Constitution (the Shared-Initiative Referendum), Article 89 applies when it comes to amending the Constitution. This article requires the National Assembly and the Senate to approve an identical amendment, followed by either a vote of the two chambers united as one, known as Congress, or a referendum. More generally, the referendum is an integral part of the legal arsenal provided by our Constitution. As the history of the Fifth Republic shows, it is not easy to use, but that makes it

all the more important. During the recent elections, various initiatives were discussed regarding this topic. One of the most important issues for our fellow citizens concerns the end of life, a vital social issue that several European countries have already addressed. Of course, crucial choices will have to be made if we are to effectively address this question in France, including the scope of application, the precise wording proposed to affirm this new freedom and the procedure to be implemented.

Following the presidential/legislative election sequence, there is no absolute majority in the National Assembly. Do you see a risk of deadlock, and what is the impact of this situation on the work of the Constitutional Council?

The current parliamentary configuration is singular because, unlike in most previous legislative terms, no single party or declared coalition of parties has an absolute majority in the National Assembly. This does not automatically lead to deadlock when it comes to passing legislation and – as initial examples have shown – it remains possible to gather *ad hoc* majorities on individual provisions. Moreover, our Constitution offers various tools to avoid or overcome potential blockages. Nonetheless, the current situation does add a layer of complexity and encourages both the executive branch and Parliament – the National Assembly and the Senate – to seek compromises. This new state of affairs does not fundamentally alter the work of the Constitutional Council.

The Council was called upon to rule on many disputes between late 2021 and fall of 2022. Which decisions do you find most noteworthy?

Yes, the Council has handled intense and sustained litigation activity in addition to our numerous monitoring operations for the presidential elections. Let me mention a few examples.
In the area of *ex ante* review, the number of referrals remained constant despite the end of the legislative session in the spring of 2022. In particular, the past year has confirmed what we have seen since the beginning of the pandemic, in that almost all laws adopted in the context of the fight against Covid-19 have been referred to us (no fewer than eight times in two years). We ruled in the course of the year that requiring a "health pass" to access certain places for a specified period of time was indeed constitutional. However, we clarified that, should such measures be implemented during an election period, the requirement could not be extended to polling stations or political rallies and activities. We also struck down the provision entitling school principals to be informed of students' vaccination status, an initiative organised without the prior consent of students. When it came to implementing the "vaccine pass", the Council was careful to ensure that the measure would be in force for a limited time and that it would not apply to citizens participating in political rallies, an important distinction to preserve one of the key aspects of the democratic process.
In the area of internal security, we struck down the use of drones by the municipal police, considering that the bill in question violated the right to privacy by allowing the recording and transmission of images involving large numbers of people, in many different places and, in some cases, without their knowledge. Regarding security once again, our decision of 13 August 2022 validated the law requiring platforms to remove publications "of a terrorist nature" within the hour; we considered that this adapted transposition of European Union law contained sufficient guarantees to ensure respect for freedom of expression and communication.
We also ruled, in a decision of 12 August 2022 concerning the abolition of the audiovisual tax, to be offset by a portion of VAT proceeds, that the lawmaking body was responsible for setting the amount of revenue necessary for public broadcasters to carry out the public service missions entrusted to them, the Constitutional Council assessing compliance with these requirements.
Concerning the QPC, the dynamism of litigation shows no signs of waning. We have had to address a wide variety of issues. Labour law: we

struck down the provision excluding employees holding a proxy or delegation of authority from voting in professional elections. Criminal law: we set constitutional limits on the requisition of connection data at different stages of criminal proceedings, preliminary investigation, *flagrante delicto* investigation, judicial inquiry. Local taxation: we struck down various provisions relating to the conditions for offsetting revenue shortfalls for certain municipalities linked to the abolition of the housing tax on primary residences.
On several occasions, QPCs have required the Council to rule on social issues, particularly bioethics with the question of refusing medically assisted reproduction to transgender men. Another such issue is freedom of religion, the subject of our decision of 22 July 2022 which validated the more stringent obligations imposed on religious associations, subject to the reservation that withdrawal of the status of religious association cannot be retroactive; as such, an association that loses said status cannot be required to reimburse the material benefits enjoyed prior to the withdrawal, according to the principles of freedom of association.
QPCs often deal with everyday issues. This was the case, for example, with our decision to partially strike down the ban on motorists sharing real-time traffic information, including with regard to roadside traffic checks. In a context where some European countries are attempting to place national identity above European rule of law, our Air France decision of 15 October 2021 is also significant. Each country can assert its own constitutional identity, provided that it adheres to the common values of the Union. This is why we consider that the Constitutional Council is competent to review the constitutionality of bills intended merely to "draw the necessary consequences from unconditional and precise provisions of a European Union directive" only when such bills call into question a principle inherent to French constitutional identity, and when the principle in question does not benefit from "equivalent protection" under EU law. In the Air France decision, we set out a precise interpretation of such a principle for the first time, without paralysing the application of European Union law. The Constitutional Council thus ensures sound interaction between the supremacy of the Constitution in the domestic legal order and the primacy of European Union law. This vision contributes to greater protection for the rule of law, which reflects complementarity rather than competition between the constitutional and European legal orders, as is apparent from the terms of the Treaty on European Union.

> "On several occasions, QPCs have required the Council to rule on social issues."

Environmental litigation is increasing in France and abroad, including before the Constitutional Council. What are the most striking trends in this area?

The environment is one of the main concerns of citizens and businesses alike; both are therefore logically turning more and more to the courts to adjudicate various environmental disputes. This is a recurring theme in my discussions with my counterparts in foreign supreme courts.
In France, the Constitutional Council is regularly called upon to determine the concrete implications of the Charter for the Environment, which has been an integral part of the Constitution since 2005. This year, for example, we reviewed old provisions of the Mining Code providing for the extension of mining concession rights without taking into account environmental impacts. We considered (QPC decision of 18 February 2022) that these provisions were contrary to Articles 1 and 3 of the Charter for the Environment. Climate disputes have also been brought before administrative courts to spectacular effect, e.g., the "Grande-Synthe" case in the Council of State and the "Affaire du Siècle" in the Paris Administrative Court. In our case, we ruled in strong and unprecedented terms in our decision of 12 August 2022 that, as per the

preamble to the Charter for the Environment, "preservation of the environment must be pursued in the same way as the other interests of the Nation and choices intended to meet the needs of the present must not compromise the ability of future generations to meet their own needs". I have no doubt that this notion of future generations will be the source of many interesting legal considerations.

"The environment is one of the main concerns of citizens and businesses alike; both are therefore logically turning more and more to the courts to adjudicate various environmental disputes."

You broke with tradition by openly criticising the ruling of the Supreme Court of the United States concerning abortion rights and climate. Why?

Indeed, it is rare for the president of a constitutional court to critically assess the decisions of another supreme court. However, you will agree that the recent series of rulings by the U.S. Supreme Court creates a unique situation. Unique both due to the prestige of that Court, which is itself linked to the United States' standing in the world, and also because, in concrete terms, the ruling handed down by the justices is liable to have an unfavourable impact on a global scale.

The two most controversial rulings of the Supreme Court in recent months concern abortion rights and climate change. In both cases, they go against established case law, deny the federal government the power to act by reserving this right to the individual states, and put forth a so-called "originalist" reading of the U.S. Constitution based on the social and political context at the time of its adoption more than 200 years ago. The interpretation long called for by the conservative fringe of the Republican Party has thus prevailed. These decisions demonstrate, among other pitfalls, the dual risk of selecting constitutional judges based on ideological criteria combined with a system of lifetime appointments.

As part of the *Nuit du Droit* (Law Night), the Constitutional Council is organising a meeting on 4 October 2022 on the theme of "War and Law", focused on the Russian invasion of Ukraine. What do you expect from this event?

Organising the *Nuit du Droit* throughout France on 4 October – the anniversary of the promul-

gation of our Constitution – has become something of a tradition. I am very pleased because when I launched this initiative at the start of my presidency, I did not know whether it would succeed. It shows the importance of understanding and explaining the vital significance of law in our society.

The Constitutional Council is devoting this 4 October to the tragically topical theme of "War and Law", in the context of the Russian aggression against Ukraine. Robert Badinter, Karim Khan, Prosecutor at the International Criminal Court, whose insightful interview can be read in these pages, as well as Andriy Kostin, Chief Prosecutor of Ukraine, and Colonel Heulard, Commander of the French evidence-gathering mission, have been invited to speak at the event, moderated by journalist Thomas Sotto. Pianist Khatia Buniatishvili has agreed to enliven the evening with music. I intend to take advantage of this opportunity not only to clearly condemn the Russian invasion, but also to recall the ways and means to punish the decision-makers and perpetrators under the law.

Immediately upon your appointment to the presidency of the Constitutional Council, you identified two priorities for action: transforming the body into a fully fledged court and ensuring openness, both within France and beyond our borders. What steps are being taken in that direction?

As regards the transformation of the Constitutional Council into a fully fledged court, the College and I have taken several decisions that demonstrate tangible progress. I would like to mention, in no particular order, our efforts to simplify and clarify the wording of our decisions; the choice to no longer cloak *amicus curiae* briefs in a shroud of mystery, but rather to publish such "external contributions" alongside the decisions to which they relate; a new culture of dialogue at hearings between the College and the parties to a case to ensure that the Council can take all relevant information into account; the adoption of a set of procedural rules for both *ex ante* review and QPC referrals. An additional step forward, as I mentioned earlier, would be the abolition of *ex officio* membership of former Presidents of the Republic. On the recurring issue of the method of appointing members, I now have quite a lot of experience. While no system can be perfect, the main priority is the concrete relevance of appointments which, in my opinion, must fulfil three main criteria: the competence and experience of appointees of course, as well as what I like to call dual independence: vis-à-vis the powers that be, and vis-à-vis their own personal convictions. That is what makes a person worthy of the title of "Sage".

> "An additional step forward would be the abolition of *ex officio* membership of former Presidents of the Republic."

My other priority – opening up the Council – is moving forward both in France and internationally. This progress owes much to numerous exchanges with our counterparts from all over the world, whether it be our regular meetings with our German, Spanish, Italian, Portuguese and, more broadly, European colleagues, or French-speaking courts brought together within the ACCF (*Association des cours constitutionnelles francophones*, or Association of Francophone Constitutional Courts), for which we provide the General Secretariat. Moreover, we look forward to hosting the association's convention in France in 2024.

With regard to the Council's openness to our fellow citizens, legal specialists and laymen alike, I would mention, in no particular order: the considerable and continuous improvement of our website, the new "QPC portal", regular publication of the new journal *Titre VII*, the *Nuit du Droit*

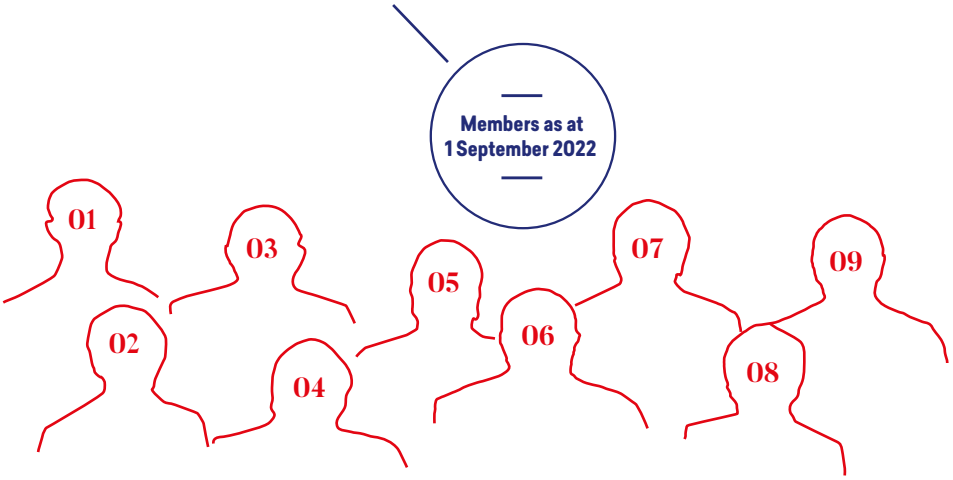
(Law Night), the *Découvrons notre Constitution* (Discovering our Constitution) competition organised together with the French Ministry of National Education, the Council boutique, the publication of a richly illustrated book on the Council, the broadcasting of online educational videos and – a highly effective innovation – holding hearings outside Paris. In 2023, we will continue and even expand these hearings, accompanying them with educational presentations given by Council members in schools, from the elementary to high school level. I also intend to take initiatives aimed at bringing our institution and Parliament closer together, with due regard for the Council's independence. These many initiatives stem from a single desire shared by my colleagues: to make constitutional justice more accessible and highlight it as an important part of our democracy.

On 1 January 2023, a new internet portal dedicated to the QPC will be set up on the Council's website. You have high expectations for this initiative. What concrete benefits will it offer?

The creation of a QPC portal on the Council's website is a milestone in many regards, technical and otherwise. On 1 January 2023, a portal will be set up on the Council's website listing all priority preliminary rulings on the issue of constitutionality raised before all courts.
In 2020, ten years after the entry into force of the QPC, we noted the success of this new procedure but recognised that something was missing: while there was a great deal of information on the QPCs that made it through the Court of Cassation or the Council of State before reaching the Constitutional Council, people were less informed and sometimes even completely unaware of the many QPCs that had been initiated beforehand but that had not been successful. This pointed to a lack not only of information, but quite simply of justice: access to justice and equality before the law.
I thus decided to launch this initiative, the creation of an online QPC portal on the Council's website. It was no easy process, but under the leadership of the Secretary General of the Constitutional Council and with the help of many partners to whom I am very grateful (Court of Cassation, Council of State, Ministry of Justice, judges, lawyers, professors, etc.), we have achieved what I believe to be an excellent result. In concrete terms, this means that, as of 1 January 2023, anyone, whether a legal expert or layman, will be able to access all useful data on every QPC initiated. The portal is managed by a dedicated team and will be continuously updated with new information. I expect this initiative will contribute to deepening and broadening the success of the QPC, bringing it closer than ever to what I like to call the "citizen's prerogative", for the benefit of law and democracy.

Watch the video interview with the President of the Constitutional Council.
urlr.me/g1hYK

Composition of the College



01—François Séners / 02—Véronique Malbec / 03—Jacques Mézard / 04—Jacqueline Gourault /
05—François Pillet / 06—Laurent Fabius, President / 07—Michel Pinault /
08—Corinne Luquiens / 09—Alain Juppé

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.**

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

The composition of the Council is moving toward gender equality.

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

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

Non-renewable terms.

An obligation to exercise reserve.

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

14
Three new members

A triennial renewal of the College took place in 2022. Jacqueline Gourault, Véronique Malbec, and François Séners were appointed in replacement of Claire Bazy Malaurie, Nicole Maestracci, and Dominique Lottin, whose terms ended on 13 March 2022.

Jacqueline Gourault

- Took office on **14 March 2022**
- Appointed on **1 March 2022** by the President of the Republic
- Sworn in on **8 March 2022** before the President of the Republic
- Born on **20 November 1950** in Montoire (in the Loir-et-Cher *département*)

Véronique Malbec

- Took office on **14 March 2022**
- Appointed on **23 February 2022** by the President of the National Assembly
- Sworn in on **8 March 2022** before the President of the Republic
- Born on **1 October 1958** in Mont-de-Marsan (in the Landes *département*)

François Séners

- Took office on **14 March 2022**
- Appointed on **23 February 2022** by the President of the Senate
- Sworn in on **8 March 2022** before the President of the Republic
- Born on **4 February 1958** in Metz (in the Moselle *département*)

Taking the oath of office

Before assuming their new duties, the three new members of the Constitutional Council took the oath of office before the President of the Republic on 8 March 2022.

According to the provisions of Article 3 of Ordinance No. 58-1067 of 7 November 1958 on the Constitutional Council, "Before assuming office, the members nominated to the Constitutional Council take an oath of office before the President of the Republic."

Article 8 of the Ordinance of 7 November 1958 specifies that: "The replacement of members of the Council shall occur at least eight days before their terms end."

In accordance with Article 56 of the Constitution, nominations to the Constitutional Council are submitted for a preliminary hearing before the Parliamentary Law Committees according to the procedure set out in the final paragraph of Article 13, which states that the member nominated by the President of the Republic is to appear before the committees of both houses, while the members nominated by the Presidents of the Senate and the National Assembly are only summoned before the Law Committee of the house in question.

Finally, pursuant to Law No. 2010-838 of 23 July 2010 relative to the application of the fifth paragraph of Article 13 of the Constitution, the hearing "cannot be held less than eight days after the name of the individual under consideration had been made public".

Since the terms of Ms Bazy Malaurie, Ms Maestracci and Ms Lottin were to expire on 13 March 2022 at midnight, the President of the Republic, the President of the National Assembly, and the President of the Senate made it known on 15 February, in application of the rules laid out above, that they respectively intended to nominate Ms Gourault, Ms Malbec, and Mr Séners to replace them.

After their hearing by the relevant parliamentary committees, Ms Gourault and Malbec, and Mr Séners, were appointed to the Constitutional Council by way of acts published in the *Official Journal of the French Republic* on 23 February and 1 March 2022.

After having taken the oath of office on 8 March 2022 at the Élysée Palace before the President of the Republic, Mr Emmanuel Macron, Ms Gourault, Ms Malbec, and Mr Séners officially assumed their duties at the Constitutional Council on Monday 14 March 2022.

Swearing-in ceremony on 8 March 2022 at the Élysée Palace.

The 2022 presidential election

Monitoring the electoral process in numbers

Pursuant to Article 58 of the Constitution, "The Constitutional Council shall ensure the proper conduct of the election of the President of the Republic. It shall examine complaints and shall proclaim the results of the vote." On this basis, the monitoring of the presidential election by the Constitutional Council spans several aspects of the electoral process, from the monitoring of electoral preparations and validation of sponsorships, to the deployment of some two thousand delegates around the country during the two rounds of the election, and the decisions regarding appeals initiated against the electoral process. See below information on the different steps of the Constitutional Council's monitoring of the 2022 presidential election.

11 Constitutional Council decisions revealing publicly the number of sponsorships validated

13,427 sponsorships validated and published by the Constitutional Council out of 13,672 received

2,000 delegates mobilised around the country during the two rounds of voting

10,216 first round votes nullified

20,594 second round votes nullified

Key dates

THE 2022 PRESIDENTIAL ELECTION

1 OCT. 2021

Start of the prohibition of any electoral display, commercial publicity through the press or audiovisual communication, and any advertising campaign with electoral ends linked to the achievements and administration of local authorities.

28 MARCH 2022

Start of the official electoral campaign for the first round, monitoring of audiovisual and digital communication to ensure the equality between candidates regarding reproduction of oral and written communication and of personal presentation, led by the Authority for the Regulation of Audiovisual and Digital Communication (ARCOM).

10 APRIL 2022

First round of voting.

13 APRIL 2022

Constitutional Council decision proclaiming the results of the first round of the election.

24 DECEMBER 2022

Deadline for this Commission to approve, amend or reject the candidates' campaign accounts.

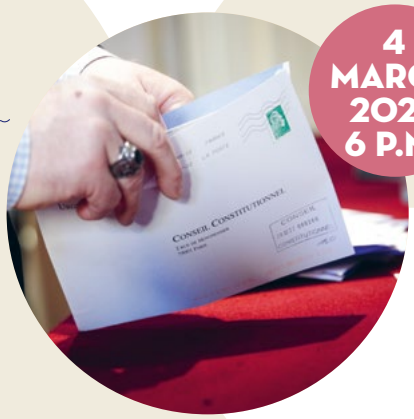
1 JAN. 2022

Start of the monitoring of the principle of equity between candidates regarding reproduction of oral and written communication and of personal presentation, led by the Authority for the Regulation of Audiovisual and Digital Communication (*Autorité de régulation de la communication audiovisuelle et numérique* or ARCOM).

27 JAN. 2022

Publication of the writ for elections for the 10 and 24 April 2022 elections and start of the receipt and processing of sponsorships.

4 MARCH 2022 6 P.M.



Deadline for the Constitutional Council to receive the candidates' sponsorships, declarations of assets and business activities.

7 MARCH 2022

Finalisation by the Constitutional Council of the list of candidates for the presidential election.

24 APRIL 2022

Second round of voting.

27 APRIL 2022

Constitutional Council decision proclaiming the election's final results.

14 MAY 2022

Start of the second term of Mr Emmanuel Macron, President of the Republic.

24 JUNE 2022

Deadline to submit the candidates' campaign accounts before the National Commission for Campaign Accounts and Political Financing (*Commission nationale des comptes de campagne et des financements politiques*).

2017-2022, the presidential election's legal framework evolves

The implementing decrees of Articles 6 and 7 of the Constitution that define the general electoral framework have been subject to several changes between 2017 and 2022, most of them in response to recommendations issued by the Constitutional Council after the elections that took place five years ago.

1

Thus, the Organic Law dated 15 September 2017 on confidence in political life provides that the President of the Republic shall submit a declaration of his assets to the Constitutional Council, which publishes it accompanied by a statement from the Authority on Transparency in Public Life (*Haute autorité pour la transparence de la vie publique*, or HATVP) evaluating the changes in the President's financial situation during his term of office. President Macron's end of term asset declaration was published in the *Official Journal of the French Republic* dated 9 December 2021.

2

The same Organic Law dated 15 September 2017 stipulates that candidates to the presidential election shall submit, alongside their declaration of assets, a declaration of interests and business activities. All these declarations were made public over fifteen days before the presidential election's first round.

3

The Organic Law dated 29 March 2021 setting out various measures relative to the election of the President of the Republic stipulates that candidates to the Presidential election shall ensure the accessibility of their political advertising supports to people with disabilities throughout the campaign.

4

It also compelled candidates to provide a receipt for every donation received through a teleservice implemented by the National Commission for Campaign Accounts and Political Financing.

5

To guarantee clear and transparent information on polls, it created an obligation to include polls' margins of error upon their publication or distribution.

6

It set modalities so that, for the first time, people incarcerated, held in custody, or serving a prison sentence that does not deprive them of their voting rights, could vote through sealed mail-in ballots from their detention centre.

7

Finally, the Decree dated 22 December 2021 bearing on the election of the President of the Republic sought to facilitate proxy voting. The proxy provider and the proxy recipient were no longer required to be registered on the electoral registers of the same municipality. The proxy request could be made online through the "Maprocuration" tool.

The President of the Constitutional Council, Laurent Fabius, proclaims the official result of the 24 April 2022 vote during the President of the Republic's inauguration ceremony, held at the Élysée Palace on 7 May 2022.

In its capacity as judge of the conformity of the presidential election, the Constitutional Council is tasked, among other things, to verify the validity of sponsorships it receives through the mail.

The Constitutional Council's role during the presidential election

From its preparation to its assessment, the monitoring of the 2022 presidential election punctuated the Constitutional Council's work for over eighteen months. We look back at the key phases of this process.

Annabelle Vicomte

Chief Clerk

"The monitoring of the presidential election is a very important aspect of the Constitutional Council's work. It entails full mobilisation of all the General Secretariat's staff to allow the College to work in a serene atmosphere. It is a moment suspended in time, where the strain of the high stakes involved blends with the happiness of working as a team to ensure the process runs smoothly. In this period, clerks are required to demonstrate their expertise in the receipt and processing of the candidate's forms and of the minutes of the departmental commissions, from their arrival at the Constitutional Council to their archiving. Speed, method, and rigor, as well as composure, are expected of clerks in this intense but fascinating period."

Over the course of 2021, the Constitutional Council prepared the mechanisms to monitor the upcoming presidential election.

The Constitutional Council did so within the bounds of its jurisdictional role by ruling, through its Decision No. 2021-815 DC dated 25 March 2021 on the Organic Law setting out various measures related to the election of the President of the Republic, which, through its organic provisions, amended on several points Law No. 62-1292 dated 6 November 1962 on the election of the President of the Republic by universal suffrage (see the 2021 Constitutional Council Annual Report).

Acting in its consultative capacity, the Constitutional Council issued in the first weeks of 2022 nineteen opinions on decrees and memoranda proposed by the Government, the National Commission for Campaign Accounts and Political Financing, and the Authority for the Regulation of Audiovisual and Digital Communication (ARCOM).

The Constitutional Council has sought to modernise its own digital sponsorship processing and electoral monitoring tools by ensuring their coordination with the data collected by the IT system of the Ministry of the Interior. In designing these tools, the Constitutional Council took great care in implementing robust defences against malicious action by seeking out the expertise of the National Agency for the Security of Information Systems (*Agence nationale de la sécurité des systèmes d'information*).

In early 2022, the Constitutional Council published a website dedicated to the presidential election to ensure that every citizen have access to reliable information on the electoral process, and that sponsorships were published as they were validated. The Constitutional Council also made preliminary contact with all the institutions and administrations participating in the organisation of the presidential election.

To be valid, each sponsorship must bear a manuscript signature and be dated and complete.

The College itself conducted several hearings with public officials tasked with distributing electoral documentation and preventing malicious cyberactivity or foreign interference with the electoral process.

In Autumn 2021, President Fabius met with the Minister of Justice and the Vice President of the Council of State to prepare the nomination of some 2,000 Constitutional Council delegates drawn from the ranks of the judiciary to monitor the two rounds of voting. Exchanges, in particular with the First Presidents of Courts of Appeals, were begun to provide all delegates with a full document package providing instructions on their electoral monitoring responsibilities.

These preparations involved several officials from the Constitutional Council's General Secretariat, as well as the ten deputy-rapporteurs of the Council of State and the Court of Audit (*Cour des comptes*) on temporary secondment to the Constitutional Council, who conducted trials ahead of the election to guarantee the fluidity of the upcoming monitoring operations.

From early January until early March 2022, the Constitutional Council's work focused primarily on the validation of sponsorships sent by regular mail.

13,672 letters were received and processed by teams composed of Constitutional Council officials and of the ten deputy-rapporteurs from the Council of State and the Court of Audit to allow the College to issue on Tuesdays and Thursdays a total of eleven updates – immediately made available on the Constitutional Council's website – on the validity of sponsorships.

Based on the final list of validated sponsorships and the asset and interest declarations received from all the candidates, the Constitutional Council established on 7 March 2022 the list of candidates to the election's first round, determining the order of presentation of the candidates on municipal displays by lot.

Stéphane Cottin

Head of the documentation and investigation assistance department

"Constitutional Council officials are given a wide array of tasks over the course of the monitoring and organisation of the presidential election.
These tasks commence months earlier – in fact from the moment the previous electoral process ends – with the collection of feedback from all the relevant institutions and exchanges with the Ministry of Interior based on the Council's public post-election observations. These discussions and analyses form a documentary basis for our successors' work. In the specific context of the presidential election, the role of the documentation and investigation assistance department is to support all the other departments, the deputy-rapporteurs and the College in their processing and investigation. The most accurate and reliable information on how thorny legal and practical questions have been handled in the past needs to be communicated at the right time and well ahead of the start of a new phase of our electoral work."

Éric Quirchove

Bailiff in the administrative and financial department

"I have had the opportunity to witness seven presidential elections and can testify to the improvements in the organisation of the processes deployed by the General Secretariat as it supports the Constitutional Council in its monitoring mission. In 2022, cooperation with La Poste was reinforced during the sponsorship receipt and processing phase, most notably through the implementation of a double envelope-counting system which enabled the perfect traceability of forms received. Over the course of these five weeks, we executed our task – which can seem repetitive – with great rigor and tireless concentration. Our job was facilitated by true anticipation and the organisation of trial runs to test new tools, define each colleague's role and provide adequate training. This year, we were also equipped with renewed IT systems and hardware which I believe have helped significantly improved the handling of the different phases and solidified the process. I will also remember the peculiar and exceptional atmosphere at the Council during the sponsorship phase and the monitoring of the voting. It was a pleasure for me to share my experience with a team that included several newcomers to the process, but who were all fully committed. I have learnt a lot from these colleagues, and in any case feel I have played a part in a historic event."

The sponsorship may nominate only one candidate.

Then, in April 2022, the Constitutional Council ruled upon all the appeals filed against the election in under three days after each round of voting. In its Decisions No. 2022-195 PDR dated 13 April 2022 and No. 2022-197 PDR dated 27 April 2022, the Constitutional Council ruled on the basis of the census commission and voting reports, which contained complaints filed by voters and their exhibits for all French *départements*, French Polynesia, Wallis and Futuna Islands, New Caledonia, Saint Martin, Saint Barthélemy and Saint Pierre and Miquelon, as well as the results registered in the reports of electoral commissions and complaints filed by voters and mentioned in the voting reports, as well as appeals directly received by the Constitutional Council and that were corroborated in writing by Constitutional Council delegates.

On 16 June 2022, the Constitutional Council published in Decision No. 2022-198 PDR its observations on the presidential election of 10 and 24 April 2022, in which it highlighted that "despite the particular climate created as a result of the Covid-19 health crisis and the war in Ukraine, [the election took place] in good conditions." However, it called for new improvements to the current framework, including with respect to the voting of French citizens abroad.

More information on the website dedicated to the 2022 presidential election.

presidentielle2022.conseil-constitutionnel.fr

Jean-François Beynel

First President of the Versailles Court of Appeals

The Constitutional Council's delegates

The Constitutional Council sent delegates into the field to oversee voting operations at polling stations. The First President of a Court of Appeals and a Constitutional Council delegate explain their role.

In application of Article 48 of Ordinance No. 58-1067 dated 7 November 1958 on the Constitutional Council, with the designation of the Constitutional Council's local delegates, I appointed 96 delegates in the Versailles Court of Appeals' purview to oversee the voting operations for the presidential election on 10 and 24 April 2022.

The appointments must take into account available staff but also the density of zones overseen, by canton or group of cantons, by municipality or group of municipalities, and the time between the poll's opening and the sending of the vote counts.

> “Every polling station was visited, and all incidents were communicated to the Constitutional Council.”

During the poll, the 96 delegates designated for the two rounds were split in the following way:

- Yvelines *département*: 32
- Hauts-de-Seine *département*: 26
- Val-d’Oise *département*: 22
- Eure-et-Loir *département*: 16

Upon their nomination, a kit designed by the Constitutional Council containing a mandate drafted by the First Presidency staff and essential documentation pertaining to their mission was given to each delegate.

On the day of the elections, I implemented a telephone hotline for local delegates to report any issues at polling stations or obtain any information they might need.

Upon visiting the polling stations, they had to report, by any means and without delay:

- Any irregularity that could jeopardise the voting’s sincerity.
- Any impediment to their mission created by the president of the polling station or other members of the polling station.
- Any irregularity that did not end despite their intervention.

Every polling station was visited, and all incidents were communicated to the Constitutional Council.

I would like to extend my warmest thanks to the 96 magistrates for their dedication and availability displayed over the course of this electoral process, thereby enabling the smooth functioning of our democracy.

Polling station in Mamoudzou on 24 April 2022.

Anne Courrèges

Constitutional Council delegate in Mayotte

“As a delegate, we verify simple things, for instance that the ballot box is transparent, that it has two locks, that the keys are in two different pockets – that of the polling station’s president and that of one of his assessors – so that no one can open the ballot box and add any ballot, or that there are enough booths. All these little details are what makes the voting process valid.”

Assessment and recommendations

In its Decision No. 2022-198 PDR dated 16 June 2022, the Constitutional Council formulated, as in previous elections, a series of observations regarding the voting that took place on 10 and 24 April 2022. Below are the main conclusions.

Despite the health and international context, voting overall took place in good conditions.

The Constitutional Council considers that an analysis of sponsorships tempers statements made according to which publicising the sponsorships (the result of a choice by Parliament in 2016) would greatly dissuade elected officials from sponsoring candidates or would drastically restrict the representation of candidates representing the main currents of thought in national politics.

The Constitutional Council highlights that any reform of this aspect of the election should ideally be made as early as possible before the next election, if only to make the implementation of any innovation feasible.

In light of the risks of digital fraud and the consequences such fraud may have, the Constitutional Council also wishes to draw the Government's attention to the necessity of taking great precautions when considering the electronic transmission of sponsorships (which should enter into effect by the next presidential election pursuant to Article 3 of Organic Law No. 2021-335 dated 29 March 2021). The Council stresses that it would be appropriate to at least consider the dual transmission – electronically and through regular mail – of sponsorships to the Constitutional Council.

The Council's plea following the 2017 presidential election that technical, regulatory, and legislative responses be designed to fend off digital threats to the campaign and electoral process was heard and has led to the implementation of useful new practices, in particular with respect to the risks of foreign interference.

While no particular incidents marred the campaign, the reality of these threats justifies that these analysis and prevention mechanisms be maintained going forward.

With respect to the voting process, the Constitutional Council notes that the centralised management of proxies through the Unified Electoral Register (*Répertoire Électoral Unique* or REU), which enables the automatic control of the proxy provider and the proxy recipient, as well as the creation of an electronic connection to the REU, contributed to facilitating proxy voting for both voters and municipalities.

However, the absence of deadlines for the filing of proxies led to some of them, filed shortly before the vote, to be disregarded

by the polling stations. The Constitutional Council's recommendation, as in its previous observations, to consider setting a deadline for proxies remains valid.

With respect to the vote of French citizens abroad, the Constitutional Council highlights once again the measures that could be implemented to improve the situation, today characterised by long queues in some of the consulates or polling stations. It also asks that a modernisation of digital mechanisms used by the Ministry of Foreign Affairs to ensure, in collaboration with the Ministry of Interior, that voting abroad take place in good conditions, be considered shortly. Furthermore, having been informed of the impossibility of opening polling stations in China and the Comoros for, respectively, health and climate-related reasons, the Constitutional Council calls the Government's attention to the benefits of considering how the respect for these citizens' voting rights could be preserved in such situations.

Finally, the Constitutional Council observes that the monitoring operations it conducted reveal, overall, the adequate functioning of the electoral process and, for the presidential election, a great sense of civic duty among mayors, members of the polling stations and observers. After having tallied the main irregularities observed during the vote, it also wishes to stress the importance for presidents of polling stations of ensuring compliance with the rules governing the electoral process, as well as the importance of having the Constitutional Council delegates solve any reported issues upon their visit to the polling stations.

"The Constitutional Council observes that the monitoring operations it conducted reveal, overall, the adequate functioning of the electoral process."

Electors queuing up to vote at the French consulate in Puducherry on 10 April 2022.

The Council's decisions

As the arbiter of the constitutionality of legislation, the Constitutional Council may review the consistency of laws with the Constitution 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 (QPC). The Constitutional Council hands down other kinds of decisions, including those relating to presidential and parliamentary elections, the reclassification of legislative provisions and the status of parliamentarians, as well as the Constitutional Council's own operations. The following pages provide an outline of some of the most noteworthy decisions that were handed down in 2021-2022. They include the 1,000th QPC recorded by the Constitutional Council, and Decision No. 2022-152 ORGA, which dealt with the rules of procedure applying to the *ex ante* constitutional review.

DC referrals between 1 September 2021 and 31 August 2022

27

DC decisions

18

8

findings of constitutionality

findings of partial non-constitutionality

10

The *ex ante* constitutional review

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 Conformity with the Constitution" (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 2021 and August 2022.

The Covid-19 crisis

Decision No. 2021-828 DC of 9 November 2021
Act Concerning Various Health Surveillance Measures

Decision No. 2022-835 DC of 21 January 2022
Act Strengthening the Mechanisms Employed in the Management of the Public Health Crisis and Amending the Public Health Code

Decision No. 2022-840 DC of 30 July 2022
Act Terminating the Emergency Arrangements Established to Combat the Covid-19 Epidemic

> "The courts were responsible for ensuring that such measures were appropriate, necessary and proportionate to the aims pursued."

As was the case in the previous two years, laws relating to the management of the health crisis were referred to the Constitutional Council on several occasions, prior to their promulgation. In November 2021, the Constitutional Council received four appeals, two of which were lodged by more than sixty deputies and the other two by more than sixty senators, concerning six Articles of the Act Concerning Various Health Surveillance Measures.

In its Decision No. 2021-828 DC of 9 November 2021, the Constitutional Council dealt with the extension of the period during which the Prime Minister could introduce certain measures in the interest of public health and for the sole purpose of combating the spread of the Covid-19 epidemic and, in addition, make access to certain places, establishments, offices or events conditional upon the presentation of a "health pass". The Constitutional Council ruled, firstly, that Parliament had sought to empower government authorities to take measures to combat the spread of the Covid-19 epidemic.

Parliament had in fact determined, particularly in the light of the opinion issued on 6 October 2022 by the Scientific Committee (as provided for under Article L. 3131-19 of the Public Health Code), that there was a significant risk of the epidemic spreading nationwide until 31 July 2022.

The Constitutional Council noted in this regard that it does not have a general power of assessment and determination equivalent to that exercised by Parliament and that it is not within its remit to challenge the Parliament's assessment of this risk, assuming that, as in the present case, the assessment formed by Parliament is not, in the light of current knowledge, manifestly inadequate in relation to the current situation.

Secondly, the Constitutional Council noted that the measures that might be introduced under these arrangements could only be taken in the interests of public health and for the sole purpose of combating the spread of the Covid-19 epidemic. They had to be strictly proportionate to the health risks involved and appropriate in terms of time and place. They were to be terminated without delay once they were no longer necessary. The courts were responsible for ensuring that such measures were appropriate, necessary and proportionate to the aims pursued.

It also ruled that, although these measures could be imposed during an election period, the presentation of a "health pass" could not be made mandatory for access to polling stations or to political meetings and activities. Moreover, these measures could be subject to a summary application for right to appeal to ensure that the regulatory authorities were respecting the right of collective expression of ideas and opinions.

Furthermore, paragraph VI of Article 1 of the 31 May 2021 Act provided that Parliament was to be informed without delay of the measures adopted by the Government, which was specifically required to submit, on 15 February 2022 and then on 15 May 2022, a report outlining these measures and the reasons for continuing to apply certain of them if the situation so warranted, along with the details of the main elements of its efforts to combat the spread of the Covid-19 epidemic. This report could be debated in a Standing Committee or in a public session.

Lastly, the contested provisions had neither the objective nor the effect of depriving Parliament of its right to meet under the circumstances provided for in Articles 28 and 29 of the Constitution, to oversee the activities of the Government and to pass legislation.

On the basis of all these reasons, the Constitutional Council concluded that the contested provisions achieved an appropriate balance between the constitutional objective of protecting public health and respect for the rights and freedoms of all persons residing within the territory of the Republic.

View the complete file relating to Decision No. 2021-828 DC on the Constitutional Council's website.
urlr.me/2rqtn

With regard to Article 9 of the Act, which allowed school principals to access and process medical information about individual students, the Constitutional Council observed that the right enshrined in Article 2 of the 1789 Declaration of the Rights of Man and of the Citizen implies a right to privacy. This right requires that the collection, recording, storage, viewing and disclosure of personal data must be warranted on public interest grounds and carried out in a manner that is adequate and proportionate to that aim. When personal data of a medical nature are involved, a high level of care must be observed in conducting these operations and in determining the methods by which they are carried out.

The Constitutional Council ruled that, in adopting these provisions, Parliament had sought to combat the Covid-19 epidemic by implementing health protocols in schools. It thus pursued the constitutional objective of safeguarding public health.

First and foremost, however, the contested provisions allowed access not only to information about students' virological and vaccination status, but also to information about any contacts they had had with contaminated persons. They also made it possible to process such data, without the prior consent of the students concerned or,

> "Parliament had sought to combat the Covid-19 epidemic by implementing health protocols in schools."

if they were minors, the prior consent of their legal representatives.

Secondly, these provisions authorised the accessing and processing of such data both by the principals of primary and secondary schools and by "persons whom they authorise specifically for this purpose". The medical information in question might therefore be disclosed to a large number of people, whose authorisation was not subject to any particular criteria or covered by any guarantee regarding the safeguarding of medical confidentiality.

Lastly, the Constitutional Council ruled that, by confining itself to providing that the processing of such data would make it possible to organise teaching procedures in such a way as to obviate the risk of the virus spreading, Parliament had not spelled out in sufficient detail the purposes that these provisions were intended to serve.

Based on all of these reasons, the Constitutional Council held that these provisions were disproportionately prejudicial to the right to privacy, and declared them to be unconstitutional.

Then, in January 2022, the Constitutional Council received two appeals lodged by more than sixty deputies and more than sixty senators, respectively, concerning several provisions of the Act Strengthening the Mechanisms Employed in the Management of the Public Health Crisis and Amending the Public Health Code.

In its Decision No. 2022-835 DC of 21 January 2022, the Constitutional Council specifically confirmed the constitutionality of the provisions which made access to certain places conditional upon the presentation of a "vaccine pass", while stipulating that those provisions must be terminated once they were no longer necessary and struck down the provision which required the presentation of a "health pass" in order to gain access to a political meeting.

In reaching its decision on the provisions relating to the "health pass", the Constitutional Council pointed out that, in the words of paragraph 11 of the Preamble to the 1946 Constitution, the Nation "shall guarantee to all… the safeguarding of their health". The safeguarding of health is thus an objective of constitutional value.

Ensuring that there is a proper balance between this objective of constitutional value and compliance with the rights and freedoms that are guaranteed under the Constitution is the responsibility of Parliament. 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.

In that regard, the Constitutional Council ruled that the contested provisions, which could potentially be used to restrict access to certain places, infringed freedom of movement and, insofar as they might place limits on freedom of assembly,

also infringed the right of collective expression of ideas and opinions.

First and foremost, however, by adopting the contested provisions, Parliament had aimed to enable government authorities to take measures designed to combat the Covid-19 epidemic through vaccination. It thus pursued the constitutional objective of safeguarding public health.

The Constitutional Council also noted that the measures permitted under the disputed provisions could only be imposed until 31 July 2022, a period during which Parliament had concluded, in view of the dynamics of the epidemic, the foreseeable pace of the vaccination campaign and the emergence of new, more contagious variants of the virus, that there would continue to be a significant risk of the epidemic spreading.

Secondly, the Constitutional Council noted that Parliament had limited the application of these provisions to activities which involve a large number of people being present in the same place at the same time and which thus entail an increased risk of spreading the virus; and to places in which the very nature of the activity carried out poses a high risk of spreading the virus.

Thirdly, although the contested provisions provided that public access to certain places could be made conditional upon the presentation of proof of vaccination status, the Constitutional Council ruled that, having regard to the nature of the places and of the activities carried out in them, those provisions could not be seen as an obligation to undergo vaccination.

Finally, although Parliament had provided that the Prime Minister could, in certain cases, require the presentation of both proof of vaccination status and the result of a virological screening test that does not indicate Covid-19 positivity, it had only granted such a power in respect of activities which, by their very nature, are incapable of guaranteeing the implementation of measures to prevent the risk of the spread of Covid-19.

By way of an interpretative reservation, the Constitutional Council nevertheless ruled that these provisions could not apply to long-distance travel on inter-regional public transport without infringing freedom of movement.

With particular regard to these grounds, the Constitutional Council concluded that, subject to the aforementioned interpretative reservation, the contested provisions achieved an appropriate balance between the constitutional requirements referred to above.

> “The Constitutional Council pointed out that, in the words of paragraph 11 of the Preamble to the 1946 Constitution, the Nation “shall guarantee to all... the safeguarding of their health”.”

View the complete file relating to Decision No. 2022-835 DC on the Constitutional Council’s website.
urlr.me/CYXKw

The petitioning deputies also challenged the provisions of Article 1 of the Act in question, which made access to a political meeting subject to the presentation of a “health pass”.

In examining these provisions, the Constitutional Council drew attention to the fact that, under Article 11 of the 1789 Declaration: “The free communication of thoughts and opinions is one of the most precious rights of man: every citizen may therefore speak, write and print freely,but shall be accountable for such abuses of this freedom as shall be defined by law”. Freedom of expression and communication, from which the right to collective expression of ideas and opinions is derived, is all the more precious in that its exercise is a condition of democracy and one of the guarantees that

other rights and freedoms are respected. It follows that any interference with the exercise of this freedom and this right must be necessary, appropriate and proportionate to the aim pursued.

> "Freedom of expression and communication, from which the right to collective expression of ideas and opinions is derived, is all the more precious in that its exercise is a condition of democracy and one of the guarantees that other rights and freedoms are respected."

It is the responsibility of Parliament to ensure that a proper balance is achieved between the constitutional objective of safeguarding public health and compliance with the rights and freedoms that are guaranteed under the Constitution. These rights and freedoms include the right to privacy guaranteed by Article 2 of the 1789 Declaration, and the right, under Article 11 of the Declaration, to the collective expression of ideas and opinions.

On this basis, the Constitutional Council ruled that, in adopting the contested provisions, Parliament had sought to make the presentation of a "health pass" mandatory for access to meetings which posed an increased risk of spreading the epidemic through the random gathering of a large number of people likely to come from distant places. It thus pursued the constitutional objective of safeguarding public health.

The Constitutional Council noted, however, that the contested provisions had not made the taking of such measures by the organiser of the political meeting subject to the condition that they be taken in the interest of public health and for the sole purpose of combating the Covid-19 epidemic, nor that the health situation justify them with regard to the circulation of the virus or its consequences on the health system, nor even that these measures be strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place. To that extent, it was ruled that the contested provisions could be distinguished from those which specified the conditions under which the Prime Minister may make access to certain places subject to the presentation of health documents.

The Constitutional Council concluded that, this being the case, the contested provisions did not achieve an appropriate balance between the aforementioned constitutional requirements and ruled that they were unconstitutional.

Lastly, in its Decision No. 2022-840 DC of 30 July 2022, handed down in response to an appeal lodged by more than sixty deputies, the Constitutional Council ruled on a number of provisions of Article 3 of the Act Terminating the Emergency Arrangements Established to Combat the Covid-19 Epidemic.

The provisions of paragraph I of the Article in question had been challenged, in particular, on the grounds that they allowed the Prime Minister to exercise control over travel to metropolitan France from its overseas communities whenever a new variant had appeared in the latter, without providing for the same option in the case of travel to the overseas communities when a new variant had emerged in metropolitan France. The petitioning deputies maintained that this resulted in unwarranted differential treatment based solely on the point of departure.

> “The Constitutional Council ruled on a number of provisions of Article 3 of the Act Terminating the Emergency Arrangements Established to Combat the Covid-19 Epidemic.”

In examining this criticism in the light of the principle of equality before the law, the Constitutional Council noted that the contested provisions of paragraph I of Article 3 do not empower the Prime Minister to require persons wishing to travel to the overseas communities from metropolitan France to produce a virological screening result that does not indicate Covid-19 positivity in circumstances where a new variant of Covid-19 likely to constitute a serious health threat appears and circulates in metropolitan France. At the same time, it noted that paragraph II of this Article does allow the Prime Minister to impose this measure on persons wishing to travel to one of the overseas communities from metropolitan France where a risk of saturation of the health system of one of these communities has been identified. However, the emergence and circulation in metropolitan France of a new variant of Covid-19 likely to constitute a serious health threat is bound to represent such a risk.

View the complete file relating to Decision No. 2022-840 DC on the Constitutional Council’s website.
urlr.me/NkJQV

On these grounds, the Constitutional Council dismissed the criticism that had been levelled at the first subparagraph of Article 3(I) of the Act Terminating the Emergency Arrangements Established to Combat the Covid-19 Epidemic and held that it was consistent with the Constitution.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The Judiciary

Decision No. 2021-829 DC of 17 December 2021

Organic Law on Confidence in the Judiciary

In its Decision No. 2021-829 DC of 17 December 2021, the Constitutional Council ruled on the Organic Law on Confidence in the Judiciary, which the Prime Minister had referred to it in accordance with the fifth paragraph of Article 46 and the first paragraph of Article 61 of the Constitution.

In particular, it struck down the provisions relating to the recording and broadcasting of hearings before the Court of Justice of the Republic, on the grounds that they had not provided sufficient details of the conditions and procedures for such recording.

Article 4 of the Organic Law stipulated that "The sound or audiovisual recording of hearings before the Court of Justice of the Republic shall be a legal requirement. Insofar as they are not inconsistent with the first sentence of this paragraph, the rules and sanctions laid down in Article 38 *quater* of the 29 July 1881 Freedom of the Press Act with regard to the recording and broadcasting of hearings shall apply."

The Constitutional Council noted in the decision which examined these provisions that, according to Article 34 of the Constitution, the law determines the rules concerning the fundamental guarantees granted to citizens for the exercise of public freedoms, as well as those concerning criminal procedure. It is incumbent upon Parliament to exercise fully the powers conferred on it by the Constitution, in particular Article 34, without passing on to administrative or judicial authorities the task of laying down rules the determination of which the Constitution has entrusted only to the law.

View the complete file relating to Decision No. 2021-829 DC on the Constitutional Council's website.
urlr.me/6dyKm

Against this background, the Constitutional Council held that, in view of the public interest in such proceedings, Parliament is empowered to authorise the recording of Court of Justice of the Republic hearings so that these hearings can be broadcast. It is, however, then up to Parliament to adopt provisions that guarantee the right to privacy and the presumption of innocence, which derive from Articles 2 and 9 of the Declaration of 1789.

The Constitutional Council ruled that, by providing that the recording of Court of Justice of the Republic hearings is "a matter of right", without specifically determining the conditions and procedures for such recording, Parliament had misinterpreted the scope of its competence and thereby stripped of legal guarantees the requirements arising from Articles 2 and 9 of the 1789 Declaration.

It accordingly ruled that Article 4 of the Organic Law was unconstitutional.

On the other hand, the Constitutional Council accepted – subject to three interpretative reservations – the constitutionality of Article 1 of this same Organic law amending the provisions relating to the temporary part-time integration into the judiciary of magistrates working on a temporary basis and of honorary magistrates. It found that Article 3 of the Organic Law on the status of honorary attorneys who may be appointed to perform the duties of assessors in departmental criminal courts was consistent with the Constitution.

The Social Security Deficit

Decision No. 2021-832 DC of 16 December 2021
The Social Security Financing Act

> "The Constitutional Council dismissed the complaint that the obligation to maintain the financial sustainability of social security had been breached."

In its Decision No. 2021-832 DC of 16 December 2021, issued in response to a referral lodged by more than sixty senators, the Constitutional Council handed down a ruling on the Social Security Financing Act for 2022.

The petitioning senators objected to Article 6 of the Act, which amended Article 50 of the 14 December 2020 Social Security Financing Act for 2021 thus leaving open until 31 December 2028 the option, for health care institutions which provide a public hospital service, to enter into a contract with regional health agencies in order to obtain a grant from the health insurance funds.

As to the merits of the appeal, it was contended that this Article implemented provisions that would make the *Caisse d'amortissement de la dette sociale* (the Social Security Deficit Amortisation Fund, CADES) responsible for the grants paid to these establishments by the health insurance bodies, in contravention of the obligation to maintain the financial sustainability of the social security system. The petitioning senators therefore called on the Constitutional Council to examine the constitutionality of the previously enacted provisions of Article 50 of the 14 December 2020 Act and of part C of paragraph II *septies* of Article 4 of the 24 January 1996 Ordinance on the funding of the social security deficit.

The Constitutional Council noted that the constitutionality of an Act that has already been promulgated may be reviewed whenever any legislative provisions which amend or supplement it, or affect its sphere of application, are being reviewed.

With that consideration duly recorded, it held that the contested provisions of Article 6 of the Act merely amend Article 50 of the 14 December 2020 Act in such a way as to postpone the deadline for the conclusion of contracts

between regional health agencies and public health establishments. They do not modify the previously enacted provisions of part C of paragraph II *septies* of Article 4 of the Ordinance of 24 January 1996, which require CADES to cover the amount of the grants paid by the health insurance agencies to health care institutions. They do not supplement them, nor do they affect their scope of application. The grounds for challenging the constitutionality of these provisions were therefore not met.

For these reasons, the Constitutional Council dismissed the complaint that the obligation to maintain the financial sustainability of social security had been breached.

A challenge was also lodged in relation to Article 35, which approves the Report on the Financing of Social Security for the period 2022-2025 accompanying the Act referred for review, as required under paragraph I of Article L.O. 111-4 of the Social Security Code.

The petitioning senators claimed that these provisions failed to comply with the requirements of Article 4 *bis* of the Ordinance of 24 January 1996, pursuant to which any new transfer of debt to CADES must be accompanied by an increase in its revenues so as to avoid extending the amortisation period of the social security deficit beyond 31 December 2033. In support of this claim, they argued that the four-year financial trajectory described in this report was "manifestly incompatible" with the amortisation of the social security deficit by 31 December 2033, since the deficits forecast for the coming years would necessarily entail the transfer of new debt to CADES.

The Constitutional Council noted that, through the operation of Article 4 *bis* of the Ordinance of 24 January 1996, any new transfer of debt to CADES must be accompanied by an increase in its revenues, so as to avoid extending the amortisation period of the social security deficit beyond 31 December 2033.

It determined that, pursuant to paragraph I of Article L.O. 111-4 of the Social Security Code, the contested provisions were, however, limited to approving the report contained in Annex B to the Act referred for review, which sets out, for the next four years, the revenue forecasts and expenditure targets for each branch of the compulsory basic social security schemes and the general scheme, the revenue and expenditure forecasts of the bodies contributing to the financing of these schemes, as well as the national health insurance expenditure target.

The contested provisions thus had neither the objective nor the effect of effecting new debt transfers to CADES.

On those grounds, the Constitutional Council dismissed the challenge alleging failure to comply with Article 4 *bis* of the 24 January 1996 Ordinance.

View the complete file relating to Decision No. 2021-832 DC on the Constitutional Council's website.
urlr.me/Hjb4g

Government finances

Decision No. 2021-831 DC of 23 December 2021

Organic Law on the Modernisation of Government Finance Management

In its Decision No. 2021-831 DC of 23 December 2021, the Constitutional Council partially struck down Article 26 of the Organic Law on the Modernisation of Government Finance Management, which was referred to it by the Prime Minister in accordance with the fifth paragraph of Article 46 and the first paragraph of Article 61 of the Constitution, and imposed reservations on the interpretation of some of its other provisions.

Article 26 of this organic law amended Article 57 of the 1 August 2001 Organic Law on Finance Acts (the so-called "LOLF"), specifically so as to enable the chairman and rapporteur of the Finance Committees of the two chambers, as well as any State employees appointed by them, to access information relating to official statistics or collected by the tax authorities.

The Constitutional Council observed that, pursuant to Article 2 of the 1789 Declaration of the Rights of Man and of the Citizen, "The purpose of all political associations is to preserve the natural and inalienable rights of man. These rights are liberty, property, security and resistance to oppression". The freedom proclaimed by this Article implies the right to privacy. To comply with the Constitution, infringements of this right must be warranted by a public interest imperative and implemented in a manner that is adequate and proportionate to that objective.

By that yardstick, the Constitutional Council noted that the third new paragraph of Article 57 of the Organic Law of 1 August 2001 authorised the chairman and the rapporteur of the National Assembly and Senate Finance Committees, "as well as any State employees whom they jointly appoint", to have access to all information relating to official statistics and to information collected in connection with the ascertainment of the tax base, the control, collection or disputes relating to taxes, duties, fees and charges and which is, where applicable, cov-

> "Parliament had sought to strengthen the powers conferred on the Finance Committees of each Chamber to monitor the implementation of the Finance Acts."

ered by the requirement for statistical or taxation confidentiality. It noted that the data likely to be disclosed in this context may contain information that could breach the right to privacy of the persons concerned.

The Constitutional Council ruled, firstly, that in adopting these provisions, Parliament had sought to strengthen the powers conferred on the Finance Committees of each Chamber to monitor the implementation of the Finance Acts and to assess any issue relating to government finances. These provisions thus aim – in accordance with the first paragraph of Article 47 of the Constitution – to implement the information and control procedures on the management of government finances necessary for an informed vote by Parliament on the Finance Bills.

Secondly, it noted that the information disclosed may not breach the confidentiality of judicial investigations or medical confidentiality. Moreover, access to this information must be provided under arrangements that safeguard its confidentiality, and the findings derived from the use of this information may under no circumstances refer to the persons to whom it relates or allow such persons to be identified.

Lastly, the Constitutional Council ruled that, even though Parliament could, in view of their functions, grant this right of access to the chairman and rapporteur of the National Assembly and Senate Finance Committees, it could not, on the other hand, without disproportionately prejudicing the right to privacy, provide for this right to be granted under the same conditions to "any State employees whom they jointly appoint for this purpose".

The Constitutional Council accordingly declared to be unconstitutional the words "and any State employees (*agents publics*) whom they jointly appoint for this purpose" which appear in the first sentence of the second subparagraph of Article 26(2°) of the Act that had been referred for review.

With regard to Article 17 of the Organic Law, relating to the deadline for tabling the Finance Bill and its appendices, and Article 20, bringing forward to 1 May of the year following that of the implementation of the budget the date of tabling of the bill relating to management outcomes and approving the accounts for the year and its appendices, the Constitutional Council ruled that a possible delay in the tabling of part or all of these appendices may not constitute an obstacle to the consideration of these bills. The constitutionality of these Finance Acts would then be assessed with regard both to the requirements of the continuity of national public life and the need for transparency in the examination of Finance Acts throughout the period of that examination.

With regard to Article 61 of the Organic Law of 1 August 2001, as revised by paragraph I of Article 30 of the Act referred for review and providing for the High Council for State Finance to be consulted on various categories of Finance Bills, the Constitutional Council held that if, as a result of the circumstances, the ruling of the High Council for State Finance was handed down after that of the Council of State, the Constitutional Council would, if necessary, assess compliance with the obligation to consult the High Council in the light of the requirements of the continuity of national public life.

View the complete file relating to Decision No. 2021-831 DC on the Constitutional Council's website.
urlr.me/RxPhF

The transparency of the Finance Acts

Decision No. 2021-833 DC of 28 December 2021
Finance Act for 2022

> "The Constitutional Council recalled that the transparency of the Finance Act for the year is characterised by the absence of any intention to distort the broad outlines of the financial stability that it determines."

In its Decision No. 2021-833 DC of 28 December 2021, the Constitutional Council ruled on the Finance Act for 2022, having received three referrals of which two were lodged by more than sixty deputies and the third was lodged by more than sixty senators. It dismissed the challenges relating to the transparency of the Act but struck down several of its provisions on the grounds that they had been improperly adopted.

The petitioners in the three appeals argued that the Act in question did not comply with this principle, specifically because the bill that was tabled did not take account of the budgetary consequences of several new measures announced by the Government before it was tabled. Those measures included the "France 2030" investment plan, the measure relating to commitment income for young people, and the "Grand Marseille" plan. In this regard, they referred to the position expressed on 17 September 2021 by the High Council for State Finance, in which the latter took the view that it could not, for that very reason, "give a fully informed opinion on the government finance forecasts for 2022".

Article 32 of the 1 August 2001 Organic Law on Finance Acts ("LOLF") states that "Finance Acts shall present all the resources and expenses of the State in a transparent manner. Their transparency is assessed in light of the information available and the forecasts that can reasonably be derived from it". With reference to that requirement, the Constitutional Council recalled that the transparency of the Finance Act for the year is characterised by the absence of any intention to distort the broad outlines of the financial stability that it determines. The requirement for transparency that is an integral element of the examination

of this Act is assessed during the entire period of examination.

In this respect, the Constitutional Council ruled, firstly, that revenue and expenditure estimates must initially be drawn up by the Government having regard to the information available on the date of submission of the Finance Bill. The Government must inform Parliament, during the examination of this bill, of any legal or factual circumstances that might have implications for the estimates and, in such cases, make the necessary corrections. It is incumbent on Parliament, when approving these estimates, to take account of all the information of which it is aware, and which has an impact on the Article on Budget Sustainability.

The Constitutional Council noted that the new measures had been the subject of simple announcements on the date of submission of the Finance Bill. The Government had thus been able to take account of the budgetary consequences of these measures during the examination of the text, without breaching the above-mentioned requirements.

The Constitutional Council ruled secondly that, having been consulted on the initial bill and then on the bill which took account of the new measures, the High Council for State Finance had, in its above-mentioned opinions of 17 September 2021 and 29 October 2021, considered the growth forecasts for 2021 and 2022 to be prudent and plausible, respectively. It did not, on the other hand, emerge from the other material submitted to the Constitutional Council that the economic assumptions on which the Finance Act was based were tainted by an intention to distort the broad outlines of the financial stability that it determined.

For these reasons in particular, the Constitutional Council dismissed the complaint that the Finance Act in question was lacking in transparency.

One of the appeals, lodged by more than sixty deputies, also challenged the fact that paragraph IV of Article 165 of the Act referred to, relating to State support for the Les Mines de potasse d'Alsace company, which is responsible for securing the underground storage of certain dangerous products, fell within the scope of the Finance Act.

View the complete file relating to Decision No. 2021-833 DC on the Constitutional Council's website.

urlr.me/TRJXG

The Constitutional Council noted that, under Article 34 of the Constitution: "Finance Acts determine the resources and expenditure of the State under the conditions and subject to the reservations provided for by an organic law". The first paragraph of Article 47 of the Constitution states: "Parliament shall vote on Finance Bills in accordance with the conditions laid down by an organic law". The Organic Law of 1 August 2001 determines the content of the Finance Act. In particular, Article 34(II)(5°) provides that the second part of the Finance Act for the year "authorises the granting of State guarantees and sets their terms and conditions" and Article 34(II)(7°)(b) provides that it may "include provisions directly affecting budget expenditure for the year".

In this respect, the Constitutional Council noted that, pursuant to Article L. 515-7 of the Environmental Code, the underground storage of dangerous products of any kind in deep geological strata is subject to administrative authorisation. By way of derogation from these provisions, paragraph IV of Article 165 authorises the underground storage in deep geological strata of non-radioactive hazardous products present within the municipality of Wittelsheim for an unlimited period. To this end, it specifies that the financial guarantees required for such an operation are presumed to be provided by the State.

The Constitutional Council ruled that these provisions, which are not inextricably linked to the rest of Article 165, were not intended to authorise the granting of a guarantee by the State and to set the rules for such a guarantee, nor did they have the effect of directly affecting budget spending for the year. Nor did they fall within any of the other categories of provisions that are appropriate in a Finance Act. Without needing to examine the other objection and without prejudging whether the content of these provisions complied with other constitutional requirements, it ruled that, having been adopted in accordance with a procedure that ran counter to the Constitution, they were unconstitutional.

Public freedoms and public order

Decision No. 2021-834 DC of 20 January 2022
The Criminal Liability and Domestic Security Act

> "The implementation of such surveillance systems must be matched by special safeguards to protect the right to privacy."

Ruling on two referrals lodged by more than sixty deputies and more than sixty senators, respectively, in relation to four Articles of the Criminal Liability and Domestic Security Act, the Constitutional Council, in its Decision No. 2021-834 DC of 20 January 2022, partially struck down the provisions relating to the use of drones by administrative police services and imposed five interpretative reservations on the remaining provisions that had been challenged.

A particular challenge was mounted to Article 15 of the Act, which allowed for the processing of images from cameras installed on aircraft, including unmanned aircraft, in the context of administrative police operations.

In examining these provisions, the Constitutional Council observed that, in order to fulfil the constitutional objectives of preventing breaches of public order and bringing perpetrators to justice, Parliament may authorise the capture, recording and transmission of images by unmanned aircraft for the purpose of investigating, recording or prosecuting criminal offences or maintaining public order and security. However, given their mobility and the altitude at which they can operate, these aircraft are capable of capturing, in any location and without their presence being detected, images of a very large number of people and to follow their movements over a wide area. Therefore, the implementation of such surveillance systems must be matched by special safeguards to protect the right to privacy.

With regard to the use of these devices in administrative police work carried out by the State, the Constitutional Council ruled that the provisions of Article 15 of the Act referred to allow the use of unmanned aircraft capable of taking and transmitting images of a very large number of people, including by tracking their movements, in many places and, in some instances, without them being made aware of it. Those provisions are therefore prejudicial to the right to privacy.

> “Parliament has clearly identified the purposes for which these devices may be used.”

The Constitutional Council noted that, firstly, in adopting the contested provisions, the Parliament had been guided by the constitutional objective of preventing breaches of public order.

Secondly, the national police and gendarmerie services, together with military personnel deployed on national territory, may be authorised to use these devices only for the purposes of preventing breaches of the security of persons and property in places where there are specific risks of certain offences being committed, protecting public buildings and facilities and their immediate surroundings where these are particularly exposed to the risk of intrusion or damage, ensuring the security of gatherings on public thoroughfares or in places that are accessible to the public, when such gatherings are likely to cause serious disturbances to public order, preventing acts of terrorism, regulating transport flows strictly for the purpose of maintaining public order and security, monitoring borders, and aiding individuals.

Furthermore, customs officers may be authorised to use such devices only to prevent the cross-border transportation of prohibited goods. In this regard, Parliament has clearly identified the purposes for which these devices may be used.

Thirdly, the use of such devices may be authorised by the Prefect only if it is proportionate to the purpose for which their use is sought. In this respect, the request from the relevant agencies must specify that purpose and, in the light of that purpose, justify the need to use airborne devices.

In a first interpretative reservation, the Constitutional Council ruled that the Prefect’s authorisation determining this purpose and the area that is absolutely necessary to achieve it, as well as the maximum number of cameras that can be used simultaneously in the same geographical area, cannot be granted without compromising

the right to privacy unless the Prefect has ensured that the agency is unable to use other means that are less intrusive with regard to this right, or that the use of these other means would be likely to result in serious threats to the physical safety of the officers involved.

In a second interpretative reservation, the Constitutional Council ruled that, unless it was established that the use of these airborne devices was the only way to achieve the intended purpose, the Prefect could not reissue such an authorisation without compromising the right to privacy.

Fourthly, the Constitutional Council noted that unmanned airborne devices must not be used in such a way as to collect either images of the interior of homes or, specifically, images of their entrances. The provisions that were challenged further provide that, in the event that these places are nevertheless viewed, recording must be immediately discontinued and that, where such discontinuation has not been possible in view of the circumstances of the operation, the recorded images shall be deleted no later than forty-eight hours after the end of the deployment of the device, except in cases where a report is transmitted to the judicial authority within that period.

Lastly, in line with the second paragraph of Article L. 242-4 of the Internal Security Code, airborne devices may not capture sound or include automated facial recognition processing. These airborne devices may not carry out any automated matching, interconnection or linking with any other processing of personal data.

In a third interpretative reservation, the Constitutional Council held that these provisions could not, without breaching the right to privacy, be interpreted as authorising the relevant agencies to analyse images by means of other automated facial recognition systems that were not placed on these airborne devices.

The Constitutional Council noted that, on the other hand, the contested provisions provided that, in the event of an emergency resulting from "a particular and unforesee-

> "The Constitutional Council ruled that the contested provisions did not ensure a proper balance between the aforementioned constitutional requirements."

able exposure to a risk of serious harm to persons or property", these same agencies could immediately resort to these airborne devices, for a period of up to four hours and only if they had previously informed the Prefect. These provisions thus allowed the deployment of airborne cameras for this period of time without the Prefect's authorisation, without limiting it to specific and particularly serious cases, and without specifying the information that must be brought to the Prefect's attention.

The Constitutional Council ruled that, as a result, they did not ensure a proper balance between the aforementioned constitutional requirements. It therefore struck down the twenty-fifth subparagraph of Article 15(6°).

In addition, with regard to the provisions of Article 15 of the Act referred for review concerning the use of these devices by municipal police forces, the Constitutional Council held, firstly, that Parliament had allowed these forces to use these airborne devices not only to regulate the flow of transport and to provide assistance and rescue services to individuals, but also to ensure the security of sporting, recreational or cultural events, without limiting this last purpose to events that were particularly exposed to the risk of serious disturbance to public order.

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urlr.me/HznpN

Secondly, although Parliament provided that the use of these airborne devices had to be authorised by the Prefect, it did not provide that the Prefect could terminate the initial authorisation at any given point in time, once he or she had established that the circumstances that had justified that authorisation were no longer in effect.

Lastly, the contested provisions provided that, in the event of an emergency resulting from "a specific and unforeseeable exposure to a risk of serious harm to persons or property", these same services could make immediate use of such airborne devices, for a period of up to four hours and only on condition that they had given prior notice to the Prefect. These provisions thus allowed airborne cameras to be deployed for that length of time without the Prefect's authorisation, without limiting such deployment to specific and particularly serious cases, and without specifying the information that must be brought to the attention of the Prefect.

The Constitutional Council ruled that these provisions did not therefore ensure a proper balance between the aforementioned constitutional requirements, and thus struck down Article 15(8°).

Preventing the online dissemination of terrorist content

Decision No. 2022-841 DC of 13 August 2022

Act Containing Various Provisions for Adaptation to European Union Law on the Prevention of the Online Dissemination of Terrorist Content

> "The transposition of a directive or the adaptation of domestic law to a regulation cannot be at odds with a rule or principle inherent in the constitutional identity of France."

The Constitutional Council, in its Decision No. 2022-841 DC of 13 August 2022 on a referral lodged by more than sixty deputies, handed down a ruling on certain provisions of the Act Containing Various Provisions for Adaptation to European Union Law on the Prevention of the Online Dissemination of Terrorist Content.

The single Article constituting this Act inserts Articles 6-1-1, 6-1-3 and 6-1-5 into the 21 June 2004 Act on Confidence in the Digital Economy ("LCEN"), for the purpose of determining, respectively, the appropriate authority to order hosting service providers to remove terrorist content under Article 3 of Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on combating the online dissemination of terrorist content, the applicable penalties in the event of failure to comply with the obligation to remove such content, and the means of appeal against such orders.

Thus, paragraph I of Article 6-1-1 of the Act of 21 June 2004 resulting from the provisions that were contested gives the administrative authority mentioned in Article 6-1 of the same Act the power to issue orders for the removal of content of a terrorist nature under Article 3 of the Regulation of 29 April 2021. The first sub-

paragraph of paragraph I of Article 6-1-3 provides that failure to comply with the obligation to remove such content or block access to it is punishable by one year's imprisonment and a fine of 250,000 euros. Paragraph I of Article 6-1-5 lists the remedies that may be sought against a removal order.

With regard to the nature of the review carried out by the Constitutional Council on these provisions, in support of their criticism of these provisions, the petitioning deputies invited the Constitutional Council to review them with regard to freedom of expression and communication and, in particular, freedom of access to online public communication services and freedom to use those services to express oneself, which, they argued, was a principle inherent in France's constitutional identity.

The Constitutional Council noted, on the basis of Article 88-1 of the Constitution, that it is responsible for ensuring that this requirement be met when an Act is referred to it under the terms of Article 61 of the Constitution with the aim of transposing a European Union directive into domestic law or adapting domestic law to a European Union regulation. However, the transposition of a directive or the adaptation of domestic law to a regulation cannot be at odds with a rule or principle inherent in the constitutional identity of France, unless the constitutional authority has agreed to it. In the absence of a challenge to such a rule or principle, the Constitutional Council is not competent to review the constitutionality of legislative provisions that merely draw the necessary consequences from the unequivocal and explicit provisions of a directive or the provisions of a European Union regulation.

In this respect, the Constitutional Council noted that the provisions of the Regulation of 29 April 2021, and in particular Articles 9, 12 and 18 thereof, only require the Member States of the European Union to designate an authority competent to issue a withdrawal order under Article 3 of the same Regulation, to provide for an effective remedy enabling hosting service providers to challenge such an order before the courts of the Member State of the issuing authority, and to determine the system of penalties applicable in the event of non-compliance. They thus give Member States a margin of discretion to choose this authority and determine the procedures for appeal and the nature and quantum of the relevant penalties.

"It is open to Parliament to promulgate rules concerning the exercise of the right of free communication and the freedom to speak, write and print."

The Constitutional Council ruled that it was indeed competent to rule on the complaint that the lawmaking body had disregarded freedom of expression and communication by designating the administrative authority competent to issue these injunctions, by not giving appeals a suspensive effect and by punishing non-compliance with the withdrawal order with one year's imprisonment and a fine of 250,000 euros.

As to the merits of the appeal, in order to rule on the claim that freedom of expression and communication had been infringed, the Constitutional Council noted that, under Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen: "The free communication of thoughts and opinions is one of the most precious rights of man: every citizen may therefore speak, write, and print freely, but shall be accountable for such abuses of this freedom as shall be defined by law." In view of the current state of methods of communication, and considering the widespread development of online public communication services and the importance of these services in terms of participation in democratic life and the expression of ideas and opinions, this right implies the freedom to access these services and to use them to express oneself.

Article 34 of the Constitution states: "The law shall establish the rules concerning … the civic rights and fundamental guarantees granted to citizens for the exercise of public freedoms". On this basis, it is open to Parliament to promulgate rules concerning the exercise of the right of free communication and the freedom to speak, write and print. It is also open to Parliament to introduce provisions designed to put an end to abuses of the exercise of freedom of expression and communication that are prejudicial to public order and the rights of third parties. However, freedom of expression and communication is all the more valued because its exercise is a condition of democracy and one of the guarantees that other rights and freedoms are respected. It follows that any interference with the exercise of this freedom and this right must be necessary, appropriate and proportionate to the aim pursued.

In the light of this constitutional framework, the Constitutional Council noted that the purpose of the contested provisions is to adapt national legislation to the European regulation of 29 April 2021, which aims to combat the online dissemination of content of a terrorist nature. Such content constitutes an abuse of the freedom of expression and communication that seriously prejudices public order and the rights of third parties.

The Constitutional Council noted that, firstly, the removal order that may be issued by the relevant administrative authority may only relate to content of a terrorist nature that is precisely defined and limited to those listed in Article 2 of the Regulation of 29 April 2021. Article 1

of the Regulation also provides that no content may be construed as being terrorist in nature if it is disseminated to the public for educational, journalistic, artistic or research purposes, or for the purpose of preventing or combating terrorism, including content which represents the expression of polarising or controversial opinions in the context of public debate.

Moreover, Article 3 of the same Regulation provides that a removal order issued by the relevant administrative authority must include not only a reference to the type of content concerned, but also a sufficiently detailed statement of reasons as to why it is deemed to be of a terrorist nature.

Furthermore, the qualified person referred to in Article 6-1 of the Act of 21 June 2004, appointed from among its members by the Authority for the Regulation of Audiovisual and Digital Communication (ARCOM), which is an independent administrative authority, must be informed of such requests for withdrawal and may, in the event of any irregularity, recommend that the relevant authority terminate it; and, if this recommendation is not acted upon, it may refer the matter to the administrative court in summary proceedings or on a petition to be heard within seventy-two hours.

Against this background, the Constitutional Council ruled that determining the terrorist nature of the content in question is not left solely to the discretion of the administrative authority that the contested provisions designate to issue removal orders.

Secondly, the removal order, which may be the subject of a summary appeal to an administrative court by the providers of hosting services or content, may also be challenged in an administrative court, under Article 6-1-5 of the Act of 21 June 2004, by way of a specific application for annulment. The court is then required to rule on the legality of this order within seventy-two hours of the referral. In the event of an appeal, the appeal court is required to hand down a decision within one month. Thus, the contested provisions enable the legality of the removal order to be decided within a short time; and, in the event of annulment, they enable the removed content, which must be preserved pursuant to Article 6 of the Regulation of 29 April 2021, to be restored.

> “The contested provisions enable the legality of the removal order to be decided within a short time.”

Lastly, although the contested provisions of Article 6-1-3 of the Act of 21 June 2004 impose criminal penalties for failure to comply with the obligation to remove terrorist content or block access to such content, it follows from Article 3 of the Regulation of 29 April 2021 that such a breach is not considered to have occurred if the hosting service provider is unable to comply with the order received because of circumstances beyond its control or a practical impossibility for which it is not responsible, or as a result of obvious errors or insufficient information in the order.

The Constitutional Council concluded from the foregoing that the contested provisions did not infringe the freedom of expression and communication. It therefore deemed them to be constitutional.

View the complete file relating to Decision No. 2022-841 DC on the Constitutional Council’s website.
urlr.me/SpYGb

Independence and pluralism of the media

Decision No. 2022-842 DC of 12 August 2022
Amending Finance Act for 2022

In its Decision No. 2022-842 DC of 12 August 2022, handed down in response to two appeals lodged by more than sixty deputies and more than sixty senators, respectively, in relation to four Articles of the Amending Finance Act for 2022, the Constitutional Council ruled that those provisions of the Act dealing with the funding of public broadcasting were constitutional but imposed two interpretative reservations circumscribing choices made by Parliament in the future.

The appeals were jointly lodged to challenge Article 6 of this Act, which, firstly, abolishes the tax known as the Public Broadcasting Contribution (*contribution à l'audiovisuel public*), which was introduced by Article 1605 of the General Tax Code to provide funding for the national broadcasting companies France Télévisions and Radio France, the company in charge of France's external broadcasting, the companies ARTE-France and TV5 Monde and the National Broadcasting Institute (Institut national de l'audiovisuel); and, secondly, replaces the revenue raised by this contribution by allocating a proportion of the revenue generated by the Value Added Tax to the public broadcasting sector.

It was specifically argued that these provisions deprived the freedom of communication of thoughts and opinions, and the independence and pluralism of the media, of a legal guarantee, since they failed to ensure the long-term financing of public broadcasting. In particular, the petitioners in the two appeals argued that they only provide for the allocation of a proportion of the VAT until 31 December 2024. The deputies also argued that, for the years 2023 and 2024, the

> "The Constitutional Council held that the contested provisions are likely to affect the resources guarantee of the public broadcasting sector which constitutes an element of its independence."

amount allocated was not guaranteed, since Parliament could adjust it, while the senators contended that the methods for determining this amount were not adequately detailed. The petitioning deputies also maintained that these provisions failed to reflect a fundamental principle recognised by the laws of the Republic, one which they claimed was derived from an Act of 31 May 1933 setting the general budget for the 1933 financial year, according to which the public broadcasting sector should be financed by a licence fee.

The Council held, firstly, that, by merely providing that, "with a view to devoting the proceeds to broadcasting expenditure, a licence fee shall be introduced ... on broadcasting reception facilities", Article 109 of the Law of 31 May 1933 had neither the objective nor the effect of establishing a principle according to which the public broadcasting sector could be financed solely by a licence fee. This Act could therefore not have spawned a fundamental principle recognised by the laws of the Republic.

Secondly, the Constitutional Council noted that, under Article 11 of the Declaration of 1789, "The free communication of thoughts and opinions is one of the most precious rights of man: every citizen may therefore speak, write and print freely, but shall be accountable for such abuses of this freedom as shall be defined by law". The free communication of thoughts and opinions would not be achieved if the public to whom the audiovisual media are targeted were not able to have access, both in the private and public sectors, to programmes that guarantee the expression of different viewpoints while respecting the need for honest reporting. Thus, listeners and viewers, who are among the essential beneficiaries of the freedom proclaimed by Article 11, must be able to exercise their free choice without private interests or government authorities being able to replace that free choice with their own decisions.

In exercising its powers in the area reserved to it by Article 34 of the Constitution, Parliament may at any time amend or repeal earlier texts and, where appropriate, substitute other provisions, provided that the exercise of those powers does not result in the removal of legal guarantees applicable to requirements of a constitutional nature.

In this respect, the Constitutional Council held that, by abolishing the Public Broadcasting Contribution as from 1 January 2022, the contested provisions are likely to affect the resources guarantee of the public broadcasting sector which constitutes an element of its independence, which in turn is essential to the exercise of the freedom of communication.

However, on the one hand, these provisions provide that, for 2022, the revenue of the financial assistance account shall be made up of a proportion of the proceeds of the VAT of an amount equivalent to the proceeds of the Public Audiovisual Contribution for the same year. On the other hand, these same provisions stipulate that, from 1 January 2023 to 31 December 2024, the revenue of the financial assistance account shall come from a proportion of the proceeds of the VAT to be determined each year by the Finance Act for that year.

In two interpretative reservations, the Constitutional Council ruled that it will be up to Parliament, firstly in the Finance Acts for the years 2023 and 2024 and, secondly, for the period after 31 December 2024, to set the amount of this revenue so that the companies and the Public Broadcasting Corporation are able to carry out the public service responsibilities with which they are charged. The Constitutional Council will determine whether these requirements are complied with.

Subject to these reservations, the Constitutional Council ruled that the contested provisions do not breach the requirements of Article 11 of the 1789 Declaration.

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Protecting the environment and future generations

Decision No. 2022-843 DC of 12 August 20222

Act Providing for Emergency Measures to Protect Purchasing Power

> "The Constitutional Council ruled that, in view of its purpose and effects, the construction and commissioning of a floating LNG terminal may adversely affect the environment."

The Act Providing for Emergency Measures to Protect Purchasing Power was referred to the Constitutional Council by two appeals from more than sixty deputies and more than sixty senators, respectively. By means of interpretative reservations based on the Charter for the Environment, the Constitutional Council provided an unprecedented framework for the implementation of provisions concerning the deployment of a floating LNG terminal and certain fossil fuel-fired electricity production facilities.

In particular, the petitioning deputies objected to Article 29 of the Act referred for review, relating to the regime for keeping a floating LNG terminal in operation, as well as to Article 30, which sets out the procedural rules applicable to the proposed construction of a floating LNG terminal on the port site at Le Havre.

The first three paragraphs of Article 29 provide, on the one hand, for the Minister responsible for energy to require an operator to keep a floating LNG terminal in operation for such a period of time as he or she may determine and to provide it with liquefied natural gas processing capacities to be achieved; and, on the other hand, the rules to be applied to this facility.

Article 30 provides for procedural derogations, in particular from the Environmental Code, that apply to the proposed construction of a floating LNG terminal on the port site at Le Havre.

> “The choices made in responding to the needs of the present must not compromise the ability of future generations and other peoples to meet their own needs.”

The petitioning deputies contended that these provisions breached the constitutional objective of protecting the environment and the requirements of Articles 1, 5 and 6 of the Charter for the Environment. In support of these objections, they argued, firstly, that by allowing the continued operation of a floating LNG terminal and, secondly, by providing for numerous and disproportionate derogations to the environmental rules for the construction of the LNG terminal in Le Havre, Parliament had authorised irreversible damage to be done to the environment.

The Constitutional Council noted that, in the words of the Preamble of the Charter for the Environment: “the future and the very existence of humanity are inseparable from its natural environment ... the environment is the common heritage of mankind ... the preservation of the environment must be pursued in the same way as the other fundamental interests of the Nation ... in order to ensure sustainable development, the choices made in responding to the needs of the present must not compromise the ability of future generations and other peoples to meet their own needs”.

Article 1 of the Charter for the Environment states that “Everyone has the right to live in a balanced environment that safeguards health”. Limitations imposed by Parliament on the exercise of this right must be in line with constitutional requirements or be warranted by a public interest consideration. They must be proportionate to the objective pursued.

According to Article 6 of the Charter for the Environment, “Government policies must promote sustainable development. To this end, they must strike a balance between the protection and enhancement of the environment, economic development and social progress”. It is the responsibility of Parliament to determine how such sustainable development is to be achieved, in accordance with the principle of reconciliation laid down by those provisions.

According to Article 7 of the Charter for the Environment: “Everyone has the right, under the conditions and within the limits defined by the law, to have access to information relating to the environment held by State authorities and to participate in the preparation of government decisions affecting the environment”. It is the responsibility of Parliament and, within the framework defined by the law, of the administrative authorities to determine, in compliance with the principles thus set out, the methods of implementation of these provisions.

In this light, noting that a floating LNG terminal is a vessel used as a liquefied natural gas processing facility, moored in a port where it is connected by a pipeline to a natural gas distribution network, the Constitutional Council ruled that, in view of its purpose and effects, the construction and commissioning of a floating LNG terminal may adversely affect the environment.

The Constitutional Council noted that, nevertheless, in the first place, it is clear from the preparatory work that these provisions are intended to address difficulties relating to the supply of gas by increasing the national capacity to process liquefied natural gas. In so doing, they implement the constitutional requirements inherent in safeguarding the fundamental interests of the Nation, which include the independence of the Nation, along with the essential features of its economic potential.

Secondly, the contested provisions provide that the continued operation of a float-

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urlr.me/7GMRF

ing LNG terminal as well as the construction of such a terminal on the port site at Le Havre may be permitted when an increase in France's LNG processing capacity is required in order to ensure security of supply.

In an interpretative reservation couched in unprecedented terms, the Constitutional Council ruled that it is clear from the Preamble to the Charter for the Environment that the preservation of the environment must be as much of a priority as the other fundamental interests of the Nation and that the choices made to meet the needs of the present must not compromise the ability of future generations to meet their own needs. This means that, unless Article 1 of the Charter for the Environment is infringed, these provisions can only be applied in the event of a serious threat to the security of gas supply.

Thirdly, the provisions of Article 29 stipulate that the floating LNG terminal that is designated by Ministerial Order must be subject to all internationally recognised safety rules and controls applicable to the "ship" category, in addition to any requirements that the Prefect might impose, on the recommendation of the port police authority, for the purpose of preventing any environmental disruptions or dangers. These requirements will set out any obligations relating to the dismantling or conversion of the plant and equipment after operations have ceased, including any obligations to restore the site to its natural state.

Fourthly, on the one hand, the provisions of Article 30, which provide for procedural derogations, only apply to the construction of a floating LNG terminal on the Le Havre port site and for a maximum operating period of five years. Furthermore, these derogations, which are listed exhaustively, can only be applied if they are strictly proportionate to the requirements of the project and are valid only until 1 January 2025. The public must in any event be provided with information on the significant impacts of the project on the environment and human health, and the operator must comply with measures to prevent and reduce damage to protected species and their habitats. In addition, within six months of the terminal's commissioning, the operator will be required to produce a study, available to the public, on the environmental impacts associated with the operation of the terminal. Six months before the terminal ceases to operate, the operator must also submit a study, available to the public, on the practical arrangements for dismantling the terminal, the compensation measures implemented and the biodiversity and soil conditions. Furthermore, the decisions taken by the relevant authority in applying these derogations may be appealed to the administrative judge, including by way of summary proceedings.

Based on these considerations, the Constitutional Council concluded that, subject to the aforementioned reservation, the provisions that had been challenged were constitutional.

The petitioning deputies also challenged, in particular, Article 36 of the law referred for review, which allowed the greenhouse

gas emissions cap applicable to certain fossil fuel-based electricity production facilities to be raised.

These deputies pointed out the irreversible damage that such an increase would cause to the environment and the lack of precision with regard to the scope of the obligation to compensate for this measure under the provisions in question. In their view, this would result in a breach of the constitutional objective of protecting the environment and of Article 6 of the Charter for the Environment.

In the light of the constitutional framework referred to above, the Constitutional Council found that, by allowing the emissions cap of these facilities to be raised, these provisions adversely affect the environment.

It noted that, in adopting these provisions, Parliament intended to reduce the risk of a breakdown in the national electricity system. It thus implemented the constitutional requirements inherent in the safeguarding of the fundamental interests of the Nation, which include the independence of the Nation, along with the essential elements of its economic potential.

On the one hand, such an increase can only occur in the event of a threat to the security of electricity supply to all or part of the country.

By the same interpretative reservation as that stated in relation to the deployment of a floating LNG terminal, the Constitutional Council held that the Preamble to the Charter for the Environment stipulates that the preservation of the environment must be as much of a priority as the other fundamental interests of the Nation and that the choices made to meet the needs of the present must not compromise the ability of future generations to meet their own needs. This means that, unless Article 1 of the Charter for the Environment is infringed, these provisions can only be applied in the event of a serious threat to the security of electricity supply.

On the other hand, the operators of the facilities concerned have a formal obligation to compensate for any greenhouse gas emissions resulting from the raising of the emissions cap, with penalties applying in the event of any breach of that obligation. This compensation is designed to finance projects located on French territory that promote forest renewal, afforestation, agroforestry, agrosylvopastoralism or the adoption of any agricultural practice that reduces greenhouse gas emissions or any practice that promotes the natural storage of carbon. Furthermore, under Article L. 229-55 of the Environmental Code, the emission reductions and sequestrations resulting from these projects must be measurable, verifiable, permanent and additional.

In an interpretative reservation, the Constitutional Council ruled that it is up to the regulatory authority to set the level and terms of this obligation in order to effectively compensate for the increase in greenhouse gas emissions and to ensure that compliance with the objectives of reducing these emissions and reducing the primary energy consumption of fossil fuels set by Article L. 100-4 of the Energy Code is not compromised.

Subject to these two reservations, the Constitutional Council found the contested provisions to be constitutional.

“The Preamble to the Charter for the Environment stipulates that the preservation of the environment must be as much of a priority as the other fundamental interests of the Nation.”


QPC referrals between 1 September 2021 and 31 August 2022
79
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Priority preliminary ruling on the issue of constitutionality

Since 2010, laws can be referred to the Constitutional Council after having entered into force. The mechanism known as the "priority preliminary ruling on the issue of constitutionality" (*question prioritaire de constitutionnalité*, or QPC) allows any litigant to initiate the procedure. In the course of a trial, a person may challenge the constitutionality of the law that applies to his or her own 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 to refer it to the Constitutional Council. If the provisions reviewed are deemed unconstitutional, they are "struck down" and, as such, cease to apply. Here is an overview of select QPCs from September 2021 to August 2022.

The Constitution and European Union law

Decision No. 2021-940 QPC of 15 October 2021

Obligation for air carriers to reroute foreign nationals refused entry into France

In its Decision No. 2021-940 QPC of 15 October 2021, the Constitutional Council ruled that the obligation for air carriers to reroute a foreign national who has been refused entry into France, which is neither intended to nor effectively entrusts such companies with a mission of surveillance or constraint, is in conformity with the Constitution. Its decision is grounded in the recognition that this obligation does not constitute a breach of the prohibition on delegating the exercise of State authority to private persons, described in unprecedented terms as "a principle inherent in French constitutional identity".

> "This obligation does not constitute a breach of the prohibition on delegating the exercise of State authority to private persons."

The Council of State referred to the Constitutional Council a priority preliminary ruling on the issue of constitutionality concerning conformity of Article L. 213-4 and paragraph 1° of Article L. 625-7 of the Code of Entry and Residence of Foreigners and the Right of Asylum (CESEDA) with the rights and freedoms guaranteed by the Constitution.

The contested provisions of CESEDA Article L. 213-4 are intended to ensure the transposition of Council Directive 2001/51/EC of 28 June 2001 aimed at supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 by providing that air or sea carriers are required to reroute foreign nationals who are not citizens of a European Union Member State in the event of refusal of entry into French territory.

These provisions were criticised for obliging airlines to reroute foreign nationals having been refused entry into France, and if necessary to physically restrain passengers whose

behaviour poses a risk to safety on board the aircraft. The provisions were thus construed as delegating to a private individual the general administrative police powers inherent in the exercise of State authority, in violation of Article 12 of the Declaration of the Rights of Man of the Citizen of 1789.

To resolve the issue, the Constitutional Council referred to its consistent case law aimed at ensuring coherence between domestic law and the legal order of the European Union. When an infringement of the rights and freedoms protected by the Constitution originates in European Union legislation, despite the fact that these same rights and freedoms are also protected by the European legal order, the Constitutional Council leaves it to the ordinary courts of EU law – i.e., French administrative and judicial courts and, where appropriate, the Court of Justice of the European Union (CJEU) – to ensure respect thereof. If, on the other hand, the issue concerns the rules and principles inherent in French constitutional identity, the Constitutional Council itself is responsible for ensuring compliance.

On these grounds, the Constitutional Council held that the contested provisions, which relate only to the obligation on carriers to reroute foreign nationals, merely draw the necessary consequences from the unconditional and precise provisions of the Directive of 28 June 2001.

Consequently, in application of its established case law, the Council held that it was competent to review the conformity of the contested provisions with the rights and freedoms guaranteed by the Constitution only insofar as said provisions called into question a rule or principle which, not finding equivalent protection in European Union law, was inherent in France's constitutional identity.

Regarding the merits of the case, the Constitutional Council nonetheless recalled that Article 12 of the Declaration of the Rights of Man and of the Citizen prohibits its delegation to private persons of general administrative police powers inherent in the exercise of the "State authority" necessary to guarantee rights, and ruled, in an unprecedented manner, that this requirement constitutes a principle inherent in French constitutional identity.

View the complete file relating to Decision No. 2021-940 QPC and the video of the hearing on the Constitutional Council website.

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Reviewing the contested provisions in light of this constitutional requirement, it observed in particular that the decision to reroute an individual who had not been admitted to French territory fell within the exclusive remit of the authorities responsible for carrying out checks on persons at the border and that the contested provisions are neither intended to nor effectively impose on private companies an obligation to monitor the passenger to be rerouted or to exert restraint on said person, such measures falling within the sole competence of law enforcement officials.

As such, the Council dismissed the complaint alleging violation of Article 12 of the Declaration of 1789 and declared the contested provisions to be constitutional.

Labour law

Decision No. 2021-947 QPC of 19 November 2021

Voter eligibility for professional elections

On application by the Labour Division of the Court of Cassation, the Constitutional Council, in its Decision No. 2021-947 QPC of 19 November 2021, struck down as a manifestly disproportionate infringement of the principle of employee participation Article L. 2314-18 of the Labour Code. The wording of the contested provisions was set out in the Ordinance of 22 September 2017 and the Law of 29 March 2018 ratifying various ordinances adopted on the basis of Law No. 2017-1340 of 15 September 2017 empowering the government to take measures to strengthen social dialogue by ordinance.

The contested provisions provided that any employee aged sixteen or over, who has worked for at least three months in the company and has not undergone a ban, forfeiture or disqualification on the exercise of his or her civic rights, may participate as a voter in the election of members of the Social and Economic Committee.

On the basis of these provisions, the Court of Cassation has consistently ruled that employees who either hold a specific written delegation of authority allowing them to be treated in all respects as head of the company, or who effectively represent the head of the company before employee representative bodies, should nevertheless be denied voting rights.

The applicant trade union criticised these provisions for violating the principle of employee participation insofar as, according to the interpretation of the Court of Cassation, they deny voter status in professional elections to employees entitled to the rights of the employer, therefore depriving said employees of any representation on the Social and Economic Committee.

The Constitutional Council recalled that, according to paragraph 8 of the Preamble to the Constitution of 1946, "All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the workplace". Article 34 of the Constitution places determination of the fundamental principles of labour regulations within the scope of the law. As such, Parliament is responsible for determining, with due regard for the principle set out in paragraph 8 of the Preamble, the conditions and guarantees for the implementation thereof and, in particular, the methods by which worker representation is ensured within the company.

On these grounds, the Constitutional Council struck down the provisions, ruling that, by depriving employees of any possibility of participating as voters in the election of members of the Social and Economic Committee based solely on the fact of their holding such a delegation or proxy, these provisions violate the principle of worker participation in a manifestly disproportionate manner.

Nonetheless, considering that the immediate repeal of the provisions struck down would effectively eliminate any condition regarding the right to vote in professional elections, with manifestly excessive consequences, the Constitutional Council postponed the date of repeal to 31 October 2022. Measures taken prior to that date in application of the provisions declared unconstitutional cannot be challenged on the basis of such unconstitutionality.

View the complete file relating to Decision No. 2021-947 QPC and the video of the hearing on the Constitutional Council website.

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Highway Code

Decision No. 2021-948 QPC of 24 November 2021

Disclosure of the location of road checks by electronic services

In its Decision No. 2021-948 QPC of 24 November 2021, the Constitutional Council partially struck down provisions allowing for the prohibition of use of driving or navigation assistance services in the event of roadside checks.

On 16 September 2021, the Council of State referred to the Constitutional Council a QPC relating to conformity of Articles L. 130-11 and L. 130-12 of the Highway Code with the rights and freedoms guaranteed by the Constitution. The wording of the contested provisions was set out in Law No. 2019-1428 of 24 December 2019, known as the Mobility Orientation Act.

Article L. 130-11 of the Highway Code provides that the administrative authority may, during certain roadside checks, prohibit the operators of an electronic driving assistance or geolocation-based navigation service from circulating messages and indications published by users of such service. Pursuant to paragraph 1° of Article L. 130-12 of the same Code, disregarding this prohibition is punishable by two years' imprisonment and a fine of 30,000 euros.

Specifically, the applicant company criticised these provisions for violating the rights of freedom of expression and communication in a way that was neither necessary, nor appropriate, nor proportionate to the objective pursued by the lawmaking body.

The Constitutional Council recalled that, under the terms of Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789, "The free communication of thoughts and opinions is one of the most precious rights of man: every citizen may therefore speak, write and print freely, but shall be responsible for such abuses of this freedom as shall be defined by law". In the present state of the media and in view of the widespread development of online public

> "These provisions, which are intended to prevent motorists from evading certain police checks, pursue the constitutional objective of maintaining public order and apprehending offenders."

communication services and the importance of these services for participation in democratic life and expression of ideas and opinions, this right implies freedom of access to and expression via these services.

Moreover, on the basis of Article 34 of the Constitution, Parliament is empowered to lay down rules reconciling the pursuit of the constitutionally valid objective of maintaining public order and apprehending offenders with the exercise of freedom of speech, writing and printing. Nevertheless, freedom of expression and communication is all the more precious as it stands out as a prerequisite for democracy, safeguarding respect for other rights and freedoms. It thus follows that limitations on the exercise of this freedom must be necessary, appropriate and proportionate to the objective pursued.

On these grounds, the Constitutional Council ruled that the contested provisions, which allow the administrative authority to prohibit users of online public communication services from exchanging certain information, infringe freedom of expression and communication.

It noted, firstly, that these provisions, which are intended to prevent motorists from evading certain police checks, pursue the constitutional objective of maintaining public order and apprehending offenders.

Secondly, it noted in particular that the prohibition provided for in Article L. 130-11 of the Highway Code only applies to electronic services specifically dedicated to driving assistance and navigation. Moreover, this ban can only be imposed in the case of roadside checks involving the interception of vehicles or an exhaustive list of other procedures, to the exclusion of speed checks.

Thirdly, the duration of the ban is limited to two hours in the case of alcohol or drug testing, and to twelve hours in other cases. In addition, the perimeter of the ban may not extend beyond a radius of 10 kilometres around the roadside checkpoint when located outside urban areas, and beyond two kilometres within urban areas.

Lastly, paragraph II of Article L. 130-11 provides that, on the national highway network, this prohibition may not concern information relating to the events and circumstances linked to road safety provided for in Article 3 of the abovementioned European Commission delegated regulation of 15 May 2013, i.e. those relating to slippery roads, the presence of obstacles on the road, an accident or work zone, reduced visibility, a driver operating a vehicle against the flow of traffic, an unmanaged obstruction, or exceptional weather conditions.

However, the Constitutional Council noted that, outside the national highway network, this prohibition covered any information usually broadcast to users by the service operator, without exception. It thus concluded that the ban was liable to apply to a great deal of information unrelated to the location of police checks. In these circumstances, the prohibition infringed freedom of expression and communication in a way that was not appropriate, necessary and proportionate to the objective pursued.

As such, the Constitutional Council declared unconstitutional the provisions limiting to the national highway network the right to exchange information unrelated to the location of police checks. There being no reason to postpone the effects of the declaration of unconstitutionality, it ruled that the declaration should take effect as of the date of publication of the decision.

View the complete file relating to Decision No. 2021-948 QPC and the video of the hearing on the Constitutional Council website.

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Right to privacy and pursuit of offenders

Decision No. 2021-952 QPC of 03 December 2021
Decision No. 2022-993 QPC of 20 May 2022
Decision No. 2022-1000 QPC of 17 June 2022

Requisition of connection data in criminal proceedings

> "The contested provisions authorised the Public Prosecutor and officers and agents of the judicial police to access or obtain connection data."

In three decisions handed down in late 2021 and the first half of 2022 on referral from the Criminal Division of the Court of Cassation, the Constitutional Council clarified the constitutional limits on requisition of connection data at various stages of criminal proceedings.

QPC No. 2021-952 concerned conformity with the rights and freedoms guaranteed by the Constitution of the provisions of Articles 77-1-1 and 77-1-2 of the Code of Criminal Procedure relating to the requisition of connection data in the context of preliminary investigations.

The applicant criticised these provisions for allowing the Public Prosecutor to authorise, without prior review by an independent court, requisition of information from a computer system or processing of personal data, which includes connection data. This was alleged to have resulted in a violation of the right to privacy, the right to a defence and the right to an effective judicial remedy.

In its Decision No. 2021-952 QPC of 3 December 2021, the Constitutional Council recalled that, according to Article 2 of the Declaration of the Rights of Man and of the Citizen of 1789: "The purpose of all political associations is to preserve the natural and inalienable rights of man. These rights are liberty, property, security, and resistance to oppression". The freedoms proclaimed in this Article imply the right to privacy.

Under Article 34 of the Constitution, Parliament is responsible for setting out rules concerning the fundamental guarantees granted to citizens for the exercise of public freedoms. It is incumbent on the lawmaking body to reconcile the pursuit of the constitutionally valid objective of apprehending offenders with respect for the right to privacy.

On these grounds, the Constitutional Council noted that, by allowing information to be requisitioned from a computer system or personal data processing system, the contested provisions authorised the Public Prosecutor and officers and agents of the judicial police to access or obtain connection data.

It held that connection data includes data relating to the identification of individuals, their location and their telephone and digital contacts, as well as the online public communication services they consult. Given the nature and diversity of connection data, as well as the processing to which such data may be subjected, they provide extensive and precise information on the persons in question and, in some cases, on third parties, which constitutes a manifest invasion of the privacy of said individuals.

Moreover, under the contested provisions, the requisition of this data was authorised in the context of a preliminary investigation that could relate to any type of offence and was not justified by urgency or subject to time restrictions.

The Council also held that, while these requisitions were subject to the authorisation of the Public Prosecutor, a judicial magistrate responsible, pursuant to Article 39-3 of the Code of Criminal Procedure, for ensuring the legality of the means used by investigators and the proportionality of investigative acts with regard to the nature and severity of the offences in question, Parliament had not adjoined any other safeguard to the use of requisitions for connection data.

The Constitutional Council concluded that, in these circumstances, the lawmaking body had not established sufficient safeguards in the procedure set out in the contested provisions to ensure a balanced reconciliation between the right to privacy and the constitutional objective of apprehending offenders. It therefore declared the contested provisions unconstitutional. Nonetheless, noting that an immediate repeal of the contested provisions would entail manifestly excessive consequences, the Council postponed the date of repeal to 31 December 2022. Measures taken prior to that date cannot be challenged on the basis of such unconstitutionality.

> “Parliament had not adjoined any other safeguard to the use of requisitions for connection data.”

View the complete file relating to Decision No. 2021-952 QPC and the video of the hearing on the Constitutional Council website.

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The Constitutional Council was then asked to rule on the provisions of Articles 60-1 and 60-2 of the Code of Criminal Procedure relating to the requisition of connection data in the context of a *flagrante delicto* investigation, said provisions being criticised for allowing the Public Prosecutor or officers of the judicial police to demand communication of connection data in the context of such an investigation without prior review by an independent court, in defiance of the right to privacy.

In reviewing these provisions, the Constitutional Council applied the same constitutional analytical framework in its Decision No. 2022-993 QPC of 20 May 2022 as that used in the aforementioned decision of 3 December 2021.

In this light, it held that Parliament had adopted the contested provisions in pursuit of the constitutionally valid objective of apprehending offenders.

It noted that these provisions allow for data requisitions only in the context of a police investigation into a *flagrante delicto* offence punishable by imprisonment.

Furthermore, the duration of said investigation is limited to eight days. It can only be extended, for a further maximum period of eight days, by decision of the Public Prosecutor, if the investigation concerns a serious crime or a misdemeanour punishable by five years or more imprisonment and if the investigations cannot be deferred.

Finally, such requisitions can only be instigated by the Public Prosecutor, an officer of the judicial police or, under the supervision of the latter, an agent of the judicial police. As these officers and agents report to the Public Prosecutor, the requisitions are implemented under the authority of a judicial magistrate responsible, pursuant to Article 39-3 of the Code of Criminal Procedure, for ensuring that investigative acts are proportional to the nature and severity of the alleged offence.

As such, the Constitutional Council ruled that the contested provisions strike a fair balance between the constitutionally valid objective of apprehending offenders and the right to privacy.

Finally, the Constitutional Council ruled in its Decision No. 2022-1000 of 17 June 2022 on the provisions relating to the requisition of connection data in the context of a judicial inquiry, set out in Article 99-3 of the Code of Criminal Procedure, as amended by Law No. 2016-731 of 3 June 2016 strengthening the fight against organised crime, terrorism and financing thereof, and enhancing the effectiveness and guarantees of criminal procedure, and in Article 99-4 of the same Code, as amended by Law 2004-204 of 9 March 2004 adapting the justice system to developments in the field of criminality.

In particular, these provisions were criticised for allowing the examining magistrate, or an officer of the judicial police appointed thereby, to demand communication of connection data, whereas an inquiry may relate to any type of offence and is not justified by urgency or subject to time restrictions. They were thus alleged to violate the right to privacy.

Applying the same constitutional analytical framework as that used in its two previous decisions, the Constitutional Council held that Parliament had adopted the contested provisions in pursuit of the constitutionally valid objective of apprehending offenders.

Secondly, the requisition of connection data is carried out on the initiative of the examining magistrate, a judge whose independence is guaranteed by the Constitution, or that of an officer of the judicial police so authorised by letters rogatory issued by said judge.

On the one hand, these provisions only allow for the requisition of connection data in the context of a judicial inquiry, which is only mandatory in criminal cases and for certain offences. Although an inquiry can also be opened for other offences, the examining magistrate can only initiate the procedure when so requested by the Public Prosecutor

or, in criminal cases and under the conditions provided for in Articles 85 et seq. of the Code of Criminal Procedure, following civil action within criminal proceedings.

On the other hand, if the requisition of connection data is implemented by an officer of the judicial police in execution of letters rogatory, said document, dated and signed by the magistrate, specifies the nature of the alleged offence and sets the time limit within which it must be returned together with the reports drawn up for implementation by the officer in question. Such requisitions must be directly related to determining the guilt of the alleged offender and, in accordance with Article 152 of the Code of Criminal Procedure, are implemented under the direction and control of the examining magistrate.

In addition, in accordance with Articles 175-2 and 221-1 of the Code of Criminal Procedure, the inquiry, under the control of the examining chamber, must not be unreasonably lengthy in view of the severity of the offence of which the defendant is accused, the complexity of the investigations necessary to establish the truth and the exercise of the rights of the defence.

On the basis of all these elements, the Constitutional Council concluded that the contested provisions achieved a balanced reconciliation between the constitutionally valid objective of apprehending offenders and the right to privacy. It thus found them to be in conformity with the Constitution.

View the complete file relating to Decision No. 2022-993 QPC and the video of the hearing on the Constitutional Council website.

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1,000 QPCs

On 25 April 2022, the Constitutional Council registered its 1,000th referral under the priority preliminary ruling on the issue of constitutionality (QPC) procedure, instituted by the Constitutional Act of 23 July 2008 and in force since 1 March 2010. The case concerned access to connection data in the context of criminal proceedings.

Under Article 61-1 of the Constitution, the Constitutional Council, when called upon by the Council of State or the Court of Cassation to review a QPC submitted by any litigant in the course of legal proceedings, is competent to decide whether or not a legislative provision infringes the rights and freedoms guaranteed by the Constitution.

For the past 12 years, this new right granted to citizens has enabled the Constitutional Council to carry out *ex post* constitutional review, ruling on the constitutionality of laws having already entered into force, whereas previously it could only examine the conformity of a law with the Constitution on an *ex ante* basis (prior to promulgation) and only upon referral by government or parliamentary authorities.

By the spring 2019, the total number of *ex post* reviews carried out by the Constitutional Council had exceeded the number of *ex ante* referrals addressed since the institution was created in 1958.

This 1,000th QPC is yet another indication of the success of the QPC, which Laurent Fabius, President of the Constitutional Council, likes to refer to as the "citizen's prerogative".

In accordance with the wish expressed by President Fabius, the Constitutional Council will set up an Internet portal on the priority preliminary ruling on the issue of constitutionality by early 2023. Thanks to this innovative platform, any citizen can find a complete overview of the current status of the QPC procedures before all the French courts.

View the complete file relating to Decision No. 2022-1000 QPC and the video of the hearing on the Constitutional Council website.

urlr.me/ybPf8

Reform of the senior civil service

Decision No. 2021-961 QPC of 14 January 2022

Appointments to the State Inspectorate, in the respective positions of Master of Requests (maître des requêtes) of the Council of State and Commissioner of Audits (conseiller référendaire) at the Court of Audit

> "These provisions could not be regarded as legislative provisions within the meaning of Article 61-1 of the Constitution."

In its Decision No. 2021-961 QPC of 14 January 2022, the Constitutional Council ruled that certain provisions of the Ordinance of 2 June 2021 on the reform of the senior management structure of the national civil service (*fonction publique de l'État*) relating to the committees responsible for proposing appointments to the positions of Master of Requests (*maître des requêtes*) of the Council of State and Commissioner of Audits (*conseiller référendaire*) at the Court of Audit were in conformity with the Constitution.

On 18 October 2021, the Council of State referred to the Constitutional Council a QPC concerning the conformity of Article 6 of said ordinance and Articles L. 133-12-3 and L. 133-12-4 of the Code of Administrative Justice, as well as Article L. 122-10 of the Code of Financial Jurisdictions, with the rights and freedoms guaranteed by the Constitution. The wording of the contested provisions was set out in the aforementioned ordinance.

The applicants criticised the provisions of Article 6 of the Ordinance for failing to provide sufficient guarantees for the terms of appointment to the State Inspectorate. They considered that said provisions were therefore undermined by negative incompetence to such a degree as to contravene the constitutional principle of independence of members of the State Inspectorate, for which they sought recognition by the Constitutional Council on the basis of Article 15 of the Declaration of the Rights of Man and of the Citizen of 1789, as well as, where appropriate, Article 16 of the same Declaration.

They also criticised the other contested provisions in that such provisions provided that the committees responsible for proposing candidates for appointment to the positions of

Master of Requests of the Council of State and Commissioner of Audits at the Court of Audit were composed of figures appointed by the President of the Republic and the presidents of the parliamentary assemblies, in equal numbers, without providing for a tie-breaking mechanism. In their view, this resulted in a breach of the principles of independence and impartiality of judicial bodies as well as the principle of separation of powers, enshrined in Article 16 of the Declaration of 1789, owing to the risk of interference by the legislative and executive powers in the exercise of judicial functions and the risk that the committees may be unable to carry out their activities.

With regard to Article 6 of the Ordinance of 2 June 2021, the Constitutional Council recalled that only provisions of a legislative nature may be referred to it by way of the priority preliminary ruling on the issue of constitutionality. The provisions of an ordinance adopted and ratified by the lawmaking body according to the procedure provided for in Article 38 of the Constitution are endowed with the force of statute law as of their signing. Nevertheless, absent ratification, they must be considered, as of the expiry of the enabling period, as legislative provisions within the meaning of Article 61-1 of the Constitution in those areas governed by statute law.

However, the Constitutional Council ruled, firstly, that the Constitution contains no terms requiring that the independence of the State Inspectorate be guaranteed and, secondly, that Article 6 of the Ordinance of 2 June 2021, which merely sets out the conditions of appointment to positions within said State Inspectorate, does not call into question the rules concerning the fundamental guarantees granted to national civil servants (*fonctionnaires de l'État*).

Consequently, these provisions could not be regarded as legislative provisions within the meaning of Article 61-1 of the Constitution. The Constitutional Council concluded that there were no grounds for a ruling on the conformity of said Article 6 with the rights and freedoms guaranteed by the Constitution.

With regard to the contested provisions of the Code of Administrative Justice and the Code of Financial Jurisdictions relating to the committees responsible for proposing appointments to the positions of Master of Requests of the Council of State and Commissioner of Audits at the Court of Audit, the Constitutional Council recalled that, under the terms of Article 16 of the Declaration of 1789: "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution". The principles of independence and impartiality are inseparable from the exercise of judicial functions.

> "The principles of independence and impartiality are inseparable from the exercise of judicial functions."

On these grounds, it ruled, firstly, that it follows from the terms of the contested provisions themselves that the qualified persons serving in these committees are appointed on the basis of their expertise in a specific field and present guarantees of independence and impartiality sufficient to prevent any undue interference by legislative or executive authorities in the committee's deliberations or any conflict of interest.

Secondly, Articles L. 133-12-4 of the Code of Administrative Justice and L. 122-10 of the Code of Financial Jurisdictions specify that the committee takes into account the aptitude of the candidates to perform the duties entrusted to them and, in particular, their understanding of the ethical requirements associated with said duties, as well as candidates' civic-mindedness.

Finally, the absence of a tie-breaking mechanism within the integration committees, which means that only candidates favoured by a majority of members can be proposed for appointment, has no impact on the independence and impartiality of the judical bodies.

Based on this reasoning, the Constitutional Council dismissed the complaint that Article 16 of the Declaration of 1789 had been disregarded and ruled that Article L. 133-12-3 of the Code of Administrative Justice and Article L. 122-9 of the Code of Financial Jurisdictions, in their wording as set out in the Ordinance of 6 June 2021, were in conformity with the Constitution.

View the complete file relating to Decision No. 2021-961 QPC and the video of the hearing on the Constitutional Council website.
urlr.me/Dt9T1

Environmental law

Decision No. 2021-971 QPC of 18 February 2022

Automatic extension of select mining concessions

In its Decision No. 2021-971 QPC of 18 February 2022, the Constitutional Council struck down provisions relating to the extension of former perpetual mining concessions as contravening the Charter for the Environment.

On 6 December 2021, the Council of State referred to the Constitutional Council a QPC relating to conformity of Articles L. 142-7, L. 142-8 and L. 142-9 of the Mining Code, as well as the second sentence of Article L. 144-4 of the same Code, with the rights and freedoms guaranteed by the Constitution. The wording of the contested provisions was set out in Ordinance No. 2011-91 of 20 January 2011 codifying the legislative section of the Mining Code.

Pursuant to Article L. 144-4 of the Mining Code, mining concessions initially established for an unlimited duration were to expire on 31 December 2018. The contested provisions provided for the automatic extension of these concessions in cases where the deposits in question were still being exploited on that date.

These provisions were criticised for allowing the extension of certain mining concessions without requiring the administrative authority to take into account the environmental effects of such a decision. According to the applicant company, this resulted in a failure to comply with the requirements of Articles 1, 2 and 3 of the Charter for the Environment.

The Constitutional Council recalled that, according to Article 1 of the Charter for the Environment: "Everyone has the right to live in a balanced environment which shows due respect for health". Article 3 states: "Everyone shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing

"These provisions were criticised for allowing the extension of certain mining concessions without requiring the administrative authority to take into account the environmental effects of such a decision."

that, limit the consequences of such damage". It is incumbent on Parliament and, within the framework set out by law, on the administrative authorities, to determine, in compliance with the principles set out in this article, the mechanisms for implementation of these provisions.

On these grounds, the Constitutional Council observed, firstly, that the decision to extend a mining concession determines, inter alia, the general framework and scope of mining operations. In view of the purpose and effects of said decision, it is therefore liable to affect the environment.

Secondly, prior to the entry into force of the Law of 22 August 2021 on Combating Climate Change and Building Resilience to its Effects, the contested provisions did not impose any condition for the extension of concessions other than continued exploitation of the deposit in question at 31 December 2018. Neither these provisions nor any other legislative provision required public authorities to take into account the environmental consequences of such an extension before deciding to deny or grant the application. In this respect, the Constitutional Council held that the possibility that some of these consequences could be taken into consideration at a later date when authorising research and work to be carried out on the perimeter of the concession is irrelevant.

Based on this analysis, the Council concluded that, during this period, Parliament had disregarded Articles 1 and 3 of the Charter for the Environment.

However, since the entry into force of the Law of 22 August 2021, paragraph II of the new Article L. 114-3 of the Mining Code provides, in particular, that applications to extend a concession must be denied if the public authorities have serious doubts as to whether it is possible to proceed with the exploitation of the deposit without severely compromising the environmental interests mentioned in Article L. 161-1 of the same Code. Paragraph III of Article L. 114-3 further specifies that the public authorities may require the operator to comply with a set of specifications, appended to the instrument conferring mining rights, which may, in particular, provide for the prohibition of certain exploration or exploitation techniques. Pursuant to Article 67 of the same law, these provisions apply to all applications under examination at that date.

View the complete file relating to Decision No. 2021-971 QPC and the video of the hearing on the Constitutional Council website.
urlr.me/1QH2v

The Constitutional Council therefore ruled that, as from the entry into force of this law, the fact that the contested provisions provide for extension of former perpetual concessions as of right cannot be interpreted as an obstacle to taking into account the environmental consequences of the decision to extend said concessions.

The Constitutional Council concluded that, since that date and subject to this reservation, the provisions no longer violate Articles 1 and 3 of the Charter for the Environment and are in conformity with the Constitution.

Noting that the entry into force of the law of 22 August 2021 eliminated the former conflict with the Constitution, the Constitutional Council ruled that there was no reason to repeal the provisions declared unconstitutional earlier in the decision. It also ruled that there was no reason to postpone the effective date of pronouncement of unconstitutionality. The pronouncement of unconstitutionality therefore took effect as of the date of publication of this decision and is applicable to proceedings pending on said date.

Local taxation

Decision No. 2021-982 QPC of 17 March 2022

Conditions for offsetting revenue shortfalls linked to the abolition of the housing tax for certain municipalities participating in a local authority association

> "The applicant municipality, with the support of the other parties to the appeal, criticised these provisions for not fully offsetting the loss of revenue resulting from the abolition of the housing tax."

In its Decision No. 2021-982 QPC of 17 March 2022, the Constitutional Council struck down as contravening the principle of equality vis-à-vis government encumbrances (*principe d'égalité devant les charges publiques*) the provisions setting out, for certain municipalities, the mechanism intended to offset revenue shortfalls resulting from the abolition of the housing tax.

On 17 December 2021, the Council of State referred to the Constitutional Council a QPC concerning the conformity of paragraph IV of Article 16 of the Finance Act for 2020 of 28 December 2019 with the rights and freedoms guaranteed by the Constitution.

Pursuant to Article L. 5212-20 of the General Local Authorities Code, local authority associations are financed by compulsory contributions paid either in the form of a budgetary allocation from the associated municipality, or a tax-based contribution resulting from the allocation of a share of the proceeds of local taxes, including the housing tax. In the latter case, the General Tax Code provides that the contribution of each municipality is distributed among such local taxes in proportion to the proceeds that each would contribute to the municipality in question by applying the rates of the previous year to the tax bases applicable to the year of taxation.

Article 16 of the law of 28 December 2019 provides for the gradual abolition for all taxpayers, as of 2023, of the housing tax levied on primary residences. In order to offset revenue shortfalls suffered by municipalities as a result of this reform, the law further transfers to them the share of proceeds from the property tax on built-up properties previously collected by the *départements*. It also institutes a corrective mechanism to ensure that the amount thus transferred corresponds to the amount of housing tax revenue lost by each municipality.

Pursuant to the contested provisions, the corrective mechanism determines this amount based on the proceeds of the housing tax on primary residences as collected by each municipality, calculated by applying the 2017 municipal housing tax rate to the 2020 tax base.

The applicant municipality, with the support of the other parties to the appeal, criticised these provisions for not fully offsetting the loss of revenue resulting from the abolition of the housing tax, as they did not include in the revenue to be offset the proceeds from the share of the housing tax collected directly by a local authority association in cases where members elect to so fund the association.

This was considered to have resulted in an unjustified difference in treatment between municipalities who fund a local authority association by allocating the proceeds of a share of housing tax, and other municipalities, in violation of the principles of equality before the tax law and vis-à-vis government encumbrances.

The Constitutional Council recalled that, according to Article 13 of the Declaration of the Rights of Man and of the Citizen of 1789: "For the maintenance of the public force, and for administrative expenses, a general tax is indispensable; it must be equally distributed among all citizens, in proportion to their ability to pay". In particular, to ensure compliance with the principle of equality, Parliament must base its assessment on objective and rational criteria in accordance with the objectives pursued. This assessment must not, however, lead to a clear breach of equality vis-à-vis government encumbrances.

View the complete file relating to Decision No. 2021-982 QPC and the video of the hearing on the Constitutional Council website.

urlr.me/s82NQ

On these grounds, the Constitutional Council noted that it was clear from the parliamentary proceedings that, by implementing the corrective mechanism provided for in the contested provisions, the lawmaking body had intended to fully offset the proceeds of the housing tax lost by municipalities and thus ensure that the abolition of this tax did not lead to an increase in other local taxes, which would undercut purchasing power for local taxpayers and consequently defeat the very purpose of the reform abolishing the housing tax.

However, by providing that the proceeds of the housing tax to be offset for each municipality are determined by applying the municipal tax rate to the tax base, the contested provisions did not include the proceeds of the share of the tax allocated to the local authority association for those municipalities having opted for a tax-based contribution.

As such, the effect of these provisions was to deprive of the benefit of full compensation for the housing tax levied within their borders only those municipalities that allocated a share of their housing tax to a local authority association. Consequently, such municipalities were obliged either to adopt a budgetary allocation to fund the association, or to increase the amount of other taxes paid by local taxpayers and allocated to said association, thus depriving these municipalities and their taxpayers of the benefits sought by Parliament.

The Constitutional Council concluded that, in view of the stated objective of the law, the contested provisions violated the principle of equality vis-à-vis government encumbrances. It thus declared these provisions unconstitutional. It further ruled that this pronouncement of unconstitutionality could be invoked in proceedings pending on the date of publication of this decision.

Bioethics

Decision No. 2022-1003 QPC of 08 July 20222

Access to medically assisted reproduction

In its Decision No. 2022-1003 QPC of 8 July 2022, the Constitutional Council ruled that the legislative provisions granting access to medically assisted reproduction to couples made up of a man and a woman or two women, as well as to unmarried women, were in conformity with the Constitution.

On 16 May 2022, the Council of State referred to the Constitutional Council a priority preliminary ruling on the issue of constitutionality relating to compliance of Article L. 2141-2 of the Public Health Code with the rights and freedoms guaranteed by the Constitution. The wording of the contested provisions was set out in Law No. 2021-1017 of 2 August 2021 on Bioethics.

These provisions grant access to medically assisted reproduction to couples made up of a man and a woman or two women, as well as to unmarried women. They do not extend such access to single men and couples made up of two men. Consequently, persons recorded as female at birth in the civil registry (*état civil*), and who have since obtained the modification of their sex designation while retaining their childbearing capacity, are excluded from the scope of the law.

> "The applicant association criticised these provisions for depriving single men or men in couples of access to medically assisted reproduction."

The applicant association criticised these provisions for depriving single men or men in couples of access to medically assisted reproduction, even though those who were recorded as female at birth in the civil registry and have officially changed their sex designation may be able to bear children. According to this association, the provisions instituted an unjustified difference in treatment between persons with childbearing capacity according to their sex as recorded in the civil registry, thus contravening the principles of equality before the law and gender equality.

The Constitutional Council recalled that Parliament, acting within its sphere of competence, is empowered at any time to adopt

> “The Constitutional Council found the contested provisions to be in conformity with the Constitution.”

new provisions, the appropriateness of which it is solely competent to judge, and to amend or repeal previously enacted legislation by substituting other provisions as it sees fit, provided that, in exercising this power, the lawmaking body does not deprive constitutional requirements of legal guarantees. Article 61-1 of the Constitution does not confer on the Constitutional Council a general power of construal and decision of the same nature as that of Parliament, merely empowering it to rule on the conformity of the legislative provisions submitted for its consideration with the rights and freedoms guaranteed by the Constitution.

According to Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789, 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.

View the complete file relating to Decision No. 2022-1003 QPC and the video of the hearing on the Constitutional Council website.

urlr.me/q3WgY

In this respect, the Constitutional Council noted that the preparatory work on the contested provisions showed that, by adopting these provisions, Parliament intended to grant women equal access to medically assisted reproduction, without distinction on the basis of their marital status or sexual orientation. In so doing, Parliament considered, in discharging its legislative responsibilities, that the difference in situation between men and women, with regard to the rules of civil registration, was apt to justify a difference in circumstances related to the purpose of the law, as regards the conditions of access to medically assisted reproduction. It is not for the Constitutional Council to substitute its assessment for that of Parliament regarding recognition of such a difference in circumstances in this matter.

Based primarily on this reasoning, the Constitutional Council found the contested provisions to be in conformity with the Constitution.

Freedom of religion

Decision No. 2022-1004 QPC of 22 July 2022

Regime governing associations carrying out religious activities

In its Decision No. 2022-1004 QPC of 22 July 2022, the Constitutional Council ruled that several legislative provisions relating to the regime of associations carrying out religious activities were in conformity with the Constitution, subject to two interpretative reservations.

On 18 May 2022, the Council of State referred to the Constitutional Council a priority preliminary ruling on the issue of constitutionality relating to the conformity of Articles 19-1 and 19-2 of the Law of 9 December 1905 on the separation of Church and State and Articles 4, 4-1 and 4-2 of the Law of 2 January 1907 on the public exercise of worship with the rights and freedoms guaranteed by the Constitution.

Religious associations established on the basis of the Law of 9 December 1905 enjoy certain material advantages. Article 19-1 of this law provides that, in order to benefit from such advantages, they must declare their religious status to the representative of the central government in their *département*. The advantages granted under the aforementioned law apply for a period of five years, renewable under the same conditions. However, the representative of the central government in the *département* may object, in certain circumstances, to an association benefiting from these advantages or withdraw said advantages.

> “Religious associations established on the basis of the Law of 9 December 1905 enjoy certain material advantages.”

Articles 4, 4-1 and 4-2 of the Law of 2 January 1907 apply to public exercise of worship through associations governed by the Law of 1 July 1901. Articles 4 and 4-1 subject these associations to various administrative and financial obligations. Article 4-2 allows the representative of the central government to formally enjoin an association engaged in activities related to the public exercise of worship, without such activities being mentioned in its stated purpose, to modify its purpose accordingly.

In particular, Article 19-1 of the Law of 9 December 1905 was criticised for requiring

associations to identify themselves as religious organisations in order to benefit from the material advantages associated with this category of association, thereby instituting a system of prior authorisation that would require the government to recognise certain religions. The applicants also argued that, since the obligations imposed on these associations had been made more onerous, these provisions would enable the representative of the central government, in many cases, to refuse or withdraw such religious status. In their view, this situation violated the principles of secularism, freedom of association and freedom of religion.

The applicants also criticised the constraints, which they considered excessive, imposed by Articles 4 and 4-1 of the Law of 2 January 1907 on associations providing for the public exercise of worship, in violation, in their view, of the principles of freedom of association, freedom of religion, and freedom of assembly. Moreover, as the "activities related to the exercise of worship" taken into account by the government upon enjoining an association to modify its articles of association to reflect these activities were not clearly defined in Article 4-2 of the same law, the applicants claimed that the provisions were undermined by negative incompetence in such a way as to affect these constitutional requirements.

With regard to the provisions of Article 19-1 of the Law of 9 December 1905: examining the criticism levelled at these provisions with regard to the principle of secularism, the Constitutional Council recalled, citing the terms of Article 10 of the Declaration of the Rights of Man and of the Citizen of 1789 and the first three sentences of the first paragraph of Article 1 of the Constitution, that the principle of secularism is among the rights and freedoms guaranteed by the Constitution and that it follows therefrom that the Republic does not recognise any religion and guarantees the free exercise of worship.

In this light, the Council noted, firstly, that the contested provisions are intended solely to introduce a declaratory obligation with the purpose of enabling the representative of the central government to verify that associations requesting the advantages specific to religious associations are so eligible. They are neither intended to nor effectively entail recognition of a religion by the Republic or impede the free exercise of worship, within the framework of an association governed by the law of 1 July 1901 or by means of meetings held upon individual initiatives.

View the complete file relating to Decision No. 2022-1004 QPC and the video of the hearing on the Constitutional Council website.
urlr.me/7VCQY

Secondly, it held that the representative of the central government may only oppose granting an association the advantages specific to religious associations or withdraw said advantages following an adversarial procedure and solely for reasons of public order or in the event that he or she finds that the association does not pursue the exclusive purpose of exercising worship or that its creation, composition and structure do not meet the conditions comprehensively listed in Articles 18 and 19 of the Law of 9 December 1905.

The Constitutional Council ruled that, consequently, the contested provisions do not have the effect of depriving of legal guarantees the free exercise of worship, and as such do not violate the principle of secularism.

Subsequently, examining the criticism levelled at these same provisions with regard to the principle of freedom of association, the Constitutional Council recalled that this principle is among the fundamental principles recognised by the laws of the Republic and solemnly reaffirmed in the Preamble to the Constitution, and that any limitations imposed thereon must be necessary, appropriate and proportionate to the objective pursued.

In this respect, it noted that the declaratory obligation imposed by the contested provisions

"The Constitutional Council ruled that, consequently, the contested provisions do not have the effect of depriving of legal guarantees the free exercise of worship, and as such do not violate the principle of secularism."

on associations seeking to benefit from certain advantages was not intended to regulate the conditions under which they were created and carried out their activities.

However, it noted that withdrawal of said advantages by the representative of the central government is liable to affect the conditions under which an association carries out its activity.

By way of a first interpretative reservation, the Constitutional Council ruled that retroactive withdrawal of the status of religious association would constitute a disproportionate infringement of freedom of association; as such, an association that loses said status cannot be required to reimburse the material benefits enjoyed prior to the withdrawal.

With regard to the provisions of Articles 4, 4-1 and 4-2 of the Law of 2 January 1907: examining the criticisms levelled at these provisions in light of the principle of freedom of association and free exercise of worship, the Constitutional Council noted that the various administrative and financial obligations they impose on associations whose activities are related to the public exercise of worship are liable to undermine these requirements.

However, it held firstly that Parliament, by adopting these provisions, intended to increase the transparency of the activities and funding of associations providing for the public exercise of worship. In so doing, it pursued the constitutionally valid objective of maintaining public order.

Secondly, pursuant to the contested provisions of Articles 4 and 4-1 of the Law of 2 January 1907, associations are subject to obligations consisting, in particular, in drawing up a list of the places in which they commonly organise worship, presenting accounting documents and the provisional budget for the current financial year at the request of the representative of the central government, establishing an accounting system in which operations relating to their religious activities appear separately, and certifying their financial statements in cases where they have received foreign funding in amounts exceeding a threshold set by decree, issued tax receipts, received a minimum amount of public subsidies or when their annual budget exceeds a minimum threshold also set by the regulatory authority.

By way of a second interpretative reservation, the Constitutional Council specified that, although such obligations are necessary and appropriate to the objective pursued by the lawmaking body, it remains within the remit of regulatory authorities, by setting the specific procedures for implementing these obligations, to ensure that the constitutional principles of freedom of association and freedom of worship are respected.

Lastly, the Council dismissed the complaints against Article 4-2 of the Law of 2 January 1907. It held that, by providing that the representative of the central government may enjoin an association to modify its purpose to reflect its activities when it carries out "activities related to the exercise of worship", Parliament had not exceeded its jurisdiction in such a way as to affect the aforementioned constitutional requirements. Moreover, the Council emphasised that it was clear from the Council of State's consistent case law that these activities included the acquisition, rental, construction, fitting out and maintenance of buildings used for worship and the upkeep and training of ministers and other persons involved in the exercise of worship.

On all these grounds, the Constitutional Council ruled that Parliament had not infringed the principles of freedom of association and free exercise of worship in a way that was not necessary, appropriate and proportionate.

> "The Constitutional Council ruled that Parliament had not infringed the principles of freedom of association and free exercise of worship in a way that was not necessary, appropriate and proportionate."

Du 9/12/5

CABINET DU MINISTRE
DE
L'INSTRUCTION PUBLIQUE,
DES BEAUX-ARTS
ET DES CULTES.

Pie Pale
B 2663

PROMULGUÉ AU JOURNAL OFFICIEL
DU 11/12

Loi

concernant la
Séparation des Églises et de l'État.

Le Sénat et la Chambre des Députés ont adopté,

Le Président de la République promulgue la loi dont la teneur suit :

Titre premier. — Principes.

Article premier.

La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public.

Art. 2.

La République ne reconnaît, ne salarie ni ne subventionne aucun culte. En conséquence, à partir du 1er janvier qui suivra la promulgation de la présente loi, seront supprimées des budgets de l'État, des départements et des communes, toutes dépenses relatives à l'exercice des cultes. Pourront toutefois être inscrites auxdits budgets les dépenses relatives à des services d'aumônerie et destinées à assurer le libre exercice des cultes dans les établissements publics, tels que lycées, collèges, écoles, hospices, asiles et prisons.

Les établissements publics du culte sont supprimés, sous réserve des dispositions énoncées à l'article 3.

Civil service working time

Decision No. 2022-1006 QPC of 29 July 2022

Abolition, in the local civil service, of working time regimes derogating from working time set out in ordinary law

> "Parliament intended to contribute to the harmonisation of working hours within the local civil service and with the national civil service, with a view to reducing inequalities between staff."

In its Decision No. 2022-1006 QPC of 29 July 2022, the Constitutional Council ruled that legislative provisions relating to the working time of local civil service employees (*agents de la fonction publique territoriale*) were in conformity with the Constitution.

On 1 June 2022, the Council of State referred to the Constitutional Council a priority issue of constitutionality concerning the conformity of Article 47 of Law No. 2019-828 of 6 August 2019 on the transformation of the civil service with the rights and freedoms guaranteed by the Constitution.

Pursuant to the first paragraph of Article 7-1 of the law of 26 January 1984 on statutory provisions relating to the local civil service, local authorities set the rules relating to the definition, duration and organisation of the working time of their employees within the limits applicable to national civil service employees (*agents de l'État*), taking into account the specific nature of the tasks performed by said local authorities. By way of derogation, the last paragraph of this same Article allowed local authorities to maintain the working time arrangements they had implemented prior to the entry into force of Law No. 2001-2 of 3 January 2001.

Article 47 of the law of 6 August 2019 eliminates this option. It requires local authorities having exercised the option to set new rules bringing the working time of their employees in line with the limits applicable to employees of the national civil service. Said rules must be decided upon by the deliberative assemblies of the local communities concerned within one year of local elections.

> “On the basis of all these elements, the Constitutional Council concluded that the complaint based on violation of the principle of free administration of local authorities should be dismissed.”

The applicant and intervening municipalities criticised these provisions primarily for obliging local authorities, which had theretofore been authorised to maintain working time arrangements by way of derogation, to set new rules relating to the working time of their employees in line with the limits applicable to employees of the national civil service. In their view, these provisions were not justified by an objective of general interest and as such violated the principle of free administration of local authorities.

The Constitutional Council recalled that, while Parliament may, on the basis of Articles 34 and 72 of the Constitution, impose obligations and burdens on local authorities or groupings thereof, such obligations and burdens must satisfy constitutional requirements or promote the public good and be defined in a sufficiently precise manner as to their purpose and scope. In addition, they must not encroach on the specific competence of the authorities concerned or hinder the free administration thereof.

With regard to this constitutional framework, the Constitutional Council noted firstly that, by adopting the contested provisions, Parliament intended to contribute to the harmonisation of working hours within the local civil service and with the national civil service, with a view to reducing inequalities between staff and facilitate mobility. In so doing, it pursued an objective of general interest.

View the complete file relating to Decision No. 2022-1006 QPC and the video of the hearing on the Constitutional Council website.
urlr.me/bG6qr

Secondly, in terms of employment, work organisation and staff management, the contested provisions simply orient the competence of local authorities to lay down rules on the working time of their staff. Meanwhile, local authorities that had maintained specific regimes by way of derogation remain free, like other sub-national authorities, to set out specific working regimes to take into account constraints associated with their employees’ duties.

On the basis of all these elements, the Constitutional Council concluded that the complaint based on violation of the principle of free administration of local authorities should be dismissed. It ruled that the contested provisions were in conformity with the Constitution.

Other categories of decisions

Between October 2021 and September 2022, in addition to the decisions it handed down through the *ex ante* and *ex post* constitutionality review processes and the decisions related to the monitoring of the presidential election, the Council issued several dozen other decisions.

In electoral matters, it issued two "SEN" decisions on the elections to the Senate, thus completing the processing of the litigation arising from the September 2021 Senate elections.

It also issued eight decisions on parliamentary by-elections held on 30 May and 6 June 2021. In its Decision No. 2021-5726/5728 AN dated 28 January 2022, it annulled the electoral process which took place on 30 May and 6 June 2022 in Paris's 15th electoral district after it found that a manoeuvre had potentially altered the voting's sincerity.

Then, on 29 July and 5 August 2022, it rejected the admissibility of 47 of the 99 complaints filed against the June 2022 legislative elections.

The Constitutional Council issued five rulings on reclassification requests made by the Prime Minister, upholding all of them.

On 7 October 2021, in its Decision No. 2021-43 I, it ruled upon the situation of Mr Luc Lamirault with regard to the rules covering parliamentary conflicts of interests and held that his position and role in the management of the Clexni, Medipha Santé, Nialex and Veggiepharm companies were compatible with his office as a deputy.

Twice, the Constitutional Council ruled on disqualification requests formulated by the Minister of Justice and the public prosecutor's office against Senator Jean-Noël Guérini and Deputy Michel Fanget. In both cases, the Constitutional Council ruled in Decisions No. 2021-26 D dated 23 November 2021 and No. 2022-27 D dated 16 June 2022 that, in the absence of a final conviction of these two individuals, the requests made by the Minister of Justice and the public prosecutor's office were not admissible and, as a result, should be rejected.

The Constitutional Council's new rules of procedure for Decisions on Conformity with the Constitution

In its Decision No. 2022-152 ORGA dated 11 March 2022, the Constitutional Council adopted, based on Article 56 of Ordinance No. 58-1067 dated 7 November 1958 on the Constitutional Council, rules of procedure governing *ex ante* Decisions on Conformity with the Constitution.

These rules apply since 1 July 2022 to Constitutional Council referrals made pursuant to Articles 54 and 61 of the Constitution.

In line with its objective of becoming a fully fledged court, promoted by President Laurent Fabius, the Constitutional Council hereby adopted another set of rules of procedure which, since 1959, include provisions on litigation concerning the election of deputies and senators, since 1988, provisions applicable to litigation concerning the referendum process and, since 2010, provisions governing the QPC process before the Constitutional Council.

The new rules – in particular those laid out in Chapter 1 concerning the filing, presentation and registration of referrals and in Chapter 3 concerning judgments – aim to codify a set of practices developed and adjusted since the creation of the Constitutional Council.

The same goes for the rules' Article 13, which codifies the choice made in 2019 by the Constitutional Council to make public, along with its decisions, all the external contributions it receives (similar to *amicus curiae* briefs, which were previously called "*portes étroites*" or "narrow portals").

> "Encoding an occasional but hitherto rare practice, the rules provide that a hearing may be organised upon request from the authors of the referral."

These new rules also modernise aspects of the current process to make it more transparent and improve the adversarial debates that take place before the Constitutional Council.

Several provisions seek to ensure better publicising of the Council's work. Article 3 provides that, not only should referrals be immediately registered on the website, but that their text should also be included online.

Similarly, Article 5 provides that the Constitutional Council may announce on its website the date it will read out its decision.

Other provisions specify the conditions under which evidence may be brought to the Council's attention and added to the record.

Furthermore, its Article 10, thereby encoding an occasional but hitherto rare practice, provides that the Council may, upon request of senators or deputies who have presented a referral, organise a hearing with a chosen representative, who may provide written observations.

Its Article 11 opens the possibility for the member of the Constitutional Council that is selected as rapporteur to collect written observations of deputies or senators that have not presented the referral if the latter make such request.

Article 12 provides that qualified individuals may be consulted at the initiative of the rapporteur and that their statements be added to the record.

Finally, Articles 14 and 15 of these new rules present the conditions under which members of the Council should recuse themselves and withdraw from the constitutional review. These rules are similar to those that govern QPC processes.

Ferdinand
Mélin-Soucramanien

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"A

nne, my sister Anne, do you not see it coming? I only see the sun shining and the green grass..." Now, the hero of Perrault's tale can finally see rules of procedure governing Decisions on Conformity with the Constitution brought before the Constitutional Council. These rules, which contain 19 articles, were adopted on 11 March 2022 through an "ORGA" decision issued under Laurent Fabius's presidency. The rules apply since 1 July 2022.

One has to highlight it took sixty years for these rules to be adopted despite the language of Article 56 of the organic Ordinance of 7 November 1958 on the Constitutional Council, which states that: "The Constitutional Council shall specify through rules of procedure the general guidelines provided herein at Title II...". One need not launch into an academic discussion of the imperative value of the future tense ("shall specify") chosen by Parliament in 1958 to understand that this provision created an obligation – and not merely an option – for the Constitutional Council. The Council had in fact adopted in 1959 rules of procedure governing disputes concerning the election of deputies and senators, in 1988 rules of procedure governing disputes concerning referendum processes, and finally in 2010 rules of procedure governing QPC proceedings.

With respect to the procedure for Decisions on Conformity with the Constitution, the Council persisted in following customary, unwritten rules, with the exception of an "Internal guide" drafted by the Constitutional Council's Secretary General from 1986 to 1993, Mr Bruno Genevois. Knowing the procedure for constitutionality processes therefore amounted until then to "insider trading", as Professor Jean Gicquel described it (*Les cahiers du Conseil constitutionnel*, No. 1, 1996). This resulted in an important shortcoming concerning the procedure followed before the Constitutional Council which impinges upon its very role. It contributed to making the Council a "mystery chamber", which was all the more perceptible due to the academic constitutional law community's constant complaints about this situation, detrimental to judicial security and, in turn, to the rule of law. A longstanding request from several thinkers was to draft true rules of procedure and thereby codify a consistent approach to constitutional justice, the argument

“Finally, rules of procedure for Decisions on Conformity with the Constitution before the Constitutional Council!”

being that the Council could not prescind from the guiding principles of justice that it imposed upon all other national courts. Such was Professor Guillaume Drago’s argument since the first edition of his 1998 work (*Contentieux constitutionnel*, 1st ed., P.U.F., 1998, p. 299). In fact, this was also the case of the author of these lines (“*La légitimité du Conseil constitutionnel : une question de procédure ?*”, *Revue belge de droit constitutionnel*, 1999, p. 325). A minority of academics, but with at their helm the tutelary figure of Dean Georges Vedel, on the contrary argued in favour of the status quo and the preservation of a form of procedural empiricism (“*Réflexions sur la singularité de la procédure devant le Conseil constitutionnel*”, *Mélanges en l’honneur de Roger Perrot*, Dalloz, 1996, p. 537). The debate was crucial since it revolved around the question of whether the *ex ante* Decisions on Conformity with the Constitution was simply a step of the legislative process, making the Constitutional Council a “third legislative chamber”, or if on the contrary this review could lead to a fully fledged constitutional dispute in which due process was to be respected. In the background, and beyond the technical aspect of the debate, the question raised was that of the Constitutional Council’s legitimacy as a court.

This gap is now filled. This “codification” was necessary, even essential, in our eyes, but is it sufficient? We believe this is not the case since this “codification” was based upon the existing rules. The rules of procedure adopted overall embrace the prevailing rules exposed in all constitutional litigation textbooks. Some rules have been specified, for instance that on “external contributions”, by crystalising the Constitutional Council practice hitherto only formalised in two statements (23 February 2017 and 24 May 2019), or that on withdrawal and challenge at Articles 14 and 15 and their alignment on the 2010 rules of procedure for QPCs. One must also highlight Article 10 of these rules of procedure, which is of particular interest. It provides that “Upon request of deputies or senators who have presented a referral, the Council may organise a hearing with one of their chosen representatives, who may then provide written observations [...].” One can see the premises of a potential application of the notion of adversarial debates to this “litigation against the law”. However, one cannot help but be struck by the importance given to “soft law” in these rules of procedure, which to a large extent remain discretionary and optional. The use of formulations such as “The Council may”, etc. testify to the desire to combine formalization and flexibility, to “codify” without rigidifying.

On balance, the adoption of these rules of procedure should be commended. Whatever the discussions on their current content, they improve constitutional justice in France and consolidate the rule of law, another step forward in what President Robert Badinter called the Constitutional Council’s “long march” towards its transformation. In our eyes, the Constitutional Council’s adoption of these rules of procedure shows it has done its part in light of the constraints under which it operates, in particular its tight deadlines. Resuming the march forward ultimately lies in the hands of constituent power – to each his own.

3 key dates

1959
Rules of procedure governing disputes concerning the election of deputies and senators.

1988
Rules of procedure governing disputes concerning referendum processes.

2010
Rules of procedure governing the QPC process.

The year at the Council

Whether through participating in various conferences, organising examinations, producing a documentary, or the hosting of foreign courts' delegations, the Constitutional Council has sought to disseminate constitutional culture and facilitate dialogue with its partners throughout the year. The following pages provide an overview of the past months' highlights.

Disseminating constitutional culture

HEARING OUTSIDE THE CAPITAL AT THE BOURGES COURT OF APPEALS

The Constitutional Council once again sat outside of the Palais-Royal walls by organising a public hearing at the Bourges Court of Appeals on Tuesday 16 November 2021. After Metz, Nantes, Pau and Lyon, this fifth "relocated" hearing was an opportunity to resume travels around the country that had been put on hold as a result of the health crisis.

By travelling outside the capital, the Council intends to raise awareness among justice professionals and the general public of its mission to ensure conformity to the laws of the Constitution and, in particular, to the "citizen's prerogative" that is the QPC.

The Constitutional Council studied QPCs Nos. 2021-948 and 2020-949/950 in the hearing room of the Bourges Court of Appeals before judges, civil servants, lawyers, academics, law students and the general public. The first examined provisions attempting to curtail the electronic reporting of highway controls and the second looked at provisions from the Criminal Code concerning the forfeiture of assets shared by two spouses.

As per the usual schedule since these trips began, President Fabius returned to Bourges the following week, on 24 November 2021, and met with students from the Faculty of Law to discuss the two decisions issued in the cases examined during the hearing.

Watch the video on the hearing in Bourges.
urlr.me/Qqd37

Accounts

"The purpose of our attendance at this public hearing is to help our students understand the setting in which a QPC is decided and thus to see the practical applications of our teachings."

David Nedelec, Law teacher at the Faculty of Bourges

"We are often exposed to theory, but here we were able to see the actual practice for ourselves, both with the decision at the Court of Appeals and with the explanations provided in the lecture hall."

Victoria Mahut, second year Law student at the Faculty of Bourges

"Such a conference enables students to see the core of our institutions, to show them concretely how our law is built every day and how due process protects citizens' civil liberties."

Pierre Allorant, Dean of the Faculty of Law, Economics and Management of Orléans

2 JUNE 2022

The Constitutional Council opens its doors for the shooting of a documentary film

In this very busy 2021-2022 year, the Constitutional Council decided to open its doors to filmmakers Mr Serge Moati and Mr Nicolas Combalbert. The resulting documentary entitled *Le Conseil constitutionnel au temps de la présidentielle* ("The Constitutional Council and the Presidential Election") was broadcast on channels LCP-AN and TV5 Monde and can be watched on the Constitutional Council's website.

Innovative and engaging, this documentary showcases the variety of missions undertaken by the Constitutional Council through interviews with Presidents Fabius and Badinter, Ms Schnapper and Ms Levade, visual archives and a deeper look at the modern functioning of the Council.

Watch the documentary *Le Conseil constitutionnel au temps de la présidentielle* (The Constitutional Council and the Presidential Election).

urlr.me/yKPsF

Stimulating dialogue with the legal community

THESIS AWARD

19 OCT. 2021

The President of the Constitutional Council awarded the 25th Constitutional Council Thesis Award on 19 October 2021 to Thibault Larrouturou 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").

The award ceremony took place at the Constitutional Council in the presence of the members of the Constitutional Council and the Thesis Award jury. This edition's jury, chaired by Laurent Fabius, was composed of Aurore Gaillet, professor at the University of Toulouse, Agnès Roblot-Troizier, professor at the Paris I Panthéon-Sorbonne University, Guillaume Tusseau, professor at Sciences Po, Claire Bazy Malaurie, former Constitutional Council member, Jacques Mézard, member of the Constitutional Council, and Jean Maïa, the Constitutional Council's Secretary General.

During the ceremony, President Fabius highlighted how "the thesis illustrates the ways in which the QPC has made the Constitutional Council the cornerstone of the protection of basic rights and liberties by reinforcing harmoniously the review of the law's conformity."

The winning thesis was published in October 2021 with LGDJ in the collection *"Bibliothèque constitutionnelle et de science politique"* (volume 158). As part of a partnership established between the Constitutional Council and the Cultural Meeting Centre of the Château de Goutelas (Marcoux, Loire *département*), the winner was offered a residency in the "Library of Legal Humanism" to conduct further research on this project.

> "The thesis illustrates the ways in which the QPC has made the Constitutional Council the cornerstone of the protection of basic rights and liberties..."

MEETING WITH PRIVATE LAW *AGRÉGÉS*

7 DEC. 2021

Upon invitation from the President of the Constitutional Council, the laureates and members of the jury of the 2021 private law and criminal sciences *agrégation* examination were welcomed at the Constitutional Council on 7 December 2021.

After the QPC hearing to which the laureates were invited to attend, a morning of talks with members of the Council, the Secretary General, members of the staff and the President's chief of staff ensued.

Over the past few years, these meetings with the new professors have been an opportunity for the Council to make to establish important relationships, thereby fostering mutual understanding between academia and the Council.

VEDEL PRIZE

24 JUNE 2022

The final round of the 12th edition of the *Concours Vedel* (Vedel Prize) was held in the Constitutional Council's public hearing room.

Organised by the Lextenso publishing house with the sponsorship of the Constitutional Council, this prize is open to graduate students in their final year of studies and is given to the two best pleadings, one for the defence and one for the plaintiff, on a question of priority preliminary ruling on the issue of constitutionality. This year's practical case concerned a QPC raised against the preliminary articles 171 and 802 of the Code of Criminal Procedure by two businessmen under investigation.

After deliberation, the jury chaired by Michel Verpeaux, emeritus professor at the Paris I Panthéon-Sorbonne University and composed of Michel Pinault, member of the Constitutional Council, Guillaume Valdelièvre, representing the Bar Association before the Council of State and the Court of Cassation, Maud Vialettes, representing the Council of State, Rusen Aytac, representing the National Bar Council (*Conseil national des barreaux*) and Christophe Soulard, representing the Court of Cassation, decided to award the best pleading to the Paris II University (plaintiff) and University of Brest (defence) teams.

Titre VII

Access *Titre VII*'s digital journal.
urlr.me/Lx58S

Launched in 2018 upon the Constitution's 60th birthday, *Titre VII - Les cahiers du Conseil constitutionnel* is a free digital publication edited by the Constitutional Council.

Titre VII allows readers to access the doctrinal debates and testimonies by major public law practitioners every half-year, reviews of case law and international comparisons. It also offers articles on the main aspects of the Constitutional Council's work.

With over 182,583 page views in 2021, *Titre VII* published its 7th issue on individual liberty in October 2021 and its 8th issue on categories of constitutional norms in April 2022.

Titre VII is entirely available online on the Constitutional Council's website.

Promoting the Council abroad

9TH CONGRESS OF THE ASSOCIATION OF FRANCOPHONE CONSTITUTIONAL COURTS IN DAKAR

31 MAY – 2 JUNE 2022

The President of the Constitutional Council and Corinne Luquiens, member of the Constitutional Council, took part in the 9th triennial Congress of the Association of Francophone Constitutional Courts (*Association des cours constitutionnelles francophones*, or ACCF) held in Dakar, Senegal, from 31 May to 2 June 2022.

This event, organised with the support of the Constitutional Council of Senegal, gathered 34 institutions that are members of the ACCF, including 16 constitutional court presidents. "The constitutional judge and human rights" were at the heart of the address made by the President of the Republic of Senegal, Macky Sall.

Discussion between the courts present at the Congress revolved around three main themes:

- Human rights, the rule of law, and democracy;
- The judicial methods and techniques of human rights protection;
- Contextualising human rights: human rights and exceptional circumstances.

President Fabius took part in the first roundtable, stating that "constitutional courts have an important role to play as guardians of democratic stability, of the rule of law and of the durability of fundamental rights, and of the interdependence of these three connected issues."

Over the course of the Congress, the Chief Justice of Canada Richard Wagner transferred the association's presidency to the President of the Constitutional Council of Senegal, Papa Oumar Sakho.

HOSTING A DELEGATION FROM THE FEDERAL CONSTITUTIONAL COURT OF KARLSRUHE

13 JUNE 2022

Renewing its usual strong ties with the Federal Constitutional Court of Karlsruhe since the public health crisis, the Constitutional Council was pleased to welcome a delegation of eleven clerks to the Federal Constitutional Court's two chambers on 13 June 2022.

The day was an opportunity for the clerks supporting the judges in their judicial office to have sustained and personal discussions about the differences and similarities in the organisation of this office between the two courts.

The first roundtable saw a rich debate over the different rules of procedure applicable within the two jurisdictions and the type of constitutional review they make. A discussion followed on the two institutions' caselaw on remand in light of Article 2 of the German Basic Law and Article 66 of the French Constitution. Finally, the last roundtable organised allowed participants to present decisions issued by the two courts as part of their control of the measures adopted to tackle the Covid-19 epidemic in both countries.

VISIT FROM THE EUROPEAN SUPREME COURTS BAR ASSOCIATION

A delegation of the European Supreme Courts Bar Association, composed of around ten lawyers before the German, Belgian, and Dutch Courts of Cassation, was welcomed by the Constitutional Council's Secretary General Jean Maïa on 20 June 2022.

20 JUNE 2022

The Secretary General presented the Council's missions and its judicial activity to the delegation. He specified the rules of procedure applicable to priority preliminary rulings on the issue of constitutionality and addressed the relationship between the Constitutional Council and other supreme national, European and international jurisdictions, in particular within the framework of the Association of Francophone Constitutional Courts. Ensuing discussions with members of the delegation proved particularly valuable. The delegation was interested in the lawyers' role in this procedure, the authority of the Council's decisions and the independence of its members. These fruitful exchanges were mutually beneficial to the knowledge of the practice of constitutional review in the states represented within the association.

Watch the video of the conference at the Canadian Embassy.

urlr.me/C48mP

CONFERENCE AT THE CANADIAN EMBASSY

Laurent Fabius and Richard Wagner, Chief Justice of Canada, held a public conference at the Canadian Embassy on 5 July 2022. They discussed the role of constitutional courts in meeting the challenges of democracy. This discussion allowed them to recall their attachment to the principles of the rule of law with particular attention paid to the independence of judges, to insist on the initiatives taken by each of their jurisdictions to strengthen the constitutional culture of citizens such as relocating hearings, and to highlight the challenges of constitutional courts in defending freedoms in times of crisis, particularly in the field of environmental protection.

5 JULY 2022

Changes at the Council

Reinforcement of its sustainability policy, inauguration of new offices, creation of a portal dedicated to QPCs... The Constitutional Council is always seeking to improve its functioning and to adapt its activity to the newest developments in law and society. Below are a few highlights of the improvements at the Constitutional Council that took place over the past year.

Energy-saving and sustainable development at the Constitutional Council

Despite the public health crisis, the Constitutional Council has continued the implementation of its pluriannual energy-saving and sustainable development plan, focussing on new mobility.

From 1 January 2021, the "sustainable mobility" pass was offered to Constitutional Council staff pursuant to Decree 2020-543 dated 9 May 2020 and its implementing act. Constitutional Council staff may thus benefit from a full or partial refund of the expenses incurred by traveling from their home to their workplace with their bicycle or electric bicycle or as the driver or passenger of a rideshare.

The Constitutional Council had also implemented measures to provide a space dedicated to bike parking, which has become very popular with staff.

Regarding the vehicle fleet, after the acquisition of three hybrid vehicles in 2020, in 2021 the Council replaced its last conventional vehicle with a hybrid vehicle. In 2022, an electrical terminal was installed at the premises at 2 rue de Montpensier, which will optimise the use of the electrical power supply for these vehicles.

In addition, as part of waste recycling, a solution for the free transfer of certain digital devices to Council employees was implemented in March 2021. Some thirty members of staff have benefited from this action.

In addition to these concrete steps, work has progressed on larger-scale projects, in particular the improvement of the entire building's thermal regulation with a view to saving energy. The first

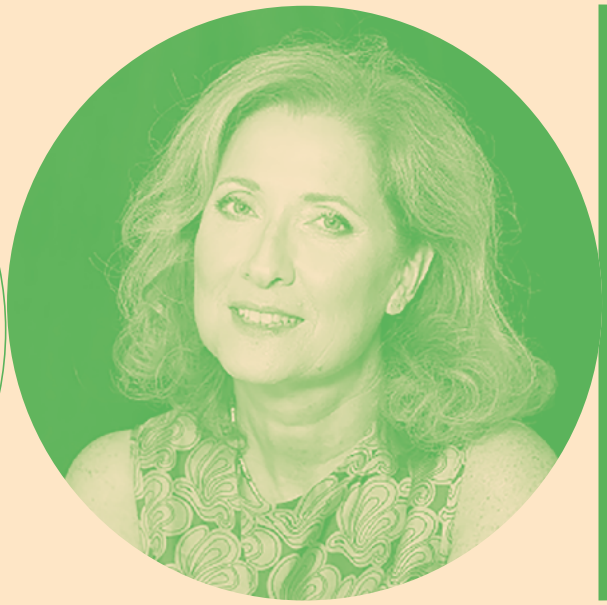
"The first phase of the plan is expected to achieve the set goal of a 25% reduction in the Council's overall energy consumption."

phase was carried out in the summer of 2021. The second phase has been scheduled for the summer of 2022. Thus, the first phase of the plan is expected to achieve the set goal of a 25% reduction in the Council's overall energy consumption.

Finally, as part of the efforts to reduce energy consumption, all measures have been taken to ensure that non-essential lighting and digital equipment is switched off when not in use, and to limit the use of heating.

The Constitutional Council's new premises

During the monitoring of the presidential election, the Constitutional Council decided to rent new premises on Avenue de l'Opéra as from late 2021. The external relations and communication departments are now located here. This choice reflects the wish to offer members of the General Secretariat working conditions that support their mission, as the staff has grown since the creation of priority preliminary rulings on the issue of constitutionality. These new premises were made all the more necessary by other regular missions of the Constitutional Council, such as the monitoring of the presidential election, which forces the Council to periodically take over part of the office space.



Valérie
Pernot-
Burckel

**Director
of the QPC
portal project**

The QPC portal

Innovation at the service of the "citizen's prerogative"

> " The evaluation of the first ten years of the procedure has shown that citizens are not always aware of its existence. "

The tenth anniversary of the creation of priority preliminary rulings on the issue of constitutionality (QPC) in late 2020 was an opportunity to reflect on the major innovation it constitutes in protecting citizens' basic rights. This procedure allows citizens to refer the non-conformity of law, in any administrative or judicial case, to the main legal principles. The opening of remedies before the Constitutional Council offered by the QPC has allowed the Council to register over 1,000 referrals since 2010, covering a wide range of legislative provisions and constitutional obligations.
The evaluation of the first ten years of the procedure has however shown that citizens are not always aware of its existence. Legal practitioners – judges and lawyers,

> “The portal will provide an easy access to all caselaw of both judiciary and administrative courts, of the two jurisdictions’ supreme courts, the Council of State and the Court of Cassation, and of the Constitutional Council itself.”

but also academics – regretted not having a database compiling all decisions issued by French courts pursuant to this procedure.
This is why President Fabius decided, working in partnership with the Council of State, the Court of Cassation and the Ministry of Justice, to deploy an information system for the QPC to make each step of the process clearer. The Constitutional Council took up this task and is preparing the deployment of a portal in early 2023 that will contain all QPC decisions and explain the procedure’s steps clearly.
This deployment is being prepared in conjunction with the open data project for jurisdictional decisions led by the two jurisdictional orders to make these decisions available to all citizens. The Council’s project is inscribed in the same objective.
The portal will provide an easy access to all caselaw of both judiciary and administrative courts, of the two jurisdictions’ supreme courts, the Council of State and the Court of Cassation, and of the Constitutional Council itself.
It is designed to be of use to different audiences. Citizens may use it to become acquainted with the right to interrogate the Constitutional Council on the constitutionality of a law created by the 2008 constitutional revision. Judges from all jurisdictions will find it easier to review caselaw. Other legal practitioners, especially lawyers, will easily be able to see whether a case they are working on has already been settled.
An editorial committee composed of the project’s different partners is working on offering the most useful information to the portal’s different users with two timeframes in mind: the portal’s launch and the early use period.
We believe that the rule of law, whose preservation is based on rules and compliance with such rules, as well as their accessibility to the widest audience, will benefit from the deployment of this portal, thereby consolidating the progress made through the QPC’s creation.

3 key dates

2008
Creation of the QPC.

2021
Launch of the QPC portal project.

2023
Deployment of the QPC portal.

War and Law

On 4 October 2022, the Constitutional Council organised as part of the *Nuit du Droit* an exceptional conference on "War and Law". One of the prestigious speakers, Mr Karim Khan, Prosecutor of the International Criminal Court, shared his views in this discourse on the tragedy of the war in Ukraine.

Conference of Supreme Courts of the European Union

21 FEBRUARY 2022

In the context of the French Presidency of the Council of the European Union (EU), the Constitutional Council – in partnership with the Council of State and the Court of Cassation – organised on 21 February 2022 a conference bringing together chief justices of Supreme Courts of the EU Member States.

This conference, dedicated to the role of the judge in the consolidation of the rule of law in Europe, gathered around 100 participants representing 24 Member States of the EU and 48 Supreme Courts.

During the introductory plenary session, Mr Laurent Fabius, President of the Constitutional Council, gave a speech in which he reminded the audience that "the community of values that defines European identity is based on a respect for law".

He added: "In a context of ever-increasing tensions, crises and even conflict, we are tasked with resisting and anticipating any backsliding. The degree of confidence and of resistance to the rule of law depends in institutions' capacity to respond to both current and future risks. In this respect, our responsibility toward future generations in particular will need to come to the fore of our work. In our attempts to resist and anticipate, the strength of the law will in large part depend on the convergence of our legal systems around shared values, starting with the rule of law."

More information on this event on the Constitutional Council's website.
urlr.me/WLR8K

The *Nuit du Droit* at the Constitutional Council

More information on the *Nuit du Droit*'s website.
urlr.me/tdk5g

4 October is the anniversary of the Fifth Republic's 1958 Constitution.

The Constitutional Council chose "War and Law" as the theme of the *Nuit du Droit*, a national event launched in 2017 upon Laurent Fabius's suggestion. The event, organised at the Council's premises on 4 October 2022 and hosted by journalist Thomas Sotto, gathered major figures to reflect on the current situation and the new era of law that could open after the tragedy of the war in Ukraine. Speakers included Robert Badinter, prominent Ukrainian figures, Karim Khan, Prosecutor of the International Criminal Court, and pianist Khatia Buniatishvili.

4 OCTOBER 2022

Aimed at the general public as well as students (with registration), the speeches took place in the Council's *Grand Salon* and was shown in the *Cour d'Honneur* of the Palais-Royal on screens as well as live streamed, notably on the Constitutional Council's website. This was an opportunity to bring the law closer to our fellow citizens around an issue that has become an essential part of public debate in France and abroad.

WAR AND LAW

Karim Khan

Prosecutor of the International Criminal Court

Since the beginning of your investigation in March 2022, you went to Ukraine several times. How does your investigation take place, what did you observe and what are the main challenges?

The unprecedented call for action by our Office, notably from the 43 States Parties referring the situation for investigation to the International Criminal Court (ICC), enabled us to make a swift start to our investigations. It is critically important to show the Office's agility, its capacity to respond in real-time to ongoing crimes in Ukraine. As I said on my first visit to Kyiv, Ukraine is a crime scene, with large scale destruction of public infrastructure, and immense suffering of citizens – children, women, and men; young and old. In such circumstances, the law cannot be a spectator. Our Office has been making efforts, since the beginning of the investigation, to apply the law in a practical and effective way, as an anchor for stability and security.

INTERVIEW

We have been present in Ukraine, including through a number of missions I led myself, and we will soon be opening a designated ICC duty station in Kyiv. Our dedicated team of lawyers, investigators, analysts, forensic experts and others, is busy collecting, processing and analysing evidence related to alleged crimes committed in the situation, including allegations of killings, torture, or intentional attacks on the civilian population and civilian objects. We have also received the secondment of a team of Dutch forensic and crimes scene experts who were then also deployed to Ukraine, marking a novel action model for partnership with national authorities, which we are building with more States Parties. This built on the rapid deployment of French forensic experts to Ukraine soon after the developments of February this year, who have collected information and evidence that may also be used in proceedings before the ICC.

Such coordination, and concerted efforts by States, international and regional organisations, and civil society organisations who are also active on the ground, are required to ensure that the law can fulfil its purpose, in a manner that avoids over-documentation and unnecessary re-traumatisation of victims and witnesses. These are the lessons of the recent past, which we must now apply in practice.

The atrocities of this war may raise doubts about the relevance of law and the protection it can provide. How does the ICC ensure that the law does not fall silent in times of war?

I am mindful that our investigative work must not result in gathering dust on shelves for historical interest but rather aim at upholding the rights of individuals and their right to be protected from atrocity crimes and for perpetrators to be held accountable. By showing concrete steps in relation to specific incidents within a timeframe that makes our actions relevant to the conflict, it is my hope that the impact of our investigative work can be strengthened, and awareness enhanced amongst all those involved in this conflict of the need to adhere to the principles of international humanitarian law.

Ultimately, if we can show through the progress in our investigations that those who commit international crimes in Ukraine can be held accountable by my Office, we can demonstrate that the law is on the front lines with those fearing for their lives.

To deliver on this, we must now maintain the momentum we have created, building on our collaborative spirit and innovative approaches to partnerships. In this moment our joint leadership is needed, to reinvigorate the law and ensure that the legitimate expectations of those who look to us for hope and a modicum of protection are vindicated.

> “Ultimately, if we can show through the progress in our investigations that those who commit international crimes in Ukraine can be held accountable by my Office, we can demonstrate that the law is on the front lines with those fearing for their lives.”

What type of perpetrators are you investigating? Is it possible to reach the top of military chains of command?

In our work we are guided by the law and the information and evidence we gather in the course of our independent and impartial investigative activities. The aim of those activities, subject to judicial control, is to identify what individuals can ultimately be held responsible for the commission of Rome Statute crimes. We have adopted a flexible model which will allow us to look in parallel at senior level potential perpetrators while also allowing us to building our prosecution efforts upwards through initial smaller cases where necessary.

By delivering results more rapidly than perhaps we may have done in the past we may be able to foster deterrence and thereby have a preventive impact on potential future atrocities. The principle of accountability requires effort and deserves respect and adherence.

In this process, our Office has reached out to all parties to the conflict. Ukrainian authorities cooperate with the Office while requests sent to the Russian Federation have so far remained unanswered. The Office will continue to seek information from all relevant actors in the exercise of its mandate.

In your inauguration speech, in June 2021, you talked about the importance of cooperation and complementarity with States. Since the beginning of the investigation in Ukraine, an unprecedented cooperation has been put in place between the ICC, domestic authorities and Eurojust. How does this cooperation take place and what does it bring to your work?

In view of the potential scale of criminality in the situation in Ukraine, our Office is engaged in close coordination with a variety of international, regional and domestic actors that are also active in relation to the collection of information and evidence. The ICC is not a panacea, and the Office is exploring various novel ways of working together with partners. To conduct rapid coordination and cooperation in a timely fashion, especially given the conflict is ongoing, our Office indeed became a participant, for a first time, in a Joint Investigation Team (JIT) with a number of domestic authorities, including those of Ukraine, under the auspices of Eurojust. Through its participation in the JIT, the Office enhances its ability to access and collect information relevant to its independent investigations. In turn, in the spirit of complementarity, the Office is also seeking to identify opportunities through which it can provide information and evidence to the concerned national authorities, and others, in support of their investigations and prosecutions.

> “The war in Ukraine has brought into stark relief that we need to have a re-awakening of the law.”

In terms of coordination, there is an important role also for our Office's investments in technological tools, such as deploying artificial intelligence and utilising machine-learning tools. We have accelerated this work by building a strong partnership with Microsoft, while also drawing on the financial support provided by States Parties in response to my request for contributions. These tools will help to streamline our evidence collection, analysis, and processing. They will also help to make such information more efficiently available to others involved in the collection of evidence. The benefits of these investments will extend to all situations currently under investigation by the Office.

I have been consistent in my view since the outset of this current phase of conflict in Ukraine that we must ensure coherence of action and coordination wherever possible. In line with this my Office co-hosted with the Netherlands and the European Commission a Ministerial Conference in July this year at which 45 States agreed to work towards the establishment of a Ukraine Accountability Dialogue Group that will increase visibility across all actors with respect to action being taken in support of accountability in Ukraine.

What does the war in Ukraine change in international criminal law, and how do you envision its future?

The war in Ukraine has brought into stark relief that we need to have a re-awakening of the law. With the devastation of people's hopes and futures has come the realisation by many that it is time for a new growth spurt of international law. It is also essential that we inject a similar focus and urgency in other dire situations that demand our attention. It now is incumbent on us – the international community writ large – to ensure we usher in a new era of accountability, with the law applied with ever greater consistency and respect across the globe, in order to safeguard future generations from the cruelty and crimes that unfortunately too many continue to suffer from today.

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