ANNUAL REPORT

2023

FRENCH CONSTITUTIONAL COUNCIL

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CONTENTS

interview

Laurent Fabius

President of the Constitutional Council

Mr. President, could you briefly outline the activity of the Constitutional Council over the October 2022-October 2023 period?

We have yet to reach the end of the current term, but I can affirm today that 2023 will stand out as the second busiest year in the history of the Constitutional Council with regard to the number of disputes, i.e. 493 at present. This intense level of judicial activity is due, in particular, to the large number of election-related cases on which we were called to rule.

With respect to constitutional review of laws, the number of *ex ante* referrals – 11 – was typical for the start of a new legislative term. We were presented with highly detailed petitions and a multitude of contested articles. In contrast, regarding *ex post* review, the number of priority preliminary rulings on the issue of constitutionality (QPC) decreased this year, with 49 decisions handed down. I will expand on that later.

Pension reform featured prominently in the Constitutional Council's rulings over the period. What lessons do you draw from these cases?

The Council was called upon to hand down three decisions relating to pension reform. Two concerned proposals for Shared Initiative Referenda, which were deemed inadmissible. The third, which directly involved the law raising the statutory retirement age, was validated by the Council, with the exception of social welfare riders, which it struck down.

I will not elaborate on the arguments put forth; the choices that prevailed, and which led to the validation of the main provisions of the law, are well known. Going beyond those arguments, I was struck by the frequent confusion, in public opinion and among certain commentators, between law and politics. Opinions may legitimately differ with regard to the relevance, wisdom and justification of a given law, but that does not concern the role of the Constitutional Council. The duty of the Constitutional Council, regardless of the legislation referred to it, is to rule on matters of law. To quote my predecessor and friend Robert Badinter: "An unconstitutional law is necessarily bad, but a bad law is not necessarily unconstitutional". This maxim aptly illustrates the Council's role – which, I repeat, is to judge not political expediency but conformity with the Constitution – and I fully endorse his words.

The Constitutional Council has been criticised. In particular, a number of comments have been made about members' legal qualifications. How do you respond?

There was indeed no lack of comment during this period regarding the Constitution and several specific articles, as well as the role of the Constitutional Council. From the standpoint of civic education, this is rather positive, but I confess that I would have preferred to see such an interest in our constitutional mechanisms in a less divisive context.

Regarding the members of the Council, we have read or heard a number of unfair comments. The method of appointing members is well known and need not be re-explained. However, it may be constructive to recall a few specific facts about these individuals, as their legal qualifications have unfortunately been called into question on occasion. This factual summary is presented in the table opposite. Although the educational and professional background of the Constitutional Council's nine members varies

Laurent Fabius, a graduate of the École Nationale d'Administration, has served as a member of the Council of State, city mayor, minister of various government departments, Prime Minister and President of the National Assembly. On the world stage, he also presided the COP21/Paris Agreement.

Michel Pinault is a graduate of the École Nationale d'Administration and has served as Section President at the Council of State, Secretary General of the same institution, member of the Executive Committee of AXA Group and Chairman of the Enforcement Committee of the French Financial Markets Authority.

Corinne Luquiens is a graduate of the Paris Institute of Political Studies (Sciences-Po) and holds a Master's Degree in public law. She has served as Administrator of the Law Committee of the National Assembly, as well as Secretary General of the National Assembly.

Jacques Mézard has worked as a lawyer and served as president of a Bar Association and a metropolitan community. He has served as a senator, a member of the Legislation and Constitutional Law Committee of the French Senate and a government minister.

François Pillet has worked as a lawyer and served as a mayor, president of a Bar Association, senator and Vice-President of the Law Committee of the French Senate.

Alain Juppé is a graduate of the École Nationale d'Administration. He has served as Finance Inspector, Member of Parliament, minister of various government departments and Prime Minister.

Jacqueline Gourault has served as a mayor, senator and member of the Law Committee of the French Senate. She has also headed several government ministries.

Véronique Malbec has served as a magistrate, Chief Prosecutor at several appellate courts and Secretary General of the Ministry of Justice.

François Seners, a graduate of the École Nationale d'Administration, has served as an administrative judge, as well as a member and Secretary General of the Council of State.

considerably, they have all actively practised law during their careers.

Going beyond these debates, what were, in your opinion, the most significant rulings handed down by the Council over the past year?

There are many, with freedoms as a common theme; indeed, our role is to uphold the freedoms guaranteed to citizens. Choosing between so many important cases is no easy task.

For *ex ante* referrals, I would first cite a rather unsensational event: the **strengthening of the framework for adversarial debate** with the implementation of our new rules of procedure. One year after these rules entered into force, the results are encouraging. In the drafting phase, the Constitutional Council received important contributions from the presidents of both houses of Parliament, as well as chairs of parliamentary groups. In the oral phase, we received multiple requests for hearings, most of which we granted. We chose to be open to dialogue. I also invited the members of the Parliamentary Law Committees to the Council last autumn. This type of meeting, with due regard for everyone's respective position and duties, is useful and will continue to take place.

We handed down substantive decisions on a wide array of topics. **On issues of security**, we ensured a balance between preventing breaches of public order and preserving freedoms such as the right to privacy. When this balance was heeded, the Council affirmed the constitutionality of practices such as algorithmic processing of images collected by means of video protection systems or drone-mounted video cameras during events presenting a particular risk of serious breaches of public order, such as the Olympic Games (Decision No. 2023-850 DC, 17 May 2023). However, we specified that the prefect must immediately discontinue such means of surveillance once the conditions having justified authorisation thereof were no longer met. By the same token, we struck down laws that did not respect this balance. Such was the case for the use of pseudonymous "undercover" investigations via electronic communications without the authorisation of the Public Prosecutor or the examining magistrate (Decision No. 2022-846 DC, 19 January 2023). Likewise, we rejected the devolution of certain responsibilities to investigation assistants, due to lack of sufficient oversight by officers of the judicial police.

In the field of labour rights, we ruled in unprecedented terms that the provisions of the Preamble to the Constitution of 1946 implied the existence of a mechanism to provide revenue to workers excluded from the labour market (Decision No. 2022-844 DC, 15 December 2022). The Council also struck down the provision of the social security budget providing for unpaid medical leave when such leave is prescribed in the context of a remote consultation and by a doctor other than the patient's primary care physician (Decision No. 2022-845 DC, 20 December 2022).

In the field of energy production, we ensured a balance between national energy independence and environmental protection. We ruled that the provisions aimed at encouraging production of renewable energies pursued the constitutionally valid objective of protecting the environment (Decision No. 2023-848 DC, 9 March 2023), and further that swifter manufacturing of new nuclear reactors contributes to safeguarding the fundamental interests of the nation – energy independence and environmental protection – by reducing greenhouse gas emissions (Decision No. 2023-851 DC, 21 June 2023). On the other hand, we struck down as a legislative rider the provision instituting more severe penalties for trespassing in nuclear facilities.

In the field of property rights, the Council upheld the current body of law relating to liability for harm caused by failure to maintain a dilapidated building (Decision No. 2023-853 DC, 23 July 2023) by striking down Article 7 of the Anti-Squatting Law, which granted property owners absolute exemption from liability in the event of unauthorised occupation. Some observers have asserted – often in bad faith – that any unlawful occupant of a residential building can henceforth claim

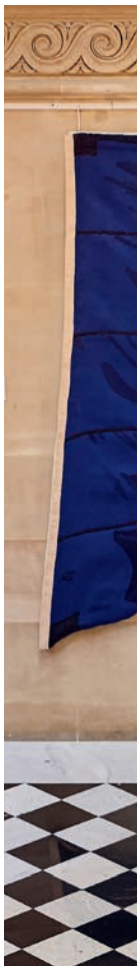
financial redress from the owner if the property in question is poorly maintained. In reality, our decision has no such effect. We ruled, in unprecedented terms, that Parliament is empowered to enact a regime of strict liability, but that such a regime may not disproportionately contravene the rights of third parties to obtain remedy for harm suffered. As such, the law-making body may indeed reform the current state of the law to revise the distribution of liability between the property owner and the unauthorised occupant.

Concerning *ex post* referrals, i.e. QPCs ("*questions prioritaires de constitutionnalité*"), the cases heard once again covered a number of different fields of law. With regard to use of the Internet, we were called upon to ensure a balance between freedom of expression and communication, and respect for law and order. As such, we validated as constitutional provisions allowing the government to order search engines to dereference websites presenting manifestly illicit content (Decision No. 2022-1016 QPC, 21 October 2022).

In the field of the press and media, we ruled that journalists do not have an overriding right allowing them to request the cancellation of an investigative act in which a journalist is involved as a third party, a decision motivated by the imperative of safeguarding the confidentiality of judicial investigations (Decision No. 2022-1021 QPC, 28 October 2022). **Concerning security**, we judged that the exceptional rules to be instituted in Mayotte with regard to identity checks were justified by the distinct characteristics and constraints specific to that *département*, provided that such identity checks are carried out on the basis of strictly non-discriminatory criteria (Decision No. 2022-1025 QPC, 25 November 2022). Regarding placement in or continuation of pre-trial detention for minors, we ruled that such detention is permissible subject to verification by a judge that these measures are no harsher than necessary. We specified that minors may not be fingerprinted or photographed without their consent in the context of a voluntary police interview. Furthermore, minors in police custody may only be fingerprinted or photographed in the presence of the minor's lawyer, legal representatives, or an appropriate adult (Decision No. 2022-1034 QPC, 10 February 2023). **With respect to the right to housing**, although we confirmed that prefects are empowered to forcefully remove persons unlawfully occupying a dwelling, we issued a reservation: prefects may not order such a measure without due regard for the personal or family circumstances of the occupant (Decision No. 2023-1038 QPC, 24 March 2023).

> "The Constitutional Council is often called upon to address social issues"

The Constitutional Council is often called upon to address social issues. Such was the case this year, particularly **in the field of bioethics**. Concerning end of life, the Constitutional Council ruled that the provisions of the law allowing doctors to refuse to comply with instructions set out in advance healthcare directives when such wishes are manifestly inappropriate or not in keeping with the patient's medical condition were in conformity with the Constitution, considering that they infringed neither the principle of safeguarding human dignity nor personal freedom (Decision No. 2022-1022 QPC, 10 November 2022). In another case concerning access to personal origins, we held that the possibility for a third-party donor to be contacted by the Commission for Access to Non-Identifying Information and Identity of Third-Party Donors on behalf of persons born through Assisted Reproductive Technology does not violate the right to privacy, insofar as communication of such information is subject to the consent of the person concerned, with the additional safeguard that requests may not be reiterated in the event of refusal (Decision No. 2023-1052 QPC, 9 June 2023).



As mentioned above, **disputes relating to the 2022 legislative elections** were extensive and consisted of two different phases. The first phase involved some one hundred complaints relating to the election results as such. These cases were heard on a regular basis throughout the year, finally concluding in February 2023. The second phase consisted of 440 complaints regarding campaign financing rules. The Council was called upon to examine the situation of nearly 6.8% of candidates, compared to 4.6% five years ago. Issuing some 30 decisions per week between March and July 2023, the Council considered the cases following its standard analytical framework and sentenced a total of 345 candidates to penalties of one or three years' electoral ineligibility, depending on the severity of the offences. In 85 other cases, the Council ruled that there were no grounds for ineligibility. All in all, 2023 was a year of acute electoral discord.

What is the current status of the information and monitoring system for priority preliminary rulings on the issue of constitutionality (QPC)?

As I promised, the QPC 360° information website has been up and running since 1 January 2023. It is ramping up and gaining users, although there is still room for improvement regarding feedback from the various jurisdictions. A "QPC Newsletter" has been created, with the first issue published in early July 2023. I visited the National School for the Judiciary in Bordeaux to explain the QPC mechanisms to future judges. I will do so again in 2024. More broadly, systematic action is being taken and will continue with all stakeholders to provide greater information and training on the QPC procedure, which represents progress for democracy and justice.

Statistically, we note a recent decline in the number of QPCs lodged and transmitted. However, it is still too early to say whether this is a cyclical phenomenon or a more fundamental trend. These developments will, of course, be closely monitored and analysed.

You announced a dual focus for your presidency: openness and transformation of the Constitutional Council into a fully fledged court. Has progress been made in this respect during the 2022-2023 period?

Together with my colleagues, we are continuing to move forward on both initiatives. With regard to the Council's national and international outreach, I would like to mention, in addition to very frequent contact with foreign constitutional courts and a commitment to maintaining our hearings outside Paris, the initiative to provide more information about our institutions in partnership with the Ministry of National Education. Aimed at young students at different levels, new training modules will be available on the "*Découvrons notre Constitution*" (Discovering our Constitution) website as of October 2023. They will assuredly

be useful for this broad and important audience. I would also like to point out an original initiative, the production of an illustrated book entitled *Dans les couloirs du Conseil constitutionnel* (*In the Halls of the Constitutional Council*), which will be published by Glénat in the coming months. Another concrete step forward, albeit of a completely different nature, is the upcoming large-scale reconstruction of the entrance and the ground floor of the Council building, as well as its surroundings, led by the Chief Architect of Historic Monuments. This project aims to ensure adequate security while enhancing the visitor experience. With regard to the transformation of the Constitutional Council into a fully fledged court, we continue to build on the significant progress made in recent years. Of particular note is the practice introduced last July of providing information on the decisions of members of the College to recuse themselves when appropriate, thus guaranteeing effective transparency in such matters.

What significant activities do you expect for the Council in 2023-2024?

In addition to our usual litigation and the continuation of hearings throughout France, I would like to draw attention to a number of significant events: the disputes relating to Senate elections in September 2023; the convention of the Association of Francophone Constitutional Courts in Paris (13, 14 and 15 June 2024); of course, the celebration of the 65th anniversary of the Constitution (October 2023) and, subsequently, the semicentennial of Parliament's right of referral (2024).

I would also like to mention the exceptional International Conference of Judges in Paris on the theme of "The Environment and the Rights of Future Generations" (7 February 2024). I firmly believe that notion of taking account of future generations, comprising many areas – the environment, health, genetics, new technologies, etc. – is ever more important, and the judiciary cannot remain on the sidelines.

The urgency of the myriad crises we are facing – climate, security, health, economic, etc. – carries the risk of focusing on short-term solutions. At the same time, the scope of these same challenges encourages us not to forget the long term as well. Moreover, this notion will greatly inform discussions at the "Summit of the Future" organised by the Secretary General of the United Nations in September 2024. More than 50 national constitutions already guarantee some form of protection for future generations. In a way, constitutional judges are becoming "judges of the future", with all the responsibilities that role entails.

> "In a way, constitutional judges are becoming "judges of the future", with all the responsibilities that role entails"

This will be the theme of the international meeting we are organising at the Council next February. I could not put it better than my colleague Michel Pinault: "The concept of the rights of future generations is fascinating because of the breadth of possibilities it generates. It allows judges to travel through time while making decisions today. It is a powerful legal tool with virtually indisputable legitimacy. It is also a tool which can wound the hand that wields it if judges overstep their legal authority with decisions that supplant those rightfully within the remit of authorities responsible for enacting and enforcing the law in democratic societies". Words of wisdom indeed.

The Constitution of the Fifth Republic will celebrate its 65th anniversary on 4 October 2023. President Macron plans to mark this event with an address from the Constitutional Council. What are your thoughts on this anniversary?

The Council is honoured to host the President of the Republic for this event on

4 October, the date of the "*Nuit du Droit*" (Law Night) throughout France.

From my experience as Prime Minister, President of the National Assembly and now the Constitutional Council, I am keenly aware of the central importance of our Constitution, its merits, and also the questions it raises.

Overall, the stability made possible by this Constitution, which has demonstrated greater longevity than any of its predecessors, is striking. The Nation benefits from that stability, provided of course that the demands of an active and vigorous democracy are also met.

In this case, stability has not meant immobility: indeed, the institutions of the Republic have alternated over the years between presidential and parliamentary pre-eminence, and no fewer than 24 constitutional revisions have been enacted since 1958. However, the fact is that no revision has been possible since 2008, and we are experiencing what I have often called a "democratic malaise". Thus, a debate and initiatives are needed, and if they were to lead to a revision of the Constitution, that revision itself would have to comply with the procedures laid down in the Constitution.

Are there questions about constitutional and institutional developments that you find particularly interesting?

Many questions can be raised in these areas. Apart from proposals concerning the Constitutional Council itself, and of course, with due regard for my obligation to exercise reserve, I would like to mention a few that often arise in current debates. Are the powers of the President of the Republic and the length of his or her term of office optimal? What role should the Prime Minister play? Do citizens enjoy sufficient opportunities to participate in democratic life? What matters should be decided by referendum? Should the powers of Parliament be strengthened, and what should be its voting procedures? What about decentralisation and devolution? This non-exhaustive list illustrates the importance and the acutely delicate nature of the exercise.

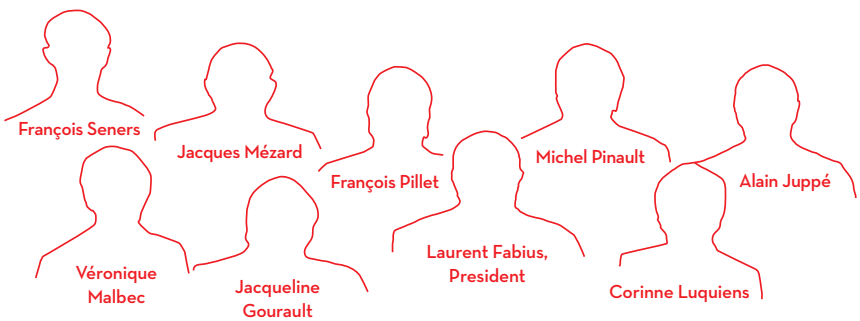
Among the proposals for constitutional revision currently being voiced, one concerns an unlimited scope for referenda, and another the possibility of a national law taking precedence over the European legal order. How do you feel about this?

These issues are indeed increasingly present in the public discourse, and not just among extremist political groups. The first – unlimited scope for referenda – claims to bridge the perceived gap between the "people" and the "political class". No referendum procedure has come into play for a long time and no Shared Initiative Referendum, which remains possible in theory, has yet been carried out in practice. The challenges in this regard are therefore undeniable. Public opinion broadly supports greater reliance on referenda. However, removing limits on the scope of such initiatives, especially if prior review by the Constitutional Council were to be ruled out, is liable to encourage certain populist excesses and cast doubt upon our representative democracy.

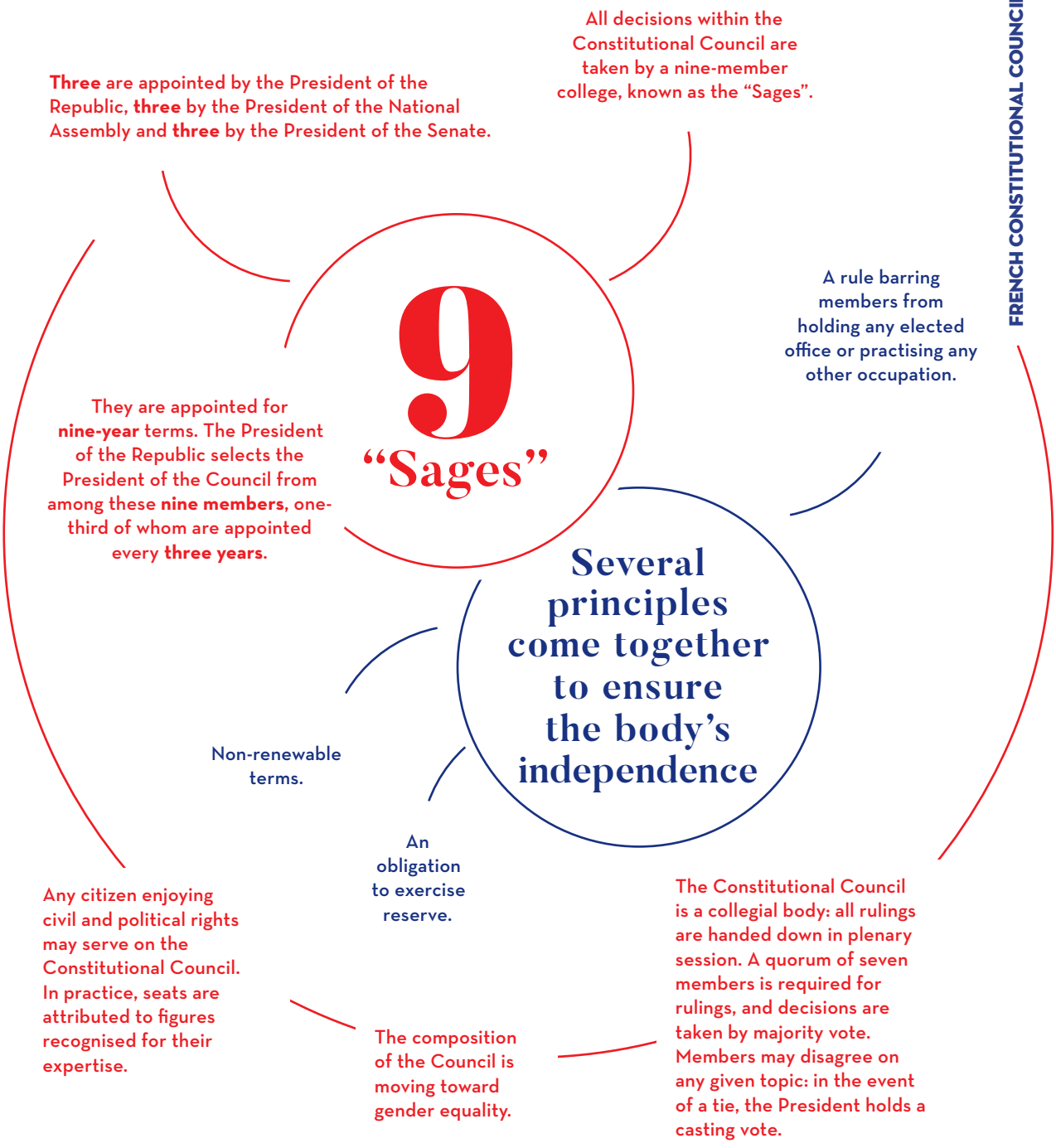
The second proposal is intended to respond to a feeling of national disempowerment and the need to reassert French sovereignty. The question regularly arises, albeit more with regard to the conduct of public policy than as a legal assessment *per se*. Striking the proper balance between national prerogatives and European engagement is of course essential. However, there can be no viable European Union without a European legal order, a structure to which we have assented, and which carries with it certain obligations. Moreover, we must not forget that international confidence in France's stability, particularly economic and financial, is built precisely on our respect for the European legal order. Going beyond the importance of a proper balance, abandoning this essential component of rule of law in France could deal a severe blow to our system of government.

Composition of the College

Members as at 1 September 2023



A collegial body



On 4 October 2023, the Constitution of the Fifth Republic will have been in force for 65 years. In the long and somewhat turbulent adventure of French constitutional history, this instrument has achieved greater longevity than any of its predecessors.

The 65th anniversary of the Constitution

65 years of stability and revisions

Since it was first drafted in 1958, the Constitution of the Fifth Republic has been revised 24 times. These constitutional revisions ensure that fundamental law continues to reflect the values of an ever-changing society, while also shaping the exercise of our democracy.

4 June 1960

1. Clarification regarding the status of States within the *Communauté française*, an organisation bringing together France and former French colonies, on the issue of reconciling independence and membership in the *Communauté*

6 Nov. 1962

2. Establishment of the election of the President of the Republic by popular vote, replacing the electoral college instituted in 1958

30 Dec. 1963

3. Modification of the dates of opening and closing of parliamentary sessions

29 Oct. 1974

4. Extension of the right of referral of legislation to the Constitutional Council, empowering a group of 60 deputies or 60 senators to call on the body to review a bill

25 June 1992

6. Revision with a view to ratification of the Maastricht Treaty dealing in particular with the economic and monetary union, voting by European nationals in municipal elections and the common visa policy

18 June 1976

5. Addition of provisions concerning ad-interim Presidency of the Republic in the event of the death of a candidate in the presidential election

25 Nov. 1993

8. Addition of an article relating to the conclusion of international agreements on the right of asylum as part of the implementation of the Schengen Agreement and the Dublin Convention

27 July 1993

7. Creation of the Court of Justice of the Republic, modification of the composition and powers of the High Council of the Judiciary, addition of provisions on the criminal liability of members of the Government

4 Aug. 1995

9. Introduction of a single parliamentary session, changes to the rules of parliamentary immunity and extension of the scope of referenda

22 Feb. 1996

10. Introduction of Social Security financing laws, which authorise the yearly Social Security budget following examination and voting by Parliament

20 July 1998

11. Transfer of powers to the local institutions of New Caledonia in accordance with the guidelines set out in the Nouméa Accord of 5 May 1998

12. Revision with a view to ratification of the Treaty of Amsterdam

15. Reduction of the term of office of the President of the Republic from seven to five years

17. Revision affirming the principle of a decentralised organisation of the French Republic with, in particular, greater financial autonomy for local authorities

20. Clarification of the composition of the electorate entitled to vote for members of the central and provincial deliberative assemblies of New Caledonia

21. Clarification of the criminal liability of the President of the Republic, confirmation of the principles of temporary immunity and inviolability of the head of state, introduction of an impeachment procedure

22. Constitutional ban on the death penalty, which was abolished in France in 1981

25 Jan. 1999

2 Oct. 2000

28 March 2003

23 Feb. 2007

8 July 1999

25 March 2003

1 March 2005

4 Feb. 2008

23 July 2008

13. Recognition of the jurisdiction of the International Criminal Court, created by the Rome Convention of 17 July 1998

14. Additions relating to gender equality, more specifically on the subject of "equal access to electoral mandates and elected office"

16. Revision allowing for the adoption of rules relating to the European arrest warrant

18. Revision with a view to ratification of the Treaty establishing a Constitution for Europe

19. Introduction of the Charter for the Environment in the Preamble to the Constitution and inclusion of "preservation of the environment" as one of the fundamental principles determined by law

23. Revision with a view to ratification of the Lisbon Treaty

24. Modernisation of the institutions of the Fifth Republic, particularly creating the priority preliminary ruling on the issue of constitutionality

Christophe Prochasson

Research Director at EHESS (School for Advanced Studies in the Social Sciences)

The Fifth Republic: a state of shift

The record for political longevity held by the Third Republic, which came to a violent end after seven decades of loyal stewardship, is about to be broken. The Fifth Republic, despite patent signs of fatigue that betray its advanced age, nonetheless achieved its 60-year milestone relatively unscathed. Subject to a few adjustments that have long been on the table, it could well reach its 70th birthday in 2028 without too much trouble.

Does this resilience to the test of time mean that the Third and Fifth Republics enjoyed the finest constitutional structure in terms of "republican values" and institutional robustness? To answer in the affirmative would signal a paradox of which there is no shortage in history, considering how ideas are refracted through the prism of circumstances. The Third Republic did without a

> **“The Republic has thus exhibited several faces, not only because of several different constitutions rooted in varied philosophical leanings, but also due to the competing interpretations imposed on these instruments even while in force”**

formal constitution; a few constitutional laws were sufficient. Its founders and much of the political class considered these laws temporary and long called for them to be revised. Even so, the system was based on a cardinal, yet intangible, principle: confidence in legislative power emanating from the two houses of Parliament. The other side of the coin was a chronic mistrust of the executive branch to the extent that the office of President of the Republic gradually became largely symbolic, despite the influence the head of state was able to exert during several crises.

1870-1940
Third Republic

1946-1958
Fourth Republic

Since 1958
Fifth Republic

The opposite is true for the Fifth Republic. In reaction to the disgraced Fourth Republic, universally portrayed as a caricature of its predecessor, which was itself highly criticised on both the left and the right, Parliament was “streamlined” and reduced to a highly circumscribed “role”, while the head of state and the ministries were strengthened and protected.

Where is the “republican model” so pervasive in public debate? Is it really so elusive? There is no denying that, since the French Revolution, France’s long constitutional history has been fraught with perpetual dissatisfaction and repeated failures to live up to ideals. The First Republic was mired in contradictory initiatives. The Second was short-lived, for reasons that went beyond the ambitions of an emperor-in-waiting. The Third suffered from fierce opposition for its purported instability, which was however less of a burden than its critics alleged. The next was decried for its “weakness”. And the latest Republic, our own, was accused first of Caesarism and then of institutional burn-out.

The Republic has thus exhibited several faces, not only because of several different constitutions rooted in varied philosophical leanings, but also due to the competing interpretations imposed on these instruments even while in force. The Third Republic cannot be reduced to the prevailing image of a regime governed by a head-spinning succession of interchangeable governments. It had its reformers, who strove to strengthen the system, all with due regard for the democratic aspirations from which the Republic was born. Legal frameworks, mighty and sacred though they may be, are always subject to appropriation by those whose actions they guide.

The Fifth Republic is no exception to this rule. It has played from several scores. The first was that of presidential *grandeur*, well suited both to the historical events surrounding its emergence and to the stature of the man who willed it into being, General Charles de Gaulle. For many years, the comparative legitimacy of his successors, who clearly lacked the historicity associated with the General, was called into question. The head of state is no longer viewed through this comparative lens, at least since the presidency of François Mitterrand. Is the constitution of the Fifth Republic thus simply a costume tailored to fit a single man in a precise set

“However, there can be no doubt that the democratisation of our societies has led to a paradoxical conjunction of two contradictory demands: a strengthening of public freedoms, sometimes said to be under threat, and more forceful authority as a political panacea”

of circumstances, and as such ill-suited to the France of today? Perhaps so.

The grandeur of the presidency and the power that comes with it are no longer, and few would advocate restoring them to their initial state. History has spoken. While the first “cohabitation” period (1986-1988) was seen as a transitory hitch soon to be forgotten, subsequent periods, including the most protracted (1997-2002), which brought together a President from the right, Jacques Chirac, and a socialist Prime Minister, Lionel Jospin, nevertheless marked a turning point. Legislative power regained ascendency at the expense of a weakened presidency, which focussed its energies on select areas “reserved” for the head of state by custom more than by law. This second face of the Fifth Republic was much more than a paper mask materialising from an electoral whim. It would appear that citizens do not disapprove of such power-sharing.

The results of the 2022 presidential and legislative elections substantiate this hypothesis. Just as everything seemed to indicate the emergence of a third version of the Fifth Republic, the momentum that had thus far carried the ‘Jupiterian’ President petered out. This new presidential grandeur should not be seen as a throwback to original Gaullism; it is in fact a much more modern invention. This time, authority was conferred not by history, but by dint of the “expertise” attributed to and exhibited by its claimant, a quality seen as paramount among the “nobility of State” that has long reigned within public institutions, and often private structures as well.

The loss of an absolute majority following the 2022 elections did not call into question the authority of a president governing as he sees fit, although this prevalent yet superficial portrayal misrepresents the circuitous channels through which presidential power is exercised. However, there can be no doubt that the democratisation of our societies has led to a paradoxical conjunction of two contradictory demands: a strengthening of public freedoms, sometimes said to be under threat, and more forceful authority as a political panacea; in short, a ‘normal’ presidency together with a republican monarch. This tension is not new. It has been a constant feature throughout the long history of successive French Republics. To this day, the Fifth Republic has proven capable of adapting to the oscillations between these two extremities. That said, there is no certainty that it will be able to maintain this agility in the face of the new societal and environmental challenges that lie ahead. Lasting endurance for the Fifth Republic will undoubtedly call for greater democratic inventiveness.

Prof. Dr. Stephan Harbarth

President of the German Federal Constitutional Court

Europe is a community of law

The Constitution of the French Republic and the French Constitutional Council are together celebrating their 65th anniversary in challenging times. Russia's war of aggression against Ukraine, which is being waged in violation of international law, provides us with a dramatic reminder of the vulnerability, but also, and equally starkly, of the preciousness of a life in peace, freedom, democracy and the rule of law, all of which must be preserved. There are still unresolved crises threatening the rule of law in parts of our continent: they

> **“The Constitutional Council and the Federal Constitutional Court each represent, in their own way, an unprecedented form of constitutional jurisdiction”**

1949
Creation of the German Federal Constitutional Court

1958
Creation of the French Constitutional Council

are a further reminder to us that threats to constitutional order can also arise from within. Climate change is a global phenomenon and not a challenge that can be met by one state alone. Nevertheless, the need for action in the best interests of present and future generations is imperative. Many other examples of key issues could easily be added to the list.

These challenges are also challenges for constitutional law and constitutional jurisdiction. Europe is a community of law. We are united by the idea of shaping our coexistence at both the national and the European level on the basis of the law – law which, despite all the disparities between national traditions, is supported by the fundamental convictions that we all share. These include the notion that the exercise of political rule must be legitimised by democratic processes, that it is bound by law, specifically that it respects citizens' human dignity and fundamental rights, and that adherence to the rule of law is subject to independent judicial review. This is the common denominator of our national constitutional traditions. At the same time, it underpins the evolving integrated European legal order which, in turn, influences the national legal systems.

Cooperation between the constitutional courts in Europe, the European Court of Human Rights and the Court of Justice of the European Union is therefore of vital importance in addressing the challenges of our time. This cooperation between the courts is guided by the common goal of guaranteeing the rule of law within a grouping which has its own distinctive character, in which the relationship between national constitutional courts, the European Court of Human Rights and the Court of Justice of the European Union transcends the traditional categories of superiority and subordination.

The French Constitutional Council is a pillar of the rule of law. The Federal Constitutional Court has enjoyed a special partnership with the Constitutional Council for decades, one that reflects the deep friendship that exists between our nations. In view of the dark chapters in our history, we regard this as a matter of great good fortune. Despite all the differences that characterise our institutions, we are also united by the destiny of having emerged from the constitutional movement of the post-war period. The Constitutional Council and the Federal Constitutional Court each represent, in their own way, an unprecedented form of constitutional jurisdiction. They are the inventions of the Constitution of the Fifth Republic of 1958 and the German Basic Law of 1949, for which there were no direct models in the respective constitutional traditions and whose role in

the constitutional structure had to develop step by step. The Constitutional Council and the Federal Constitutional Court each have their own constitutional role. In France, this development is linked in particular to the development, starting in the early 1970s, of the "*bloc de constitutionnalité*" (constitutional corpus) and, most recently, to the introduction of the "*question prioritaire de constitutionnalité*" (priority preliminary ruling on the issue of constitutionality) in the 2008 constitutional amendment. In Germany, the development of the dual role of the Federal Constitutional Court as a court and as a constitutional body comes to mind.

The more recent existence of the Constitution of the Fifth Republic, as compared with the Basic Law, may at first glance obscure the fact that the constitutional law of the Fifth Republic is based on much older sources of law. The "*bloc de constitutionnalité*" includes the 1789 Declaration of the Rights of Man and of the Citizen. As a shining testimony to the Enlightenment, it resonated across the world and inspired numerous liberation movements in Europe – including the German March Revolution of 1848, whose 175th anniversary we were able to celebrate this year. A line of tradition in the history of ideas leads from this, via the St. Paul's Church Constitution of 1849 and the Weimar Imperial Constitution of 1919, to the fundamental rights of the Basic Law of 1949. Most recently, the "*bloc de constitutionnalité*" has been considerably expanded with the Charter for the Environment of 2004, in which – as with Article 20a of the Basic Law, which was introduced almost at the same time – the aforementioned challenges in the protection of the natural foundations of life can be found. Thus, both the Constitution of the Fifth Republic itself and the jurisprudence of the Constitutional Council provide the Karlsruhe jurisprudence with multiple points of reference for a constantly rewarding legal comparison and a continuation of the dialogue between our institutions in the most varied formats.

"Both the Constitution of the Fifth Republic itself and the jurisprudence of the Constitutional Council provide the Karlsruhe jurisprudence with multiple points of reference"

In the light of our shared responsibility for the protection of the European community of law, I offer the warmest congratulations of the Federal Constitutional Court and its members on the occasion of the 65th anniversary of the French Constitution and of the Constitutional Council, together with all good wishes for a common future in a Europe dedicated to law, democracy, freedom and peace.

Watch the video animation on the 65th anniversary of the Constitution

The Constitutional Council's decisions

From 1 September 2022 to 31 August 2023, the Constitutional Council held no fewer than 41 deliberation sessions and 24 open QPC hearings, three of which were held away from the Council's premises. It handed down a total of 542 decisions.

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 2022 and August 2023.

Between 1 September 2022 and 31 August 2023

11 DC referrals

8 DC decisions

1 finding of constitutionality

7 findings of partial non-constitutionality

Government finances

2023 Social Security Financing Act

Decision No. 2022-845 DC of 20 December 2022

2023 Finance Act

Decision No. 2022-847 DC of 29 December 2022

The Constitutional Council was asked to rule on the circumstances under which the Government may assume responsibility in respect of Finance Acts

In late 2022, the Constitutional Council was asked to rule on **the circumstances under which the Government may assume responsibility in respect of Finance Acts, on the basis of the third paragraph of Article 49 of the Constitution.**

While preserving the essential elements of this mechanism, which the original version of the Constitution provided for in order to enable the Government to have certain bills adopted by the National Assembly by restricting the time available for them to be debated, the constitutional amendment of 23 July 2008 introduced a per-session limit on the number of scenarios in which the Prime Minister may apply these provisions, other than in the case of Finance Acts.

The appeals submitted to the Constitutional Council against the 2023 Social Security Financing Act specifically objected to the fact that the Prime Minister had, on the first and second readings, pledged the Government's responsibility to the National Assembly in respect of the vote on only certain parts of the 2023 Social Security Financing Bill, whereas the appellants contended that the third paragraph of Article 49 of the Constitution required this prerogative to be exercised in respect of the vote on the Bill in its entirety.

In its 20 December 2022 decision on the 2023 Social Security Financing Act, the Constitutional Council held, in accordance with established case law, that the exercise of the prerogative thus vested in the Prime Minister is not subject to any conditions other than those laid down by these provisions. It further noted that the constitutional amendment of 23 July 2008 had not

View the complete file relating to Decision No. 2022-845 DC on the Constitutional Council's website

View the complete file relating to Decision No. 2022-847 DC on the Constitutional Council's website

altered the circumstances under which the Government could assume responsibility for the adoption of a Finance Act or a Social Security Financing Act.

In addition, paragraph I of Article L.O. 111-7-1 of the Social Security Code, as it applies to the 2023 Social Security Financing Act, lays down the order in which the various parts of the Social Security Financing Act for the year must be debated. These provisions make debate on one part of the Finance Act for the year subject to the vote on the preceding part and, in the case of Part IV, relating to expenditure for the coming year, subject to the adoption of Part III, which relates to revenue.

Guided by this dual yardstick, the Constitutional Council ruled that, by successively accepting the Government's responsibility before the National Assembly for the vote on Part III of the 2023 Social Security Financing Bill, and then for the vote on Part IV, during its examination at first and subsequent readings, the Prime Minister exercised this prerogative under circumstances that did not contravene either the third paragraph of Article 49 of the Constitution or the requirements arising from paragraph I of Article L.O. 111-7-1 of the Social Security Code.

In its decision of 29 December 2022 relating to the Finance Act, the Constitutional Council ruled, on similar grounds, that, by successively making the Government responsible to the National Assembly for the vote on Part I and then for the vote on Part II of the 2023 Finance Bill, during its examination at first and subsequent readings, the Prime Minister exercised this prerogative under circumstances that contravened neither the third paragraph of Article 49 of the Constitution nor the requirements arising from Article 42 of the Organic Law on Finance Act.

The Constitutional Council also set aside Article 101 of the 2023 Social Security Financing Act, which governed the circumstances under which sick leave prescribed in the course of a teleconsultation gives rise to the payment of daily benefits.

These provisions stipulated that when such sick leave is prescribed during a teleconsultation, the insured person is not entitled to the payment of daily benefits unless their physical impairment has been confirmed by their GP or a doctor who has seen them at any time within the preceding year.

The Constitutional Council noted that, in adopting these provisions, Parliament wished to guard against the risks of abuse associated with the prescribing of sick leave during a remote consultation. In so doing, it had sought to pursue the constitutional objective of combating fraud in the welfare system.

However, the contested provisions could have the effect of preventing an insured person who has used teleconsultation from receiving daily benefits, even though a doctor had determined that the person concerned is physically incapable of continuing to work or returning to work.

The Council observed, firstly, that the mere fact that this incapacity was confirmed during a teleconsultation by a doctor other than the insured person's GP or a doctor who had seen the insured person within the preceding year was not sufficient to establish that the sick leave had been inappropriately prescribed. Secondly, the rule whereby these benefits are not paid applies even if the insured person, who is required to send a notice of sick leave to the primary health insurance fund within a specified period, is unable to obtain a teleconsultation within that period with their GP or a doctor who has seen them within the preceding year.

Taking account of all these grounds, the Constitutional Council concluded that the disputed provisions were in breach of the eleventh paragraph of the Preamble to the 1946 Constitution, which states that the Nation "guarantees to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All those who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society".

Pension system reform

Amending Social Security Financing Act for 2023

Decision No. 2023-849 DC of 14 April 2023

In its ruling on the Supplementary Social Security Financing Act for 2023, an Act which was aimed at reforming the pension system, the Constitutional Council dismissed complaints alleging that the procedure followed for its adoption was irregular but struck down six series of "social welfare riders".

With regard to the procedure followed for the adoption of the Act, the petitioning deputies and senators had objected in particular to the use of an Amending Social Security Financing Act for the purpose of carrying out a reform of the pension system. In their view, this choice by the Government had amounted to procedural abuse, employed for the sole purpose of enabling it to avail itself of the accelerated review arrangements set out in Article 47-1 of the Constitution, whereas a reform of this nature should have been dealt with in accordance with the customary legislative procedure.

In examining these arguments alleging procedural error, the Council relied on the terms of Articles 34 and 47-1 of the Constitution, which created the category of Social Security Financing Acts, and on the organic provisions that specified how such Acts were to be applied.

The Council ruled that neither these texts, nor indeed the preparatory studies for the current organic provisions, indicate that recourse to an Amending Social Security Finance Bill would be subject to conditions other than those resulting from these provisions. Thus, contrary to what the applicants had argued, recourse to a legislative vehicle of this kind is not dependent upon a compelling need for urgent action, exceptional circumstances or a major imbalance in the social security accounts.

When an Amending Social Security Financing Act is referred to the Constitutional Council, the Council's sole task is to verify that

The Constitutional Council dismissed complaints alleging that the procedure followed for the adoption of the Act was irregular but struck down six series of "social welfare riders"

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the Act includes the "compulsory provisions" (an introductory article, presentation in two parts covering revenue and expenditure, and the adjustment of forecasts, balances and objectives), and to check that the other provisions are not "social welfare riders" but fall into one of the categories of the "optional provisions".

Applying this analytical framework, the Constitutional Council ruled in particular that, even though it was possible to include the provisions relating to pension reform (which don't fall within the mandatory scope of Social Security Financing Acts) in an Ordinary Act, the Government's original decision to include them in an Amending Financing Act did not in itself contravene any constitutional requirement. It is not the role of the Constitutional Council to substitute its own assessment for that of Parliament regarding that choice; it must merely ensure that those provisions are in line with one of the categories referred to in Article L.O. 111-3-12 of the Social Security Code.

For these reasons, it dismissed the objection that Parliament had improperly made use of a Supplementary Social Security Financing Act.

Another aspect of the deliberations concerning the procedure for adopting the Act related to the transparency and integrity of the parliamentary debates. In particular, the question was raised by the petitioning Members of Parliament as to whether the cumulative application of several procedures provided for by the Constitution and by the Standing Orders of the Assemblies had or had not resulted in an irregularity in the procedure followed.

After examining each of these procedures in turn, the Constitutional Council found that, when applied in accordance with the Standing Orders of the Assemblies, none of them had substantially undermined the requirements of transparency and integrity of Parliamentary debate.

The Constitutional Council then ruled that the fact that several procedures provided for by the Constitution and by the Standing Orders of the Assemblies had been used cumulatively to speed up the examination of the Act in question was not in itself a sufficient reason to regard as unconstitutional the entire legislative procedure that had culminated in the adoption of that Act. In the present case, although the combined use of the procedures that had been implemented was an unusual response to the exigencies of the debate, it did not have the effect of rendering the legislative procedure unconstitutional.

On the other hand, the Constitutional Council, either based on the objections raised in the referrals or on its own motion, struck down six groups of provisions that should not have been included in the Act under consideration.

In accordance with its established case law on "social welfare riders" and on the grounds that they had no effect, or an excessively indirect effect, on the revenues of the basic compulsory pension schemes or of the bodies which contribute to their funding, it ruled that the following provisions should be declared invalid:

— Article 2, relating to what is commonly known as the "Senior Index",

— Article 3, relating to the "Senior Employment Contract",

— Article 6, which made certain changes to the procedures governing the collection of social security contributions,

— certain provisions of Article 10, relating to the eligibility conditions for early retirement for civil servants who, in the ten years prior to their permanent appointment, have worked in a position classified as "arduous" or "extremely arduous",

— certain provisions of Article 17, concerning specific individual health monitoring for employees who work or have worked in occupations or activities that are particularly exposed to certain work-related risk factors,

— and Article 27, which creates an information system for insured persons in the pay-as-you-go pension system.

Without commenting on whether their content complied with the other constitutional requirements, the Council therefore struck down these six sets of provisions which, from a legal standpoint, could be separated from the rest of the Act.

Another aspect of the deliberations concerning the procedure for adopting the Act related to the transparency and integrity of the parliamentary debates

The 2024 Olympic Games

View the complete file relating to Decision No. 2023-850 DC on the Constitutional Council's website

Act Relating to the 2024 Olympic and Paralympic Games and Various Other Provisions

Decision No. 2023-850 DC of 17 May 2023

The Constitutional Council entered an interpretative reservation on the declaration of constitutionality of the provisions allowing the use of genetic testing in connection with doping tests

Ruling on a referral from more than sixty deputies on the Act Relating to the 2024 Olympic and Paralympic Games and Various Other Provisions, the Constitutional Council entered an interpretative reservation on the declaration of constitutionality of the provisions allowing **the use of genetic testing in connection with doping tests.**

Under these provisions, a laboratory accredited by the French Anti-Doping Agency may, in certain cases, and using blood or urine samples that are sent to it, compare genetic fingerprints and examine the genetic characteristics of any person taking part in or preparing for a sporting event.

Challenging them on the grounds that they authorised genetic testing to be carried out on an ongoing basis without first obtaining the consent of the athlete being tested, the applicants claimed that these provisions infringed the right to privacy, to the protection of human dignity and to individual freedom.

Having regard to Article 2 of the Declaration of the Rights of Man and of the Citizen of 1789, which implies the right to privacy, the Constitutional Council noted in particular that, in adopting these provisions, Parliament sought to strengthen the resources available to prevent and investigate breaches of the anti-doping regulations, which are designed to ensure the protection of athletes' health and the fairness of sporting competitions. In so doing, it pursued the constitutional objectives of protecting health and safeguarding public order.

The Constitutional Council also considered, among the various safeguards provided by Parliament, the fact that the accredited laboratory may only compare genetic fingerprints and examine genetic characteristics for the purpose of detecting the presence of a banned substance in a sample taken from an athlete and the athlete's use of a banned substance or method.

It also based its decision on the fact that the contested provisions stipulate that genetic testing may only be carried out if the person being tested has been expressly informed, prior to the sample being taken, and in particular when registering for each sporting competition, that the samples taken may be subject to such testing, whose nature and purposes must then be clearly explained to them. The person must also be informed of the possibility of an incidental discovery of genetic characteristics that may be responsible for a condition requiring preventive measures or care for themselves or for members of their family who may be affected, and of the consequences of such a condition, as well as the possibility of objecting to such a discovery being disclosed to them.

The Constitutional Council ruled, by way of an interpretative reservation, that it will be up to the competent administrative authorities to ensure, under the supervision of the judge, that the procedures for providing this information to the athlete are such as to guarantee that, by deciding to take part in the competition, the athlete also consents to the samples taken being subject to genetic testing.

It is subject to this reservation, and regarding the current state of scientific knowledge and techniques, that the Constitutional Council acknowledged that the contested provisions did not violate the right to privacy.

Likewise, considering the guarantees provided by Parliament and subject to an interpretative reservation, the Constitutional Council accepted as constitutional the **provisions allowing that, on an experimental basis, images collected by means of a video-surveillance system or cameras installed on aircraft may be processed with the use of algorithms in order to detect and report certain events.**

In a groundbreaking decision, the Constitutional Council ruled that, in order to satisfy the constitutional objective of preventing disruption to public order, Parliament may authorise the algorithmic processing of images collected by means of a video-surveillance system or by cameras installed on aircraft. While such processing has neither the purpose nor the effect of modifying the procedures under which the images are collected, it nevertheless analyses the images systematically and using automated techniques, in such a way as to considerably increase the amount and accuracy of the information that can be extracted from them. The use of surveillance systems of this kind must therefore be underpinned by special

safeguards designed to protect the right to privacy.

Within the constitutional framework thus defined, the Constitutional Council noted that, in adopting the contested provisions, Parliament had pursued the constitutional objective of preventing breaches of public order.

Among the guarantees provided for by the Act under review, and which the Constitutional Council expressly took into account in reaching its decision, is the fact that algorithmic processing of the images collected in this way may only be used to ensure the security of sporting, recreational or cultural events which, because of the numbers attending them or the circumstances in which they take place, are particularly exposed to the risk of acts of terrorism or serious threats to personal safety. The provisions that were challenged thus restrict the use of such processing to events where there is a particular risk of serious disruption to public order and rule out its use where there is only a risk of damage to property.

The Constitutional Council also ruled, by way of an interpretative reservation, that although the contested provisions state that the Prefect who authorised the measure "may suspend or terminate the authorisation at any time if he or she finds that the circumstances that justified its being issued are no longer met", those provisions cannot, without breaching the right to privacy, be interpreted other than that they oblige the Prefect to immediately terminate an authorisation if the conditions that justified its being issued are no longer met.

The Constitutional Council also based its decision on the fact that the contested provisions stipulate that algorithmic processing must not involve any facial recognition techniques, use any biometric identification system or draw on any biometric data, i.e. data relating to a natural person's physical, physiological or behavioural characteristics that make it possible for their unique identity to be detected or confirmed. The Council added that it is up to the regulatory authority to ensure that the predetermined events it stipulates can be detected without the need for such techniques or data. Furthermore, the processing operations may not be reconciled, interconnected or linked by automated means with other personal data processing operations.

The processing operations may not be reconciled, interconnected or linked by automated means with other personal data processing operations

The Constitutional Council also noted that Parliament has ensured that the algorithm-based processes were developed, implemented and, where appropriate, enhanced in such a way that they always remained under the control and management of human beings.

Particularly in the light of these guarantees, and subject to the interpretative reservation referred to above, the Constitutional Council ruled that the contested provisions did not breach the right to privacy.

Boosting energy production

Act relating to the Acceleration of Renewable Energy Production

Decision No. 2023-848 DC of 9 March 2023

Act relating to the Acceleration of Procedures Governing the Construction of New Nuclear Facilities near Existing Nuclear Sites and to the Operation of Existing Facilities

Decision No. 2023-851 DC of 21 June 2023

In the first half of 2023, two Acts were referred to the Constitutional Council, one aimed at boosting the production of renewable energy and the other at streamlining procedures relating to the construction of new nuclear facilities near existing nuclear sites and to the operation of these facilities.

In its Decision No. 2023-848 DC of 9 March 2023, the Council found eight articles of the first of these Acts to be in compliance with the Constitution, but struck down eleven other articles as lacking normative scope or because they were deemed to be "legislative riders".

In particular, **there was a challenge to Article 19 of the Act, which states that renewable energy production or energy storage projects in the electricity system are, under certain conditions, deemed to satisfy a compelling criterion of overriding public interest such as to justify the granting of an exemption from the rules that prohibit the harming of protected species.**

The petitioning deputies argued that the article created an irrefutable presumption that certain projects were of overriding public interest, and that this would automatically operate in favour of their approval. They claimed that, given the harmful effects that these facilities

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View the complete file relating to Decision No. 2023-851 DC on the Constitutional Council's website

could have on the health of local residents and on protected species and their habitats, this resulted in abuse of the right to an impartial review, abuse of the right to an effective legal remedy and abuse both of the constitutional objective of protecting the environment and of the requirements arising from Articles 1, 2, 5 and 6 of the Charter for the Environment.

Having regard to Article 1 of the Charter for the Environment, the Constitutional Council noted in particular that, as stated in the preparatory studies, these provisions aim to encourage the production of renewable energy and the development of energy storage capacities. In so acting, Parliament pursued the constitutional objective of protecting the environment.

At the same time, the presumption established by these provisions does not exempt the proposed facilities to which said presumption applies from the need to comply with the other conditions under which an exemption from the prohibitions set out in Article L. 411-1 of the Environmental Code may be granted. In this respect, the relevant administrative authority must, under the supervision of the courts, determine that no other satisfactory solution is available, and that the exemption does not adversely affect the maintenance, under favourable conservation conditions, of the populations of the affected species in their natural area of distribution.

The Constitutional Council also noted that, while Parliament had given the Council of State responsibility for drawing up the conditions which renewable energy production or energy storage facility projects must satisfy, it had stipulated that these conditions must be set with due regard to the type of renewable energy source, the projected total capacity of the proposed facility and the overall contribution expected from facilities of similar capacity to the achievement of the objectives set out in Article L. 141-2 of the Energy Code under the multi-year energy programme.

For all of these reasons, the Constitutional Council concluded that the contested provisions did not contravene Article 1 of the Charter for the Environment and that they were not vitiated by negative incompetence.

In its Decision No. 2023-851 DC of 21 June 2023, the Constitutional Council once again held that several articles of the second of these Acts were in compliance with

the Constitution, but it struck down all or part of ten of its articles as "legislative riders" or as being in conflict with the separation of powers.

One area under specific challenge was Article 7 of the Act, which determined **the scope of the specific measures** provided for in Title II of the Act, **aimed at speeding up procedures relating to the construction of new nuclear power reactors near existing nuclear sites.**

Against the background of Article 1 of the Charter for the Environment, the Constitutional Council noted, firstly, that it was clear from the preparatory studies that, by adopting measures to speed up the construction of new nuclear power reactors, Parliament sought to create the circumstances that would boost nuclear energy production capacity in order, in particular, to help reduce greenhouse gas emissions. It thus applied the constitutional requirements inherent in safeguarding the fundamental interests of the Nation, which include its independence and the essential elements of its economic potential, and was in line with the constitutional objective of protecting the environment. In this respect, the Constitutional Council noted that it was not its role to determine whether the objectives set by Parliament could have been achieved by other means, provided that the methods adopted by the Act were not, in the light of current scientific and technical knowledge, patently inappropriate for achieving those objectives.

Parliament thus applied the constitutional requirements inherent in safeguarding the fundamental interests of the Nation, which include its independence...

Furthermore, the contested provisions, which merely determine the scope of application of the specific measures provided for in Title II of the Act under review, have neither the aim nor the effect of exempting the nuclear power reactor projects that will be covered by these measures from compliance with those provisions of the Environmental Code which establish the legal framework for the operation of basic nuclear facilities where there may be risks or disadvantages for public safety, health and hygiene or for the protection of nature and the environment.

The Constitutional Council held that, in addition, with regard to the objectives it pursued and with account taken of the time required to build new nuclear power reactors, Parliament, which was not obliged to set a maximum number of reactors that could be built during this period, was able to provide that the specific measures set out in Title II of the Act in question would apply to the construction of reactors for which an application for authorisation to build was submitted within the twenty years of the promulgation of the Act.

For these reasons, it ruled that the objection alleging a breach of Article 1 of the Charter for the Environment had to be dismissed.

Among the articles that it struck down on the grounds that they were "legislative riders", i.e. as having been improperly introduced into the Act in terms of Article 45 of the Constitution, were Article 19, which provided for the submission to Parliament of a report on the human and financial requirements of the *Autorité de Sûreté Nucléaire* (Nuclear Safety Authority), the *Institut de Radioprotection et de Sûreté Nucléaire* (Institute for Radiation Protection and Nuclear Safety) and the *Commissariat à l'Énergie Atomique et aux Énergies Alternatives* (Atomic Energy and Alternative Energies Commission) with regard to nuclear safety and radiation protection; and Article 26, which increases the quantum of penalties for certain breaches of the rules relating to the prevention of unauthorised access to nuclear facilities.

Protection of property rights

View the complete file relating to Decision No. 2023-853 DC on the Constitutional Council's website

Act to Protect Residential Premises against Unlawful Occupation

Decision No. 2023-853 DC of 26 July 2023

The Constitutional Council pointed out that, under the terms of Article 4 of the 1789 Declaration: "Freedom consists in being able to do anything that does not harm others"

In a ruling on the Act to Protect Residential Premises against Unlawful Occupation, the Constitutional Council entered a reservation on the interpretation of the article setting out the tests for determining whether residential premises containing movable property constitute a domicile. It struck down the article that amended the liability system to be applied in cases of damage resulting from the inadequate maintenance of a dilapidated building, on the basis that it disproportionately infringed the rights of victims.

Among the provisions challenged by the appeal were those of paragraph I of Article 6 of the Act under review, **relating to the concept of a "domicile" as it is construed in the criminal law provisions designed to protect dwellings from unlawful occupation**.

Article 226-4 of the Criminal Code makes it an offence to enter another person's domicile by means of manoeuvres, threats, assault or coercion, or to remain there after having entered by such means. It is settled case law of the Court of Cassation that a domicile, within the meaning of this article, is the place which a person, whether living there or not, has the right to call their home, regardless of the legal nature of their occupancy and the use to which the premises are put. The contested provisions stipulated that a person's domicile included any residential premises containing movable property belonging to that person, regardless of whether that person lives there and whether it is their principal residence.

According to the petitioning deputies, by extending the offence provided for in Article 226-4 of the Criminal Code to residential premises that could not be classified as a domicile, these provisions contravened the principle of the necessity of offences and penalties. The increased penalties provided for in the same article contravened the principle of proportionality of penalties.

Ruling on the basis of the principle of the necessity of offences and penalties, which derives from Article 8 of the 1789 Declaration of the Rights of Man and of the Citizen, the Constitutional Council held in particular that, by adopting these provisions, Parliament sought to provide more precise definitions regarding certain residential premises that could be classified as a domicile in order to ensure that the offence of unlawful entry into a person's domicile was made punishable by law.

However, by way of an interpretative reservation, it held that, while it is open to Parliament to provide, for this purpose, that residential premises in which there is movable property belonging to a person constitute that person's domicile, the presence of such movable property cannot on its own be sufficient, without contravening the principle of the necessity of offences and penalties, to establish that the offence of unlawful entry into a person's domicile has been committed. It will therefore be up to the courts to assess whether the presence of these items of furniture can be considered as giving this person the right to call the premises their home.

In addition, the Constitutional Council ruled that, by classifying certain residential premises as a domicile, Parliament had not adopted provisions that were lacking in clarity. For all these reasons, the Constitutional Council dismissed the claim that the principle of the legality of offences and penalties had been breached and, subject to the aforementioned reservation, ruled that the contested provisions were constitutional.

The Constitutional Council also had to review **Article 7 of the Act under consideration, which amended Article 1244 of the Civil Code so as to release the owner of an unlawfully occupied property from the obligation to maintain the property and to relieve the owner of liability in the event of damage resulting from a failure to maintain the property.**

Under Article 1244 of the Civil Code, a building's owner is automatically liable for any loss or damage caused by its deterioration, where this is the result of a lack of maintenance or a defect in its construction, and can only be relieved of liability by proving that the loss or damage is due to an external cause. The contested provisions stipulated that, where the property is unlawfully occupied, the owner cannot be held liable for any loss or damage resulting from a lack of maintenance during the period of occupation; and that, in the event of loss or damage caused to a third party, liability lies with the unlawful occupant.

The petitioning deputies contended in particular that, by releasing the owner from the obligation to maintain their property, these provisions would have the effect of placing this burden on the illegal occupants, even though most of them would be in precarious material

circumstances. In their view, these provisions thus failed to comply with the constitutional objective of providing everyone with suitable housing, the principle of safeguarding human dignity and the right to lead a normal family life.

The Constitutional Council pointed out that, under the terms of Article 4 of the 1789 Declaration: "Freedom consists in being able to do anything that does not harm others". It follows from these provisions that, in principle, any act whatsoever by an individual that causes loss or damage to another person obliges the person who caused the loss or damage to remedy it. The ability to sue for damages gives effect to this constitutional requirement.

However, this requirement does not prevent Parliament from regulating the circumstances in which liability may be incurred, on public interest grounds. It may thus, on such grounds, provide for exclusions or limitations to this principle, provided that this does not result in a disproportionate restriction of the rights of the victims of wrongful acts or of the right to an effective judicial remedy, as provided for in the 1789 Declaration.

In groundbreaking terms, the Constitutional Council also ruled that this constitutional requirement does not prevent Parliament from enacting, on the same public interest grounds, a statutory liability system. Although Parliament may legislate grounds on which liability may be waived, this must not result in a disproportionate impact on the rights of victims to obtain compensation for any loss or damage they have suffered.

Based on these considerations, the Constitutional Council ruled that, by introducing a statutory liability system to cover loss or damage caused by the deterioration of a building as a result of poor maintenance or a defect in construction, Parliament sought to make it easier to compensate the victims. It thus pursued a public interest objective.

The Constitutional Council in no way ruled that any unlawful occupant of a dwelling would henceforth be entitled to compensation from the owner if the property in question was poorly maintained

Firstly, however, exemption from liability is extended to the owner of the property for any loss or damage that occurs during the period of unlawful occupation, irrespective of whether the cause of the loss or damage lies in a lack of maintenance attributable to the unlawful occupant. Furthermore, the owner qualifies for this exemption without having to show that the occupant's conduct prevented the necessary repair work from being carried out.

Secondly, the contested provisions provide that the owner is exempt from liability not only towards the unlawful occupier, but also towards third parties. Thus, while the purpose of this statutory liability system is to make it easier to compensate victims, any action by third parties to obtain compensation for their loss can only be brought against the unlawful occupant, whose identity has not necessarily been established and who does not provide the same guarantees as the owner, particularly with respect to insurance.

For all these reasons, the Constitutional Council found that the contested provisions disproportionately infringed the right of victims to obtain compensation for damage resulting from failure to maintain a deteriorating building. It therefore declared them to be unconstitutional.

In doing so, the Constitutional Council in no way ruled that any unlawful occupant of a dwelling would henceforth be entitled to compensation from the owner if the property in question was poorly maintained. The reasons why the provisions were struck down do not in any way prevent Parliament from revising this same legislation in order to better apportion responsibility between an owner and an unlawful occupant. Those reasons are predicated on the need to ensure that, should such a revision occur, the rights of third-party victims of loss or damage continue to be safeguarded.

Other *ex ante* decisions on constitutional conformity

Four other decisions were handed down between 1 September 2022 and 31 August 2023 in connection with the *ex ante* review of laws.

These constitutional requirements called for the existence of a system of benefits for workers who were without employment

In its **Decision No. 2022-844 DC of 15 December 2022**, the Constitutional Council ruled that certain provisions of the **Act on Emergency Measures Relating to the Operation of the Labour Market in Support of Full Employment**, which had been referred to it by more than sixty deputies, were in compliance with the Constitution.

In this ruling, the Constitutional Council held that, in keeping with the fifth and eleventh paragraphs of the Preamble to the 1946 Constitution, these constitutional requirements called for the existence of a system of benefits for workers who were without employment.

In its **Decision No. 2022-846 DC of 19 January 2023**, the Constitutional Council struck down two of the eighteen articles of the **Ministry of the Interior Orientation and Programming Act**, which had been referred to it for review by more than sixty deputies, and struck down two other articles

on the grounds that they were "legislative riders".

With regard to Article 25 of that Act, which broadened the list of offences that may attract fixed tort fines, the Constitutional Council pointed out that Articles 6 and 16 of the Declaration of 1789 stipulate that, while Parliament may provide for different rules of procedure depending on the facts, situations and persons they apply to, these differences must not involve unjustified distinctions and citizens must be assured of equal safeguards, particularly with regard to the circumstances in which public proceedings may be discontinued.

While Parliament may provide for different rules of procedure depending on the facts, situations and persons they apply to, these differences must not involve unjustified distinctions

In this vein, the Council noted that the consequence of the fixed fine procedure is that, depending on whether the offence is prosecuted by means of this procedure or alternative prosecution track that may lead to a prison sentence, the public prosecution for the commission of an offence may or may not be discontinued through the payment of the fine alone, without the need to involve a judicial authority.

It held that the principle of equal treatment before the law means that, while the requirements of the proper administration of justice and the effective prosecution of offences may justify the use of such methods of discontinuing public proceedings other than by way of a court decision, this is with the proviso that such methods are used in respect of offences punishable by a term of imprisonment of no more than three years, where the constituent elements of the offence can be easily determined, and that only small fines are levied.

At the same time, the Constitutional Council ruled that the principle of equal treatment under criminal law meant that the fixed tort fine procedure could not be used to deal with offences where the amount of the fixed fine exceeds half of the ceiling set for fixed tort fines by the first paragraph of Article 495-17 of the Code of Criminal Procedure.

In its **Decision No. 2023-852 DC of 20 July 2023**, the Constitutional Council ruled that the single article of the **Act to Regularise the Intercommunal Local Urban Development Plan of the Bas-Chablais Community of Communes**, which had been referred to it by more than sixty deputies, complied with the Constitution.

Finally, in its **Decision No. 2023-854 DC of 28 July 2023**, the Constitutional Council, which had been asked by more than sixty deputies to review the procedure for adopting three articles of the **Act Relating to Military Programming for the Years 2024 to 2030 and Containing Various Provisions Pertaining to Defence**, struck down two of them and, of its own motion, declared nine other articles to be "legislative riders".

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 2022 to August 2023.

Between 1 September 2022 and 31 August 2023

45 QPC referrals

49 QPC decisions

3 findings of non-constitutionality

7 interpretative reservations

Criminal procedure and confidentiality of journalists' sources

Application for annulment of an investigative act filed by a journalist who is neither a party to the proceedings nor an assisted witness

Decision No. 2022-1021 QPC of 28 October 2022

In its Decision No. 2022-1021 QPC of 28 October 2022, the Constitutional Council ruled that legislative provisions pursuant to which a third party to proceedings may not request the annulment of an investigative act carried out in the context of criminal proceedings and contravening the principle of confidentiality of sources, were in conformity with the Constitution.

The issue of whether paragraph III of Article 60-1, paragraph IV of Article 100-5 and Articles 170, 171 and 173 of the Code of Criminal Procedure were consistent with the rights and freedoms guaranteed by the Constitution was referred to the Constitutional Council by the Court of Cassation.

Articles 60-1 and 100-5 of the Code relate, in the first case, to the authority conferred on the investigating authorities to requisition information in the context of a *flagrante delicto* investigation and, in the second case, to the power of the examining magistrate to intercept correspondence transmitted via electronic communications in the context of a judicial inquiry.

The challenge concerned provisions of the aforementioned articles that prohibited,

View the complete file relating to Decision No. 2022-1021 QPC on the Constitutional Council's website

on pain of nullity, including in the record of the proceedings material obtained pursuant to a requisition carried out in violation of the principle of confidentiality of journalists' sources, as guaranteed by Article 2 of the Law of 29 July 1881 on Freedom of the Press, and the act of transcribing correspondence with a journalist making it possible to identify a source in violation of those same provisions.

In particular, the applicant, joined by other parties to the petition, criticised those provisions for not allowing a journalist to move for annulment of an investigative act carried out in violation of the confidentiality of his or her sources, where said journalist was a third party to the proceedings in the course of which such act had been carried out. The applicant further argued that no other legal remedy would enable her to ensure that the act was recognised as being unlawful. In her view, this resulted in a violation of the right to an effective judicial remedy, the right to privacy and freedom of expression.

Referring to Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, the Constitutional Council recalled that the right of interested parties to an effective remedy before a court of law must not be materially infringed.

The Constitutional Council concluded that Parliament had not materially infringed the right to obtain an effective remedy

In this respect, the Constitutional Council noted that according to consistent case law of the Court of Cassation, a third party to proceedings, including a journalist, may not seek the annulment of an act carried out in violation of the principle of confidentiality of sources.

The Constitutional Council ruled, firstly, that pursuant to Articles 170 and 173 of the Code of Criminal Procedure, the investigating judge, the public prosecutor, the parties or the assisted witness may apply to the examining chamber during the course of an investigation to obtain the annulment of an act or pleading. By granting solely to such parties the possibility of challenging the legality of acts or documents placed in the case file, the law-making body sought to safeguard the secrecy of the investigation and inquiry, and to protect the interests of the persons concerned. In so doing, it pursued the constitutionally valid objectives of preventing breaches of the public order and apprehending offenders, and sought to guarantee the right to privacy and the presumption of innocence, which stem from Articles 2 and 9 of the Declaration of 1789.

Secondly, when an investigative act carried out in violation of the confidentiality of sources constitutes an offence, a journalist who considers that he or she has been harmed by said act may take legal action before the criminal courts by filing a civil claim in the context of the criminal proceedings and seeking remedy for the harm suffered. Although Article 6-1 of the Code of Criminal Procedure precludes legal action in the event that the legality of the act in question is not disputed by the examining magistrate, the public prosecutor, the parties or the assisted witness, and said act definitively recognised as unlawful by the court hearing the case, the journalist nonetheless retains the possibility of invoking the illegality thereof in support of a claim seeking to hold the French government liable for the violation.

The Constitutional Council therefore concluded that, in view of the different legal remedies available, Parliament had not materially infringed the right to obtain an effective remedy by preventing the journalist, like any other third party to the proceedings, from obtaining the annulment of an investigative act carried out in violation of the principle of confidentiality of sources.

Considering that the contested provisions are not undermined by negative incompetence and do not infringe the right to privacy, freedom of expression, the principle of equality before the law or any other right or freedom guaranteed by the Constitution, the Constitutional Council deemed them to be in conformity with the Constitution.

End of life

Refusal by a physician to comply with wishes set out in advance healthcare directives when such wishes are manifestly inappropriate or not in keeping with the patient's medical condition

Decision No. 2022-1022 QPC of 10 November 2022

View the complete file relating to Decision No. 2022-1022 QPC on the Constitutional Council's website

In its Decision No. 2022-1022 QPC of 10 November 2022, the Constitutional Council ruled that the legislative provisions relating to the conditions under which a physician may, in the context of end-of-life treatment, overrule the wishes expressed by a patient through advance directives were in conformity with the Constitution.

The issue of whether paragraph III of Article L. 1111-11 of the Public Health Code were consistent with the rights and freedoms guaranteed by the Constitution was referred to the Constitutional Council by the Council of State.

Article L. 1111-11 of the Public Health Code provides that any person of legal age may draw up advance healthcare directives relating to end-of-life treatment and containing instructions that are, in principle, binding on medical professionals in the event that the individual is unable to express his or her wishes regarding the conditions for continuing, limiting, discontinuing or withholding medical treatment or procedures.

The contested provisions of this article allow the doctor to refuse to comply with such advance directives, in particular when they are manifestly inappropriate or not in keeping with the patient's medical condition.

In particular, the provisions in question were criticised for allowing a doctor to override advance directives in which a patient had expressed his or her wish that life-sustaining measures should continue. The applicants and other parties to the case argued that, by allowing the physician to make such a decision based on the opinion that the directives are "manifestly inappropriate or not in keeping" with the patient's medical situation, these provisions lacked adequate safeguards due to imprecise wording that affords a disproportionate degree of discretion to the physician, whose decision is taken alone and not

subject to a period of reflection. The result, they argued, was a violation of the principle of safeguarding human dignity, described as the foundation of the right to respect for human life as well the rights of personal freedom and freedom of conscience.

The Constitutional Council pointed out that the Preamble to the Constitution of 1946 reaffirms the principle that every human being, regardless of race, religion or belief, is endowed with sacred and inalienable rights. These rights include safeguarding the dignity of the individual against all forms of bondage and degradation, which constitutes a constitutionally valid principle.

It also recalled that personal freedom is proclaimed in Articles 1, 2 and 4 of the Declaration of the Rights of Man and of the Citizen of 1789.

As such, Parliament, competent pursuant to Article 34 of the Constitution to enact rules concerning the fundamental guarantees granted to citizens for the exercise of public freedoms, including in medical matters, has the authority to determine, in compliance with these constitutional requirements, the conditions under which decisions may be taken to prolong or discontinue treatment of a person at the end of life.

On the basis of all these elements, the Constitutional Council concluded that Parliament had not disregarded the principle of safeguarding human dignity or personal freedom

In light of the constitutional framework thus specified, the Constitutional Council noted, firstly, that in allowing physicians to override advance healthcare directives, Parliament considered that compliance with such advance directives could not be required under all circumstances, inasmuch as they were drawn up at a time when the person was not yet confronted with the particular end-of-life situation in which the seriousness of the medical condition makes it impossible for the person to express his or her wishes. In so doing, the law-making body sought to guarantee the right of all persons to receive the care that is most appropriate to their condition and to safeguard human dignity at the end of life.

In this respect, the Council recalled that it does not have a general power of construal and decision of the same nature as that of Parliament and as such has no authority to substitute its assessment for that of Parliament regarding the conditions under which a doctor may override the advance directives of a patient at the end of life who is unable to express his or her wishes, provided that such conditions are not manifestly ill-suited to the objective pursued.

Secondly, the contested provisions allow doctors to override advance directives only when such wishes are "manifestly inappropriate or not in keeping with the medical condition" of the patient. These provisions are neither imprecise nor ambiguous.

Thirdly, the doctor's decision may only be taken following a collegiate procedure designed to provide insight into the specific situation. This procedure is documented in the medical record and brought to the attention of the support person designated by the patient or, alternatively, the patient's family members and loved ones.

Finally, the physician's decision is subject to review by the courts, if necessary. Where a decision is taken to limit or discontinue life-sustaining treatment on the grounds of unreasonable obstinacy, this decision is notified in such a way as to enable the support person or, alternatively, the patient's family or loved ones, to appeal in good time. Moreover, such appeal is examined as quickly as possible by the competent court, which may issue a stay of the contested decision where appropriate.

On the basis of all these elements, the Constitutional Council concluded that Parliament had not disregarded the principle of safeguarding human dignity or personal freedom.

Considering further that the contested provisions do not infringe freedom of conscience, the principle of equality before the law or any other right or freedom guaranteed by the Constitution, the Constitutional Council deemed them to be in conformity with the Constitution.

Mayotte

Identity checks in Mayotte

Decision No. 2022-1025 QPC of 25 November 2022

The Constitutional Council ruled that legislative provisions pertaining to identity checks in Mayotte are constitutional, subject to an interpretative reservation

View the complete file relating to Decision No. 2022-1025 QPC on the Constitutional Council's website

Through its Decision No. 2022-1025 QPC of 25 November 2022, the Constitutional Council ruled that legislative provisions pertaining to identity checks in Mayotte are constitutional, subject to an interpretative reservation.

The Constitutional Council had received a referral from the Court of Cassation regarding the conformity of paragraph XIV of Article 78-2 of the Code of Criminal Procedure, as amended by Law No. 2018- 778 of 10 September 2018 for managed immigration, effective right to asylum and successful integration, with the rights and freedoms guaranteed by the Constitution.

Article 78-2 of the Code of Criminal Procedure sets out the conditions according to which judicial police officers and, under their authority and responsibility, judicial police agents and certain deputy judicial police agents may carry out identity checks regarding any person with a view to verifying individuals' compliance with the legal obligation to hold, carry, and present identity papers and documents. The contested provisions authorise such checks throughout the territory of Mayotte.

The applicant and several other parties to the petition criticised these provisions for permitting a generalised and discretionary practice of identity checks by allowing such checks to take place throughout the territory of Mayotte, thus constituting, in their view, an infringement of freedom of movement.

Some parties to the case also alleged that the contested provisions violated the principle of equality before the law, as in other Overseas Territories, such identity checks may only be conducted in designated geographical areas.

To rule on the complaint alleging infringement of freedom of movement, the

Constitutional Council recalled that Article 2 of the Declaration of the Rights of Man and of the Citizen of 1789 holds that: "The aim of all political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression", and that Article 4 of the same Declaration states that "Freedom consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law".

Parliament is responsible for striking a proper balancing between, on the one hand, preventing breaches of public order and apprehending offenders, both necessary to safeguard constitutionally valid rights and principles, and on the other hand, the exercise of constitutionally protected freedoms, including freedom of movement, which is a component of personal freedom protected by Articles 2 and 4 of the Declaration of 1789.

The constitutionally valid objectives of preventing breaches of public order and apprehending offenders may justify the use of identity checks

The constitutionally valid objectives of preventing breaches of public order and apprehending offenders may justify the use of identity checks. Although Parliament is empowered to establish that checks may be performed regardless of the behaviour of the individual in question, generalised and discretionary identity checks would be incompatible with personal freedoms, and in particular freedom of movement.

In light of this constitutional framework, the Constitutional Council noted, firstly, that by adopting the contested provisions, which authorise identity checks aiming to verify compliance with the legal obligation to hold, carry and present identity

papers and documents throughout the territory of Mayotte, Parliament sought to reinforce action to combat illegal immigration, which contributes to the constitutionally valid objective of maintaining public order.

Secondly, the Constitutional Council noted that the *département* of Mayotte has, for several years, been experiencing exceptional migratory flows including a significant portion of foreign nationals, many of whom are undocumented in France. This *département* is subject to particular risks of disruptions to public order. Moreover, the Council noted that, due to its geographical location, these risks apply throughout the territory of Mayotte.

The Constitutional Council therefore concluded that Parliament authorised the implementation of identity checks with the aim of verifying legally mandatory papers and documents throughout the *département* of Mayotte without disrupting the constitutionally required balance between the need to uphold public order and to safeguard freedom of movement.

Furthermore, in light of Article 6 of the Declaration of 1789 and paragraph I of Article 73 of the Constitution, the Constitutional Council noted, firstly, that the circumstances described above constitute, within the meaning of Article 73 of the Constitution, "distinct characteristics and constraints" the nature of which empowers Parliament to adapt the rules pertaining to identity checks to a certain extent.

The Council furthermore noted that the adaptation enacted by the contested provisions pertains to the framework in which such identity checks may be conducted to verify compliance with the legal obligation to hold, carry and present identity papers and documents, while maintaining the conditions governing such activities elsewhere in France.

By way of an interpretative reservation, the Constitutional Council ruled that, pursuant to the above, such checks, performed by the legally competent authorities, could only be carried out based on objective criteria precluding any discrimination whatsoever between individuals, in strict accordance with constitutionally valid principles and rules.

Based on all these elements, the Constitutional Council concluded that the difference in treatment created by the contested provisions, which takes into account the distinct characteristics and constraints specific to the *département* of Mayotte, were proportional to the objective pursued by the law.

The contested provisions were therefore deemed constitutional, subject to the aforementioned interpretative reservation.

Minors and criminal procedure

Placement in or continuation of pre-trial detention for minors, and the forced making of identification records

Decision No. 2022-1034 QPC of 10 February 2023

The Constitutional Council partially struck down provisions relating to pre-trial detention of minors

In its Decision No. 2022-1034 QPC of 10 February 2023, the Constitutional Council partially struck down provisions relating to pre-trial detention of minors and forced making of identification records and subjected the remaining provisions to interpretative reservations.

The Council of State called on the Constitutional Council to rule on whether Article 397-2-1 of the Code of Criminal Procedure and paragraph IV of Article 55-1 of the same Code were consistent with the rights and freedoms guaranteed by the Constitution.

With regard to pre-trial detention of minors, pursuant to Article L. 12-1 of the Code of Juvenile Criminal Justice, offences committed by minors fall within the jurisdiction of specialised courts and divisions. Paragraph I of Article 397-2-1 of the Code of Criminal Procedure specifies that when a criminal court, hearing cases under the immediate or deferred appearance procedures, or the liberty and custody judge, presiding on the basis of Article 396 of the same Code, observes that the accused is a minor,

View the complete file relating to Decision No. 2022-1034 QPC on the Constitutional Council's website

the court in question declares that it does not have jurisdiction and refers the case back to the Public Prosecutor.

The contested provisions of Article 397-2-1 of the Code of Criminal Procedure stipulate that, in the case of a minor aged thirteen or over, the court or the liberty and custody judge must first rule on placement in or continuation of custody for a maximum of twenty-four hours pending appearance before the competent court.

These provisions were criticised primarily for allowing a court that has recognised its incompetence to judge a minor erroneously brought before, to remand said minor in custody or prolong custody pending the minor's appearance before a juvenile court, regardless of the severity of the alleged offence, despite not being a specialised court and being subject to no obligation to follow an appropriate procedure.

The Constitutional Council recalled that the fundamental principle recognised by French law in matters of juvenile justice demands a restorative approach aiming for the educational and moral rehabilitation of young offenders through measures appropriate to their age and personality, determined by a specialised court or in accordance with appropriate procedures. However, these requirements do not preclude, where necessary, measures such as placement, supervision, restraint or, in the case of minors over the age of thirteen, deprivation of liberty.

On this basis, the Constitutional Council ruled, firstly, that these provisions sought to pursue the constitutionally valid objective of safeguarding public order by providing, where the court hearing a case realises that the accused is a minor, that said minor remain at the disposal of the justice system to ensure that he or she is promptly brought before a specialised court competent to determine the educational and other measures appropriate to the age of the minor.

Secondly, after hearing from the minor and his or her lawyer, the court may only order placement in or continuation of pre-trial detention if its decision is specifically motivated by the need to ensure that the minor remains at the disposal of the justice system.

By way of a first interpretative reservation, the Constitutional Council ruled that, in order to ensure compliance with the aforementioned constitutional requirements, the court is responsible for verifying that placement in or continuation of pre-trial detention is not disproportionately harsh in light of the circumstances, the personal situation of the minor and the severity of the alleged offences.

Lastly, a minor placed or maintained in custody must appear within a maximum of twenty-four hours before the specialised court competent to impose educational measures or sentences appropriate to his or her age and personality. At the end of this period, failing appearance before said specialised court, the minor is automatically released. Furthermore, pursuant to Article L. 124-1 of the Code of Juvenile Criminal Justice, a minor must be detained in either a specialised correctional facility or an establishment that guarantees separation of juvenile and adult detainees.

On the basis of all these elements, the Constitutional Council dismissed the petition alleging violation of the fundamental principle recognised by French law in matters of juvenile justice, subject to the reservation mentioned above.

As regards the use of identification records made under force, Article 55-1 of the Code of Criminal Procedure allows judicial police officers, in the context of a *flagrante delicto* investigation, to take or cause to be taken the fingerprints, palm prints or photographs

required to assemble and consult police files. Articles L. 413-16 and L. 413-17 of the Code of Juvenile Criminal Justice set out the conditions under which these operations are carried out with regard to minors.

Pursuant to the contested provisions of these articles, when an adult or a minor who is visibly at least thirteen years old is questioned while in police custody or in the context of a voluntary police interview, fingerprints, palm prints and photographs may, under certain conditions, be taken without the minor's consent.

In particular, these provisions were criticised for authorising the use of coercion to take fingerprints, palm prints or photographs of a person in police custody or in the context of a voluntary interview, whereas these operations were neither necessary to establish the truth nor justified by the severity and complexity of the offences.

Fingerprints, palm prints or photographs cannot be taken without the consent of the individual concerned except in the presence of the individual's lawyer, legal representatives or the appropriate adult

In light of Articles 2, 4, 9 and 16 of the Declaration of 1789, the Constitutional Council held, firstly, that by adopting these provisions, Parliament intended to facilitate the identification of suspects during a criminal investigation. It thus pursued the constitutionally valid objective of apprehending offenders.

Secondly, fingerprints or photographs may be taken without the consent of the person concerned only with the written authorisation of the public prosecutor in response to a reasoned request from the judicial police officer. Authorisation may only be granted if these operations are the sole means of identifying a person who refuses to state his or her identity or provides clearly inaccurate identity data and when the individual in question is suspected upon reasonable grounds of having committed or attempted to commit an offence punishable by not less than three years' imprisonment and, where the person is a minor, not less than five years' imprisonment. Furthermore, in the case of a minor, the judicial police officer or agent must first attempt to obtain the minor's consent and inform the minor, in the presence of his or her lawyer, of the penalties for refusing to submit to these procedures and specify that they may be carried out without his or her consent.

Thirdly, the officer of the judicial police officer or, under the supervision of the latter, an agent of the judicial police may only use coercion when strictly necessary and in a proportionate manner, taking into account, where appropriate, the state of vulnerability and the particular situation of the minor.

By way of an interpretive reservation, the Constitutional Council ruled that, to ensure that the aforementioned constitutional requirements are supported by legal guarantees, fingerprints, palm prints or photographs cannot be taken without the consent of the individual concerned except in the presence of the individual's lawyer, legal representatives or the appropriate adult.

Moreover, the contested provisions permit the use of coercion in the context of voluntary police interviews, whereas respect for the rights of the defence in such a context requires that the person being questioned participate freely and be entitled to leave the premises of the interview at any time. Consequently, the Constitutional Council struck down the words "61-1 or" in paragraph IV of Article 55-1 of the Code of Criminal Procedure and ruled that the provisions of Article L. 413-17 of the Juvenile Criminal Justice Code could not be construed as applying to minors participating in voluntary police interviews.

Bioethics

Access to non-identifying information and identity of third-party donors for persons born through Assisted Reproductive Technology involving a third-party donor

Decision No. 2023-1052 QPC of 9 June 2023

View the complete file relating to Decision No. 2023-1052 QPC on the Constitutional Council's website

In its Decision No. 2023-1052 QPC of 9 June 2023, the Constitutional Council ruled, subject to an interpretative reservation, that provisions relating to access to non-identifying information and the identity of third-party donors for persons born through Assisted Reproductive Technology were in conformity with the Constitution.

The Council of State referred to the Constitutional Council a case relating to compliance of Article L. 2143-6 of the Public Health Code, as amended by Law No. 2021-1017 of 2 August 2021 on bioethics, with the rights and freedoms guaranteed by the Constitution.

Prior to the Bioethics Law of 2 August 2021, Articles 16-8 of the Civil Code and L. 1211-5 of the Public Health Code prohibited any release of information making it possible to identify the third-party donor in cases of birth through Assisted Reproductive Technology.

Article L. 2143-6 of the Public Health Code, introduced by the Law of 2 August 2021, now provides that an adult born as a result of a gamete or embryo donation made before a date set by decree at 1 September 2022 may apply to the Commission for Access to Non-Identifying Information and Identity of Third-Party Donors for access to such information.

The applicant criticised these provisions for allowing the Commission to contact third-party gamete or embryo donors, who benefited from a statutory guarantee of anonymity at the time the donation took place, to request consent for the release of this information, with no possibility of anticipatory refusal to be contacted and no guarantee that requests would not be reiterated. On this basis, the applicant alleged a violation of the right to privacy.

In addition, in the context of the adversarial procedure, the Constitutional Council invoked, ex officio, the issue that, by calling into question legitimate and reasonable expectations under the previous legislation, these provisions fail to secure guaranteed rights.

The Constitutional Council recalled that, according to Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789: "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution".

Parliament, acting within its sphere of competence, is empowered at any time to amend or repeal previous legislation, substituting other provisions where appropriate. In so doing, however, it may not undermine the legal certainty of constitutional requirements. In particular, it may not, without compelling justification grounded in reasons of public interest, contravene legally established norms or call into question legitimate and reasonable expectations arising from previous legislation.

Should consent be refused, these provisions cannot be construed as allowing for repeated requests to the third-party donor on behalf of the same individual

In this light, the Constitutional Council noted that the contested provisions of Article L. 2143-6 of the Public Health Code provide that, when an adult born as a result of a gamete or embryo donation made before 1 September 2022 applies to the Commission for Access to Non-Identifying Information and Identity of Third-Party Donors for access to this information, the Commission contacts the third-party donor to request consent for the release of the donor's non-identifying information and identity and transmission of said information to the French Biomedical Agency.

The Constitutional Council observed that, although these provisions allow individuals born as a result of a gamete or embryo donation to obtain the non-identifying information and identity of the third-party donor, transmission thereof is subject to consent by the latter.

As such, the Council ruled that the contested provisions do not undermine the anonymity a third-party donor could legitimately and reasonably expect insofar as the donation was made prior to the entry into force of the Law of 2 August 2021.

Consequently, the Constitutional Council dismissed the complaint alleging violation of the Declaration of 1789.

Ruling subsequently on the issue of infringement of the right to privacy, the Constitutional Council noted, firstly, that the contested provisions merely provide that third-party donors may be contacted by the Commission for Access to Non-Identifying Information and Identity of Third-Party Donors to request consent for the release of such information.

By way of an interpretative reservation, it ruled that these provisions do not seek to determine the conditions under which consent is given and, should consent be refused, cannot be construed as allowing for repeated requests to the third-party donor on behalf of the same individual.

Secondly, by adopting the contested provisions, Parliament intended to ensure respect for donors' privacy while, to the extent possible and by means of appropriate measures, offering individuals born as the result of such donations the possibility to access information regarding their personal origins. The Council ruled that it has no authority to substitute its assessment for that of Parliament regarding the balance thus established between the interests of third-party donors and those of persons born through Assisted Reproductive Technology involving a third-party donor.

On these grounds and subject to the aforementioned reservation, the Constitutional Council dismissed the complaint alleging violation of the right to privacy.

Subject to this same interpretative reservation, the Constitutional Council ruled that the contested provisions were in conformity with the Constitution.

RIP decisions: admissibility of referendum initiatives

Bill establishing an additional tax on exceptional profits of large companies

Decision No. 2022-3 RIP of 25 October 2022

Bill aimed at establishing the age of 62 years as the maximum legal retirement age

Decision No. 2023-4 RIP of 14 April 2023

Draft aimed at forbidding a legal retirement age above 62 years

Decision No. 2023-5 RIP of 3 May 2023

The Constitutional Council was called upon on three occasions to review bills introduced in the framework of the "Shared Initiative Referendum" procedure instituted by the Constitutional Act of 23 July 2008, governed by paragraphs III to VI of Article 11 of the Constitution, and clarified through Organic Law No. 2013-1114 of 6 December 2013 on the application of Article 11 of the Constitution.

It stems from Articles 45-1 to 45-3 of Ordinance of 7 November 1958 that, when called upon to examine a bill presented pursuant to paragraph III of Article 11 of the Constitution, the Constitutional Council must ensure that the draft bill was introduced by no less than one-fifth of Members of Parliament, that it concerns one of the topics liable to be decided by referendum as listed in paragraph I of Article 11 of the Constitution, that it does not aim to nullify a legislative provision in force for less than one year, and that it does not concern the same topic as a proposal rejected by the citizenry by referendum over the preceding two years.

With its **Decision No. 2022-3 of 25 October 2022**, the Constitutional Council reviewed the bill, signed by 242 deputies and senators, establishing an additional tax on exceptional profits of large companies.

In light of Article 11 of the Constitution, the Constitutional Council noted that this bill only sought to increase, as from its entry into force and until 31 December 2025, the tax rate applicable to companies with revenues above 750 million euros in respect of the proportion of profits exceeding 1.25 times the average of the company's taxable revenue for fiscal years 2017, 2018, and 2019.

Considering that the sole purpose of this bill was to increase the state budget by creating a provision to increase existing taxes on the profits of some companies until 31 December 2025, the Council deemed that this initiative did not aim to reform French economic policy within the meaning of Article 11 of the Constitution. After noting that the bill did not concern any of the other topics mentioned in paragraph I of Article 11 of the Constitution, the Council held that it therefore did not meet the conditions set in paragraph III of this same article and Article 42-2(2°) of the Ordinance of 7 November 1958.

In its **Decision No. 2023-4 RIP of 14 April 2023**, the Constitutional Council reviewed the bill signed by 252 deputies and senators aiming to establish that the legal retirement age may not exceed 62 years.

The Constitutional Council noted that the single and unique article of this bill held that the legal age of entitlement to a retirement pension, as mentioned in paragraph I of Article L. 351-1 of the Social Security Code, applicable to affiliates of the general pension scheme, Article L. 732-18 of the Rural and Maritime Fishing Code, applicable to affiliates of the specific pension scheme for non-salaried agricultural workers, as well as paragraph I(1°) of Article L. 25 of the Civil and Veteran Pensions Code, applicable to civil servants, cannot be set above the age of 62 years.

However, on the date on which the Council was called upon to review this bill, the retirement age mentioned in the aforementioned provisions was already set at 62 years according to Article L. 161- 17-2 of the Social Security Code. Therefore, on the date of registration of the referral, the bill would have enacted no change in the current body of law.

The Constitutional Council must ensure that the draft bill was introduced by no less than one-fifth of Members of Parliament

Furthermore, the legislative body is always empowered to modify, complement, or nullify previous legislation, whether through a law voted by Parliament or through a law adopted via referendum. As such, neither the circumstances under which this bill would be adopted, i.e. via referendum, nor the fact that it would set an age limit meant to be binding on the legislative body, could be construed as enabling the bill to modify the current body of law.

The Constitutional Council therefore concluded that this draft bill did not involve a "reform" of social welfare policy within the meaning of Article 11 of the Constitution.

Finally, in its **Decision No. 2023-5 RIP of 3 May 2023**, the Constitutional Council reviewed the bill signed by 253 deputies and senators seeking to prohibit the institution of a statutory retirement age above 62 years.

It noted that this bill sought to set the statutory retirement age and to increase the

contribution of capital gains to the funding of the pay-as-you-go pension plan.

On the one hand, following a similar line of reasoning as in its Decision No. 2023-4 RIP of 14 April 2023, the Council noted that this bill would rewrite Article L. 161-17-2 of the Social Security Code to the effect that the statutory retirement age mentioned in the first paragraph of Article L. 351-1 of said Code, applicable to affiliates of the general pension scheme, Article L. 732-18 of the Rural and Maritime Fishing Code, applicable to affiliates of the specific pension scheme for non-salaried agricultural workers, as well as paragraph I(1°) of Article L. 25 of the Civil and Veteran Pensions Code, applicable to civil servants, cannot exceed 62 years.

However, on the date on which the Council was called upon to review this bill, Article L. 161- 17-2 of the Social Security Code already set the retirement age mentioned in said provisions at sixty-two years. Therefore, on the date of registration of the referral, a provision prohibiting enactment of a statutory retirement age exceeding 62 years would not have resulted in any change in the current body of law.

Furthermore, through reasoning analogous to its Decision No. 2022-3 RIP of 25 October 2022, the Constitutional Council noted that the bill sought to increase from 9.2% to 19.2% the rate of the *Contribution Sociale Généralisée* (a social security contribution levied on virtually all sources of income) applied to investment income mentioned in paragraph I(e) of Article L. 136-6 of the Social Security Code and investment products mentioned in paragraph I(1) of Article L. 136-7 of the same Code, and to allocate the proceeds from this tax on said income and products to the old-age and widowhood branch of the general scheme of the social security system. Its sole effect was therefore to fund a branch of the social security system by increasing the rate applicable to a proportion of an existing tax base the proceeds of which are already allocated in part to funding the general scheme of the social security system.

The legislative body is always empowered to modify, complement, or nullify previous legislation, whether through a law voted by Parliament or through a law adopted via referendum

For all the above reasons, the Constitutional Council concluded that the bill did not involve a reform of national social welfare policy within the meaning of Article 11 of the Constitution.

Other decisions of the past year

In addition to the decisions handed down through the *ex ante* and *ex post* constitutional review processes, the Constitutional Council issued several hundred other decisions between 1 September 2022 and 31 August 2023.

In its **Decision No. 2023-13** FNR of 20 April 2023, it was called on to rule, within the terms of paragraph IV of Article 39 of the Constitution, on the introduction of the military programming law for the period 2024-2030 containing various defence-related provisions. Without prejudging whether the content of these provisions was in conformity with the Constitution, the Constitutional Council held that they met organic requirements applicable to the introduction of draft legislation.

In electoral matters, the Council completed on 3 February 2023 the review of disputes related to the legislative elections of June 2022, and then on 7 July 2023 the review of cases related to candidates' campaign financing accounts referred by the National Commission for Campaign Accounts and Political Financing.

The first of these procedures led to the invalidation of the results of seven elections. In the second procedure, the Council sentenced 345 candidates to penalties of one or three years' electoral ineligibility, depending on the severity of the offences. In 85 other cases, the Council ruled that there were no grounds for ineligibility.

In its Decision No. 2023-199 PDR of 23 February 2023, the Constitutional Council took note of the explicit withdrawal by Ms Marine Le Pen of a petition requesting the revocation of the decision of 14 December 2022 through which the National Commission for Campaign Accounts and Political Financing ultimately approved the candidate's campaign accounts and set the amount of the reimbursement due by the French government at 10,220,842 euros.

The Constitutional Council issued three decisions regarding requests by the Prime Minister to recognise the **regulatory character of legislation**, granting such requests for the most part.

In its Decision No. 2023-303 L of 28 July 2023, it confirmed there were no grounds for the Council to rule on the provisions of a non-ratified ordinance within the framework of this procedure since such provisions cannot be deemed legislative acts within the meaning of paragraph II of Article 37 of the Constitution.

Called upon to rule on the **situation of a member of Parliament and the compatibility of her mandate with her role as member of the Board of Directors** of the La Française des Jeux company foundation, the Constitutional Council held in its Decision No. 2022-4 I of 2 February 2023 that the La Française des Jeux company foundation, the by-laws of which define its corporate purpose as "promoting equal opportunities", in particular by supporting "general-interest projects aimed at persons in distress", is not a national company within the meaning of Article L.O. 145 of the Electoral Code. The Council therefore concluded that this role was compatible with a parliamentary mandate.

Changes at the Council

In light of the objectives set by President Fabius for his presidency – turning the Council into a fully fledged court and disseminating its work abroad – the Constitutional Council has over the past year deepened its dialogue with both academia and youth, as well as with its international peers.

STIMULATING DIALOGUE WITH THE LEGAL COMMUNITY

Thesis Award

17 NOV. 2022

The President of the Constitutional Council, Mr Laurent Fabius, awarded the 26th Constitutional Council Thesis Award on 17 November 2022 to Ms Rym Fassi-Fihri for her thesis entitled "*Les droits et libertés du numérique : des droits fondamentaux en voie d'élaboration. Étude comparée en droits français et américain*" ("Digital right and liberties: fundamental rights under construction. Comparative study in French and US law"). 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 Ms Laurence Burgorgue-Larsen, professor at the Paris 1 Panthéon-Sorbonne University, Mr Julien Bonnet, professor at the University of Montpellier, and Mr Jean-Éric Gicquel, professor at the University of Rennes, of the members of the Council, Mr Alain Juppé and Ms Véronique Malbec, and of the Council's Secretary General, Mr Jean Maïa.

The winning thesis was published in October 2022 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.

Watch the video of the interview with Ms Rym Fassi-Fihri, winner of the 2022 Thesis Award

The *Titre VII* journal

Read the *Titre VII* journal online

The free digital publication of the Constitutional Council, *Titre VII – Les Cahiers du Conseil constitutionnel* makes accessible doctrinal debates and testimonies by major public law practitioners every semester through thematic features, reviews of case law and international

Meeting with advanced public law degree holders

13 DEC. 2022

Upon invitation from the President of the Constitutional Council, the laureates, and members of the jury of the 2022 public law *agrégation* examination, led by Mr Philippe Terneyre, were welcomed at the Constitutional Council on 13 December 2022. Over the past few years, the Constitutional Council has used these meetings with the new professors as an opportunity to establish useful and trustful relationships, thereby sustaining a permanent dialogue between academia and the Council.

comparisons. Each volume features a main theme and offers articles on the highlights of the Constitutional Council's activities.
With over 198,184 visits in 2022 (an 8.5% increase compared to the previous year), *Titre VII* published its volume 9 on decentralisation in October 2022 and volume 10 on confidentiality in April 2023. This makes accessible, among others, the writings of Michel Degoffe on four decades of decentralisation, of Éric Giuily on the behind-the-scenes of the elaboration of the Law of 2 March 1982, or of François Molins and Jean Barthélemy on confidentiality of judicial investigations. The journal is available in full on the Constitutional Council's website.

QPC 360° portal

The Constitutional Council equips QPCs with a dedicated website, observatory, and newsletter

A true "velvet revolution", in the words of President Fabius on its tenth anniversary in 2020, the priority preliminary ruling procedure (QPC) is a major step for the rule of law in France. Since its implementation was overall very fluid, it had not necessarily been accompanied by the analysis, training, and communication efforts that befit its importance.

This is why, on the eve of the procedure's tenth anniversary, the Constitutional Council, working alongside the two jurisdictional orders, lawyers, and universities, had launched a research program entitled "QPC 2020".

The assessment of these ten first years established at the end of 2020 was that the procedure makes significant progress for justice in France. The main difficulty highlighted by this assessment was that practitioners and the greater public lacked an information system to understand in detail the reality of QPC activities beyond the easily accessible case law of the Council of State, the Court of Cassation and of the Constitutional Council.

This is why in late 2020, President Fabius decided alongside the two jurisdictional orders, lawyers, the Ministry of Justice, and universities, to remedy this with the creation by early 2023 of a tool designed to broaden the access to QCP procedures and, if applicable, to put it to use, and at least to identify all of the QPC decisions rendered by French courts, be they referrals or not.

This was achieved on 10 January 2023 with the launch of the new website QPC 360°, an unprecedented QPC database which already includes over 3,000 QPC decisions stemming from all jurisdictions applying this procedure.

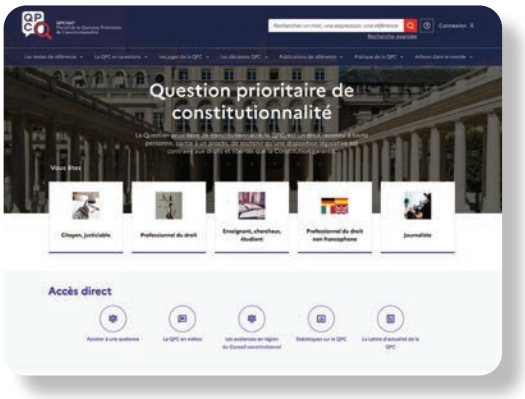
Building on this major achievement, President Fabius sought to create on 19 June 2023 an QPC Observatory housed within the Constitutional Council, which will call together personalities representing of the two jurisdictional orders, lawyers, and universities twice a year. This is by no means an attempt by the Constitutional Council to interfere in the courts and other institutions represented

but rather an observation as to a reality that no stakeholder can escape, namely that these actors share a responsibility with respect to the good functioning of the QPC procedure. This implies that they make space for regular and trustful dialogue on the procedure and what could be undertaken, including of course by the Constitutional Council, to facilitate its understanding and use by legal professionals.

Following up on this first meeting of the Observatory, the Constitutional Council communicated on 6 July 2023 the first edition of the "QPC Newsletter", whose objective is to support the deployment of the QPC 360° portal and the creation of the QPC Observatory by providing regular updates to legal professionals and the greater public on the procedure, the training and tools that facilitate its understanding and practice, and to gather practitioner testimonies.

Following its first meeting, the QPC Observatory identified two main themes in which President Fabius wants to be associated with closely and personally involved in the coming months. The first is to ensure, as provided for in a decree dated 13 October 2022, that all QPC decisions be made available on the QPC 360° portal, which requires special effort on the part of the courts. The second is the creation of QPC-specific training programs, which offers exciting perspectives.

> "The new website QPC 360°, an unprecedented QPC database which already includes over 3,000 QPC decisions"



Discover the QPC 360° portal

Read the QPC Newsletter

Watch the video announcing the new QPC 360° website by President Fabius

Hearings outside

Montpellier

16 NOV. 2022

After trips to Metz, Nantes, and Pau in 2019, to Lyon in 2020, to Bourges in 2021 and to Marseille in 2022, the Constitutional Council once again sat outside the capital on 16 November 2022 at the Montpellier Court of Appeals. It organised there a public hearing on QPCs No. 2022-1025 and 2022-1026.
This seventh hearing held outside the capital is a response to President Laurent Fabius's wish to raise awareness of the Council's work and of the "citizen questions" raised by QPCs. The Montpellier hearing was an opportunity for the Council to engage in a dialogue with judges operating within the ambit of the Montpellier Court of Appeals and the Toulouse Administrative Court of Appeals, as well as with representatives of lawyers.
This trip was also an opportunity to deepen the partnership established between the Constitutional Council and the Ministry of National Education in 2016 to promote constitutional culture among students through, notably, the "Discovering our Constitution" ("*Découvrons notre Constitution*") contest. The nine members of the Constitutional Council indeed met with pupils of the Montpellier high schools Georges Clemenceau and Jules Guesde.
The President of the Constitutional Council returned to Montpellier on 25 November 2022 for a visit to the Faculty of Law to present the decisions issued in the two QPCs examined during the hearing of 16 November. This conference was an opportunity to have fruitful exchanges with the students and faculty of the University of Montpellier, thereby consolidating ties with academia.

Video of the public hearing in Montpellier

the capital

Marseille

On Tuesday 27 September 2022, the Constitutional Council held a public hearing in Marseille, France's second-largest city. It sat in the Marseille Administrative Court of Appeals, a jurisdiction that has been very active lately.

27 SEPT. 2022

During the hearing, the Constitutional Council examined QPCs No. 2022-1011 and 2022-1012. The first tackled the provisions a judge ought to verify to characterise a manifest imbalance between parties, despite free prior negotiations, of the economic terms of a commercial relationship; the second tackled the provisions of a compensatory allowance paid by territorial public establishments to the *Métropole du Grand Paris*.

As part of this trip, the nine members of the Constitutional Council met with pupils studying at the Saint-Exupéry and Thiers high schools. The following week, on 6 October 2022, President Fabius returned to Marseille to meet students at the Faculty of Law to discuss the decisions rendered in the cases examined during the hearing.

Video of the public hearing in Marseille

Video of Laurent Fabius's conference at the Faculty of Law, University of Aix-Marseille

Video of the meeting between members of the Constitutional Council and students from two high schools in Marseille

Bordeaux

21 FEB. 2023

On Tuesday 21 February 2023, the Constitutional Council held its eighth QPC hearing outside the walls of the Palais Royal with a trip to Bordeaux. It held the hearing in the premises of the Bordeaux Court of Appeals. Before an audience made up of judges, civil servants, academics, law students and members of the greater public, it examined QPC 2023-1036 on the producer's liability in case of damages caused by a part of human body or a product derived from the human body.

As part of this trip, the President of the Constitutional Council, Laurent Fabius, spoke to students of the National School for the Judiciary (*École Nationale de la Magistrature*) during a conference.

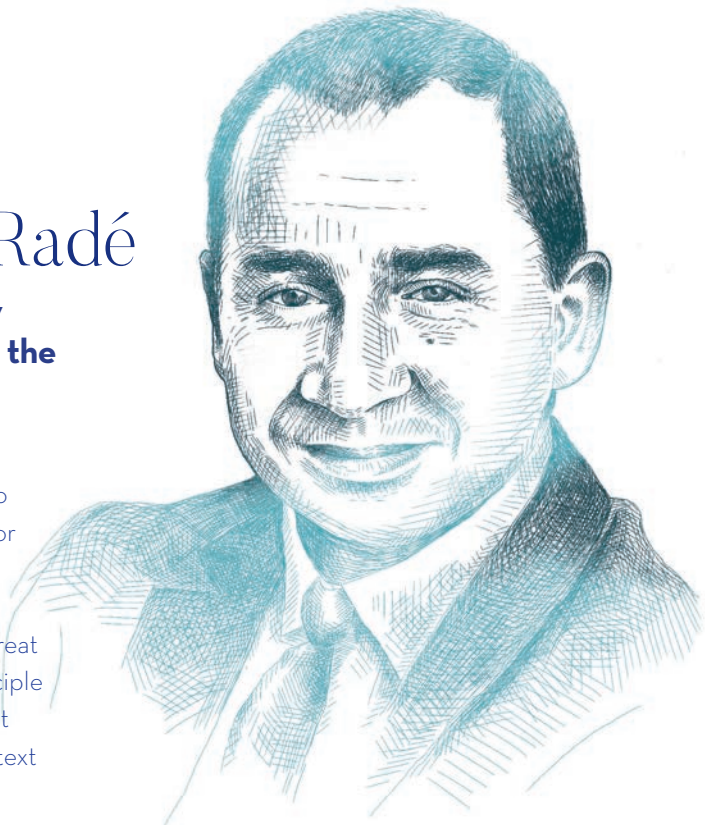
Pauline Gervier

Lecturer in Public Law at the University of Bordeaux

"President Laurent Fabius's conference at the University of Bordeaux was an opportunity to grasp the stakes of the QPC examined during the hearing and to apprehend the Constitutional Council's practical activities. It was also an opportunity to announce the creation of a new university degree "QPC and Civil Liberties" ("*QPC et Libertés*") for all QPC agents, in particular lawyers and judges, starting in September 2023, a sign of our commitment to ensuring the success of this remedy, so that the rule of law may be strengthened!"

The President and members of the Constitutional Council also used this trip as an opportunity to individually meet with headmasters, professors and pupils of the Gustave Eiffel and François Mauriac high schools to discuss the Constitution, the rights and liberties it enshrines, and the Constitutional Council's missions.
On Friday 10 March 2023, as per the usual schedule since these trips began, President Fabius returned to Bordeaux, at the Pey-Berland building of the Faculty of Law to meet with students and discuss the decision rendered on the case examined during the hearing.

Video of Laurent Fabius's conference at the National School for the Judiciary



Christophe Radé

Professor of Private Law and Criminal Sciences at the University of Bordeaux

"President Laurent Fabius's trip to Bordeaux for the famous Mediator case demonstrates the extent to which the Constitutional Council has become a key player in the great trials of our times. Since the principle of equality before the law was not breached, the incriminated legal text (Article 1245-11 of the Civil Code) survived the test. Let's hope that the decision of the Court of Appeal will be overturned, in accordance with prevailing case law, and that the victims will be compensated!"

The *"Discovering our Constitution"* initiative expands

Launched in 2016 by the Constitutional Council in partnership with the Ministry of National Education, Youth and Sport, the "Discovering our Constitution" ("*Découvrons notre Constitution*") competition enables pupils of all age groups to grasp the major constitutional principles through group reflection and work.
The winners of the 6th edition of the competition were announced by the President of the Constitutional Council, Mr Laurent Fabius, and the Minister of National Education and Youth, Mr Pap Ndiaye, at an awards ceremony at the Constitutional Council on 10 November 2022.

The winners were:

• Key stage 2/3 category
The Year 7 class from *Collège* Robert Paparemborde in Colombes (Versailles Academy), for its virtual cinema production "The Constitution explained to children" ("*La Constitution expliquée aux enfants*").
A special mention goes to the Year 5/6 class from Brie-sous-Archiac school (Poitiers Academy), for their video "What is the Constitution" ("*C'est quoi la Constitution?*").

• Key stage 3 category
The Year 9 class from *Collège* Simone Veil in Lamballe-Armor (Rennes Academy), for its magazine "The Constitution at the Collège Simone Veil" ("*La Constitution au collège Simone Veil*").

• Key stage 4 category
The Year 11 class from the *Lycée* l'Oiselet, Bourgoin-Jallieu (Grenoble Academy), for its board game "The small Council" ("*Le petit Conseil*").

• Secondary school with specialised legal training category
The final year class of the Law option at *Lycée* Murat in Issoire (Clermont-Ferrand Academy), for its "Constitution" escape game.

A special prize was awarded to the final year Law option classes from the Versailles Academy for their work on the digital book "Rewriting the Declaration of the Rights of Man and of the Citizen" ("*Réécriture de la Déclaration des droits de l'homme et du citoyen*"), and a special mention to the Year 12 Management option class from the *Lycée* Jules Michelet in Montauban (Toulouse Academy) for their digital book "Constitution: Neighbourhood disturbances and the right to live in a balanced environment" ("*Constitution : les troubles du voisinage face au droit de vivre dans un environnement équilibré*").
At the prize ceremony, the Minister of Education and the President of the Constitutional Council announced the construction of a joint website to help students discover the Constitution.
The website, which will be launched no later than 4 October 2023 to mark the 65th anniversary of the Constitution, will enable students of all ages to test and expand their knowledge of the Constitution, how it was drawn up and its main principles, in a fun, learning atmosphere.

A new version of the Constitutional Council's mobile application is available

Free to download on iOS and Android, a new version of the Constitutional Council mobile application was rolled out in spring 2023. It notably enables users to check case law, receive alerts on new decisions and keep abreast of news from the Constitutional Council. As one browses the application, this new version enables one to select as "favourites" chosen cases and decisions for easy retrieval, and to receive notifications of updates to these cases. For example, one can be automatically informed when a hearing date is announced, or when a live QPC hearing is broadcast. The application also allows one to consult the Council's multimedia content collection, with over 1,000 videos. This means one can access all video broadcasts of public hearings.

Watch a video presenting the Constitutional Council new app

International Meetings

Congress in Berlin

On 4 and 5 May 2023, President Fabius took part in the congress organised in Berlin by the German Federal Constitutional Court for the presidents of the Constitutional Courts in Europe. The congress addressed "Climate change as a challenge to constitutional law and constitutional courts".

4-5 MAY 2023

Thirty-five national jurisdictions were represented, as well as the Court of Justice of the European Union and the European Court of Human Rights. In a context of global climate emergency, the judges attending discussed the potential of constitutional law and its role in the struggle against climate change. Contributions will be published in a special issue of *The Human Rights Law Journal* (HRLJ).

Franco-Israeli seminar

A delegation of the Israeli Supreme Court, led by its President Ms Esther Hayut, was hosted at the Constitutional Council on Wednesday 10 May 2023 for a Franco-Israeli seminar organised jointly with the Council of State and the Court of Cassation.

10 MAY 2023

For several years, the Israeli Supreme Court and the three highest French courts, which are its functional peers, have established a regular institutional dialogue to enable better mutual understanding of their legal systems and case law. This year's working themes were, on the one hand, the role of the constitutional judge in the consolidation of the rule of law, and on the other hand, the constitutional protection of the environment. Discussions focused on procedures, jurisdiction, and case law of the two courts.

President Fabius underscored the importance of such meetings, which is a tangible translation of the solidarity between courts and are bulwarks of the rule of law in a context where its guiding principles are increasingly challenged.

ACCF bureau session in Lausanne

The General Assembly of the Association of Francophone Constitutional Courts (*Association des cours constitutionnelles francophones*, or ACCF), meeting at the Dakar Congress in June 2022, elected the Constitutional Council of Senegal to chair the association.

1 JUNE 2023

Mr Mamadou Badio Camara, President of the Constitutional Council of Senegal, will serve as President until May 2025. On 1 June 2023, the new members of the ACCF board (which includes Belgium, Benin, Canada, Cambodia, Djibouti, France,

4th quadrilateral meeting of Latin courts

A delegation of the Constitutional Council led by President Laurent Fabius, accompanied by Alain Juppé, Corinne Luquiens and Michel Pinault travelled to Rome from 22 to 24 June to take part in the 4th "quadrilateral" meeting of Latin constitutional courts.
This informal network, founded in 1999, includes the Italian Constitutional Court, the Spanish Constitutional Tribunal, the Portuguese Constitutional Tribunal and, since 2017, the French Constitutional Council. It aims to meet yearly to discuss a theme relevant to all courts and the evolution of case law.

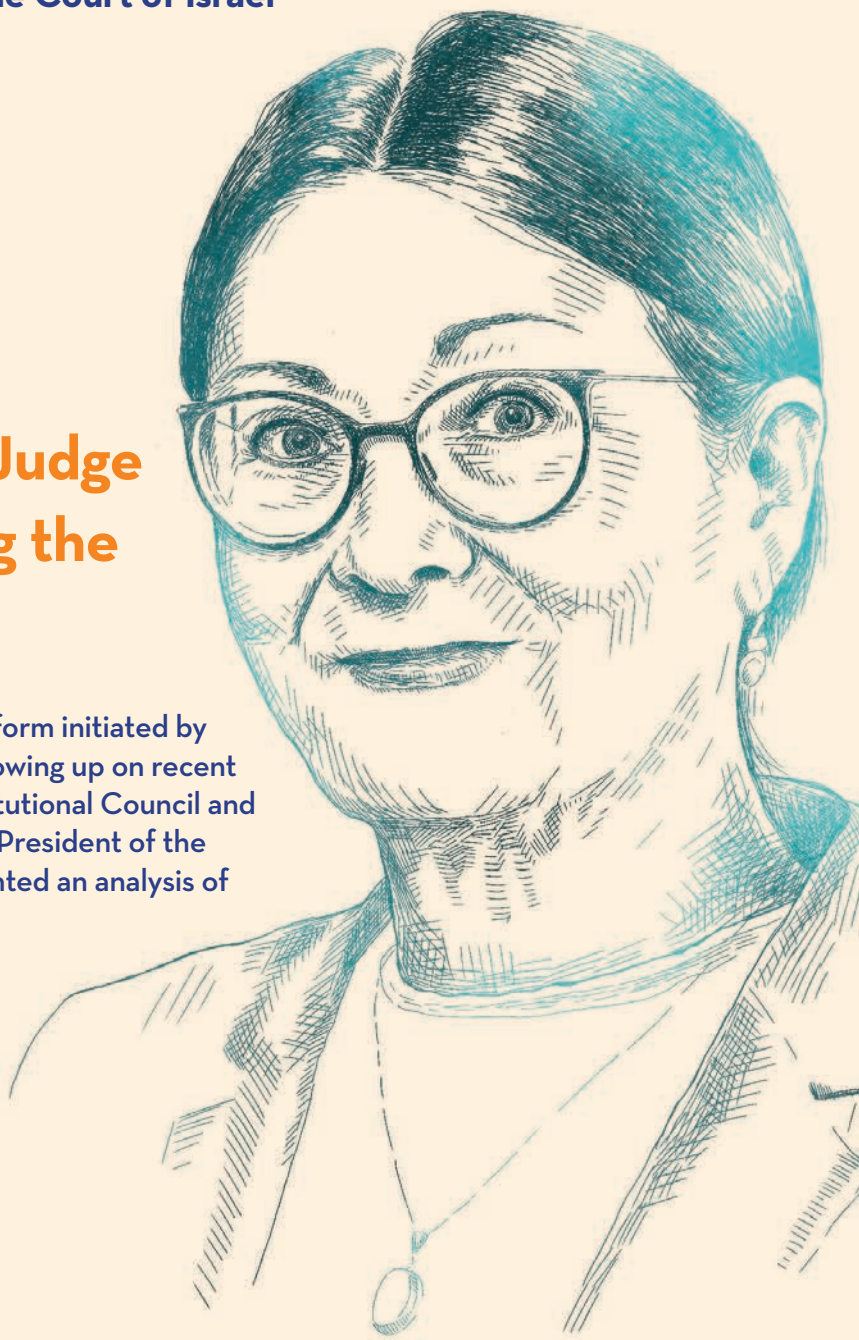
22-24 JUNE 2023

Organised by the Italian Constitutional Court led by Silvana Sciarra, this 4th meeting was an opportunity to discuss one of the main contemporary debates in constitutional justice, namely, accounting for future generations in law. The first theme discussed concerned "Future generations and the environment", an opportunity for Michel Pinault to present his national report in which he designated future generations as an "irresistible concept" for judges. Corinne Luquiens presented her report during discussions of the second theme, "Future generations and health", showing that in this respect "the situation is overall improving", a contrast with environmental concerns.
During debates, judges attending agreed on the necessity to "go beyond presenteeism to safeguard the future". Alain Juppé highlighted the contradictions that may arise between short, medium, and long-term. For President Fabius, "the strength of our justice system will depend on our ability to safeguard the future, so that the fundamental rights of present generations be guaranteed while also taking into account the ability of future generations to exercise theirs." He concluded by stating that the Constitutional Council would host an international conference of judges on the theme of "Law, future generations and the environment" in February 2024, upstream of the Summit on the Future hosted by the Secretary-General of the United Nationals in September 2024, where this concept will be central to discussions.
The next quadrilateral meeting will take place in Madrid in the first semester of 2024.

Gabon, Romania, Senegal, and Switzerland), who were holding their first meeting in Switzerland, unanimously accepted Mr Laurent Fabius's invitation for the Constitutional Council to host the next summit in 2024.
This event will be held in Paris on 13-15 June 2024, and will bring together all member courts. The constitutional protection of freedom of expression will be at the heart of the discussions.
The ACCF, which today brings together 50 constitutional courts and equivalent institutions from Africa, Europe, America, and Asia, organises regular meetings between its members to enable them to share ideas and experiences on furthering the rule of law. It also cooperates in training and legal and technical activities.

Esther Hayut

President of the Supreme Court of Israel



The Role of the Constitutional Judge in Consolidating the Rule of Law

In the context of the judicial reform initiated by the Israeli government and following up on recent exchanges between the Constitutional Council and the Israeli Supreme Court, the President of the Court, Ms Esther Hayut, presented an analysis of the notion of rule of law.

2003
Appointed as a Justice of the Supreme Court of Israel

2017
Elected President of the Supreme Court or Israel

2023
End of her mandate at the Supreme Court of Israel

The term "the rule of law" is the subject of a longstanding discourse in legal theory and practice. It is generally agreed that this term may encompass several different meanings: the simplest of which is "Rule by Law", meaning that all entities in the State, from government institutions to individual citizens, are subject to the law and expected to follow it. According to this perception, the "rule of law" is realized simply by the existence of law, irrespective of what its characteristics are or its applications.

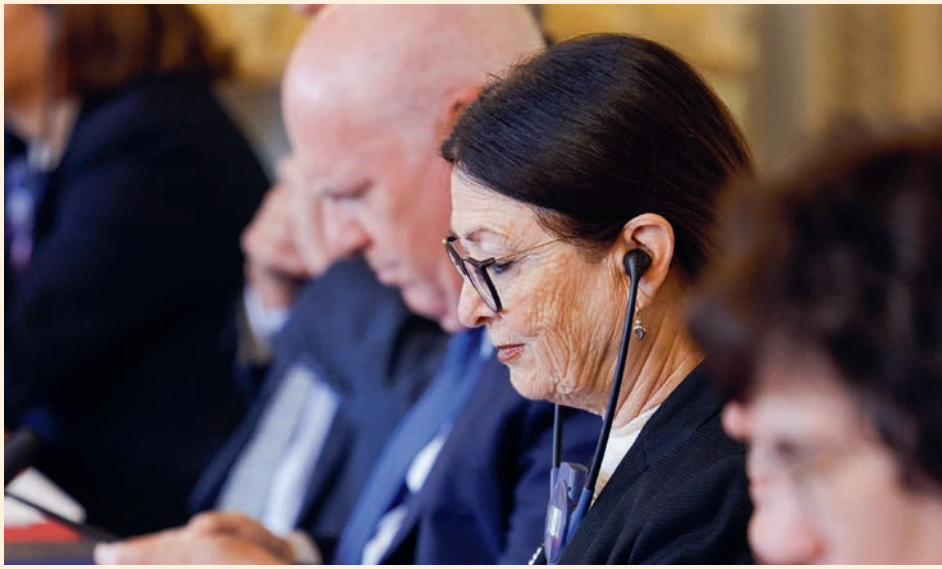
However, modern democracies have found this basic perception insufficient. In Israel, like in many other democracies around the world, the rule of law is viewed as having a *substantive* aspect, in addition to its formal and procedural aspects. This notion is based on the existence of fundamental rights that State institutions must uphold, and which may be infringed only under specific conditions – particularly ones outlined in the State Constitution.

Israel, it should be noted, does not have a complete Constitution. Its Constitution is being progressively formulated since the establishment of the State, through special laws known as "Basic Laws" – each of which constitutes a chapter of the future Constitution and has a higher normative status than "regular" laws. Two of these Basic Laws – Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation – enshrine fundamental human rights and include a mechanism called a "Limitation Clause", through which the Supreme Court of Israel – sitting as the High Court of Justice (HCJ) – conducts judicial review of actions that infringe on these rights. Unlike some legal systems around the world, the Israeli Supreme Court does not give preliminary rulings on the constitutionality of legislative or executive acts, but rather focuses on reviewing these acts after they come into force. In this capacity, the Court often engages in what is known as a "Constitutional Dialogue" with the other two State branches: the Legislative Authority (*Knesset*) and the Executive Authority.

The term "constitutional dialogue" refers to an ongoing interaction between the three State branches of Israel, which is conducted within the framework of concrete cases brought before the High Court of Justice. This dialogue manifests itself in various stages of the case: in the threshold requirements for filing a petition; during oral hearings; and even after the judgment is handed down. Thus, constitutional dialogues fulfill an important part of the Supreme Court's role in upholding the rule of law.

As a general rule, the High Court of Justice hears petitions only after the petitioners have raised their arguments before the relevant State Authority. In doing so, the Court ensures that the governmental Authority is given an opportunity to address the issue even before the petition is filed – which often leads to the resolution of the issue without the need for legal proceedings.

The State branches whose actions are targeted in a petition are generally required to submit a preliminary written response – following which an oral hearing is often held, wherein the Court hears



the parties' arguments and clarifies the issues in dispute. In certain cases – particularly when circumstances have changed after the petition was filed – the Court instructs the State respondents to submit their updated position within a specified timeframe. The Court's comments at this stage sometimes lead the respondents to alter their position, which in turn allows for the resolution of the petition without the need for formal judicial intervention. Notable examples for the willingness of State respondents to reassess their positions while a petition was pending before the Court, are HCJ 3345/19 *Kaplan v. State Archives* (Sept. 13th, 2021) and HCJ 5258/21 *MK Bitan v. The Knesset* (Oct. 25th, 2021).

If the dispute is not resolved at this preliminary stage, the Court will issue an "order nisi", which transfers the burden of proof to the respondents to explain why the petition should not be granted. In doing so, the Court indicates to the respondents that it was not convinced by their preliminary claims. The State Authorities are then instructed to submit a comprehensive and detailed response that addresses the Court's concerns, and this stage presents another opportunity for the State authorities to reassess their earlier position.

The ongoing constitutional dialogue between the Court and other State branches, which is held under the framework of HCJ petitions, reflects the understanding that upholding the rule of law is not solely the Court's responsibility – but rather a task shared by all State institutions. When a case cannot be resolved through dialogue alone, the Court will, of course, hand down a final and binding ruling.

However, the constitutional dialogue may continue even at this stage, focusing on the implementation methods for the concrete legal remedy prescribed. Thus, the invalidation of a legislative act may lead the Knesset to enact an amended version of the law (see, for example, HCJ 2599/00 *Yated v. Ministry of Education* (Aug. 14th, 2002)); while the enactment of the new law may, in turn, become the subject of another HCJ petition (e.g.: HCJ 7146/12 *Adam v. The Knesset* (Sept. 16th, 2013); HCJ 7385/13 *Eitan – Israeli Immigration Policy v. The Israeli Government* (Sept. 22th, 2014); HCJ 8665/14 *Desta v. The Knesset* (Aug. 11th, 2015)). The Court may also defer making an operative ruling for a specified time, thus allowing the other branches of government to reach a new decision pursuant to

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the Court's guidelines (HCJ 781/15 *Arad-Pinkas v. The Committee for Approving Embryo-Carrying Agreements under the Law for Embryo-Carrying Agreements* (Agreement Approval & Status of Child), 5756-1996 (Feb. 27th, 2020)). Alternatively, the Court may issue a remedy known as a “nullification notice”, wherein it outlines the legal flaws in the State respondents' decision but refrains from nullifying it, while declaring that if the relevant State Authority makes another, future decision that suffers from the same flaws – the Court will nullify it (see, e.g.: HCJ 8260/16 *The Academic Center for Law and Business v. The Knesset* (Sept. 6th, 2017)).

It is worth mentioning that the constitutional dialogue between the three State branches of Israel was especially intensive and productive during the COVID-19 crisis. Against the backdrop of unprecedented restrictions imposed on rights and liberties – restrictions that became the subject of several petitions to the High Court of Justice – the Court maintained in-depth, goal-oriented dialogue with the Legislative and Executive branches, aimed at striking appropriate balances between individual rights and essential public interests during times of emergency.

In conclusion, the Israeli legal system views constitutional dialogue as an important tool for addressing complex legal issues. It allows the Court to fulfill its role as the interpreter of the law, and to determine the constitutionality of various legislative and executive acts – while safeguarding the wide margin of discretion given to the other State branches, and allowing them to redress legal issues according to the principles of Israeli law. This approach is rooted in the understanding that by identifying constitutional flaws in the conduct of other State Authorities, the Court does not strive to increase its own powers, but rather it fulfills its role in protecting human rights and the fundamental values of the State – a role that the Court shares with the Legislative and Executive branches as well. Constitutional dialogue thus contributes to promoting the rule of law in its substantive sense, which mandates that fundamental rights are to be protected by all three State branches.

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