



CONSTITUTIONAL
COUNCIL

ANNUAL REPORT
2019



**CONSTITUTIONAL
COUNCIL**

**ANNUAL REPORT
2019**

4

Interview

The Constitutional Council decided to hold sittings in regional areas

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

12

Changes at the Council

Sittings held outside the capital, in Metz and Nantes

..... p.14

A few of this year's events:
Titre VII - the new journal, the Découvrons Notre Constitution national competition

..... p.18

Three new members

..... p.24

26

Shared Initiative Referendum

The viewpoint of...

**Romain Rambaud,
Professor in public
law, Université
Grenoble-Alpes**

..... p.31



Decisions in 2018-2019

76

International Relations

Upholding
human rights

**Guido Raimondi,
President of the
European Court of
Human Rights**

.....P.84



Ex ante constitutional reviews

.....p.32

**Priority preliminary rulings on the
issue of constitutionality**

.....p.56

Laurent Fabius

President of the
Constitutional Council

INTERVIEW



The Constitutional Council decided to hold sittings in regional areas

In 2019, the Constitutional Council was in the news, in particular with the first application of the so-called Shared Initiative Referendum or SIR (in French: “*Référendum d’Initiative Partagée*” or “*RIP*”) procedure, while there were also calls for the introduction of the Citizen Initiated Referendum (CIR) in the Constitution. What was the impact on the Council’s overall workload?

At the very time when the country was going through a period of tensions and controversies, particularly with regard to the interaction between representative democracy and participatory democracy, a Shared Initiative Referendum procedure (SIR), instituted by the legislature in 2008, was activated for the first time. We were petitioned by more than 10% of the parliamentarians concerning a referendum initiative that would, in practice, aim to block the privatisation of Groupe ADP (formerly Aéroports de Paris). As provided for in the Constitution, we first confirmed that the proposed referendum bill met the required admissibility criteria. This proved to be the case, and we so ruled on 9 May 2019. Then, 13 June marked the start of the designated period for collecting registered voters’ expressions

of support for the referendum initiative. The Council is responsible for ensuring that all associated procedures comply with the law. Consequently, we received a number of submissions, most of which concerned the operation of the Ministry of the Interior’s dedicated website. We requested some improvements, and these were implemented. In the interest of transparency, the Council also took the initiative of issuing regular reports on the progress of the procedure, in particular as a means of providing updated information on the number of expressions of support that had been recorded and authenticated. When the period for collecting expressions of support ends at midnight on 12 March 2020, we will have one month to declare whether the bill has gathered the required number for the procedure to continue, that is, at least one-tenth of the voters registered on the electoral rolls, or 4,717,396.

The Constitutional Council’s decision confirming the admissibility of the referendum initiative on Groupe ADP generated a great deal of comment...

Irrespective of the criticisms levelled at the mechanism itself, which was initiated by the legislature in 2008 and enshrined in legislation in 2013, we were obliged to apply provisions which were perfectly clear. And that is what we did.

Leaving aside the SIR, the Council kept up its jurisdictional activity at a steady pace. What were the highlights of the past year? Are priority preliminary rulings on the issue of

constitutionality (QPCs) still used by members of the public?

They certainly are. This year, we even passed a milestone in terms of the number of *ex ante* and *ex post* reviews completed. In May 2019, the number of QPC cases that the Constitutional Council ruled on in less than 10 years exceeded the number that it ruled on in 60 years via the direct channel. This underscores the vitality of the QPC procedure which, to use an everyday expression, I call “the citizen’s prerogative”. In 2020, on the occasion of the tenth anniversary of the QPC, the Constitutional Council will carry out a wide-ranging review of the implementation of the procedure, drawing on research studies that it has encouraged and which will be discussed at an international symposium to be held on 10 June 2020 in the Grand Auditorium of the Sorbonne.

In terms of substance, we had to deal with a wide variety of subjects, noting a certain decline this year in the proportion of tax cases and an increased proportion of criminal matters. On several occasions, the QPC provided an opportunity for the Council to rule on very controversial societal issues, relatively soon after the law was put into effect. I have in mind, in particular, the law which punishes the clients of persons engaged in prostitution or the law authorising bone x-rays to be performed to determine a person’s age, both of which came into force in 2016. Regarding the law relating to bone x-rays, we decided, for the first time, that the requirement to protect the best interests of the child was a principle of constitutional status. I also note our QPC decision of May 2019 confirming the new constitutional requirement, in relation to

state prosecutions in criminal matters, for time-barring rules that are not manifestly inappropriate to the nature and gravity of the offences in question. This decision will undoubtedly be much discussed by judges in the future, perhaps even beyond our borders.

Has the vitality of the QPC placed downward pressure on the number of referrals sent to the Council by parliamentarians for *ex ante* review?

No, that is not the case. For example, in relation to the Justice Reform Act, no fewer than 57 articles were referred to the Council for review. This resulted in our handing down the longest decision in our history, one containing 395 paragraphs. Several highly contentious texts, such as the so-called “anti-rioter” law, were referred to us by the President of the Republic. This is still a rare method of

“On several occasions, the QPC provided an opportunity for the Council to rule on very controversial societal issues”

referral, having been used only twice in 60 years. As things turned out, far from triggering the catastrophes that some people had predicted, the Council’s decisions, including those on the SIR and on the Action Plan for Business Growth

“Our Constitution can serve to promote social harmony”

and Transformation Act, helped to set the stage for more rational debate. Our Constitution can serve to promote social harmony.

This year, the Council was, I think, the first constitutional court in the world to rule on a so-called “anti-fake news” law at the time of an election. We held that it was the responsibility of the legislature to reconcile the integrity of the voting process with freedom of expression and communication. We took the view that the provisions that had been referred to us were constitutional, while recording several interpretative reservations in order to ensure that any application of those provisions in the future would satisfy those constitutional requirements.

Thus, we required that the blocking of the dissemination of false information on online public communication services by the judge hearing the application for interim measures could only proceed if the inaccuracy or misleading nature of the information disseminated, together with the risk of impairing the integrity of the election, is evident.

This year, one-third of your fellow Council members were replaced. What are the changes that took place?

Three of our colleagues did indeed come to the end of their terms of office last March: Michel Charasse, who was



appointed in 2010, as well as Jean-Jacques Hiest and Lionel Jospin, who were both appointed in 2015. These three “Sages” were also exemplary companions. I thank them once again for their years of devoted work in the service of our Constitution and our institution. We were joined by three new members: Jacques Mézard, François Pillet and Alain Juppé, who lost no time in fully taking on their new duties. Their appointment underlines the quality and the cross-fertilisation of experience within the Council.

What view do you take of the interruption of the process of constitutional review that had been set in train by the Government?

One of the great strengths of the Constitution of the 5th Republic is its stability. But it must also be a living text, responding to our society’s needs and the major changes taking place around the world. I call this “adaptive stability”. I hope that this virtue of our Constitution will once again prove its worth.

At a time when there is a certain amount of scepticism, even mistrust with regard to institutions, what action do you take to foster citizens’ knowledge of and confidence in the Constitutional Council?

Ever since my appointment as President, the members and I have sought to open up our institution to national and international issues. In particular, I wanted to bring the Constitutional Council closer to our fellow citizens. In this spirit of openness, we decided that, in 2019, for the first time in its history, the Council would hold sittings in the regional areas,

“Fraternal relations between courts contribute to the strength of the rule of law throughout the world”

away from the capital. We sat in Metz and then in Nantes, holding public hearings and examining two QPCs at each of these sittings. The following week, I went to a law school to personally announce and explain the decisions we had made in the intervening period to an auditorium of professors and students, as well as the press. This type of initiative helps to raise the profile of the Constitutional Council and awareness of its importance as a guarantor of democracy. In turn, it enables members of the Council to establish and strengthen excellent contacts with a variety of lawyers. Indeed, I am pleased to see that our initiative coincides with the one of my colleague Richard Wagner, Chief Justice of the Supreme Court of Canada, to hold a first hearing outside his country’s capital, in the very near future, in order, he says, to “maintain public confidence in the justice system”. In a further effort to consolidate the Council’s openness to society and promote the requisite degree of transparency, we have now decided to make public the “external contributions”, those opinions that are sometimes submitted to us in the context of *ex ante* reviews of laws, and which may come from associations, trade unions, companies, professional organisations or individuals, such as lecturers in law. We felt it appropriate

to make the actual texts of these contributions available to the public, and they can be viewed on the Council's website in the file accompanying the so-called DC decisions. The first publication took place in conjunction with our decision of 4 July 2019 on the resolution amending the Standing Orders of the National Assembly. I would like to point out that, since these opinions are not in the nature of procedural documents, the Council is not required to respond to them in its decisions.

What relationships does the Council maintain with its foreign counterparts and with European and international courts and tribunals?

A close and very privileged relationship. At a time when judicial independence is unfortunately under pressure in some States, fraternal relations between courts contribute to the strength of the rule of law throughout the world.

In January 2019, I was honoured to be invited to address a formal sitting of the European Court of Human Rights in Strasbourg, at the invitation of President Raimondi, to whom I would like to pay tribute for his work on the protection of human rights and for the close links he has helped to forge between our two institutions. On that occasion, I stressed three essential virtues – “vigilance, resistance and perseverance” – in a world and in a Europe where the list of unacceptable violations of fundamental rights is long. At a time of rising populism and “brutalism”, those who seek to demolish the rule of law often attack institutions and judges whose specific mission is to protect the rule of law as a matter of priority. In this regard one must welcome the decision of the Luxembourg

Court of June 2019, which ruled that it was contrary to EU law to apply, without legitimate cause, a measure lowering the retirement age of serving judges of a Supreme Court, on the grounds that such a measure would constitute a violation of the principles of judges' security of tenure and the independence of the justice system. In the wake of this important decision, may the judges dealing with fundamental rights and freedoms continue to carry out, with serenity, their tasks as guardians of the rule of law.

In September 2019, as in the framework of France's Presidency of the Committee of Ministers of the Council of Europe, the Constitutional Council will be co-hosting, together with the Council of State and the Court of Cassation, a conference of the heads of the Supreme Courts of the Council of Europe Member States, dedicated to dialogue and debate among judges. Three topics will be examined: the right to an effective remedy before an independent and impartial judge, the relationship between national courts and the European Court of Human Rights, and freedom of expression in the context of the protection of private and family life. The progress reported by some jurisdictions provides an opportunity to feed into the thinking of others. In any case, I believe that the dialogue and cooperation thus developed between judges makes it possible to consolidate the fundamental principles of law in Europe.

KEY FIGURES

> From September 2018 to August 2019

Number of
DC referrals

20

Number of
QPC referrals

67

Average number
of days for ruling
on a QPC

75

Number of rulings
issued, for both
legislative and
senatorial elections

175

A FEW HIGHLIGHTS

08-10
October
2018

PRESIDENT FABIUS TOOK PART IN THE J20 MEETING

Mr Laurent Fabius, President of the Constitutional Council, travelled to Buenos Aires for the Conference of Supreme Courts of G20 Countries, hosted by the Supreme Court of Argentina.

12
February
2019

THE CONSTITUTIONAL COUNCIL HELD SITTINGS AWAY FROM ITS HOME PREMISES

For the first time in its history, the Council held a hearing outside the capital, in Metz. It repeated the experiment in Nantes, on 14 May.

12
March
2019

THREE NEW MEMBERS JOINED THE COUNCIL

One third of the College of "Sages" are replaced every three years. In 2019, the Council welcomed Jacques Mézard, François Pillet and Alain Juppé to its ranks.

21
March
2019

INTENSIVE WORK ON THE JUSTICE ACT

After the Act on 2018-2022 Programming and Reform for the Justice System was referred to it, the Constitutional Council handed down the longest decision in its history.

09
May
2019

A "FIRST" FOR THE SHARED INITIATIVE REFERENDUM

The year 2019 was marked by the first application of the Shared Initiative Referendum procedure which was introduced by the constitutional revision of 2008.

Change
the Co

Hearings outside the capital, in Metz and Nantes; the Nuit du Droit (Law Night) held on a national scale; the Découvrons Notre Constitution (Discovering our Constitution) competition... This year again, the Constitutional Council created numerous opportunities to get closer to the general public and to raise awareness of the fundamental role of the law in ensuring the proper functioning of our society.

ges at
Council

The Constitutional Council develops a closer relationship with the general public

On 12 February 2019, the Constitutional Council allowed itself, as the texts governing its operations permit, to carry out a small “palace revolution”: more precisely, a revolution “outside the walls of the Palais-Royal”, by going to Metz to hold a hearing away from its Paris premises for the first time in its history. President Fabius and the College are determined to repeat the experiment on a quarterly basis. By way of proof, almost three months to the day after the Metz experiment, the nine “Sages” sat in Nantes.

There was not an empty seat in the criminal courtroom on that afternoon of Tuesday, 12 February. Nearly 180 people were present: magistrates, lawyers, students and professors, but also many members of the public who were keen to be present at a hearing held, for the very first time, outside the Council's Paris premises. When the bailiff announced their entry into the room, Council members found themselves facing almost four times as many people as the Council's own hearing room, inaugurated in 2012, was built to accommodate.

In opening the session, President Fabius discussed the principles applying to the QPC. He briefly reminded those present that it was open to all members of the public to avail themselves of the procedure for seeking priority preliminary rulings on the issue of constitutionality. The floor was then given to the Registrar, and the hearing got underway.

The first case examined (2018-766 QPC) was referred to the Council by the Court of Cassation on 13 December 2018. It concerned a dispute between a property owner and his tenants over an increase in the security bond following the breaking of the lease, if the bond was not reimbursed to the tenants.

The second case, registered under the reference number 2018-767 QPC and

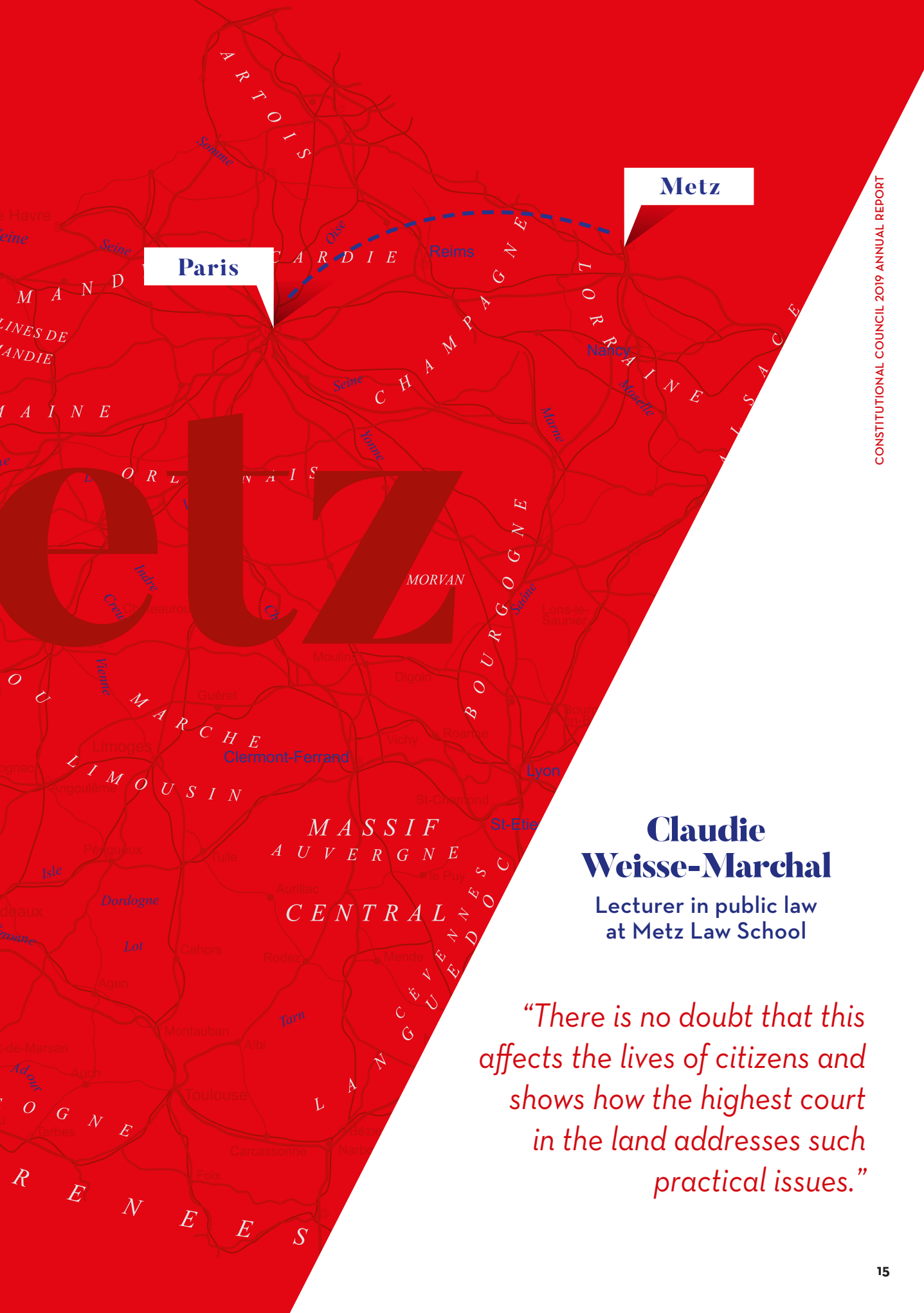
received from the Court of Cassation on 23 December 2018, related to the exclusion of shares that are assigned on a gratis basis from the social security contributions base. This dispute was between a private company, the Applicant, and the Île-de-France URSSAF (the social security contribution collection agency for the Paris Region), the Respondent.

This event provided the audience with an opportunity to learn about both the form and the substance of a hearing, the topics covered and the lawyers' art of advocacy.

Ten days later, President Fabius returned to Metz accompanied by the Secretary General of the Constitutional Council, Jean Maïa. This time, the event was held in the auditorium of the Faculty of Law where, before an audience of a few hundred students, the President of the Council read out the two decisions and explained the role and place of the Council within the institutions of the French Republic.

12
FEBRUARY
2019





Paris

Metz

CLZ

**Claudie
Weisse-Marchal**

Lecturer in public law
at Metz Law School

*“There is no doubt that this
affects the lives of citizens and
shows how the highest court
in the land addresses such
practical issues.”*

The Constitutional Council develops a closer relationship with the general public

For the first time, the capital of the Dukes of Brittany hosted a public examination of two QPCs. QPC No. 2019-785 related to Article 7 of the French Code of Criminal Procedure which, prior to the adoption of Law 2017-242 of 27 February 2017, set out for criminal matters a statute of limitations of 10 years as from the day the crime was committed. However, with regard to continuing offences, the substantive element of which extends over time through the perpetrator's consistent reiteration of *mens rea*, the Court of Cassation invariably holds that the statute of limitations runs only from the day on which the criminal state has ceased to exist both in its constituent acts and its effects. The second case (QPC 2019-786) concerned a provision of the Law of 29 July 1881 on freedom of the press extending the time period between the issuance of a summons and appearance before a criminal court of the party concerned by one day per 5 myriametres of distance, in cases of press-related offences. The myriametre, equivalent to ten kilometres, was a unit of measure instituted during the French Revolution. The Applicant,

represented by Patrick Spinosi, denounced the fact that this provision could delay appearances before the court by several months, thereby leading, in his estimation, to "irreparable reputational damage".

President Fabius returned to Nantes Law School on 24 May, before several hundred students, to present the decisions handed down in the interim

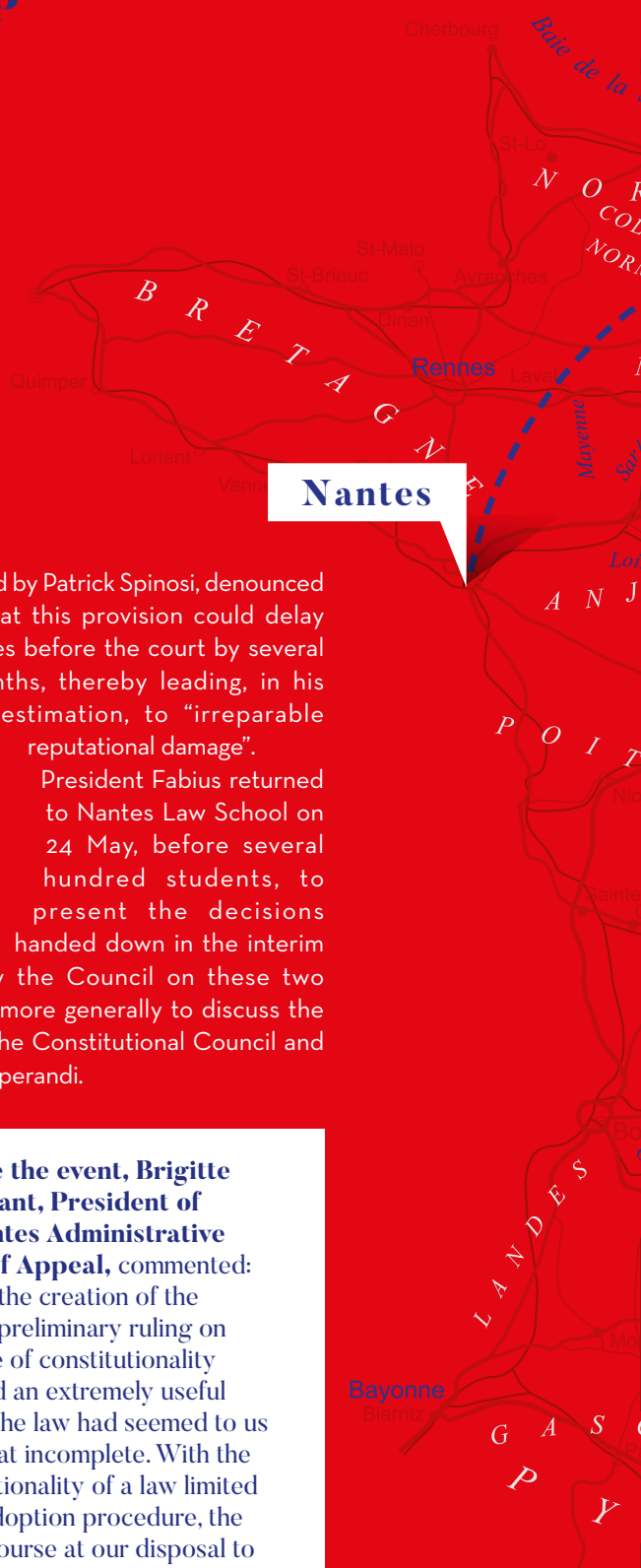
by the Council on these two cases, and more generally to discuss the history of the Constitutional Council and its *modus operandi*.

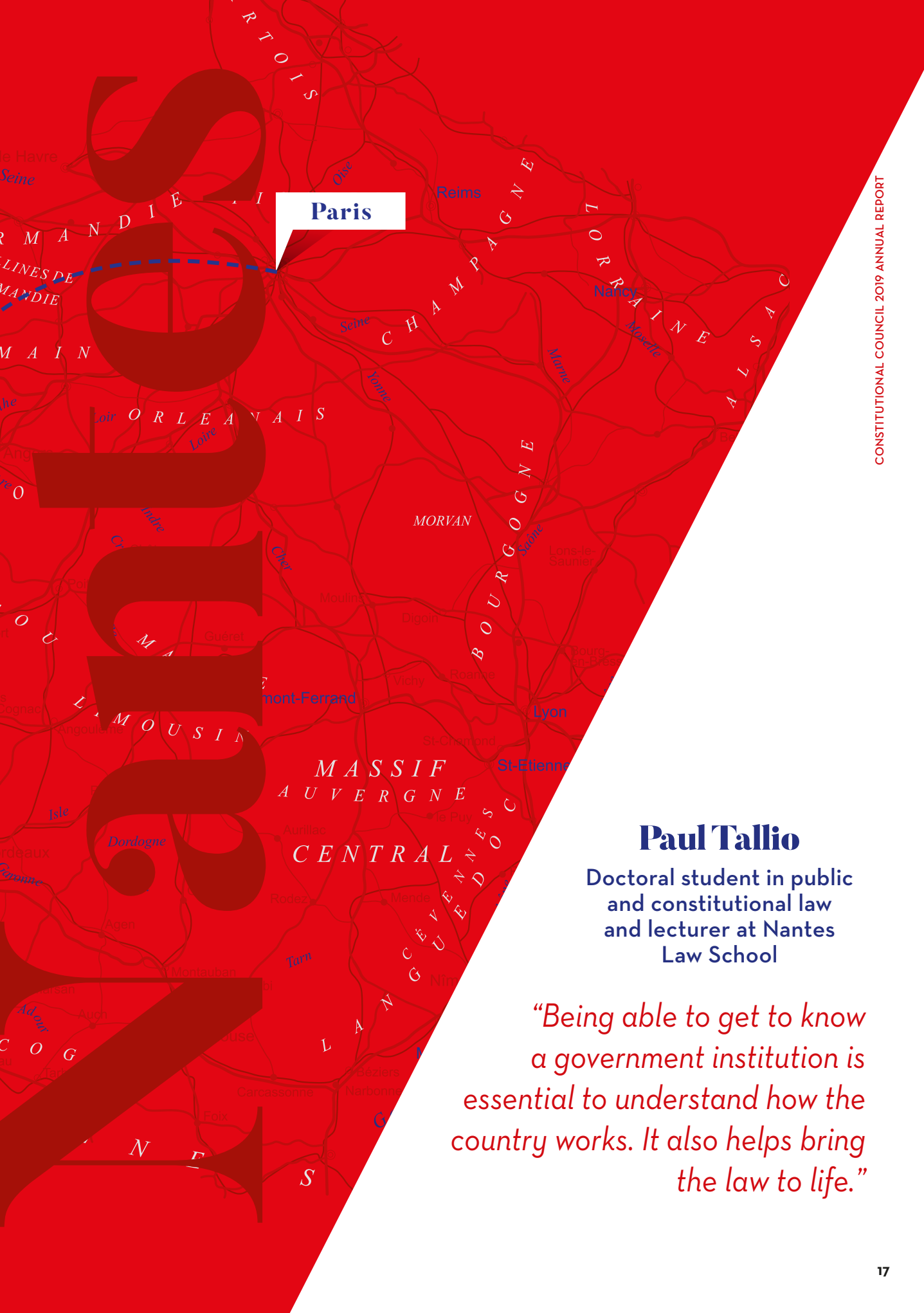
14 MAY
2019

Mourtallah Brahim, a student at Nantes Law School, welcomed the presentation: "Outreach is essential to achieve the current goal of a more participatory democracy. I believe that the Constitutional Council understands this. That is why it is working outside of Paris, in Nantes or elsewhere, to be as close as possible to us as participants in the judicial system".

Outside the event, Brigitte Phémolant, President of the Nantes Administrative Court of Appeal, commented:

"For us, the creation of the priority preliminary ruling on the issue of constitutionality provided an extremely useful tool, as the law had seemed to us somewhat incomplete. With the constitutionality of a law limited to the adoption procedure, the only recourse at our disposal to avoid applying a law that had not been contested at the right time was to object to it on the basis of international law, which was utterly paradoxical".





Paris

Paul Tallio

Doctoral student in public
and constitutional law
and lecturer at Nantes
Law School

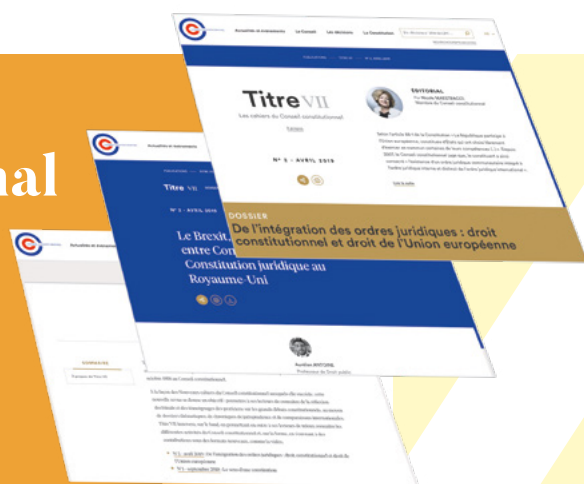
*“Being able to get to know
a government institution is
essential to understand how the
country works. It also helps bring
the law to life.”*

Titre VII

The new journal of the Constitutional Council

The Constitutional Council chose a symbolic date, 4 October 2018, the 60th anniversary of the Constitution of the 5th Republic, to launch *Titre VII* (*Titre VII*), its new free semi-annual digital journal. The journal takes its name from the heading of the article of the Constitution dedicated to the Constitutional Council. In keeping with the philosophy of its predecessor, *Nouveaux Cahiers du Conseil Constitutionnel*, the journal aims to help readers understand the institution's doctrinal conception, as well as select testimonials from participants regarding major constitutional debates.

4 OCTOBER
2018



Titre VII issues published in 2018-2019

No. 1

September 2018

The meaning of a constitution

No. 2

April 2019

Integrating legal systems: constitutional law and law of the European Union

Available on the
Constitutional Council website:
www.conseil-constitutionnel.fr

Hélène Surrel

Professor, Sciences Po Lyon, CEE-EDIEC, EA 4185 and contributor to *Titre VII*

"The fact that the Council is publishing a journal is an event in itself. But in my opinion, *Titre VII* replacing the *Nouveaux Cahiers du Conseil Constitutionnel* marks an important step. The journal is now free of charge, which is important for a public institution. Above all, *Titre VII* is a digital journal accessible to all online, thus allowing for wider dissemination, particularly to students or legal practitioners. In my view, *Titre VII* also displays a spirit of genuine openness, fostered first and foremost by the creation of a scientific committee with the ability to call on a variety of authors, including legal practitioners. This openness is also reflected in the place set aside for both comparative law and European case law. In a context of extensive use of QPCs, it stands out for a commitment to providing critical analyses of the Council's case law, presented alongside the solutions of other jurisdictions."

Papeete
2 events

Nuit du Droit

4 OCTOBER
2018

The second annual Nuit du Droit (Law Night), designed to enable citizens to better understand the reality of the law, took place on 4 October 2018. After a first event held in the Palais-Royal in 2017, this year's Nuit du Droit took on a national dimension by bringing together more than 40,000 people, through nearly 120 initiatives in mainland France and French overseas territories.

To mark the 60th anniversary of the Constitution, a constellation of entities came together, including universities, courts, the National Assembly, the Senate, Bar associations, government agencies, notary and bailiff offices, associations and companies. Each organisation participating in this celebration of law organised its own contribution, thus making for events of great diversity in terms of both form and content, from the most classic formats – debates, conferences – to the most imaginative performances. Brest Law School is a case in point, with two functions back to back: “Law vs Zombies” and “Law vs Terminator”. A wide range of mock trials were also presented to the public throughout the country: drug traffickers in Cayenne and Cyrano de Bergerac in Marseille. With an “Escape game”, film screenings, eloquence contests and more,

conviviality took centre stage.

The most practical aspect was present as well: several Parisian arrondissement city halls opened their offices for free consultations with lawyers, while the Clinique des Hautes Études Appliquées du Droit offered legal advice, for example to familiarise private individuals with a business project.

The next Nuit du Droit will be held in 2020.

JOËLLE MUNIER, President of the Tribunal de Grande Instance in Caen since December 2018, President of the Conférence Nationale des Tribunaux de Grande Instance

“Having staged a mock trial at the Tribunal de Grande Instance in Albi involving the assassins of Royal Prosecutor Bernardin Fualdès for the 2018 Nuit du Droit, I can say in all sincerity that this event is a wonderful opportunity to familiarise our fellow citizens with the law in all its forms, while making them aware of the importance of law in their daily lives, opening the doors to an often little-known topic through interesting and entertaining events. It is also the perfect time to bring together magistrates, court staff, various legal professionals, academics and associations around a common objective: presenting the law under a new light.”

64 cities

112 events

Fort-de-France

1 event

Cayenne

1 event

Saint-Denis

1 event

Noumea

1 event

10-year anniversary of the Salon du Livre Juridique

The 10th annual Salon du Livre Juridique (Legal Book Fair) took place on Saturday, 6 October 2018 in the Montpensier wing of the Palais-Royal. Organised by the Club des Juristes and the Constitutional Council, it attracted more than 1,200 visitors eager to meet participating legal publishers, as well as the 200 authors in attendance. The day was rich in debates, demonstrations and conferences on developments in the practice of law and legal professions brought about through "legaltech". Visitors had the chance to participate in a treasure hunt, with prizes including books and subscriptions to legal journals. As in previous Legal Book Fairs, a Legal Book Award (Prix du Livre Juridique) and a Legal Practice Award (Prix de la Pratique Juridique) were presented.

6 OCTOBER
2018

For this 10th anniversary event, Ms Nicole Belloubet, Minister of Justice and President of the Jury, presented the Legal Book Award to Mr Christophe Jamin, Director of the Sciences Po School of Law, and Mr Fabrice Melleray, Professor of law at Sciences Po, authors of *Droit Civil et Droit Administratif - Dialogue(s) sur un Modèle Doctrinal (Civil Law and Administrative Law - Dialogue(s) on a Doctrinal Model)*, published by Dalloz. The Legal Practice Award went to Ms Marie Cresp, lecturer in private law at the Université de Bordeaux Montaigne, and Ms Marion Ho-Dac, lecturer in private law at the Université Polytechnique Hauts-de-France, for their book on family law, co-written with Ms Sandrine Sana-Chaillé de Néré, Professor at Université Montesquieu in Bordeaux, and the late Mr Jean Hauser, Professor Emeritus at Université Montesquieu - Bordeaux IV.

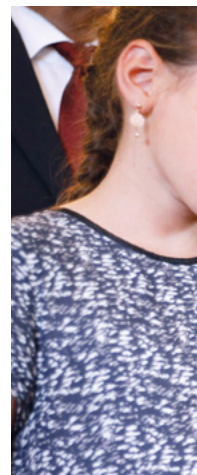
Thesis Award

The jury for the 22nd Thesis Award met on 15 May 2019. Chaired by Laurent Fabius, the jury attributed the award to Théo Ducharme (Université de Paris I) for his thesis on "State Responsibility concerning Laws Declared Unconstitutional". Basing his work on the definition of denial of justice adopted by Dean Favoreu, as well as a detailed analysis of recent case law, the author clarifies the potential recognition of a legal remedy allowing for compensation for damages resulting from the application of an unconstitutional law. The jury comprised Professors Ferdinand Mélin-Soucramanien (Bordeaux), Romain Rambaud (Grenoble-Alpes) and Ariane Vidal-Naquet (Aix-Marseille), Constitutional Council members Corinne Luquiens and Claire Bazy Malaurie, and the Secretary General of the Constitutional Council. The thesis will be published in autumn 2019 in the LGDJ-Lextenso "Constitutional and Political Science Library" collection.

15 MAY
2019

THÉO DUCHARME

"It is a great honour for the winner to see his work recognised by the Constitutional Council's Thesis Award. In addition to rewarding several years of research, this distinction contributes significantly to disseminating said research through publication in a renowned collection."



Nationwide competition

Découvrons Notre Constitution: 2019 winners

4 JUNE
2019

On 4 June 2019, at an awards ceremony organised by the Constitutional Council, Laurent Fabius, President of the Council, and Jean-Michel Blanquer, Minister of National Education and Youth, honoured the winners of the Découvrons Notre Constitution (Discovering our Constitution) nationwide competition.

Launched in 2016, Découvrons Notre Constitution was designed as an educational initiative to help pupils and teachers from primary to high school understand key constitutional principles through collective projects presented to a national jury. To select the winners of the 2019 competition, the jury, made up of members of the Constitutional Council and representatives of the Ministry of National Education, met on 13 May 2019 and selected the finest project presented in each institutional category.

The 2019 list of awards thus included the Year 5 class at Blaise Pascal School in Gagny (Créteil school district) for the production of a photo novel entitled *Nous Tous - Le Grand Roman-Photo* (All of Us - The Story in Photos),

the Year 9, Section 4 class at Jean Jaurès Junior High School in Poissy (Versailles school district) for a board game entitled *Un Jeu Révolutionnaire* (A Revolutionary Game), and the Year 12, Section 3 class at Guy Mollet Secondary School in Arras (Lille school district) for the production of a video entitled *La Constitution, ses Avancées et ses Limites* (The Constitution: Progress and Limits).

During the ceremony, Mr Fabius and Mr Blanquer expressed their gratitude to all the teachers who took part in this competition to introduce the students to France's main constitutional principles. This 3rd annual competition saw a growing number of contributions, particularly from overseas schools, with citizenship and environmental protection ranking among the most popular topics.

The participating classes explored the main constitutional principles throughout the year to complete their projects, and enjoyed complete liberty in terms of both form and content.

CÉCILE LAPORTE-RYKAERT,
Year 5 teacher at Blaise Pascal Primary School in Gagny

“Being here is an immense source of pride, a reward for all our efforts. The students devoted a great deal of energy to learning about our country's values.”

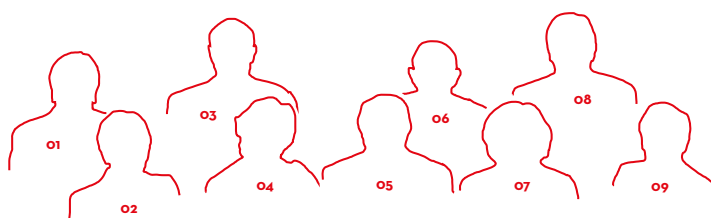


YASSINE, student in the Year 9 class at Jean Jaurès Junior High School in Poissy

“This competition taught me about my role as a citizen.”



Composition of the College

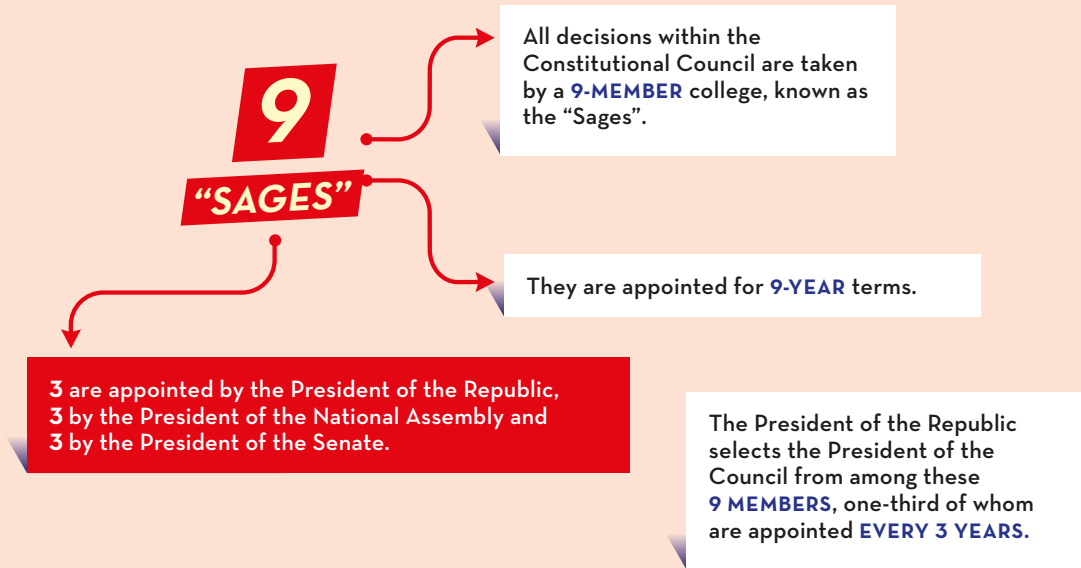


MEMBERS AS AT 1 SEPTEMBER 2019

- 01_ François Pillet
- 02_ Dominique Lottin
- 03_ Alain Juppé
- 04_ Claire Bazy Malaurie
- 05_ Laurent Fabius, President
- 06_ Jacques Mézard
- 07_ Nicole Maestracci
- 08_ Michel Pinault
- 09_ Corinne Luquiens

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

A COLLEGIAL BODY



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

Non-renewable terms.

A strict obligation to exercise reserve.

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

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

The composition of the Council is moving toward gender equality.

The Constitutional Council is a collegial body: all rulings are handed down in plenary session. A quorum of **7 MEMBERS** is required for rulings, and decisions are taken by majority vote. Members may disagree on any given topic: in the event of a tie, the President holds a casting vote.

Three new members

In 2019, as every three years, three new members were appointed. The terms of Mr CHARASSE, Mr JOSPIN and Mr HYEST came to an end at midnight on 11 March 2019. The President of the Republic, the President of the Senate and the President of the National Assembly thus announced on 13 February 2019 their intention to nominate as successors Mr MÉZARD, Mr PILLET and Mr JUPPÉ, respectively, pursuant to Article 56 of the Constitution.

Indeed, the Constitution provides that one-third of the “College of Sages”, made up of nine members serving a single nine-year term, must be renewed every three years.

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

Following their hearing before the competent parliamentary committees on 21 February 2019, Mr MÉZARD, Mr PILLET and Mr JUPPÉ were appointed to the Constitutional Council by way of acts published in the Official Journal of the French Republic on 23 February 2019.

After having taken the oath of office on 11 March 2019 at the Elysée Palace before the President of the Republic, Mr Emmanuel MACRON, Mr MÉZARD, Mr PILLET and Mr JUPPÉ officially assumed their duties as of 12 March 2019.



Jacques Mézard

Nominated by the President of the Republic on 22 February 2019

Sworn in before the President of the Republic on 11 March 2019

Jacques Mézard, born on 3 December 1947, holds a graduate degree in private law. Alongside his work as a lawyer, first with the Paris Bar and subsequently with the Aurillac Bar, Jacques Mézard spent part of his career as a lecturer at Université de Paris I (1971-1976). From 1971 to 1975, he also served as Vice-President of Université de Paris II and of the National Council for Higher Education and Research. He was elected Deputy Mayor of Aurillac in 1991, and General Councillor of the Département of Cantal and President of the Bassin d'Aurillac Metropolitan Community from 2001 until 2017. As the Senator of Cantal from 2008 until his appointment to the Constitutional Council, Jacques Mézard served as Vice-President of the senatorial delegation on local governments and decentralisation from 2009 to 2017. He also held government responsibilities as Minister of Food and Agriculture (May-June 2017) and Minister of Territorial Cohesion (2017-2018).



François Pillet

Nominated by the President of the Senate on 21 February 2019

Sworn in before the President of the Republic on 11 March 2019

Born on 13 May 1950, François Pillet holds undergraduate and graduate degrees in private law. François Pillet initially pursued a dual career in law and education. His first teaching position was as a lecturer in law at the Sainte-Marie educational institution in Bourges, and then at the Chamber of Commerce and Industry of Bourges and the Département of Cher, as well as at the Institute of Accounting Studies. He was also appointed Vice-President of the École du Centre-Ouest des Avocats in Poitiers. As a lawyer at the Bourges Court of Appeal (1975-2013), François Pillet served as President of the Bar Association of the Bourges Court of Appeal from 1986 to 1991. As of the 1990s, François Pillet's career shifted to the political realm, as first deputy mayor and then mayor of Mehun-sur-Yèvre (1995-2014). He served as General Councillor of the Département of Cher from 1998 to 2008, and was elected Senator in 2008 and 2014. Prior to his appointment to the Constitutional Council, François Pillet sat as a permanent judge at the Cour de Justice de la République (2014-2019).



Alain Juppé

Nominated by the President of the National Assembly on 21 February 2019

Sworn in before the President of the Republic on 11 March 2019

Born on 15 August 1945, Alain Juppé is a graduate of the École Normale Supérieure and the École Nationale d'Administration (class of 1972). He began his career as a finance inspector before joining the Interministerial Committee for the Promotion of Employment in 1976 as assistant to the Permanent Secretary. Alain Juppé then served in several ministerial cabinets (1976-1978) before taking on various mandates as an elected official. He was elected Deputy Mayor of the City of Paris (1983-1995) and later Mayor of Bordeaux (1995-2004 and 2006-2019). Mr Juppé also served as a Member of the European Parliament from 1984 to 1986. Alain Juppé held a number of ministerial posts as of the 1980s: Deputy Minister for the Budget and Government Spokesman (1986-1988); Minister of State, Minister of Ecology, Development and Sustainable Development (May-June 2007); Minister of State, Minister of Defence and Veterans Affairs (2010-2011). Alain Juppé was twice named Minister of Foreign Affairs (1993-1995 and 2011 to 2012). He served as Prime Minister (1995-1997) during Jacques Chirac's first term of office.

Shared
Initiative
Reference

In 2019, the Shared Initiative Referendum procedure (*“Référéndum d’Initiative Partagée”* or *“RIP”* in French) was implemented for the first time since its creation by the constitutional amendment of 23 July 2008. The Constitutional Council, responsible for ensuring the proper functioning of every step in the procedure, employed a never-before used facet of its mission as electoral arbiter.

Shared Initiative Referendum

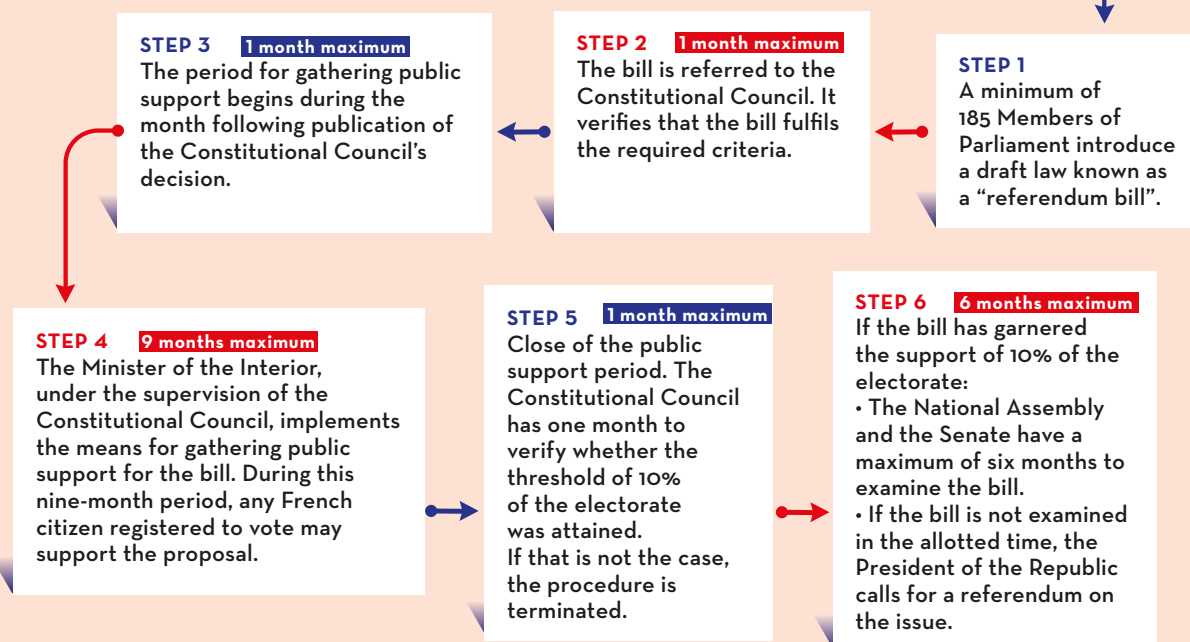
Initial implementation

The Shared Initiative Referendum procedure was instituted by the constitutional amendment of 23 July 2008. It was implemented for the first time upon the submission of a referendum initiative aiming to confirm the legal personality of Groupe ADP as a national public service. 248 Members of Parliament activated the procedure by introducing this legislative proposal.

WHAT IS THE SHARED INITIATIVE REFERENDUM?

The Shared Initiative Referendum or SIR (“*Référendum d’Initiative Partagée*” or “*RIP*” in French) is a procedure that makes it possible for a bill introduced by one-fifth of Members of Parliament to be placed on the agenda of the two Houses of Parliament provided that it enjoys the support of 10% of the electorate. The Shared Initiative Referendum is cited in Article 11 of the Constitution. Several aspects of this procedure have been clarified by implementing decrees.

HOW DOES THE SHARED INITIATIVE REFERENDUM WORK?



WHAT IS THE ROLE OF THE CONSTITUTIONAL COUNCIL IN THE SHARED INITIATIVE REFERENDUM PROCEDURE?

The Constitutional Council is responsible for ensuring the proper functioning of the Shared Initiative Referendum procedure.

Prior to the period for gathering public support

Following introduction of the referendum bill in one of the two Houses of Parliament, the President of the House in question must transmit it to the Constitutional Council without delay.

The Constitutional Council then has one month to verify the following:

- the bill is sponsored by at least one-fifth of Members of Parliament;
- the subject matter of the bill fulfils the conditions set out in paragraphs 3 and 6 of Article 11 of the Constitution, i.e. the bill:
 - concerns “the organisation of public authorities, reforms relating to national economic, social or environmental policy and associated public services, or reforms seeking to authorise ratification of a treaty that, while not contrary to the Constitution, would affect the functioning of institutions”;
 - does not aim to repeal a legislative provision in force for less than one year;
 - does not concern the same subject as a bill rejected by referendum less than two years before.
- no provision of the bill is contrary to the Constitution.

During the period for gathering public support

If the referendum bill is deemed valid by the Constitutional Council, the Minister of the Interior implements the means to gather public support during a nine-month period.

The Constitutional Council ensures the proper functioning of initiatives to gather public support. It may be called upon by any registered voter during this period or within 10 days following the end of the period.

Complaints are examined by a three-member committee appointed by the Constitutional Council from among judicial magistrates or members of administrative courts, including honorary members, for a term of five years.

Should a complaint be rejected, the registered voter having introduced said complaint may appeal to the Constitutional Council by mail or via the public support website.

Should the Constitutional Council identify irregularities in the conduct of operations, the body must decide whether said operations should be maintained, or else declare a partial or total nullification thereof.

The Constitutional Council may commission investigations of any kind and require transmission of any document concerning operations to garner public support. It may designate a member or delegate to gather sworn statements from witnesses or perform other on-site investigatory measures.

The Minister of the Interior transmits to the Constitutional Council, upon request, the list of expressions of public support.

At the end of the nine-month period, the Constitutional Council has one month to declare whether the bill garnered valid expressions of support from at least 10% of registered voters.

In the event a referendum is called

The Constitutional Council monitors all operations relating to the referendum. It ensures the proper conduct thereof and rules on complaints. Finally, it counts the votes and announces the result.

DECISION 2019-1 RIP OF 9 MAY 2019, STARTING POINT FOR THE ONGOING PROCEDURE

Through its Decision No. 2019-1 RIP of 9 May 2019, the Constitutional Council ruled on the bill aiming to confirm the legal personality of the operator of Paris airports as a national public service. The bill, signed by 248 members of the Senate and National Assembly, was referred to the Constitutional Council on 10 April. This bill is the first to have been submitted to the Constitutional Council and to have reached the first stage of the Shared Initiative Referendum (SIR) procedure.

The Constitutional Council ruled in this decision that the constitutional and organic conditions for opening the SIR procedure phase had been fulfilled. The period for collecting public support, which must be initiated within one month of the publication of the Constitutional Council's decision in the Official Journal, thus began at midnight on 13 June 2019, for a period of nine months.

At the end of this period, it will be up to the Constitutional Council to determine whether the bill has garnered the support of 10% of registered voters, i.e. at least 4,717,396 supporters, as the body ruled in its Decision No. 2019-1 RIP of 9 May 2019.

THE VIEWPOINT OF...

Romain Rambaud

Professor of public law, Université
Grenoble-Alpes

It is no longer possible today, as was the case since 2008, to profess to students that the referendum provided for in Article 11, par. 3 et seq. of the Constitution is a totally ineffective procedure. However, it should be stressed that although the Constitutional Council confirmed the term “Shared Initiative Referendum” by Decision No. 2019-1 RIP of 9 May 2019, this expression remains open to criticism in the sense that such a referendum is in reality a “parliamentary” initiative, with citizens acting merely as supporters of the procedure, and not as instigators. This may change in the event of a constitutional reform.

Decision No. 2019-1 RIP is remarkable in other respects. We are indeed witnessing the first direct review of the constitutionality of a referendum bill, made possible by the 2008 reform: insofar as the Constitutional Council has no competence to conduct an *ex post* review of the “direct expression of national sovereignty” (Decision No. 62-20 DC of 6 November 1962), only an *ex ante* review can guarantee the rule of law without opposing the will of the people. In substance, the solution is in keeping with case law, which leaves to legislators the prerogative of deciding what falls within the scope of a national public service.

With regard to the role of the Constitutional Council, it managed to steer clear of political controversy, applying the law with impartiality by assessing the criteria, in accordance with the legislation (Article 2 of Organic Law No. 2013-1114 of 6 December 2013) “on the date of registration of the referral”, such that no previously enacted law opposed the SIR. However, it took a press release by President Laurent Fabius to bring common sense back into the debate (press release of 16 May 2019).

In so doing, the Constitutional Council lived up to its role of protecting the Constitution, which indeed guarantees the possibility of a SIR (Decision No. 2014-705 DC of 11 December 2014). That is good news, but unfortunately it will not be enough to bring about direct democracy in France.



Decision
2018-2

THE EX ANTE CONSTITUTIONAL REVIEW

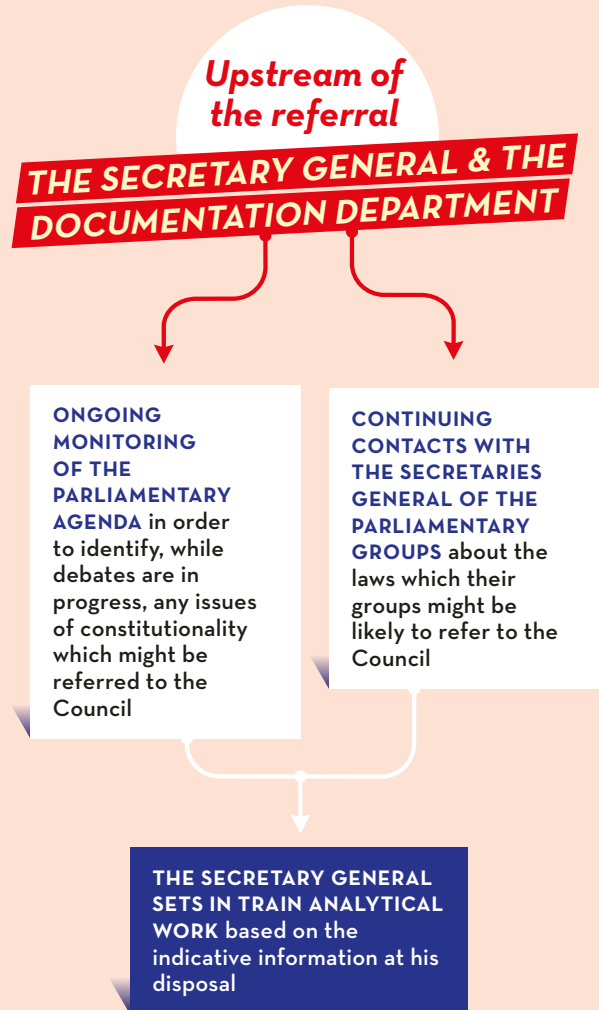
The Constitutional Council is constantly evolving, even when it comes to a historical function such as carrying out *ex ante* reviews. This year, the Council decided to make public the external contributions received in the context of the review process, further increasing transparency. The content of these consultations is now available on the institution's website.

ons in 2019

In order to hand down its decisions as quickly as possible, the Constitutional Council relies on the expertise of its in-house staff and on a very precise organisational structure. It seeks to anticipate possible referrals by monitoring the work performed by Parliament. The President of the Council draws up a work program which is regularly updated in line with the number of referrals. The following diagrams give an overview of the key stages in the handling of a particular matter within the Constitutional Council, from the arrival of the referral to the decision.

The ex ante constitutional review

FROM REFERRAL



TO DECISION

**Receipt of the
referral at the
Constitutional
Council**

THE SECRETARY GENERAL

**PREPARATION
OF A DRAFT
MEMORANDUM**

REFERRAL FORWARDED BY EMAIL to the President of the Republic, the Prime Minister, the President of the National Assembly and the President of the Senate

THE LEGAL DEPARTMENT

**THE
REGISTRY**

CHECKING of the memorandum and
clearance by the Secretary General

**DRAFT
QUESTIONNAIRE**
to be sent to the
Government

CIRCULATION of the memorandum
to the Members, accompanied
by the documentary brief

THE RAPPORTEUR

Clearance of the draft questionnaire, which is forwarded to the General Secretariat of the Government together with an invitation to attend a meeting

MEETING CHAIRED BY THE RAPPORTEUR and attended by a delegation of competent officials led by the member responsible for the constitutional questions of the General Secretariat of the Government

RECEIPT OF THE GOVERNMENT'S WRITTEN OBSERVATIONS at the conclusion of the meeting

THE SECRETARY GENERAL

THE RAPPORTEUR

THE LEGAL DEPARTMENT

PRELIMINARY EXCHANGE OF VIEWS on the case file and initial drafting of the decision
SECOND EXCHANGE OF VIEWS on the case file and drafting of the final version of the draft decision

CIRCULATION OF THE DRAFT DECISION to the Members

PRESENTATION of the
report to the Members

THE RAPPORTEUR

DELIBERATION BY THE MEMBERS

PUBLICATION OF THE DECISION

1 month

Combating the manipulation of information

DECISION
No. 2018-773 DC

20 December 2018

Organic Law and
Ordinary Law against
the Manipulation of
Information

[Constitutional conformity -
reservation]

The Constitutional Council was asked to review the Organic Law against the Manipulation of Information, along with several provisions of the Ordinary Law dealing with the same objective.

With particular regard to Article L. 163-2 of the Electoral Code, which is a new addition to Article 1 of the Ordinary Law, which establishes a summary procedure for the purposes of preventing, during the three months preceding a general election, the dissemination of false information on online communication services to the public, where such information is likely to adversely affect the integrity of the vote, the Constitutional Council confirmed its compliance with the Constitution subject to several interpretative reservations.

It examined these provisions in the light of the freedom of expression and communication guaranteed by Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen, but also in the light of the principle of the integrity of the vote, which stems from Article 3 of the Constitution.

With regard to freedom of expression and communication, in line with its traditional jurisprudence, it stressed that the exercise of this freedom is a necessary condition of democracy and one of the guarantees that other rights and freedoms will be respected. This is particularly so, given the current state of the media, the exercise of this freedom through online public communication services,

The Constitutional Council considers that it is the responsibility of the legislature to reconcile the constitutional principle of the integrity of the vote with the constitutional freedom of expression and communication

the widespread growth of such services and their importance for participation in democratic life and the expression of ideas and opinions. However, it is open to the legislature to introduce provisions to stop abuses of the exercise of freedom of expression and communication that adversely affect public order and the rights of third parties.

The Constitutional Council considers that it is the responsibility of the legislature to reconcile the constitutional principle of the integrity of the vote with the constitutional freedom of expression and communication.

As part of these constitutional requirements, it noted in particular that, by introducing an interlocutory procedure to prevent the dissemination of certain false information likely to undermine the integrity of the election, the legislature intended to combat the risk of citizens being misled or manipulated in the exercise of their vote by the massive dissemination of such information on online communication services to the public. In this way, it sought to ensure the clarity of the electoral process and respect for the principle of the integrity of the vote. In addition, the summary procedure only concerns content published on online public communication services. However, the latter lend themselves more easily to massive and coordinated manipulation because of their sheer number and the particular ways in which their content is disseminated.

With regard to the scope of the interlocutory procedure which was the subject of the complaint, the Constitutional Council also noted that the legislature had strictly defined the information that could be subject to it. It considers that this procedure can only cover inaccurate or misleading allegations or imputations of a fact likely to impair the integrity of the forthcoming election. These allegations do not include opinions, parodies, partial inaccuracies or simple exaggerations. They are those whose falsity can be objectively demonstrated. Moreover, only the dissemination of such allegations or imputations that meet three cumulative conditions can be challenged: it must be artificial or automated, massive and deliberate.

However, the Council noted that freedom of expression is of particular importance in the political process and election campaigns

However, it noted that freedom of expression is of particular importance in the political process and election campaigns. It guarantees both each individual's right to information and the defence of all opinions; but it also protects against the consequences of abuses committed on its basis by allowing them to be answered and denounced.

The Council therefore considers that, in view of the consequences of a procedure which may have the effect of stopping the dissemination of certain information content, the allegations or imputations in question cannot, without prejudicing freedom of expression and communication, justify such a measure unless their incorrect or misleading nature is clearly apparent. The

same applies to the risk of impairing the integrity of the election, which must also be demonstrably obvious.

Subject to these reservations, it considers that the contested provisions do not infringe freedom of expression and communication in any way that would not be necessary, appropriate and proportionate.

The Constitutional Council also found that provisions inserted in Act No. 86-1067 of 30 September 1986 on freedom of communication by Articles 5, 6, 8 and 10 of the referred law, relating to the powers of the Higher Audiovisual Council to regulate the broadcasting of radio and television services, were in conformity with the Constitution.

Social Security financing

DECISION
No. 2018-776 DC

21 December 2018

**Social Security Financing
Act for 2019**

[Partial constitutional
non-conformity]

The Constitutional Council was asked to review several provisions of the Social Security Financing Act for 2019.

The Constitutional Council rejected criticisms by parliamentarians of Article 7 of the Act which established, with effect from 1 September 2019, a reduction in the amount of employee contributions payable in respect of overtime and additional hours of work performed by private sector employees and government officials.

In dismissing the complaint that those provisions infringed the principles of equality before the law and in relation to government imposts, the Council noted, in particular, that the reduction in employee contributions applies not only to salaries paid to full-time employees for overtime, but also to those paid to part-time employees, for additional hours worked. It also applies to the increase in remuneration paid to employees who have entered into a collective working-time package agreement in return for their relinquishment of days off. Therefore, in defining the scope of the reduction of employee contributions in question, the contested provisions do not give rise to any difference in remuneration or any breach of equality in relation to government imposts to the detriment of part-time employees or those covered by a collective working-time package agreement. They do not affect women more adversely than men.

The Constitutional Council



also ruled that neither the right to health protection nor the principle of equality in dealings with the public service infringes Article 43 of the Act, which, on an experimental basis, allows a healthcare establishment to charge for a hospitalisation service when the emergency department refers a patient to another type of care. It noted in this regard that these provisions are limited to providing that, on an experimental basis, when hospital emergency departments decide to redirect a patient to a more suitable health care provider, this redirection,

The Social Security Financing Acts were created through the 22 February 1996 revision of the Constitution.



which is carried out with due regard to the patient's medical condition, may be invoiced as a hospitalisation service.

The Constitutional Council deemed to be constitutional those provisions of Article 51 which aim to ensure the availability of products and services eligible for full coverage by health insurance and complementary insurance funds, to enable insured persons to access certain health products, such as optical products, hearing aids and dental prostheses, with out-of-pocket expenses.

In dismissing the complaint raised by one of the appeals against these provisions

with regard to freedom of enterprise, the Council pointed out that the obligation imposed by the contested provisions can only apply to manufacturers who intend to seek the listing, on the list of products and services eligible for health insurance reimbursement, of a product or a service falling into a category one class of which is intended to attract increased coverage of costs. Where a manufacturer has failed to request such a listing for one of the products in the category in question, the obligation imposed by the contested provisions is not binding. When a manufacturer has obtained such a listing, this obligation, which is imposed in return for reimbursement by the health insurance, does not occasion any manifestly disproportionate prejudice to freedom of enterprise.

For procedural reasons, the Constitutional Council rejected the words "and 2020" in Article 68 of the Act that had been referred for review. That article provides for certain social benefits to be adjusted annually at a rate lower than the inflation rate. It noted that the year 2020 is not covered by the Financing Act and that, despite the fact that they would have an effect on the basis of the adjustment of the social benefits due

for subsequent years, these provisions are not, for that reason, of a permanent character within the meaning of Section C(2) of paragraph V of Article LO 111-3 of the Social Security Code.

The Constitutional Council rejected the words "and 2020" in Article 68 of the Act that had been referred for review

Finance Act

DECISION
No. 2018-777 DC
28 December 2018
Finance Act for 2019
 [Partial constitutional
 non-conformity]

Several provisions of the Finance Act for 2019 were challenged before the Constitutional Council before it entered into force.

The Council examined the criticisms referred by the applicant deputies with regard to the principle of equality in relation to government imposts in certain provisions of Article 40 of the Act which are designed to moderate certain conditions governing the partial exemption from transfer duties free of charge in the event of the transfer of stocks or shares of companies which are subject to a collective retention commitment (known as the “Dutrel Pact”). The Council noted in particular that, under these provisions, the benefit of exemption in the event of an assignment or donation during the collective retention commitment period applies only where the transfer is made to the benefit of another person who is party to this commitment. Furthermore, any securities that are assigned or donated do not benefit from the exemption.

As the transfer of shares to associates who are subject to the collective commitment jeopardises the stability of the shareholding and the sustainability of the company, the Council held that, in relation to the objective pursued by the legislature (which is precisely to promote the transfer of businesses under arrangements that ensure both the stability of the shareholding and the sustainability of the company), these provisions are not likely to lead to a clear-cut undermining of equality with regard to government imposts.

The Constitutional Council partially rejected Article 81 of the Act on the grounds that, in respect of foreign nationals

who are not nationals of a Member State of the European Union, another State Party to the Agreement on the European Economic Area or the Swiss Confederation and who reside in French Guiana, Article 81 required specific minimum periods of possession of a residence permit in order to be eligible for the Earned Income Supplement.

Under these provisions, in order to qualify for the Earned Income Supplement, a foreigner who was a national of the above-mentioned States had to have held, for fifteen years, a residence permit allowing him or her to work. If the foreign national was a single person with dependent children or a single pregnant woman, these same provisions reduced this period to five years. In the other parts of the territory of the Republic, with the exception of Mayotte, the first of these qualifying periods is five years, while no qualifying period at all is required in the second scenario.

The Constitutional Council noted that, in respect of eligibility for the Earned Income Supplement, these provisions set up different standards of treatment as between foreign nationals residing in French Guiana and those residing in other parts of the Republic, with the exception of Mayotte.

The Council found that, in relation to the entire population residing in France, the population of French Guiana includes a high proportion of foreign nationals, many of whom have irregular status, and that these circumstances constitute “special characteristics and constraints” within the meaning of the Article 73 of the Constitution, thus allowing the legislature, in order to combat irregular immigration to French Guiana, to apply in a modified

fashion, and to a certain extent, the laws that are in force throughout the country. The Council nevertheless found that, by imposing a longer minimum period of possession of a residence permit in French Guiana than that applying elsewhere in the national territory for the sole purpose of combating illegal immigration, the legislature has introduced a specific condition for receiving the Earned Income Supplement, that condition being unrelated to the purpose of the Supplement. Moreover, the contested provisions apply, in French Guiana, to all foreign nationals who have regular status, including those who entered its territory lawfully and have lived there, in compliance with all laws and regulations, on an ongoing basis. They also apply to foreign nationals residing in French Guiana who have previously resided in another part of the national territory with legal status, by having a residence permit authorising them to work.

Debated and adopted every year, the purpose of the Finance Act is to present details of the country's income and expenditure.

Against this background, the Constitutional Council concluded that, while it is up to the legislature to develop measures designed to combat illegal immigration, the difference in treatment that has been created with regard to access to

The Council held that these provisions are not [...] likely to lead to a clear-cut undermining of equality with regard to government imposts

the Earned Income Supplement cannot be regarded as justified having regard to the purpose of the Act. Moreover, that difference exceeded the extent of the adjustments that could be justified by the particular characteristics and constraints of the community of French Guiana.



Programming and Justice Reform Act

DECISION
No. 2019-778 DC

21 March 2019

**Act on 2018-2022
Programming and
Reform for the Justice
System**

[Partial constitutional
non-conformity -
reservation]

No fewer than 57 articles of the Act on Programming and Reform for the Justice System were referred to the Constitutional Council for review. In the longest decision it has ever handed down, the Council rejected some of those provisions, mainly related to criminal offences.

With regard to the civil component of the Act, the Constitutional Council rejected Article 7, which aims to assign to family allowance funds, on an experimental basis and for a period of three years, responsibility for the issuing of enforceable orders relating to the adjustment of the quantum of child support payments.

It noted that these funds are private entities responsible for a public service function. However, the contested provisions give them the power to review the quantum of child support payments that have been determined by the judicial authority or are set out in an agreement approved by that authority. Furthermore, under the Social Security Code, they are required to pay the family support allowance in the event of default by the parent who is liable for payment of child support contributions and may thus have some involvement in the determination of the quantum of the contributions.

For these reasons, and even though the review decisions taken by the funds

could be appealed to the Family Court, it held that the legislature authorised a private entity in charge of a public service function to amend judicial decisions without attaching sufficient guarantees to this power with regard to the impartiality requirements arising from Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen.

On the criminal component of the Act, while the Council validated various measures to reform criminal procedure,



including Article 69 establishing a national anti-terrorist prosecutor's office, Article 74 amending the conditions for imposing mandatory prison sentences or Article 93 empowering the Government to reform juvenile criminal justice by ordinance, among other measures, it rejected provisions of Article 44 amending the conditions under which interceptions of correspondence issued by means of electronic communications may be used in an investigation or a judicial enquiry.

The Council noted in this regard that, although the legislature may provide for special investigative measures to identify crimes and offences of particular gravity and complexity, in order to gather evidence and to seek the perpetrators, it is subject to the reservation that the restrictions they impose on constitutionally guaranteed rights must be proportionate to the gravity and complexity of the offences committed

This judgment runs to 395 paragraphs – the longest ever handed down by the Constitutional Council.



and do not introduce any unjustified discrimination; and that such measures must be conducted in compliance with the prerogatives of the judicial authority, which is responsible in particular for ensuring that their implementation is necessary for the purposes of establishing the truth.

In this context, the Council noted that the legislature had authorised the use of interception measures for correspondence issued by electronic communications for offences which are not of a particularly serious and complex nature, without attaching to such use guarantees allowing sufficient oversight by a judge to ensure that the necessary and proportionate nature of such measures was maintained during their implementation. The legislature therefore failed to strike a proper balance between the constitutionally valid objective of the search for offenders and the right to privacy and the confidentiality of correspondence.

It also rejected provisions of Article 46 authorising the use of special

The Constitutional Council rejected provisions of Article 44 amending the conditions under which interceptions of correspondence issued by means of electronic communications may be used in an investigation or a judicial enquiry



THE VIEWPOINT OF...

Olivia Dufour

**Journalist, President of the Cercle des Journalistes Juridiques
(Society of Journalists Reporting on Legal Matters)**

One of the dangers associated with the inadequacy of the justice budget for the past 200 years in France lies in the temptation to sacrifice essential principles in order to increase productivity. Thus, for example, in the field of civil justice, collegiality has almost disappeared in practice, even though it is perceived as a guarantee of good justice and as a form of assistance and protection for the magistrate. Similarly, hearings are being reduced as the burden of management responsibilities increases, making collegiality appear to be an unnecessary waste of time. There is a long list of these sacrifices, small or large, inspired more or less intentionally by the structural shortage of resources. There is one that the 23 March 2019 Act on 2018-2022 Programming and Reform for the Justice System was about to make and that the Constitutional Council very wisely prevented. The reform provided that the judge could compel a detainee to take part in a videoconference for the hearing to extend his or her pre-trial detention. The Constitutional Council rejected this provision, in view of the importance of the issue of freedom in relation to the conditions under which videoconferencing was to be held in this specific situation. Admittedly, as it has been decided several times both at rue de Montpensier and at the Palais-Royal, this measure aims to “contribute to the proper administration of justice and the proper use of public funds”, for example by saving on escort costs, but how can its dehumanising nature be ignored? Do we perceive situations and people in the same way behind a screen? The answer is obviously no. In some instances the stakes are not serious enough to justify a face-to-face encounter between a man and his judge, so videoconferencing has its place. But when it comes to people’s future, as in the case of the rights of foreigners, or to their freedom, in criminal matters, it would undoubtedly be worth listening to the lawyers when they say that the use of videoconferencing should always be subject to the consent of the person concerned.





investigative techniques, in the context of on-the-spot or preliminary investigations, for any crime, and not only for offences relating to organised crime and delinquency.

As regards techniques of a particularly intrusive nature, the Constitutional Council notes that, while a judge empowered to grant or refuse bail may at any time order that those techniques be discontinued, the contested provisions did not provide for the judge to have access to all elements of the procedure. Thus, while his authorisation is granted for a period of one month, the judge does not have access to the detailed records that are prepared while the investigation is ongoing, other than those that are drawn up in execution of his decision; he is not kept abreast of progress with regard to investigations other than acts performed in execution of his decision.

For this reason in particular, the Council considers that the legislature did not achieve a proper balance between the objective of a search for offenders and the right to privacy, the confidentiality of correspondence and the inviolability of the home.

With regard to the structuring of the court system, the Constitutional Council did however reject Article 95 which replaced the magistrates' courts and regional courts with judicial courts (*tribunaux judiciaires*), and Article 106 which set up an experimental project concerning the leadership and coordination functions assigned to certain heads of courts of appeal and the specialisation of courts of appeal in civil matters.

The legislature therefore failed to strike a proper balance between the constitutionally valid objective of the search for offenders and the right to privacy and the confidentiality of correspondence



In 2018-2019, the Constitutional Council handed down 20 decisions, including 3 DCs and 17 QPCs, that were directly related to the justice system.

Maintaining public order during demonstrations

**DECISION
No. 2019-780 DC**

4 April 2019

An Act to strengthen and ensure the maintenance of public order during demonstrations

[Partial constitutional non-conformity]

Asked to review the so-called “anti-rioter” Act, the Constitutional Council validated provisions allowing certain checks based on judicial request, and the criminal prosecution of the deliberate concealment of the face, but it rejected those relating to the imposition of individual administrative prohibitions on demonstrations.

In ruling on the constitutional conformity of the contested provisions, the Constitutional Council noted in particular, on the basis of Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen, that freedom of expression and communication, from which the right to collective expression of ideas and opinions derives, is all the more precious since its exercise is a fundamental prerequisite for democracy and one of the guarantees of respect of other rights and freedoms. It follows that infringements of this freedom and right must be necessary, appropriate and proportionate to the objective pursued.

With regard to the provisions of Article 2 of the Act allowing, under certain conditions, judicial police officers and, under their responsibility, other judicial police officials to carry out, at the scene of a demonstration and in the immediate vicinity, visual inspections and baggage and

vehicle searches, the Constitutional Council noted that these operations can only be carried out for the investigation and prosecution of the offence of participating in a demonstration or public meeting while carrying a weapon. They therefore pursue the objective of investigating the perpetrators of an offence likely to seriously disturb the conduct of a demonstration. These operations are placed under the control of a judicial magistrate who specifies, in his request, the place and duration based on those of the expected demonstration. Thus, they can only target specific locations and for limited periods of time. Lastly, these provisions

The legislature reconciled the constitutional requirements in a way that is not imbalanced

may lead to the detention of the person concerned only for the length of time that is strictly necessary for them to be applied. They do not, therefore, in themselves have the effect of restricting access to a demonstration or preventing it from taking place.

The Constitutional Council infers that the legislature reconciled the above-mentioned constitutional requirements in a way that is not imbalanced and did not infringe the right to collective expression of ideas and opinions in a way that would not be necessary, appropriate and proportionate.

With regard to Article 6, which provides for a one-year prison sentence and a fine of 15,000 euros for a person who, in the midst of or in the immediate vicinity of a demonstration on a public thoroughfare, wilfully conceals all or part of his face without legitimate reason, the Constitutional Council noted in particular that, by including, as a constituent element of the offence, the fact of wilfully concealing part of the face, the legislature had in mind the circumstances in which a person wishes to avoid identification by obscuring certain parts of his face. By focusing on demonstrations “during or at the end of which” disturbances to public order are committed or are likely to be committed, the legislature has precisely defined the period during which the existence of disturbances or a risk of disturbances must be assessed, which begins when the participants in the demonstration assemble and ends when they have all dispersed. By referring to the risk of public disorder, it also intended to address the obvious risks of such disorder.

With regard to Article 3, which allowed the administrative authority, under certain conditions, to prohibit a person from participating in a street demonstration and, in certain cases, from taking part in any demonstration throughout the national territory for a period of one month, the Constitutional Council noted specifically that the particularly serious threat to public order necessary for the ban on demonstrating must, according to the contested provisions, result either from a “violent act” or from “acts” committed during demonstrations in which serious violations of the physical integrity of persons or serious damage to property took place.

The legislature infringed the right to collective expression of ideas and opinions in a way that is not appropriate, necessary and proportionate

Thus, the legislature did not require that the behaviour in question necessarily have a link with the serious injury to physical integrity or the significant damage to the property that occurred in the course of this demonstration. Nor did it require that the demonstration covered by the prohibition be likely to give rise to such damage or injury.

Furthermore, the prohibition can be issued on the basis of any conduct, irrespective of any connection with the commission of acts of violence. Finally, any behaviour, regardless of the time it was committed, may justify the issuing of a ban on demonstrating. Accordingly, the contested provisions allow the administrative authority too much latitude in assessing the reasons which may justify the prohibition. In addition, when a street demonstration has not been notified or the notification is late, the prohibition on demonstrating order is automatically enforceable and may be served on the individual at any time, including during the demonstration to which it applies.

The Constitutional Council held that, in regard to the scope of the contested prohibition, the reasons which might justify it and the circumstances of the challenge to it, the legislature infringed the right to collective expression of ideas and opinions in a way that is not appropriate, necessary and proportionate.

Business growth and transformation

DECISION
No. 2019-781 DC

16 May 2019

Business Growth and Transformation Act

[Partial constitutional non-conformity]

Asked to review certain provisions of the Business Growth and Transformation Act, the Constitutional Council rejected the criticisms of substance which had been made of several of them.

In particular, and in specific regard to the principle of equality, the Constitutional Council rejected criticisms directed against Article 11, amending the rules governing the counting of the number of employees of a business for the purpose of applying several social obligations, and against Article 20, reducing the scope of the requirement to appoint an auditor to certain companies exceeding particular balance sheet, turnover or workforce thresholds.

With regard to the criticisms directed against Articles 130 to 136, redefining the legal framework applicable to Groupe ADP, in view of privatising it, the Constitutional Council began by dismissing complaints alleging breach of the ninth paragraph of the Preamble to the 1946 Constitution, which prohibits the privatisation of an enterprise having the character of a de facto monopoly or a national public service.

To rule out the de facto monopoly description, the Constitutional Council noted that, although Groupe ADP has exclusive responsibility for operating several civilian airports located in the Paris Region (Île-de-France), there are other airports in France which are of national or international interest. Moreover, although

The Constitutional Council ruled that the development, operation and development of the Paris-Charles de Gaulle, Paris-Orly and Paris-Le Bourget airports do not constitute a national public service the need for which would result from constitutionally valid principles or rules

it largely dominates the French airport sector, Groupe ADP faces increasing competition from the main regional airports, including for international flights, as well as from the major European airport hubs. Lastly, the transport market in which Groupe ADP operates includes links for which several alternative modes of transport are available. Thus, on certain routes, Groupe ADP must compete with road and particularly rail transport, thanks to the development of high-speed rail lines.

As for the existence of a national public service, the Constitutional Council referred to its established case-law that, while the need for certain national public services derives from constitutionally valid principles or rules, the determination of other activities that must be made a national public service is left to the discretion of the legislature or regulatory authority, as appropriate, by determining their specific organisational form at national level. As it did in its Decision No. 2019-1 RIP of 9 May 2019, it ruled that the development, operation and development of the Paris-Charles de Gaulle, Paris-Orly and Paris-Le Bourget airports do not constitute a national public service the need for which would result from constitutionally valid principles or rules.

In addition, as the legislation stands, the Council also notes that not only is there no existing statutory provision which

On the other hand, the Constitutional Council rejected as having been improperly adopted nine provisions whose lack of a direct or indirect link with the original draft bill had been explicitly challenged by the applicant parliamentarians

describes Groupe ADP as a national public service, but that, as provided for in the Transport Code, the State is empowered to create, develop and operate “airports of national or international interest”, whose

list, established by decree in Council of State, includes several airports located in different regions. Thus, the legislature has not so far intended to entrust the Groupe ADP alone with the operation of a public airport service of a national nature.

With regard to Article 137 authorising the transfer to the private sector of most of the capital of Française des Jeux (the operator of France’s national lottery games), the Constitutional Council held that, while the contested provisions confer on that company exclusive rights for lottery games marketed on the physical network and online as well as for sports betting games offered on the physical network, these exclusive rights do not confer on Française des Jeux a de facto monopoly within the sector of money and chance games which also includes horse betting, casino games and online sports betting.

Moreover, although Française des Jeux offers sports betting and online poker games, in competition with other operators, these activities, together with those of its exclusive rights, do not give it a dominant position in the gambling sector either, which would constitute a de facto monopoly.

On the other hand, the Constitutional Council rejected as having been improperly adopted nine provisions whose lack of a direct or indirect link with the original draft bill had been explicitly challenged by the applicant parliamentarians. For this reason, in particular, Article 17 amending the rules on the prohibition of the provision of certain single-use plastic utensils, Article 18 amending the rules on the prohibition of the production of certain pesticides, fungicides or herbicides and Articles 213, 214 and 215 terminating regulated tariffs for the sale of gas and electricity were rejected on the grounds that they failed to comply with the requirements of Article 45 of the Constitution.

Standing Orders of the Assemblies

DECISIONS
Nos. 2019-785 AND
786 DC

4 and 11 July 2019

Resolution amending the Standing Orders of the National Assembly and Resolution clarifying and updating the Standing Orders of the Senate

[Partial constitutional non-conformity - reservation]

In two decisions handed down in July 2019, the Constitutional Council ruled on amendments to the Standing Orders of the Assemblies, referred to the Council by the respective Presidents in compliance with the first paragraph of Article 61 of the Constitution.

Ruling, by its Decision No. 2019-785 DC of 4 July 2019 on a resolution amending the Standing Orders of the National Assembly, the Constitutional Council rejected two provisions, recorded reservations on seven other provisions and found the rest of the resolution to be in conformity with the Constitution.

The Council specifically rejected Article 53, which dealt with the conditions under which a parliamentary committee may debate a petition addressed to the President of the National Assembly, by providing that it may “decide [...] to hear ministers”. In accordance with settled case-law, this provision, which made it

This provision, which made it possible to compel a minister to take part in a hearing, was rejected by the Constitutional Council on the grounds that it was incompatible with the separation of powers

possible to compel a minister to take part in such a hearing, was rejected by the Constitutional Council on the grounds that it was incompatible with the separation of powers. In any event, the committees retain the power to request the hearing of a member of the Government on the basis of the Standing Orders already in force (second paragraph of Article 45 of the Standing Orders).



The amendments to the Standing Orders related, in particular, to the speaking time available to parliamentarians.



The Constitutional Council recorded an interpretative reservation regarding the provisions of Article 10 of the resolution, which relate to the general discussion of draft bills, chiefly providing that the Conference of Presidents must allow each group, in compliance with the regulatory texts, a speaking time of five minutes or ten minutes (the groups being able, in the latter case, to appoint two speakers). It took the view that the duration of speaking time and the number of speakers could not be set in such a way as to negate the requirements for clarity and fairness in parliamentary debate.

The Constitutional Council recorded the same interpretative reservation when it examined Article 31 of the resolution, which set a limit of two minutes and one speaker per group, and one deputy who

did not belong to any group, for interventions on the articles under discussion.

With regard to the provisions of Article 33 of the resolution specifying that, when several members of the same group submit identical amendments, only one speaker from that group shall speak, the Constitutional Council observed that the restriction placed on a deputy's ability to speak in support of an amendment he has tabled is subject to two conditions: namely, that it applies only to amendments which have the same objective, tabled by authors belonging to the same political group. The Council also recorded an interpretative reservation whereby the presiding officer, who must ensure that the requirements of clarity and fairness of parliamentary debate are met, can use this limitation only to prevent misuse, by deputies of the same group, of the speaking time devoted to identical amendments of which they are themselves the authors.

At Article 37, the Constitutional Council accepted the amendment to the rules governing the composition of joint committees, subject to the reservation that this amendment should not have the effect of depriving the majority group of the right to claim a number of places in a joint committee which was representative of the membership of that group in the National Assembly.

Ruling by its Decision No. 2019-786 DC of 11 July 2019 on a resolution clarifying and updating the Standing Orders of the Senate, the Constitutional Council partially rejected one of its provisions, confirmed an interpretative reservation that it had already recorded on one of the provisions contained in the new bill, and found the rest of the resolution to be in conformity with the Constitution. It partially rejected Article 17 of the resolution, which was designed to specify the conditions under which, by way of exception and after the first reading, amendments may be considered provided that they are not directly related to a provision which is still under discussion.

Act for a “School of Trust”

DECISION
No. 2019-787 DC

25 July 2019

**Act for a “School
of Trust”**

[Partial constitutional
non-conformity]

Article 17 of the Act for a “School of Trust”, which determines the conditions under which the State allocates to municipalities the resources which became necessary as a result of the lowering of the mandatory school age from six years to three, was referred to the Constitutional Council by more than sixty deputies.

The provisions of the Act provide for the State to allocate to each municipality, on a permanent basis, resources corresponding to the increase, compared to the 2018-2019 school year, in the compulsory expenditure that the municipality has to bear in order to finance schools and nursery classes during the 2019-2020 school year, to a maximum amount corresponding to the part of the increase directly attributable to the lowering of the mandatory school age to three years. These expenditures are those that are used to assist public schools and private educational institutions that have entered into a partnership contract with the State.

The applicant deputies criticised these provisions for limiting the State’s financial support to compensation for the additional costs created by this reform and for being of assistance only to municipalities that did not already provide voluntary funding for nursery schools. In so doing, they created, in their view, a difference in the way

The Constitutional Council noted the existence of a difference in the way municipalities were treated, depending on whether or not they were financing nursery classes before the lowering of the mandatory school age

municipalities were treated, contrary to the principle of equality before the law.

On the basis of Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen, which establishes the principle of equality before the law, the Constitutional Council noted the existence of a difference in treatment between municipalities, depending on

The lowering of the mandatory school age to three will enable an additional 25,000 children, as of the beginning of the 2019 school year, to attend classes taught at nursery school.



whether or not they financed nursery classes before the mandatory school age was lowered to three years.

However, it found that municipalities which, during the 2018-2019 school year, had established public nursery classes or schools or approved partnership contracts for private nursery schools were not placed in the same situation as the other municipalities, which did not already exercise the same powers and therefore did not bear the corresponding costs. The difference in treatment between these two categories of municipalities is directly related to the purpose of the law establishing it, which consists, pursuant to the second sentence of the fourth paragraph of Article 72-2 of the Constitution,

in providing financial resources to support an extension of responsibilities resulting in an increase in expenditure by local authorities.

On these grounds, the Constitutional Council accepted that the contested article is in conformity with the Constitution.

Transformation of the Civil Service

DECISION
No. 2019-790 DC

1 August 2019

Act on the Transformation of the Civil Service

[Constitutional conformity]

In its Decision No. 2019-790 DC of 1 August 2019, the Constitutional Council ruled on several provisions of the Act on the Transformation of the Civil Service which had been referred to it by more than 60 deputies.

Several provisions of the referred Act reforming institutions of social dialogue in all three branches of the civil service were criticised on the basis of the principle of employee participation deriving from the eighth paragraph of the Preamble to the 1946 Constitution.

With regard to Articles 1, 10, 25 and 30 of the Act reforming the Joint Administrative Committees with the aim, *inter alia*, of providing that these committees are not called upon to review all individual decisions relating to civil servants, but only those provided for by law and the regulatory authorities, the Constitutional Council rejected this criticism, pointing out that the principle of participation involves the collective determination of working conditions.

Article 4 of the referred Act, replacing the technical committees and the committees on occupational health, safety and working conditions with a single joint body called the Administration Social Committee in the State civil service, the Territorial Social Committee in the territorial civil service and the Establishment Social Committee in the hospital sector civil service, was criticised on the grounds that this body would only include specialised training in health, safety and working conditions when the

number of employees in the administration or establishment in question exceeded a certain threshold. However, the Constitutional Council noted that, irrespective of the size of the administration or establishment, the Administration, Territorial or Establishment Social Committee, composed of representatives of the administration and the staff, deals with issues relating to the protection of physical and mental health, hygiene, work safety, work organisation, teleworking, issues relating to disconnection and mechanisms to regulate the use of digital tools, improving working conditions and the relevant legal requirements. It concluded that the contested provisions do not infringe the right of workers to participate in the collective determination of working conditions.

With regard to the extension, by Articles 16, 18, 19 and 21 of the referred Act, of cases in which, by way of exception, contract agents may be recruited to occupy certain posts, in particular management posts, in the State, territorial and hospital civil service, the Constitutional Council pointed out, on the basis of Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen, that the principle of equal access to public employment does not preclude the legislature from providing that persons who are not civil servants may be appointed to jobs which are in theory filled by civil servants.

It further noted that, under the referred Act, the recruitment of contract agents to fill permanent posts must comply with a procedure guaranteeing equal access to civil service posts, with the exception of posts which exceed the Government's authority, those of Director General of a territorial authority's administration and senior executives of the hospital sector civil service. As such, the competent authority shall ensure that the vacancy and the creation of these jobs are

advertised. In addition, the Constitutional Council stressed that it is incumbent on the competent authorities to base their appointment decisions on the ability of the persons concerned to fulfil their duties, including for jobs for which this procedure does not apply. The Constitutional Council indicated that, in addition, pursuant to the legislation referred to, the recruitment of a contract agent occupying a post whose hierarchical level or the nature of whose duties justify it is subject to ethical oversight, which gives rise, if necessary, to an opinion from the High Authority for the Transparency of Public Life.

For these reasons, it held that the contested provisions do not infringe the principle of equal access to public employment.

With regard to the provisions of Article 56 of the referred Act, regulating the right to strike in local public services, the Constitutional Council noted that the legislature has sufficiently delimited the scope of the public services to be regulated by this new regime by making it applicable to public services such as household waste collection and processing, public passenger transport and the public transport sector, assistance to the elderly and disabled, care for children under three years of age, after-school care and community and school catering in the event that their interruption, in the event of a strike by government officials directly involved in their execution, would contravene public policy, particularly public health, or the essential needs of the users of these services.

It further noted that the obligation to provide prior notice of participation in the strike, which cannot be extended to all employees, is enforceable only against employees directly involved in the performance of public services and who are considered “essential” to the continuity of the public service under the agreement

provided for in Article 56 or in the deliberations of the local authority or local public institution. Such an obligation does not prevent one of these employees from joining a strike movement which has already begun and in which he did not initially intend to participate, or in which he would have ceased to participate, provided that he informs the territorial authority of this no later than forty-eight hours in advance.

The Constitutional Council has made it clear that the restriction on the conditions for exercising the right to strike, by allowing the territorial authority to impose on the officials concerned the right to strike from the time they commence work until the conclusion of the latter, does not oblige an official who wishes to stop working to do so from the time he first begins work after the strike is called.

The Constitutional Council dismissed this criticism, pointing out that the principle of participation involves the collective determination of working conditions

Finally, the disciplinary sanctions provided for by the contested provisions are only intended to punish failure to comply with the obligations of prior notification and of the exercise of the right to strike as soon as work begins, and failure to so comply does not in itself entail any unlawful exercise of the right to strike.

For all these reasons, the Constitutional Council has ruled that the adjustments made to the conditions for exercising the right to strike are not disproportionate to the objective pursued by the legislature and do not contravene the seventh paragraph of the Preamble to the 1946 Constitution.

Decision
2018-2

PRIORITY PRELIMINARY
RULINGS ON THE ISSUE
OF CONSTITUTIONALITY

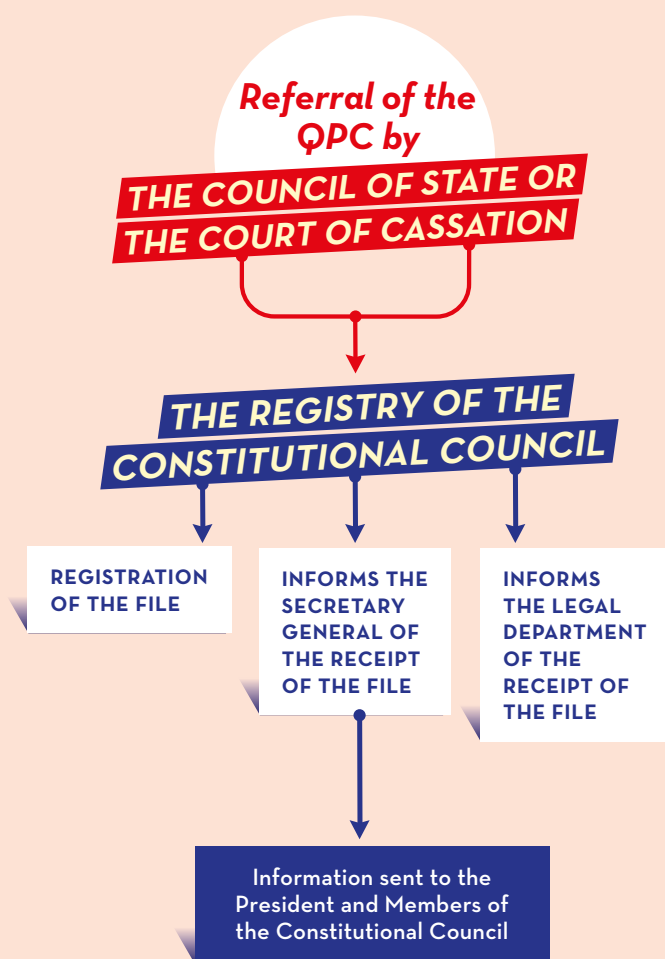
Less than ten years after its establishment, the number of cases judged by the Constitutional Council under the priority preliminary rulings on the issue of constitutionality procedure (QPC) this year exceeded the total number of *ex ante* referrals dealt with since 1958. This is a measure of the success of the QPC, a true “citizen’s prerogative” that allows any member of the public involved in court proceedings to argue that a legislative provision is at odds with the rights and freedoms guaranteed by the Constitution.

ons in
2019

As with the handling of ex ante reviews of legislation, the Constitutional Council relies on the expertise of its in-house departments and on a very specific organisational structure in order to make its decisions on QPCs, which are reflected in the diagrams on the opposite page. With few exceptions, the College's schedule for each week is set by the QPC public hearing held on Tuesdays at 9:30 a.m. and by the Thursday morning deliberation session commencing at 9:30 a.m. Each hearing has at least two items on its agenda, and sometimes three or four.

QPC, the citizen's prerogative

FROM REFERRAL



TO DECISION

The Constitutional Council has 3 months to hand down its decision

NOTIFICATION BY EMAIL to the President of the Republic, the Prime Minister, the President of the National Assembly and the President of the Senate

NOTIFICATION TO THE PARTIES of the proceedings before the Council of State or the Court of Cassation

ENTRY POSTED on the Constitutional Council's website

The QPC file is examined within the Secretariat General under the authority of the **MEMBER ACTING AS RAPPORTEUR** or the College

VERIFICATION of the admissibility of the request

PRELIMINARY EXAMINATION OF THE FILE: formation of a two-person team comprising a senior legal officer of the Legal Department and a research officer reporting to one of the four members of the Legal Department

FINALISATION of the memorandum by the Legal Department, under the authority of the Secretary General

DRAFTING OF THE MEMORANDUM BY THE LEGAL DEPARTMENT: the memorandum must cover all possible issues for consideration by the Council in its review of the matter

THE REGISTRY

DISTRIBUTION of the memorandum to the Members, with the accompanying documentary brief

CONTACT WITH THE LAWYERS to advise them of the allocation of speaking time, as determined under the authority of the President of the Constitutional Council

PREPARATION FOR THE HEARING: setting-up of the hearing room, liaison with the Communication Department and the Information Technology Department to lock in the live-streaming of the hearing on www.conseil-constitutionnel.fr

PUBLIC HEARING

- Oral submissions by the parties' lawyers and other parties addressing the Council on the issues
- Oral presentation by the representative of the Secretariat General of the Government
- Questions (if any) from Members of the Constitutional Council

COMPILATION OF THE RAPPORTEUR'S GUIDANCE by the Secretary General and the Legal Department

DRAFT DECISION prepared by the Legal Department

DRAFT DECISION

THE RAPPORTEUR

DELIBERATION BY THE COLLEGE

Presentation of the case by the Rapporteur
Deliberation
Publication of the decision

3 months

Regime governing the police custody of minors

DECISION
No. 2018-744 QPC

16 November 2018

Ms Murielle B. [Regime governing the police custody of minors]

[Total non-conformity]

When the Court of Cassation referred a QPC issue raised by Ms Murielle Bolle to the Constitutional Council, the latter ruled that the provisions of the Ordinance of 2 February 1945 on juvenile delinquents, in the version that was in force in 1984, were unconstitutional because they did not provide sufficient guarantees to ensure that the rights of persons in police custody, particularly minors, were duly respected.

The provisions in question, the wording of which was being challenged and which has now been repealed, date back to an Act of 5 July 1974, and determined in particular the conditions under which the children's judge or investigating judge shall investigate when a matter is referred to him/her by the public prosecutor for the purpose of investigating criminal or delinquent acts committed by a minor. As a result, a judicial police officer could, in the context of an investigation procedure, detain a person for a 24-hour period, at the end of which the person had to be brought before the investigating judge. Police custody could be extended, by decision of that judge, for a period of 24 hours. The person in custody had the

right to request a medical examination in the event that the period of detention was extended.

The Constitutional Council noted that, according to settled case law, it is incumbent on the legislature to ensure that the search for offenders, which is necessary to safeguard constitutionally valid rights and principles, is conducted in a way that is compatible with the exercise of constitutionally guaranteed freedoms. These include respect for the rights of the defence, which derives from Article 16 of the 1789 Declaration of the Rights of Man



The legislature has also violated the fundamental principle recognised by the laws of the Republic in the field of juvenile justice

and of the Citizen, and the constitutional requirements protected by Article 9 of the same Declaration.

It also reaffirms the scope of the fundamental principle recognised by the laws of the Republic in the field of juvenile justice.

In the constitutional framework thus cited, the Constitutional Council noted that, under the contested provisions, no legal guarantee other than the right to obtain a medical examination in the event

No police custody or detention measures may be taken against a minor under ten years of age.



of an extension of police custody was provided for in order to ensure that the rights, in particular those of defence, of the person in police custody, whether of full age or not, were respected. Furthermore, there was no legislative provision specifying an age below which a minor may not be placed in police custody.

The Constitutional Council concluded that, by these provisions, the legislature, which failed to ensure a proper balance between the search for offenders and the exercise of constitutionally guaranteed freedoms, had failed to comply with Articles 9 and 16 of the 1789 Declaration. It also violated the fundamental principle recognised by the laws of the Republic in the field of juvenile justice.

With regard to the effects of this decision, which concerned provisions that are no longer in force, the Constitutional Council stated that it follows from Article 62 of the Constitution that the declaration of unconstitutionality must, in principle, be in favour of the author of the priority preliminary ruling on the issue of constitutionality and that the provision that is found to be unconstitutional cannot be applied in current proceedings at the date of publication of the Constitutional Council's decision.

In accordance with this principle it held that, in the present case, there were no grounds for postponing the entry into force of the declaration of unconstitutionality. This therefore took place from the date of publication of the decision. It is applicable to cases which were not definitively decided on that date. It is for the competent court, in accordance with the provisions of the Code of Criminal Procedure, to determine the consequences of this unconstitutionality on the validity of procedural acts or documents.

Competence of specialised military courts

DECISION
No. 2018-756 QPC

16 November 2018

Mr Jean-Pierre F.
[Competence of specialised military courts in relation to offences committed by members of the gendarmerie while they are maintaining law and order]

[Constitutional conformity]

Article 697-1 of the Code of Criminal Procedure reserves to courts specialising in military matters the jurisdiction to try crimes and misdemeanours committed by the military in the performance of their duties, in particular in their law enforcement tasks.

The Constitutional Council was asked by the Court of Cassation to review a QPC whose author claimed that these provisions introduced an unjustified difference in the treatment of civil parties, depending on whether the perpetrator of the offence committed in the exercise of a law enforcement task was a soldier or a member of the national police force.

The Constitutional Council noted, in the light of Articles 6 and 16 of the 1789 Declaration of the Rights of Man and of the Citizen, that although the legislature may provide for different procedural rules depending on the facts, situations and persons to whom they apply, it is on condition that these differences do not result from unjustified distinctions and that individuals are afforded equal guarantees, especially with regard to respect for the principles of the independence and impartiality of the courts.

In the constitutional framework thus cited, it noted that the contested provisions do indeed establish a difference of treatment between individuals depending

on whether the perpetrator of the offence committed in the course of maintaining law and order is a member of the gendarmerie or of the national police force.

In considering the status of the specialised courts in question, the Constitutional Council noted that they are designated among the courts of first instance and the criminal courts. They have three specific features compared to these ordinary judicial courts. Their territorial jurisdiction is necessarily extended to that of one or more courts of appeal. Judges of the criminal courts specialising in military matters are specially assigned to them upon the recommendation of the General Assembly.

Lastly, under Articles 698-6 and 698-7 of the Code of Criminal Procedure, when specialised criminal courts try a crime other than one dealt with under ordinary law, or when there is a risk of disclosure of a national defence secret, they are composed solely of judges. The Council concluded that these rules on the structure and composition of those courts which specialise in military matters offer, for individuals, guarantees equal to those of the ordinary criminal courts, in particular as regards respect for the principles of the independence and impartiality of the courts.

In addition, the Constitutional Council observed that the national gendarmerie is part of the armed forces. As such, gendarmerie soldiers are subject to the duties and constraints of military status as defined in Part IV of the Defence Code. Like other military personnel, they are liable, by virtue of their status, to prosecution for military offences provided for in Articles L. 321-1

The Applicant and the Ligue des droits de l'Homme (the Human Rights League), which also addressed the Council on the referral, criticised these provisions for giving rise to an unjustified difference in treatment between civil parties.



The Council concluded that these rules on the structure and composition of those courts which specialise in military matters offer, for individuals, guarantees equal to those of the criminal courts dealing with offences under ordinary law

to L. 324-11 of the Code of Military Justice, which may be committed in conjunction with offences under ordinary law. In addition, they are liable, under Article L. 311-3 of the same Code, to specific military penalties imposed by the court, such as discharge from the gendarmerie or loss of rank.

Finally, they are also subject to certain specific procedures for the enforcement of sentences, as defined in

Chapter VI of Book II of the same Code. The Constitutional Council ruled that, in view of these particularities of military status, it was open to the legislature, in the name of the constitutionally valid objective of the proper administration of justice, to provide for the specialisation of judicial bodies dealing with offences under ordinary law committed by the military in the performance of their duties, in order to promote a better awareness of these distinctive characteristics.

Noting that the military members of the gendarmerie remain subject to these special rules in their law enforcement activities, the Constitutional Council ruled, in the light of all the above reasons, that they are not placed, for offences committed in this context, in the same situation as members of the national police.

Consequently, despite the similarities in the operational framework of the gendarmerie soldiers and members of the national police in the maintenance of law and order, the legislature has not, in relying on the particularities of the military status of the gendarmes to lay out the jurisdiction of the courts specialising in military matters, introduced unjustified discrimination between litigants.

Prostitution and the punishment of clients

DECISION
No. 2019-761 QPC

1 February 2019

The Association
Médecins du Monde
(Doctors of the World)
and others [Punishment
of the clients of
persons engaging in
prostitution]

[Constitutional conformity]

The Constitutional Council received a request from the Court of Cassation for a QPC relating to the 13 April 2016 Act which was aimed at stepping up the fight against the prostitution industry and at providing support for prostitutes.

The text that was specifically challenged was the first paragraph of Article 611-1 of the Criminal Code, which establishes a contravention against soliciting, accepting or obtaining sexual relations from a person who engages in prostitution, including on an occasional basis, in exchange for remuneration, a promise of remuneration, the provision of a benefit in kind or the promise of such a benefit.

The Constitutional Council stressed that it is the responsibility of the legislature to ensure a proper balance between the constitutionally valid objective of safeguarding public order and preventing the commission of offences and the exercise of constitutionally guaranteed freedoms, which include the personal freedom protected by Articles 2 and 4 of the 1789 Declaration of the Rights of Man and of the Citizen.

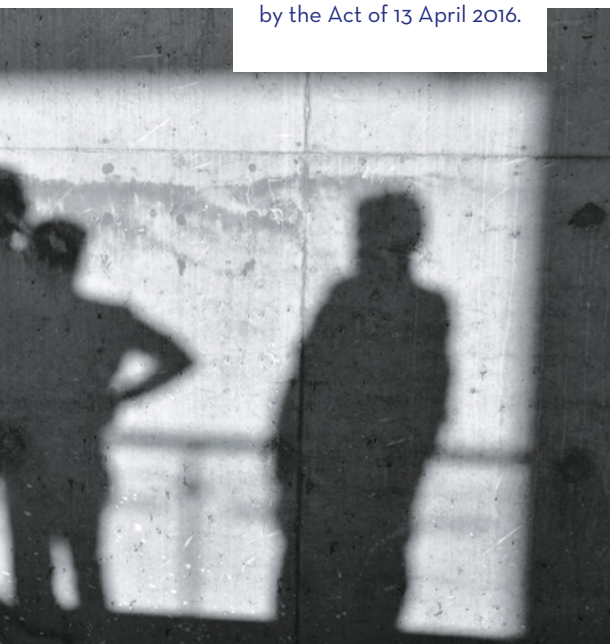
In this constitutional framework, the Council noted that it emerged from the preparatory work on the contested provisions that, by choosing to punish purchasers of sexual services, the legislature sought to deprive the purveyors of



prostitution of sources of profit and thus combat this activity along with human trafficking for the purposes of sexual exploitation, criminal activities based on

**By depriving
the purveyors of
prostitution of sources
of profit, the legislature
sought to combat this
activity and human
trafficking for the
purposes of sexual
exploitation**

The punishment of clients of prostitution was introduced by the Act of 13 April 2016.



coercion and the enslavement of human beings. In so doing, it sought to ensure the protection of the dignity of the individual against these forms of enslavement and to pursue the constitutionally valid objective of safeguarding public order and preventing crime.

The Constitutional Council further noted that the Constitution does not confer on it a general power of assessment and decision of the same nature as that of Parliament, but only gives it the power to decide on the constitutionality of the laws referred to it for consideration. While the legislature has criminalised any use of prostitution, including where sexual acts occur freely between consenting adults in a private space, it nevertheless considered that the vast majority of persons involved

in prostitution are victims of procuring and trafficking and that these offences are made possible by the existence of a demand for paid sexual relations. By prohibiting this demand through the criminalisation provisions that were the subject of the challenge, the legislature adopted an approach that is not manifestly inappropriate to the public policy objective pursued.

On these grounds, it held that the legislature struck a compromise which was not manifestly lacking in balance between the constitutionally valid objective of safeguarding public order and preventing crime and safeguarding the dignity of the human person and personal freedom.

The legislature adopted an approach that is not manifestly inappropriate to the public policy objective pursued

With regard to the right to health protection, enshrined in the eleventh paragraph of the Preamble to the 1946 Constitution, the Constitutional Council held that it was not incumbent on it to substitute its own assessment for that of the legislature regarding the impact on health of prostituted persons of the contested provisions, since that assessment was not, based on currently available knowledge, manifestly inadequate.

Free hearing of minors

DECISION
No. 2019-762 QPC

8 February 2019

Mr Berket S.
[Arrangements governing the free hearing of minors]

[Total non-conformity - deferred effect]

The Constitutional Council was presented by the Court of Cassation with a QPC on the arrangements governing the free hearing of minors, as set out in Article 61-1 of the Code of Criminal Procedure, in the form approved in an Act of 27 May 2014.

According to the contested provisions, any person in respect of whom there are reasonable grounds to suspect that they have committed or attempted to commit an offence could, during the criminal investigation, be heard freely on these matters. This “free hearing” could only take place if the person consented to it and if they had not been brought, under duress, to appear before the judicial police officer. In addition, the person could only be heard after having been informed of the alleged nature, date and place of the offence; their right to leave, at any time, the premises where they are being heard; their right to be assisted by an interpreter; their right to make statements, to answer questions or to remain silent; the possibility of receiving legal advice in a facility providing them with access to the law; and, if the offence for which the person is

being heard is a crime or an offence punishable by imprisonment, their right to be assisted during the hearing by a lawyer. The person could expressly agree to continue the hearing without their lawyer present.

The guarantees provided by the legislature were not sufficient to ensure that the minor gave informed consent to the free hearing, nor to prevent him from making choices that would be contrary to his interests

The Applicant argued that these provisions were contrary to the principle of equality in criminal proceedings guaranteed by Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen, since, in circumstance where a minor suspected of having committed an offence is heard freely during a criminal investigation, they failed to provide guarantees equivalent to those provided when he is heard while in police custody. Similarly, by failing, inter

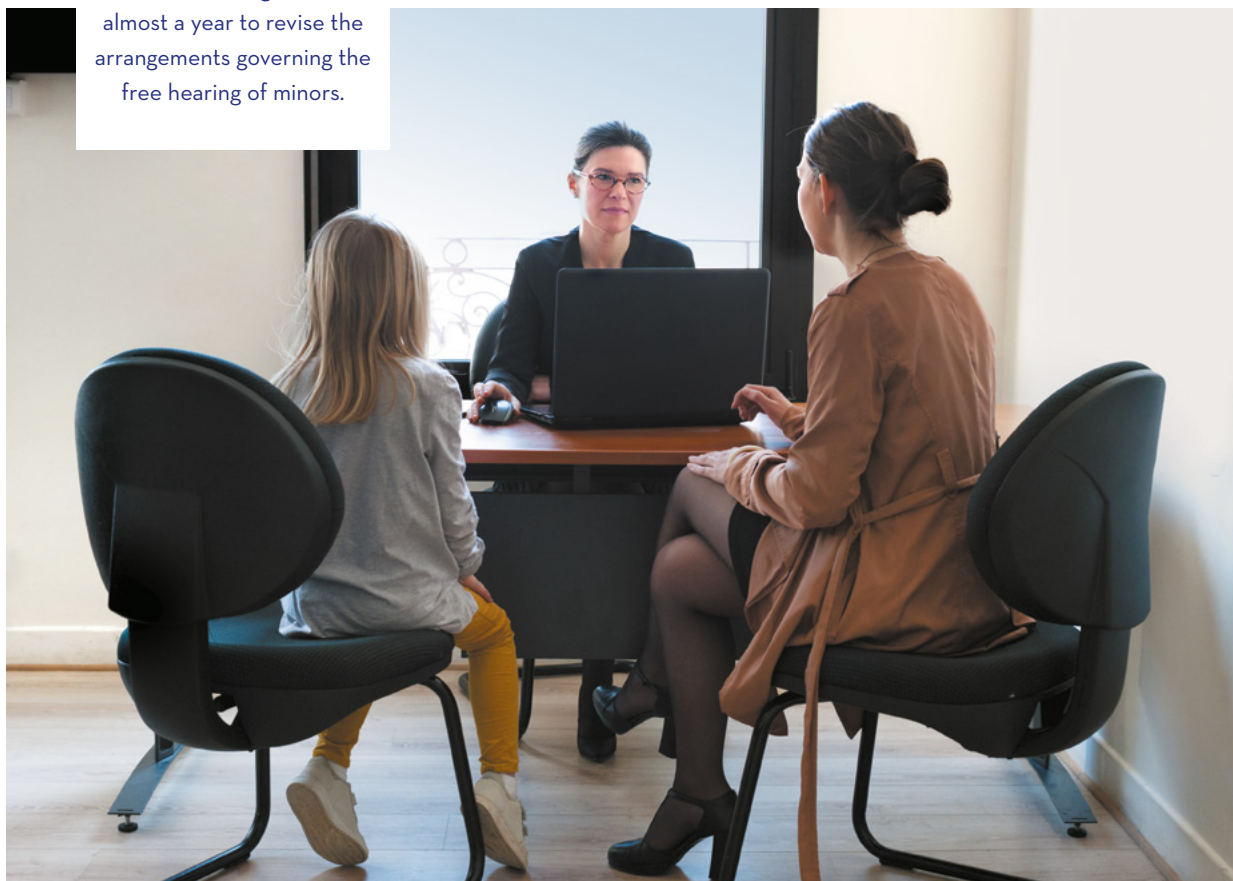
alia, to provide that a minor heard freely is entitled to the mandatory assistance of a lawyer and a medical examination and that his legal representatives must be informed of the measure, these provisions contravened, according to the Applicant, the fundamental principle embodied in the laws of the Republic in the field of juvenile justice.

The Constitutional Council, after restating the fundamental principle embodied in the laws of the Republic on juvenile justice, noted that, according to the contested provisions, the free hearing was conducted in the same way when the person being heard is a minor, regardless of his age. However, the guarantees provided by the legislature were not sufficient to ensure that the minor gave

informed consent to the free hearing, nor to prevent him from making choices that would be contrary to his interests. Consequently, the Constitutional Council ruled that, by failing to provide for appropriate procedures to ensure the effective exercise of the minor's rights in the context of a criminal investigation, the legislature breached the fundamental principle embodied in the laws of the Republic in the field of juvenile justice.

Noting that the immediate repeal of the contested provisions would have had the effect of removing the legal guarantees governing the free hearing of suspected persons, whether adults or minors, with clearly unacceptable consequences, the Constitutional Council postponed the date of their repeal until 1 January 2020.

The Constitutional Council allowed the legislature almost a year to revise the arrangements governing the free hearing of minors.



Geographical closeness to family members for remand prisoners

DECISION
No. 2019-763 QPC

8 February 2019

French Section of
the Observatoire
International des
Prisons (International
Prison Observatory)

[Geographical
closeness to family
members for remand
prisoners awaiting their
appearance before the
trial court in which their
matter will be heard]

[Total non-conformity -
deferred effect -
transitional reservation]

The Constitutional Council was presented by the Council of State with a QPC relating to Article 34 of the 24 November 2009 Prisons Act.

These provisions recognised that accused persons whose case has been investigated and who are awaiting their first appearance before the court in which their matter will be tried may be granted geographical closeness to family members until such appearance. It follows from the established case law of the Council of State that the administrative decision on geographical closeness to family members is necessarily subject to the agreement of the judicial magistrate hearing the case. It also follows that, although an administrative judge exercises oversight of the legality of this decision, he must refrain from reviewing the lawfulness and validity of any adverse opinion of the judicial magistrate, which may constitute its underlying justification.

According to the applicant association, the provisions it was challenging infringed, in particular, the right to an effective judicial remedy. It criticised them for not providing any means of appeal enabling the accused prisoner to contest the opinion on the basis of which the judicial authority may oppose

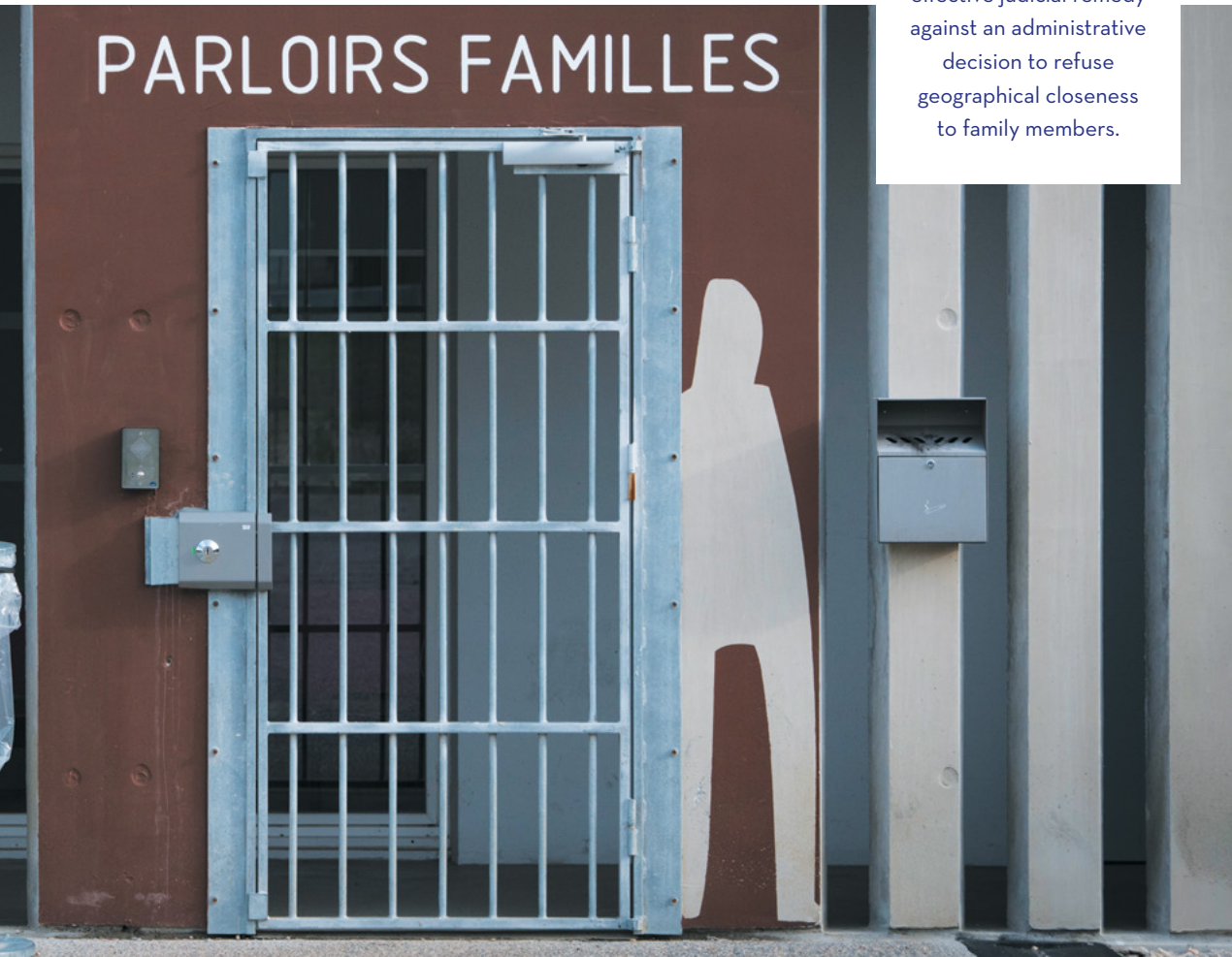
the granting of geographical closeness to family members. It also criticised them for not specifying the reasons that might justify this opposition.

The Constitutional Council recalled that it follows from Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen that the right of the persons concerned to exercise an effective remedy before a court must not be substantially impaired.

The contested provisions therefore failed to comply with the requirements of Article 16 of the 1789 Declaration

In the case under review it held that, since neither the legislative provisions nor the appeal before the administrative court made it possible to challenge the adverse opinion of a judicial magistrate, there was no effective judicial remedy available

The contested provisions did not provide for an effective judicial remedy against an administrative decision to refuse geographical closeness to family members.



against the administrative decision to refuse geographical closeness to family members where such a decision was made in consequence of that opinion. The contested provisions therefore failed to comply with the requirements of Article 16 of the 1789 Declaration.

Noting that the immediate repeal of the contested provisions would have had the effect of depriving accused persons whose investigation has been completed, and who are awaiting their first appearance before the court in which their matter will be tried, of the possibility of securing geographical closeness to family members and that this would have had manifestly excessive consequences, the Constitutional

Council postponed until 1 September 2019 the date of its repeal, in order to enable the legislature to remedy the unconstitutionality that had been identified. In addition, in order to put an end to this unconstitutionality with effect from the publication of its decision, the Council stipulated, by way of a transitional reservation, that it was necessary to rule that adverse opinions adopted on the basis of the disputed provisions by the judicial magistrates after the date of that publication may be challenged before the President of the investigating division under the conditions laid down in the second sentence of the fourth paragraph of Article 145-4 of the Code of Criminal Procedure.

Radiological bone examinations

DECISION
No. 2019-768 QPC

21 March 2019

Mr Adama S.
[Radiological bone
examinations for
the purpose of
determining age]

[Constitutional conformity]

Article 388 of the Civil Code, as amended by the 14 March 2016 Act on the Protection of Children, authorises the use of a radiological bone examination for the purpose of contributing to the determination of a person's age.

In its review of a QPC referred to it by the Court of Cassation concerning these provisions, the Constitutional Council deduced for the first time, from the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution, that there was a requirement to protect the best interests of the child and that minors present in the country should be afforded the legal protection associated with their age. It follows that the rules relating to the determination of an individual's age must be backed by the necessary safeguards to ensure that minors are not wrongly considered to be of adult age.

In the light of the framework thus established, it noted that the contested legislative provisions allow the use of a radiological bone examination to assist in the determination of a person's age. Based on current scientific knowledge, it is established that the results of this type of examination may be subject to a significant margin of error.

The Council noted, however, that only the judicial authority may decide to have recourse to an examination of this kind. The order can only be made if the person



concerned does not have valid identity documents and the age they are claiming is not plausible. The Council specified that it is the responsibility of the judicial authority to ensure that the subsidiary nature of this examination is not overlooked. In addition, such an examination may only take place after the informed consent of the person concerned has been obtained, in a language they understand. In this respect, it cannot be inferred solely from a refusal to submit to a bone examination that a person is of adult age.

The Constitutional Council also noted that, in the guarantees it has established, the legislature has taken into account the

Based on current scientific knowledge, it is known that there may be a significant margin of error in the results of radiological bone examinations.



existence of the margin of error concerning the conclusions of radiological examinations. For one thing, the law requires that this margin be mentioned in the results of these examinations. It has also stipulated that these conclusions cannot constitute the sole basis for determining a person's age. It is therefore for the judicial authority to assess whether the person concerned is a minor or of adult age by taking into account other matters that may have been used to determine that person's age, such as the social assessment or interviews conducted by the child protection services. Finally, if the conclusions of the radiological examinations are at odds with the other

elements of assessment referred to above, and if there is continuing doubt having regard to all the information collected, this doubt must result in the person concerned being deemed to be a minor.

The Constitutional Council considers that the legislature has not breached the requirement to protect the best interests of the child under the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution

The Constitutional Council holds that the competent administrative and judicial authorities must give full effect to all these guarantees.

The Constitutional Council holds that it is for the competent administrative and judicial authorities to give full effect to all these guarantees.

In summary, taking into account the guarantees that surround the use of radiological bone examinations for age determination purposes, the Constitutional Council considers that the legislature has not breached the requirement to protect the best interests of the child under the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution.

With regard to these guarantees, the complaint alleging a breach of the right to health protection is also dismissed, it being noted that the Council must take into account a medical opinion that would advise against a bone examination on the grounds of the particular risks it might present to the person concerned.

Time-barring of public prosecutions

DECISION
No. 2019-785 QPC

24 May 2019

Mr Mario S. [Starting point of the time-barring period for public prosecutions in criminal matters]

[Constitutional conformity]

When the Council of State referred to it a QPC relating to Article 7 of the Code of Criminal Procedure, as interpreted by the Court of Cassation, the Constitutional Council deduced, for the first time, a new constitutional principle from Articles 8 and 16 of the 1789 Declaration of the Rights of Man and of the Citizen.

According to this principle, in criminal matters, it is the responsibility of the legislature, in order to take into account the consequences attached to the passage of time, to lay down rules on the time-barring of public prosecutions that are not manifestly inappropriate to the nature or gravity of the offences.

Pursuant to the provisions of the article that was challenged, the time limit for public prosecutions in criminal matters runs from the day on which the crime was committed. In accordance with the established case law of the Court of Cassation, the statute of limitations for ongoing offences, the material element of which extends over time through the constant repetition of the perpetrator's guilty intentions, runs only from the day on which those offences cease to have effect in their constitutive deeds and in their effects.

The Applicant alleged that these provisions, as interpreted by the Court of Cassation, render a continuous offence exempt from time-barring when the prosecuted party failed to demonstrate that

it had not been committed or that it had come to an end. This allegedly resulted, in particular, in a breach of a fundamental principle recognised by the laws of the Republic, which the Applicant requested the Constitutional Council to acknowledge, requiring the legislature to provide for a limitation period for public proceedings for offences “the nature of which is not to be exempt from time-barring”.

The Constitutional Council initially rejected the thesis that there was a fundamental principle recognised by the laws of the Republic of time-barring public



It is the responsibility of the legislature, in order to take into account the consequences linked to the passage of time, to lay down rules on the time-barring of public prosecutions which are not manifestly inappropriate to the nature or gravity of the offences

With this decision, the Council deduced a new constitutional principle from Articles 8 and 16 of the 1789 Declaration.



prosecutions in criminal matters. In this regard it noted that, while the vast majority of the texts on criminal procedure in the national legislation enacted before the entry into force of the 1946 Constitution contain provisions on the time-barring of public prosecution in criminal matters, the Acts of 9 March 1928 and 13 January 1938 amending the Military Justice Code for the Army and the Navy respectively both excluded time-barring for certain crimes. In a new and unprecedented way, the Constitutional Council therefore considered that it follows from the principle of the necessity of penalties, protected by Article 8 of the 1789 Declaration, and from the guarantee of rights, proclaimed by Article 16 of the same Declaration, a principle according to which, in criminal matters, it is the responsibility of the legislature, in order to take into account the consequences of the passage of time, to establish rules on the time-barring of public prosecutions which are not obviously inappropriate to the nature or gravity of the offences. The Constitutional Council thus clarified its case law on the time-barring of public prosecution, in particular its Decision No. 98-408 DC of 22 January 1999, in which it ruled that the non-applicability of time-barring to “the most serious crimes affecting the entire international community” is in compliance with the Constitution.

In the light of the constitutional requirement thus enshrined in the contested provisions as interpreted by the Court of Cassation, the Constitutional Council held that the sole effect of these provisions is to determine the starting point of the time-barring period for ongoing offences on the day on which the offence ends in its constituent deeds and in its effects. By providing that such offences cannot begin to be time-barred while they are in progress, the provisions that were challenged lay down rules which are not manifestly inappropriate to the nature of such offences. The Constitutional Council further noted that, contrary to what the Applicant claimed, these provisions do not make it impossible for a person prosecuted for a continuing offence to prove that the offence has ended, as the criminal court has the discretion to assess the evidence submitted to it in order to determine the date on which the offence ceased.

Register of unaccompanied minors

DECISION
No. 2019-797 QPC

26 July 2019

Unicef France and others [Creation of a database of foreign nationals who state that they are unaccompanied minors]

[Constitutional conformity]

The Constitutional Council had occasion to review, by way of a QPC referred to it by the Council of State, the creation of a register of foreign nationals who declare themselves to be unaccompanied minors.

On 16 May 2019, the Constitutional Council was asked by the Council of State to make a priority preliminary ruling on the issue of constitutionality relating to compliance with the rights and freedoms guaranteed by the Constitution under Article L. 611-6-1 of the Code on the Entry and Residence of Foreigners and the Right to Asylum, as amended by the 10 September 2018 Act No. 2018-778 for Managed Immigration, Effective Right to Asylum and Successful Integration. These provisions create a database containing the fingerprints and photographs of foreign nationals who state that they are minors and are temporarily or permanently deprived of the protection of their families. Such data may be collected as soon as the foreigner requests protection as a minor. In such a case, the collection, recording and storage of a foreigner's fingerprints and photographs enables the authorities responsible for assessing their age to check whether such an assessment has not already been carried out.

The Applicants and others associated with the referral argued that these provisions violated the constitutional requirement to protect the best interests of the child and the right to privacy,

in particular by failing to sufficiently define the concept of "persons found to be minors". They claimed that these deficiencies would have made it possible for the person concerned to be expelled on the basis of an incorrect administrative assessment of their age, even though they were indeed a minor. In addition, they argued that, by not limiting the purpose of the database solely to child protection, the legislature would not have ruled out the re-use of the data for the purpose of combating the illegal entry and residence of foreign nationals in France.

The Constitutional Council examined the contested provisions both in the light of the requirement to protect the best interests of the child arising from the tenth and eleventh paragraphs of the Preamble to the 1946 Constitution and the right to privacy implied by the freedom proclaimed in Article 2 of the Declaration of the Rights of Man and of the Citizen of 1789.

It noted that these provisions have neither the purpose nor the effect of amending the rules relating to the determination of an individual's age and the forms of protection attached to the status of a minor, i.e. the protection measures which prohibit removal procedures and which allow the assessment to be challenged before a judge.

The Constitutional Council ruled, in this respect, that the adult age of an individual cannot be inferred either from

Data relating to persons recognised as minors may not be stored for longer than is strictly necessary for them to be taken into charge and appropriately orientated

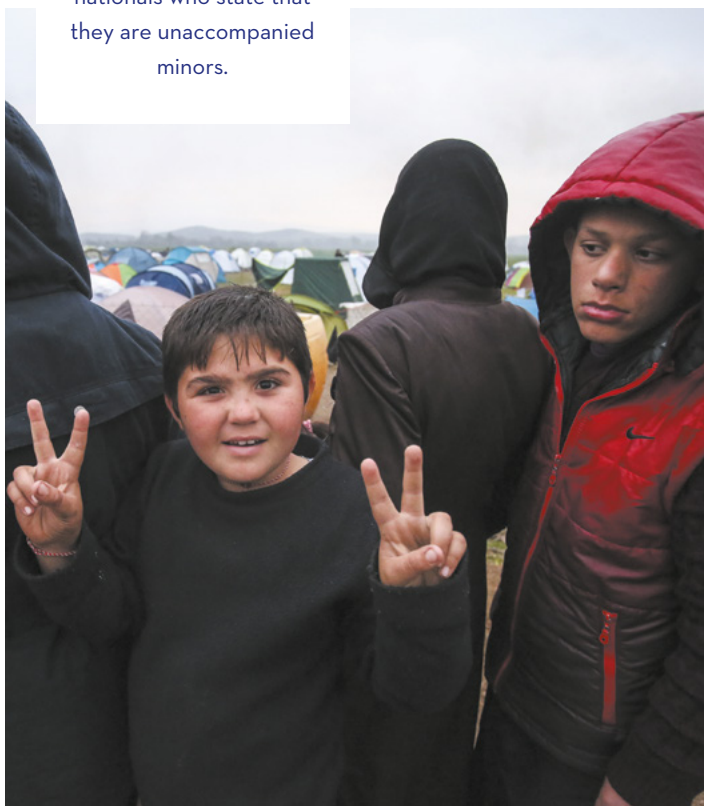
their refusal to allow their fingerprints to be taken or from the mere fact that an authority responsible for assessing their age has found that they are already recorded in the database in question or in another database which draws on its contents. Therefore, the provisions do not breach the constitutional requirement to protect the best interests of the child.

Furthermore, the Constitutional Council relied on the fact that, by avoiding filings of applications for protection by adults which had previously been rejected, the automated processing set up by the contested provisions aims to facilitate the work of the authorities responsible for the protection of minors and to combat the illegal entry and illegal residence of foreign nationals in France. In so doing, and while there is no constitutional provision in principle preventing automated processing from pursuing several purposes, the legislature, by adopting the contested provisions, intended to implement the constitutional requirement to protect the best interests of the child and to pursue the

constitutionally valid objective of combatting illegal immigration.

Lastly, the Constitutional Council noted that the data collected, which exclude the use of any means of facial recognition, are those needed to identify the person and verify that they have not already been the subject of an age assessment. Data relating to persons recognised as minors may not be stored for longer than is strictly necessary for them to be taken into charge and appropriately orientated. The Constitutional Council concluded that, by adopting the contested provisions, the legislature struck an appropriate balance between the protection of public order and the right to privacy.

The database will contain the fingerprints and photographs of foreign nationals who state that they are unaccompanied minors.



International Relations

The Constitutional Council is an accessible institution. Every year, it liaises with constitutional courts from other countries, and hosts counterparts from around the world at the Palais-Royal. Such exchanges among constitutional judges are indispensable to engage in joint reflections on case law and gain perspective on decisions within an ever-changing international context.

Constitutional Councils

2018-2019 international

Hosting foreign partners



■ The Constitutional Council hosted a delegation from the Supreme Court of Justice of the Mexican Nation for a working meeting on 19 November 2018. Chaired by Nicole Maestracci, a member of the Constitutional Council, the exchanges made it possible to combine legal and jurisprudential approaches on three topics of shared interest: integration of supranational standards into national law, new technologies and fundamental rights, constitutional procedures and transparency. This dialogue helped strengthen the relationship of cooperation between the two institutions.



■ On 28 January 2019, President Fabius hosted the Chancellor of Justice of Finland, Mr Tuomas Pöysti, whose mission is to ensure the legality of Finnish draft legislation and government acts. Their meeting allowed for a comparative perspective on French and Finnish judicial models, environmental protection and protection of fundamental rights. President Fabius and Mr Pöysti also discussed developments in judicial review in France and Finland, a country that has so far only practised *ex ante* judicial review.

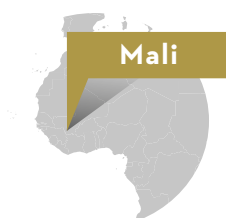


■ On 17 April 2019, Mr Mohamed Odeh Saleh al-Ghazo, President of the Judicial Council, and Mr Mahmoud Mohammed Salama al-Ababneh, President of the High Administrative Court and Vice-President of the Judicial Council of Jordan, were received at the Constitutional Council by President Fabius. Organised in the context of Jordanian judicial reform, the visit of these high-

ranking judicial personalities served to introduce them to the role and workings of the French Constitutional Council.



■ On 6 May 2019, a delegation from the Constitutional Council of the Kingdom of Cambodia, led by its Secretary General, was received at the French Constitutional Council for a day devoted to presentation of the Documentation and IT Departments. This day-long event was an opportunity for the members of the delegation, who sought inspiration from the organisational system of the French Constitutional Council, to participate in a practical workshop on research and legal monitoring work conducted by the Documentation Department.



From 20 to 23 May 2019, the Constitutional Council hosted a delegation from the Constitutional Court of Mali, led by Judge Bamassa Sissoko. The Malian Court, whose jurisdiction could be extended with the establishment of an *ex post* judicial review mechanism akin to the French QPC, wished to discover how the Constitutional Council works. This immersion in the heart of the institution enabled the members of the delegation to participate in the work of the General Secretariat Departments.

brought together representatives of various Supreme Courts for themed panel discussions. President Fabius was invited to participate in the panel devoted to sustainable development, with a specific focus on “legal responses to globalisation of environmental issues”. President Fabius also took the opportunity to meet with several high-ranking figures from the Argentine legal community. He spoke with the new President of the Supreme Court of Argentina, Carlos Rosenkrantz, the Minister of Justice and Human Rights, Germán Garavano, and the Minister of Foreign Affairs and Worship, Jorge Faurie.



principle, depending on national approaches, legal certainty irrigates all branches of law. All constitutional courts are mindful of this concept. Participants engaged in rich debates on the role of member courts and recent developments in case law in this area. Ms Luquiens spoke during the event on “Controlling the effects of rulings of unconstitutionality in the case law of the French Constitutional Council”. Alongside this event, President Fabius was received at the Canadian Supreme Court in Ottawa by Chief Justice Richard Wagner, who is eager to strengthen ties with the French Constitutional Council. He also met with several Canadian figures, including Mr Justin Trudeau, Prime Minister of Canada, and Ms Valérie Plante, Mayor of Montreal.

Travel abroad



Mr Laurent Fabius, President of the Constitutional Council, travelled to Buenos Aires, Argentina from 8 to 10 October 2018 to participate in the conference of the Supreme Courts of the G20 countries, known as the J20 conference. Organised by the Supreme Court of Argentina, this international event focused on “the role of the judiciary in achieving just and sustainable development” and

Mr Laurent Fabius, President of the Constitutional Council, and Ms Corinne Luquiens, a member of the Constitutional Council, travelled to Canada from 29 April to 2 May 2019 to attend the 8th Triennial Convention of the Association of Constitutional Courts using the French Language (ACCPUF). Organised with the support of the Supreme Court of Canada, this 8th Congress provided the occasion for the association to amend its by-laws and name, becoming the Association of Francophone Constitutional Courts (ACCF). The convention brought together more than 35 leaders and representatives of member courts to discuss “the Constitution and legal certainty”. Whether or not it is explicitly recognised as a constitutional



**Questions to
the Right
Honourable
Richard Wagner,
Chief Justice of
Canada**

On 2 May 2019, you became the new President of the Association of Francophone Constitutional Courts (ACCF) during the association's convention in Montreal. What are the aspirations of such a structure?

ACCF now brings together 48 constitutional courts and equivalent institutions from Africa, Europe, America and Asia. Its by-laws define its mission as “promoting intensification of the rule of law by developing relations among institutions in French-speaking countries which, whatever their title, enjoy guaranteed independent status and, in particular, competence to adjudicate, in the final instance, disputes concerning conformity with the Constitution, their rulings endowed with *res judicata* authority”. In practice, actions to promote the rule of law take the form of legal cooperation. As such, under the aegis of ACCF, the constitutional courts of the French-speaking world played a pioneering role in adopting the Bamako Declaration on Democracy in 2000. Through this important document Francophone Heads of State and Government committed to strengthening institutions essential to the rule of law. ACCF also pursues a mission of technical cooperation, providing legal publications on its website and offering assistance to member institutions for their communication, as well as donating books.

More broadly, the association aims to facilitate exchanges among its members by organising regular meetings, exchanges of ideas and experiences on specific topics. I firmly believe that all of these actions contribute to promoting the rule of law and public confidence in justice systems.

You will serve a three-year term as President of the association. What do you intend to do during this period?

The Supreme Court of Canada is proud to be a member of ACCF and has been involved in the association, directly or indirectly, since its inception. Constitutional justice stands out as one of the keys to democracy, and ACCF's main mission – to work towards strengthening rule of law – is among the noblest goals in the world. I am a fervent believer in this quest. That is why I accepted the presidency of ACCF, and the conference we recently attended in Montreal further heightened my conviction that ACCF is an important instrument of solidarity within the French-speaking world.

By embracing the commitments made in the Bamako Declaration, we aim in particular to promote the judicial independence of our institutions to ensure impartial exercise of their mis-

“The rule of law cannot exist without public trust in justice”

sions. We also aspire to promote efficient and accessible justice and to implement the principle of transparency as a rule for the functioning of institutions. Finally, we seek to contribute to the emergence of a sense of citizenship oriented towards development, progress and solidarity.

These are the topics on which I intend to focus throughout my presidency. Strengthening the rule of law necessarily requires exchange of ideas – not only between members of institutions in the French-speaking world, but also with the citizenry itself. Fundamentally, individuals must be provided with the means to learn about their rights and responsibilities, and to better understand the crucial importance of law, justice and judicial independence in a free and democratic society. This is essential, as the rule of law cannot exist without public trust in justice. That trust must be earned and cannot be maintained in the absence of independent and impartial courts.

As a side event to the latest ACCF convention, you invited President Fabius to the Supreme Court of Canada as a testimony to the friendship that unites the two institutions. How exactly would you describe the links between the Supreme Court of Canada and the French Constitutional Council?

It should first be noted that Canada and France have the honour of celebrating 90 years of diplomatic relations this year. With relations between countries appearing to be increasingly fragile, the successful union of our respective nations is remarkable. This is due in part to a shared history and language, but also and above all, shared values. Our two countries believe in respect for the rule of law, democracy and the importance of fundamental and human rights. They are open to the world and celebrate diversity and international exchanges.

Just as France and Canada have long been partners, the Supreme Court of Canada enjoys a privileged relationship with the French Constitutional Council. Our two institutions are founding members of ACCF. Delegations from the Supreme Court have been regularly welcomed by the Council and vice versa. These meetings always present opportunities for experience-sharing, particularly regarding the role and functioning of our respective institutions.

The Constitutional Council and the Supreme Court of Canada have undertaken shared experiments in the past, including a recent initiative concerning hearings held outside the capital. Could you expand on this idea?

First of all, I would like to mention that President Fabius and I each had the idea of holding hearings outside our respective capitals independently, without our having discussed it before. This year, the French Constitutional Council held hearings outside of Paris, in Metz and Nantes. Meanwhile, the Supreme Court of Canada will hold hearings this fall in Winnipeg, Manitoba, a first in the Court's history.

This approach reflects the importance of ensuring access to justice for all. As the highest court in Canada and the ultimate guardian of the Canadian Constitution, the Supreme Court enjoys a privileged position when it comes to preserving the rule of law. This status goes along with a significant responsibility, particularly in terms of accessibility. For several years now, Canadians have been able to watch our hearings on television or on our website, read our decisions online and follow our activities on social media. However, Canada is a big country, and not everyone can travel to Ottawa to observe the Court at work.

This project, initiated by the Court, aims to bring the institution closer to citizens in order to maintain public confidence in the justice system. It also serves an educational objective, and the Justices will use their time in Manitoba to meet with several members of the legal community, Manitoban First Nations communities, Franco-phone communities and, of course, the general public.

In its new journal, Titre VII, the Constitutional Council devotes considerable attention to international points of view. This is essential to gain a sense of perspective and enrich debates on constitutional law. Specifically dedicated to this approach, the Autour du Monde (Around the World) section welcomes viewpoints on experiences outside of France, articles on comparative law, as well as a doctrinal review of foreign constitutional law. In issue No. 1 of Titre VII, published in October 2018, the Autour du Monde section explores “the meaning of a constitution” as seen by different countries. Below is a brief overview of selected articles, the full text of which can be found on the Constitutional Council website.

Constitution without borders

THE MEANING OF A CONSTITUTION AS SEEN FROM GERMANY



by

Aurore Gaillet

**Professor of public law, Université
Toulouse 1 Capitole (IRDEIC-CDC),
junior member of the Institut
Universitaire de France**

The respective approaches to celebrating the 60th anniversary of the French Constitution and the 70th anniversary of the German Basic Law provides an opportunity to propose a German viewpoint. Following a presentation of the peculiar notion of “constitution” in the light of German constitutional history (19th century and Weimar Republic), the article focuses on the more contemporary debates, tracking the evolution of the Basic Law, from its difficult start in 1949 to its close relationship with the Federal Constitutional Court. Finally, the concluding remarks recall the spirited debates in Germany around the idea of a European constitution.

THE MEANING OF A CONSTITUTION AS SEEN FROM AFRICA



by

Fabrice Hourquebie

Professor of public law, Université
de Bordeaux, Director of
the Doctoral Law School

African constitutions inspired great hope post-1990, as winds of constitutionalism swept across the continent. Their promising content, in terms of both the distribution of power and the protection of fundamental rights, imbued the notion of constitution with a sacred character that was absent following independence of the various countries. However, by letting the letter of the law take precedence over the spirit of the law, these constitutions also participated in distorting the in-depth meaning of the “law of the land”: the supreme law, sometimes instrumentalised by governments in power; sometimes destabilised by making amendments the norm despite an outward display of rigidity; sometimes threatened from within by content liable to spark crises; and sometimes even rivalled by political agreements of questionable legal weight. This de-legitimisation of the common meaning of constitutions reveals a hidden meaning that now imparts uncertainty into the very notion of constitution in Africa.

THE ITALIAN CONSTITUTION: THE HIGHEST EXPRESSION OF RULE OF LAW EXPOSED TO POLITICAL CROSS-WINDS



by

Paolo Passaglia

Professor of comparative law at
the Università di Pisa, scientific
coordinator of the comparative law
section of the Research Department
of the Constitutional Court of the
Republic of Italy

Born from the tragedies of the fascist dictatorship and the Second World War, the 1947 Constitution introduced altogether new principles that proved extremely difficult to implement, particularly considering the political conditions that characterised the early history of the Republic of Italy. After delayed implementation, the Constitution weathered a debate regarding a possible overhaul. Although its outcome in terms of concrete reforms was modest, this debate had the effect of lowering the prestige of a Constitutional Charter that has long been the cornerstone of the system, the act which brought together a majority of political forces despite their differences.

Upholding human rights

Guido Raimondi, President of the European Court of Human Rights from 2015 to 2018, recounts his life in the service of fundamental rights: a valuable and insightful analysis from a direct witness to democratic developments in Europe over the last twenty years.

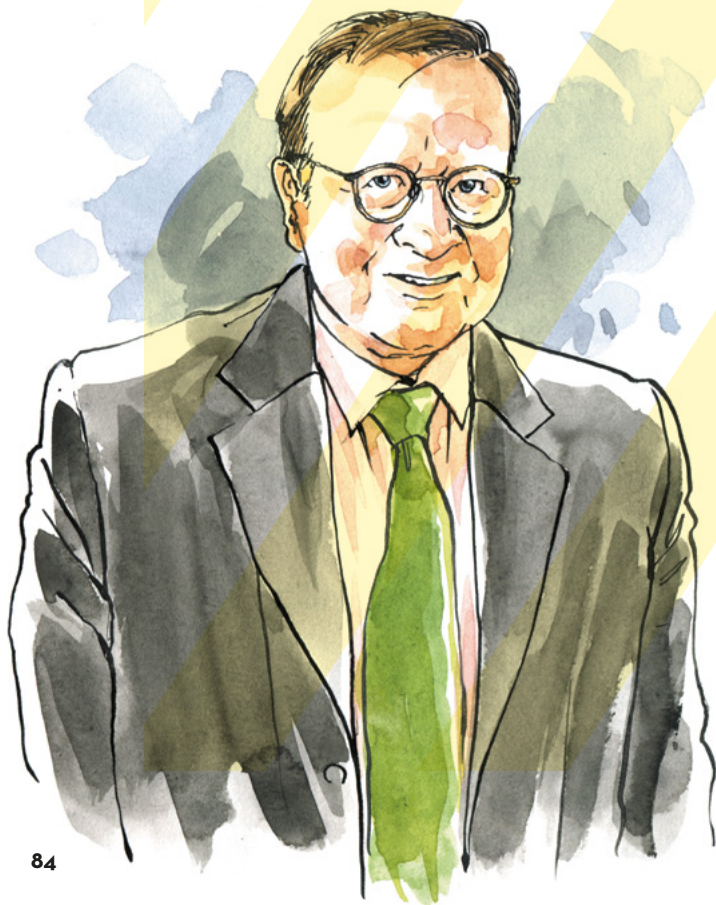
In 1989, exactly thirty years ago, I moved to Strasbourg to take up my position as co-agent of the Italian Government before the European Court and Commission of Human Rights. As a magistrate for more than 10 years, I never imagined that these duties, which were new to me and traditionally entrusted to a judicial magistrate in Italy, would change the course of my life, leading me to spend the majority of my career far from my native country. In the end, France became my second home and Strasbourg my adopted city.

In the late 1980s, the European human rights protection mechanism bore little resemblance to what it was to become as of 1998. It was indeed a remarkable system that represented a singular step forward in guaranteeing respect for human rights in Europe. It was not perfect, however, and reform was essential, particularly to cope with the impending enlargement of the Council of Europe to include the countries of Central and Eastern Europe.

As part of my duties, I had the honour of participating in the negotiations underway at that time within the Human Rights Steering Committee of the Council of Europe, which led to the adoption of Protocol No. 11. It was a thoroughly fascinating experience, as the aim was nothing less than an in-depth reform of system. We had a twofold ambition: on the one hand, to guarantee the right of individual petition as a mandatory, and no longer optional, feature of the system, and on the other hand, to eliminate the decision-making role of the Committee of Ministers, a purely diplomatic body. The Court's jurisdiction had to become compulsory, and it was essential to put the State and the applicant on an equal footing. The goal, in some sense, was to take an extremely complex mechanism and make it both more democratic and more intelligible for European citizens.

After lengthy negotiations during which radically different conceptions were opposed, we reached a compromise that all parties were able to accept: those who were in favour of a single Court, as well as those who preferred a two-tier system with a mechanism allowing for appeal of Commission decisions before the Court. Protocol No. 11 was the fruit of this compromise, establishing the single and permanent Court twenty years ago.

Back at the Italian Court of Cassation, I remained involved with the Court in Strasbourg, continuing to take a close interest in the body and writing about it. It was therefore only natural that in 2010, when I was acting as legal adviser to the International Labour Office in Geneva,



“The Court’s jurisdiction had to become compulsory, and it was essential to put the State and the applicant on an equal footing”

I applied for the position of judge at the European Court of Human Rights for Italy. I was elected and took office in May 2010, happy to finally participate in this unique system to which I had long been committed. I was also happy to return to a country and a city that had become very dear to me, and where my two daughters had grown up. Our familiarity with (and love for) French language and culture, which were already important to our family, grew even more pronounced, my wife saying that her heart is in Strasbourg.

Upon joining the Court as a judge, I discovered a perfectly oiled mechanism organised so as to receive a great number of petitions. It must be said that the Council of Europe was utterly transformed. The institution once made up of some 20 Western European countries had given way to a truly pan-European organisation, now comprising almost all the countries of the former communist bloc. As for the new European mechanism for the protection of human rights, it has faced many challenges since its creation in 1998.

First and foremost, it had to rise to a quantitative challenge due to its attractiveness. Indeed, the number of petitions to the new Court quickly reached such a level that, around 2010, it was common to hear the Court described as a “victim of its success”. In 2011, we had a massive 160,000 petitions pending, an astronomical figure that made us fear for the survival of the system.

Naturally, this flood of applications prevented the Court from devoting itself, within a reasonable timeframe, to the most serious cases, i.e. those in which serious human rights violations had been committed, or those which stood out for meaningful questions of interpretation of the Convention. Rapid reform was essential. Thus began the negotiation of Protocol No. 14, followed by the Interlaken Process, designed to reform the system for greater efficiency, while preserving the right of individual petition, the cornerstone of the European mechanism for the protection of human rights.

The key tools to deal with this avalanche of cases included the single-judge procedure, which came about through implementation of Protocol No. 14, as well as increased use of the pilot judgements procedure and, above all, modernisation and streamlining of our working methods. Today, there are just over 58,000 petitions pending before the European Court of Human Rights.

The other and certainly the biggest challenge that had to be dealt with during this growth phase concerned the quality and authoritative-ness of case law. In this respect, the results are quite positive. Looking back at the changes that have taken place in Europe over the past twenty years, one sees many reforms introduced in Member States as a result of the rulings of the European Court of Human Rights. This influence extends even beyond European borders. For example, in 2018, judges of the Supreme Court of India handed down a decision declaring section 377 of the Indian Criminal Code, which condemns sexual relations between persons of the same sex, illegal. This historic decision, long awaited by human rights defenders, provoked worldwide commentary. In addition to the decision itself and the progress it represents for the persons concerned, it is interesting to note that the Supreme Court in Delhi repeatedly cited in its ruling the decisions of this Court in the well-known cases of *Dudgeon*, *Norris*, *Modinos* and *Oliari*, which were instrumental in the fight to end discrimination against LGBT individuals. This stands out as further proof that our case law serves as a model outside European borders. It also demonstrates the universality of human rights, despite divergent cultures and traditions.

Nonetheless, these past twenty years have not been easy for our continent. Today’s world is not the world of 1998. We have all witnessed, often in helpless angst, the rise of terrorism, a severe economic crisis and massive migration. Each of these issues raises questions to which the Court was asked to respond. It did so, reaffirming the importance of fundamental rights in this new context.

At the same time, we have been called upon to rule on original questions, often related to scientific developments and the emergence of new technologies. At times, the Court has had to arbitrate between different rights protected by the Convention, always giving precedence to the interpretation matrix developed over time. Many sensitive cases tried over the past two decades have captured the full attention of national authorities, civil society and the media. The Court has never lost sight of its responsibility. What has changed compared to the previous system is precisely their permanent nature, which places us in a position similar to that of national high courts



“These three and a half years at the head of the European Court of Human Rights have certainly been among the richest and most intense in my professional life”

in Member States. This congruence has certainly contributed to bringing us closer to them.

As for myself, I continued my work at the Court, where my colleagues honoured me by electing me first as Section President and Vice-President, and finally as President of the Court as of 1 November 2015. These three and a half years at the head of the European Court of Human Rights have certainly been among the richest and most intense in my professional life. It is difficult to single out a specific individual or proceeding among the important cases I have chaired and the exciting personalities I was able to meet.

Nevertheless, I would say that the adoption of Protocol No. 16 was a momentous step forward and a major development in the European system of human rights protection. This treaty was conceived as a new element in the dialogue between the highest jurisdictions in the various Member States and the Court in Strasbourg. It effectively allows these high courts to request advisory opinions from the Court on questions of principle relating to the interpretation or application of the rights and freedoms set out in the Convention. The aim is to enlighten national courts without forcing their hand. Unfortunately, when I assumed the Presidency of the Court, the Treaty was struggling to obtain the ten ratifications necessary for its entry into force.

The decisive moment was my meeting with French President Emmanuel Macron. When he received me on 13 June 2017, at my request, he expressed his strong will to address this essential issue, informing me of his intention to come to the Court to inform me of his response. He fully understood the political significance and the impact of this treaty for the European mechanism for the protection of human rights.

On 31 October 2017, he became the first French Head of State to address the Court. He had made up his mind on Protocol No. 16. In his speech, which I would unhesitatingly describe as historic, he announced France's decision to ratify Protocol No. 16 and said that dialogue among judges “will undoubtedly be strengthened once Protocol No. 16 enters into force”, adding that Protocol No. 16 would complement “the legal structure built around the European Convention on Human Rights”. As per the desire expressed by President Macron in his

speech, France's ratification triggered the entry into force of this instrument on 1 August 2018.

It is quite remarkable to note that, only a few weeks after the Protocol entered into force, the French Court of Cassation called upon us for an initial advisory opinion relating to questions concerning surrogate motherhood. This was a challenge for us, but in my view we showed ourselves equal to the task. Indeed, within a mere six months, the Court was able to deliver on this delicate and controversial issue an opinion that I believe was well accepted by both sides. On a personal note, I am pleased, during my term of office, to have witnessed the entry into force of this Protocol, a pivotal agreement from the standpoint of the European system of human rights protection. Above all, I am honoured to have chaired the Grand Chamber responsible for issuing the first advisory opinion.

President Macron was right to say that Protocol No. 16 would establish “an even closer dialogue between national jurisdictions and the Court”. This dialogue has existed for many years, during visits from national Supreme Courts to our institution, as well as during official visits of the President of the Court to the Member States. These visits were particularly important events during my term as President of the Court.

My predecessor put forward the idea of a network of high courts. I am pleased to have contributed to its development and success, as more than 75 courts had joined this network by the end of my term. Above all, these close contacts with high courts, whether constitutional or supreme courts, gave me the opportunity to meet people whom I shall never forget.

This was particularly the case with Laurent Fabius, President of the French Constitutional Council. I was quite moved by his choice, just a few weeks after his appointment, to make an official visit to the Court with a view to strengthening the ties between our two institutions. When he launched the *Nuit du Droit* (Law Night) at the Constitutional Council and invited me to speak, I immediately and enthusiastically accepted his invitation to give a presentation on the Court's case law at a round table devoted to the fight against terrorism, accompanied by Robert Badinter and Bernard Cazeneuve.

For my last solemn reception to mark the beginning of the Court's judicial year, it was with no misgivings that I invited President Laurent Fabius, a privileged witness and actor in the history of France and the world at large, as our guest of honour. He agreed to address the presidents of the high courts of the 47 Member States of the Council of Europe. I was struck by the close links between our two speeches.

Personally, I noted that for the men and women of my generation, once democracy was established, there was no turning back. But I remarked that we were witnessing the emergence of a phenomenon of social disenchantment that could lead to a democratic collapse. I also noted that, for younger generations, immediate commitment to the idea of human rights was no longer self-evident. In many countries, voters seem to be breaking away from their political systems. Citizens' disaffection with the democratic model could thus facilitate the spread of extremist discourse, and in some cases the rise to power of leaders who question the very foundations of pluralist democracy. This is where the dismantling of democracy I referred to takes place. It starts with attacks on the rights of the opposition and the independence of the judiciary, then the press is muzzled, and sometimes opponents are even imprisoned. Policies aimed at eliminating checks and balances attempt to weaken or even eliminate institutional actors that are essential to the democratic process. In their eyes, the judiciary, the press, and the opposition become the common foe.

This Court is obviously a direct witness to such developments. For instance, the increasing number of convictions for violations of Article 18 of the Convention is a clear indication of the regression of the rule of law. This article provides that restrictions to the rights and freedoms guaranteed by the European Convention on Human Rights shall not be applied for any purpose other than those for which they have been prescribed. This provision, which is essential in a pluralist democracy, has been violated only 12 times in its history, but five violations occurred in 2018 alone. This is a telling, and disturbing, symptom. Without pointing a finger at any specific country, we see that the objective behind such violations is often to silence an opponent, to stifle political pluralism, which is a characteristic of a "truly democratic political system".

President Fabius' speech addressed my concerns exactly; our analyses perfectly reflected each other. Indeed, Laurent Fabius observed the significant number of violations of fundamental rights in Europe, calling into

question the independence of the judiciary, freedom of the press, access to asylum, arrests of political opponents and homophobic violence. He noted that as these threats appeared, attacks against high courts were also on the rise. He contended that the enemies of the rule of law want brute force to prevail and that they attack institutions and judges in pursuit of this goal. Finally, Laurent Fabius rightly recalled that "resistance to government folly calls for legal and judicial attention at all times; the sustainability of the rule of law depends to a large extent on this resistance".

These words struck everyone in the room, and they resonate strongly with me.

That was one of the greatest moments of my presidency, and one reason why I am happy to offer this personal account at the request of President Fabius, a statesman, a great lawyer and a faithful friend of the European Court of Human Rights.

September 2019

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

Publication Director: Laurent Fabius

Editorial coordination: Sylvie Vormus, Florence Badin

Design and production: Agence Cito

Translation: Corporate Editions

Printing: Frazier

Illustrations: Titwane (p.2, p.3, p.31, p.44, p.84)

Photo credits: Benoît Teillet (inside front and back covers) •

Eric Feferberg / AFP Photo (p.4, p.7) • Geoffroy Van der Hasselt

(p.21, p.22, p.25) • Istock (p.38, p.45, p.53, p.64, p.67, p.70, p.72)

• Jean-Sébastien Evrard / AFP Photo (p.41) • Denis Charlet /

AFP Photo (p.42) • Daniel Pier / AFP Photo (p.50) • Stéphane

de Sakutin / AFP Photo (p.60) • Franck May / AFP Photo (p.63)

• Gérard Julien / AFP Photo (p.69) • Nicola Economou / AFP

Photo (p.75) • Supreme Court of Canada (p.80)

Opinions expressed in the points of view and those of outside
contributors belong solely to their authors.

Keep up-to-date with developments at the Constitutional Council on:

www.conseil-constitutionnel.fr, Twitter and Facebook.



