

PRESS RELEASE

Decision No. 2021-828 DC of 9 November 2021

(Law on various public health surveillance provisions)

The Constitutional Council received a referral for six articles of the law containing various public health surveillance provisions, and censures the article relating to the access of school directors to health data concerning pupils, as well as the provisions giving power to issue ordinances

In its decision no. 2021-828 DC of 9 November 2021, the Constitutional Council ruled on certain provisions of the law containing various public health surveillance provisions, which it had received in four referrals, two of which came from more than sixty Members of Parliament and the other two from more than sixty Senators.

*The criticism was directed at Articles 1, 2 and 6 of this law extending until 31 July 2022, respectively, the applicability of the legal regime known as the public health state of emergency, the period during which the Prime Minister may take certain measures falling under the regime for exiting the public health state of emergency, as well as the application of the information systems implemented to combat the Covid-19 epidemic.

- With regard to the extension of the legal framework organising the public health state of emergency regime, the Constitutional Council's decision notes that the Constitution does not exclude the possibility for the legislator to provide for a public health state of emergency regime. In this situation, the legislator must ensure the reconciliation between the objective of constitutional value of protecting health and the respect of the rights and freedoms recognised for all individuals who live in the territory of the French Republic.

In this respect, the Constitutional Council notes that Article 1 of the law referred for review merely postpones the end of the provisions organising the legal framework of the public health state of emergency until 31 July 2022. This article thus has neither the purpose nor the effect of declaring a public health state of emergency or extending its application.

Even so, on the one hand, such an emergency can only be declared on all or part of the national territory, as provided for in Article L. 3131-12 of the Public Health Code, “*in the case of a public health catastrophe that puts the population’s health in danger due to its serious nature.*” It is then declared by decree in the Council of Ministers, which can be challenged before the administrative court. Furthermore, this state of emergency, after a delay of one month, can only be extended by a law that sets the duration, after the issue of an opinion by the committee of scientific experts, provided for by Article L. 3131-19 of the same code. This law may be subject to review by the Constitutional Council.

On the other hand, in the event of the implementation of a public health state of emergency, the measures that may be taken by the regulatory power may only be taken for the sole purpose of guaranteeing public health. They must be strictly proportionate to the public health risks faced, and appropriate for the circumstances of time and place. The state of emergency is ended without delay when the measures are no longer necessary. The court is responsible for ensuring that the measures are appropriate, necessary, and proportionate to the result they are pursuing.

- With regard to the extension of the period during which the Prime Minister may, on the one hand, take certain measures in the interest of public health and for the sole purpose of combating the spread of the Covid-19 epidemic and, on the other hand, make access to certain places, establishments, services or events subject to the presentation of a “*health pass*”, the Constitutional Council held, firstly, that the legislator intended to allow the public authorities to take measures aimed at combating the spread of the Covid-19 epidemic.

The legislator considered, in particular with regard to the opinion of 6 October 2021 of the committee of scientific experts provided for in Article L. 3131-19 of the Public Health Code, that a significant risk of the epidemic spreading nationwide would persist until 31 July 2022.

It should be noted that the Constitutional Council does not have a general mandate for judgements that is similar to that of Parliament, and that it is not in its remit to call into question the legislator's evaluation of this risk, as soon as, as in this case, this evaluation is not, to current knowledge, clearly inadequate concerning the current situation.

Secondly, the Constitutional Council notes that, on the one hand, the measures that are likely to be announced as part of this regime can only be implemented in the interest of public health, and for the sole reason of limiting the propagation of the Covid-19 epidemic. They must be strictly proportionate to

the public health risks faced, and appropriate for the circumstances of time and place. The state of emergency is ended without delay when the measures are no longer necessary. The court is responsible for ensuring that such measures are appropriate, necessary, and proportionate to the results they are pursuing.

It also considers that while these measures can be taken during the election period, the presentation of the “*health pass*” cannot be required for access to polling stations or to political meetings and activities. Furthermore, these measures may be subject to a summary judgement (*référé-liberté* in French) to ensure that the regulatory authority respects the right of collective expression of ideas and opinions.

In addition, paragraph VI of Article 1 of the Act of 31 May 2021 provides that Parliament shall be informed without delay of the measures taken by the Government, which is required to submit a report on 15 February 2022, and 15 May 2022, setting out these measures, the reasons for maintaining, where applicable, some of the measures taken, and the guidelines for its action to combat the spread of the Covid-19 epidemic. This report may be debated in the standing committee or in a public session.

Finally, the disputed provisions have neither the object nor the effect of depriving Parliament of its right to meet under the conditions laid down in Articles 28 and 29 of the Constitution, to control the action of the Government, and to legislate.

Given the foregoing, the Constitutional Council deduces that the disputed provisions provide a balanced reconciliation between the constitutional value of the protection of health and the respect of the rights and freedoms recognised for all persons who live in the territory of the French Republic.

- For similar reasons, the Constitutional Council accepted the conformity with the Constitution of the extension of the provisions allowing the application of the information systems implemented to combat the Covid-19 epidemic.

*Also criticised was Article 9 of the Act, which allowed school directors to access and process medical information on pupils.

By way of derogation from the requirement set out in Article L. 1110-4 of the Public Health Code, these provisions stipulated that the directors of primary and secondary schools could have access to medical information relating to pupils for a period not exceeding the end of the current school year. They authorised them to process the data thus collected for the purpose of facilitating the organisation of screening and vaccination campaigns and organising teaching conditions to prevent the risk of the spread of the virus.

The Constitutional Council points out that the freedom declared by Article 2 of the Declaration of Human and Civic Rights of 1789 presupposes the right to personal privacy. It follows from this right that the collection, recording, storage, consultation, and communication of personal data must be justified by a motive of general interest, and put in place in a manner that is appropriate and proportionate to this objective. When this concerns personal medical information, particular vigilance should be observed in carrying out these operations and the determination of the methods used for them.

It considers that, by adopting these provisions, the legislator intended to combat the Covid-19 epidemic by implementing public health protocols in schools. As such, the legislator has pursued the objective of constitutional value of the protection of health.

However, firstly, the disputed provisions allow access not only to the virological and vaccination status of pupils, but also to the existence of contacts with contaminated persons, as well as the processing of such data, without obtaining prior consent of the pupils concerned or, if they are minors, of their legal representatives.

Secondly, these provisions authorise access to and processing of such data both by the directors of primary and secondary schools and by “*persons whom they specially authorise for this purpose*”. The medical information in question is therefore likely to be communicated to a large number of people, whose authorisation is not subject to any criteria or guarantees regarding the protection of medical confidentiality.

Finally, the Constitutional Council considers that, by merely providing that the processing of such data makes it possible to organise teaching conditions to prevent the risk of the virus spreading, the legislator had not defined the purposes pursued by these provisions with sufficient precision.

For all these reasons, the Constitutional Council considers that these provisions disproportionately infringe the right to personal privacy and declares them unconstitutional.

*Finally, the Constitutional Council censured several provisions of Articles 13 and 14 of the law referred for review as contrary to Article 38 of the Constitution, giving the Government authorisation to issue ordinances.

Recalling the terms of Article 38 of the Constitution, from which it follows that only the Government can ask Parliament for authorisation to issue such ordinances, the Constitutional Council noted that these provisions, some of which were introduced by the initial bill and others by government

amendments, before being deleted at first reading, were reinstated at the new reading by means of parliamentary amendments. They were therefore not adopted at the request of the Government.