

Decision n° 2008-573 of January 8th 2009

Act pertaining to the Committee provided for in Article 25 of the Constitution and the Election of Members of the National Assembly

On December 16th 2008, the Constitution Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, from Mr Jean-Marc AYRAUT et al.... Members of the National Assembly, and the same day from Messrs Jean-Pierre BEL et al, Senators.

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution as worded pursuant to Constitutional Act n° 2008-724 of July 23rd 2008 for the modernisation of the Institutions of the 5th Republic;

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the Institutional Act on the application of Article 25 of the Constitution enacted by Parliament on December 11th 2008;

Having regard to the Electoral Code;

Having regard to Act n° 86-1197 of November 24th 1986 pertaining to the drawing of boundaries of constituencies for the election of Members of the National Assembly;

Having regard to Decree n° 2008-1477 of December 30th 2008 authenticating population figures of mainland France, overseas Départements, Saint-Barthélemy, Saint-Martin and Saint-Pierre-et-Miquelon.

Having regard to the observations of the Government registered on December 23rd 2008;

Having heard the Rapporteur;

ON THE FOLLOWING GROUNDS

1. The Members of the National Assembly and the Senators making the referral contend that sections 1 and 3 of the Act pertaining to the Committee provided for in Article 25 of the Constitution and the Election of Members of the National Assembly are unconstitutional.

WITH RESPECT TO SECTION 1

2. Section 1 of the statute referred for review inserts into the Electoral Code Articles L.567-1 to L.567-8 which lay down the rules governing the composition of the committee provided for in paragraph 3 of Article 25 of the Constitution, the appointment of the members thereof together with the period of membership and the conditions of their holding such office. These sections also lay down the conditions for referral of issues to this committee and the giving by said committee of its opinion on the Government and Private Members' Bill submitted to it.

3. The parties making the referral contend that the composition of said committee fails to comply with the requirement laid down by Article 25 of the Constitution and the "principle of expression of diverse opinions" provided for by Article 4 thereof. They argue that half of the members of said committee, including the Chairman, are to be appointed by Authorities of the same political tendencies. They claim that in view of the task entrusted to this committee this statute should have made provision for an equitable participation of all political parties and groups making up Parliament. Thus, according to the Members of the National Assembly making the referral, a seat should have been reserved for the opposition, while the Senators for their part argue that the opposition should have been given the right to appoint at least one member.

As regards the independence of the committee provided for by Article 25 of the Constitution:

4. Paragraph 3 of Article 25 of the Constitution provides for the creation of an "independent committee". This standing committee is vested with the task of giving its opinion on all Government and Private Members' Bills drawing the boundaries of constituencies for the election of Members of the National Assembly or modifying the distribution of seats in the National Assembly or the Senate. It is incumbent upon the Constitutional Council to check whether, when laying down the rules governing the composition, organisation and proceedings of said committee, Parliament has not failed to accompany these rules by statutory guarantees.
5. Firstly, pursuant to section 1 of the statute referred for review, one half of the membership of said committee shall be composed of :^{4°} a member of the Conseil d'Etat, of a rank at least equal to Conseiller d'Etat and elected by the General Assembly of the Conseil d'Etat; ^{5°} a member of the Cour de cassation, of a rank at least equal to Conseiller, elected by the General Assembly of the Cour de cassation; ^{6°} a member of the Cour des comptes, of a rank at least equal to Conseiller-maître, elected by the General Assembly of the Cour des comptes. Parliament intended to provide for the appointment of a member of the Conseil d'Etat and two judges from the Cour de cassation and Cour des comptes, having respectively at least the rank of conseiller d'Etat, conseiller and conseiller-maître. However the fact that this committee should be seen to be independent implies that Parliament intended that the members appointed by the Conseil d'Etat, the

Cour de cassation and the Cour des comptes be elected solely from those person actually in post in these bodies.

6. Secondly, under Article L.567-2 of the Electoral Code, the members of the committee are to be appointed for a non-renewable term of six years. The committee alone is empowered to "suspend or terminate the term of office of one of its members if it finds unanimously that the situation of said member is incompatible with the holding of said office, that said member is unable to perform or has failed to perform his duties". Article L 567-3 of the Electoral Code firstly makes membership of the committee incompatible with the holding of any elective office governed by the said Code and secondly prohibits the giving of instructions by any Authority whatsoever to members of the committee as regards the carrying out of their duties. Article L 567-5 prohibits revealing anything concerning the proceedings, voting or internal working documents of the committee. Lastly, under Article L 657-8 the Chairman of the committee has sole authority as regards funding and, furthermore, the committee is not subject to the provisions of the Act of August 10th 1922 concerning the organization of the verification of expenditure incurred. These provisions ensure that the independence of the consultative committee provided for by Article 25 of the Constitution is guaranteed.

As regards the argument based on failure to comply with the "guarantees of the diversity of political opinions".

7. Under paragraph 3 of Article 4 of the Constitution : "Statute law shall guarantee the expression of a diversity of opinions and the equitable participation of political parties and groups in the democratic life of the Nation".

8. Under Article L.O 567-9 and 567-1 of the Electoral Code the qualified persons sitting on the Committee, who are chosen for their experience or legal or scientific expertise in electoral matters are respectively appointed by the President of the Republic, the President of the National Assembly and the President of the Senate after consultation with the relevant committees. Appointments cannot be made when the total of negative votes cast in each committee represents not less than three fifths of the votes cast by these two committees.

9. The committee provided for by Article 25 of the Constitution is entrusted with the task of ensuring compliance with the principle of equality before suffrage and the constituent power has specifically provided for its independence. If the drawing of boundaries of constituencies for the election of Members of the National Assembly or the modification of the distribution of seats of such Members or Senators participate in the democratic life of the Nation, the guarantee of independence and the rules governing incompatibility as laid down in Article L 567-3 of the Electoral Code which are designed to ensure said independence prohibit direct or indirect representation of political parties or groups on this committee. The argument contending that the composition of this

committee fails to comply with paragraph 3 of Article 4 of the Constitution must therefore be dismissed.

10. In consequence of all the foregoing, section 1 of the statute referred for review does not, with the qualification set forth in paragraph 5 hereinabove, run counter to Article 4 and 25 of the Constitution

WITH RESPECT TO SECTION 2:

11. I of Section 2 of the statute referred for review authorizes the Government to proceed by Ordinances firstly to fix the total number of Members of the National Assembly elected by French Nationals living abroad and to update the distribution of seats of Members elected in the Departments, in New Caledonia and in Overseas Communities and secondly to update the drawing of boundaries of electoral constituencies in these Communities and of electoral constituencies reserved for French Nationals living abroad. II of this section lays down the rules with which the Government must comply when implementing the provisions of I.

- As regards the consultation of the committee created by the final paragraph of Article 25 of the Constitution.

12. The parties making the referral contend that these provisions were not submitted to the independent committee provided for by the final paragraph of Article 25 of the Constitution and created by the Institutional Act passed on the same day. They argue that this omission constitutes an improper manner of proceeding.

13. Paragraph 3 of Article 25 of the Constitution provides : " An independent committee shall give a public opinion on Government and Private Members' Bills drawing the boundaries of constituencies for the election of Members of the National Assembly or modifying the distribution of seats of such Members or Senators". I of section 2 which authorises the Government to proceed by way of Ordinance does not per se carry out any such operations. Neither does II of section 2, which lays down the general rules concerning the drawing of boundaries of constituencies and the distribution of seats, deprive said committee of the power to usefully give its opinion on draft Ordinances submitted to it. The provisions of section 2 do not therefore fall into the category of Bills which must be referred to said committee.

14. Parliament was at liberty to pass in one single statute the provisions laying down the composition and the rules governing the organisation and manner of proceeding of said committee and the provisions authorising the Government to distribute seats of Members of the National Assembly and draw the boundaries of electoral constituencies. The argument based on an improper manner of proceeding must therefore be dismissed.

As regards the arguments based in failure by Parliament to exercise fully its powers and failure to comply with Article 4 of the Constitution.

15. The parties making the referral argue that the authority conferred on the Government by section 2 of the statute referred for review fails to respect the Republican tradition whereby the drawing of boundaries of electoral constituencies is the preserve of statute law. They claim in particular that Article 34 of the Constitution, backed up by Article 4, prohibits Parliament from proceeding by way of Ordinances firstly to fix without any predetermined criteria the number of members of the National Assembly representing French Nationals living abroad and secondly to distribute the total number of seats of Members of the National Assembly between the Departments, Overseas Communities and the constituencies representing French Nationals living abroad.

16. Firstly, the Government may, in order to enable it to implement its programme, request Parliament, under Article 38 of the Constitution, to authorize it for a limited period of time and in the conditions provided for in paragraph 2 of said Article, to take measures by Ordinance which are normally the preserve of statute law. Among the matters listed by Article 34 of the Constitution as being reserved for statute law is to be found the laying down of the rules governing the system of election to the Houses of Parliament. The distribution of seats of Members of Parliament, within the limits fixed by Article L.O 119 of the Electoral Code as worded pursuant to the Institutional Act passed on December 11th 2008 is an element of this system. Furthermore the Republican tradition cannot be usefully raised to argue that a statute which runs counter to it is unconstitutional unless this tradition has given rise to a fundamental principle recognised by the laws of the Republic within the meaning of the first paragraph of the Preamble to the Constitution of October 27th 1946. The principle relied upon by the parties making the referral does not derive from any legislative provisions prior to the Constitution of 1946 and is, in any case, expressly contradicted by the Constitution of October 4th 1958.

17. Article 38 of the Constitution, without in any way adversely affecting Article 4 of the Constitution, allows Parliament to authorise the Government to proceed by Ordinances to fix the total number of Members of the National Assembly elected by French Nationals living abroad and the distribution of seats in the National Assembly between the Departments, Overseas Communities, New Caledonia and electoral constituencies reserved for French Nationals living abroad.

18. Secondly, although Article 38 of the Constitution requires the Government to indicate clearly to Parliament the intended purpose and scope of the measures which it proposes to take by Ordinance, it does not require the Government to inform Parliament of the contents of the Ordinances issued pursuant to this authorisation. In the case in hand, the statutory provisions concerned by this authorisation, together with the conditions in which they will be passed, have been clearly set out.

19. In consequence of the foregoing, the arguments based on the failure by Parliament to fully exercise its powers are to be dismissed.

As regards the principle of equality of all before suffrage

20. Article 1 of the Constitution provides that the Republic "shall ensure the equality of all citizens before the law, without distinction of origin, race or religion". Article 3 of the Constitution provides in paragraph 1 " National sovereignty shall vest in the people who shall exercise it through their representatives and by means of referendum" and in paragraph 3 : "Suffrage shall always be universal, equal and secret". Under paragraph 3 of Article 24 of the Constitution, "members of the National Assembly ...shall be elected by direct suffrage".

21. These provisions of the Constitution show that the National Assembly, which is elected by direct universal suffrage, must be elected on an essentially demographic basis providing for a distribution of the number of seats and the drawing of boundaries of constituencies which best comply with the principle of equality before suffrage. Although Parliament may take into account considerations of general interest which may affect the scope of this general rule, this may only be done to a limited extent.

22. Firstly, indent 1 of 1° of II of section 2 of the statute referred for review provides that the drawing of boundaries of electoral constituencies shall be carried out on an essentially demographic basis subject to adjustments warranted by reasons of general interest "depending in particular on the respective change in the size of the population and number of voters registered on the electoral rolls". This rule, which makes it possible to determine, in a different manner depending on the constituencies involved, the demographic basis on which seats in the National Assembly are to be allocated, fails to comply with the principle of equality before suffrage. The authorisation given to the Government under Article 38 of the Constitution to carry out such adjustments in the conditions referred to above in order to redraw electoral constituencies must be held to be unconstitutional.

23. Secondly, indent 2 of 1° of II of section 2 of the statute referred for review provides that "the number of Members of the National Assembly shall not be fewer than two for each Department". The total number of Members which cannot, under Article 24 of the Constitution, exceed 577, was fixed at this number by the Institutional Act passed on December 11th 2008. The final paragraph of Article 24 of the Constitution furthermore requires the inclusion of the representatives of French Nationals living abroad. Therefore, since the drawing of constituency boundaries for the election of Members of the National Assembly carried out by the Act of November 24th 1986 referred to above, the total number of Members elected in the Departments must be reduced while the population numbers of the latter have increased by more than 7 600 000, figures

authenticated by the Decree of December 30th 2008 referred to above. Maintaining a minimum of two Members per Department is no therefore longer warranted by a requirement of general interest likely to affect the scope of the fundamental rule whereby the National assembly must be elected on an essentially demographic basis. The abovementioned provisions must therefore be held to be unconstitutional.

24. Furthermore, the Members of the National Assembly elected for Overseas Communities governed by Article 74 of the Constitution must also be elected on an essentially demographic basis. No requirement of general interest necessitates that each Overseas Community constitute an electoral constituency. The sole exception to this would be if a territory with a relatively small population were situated at some considerable distance from an Overseas Department or Community.

25. Thirdly, indent 3 of 1° of II of section 2 provides, firstly, that "unless warranted by geographical or demographic considerations, constituencies are composed of an uninterrupted territorial area", and secondly, "any commune in which there are fewer than 5000 inhabitants and any canton composed of an uninterrupted territorial area other than the constituencies of Paris, Lyon and Marseille, and which has less than 40 000 inhabitants shall be included in one and the same constituency for the election of a Member of the National Assembly³. Lastly indent 4 of 1° of II of section 2 authorises, in order to take into account requirements of general interest, differences in population size to a limit of 20% in comparison with the average population of the constituencies of the Department, the Overseas Community governed by Article 74 of the Constitution or New Caledonia.

26. Taken individually, none of these three provisions per se fails to comply with the Constitution. The first two may be usefully employed to guarantee equality before suffrage. However they might, when taken all three together, or due to the manner in which they are applied, lead to arbitrary drawing of constituency boundaries or result in creating situations where the principle of equality was not respected. Consequently, the possibility of not creating a constituency on an uninterrupted territorial area, that of not having to comply with certain commune or canton limits when the abovementioned conditions so permit, together with recourse to the maximum difference mentioned in indent 4 of 1° of II of section 2 must be reserved for exceptional cases and duly justified. Recourse may only be had to these provisions to a limited extent justified, on a case by case basis, by specific requirements of general interest. Their implementation must be strictly proportionate to the purpose it is sought to achieve. Any other interpretation would be unconstitutional.

27. Fourthly, under 4° of II of section 2 of the statute referred for review " The computation of the number of French Nationals living in each foreign country shall take into consideration the data recorded in the Register of French Nationals living abroad kept in each Consular constituency". The fundamental

rule whereby the National Assembly must be elected on an essentially demographic basis requires that the number of Members by fixed and constituency boundaries drawn on the basis of total recorded population numbers.

28. Fifthly under indent 3 of 1° of II of section 2 of the statute referred for review, "any electoral constituency found in Table 2 appended to section 3 of Act n° 82-471 of June 7th 1982 pertaining to the Assembly of French Nationals living abroad, once it is comprised of territories not far distant from each other, shall be included in its entirety in one and the same constituency for the election of a Member of Parliament". The need for the National Assembly to be elected on an essentially demographic basis requires, in the absence of an exception specifically warranted by geographical considerations, that the drawing of constituency boundaries take into account the maximum difference tolerated between the population of each constituency and the average population as provided for by indent 4 of 1° of II of section 2 of the statute referred for review, for Departments, Overseas Communities governed by Article 74 of the Constitution and New Caledonia.

WITH RESPECT TO SECTION 3

29. The parties making the referral contest I of section 3 of the statute referred for review which provides that Members of the National assembly representing French Nationals living outside France are to be elected on a majority voting two round basis. They feel that in view of the specific nature of the geographical area represented this provision is flawed by a patent error of appraisal as regards the principle of equality before suffrage.

30. Although, generally speaking, the principle of equality requires that people in the same situation be treated alike, this does not necessarily means that people in different situations be treated differently. Furthermore, just like all other Members of the National Assembly and Senators, the Members representing French Nationals living abroad represent the Nation in its entirety and not merely the population of the constituency which has returned them to Parliament. The provisions of I of section 3 of the statute referred for review, which merely provide that said Members shall be elected by the same electoral process as that used to elect Members elected on the territory of Republic, do not fail to comply with any constitutional requirement.

31 The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

HELD

Article 1 : The following are held to be unconstitutional:

- the words "depending in particular on the respective change in the size of the population and number of voters registered on the electoral rolls" in indent 1 of 1° of II of section 2 of the Act pertaining to the Committee provided for in Article 25 of the Constitution and the Election of Members of the National Assembly
- indent 2 of 1° of II of the same section 2

Article 2 : With the qualifications set out in paragraphs 5,24,26,27 and 28, the rest of section 2 and sections 1 and 3 of the same statute are not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on January 8th 2009 and composed of Messrs Jean-Louis DEBRE, President, Guy CANIVET, Jacques CHIRAC, Renaud DENOIX de SAINT MARC, Olivier DUTHEILLET de LAMOTHE, Valéry GISCARD d'ESTAING Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ.

Publication Journal officiel January 14th 2009, p. 724