

ORDINANCE N° 58-1067 CONSTITUTING AN INSTITUTIONAL ACT ON THE CONSTITUTIONAL COUNCIL¹

As amended by Ordinance n° 59-223 of February 4th 1959² and Institutional Acts n°s 74-1101 of December 26th 1974³, 90-383 of May 10th 1990⁴, 95-63 of January 19th 1995⁵, 2007-223 of February 21st 2007⁶, 2008-695 of July 15th 2008⁷, 2009-403 of April 15th 2009⁸, 2009-1523 of December 10th 2009⁹, 2010-830 of 22 July 2010¹⁰, no. 2011-333 of 29 March 2011¹¹ and no. 2011-410 of 14 April 2011¹²

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¹ *Journal officiel* of 9 November 1958 p. 10129.

² Ordinance no. 59-223 of 4 February 1959 amending the Ordinance of 7 November 1958 concerning organic law on the Constitutional Council, *Journal officiel* of 7 February 1959, p. 1683.

³ Organic law (OL) no. 74-1101 of 26 December 1974 amending the Ordinance of 7 November 1958 concerning organic law on the Constitutional Council, *Journal officiel* of 27 December 1974, p. 13068.

⁴ OL no. 90-383 of 10 May 1990 on the funding of the campaign for the election of the President of the Republic and the Members of the National Assembly, *Journal officiel* of 11 May 1990, p. 5615.

⁵ OL no. 95-63 of 19 January 1995 on the declaration of wealth of the Members of Parliament and the incompatibilities applicable to the Members of Parliament and the members of the Constitutional Council, *Journal officiel* of 20 January 1995, p. 1041.

⁶ OL no. 2007-223 of 21 February 2007 concerning statutory and institutional provisions relating to overseas territories, *Journal officiel* of 22 February 2007, p. 3121, @ no. 1.

⁷ OL no. 2008-695 of 15 July 2008 on the archives of the Constitutional Council, *Journal officiel* of 16 July 2008, p. 11322, @ no. 1.

⁸ OL no. 2009-403 of 15 April 2009 on the application of Articles 34-1, 39 and 44 of the Constitution, *Journal officiel* of 16 April 2009, p. 6528, @ no. 1.

⁹ OL no. 2009-1523 of 10 December 2009 on the application of Article 61-1 of the Constitution, *Journal officiel* of 11 December 2009, p. 21379, @ no. 1.

¹⁰ OL no. 2010-830 of 22 July 2010 on the application of Article 65 of the Constitution, *Journal officiel* of 23 July 2010, p. 13562, @ no. 1.

¹¹ OL no. 2011-333 of 29 March 2011 on the Defender of Rights, *Journal officiel* of 30 March 2011, p. 5504, @ no. 1.

¹² OL no. 2011-410 of 14 April 2011 on the election of Members of the National Assembly and Senators, *Journal officiel* of 19 April 2011, p. 6826, @ no. 1.

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Title 1: Organisation of the Constitutional council

Section 1

The members of the Constitutional Council, other than ex officio members, shall be appointed by the President of the Republic, the Presidents of the National Assembly and the Senate.

The President of the Constitutional Council shall be appointed by the President of the Republic. He shall be selected from among members of the Council, whether appointed or ex officio members.

The appointments referred to hereinabove shall be published in the Journal officiel.

Section 2

The first Constitutional Council shall comprise three members appointed for a term of three years, three members appointed for a term of six years and three members appointed for a term of nine years. The President of the Republic, the Presidents of the National Assembly and the President of the Senate shall each appoint one member of each of these three groups.

Section 3

Before taking up office, the appointed members of the Constitutional Council shall take the oath before the President of the Republic.

They shall swear to properly and faithfully carry out their duties, to perform them in an impartial manner in accordance with the Constitution, to preserve confidentiality as to proceedings and voting, to refrain from taking any public stance, from giving any consultation on matters coming under the jurisdiction of the Council.¹³

A formal record shall be made of the swearing of the oath.

Section 4^{14 and 15}

The office of a member of the Constitutional Council shall be incompatible with that of a member of the Government or the Economic, Social and Environmental Council, and also that of the Defender of Rights. It shall also be incompatible with the exercising of any elective office.

Members of the Government or of the Economic, Social and Environmental Council or holders of an elective office appointed to the Constitutional Council shall be deemed to have opted for the latter office unless they have stated otherwise within eight days of the publication of their appointment.

Members of the Constitutional Council appointed to Government office or to the office of the Defender of Rights, appointed as members of the Economic, Social and Environmental Council or who take up an elective office shall be replaced.

Professional incompatibilities affecting Members of Parliament shall also apply to members of the Constitutional Council.¹⁶

Section 5

Throughout their term of office members of the Constitutional Council shall not be appointed to any public post nor, if they are civil servants, benefit from any discretionary promotion.

Section 6

¹³ Giving consultations is prevented by organic law no. 59-223 of 4 February 1959.

¹⁴ The wording of this Section is based on Article 7 of organic law no. 95-63 of 19 January 1995 (incompatibility with any elective office and also professional incompatibilities).

¹⁵ References to the Defender of Rights have also been inserted by Article 40 of organic law no. 2011-333 of 29 March 2011 on the Defender of Rights.

¹⁶ Article 7 of organic law no. 95-63 of 19 January 1995 provides that: II. Members of the Constitutional Council who, at the date of publication of this organic law, are holders of one or more elective offices may fulfil them until the term of office that they hold comes to an end.

III. Members of the Constitutional Council who, at the date of publication of this organic law, are in one of the situations of professional incompatibility provided for in the last paragraph of I of this Article shall have one month to relinquish the office(s) that are incompatible with their position as a member of the Constitutional Council. Should they not do so, they shall be replaced, at the end of this time frame, as a member of the Constitutional Council.

The President and members of the Constitutional Council shall receive respectively an allowance equal to the salary paid to the two highest ranking categories of civil servants. Said allowances shall be reduced by one half for those members of the Council who continue to maintain a professional activity compatible with their office.

Section 7

A Decree¹⁷ issued in the Council of Ministers on the recommendation of the Constitutional Council shall specify the obligations of the members of the Constitutional Council in order to guarantee the independence and dignity of their office. These obligations shall include the prohibition on members of the Constitutional Council taking public stances on issues which have been or may be the object of a decision of the Council or giving consultations on such matters¹⁸.

Section 8

Members of the Constitutional Council shall be replaced no later than eight days before the expiry of their term of office.

Section 9

A member of the Constitutional Council may resign from office by a letter addressed to the Council. The appointment of his replacement shall take place no later than one month from such resignation. Said resignation shall become effective upon the appointment of the replacement member.

Section 10

The Constitutional Council shall formally record the automatic resignation of a member who carries on a profession or holds a position or elective office incompatible with membership of the Council or who does not enjoy his full civil and political rights. Such a member shall be replaced within eight days.

Section 11

The rules set forth in Section 10 shall apply to those members of the Constitutional Council who are definitively prevented from performing their duties by reason of a permanent physical disability.

Section 12

Members of the Constitutional Council appointed to replace members whose term of office has ended before the normal date shall serve the remainder of the unserved term. Upon the expiry of this term, they may be appointed as members of the Constitutional Council if they have served in said capacity for less than three years.

Title II: The operation of the Constitutional council

Chapter 1: Common provisions.

Section 13

The Constitutional Council shall meet when summoned to do so by its President or, in cases of an impediment affecting the latter, by its oldest member.

Section 14

Decisions and opinions of the Constitutional Council shall be given by no fewer than seven members, except in cases of force majeure duly recorded in the minutes.

¹⁷ Decree no. 59-1292 of 13 November 1959 regarding the obligations of members of the Constitutional Council.

¹⁸ The wording of this Section is based on Section 2 of Ordinance no. 59-223 of 4 February 1959.

Section 15

A Decree¹⁹ issued by the Council of Ministers, on the recommendation of the Constitutional Council, shall determine the organization of the Secretariat General.

Section 16

The appropriations necessary to finance the operation of the Constitutional Council shall be entered in the general budget. The President shall be vested with the power to order expenditure.

Chapter II: Rulings as to constitutionality

Section 17

Institutional Acts enacted by Parliament shall be transmitted to the Constitutional Council. The letter transmitting the same shall indicate, if need be, whether the matter is one of urgency. Regulations and amendments to them enacted by one or other of the Houses of Parliament shall be transmitted to the Constitutional Council by the President of the relevant House.

Section 18

When a statute is referred for review by the Constitutional Council on the initiative of members of Parliament, the referral shall be made by one or more letters containing the signatures of no fewer than sixty Members of the National Assembly or sixty Senators.

When the Constitutional Council receives a referral pursuant to Articles 54 or 61 (paragraph 2) of the Constitution, it shall immediately inform the President of the Republic, the Prime Minister and the Presidents of the National Assembly and the Senate. The latter shall inform the members of their respective Houses²⁰.

Section 19

Constitutional review shall proceed on the basis of a report from one of the members of the Council within the time allotted in paragraph 3 of Article 61 of the Constitution.

Section 20

The Constitutional Council shall give reasons for its decision

Section 21

The publication of a decision of the Constitutional Council ruling that a provision is not unconstitutional shall terminate the period of suspension of promulgation of the statute involved.

Section 22

When the Constitutional Council rules that a statute referred to it for review contains a provision which is unconstitutional and unseverable from the statute as a whole, said statute shall not be promulgated.

Section 23

In the event of the Constitutional Council ruling that a statute referred to it for review contains a provision which is unconstitutional without holding it to be unseverable from the rest of the statute, the President of the Republic may promulgate said statute without the impugned provision or ask the two Houses to proceed to a further reading.

In cases where the Constitutional Council rules that a Parliamentary regulation referred to it contains a provision which is unconstitutional, this provision shall not be applied by the House which adopted the same.

¹⁹ Decree no. 59-1293 of 13 November 1959 regarding the organisation of the Secretariat General of the Constitutional Council.

²⁰ The wording of this Section is based on organic law no. 74-1101 of 26 December 1974.

Chapter II bis: On priority preliminary rulings on the issue of constitutionality (coming into force on March 1st 2010)²¹

Part 1: Provisions applicable before courts coming under the supervisory jurisdiction of the Conseil d'État or the Court of Cassation

Section 23-1 (coming into force on March 1st 2010)

Before Courts coming under the supervisory jurisdiction of the Conseil d'État or the Court of Cassation, the argument that a statutory provision infringes the rights and freedoms guaranteed by the Constitution shall, on pain of inadmissibility, be raised in writing and accompanied by a reasoned justification of this argument. Such an argument may be raised for the first time before a Court of Appeal. It cannot be raised by the court proprio motu.

Before a Court coming under the supervisory jurisdiction of the Court of Cassation, when the Public Prosecutor is not a party to these proceedings, the matter shall be brought to his attention once the argument has been raised so that he may make his opinion known.

If such an argument is raised during a preliminary investigation into a criminal offence, the matter shall be brought before the relevant appellate court.

Such an argument may not be raised before a Cour d'assises. In the event of appeal against a decision handed down at first instance by a Cour d'assises, it may be raised in writing in a document accompanying the notice of appeal. This document shall be immediately transmitted to the Court of Cassation

Section 23-2 (coming into force on March 1st 2010)

The Court shall rule without delay, giving reasons for its ruling, as to the transmission to the Conseil d'État or the Court of Cassation of the application for a priority preliminary ruling on the issue of constitutionality. Such transmission shall require that the following conditions be met :

1° The challenged provision is applicable to the litigation or proceedings underway, or is the grounds for said proceedings;

2° Said provision has not previously been found to be constitutional in the holding of a decision of the Constitutional Council, except in the event of a change of circumstances

3° The matter is of a serious nature

In all events, the court involved must, when confronted firstly with arguments challenging the conformity of a statutory provision with the rights and freedoms guaranteed by the Constitution and secondly with the international commitments entered into by France, rule in priority on the matter of the transmission of the application for a priority preliminary ruling on the issue of constitutionality to the Conseil d'État or Court of Cassation.

The decision to transmit the application shall be sent to the Conseil d'État or the Court of Cassation within eight days of the handing down of said decision, together with the submissions of the parties. Refusal to transmit the application may only be challenged upon appeal against the decision settling all or part of the litigation involved

Section 23-3 (coming into force on March 1st 2010)

When the application for a priority preliminary ruling is transmitted, the court shall stay its ruling until receipt of the decision of the Conseil d'État or Court of Cassation or of the Constitutional Council, if the matter has been referred to the latter. The preliminary investigation underway shall not be suspended and the court may order any necessary temporary measure or measure of conservation.

²¹ Chapter inserted by OL no. 2009-1523 of 10 December 2009, Art. 1. Applicable from 1st March 2010 (Art. 5 of the OL: "1st day of the 3rd month following that of its promulgation").

However there shall be no stay of ruling when the person involved is in custody due to the proceedings underway, nor when the purpose of such proceedings is to discharge a custodial measure.

The court may also rule without waiting for the decision on the application for a priority preliminary ruling on the issue of constitutionality if statute law or regulations provide that it should give its ruling within a specified time or as a matter of urgency. If the court of first instance rules without waiting for said decision on the priority preliminary ruling and its decision is appealed against, the appellate court shall stay its ruling. It may however not stay its ruling if it itself is required to rule on issues which must be dealt with forthwith.

Furthermore, if staying the ruling would lead to irremediable or patently excessive consequences as regards the rights of one of the parties, the court deciding to transmit the application for a priority preliminary ruling as to constitutionality may rule on those issues which need to be dealt with forthwith.

If an appeal on a point of law has been made to the Court of Cassation and the trial judges have handed down their decision without waiting for the decision of the Conseil d'État or the Court of Cassation or of the Constitutional Council, if the matter has been referred to the latter, the Court of Cassation shall stay its ruling on said appeal pending a ruling on the application for a priority preliminary ruling on the issue of constitutionality. This shall not however be the case when the applicant is deprived of his freedom because of the proceedings underway and statute law provides that the Court of Cassation shall give its ruling within a specified time."²²

Part 2 : Provisions applicable before the Conseil d'État and the Court of Cassation

Section 23-4 (coming into force on March 1st 2010)

Within three months of receipt of the transmission provided for in Section 23-2 or in the final paragraph of section 23-1, the Conseil d'État or the Court of Cassation shall rule on the referral of the application made to the Constitutional Council for a priority preliminary ruling on the issue of constitutionality. This referral shall be made when the conditions provided for in 1° and 2° of Section 23-2 have been met and the issue raised is new or of a serious nature.

Section 23-5 (coming into force on March 1st 2010)

The argument based on the infringement by a statutory provision of the rights and freedoms guaranteed by the Constitution may be raised, including for the first time before the Court of Cassation, when a case is being heard before the Conseil d'État or Court of Cassation. Said argument shall be presented, on pain of being inadmissible, in a separate and reasoned submission. It cannot be raised by the court proprio motu.

In all events the Conseil d'État or Court of Cassation must, when asked to rule on arguments claiming firstly that a provision infringes the rights and freedoms guaranteed by the Constitution, and secondly that it runs counter to the international commitments entered into by France, rule in priority on the transmitting to the Constitutional Council of the application for a priority preliminary ruling on the issue of constitutionality.

The Conseil d'État or the Court of Cassation shall have a period of three months as from the formal raising of the argument to hand down its decision. The Constitutional Council shall be asked to rule on the application for a priority preliminary ruling on the issue of constitutionality once the conditions provided for in 1° and 2° of Section 23-2 have been met and the issue raised is new and of a serious nature.

²² Cf. decision 2009-595 DC, recital clause 18: "Whereas, however, the last sentence of the last paragraph of Section 23-3 can result in a definitive decision being given in proceedings where a priority preliminary ruling on the issue of constitutionality has been referred to the Constitutional Council and without the latter having ruled on it; that, in such a scenario, neither this provision nor the authority of the res judicata can deprive the litigant of the right to initiate new proceedings so that the decision of the Constitutional Council can be taken into account; that, subject to this reservation, Section 23-3 is not contrary to the Constitution".

When the matter has been referred to the Constitutional Council, the Conseil d'État or the Court of Cassation shall stay their ruling until the Constitutional Council has given its decision. This shall not however be the case when the applicant is deprived of his freedom because of the proceedings underway and statute law provides that the Court of Cassation shall give its ruling within a specified time. If the Conseil d'État or the Court of Cassation is required to rule in a matter of urgency, there can be no stay of ruling.²³

Section 23-6 (coming into force on March 1st 2010)

Repealed.²⁴

Section 23-7 (coming into force on March 1st 2010)

The reasoned decision of the Conseil d'État or the Court of Cassation to refer the matter to the Constitutional Council, accompanied by the submissions of the parties, shall be transmitted to the Council. The Constitutional Council shall be provided with a copy of the reasoned decision at the basis of the refusal of the Conseil d'État or Court of Cassation to refer the application for a priority preliminary ruling to it. In the event of failure by the Conseil d'État or the Court of Cassation to rule within the time allotted by Sections 23-4 and 23-5, the application shall be transmitted to the Constitutional Council.

The decision of the Conseil d'État or the Court of Cassation shall be communicated to the court which transmitted the application for a priority preliminary ruling and shall be notified to the parties within eight days of the making of said ruling.

Part 3: Provisions applicable before the Constitutional Council

Section 23-8 (coming into force on March 1st 2010)

When the Constitutional Council has been asked to make a priority preliminary ruling under the provisions hereof, it shall immediately inform the President of the Republic, the Prime Minister and the Presidents of the National Assembly and the Senate. Said persons may send the Constitutional Council their remarks on the application for a priority preliminary ruling on the issue of constitutionality made to the Council.

When a provision of a law of the land of New Caledonia is the object of such an application, the Constitutional Council shall also inform the President of the Government of New Caledonia, the President of the Congress and the Presidents of Provincial Assemblies.

²³ Cf. decision 2009-595 DC, recital clause 23: "Whereas, thirdly, the last sentences of the last paragraph of Section 23-5 allow a definitive decision to be given in proceedings where a priority preliminary ruling on the issue of constitutionality has been referred to the Constitutional Council and without the latter having ruled on it; that, subject to the same reservation as stated in recital clause 18, these provisions are not contrary to the Constitution " i.e. that "neither this provision nor the authority of the res judicata can deprive the litigant of the right to initiate new proceedings so that the decision of the Constitutional Council can be taken into account".

²⁴ Section repealed by Article 12 of organic law no. 2010-830 of 22 July 2010 on the application of Article 65 of the Constitution. Previous wording:

The First President of the Court of Cassation shall receive applications transmitted to the Court of Cassation as provided for in Section 23-2 and the last paragraph of Section 23-1. The submission mentioned in Section 23-5, presented with applications addressed to the Court of Cassation, shall also be submitted to the same.

The First President shall immediately inform the Chief Public Prosecutor.

The Court of Cassation shall rule with a Bench presided by the First President and comprising the Presidents of the Chambers and two judges from each of the Chambers specifically concerned by the application.

However the First President may, if he feels that the solution to the issue raised is self-evident, refer this matter to a Bench composed of himself, the President of the Chamber specifically concerned and a further judge from the latter.

For the purposes of the foregoing two paragraphs, the First President may be replaced by a delegate appointed by him from among the Presidents of the various Chambers of the Court of Cassation. Said Presidents may also be replaced by delegates appointed by them from among judges sitting in said Chambers.

Section 23-9 (coming into force on March 1st 2010)

When the Constitutional Council has been asked to rule on an application for a priority preliminary ruling on the issue of constitutionality, the termination for any reason whatsoever of the proceedings in which this issue was raised shall have no effect on the examination of this issue.

Section 23-10 (coming into force on March 1st 2010)

The Constitutional Council shall give its ruling within three months of the referral being made to it. The parties shall be given a full hearing and invited to address their arguments to the Council. The hearing shall be held in public except for exceptional cases specified by the internal rules²⁵ of procedure of the Constitutional Council

Section 23-11 (coming into force on March 1st 2010)

The Constitutional Council shall give reasons for its decision. The parties shall be notified of this decision, and the same shall be communicated either to the Conseil d'État or the Court of Cassation and, if need be, to the court before which the application for a priority preliminary ruling on the issue of constitutionality was first made.

The Constitutional Council shall also communicate its decision to the President of the Republic, the Prime Minister and the Presidents of the National Assembly and the Senate together with, in the case provided for in the final paragraph of Section 23-8, the authorities mentioned therein.

The decision of the Constitutional Council shall be published in the Journal officiel and, if need be, in the Journal officiel of New Caledonia.

Section 23-12

When the Constitutional Council is asked to make a priority preliminary ruling on the issue of constitutionality, the State contribution to the remuneration under the system of legal aid of those judicial auxiliaries assisting in the making of the application shall be increased in the manner provided for by regulations.

Chapter III : Review of statutory provisions

Section 24

In the cases provided for in paragraph 2 of Article 37 of the Constitution, referral to the Constitutional Council shall be made by the Prime Minister.

Section 25

The Constitutional Council shall give its decision within one month. When the Government declares the matter to be one of urgency the time allotted shall be eight days.

Section 26

The Constitutional Council shall, by a reasoned decision, rule that the provisions referred to it are of a statutory or regulatory nature.

Chapter III bis : Review of the manner in which Bills are tabled.²⁶

Section 26-1²⁷

When referral is made to it in accordance with paragraph 4 of Article 39 of the Constitution, the Constitutional Council shall immediately inform the Prime Minister and the Presidents of the National Assembly and the Senate.

²⁵ Section 8 of the QPC internal regulations

²⁶ Chapter brought in by organic law no. 2009-403 of 15 April 2009, Article 10.

²⁷ Article brought in by organic law no. 2009-403 of 15 April 2009, Article 10; applicable to draft bills filed from 1st September 2009 (organic law no. 2009-403 of 15 April 2009, Article 20)

The reasoned decision of the Constitutional Council shall be notified to the Prime Minister and the Presidents of the National Assembly and the Senate. It shall be published in the Journal officiel.

Chapter IV : Review of decisions of inadmissibility.²⁸

Section 27

In the cases provided for by paragraph 2 of Article 41 of the Constitution, debate on a Private Member's Bill or an amendment which is held to be inadmissible by the Government shall be immediately adjourned.

The Authority making the referral to the Constitutional Council shall immediately inform the Authority which is also empowered to act under Article 41 of the Constitution.

Section 28

The Constitutional Council shall give a reasoned decision within eight days.

Section 29

This reasoned decision shall be notified to the House involved and to the Prime Minister.

Chapter V: The exercising of the powers of the Constitutional Council as regards the election of the President of the Republic.

Section 30

The powers of the Constitutional Council as regards the election of the President of the Republic shall be determined by the Institutional Act pertaining to this election²⁹.

Section 31

When a referral is made by the Government in the cases provided for in Article 7 of the Constitution for a ruling that an impediment prevents the President of the Republic from performing his duties, the Constitutional Council shall give said ruling by an absolute majority of its members.

Chapter VI: Litigation as to the election of Members of the National Assembly and Senators³⁰.

Section 32³¹

The Minister of the Interior shall, without delay, notify the House involved of the names of the persons proclaimed elected.

The formal records of the Vote Counting Committees, to which the representative of the State shall append a certified copy of the birth certificate and form no. 2 of the Criminal Record of the persons elected and their substitutes, shall be made available for a period of ten days to persons registered on the electoral roll or the consular electoral roll and persons having declared their intention to stand in said election.

Upon the expiry of this allotted period of time, the formal records and their appendices shall be filed with the relevant Departmental or Territorial Archive Service. They shall only be communicated to the Constitutional Council at the request of the latter.

Section 33³²

²⁸ No decision since FNR decision no. 79-11 of 23 May 1979

²⁹ OL: Amended law no. 62-1292 of 6 November 1962 on the election of the President of the Republic by universal suffrage

³⁰ The provisions of Sections 32, 33, 34, 35, of the second paragraph of Section 38, and of Sections 39, 40, 41, 42, 44 and 45 have been set out for the election of Members of the National Assembly in chapter X of title II of the first book of the electoral code (Articles L.O. 179 to 189), also applicable to the election of Senators under Article L.O. 325 of the same Code.

³¹ As amended by organic laws no. 2007-223 of 21 February 2007, Art. 12, I, 1° ("representative of the State") and no. 2011-410 of 14 April 2011, Art. 14, I, 1°.

The election of a Member of the National Assembly or a Senator may be challenged before the Constitutional Council up to six p.m. on the tenth day following the proclamation of the election results.

All persons registered on the electoral roll or the consular electoral roll and all persons standing for election shall be entitled to challenge an election held in their constituency.

Section 34³³

Referral to the Constitutional Council shall only be made in writing and addressed to the Secretary General of the Constitutional Council or the representative of the State.

The representative of the State shall inform the Secretary General by electronic means of the referral and transmit the same.

The Secretary General of the Council shall without delay inform the House involved of the referrals of which he has been notified.

Section 35

Referrals shall contain the surname, forename(s) and status of the applicant, the names of the elected candidates whose election is challenged and the arguments raised in support of this challenge.

The applicant shall append to the referral the documents produced in support of his challenge. The Council may exceptionally grant an extension of time for the production of some of the supporting documents.

Such referral shall not have any suspensive effect. It shall not require payment of any duties or registration fees.

Section 36

The Constitutional Council shall constitute three Sections each comprising three members drawn by lot. Separate lots shall be drawn between members appointed by the President of the Republic, the President of the National Assembly and the President of the Senate.

Each year during the first fortnight of October, the Constitutional Council shall draw up a list of ten assistant Rapporteurs chosen from among the Maîtres des requêtes of the Conseil d'État and the Conseillers référendaires of the Court of Audit. Said assistant Rapporteurs shall not participate in voting by the Council

Section 37

Upon receipt of a referral, the President of the Council shall assign the same to one of the abovementioned Sections and appoint a Rapporteur who may be chosen from among the assistant Rapporteurs.

Section 38

The Sections shall examine the cases referred to them prior to the bringing of the same before the full Council.

The Council may however, without any preliminary investigation into a referral and without hearing the parties involved, dismiss by a reasoned decision those referrals which are inadmissible or contain complaints as to facts which patently cannot have influenced the outcome of an election. The House involved shall be immediately notified of the decision.

Section 39

In all other cases, the member of Parliament whose election is disputed shall be notified of the referral, as shall his substitute. The Section shall grant them a period of time to take cognizance of

³² As amended by organic law no. 2011-410 of 14 April 2011, Article 14, I, 2°. Previous wording: "during the ten days after the proclamation of the results of the ballot"

³³ As amended by organic law no. 2007-223 of 21 February 2007, Art. 12, I, 2° ("representative of the State") and introduction of electronic communication).

the referral and accompanying documents filed with the Secretary General and put forward their written response.

Section 40

Once this written response has been received or upon expiry of the time allotted for the putting forward of the same, the report on the case shall be given to the Council which shall rule by a reasoned decision. Said decision shall be immediately notified to the House involved.

Section 41

When the Council upholds a challenge, it may, if need be, declare the election results to be void or modify the proclamation of the results made by the Vote Counting Committee and proclaim the new elected candidate.

Section 41-1³⁴

If the preliminary investigation into a complaint reveals that a candidate is in one of the situations referred to under Article L.O 136-1³⁵ of the Electoral Code, the Council may proclaim the ineligibility of said candidate in accordance with said provision and, in the event of the latter having been elected, hold this election to be void.

Section 42

The Council and the Sections thereof may, if need be, order an enquiry and cause to be transmitted to it/them all documents and reports connected with the election, in particular campaign accounts drawn up by the candidates involved, together with all documents, reports or decisions as may have been collected or drawn up by the Committee set up under Article L 52-14 of the Electoral Code³⁶. The Rapporteur shall be vested with due authority to take evidence from witnesses under oath. He shall make a formal record thereof and communicate the same to the candidates involved, who shall have three days to respond in writing.

Section 43

The Council and the Sections thereof may appoint one of its/their members or an assistant Rapporteur to carry out further on-the-spot investigations.

Section 44

When hearing cases referred to it the Constitutional Council shall have jurisdiction over all matters and arguments raised on the making of the referral. In such cases, its decision shall be effective solely with respect to the election referred to it.

Section 45

Subject to any subsequent ineligibility of the candidate and the substitute thereof, the Constitutional Council shall rule on the lawfulness of the election of both the candidate and the substitute thereof.

Chapter VII :Monitoring the holding of Referenda and proclaiming the results thereof.

Section 46

The Constitutional Council shall be consulted by the Government on the holding of referenda. It shall immediately be informed of all measures taken for that purpose.

Section 47

³⁴ Section added by Article 8-I of organic law no. 90-383 of 10 May 1991.

³⁵ Reference amended by organic law no. 2011-410 of 14 April 2011, Article 14, I, 3°. Previous wording: "second paragraph of Article L.O. 128"

³⁶ This paragraph was amended by subsection I of Article 9 of organic law no. 90-383 of 10 May 1990.

The Constitutional Council may put forward its remarks on the list of organizations authorized to use official publicizing facilities.

Section 48

The Constitutional Council may appoint one or more delegates chosen, with the agreement of the relevant Ministers, from judges from the Courts of Law or Administrative Courts, for the purpose of monitoring the operations involved in holding a referendum

Section 49

The Constitutional Council shall directly monitor the taking of a general census.

Section 50

The Constitutional Council shall examine and definitively settle all complaints.

When the Constitutional Council ascertains the existence of irregularities occurring during the holding of the referendum, it shall decide whether, in view of the nature and seriousness of such irregularities, the holding of the referendum should be maintained or held to be partially or entirely void.

Section 51

The Constitutional Council shall proclaim the results of a referendum. Said proclamation shall be included in the Decree promulgating the statute in favour of which the people have voted.

Chapter VIII: Consultation of the Constitutional Council in exceptional circumstances.

Section 52

When consulted by the President of the Republic in the cases provided for in paragraph 1 of Article 16 of the Constitution, the Constitutional Council shall meet immediately.

Section 53

It shall give its opinion on compliance with the requirements set forth in the provision referred to in the foregoing paragraph. This opinion shall be reasoned and made public.

Section 54

The President of the Republic shall inform the Constitutional Council of measures which he contemplates taking.

The Constitutional Council shall give its opinion without delay.

Title III – Miscellaneous and temporary provisions

Section 55

The manner of application of this Ordinance may be specified by a Decree^{37,38 and 39} in the Council of Ministers after consultation with the Constitutional Council and seeking the opinion of the Conseil d'État.

³⁷ Cf. Decree no. 2011-573 of 24 May 2011 on the regulatory part of the National Heritage Code (Art. R* 212-38 to R* 212-48). Its Art. 3 repeals Decree no. 2009-1123 of 17 September 2009 on the archives of the Constitutional Council.

³⁸ Cf. Decree no. 2010-148 of 16 February 2010 implementing organic law no. 2009-1523 of 10 December 2009 on the application of Article 61-1 of the Constitution.

³⁹ Cf. Decree no. 2010-149 of 16 February 2010 on the continuation of legal aid if the application for the priority preliminary ruling on the issue of constitutionality is examined by the Council of State, the Court of Cassation and the Constitutional Council.

Section 56

The Constitutional Council shall complete by its internal rules^{40, 41 and 42} of procedure those rules of procedure "applicable before it"⁴³ laid down by Title II hereof. It shall in particular specify the conditions governing the enquiries and investigations provided for in Sections 42 and 43 under the supervision of a Rapporteur.

Section 57

(obsolete)

Section 58^{44 and 45}

Articles L 211-3, L 212-1, L 212-2, L 212-3, L 212-4, L 213-3, L 214-1, L 214-3, L 214-4, L 214-5, L 214-9 and L 214-10 of the National Heritage Code⁴⁶ shall apply to the Archives of the activity of the Constitutional Council. These archives may be freely consulted upon the expiry of the period of time fixed in 1° of I of Article L 213-2 of said Code⁴⁷.

Section 59

(obsolete)

Section 60

(obsolete)

Section 61

This Ordinance shall be published in the Journal officiel of the French Republic and implemented as an Institutional Act. 13

⁴⁰ Regulations regarding the procedure applicable before the Constitutional Council for litigation regarding the election of the Members of the National Assembly and Senators (published in the *Journal officiel* of 31 May 1959 and amended in March 86, November 1987, July 1991 and on 28 June 1995).

⁴¹ Regulations regarding the procedure applicable before the Constitutional Council for complaints relating to the holding of referenda (5 October 1988).

⁴² Internal regulations regarding the procedure applicable before the Constitutional Council for priority preliminary rulings on the issue of constitutionality (Amended decision of 4 February 2010; published in the *Journal officiel* of 18 February 2010 and amended on 24 June 2010 and 21 June 2011).

⁴³ "applicable before it" inserted by OL no. 2009-1523 of 10 December 2009, Art. 4.

⁴⁴ As amended by organic law no. 2008-695 of 15 July 2008, Article 1 (which came into effect on 1st January 2009).

Previous wording:

This committee will review challenges concerning the election of Senators elected on 8 June 1958 and Senators elected since then sent by the Senate Bureau within ten days of publication of this Ordinance. It shall rule on those challenges in accordance with the legislation in force at the date of the election and according to the conditions specified by this text.

The committee shall establish its own secretariat and may use the rapporteurs chosen in the major State bodies.

⁴⁵ See Decree no. 2011-573 of 24 May 2011 on the regulatory part of the National Heritage Code (Cf. L.II, T.I, Ch. 2, Sect. 1, subsect. 2 Archives of the Constitutional Council, Art. R* 212-38 to R* 212-48). Its Art. 3 repeals Decree no. 2009-1123 of 17 September 2009 on the archives of the Constitutional Council.

⁴⁶ Sections in their definitive wording formulated in the light of law no. 2008-696 of 15 July 2008. Cf. decision 2008-566 DC of 9 July 2008, recital clause 2: "Whereas Article 1 of organic law (...) makes these last twelve Articles of the National Heritage Code, based on the above-mentioned law on archives, adopted on the same day (...) applicable;"

⁴⁷ I.e. "Twenty-five years from the date of the document or of the most recent document included in the application".

Appendix: The archives of the Constitutional Council: Articles of the National Heritage Code⁴⁸

Legislative Part⁴⁹

Book II: Archives

Title 1: General archiving rules

Chapter 1: General provisions

Article L. 211-3

Any civil servant or officer responsible for collecting or keeping archives in accordance with the provisions of this title is bound by professional secrecy concerning any document which cannot be legally made available to the public.

Chapter 2: Collecting, keeping and protecting

Section 1: Public archives

SubSection 1: General provisions

Article L. 212-1

As amended by law no. 2008-696 of 15 July 2008 - Art. 5

Public archives are imprescriptible.

No-one without right or title can hold public archives.

The document owner, the archives office or any competent public archives service can initiate an action for repossession of public archives, an action for nullification of any act performed that violates the second paragraph or an action for recovery.

The terms of application of the foregoing provisions are set by decree in the Council of State⁵⁰.

Article L. 212-2

As amended by law no. 2008-696 of 15 July 2008 - Art. 5

Upon expiry of their period of routine use, public archives other than those mentioned in Article L. 212-3 are subject to a selection to separate the documents to be kept from the documents that have no administrative value or historic or scientific interest and are to be disposed of.

The list of documents or categories of documents that are to be disposed of and the conditions of their disposal are set by agreement between the authority which produced or received them and the archives office.

Article L. 212-3

As amended by law no. 2008-696 of 15 July 2008 - Art. 5

When public archives contain personal data collected as part of the processed governed by data protection law no. 78-17 of 6 January 1978, such data shall, upon expiry of the time frame stated in 5° of Article 6 of that law, be subject to a selection to determine the data to be kept and the data

⁴⁸ For the legislative part, Sections in their wording formulated in the light of law no. 2008-696 of 15 July 2008. Cf. decision 2008-566 DC of 9 July 2008, recital clause 2: "Whereas Article 1 of organic law (...) makes these last twelve Articles of the National Heritage Code, based on the above-mentioned law on archives, adopted on the same day (...) applicable;"

⁴⁹ Sections in their definitive wording formulated in the light of law no. 2008-696 of 15 July 2008. Cf. decision 2008-566 DC of 9 July 2008, recital clause 2: "Whereas Article 1 of organic law (...) makes these last twelve Articles of the National Heritage Code, based on the above-mentioned law on archives, adopted on the same day (...) applicable;"

⁵⁰ Cf. Decree no. 2011-573 of 24 May 2011 on the regulatory part of the National Heritage Code (Art. R* 212-38 to R* 212-48).

which, having no administrative value or historic, statistical or scientific interest, is to be disposed of.

The categories of data to be disposed of and the conditions of the disposal are set by agreement between the authority which produced or received the data and the archives office.

Article L. 212-4

As amended by law no. 2008-696 of 15 July 2008 - Art. 5

I.- Public archives which, at the end of the selection process stated in Articles L. 212-2 and L. 212-3, are to be kept shall be deposited into a public archives service according to the conditions set by decree in the Council of State⁵¹. This decree shall determine the cases where, notwithstanding the foregoing provisions, the archives office shall leave the keeping of documents from archives produced or received by certain public services or certain bodies to the competent services of those public services or bodies when they have satisfactory document conservation, security, communication and access conditions. It sets the conditions for cooperation between the archives office and those public services or bodies.

II.- (Documents from public archives emanating from the activity of the parties mentioned in Article L. 211-4 which have not yet been subject to the selection process stated in Articles L. 212-2 and L. 212-3 shall be kept by those parties under the scientific and technical supervision of the archives office. Those parties can, after having made a declaration to the archives office, lodge all or part of those documents with the individuals or legal entities approved for that purpose by the archives office. This shall be subject to an agreement stating the security and conservation conditions for the documents lodged and also the procedures for their communication and access, for the documents to be checked by the archives office and for their return to the depositor at the end of the contract. A decree in the Council of State⁵² shall set the procedures for the prior declaration and also the conditions for granting and withdrawing the custodians' approval and it shall state the content of the clauses that must appear in the custodian agreements.

Personal health data is lodged according to the conditions stated in Article L. 1111-8 of the Public Health Code.

III.- II applies to the lodging of public archives which are not subject to the obligation of depositing with a public archives service.

Chapter 3: Communication rules

Article L. 213-3

As amended by law no. 2008-696 of 15 July 2008 - Art. 17

I.- The authorisation to consult documents from public archives before the expiry of the time frames set in Article L. 213-2(I) can be granted to persons/entities who apply for it provided that the interest attached to consulting those documents does not result in the interests which the law intended to protect being excessively prejudiced. Subject, as far as notaries' original drafts and registers are concerned, to the provisions of Article 23 of the law of 16 March 1803 regarding the organisation of the profession of a notary, the authorisation is granted by the archives office to persons/entities who apply for it subject to the agreement of the authority from which the documents come.

The time for answering an application for consultation cannot exceed two months from the registration of the application.

⁵¹ Cf. Decree no. 2011-573 of 24 May 2011 on the regulatory part of the National Heritage Code (Art. R* 212-38 to R* 212-48).

⁵² Cf. Decree no. 2011-573 of 24 May 2011 on the regulatory part of the National Heritage Code (Art. R* 212-38 to R* 212-48).

II.- The archives office can also, subject to the agreement of the authority from which the documents come, decide on the early opening up of fonds or parts of fonds of public archives.

Chapter 4: Penal provisions

Article L. 214-1

As amended by law no. 2008-696 of 15 July 2008 - Art. 19

Any breach of the provisions of Article L. 211-3 shall be liable to the penalties stated in Articles 226-13 and 226-31 of the Criminal Code.

Article L. 214-3

As amended by law no. 2008-696 of 15 July 2008 - Art. 19

Notwithstanding the application of Articles 322-2, 432-15, 432-16 and 433-4 of the Criminal Code, anyone holding public archives because of his/her office, who misappropriates or steals all or part of those archives or destroys them without the prior agreement of the archives office shall be punished by three years' imprisonment and a fine of €45 000.

Anyone holding public archives because of his/her office, who has allowed all or part of those archives to be destroyed, misappropriated or stolen without the prior agreement of the archives office shall suffer the same punishment.

When the acts stated in the first and second paragraphs above are committed through negligence according to the conditions and the distinctions stated in Article 121-3 of the Criminal Code, the punishment shall be one year's imprisonment and a fine of €15 000.

An attempt at the offences stated in the first paragraph above and anyone mentioned in the second paragraph having allowed such an attempt to be committed shall suffer the same punishment.

Article L. 214-4

As amended by law no. 2008-696 of 15 July 2008 - Art. 19

Individuals guilty of the offences stated in Article L. 214-3 shall also be punished as follows:

- 1° The loss of civil, civic and family rights, according to the terms and conditions provided by Article 131-26 of the Criminal Code;
- 2° Being banned, according to the terms and conditions provided by Article 131-27 of the same Code, from holding public office or from performing the professional or corporate activity during or in respect of the performance of which the offence was committed;
- 3° The confiscation, according to the terms and conditions provided by Article 131-21 of the same Code, of the sums or objects illegally received by the perpetrator of the offence, except for objects able to be returned.

Article L. 214-5

As amended by law no. 2008-696 of 15 July 2008 - Art. 19

Anyone holding public archives without right or title who does not return them to the competent authority asking for them shall be punished by one year's imprisonment and a fine of €15 000.

Article L. 214-9

Created by law no. 2008-696 of 15 July 2008 - Art. 19

Legal entities declared criminally responsible for the offences stated in Article L. 214-3 shall suffer the penalties mentioned in 2°, 8° and 9° of Article 131-39 of the Criminal Code.

The banning mentioned in 2° of that Article 131-39 relates to the activity during or in respect of the performance of which the offence was committed.

Article L. 214-10

Created by law no. 2008-696 of 15 July 2008 - Art. 19

Anyone who has committed acts likely to result in his/her conviction on the basis of Articles 432-15 and 433-4 of the Criminal Code can be prevented from having access to the premises where

documents from public archives are consulted. This measure is ordered by the administrative authority, for a maximum period of five years, according to the conditions set by decree in the Council of State⁵³.

Reglementary parts⁵⁴

Book II: Archives

Title 1: General archiving rules

Chapter II: Collecting, keeping and protecting

Section 1: Public archives

SubSection 2 Archives of the Constitutional Council

Article R*212-38

Created by Decree no. 2011-573 of 24 May 2011

For the purposes of Section 58 of Ordinance no. 58-1067 of 7 November 1958 concerning organic law on the Constitutional Council and Articles L. 212-1 to L. 212-4, L. 213-3 and L. 214-10, the management, depositing, selection and disposal conditions and also the rules for processing, filing, keeping and consultation the archives of the Constitutional Council are defined by this subsection.

The Constitutional Council shall have the scientific and technical assistance of the French Archives Administration of the General Directorate for Heritage to ensure the documents' security, the compliance of the fonds unit and their organic structure, the scientific and technical quality of the research instruments, the compatibility of the processing systems and the optimisation of its archival heritage.

Article R*212-39

Created by Decree no. 2011-573 of 24 May 2011

Before initiating an action for repossession or for recovery as provided for by Article L. 212-1, the Constitutional Council or the French Archives Administration of the General Directorate for Heritage shall send a formal notice to the holder of those archives by registered letter requiring acknowledgement of receipt. This letter points out the public and imprescriptible nature of the Council's archives and formally instructs the holder to return them without delay. When the Council's archives are put up for sale, the formal notice is also sent to the person carrying out the sale.

Article R*212-40

Created by Decree no. 2011-573 of 24 May 2011

Documents which are routinely used for the Constitutional Council's activity are considered to be current archives.

The following documents are considered to be intermediate archives:

- a) Those which have ceased to be considered current archives;
- b) Those which cannot yet, because of their legal or administrative interest, be subject to selection and disposal in accordance with Article R.* 212-42.

It is the Constitutional Council's responsibility to keep current and intermediate archives, with the scientific and technical assistance of the French Archives Administration of the General Directorate for Heritage. These archives can be lodged in accordance with the conditions stated in Article L. 212-4(II).

⁵³ Cf. Decree no. 2011-573 of 24 May 2011 on the regulatory part of the National Heritage Code (Art. R* 212-38 to R* 212-48).

⁵⁴ Decree no. 2011-573 of 24 May 2011 on the regulatory part of the National Heritage Code (Cf. L.II, T.I, Ch. 2, Sect. 1, subsect. 2 Archives of the Constitutional Council, Art. R* 212-38 to R* 212-48). Its Art. 3 repeals Decree no. 2009-1123 of 17 September 2009 on the archives of the Constitutional Council.

Article R*212-41

Created by Decree no. 2011-573 of 24 May 2011 - Art.

Documents which have subject to the selections and disposals defined in Article R.* 212-42 and which are to be kept without any time limitation are considered to be definitive archives.

The service with nationwide jurisdiction for national archives shall keep the definitive archives.

Article R*212-42

Created by Decree no. 2011-573 of 24 May 2011 - Art.

The following shall be defined by agreement between the Constitutional Council and the French Archives Administration of the General Directorate for Heritage:

- 1° The time that archives are kept as intermediate archives;
- 2° The final destination at the end of the period during which they are kept as intermediate archives, i.e.:
 - a) Immediate or eventual disposal, wholly or partly, with or without selection;
 - b) Depositing, as definitive archives, with the service with nationwide jurisdiction for national archives;
- 3° The conditions for managing definitive archives.

Article R*212-43

When documents are transferred to the service with nationwide jurisdiction for national archives, a depositing slip shall be issued by the Constitutional Council.

The depositing of a document drawn up on electronic medium shall be accompanied by all of the information about it since it was drawn up which is necessary for its operation, such as the data used to identify it, determine its properties and ensure its traceability.

Article R*212-44

Created by Decree no. 2011-573 of 24 May 2011 - Art.

The service with nationwide jurisdiction for national archives shall send the Constitutional Council the research instruments which relate to the documents which it has deposited.

Article R*212-45

Created by Decree no. 2011-573 of 24 May 2011 - Art.

The documents kept by the service with nationwide jurisdiction for national archives shall be solely available to the Constitutional Council provided that they cannot be consulted in accordance with the terms of Section 58 of Ordinance no. 58-1067 of 7 November 1958 concerning organic law on the Constitutional Council.

Article R*212-46

Created by Decree no. 2011-573 of 24 May 2011 - Art.

When the Constitutional Council intends to lodge current or intermediate archives in accordance with the conditions stated in Article L. 212-4(II), the lodging declaration shall be sent, by registered letter requiring acknowledgement of receipt, to the French Archives Administration of the General Directorate for Heritage.

This declaration shall include the following information:

- 1° The context, the objectives, the timetable and the anticipated duration of the operation;
- 2° The list and the ultimate dates of the archives lodged;
- 3° The volume and the linear footage or the number of documents lodged.

Article R*212-47

Created by Decree no. 2011-573 of 24 May 2011 - Art.

The custodian agreement mentioned in Article L. 212-4(II) shall be entered into in writing. Any clause the purpose of which is to apply the right of retention to archives lodged by the Constitutional Council shall be deemed not to have been written. The French Archives Administration of the General Directorate for Heritage shall provide the Constitutional Council with

assistance in drawing up the custodian agreement. The General Directorate for Heritage shall be sent a copy of it after it has been signed by the contracting parties.

The custodian agreement shall contain clauses relating to:

- 1° The nature and the medium of the archives lodged;
- 2° The description of the services carried out: content of the services and results expected;
- 3° The description of the resources used by the le custodian to provide the services;
- 4° The mechanisms for material communication and access to the archives by the Constitutional Council;
- 5° If the custodian makes changes or brings in technical developments, its obligations vis-à-vis the Constitutional Council;
- 6° Information regarding the guarantees covering any default by the custodian;
- 7° The mechanisms for returning the archives lodged at the end of the custodian agreement, together with an undertaking to fully destroy the copies which the custodian might have made during the period of the agreement;
- 8° Information regarding the conditions for the right of recourse against external providers and also the custodian's undertakings that this right of recourse ensures an equivalent level of guarantee in respect of the obligations incumbent on the activity of keeping documents;
- 9° The insurance policies which the custodian takes out to cover the loss and damage which the archives lodged could suffer; the agreement shall provide that these expressly exclude archives lodged within the scope of the relinquishment clause;
- 10° The duration of the agreement and the conditions for a possible renewal.

Article R*212-48

Created by Decree no. 2011-573 of 24 May 2011 - Art.

The decisions taken on the basis of Article L. 214-10 by the Minister of Culture to prevent certain people from having access to the premises where documents from public archives are consulted are applicable at the Constitutional Council's premises as soon as they are conveyed to it. However, the Constitutional Council can authorise these people to have access to such premises in respect of the carrying out of assignments entrusted to them by the Constitution.