

CONSTITUTIONAL
COUNCIL

ANNUAL REPORT
2018

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The Constitution 60 years on



Laurent Fabius

**President of the
Constitutional
Council**

Last year was the beginning of a new parliamentary term and saw intense activity including disputes concerning the election of deputies and senators, and the usual large number of petitions for priority preliminary rulings on the issue of constitutionality (QPC). How would you sum up the activity of the Constitutional Council last year?

The Constitutional Council's judicial activity continued at a brisk pace.

With a total of 18 ex ante (DC) decisions since September 2017, we issued rulings on the first Acts of Parliament of the new legislature. These included the Amended Finance Act, the 2018 Social Security Financing Act, as well as the 2018-2022 Public Funding Planning Act, the act relating to the guidance and achievement of students, the Common European Asylum System Act, the act ratifying certain ministerial orders ("ordonnances") relating to employment law, the organic law on organising a consultation on the assumption of full sovereignty by New Caledonia, the act relating to the protection of personal data and the act on freedom to choose

**The Constitution,
bulwark of the
Republic**

INTERVIEW



one's career and continuing professional training. So, all in all, we accomplished quite a lot.

As regards priority preliminary rulings on the issue of constitutionality (QPC), the number of petitions from the Council of State (*Conseil d'État*) and the Court of Cassation (*Cour de Cassation*) continued unabated given that - in a short space of time - we have ruled on a total of 69 cases since September 2017. These cases covered a variety of issues even though criminal and tax law still represent the lion's share. In about two thirds of cases we ruled ex post (on QPCs) that legal provisions were compliant with the Constitution, whilst occasionally expressing reserves as to interpretation. In one third of cases, our college handed down rulings of partial or total non-compliance. In addition

to this routine judicial activity, I should mention disputes arising from the legislative and senatorial elections amounting to a total of 319 electoral disputes and 232 disputes relating to campaign spending. The assistance we obtained from deputy rapporteurs from the Council of State and the Court of Audit (*Cour des Comptes*) was invaluable in the handling of these cases.

Several decisions handed down by the Constitutional Council this year have triggered a lot of comment. Which decisions do you think were the most significant?

It is difficult to rank them. Our ruling on the "solidarity offence" is without a doubt one of the year's most important ones, in that for the first time we had to define "fraternity" -

INTERVIEW

the only word of the Republic's three-word motto that the Constitutional Council had never had to rule on. The ruling of October 2017 on the three percentage points rise in corporation tax also attracted much comment, not so much for the legal arguments put forward but because of its impact on public finances. The Council demonstrated that its decision had proper legal grounding and took full account of the Act being unconstitutional. Another major ruling this year, that many have welcomed as a step forward in the rule of law, concerned the wording of decisions handed down by criminal courts. For the first time, the Council ruled that a court judgement should give detailed reasoning for its sentencing rather than simply determination of guilt. On another matter, we have been petitioned regarding the Personal Data Protection Bill, which prompted us to specify for the first time how we review laws transposing EU Directives and set legal precedents as to algorithm-based government decisions. Finally, I would like to mention our rulings on homeland security and anti-terrorism cases, such as when we once again disallowed provisions that created the offence of regularly surfing terrorist websites. Generally we can see that our rulings coincide with the major political and media issues of the day. This can be explained both by the very short time frame in which we deliberate - never more than three months ex post (QPC), never more than a month ex ante (DC) - and by the specific features of our ex ante review and, more recently, by the fact that we are petitioned more and more rapidly in the form of QPCs on aspects of recently voted legislation for which we had not been petitioned ex ante. This is what occurred with the 30 October 2017 Homeland Security and Anti-Terrorism Act, on which we had not been petitioned ex ante but where several provisions were quickly put to us ex post by QPC.

We can see that our rulings coincide with the major political and media issues of the day.”

The Council's international activity is growing at a brisk pace. Given the current European and global environment, do you think judges talking among themselves is really relevant?

Definitely.

Ever since my appointment, the members and I have sought to open up the Council to international issues. We are developing such a “dialogue of judges” in particular with the German Federal Constitutional Court in Karlsruhe - who came to see us in Paris in December 2017, and with the constitutional courts in other Southern European ‘Latin’ countries - Italy, Spain and Portugal – whom we met in Albi in September 2018 – and with the European Courts in Luxembourg and Strasbourg, as well as with the courts in other French-speaking countries. Such talks have become essential at a judicial level. These exchanges of view with other courts enable us to sharpen our thinking and decision-making, and this must surely be true for them also. On a broader level, in such times where tensions are unfortunately on the increase in Europe and internationally, I believe it is important that constitutional courts should unite in support of fundamental democratic principles.

Following on from “Law Night” (“Nuit du Droit”) held last year at the Constitutional Council, a national event will take place on 4 October 2018. Can you tell us more?

The first “Nuit du Droit” held at the Constitutional Council on 4 October 2017 was a big success. More than 1,000 people heard an interesting exchange of views on several major issues in the public eye that raise important legal questions such as the fight against terrorism, artificial intelligence, employment and environmental protection. In 2018, the “Nuit du Droit” is being held again but with a new goal: on 4 October throughout France, many organisations – such as courts, universities, bar associations and companies – will put on events relating to

the importance of law in society at large. The events strive to make a wider public aware as to the principles of law, its institutions and its professions, while showing how it safeguards our freedoms, guarantees legal security, allows disputes to be settled peacefully and ensures that the economy and society run smoothly. The law, which governs all aspects of living together, is often poorly understood by our fellow citizens. The “Nuit du Droit” is held on our Constitution’s anniversary and is designed to be a time to celebrate, learn and consider how the law impacts our lives.

The planned constitutional reform started being debated in Parliament. To what extent will the Constitutional Council be involved?

The Government is planning to introduce into Parliament three different bills on this subject: a constitutional bill, an organic bill and an ordinary bill. The Constitutional Council did not have any specific role to play during the preparation of these bills. Contrary to what our name suggests and what is widely believed, we do not in fact offer “advice” or opinions to the Executive on institutional reform. This is the role of the Council of State as legal adviser to the Government. If these bills are discussed and become law then the role of the Constitutional Council varies depending on the type of law voted.

For an ordinary act we will check compliance with the Constitution, if we are petitioned to do so. In the case of an organic law, we have a legal duty to get involved. For a constitutional law, if the Executive chooses to hold a referendum we will probably be petitioned ahead of the vote. Ever since the year 2000 and the so-called “Hauchemaille” ruling in the run-up to the referendum on the five-year presidential term, the Constitutional Council now deems itself competent to rule on appeals tabled against preparatory steps leading to a referendum. But we are not there.

What is more, if the constitutional reform sought by the Executive is adopted, one of its provisions will directly affect the Constitutional Council. The Government has

“The events strive to make a wider public aware as to the principles of law, its institutions and its professions, while showing how it safeguards our freedoms, guarantees legal security, allows disputes to be settled peacefully and ensures that the economy and society run smoothly.”

in fact planned to abolish the right for former Presidents of the Republic to sit on the Constitutional Council for life. There will be a temporary exception for former Presidents who sat in the Council in the course of the previous year. Former Presidents of the Republic sitting in the Constitutional Council is a peculiarity related to the circumstances prevailing when the Council was founded in 1958. Putting an end to this anachronistic situation would be a common-sense reform heading in the right direction, namely a “jurisdictionalisation” of the Council. Of course, the Council will have to fully adapt to the consequences of any constitutional amendments enacted.

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This year we celebrate the sixtieth anniversary of the Constitution of the Fifth Republic. A feature article on this appears in this annual report. What do you think is the main purpose of a constitution in contemporary democratic countries?

The sixtieth anniversary of our fundamental Constitution is indeed a time to question the “purpose of a constitution” for any democracy. It is interesting to draw comparisons. In the United States, for example, the constitution and amendments thereto are almost sacred. This can certainly be put down to the fact that its adoption in 1787 coincided with the birth of the American nation, its emancipation from colonial Britain and the adoption of new principles coming out of the age of Enlightenment. In Germany, the 1949 “Basic Law” is also held in high regard by a large majority of people. This document, the first twenty articles of which lay down fundamental human rights, marked a break from the Nazi period and the birth of a new Germany. Constitutions in Italy, Spain and in several former “people democracies” are also held in high esteem and are strongly associated with breaking away from a previous regime.

France is a different matter. The 4 October 1958 Constitution was far from being the first one. It mostly addresses government powers rather than the country’s underlying principles. They do not break from the past and is primarily based on the 1789 Declaration of the Rights of Man and of the Citizen, the Preamble to the 1946 Constitution, the 2005 Charter for the Environment and the constitutional principles established via rulings from the Constitutional Council. So it is more like what we call a “constitutional corpus” than a real constitution. Even though this constitution largely relates to the organisation and function of state institutions and has undergone 24 amendments, it does provide tremendous stability to deal with numerous situations and crises. It sometimes comes under attack from politicians but nearly everyone agrees on its fundamental constitutional principles. We should welcome

the fact that the Constitutional Council does not trigger the same protests, even if some of its legally-based rulings may not please everyone.

A democratic constitution, and upholding it, are pivotal in coping with threats of all sorts.”

Given all this, I think it is important to stress how much, in France as elsewhere, a democratic constitution, and upholding it, are pivotal in coping with threats of all sorts. There are many risks threatening society, including in Europe, as we can see, ranging from terrorism, infringement on civil liberties, and increasing inequality to the weakening of institutions and the the rule of law coming under threat.

So the role of a “constitution” is what the word actually means: it “constitutes” a nation, i.e. transforms a community of people into an organised democratic society and lays down rules that ensure the state and country function properly, guaranteeing their unity and sustainability. In my opinion, this simple idea should be highlighted during the forthcoming sixtieth anniversary celebrations. Our Constitution, in its widest sense, is an anchor-point, a cornerstone, a bulwark of the Republic.



Every year the Constitutional Council hands down approximately 100 rulings on issues that directly concern everyone, including civil liberties, employment law, taxation, healthcare and the environment.

CHANGES AT THE CONSTITUTIONAL COUNCIL

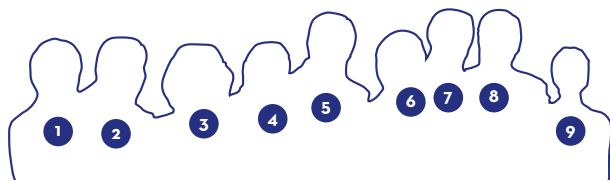
The Constitutional Council is made up of nine members who sit for non-renewable terms of nine years.

One third of its members, known as the “Sages”, are replaced every three years.

The President of the Republic, the President of the National Assembly (lower house) and that of the Senate (upper house) each appoint one member.

If a member cannot continue to fulfil his role, a new councillor is appointed for the remainder of his predecessor’s term.

Members of the Constitutional Council



Members as at 10 September 2018

- 1 Corinne Luquiens
- 2 Jean-Jacques Hiest
- 3 Nicole Maestracci
- 4 Michel Charasse
- 5 Laurent Fabius, président
- 6 Claire Bazy Malaurie
- 7 Lionel Jospin
- 8 Michel Pinault
- 9 Dominique Lottin

HOW MEMBERS ARE APPOINTED

The President of the Republic appoints three members and also appoints the Council President. The Presidents of the National Assembly and Senate each appoint three members. Any person enjoying the full rights of citizenship may be appointed to the Constitutional Council. In practice, appointees are individuals with recognized expertise, particularly in legal and political matters. Appointments must be approved by Parliament. Following the constitutional amendment of 23 July 2008, appointments are subject to the procedure stipulated in the final paragraph of the Constitution's Article 13. Thus, appointments made

by the President of the Republic are subject to approval by the standing committees of both houses of Parliament. Nominations by the President of each chamber are subject to approval by the standing committee of that chamber only. In addition, former Presidents of the Republic are automatically lifetime members.

Dominique Lottin

Dominique Lottin holds a master's degree in law. She entered the Ecole Nationale de la Magistrature (National School of the Judiciary) in 1980. She also graduated in 2005 from IHEDN, the Institute of Higher Studies in National Defence.

She began her career in Arras as a judge in the lower court (*tribunal d'instance*) before being appointed, in 1985, to the intermediate appellate court in Rouen (*tribunal de grande instance*) where she was deputy president from 1993 to 1996. From 1996 to 1998, she was a special advisor (*chargé de mission*) to the First President of the Versailles Court of Appeal before joining the public prosecutor's office of the Rouen Court of Appeal as deputy (*substitut*) to and secretary general for the general prosecutor. In 2001, she joined the Ministry of Justice, first as an Inspector of Judicial Services then, in 2005, as Assistant at the ministry's General Secretariat, before being appointed Director of Judicial Services in 2008. In 2010 she was appointed First President of the Douai Court of Appeal and, in 2014, First President of the Versailles Court of Appeal. In 2015, she was elected President of the Conference of First Presidents.

On 12 October 2017, Gérard Larcher, President of the Senate, put her name forward for appointment to the Constitutional Council to replace Nicole Belloubet when she became Minister of Justice. The appointment of Dominique Lottin was approved by the Senate law committee on 25 October, and signed the same day.

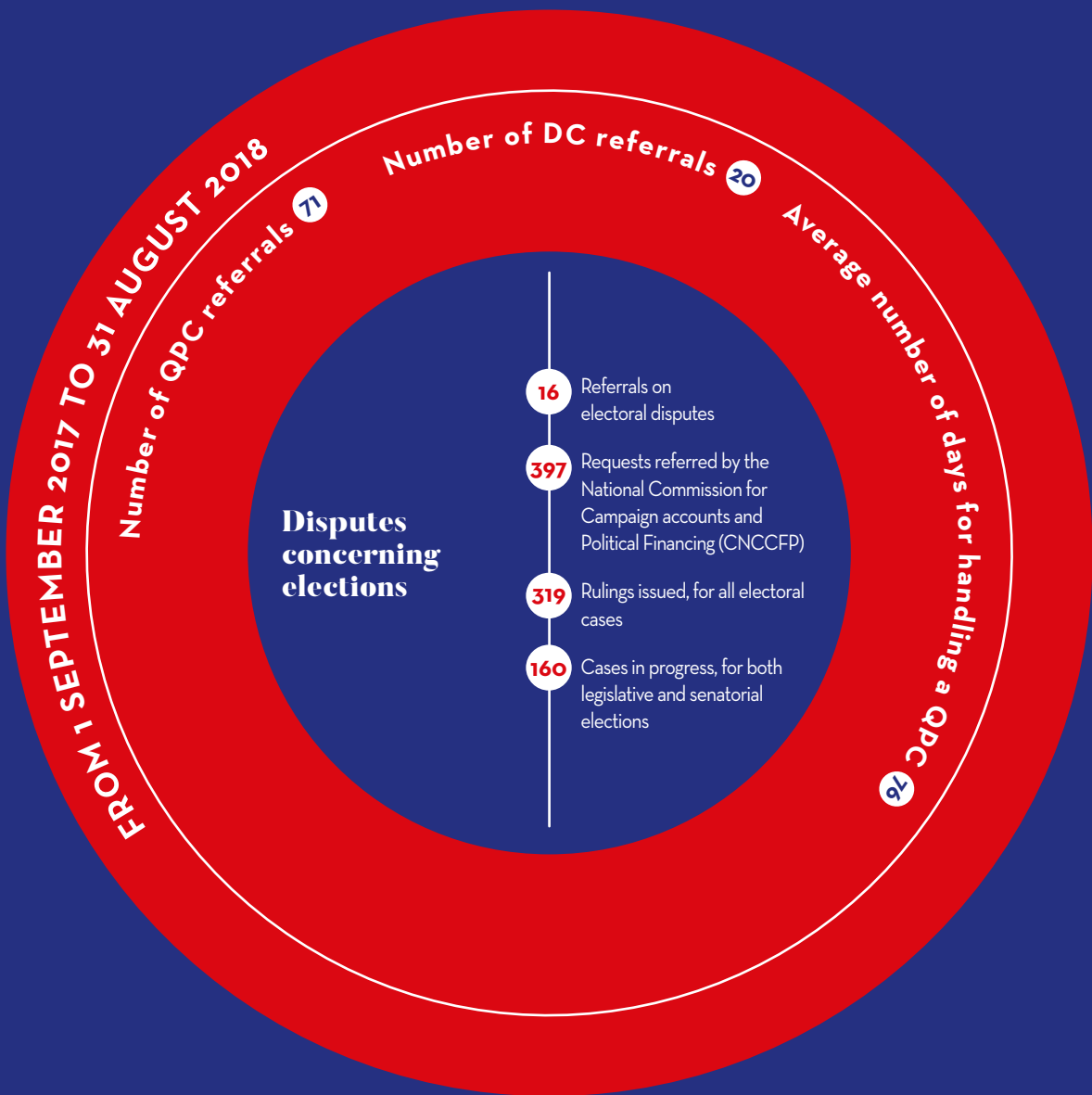


“ My appointment as a member of the Constitutional Council, which follows on from my trial judge career, demands excellence to ensure respect for the nation's highest legal standard that underpin our rights and freedoms.

Thus, since I took up my position on 25 October 2017, I have striven to bring to the Council the pragmatic and humane approach of a trial judge, while seeking to further my knowledge of government and the law to support the Council's trend to 'judicialisation' primarily concerning procedures and legal drafting.

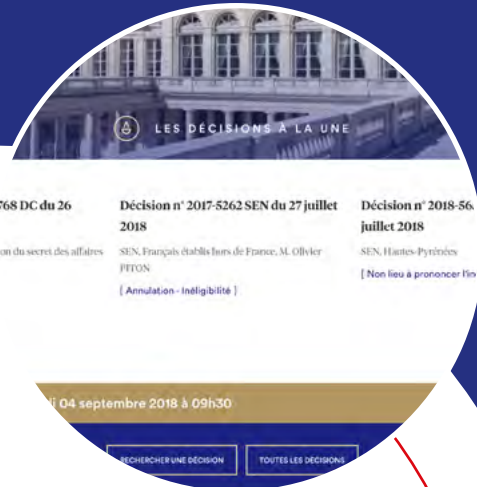
I can testify that the Council's breadth and strength derives from the varied professional backgrounds of its members, who combine their respective experience and expertise to build a common culture. ”

12 months at the Constitutional Council



NEW WEBSITE

A new version of the Constitutional Council website is now online. The site has been designed to reach as many people as possible without compromising on legal quality. As such, browsing is now more user-friendly, content has been reorganised and multimedia content including a new DailyMotion channel and two new video clips presenting the Council and QPC activities, now features more prominently. The website can be viewed on all devices including smartphones and tablets and the mobile app **CConstit** has been revamped.



Our years on Rue de Montpensier

IN MARCH 2019, THREE “SAGES” WILL STEP DOWN: MICHEL CHARASSE, APPOINTED IN 2010, JEAN-JACQUES HYEST AND LIONEL JOSPIN, APPOINTED IN 2015 AS REPLACEMENTS RESPECTIVELY FOR HUBERT HAENEL AND JACQUES BARROT.

Michel Charasse



In less than a year's time, three Council members—the 12 March 2010 “trio”—will come to the end of their term of office.

Two prominent members appointed from the outset were unfortunately not able to complete their terms of office. The very special working atmosphere at the Council based on trust, respect and friendship means we will not forget them.

All three of us, Jaques Barrot, Huber Haenel and myself sat in Parliament or on France's local councils. Despite our different convictions, which by the way are irrelevant at the Council, we were motivated by a deep commitment to public service.

And it was a pleasure to sit with their successors, Lionel Jospin and Jean-Jacques Hyest, whose broad governmental and parliamentary experience is underpinned by the honour of serving France.

Let's not forget that shortly after we three newcomers arrived, we heard the sad news that Jean-Louis Pezant had passed away, who we had known and esteemed as the National Assembly's secretary general. But he was successfully replaced by the highly qualified Claire Bazy Malaurie.

In March 2010, some people jokingly described the Council as a sort of “long, gently flowing river”. We have never experienced this type of Council

“Citizens must understand us, and we owe this indispensable clarity to them”

because we arrived at the Montpensier Wing at the start of the priority preliminary rulings on the issue of constitutionality (QPC) activities, which meant the Council's output had to really step up a gear. Indeed, the number of rulings per year, except for election years, leapt from 30 to over a hundred in one fell swoop, even if the quality of its analytical and judicial work did not suffer because of this surge in volume. It was initially a bit of a shock dealing with new, highly varied and sometimes rather unexpected referrals!

This meant our departments and staff had to work extremely hard. But President Debré, who was the driving force behind this citizen-favouring reform, gradually managed to put the Council back on an even keel with no sharp increase in resources, headcount or budget, by drawing on the Council's tremendous capacity to adapt and the extraordinary dedication of its people.

The Council has had a lot of work during the current term. Now that I am about to step down, I would like to take this opportunity to pay tribute to our staff who, under the authority of our three enlightened, competent and hard-working general secretaries, have given members top class support through their hard work. I also pay tribute to the work of our members, because, in the end, at the Council, each must work alone without individual assistants.

Naturally, with 78 members appointed since 1958, the Council has always been able face up to necessary changes. The fact that it is a small organisation with just 70 people at most, including members, says a lot.

So, throughout its 60-year history, the Council has managed to serenely absorb the implications of its bold 16 July 1971 decision, which for the first time was based on the 1946 Preamble and the fundamental principles of French law. Similarly, three years later, it ushered in the constitutional revision sought by President Giscard d'Estaing which granted an ex ante right of referral to 60 deputies or 60 senators. And it also smoothly adapted when, following the 1992 Maastricht Treaty and many other treaties since then, it became necessary to include in our reasoning the implications of ever more intrusive supranational EU law. And again, after 2014, when the Charter for the Environment was introduced into the Constitution's preamble, which gave citizens numerous opportunities to petition the Council for a precise interpretation of its scope and limits. And lastly, when laws on the "moralisation of public life" caused the Council to carry out detailed investigations into hundreds of alleged campaign spending infringements leading to instances of ineligibility pronounced by the Council after a thorough review of each case. And obviously, we have an overriding duty to ensure presidential

elections are conducted properly and must always be protected from cyber hacking risks.

We mustn't forget the need to take into account - at least in our thinking - the methods and reasoning of foreign courts, whether from the EU or not, with whom, at the behest of President Fabius, we maintain close, trust-based and even amicable relations, as with the German Court. This is a positive addition to relationships of confidence built up since the beginning of the century, with French-speaking courts around the world. The Council has a duty to take a close interest in the work and practices of the Council of State, the Court of Cassation and our QPC "constitutional partners". And we must not neglect what some Court of Strasbourg rulings may imply for our analytical work.

Since 2010, our work has been intense. As displayed by our votes, neither our philosophical or political convictions, nor any public statements made by some of us in the past, have ever intruded on our deliberations. The only criterion has been strict respect for the fundamental legal texts of our institutions. Personal opinions, feelings and opportunities are also put aside. Similarly, we are never tempted to aspire to "government by judges". The Council reminds people regularly that it does not have the same powers as Parliament and that it is not allowed to legislate in its place. All our work is driven by an overriding determination never to breach the tightly defined scope of our constitutional powers.

While any human institution can always be criticised, I am convinced that during the term now coming to an end the Constitutional Council has continued to fulfil its duties arising from the 1958 Constitution, in strict compliance with the Constitution's underlying principles, and that the Council and all Council members have acted in total independence ignoring all outside voices, pressure and threats! The freedom and independence of this chamber has never been compromised throughout these years!

We have constantly striven both to issue rulings that people, even those with little legal knowledge, can easily understand, and to always clearly explain their meaning, substance and implications without too much concern as to whether they will be popular with the public. Citizens must understand us, and we owe this indispensable clarity to them. Over the years, this has become the hallmark of our term of office.

My duties at the Council are drawing to a close. Fortunately, what will remain is the memory of having constantly tried my best, alone in thought and in reverence to our oath on taking office, and, for my part, without seeking anything other than to have for a short period of time made a small contribution to the strength and perennity of the French Republic.

Jean-Jacques Hiest



Having joined the Constitutional Council in mid-term, to replace the late Hubert Haenel, and before leaving along with Lionel Jospin and Michel Charasse at the end of next winter, perhaps I will be spared a too long and wearisome term of office, even though every day I am made aware of how my colleagues are tireless in their determined pursuit of legal excellence.

What struck me initially at the Constitutional Council – contrary to the image some, perhaps frustrated or envious people attempt to give – is the diversity of the members' careers and political leanings which does not detract from the quality of our deliberations. The rich experience of each one of them is indeed an asset.

The issue of whether laws are constitutional has always coloured my thinking throughout my almost thirty years of parliamentary and local responsibilities. I had the good fortune to sit in both the National Assembly and the Senate and I was always a member of Law Commissions. In Parliament there used to be considerable reluctance to verify whether laws were constitutional, and it took the 16 July 1971 ruling and President Giscard d'Estaing's 1974 constitutional revision to actually set this in motion.

But the 2008 constitutional revision, introducing ex ante questions of constitutionality (QPCs) has undoubtedly given the Constitutional Council both greater clout and shored up its judicial role. Having had the good fortune to be the Senate rapporteur for that reform, I must confess that it has paid off even

beyond the expectations of those who had advocated it for so long, including Robert Badinter himself, could have thought possible. The Council has certainly been a success story, if only because it is petitioned merely on some clauses rather than on all bills before enactment. After some trial and error, the Council of State and the Court of Cassation effectively make sure that all petitions are well founded.

Yet on arriving at Rue Montpensier, what strikes a new member most is how the Constitutional Council gets by most efficiently with very sparse resources, even though its rulings are under very tight deadlines, which does not apply to many of our European counterparts. Reporting to the Secretary General, the team of lawyers and the documentation department are particularly efficient and contribute greatly to the quality of our thinking and rulings.

Most importantly, Constitutional Council members must steadfastly ensure compliance with constitutional rules and uphold civil liberties and fundamental rights regardless of their past experience as government ministers, MPs, administrative or judicial court judges or National Assembly senior civil servants. The tendency in today's society is to make compliance with fundamental legal principles less important than a need to ensure people's security but the Council never waivers from its duty in this regard.

“What strikes a new member most is how the Constitutional Council gets by most efficiently with very sparse resources”

So, I spent many happy years gaining valuable experience alongside other Council members while respecting Parliament's role but maintaining an independent mind and a sense of responsibility that a constitutional judge must display. I wish the Constitutional Council all the best for the future under Laurent Fabius's enlightened leadership, and I am sure all Council members will continue to work for the common good and in the public interest, which must remain the Council's overarching mission.

“What I liked at the Constitutional Council is the lack of dogma”

Lionel Jospin



Like Michel Charasse and Jean-Jacques Hiest who will soon step down from the Council, I have written this - albeit subjective - testimony of the years* at Rue Montpensier.

Early 2015, I was surprised by a proposal from Claude Bartolone, President of the National Assembly, to appoint me to the Constitutional Council since I had left public office over ten years before that, but I accepted. The intellectual challenge was tempting. The illusion of becoming a “Sage” was flattering. It was another chance to serve France.

I was warmly welcomed by President Jean-Louis Debré. The President’s role is to spread the preparation of preliminary reports equitably among the Council prior to decision-making and this enabled me to get a taste of a wide range of cases dealt with by the Council. Once he felt I had earned my spurs, he sought out a senior role for me where he hoped my previous public service and experience in government meant I would adopt a reasoned approach.

For my part, I had to plunge back into law. Certainly, my previous training had provided me a good grounding in constitutional and administrative law. My terms as a Member of Parliament had taught me how legislation is drafted. Having led a big political party and my duties in government gave me insight into the complex interplay between the state’s duties, legal requirements and the people’s expectations. But I did not know that much about the intricacies of private law that we are exposed to with QPCs.

The Constitutional Council’s top-class legal department and the three remarkable general secretaries who served during my time – Marc Guillaume, then Laurent Vallée, and now today Jean Maia – gave me valuable assistance. I managed to fill any gaps, sharpen my insight and play an honourable role in the Council by asking questions, discussing arguments put forward in their briefing notes and, on occasions, making choices between their various options, while constantly talking to my colleagues and working alone.

At the Council, I stayed true to my beliefs and my past career. I only rid myself of any prejudices I may have had. This is because our role is legal not political. We are not here to judge whether the law is necessary or not, but whether it complies with the Constitution and the principles enshrined in the legal texts underpinning France.

However, while this does not rule out legal controversies or do away with individual feelings or disagreements, formal voting on decisions is in fact a rare occurrence. No doubt this is because the Council is well aware that seeking an intelligent consensus best ensures that its rulings are right, which in turn means they will be accepted.

What I liked at the Constitutional Council is the lack of dogma. The Council no doubt keeps in mind past case law and legal precedents of the Council of State and the Court of Cassation. Indeed, it must never create legal instability. But the Council knows how to bend norms, if it deems it necessary.

When preparing the grounds for its rulings, the Council often seeks a balance between various, sometimes contradictory, constitutional requirements.

Compromises must constantly be sought when, for example, balancing civil liberties and the safeguard of public order, individual property rights and public interest imperatives, or freedom to do business and workers’ participation.

I will be leaving soon. I admire the fact that, as President, Laurent Fabius was closely involved intellectually, keeping an eye on collective opinions and anxious that rulings should be clear while upholding the Council’s prestige. I will never forget some lawyers’ pleadings during our public hearings. I would like to thank all the staff who work here for their willingness, amiability and efficiency. I am sad to leave my colleagues.

Will I also miss the comfort of the duty of confidentiality I have so scrupulously respected over the last four years? We’ll see.

* Not nine years in my case, but four, as I assumed Jacques Barrot’s term of office after he sadly passed away.

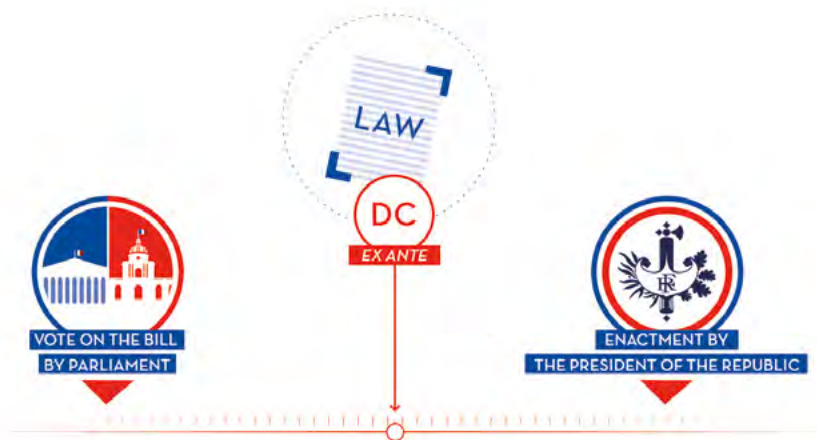
DECI- SIONS IN 2017-2018

EX ANTE CONSTITUTIONAL REVIEW

The reviewing of a law's conformity with the Constitution may be undertaken after its enactment by the Parliament, prior to its promulgation by the President of the Republic. As part of this so-called ex ante review, the Constitutional Council hands down a "Decision on Constitutional Conformity"(DC). While organic laws are automatically reviewed by the Constitutional Council, so-called "ordinary" laws must be explicitly referred to it for review. That referral may be instigated by the President of the Republic, the Prime Minister, the President of each house, 60 deputies or 60 senators. Here is an overview of this year's key decisions.

Ex ante reviews: decisions on constitutional conformity

EVER SINCE IT WAS ESTABLISHED IN 1958, THE CONSTITUTIONAL COUNCIL HAS HAD THE TASK OF REVIEWING THE CONSTITUTIONAL CONFORMITY OF LAWS PASSED BY PARLIAMENT, IN ADVANCE OF THEIR PROMULGATION BY THE PRESIDENT OF THE REPUBLIC. ITS DECISIONS IN THIS SPHERE ARE REFERRED TO AS DCs – “DÉCISIONS DE CONFORMITÉ” OR DECISIONS ON CONFORMITY. THE REVIEW PROCESS IS TERMED “EX ANTE” SINCE IT TAKES PLACE BEFORE THE LAW COMES INTO FORCE.



The Constitutional Council automatically reviews the constitutional conformity of:

- > organic laws (which are forwarded to it by the Prime Minister)
- > regulations adopted by the parliamentary assemblies (forwarded by the President of the National Assembly and the President of the Senate)
- > legislative proposals that one fifth of the Members of Parliament, supported by one tenth of all registered voters, are planning to submit to a referendum.

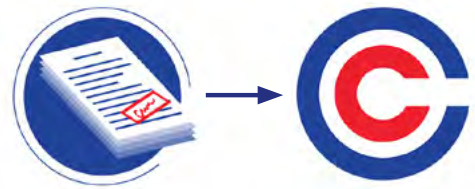
The review procedure is optional in respect of:

- > ordinary laws
- > international commitments, prior to their ratification.

Requests for optional reviews may be referred to the Constitutional Council by:

- > the President of the Republic
- > the Prime Minister
- > the President of the Senate
- > the President of the National Assembly
- > 60 deputies
- > 60 senators.

1 The referral is submitted by means of a letter addressed to the Constitutional Council. The letter must be accompanied by a position paper setting out the arguments which are intended to establish the unconstitutionality of all or part of the law.






2 The Constitutional Council has one month in which to issue its decision. The Government may ask that this period be reduced to eight days if the matter is deemed to be urgent.

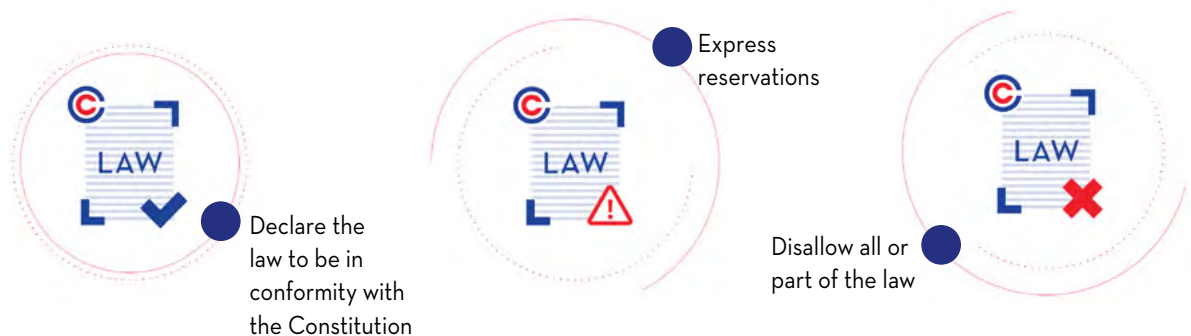


The Constitutional Council ensures that the law is consistent with the Constitution of the Fifth Republic, which was adopted in 1958 and which includes the following:



- 1789 THE DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN 
- 1946 THE PREAMBLE OF THE CONSTITUTION OF THE FOURTH REPUBLIC 
- 2004 THE CHARTER FOR THE ENVIRONMENT 

3 When the Constitutional Council has completed its review, it may:



4 If, notwithstanding the rejection issued by the Constitutional Council, the Government and the Parliament wish to have the law adopted, they may either:

- > pass a new law; or
- > undertake a revision of the Constitution.

Social Security financing

THE COUNCIL HAD BEFORE IT SEVERAL PROVISIONS OF THE SOCIAL SECURITY FINANCING ACT FOR 2018, WHICH PROVIDED, INTER ALIA, FOR A REDUCTION IN THE RATE OF THE SOCIAL SECURITY CONTRIBUTIONS LEVIED ON THE EARNINGS OF WORKERS IN THE PRIVATE SECTOR AND AN INCREASE OF 1.7 POINT IN THE GENERAL SOCIAL CONTRIBUTION (CSG) SURCHARGE.

The Council ruled that, even though provisions relating to unemployment insurance contributions are, in theory, outside the scope of the Social Security Financing Act, those contained in the law under consideration could, in these specific circumstances, be incorporated once the legislature had decided to carry out an across-the-board reform consisting in reducing workers' social contributions and, to that end, arranging for the Central Agency of Social Security Organisations (ACOSS) to bear the cost of financing the reduction in unemployment insurance contributions in 2018.

On a substantive level, and in the light of the principles relating to equality before the law and as regards government charges, the Council held that the different treatment applied by the legislature, in increasing the CSG rates by 1.7 point for all the components of its tax base, with the specific exception of unemployment benefits and retirement or invalidity pensions for low-income earners, was justified by the difference in the situation existing between low-income earners and others individuals.

A difference in situation also justifies the legislature's move to reduce contributions for private sector staff, but not for retirement or invalidity pensioners and civil servants, the former being the only ones who are subject to health insurance and unemployment insurance contributions. The Constitutional Council also ruled that the tapering rates of family, sickness and maternity insurance contributions for self-employed workers do not contravene the principle of equality, since the level of benefits to which they confer entitlement does not depend on the period of contribution or the level of employment-derived income to which those contributions relate.

In relation to the law that had been referred to it, concerning reforms to social protection for self-employed workers, the Constitutional Council also held that certain provisions were in conformity with the Constitution. These were: the article amending the 26 January 2016 law on the modernisation of the health system aimed at maintaining, at this stage, the general implementation of direct third-party payments only for maternity insurance claimants and sickness insurance recipients suffering from certain long-term illnesses; and the article amending certain rules relating to the use of contract employment in the medico-social sector.

On the other hand, without ruling on the constitutionality of the substance of these articles, it disallowed several provisions on the grounds that they lay outside the scope of social security financing laws and thus had no effect, or too indirect an effect, on the expenditure of the basic compulsory social security schemes ("social security riders"). —



Members of the Constitutional Council meet in the deliberation room, taking their decisions behind closed doors. The Secretary General and the Legal Department also participate in the deliberations.

Finance Act

THE FINANCE ACT FOR 2018 CONTAINED SEVERAL IMPORTANT TAX REFORMS, INCLUDING THE HOUSING TAX, THE SINGLE FLAT-RATE WITHHOLDING TAX AND THE WEALTH TAX.

The Finance Act introduced a new tax rebate, funded by the State, on the housing tax levied by municipalities and their public intermunicipal cooperation agencies operating their own tax system. The rate of this rebate, for which eligibility is linked to a taxpayer's income, is set at 30% of the amount of housing tax due in 2018, 65% in 2019 and 100% thereafter. Beginning in 2020, about 20% of taxpayers will remain liable for this tax.

As regards equality with respect to State charges, the Council noted that, through the contested provisions, which were presented to Parliament as constituting a step towards a more comprehensive reform of local taxation, the legislature had intended to reduce the housing tax levied on the majority of the population. In adopting an income ceiling based on the family quotient tax system (*quotient familial*) as the eligibility criterion for the new rebate, it was guided by a criterion that was objective, rational and consistent with the purpose of the Act. As the decision itself clearly states, the Constitutional Council's ruling on this point in no way precludes it from undertaking a fresh examination of these issues, particularly in the light of the way in which taxpayers who remain liable for the housing tax fare after the introduction of an expected reform of local taxation.

With regard to the financial autonomy of local authorities, the Council stressed that the category of the latter's own resources, within the meaning of Article 72-2 of the Constitution, included the proceeds of taxes of all kinds, not only when the law authorises these authorities to determine the basis of assessment, the rate or the amount, or when it determines, by authority, the rate or a local share of the basis of assessment, but also when it distributes these tax revenues within a category

“The Council noted that, through the contested provisions, which were presented to Parliament as constituting a step towards a more comprehensive reform of local taxation, the legislature had intended to reduce the housing tax levied on the majority of the population.”

of local authorities. The Council noted that, in the present case, the contested rebate was entirely borne by the State on the basis of the overall housing tax rates applicable in 2017; that the rebate did not affect the basis of assessment of that tax and did not compromise its local character; and that the municipalities remained free to set a different rate of housing tax, to which the recipients of the rebate will be liable, for the portion that exceeds the rate applicable in 2017.

The Constitutional Council nevertheless observed that if, because of changing circumstances, and in particular as a consequence of any amendment to the contested provisions, together with other causes, it appeared that the share of the municipalities' own resources within their overall resources fell below the minimum threshold of own resources determined by the General Local Authorities Code, then the Finance Act for the second year following that in which this situation was formally noted would need to introduce appropriate measures to restore the degree of financial autonomy of the municipalities to the level imposed by the legislature.

The Constitutional Council also issued a decision on the provisions which, with effect from 1 January 2018, subject income from movable capital, capital gains and certain income from life insurance, home-purchase savings and employee share ownership to a single flat-rate withholding tax. By setting this rate at 12.8%, the contested provisions bring the overall tax rate on such income to 30%, when the increase in social contributions on income from assets and investment income brought about by the Social Security Financing Act for 2018 is factored in.

The Council indicated that, by aiming to reduce marginal rates of taxation on capital income and improving the clarity and predictability of the taxes applying to such income, the legislature was able, without being in breach of the Constitution, to distinguish between, on the one hand, capital income which is now subject to the new proportional withholding tax and, on the other hand, other categories of income which remain subject to the progressive scale of income tax. As the other types

“The Council held that the provisions abolishing the wealth tax and creating a property wealth tax were in conformity with the Constitution.”

of income previously assessed under this scale remain so at the end of the reform, the contested provisions do not undermine the progressive nature of the overall amount of personal income taxation.

Finally, the Council held that the provisions abolishing the wealth tax and creating a property wealth tax were in conformity with the Constitution. It observed that this new tax, the basis of assessment of which is comprised of all immovable assets, falls within the category of “taxes of all kinds” mentioned in Article 34 of the Constitution, for which it is up to the legislature to determine the rules governing the basis of assessment and the rate and methods of collection (subject to compliance with the principles and rules of a constitutional character). In introducing this tax, the legislature intended, with a view to achieving a budgetary yield, to create a specific levy on property assets other than those allocated by the owner to his own professional activity. Consequently, it was able, without being in breach of the Constitution, to include in the assessment base of the new tax any assets that contributed to the financing of businesses, or to exempt from it any assets that the appeals characterised as “unproductive”. —

16 January
2018Decision
No. 2017-757 DCSenate resolution entrenching and adapting legislation in
committee

Legislation in committee

AS PROVIDED FOR IN THE FIRST PARAGRAPH OF ARTICLE 61 OF THE CONSTITUTION, THE PRESIDENT OF THE SENATE HAS REFERRED TO THE CONSTITUTIONAL COUNCIL A RESOLUTION AMENDING THE SENATE'S RULES OF PROCEDURE IN ORDER TO ENTRENCH AND ADAPT THE LEGISLATION IN COMMITTEE.

The resolution was aimed at introducing a legislative procedure in committee which, at the request of the President of the Senate, the chairman of the committee considering the matter, the chairman of a group or the Government, would have the effect of enabling the Conference of Presidents to decide that the right of senators and the Government to amend all or part of a bill or a motion for a law or resolution should be exercised only in committee. The Government, the chairman of the committee dealing with the substance or a group chairman may oppose the implementation of this legislative procedure in committee or request a reversion to the normal procedure for examining the text, if necessary only with respect to certain articles. During a public sitting, debates on the articles that are covered by this procedure are restricted, and no amendments are permitted – with the exception of those aimed at ensuring compliance with the Constitution, harmonising legislative texts or rectifying a material error.

The Constitutional Council acknowledged the constitutional conformity of this resolution. At the same time it noted – as it had already stated in its Decision No. 2015-712 DC of 11 June 2015 concerning a Senate

resolution which had made it possible to introduce a similar procedure on a trial basis – that it was for the Conference of Presidents, which was responsible for setting the deadlines for tabling amendments, to reconcile the requirement that the right of amendment

The Constitutional Council recorded a reservation regarding the limiting of speaking time during its discussion of the text.”

be exercised effectively with the need for transparency and integrity in parliamentary debate. The Conference of Presidents is also responsible, in the event of a late return to the standard legislative procedure, for ensuring compliance with these same requirements by setting, where appropriate, a date for tabling amendments other than the one that was originally proposed.

Furthermore, the Constitutional Council recorded a reservation regarding the limiting of speaking time during its discussion of the text. It took the view that it was for the committee chairman, the session chairman and the Conference of Presidents to determine or apply the various speaking time limits while ensuring that the requirements of transparency and integrity in parliamentary debate were respected. The Council also stressed that nothing in the resolution confers on the Conference of Presidents the power to limit the speaking time allowed to the Government. —

18 January
2018Decision
No. 2017-760 DCThe Public Finance Programming Act
for the Years 2018 to 2022

The Public Finance Programming Act

THE APPLICANTS CHALLENGED THE ARTICLE OF THE ACT THAT ESTABLISHED A MECHANISM FOR CONTROLLING THE OPERATING EXPENDITURE OF LOCAL AUTHORITIES.

The mechanism envisaged by the Act that had been referred to the Council was based primarily on the fact that certain local authorities had concluded contracts with the State with the aim of enhancing their self-financing capacities and helping to reduce public expenditure and the public deficit over the period 2018-2020. These contracts set an objective for each local authority for changes in its operating expenditure, to be determined by reference to a national target. If the implementation of the budget does not achieve this objective, the State will undertake “financial recovery” action, i.e. a deduction from the local authority’s revenue, the amount of which will depend on the level of the expenditure overrun.

The Constitutional Council noted that, although the legislature may require local authorities or their groupings to accept obligations and charges, this is subject to the proviso that those obligations and charges are in line with constitutional requirements or are in the public interest, that they do not infringe the specific competence of the local authorities concerned, that they do not inhibit their freedom of administration and that they are framed with sufficient precision as to their purpose and scope.

In the case in point, it found, on the one hand, that by introducing a binding mechanism to oversee the real operating expenditure of certain local

authorities, the legislature was seeking to give effect to the “objective of balanced accounts for public administrations”, as laid down in Article 34 of the Constitution.

The Constitutional Council also noted that efforts aimed at curbing operating expenditure are measured against the national rate of increase in local authority operating expenditure recorded between 2014 and 2017, which was equal to 1.2%. Moreover, the mechanism contested by the applicants is geared to take account of particular constraints faced by certain local authorities. Population changes, numbers of dwellings and the local community’s per capita tax potential can thus be taken into consideration. Each authority may request that an amendment be concluded, allowing the consequences of legislative or regulatory changes affecting the level of its operating expenditure to be factored in. The financial recovery mechanism, the quantum of which is capped at 2% of the local authority’s operating revenue, is applied only after a hearing, in which the parties’ views are presented, is held with the State representative. The latter must – possibly under the supervision of an administrative judge – take into account several factors that may affect the comparison of the level of administrative expenditure for the year in question with that of previous years.

For all of these reasons, the Constitutional Council took the view that the legislature had not affected the free administration of local and regional authorities to such an extent that Articles 72 and 72-2 of the Constitution would be breached. —

8 March 2018

Decision
No. 2018-763 DC

Student Guidance and Achievement Act

Student Guidance and Achievement

THE DEPUTIES WHO SUBMITTED

THE REQUEST PRIMARILY CONTESTED

THE REFORM OF THE RULES GOVERNING

ENROLMENT IN UNDERGRADUATE COURSES

OFFERED BY STATE-RUN INSTITUTIONS.

The law referred to the Constitutional Council stipulated that enrolment in undergraduate courses taught in these institutions is tied to a nationwide pre-enrolment procedure which is administered via the “*Parcoursup*” platform. At the time of this pre-enrolment procedure, candidates are provided with details of each course, together with statistics relating, in particular, to examination pass rates, the continuation of studies and post-course employment prospects. Where a candidate’s prior knowledge and skills are not entirely compatible with the specific characteristics of the course, enrolment may be made conditional upon the individual’s acceptance of any personalised academic support measures or training programs suggested by the institution as a way of improving their prospects of success. In this regard, any modifications and adaptations that may be of assistance to candidates with disabilities will be taken into account.

The Constitutional Council dismissed the claim that these provisions breached the principle of equal access to education because they would allow for differential treatment of candidates in the same stream, depending on the institution. In particular, it determined that, by allowing public higher education establishments to take account of course characteristics, which are in any case regulated by a “national framework” laid down by ministerial

order, and of candidates’ prior experience and skills, in order, where appropriate, to make their enrolment conditional on their acceptance of support and training arrangements, the legislature has adopted objective and rational criteria whose content it has spelled out in sufficient detail as to guarantee compliance with the principle of equal access to education. The same is true of the legislature’s intention to require that enrolments be approved with due regard to the extent to which the candidate’s training plan, experience and prior training are compatible with the key aspects of the course to be undertaken.

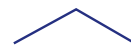
The Constitutional Council also declared that the scope of the information provided to

“The legislature has adopted objective and rational criteria whose content it has spelled out in sufficient detail as to guarantee compliance with the principle of equal access to education.”



candidates during the pre-enrolment procedure did not undermine the guarantee of academic independence, a fundamental principle enshrined in the laws of the Republic.

Lastly, the Constitutional Council rejected the criticism that the contested provisions would adversely affect the right to an effective appeal. It noted that these provisions guarantee that the administration will respond to any applicant who has submitted their preferences at the pre-registration stage. If the administration does not provide an explicit reply, the provisions entail an implicit decision no later than the end of the procedure,



High school students learn their *Baccalauréat* results, 6 July 2018.

thus affording the candidate the opportunity to appeal, where appropriate, against the rejection of each of the preferences they submitted. —

15 March
2018Decision
No. 2018-762 DCLaw allowing for the sound application
of the European Asylum System

The European Asylum System

THE APPLICANTS CHALLENGED PROVISIONS AMENDING THE CONDITIONS GOVERNING THE ADMINISTRATIVE DETENTION AND HOUSE ARREST OF ASYLUM SEEKERS UNDER THE EUROPEAN REGULATION OF 26 JUNE 2013 ESTABLISHING THE CRITERIA AND MECHANISMS FOR DETERMINING THE MEMBER STATE RESPONSIBLE FOR EXAMINING AN APPLICATION FOR INTERNATIONAL PROTECTION LODGED IN ONE OF THE MEMBER STATES BY A THIRD-COUNTRY NATIONAL OR A STATELESS PERSON (THE “DUBLIN III” REGULATION).

It was argued that the contested provisions constituted an infringement on individual freedom by permitting, even in the absence of a threat to public order or a need linked to the proper administration of justice, the detention of asylum seekers who are not necessarily, at this stage of the procedure laid down by the Dublin III Regulation, the subject of a deportation order, and by authorising the detention of an alien without demonstrating that he posed a flight risk.

The Constitutional Council accordingly noted that detention occurs at a stage of the procedure when the administrative authority is in possession of reliable evidence that the examination of the asylum application is, pursuant to the European Dublin III Regulation, the responsibility of another State. A placement order may be issued only against an alien who presents a significant flight

“A placement order may be issued only against an alien who presents a significant flight risk, at a time when he is subject to transfer to another State.”

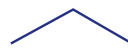
risk, at a time when he is subject to transfer to another State. This measure is therefore aimed at upholding public order. The administration must, under the supervision of the courts, evaluate situations where there is a significant flight risk, on the basis of an individual assessment that takes into account the vulnerability of the person concerned, and of any specific circumstances whereby the alleged risk cannot be regarded as having been substantiated. Situations which may constitute such a flight risk include the alteration of fingerprints to prevent them from being recorded; identity, residence or travel document fraud; and concealment of one’s identity, background or other relevant circumstances, in particular with regard to asylum. An assessment as to whether or not such alterations, fraud or concealment were intentional is subject to review by the courts.



Furthermore, detention is only likely to be used as a last resort, if a house arrest order is not enough to avert the risk of flight. The detention period, which may only be extended beyond 48 hours with the consent of the judiciary, may not exceed 45 days.

On the basis of all these considerations, the Constitutional Council concluded that any infringement of individual freedom must be deemed to be necessary, appropriate and proportionate to the objective of the legislation.

“Detention is only likely to be used as a last resort, if a house arrest order is not enough to avert the risk of flight.”



The “Dublin III Regulation” entered into force on 1 January 2014.

As a final point, the Council considered that the reduction of the time limit for an appeal against the transfer decision, where the alien is not subject to a detention or house arrest measure, did not compromise the right to an effective judicial review. It noted in particular that, where the person concerned is not assisted by a lawyer, the main elements of that decision are provided to him in a language which he understands or which he may reasonably be expected to understand, that the transfer decision may not be enforced automatically before the expiry of a two-week period and that any appeal against that decision has the effect of staying its enforcement. —

21 March 2018

Decision
No. 2018-761 DCLaw ratifying various Ordinances adopted on the basis
of Act No. 2017-1340 of 15 September 2017 providing authority
to take measures, by means of Ordinances, for the purpose of
promoting social dialogue

Labour Ordinances

**THIS ACT RATIFIED THE “LABOUR
ORDINANCES” WHICH WERE ADOPTED
FOLLOWING THE ENABLING LAW
EXAMINED BY THE CONSTITUTIONAL
COUNCIL IN SEPTEMBER 2017.**

The Constitutional Council disallowed the provisions introducing a derogation from the ordinary rules of law in respect of employer-run by-elections to fill vacant seats on the staff delegation of the Social and Economic Committee. The employer was exempted from holding such elections where the vacancies arose from the annulment, by a court, of the election of members of the Committee on the grounds of non-compliance with the rules on gender balance. The Constitutional Council held that these provisions could result in the normal operations of the Social and Economic Committee being affected under circumstances which undermined the principle of worker participation.

With regard to the requirements for appealing against collective covenants and agreements, the Constitutional Council dismissed the complaints submitted by the applicant deputies based on the infringement of the right to an effective judicial review, the principle of participation and freedom of association. The Council also dismissed the claims that the principles of employee participation and freedom of association had been compromised by the provisions which allow an employer, in an undertaking with fewer than 20 employees, to submit to employees, for their consideration, a

draft agreement or a revision amendment relating to matters open to collective enterprise bargaining.

The Constitutional Council also found that the provisions setting out the circumstances in which a collective performance agreement may modify certain aspects of the way in which work is structured, of employees' remuneration or of their geographical or career mobility, as a means of meeting the needs of the enterprise's operations or of preserving or boosting employment, are in conformity with the Constitution.

The Constitutional Council also rejected criticism of the provisions which provide that, in the context of certain dismissal procedures, “economic difficulties, technological change or the need to safeguard the undertaking's competitiveness shall be assessed at the level of the enterprise concerned if it does not belong to a group and, where it does belong to a group, at the level of the sector of activity that is common to that undertaking and to the undertakings in the group to which it belongs, established within the national territory, except where fraud is involved”. It held that, by stipulating that the economic cause of dismissal in an enterprise belonging to a group may be assessed at the level of enterprises belonging to the same group, situated only within the national territory and in the same sector of activity, the legislature did not infringe the right to employment. It further noted that it follows from the very terms of the Act that this assessment confined to the national territory does not apply where fraud, in whatever form, occurs, in particular by means of the artificial creation of economic difficulties within a subsidiary. —



The Constitutional Council does not follow a schedule of “sessions”. Its members meet whenever necessary, at the President’s request.

Personal Data Protection

THE MAIN OBJECTIVE OF THE LAW REFERRED TO THE CONSTITUTIONAL COUNCIL WAS TO AMEND THE NATIONAL LEGISLATION ON THE PROTECTION OF PERSONAL DATA, SO AS TO BRING IT INTO LINE WITH THE REGULATION OF 27 APRIL 2016 KNOWN AS THE GENERAL DATA PROTECTION REGULATION (GDPR).

In handing down this decision, the Constitutional Council clarified, for the first time, the nature of its oversight of legislative provisions which draw consequences from European Union law, when that law derives from a regulation. This oversight has the same scope and is subject to the same requirements as those applied by the Council to the laws transposing a European directive: review is confined to the absence of any disregard for France's constitutional identity in cases where the law merely draws the necessary conclusions from the provisions of the European regulation; review is confined to the absence of manifest incompatibility between the law and the European regulation; and review is possible in respect of the legislature's observance of the extent of its jurisdiction (absence of "negative incompetence").

With regard to the substance of the law under review, the

Constitutional Council took the view that the provisions extending the cases in which a decision which produces legal effects with regard to a person, or which significantly affects that person may, by exception, be taken solely on the basis of automated processing of personal data, are in conformity with the Constitution.

In its first ruling on the authorities' use of algorithms to produce their decisions, the Council noted in particular that the only provisions that were contested in the appeal were those which allowed the authorities to make an individual assessment of a person's circumstances solely by means of an algorithm, in accordance with rules and criteria which had been decided in advance by the data controller. Those provisions have neither the objective nor the effect of permitting the authorities to adopt decisions on non-legal grounds, or to apply rules other than those that apply under prevailing law. There is therefore no

relinquishment of regulatory power arising from the provisions in question.

The Council also referred to the fact that the exclusive use of an algorithm as the basis underpinning an individual administrative decision is subject to compliance with three conditions. First of all, in accordance with the Code on Relations between the Public and the Administration, an individual administrative decision must

The Constitutional Council clarified, for the first time, the nature of its oversight of legislative provisions which draw consequences from European Union law, when that law derives from a regulation."

The Constitutional Council stressed that the processing controller must ensure that the algorithmic processing and any changes thereto are properly managed in order to be able to explain to the person concerned, in detail and in an intelligible form, exactly how the processing relating to them has been carried out.”

explicitly state whether it was reached on the basis of an algorithm and the main aspects of its implementation must, at their request, be disclosed to the person concerned. It follows that an individual decision cannot be taken using an algorithm whose operating principles could not be disclosed without compromising one of the confidential matters or interests enshrined in the Code on Relations between the Public and the Administration.

Secondly, there must be an avenue of appeal against an individual administrative decision. The authority to which an appeal is referred is then required to issue a decision that is no longer based exclusively on the algorithm. In the event of a contentious appeal, the administrative decision is also placed under the oversight of the judge, who may require the administration to disclose details of the algorithm.

Finally, exclusive reliance on an algorithm is prohibited if such processing involves one of the sensitive

data identified in the Act of 6 January 1978, i.e. personal data “revealing the supposed racial origin or the ethnic origin”, the political opinions, religious or philosophical beliefs or trade union membership of a natural person, or genetic data, biometric data, health data or data relating to the sexual life or sexual orientation of a natural person.

The Constitutional Council also stressed that the processing controller must ensure that the algorithmic processing and any changes thereto are properly managed in order to be able to explain to the person concerned, in detail and in an intelligible form, exactly how the processing relating to them has been carried out. As a result, algorithms that are capable of autonomously reviewing the rules that they apply cannot be used as the sole basis for an individual administrative decision unless they are checked and validated by the data controller (“self-learning” algorithm).

For all these reasons, the Constitutional Council held that the legislature provided appropriate guarantees for the protection of the rights and freedoms of persons who are subject to individual administrative decisions taken exclusively on the basis of an algorithm. —

26 July 2018

Decision
No. 2018-768 DC

Commercial Confidentiality Protection Act

Protection of commercial confidentiality

THE CONSTITUTIONAL COUNCIL HAD BEFORE IT SEVERAL PROVISIONS OF THE COMMERCIAL CONFIDENTIALITY PROTECTION ACT, THE PURPOSE OF WHICH IS TO AMEND NATIONAL LEGISLATION WITH A VIEW TO TRANSPOSING THE DIRECTIVE OF 8 JUNE 2016 ON THE PROTECTION OF UNDISCLOSED KNOW-HOW AND COMMERCIAL INFORMATION (TRADE SECRETS) AGAINST UNLAWFUL ACQUISITION, USE AND DISCLOSURE.

In order to address the criticisms directed at these provisions, it cited its previous jurisprudence on the monitoring of laws designed to transpose a European Union directive into national law. In essence, it emerged from that jurisprudence that, given the constitutional requirement to transpose European directives, its oversight of transposition provisions is quite specific. In the first place, the transposition of a directive cannot be at variance with a rule or principle inherent in France's constitutional identity, unless the legislature has consented to it. No such rule or principle being at issue, the Constitutional Council is not competent to review the constitutionality of legislative provisions which merely draw the necessary conclusions from categorical and precise provisions of a European Union directive. Secondly, the Constitutional Council may only declare to be incompatible

“The transposition of a directive cannot be at variance with a rule or principle inherent in France's constitutional identity, unless the legislature has consented to it.”

with Article 88-1 of the Constitution a legislative provision which is manifestly incompatible with the directive which it is meant to transpose.

By applying this jurisprudence, the Constitutional Council rejected the criticisms of Article L. 151-1 of the Commercial Code, which sets out the criteria for identifying information protected by commercial confidentiality provisions. In particular, it observed that this provision, which reproduces the criteria laid down by the Directive of 8 June 2016 in defining information that is protected by virtue of its commercial confidentiality, is not demonstrably incompatible with the Directive it is intended to transpose. Since the definition of commercial confidentiality arising from the contested provisions merely draws the necessary conclusions from the categorical and precise provisions of the Directive of 8 June 2016, the Council considered that it was

not incumbent upon it to rule on the claim that this definition would infringe freedom of expression and communication, which is protected both by Article 11 of the Charter of Fundamental Rights of the European Union and by Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen. The Constitutional Council observed that the Directive confers on Member States a margin of discretion allowing them to adopt additional provisions to enhance the protection of commercial confidentiality. The Council considered, however, that it should rule on the claim that the legislature infringed freedom of enterprise by not laying down such additional provisions, supplementing those that draw the necessary conclusions from the Directive's categorical and precise provisions, so as to enable small businesses, as well, to protect their commercial confidentiality. However, on the one hand, the protective measures that businesses are required to implement in order to claim protection of commercial confidentiality are only "reasonable" measures; on the other hand, the legislator provided that this condition be assessed "having regard to the circumstances", a formulation which refers in particular to the resources available to a business. On these grounds, the Constitutional Council dismissed the claim that Article L. 151-1 of the Commercial Code constituted an infringement of the freedom of enterprise.

The Constitutional Council also rejected criticisms levelled at Article L. 151-9 of the Commercial Code in light of the constitutional requirement for workers participation in the collective determination of working conditions and in the management of the business, as required by paragraph 8 of the Preamble to the 1946 Constitution. Without commenting on the nature of this requirement, as an intrinsic principle of the constitutional identity of France, the Constitutional Council ruled in particular in this regard that, in any event, information that is legally obtained or disclosed, pursuant to paragraphs 1° and 2° of Article L. 151-9 of the Commercial Code, in the exercising of employees' or their representatives' right to information and consultation, or in the legitimate performance of their duties, may be

The protective measures that businesses are required to implement in order to claim protection of commercial confidentiality are only 'reasonable' measures."

used for the same purposes, on condition (as provided for in the final paragraph of Article L. 151-9) that it remains protected as a matter of commercial confidentiality with regard to other persons. —



QPC hearings are held in the hearing room.
They are open to the public and are broadcast
live on www.conseil-constitutionnel.fr



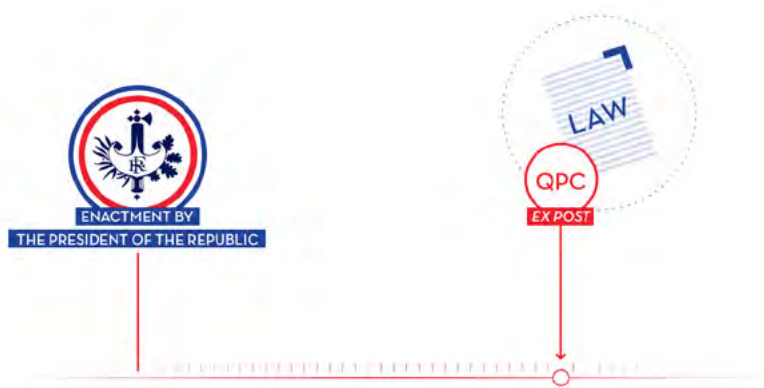
DECI- SIONS IN 2017-2018

PRIORITY PRELIMINARY RULINGS ON THE ISSUE OF CONSTITUTIONALITY (QPC)

Since 2010, members of the public have been able to initiate requests for judicial review. This is the mechanism underpinning what is known as the “*Question Prioritaire de Constitutionnalité*” (QPC), or priority preliminary ruling on the issue of constitutionality. In the course of a trial, an individual may have the law applying to their case tested for compliance with the Constitution. Depending on the nature of the dispute, the request is referred to the Court of Cassation (*Cour de Cassation*) or the Council of State (*Conseil d’État*). If the provisions raised for review are deemed to be unconstitutional they are “censored”, i.e. disallowed, and may no longer be applied in the future. A retrospective.

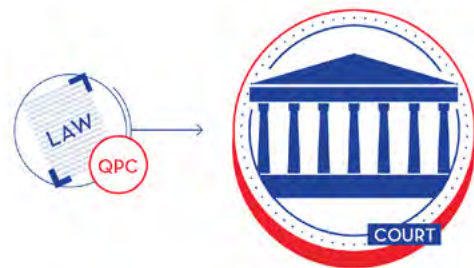
The ex post review process: QPC decisions

THE CONSTITUTIONAL REFORM OF 23 JULY 2008, WHICH CAME INTO FORCE ON 1 MARCH 2010, ESTABLISHED THE “PRIORITY PRELIMINARY RULING ON THE ISSUE OF CONSTITUTIONALITY” (QPC). BECAUSE IT IS UNDERTAKEN IN RELATION TO LAWS THAT HAVE ALREADY ENTERED INTO FORCE, THIS FORM OF REVIEW IS DESCRIBED AS “EX POST”.



The QPC enables any individual involved in a trial to ask the Constitutional Council to check that the law that has been applied in that trial does not violate the rights and freedoms guaranteed by the Constitution.

1 The issue of the constitutionality of a law is initially put to the court which is conducting the trial.



2 If the judge takes the view that the request is not a frivolous one, the question is referred to the Council of State or Court of Cassation.



3 MONTHS

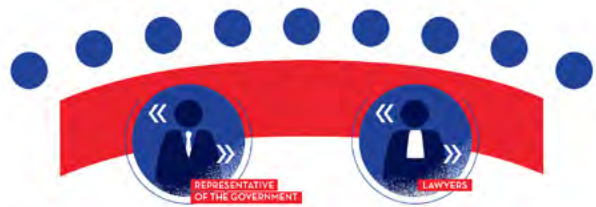
They then have three months in which to check:

- that the contested law applies to the dispute or the proceedings,
- that it hasn't already been found by the Constitutional Council to be in conformity with the Constitution
- and that the question is not a frivolous one.

3 If these three criteria are satisfied, the Constitutional Council will examine the matter and must hand down its decision within three months.



The procedure involves exchanges of written submissions and an open hearing at which the nine members of the Constitutional Council hear the arguments put forward by the lawyers, who argue either for or against the constitutionality of the law in question, and the representative of the Government, who defends the law.



4 At the conclusion of that hearing, the nine members of the Constitutional Council deliberate and arrive at their decision.



If the legislative provision that was challenged is declared to be constitutional, it remains in force.



If it is found to be at odds with the Constitution, the Constitutional Council abrogates it.



It may defer such abrogation to give the Parliament time to amend the law.

15 September
2017Decision
No. 2017-655 QPC

Mr François G.

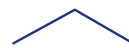
[Access to the archives of the President of the Republic, the Prime Minister
and other members of the Government]

Government archives

WHILE CONSIDERING A QPC REFERRED BY THE COUNCIL OF STATE, THE CONSTITUTIONAL COUNCIL GAVE ITS OPINION ON ARTICLE L. 213-4 OF THE HERITAGE CODE WHICH, BY DEROGATING FROM THE COMMON LAW ON ACCESS TO GOVERNMENT ARCHIVES, CONFERS ON FORMER PRESIDENTS OF THE REPUBLIC, PRIME MINISTERS AND OTHER MEMBERS OF THE GOVERNMENT OR THEIR REPRESENTATIVES THE POWER TO AUTHORISE EARLY ACCESS TO THE GOVERNMENT ARCHIVES WHICH THEY HAVE GENERATED.

The Constitutional Council was thus led to clarify the scope of Article 15 of the Declaration of 1789, according to which “Society has the right to hold any public official accountable for his administration”. In a groundbreaking paragraph of principle, it considered that this provision guarantees the right of access to public archival documents. It is, however, open to the legislature to place limits on this right, whether linked to constitutional requirements or justified by the public interest, provided that this does not result in any infringement which disproportionate to the objective pursued.

Within the constitutional framework thus defined, the Constitutional Council deemed the contested provisions to be in conformity with the Constitution. It noted in particular that the legislature has pursued an objective of general interest by granting special



The Museum of the National Archives in Paris.

protection to these archives, which may contain information likely to be subject to the confidentiality of executive branch deliberations. In this way it has acted to encourage the preservation and archiving of these documents. It further reasoned that this restriction on the right of access to public archive documents is limited in time. —

6 October
2017Decision
No. 2017-660 QPCFinancial holding company
[3% contribution on amounts distributed]

Taxation of dividends

AN ADDITIONAL CORPORATE INCOME TAX CONTRIBUTION OF 3% OF THE AMOUNTS DISTRIBUTED WAS INTRODUCED BY ARTICLE 6 OF THE AMENDING FINANCE ACT FOR 2012 OF 16 AUGUST 2012. THE QPC REFERRED TO THE CONSTITUTIONAL COUNCIL CONCERNED THE CONFORMITY OF THIS CONTRIBUTION WITH THE PRINCIPLES OF EQUALITY BEFORE THE LAW AND EQUALITY IN RELATION TO GOVERNMENT IMPOSTS.

In the light of a preliminary ruling handed down on 17 May 2017 by the Court of Justice of the European Union, the Council of State referred this matter to the Constitutional Council after having ruled that this contribution could not be applied to profits that were redistributed by a parent company from a subsidiary established in the European Union under the European “parent-subsidiary” regime. According to this interpretation by the Council of State, however, redistributions of dividends from subsidiaries established in France or in a third country, and the distribution of dividends withheld by parent companies from their own operating income, remained liable to the contribution. Applying its established case-law in the light of Articles 6 and 13 of the Declaration of the Rights of Man and of the Citizen of 1789, the Constitutional Council held that there resulted from the contested provisions, as interpreted by the Council of State, a difference in treatment between parent companies, depending on whether the dividends they redistribute come from subsidiaries

“The result is a violation of the principles of equality before the law and in relation to government.”

established in a Member State of the European Union other than France. However, these companies are in the same situation as regards the purpose of the contribution, which consists in taxing all amounts distributed, irrespective of their place of origin and including those covered by the “parent-subsidiary” regime under European Union law.

In the absence of a difference in circumstances, only a general interest ground could have justified the contested difference in treatment. By introducing the contribution in question, the legislature pursued a budgetary performance objective. As in an earlier decision concerning an exemption from this tax (No. 2016-571 QPC of 30 September 2016, Société Layher SAS), the Constitutional Council considers that such an objective does not, in itself, constitute a reason of general interest such as to justify such a difference in treatment. The result is a violation of the principles of equality before the law and in relation to government imposts.

The Constitutional Council therefore held that the contested provisions were unconstitutional and found that, under Article 62 of the Constitution, there were no grounds for deferring the effects of the declaration of unconstitutionality. —

20 October
2017Decision
No. 2017-664 QPC*Confédération Générale du Travail - Force Ouvrière*
(General Confederation of Labour - Workers' Force)
[Arrangements for consulting employees on a minority company or establishment agreement]

Company referendum

THE CONFÉDÉRATION GÉNÉRALE DU TRAVAIL - FORCE OUVRIÈRE REFERRED A QPC TO THE CONSTITUTIONAL COUNCIL CONCERNING ARRANGEMENTS FOR CONSULTING EMPLOYEES IN RELATION TO A MINORITY COMPANY OR ESTABLISHMENT AGREEMENT.

At 2016-1088 of 8 August 2016 on employment, the modernisation of social dialogue and the security of career paths stipulates that, unless signed both by the employer and by one or more trade union organisations of representative employees who received more than 50% of the votes cast in the first round of the most recent elections of enterprise committee members or a single staff delegation, a company or establishment agreement could be validated by a consultation of employees provided that it has been signed by representative trade union organisations that received more than 30% of the votes cast in the first round of the same elections.

The QPC led the Constitutional Council to consider the provisions resulting from this Act which allow the employer and the trade union organisations that have signed the company or establishment agreement the possibility of concluding the protocol outlining the procedures for consulting employees in relation to that agreement.

The Constitutional Council disallowed these provisions on the grounds that they are contrary to the principle of equality. While it was open to the legislature, on the one hand, to refer to collective

“The Constitutional Council disallowed these provisions on the grounds that they are contrary to the principle of equality.”

bargaining the determination of the modalities of consultation and, on the other hand, to establish rules aimed at preventing trade union organisations that are not signatories to the agreement from obstructing any request for consultation made by other organisations, it created differential treatment which is not based on a difference of circumstances or on a reason of general interest directly related to the object of the law by stating that only trade union organisations which have signed a company or establishment agreement and wished to submit it to employee consultation are called upon to conclude the protocol laying down the arrangements for conducting such consultation. —

27 October
2017Decision
No. 2017-670 QPC

Mr Mikhail P.

[Early deletion of personal data entered in a criminal record processing file]

Criminal record database

THE CONSTITUTIONAL COUNCIL WAS ASKED TO GIVE ITS OPINION, IN THE COURSE OF A QPC, ON THE RULES OF THE CODE OF CRIMINAL PROCEDURE THAT APPLY TO THE DELETION OF PERSONAL DATA CONTAINED IN THE CRIMINAL RECORD FILES MAINTAINED BY THE NATIONAL POLICE AND THE NATIONAL GENDARMERIE.

A ccording to the contested provisions, defendants' personal data are deleted from these files if a decision to discharge or acquit becomes final, unless the public prosecutor orders that they be retained. The public prosecutor may also order the deletion of personal data in the event of a decision to dismiss the case or to discontinue proceedings. On the other hand, the provisions did not allow defendants other than those who are acquitted or discharged, or have had their cases dismissed or discontinued, to have their data deleted.

The Constitutional Council held that by authorising the creation of, and access to, any processing of personal data relating to criminal records by authorities legally vested with judicial police powers and by certain personnel entrusted with administrative police tasks, the legislature was pursuing the constitutionally valid objectives of tracking down the perpetrators of offences and preventing violations of public order. It did, however, note the particularly sensitive nature of some of the

data in question, the large number of individuals to whom these files may relate and the absence of rules laid down by the legislature in terms of the maximum period for which information may be kept.

Lastly, this information may be accessed not only for the purpose of establishing that criminal offences have been committed, of gathering evidence of such offences and of tracking down their perpetrators, but also for other administrative police purposes.

For all these reasons it held that, by denying defendants in criminal proceedings, other than those who have been acquitted or discharged, or have had their cases dismissed or discontinued, any possibility of having their personal data in the criminal records database erased, the contested provisions disproportionately violated their right to privacy. —

“The legislature was pursuing the constitutionally valid objectives of tracking down the perpetrators of offences and preventing violations of public order.”

10 November
2017Decision
No. 2017-671 QPC

Mr Antoine L.

[Ex officio referral to the judge responsible for the terms and conditions of sentences]

Judicial impartiality

**THE COURT OF CASSATION REFERRED TO
THE CONSTITUTIONAL COUNCIL A QPC
RELATING TO CONFORMITY OF ARTICLE 712-4
OF THE CODE OF CRIMINAL PROCEDURE
WITH THE RIGHTS AND FREEDOMS
GUARANTEED BY THE CONSTITUTION.**

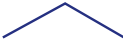
In accordance with the principle of the impartiality of the courts, which is derived from article 16 of the Declaration of the Rights of Man and of the Citizen, the Constitutional Council strictly controls the possibility for a court to refer matters to itself ex officio. Except in the case of proceedings for the imposition of punitive sanctions, it has consistently held that “referral to a court of its own motion can be justified only on the condition that it is based on a ground of general interest and that safeguards are established by law to ensure respect for the principle of impartiality”.

It is in the light of this jurisprudence that the Court of Cassation referred to the Constitutional Council the provisions of the Code of Criminal Procedure that allow the judge responsible for the terms and conditions of sentences to examine of his own motion, with a view to granting, amending, adjourning, withdrawing or revoking, by order or judgment, the measures for which he is competent. As part of the monitoring of a conditional release on probation, the judge may, among other things, add to the obligations to be met as part of the conditional sentence, extend the probation period or revoke the conditional sentence, resulting in the incarceration of the convicted person.

The Constitutional Council found these provisions in conformity with the Constitution, subject to one reservation. It noted, on the one hand, that when the judge responsible for the terms and conditions of sentences takes up a case on his own motion, he does not initiate a new proceeding within the meaning and for the application of the aforementioned constitutional requirements. On the other hand, by allowing the judge responsible for the terms and conditions of sentences to take up the matter ex officio and to impose appropriate measures relating to the ways in which sentences will be applied, the legislature has pursued the general interest objectives of protecting society and reintegrating the convicted person into society.

“The Constitutional Council found these provisions in conformity with the Constitution, subject to one reservation.”

The Constitutional Council added to the declaration of conformity a reservation with regard to a judge responsible for the terms and conditions of sentences imposing an unfavourable measure in the context of an ex officio referral without the convicted person being given the opportunity to make their own submissions. The Council stressed that this would amount to an infringement of the principle of impartiality. —



In 2017-2018, the Constitutional Council took 27 decisions related to the administration of justice, including 22 QPCs and 5 DCs.

Status of the public prosecutor

THE COUNCIL OF STATE REFERRED TO THE CONSTITUTIONAL COUNCIL A QPC CONCERNING ARTICLE 5 OF THE ORDINANCE OF 22 DECEMBER 1958 ON THE ORGANIC LAW ON THE STATUS OF THE JUDICIARY. ACCORDING TO THIS ARTICLE, "PROSECUTORS ARE PLACED UNDER THE DIRECTION AND CONTROL OF THEIR HIERARCHICAL HEADS AND UNDER THE AUTHORITY OF THE KEEPER OF THE SEALS, THE MINISTER OF JUSTICE. AT HEARINGS, THEIR VOICE IS UNFETTERED".

In response to the applicant union's contention that these provisions violate the principle of the independence of the judiciary guaranteed under Article 64 of the Constitution, the Constitutional Council drew attention to the constitutional framework that is in force.

As well as the principle of separation of powers resulting from Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, it thus noted that, by virtue of Article 20 of the Constitution, the Government determines and conducts the policy of the Nation, specifically with regard to the areas of responsibility of the Public Prosecutor's Office. Citing the first paragraph of Article 64 of the Constitution, according to which "the President of the Republic is the guarantor of the independence of the judicial authority", it ruled that the independence of the judicial authority, of which public prosecutors (referred to as the "Parquet" in French) are an

integral part, implied a principle according to which the public prosecutor's office operates freely, seeking to protect the interests of society, in its action before the courts. Finally, it referred to the provisions of Article 64 of the Constitution according to which "judges are irremovable", and to the fourth to seventh paragraphs of Article 65 of the Constitution on the respective conditions of appointment of judges and prosecutors and the exercising of disciplinary power against them.

Taken together, these provisions mean that the Constitution enshrines the independence of public prosecutors, from whom the free exercise of their duties before the courts derives; that this independence must be reconciled with the prerogatives of the Government; and that it is not guaranteed by the same guarantees as those that apply to judges on the bench.

Within the constitutional framework thus clarified in accordance with its previous jurisprudence, the Constitutional Council reviewed the manner

"The Constitution enshrines the independence of public prosecutors, from whom the free exercise of their duties before the courts derives."

in which, for the purpose of framing relations between the Keeper of the Seals and public prosecutors, the legislature has applied this requirement of reconciliation between the principle of the independence of public prosecutors and the prerogatives of the Government.

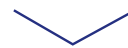
On the one hand, the authority of the Minister of Justice (*Garde des Sceaux*, or Keeper of the Seals) over public prosecutors is expressed specifically through the exercise of his power of appointment and disciplinary action. Furthermore, pursuant to the paragraph 2 of Article 30 of the Code of Criminal Procedure, the Minister of Justice may issue general instructions on criminal jurisdiction policy to public prosecutors, particularly with regard to the need to ensure citizens' equality before the law throughout the Republic. In accordance with the provisions of Articles 39-1 and 39-2 of the same Code, it is for the Office of the Public Prosecutor to give effect to these instructions.

Furthermore, pursuant to Article 30 of the Code of Criminal Procedure, the Minister of Justice may not issue instructions to prosecutors in individual cases. According to Article 31 of the same Code, the Office of the Public Prosecutor carries out the prosecution policies determined by the Government and calls

for the application of the law, in compliance with the principle of impartiality by which it is bound. Pursuant to article 33, it is free to make such oral submissions as it believes to be in the interest of justice. Article 39-3 entrusts the public prosecutor with the task of ensuring that investigations by the judicial police are aimed at establishing the truth and that they are carried out on behalf and in defence of the victim, the complainant and the suspect. In accordance with Article 40-1 of the Code of Criminal Procedure, the public prosecutor freely decides whether to institute proceedings.

For all these reasons, the Constitutional Council ruled that the contested provisions of Article 5 of the Ordinance of 22 December 1958 ensure a balanced reconciliation between the principle of the independence of the judiciary and the prerogatives which the Government derives from Article 20 of the Constitution, and do not further undermine the separation of powers. —

The Minister of Justice may not issue instructions to prosecutors in individual cases.



15 December
2017Decision
No. 2017-682 QPCMr David P.
[Offence of habitual viewing of terrorist websites II]

Internet and terrorism

BY ITS DECISION NO. 2016-611 QPC OF 10 FEBRUARY 2017 (SEE ANNUAL REPORT 2017, P. 46), THE CONSTITUTIONAL COUNCIL DISALLOWED PROVISIONS OF AN ACT OF 3 JUNE 2016 THAT CREATED THE OFFENCE OF HABITUAL VIEWING OF TERRORIST WEBSITES.

The Council of State referred to it a QPC concerning provisions of the Act of 28 February 2017 on Public Security which re-established this offence, using new wording. These provisions prescribed two years' imprisonment and a fine of 30,000 euros for habitually accessing, without legitimate reason, an online public communication service that promotes or provokes acts of terrorism and includes images or representations of wilful attacks on life.

It ruled, in accordance with its settled jurisprudence, that freedom of expression and communication is all the more precious inasmuch as the exercise of this freedom is a vital aspect of democracy and one of the guarantees of observance of other rights and freedoms. Any infringement of this freedom must be necessary, appropriate and proportionate to the objective pursued.

As regards the conformity of the contested provisions with the principle of the necessity of penalties, it again noted that the existing preventive and punitive legislation already includes a set of criminal offences and specific procedural provisions aimed at preventing the commission of terrorist acts. The Act of 30 October 2017 on the enhancement of internal security and the fight against terrorism added new individual administrative control and surveillance measures to the list of legislative provisions in force previously drawn up in its February 2017 decision,



with a view to preventing the commission of terrorist acts. The administrative and judicial authorities thus have numerous tools at their disposal, besides the contested provisions, not only to keep terrorist sites under surveillance but also to monitor a person accessing these services and to arrest and punish them when such accessing is accompanied by conduct revealing a terrorist intention, even before the plan has entered its implementation phase.

With regard to the requirements of adaptation and proportionality, the Constitutional Council noted that, while the contested provisions provide that, in order to fall within the scope of the offence they establish, accessing must be accompanied by an expression of support for the ideology expressed on the sites being accessed, such accessing and conduct alone are not sufficient to establish the existence of an intention to commit terrorist acts. Moreover, although the legislature ruled out criminalising the act of accessing when it was for a "legitimate reason", the scope of this exemption could not be determined in the present case. This resulted in uncertainty as to the lawfulness of the consultation of sites and, consequently, the use of the Internet to search for information.

The Constitutional Council concluded that the contested provisions infringed the exercise of freedom of communication, and that this was not necessary, appropriate and proportionate. It therefore declared them to be unconstitutional. —

The Constitutional Council ruled in accordance with its settled jurisprudence, which states that that freedom of expression and communication is all the more precious inasmuch as the exercise of this freedom is a vital aspect of democracy.

12 January
2018

Decision
No. 2017-685 QPC

Fédération Bancaire Française
(French Banking Federation)
[Annual right to terminate loan insurance contracts]

Loan insurance

Article L. 313-30 of the French Consumer Code, which derives from an Act of 21 February 2017, allows an insured borrower, after entering into the loan contract, to substitute another insurance contract for the group insurance contract offered by the lender. The insured may do so every year. The legislature made this annual right of termination applicable to insurance contracts which were in the course of operation as at 1 January 2018.

These provisions were deemed by the Constitutional Council to be constitutional, in a QPC raised before the Council of State by the French Banking Federation.

Applying settled jurisprudence on questions of legal certainty, the Constitutional Council held in particular that no provision of the law which, prior to the Act of 21 February 2017, applied to the group insurance contracts in question, had given rise to a legitimate expectation on the part of banking institutions and insurance companies offering such contracts as to the permanence of their termination conditions.

It also dismissed criticism alleging unconstitutional infringement of legally concluded contracts. In this respect, it considered that the legislature had pursued the general interest objective of strengthening consumer protection by ensuring a better contractual balance between the insured borrower and the banking institutions and their insurance partners and by ensuring that this reform could benefit the large number of borrowers who had already entered into a group insurance contract applying this right of cancellation to existing contracts. It further noted that the legislature limited the extent of the possible infringement to existing contracts, in particular since the contested provisions do not have the effect of directly leading to the termination of existing contracts, but only of giving borrowers an annual right to terminate them. —

2 February
2018Decision
No. 2017-687 QPCWikimédia and others
[Image rights to national estates]

Image rights

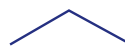
THE CONSTITUTIONAL COUNCIL WAS PRESENTED WITH A QPC ON ARTICLE L. 621-42 OF THE HERITAGE CODE, WHOSE WORDING AROSE FROM ACT NO. 2016-925 OF 7 JULY 2016 ON THE FREEDOM OF CREATION, ARCHITECTURE AND HERITAGE.

The Act of 7 July 2016 on Freedom of Creation, Architecture and Heritage introduced a system of prior authorisation for the commercial use, on any medium, of images of buildings constituting national estates. The authorisation issued by the operator of the domain may be subject to financial conditions, in which case the fee shall take into account any benefits, irrespective of their nature, accruing to the holder of the authorisation.

These provisions were challenged, mainly with regard to freedom of enterprise and property rights, in the context of a QPC raised for the associations Wikimédia France and La Quadrature du Net and referred to the Constitutional Council by the Council of State.

The Constitutional Council found these provisions to be in conformity with the Constitution.

It noted in particular that, in adopting them, the legislature had pursued a twofold objective of general interest, namely the protection of the image of national estates in order to prevent any harm to the character of property having an exceptional link with the history of the Nation and owned, at least in



The Château d'Angers was declared a national estate by Decree of 2 May 2017.

part, by the State; and the economic enhancement of the heritage of these national estates.

It further noted that the prior authorisation of the national domain manager is not required where the image is used for commercial purposes and where there is also a cultural, artistic, educational, teaching, research, information, news illustration or public service activity-related objective. In view of the legislature's aim of protection, authorisation may be refused by the manager of the national estate only if the intended commercial exploitation damages the image of this property, which has an exceptional link with the history of the nation. Otherwise, authorisation shall be granted under the conditions, including any financial conditions, laid down by the national domain manager, under the supervision of the courts. —

2 March 2018

Decision
No. 2017-694 QPCMr Ousmane K.
[Statement of reasons for decisions in jury trials]

Statement of reasons for court decisions

THE CODE OF CRIMINAL PROCEDURE EXPLICITLY PROVIDES THAT THE REASONS UNDERLYING A JUDGMENT HANDED DOWN BY THE CRIMINAL COURT (COUR D'ASSISES) MUST INCLUDE, IN RESPECT OF EACH OF THE OFFENCES OF WHICH HE IS ACCUSED, A STATEMENT OF THE MAIN ELEMENTS OF THE CHARGES AGAINST THE ACCUSED WHICH CONVINCED THE CRIMINAL COURT, AT THE END OF ITS DELIBERATIONS AS TO HIS GUILT. HOWEVER, ACCORDING TO A SETTLED INTERPRETATION BY THE COURT OF CASSATION, THE CODE PROHIBITED THE CRIMINAL COURT FROM STATING REASONS FOR THE SENTENCE IT IMPOSES.

The Constitutional Council was presented by the Court of Cassation with a QPC on this prohibition, particularly with regard to the principles governing the necessity and legality of sentences, the principle requiring that sentences be individualised and the rights of the defence.

The Constitutional Council ruled that Articles 7, 8 and 9 of the Declaration of the Rights of Man and of the Citizen of 1789 make it clear that it is the responsibility of the legislature, in exercising its powers, to lay down rules of criminal law and criminal procedure that are designed to exclude arbitrariness in the detection of the perpetrators of offences, the trial of the persons prosecuted and the handing

down and enforcement of sentences. The principle of individualisation of sentences, which derives from Article 8 of the Declaration, implies that a criminal sanction can only be applied if the judge has expressly imposed it, taking into account the specific circumstances of each case. For the first time, it inferred from these constitutional requirements an obligation to state reasons for courts' decisions, as regards both guilt and sentencing.

For these reasons, it declared the provisions submitted to it to be unconstitutional. In view of the manifestly excessive consequences which the immediate application of that decision would have had, it deferred the date of that repeal to 1 March 2019, while stipulating that, for trials begun after the date of its decision and without waiting until 1 March 2019, the law should be interpreted as also requiring the Criminal Court to indicate, in its statement of reasons, the main elements which influenced it in relation to the determination of the sentence. —

“For the first time, it inferred from these constitutional requirements an obligation to state reasons for courts' decisions, as regards both guilt and sentencing.”

29 March
2018Decision
No. 2017-695 QPCMr Rouchdi B. and another
[Administrative measures in the fight against terrorism]

The fight against terrorism

THE CONSTITUTIONAL COUNCIL RECEIVED FROM THE COUNCIL OF STATE A QPC ON FOUR SETS OF PROVISIONS RESULTING FROM THE ACT OF 30 OCTOBER 2017 STRENGTHENING INTERNAL SECURITY AND THE FIGHT AGAINST TERRORISM.

The first of these sets of provisions allows a Prefect to establish a protective perimeter within which people's access and movement are regulated for the purpose of ensuring the security of a place or event which may be exposed to a terrorist risk. Access and movement may be made subject to pat-down body searches, visual inspections or searches of luggage and vehicle checks.

The Constitutional Council found these provisions to be constitutional, subject to three interpretative reservations. It ruled that public authorities were required to take steps to ensure the ongoing effectiveness of the oversight exercised by judicial police officers over private individuals associated with the performance of general surveillance duties on public roads. Legally authorised checks can only be carried out on the basis of criteria which exclude discrimination of any kind. Lastly, the Prefect cannot - without infringing freedom of movement and the right to privacy - extend the period for which the protective perimeter is left in place unless he first establishes that the identified risk still exists.

The second set of provisions empowers the Prefect to temporarily close places of worship in order to

prevent the commission of acts of terrorism, on the basis of certain statements, ideas, theories or activities that occur in those places of worship.

The legislature's attempt to accommodate the constitutionally valid objective of preventing violations of public order, and freedom of conscience and the free exercise of religious worship, was not considered by the Constitutional Council be lacking in balance. In this regard, it noted the existence of several guarantees. The legislature limited the duration of the measure to six months and did not provide for it to be extended. The subsequent

“The legislature’s attempt to accommodate the constitutionally valid objective of preventing violations of public order, and freedom of conscience and the free exercise of religious worship, was not considered by the Constitutional Council be lacking in balance.”

“The Constitutional Council accepted the constitutionality of these provisions, but added some interpretative reservations.”

adoption of a further closure measure may only proceed on the basis of circumstances arising after the reopening of the place of worship. The closure of a place of worship must be justified and must, particularly with regard to its duration, be proportionate to the reasons on which it is based. Lastly, the closure may be the subject of an urgent appeal to an administrative judge and is then suspended until the judge decides whether or not to hold an open hearing.

The third set of provisions gives the Minister of the Interior the option of taking individual administrative monitoring and surveillance measures and, in particular, of ordering a ban on associating with certain persons.

The Constitutional Council accepted the constitutionality of these provisions, but added some interpretative reservations. On the one hand, it is for the Minister of the Interior, in ordering a ban on associating with certain persons, to take account of the family ties of the persons concerned and, in particular, to ensure that the ban does not disproportionately affect their right to lead a normal family life. On the other hand, in view of its stringent nature, the ban on associating may not exceed, continuously or otherwise, a total cumulative period of 12 months.

The Constitutional Council also disallowed, on the basis of infringement of the right to an effective judicial remedy, the provision that the administrative judge must rule within four months on appeals against such measures on the grounds of misuse of powers. The right to an effective judicial remedy obliges the administrative court to decide on the application for

annulment of the measure within a short period of time. For the same reason, the provision allowing the contested measure to be extended beyond three months without a judge having previously ruled, at the request of the person concerned, on the regularity and validity of the renewal decision was disallowed.

The last set of provisions establishes a system of inspections and seizures, subject to the authorisation of a judge empowered to grant or refuse bail, for the purpose of preventing terrorist acts. In particular, they stipulate the requirements under which the administrative authority may, at the time of the inspection, seize or use documents or objects and any data contained therein.

The Council found that, by strictly limiting the scope of the measure and providing the necessary guarantees, the legislature had achieved a solution that was not manifestly lacking in balance between the constitutionally valid objective of preventing violations of public order and the right to privacy, the inviolability of the home and freedom of movement. noted that the contested provisions allowed the seizure, during the inspection, not only of data and the computer systems and terminal equipment that support it, but also of “documents” and “objects”. In the absence of any legislative framework for the use, retention and return of the documents and objects seized during the inspection visit, these provisions infringing property rights were deemed to be unconstitutional. —

18 May 2018

Decision
No. 2018-706 QPCMr Jean-Marc R.
[Justification of terrorism]

Terrorism and freedom of expression

ASKED BY THE COURT OF CASSATION TO REVIEW THE PROVISIONS OF THE CRIMINAL CODE THAT CRIMINALISE THE JUSTIFICATION OF ACTS OF TERRORISM, THE CONSTITUTIONAL COUNCIL FOUND THEM TO BE IN CONFORMITY WITH THE CONSTITUTION.

In noting that the definition provided by law of the offence of justification of terrorism implies that the conduct in question must incite one to pass a favourable judgment on an offence expressly described by law as an “act of terrorism”, or on its perpetrator, and that such conduct must take the form of words, images or acts of a public nature, it held that the contested provisions were unambiguous and sufficiently precise. For these reasons, the criticism that the principle of the legality of offences and penalties had been infringed was dismissed. With regard to the need for contested penalties, the Constitutional Council noted in particular that, by increasing the amount of the penalty incurred by the perpetrator when the offence was committed using an online service allowing communication with the public, the legislature had taken into account the particular extent of the dissemination of the prohibited messages made possible by that mode of communication, as well as its influence in the process of indoctrinating individuals who were likely to commit acts of terrorism. Having regard to the nature of the conduct being punished, it was considered that the penalties imposed were not manifestly disproportionate.

Lastly, the infringement of freedom of expression and communication by the contested provisions was considered by the Constitutional Council to be necessary, appropriate and proportionate to the objective pursued by the legislature, which is to prevent the commission of acts of terrorism and to avoid the dissemination of statements praising acts intended to seriously disturb public order by intimidation or terror. In addition, public justification, through the wide dissemination of the dangerous ideas and comments it promotes, itself creates a threat to public order. Acts of terrorism the justification of which is punishable by law are particularly serious offences likely to endanger life or property. —

“The infringement of freedom of expression and communication by the contested provisions was considered by the Constitutional Council to be necessary, appropriate and proportionate to the objective pursued by the legislature.”



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6 July 2018

Decision
No. 2018-717/718 QPCMr Cédric H. and another
[The offence of aiding the unauthorised entry, movement
or residence of an alien.]

The principle of fraternity

**THE CONSTITUTIONAL COUNCIL RECEIVED
FROM THE COURT OF CASSATION A
QPC RELATING TO ARTICLES L. 622-1
AND L. 622-4 OF THE CODE ON THE
ENTRY AND STAY OF ALIENS AND THE
RIGHT TO ASYLUM (CESEDA).**

These provisions provide for a penalty of five years' imprisonment and a fine of 30,000 euros for directly or indirectly helping an alien to enter, move or reside illegally in France. However, they provide for several types of criminal exemption for accused of this offence.

For the first time, the Constitutional Council ruled that fraternity is a constitutionally valid principle. To this end, it pointed out that the Constitution refers, in its preamble and in Article 72-3, to the "common ideal of liberty, equality and fraternity". Furthermore, according to Article 2: "The motto of the Republic is 'Liberty, Equality, Fraternity'". This principle implies the freedom to help others, for humanitarian purposes, without regard to the legality of their stay in the national territory.

Recalling, however, according to its settled jurisprudence, that no constitutionally valid principle or rule guarantees aliens general and absolute rights of access to and residence in the national territory and that, in addition, the objective of combating

illegal immigration is part of the safeguarding of public order, which is a constitutionally valid objective, the Constitutional Council held that it is for the legislature to reconcile the principle of fraternity with the safeguarding of public order.

In the light of the jurisprudential framework thus defined, the Constitutional Council ruled, on the one hand, that the words "illegal residence" in the first paragraph of Article L. 622-4 of the CESEDA should be disallowed, declaring that, in criminalising any assistance given to the movement of illegal aliens, even if motivated by a humanitarian purpose, the legislature has not ensured a balanced reconciliation between the principle of fraternity and the constitutionally valid objective of safeguarding public order. It did, however, find that such an exemption need not necessarily be extended to the facilitation of unauthorised entry which, unlike the facilitation of residence or movement, gives rise, as a matter of principle, to an unlawful situation.

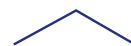
On the other hand, in expressing an interpretative reservation, it considers that the provisions of CESEDA which establish criminal immunity in

the event of assistance with illegal residence cannot, without infringing the principle of fraternity, be interpreted otherwise than as also applying to any act of assistance for humanitarian purposes other than those already listed in those provisions.

**For the first time, the
Constitutional Council
ruled that fraternity is
a constitutionally valid
principle."**



Recalling that it does not have a general power of review of the same nature as that exercised by Parliament, and that it is not for it to indicate which amendments must be adopted in order to remedy the unconstitutionality that has been identified, the Constitutional Council considers that the immediate repeal of the words “illegal residence” (“*séjour irrégulier*”) in the first paragraph of Article L. 622-4 of the CESEDA would have the effect of extending the criminal exemptions provided for in Article L. 622-4 to acts tending to facilitate or attempt to facilitate illegal entry into French territory. It would have manifestly excessive consequences. Consequently, its decision defers the date of this repeal to 1 December 2018. —



Fraternity is recognised as a constitutional principle.

INTERNATIONAL RELATIONS

The Constitutional Council is widening the scope of its activities with other constitutional courts in Europe and French-speaking countries in order to foster the necessary dialogue among judges.

2017-2018 international meetings

ACCPUF, 20 YEARS ON

ACCPUF, the Association of French-speaking Constitutional Courts, celebrated its 20th anniversary on 16 and 17 November 2017 at the Constitutional Council.

Thirty-six Courts and Councils were represented at the Palais Royal to exchange ideas, in particular about “drafting decisions”.

President Fabius, who opened the conference, and Ulrich Meyer, ACCPUF President and President of the Swiss Federal Tribunal, reminded delegates of the decisive role Constitutional Courts play in upholding fundamental rights and safeguarding the “Rule of Law”.





ALGERIA

Laurent Fabius, Constitutional Council President, gave a talk in Algiers on 25 November 2017 about the constitutional, legislative and regulatory framework for raising the objection of unconstitutionality in legal cases. He did so at the 2nd international conference organised by CJCA (Conference of African Constitutional Jurisdictions) and the Algerian Constitutional Council.



MEXICO

On 12 March 2018, the Constitutional Council President welcomed Ms Janine Madeline Otálora Malassis, President of the Electoral Tribunal of the Mexican Federal Judiciary.

Seeking to learn about legal practices in France in her domain, she exchanged information on the organisation of the 1 July 2018 Mexican federal and local elections.

President Otálora Malassis also wanted to take the opportunity to talk about the launch of a Worldwide Network of Electoral Justice, an initiative that she supports.



LATVIA

On 1 March 2018, the Constitutional Council hosted a delegation from the Latvia Constitutional Court led by its President, Ms Ineta Ziemele. A working meeting was held to discuss “constitutional identity” and the “constitutionality of Finance Acts”.

Following on from this meeting, the Council was invited to Riga in May 2018 to attend a conference coinciding with the 100th anniversary of the Latvian State on the “Role of Constitutional Courts in the globalised world of the 21st century”. Claire Bazy Malaurie gave a talk on the following issue: “Upholding fundamental rights in the digital era: How are European jurisdictions related?”.



CZECH REPUBLIC

CCCE, the Association of European Constitutional Courts, whose presidency has been held by the Czech Constitutional Court over the last three years, held a meeting in Prague from 13 to 15 June 2018 in preparation for the association’s next congress set for 2020.

Alongside this meeting there was also a symposium on “The Heirs of Hans Kelsen”, a topical theme for many European Constitutional Courts this year as they celebrate their anniversaries.

Ms Corinne Luquiens was the Constitutional Council’s delegate and made a presentation on “The Constitutional Council evolves: From regulating State power to ‘jurisdictionalisation’”.





GIORGIO LATTANZI,

President of the Italian Constitutional Court

Dialogue among judges Europe- wide

Despite the cultural and legal framework in which they operate, dialogue between courts, by its very nature, and in particular between national courts and European courts, is not guaranteed success. That is why, for talks to be effective, a few conditions must be met and two dangers avoided, largely by carefully phrasing one's arguments.

The first danger is to consider that listening to other people's arguments is just a necessary but tedious pre-condition before making a definitive statement oneself. If, after such discussions, the points of view of the parties has not changed and no concession has been made, then one could seriously doubt whether the parties had engaged in serious dialogue with the intention of listening to the other party before deciding.

Less serious – but in practice more probable – the second danger is not being able to understand one another due to cultural differences and the intricacies of different legal systems, which appear similar but in practice are not. Firstly, courts use EU law as interpreted by EU courts. Secondly, EU courts can hardly fully assess a situation without referring to the relevant national law and this, in turn, introduces various complications.

While the conditions we set out below for constructive talks may not be complete, they are nevertheless a good starting point.

Based on our experience, we feel that the conditions likely to result in constructive talks are as follows:

1. A common language, since, although we work with legal vocabulary, some effort is required to meticulously clarify what certain expressions actually mean, given that from one legal system to another, apparently univocal expressions do not always mean the same thing.
2. A sharing of information, i.e. introducing into the talks as many explanations about your own legal system as possible and how it arrives at the relevant ruling. This is because, whereas it might seem obvious to someone working under that system, it may seem strange to outsiders working under other systems.
3. Respect for the exclusive authority of others, i.e. discussions should only focus on issues where both parties

are empowered to take decisions (and dialogue itself should also set out the individual boundaries). Such discussions should avoid touching on issues where only one party has authority.

4. A multilateral dialogue, i.e. an approach that goes beyond pitting one party's arguments against the other party's arguments, but takes into account those of other national and European courts. This means not just seeking to apply common constitutional traditions but also seeking to make the solution found for a given case become a general rule applicable to similar cases in the future.

As an illustration of how talks can be fruitful when these four conditions are met, we can cite a recent case involving the European Court of Justice (ECJ) and the Italian Constitutional Court (ICC).

“Dialogue between courts is not guaranteed success.”

In its 8 September 2015 Taricco judgement, the ECJ considered that in criminal VAT fraud cases, the Italian judge should have set aside the statute of limitations in two instances:

- a) if applying the statute of limitations would result in serious tax fraud escaping justice in a large number of cases;
- b) if, under the national system, similar offences committed instead against the local member State were subject to longer statute of limitation periods.

The European judge came to that conclusion by interpreting the first and the second paragraph of article 325 TFEU, which obliges member states to effectively combat fraud committed at the expense of the EU. The judge took the view that systematic VAT fraud escaping justice due to time barring was bad for European finances. Pending assessment by the national court, the ECJ did not consider that the “Taricco rule”, as published, conflicted with criminal law principles since time-barring did not relate to the description of the offence and sentence. In this area of law, it would therefore be permissible to render a decision that is less favourable than that provided for in the Penal Code applicable at the time of the offence.

In our legal system, because the time bar has an effect on guilt, it is part of substantive criminal law. Our system is based on a consolidated judicial tradition and the broad scope of the second paragraph of the

Constitution's article 25 (no one can be condemned for an offence committed before the relevant law had come into effect). As our Constitutional Court has already stated on several occasions, this principle is only compliant with the Constitution if it satisfies predictability and non-retroactivity conditions enshrined in underlying legal principles.

This is why Italian jurists argue that the "Tarrico rule" does not respect a principle inherent in the Italian supreme constitutional order in criminal matters, because it is being applied to acts committed before it was introduced and because of a total lack of predictability. This renders the rule unpredictable for litigants and irrelevant for a judge. In fact, a judge cannot determine when "a large number of cases" has been reached, on which the "Taricco rule" is predicated, since quantity has not been adequately defined. In the same way, a person to whom a criminal standard applies - which should be clear and intelligible - could never have foreseen that article 325 of TFEU could give rise to a complex judicial situation culminating in the non-application, to his/her detriment, of a specific aspect of the statute of limitations in criminal matters.

Doubts fuelled by the legal debate were handled through jurisprudence, thus the issue was construed to be one of constitutionality. Meanwhile, the Italian Constitutional Court did not eliminate it entirely even though it considered that the "Taricco rule" breached the principle of legality of criminal law. Indeed, the court had been petitioned to declare as unconstitutional that part of the Act ratifying the Treaty that imposed application of article 325 TFEU as interpreted by the ECJ; this implied non-compliance with two Penal Code rules on time-barring.

With Ordinance No. 24 of 2017, the Italian Constitutional Court preferred to seek a preliminary ruling from the ECJ. Without inviting discussion over the interpretation of article 325 of TFEU made by the European judge, the Constitutional Court, in its referral, merely emphasized the substantive nature of the limitation period in the Italian legal system. This means the "Tarrico rule" violates the principle of legality in criminal proceedings by its retroactivity and its lack of predictability, if ever it is applied by a judge.

With its M.A.S. and M.B. 5 December 2017 ruling, the ECJ adopted the position of the ICC and admitted that

“Dialogue has helped to develop a common rule for different legal systems, whilst upholding human rights.”

the statute of limitations under our legal system forms part of substantive law. Furthermore, in addition to directly excluding application to acts committed before 8 September 2015 the ECJ now allows a national judge to suspend application of the "Tarrico rule" in cases where it is deemed to breach the principle of legality that is also set out in article 49 of the EU's Charter of Fundamental Rights. The M.A.S. decision does not go against the initial approach of the Taricco decision. Instead, it revises it in the light of new information concerning the national legal system, presented to the ECJ by the ICC in its referral statement.

This matter has now been settled with ICC Decision No. 115 of 2018, by which, after recalling that article 325 of TFEU and the "Taricco" rule are contrary to the fundamental principle of legality in criminal proceedings, lays down a strict prohibition for a criminal judge to set aside the legal limitation period.

It is important to emphasize that this conclusion was not adopted solely on the basis of national constitutional law, but by application of EU law, as interpreted by the ECJ. In other words, dialogue in this case has helped to develop a common rule for different legal systems, whilst upholding human rights.

The outcome of the Taricco case was particularly satisfactory. If one considers the way this all began, there was a risk that an EU member State, relying on the supreme principles of its own Constitution, would violate the primacy of European law, resulting in a particularly unpredictable difference of opinion, in the sensitive area of criminal law and, in particular, that of upholding human rights when faced by repressive State powers.

The fact that such a scenario was avoided is largely due to high quality discussions conducted with due attention to the success factors set out above.

The search for a common language required effort to understand the Italian statute of limitations in criminal proceedings. By taking this route, the European legal system, which covers legality of offences and sentences in article 49 of the European Charter of Fundamental Rights, introduced time-bars on criminal offences, which were initially excluded.

The sharing of information turned out to be the necessary trump card. Once an acceptable degree of correlation between legality in criminal proceedings and time bars had been agreed, it was necessary to explain that,

“The sharing of information turned out to be the necessary trump card.”

in the Italian system, this is not just theoretical but is constantly bolstered by legislation and constitutional jurisprudence.

Respect for the exclusive authority of others underpinned the legal reasoning of both Courts. The Italian Court did not submit for discussion how the ECJ had interpreted TFEU article 325. If we had gone in that direction, conflict would have been inevitable. No national judge may violate the uniform application of European law by setting aside the meaning as interpreted by the concerned institution. However, after having reviewed the European standard, which only a Luxembourg judge has the power to interpret, we moved on to check compatibility with the principle of predictability in criminal law and the way this would be applied by a judge. We came to a negative conclusion.

Finally, a multilateral stage was found when the ICC alluded to the constitutional traditions of continental countries and, in particular Spain, where the time-bar is part of substantive criminal law.

It is very likely that courts in the future will again find themselves in this sort of dilemma.

Nevertheless, after the Taricco case, we are more confident in our ability to solve any problems that arise.

From Seville to Albi: the Constitutional Council joins the network of Latin constitutional courts

THE CONSTITUTIONAL COUNCIL WAS INVITED FOR THE FIRST TIME TO JOIN THE GROUP OF 'LATIN' CONSTITUTIONAL COURTS COVERING PORTUGAL, ITALY AND SPAIN, AT A MEETING HELD IN SEVILLE FROM 26 TO 28 OCTOBER 2017.



Mr Laurent Fabius, President of the Constitutional Council, as well as Mr Michel Pinault and Ms Corinne Luquiers, members of the Council participated in the first “foursome” meeting of Latin constitutional courts held in Seville from 26 to 28 October 2017.

Established in 1999 originally as a “threesome”, this informal group comprises the Spanish Constitutional Tribunal, the Portuguese Constitutional Tribunal, the Italian

Constitutional Court and, since 2017, the French Constitutional Council. Its purpose is to hold annual meetings for discussions on legal topics of common interest and recent developments in various jurisdictions.

The French delegation was welcomed at the Seville Real Alcazar by Mr Juan José Gonzales Rivas, President of the Spanish Constitutional Tribunal and participated in the work on “fundamental rights in the national and European legal systems”.

Meetings with the following local authorities were also a feature of this trip to Spain: Ms Susana Diaz Pacheco, Head of the regional Government of Andalusia and Mr Juan Espadas Cejas, Mayor of Seville.

Following on from this first meeting, the Constitutional Council will host the network’s second meeting from 27 to 29 September 2018, in Albi. The agenda for this meeting includes “controlling anti-terrorist measures” and “aids to judicial decision-making”. This is intended to cover the question of resources employed (doctrine, comparative law, outside contributions, etc.) and the organisations that courts can turn to for help in decision-making.

The Constitutional Council is enhancing its ties with the German Federal Constitutional Court

**THE CONSTITUTIONAL COUNCIL
AND THE GERMAN FEDERAL
CONSTITUTIONAL COURT SEEK
TO DEEPEN THEIR SPECIAL
RELATIONSHIP AND SO HAVE
AGREED TO REGULAR MEETINGS.**

From 11 to 13 December 2017, the Constitutional Council welcomed a delegation from the German Federal Constitutional Court, led by its President, Andreas Voßkuhle.

This meeting was a follow-up to the first trip to Karlsruhe undertaken by the French Constitutional Council President and members in October 2016, which set in motion closer dealings between the two courts.

Working visits were launched by Laurent Fabius, Constitutional Council President, and the German Federal Constitutional Court President, and have proven to be valuable in discussions on topics of common interest and respective case law.

The first day's work focused on "The role of constitutional courts in strengthening safeguards for fundamental rights especially regarding security laws" based on a joint presentation from Mr Lionel Jospin of the Constitutional Council and Dr. Johannes Masing, a judge at the Karlsruhe Court.

Discussions during the second round-table centred on the challenges posed by "EU trade agreements" sparked by a combined presentation from Mr Michel Pinault and Ms Claire Bazy Malaurie, members of the French Constitutional Council and Dr Peter M. Huber, a professor and judge at the German Court.

Alongside these meetings between constitutional judges, talks have been held on a regular basis since 2016 between members of the Constitutional Council's legal staff and those of the German Federal Court. A delegation from the French legal department has been invited to Karlsruhe for a working meeting on 1 and 2 February 2018.



A FEW OF THIS YEAR'S EVENTS

**The activity of the
Constitutional Council
is not exclusively
judicial.**

**The Constitutional
Council is an open
institution and each
year it organises and
hosts various events
so that teachers,
lawyers, students and
the general public can
regularly get together.**

4 October 2017

The “Nuit du Droit”



On 4 October 2017, anniversary of the Constitution of the Fifth Republic, the Constitutional Council played host to the first ever “Nuit du Droit” (“Law Night”).

This event was attended by over a 1,000 people including many students.

From 7.30 p.m. to 1.00 a.m., legal specialists, academics, public officials opinion leaders participated in round-tables addressing four major issues: combating terrorism and the rule of law, environmental safeguards, employment law and artificial intelligence.

Participants came from many walks of life and included members of the legal and intellectual professions, politicians, etc. Robert Badinter, Bernard Cazeneuve, Isabelle Falque-Pierrotin, Raphaël

Enthoven and Cédric Villani were among those present.

These group discussions were screened in the Palais Royal courtyard and aired live on a dedicated website so that a wider audience could follow the debates.

Given the importance of law in our society, the Constitutional Council takes special care to provide the opportunity for citizens to be aware of the major legal debates that come to our hearing room. We fully reached our goal with this first ever “Nuit du Droit” !

The 9th edition of the “Salon du Livre Juridique” (“Legal Book Fair”) was held on 7 October 2017 in the rooms of the Constitutional Council. The Fair attracts major publishers and many authors and is organised jointly by the Club des Juristes, a legal think tank, and the Constitutional Council.

Ever since the Legal Book Fair was founded in 2009, a prize (“Prix du Livre Juridique”) is awarded to a legal work published during the previous 12 months. In addition, since 2013, a legal practice award (“Prix de la Pratique Juridique”) goes to the author of a work written for law practitioners.

This year, the jury chaired by Bernard Stirn, awarded the “Prix du Livre Juridique” to the work *Eléments d’histoires du Droit International Privé*¹ by Bertrand Ancel and the “Prix de la Pratique Juridique” to the work *Droit des Applications Connectées*² by David Lefranc.

On 6 October 2018 we will celebrate the 10th anniversary of the “Salon du Livre Juridique”.



7 October 2017

The “Salon du Livre Juridique”

¹ *Aspects of Private International Law.*

² *Law for Smart Devices.*

23 March 2018

The “Journée de la Jeune Recherche en Droit Constitutionnel”

On 23 March 2018 the Constitutional Council hosted the 7th edition of the “Journée de la Jeune Recherche en Droit Constitutionnel (JRC)” (“Day of Young Legal Research”, or JRC Day).

JRC Day is open to the public and for the first time it was held “off-campus university” and was attended by the President and members of the Constitutional Council.

It strives to enable current PhD students, and those awarded a PhD within the last five years, to promote their research by talking with the specialized committee and the general public. It is organised by the “Commission de la Jeune Recherche en Droit constitutionnel” (Commission for Latest Research into Constitutional Law), a group of young researchers working for the French Constitutional Law Association (AFDC).

This 7th edition featured major issues such as constitutional disputes, parliamentary powers and fundamental rights.

The specialized committee, made up of professors and lecturers, awarded the prize for best presentation to Ms Gohar Galustian, a PhD student in Montpellier, for her “Protection of Personal Data in the Digital Era” presentation.

A special prize was awarded to Mr Alexandre Cagnimel, a PhD student in Bordeaux, for his presentation, “What Status for Parliamentary Staff?”. The above presentations will soon be published in legal journals.

“The excellent welcome that the Constitutional Council gave us demonstrates the importance the Council gives to university work and research in general and, in this case, to young researchers. The annual JRC event allows participants to air their constitutional law research to a larger audience. The 2018 edition held at the Constitutional Council gave them increased visibility.”

Mathilde Heitzmann-Patin,
President of the Commission
for Latest Research into
Constitutional Law



**The
Constitution**

years on

The Constitution of the Fifth Republic came into being on 4 October 1958. Its wording and content are closely bound up with the political and economic environment in the post-war decolonisation era. Let's look back at the milestones of that period.

13 May.

The "Algiers putsch" leads to collapse of the Fourth Republic.

29 May.

René Coty, President of the Republic, asks General de Gaulle to form a new government. He accepts on condition that the Constitution be revised.

31 May.

The heads of National Assembly (lower house) parties and those of the Council of the Republic (upper house), except communist party politicians, meet with de Gaulle in the Hotel La Pérouse.

1958

The Constitution

1 June.

General de Gaulle delivers his inaugural address to the National Assembly. He asks for full powers for a six-month term and for a revised constitution. He was elected President by the National Assembly - 329 votes for and 224 against.

3 June.

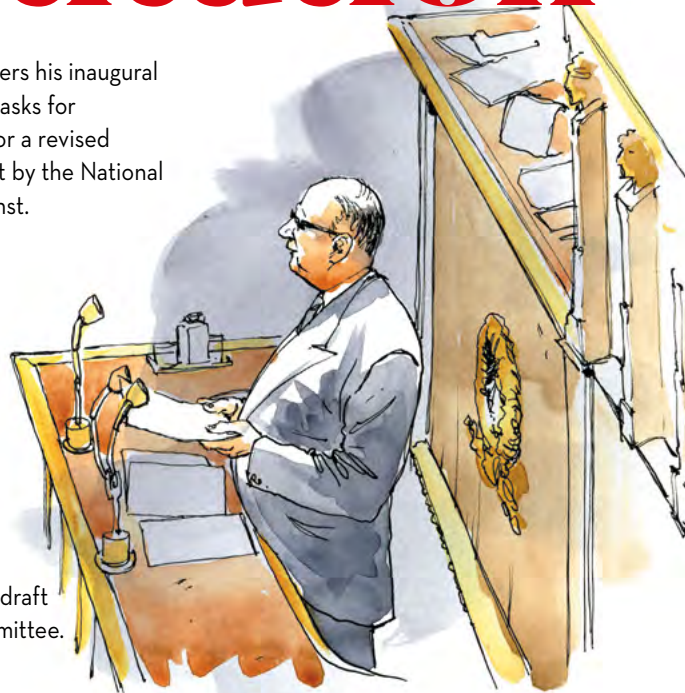
The Constitutional Bill, which tasks the Government with drawing up a new constitution, is enacted. This Act also creates a Consultative Committee charged with giving an opinion on a future constitutional bill and provides for the bill to be put to referendum.

29 July.

The Government sends a provisional draft constitution to the Constitutional Consultative Committee.

27 August.

The Minister of Justice (*Garde des Sceaux*) presents and defends the draft Constitution before the Council of State (*Conseil d'État*).

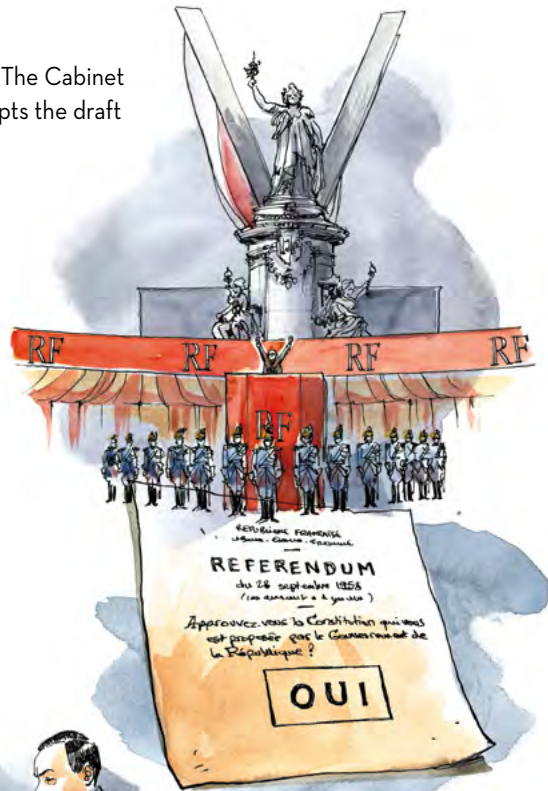




3 September. The Cabinet (*Conseil des Ministres*) adopts the draft Constitution.

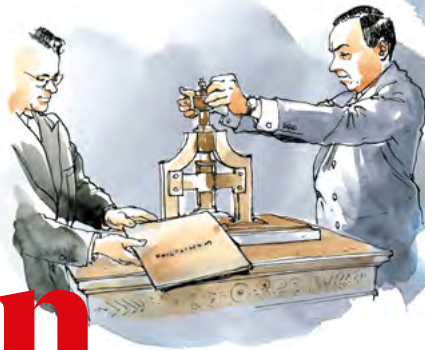
4 September.

The Constitution is presented to the French people in Paris, Place de la République. General de Gaulle delivers a speech in which he urges people to vote in favour of the Constitution.



28 September.

The Constitution is approved by universal suffrage referendum, backed by a resounding majority (79.25%).



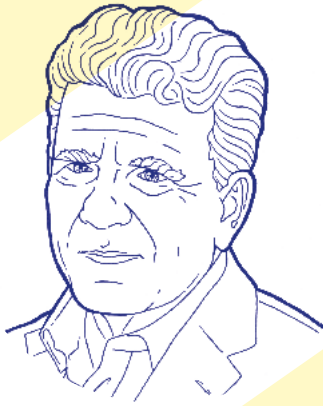
4 October.

Promulgation of the Constitution of the Fifth Republic by the President of the Republic.

5 October. The Constitution of the Fifth Republic is published in the *Journal officiel* (official gazette).



is
born



OLIVIER DUHAMEL,

professor emeritus in public law
and Chairman of the Fondation
Nationale des Sciences Politiques
(Sciences Po).

60 years on: the secrets of exceptional longevity

Who could have imagined it would last so long? We have had about fifteen constitutions and fourteen in one hundred and sixty-seven years, from 1791 to 1958. One of the most acclaimed, at least on the left, was the 1793 constitution which never came into effect. Most of the others were appreciated only by their authors, some not even: be they members of the 1791 Constituent Assembly, proud to have written one of the world's first constitutions, members of the *Directoire*, happy to get rich, Bonapartists eager about the Consulate, of which they became life members and which was then transformed into an Empire, legitimists of the Restoration, Orléanists of the July monarchy, republicans of 1848, then 1875, 1945 and 1946. Fourteen very different constitutions, each lasting just 11 years on average.

Throughout the 19th century, French people would argue about the best way to govern France. Just as soon as agreement was reached on a Republic, battle

recommended for the best regime. These quarrels are now history, although at times people still make a play to revive them. Even though people in all democracies are increasingly disenchanted with politics, the vast majority of French people favour the Fifth Republic. Only one big political party known as "France Insoumise" (insubordinate France) - is currently calling for a Sixth Republic. All the other parties accounting for four-fifths of the electorate propose amendments, but no change of Republic.

Only one regime has ever lasted longer than the 1958 one, although it was only based on "constitutional laws". The Third Republic will lose this record for longevity in five years' time, when the 1958 Constitution will overtake it. What is the explanation for such success? In seeking an explanation it is sufficient to measure the Fifth Republic against the three major purposes of a democratic Constitution: allowing the free attribution of power, ensuring it is exercised effectively and guaranteeing respect for fundamental rights.

Free attribution of power

Elections are competitive. The two elections that confer governmental authority, the presidential and the parliamentary elections, are carried out in respect of the law thanks to the supervision of the Constitutional Council, which does not hesitate to invalidate improper presidential campaign spending or fraudulent parliamentary elections. And, what is equally important is that these elections do actually confer real power. The elected president stays in power throughout his term as long as he is alive or else resigns, as did General de Gaulle, an extremely rare exception. As for the Executive, they have acquired a stability that was unheard of in previous Republics.

Effective exercise of power

It is true that politicians never achieve everything they expect, and the people think they achieve even less. In the words of Guy Carcassonne, “a good Constitution is not enough to make a country happy. But a bad one can be enough to make a country unhappy”. We should therefore base our judgement by comparing misfortunes.

The Algerian War led to a great upheaval. The Constitution helped put an end to it, largely due to the referendums which gave the founders of the Fifth Republic the legitimacy they needed to make people accept that a long-standing French territory was now independent. A crisis in society as big as May '68 could have triggered a civil war. The dissolution of Parliament helped keep the peace. Some people at the time thought a change in government ushering in socialists and communists would have brought in Soviet tanks and others could see a coup d'état looming. Nothing of the sort happened. A right-wing president and a left-wing government or vice versa used to lead to a political crisis and the president resigning, just like in 1879 and 1924. But not this time. When confronted with other misfortunes, such as a serious economic crisis or deadly terrorist attacks, the power in place has had sufficient resources to cope.

Respect for fundamental rights

Effectiveness counts but is not enough. Dictatorships can be effective. Consider China. This third criterion is where the Fifth Republic has enjoyed the most extraordinary fortune. The 1958 Constitution had little to say on fundamental rights, except Article 1 on equality before the law and Article 66 on civil liberties.

“The Third Republic will lose this record for longevity in five years’ time, when the 1958 Constitution will overtake it.”

The Constitutional Council has been able to plug this gap although it was not created for that purpose. It has done so by boldly revising the Constitution, in effect, by incorporating the Preamble into its 1970 and 1971 rulings. This means that the 1789 Declaration and the 1946 Preamble addressing the most important political rights, civilised criminal law principles and a number of economic and social rights, took on constitutional status. Constitutional amendments emanating from the legislature were needed for this revision to take full effect. This happened on two occasions: in 1974 with the creation of the right for sixty deputies or senators to petition the Council, and in 2008 with the creation of the priority preliminary ruling on the issue of constitutionality (QPC) allowing a litigant to claim that a law which might infringe fundamental rights was unconstitutional. With these powers in its possession, the Council does its job to guarantee that the rule of law endures in our country.

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