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A COMPARATIVE ANALYSIS OF BODIES RESPONSIBLE FOR ELECTORAL SUPERVISION, ESPECIALLY THE JUDICIAL ONES – THE CASE OF FRANCE

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France's 1958 Constitution gave the newly established Constitutional Council responsibility for scrutiny of the three main political voting exercises that take place at national level – the election of members of parliament, election of the President of the Republic, and referendums. Litigation arising out of local elections is a matter for the administrative judge (administrative courts, with appeal to the *Conseil d'Etat* in the case of municipal and cantonal elections, whilst the *Conseil d'Etat* is the body of first and last resort for regional elections, as well as for elections to the European Parliament).

The powers of the Constitutional Council vary depending on the type of vote involved. In the case of elections to the two houses of parliament, its role is solely to adjudicate on disputes. For the other two kinds of vote it has a broader role which includes overseeing the proper conduct of voting operations and announcing the results. We shall thus look in turn at the powers and role of the Constitutional Council in respect of these three types of voting exercise.

I. THE CONSTITUTIONAL COUNCIL AND ELECTIONS TO PARLIAMENT

Prior to 1958 the only people who judged whether or not parliamentary assemblies were properly constituted and operated in the correct manner were the members of those assemblies. This internal scrutiny was replaced by a system of external scrutiny. Since the start of the Fifth Republic the Constitutional Council has been responsible for ensuring that members of the National Assembly and Senate are properly elected and it has ruled on matters of ineligibility and incompatibility.

1. Litigation arising out of parliamentary elections[1]

Under the old system of verification of credentials each house of parliament, immediately following an election, verified the situation of each of its members and, if necessary, disqualified any member found to have been improperly elected. This scrutiny was often more political than legal, and under the Fourth Republic it gave rise to serious abuses. To quote just one example: in the 1956 legislative elections 11 *Poujadist* members of the National Assembly, in a totally arbitrary decision, were replaced by candidates of the governing majority who had come second in the vote. So when judicial review of these matters by the Constitutional Council was introduced, this met with broad approval.

From this point on, scrutiny was very different from that previously exercised by the two Chambers. Firstly, the Constitutional Council initially interpreted the scope of its powers very strictly; in contrast to the earlier practice of the houses of parliament, it did not consider itself to have sovereign powers of judgment in these matters. Secondly, in building its body of electoral case-law it took an extremely prudent position, basing itself not on what had formerly been done in parliament but on the principles established by the administrative courts in litigation over local elections.

A. Scope of its powers

To begin with the Council put a restrictive interpretation on Article 59 of the Constitution. This requires it to rule, in the event of a dispute, on whether or not a member of the National Assembly or Senate was properly elected.

Its powers are limited in two respects.

a. Firstly, the Council can only investigate the proper conduct of an election if an objection, made in due and proper form, has been referred to it.

[1] Cf. L. PHILIP, "Le Conseil constitutionnel, juge électoral", *Pouvoirs*, No. 13, new edition, 1991.

The right of referral is quite broad here: it may be exercised by any candidate and by any constituency voter. However, objections to the Council may not be made by political parties or groupings, even if the person acting for them was on the electoral lists or a candidate in the constituency where the election was held (cf. Decision 88-1040/1054 of 13 July 1988), by associations (Decision of 23 March 1973), or even by the representative of the State in the *département* (Decision 88-1043 of 21 June 1988).

In the absence of any written and signed objection, lodged (directly with the Council, or the Prefect, who must pass it on) within ten days of the election results being announced, the election is deemed to have been properly conducted. This ten-day period also applies to the content of objections: thereafter the objector cannot submit any pleadings different from those contained in his initial challenge (Decision 88-1040/1054 of 13 July 1988). He may only add to or further explain his initial complaint (Decision 88-1093 of 25 November 1988).

In no event may the Constitutional Council give a ruling on its own initiative.

This is certainly consistent with the terms of Article 59 of the Constitution. But the Council's application of this principle has sometimes been questionable. In 1959 it was required to rule on an objection to the election of a senator for the Dordogne. This *département* had two Senate seats to fill. Both of the successful candidates had benefited from improper electioneering publicity which had rendered the result invalid. But the Council had received an objection to only one of the senators, and so it disqualified him without looking at the case of the other, who was not challenged (Decision of 9 July 1959).

Once an objection has been lodged, the process of review is referred by the President of the Constitutional Council to one of three sections, each comprising three members drawn separately and by lot from among the members appointed by the President of the Republic, those appointed by the Speaker of the National Assembly and those appointed by the Speaker of the Senate. The President then appoints a rapporteur who may be one of the existing deputy rapporteurs. Every year the Constitutional Council draws up a list of 10 deputy rapporteurs chosen from the *maîtres des requêtes* (legal advisers) of the *Conseil d'Etat* and the *conseillers référendaires* (auditors) of the Court of Audit. The review section has very broad powers. It may consult all appropriate documents and may hear witnesses. The parties submit their written observations in an exchange of pleadings. The review process allows all parties a hearing and access to all the relevant procedural documents. When the case is ready for judgment, the section hears the rapporteur, who sets out the facts and legal implications and puts forward the draft of a decision; if he or she thinks that an inquiry or other investigative measures would be helpful, he or she explains why. The section considers the rapporteur's proposals and lays the matter before the Council for a judgment on the merits. But if it sees fit, the section may either order the inquiry or other investigative measure itself or it may lay the matter before the Council to that end, whereupon the Council will decide whether that measure is appropriate and, where appropriate, rule on the merits straight away. It should be noted that the Council may, without hearing the parties beforehand, take a reasoned decision to dismiss objections that are inadmissible or related to complaints which manifestly cannot affect the election outcome. The decision is then communicated to the house of parliament concerned.

In a decision of 8 November 1988 the Council firmly restated the rule that hearings should not be held in public, saying that this was not contrary to Article 6-1 of the European Convention on Human Rights. On 28 June 1995, however, it amended its rules on electoral disputes, allowing that "the parties may ask to be heard".

b. Secondly, the Council does not rule on the overall conduct of an election but only that part of it which relates to the declaration of a successful candidate.

Thus the Council does not consider objections to elections as a whole, to all the successful

candidates from a party, or to elections in a specific municipality (Decision of 24 May 1963). The challenge must be to the election of a specific individual, and the complainant must clearly name the candidate whose election is challenged or the constituency concerned (Decision of 17 May 1978).

It is also worth mentioning that the Council initially saw fit to apply a very narrow interpretation to the concept of "elections", but a slightly wider interpretation of its powers.

The word "election" can have two meanings. Strictly speaking, an election means choosing elected representatives. In that case the word describes simply the process which culminates in the declaration of the candidate who has received the greatest number of votes, and anything that is not directly connected with that declaration, anything that does not result in a challenge to it, is not the concern of the election judge. In a broader sense, the word "election" means the whole of the electoral process and the expression "proper conduct of the election" necessarily encompasses a whole range of acts and operations in addition to the actual vote itself. Specifically, proper conduct of an election supposes that the acts which precede it (calling the election, organising the poll) are lawfully performed. If we adopt the wider meaning it follows that the Constitutional Council has real "blanket powers" covering all aspects of the electoral process. But the Council applies the narrow definition: it rules only on whether an elected member of parliament has been properly elected. Faced with an objection which does not challenge this, it declares itself incompetent. Thus, for example, it will not consider the case of a candidate who disputes the number of votes he has received, when just one vote more would get him to the threshold of 5% above which he can claim reimbursement of his campaign expenses (Decision of 12 December 1958 in the Rebeuf case).

Since 1981, however (Decision in the Delmas case), the Council has interpreted its powers less restrictively, amending Article 1 of its rules of procedure accordingly in 1986.

When required to rule on a dispute over whether a member of parliament was properly elected, it is competent to examine all questions and all objections raised at the time of the challenge. Thus, when an objection is raised to the conduct of an election, it can rule on whether the electoral lists were properly drawn up or the declarations of candidacies properly made. It also decides whether the successful candidate and his/her substitute have been properly elected. It sees Article 59 of the Constitution as giving it a duty of scrutiny, authorising it to assess whether the administrative acts entailed in organising and holding elections were properly performed, where such acts may prejudice the legitimacy of the subsequent elections as a whole (Decisions of 17 December 1993 in the Mayet case and of 20 March 1997 in the Richard case). In a decision of 22 May 2002 (Hauchemaille case) it confirmed that it is competent in exceptional cases to rule on "objections to acts affecting the legitimacy of the forthcoming vote, where a finding of inadmissibility might seriously compromise the efficacy of its scrutiny of the electoral process, invalidate the overall conduct of the vote or disrupt the routine functioning of the apparatus of government". This case-law was further extended to the Senate elections (20 September 2001, Marini and Hauchemaille cases), election of the President (14 March 2000, Hauchemaille case) and a referendum (25 July 2000, Hauchemaille case).

And whilst no legal text specifically provides for this, the Constitutional Council feels free to comment on the conduct of parliamentary elections (observations of 15 May 2003, for example).

c. Lastly, the Constitutional Council does not punish all irregularities committed during an election campaign. The Council does not, in fact, pass judgment on whether the election was properly conducted, but merely on whether the election result is fair. That means it only punishes an irregularity by nullifying the election result if that irregularity is likely to have led to an incorrect result. To assess exactly what influence the irregularities committed have had, the Council reviews a number of factors: the seriousness and scale of the irregularity, how the

various candidates behaved, how much chance they had to refute last-minute personal slurs or untrue allegations and, above all, how many votes separated the successful candidate from the runner-up. The smaller the gap, the more likely it is that the alleged irregularities (assuming they are proven, of course) may be thought to have possibly distorted the result (cf. the Decision of 5 January 1959, Deval v. Durand). Decisions are often difficult here since the number of irregularities committed in the course of an election campaign is often large, and it is not always easy to know exactly how much effect they have had.

B. Principles of electoral case-law

The Constitutional Council may have based its rulings largely on the case-law of the administrative courts, but it does not hesitate on occasion to take a different line. It did so notably on the matter of postal voting (Decision of 14 February 1974). Its own case-law thus has a number of specific features: on the one hand it seeks to ensure that elections are morally fair; on the other hand it comes down relatively hard on voting irregularities, and, lastly, it is extremely prudent when it comes to nullifying elections.

a. "Moral" elections: The guardian of the Constitution endeavours primarily to condemn any unfair practices employed by candidates during an election campaign. To that extent the Council's case-law sounds a somewhat moralising note. This is clearly apparent if we look at the many nullifying decisions which are quite outspoken in their moral condemnation of the behaviour of certain elected representatives. The Council unhesitatingly points to the "serious", "regrettable" or "particularly regrettable" nature of some procedures, or deplores certain actions as "particularly reprehensible".

It seems that the supreme authority wants to encourage candidates to remain within the limits of electioneering polemics and that, whilst it cannot enforce strict adherence to the electoral code, it seeks at least to encourage candidates to abide by the rules of political ethics for the duration of the election period. It especially castigates personal slurs against opponents, manoeuvres designed to deceive the voter, insisting in particular that candidates retract or abstain from making untrue allegations, etc. And, when only a small number of votes separates the two main candidates, it does not hesitate to nullify the election result and punish behaviour of that kind.

b. Punishment of voting irregularities: The Council has sought here to counter fraud, especially in connection with postal or proxy voting. Likewise, it punishes very serious electoral irregularities such as a missing election record (protocol) or missing poll lists, opening of the ballot box during voting, etc. Many elections have been nullified for reasons like these. Its very strict attitude towards irregularities in postal voting prompted parliament to abolish that method in 1975 in favour of broader opportunities for proxy voting.

c. Scrutiny of the funding of election campaigns: The laws of 11 March 1988 and 15 January 1990 on the funding of political activities gave the Council the power to punish candidates who fail to comply with the new statutory requirements (keeping proper accounts, not exceeding a prescribed ceiling for expenses, filing accounts, etc.) by declaring them ineligible and by removing from office elected persons who exceed the ceiling. Depending on the case it may, or must, declare ineligible a candidate who fails to respect the rules on the funding of election campaigns, even if the candidate himself or herself is not directly at fault. The Council may be called upon to rule on a candidate's campaign accounts in one of three ways: by the National Committee for Campaign Accounts and Political Funding if the account has been refused, by an objection challenging the accounts of an elected representative, or by ruling on its own initiative if the elected representative has failed to file the required statement of his assets or his campaign accounts. In the latter two cases the Council automatically declares the individual concerned ineligible for one year. It may also declare him ineligible, again for one year, if he has exceeded the ceiling for electioneering expenses. Since 1985, the date on which

an elected representative becomes ineligible is the date on which the judge's ruling of ineligibility becomes final, which means that the individual concerned cannot then stand in the by-election which follows after his election has been nullified.

d. The Constitutional Council's relative prudence in nullifying elections: From the list of nullifying decisions we see that these are relatively rare. Since 1958 the Council has delivered over 2 000 decisions, but only five elections of senators have been declared invalid and just over fifty elections of members of the National Assembly. The Council appears to be more conservative in this regard than the administrative courts are on local election matters.

Its prudence is further evident in the fact that it has never yet inverted a result, as the administrative courts sometimes do, although it too has the power to do this.

This case-law of the Constitutional Council, fairly prudent overall, has its drawbacks. These are essentially two in number: firstly, the fact that irregularities in the conduct of election campaigns are only rarely punished by nullification hardly encourages candidates to abide by the electoral rules during campaigning; secondly, many cases still do not come under its jurisdiction. Moreover, members of parliament whose election is declared invalid are often re-elected. Following the elections of June 2002, the Council nullified the election of five members of the National Assembly and the five individuals concerned were then re-elected. But decisions punishing infringements of the rules on campaign funding are more efficacious because the offender is rendered ineligible (two members of the National Assembly were dismissed and declared ineligible in 2002, and three in 2008 following the 2007 elections).

2. Scrutiny of ineligibility to be elected and incompatibility

The Constitution does not expressly give the Constitutional Council competence in this area. But it is generally held that scrutiny of the proper conduct of an election necessarily includes checks on eligibility and on incompatibility too. The organic ordinance [*ordonnance organique*] on the conditions of eligibility and incompatibility of members of parliament upheld this tradition by making provision for the Council to act. Here, however, in contrast to its scrutiny of the proper conduct of elections, it does not have sole competence. It performs this scrutiny jointly with other bodies.

A. Scrutiny of eligibility to be elected

a. The Council may be called upon to rule at different stages and in different ways.

- When a nomination is filed, it is the Prefect who must check whether the would-be candidate is in fact eligible. If he has any doubts, he must suspend registration, referring the matter within 24 hours to the administrative court, which has sole competence to rule on this and, if appropriate, to bar a candidate from standing for election. However, the administrative court's decision, which must be given within three days, may be challenged before the Constitutional Council if an objection is lodged asking for the election to be nullified. Thus the Constitutional Council may have to overturn the judgment of an administrative court, something that is normally a matter for the administrative appeal courts (8 July 1986, AN, Houteer, Haute-Garonne).
- If a person who is ineligible is declared elected, his or her election may be challenged before the Constitutional Council within ten days. And the Council may declare his or her election invalid if it thinks that the member of parliament was indeed ineligible. His or her election may also be declared invalid if it was the member’s alternate who was ineligible (Decision of 5 July 1973).
- As we have already seen, the Council declares ineligible for one year from the date of their election any candidates who fail to comply with the new rules on the scrutiny of campaign accounts and political funding.

- If the elected candidate is found to be ineligible to be elected after ten days have elapsed, or during his or her term of office, the procedure is different again. In this case the Constitutional Council simply records the elected member's removal from office at the request of the bureau of the house of parliament concerned, the Justice Minister or the Public Prosecutor (where the offence is identified post-election). The scope for the Council to act is thus far more limited here. If the matter is not referred to the Council the member, despite being ineligible, will retain his or her office. On the face of it that seems rather shocking, especially if it works to the benefit of a member of parliament representing the majority. But it is not an issue in cases where judgment against a member is confirmed, because to date the Public Prosecutor has always, virtually automatically, referred such cases to the Constitutional Council.

b. The Council's case-law on ineligibility is dominated by the principle of restrictive interpretation.

The principle, in electoral matters, is freedom. Consequently a citizen may never be declared ineligible to be elected in the absence of a legal text, and that text has to be interpreted rigorously when it comes to the exercise of a civic right.

The Constitutional Council has had occasion to apply this principle many times. Thus, someone doing his military service is not ineligible to stand for election as President – though he cannot stand for election to parliament – because the legal texts on the election of the President make no express provision for this possibility (Decision of 17 May 1969). Similarly, since the functions of the director of a *département's* CIO (careers guidance centre, *centre d'information et d'orientation*) do not feature on the restrictive list given in the electoral code, they do not bar such a director from standing for election even though they are similar to other functions which do.

The Council has also deemed the following to be eligible to be elected: a deputy director of veterinary services of a *département* (though directors of agricultural services are ineligible), and a forestry engineer ("*Itef*" – *ingénieur des travaux des Eaux et Forêts*) is eligible but his superior, an "*Igref*" (*ingénieur (du génie rural) des Eaux et Forêts*), is not. Under the organic law a member of the National Assembly or Senate or an alternate may not be an alternate for a candidate standing for election to parliament. But the Council decided that this prohibition did not apply to members (or alternates) standing for re-election.

B. Scrutiny of incompatibility

The issue of incompatibility can only arise post-election and indeed only after the period of time allowed for the member of parliament to resign from functions incompatible with his or her office has elapsed. Consequently objectors cannot refer this issue to the Council as part of a challenge to the election result. As with ineligibility which becomes apparent when a person has already taken office, the Constitutional Council's powers to act here are limited. The matter may only be referred to it by the Justice Minister or the bureau of the house of parliament concerned. As of 1961, however, review by the Council may also be sought by any member of parliament who is doubtful about his or her situation.

a. When the Council has a case referred to it by the Justice Minister or the bureau of the Assembly, it removes from office the member who is exercising an incompatible function, either immediately in some cases or after 15 days have elapsed (if the MP has not acted to rectify the situation).

The Rives-Henry case of 1971 raised the question of whether the authorities empowered to refer cases to the Constitutional Council had an obligation to exercise that prerogative where incompatibility was doubtful or contested, or whether, on the contrary, they were free not to do

so if they deemed such action inopportune. It would seem difficult to accept that referral is obligatory when this is not expressly provided for in a legal text. Consequently a member of parliament may hold a function incompatible with his office and happily carry on doing so, if the bureau of the Assembly and the Justice Minister decline to refer his or her case to the Council.

b. There have been several instances of a member of parliament asking the Council for a judgment, and the Council has established the following points:

- It applies the same principle as in matters of ineligibility; namely the legal texts defining incompatibility must be strictly interpreted.
- It also seeks to establish whether, in fact, the exercise of a given function is likely to be subject to a statutory prohibition or to compromise the independence of the person elected, although appraisal of such matters is sometimes delicate (case of Mr. Marcel Dassault in 1977, for example).
- Incompatibility does not (usually) mean ineligibility. Consequently, whilst MPs cannot serve more than one constituency at once, a serving member is free to stand for election during his or her mandate in a different constituency. Similarly, whilst membership of the government is incompatible with exercise of the office of a member of parliament, there is nothing to stop a minister from standing in a parliamentary election.
- Lastly, the Council has been prompted to clarify that a member of parliament may only ask it to rule on an issue of incompatibility if the matter is in doubt or contested. Specifically, he may not refer it to the Council unless his position has first been considered by the bureau of the Assembly. If the Assembly does not recognise the problem, or declines to give an opinion on it, the Council cannot give a ruling on incompatibility.

II. THE CONSTITUTIONAL COUNCIL AND ELECTION OF THE PRESIDENT

The Constitutional Council has a wider role in presidential elections because it has both judicial and advisory powers, playing a part before, during and after the vote. It has also got into the habit of publishing its "observations" on the election process, enabling it to suggest improvements to the way in which the process is conducted.

1. Scrutiny of the proper conduct of the election

The role of the Constitutional Council here is wider than in elections to parliament; it is involved in preparing the election, the conduct of voting operations and declaration of the results.

A. Preparing the election

The Constitutional Council is actively involved in the measures which precede the election. Not only is it consulted by the Government on the organisation of voting operations, it also draws up the list of candidates and adjudicates disputes.

a. It is consulted during drafting of the texts concerning the election's organisation. In the past the Government seems to have paid little heed to the Council's comments on these. Thus, in announcing the 1974 results, it saw fit to publish its observations on omissions and imperfections in the legal texts governing presidential elections. It called on the Government to make changes to the rules governing the nomination of candidates and to cater for the eventuality of a candidate dying. Its recommendations led to amendment of the organic law on the election of the President of the Republic and to revision, in 1976, of Article 7 of the Constitution. After each presidential election it formulates its observations and offers a number of recommendations (cf. its observations of 7 November 2002 on the election of 21 April and 5 May 2002, which suggested that the official list of candidates should be drawn up earlier or

that the full list of candidate sponsors ("*parrains*")should be published; cf. also its observations of 31 May and 7 June 2007 which suggested a standardised closing time for all polling stations in Metropolitan France and an express ban, throughout the national territory and until the last polling station has closed, on the release of any partial result or exit poll figures, or an increase from 500 to 1 000 in the number of proposers in order to avoid multiple candidacies).

b. The Constitutional Council is directly involved in the election process. It receives the candidacies, checking their number and that they are validly presented. A candidate must be nominated by at least 500 elected representatives – members of parliament, regional or general councillors, Paris councillors, mayors, etc. Signatories must include elected representatives from at least 30 *departments* or overseas territories, and not more than one tenth of them may hold elected office in any one department or overseas territory.

The Constitutional Council, after running the above checks and making sure that the person nominated does indeed wish to stand, is eligible to be elected and has paid his deposit, publishes the official list of candidates. Whilst its decisions are not appealable under the Constitution, the Council has been prepared to consider challenges to those of its own decisions which finalised the list of candidates or attributed distinctive identifiers to certain candidates. Thus, in 1969 it looked at an objection by one candidate to the inclusion on the official list of another candidate who was currently doing his military service and whom he considered to be ineligible. This kind of appeal, however, is open only to nominated candidates (Decision of 7 April 2002, Hauchemaille case).

All these checks must be carried out very quickly, since nominations have to reach the Council no later than 19 days before the first round of voting, and the Council must draw up the list of candidates ready for publication in the *Journal Officiel* not later than 16 days prior to the vote.

Following an Order of 27 December 1987 by the President of the Constitutional Council, candidacies have been processed electronically, which makes these operations much easier.

The constitutional revision of 18 June 1976, amending Article 7, also envisaged a role for the Council in one theoretical circumstance, which has never yet arisen, that a candidate dies or becomes incapable of standing for election. If one or other circumstance should arise within the seven days prior to the closing date for receipt of candidacies, the Council "may decide to postpone the election". If it arises before the first round of voting and when the list has already been published in the *Journal Officiel*, the Council must postpone the election. If one of the two remaining candidates remaining after the first round of voting dies or becomes incapable, the Council will declare that the whole election must be re-run, including the first round of voting. It is up to the Council to assess the acts or circumstances which indicate "incapacity", a concept which has not as yet been defined.

B. Monitoring the conduct of the election

The Constitutional Council plays no part in the election campaign, which is overseen by a National Supervisory Committee (the CNCCEP) especially appointed for the purpose. This Committee is tasked with ensuring compliance with the principle that "all candidates shall be given the same campaign facilities by the State with a view to election of the President". This solution, which creates some conflicts of competence with the Council, is not logical. It would have been preferable to entrust this task to the Council, which has responsibility for ensuring that the election is properly conducted, even if the Council had to ask the Committee for help in performing it.

The Constitutional Council does, however, oversee the conduct of voting operations. To that end it usually delegates officials (usually law officers) to monitor operations on the spot. These have not always been well received by the polling station presiding officers, and this prompted

the Council, in 1974, to declare invalid the voting operations in some polling stations to which its officials had not been allowed access. In its observations on the presidential election of 2002 the Council suggested that parliament "introduce the offence of obstructing the work of the Council's officials, given that they are sometimes impeded in the performance of their duties". This was acted on in the organic law of 5 April 2006.

C. Declaration of the results

The general count of the votes takes place under the Council's direct supervision. The Council verifies the number of votes obtained by the candidates, announces the result of the first round of voting and then the second round, and subsequently declares that the candidate who obtains the greatest number of votes has been elected as President of the Republic. Before making that declaration, it considers all complaints forwarded to it within 48 hours of the polls closing either directly by the representative of the State or by a candidate, or complaints mentioned in the election records of polling stations or returning offices. But it cannot receive complaints directly from voters, as is the case in parliamentary elections.

In the election of the President, any complaints expressed may not challenge the actual election result. They must be made whilst voting is ongoing, that is to say before the results are announced. The Constitutional Council exercises its scrutiny here *a priori*, even before the results are declared. Once they have been declared, the proper conduct of the election can no longer be challenged and no further complaints are permitted.

In the event of irregularities the Council is empowered, before the results are declared, to declare either certain operations or the entire election invalid. It has already had occasion to nullify some parts of the election process, for example because voters' identity was not properly checked despite repeated warnings by the Council's official, because the poll list was missing, because there were major discrepancies between the number of persons voting and those on the poll list, because certain polling stations did not open due to serious disruptive events, etc.

If it seemed likely that nullification would change the outcome, the Council would probably decide to declare the entire election invalid and would not use its rectifying power. Within two months of the election, each candidate in the first round of voting must submit the accounts for his or her election campaign to the National Committee for Campaign Accounts (prior to the organic law of 5 April 2006 these accounts went directly to the Constitutional Council). This enables checks to be done that the accounts are fair and honest and that the authorised ceiling on expenses has not been exceeded (ceiling set in 2007 at €15.481 million for the first round and €20.679 million for the second round). If the checks are satisfactory, the State reimburses the expenditure incurred by the candidate, at a flat rate.

The National Committee for Campaign Accounts may approve the accounts, amend them or reject them after hearing the parties. Candidates challenging a Committee decision may appeal against it to the Constitutional Council within one month of being notified of the decision.

In 2002 Mr Bruno Mégret had his campaign accounts rejected and was thus not entitled to reimbursement of his election expenses (decision of 26 September 2002).

III. THE CONSTITUTIONAL COUNCIL AND REFERENDUMS

Article 60 of the Constitution says that "The Constitutional Council shall ensure the proper conduct of referendum proceedings […] and shall proclaim the results of the referendum." The term referendum means not only the legislative referendum referred to in Article 11 of the Constitution, but also the referendum in Article 89 on amendments to the Constitution and, following the constitutional revision of 3 March 2005, the referendum referred to in Article 88-5 on ratification of a treaty pertaining to the accession of a new Member State to the European

Union.

The Council has interpreted the terms of Article 60 in a fairly restrictive way. Consequently, with regard to referendums, it exercises powers that are both limited and very different, depending on whether it is organising the vote and scrutinising the election campaign, or overseeing the conduct of the vote and declaring the results. In the former case its powers are purely advisory, whilst in the latter case they are judicial.

1. Advisory powers

Some of these are not set out in the Constitution itself, but in an organic law or even in simple decrees.

A. Regarding the holding of a referendum: The ordinance of 7 November 1958 enacting an organic law on the Constitutional Council provides that the Council shall be consulted by the Government and informed of all measures taken on this subject. That implies that it is free to give its opinion on all texts concerning the holding of the referendum, for example the decree deciding to put a bill to a referendum (with the bill appended), plus the decrees on organisation of the election campaign. The order also stipulates that the Council may submit observations on the list of organisations authorised to use official media in their electioneering. This is an essential question. But the position is very different from that we have described in regard to presidential elections. Here the Constitutional Council has no direct responsibility. It is not the Council that draws up the list of organisations allowed to use official media in their electioneering and it declines, moreover, to consider objections to the content of the list (Decision of 23 December 1960).

It is unfortunate that its role is so closely constrained here. Ideally it should be the Council that draws up the list of organisations allowed access to official media for their electioneering.

The Council's opinions are purely advisory, and whilst it may be that the prestige of the Council definitely lends them authority, it is hard to measure their precise impact given that they are confidential.

Ideally, too, it should be consulted by the President of the Republic on the wording of the referendum question put to voters and should deliver a published opinion on this question which is often of capital importance.

In a decision of 2 June 1987 concerning a referendum on self-determination held in a French territorial community, the Council took the view that the situation required total clarity and should satisfy the twofold requirements of a fair and unequivocal vote (cf. also Decision of 4 May 2000, *Referendum on Mayotte*).

If the Council was able to give its opinion on the presentation and wording of the referendum question, it could check that the requirements of the Constitution had been complied with.

In 1993 the Vedel Commission had very pertinently suggested that all bills requiring approval by referendum should be checked for their constitutionality. During the debate of 23 July 2003 on revision of the Constitution the Senate, and the National Assembly, were both unwilling to go as far as to introduce that kind of check on bills requiring a referendum. The – questionable – reason given was that one should not raise the eventuality of the President of the Republic invoking Article 11 in order to revise the Constitution...

It should be pointed out, though, that the constitutional revision of 23 July 2008 gave new powers to the Constitutional Council, under the new procedure for a parliamentary and popular referendum which may be initiated at the request of one fifth of members of parliament and one

tenth of voters on the electoral rolls.

The original intention was simply that the Constitutional Council should scrutinise the "proper conduct of the initiative". An amendment by the Senate significantly broadened this scrutiny to the extent that an organic law must now set out the conditions in which the Constitutional Council monitors compliance with the requirements of the new system as a whole; this means, implicitly but clearly, that it must check the substantive constitutionality of any bill that is to be put to a referendum. Thus it will be able to check that the bill does indeed concern one of the matters named in Article 11, paragraph 1 (organisation of the public authorities, reforms relating to the economic, social or environmental policy of the Nation and to the public services contributing thereto, ratification of a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions) and that it contains no provisions inconsistent with the rules and principles of the Constitution, notably those relating to fundamental rights.

Even if confined to private members' bills submitted to referendums, scrutiny of constitutionality prior to the approval of any referendum initiative is of real value because it will prevent a situation in which a text that is unconstitutional or inconsistent with international law gets put to a popular vote and may subsequently be referred for a ruling on its unconstitutionality… This latter remains, *a priori*, a possibility in the case of referendum-approved laws that originate in government bills, and this is not without its problems.

In any event it would seem desirable to have scrutiny exercised once the bill receives the support of one fifth of members of parliament and before it receives the support of one tenth of the electorate. Voters would have difficulty understanding an interruption of the procedure on grounds of unconstitutionality if signatures had already been collected.

B. Conduct of the referendum campaign

In contrast to the procedure for a presidential election, it is the Constitutional Council and not the National Supervisory Committee which oversees the conduct of the campaign here. Its monitoring of equal radio and TV time for the different political groupings is specifically regulated in a decree. It is a rare instance of a specific power being conferred on the Constitutional Council by simple decree.

2. Judicial powers

Under Section 50 of the organic law on the Constitutional Council, the Council is competent to rule on "irregularities in the conduct of voting operations". It has interpreted this provision very restrictively. It takes the view that this legal text is concerned only with challenges which may be made to voting operations after the vote. This means that objections, whether made by the representative of the State in the *département* within 48 hours of the polls closing or by voters (objections which must be included in the election record and not sent to the Council direct) can only be made in respect of the conduct of the vote. Consequently, no appeal is possible against the organisation of the referendum and conduct of the campaign, though these are the most important things. The Constitutional Council's action is thus confined to the conduct of the vote: it monitors voting through the officials representing it on the spot; it oversees the general count; it considers objections and it declares the results. As in presidential elections, it may decide, in the event of serious irregularities, either to nullify part of the results (for example because the polling station was closed too soon, or because voters did not have the use of a polling booth as the constitutional principle of the secret ballot demands), or to declare the entire referendum invalid, something that has never happened yet.

It should be remembered that the Council declines to scrutinise the constitutionality of texts approved in a referendum (Decision of 8 November 1962), arguing that the Constitution concerned itself only with laws passed by Parliament and not those approved in a referendum

which are the direct expression of national sovereignty.

Existing legislation on the Constitutional Council's powers in electoral matters, whether parliamentary or presidential elections or referendums, is not very satisfactory, on the one hand because its competence is still too limited and, on the other hand, because it varies too much depending on the nature of the vote concerned. Ideally the Constitutional Council should become the ordinary-law judge in political elections. Ideally too, the rules governing referrals to the Council and the scope of its powers here should be standardised. The Council itself seems to favour such a development because it indicated its wish, when declaring the result of the 1974 presidential election and during the 1981 parliamentary elections, to be the true judge and sole guarantor of the proper conduct of elections. It would make sense for it to play the same role in referendums.