

DECISION 2000-429 DC OF 30 MAY 2000

Act to promote equal access of women and men to electoral mandates and elective offices

On 5 May 2000 the Constitutional Council received a referral from Mr Josselin de ROHAN, Mr Nicolas ABOUT, Mr Louis ALTHAPÉ, Mr Jean-Paul AMOUDRY, Mr Pierre ANDRÉ, Mr Philippe ARNAUD, Mr Jean ARTHUIS, Mr Denis BADRÉ, Mr José BALARELLO, Mr Jacques BAUDOT, Mr Jean BERNARD, Mr Roger BESSE, Mr Jean BIZET, Mr Paul BLANC, Mr Maurice BLIN, Ms Annick BOCANDÉ, Mr André BOHL, Mr Christian BONNET, Mr James BORDAS, Mr Jean BOYER, Mr Louis BOYER, Mr Jean-Guy BRANGER, Mr Gérard BRAUN, Mr Dominique BRAYE, Mr Michel CALDAGUÈS, Mr Robert CALMÉJANE, Mr Jean-Pierre CANTEGRIT, Mr Jean-Claude CARLE, Mr Auguste CAZALET, Mr Gérard CÉSAR, Mr Jean CHÉRIOUX, Mr Jean CLOUET, Mr Gérard CORNU, Mr Charles-Henri de COSSE-BRISSAC, Mr Jean-Patrick COURTOIS, Mr Xavier DARCOS, Mr Luc DEJOIE, Mr Jean DELANEAU, Mr Jean-Paul DELEVOYE, Mr Jacques DELONG, Mr Robert del PICCHIA, Mr Fernand DEMILLY, Mr Christian DEMUYNCK, Mr Marcel DENEUX, Mr Gérard DÉRIOT, Mr Charles DESCOURS, Mr Paul DUBRULE, Mr Alain DUFAUT, Mr André DULAIT, Mr Jean-Léonce DUPONT, Mr Jean-Paul ÉMIN, Mr Jean-Paul ÉMORINE, Mr Hubert FALCO, Mr André FERRAND, Mr Hilaire FLANDRE, Mr Bernard FOURNIER, Mr Serge FRANCHIS, Mr Philippe FRANÇOIS, Mr Yves FRÉVILLE, Mr René GARREC, Mr Jean-Claude GAUDIN, Mr Philippe de GAULLE, Mr Patrice GÉLARD, Mr François GERBAUD, Mr Charles GINÉSY, Mr Francis GIRAUD, Mr Daniel GOULET, Mr Alain GOURNAC, Mr Francis GRIGNON, Mr Louis GRILLOT, Mr Georges GRUILLOT, Mr Hubert HAENEL, Ms Anne HEINIS, Mr Pierre HÉRISSON, Mr Rémi HERMENT, Mr Daniel HOEFFEL, Mr Jean HUCHON, Mr Jean-François HUMBERT, Mr Claude HURIET, Mr Charles JOLIBOIS, Mr André JOURDAIN, Mr Lucien LANIER, Mr Gérard LARCHER, Mr Patrick LASSOURD, Mr Robert LAUFOAULU, Mr Edmond LAURET, Mr René-Georges LAURIN, Mr Henri LE BRETON, Mr Dominique LECLERC, Mr Jacques LEGENDRE, Mr Guy LEMAIRE, Mr Simon LOUECKHOTE, Mr Roland du LUART, Mr Kléber MALÉCOT, Mr André MAMAN, Mr Philippe MARINI, Mr Serge MATHIEU, Mr René MARQUÈS, Mr Pierre MARTIN, Mr Paul MASSON, Mr Jean-Luc MIRAUX, Mr Philippe NACHBAR, Mr Philippe NOGRIX, Mr Jacques OUDIN, Mr Jacques PELLETIER, Mr Bernard PLASAIT, Mr Guy POIRIEUX, Mr Ladislav PONIATOWSKI, Mr André POURNY, Mr Henri de RAINCOURT, Mr Charles REVET, Mr Henri REVOL, Mr Henri de RICHEMONT, Mr Louis-Ferdinand de ROCCA SERRA, Mr Michel RUFIN, Mr Jean-Pierre SCHOESTECK, Mr Raymond SOUCARET, Mr Michel SOUPLET, Mr Martial TAUGOURDEAU, Mr Henri TORRE, Mr René TRÉGOUËT, Mr François TRUCY, Mr Jacques VALADE, Mr André VALLET, Mr Alain VASSELLE, Mr Xavier de VILLEPIN, Mr Serge VINÇON and Mr Paul GIROD, Senators, pursuant to the second paragraph of Article 61 of the Constitution, for constitutional review of the Act to promote equal access of women and men to electoral mandates and elective offices;

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution, and in particular Articles 3 and 4 thereof, as amended by Constitutional Act 99-569 of 8 July 1999 concerning equality between women and men;
Having regard to Ordinance 58-1067 of 7 November 1958 laying down the Institutional Act on the Constitutional Council, as amended, and in particular Chapter II of Title II thereof;

Having regard to Ordinance 59-2 of 2 January 1959 laying down the Institutional Act on Finance Acts, as amended;
Having regard to Institutional Act 2000-294 of 5 April 2000 concerning incompatibilities between electoral mandates;
Having regard to Act 83-27 of 19 January 1983 amending various provisions concerning the election of municipal councils in New Caledonia and French Polynesia;
Having regard to the Political Life (Financial Transparency) Act (No 88-227 of 11 March 1988), as amended;
Having regard to the Electoral Code;
Having regard to the General Code of Local Authorities;
Having regard to Decision 2000-427 DC of the Constitutional Council of 30 March 2000;
Having regard to the Government's observations, registered on 16 May 2000;
Having regard to the observations by way of rejoinder submitted by the authors of the referral, registered on 17 May 2000;
Having regard to the fresh observations of the Government, registered on 19 May 2000;
Having heard the rapporteur;

On the following grounds:

1. The Senators making the referral submit the Act to promote equal access of women and men to electoral mandates and elective offices for review by the Constitutional Council, arguing that sections 1 to 10, 15 and 18 to 20 are unconstitutional; sections 2, 3, 5, 6, 7 and 8 are in their view contrary to Article 6 of the Declaration of Human and Civic Rights of 1789 and to Article 3 of the Constitution; section 15 provides for a penalty that violates the principle of the need for penalties; sections 1, 4, 10, 18, 19 and 20 are the result of amendments adopted by an irregular procedure;

ON SECTIONS 2, 3 AND 5 TO 8:

2. Sections 2, 3 and 5 to 8 of the Act referred amend provisions of the Electoral Code concerning municipal elections in the communes referred to in Chapter III of Title IV of Book 1 of the Electoral Code, Senate elections in the departments where proportional representation applies, regional elections, the election of councillors in the Corsican Assembly, elections to the European Parliament and the cantonal elections in the local authority of Saint-Pierre-et-Miquelon; for all these elections, the effect of the amendments is that "the difference between the number of candidates of each sex on any list may be no more than one";

3. Sections 3 and 7 provide that, for all elections conducted by the single-ballot list system, "each list shall be composed alternately of a candidate of each sex"; by sections 2, 5, 6 and 8, with regard to elections conducted by the two-ballot list system, "within any segment of six candidates in the order of presentation on the list, there shall be an equal number of candidates of each sex";

4. The authors of the referral argue that the new constitutional provisions enacted by the Constitutional Act referred to above "repealed no other provisions of the Constitution, in particular Article 3 as a whole and Article 4 prior to amendment"; the provisions enacted in the constitutional reform of 1999 "do not lay down rules but set an objective"; insofar as they merely set an objective, they do not warrant mandatory or punitive measures; accordingly, while imposing for two-ballot proportional elections a "quota close to 50% for each sex" and imposing "a genuine quota obligation" for single-ballot proportional elections, the legislature established a mechanism violating Articles 3 and 4 of the Constitution and Article 6 of the

Declaration of Human and Civic Rights of 1789; it also acted contrary to Constitutional Council Decisions 82-146 DC of 18 November 1982 and 98-407 DC of 14 January 1999;

5. The last paragraph of Article 3 of the Constitution reads: “Statutes shall promote equal access by women and men to electoral mandates and elective offices”; the second paragraph of Article 4 provides that political parties and groups “shall contribute to the implementation of the principle set out in the last paragraph of Article 3 as provided by statute”;

6. In the first place, there is nothing, subject to Articles 7, 16 and 89 of the Constitution, to preclude the constituent authority from inserting in the Constitution new provisions which derogate from constitutional rules or principles in the situations they concern; such is the case of the provisions referred to above, which have the object and effect of removing the constitutional obstacles recorded by the Constitutional Council in the above-mentioned Decisions; accordingly, it was not legitimate for the applicants to plead that those decisions had the force of settled law;

7. In the second place, it follows from the fifth paragraph of Article 3 of the Constitution, read in the light of the legislative history of the Constitutional Act of 8 July 1999, that the constituent authority’s intention was to empower the legislature to establish any mechanism that would give full effect to the principle of equal access for women and men to electoral mandates and elective offices; to this end, the legislature henceforth has the power to adopt provisions to attain that objective either on an exhortatory or on a mandatory basis; but it must reconcile the new constitutional provisions with the other constitutional rules and principles from which the constituent authority did not intend to derogate;

8. The contested provisions of the Act referred, laying down mandatory rules concerning the presence of candidates of each sex in the lists of candidates at proportional elections, are within the measures that the legislature can henceforth adopt under the new provisions of Article 3 of the Constitution; they violate none of the constitutional rules or principles from which the Constitutional Act did not intend to derogate;

ON SECTION 15:

9. Section 15 amends section 9-1 of the Political Life (Financial Transparency) Act of 11 March 1988 to determine new rules for calculating the first fraction of the aid given to political parties;

10. Under sections 8 and 9 of that Act, this fraction, reserved for the parties and groups having presented candidates in at least fifty constituencies at the most recent general election to the National Assembly, is distributed between candidates in proportion to the number of votes cast at the first ballot for each of the parties and groups in question; for the purposes of this distribution, candidates for election as deputies must state the party or group to which they are attached in their declaration of candidature;

11. Under the new section 9-1, when the difference between the number of candidates of each sex having declared that they are attached to a given party or group exceeds 2% of the total number of candidates, the amount of this fraction “is reduced by a percentage equal to half this difference in relation to the total number of candidates”;

12. The senators making the referral object that this section violates the principle of the need for penalties stated by Article 8 of Declaration of Human and Civic Rights of 1789; they submit in this respect that “the financial penalty provided for ... can be manifestly out of proportion to the objective set by Articles 3 and 4 of the Constitution”;

13. The mechanism thus established is not punitive in nature but simply adjusts the public assistance given to political parties and groups under sections 8 and 9 of the Act of 11 March 1988; its purpose is to give these parties and groups an incentive to implement the principle of equal access of women and men to elective functions in accordance with Articles 3 and 4 of

the Constitution; consequently, the objection based on violation of the principle of the need for penalties is inoperative;

14. On the other hand, the penultimate paragraph of the same section provides: “The appropriations generated by this reduction shall be reallocated in the Finance Act”, and in the last paragraph provides: “An annual report shall be laid before Parliament on the use of the appropriations generated by this reduction...”; these provisions, read together, require the Government or Parliament, as the case may be, to allocate and utilise the corresponding appropriations; with regard to the allocation by the Finance Act, an ordinary statute cannot impose such a requirement without violating the Government’s right to take initiatives as regards Finance Bills under Articles 39, 40 and 47 of the Constitution; nor was it legitimate for the legislature to obstruct the Government’s prerogatives as regards implementation of the Finance Act, both to cancel any appropriation becoming superfluous during the year and to amend by way of transfer the distribution of appropriations between budgetary chapters, within the conditions and limits provided for in sections 13 and 14 of the Ordinance of 2 January 1959;

15. The Constitutional Council must accordingly hold the penultimate paragraph of section 15 of the Act referred and the words “on the use of the appropriations resulting from this reduction and” in the last paragraph of that section unconstitutional; the reduction in aid is bound to cause to cause the corresponding appropriations to lapse;

ON SECTIONS 1, 4, 9, 10, 18, 19 AND 20:

Regarding sections 1, 9 and 10:

16. Section 1 of the Act lowers from 3500 to 2500 inhabitants the population threshold above which the election of municipal councillors is governed by Chapter III of Title IV of Book 1 of the Electoral Code; in particular, section 1(II) amends section L 252 of the Code;

17. The Senators making the referral submit that the changes to the municipal balloting technique, determined by an amendment adopted at the National Assembly’s first reading of the Bill, is “not directly related to” the provisions of that Bill; in their observations by way of rejoinder, they argue that the amendment was, furthermore, contrary to section L.O. 141 of the Electoral Code, as amended by the Act of 5 April 2000 on incompatibilities between electoral mandates;

18. The Bill to promote equal access of women and men to electoral mandates and elective offices, laid before the Bureau of the National Assembly on 8 December 1999, comprised two series of provisions in addition to the transitional measures in Title III; the provisions under Title I were for implementation of the principle of parity for list-system elections; the other provisions, in Title II, referred to the methods of calculating financial aid for political parties and groups contesting the general election;

19. The main purpose of section 1 of the Act referred is to modify the population threshold determining the change of the balloting method for municipal elections; but its provisions, combined with those of section 2, have the effect of extending the principle of parity to communes with a population of between 2500 and 3499 inhabitants; the amendment which gave rise to section 1 can therefore be regarded as not lacking a relationship with the relevant Bill;

20. On the other hand, in the decision of 30 March 2000, the Constitutional Council, on a referral pursuant to Articles 46 and 61 of the Constitution, held the Institutional Act concerning incompatibilities between electoral mandates to be constitutional; the Constitutional Council considered, in connection with section L.O. 141 of the Electoral Code as amended by section 3 of the Institutional Act, that “it is legitimate for the Institutional Act

to include municipal councillorship in the mechanism for restricting the simultaneous exercise of membership of Parliament and of local electoral mandate only above a certain population threshold, provided the threshold selected is not arbitrary; that condition is met in the instant case, since the threshold of 3500 inhabitants determines, pursuant to section L 252 of the Electoral Code, a change of balloting technique for the election of members of municipal councils”; this reason provides the necessary support for the operative part of that decision;

21. The fact that the ordinary legislature has amended the population threshold laid down by section L 252 of the Electoral Code while the institutional legislature has not amended the threshold determined by section L.O. 141 of the Code means that section 3 of the Institutional Act of 5 April 2000 no longer has a basis in the Constitution; it follows that section 1 of the Act referred must be declared unconstitutional;

22. Section 9 of the Act referred, which makes sections L 264 (first paragraph), L 265 and L 267 of the Electoral Code, and the referral to section 1 in section 10 of the Act applicable to the communes of French Polynesia of 2500 inhabitants and more, are inseverable from this unconstitutional provision;

Regarding sections 4, 18, 19 and 20:

23. The applicants submit that sections 4, 18, 19 and 20 are unrelated to the Act;

24. Section 4, which provides for joint lists for the election of members of the Higher Council of French nationals resident in foreign countries elected by proportional representation, is the result of an amendment adopted after failure of the Joint Committee; it is in direct relation to none of the provisions of the Act under discussion; moreover, its adoption is not warranted by the need for coordination with other instruments being debated in Parliament; section 4 must accordingly be held unconstitutional;

25. Sections 18 and 19 relate to the consequences, provided for respectively in sections L 205 and L 210 of the Electoral Code, of situations of ineligibility and of incompatibility concerning a general councillor after his election; section 20 supplements section L 2113-17 of the General Code of Local Authorities to lay down a condition of eligibility for the advisory council of each of the associated communes in certain merged communes;

26. Sections 18 and 20 are the result of amendments adopted at first reading of the Bill in the National Assembly; the additions thus made to the Bill being debated were unrelated to its purpose, which is to encourage the equal access of women and men to electoral mandates; sections 18 and 20 must accordingly be declared unconstitutional; so must section 19, especially as it was inserted by amendment after the failure of the Joint Committee;

27. There are no grounds for the Constitutional Council to consider other questions of constitutionality of its own motion;

Has decided as follows:

Article 1

The following provisions of the Act to promote equal access of women and men to electoral mandates and elective offices are declared unconstitutional:

1° Section 1;

2° Section 4;

3° Section 9;

4° In Section 10, the words “the first and”;

5° The penultimate paragraph of section 15 of the Act referred and the words “on the use of the appropriations resulting from this reduction and” in the last paragraph of that section;

6° Sections 18, 19 and 20.

Article 2

This decision shall be published in the *Journal officiel de la République française*.

Deliberated by the Constitutional Council at its sitting of 30 May 2000, attended by Mr Yves GUÉNA, President, Mr George ABADIE, Mr Michel AMELLER, Mr Jean-Claude COLLIARD, Mr Alain LANCELOT, Ms Noëlle LENOIR, Mr Pierre MAZEAUD, Ms Monique PELLETIER and Ms Simone VEIL.