

Decision n° 2004-492 DC March 2nd 2004

The Act adapting the Administration of Justice to the changing face of crime

On February 11th 2004, the Constitution Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, for review of the constitutionality of the Act adapting the Administration of Justice to the changing face of crime, from M Claude ESTIER et al ... Senators and on the same day a second referred from Mr Jean-Marc AYRAULT et al, Members of the National Assembly

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58 1057 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the United Nations Convention against Transnational Organized Crime, adopted in New York on November 15th 2000, signed by France in Palermo on December 12th 2000 and published by Decree n° 2003-875 dated September 8th 2003;

Having regard to the Criminal Code ;

Having regard to the Code of Criminal Procedure;

Having regard to Ordinance n° 45-174 dated February 2nd 1945 as amended pertaining to juvenile delinquency;

Having regard to Ordinance n° 45-2658 of November 2nd 1945 as amended pertaining the conditions governing entry and residence of Foreigners on the territory of France;

Having regard Ordinance n° 58-1270 of December 22nd 1958 as amended constituting an Institutional Act pertaining to the status of the Judiciary;

Having regard to Act n° 78-17 of January 6th 1978 as amended pertaining to data processing, computerized files and individual freedom;

Having regard to the observations of the Government, registered on February 19th 2004;

Having regarding to the observations by way of rejoinder submitted by the Senators making the first referral, registered on February 27th 2004;

Having regard to the observations by way of rejoinder submitted by the members of the National Assembly making the second referral, registered on February 27th 2004;

Having regarded to the new observations of the Government, registered on February 28th 2004

Having heard the Rapporteur;

1. The parties making the two referrals dispute the constitutionality of all or part of Sections 1, 14,48,63 and 137 of the Act adapting Justice to the changing face of crime.

AS REGARDS SECTIONS 1 AND 14.

2. Section 1 of the statute referred inserts into Book IV of the Code of Criminal Procedure a title XXV " Procedure applicable to organized crime "; new Article 706-73 of the Code contains a list of offences and crimes falling into this category; in order to identify persons committing such offences and crimes it provides for special rules governing the investigation, prosecution, judicial preliminary investigations and trial of such crimes and major offences ; section 14 completes these provisions as regards remanding in custody for police questioning and searches.

As regards applicable constitutional standards

3. Firstly, Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims "The Law is the expression of the general will.. It must be the same for all, whether it protects or punishes..". Article 7 provides that " No man may be accused, arrested or detained except in cases determined by the Law, and following the procedure that it has prescribed"; Article 8 continues " The Law must prescribe only those punishments which are strictly and evidently necessary.."; Article 9 provides : "As every man is presumed innocent until he has been found guilty, if it is deemed necessary to arrest him, any undue harshness not required to secure his person must be severely curtailed by Law"; under Article 16 " Any society in which no provision is made for guaranteeing rights or the separation of powers has no Constitution". Lastly Article 66 of the Constitution proclaims: " No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute."

4. Secondly, it is the task of Parliament to reconcile on the one hand the need to prevent breaches of the peace and to seek out offenders, both of which are essential for the safeguard of rights and principles of constitutional value, with on the other hand the need to ensure the exercising of constitutionally guaranteed freedoms. Such freedoms include the freedom to come and go, the inviolability of the home, the confidential nature of correspondence and respect for privacy, protected by Articles 2 and 4 of the Declaration of 1789, together with the freedom of the individual, which Article 66 of the Constitution places under the surveillance of the Judicial Authority.

5. Lastly, Article 34 of the Constitution, together with the principal of the legality of offences and penalties, places Parliament under a duty to fix the scope of criminal law and to define offences and crimes in sufficiently clear and precise terms; this requirement exists not merely to exclude any arbitrariness from the imposing of punishments but also to avoid any undue harshness when seeking to apprehend offenders.

6. All these provisions show that, although Parliament may provide for special investigatory measures in order to ascertain the commission of crimes and offences of a particularly serious nature and particular complexity, to collect evidence and seek out and

apprehend offenders, this is upon the condition that these measures are implemented with due respect for the prerogatives of the Judicial Authority, guardian of the freedom of the individual, and that any restrictions imposed upon constitutionally guaranteed rights be necessary for uncovering the truth, be proportionate to the seriousness and complexity of the offences committed and do not introduce unjustified discriminations. It is the task of the Judicial Authority to ensure respect for these principles, which same are reiterated in the first article of the Code of Civil Procedure, in the application of the rules of special criminal procedure introduced by the Act

As regards the definition of offences coming under the scope of organised crime

7. New Article 706-73 of the Code of Criminal Procedure lists the offences coming under the definition of organised crime to be governed by the rules of procedure laid down by new Title XXV of Book IV of the Code of Criminal Procedure refer.

8. The list of these offences comprises :

1° Murder committed by an organised criminal gang punishable by life imprisonment under Article 221-4 as amended of the Criminal Code;

2° Torture and barbaric acts committed by an organised criminal gang when habitually committed on a minor aged fifteen years or on a person whose particular vulnerability, due to his age, illness, infirmity, physical or psychic deficiencies or state of pregnancy is apparent to or known by the offender, constituting a crime punishable by a term of thirty years imprisonment under Article 222-4 as amended of the Criminal Code

3° Crimes and offences involving drug trafficking as provided for by Articles 222-34 to 222-40 of the Criminal Code, punishable by sentences of between five years' and life imprisonment

4° Crimes and offences involving kidnapping and sequestration committed in an organized criminal gang, punishable by sentences of thirty years' imprisonment under Article 224-5-2 of the New Criminal Code

5° Aggravated crimes and offences involving trafficking in human beings punishable by Articles 225-4-2 to 225-4-7 of the Criminal Code and carrying between ten years' and life imprisonment.

6° Aggravated crimes and offences of procuring provided for by Articles 225-7 to 225-12 of the Criminal Code and carrying between ten years and life imprisonment

7° Theft committed by an organised criminal gang punishable under Article 311-9 of the Criminal Code by fifteen to thirty years' imprisonment.

8° Aggravated crimes and offences of extortion provided for by Articles 312-6 and 312-7 of the Criminal Code when such acts have led to mutilation, infirmity, death, torture or barbaric acts, or committed with the use or under the threat of a weapon, punishable by between twenty years' and life imprisonment

9° The crime of destruction, criminal damage to and deterioration of property committed by a organized criminal gang, when such acts have been committed by using explosives, fire or in any other manner liable to place persons in jeopardy, punishable under Article 322-8 as amended of the Criminal Code by between twenty to thirty years' imprisonment

10° Crimes of counterfeiting provided for by Articles 422-1 and 422-2 as amended of the Criminal Code, punishable by between ten to thirty years' imprisonment

11° Crimes and offences of terrorism as provided for by Articles 421-1 to 421-5 as amended of the Criminal Code, punishable by up to life imprisonment

12° Offences involving the use of weapons when committed in organised criminal gangs as provided for by special statutes, punishable by ten years' imprisonment under XVI to XXI of section 6 of the statute referred for review

13° Offences consisting, as part of an organised criminal gang, in assisting persons to unlawfully enter, travel and reside on French territory as provided for by indent 4 of I of Article 21 of the Ordinance of November 2nd 1945 referred to hereinabove, punishable under Article 21 bis of the same Ordinance by ten years' imprisonment

14° Offences of money laundering provided for by Articles 324-1 and 324-2 of the Criminal Code, or, as provided for by Articles 321-1 and 321-2 of the Criminal Code, of receiving the proceeds, income or goods from the commission of offences referred to hereinabove, punishable by five or ten years' imprisonment

15° Offences of consorting with criminals for the purpose of preparing to commit one of the offences referred to hereinabove, punishable under Article 450-1 of the Criminal Code by five or ten years' imprisonment

9. Under Article 132-71 of the Criminal Code "Within the meaning of the law, an organized criminal gang means any group formed or any arrangement reached for the purpose of preparing one or more criminal offences, as shown by the commission of one or more practical acts

10. Under indent 1 of Article 450-1 of the same Code, " The offence of consorting with criminals is committed by any group formed or any arrangement reached for the purpose of preparing one or more crimes or serious offences punishable by a term of not less than five years' imprisonment, as shown by the commission of one or more practical acts";

11 The persons making the referral argue that the list of offences laid down in new Article 706-73 of the Code of Criminal Procedure disregards Article 8 of the Declaration of 1789, the principles of the necessity of the legality of offences and punishments, together with the right of redress which derives from Article 16 of the Declaration. They contend that the concept of "organized criminal gang" is vague and imprecise, that "if the offences of drug-trafficking, aggravated procuring, trafficking in human beings and terrorism are indisputably offences committed by organised crime within the criminological meaning of the term, such is most certainly not the case as regards destruction, criminal damage to and deterioration of property committed in an organized criminal gang, a charge likely to be preferred for urban disorders or excessive Trade Union actions, nor as regards theft, extortion, assisting foreign illegal immigrants to enter and reside on French Territory";

12. Parliament, when passing new Article 706-73 of the Code of Criminal Procedure drew up a restricted list of crimes and major offences which, in view of their seriousness and the difficulties which arise when seeking to apprehend those committing them who act within an organised framework, require special rules of criminal procedure for investigating, prosecuting, preparing a case for trial and trying such crimes and major offences;

As regards the clarity and precision of the definition of the offences involved :

13. Articles 265 and 266 of the 1810 Criminal Code already defined as being a crime against public order " any consorting with criminals with respect to persons or property", by specifying that this offence was committed "by the mere fact of organising gangs or correspondence between them and their heads or leaders, or of reaching agreements designed to account for or share the proceeds of their wrongdoing"; the concept of organised criminal gang was retained as an aggravating circumstance by Article 385 of the former Criminal Code, deriving from Section 21 of Act n° 81-82 of February 2nd 1981, whereby an organised criminal gang was " any group of criminals created for the purpose of committing one or several thefts aggravated by one or more of the circumstances referred to in Article 382 (indent 1) distinguished by the preparation or possession of practical means for carrying out the contemplated act" ; Acts n° 83-466 of June 10th 1983 and 94-89 of February 1st 1994 , together with the New Criminal Code of 1994 extended the aggravating circumstance of committing offences in an organized criminal gang to other offences ; the concept of organized criminal gang was retained in the framework of remand in custody for questioning by the police by Section 3 of Act n° 93-1013 of August 24th 1993 which, completing Articles 63-4 of the Code of Criminal Procedure, extended from 20 to 36 hours the length of time after which a person remanded in custody for police questioning may ask to be allowed to consult a lawyer, once the investigation deals with an offence committed in a organized criminal gang; Section 59 of Act n° 2000-516 of June 15th 2000 completed Article 145-2 of the Code of Criminal Procedure by fixing a maximum of four years preventive custody for offences committed in an organized criminal gang; case law from the criminal courts has added further useful clarifications of the aggravating circumstance of acts committed while a member of an organized criminal gang, which presupposes the premeditation of the offences involved and the belonging of the offenders to a structured organisation. Lastly the UN Convention against Transnational Organized Crime referred to hereinabove, ratified by France, adopted a very similar definition when it invited signatory States to combat more effectively "any structured

group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit".

14. In these conditions, the offences retained by Parliament are defined in sufficiently clear and precise terms to meet the principle of legality of offences and punishments, in particular the expression "organized criminal gang" is neither obscure nor ambiguous, insofar as it is defined by Article 132-71 of the Criminal Code as being " any group formed or any arrangement reached for the purpose of preparing one or more criminal offences, as shown by the commission of one or more practical acts" and is distinguished from the concept of joint action or co-action

As regards the seriousness and complexity of the offences involved:

15. Generally speaking, the difficulty in apprehending offenders committing the offences mentioned in new Article 706-73 of the Code of Criminal Procedure is due to the existence of a group or network of which the identification, knowledge and dismantling pose complex problems

16. The offences covered by Article 706-73 are such as are liable to seriously endanger the security, dignity or life of individual persons. The same holds good for the offence of extortion, mentioned in 8° of said Article, an offence of which violence, threats of violence or duress are ingredients under Article 312-1 of the Criminal Code; the same applies to destruction, criminal damage to and deterioration of property mentioned in 9° of said Article, when, under Article 322-6 of the Criminal Code, such destruction, criminal damage and deterioration are caused by explosive substances, fire or any other means liable to endanger the life of others.

17. Theft is among the offences which do not necessarily involve endangering the life of others ; however when theft committed in a organized criminal gang is included in this list, this is because it is of a sufficiently serious nature to warrant departing from the normal rules of criminal procedure provided for in Section 1 of the statute referred for review; were this not the case, these special procedures would impose unnecessarily harsh measures within the meaning of Article 9 of the Declaration of 1789. It will be the task of the Judicial Authority to assess whether facts of sufficient seriousness exist for the purposes of the Act referred for review.

18. The very terms of new Article 706-73 of the Code of Criminal Procedure show that the offence of assisting a foreign illegal immigrant to reside in France committed in an organised criminal gang cannot concern humanitarian organisations assisting foreign Nationals. Moreover the principle stated in Article 121-3 of the same Code, whereby there can be no offence without the existence of mens rea , would apply to such a case.

19. With the qualifications stated in the two foregoing paragraphs, offences covered by Article 706-73 are sufficiently serious and complex to warrant Parliament laying down special rules of criminal procedure where they are involved. The objections raised against Article 706-73 are therefore to be dismissed.

20. It is however advisable to check whether the rules governing each of these procedures applicable to the search for persons committing such infractions comply with the Constitution.

As regards remand in custody for police questioning.

21. The statute referred for review modifies the system of remand in custody for police questioning. Section 1 thereof inserts a new Article 706-88 into the Code of Criminal Procedure; I of Section 14 and Section 85 modifies Article 63-4 of said Code; VI of Section 14 completes Article 4 of the Ordinance of February 2nd 1945 referred to hereinabove.

22. The parties making the referral dispute the extension of remand in custody for police questioning to certain offenders, the extension of the period during which a person on remand cannot ask to see a lawyer and the application of this extension to certain minors aged under 16

23. New Article 706-88 of the Code of Criminal Procedure provides that, should the needs of investigation into one of offences arising under Article 706-73 so require, the period during which a person is remanded in custody for police questioning may, exceptionally, be extended by two successive periods of twenty four hours, each of which must be decided by the judge of freedom and detention or by the investigating magistrate. In such circumstances, these extensions, which are in addition to the normal period of remand as defined by Article 63 of the same Code, mean that the maximum length of a period of remand in custody for police questioning stands at a total of ninety six hours , as already provided for by Articles 706-23 and 706-29 in cases of terrorism and drug-trafficking. If the foreseeable remaining duration of investigations so warrants, the judge of freedom and detention or the investigating magistrate may decide to extend the period on remand for one sole further period of forty eight hours.

24. According to the parties making the referral " such a maximum period is patently excessive and disproportionate within the meaning of Article 8 of the Declaration of 1789, thus violating individual freedom as guaranteed by Article 2 id the Declaration of 1789. They find that the scope of such a measure is excessive and denounce the "particularly imprecise" nature of the conditions required for the renewal of periods of remand in custody for police questioning.

25. Articles 706-73 and 706-88 of the Code of Criminal Procedure provide that the scope of the criticised provisions concerns investigations into specific offences which, on account of their seriousness and complexity, require special investigations. Article 706-88 makes the extension of a period on remand dependent upon a written reasoned opinion from a judge, before whom the suspect must appear, while in addition medical checks on the person

remanded are required. These guarantees supplement the rules of a general scope set forth in the Code of Criminal Procedure which place remand in custody for police questioning under the control of the Judicial Authority.

26. The criticised provisions are worded in sufficiently clear and precise terms to avert any risk of arbitrary action. In particular, the foreseeable remaining duration of the investigations, which may warrant holding a person on remand for a further forty eight hours, will be assessed on a case by case basis by the judge of detention and freedom or the investigating magistrate, and this assessment will be set out in written reasoned opinion.

27. In the foregoing conditions, the provisions of Article 706-88 of the Code of Criminal Procedure do not constitute an excessive interference with the freedom of the individual

As regards the period of time prior to the intervention of a lawyer

28. I of Section 14 of the statute referred for review, which amends Article 63-4 of the Code of Criminal Procedure, provides : " If a person is remanded in custody for police questioning in connection with an offence mentioned in 4°, 6°, 7°, 8° and 15° of Article 706-73, consultation of a lawyer shall not take place before the expiry of a period of forty-eight hours. If said person is remanded for questioning for an offence mentioned in 3° through 11° of the same Article, consultation of a lawyer shall not take place before the expiry of a period of seventy two hours. The Public Prosecutor shall be informed of the offence which the investigators deem to have been constituted by the acts of the suspect, when informed by the investigators of the remanding of the suspect in custody for questioning.

29. The parties making the referral argue that extending the duration of remand in custody for police questioning for investigations into organized crime infringes even more the principle of the freedom of the individual and the rights of the defence as the first consultation with a lawyer is postponed until the fort eighth hour.

30. Parliament, which is competent to fix the rules of criminal procedure under Article 34 of the Constitution, is at liberty to provide for different rules of procedure depending upon the facts, situations and persons involved, on condition that these differences are not based on unwarranted discriminations and that all persons benefit from the same guarantees, in particular as regards the respect for the principle of the rights of the defence.

31. One of the rights of the defence is for a person remanded in custody for police questioning to be able to consult a lawyer

32. I of Section 14 of the statute referred for review provides that where certain offences listed in Article 706-73 are involved, the first consultation with a lawyer may take place at the forty eighth hour of remand in custody. For most offences this period without access to a lawyer was already fixed at thirty six hours under Article 63-4 of the Code of Criminal Procedure, and the extension of such a period to forty eight hours, warranted by the seriousness and complexity of the offences involved, while modifying the manner in which the rights of the defence are exercised, does not call the principle into question.

33. Parliament, when indicating that the Public Prosecutor is informed of the nature of the ingredients of the offence warranting the postponing of the first consultation with a lawyer when a suspect is remanded in custody for police questioning, necessarily implied that this judge, exercising the powers vested in him by Article 41 of the general principles of the Code of Criminal Procedure, also exercises this power with respect to the definition of the offence. The initial assessment made by the police officer from the Criminal Investigation Department of the need to postpone access to a lawyer is thus subject to the control of the Judicial Authority and in no way dictates the ensuing unfolding of the procedure followed.

34. Subject to the qualifications set forth in the foregoing paragraph, the challenged provisions do not violate the principle of the freedom of the individual, nor the rights of the defence, nor the prerogatives of the Judicial Authority.

As for the system applicable to minors:

35. The two final indents of VI of Section 14 of the statute referred for review complete Article 4 of the Ordinance of February 2nd 1945 referred to hereinabove. These new provisions extend the duration of remand in custody in the framework of investigations coming under the scope of new Article 706-73 of the Code of Criminal Procedure to minors over sixteen "when there are one or more plausible reasons to suspect that one or more adults may be involved in the commission of the offence, as either principal offenders or accessories or accomplices"

36. The parties making the referral argue that the new provisions infringe the principle of equality before the Law " to the extent that only a certain category of minor aged over sixteen may be thus remanded in custody, namely that comprising minors who perhaps have links with adult offenders", and also contend that "remanding a minor aged over sixteen in custody for four days infringes the fundamental principle of the Republic whereby minors benefit from special criminal law and special protection"

37. The diminished criminal liability of minors depending upon their age, together with the need to strive to raise the educational and moral standards of young offenders by measures adapted to their age and personality, ordered by a special court or under suitable procedures, have constantly been recognised by the laws of the Republic since the beginning of the twentieth century. These principles are set out in particular in the Act of April 12th 1906 on the penal majority of minors, the Act of July 22nd 1912 on special courts for children and young persons and the Ordinance of February 2nd 1945 on juvenile delinquency. Nevertheless the laws of the Republic prior to the coming into force of the Constitution of 1946 have never enshrined any principle whereby any punishments or constraining measures should always be eschewed in favour of purely educational measures. In particular the original provisions of the Ordinance of February 2nd 1945 did not exclude minors' criminal liability nor the imposing of measures such as placement, supervision, detention or, for minors aged over thirteen, imprisonment when circumstances so warranted. This is the scope of the fundamental principle at the heart of the laws of the Republic as regards the judicial treatment of minors.

38. Firstly, the provisions of new Article 706-88 of the Code of Criminal Procedure concern investigations into offences requiring, due to their seriousness and complexity, special investigations. Parliament has made their application to minors dependent upon the twofold requirement that the minors involved be aged over sixteen and that there exist one or more plausible reasons to suspect that one or more adults may be involved in the commission of the offence. It thus intended to ensure the proper conduct of such investigations and protect minors from any risk of reprisals from the adults involved. The difference of treatment thus introduced is not the result of any unwarranted discrimination.

39. Secondly, the protective provisions of the Ordinance of February 2nd 1945 are not called into question. Article 4 of this Ordinance excludes minor under thirteen from remand on custody for police questioning and lays down specific conditions concerning the remanding of other minors. A minor remanded in custody for police questioning undergoes a medical examination, may ask to consult a lawyer from the beginning of the period of remand and cannot be remanded for a further period without first being presented to the Public Prosecutor or the Investigating Magistrate. The questioning of the minor is moreover the object of a sound and film recording. Given the foregoing, the challenged measure, which only concerns minors over sixteen implicated in serious offences, does not run counter to any constitutional requirements concerning juvenile justice.

40. In consequence of the foregoing, the challenged provisions applicable to minors do not run counter to any constitutional requirement.

As regards searches

41. Articles 706 -89 to 706-94 inserted into the Code of Criminal Procedure by Section 1 of the statute referred for review, together with the provisions of II of Section 14 of the Act amend the rules governing searches of residential and other premises and seizing of evidence.

42. The parties making the referral argue that the new search possibilities cover " a very wide field" and constitute "patently disproportionate" infringements of the freedom of the individual and the inviolability of the home

As regards the rules governing the treatment of persons caught flagrante delicto

43. New Article 706-89 of the Code of Criminal Procedure permits, when required by the needs of flagrante delicto investigations into an offence mentioned in Article 706-73, searches of places of residence and the seizing of evidence outside the hours provided for in Article 59 of said Code.

44. The parties making the referral argue that this new exception to the rule prohibiting night searches, in addition to those already provided for by statute, constitutes an infringement of the freedom of the individual. This infringement is all the greater in that the amendments made to Article 53 of the Code of Criminal Procedure by II of section 77 of the statute referred for review make it possible to extend the length of such flagrante delicto investigations from eight to sixteen days.

45. Firstly, II of section 77 of the statute referred for review provides that the duration of the flagrante delicto investigation, which in principle remains limited to eight days, may be extended once " when the investigations needed to uncover the truth in relation to a criminal offence punishable by a term of imprisonment of five years or more cannot be deferred". This decision is taken by the Public Prosecutor and presupposes that any interruption of the investigation carried out by police officers would be prejudicial to the outcome of said investigation.

46. Secondly, Parliament may, when the requirements of public order and the prosecution of offenders so dictate, provide for the possibility of carrying out night searches, searches of residential and other premises and the seizing of evidence when a crime or major criminal offence defined as being one committed by a organized criminal gang has been committed, on condition that such operations are authorised by the Judicial Authority, guardian of the freedom of the individual, and that they are carried out with due respect for appropriate procedural guarantees. In the case in hand, Parliament has conferred jurisdiction on the judge of freedom and detention to organise night searches of residential and other premises and the seizing of evidence. It has also required a written reasoned opinion specifying the offence of which evidence is sought, the address of the premises involved, the points of fact and law justifying the need for such operations. The latter are moreover placed under the control of the judge authorising the same, and said judge may personally be present on the premises to ensure due compliance with for statutory provisions. Lastly, Parliament has specified that the operations carried out must not, on pain of being held null and void, serve any other purpose than to detect and establish the commission of offences.

47. In consequence of the foregoing, Parliament has not infringed the principle of the inviolability of the home by providing for measures designed to seek out and apprehend persons committing serious and complex major offences.

As regards the rules applicable to preliminary investigations

48. New Article 706-90 of the Code of Criminal Procedure, together with the amendments made to Article 76 of the same Code by II of Section 14 of the statute referred for review, amend the rules governing searches of residential and other premises and the seizing of evidence in the framework of preliminary criminal investigations. In particular such investigations may be carried out without the consent of the person on whose premises they take place if this is needed by investigations into an offence punishable by a term of imprisonment of five years or more. They may be carried out at night in the case of investigations into offences committed by organised criminal gangs referred to in Article 706-73, provided that they do not take place on residential premises.

49. The parties making the referral argue that these dispositions by their " particularly general and permanent nature" do not sufficiently protection the freedom of the individual nor do they "adequately" guarantee the inviolability of the home.

50. The operations involved can only be carried out without the consent of the person on said premises when authorised by a judge of freedom and detention at the Tribunal de grande instance at the request of the Public Prosecutor. They must be justified by the need to seek out and apprehend offenders committing offences punishable by terms of imprisonment of five years or more.

51. The operations involved can only be carried out at night on premises other than residential when authorised by the same judge in connection with one of the offences listed in Article 706-73.

52. In view of the foregoing, the challenged provisions do not constitute any excessive infringement of the principle of the inviolability of the home.

As regards the rules governing judicial preliminary investigations

53. New Article 706-91 of the Code of Criminal Procedure amends the rules governing searches of residential and other premises and the seizing of evidence in the framework of a judicial preliminary investigation into acts coming under the scope of Article 706-73; in particular such searches may be carried out at night when they do not involve places of residence. In cases of emergency they may be carried out in places of residence in three cases : 1°) where investigation into a crime or major offence flagrante delicto is involved ; 2°) when there is an immediate risk that material evidence or clues will disappear ; 3°) when there are one or more plausible reasons to suspect that one or more persons on the premises to be searched are in the course of committing crimes or major offences coming under the scope of Article 706-73.

54. The parties making the referral argue that these provisions constitute " an excessive infringement of constitutionally guaranteed rights", in particular the inviolability of the home.

55. The provisions of Article 706-91 are reserved for investigations into the offences mentioned in Article 706-73. The possibility of carrying out of such searches of residential and other premises and the seizing of evidence at night does not apply to places of residence. Searches of a place of residence require prior authorisation by a judge granted to police officers acting under letters rogatory. The possibility that such searches may, in certain specifically listed cases of emergency, take place in places of residence is also subject to judicial authorisation.

56. These measures are justified by the need to apprehend persons committing particularly serious offences and the need to have access to premises where such offences are being committed. The condition of an " immediate risk that material evidence or clues might disappear" must be taken as only allowing the investigating magistrate to authorise such night searches when such searches cannot be carried out at any other time. With this qualification, the challenged provisions do not constitute any excessive infringement of the principle of the inviolability of the home.

As regards interceptions of telephone calls

57. Indent I of Article 706-95 inserted into the Code of Criminal Procedure by Section 1 of the statute referred for review provides : " If the needs of an investigation in flagrante delicto or a judicial preliminary enquiry into one of the offences coming under the scope of Article 706-73 so require, the judge of freedom and detention of the Tribunal de grande instance may, at the request of the Public Prosecutor, authorise the interception, recording and transcription of telephone calls in the manner provided for by Articles 100, indent 2, 100-1 and 100-3 to 100-7, for a maximum period of fifteen days renewable once in the same conditions of form and duration. These operations shall be carried out under the control of the judge of freedom and detention.

58. The parties making the referral argue that "interceptions of phone calls on the initiative of the Public Prosecutor do not offer sufficient guarantees with respect to Article 66 of the Constitution".

59. The challenged provisions are only applicable to investigations intended to apprehend persons committing offences coming under the scope of Article 706-73. They must be required for the purposes of such investigations and authorised by the judge of freedom and detention of the Tribunal de grande instance, at the request of the Public Prosecutor. Such an authorisation is granted for a maximum period of fifteen days, renewable once under the control of the judge of freedom and detention.

60. The procedural guarantees required for the implementation of such measures in the framework of a judicial preliminary investigation into other types of offence remain applicable.

61. In such conditions, the challenged provisions do not constitute any excessive infringement of the right to privacy nor any other constitutionally guaranteed principle

As regards sound and film recordings of certain places or vehicles

62. The first two indents of Article 706-96 inserted into the Code of Criminal Procedure by section 1 of the statute referred for review provide: "When the needs of the judicial preliminary investigation into a crime or major offence coming under the scope of Article 706-73 so require, the investigating magistrate after consultation with the Public Prosecutor may, by a written reasoned decision, authorise police officers from the Criminal Investigation Department acting under Letters Rogatory to install a technical device designed to listen to, record, register and transmit words spoken by one or more persons in a private or confidential capacity in public or private vehicles or places or to film one or more persons in private places, without the consent of any of said persons. These operations shall be carried out under the authority and control of the investigating magistrate. In order to install the technical device referred to hereinabove, the investigating magistrate may authorize persons to place it in a private vehicle or premises, including outside the time provided for in Section 59, without the knowledge or consent of the owner or possessor of said vehicle or the occupier of said premises of any person vested with respects with respect thereto. In the event of such a

device being installed in a place of residence at a time outside that provided for by Section 59, the authorisation to proceed with this installation shall be granted by the freedom and detention judge upon the application of the investigating magistrate. These operations, which must be solely designed to install the necessary technical device, shall be carried out under the authority and control of the investigating magistrate". The rest of this section together with new Articles 706-97 to 706-102 provide for the conditions governing the installation of such devices, the manner in which they are to be used and their destruction once the relevant limitation period has expired. Article 706-98 provides in particular that "These decisions shall be taken for a maximum period of four months. They may only be renewed in the same conditions of form and duration".

63. The parties making the referral argue that "the possibility of installing sound recording equipment in homes, workplaces and vehicles" infringes the freedom of the individual, the right to privacy and the inviolability of the home. They also contend that the new provisions "do not specify any limit as to the time such sound recordings may be carried out".

64. Investigations intended to apprehend persons committing offences mentioned in Article 706-73 justify installing technical devices designed to listen to, record, register and transmit words or images without the consent of the persons involved when their use has been authorised by the Judicial Authority, guardian of the freedom of the individual, and suitable procedural guarantees have been provided for. In the case in hand, the disputed measures can only be implemented after the opening of a judicial preliminary investigation and on condition that the needs of this investigation warrant recourse to such measures. Parliament has vested the investigating magistrate or, as needs be, the judge of freedom and detention, with the requisite authority to order that such measures be implemented. It has required a written reasoned decision specifying the offence for which evidence is sought. It specified that the authorisation granted by the judge involved would be valid for a maximum of four months and only renewable in the same conditions of form and duration. Furthermore Parliament placed such operations under the control of the judge authorising their carrying out and, lastly, specified that each operation would be the object of a formal report, that recordings would be placed under seal and destroyed once the relevant criminal proceedings had become time-barred.

65. New Article 706-101 of the Code of Criminal Procedure restricts the contents of the formal report describing or transmitting the sounds and images recorded drawn up by the investigating magistrate or the investigating police officer entrusted by him with this task to those recordings likely to assist in uncovering the truth. Parliament thus necessarily intended that those elements of a purely private nature unconnected with the offences involved should not under any circumstances be kept in the case file.

66. With the foregoing qualifications, the challenged provisions are not unconstitutional.

As regards measures taken being struck down as being null and void

67. Article 706-104 inserted into the Code of Criminal Procedure by Section 1 of the statute referred for review provides " The fact that following a police investigation, a judicial preliminary investigation or when a case comes on for trial the aggravating circumstance of an organised criminal gang is not retained, will not entail measures properly taken hereunder being deemed null and void".

68. The parties making the referral argue that, by failing to state that any wrongful or improper procedure will entail measures being struck down as being null and void, these provisions "constitute a particularly serious and hitherto unknown infringement of constitutionally protected rights and freedoms".

69. Special procedures as defined by Section 1 of the statute referred for review are such as to seriously affect the exercising of constitutionally protected rights and freedoms such as the freedom of the individual, the inviolability of the home and the right to privacy. The Judicial Authority, guardian of the freedom of the individual, is empowered to authorise recourse to such procedures solely to the extent necessary to seek out and apprehend persons committing particularly serious and complex offences, the pursuit of such an end being in itself indispensable for the safeguarding of principles and rights of constitutional value.

70. When deciding to implement one of such procedures, the Judicial Authority must have one or more plausible reasons for suspecting that the acts involved constitute the ingredients of one of the offences listed by Article 706-73 of the Code of Criminal Procedure. Although Parliament was at liberty to shield measures taken during a police or judicial preliminary investigation from being struck down as null and void once the aggravating circumstance of an organized criminal gang seemed to exist at the time such measures were authorised, it was not at liberty to grant blanket immunity to measures taken irregardless of the abovementioned requirements.

71. In view of the foregoing, new Article 706-104 of the Code of Criminal Procedure must be held to be unconstitutional.

AS REGARDS SECTION 48

72. Section 48 of the statute referred for review sets up a " national computerised data base of sexual offenders".

73. The parties making the two referrals for review have argued that this section runs counter to the principal that punishments must only be imposed when necessary, infringes the right to privacy and disregards the fundamental principal recognized by the laws of the Republic with respect to the criminal law applicable to minors.

As regards the constitutionally applicable norms of reference

74. The purpose of registering sexual offenders in a national computerized data base under Section 706-47 reintegrated into the Code of Criminal Procedure by Section 47 of the statute referred for review is, under Article 706-53-1 inserted into this same Code by section 48 of the same statute, to prevent repeat offences and facilitate the identification of offenders. It follows that such registration is not a punishment but a police measure. The parties making the referral cannot therefore validly argue that it disregards the constitutional principle deriving from Article 8 of the Declaration of 1789 whereby punishments imposed must be necessary. It is however necessary to verify whether such an entry constitutes unnecessary harshness within the meaning of Article 9 of the 1789 Declaration.

75. The freedom proclaimed by Article 2 of the 1789 declaration implies respect for privacy.

76. It is the task of Parliament, under Article 34 of the Constitution, to lay down the rules concerning the fundamental guarantees granted to citizens for the exercising of their civil liberties. It is in particular incumbent upon Parliament to ensure the necessary balance between safeguarding public order and seeking out and apprehending offenders, both of which are necessary for the protection of rights and principles of constitutional value on the one hand and the respect for privacy and other constitutionally protected rights and freedoms on the other hand.

As regards registration in the computerized data base of sexual offenders , and consultation and use of said data base.

77. New Article 706-53-1 of the Code of Criminal Procedure provides that the data base will be operated by the Criminal Records Office under the control of a judge and under the authority of the Ministry of Justice.

78. New Article 706-53-2 of the Code of Criminal Procedure provides that entry of a person's name in the data base shall be dependent upon one of the following court decisions:

1° a conviction, even when not res judicata, including conviction by default or a finding of guilt accompanied by a stay of or exemption from sentence

2° a decision, even when not res judicata, handed down under Articles 8,15, 15-1, 16, 16 bis and 28 of Ordinance n° 45-174 of February 2nd 1945 pertaining to juvenile delinquency

3° an alternative punishment as provided for by Article 41-2 as amended of the Code of Criminal Procedure, of which the Public Prosecutor has ascertained the carrying out.

4° a decision of no case to answer or acquittal based on the provisions of indent 1 of Article 122-1 of the Criminal Code pertaining to persons suffering from psychiatric or neuro-psychiatric disorders at the time the incriminated acts were committed

5° a placing under a judicial preliminary investigation accompanied by a placing under judicial supervision, when the investigating magistrate has ordered the decision to be entered in the data base

6° a decision of a similar nature to those listed above handed down by foreign courts or judicial authorities which, under an International Convention or Agreement, has been notified to the French Authorities or been executed in France following the repatriation to France of the convicted persons.

79. In the event of the coming into play of one of the court decisions listed in 1° to 4° and 6° hereinabove, the final indent of new Article 706-53-2 of the Code of Criminal Procedure provides for the automatic entering in the data base of only some of the offences mentioned in Article 706-74 of the same Code, namely those punishable by a term of imprisonment of more than five years, to wit:

- murder with or without premeditation of a minor preceded or accompanied by rape, torture or barbaric acts
- rape and aggravated rape punishable under Articles 222-23 to 222-26 of the Criminal Code
- sexual assault or attempted sexual assault other than rape, when accompanied by aggravating circumstances mentioned in Article 222-28 to 222-30 of the Criminal Code
- corruption of a minor aged under fifteen, or when the minor has come into contact with the offender through a telecommunications network used to send messages to an indeterminate public or the acts involved were committed when pupils were entering or leaving school premises, or in the vicinity of school premises, or the organising by an adult of meetings which show or involve sexual relations watched or participated in by a minor aged fifteen, punishable under Article 227-22 as amended of the Criminal Code
- sexual interference without recourse to violence, duress, threats or surprise by an adult on the person of a minor aged fifteen when committed by a relative in the ascending line or any other person having authority over the victim or any person wrongfully using the authority conferred by his position, or by several persons acting as principal offender or accomplice, or when the minor has come into contact with the offender through a telecommunications network used to send messages to an indeterminate public, punishable under Article 227-26 of the Criminal Code

80. The final indent of new Article 706-53-2 of the Code of Criminal Procedure provides that court decisions concerning other offences than those mentioned in new Article 706-47 of the Code of Criminal Procedure and punishable by a term of less than five year's imprisonment, are not entered in the data base, unless such an entry is ordered expressly by the Court or, in certain cases, the Public Prosecutor. The offences involved are the following:

- sexual assault or attempted sexual assault other than rape punishable under Articles 222-27 and 222-31 of the Criminal Code
- prostituting of a minor, punishable under Article 225-12-1 of the Criminal Code
- corrupting a minor, punishable under Article 227-22 of the Criminal Code
- fixing, recording or transmitting a pornographic representation of a minor, punishable under Article 227-23 as amended of the Criminal Code
- producing, transporting, sending or trading in messages of a violent or phonographic nature or of a kind liable to seriously adversely affect human dignity when such a message is likely to be read or seen by a minor, punishable under Article 227-24 of the Criminal Code
- sexual interference without recourse to violence, duress, threats or surprise by an adult on the person of a minor aged fifteen, punishable under Article 227-25 of the Criminal Code
- sexual interference without recourse to violence, duress, threats or surprise by an adult on the person of a minor aged over fifteen when committed by a relative in the ascending line or any other person having authority over the victim or any person wrongfully using the authority conferred by his position, punishable under Article 227-27 of the Criminal Code

81. The challenged provisions do not provide for the entry in the data base of persons committing sexual offences such as indecent exposure, sexual harassment, punishable under Articles 222-32 and 222-33 of the Criminal Code

82. New Article 706-53-4 of the Code of Criminal Procedure provides that the length of time the entry remains in the data base is fixed in principle at thirty years for crimes or major offences punishable by ten years' imprisonment and twenty years for other cases. Convictions and decisions not yet res judicata and persons placed under judicial preliminary investigation accompanied by judicial supervision are automatically removed from the data base in the event of a final decision of no case to answer, acquittal, and the lifting of any judicial supervision order for persons placed under judicial preliminary investigation. Furthermore, once a person whose identity has been entered in the data base has had his name cleared or been rehabilitated, he may apply successively to the Public Prosecutor, the judge of freedom and detention and the President of the Chambre de l'Instruction for the removal of data

concerning him. This data will be removed if the keeping thereof " appears unnecessary in view of the ultimate purpose of the data base, having regard to the nature of the offence, the age of the offender at the time of the commission thereof, the time elapsed since said commission and the present day personality of the person involved".

83. New Article 706-53-7 of the Code of Criminal Procedure gives a strict definition of persons having access to the computerized data base of sexual offenders.

84. The abovementioned Article allows firstly the Judicial Authorities and Police officers from the Criminal Investigation Department to search the data base in the framework of investigations into crimes involving murder, kidnapping or sequestration or an offence mentioned in Article 796-47. The rules governing such searches shall be determined by a decree from the Conseil d'Etat issued after consultation with the National Commission on Data Processing and Freedoms.

85. The abovementioned Article allows secondly Prefects and State Administrations on a list drawn up by a Decree of the Conseil d'Etat after consultation with the National Commission on Data Processing and Freedoms to consult the computerized data base of offenders in cases of clearance required for activities or professions involving contact with minors, while restricting the scope of such consultation to the sole criterion of the identity of the person concerned by the request for clearance.

86. New Article 706-53-11 of the Code of Civil Procedure prohibits any linkage or connection, within the meaning of Section 19 of the Act of January 6th 1978 referred to hereinabove, between the sexual offenders data base and any other register or data base containing nominative data kept by any person or State administration not under the authority of the Ministry of Justice.

87. In view of the guarantees ensured by the conditions governing the use and consultation of the data base and by the vesting in the Judicial Authority of the power to enter and remove nominative data, and the seriousness of the offences warranting the entry of nominative data in the base and the repeat offender rate encountered in this type of offence, the challenged provisions are such as to ensure an equitable balance between the respect for the right to privacy and the safeguarding of public order.

88. Similarly, in view of the grounds set out for consultation of the data base by administrative authorities, and the restrictions and conditions attached to such consultation, the challenged provisions do not constitute an excessive infringement of the right to privacy or the requirements of Article 9 of the Declaration of 1789.

As regards the obligations placed on persons whose names have been entered in the data base.

89. New Article 706-53-5 of the Code of Criminal Procedure requires a person whose name has been entered in the data base of sexual offenders, when said person has been definitively convicted of a crime or major offence punishable by ten years' imprisonment, to supply proof of his address every six months by a personal visit to the local police or

gendarmerie station. It requires other persons whose names appear there to supply proof of their addresses once a year and to officially declare any change of address within fifteen days thereof to the local police or gendarmerie station. This obligation can be complied with by merely sending a letter with the relevant information to said police or gendarmerie station.

90. The seriousness of the conviction involved, which determines whether or not the person involved has to personally appear at the police or gendarmerie station, constitutes an objective and rational criterion for such a distinction in view of the ultimate purpose of the data base.

91. The obligation for persons whose name is in the data base to periodically inform the authorities of their home address or their place of residence is not a punishment, merely a police measure designed to prevent the commission of repeat offences and to facilitate the identification of offenders. The very purpose of the data base makes it necessary to constantly verify the address of such persons. The obligation thus placed upon them to comply with this requirement in order to allow for such verification is not a requirement of unnecessary harshness within the meaning of Article 9 of the Declaration of 1789.⁹²

As regards the rules applying to minors

92. Under Article 20-2 of the Ordinance of February 2nd 1945 referred to hereinabove minors aged under sixteen cannot be sentenced to a term of imprisonment of longer than one half of the normal term and hence the final indent of new Article 706-53-2 of the Code of Criminal Procedure provides for the automatic entry of their names in the data base with respect to offences carrying sentences of more than ten years' imprisonment. For the same reasons, the ten year prison term which places the convicted offender under an obligation to present himself at a police or gendarmerie station every six months to provide proof of his address is increased to twenty years when minors under sixteen are involved.

93. Minors under the age of thirteen cannot be sentenced to a term of imprisonment and hence the final indent of new Article 706-53-4 prohibits the automatic entry of their names in the data base of sexual offenders.

94. Under 7° inserted by Section 201 of the statute referred for review in Article 769 of the Code of Criminal Procedure, the punishments entailing the entry of the names of minors in the data base are deleted from their criminal records three years after the imposing thereof, unless the offender is convicted of a fresh offence. Once this entry has been removed the minor may, under the procedure provided for by new Article 706-53-4 of the Code of Criminal Procedure, apply successively to the Public Prosecutor, the Judge of freedom and detention or the President of the Chambre de l'Instruction for information concerning him to be removed from the data base. Such removal will be ordered if it is no longer necessary to keep such data, in particular in view of the age at which the minor committed the offence involved.

95. The adjustments thus made to the automatic data base of sexual offenders in favour of offenders who are minors are inspired by the need to strive to raise their educational and moral standards. They do not run counter to the fundamental principle recognized by the laws of the Republic in matters of criminal law applicable to minors.

AS REGARDS SECTION 63

96. Section 63 of the statute referred for review inserts into the Code of Criminal Procedure Article 30 worded as follows : "The Minister of Justice conducts the public prosecution policy as determined by the Government. He shall ensure the coherent implementation of this policy throughout the territory of the Republic. To this end he shall transmit to Public Prosecutors general instructions as to prosecution of offenders. He may inform the Chief Public Prosecutor of offences of which he has cognizance and, by written instructions to be appended to the case file, order him to bring criminal proceedings or cause such proceedings to be brought or to refer to the relevant court such written directives as the Minister shall deem appropriate ".

97. The parties making the referral argue that such provisions disregards the principle of the separation of powers, Article 2 of the Declaration of 1789 and Article 66 of the Constitution.

98. Article 20 of the Constitution provides that the Government shall determine and conduct the policy of the Nation, in particular in the field of prosecution of offences. Article 5 of the Ordinance of December 22nd 1958 referred to hereinabove, constituting an Institutional Act pertaining to the status of the Judiciary, places Public Prosecutors under the authority of the Minister of Justice . New Article 30 of the Code of Criminal Procedure, which defines and delimits the conditions in which such authority is to be exercised, does not disregard the French conception of the separation of powers nor the principle whereby the Judicial Authority comprises both Judges and Public Prosecutors, nor any other principle of constitutional value.

WITH RESPECT TO SECTION 137

99. I of Section 137 inserts in Chapter I of Title II of the Code of Criminal Procedure a section 8 intitled : " Pleading guilty to charges before trial". This section comprises ten new Articles numbered 495-7 to 495-16.

100. Article 495-7 makes this new procedure applicable to persons who, sent before the Public Prosecutor or summoned to appear, plead guilty to having committed one or more offences punishable by a term of imprisonment of five years or less. It specifies that the Public Prosecutor may automatically apply this procedure, or do so at the request of the offender or his lawyer. However under Article 495-16, the provisions cannot apply " to minors aged eighteen, nor to offences under the law of the press, involuntary homicide, political offences or offences for which a special statute has provided a prosecution

procedure". Neither are they applicable, under Article 495-11, to persons committed for trial before the Tribunal Correctionnel by the Investigating Magistrate.

101. Article 495-8 poses the limits and the conditions in which the Public Prosecutor may offer the offender the choice of one or more alternative punishments. In particular in cases involving a prison sentence, the length of said punishment must not exceed one year nor exceed one half of the sentence liable to be passed on the offender. In the event of the punishment being the payment of a fine, the alternative punishment shall not exceed the amount of the fine itself. The same Article specifies that both the plea of guilty and the proposal of an alternative punishment must be made in the presence of the offender's lawyer. The offender, informed that he may request a further ten days in which to consider his response, may consult with his lawyer, without the Public Prosecutor being present, before finally making his decision known.

102. Article 495-9 provides for the official approval by the President of the Tribunal de grande instance of the proposal made by the Public Prosecutor's Office and accepted by the offender in the presence of his lawyer. It specifies that the President of the Tribunal de grande instance must hear the offender and his lawyer in chambers before deciding whether or not to approve the proposed measures. In the event of approval being granted, the decision of the court shall be read out in open court. New Article 495-11 specifies the conditions of said approval, which must be set out in the reasons given in the decision. In particular, the latter must note that " firstly the offender, in the presence of his lawyer, admits to having committed the incriminated acts and agrees to the alternative punishment(s) proposed by the Public Prosecutor, secondly, this punishment (or these punishments) is/are justified in view of the circumstances of the offence and the personality of the offender.

103. Article 495-13 sets out the rights of the victim who, when identified, is informed without delay and by any means of the procedure underway and invited to appear, if need be accompanied by his lawyer, at the same time as the offender before the President of the Tribunal de grande instance or the delegate of the latter in order to bring a civil suit for damages as relief for the injury sustained. If the victim has not been able to exercise his rights at the time approval was granted, either because he was not informed sufficiently in advance or did not wish to or could not attend the hearing, the Public Prosecutor shall inform him of his right to have the offender appear before a Tribunal correctionnel in order for him to bring a civil suit for damages and shall notify him of the date of said hearing.

104. Article 495-14 prohibits the communication before a trial court or during the judicial preliminary investigation of statements made or documents handed transmitted during the procedure when the proposal made by the Public Prosecutor has been refused or has not obtained the requisite approval.

105. The parties making the referral argue that these provisions disregard the right to a fair trial and infringe the principles of the presumption of innocence, equality before courts of law and trial in open court.

As regards the argument based on the disregarding of the right to a fair trial

106. The parties making the referral argue that by giving the prosecution the opportunity of proposing a fine or prison sentence, the procedure of pleading guilty to charges before trial infringes the principle of separation of the authorities in charge of bringing prosecutions and those in charge of trying offenders and places the offender " in a position where he is under real pressure due to the threat of being placed in detention pending trial or under judicial supervision, or seeing his punishment increased if he refuses the proposal put to him by the Public Prosecutor".

107. Firstly if the alternative punishment is proposed by the Public Prosecutor's Office and agreed to by the offender, only the President of the Tribunal de grande instance can grant the requisite official approval. It will be incumbent upon the latter to verify the offence which the acts of the offender are said to constitute, together with the personality of the offender. If he feels that the nature of the acts involved, the personality of the offender, the situation of the victim or the interests of society justify committing the offender for trial before the normal Tribunal correctionnel, he can refuse to grant official approval. It follows from the general thrust of the challenged provisions that the President of the Tribunal de grande instance can also refuse to grant approval if the statements of the victim throw a fresh light on the conditions in which the offence was committed or on the personality of the offender. With this qualification, the challenged provisions do not infringe the principle of the separation of authorities in charge of bringing prosecutions and those in charge of trying offenders.

108. Secondly the lawyer, whose attendance is mandatory, will be present throughout the procedure of pleading guilty to charges before trial; in particular the lawyer will be present when the offender admits to his guilt, when he receives the proposal of the Public Prosecutor, when he accepts or refuses this proposal and , in the event of acceptance, when he appears before the President of the Tribunal de grande instance. The lawyer can moreover freely consult with his client and immediately have access to the case file. The offender will be informed that he has a period of ten days to think things over before accepting or refusing this proposal. Even when he has accepted the proposal at the court hearing when official approval of the proposal was granted, he will still have ten days within which he can appeal against conviction. Given all the guarantees offered by the statute, the right to a fair trial has done been infringed by the challenged provisions.

As regards the argument based on the disregarding of the presumption of innocence.

109. The parties making the referral contend that the new procedure introduced by Section 137 of the statute referred for review runs counter to Article 9 of the Declaration of 1789 in that it introduces a presumption of guilt and reverses the burden of proof by placing the person being prosecuted in a position of self-incrimination.

110. Although, if it follows from Article 9 of the Declaration of 1789 that no one is under a duty to incriminate himself, neither this provision nor any other provision of the Constitution forbids a person from admitting his guilt.

111. Furthermore, the judge is not bound by any proposal put forward by the Public Prosecutor, nor by the acceptance of such a proposal by the offender. It is incumbent upon him to verify that the offender freely and genuinely admitting to having committed the acts of which he is accused and to verify the reality of said acts. If he grants official approval of the arrangement concluded between prosecution and accused, he must note that the offender, in the presence of his lawyer, admits to having committed the acts of which he is accused and accepts, in full awareness of their nature, the punishment(s) proposed by the Public Prosecutor. The judge is thus required to verify not only the reality of the consent of the offender but also the genuineness of such consent. Lastly, in the event of refusal to grant official approval, new Article 495-14 of the Code of Criminal Procedure prohibits the communication before a trial court or during the judicial preliminary investigation of statements made or documents transmitted during the procedure of pleading guilty to charges before trial, and provides that neither the prosecution nor the parties may rely on such statements or documents when the case is heard before such courts.

112. In the above conditions, Section 137 of the statute referred for review does not infringe the principle of the presumption of innocence.

As regards the argument based on the infringement of the principle of equality before the Law

113. The parties making the referral argue that the principle of equality before the law would be infringed " with respect to persons prosecuted for acts of a similar nature" and "with respect to victims of offences".

114. Firstly the provisions of Section 137 are not based on any unwarranted discrimination between persons prosecuted for acts of a similar nature depending on whether or not they admit their guilt. In both cases both the rights of the defence and the presumption of innocence are respected.

115. Secondly, new Article 495-13 of the Code of Criminal Procedure guarantees the rights of the victims of offences, irrespective of whether it has been possible to identify them before the court hearing convened to decide whether or not to grant official approval of the arrangement or of whether they did or did not appear at this hearing. The rights of victims to file civil suits for damages have been preserved in all cases. The grounds for the civil suit will be dealt with by a court order handed down by the President of the Tribunal de grande instance when granting official approval of the arrangement concluded or by a judgement delivered by the Tribunal correctionnel after said approval has been granted.

116. In consequence of the foregoing, the argument based on the infringement of the principle of equality before the Law is without foundation.

As regards the argument based on the absence of a hearing in open court

117. It follows from the combination of Articles 6,8,9 and 16 of the Declaration of 1789 that the trial of a criminal case which may entail a custodial sentence should, except in particular circumstances requiring a case to be heard in camera, take place at a hearing held in open court.

118. The granting or refusing by the President of the tribunal de grande instance of official approval of the alternative punishment proposed by the prosecution and accepted by the offender is a decision handed down by a court of law. This approval of the proposed arrangement may lead to a one year custodial sentence. The fact that this hearing, where the President of the tribunal de grande instance rules on the proposal put forward by the prosecution, does not take place in open court, even when there are no particular circumstances warranting the holding of proceedings in camera, disregards the constitutional requirements recalled hereinabove. Hence the words " in chambers" found at the end of the second sentence of indent two of new Article 495-9 of the Code of criminal Procedure must be ruled to be unconstitutional.

AS REGARDS SECTION 121

119. Section 121 of the statute referred for review modifies the conditions in which a person placed under a judicial preliminary investigation may, exceptionally, be temporarily placed in detention. Under Article 137-1 of the Code of Criminal Procedure, as currently worded, such detention is ordered by the judge of freedom and detention, on the basis of a reasoned request from the investigating magistrate, who also transmits the case file and the directives of the Public Prosecutor. Article 137-4 of the same Code provides however that the investigating magistrate may also decide not to transmit the case file to the judge of freedom and detention if he deems that the request that the person suspected be placed in detention made by the Public Prosecutor is not justified. The new provisions of the statute referred for review complete Article 137-4 by a new indent which provides that, in such circumstances, the Public Prosecutor may directly apply to the judge of freedom and detention in the event of a crime or major offence punishable by a term of ten years' imprisonment, once the directives specify that recourse to such a procedure is contemplated and warranted by the need to protect the person placed under the judicial preliminary investigation, to ensure that said person remains within the reach of the law, to put an end to the offence or preclude the repetition thereof, or to put an end to a persistent and exceptional breach of public order caused by the seriousness of the offence, the circumstances in which it was committed or the significant injury to which it has given rise.

120. Firstly, the new provisions of Article 137-4 of the Code of Criminal Procedure do not affect the jurisdiction of the judge of freedom and detention as regards placing suspects in temporary detention. Article 66 of the Constitution has therefore not been infringed.

121. Secondly, the acknowledged possibility for the Public Prosecutor, on the grounds and in the circumstances mentioned hereinabove, to directly request the judge of freedom and detention to place a person in provisional detention notwithstanding the opinion of the investigating magistrate that such detention is unwarranted, is due to a situation of urgency and based on objective and rational grounds, inspired by considerations of general public interest directly connected with the purpose of the statute. The difference in treatment thus introduced between persons whom it is wished to place in provisional detention does not proceed from any unwarranted discrimination.

122. In the circumstances described hereinabove Section 121 does not run counter to any constitutional requirement.

AS REGARDS SECTION 186

123. II of Section 186 of the statute referred for review inserts in particular into the Code of Criminal Procedure Articles 723-20 to 723-28 pertaining to certain adjustments affecting the serving of the final period of their sentence. Offenders sentenced to one or more terms of imprisonment ranging from six months to two years will henceforth, during the final three months of their sentence, benefit from an adjustment of the serving of their sentence. This adjustment shall also apply during the final six months of the sentence of offenders serving a term of between two to five years' imprisonment. This adjustment will take the form of a semi-custodial sentence, having the offender reside in premises outside the prison, or subjecting the offender to electronic monitoring. The Director of the Prison Service Department of Reinsertion and Probation, after consultation with the Prison Director, will recommend to the Penalty Enforcement Judge the measure best suited to the personality of the convicted offender, except in cases of bad behaviour, the absence of any serious reinsertion project, the material impossibility of implementing such a measure or the refusal of the prisoner involved to agree to such a measure. The Penalty Enforcement Judge will then have a period of three weeks to make his ruling, after consultation with the Public Prosecutor, by a decision which may be appealed against. In the event of failure to making this ruling within the allotted time, the Director of the Prison Service Department of Reinsertion and Probation may, by a decision defined as being " a judicial administration measure" decide to implement the measure of adjustment decided upon. He shall notify the Penalty Enforcement Judge and the Public Prosecutor of this decision and the latter may within twenty four hours lodge an appeal of a suspensive nature before the President of the Penalty Enforcement Chamber of the Court of Appeal.

124. Firstly, no principle nor rule of constitutional value precludes Parliament from entrusting Authorities other than courts of law with the task of determining certain means for serving the final part of a custodial sentence and defining the same as "judicial administration measures". In the case in hand, if the statute permits the Director of the Prison Service Department of Reinsertion and Probation to implement this measure when, after being informed of this recommendation, the Penalty Enforcement Judge has failed to respond within a period of three weeks, such a measure must nevertheless be notified to the Public Prosecutor and the Penalty Enforcement Judge before its actual implementation. The Public Prosecutor

may lodge an appeal of a suspensive nature against such a measure. The Penalty Enforcement Judge, who is not deprived of the powers vested in him by Articles 712-4 and following of the Code of Criminal Procedure, may automatically revoke such a measure in accordance with the provisions of Article 723-26. In such conditions, the challenged provisions do not disregard the constitutional prerogatives of courts of law with respect to the handing down and enforcement of criminal penalties.

125. Secondly, the serving of the final period of a sentence in the form of a semi-custodial sentence, or by having the prisoner reside in premises outside the prison, subjecting the prisoner to electronic monitoring or allowing him a period of leave can only take place with the agreement of the prisoner involved. In the event of an appeal lodged by the Public Prosecutor the prisoner may put forth his own observations. In these conditions, the challenged provisions do not fail to take into due account the constitution principle of the rights of the defence nor the right to effective redress deriving from Article 16 of the 1789 Declaration.

126. Section 186 of the statute referred for review is thus not unconstitutional.

127. The Constitutional Council is not required proprio motu to examine any other question of conformity with the Constitution

HELD

Article 1 : The following provisions of the Act adapting the Administration of Justice to the changing face of crime are declared unconstitutional:

- in Section 1, new Article 706-104 of the Code of Criminal Procedure
- in section 137, the words " in chambers" at the end of the first sentence of indent two of new Article 495-9 of the Code of Criminal Procedure

Article 2: The remaining contents of Sections 1 and 137 of the Act, together with Sections 14, 48, 63, 121 and 186 conform to the Constitution with the qualifications set forth in paragraphs 6, 17,18,33,56,65 and 107 hereinabove.

Article 3 : This decision shall be published in the *Journal Officiel* of the French Republic.

Deliberated by the Constitutional Council sitting on March 4th 2004 composed of Messrs Yves GUENA, President, Michel AMELLER, Jean-Claude COLLIARD, Olivier DUTHEILLET de LAMOTHE, Pierre JOXE, Pierre MAZEAUD, and Mesdames Monique PELLETIER, Dominique SCHNAPPER and Simone VEIL.