

Decision n° 2007-554 DC – August 9th 2007  
The Act to step up the fight against repeat offending by adults and minors

On July 31<sup>st</sup> 2007, the Constitution Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, for review of the constitutionality of the Act to step up the fight against repeat offending by adults and minors, from Mr. Jean-Pierre et al..... Senators and from Mr Jean-Marc AYRAUT et al.... members of the National Assembly

**THE CONSTITUTIONAL COUNCIL**

Having regard to the Constitution;

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

Having regard to the Criminal Code;

Having regard to the Code of Criminal Procedure;

Having regard to Ordinance n° 45-174 of February 2<sup>nd</sup> 1945 pertaining to juvenile delinquency;

Having regard to the observations of the Government registered on August 2<sup>nd</sup> 2007;

Having heard the Rapporteur;

**ON THE FOLLOWING GROUNDS**

1. The Senators and Members of the National Assembly who have referred for review by the Constitutional Council the Act to step up the fight against repeat offending by adults and minors contest the constitutionality of the provisions pertaining to minimum penalties incurred in the event of repeat offending, the law applicable to minors who re-offend, and the order to undergo treatment

**- WITH RESPECT TO MINIMUM PENALTIES INCURRED IN THE EVENT OF REPEAT OFFENDING**

2. The first two sections of the statute referred for review insert into the Criminal Code Articles 132-18-1 and 132-19-1 pertaining to minimum custodial sentences for crimes and serious offences committed while re-offending. New article 132-18-1 fixes the minimum term of imprisonment at 5, 7 or 10 years if the corresponding crime carries a term of 15, 20 or 30 years imprisonment; said term is fixed at 15 years if the crime involved carries a sentence of life imprisonment. New article 132-19-1 provides for a minimum sentence for serious offences of 1,2,3,4 years if the offence carries a term of 3,5,7 or 10 years' imprisonment. However, taking into consideration the circumstances in which the offence was committed, the personality of the offender or the guarantees of social insertion or reinsertion offered by the latter, the court may pass a sentence of a lesser duration and, in the event of less serious offences, decide upon a non-custodial punishment.

3. Pursuant to indent 7 of Article 132-1-18, when a crime is committed by a repeat offender, the court may only pass a sentence lighter than the fixed minimum if the accused " offers exceptional guarantees of insertion or reinsertion". Indents 7 to 12 of Article 132-19-1 provide that, in the event of the committing by a repeat offender of the offence of perpetrating intentionally violent acts, of an offence accompanied by aggravating circumstances of violence, an offence of common assault or sexual abuse or an offence carrying a term of 10 years' imprisonment, the court may only pass a non custodial sentence or a sentence lighter than the fixed minimum if the accused offers such guarantees. In such cases the court is required to give special reasons for its decision.

4. The parties making the referral argue that these provisions disregard the principles of the necessity of punishment and the of tailoring of punishments to the characteristics of offenders, the jurisdiction of the Judicial Authority in its capacity as Guardian of the freedom of the individual, the rights of the defence and the right to a fair trial.

As regards the principle of the necessity of punishment:

5. The parties making the referral argue that introducing mandatory minimum sentences "will result in passing sentences patently disproportionate to the actual seriousness of the offence involved and in adversely affecting public order";

6. Article 8 of the Declaration of the Rights of Man and the Citizen of 1789 provides " The Law must prescribe only punishments which are strictly and evidently necessary..". Article 34 of the Constitution provides : "Statutes shall determine the rules concerning ... the determination of crimes and other major offences and the penalties they carry";

7. The Constitutional Council is not vested by Article 61 of the Constitution with any general power of appreciation and decision-making similar to that conferred upon Parliament. The task of the Council is solely to decide whether statutes referred to it for review do or do not conform to the Constitution;

8. Although it is the task of Parliament to appraise the necessity of prescribing punishments for offences, it is incumbent upon the Constitutional Council to ensure that a punishment provided for is not patently disproportionate to the offence involved;

*- As regards offences committed by repeat offenders*

9. When the incriminated acts are committed by a repeat offender, the minimum penalties apply to crimes and serious offences punishable by at least three years' imprisonment. The court may however pass a lighter sentence, in particular after taking into consideration the circumstances of the offence. There is therefore no infringement of the principle of the necessity of punishments

*- As regards offences committed by persistent repeat offenders*

10. The rule as to mandatory minimum sentences, when the offence has been committed by a person who is already a repeat offender, applies to crimes and major offences of a particularly serious nature. It only applies to offences to property when they are committed with the aggravating circumstance of violence or punishable by a term of ten years' imprisonment. The fact that such offences were committed by a person who is already a repeat offender is in itself a particularly serious objective circumstance;

11. Considering the serious nature of such elements, introducing mandatory minimum sentences amounting to around one third of the normal applicable sentence, i.e one sixth of the sentence which the court may pass in cases of repeat offending, does not disregard the principle of the necessity of punishments;

- As regards the tailoring of punishments to the characteristics of offenders

12. The parties making the referral argue that the statute referred for review by the Constitutional Council disregards the principle of the tailoring of punishments to the characteristics of offenders. They contend that, when an offence is committed by a person who is already a repeat offender, the court is required to pass a sentence not lighter than the mandatory minimum without being able to take into consideration the personality of the offender or the circumstances of the case involved;

13. The principle whereby punishments should be tailored to the characteristics of offenders, which derives from Article 8 of the declaration of 1789, does not preclude Parliament from determining rules to ensure effective punishment of offenders, nor does it imply that the punishment imposed be determined solely on the basis of the personality of the offender;

- *As regards offences committed by repeat offenders*

14. The provisions referred for review provide that for a first case of re-offending the court may pass a sentence lighter than the mandatory minimum, taking into account the circumstances of the offence, the personality of the offender or the guarantees of insertion or re-insertion offered by the latter. There is thus no infringement of the principle of the tailoring of punishments ;

- *As regards offences committed by persistent repeat offenders*

15. The court may only pass a sentence lighter than the mandatory minimum or pass a non custodial sentence if the offender offers "exceptional guarantees of insertion or re-insertion". This restriction placed on the possibility of passing a lighter sentence has been provided for by Parliament to ensure effective punishment of particularly serious offences and fight against the repeated commission thereof;

16. Even when a person who has already re-offended commits a further offence, the court, within the limits fixed by statute, passes sentence taking into account the circumstances of the offence and the personality of the offender;

17. Parliament has not modified the power of the court, pursuant to Articles 132-40 and 132-41 of the Criminal Code, to order at least a partial suspension of the sentence, when the convicted offender is placed on probation;

18. Lastly, when introducing mandatory minimum sentences, Parliament has not derogated from the special provisions of indent 2 of Article 122-1 of the Criminal Code which provide that when the offender, at the time the offence was committed, was affected by psychic or neuropsychic disorders which impaired his judgment or his ability to control his behaviour, the court shall take such circumstances into account when passing sentence and determining the methods of serving the same. Hence, even when a re-offender commits a further offence, these provisions allow the court, if it feels it necessary, to pass a non custodial sentence or a sentence lighter than the mandatory minimum;

19. Sections 1 and 2 of the statute referred for review, worded in sufficiently clear and precise terms, do not therefore infringe the principle of the tailoring of punishments;

- As regards other constitutional requirements :

20. Contrary to the contentions of the parties making the referral, Sections 1 and 2 do not disregard the powers of the Judicial Authority, Guardian of the freedom of the individual, the rights of the defence and the principle of a fair trial guaranteed by Article 16 of the Declaration of 1789;

#### WITH RESPECT TO THE LAW APPLICABLE TO MINORS WHO RE-OFFEND

21. 1° of I of section 5 of the statute referred for review completes the first indent of Article 20-2 of the Ordinance of February 2<sup>nd</sup> 1945 referred to above pertaining to the attenuation of penalties applicable to minors. This provision specifies that a reduction of one half of the custodial sentence liable to be passed on minors aged over thirteen " also applies to the mandatory minimum sentences provided for by Article 132-18, 132-18-1 and 132-19-1 of the Criminal Code";

22. 2° of I amends the second indent of the same article 20-2 and adds "an offence committed with the aggravating circumstance of violence" to the list of offences for which the Cour d'Assises or Children's Court may, in the case of minors over sixteen, not exercise its power to reduce a sentence. It provides that, in the event of minors aged over sixteen committing serious offences when re-offending, the relevant sentence will not be reduced, unless the Court decides otherwise. In the latter case, the Cour d'Assises must reply to a question raised on this point and the Children's Court give special reasons for its decision. Lastly it is specified that educational measures or penalties imposed on a minor may only constitute the first step in the process of repeat offending;

23. The parties making the referral contend that these provisions disregard the fundamental principle of the necessity and tailoring of punishments recognised by the laws of the Republic in matters of youth justice;

As regards the fundamental principle recognised by the laws of the Republic in matters of youth justice:

24. The fact that the diminishing of responsibility where minors are concerned depends on the age of the latter, and the need to seek to morally and educationally regenerate delinquent children by measures adapted to their age and personality ordered by a specialised court or under appropriate procedures, have been constantly recognised by the laws of the Republic since the beginning of the twentieth century. These principles are in particular expressed in the Act of April 12<sup>th</sup> 1906 on the criminal majority of minors, the Act of July 22<sup>nd</sup> 1912 on Children's Courts and the Ordinance of February 2<sup>nd</sup> 1945 on juvenile delinquency; prior to the coming into effect of the Constitution of 1946, the laws of the Republic did not lay down any rule whereby coercive measures or punishments should always be eschewed in favour of purely educational measures. In particular the original provisions of the Ordinance of February 2<sup>nd</sup> 1945 did not absolve minors from criminal liability nor did it not exclude the need, when circumstances so require, to order measures such as placements, supervision, remand, or for minors over thirteen, detention. Such is the scope of the fundamental principle recognised by the laws of the Republic in matters of youth justice.

25. The challenged provisions maintain the principle whereby, barring an exception warranted by the case in hand, minors aged over sixteen have the benefit of a reduced sentence. Although this reduction does not apply to certain minors aged over sixteen when they have re-offended, the Court may rule otherwise. Furthermore, as is shown by Parliamentary debate, Parliament did not intend to preclude the application of the provisions of Articles 2 and 20 of the Ordinance of February 2<sup>nd</sup> 1945 whereby the court having jurisdiction over a minor may decide upon measures of protection, assistance, supervision and education while imposing a criminal punishment if it feels this to be necessary. The mandatory minimum sentences provided for in Articles 132-18, 132-18-1 and 132-19-1 of the Criminal Code shall apply solely in the latter case;

26. Parliament when passing such provisions did not infringe the constitutional requirements governing youth justice;

As regards the principles of necessity and tailoring of punishments:

27. For the same reasons as those set forth regarding the attenuation of punishments and sections 1 and 2, section 5 does not run counter to the principles of necessity and tailoring of punishments;

28. It results from the foregoing that section 5 of the statute referred for review is not unconstitutional;

- AS TO ORDERS TO UNDERGO TREATMENT

29 The provisions of Chapter II of the statute deferred, which amend or complete the Criminal Code and Code of Criminal Procedure, concern the order to undergo treatment. Sections 7, 8 and 9 make such an order applicable to persons sentenced to socio-judicial supervision, to a suspended sentence accompanied by probation or placed under court-ordered supervision. Sections 10 and 11 modify the conditions governing the granting of further reductions of sentence and release on parole to persons convicted of a crime or major offence for which socio-judicial supervision is ordered;

30. The parties making the referral contend that these provisions "by their automatic nature" disregard the principles of the necessity and tailoring of punishments and the provisions of Articles 64 and 66 of the Constitution.;

31. Firstly, in the framework of socio-judicial supervision, suspended sentence accompanied by probation, court-ordered supervision and release on parole, convicted persons sentenced to such measures may only be the object of an order to undergo treatment if it is proved, after a medical expert examination, that they are likely to require such treatment. Parliament, when using the words "unless otherwise decided", expressly left it open for the Court or the judge in charge of enforcing penalties not to make such an order. Furthermore, the contested provisions which deprive imprisoned offenders of the benefit of further reductions in sentence also allow the judge or a court in charge of enforcing penalties to decide otherwise;

32. Firstly, I of section 11 of the statute referred for review provides that a person who is imprisoned cannot be granted parole if, during the period of imprisonment, said person refuses to undergo treatment proposed by the penalty enforcement judge under Articles 717-1 and 763-7 of the Code of Criminal Procedure or refuses to promise to undergo treatment proposed as from the date of release from prison under Article 731-1 of the same Code. Article 763-7 is applicable to persons sentenced to a custodial sentence accompanied by socio-judicial supervision including an order to undergo treatment. Articles 717-1 and 731-1 provide that during the serving of the custodial sentence, the judge in charge of enforcing penalties may propose such treatment to a person convicted of an offence for which social-judicial supervision may be ordered. These provisions thus always involve a decision of a court which is in no way automatic.

33. In such conditions, the implementation of said provisions in no way infringes the principles of the necessity and tailoring of punishments, nor Articles 64 and 66 of the Constitution;

34. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

### **HELD**

Article 1 - Sections 1, 2, 5 and 7 to 11 of the Act to step up the fight against repeat offending by adults and minors are not unconstitutional

Article 2 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on August 9th 2007 and composed of Mr Jean-Louis DEBRE, President, Messrs Guy CANIVET, Renaud DENOIX de SAINT MARC, Olivier DUTHEILLET de LAMOTHE and Valéry GISCARD d'ESTAING, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ