Decision n° 2008-562 DC – February 21st 2008

Act pertaining to post-sentence preventive detention and diminished criminal responsibility due to mental deficiency.

On February 11th 2008, the Constitution Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, from Mr Jean-Pierre BEL et al.... Senators, and the same day from Mr Jean-Marc AYRAUT et al, Members of the National Assembly, for review of the constitutionality of the Act pertaining to post-sentence preventive detention and diminished criminal responsibility due to mental deficiency.

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58-1067 of November 7th 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 the Public Health Code;

Having regard to Act n° 78-17 of January 1978 as amended on Data Processing, Data Files and Individual Liberties;

Having regard to the observations of the Government registered on February 14th 2008;

Having heard the Rapporteur;

ON THE FOLLOWING GROUNDS

1. The Senators and Members of the National Assembly making the referral have referred the Act pertaining to post-sentence preventive detention and diminished responsibility due to mental deficiency for review by the Constitutional Council; they contend that sections 1, 3 and 13 thereof are unconstitutional. The Members of the National Assembly also challenge the constitutionality of section 12 of the Act, and the Senators that of section 4 thereof.

WITH RESPECT TO POST-SENTENCE PREVENTIVE DETENTION AND PREVENTIVE SURVEILLANCE

2. I of section 1 of the Act referred for review inserts in Title XIX of Book IV of the Code of Criminal Procedure entitled "Procedure applicable to sexual offences and the protection of victims who are minors", a Chapter III entitled "On post-sentence preventive detention and post-sentence preventive surveillance" comprised of Articles 706-53-13 to 706-53-21 of the Code of Criminal Procedure. These articles provide for the conditions under which a person may be placed under post-sentence preventive detention or preventive surveillance after serving a custodial sentence of not less than fifteen years for the crimes of assassination or murder, torture or acts of barbarity, rape, kidnapping or sequestration of a victim who is a minor, or a victim who is an adult on the condition, in the latter case, that the commission of said crime is accompanied by aggravating circumstances.

3. Indent 4 of Article 706-53-13 of the Code of Criminal Procedure provides : " Post-sentence preventive detention consists in placing the person involved in a socio-medico-legal preventive detention centre where he will be offered medical, social and psychological care intended to make it possible to put an end to said detention" Such a measure may only be ordered if the Cour d'Assises which has convicted the offender has expressly provided for a re-examination of his situation at the end of the sentence with a view to placing said offender under post-sentence preventive detention, if said offender presents " particularly dangerous characteristics with a high risk of repeat offending because he suffers from serious personality disorders", and, lastly, if no other preventive measure seems sufficient to prevent the offender from recommencing to commit the same crimes. Under Article 706-53-14 "The situation of persons referred to in Article 706-53-13 is examined, no later than one year prior to the date envisaged for their release by the Pluridisciplinary Preventive Measures Committee provided for by Article 763-10, in order to assess their dangerousness - For this purpose the Committee requests the placement of the person concerned for a period of at least six weeks in a specialised service in charge of putting prisoners under observation in order to carry out a pluridisciplinary assessment of their dangerousness together with a medical appraisal carried out by two experts". This Committee may only propose placing the offender under post-sentence preventive detention if it feels that the necessary conditions have been met, and by giving reasons for its decision.

4. Under Article 723-37, 723-38 and 763-8 of the Code of Criminal Procedure, as worded pursuant to the statute referred for review, placing a person under preventive surveillance consists in extending beyond the period fixed for judicial supervision or socio-judicial follow-up all or part of the obligations imposed upon the offender under one or other of these two measures, in particular placement under mobile electronic surveillance. Under Article 723-37 of the Code of Criminal Procedure this measure may only be ordered after a medical expert

appraisal ascertaining that the person continues to present dangerous characteristics and in the case where "the obligations arising from the entry of the name of the person in the national computer register of offenders who have committed sexual and violent offences would seem insufficient to prevent the offender from committing the crimes listed in Article 706-53-13" and if such a measure "constitutes the sole means of preventing the offender, who is most likely to re-offend, from committing such offences". Under Article 706-53-19 of the same Code, preventive surveillance may also be ordered if post-sentence preventive detention is not extended or has been terminated while the offender involved still presents a risk of re-offending by committing the offences listed in Article 706-53-13.

5. I of section 13 of the statute referred for review organises the conditions in which certain people serving a custodial sentence as of September 1st 2008 may, firstly, be subjected in the framework of judicial supervision, socio-judicial follow-up or post-sentence preventive surveillance, to home confinement with placement under mobile electronic surveillance and, secondly, in exceptional circumstances, under post-sentence preventive detention. II of this section provides that post-sentence preventive surveillance and post-sentence preventive detention shall apply to persons convicted after the publication of the statute for acts committed prior to said date. III of said section makes the provisions pertaining to post-sentence preventive surveillance immediately applicable and, in the event of failure by the person involved to comply with the obligations imposed under such surveillance, authorises post-sentence preventive detention.

6. The parties making the referral argue that when such a measure is ordered by a court after criminal proceedings in order to extend, after the serving of the custodial sentence passed at trial, the maintaining in custody of persons who have committed particularly serious crimes, post-sentence prevention detention is in fact a punitive measure and as such infringes the set of constitutional

principles deriving from Article 8 and 9 of the Declaration of the Rights of Man and the Citizen of 1789. It infringes the principle of the legality of offences and necessity of punishments insofar as "it is not a punishment handed down in relation to a clearly specified offence" and is not limited in time. They add that insofar as "there exist alternatives such as socio-judicial follow-up introduced by the Act of June 17th 1998 or judicial supervision introduced by the Act of December 12th 2005", post-sentence preventive detention infringes the principle of the necessity of punishments. Depriving a person who has already served his sentence of his freedom on the grounds that he is likely to re-offend, infringes both the presumption of innocence, the principle of *res judicata* and the principle *non bis in idem*. Detaining a person "for a indeterminate term" which may be extended indefinitely depending on the risk of re-offending presented by the individual involved, is a patently disproportionate measure. Assessing the dangerousness of a person is fraught with too much uncertainty and is too vague a notion to warrant depriving a person of his freedom. Post-sentence prevention detention is arbitrary detention prohibited by Article 66 of the Constitution and an infringement of the protection of human dignity. Lastly, they contend that applying such a measure to persons convicted of offences committed prior to the promulgation of the statute infringes the principle of no retrospective effect of a harsher criminal statute .

7. The Members of the National Assembly making the referral also argue that even if post-sentence preventive detention should be considered as not being a form of punishment it still infringes Article 4 and 9 of the 1789 Declaration which prohibit unnecessary harshness of measures restricting the freedom of the individual and the right to privacy. The principle of the presumption of innocence precludes depriving a person of his freedom when he has not been found guilty, whatever the procedural guarantees applicable to the implementation of the incriminated measure.

With respect to the arguments based on failure to comply with Article 8 of the Declaration of 1789 :

8. Article 8 of the Declaration of 1789 proclaims that "The Law must prescribe only punishments which are strictly and evidently necessary and no one shall be punished except by virtue of a statute drawn up and promulgated before the commission of the offence and legally applied". These principles thus apply solely to penalties and sentences intended to serve as punishments.

9. Although for persons convicted after the coming into effect of the statute, post-sentence preventive detention may only be ordered if the Cour d'Assises has expressly provided when convicting and sentencing the offender that his case be re-examined after the completion of the custodial sentence with a view to possibly making such an order, the decision of the Court does not per se constitute an order for such a measure but merely makes it possible in cases, when at the end of a custodial sentence, the other requirements have been met. The Cour d'Assises does not therefore make an order for post-sentence preventive detention when handing down the original sentence; such an order is made by the regional court which decides on such measures. The making of a post-sentence preventive detention order is not based on the guilt of the person convicted by the Cour d'Assises but on whether or not such a person would appear to present a high risk of dangerousness in the opinion of the regional court when the latter takes its decision. Such an order is only made once the convicted offender has served his sentence and is designed to prevent persons who suffer from serious personality disorders from re-offending. Post-sentence preventive detention is therefore neither a penalty nor a sentence of a punitive nature. The same holds good for post-sentence preventive surveillance. The arguments based on failure to comply with Article 8 of the Declaration of 1789 are thus inoperative.

10. In view of its custodial nature, the time it may last, the fact that it is indefinitely renewable and ordered after conviction by a court of law, post-sentence preventive detention cannot be ordered in the cases of persons convicted prior to the publication of the statute or convicted after this date of offences committed prior to such date. Indents 2 to 7 of I of section 13 of the statute referred for review, II and consequently IV thereof must therefore be held to be unconstitutional.

With respect to the arguments based on failure to comply with Article 9 of the Declaration of 1789 and Article 66 of the Constitution.

11. Article 9 of the Declaration of 1789 proclaims : " Every man shall be presumed innocent until found guilty, and if it be considered indispensable to arrest him, any undue harshness not needed to secure his person shall be severely curtailed by Law". Article 66 of the Constitution provides : " 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".

12. Post-sentence preventive detention and surveillance are not repressive measures and hence the argument based on failure to respect the presumption of innocence is inoperative.

13. Post-sentence preventive detention and surveillance must comply with the principle, deriving from Article 9 of the Declaration of 1789 and Article 66 of the Constitution, whereby the freedom of the individual should not be restricted with undue harshness. It is indeed the task of Parliament to ensure the conciliation between the necessary maintenance of law and order to ensure the safeguarding of rights and principles of constitutional value and the exercising of

constitutionally guaranteed freedoms. The latter include the freedom to come and go and the right to privacy, protected by Articles 2 and 4 of the Declaration of 1789 and the freedom of the individual of which Article 66 entrusts the protection to the Judicial Authority. Any infringement of the exercising of these freedoms should be tailored, necessary and proportionate to the aims of preventing the commission of offences it is sought to attain.

- *With respect to appropriateness*

14. Under indent 4 of Article 706-53-13 of the Code of Criminal Procedure, placing a person in a secure socio-medico-judicial centre is intended to make it possible, thanks to the medical, social and psychological care which is permanently on offer, to eventually put an end to such detention. Post-sentence preventive detention is reserved for persons who are potentially very dangerous and present a high risk of re-offending because they suffer from serious personality disorders. In view of the fact that a post-sentence preventive detention order is a measure which totally deprives an offender of his freedom, the definition of the scope of such a measure must be one which is appropriate in view of such personality disorders.

15. Firstly, under Article 706-53-13 of the Code of Criminal Procedure, solely "persons who have been sentenced to a term of imprisonment of fifteen years or more for the crimes, committed against a person who is a minor, of assassination or aggravated murder, torture or acts of barbarity, kidnapping or sequestration" may be the object of a post-sentence preventive detention order. This Article goes on to add that "the same applies to the crimes, committed against an adult, of assassination or aggravated murder, torture or aggravated acts of barbarity, aggravated rape, aggravated kidnapping or sequestration provided for by Article 22162, 221-3, 221-4, 222-2, 222-3, 222-4, 222-5, 222-6, 222-24, 222-25, 222-26,

224-2, 224-3 and 224-5-2 of the Criminal Code". In view of the extreme seriousness of the crimes involved and the severity of the sentence passed by the Cour d'Assises, the scope of post-sentence preventive detention appears to be appropriate for the purpose it is sought to achieve.

16. Secondly, under the first two indents or Article 706-53-14 of the Code of Criminal Procedure: "The situation of persons referred to in Article 706-53-13 is examined, no later than one year prior to the date envisaged for their release by the Pluridisciplinary Preventive Measures Committee provided for by Article 763-10, in order to assess their dangerousness - For this purpose the Committee requests the placement of the person concerned for a period of at least six weeks in a specialised unit in charge of putting prisoners under observation in order to carry out a pluridisciplinary assessment of their dangerousness together with a medical appraisal carried out by two experts". These provisions constitute suitable guarantees that post-sentence preventive detention will be reserved solely for persons who are particularly dangerous because they suffer from serious personality disorders.

- With respect to necessity :

17. Firstly, given the seriousness of the restrictions it places on the freedom of the individual, post-sentence preventive detention can only be considered as being a necessary measure as long as no other measure less invasive of such freedom can offer sufficient guarantees of preventing the commission of acts which seriously endanger the personal safety of others.

18. Under Article 706-53-13 and 706-53-14 of the Code of Criminal Procedure a post-sentence preventive detention order can only be made " in exceptional circumstances" as regards a person sentenced to a long term of imprisonment for acts of a particularly serious nature and if the Cour d'Assises which has convicted

the offender has expressly provided for a re-examination of his situation at the end of the sentence with a view to placing said offender under post-sentence preventive detention. The dangerousness of the offender is assessed when the sentence is completed by a pluridisciplinary evaluation of such dangerousness accompanied by a expert medical appraisal carried out by two experts. Under Article 706-53-14 of the Code of Criminal Procedure such a measure may only be ordered if the Pluridisciplinary Commission on Preventive Measures, which recommends such a measure, and the regional court competent to order such preventive measures, both feel that "the obligations arising from the entry of the name of the person in the national computer register of offenders who have committed sexual and violent offences, and the obligations arising under an order for treatment or for placement under mobile electronic supervision which might be made in the framework of socio-judicial follow-up or judicial supervision would seem insufficient to prevent the offender from committing the crimes listed in Article 706-53-13" and if such a measure "constitutes the sole means of preventing the offender, who is most likely to re-offend, from committing such offences". These provisions guarantee that the regional court competent to order such measures can only order post-sentence preventive detention as and when this is strictly necessary.

19. Secondly, maintaining a convicted person who has served his sentence in a socio-medico-judicial preventive centre in order to ensure that he benefits from medical, social and psychological treatment must be of a necessary harshness. This is the case when the convicted offender while serving his sentence was able to receive care or treatment intended to diminish his dangerousness but such care or treatment failed to produce satisfactory results either due to the state of the person involved or his refusal to undergo treatment.

20. III of section 1 of the statute referred for review inserts in the Code of Criminal Procedure an Article 717-A which provides that, in the year following

final conviction of the offender, the latter is placed, for a period of at least six weeks, in a specialised unit which makes it possible to decide the type of social and health care required and to draw up an "individualised sentence serving programme" including if need be psychiatric care. V of the same section completes Article 717-1 of the same Code by an indent worded as follows : "Two years prior to the contemplated date of release of a convicted person who may come under the scope of the provisions of Article 706-53-13, said person will be summoned to appear before the penalty enforcement judge and shall be required to explain how he has followed the appropriate medical and psychological treatment offered to him under indents two and three hereof. On the basis of this assessment the Penalty enforcement judge may if need be, recommend that he undergo treatment in a specialised penal institution". Under Article 706-53-14 : "The situation of persons referred to in Article 706-53-13 is examined, no later than one year prior to the date envisaged for their release by the Pluridisciplinary Preventive Measures Committee..... For this purpose the Committee requests the placement of the person concerned for a period of at least six weeks in a specialised unit in charge of putting prisoners under observation in order to carry out a pluridisciplinary assessment of their dangerousness, together with a medical appraisal carried out by two experts".

21. Compliance with these provisions guarantees that it has proved impossible to avoid post-sentence preventive detention by treatment and care while the original sentence was being served. It will thus be left to the regional court competent to order post-sentence preventive detention to check whether the person who is the subject of such an order has been able, during his sentence, to have the benefit of care and treatment suitable for the personality disorders from which he suffers. With this qualification post-sentence preventive detention applicable to persons convicted after the publication of the statute referred for review is necessary for the purpose it is sought to achieve.

- With respect to proportionality:

22. Post-sentence preventive detention can only be ordered, after a favourable opinion from the Pluridisciplinary Preventive Measures Committee, by a Court with a Bench of three Court of Appeal judges. It is decided upon after a full hearing of all parties and, if the convicted offender so requests, in open court. The convicted person is assisted by an Attorney of his choice or, failing that, by one appointed by the Court. Three months after the final decision to make the post-sentence preventive detention order the person involved may request that an end be put to this measure. Furthermore such detention will automatically be ended if the regional court competent to order post-sentence preventive detention has not ruled on the request within three months of the making thereof. Decisions handed down by the latter court may be appealed against before the National Preventive Detention Court, and its decisions may in turn be appealed against on a point of law before the Cour de Cassation. Lastly, under Article 706-53-18 of the Code of Criminal Procedure : "The regional court competent to order post-sentence preventive detention automatically orders the lifting of such an order if the necessary requirements…. are no longer met". As the foregoing provisions show, the Judicial Authority retains the power to interrupt at any time the extending of preventive detention, either on its own initiative or at the request of the person detained when circumstances of fact or law so warrant. Parliament has therefore accompanied the placing of persons under post-sentence preventive detention orders by guarantees such as to ensure the conciliation between freedom of the individual of which Article 66 of the Constitution entrusts the protection to the Judicial Authority and the aim of preventing persons from re-offending.

23. Under Article 706-53-16 of the Code of Criminal Procedure a post-sentence preventive detention order is valid for a year and is renewable, after a favourable opinion given by the Pluridisciplinary Preventive Measures Committee in the

manner provided for in Article 706-53-15 and for a similar length of time when the conditions set out in Article 706-53-14 have been met. Under the final indent of Article 723-37 of the Code of Criminal Procedure placement under post-sentence preventive surveillance is also renewable for the same length of time. The number of renewals is not limited. These provisions show that renewal of the measure may only be decided if, on the date of such renewal, and, as the case may be, after examination of the pluridisciplinary assessment or the medical appraisal carried out with a view to prolonging the measure, such a measure is the sole means of preventing commission of the crimes provided for in Article 706-53-13 of the Code of Criminal Procedure. Thus, in order for the measure to continue to be one of strict necessity, Parliament has intended that regular account be taken of the progress made by the person subjected to such measures and whether said person submits himself on a permanent basis to the treatment on offer. The argument based on the fact that unlimited renewal of the measure is disproportionate must thus be dismissed.

WITH RESPECT TO DIMINISHED CRIMINAL RESPONSIBILITY FOR MENTAL DEFICIENCY:

24. Section 3 of the statute referred for review inserts in the Code of Criminal Procedure Title XXVIII "On criminal procedure and decisions of diminished criminal responsibility for mental deficiency" comprising Articles 706-119 to 706-140 of the Code of Criminal Procedure. These Articles are divided into three chapters, the first dealing with provisions applicable before the Investigating Magistrate and the Chambre de l'Instruction, the second with provisions applicable before the Tribunal Correctionnel or the Cour d'Assises, the third with preventive measures which may be ordered in the event of a person being found criminally irresponsible on the grounds of mental deficiency. Section 4 coordinates several provisions of the Code of Criminal Procedure with the introduction of the finding of diminished criminal responsibility on the grounds of mental deficiency.

With respect to Section 3 :

25. The parties making the referral contend that the provisions set out in Section 3 fail to respect the rights of the defence and the right to a fair trial. To this end they criticise the fact that the Chambre de l'Instruction, when asked to rule, may find both that there exist sufficient charges against a person of having committed the acts of which he is accused and that said person is criminally irresponsible. They argue that such a finding creates a confusion between the role of an Investigating Magistrate and a Trial court and infringes the presumption of innocence as regards the person concerned. They argue that correlatively such a confusion infringes the rights of the defence of any possible co-offenders in particular with respect to the presumption of innocence. Lastly they challenge, as being contrary to the principle of the legality of offences and necessity of punishments, the introduction of a offence dealing with the failure by a person found to be of diminished responsibility to comply with the conditions of a preventive measure.

26. Firstly, under Article 706-125 of the Code of Criminal Procedure when, after the hearing as to diminished criminal responsibility for mental deficiency, the Chambre de l'Instruction deems that there are sufficient charges against the person who was the object of the preliminary criminal investigation and that the latter comes under the scope of Article 122-1 of the Criminal Code, this Court has no jurisdiction either to find the person guilty of committing the offences charged or to rule on the civil liability of said person. The arguments raised are therefore unsupported by the facts.

27. Secondly, the provisions of Article 706-139 of the Code of Criminal Procedure which deal with failure by a person found to be of diminished responsibility to comply with preventive measures ordered does not depart from

the provisions of Article 122-1 of the Criminal Code whereby the criminal diminished responsibility of a person due to his mental or psychic state is to be assessed at the time when the incriminated acts are committed. The offence provided for under Article 706-139 will therefore only apply to persons who were criminally responsible for their acts when failing to comply with the requirements contained in a preventive measure. The argument based on an infringement of the principle of the necessity of punishments and legality of offences must be dismissed.

With respect to section 4 :

28. VIII of section 4 of the statute referred for review, which completes Article 768 of the Code of Criminal Procedure, provides for the entry in the National Computerised Criminal Record Register of findings of diminished criminal responsibility based on mental deficiency. X thereof, which completes Article 775 of the same Code, provides that these findings shall not be entered on form 2 of the Criminal Record file, unless the preventive orders provided for by new Article 706-136 have been made and remain in effect.

29. The parties making the referral argue that the abovementioned provisions, which infringe the principles of necessity and proportionality set out by the abovementioned Act of January 6th 1978, infringe statutory guarantees of the right to privacy.

30. It is incumbent upon Parliament to ensure conciliation between the right to privacy and other constitutional requirements connected in particular with the safeguarding of law and order.

31. A finding of diminished criminal responsibility on the grounds of mental deficiency is not a punishment. When no preventive measure as provided for by

Article 706-136 of the Code of Criminal procedure has been ordered, such information cannot be legally necessary for assessing the criminal responsibility of the person who may subsequently be the object of other criminal proceedings. Hence, as regards Criminal Records, such a finding can only, without infringing in an unnecessary manner the right to privacy as deriving from Article 2 of the Declaration of 1789, be entered on form n° 1 of the Criminal Record file when the preventive measures provided for by new Article 706-136 of the Code of Criminal Procedure have been ordered and remain in effect. With this qualification these provisions are not unconstitutional.

WITH RESPECT TO RELEASE ON PAROLE OF PERSONS SENTENCED TO LIFE IMPRISONMENT

32. Section 12 of the statute referred for review completes Article 729 of the Code of Criminal Procedure by an indent which provides : "A person sentenced to life imprisonment may only be released on parole after a favourable opinion given by the Pluridisciplinary Preventive Measures Committee in the conditions provided for by indent 2 of Article 706-53-14". The Members of the National Assembly making the referral argue that this provision infringes the constitutional principle of the independence of Courts of law.

33. Article 66 of the Constitution provides : "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". Article 16 of the Declaration of 1789 and Article 64 of the Constitution guarantee the independence of the Courts of law and the specific nature of their functions, which may not be encroached upon by either Parliament, the Government or any Administrative authority.

34. By making the power of the Penalty enforcement court dependent upon a favourable opinion of an Administrative committee, Parliament has failed to respect the principle of the separation of powers and of the independence of the Judiciary. The word "favourable" in section 12 of the statute referred for review is thus unconstitutional.

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

HELD

Article 1 - The following provisions of the Act pertaining to post-sentence preventive detention and diminished criminal responsibility due to mental deficiency are unconstitutional :

- in section 12, the word "favourable"
- in section 13, indents 2 to 7 of I, II and consequently IV thereof

Article 2 - Sections 1, 3, 4 and the rest of sections 12 and 13 of the Act pertaining to post-sentence preventive detention and diminished criminal responsibility due to mental deficiency, subject to the qualifications set out in paragraphs 21 and 31 above, are not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on February 21st 2008 and composed of Messrs Jean-Louis DEBRE, President, Guy CANIVET, Renaud DENOIX de SAINT MARC and Olivier DUTHEILLET de LAMOTHE, Mrs Jacqueline de GUILLENCHMIDT, Mr Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ.