

Decision no. 2011-113/115 QPC
of 1 April 2011

(Mr Xavier P. and another)

On 21 January 2011 the Constitutional Council, pursuant to Article 61-1 of the Constitution, received an application for a priority preliminary ruling on the issue of constitutionality from the Cour de Cassation (criminal chamber, decree no. 516 of 19 January 2011) raised by Mr Xavier P., regarding the compatibility of Articles 353 and 357 of the Code of Criminal Procedure with the rights and freedoms guaranteed by the Constitution.

It also received an application on 25 January 2011, under the same conditions, from the Cour de Cassation (criminal chamber, decree no. 515 of 19 January 2011), for a priority preliminary ruling on the issue of constitutionality raised by Mr Jean-Louis M. relating to Articles 349, 350, 353 and 357 of the same Code.

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution;

Having regard to Ordinance no. 58-1067 of 7 November 1958 as amended, concerning the basic law on the Constitutional Council;

Having regard to the Code of Criminal Procedure;

Having regard to decree no. 08-86480 of the Cour de Cassation, criminal chamber, of 14 October 2009;

Having regard to the Regulation of 4 February 2010 as to the procedure applicable before the Constitutional Council with respect to applications for priority preliminary rulings on the issue of constitutionality;

Having regard to the observations filed on behalf of Ms Annick B., Ms Nathalie B. acting both in her own right as well as in her capacity as the legal guardian of her underage child Élisabeth B., Ms Sandrine M. acting both in her own right as well as in her capacity as the guardian of her underage children Mickaël B. and Morgane B., Mr Jacques M. and Mr David Q., by SCP Thouin-Palat et Boucard, Attorney at the Conseil d'État and the Cour de Cassation, registered on 8 February 2011;

Having regard to the observations filed on behalf of Mr Jean-Louis M. by SCP Waquet, Farge et Hazan, Attorney at the Conseil d'État and the Cour de Cassation, registered on 17 February and 1 March 2011;

Having regard to the observations filed on behalf of Mr Xavier P. by SCP Gadio et Chevalier, Attorney at the Conseil d'État and the Cour de Cassation, registered on 18 February and 1 March 2011;

Having regard to the observations filed on behalf of Ms Jeanine O., née W., and Messrs Roger, Jean-Pierre and Franck O. by SCP Baraduc et Duhamel, Attorney at the Conseil d'État and the Cour de Cassation, registered on 18 February and 1 March 2011;

Having regard to the observations of the Prime Minister, registered on 18 February 2011;

Having regard to the documents produced and appended to the case files;

Having heard Esq. Jean-Pierre Chevalier on behalf of Mr P., Esq. Claire Waquet on behalf of Mr M., Esq. Françoise Thouin-Palat on behalf of the parties B., M. and Q., Esq. Jean-Philippe Duhamel on behalf of the parties O. and M. Thierry-Xavier Girardot, appointed by the Prime Minister, at the public hearing of 15 March 2011;

Having heard the Rapporteur;

1. Considering that these priority preliminary rulings on the issue of constitutionality relate to the deliberation procedures of the Assize courts; that there are grounds for them to be joined in order to be ruled upon in one single decision;

2. Considering that Article 349-3 of the Code of Criminal Procedure provides: "Each principal question shall be posed as follows: "Is the accused guilty of having committed that act?"

"A question is posed in relation to each fact specified in the arraignment.

"Each aggravating circumstance is covered by a different question.

"The same applies, where invoked, for each legal ground for exemption from or reduction of the punishment";

3. Considering that Article 350 of the same Code provides: "If one or more aggravating circumstance is established during the course of the proceedings that was not mentioned in the arraignment, the president shall pose one or more special questions";

4. Considering that Article 353 provides: "Before the Assize Court retires for judgment, the president shall read the following instruction, which shall moreover be posted in large characters in the most visible part of the deliberation chamber:

"The law does not require the judges to explain the reasons in support of their findings, and does not prescribe rules which they must apply in particular in order to establish whether or not evidence is sufficient; it requires that they ask themselves in silence and contemplation and attempt to establish, with a sincere conscience, the impression that the evidence brought against the accused and the defence arguments made on their reasoning. The law asks of them only this question, which specifies the full extent of their duties: Are you fully convinced? » ;

5. Considering that pursuant to Article 357: "To this effect, each of the judges and the jurors receives an open sheet of paper bearing the stamp of the Assize Court and bearing the following words: "by my honour and conscience, I declare that..."

"He then writes or instructs in secret the writing of the word 'yes' or the word 'no' on a table set out in such a manner that no person may see the vote registered on the sheet of paper. He returns the sheet of paper filled in and folded to the president, who places it in an urn intended for this use";

6. Considering that according to the settled case law of the Cour de Cassation on these articles, the judgments of the Assize courts

ruling on a public prosecution do not require any other findings relating to guilt other than those which the judges and jurors sitting on the Assize court have, according to their inner conviction, reached regarding the questions raised in accordance with the operative part of the referral decision and those submitted for discussion by the parties;

7. Considering that, according to the applicants, these provisions violate the principle of equality between persons prosecuted before the criminal courts, the requirement to respect the rights of the defence and the obligation to give reasons for judgments imposing criminal penalties;

8. Considering, on the one hand, that Parliament, which is competent to determine the rules of criminal procedure pursuant to Article 34 of the Constitution, is entitled to establish rules of procedure that differ depending on the facts, situations and persons to which they apply, provided that these differences are not unjustifiably discriminatory and that equal guarantees are assured to the parties to the trial, in particular as regards the requirement that the rights of the defence be respected;

9. Considering, firstly, that the situation for persons accused of a criminal offence before an Assize Court is different to that of persons who are prosecuted for an offence, including minor offences, before a Criminal Court or a Police Court; accordingly, the legislator was able to make provision for the issue of judgments by the Assize courts according to rules differing from those applicable before the other criminal courts, without thereby violating the principle of equality;

10. Considering, secondly, that it follows from the body of provisions contained in Title I of Book II of the Code of Criminal Procedure on the Assize courts that the rights of the defence are assured throughout the proceedings held before that court; that the contested provisions have the sole object of determining the procedures by which the Assize Court is to deliberate; that they do not in themselves cause any violation to the rights of the defence guaranteed under Article 16 of the Declaration of the Rights of Man and the Citizen of 1789;

11. Considering, on the other hand, that it follows from Articles 7, 8 and 9 of the 1789 Declaration that it is for the legislator, when exercising its powers, to determine the rules of criminal law and criminal

procedure that are capable of preventing arbitrariness in the search for the authors of criminal offences, the prosecution of suspects as well as in the judgment and the enforcement of penalties; that the obligation to give reasons for judgments and convictions amounts to a legal guarantee of this constitutional law requirement; that, whilst the Constitution does not establish this obligation as being general and absolute in nature, the failure to give reasons as a matter of procedure can only be justified if appropriate guarantees capable of excluding arbitrariness are established by law;

12. Considering, firstly, that the special provisions set out under Chapter VI of Title I of Book II of the Code of Criminal Procedure subject proceedings before the Assize courts to the requirements of continuity and that they be oral; that these principles require that evidence and defence submissions be produced and discussed orally during the course of proceedings; that it follows from Articles 317 et seq of the Code of Criminal Procedure that the accused may attend proceedings in person and that he may be assisted by a defence counsel; that Article 347 prevents the case file from being consulted during the course of deliberations by the Assize Court unless the public prosecutor and the counsel for accused and the civil claimant are present; that moreover, the judges and jurors shall deliberate together immediately after the conclusion of oral proceedings; that accordingly these provisions ensure that the judges and jurors establish their conviction solely on the basis of the evidence and arguments discussed orally by the parties;

13. Considering, secondly, that the Assize Court must mandatorily rule on the questions posed on accordance with the operative part of the referral decision which Article 327 of the Code of Criminal Procedure specifies must be read out at the start of oral proceedings; that Article 348 provides that after having declared the conclusion of oral proceedings, the president shall read out the questions which the court and the jury must answer; that Article 349 requires that each fact specified in the arraignment as well as each factual circumstance or each legal ground for exemption from or reduction of the punishment relied on be covered by a question; that special or subsidiary questions may moreover be posed on the initiative of the president or upon request by the public prosecutor or one of the parties; that the accused may also request that the list of questions submitted be supplemented in order to enable the assize court to rule specifically on a question of fact discussed during oral proceedings;

14. Considering, thirdly, that the procedures governing deliberations by the Assize courts on public prosecutions are defined in a precise manner in Chapter VII of the same Title; that the provisions of that chapter, which include the contested articles, specify the order in which the questions placed before the Assize Court are to be examined, the organisation of voting and the rules according to which answers must be adopted;

15. Considering, fourthly, that it is for the president of the Assize Court and for the court where it is seized with an interlocutory challenge to ensure, subject to review by the Cour de Cassation, that the questions placed before the Assize Court are clear, precise and specific to the individual case;

16. Considering, finally, that Article 359 of the Code of Criminal Procedure has the effect of requiring that every decision by the Assize Court that is unfavourable to the accused be adopted by at least an absolute majority of jurors; that in requiring that the decision of the Assize Court on the guilt of the accused be issued solely by reading the answers provided to the questions, the legislator intended to guarantee that the decision on the public prosecution directly expresses the inner conviction of the members of the Assize Court;

17. Considering that it follows from the overall body of these guarantees relating to oral proceedings before the Assize courts and the procedures governing their deliberations that the grievance asserting that the contested provisions grant these courts an arbitrary power to rule on the guilt of an accused must be rejected;

18. Considering that the contested provision do not violate any other right or freedom guaranteed by the Constitution;

HELD :

Article 1.— Articles 349, 350, 353 and 357 of the Code of Criminal Procedure conform to the Constitution.

Article 2.— This decision shall be published in the *Journal Officiel* of the French Republic and notified in the conditions provided for under Article 23-11 of the Ordinance of 7 November 1958 referred to hereinabove.

Deliberated by the Constitutional Council in its session of 31 March 2011, sat on by: Mr Jean-Louis DEBRÉ, President, Mr Jacques BARROT, Mrs Claire BAZY MALAURIE, Mr. Guy CANIVET, Mr. Michel CHARASSE, Mr. Renaud DENOIX de SAINT MARC, Mrs Jacqueline de GUILLENCHMIDT, Mr. Hubert HAENEL and Mr. Pierre STEINMETZ.

Announced on 1 April 2011.