

The law relating to security detention and to the declaration of absence of criminal responsibility by reason of mental disorder Decision No 2008-562 DC of 21 February 2008

[...] THE CONSTITUTIONAL COUNCIL

In view of: the *Constitution*, Ordinance No 58-1067 of 7 November 1958, as amended, pertaining to the organic law concerning the Constitutional Council; the *Penal Code*, the *Criminal Procedure Code*, the Public Health Code, Law No 78-17 of 6 January 1978, as amended, relating to data processing, data files and individual liberties and the Government submissions lodged on 14 February 2008;

The Rapporteur having been heard;

- (1) The petitioning deputies and senators referred to the Constitutional Council the law relating to security detention the declaration of absence of criminal responsibility by reason of mental disorder; they challenged, in particular, whether its Articles 1, 3 and 13 were in compliance with the *Constitution* (whether they confirmed with the Constitution, Articles 1er, 3 and 13); and, in addition, the deputies challenged the provisions of its Article 12 and the senators those of its Article 4;

SECURITY DETENTION AND SECURITY SURVEILLANCE (RETENTION IN CUSTODY AND SURVEILLANCE IN CUSTODY)

(2) The Court had regard to Heading 1 in Article 1er of the law under consideration which inserted, in Title XIX, Book IV of the *Criminal Procedure Code* entitled "Procedure applicable to sex offences and protection of minor victims", a chapter III entitled "Security detention and security surveillance" composed of Articles 706-53-13 to 706-53-21 of the *Criminal Procedure Code*. These articles were intended to set out the conditions in which a person could be placed in security detention and security surveillance after the completion of a prison sentence of 15 years or more for crimes of assassination, murder, torture, or acts of barbarity, rape, kidnapping or illegal confinement, committed either on a minor victim or on an adult victim where the victim was a minor, and also where the victim was an adult provided that, in the latter case, the crime was had been committed in the prescribed aggravating circumstances.

(3) The Court had regard to the provisions of the fourth paragraph of Article 706-53-13 of the *Criminal Procedure Code*: "Security detention consists of the placement of the person in question in a socio-medico-judicial custodial facility where the person is offered, on an ongoing basis, medical, social and psychological treatment intended designed to put an end to this procedure". Such an order can only be made if the Court of Assises, which sentenced the person in question for one of the crimes listed above, has expressly foreseen the reconsideration of the person's situation at the end of his/her sentence, in view of having regard to an eventual security detention, only if this person shows "a particular dangerousness characterised by a very high risk of recidivism because the person suffers from a serious

personality disorder" and, finally, only if no other preventative measure would seem to be sufficient to prevent recidivism of the crimes listed above. Under the terms of Article 706-53-14: "The situation of the persons referred to in Article 706-53-13 is examined, at least one year before the proposed date for their release, by the Multi-disciplinary Commission responsible for the Security Measures set out in Article 763-10, in order to evaluate their level of dangerousness. To this end, the Commission requests the placement of the person, for a period of at least six weeks, in a centre specialized in the observation of persons in detention, for a multi-disciplinary assessment of dangerousness and a medical report prepared by two experts". This commission cannot recommend security detention retention in custody, by a reasoned opinion, except if it considers that these conditions have been complied with.

(4) By reason of Articles 723-37, 723-38 and 763-8 of the *Criminal Procedure Code*, which sets out the procedure for the law under challenge, the placement of a person in security surveillance consists of extending, beyond the term fixed for a measure of judicial surveillance or for a socio-judicial follow up, all or part of the obligations which the person detained is compelled to observe in accordance with either of these measures, notably, the placement of a person under mobile electronic surveillance. The provisions of Article 723-37 of the *Criminal Procedure Code*, can only be made after an expert medical evidence confirming that the dangerousness persists and in a case where "the obligations arising from the entry into the National Computerized Judicial Register of persons who have committed sexual or violent crimes would seem to be insufficient to prevent the commission from the crimes listed in Article 706-53-13" and if it "is the only way to prevent the commission from these wrongs and the probability is high". By reason of Article 706-53-19 of the same Code, security surveillance can also be ordered if the security detention has not been prolonged or if it has been ended although the person in question is at risk of committing the offences listed in Article 706-53-13.

(5) Heading I of Article 13 of the law in question sets out the circumstances in which certain persons having, as at 1 September 2008, completed a period of imprisonment for a criminal offence may, on the one hand, within the framework of a judicial surveillance, a socio-judicial follow up or a security detention, be subjected to an obligation to reside at a designated place under the mobile electronic surveillance regime and, on the other hand, may, in exceptional circumstances, be placed in security detention. Heading II envisions that security surveillance and security detention are applicable to persons who have been sentenced after the publication of the law for crimes committed before its enactment. Heading III provides that, after the publication of the law, the provisions relevant to security surveillance are immediately applicable and authorises, in the case of misunderstandings as to the obligations which result there from, a placement in security detention.

(6) According to the petitioners, from the moment it was ordered by a jurisdiction following a criminal procedure, in order to prolong, beyond the completion of the sentence initially pronounced, the deprivation of liberty of persons who had committed particularly serious offences, security detention constituted a complementary punishment having the character of a punitive sanction. It would misconceive the whole of the constitutional principles arising from Articles 8 and 9 of the *Declaration of the Rights of Man and of the Citizen* of 1789. It would violate the principle of legality of crimes and punishments, since it "would not sanction

any clearly determined offence" and it was not even limited in time. Insofar as "there are alternatives such as the socio-judicial follow-up instituted by the Law of 17 June 1998 or the judicial surveillance instituted by the Law of 12 December 2005", security detention would violate the principle of the purpose of punishment. The deprivation of liberty, when imposed on a person who has already completed his/her sentence, on the justification of risk of recidivism for future offences that the offender might eventually commit, would violate at the same time the right to the presumption of innocence, the authority of the judgment process and the *non bis in idem* principle. This imprisonment "without any set term", which could be renewed indefinitely based on the probability of recidivism, would manifestly be disproportionate. The assessment of risk would present too many uncertainties and imprecision to justify such a serious deprivation of liberty. In fact, this detention would constitute an arbitrary detention prohibited by Article 66 of the Constitution and a violation of the dignity of the human being. Finally, its application to persons sentenced condemned for crimes committed before the law was promulgated would contravene the non-retroactivity principle for serious criminal law provisions.

(7) The Court noted that the petitioning deputies maintained, in addition, that even if security detention retention in custody could be considered as a non-punitive measure, it would contravene Articles 4 and 9 of the Declaration of 1789, which prohibits unnecessary rigueur in matters of restrictions to individual liberty, personal liberty or the right to a private life. The principle of respect for the presumption of innocence would forbid that a person could be deprived of his/her liberty in the absence of clearly established guilt, whatever the procedural guarantees surrounding the implementation of this proposal.

Concerning the challenges drawn from the misconception of Article 8 of the *Declaration of 1789*:

(8) Article 8 of the Declaration of 1789 provides: "The law should provide only for penalties strictly and clearly necessary and no one can be punished other than by virtue of a law established and promulgated before the offence and legally applied". It follows that these principles should only apply to penalties and sanctions having the character of punishment.

(9) If, for persons sentenced after the law came into force, security detention could only be ordered if the Court of Assises has, in its sentencing judgment, expressly provided for the re-examination, at the end of his/her sentence, of the situation of the offender as to the likelihood of such a measure, the decision of the Court did not consist in pronouncing that the procedure would take place, but in making it possible in a case where, at when passing the sentence, other conditions could be brought into play. Detention was not decided by the Court of Assises when it was pronouncing the sentence but, at the expiration of that sentence, by the regional Court of law for detention in security. This depended not on the guilt of the person sentenced by the Court of Assises but on his/her particular dangerousness a particular risk as appreciated by the regional Court of law at the date of its decision. This was not put into place until after the completion of the sentence by the prisoner. It had as its end the forbidding and preventing of recidivism by persons suffering from a serious personality disorder. Thus, detention in security was neither a penalty nor a sanction having the character of a punishment. Security surveillance did not have this character either.

Accordingly, challenges based on an alleged misconception of Article 8 of the *Declaration of 1789* were without force.

(10) However, detention in custody, having regard to its nature as a deprivation of liberty, to the duration of this deprivation, and to the fact that it was renewable without limit and pronounced after a sentence of a Court of law, could not be applied to persons sentenced before the publication of the law, or who were the subject of sentencing following that date for crimes committed before that date. Accordingly, these parts of the provisions should be declared contrary to the *Constitution*: paragraphs 2 to 7 of Heading I of Article 13 of the law in question, its Heading II and, by consequence, its Heading IV.

The submission that the provisions were contrary to Articles 9 of the Declaration of 1789 and 66 of the *Constitution*:

(11) Article 9 of the Declaration of 1789 provides: "Any man being presumed innocent until he is found guilty; if he must be arrested, any rigueur which would not be necessary to take hold of his person should be severely punished by the law". Article 66 of the Constitution provides that: "No one can be arbitrarily detained. - Judicial authority, guardian of individual liberty, ensures the respect for this principle in the conditions foreseen by the law".

(12) Security detention and security surveillance are not repressive measures, consequently, the challenge that they violate the presumption of innocence is without force.

(13) Security detention and security surveillance must respect the principle arising from Articles 9 of the *Declaration* of 1789 and 66 of the *Constitution*, which provide that individual liberty cannot be entrained by any rigueur which is not necessary. In fact, it is incumbent, on the legislator to ensure that there is harmony between, on the one hand, the prevention of attacks on public order necessary for the safeguarding of rights and principles of constitutional value and, on the other hand, the exercise of liberties which are constitutionally guaranteed. Those liberties include the liberty to come and go and the respect for private life, protected by Articles 2 and 4 of the *Declaration* of 1789, as well as individual liberty, which Article 66 of the Constitution placed under the protection of the judicial authority. Attacks based on the exercise of these liberties should be adapted, necessary and proportionate to the objective of the prevention of crime that was the intention of the legislation.

- *As to the issue of appropriateness*

(14) By reason of the fourth paragraph of Article 706-53-13 of the *Criminal Procedure Code*, the placement of a person in a socio-medico-judicial security centre was intended to allow, by means of a medical, social and psychological care, which is offered to the person on a permanent basis, the end of this procedure. In fact, security detention is reserved for persons who present a particular risk characterised by a very high probability of recidivism because they are suffering from a serious personality disorder. Having regard to the total deprivation of liberty which results from this detention, the definition of the field of application of this procedure should be consistent with the existence of such a personality disorder.

(15) In the first instance, as set out in the terms of Article 706-53-13 of the *Criminal Procedure Code*, persons could not be the subject of a security detention order unless they had been "sentenced to a period of penal servitude for a period equal to or in excess of 15

years for the crimes, when committed on a minor victim, of assassination, murder, torture, acts of barbarity, rape, kidnapping or illegal confinement". This provision adds that it "is the same for crimes, committed on an adult, of assassination or aggravated murder, torture or acts of barbarity of an aggravated nature, aggravated rape, kidnapping and illegal confinement of an aggravated nature, as provided for in Articles 221-2, 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 *Penal Code*". Having regard to the extreme gravity of the crimes listed and the importance of the penalty pronounced by the Court of Assises, the field of application of security detention appeared to be consistent with its finality.

(16) Considering, in the second instance, that in the terms of the first two paragraphs of Article 706-53-14 of the *Criminal Procedure Code*: "The situation of persons referred to in Article 706-53-13 is examined at least one year before the date provided for their release from prison, by the Multi-disciplinary Commission responsible for Security measures provided for in Article 763-10, in order to assess their dangerousness. To this end, the Commission sought the placement of the offender, for a period of at least six weeks, in a centre specialized in observing persons in detention for the purpose of a multi-disciplinary assessment of dangerousness and a medical report prepared by two experts". These provisions constituted guarantees adapted to reserve security detention only for persons who were particularly dangerous because they suffered from a serious personality disorder.

- *As to the issue of necessity*

Firstly, having regard to the seriousness of the attack that these provisions had on individual liberty, security detention could only constitute a necessary measure if no other measure less harmful to this liberty could not sufficiently prevent the commission of acts which would seriously greatly undermine the integrity of persons.

(18)As to Articles 706-53-13 and 706-53-14 of the *Criminal Procedure Code*, security detention could only be decided used "in exceptional cases" for an offender sentenced condemned for a lengthy penalty for facts of particular gravity and if the Court of Assises had expressly foreseen in its sentencing judgment that the Court could make provision at the end of the sentence for a re-examination of the offender's situation having regard to an the eventual security detention. The dangerousness of the offender is analysed at the expiration of the penalty, by means of as part of a multi-disciplinary assessment of dangerousness and a medical report prepared by two experts. By reason of Article 706-53-14 of the *Criminal Procedure Code*, this measure could only be ordered if the Multi-disciplinary Commission for Security Measures, which proposed it, and the regional Court of law for the security detention, which makes the decision, considered that "the obligations arising from entering putting the offender's name in the National Computerized Judicial Register for Sexual and Violent Offenders, as well as the obligations resulting from an injunction to care or a placement under mobile electronic surveillance, both orders likely to be made within the framework of a follow-up of a socio-judicial nature or a judicial surveillance, appeared to be insufficient to prevent the commission of the crimes listed in Article 706-53-13" and that "this detention constituted thereby the only way to prevent the commission, of which there was a

very high probability, of these offences". These provisions guaranteed that the regional Court of law for security detention could not order a security detention other than in a case of strict necessity.

(19) Secondly, the fact of keeping the offender, beyond the time of completion of his/her sentence, in a socio-medico-judicial security centre in order that he/she should benefit from a medical, social and psychological review should be a necessary rigueur. This is the case where the condemned person had been able, during the period of his/her sentence, to benefit from care or treatments intended designed to reduce his dangerousness to the community but where those means have not produced sufficient result, either because of the state of the offender or because of his refusal to accept treatment.

(20) Heading III of Article 1 of the law in question inserts in the *Criminal Procedure Code* an Article 717-1A which provides that, in the year which follows his conviction, the offender satisfying the above conditions is placed, for a period of at least six weeks, in a specialized centre to allow an estimation of the modalities for the social and sanitary care services and to determine a "a personalised course for executing the sentence " including, if necessary, psychiatric treatment. The Heading V of this Article complements Article 717-1 of the same Code by a paragraph in the following terms: "Two years before the date provided for the release of an offender, who is likely to fall within the provisions of Article 706-53-13, the offender is called by the sentencing judge before whom he must justify the consequences following from the specially adapted medical and psychological follow-up which was proposed to him in pursuance of the second and third paragraphs of the present Article. In view of this report, the sentencing judge may, eventually, propose to the offender to have treatment in a specialised penitentiary establishment specialist penitentiary". Article 706-53-14 provides: "The situation of persons referred to in Article 706-53-13 is considered at least one year before the date provided for their release by the Multi-disciplinary Commission responsible for Safety Measures ... To this end, the Commission requests the placement of the person, for a period of at least six weeks, in a specialised service charged with the observation of persons in detention for the purpose of a multi-disciplinary assessment of dangerousness and a medical report prepared by two experts".

(21) Considering that regard for these provisions guarantees that security detention could not be avoided by care and assistance during the period of the sentence. Consequently, it will be up to the regional Court of law for security detention to verify that the offender has effectively been given the opportunity to benefit, during the period of the sentence, from being provided with the care and assistance adapted to the particular personality disorder from which the offender suffers. With this reserve, security detention applicable to persons who have been sentenced after the publication of the law under attack is necessary for the aim sought.

-As to proportionality:

(22) Security detention can only be ordered after a favourable report by the Multi-disciplinary Commission responsible for Security Detention, by a Court of law composed of three magistrates of the Court of Appeal. It is decided after both sides have been heard and, if the

offender requests it, in public. The offender is assisted by a lawyer chosen by him, or by default, who is provided for him. Three months after the decision of security detention is made, the offender placed in security detention can ask that it be terminated. In addition, it is automatically terminated if the regional Court of law for security detention has not come to a decision regarding the request within a timeframe of three months. The decisions of this Court of law can be challenged before the National Court of law for security detention whose decisions can be set aside on appeal. Finally, the provisions of Article 706-53-18 of the *Criminal Procedure Code* provide: "The regional Court of law for security detention automatically orders to immediately put an end to the security detention as soon as the conditions provided ... are no longer met". It follows from these provisions that the judicial authority reserves the possibility to interrupt at any moment the prolongation of the detention, of its own initiative or at the request of the person detained, when the circumstances of law or fact justify it. Consequently, the legislator has provided in the procedure for placement in security detention appropriate guarantees to ensure the conciliation incumbent on him between, on the one hand, individual liberty, which Article 66 of the Constitution confides to the protection of the judicial authority and, on the other hand, prevention of recidivism, which is the objective sought.

(23) Having regard to Article 706-53-16 of the *Criminal Procedure Code*, the decision of security detention is valid for the period of one year but it can be renewed, after confirmatory advice from the Multi-disciplinary Commission responsible for Security Detention. In accordance with the procedures set out by Article 706-53-15 and for the same duration as soon as the conditions provided by Article 706-53-14 are fulfilled. By reason of the penultimate paragraph in Article 723-37 of the *Criminal Procedure Code*, placement in security detention may also be renewed for the same period of time. The number of renewals is not limited. It follows from these provisions that renewal of the procedure cannot be determined unless, date of renewal, and, as appropriate, having regard to the multi-disciplinary assessment or the medical report completed with a possible prolongation of the measure in view, this is the only way to prevent the commission of the crimes listed in Article 706-53-13 of the *Criminal Procedure Code*. Thus, in order that the provision should retain its character as a tool of last resort, the legislator has understood that there should be a procedure to regularly take into account changes observed in the offender and the fact that he accepts to submit to the treatments proposed to him on a long term basis. It follows that the submission that the renewal of the procedure without limitation in time is disproportionate should be dismissed.

- ON THE ABSENCE OF CRIMINAL RESPONSIBILITY BY REASON OF MENTAL DISORDER

(24) Article 3 of the law under challenge inserts, in the *Criminal Procedure Code*, a title XXVIII entitled "Criminal procedure and decisions of absence of criminal responsibility on account of mental disorder", composed of Articles 706-119 to 706-140 of the *Criminal Procedure Code*. These Articles are set out in three chapters. The first relates to provisions applicable to the juge d'instruction and the chambre d'instruction. The second relates to provisions appropriate in the criminal Court or the Court of Assises. The third relates to safety measures which can be ordered in the case of a declaration of absence of criminal responsibility.

Article 4 co-ordinates a number of provisions of the *Criminal Procedure Code* with the creation of the declaration of absence of criminal responsibility by reason of mental disorder.

Concerning Article 3:

(25) The petitioners challenged the procedure envisaged by Article 3, asserting it misconceives the rights of the defence as well as the right to a fair trial. In this regard they criticised the fact that a judge in chambers, when he is seized with a matter, can declare at the same time that there exists sufficient evidence against a person that he has committed the wrongs with which he is charged but that he is not criminally liable for them. They denounce, in this procedure, a confusion between the functions of instruction and of judgment, undermining the presumption of innocence of the person concerned. According to them, it would follow from this, correlatively, a violation of the rights of the defence of eventual co-offenders and, in particular, of the respect of their presumption of innocence. Finally, they denounce, as contrary to the principle of the necessity of crime and punishment, the creation of an offence repressing the lack of awareness of a security measure by a person who has been declared to be criminally irresponsible.

(26) On the one hand, Article 706-125 of the *Criminal Procedure Code* provides that, when, at the end of the hearing on criminal irresponsibility by reason of mental disorder, the examining magistrate determines that the evidence against the person under examination is sufficient and that by reason of Article 122-1 of the *Penal Code*, the examining magistrate is not competent to declare that this person has committed the acts with which he is charged, nor is he competent to determine his civil liability; accordingly, the arguments invoked fail on the facts.

(27) On the other hand, the provisions of Article 706-139 of the *Criminal Procedure Code*, which are designed to prevent lack of awareness of the measures of safety ordered against a person declared to be penally irresponsible, do not derogate from the provisions of Article 122-1 of the *Criminal Code* by virtue of which the criminal irresponsibility of a person on account of his/her mental or psychological condition (by reason of the fact that the penal irresponsibility of a person by reason of his mental or psychological state) is assessed at the moment of the criminal act. Consequently, the wrongdoing provided for by Article 706-139 can only apply with regard to persons who, at a time when they were unaware of the obligations requiring the imposition of this measure of safety were penally responsible for their acts; accordingly, the argument based on the attack on the principle of necessity of offences and of punishments must be rejected.

Concerning Article 4:

(28) Heading VIII of Article 4 of the law under challenge, which complements Article 768 of the *Criminal Procedure Code*, envisages the entry in the National Computerised Judicial Register of decisions of penal irresponsibility made on the basis of mental disorder. Provision X, which complements Article 775 of the same Code, envisages that these decisions will not be placed in the Criminal Record Bulletin No 2, unless security measures provided by the

newly added Article 706-136 have been made and as long as these prohibitions have not ceased to have their effects.

(29) According to the petitioners, the provisions set out above, which would contravene the principles of necessity and proportionality enunciated by the Law of 6 January 1978 as set out above, are an attack on the legal guarantees of the right to respect for private life.

(30) It is the job of the legislator to ensure there is harmony between the respect for private life and the other constitutional exigencies which are linked, in particular, to the safeguarding of public order.

(31) A Court decision of lack of penal responsibility by reason of mental disorder does not take on the character of a sanction. When no measure of safety envisaged by Article 706-136 of the *Criminal Procedure Code* has been pronounced, this information cannot be legally necessary for the consideration of penal responsibility of the person eventually charged on the occasion of subsequent procedures. Accordingly, having regard to the finality of the Criminal Record, it should not, without conveying an unnecessary attack on the protection of private life, which is implied by Article 2 of the *Declaration* of 1789, recorded in Bulletin No 1 of the Criminal Record, except when security measures envisaged by the new Article 706-136 of the *Criminal Procedure Code* have been pronounced and as long as where the prohibitions have not ceased to have effect. Under this reservation, these provisions are not contrary to the *Constitution*.

ON THE CONDITIONAL LIBERTY OF PERSONS SENTENCED CONDEMNED TO PENAL SERVITUDE FOR LIFE

(32) Article 12 of the law under challenge complements Article 729 of the *Criminal Procedure Code* by a paragraph which provides that: "The person sentenced to penal servitude for life cannot benefit from conditional liberty other than after a favourable report from the Multi-disciplinary Commission concerning Measures of Security safety, under in the conditions set out in the second paragraph of Article 706-53-14". According to the petitioning deputies, this provision infringes upon the constitutional principle of independence of the Courts of law.

(33) Article 66 of the *Constitution* provides: "No-one can be arbitrarily detained. - Judicial authority, guardian of individual liberty, ensures the respect of this principle in the provisions) provided by the law". Article 16 of the *Declaration* of 1789 and Article 64 of the *Constitution* guarantee the independence of Courts of law as well as the specific character of their functions, which cannot be encroached upon by either the legislator or the Government or any administrative authority.

(34) By subordinating the power of a Court to the favourable opinion of an administrative commission concerning the abrogation of punishment in order to grant conditional liberty, the legislator has misconceived as much the principle of a separation of powers as that concerning the judicial authority independence. It results that there are grounds to declare as contrary to the *Constitution*, the use of the word "favourable" in Article 12 of the Law in question.

(35) There are no grounds, for the Constitutional Council, to raise automatically any question of conformity with the *Constitution*.

ORDERS:

Article 1. Are declared as contrary to the Constitution, the following provisions of the law relating to security detention and to the declaration of absence of criminal responsibility by reason of mental disorder.

- As to Article 12, the word "favourable";
- As to Article 13, paragraphs 2 to 7 of Heading I, Heading II and, consequently, Heading IV.

Article 2. With the reservations stated in Preambles 21 and 31, Articles 1, 3 and 4 and the additional parts of Articles 12 and 13 of the law relating to security detention and the declaration of absence of criminal responsibility by reason of mental disorder are declared to be conformable to the Constitution.

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

[...]

[Editor's note: For a review of legislation of this kind in England, the United States and Australia, see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (12 September 1996)].