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Decision No. 2023-1058 QPC of July 21, 2023

NOR: CSCX2320551S

JORF n°0168 of July 22, 2023

Text No. 79

Initial version

(Mr. ROMEO NAMBU MPONGO)

A priority question of constitutionality. This question was asked for Mr. Roméo NAMBU MPONGO by SAS Hannotin lawyers, lawyer at the Council of State and the Court of Cassation. It was registered at the general secretariat of the Constitutional Council under number 2023-1058 QPC. It relates to compliance with the rights and freedoms that the Constitution guarantees in the first paragraph of article 222-23-1 of the penal code and in article 222-23-3 of the same code, in their wording resulting from the law. No. 2021-478 of April 21, 2021 aimed at protecting minors from sexual crimes and incest.

In view of the following texts:

- the Constitution ; -

Ordinance No. 58-1067 of November 7, 1958 relating to the organic law on the Constitutional Council; - the Penal Code ;

- Law No. 2021-478

of April 21, 2021 aimed at protecting minors from sexual crimes and incest; - the regulation of February 4, 2010 on the procedure followed before the Constitutional Council for priority questions of constitutionality;

In view of the following documents:

- the observations presented for the applicant by SAS Hannotin lawyers and Messrs Louis Heloun and Antoine Ory, lawyers at the Paris bar, recorded on June 7, 2023; - the observations presented by the Prime

Minister, recorded on June 9, 2023; - the observations in intervention presented for Mr. Pierre-Ange

MICHEL by Me Antonin Gravelin-Rodriguez, lawyer at the Paris bar, recorded on June 12, 2023; - the second observations presented for the applicant by SAS Hannotin lawyers and Mes Heloun et

Ory, recorded on June 23, 2023; - other documents produced and attached to the file; - the decision by which Ms. Véronique Malbec felt she had to abstain from sitting;

After hearing Messrs Heloun and Ory, for the applicant, Me Gravelin-Rodriguez, for Mr Pierre-Ange MICHEL, and Mr. Benoît Camguilhem, appointed by the Prime Minister, at the public hearing on July 4, 2023; In view of the following documents:

- the deliberation note presented by the Prime Minister, recorded on July 7, 2023;



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- the note of deliberation presented for the applicant by SAS Hannotin lawyers and Mes Heloun et Ory, recorded on July 12, 2023;

And after hearing the rapporteur; The
Constitutional Council based itself on the following: 1.

The first paragraph of article 222-23-1 of the penal code, in its wording resulting from the law of April 21, 2021 mentioned above, provides: "Except

the case provided for in article 222-23, any act of sexual penetration, of whatever nature, or any oral-genital act committed by an adult on the person of a minor aged fifteen or committed against the perpetrator by the minor, when the age difference between the adult and the minor is at least five years."

2. Article 222-23-3 of the penal code, in the same wording, provides: "Rapes defined in articles 222-23-1 and 222-23-2 are punishable by twenty years of criminal imprisonment".

3. The applicant first argues that, by establishing an offense of rape of a minor under fifteen years of age punishable without proof that the sexual act was committed with violence, coercion, threat or surprise, these provisions, which do not thus make the absence of consent of the minor one of the constituent elements of the offense, would establish an irrefutable presumption of guilt contrary to the principle of the presumption of innocence and the rights of the defense.

4. He also maintains, on the one hand, that the guilt of the author would result from the simple observation of the materiality of the facts, without there being any need for the prosecuting authority to provide proof of the intention of the adult to impose a sexual act on a minor, and, on the other hand, that the victim's fifteen-year minority would be both a constitutive element and an aggravating circumstance of the offense. This would result in a lack of understanding of the principle of legality of offenses and penalties.

5. The applicant then argues that the age thresholds provided for by these provisions would lead to people being treated differently although, according to him, they are placed in comparable situations. This would result in a disregard of the principle of necessity of offenses and penalties as well as the principle of equality before the law.

6. Finally, he argues that, by imposing the same sentence of twenty years of criminal imprisonment for sexual acts between an adult and a minor under fifteen years of age, whether or not they are committed with violence, threat, coercion or surprise, these provisions disregard the principles of necessity and proportionality of penalties.

7. Consequently, the priority question of constitutionality concerns the first paragraph of article 222-23-1 of the penal code and the reference "222-23-1" appearing in article 222-23-3 of the same code .

- On the intervention:

8. It follows from the second paragraph of article 6 of the internal regulations of February 4, 2010 mentioned above that a person demonstrating a special interest must send his observations in intervention to the general secretariat of the Constitutional Council before the date set for the presentation of the first observations of the parties and authorities mentioned in article 1 of this regulation.

9. The third paragraph of this same article 6, however, provides that "Exceeding the time limit expired on this date is not enforceable against a party who has filed before a court of the Council of State or the Court of Cassation, before the Council of State or before the Court of Cassation a priority question of constitutionality calling into question a legislative provision of which the Constitutional Council is already seized when, for this reason, this question has not been referred or transmitted.

10. In the present case, Mr. Pierre-Ange MICHEL sent his observations in intervention to the general secretariat of the Constitutional Council on June 12, 2023, i.e. after the date of presentation of the first observations set for June 9, 2023.

11. However, Mr. Pierre-Ange MICHEL, who allegedly asked the investigating chamber a priority question of



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constitutionality relating to the contested provisions, does not justify that this court would have refused to transmit this question to the Court of Cassation on the grounds that the Constitutional Council was already seized of these provisions.

12. Consequently, his intervention is not admitted.

- On the background :

13. Firstly, under Article 9 of the Declaration of the Rights of Man and of the Citizen of 1789, every man is presumed innocent until proven guilty. It follows that in principle the legislator cannot establish a presumption of guilt in criminal matters.

14. Under the terms of article 222-23 of the penal code, any act of sexual penetration, of whatever nature, or any oral-genital act committed on the person of another or on the person of the perpetrator by violence, coercion, threat or surprise is rape. This crime is punishable by fifteen years' imprisonment and, in accordance with 2° of article 222-24 of the same code, by twenty years' imprisonment when committed against a minor under fifteen years of age.

15. The contested provisions establish a new offense in order to punish with twenty years of criminal imprisonment any act of sexual or oral-genital penetration committed by an adult on the person of a minor of fifteen years, or committed on the author by the minor, when the age difference between the adult and the minor is at least five years.

16. By adopting these provisions, the legislator prohibited any act of sexual or oral-genital penetration between an adult and a minor aged fifteen, when the age difference between them is at least five years. On the one hand, this incrimination, the characterization of which does not require that these acts be committed with violence, coercion, threat or surprise, is not based on a presumption of absence of consent of the victim. On the other hand, it is up to the prosecuting authorities to provide proof of all of its constituent elements.

17. Therefore, the contested provisions have neither the aim nor the effect of establishing a presumption of guilt. The complaint based on disregard for the principle of the presumption of innocence must therefore be dismissed. The same applies, for the same reasons, to that based on disregard for the rights of the defense.

18. Secondly, the legislator is under Article 34 of the Constitution, as well as the principle of legality of offenses and penalties which results from Article 8 of the Declaration of 1789, the obligation to establish itself the scope of application of criminal law and to define crimes and offenses in sufficiently clear and precise terms to exclude arbitrariness.

19. On the one hand, the contested provisions do not have the effect of derogating from the principle, provided for by article 121-3 of the penal code, according to which there is no crime without the intention to commit it, the sole material imputability of the punished acts is not sufficient to characterize the offense.

20. On the other hand, it follows from the very terms of the contested provisions that the victim's fifteen-year minority, which is a constituent element of the offense, is not, at the same time, an aggravating circumstance of this same offense.

21. The complaint based on disregard for the principle of legality of offenses and penalties must therefore be dismissed.

22. Thirdly, under the terms of article 6 of the Declaration of 1789, the law "must be the same for all, whether it protects or punishes". The principle of equality before criminal law does not prevent a differentiation being made by the legislator between actions of a different nature.

23. If the facts punished by the contested provisions are likely to fall within the scope of the crime of aggravated rape committed against a minor under fifteen years of age, provided for in articles 222-23 and 222-24 of the penal code, they are punished, unlike those punished by the latter offense, even when they are committed without violence, coercion, threat or surprise and assume that there exists between the adult perpetrator and the minor victim an age difference of at least five years.

24. It follows that these two offenses punish actions of a different nature. The complaint based on disregard for the principle of equality before criminal law must therefore be dismissed.

25. Finally, article 8 of the Declaration of 1789 states: "The law must only establish penalties strictly and



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obviously necessary.” Article 61-1 of the Constitution does not confer on the Constitutional Council a general power of appreciation and decision of the same nature as that of Parliament, but only gives it competence to rule on the conformity of the legislative provisions submitted for its examination to the rights and freedoms that the Constitution guarantees. If the necessity of the penalties attached to the offenses falls within the discretionary power of the legislator, it is up to the Constitutional Council to ensure the absence of manifest disproportion between the offense and the penalty incurred.

26. By punishing with a penalty of twenty years of criminal imprisonment any act of sexual or oral-genital penetration committed by an adult on a minor of fifteen years or committed on the perpetrator by the minor, when the age difference between them is at least five years, the legislator, who intended to strengthen the protection of these minor victims of sexual offenses, did not institute a manifestly disproportionate sentence.

27. Furthermore, the methods for punishing this offense have neither the aim nor the effect of deviating from the principle of the individualization of penalties entrusted to the judge in accordance with article 8 of the Declaration of 1789.

28. Consequently, the complaint based on failure to observe the principles of necessity and proportionality of penalties must be dismissed.

29. It follows from all of the above that the contested provisions, which do not disregard any other right or freedom that the Constitution guarantees, must be declared to be in conformity with the Constitution.

The Constitutional Council decides:

Article 1

The first paragraph of article 222-23-1 of the penal code and the reference “222-23-1” appearing in article 222-23-3 of the same code, in their wording resulting from law no. 2021- 478 of April 21, 2021 aimed at protecting minors from sexual crimes and incest, are consistent with the Constitution.

Article 2

This decision will be published in the Official Journal of the French Republic and notified under the conditions provided for in article 23-11 of the aforementioned order of November 7, 1958.

Judged by the Constitutional Council in its session of July 20, 2023, where sat: Mr. Laurent FABIUS, President, Ms. Jacqueline GOURAULT, Mr. Alain JUPPÉ, Ms. Corinne LUQUIENS, MM. Jacques MÉZARD, François PILLET, Michel PINAULT and François SÉNERS.

Made public on July 21, 2023.