Protecting the Offender or Protecting the Judge?

The Legislative and Constitutional Struggle over Minimum Sentences in France

By Trevor Shaw[1]

1. Introduction

To the extent that common-law lawyers know about French criminal law, it is as a contrasting model to their own adversarial process. Comparative studies focus on procedural differences (the role of the *juge d'instruction*)[2] or substantive ones (levels of fault and defences)[3] but typically leave sentencing untouched, as if it were a mere after-effect of a much more interesting trial process.

The French themselves place sentencing at the core of criminal law. Sentencing is "the emblem of the criminal trial".[4] As one author put it: "One cannot conceivably understand criminal law without focusing on what makes it unique: the sentence."[5] In the taxonomy of French criminal law, sentencing is included in "le droit pénal général".[6] Thus the *Code Pénal* of 1994 includes sentencing in its opening "Dispositions générales".[7]

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[2] See for instance J. Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (2005) Hart Publishing [an otherwise detailed comparison that does not deal with sentencing or even include the term in its index]; S.C. Thaman, *Comparative Criminal Procedure* (2002) Carolina Academic Press [an equally thorough study but with no reference to sentencing]. Sentencing is dealt with in P. Beliveau & J. Pradel, *La Justice pénale dans le droits canadien et français,* 2nd ed. (2007)., Bruylant & Yvon Blais, pp. 645-678, para. 1921-2019 [but this is consistent with the "unprecedented" nature of the work and its completeness: "Préface de la première édition" (1986) reproduced at p. vii].

[3] J. Pradel & A. Cadoppi, *Droit pénal général comparé* (2005), Editions Cujas, p. 203 [in French legal nomenclature "general" criminal law includes sentencing but the editors chose to focus on self-defence, necessity, euthanasia, attempts, complicity, *mens rea*, drunkness and mistake of law].

[4] J. Leblois-Happe, "Le prononcé de la peine par le juge" in *Vers un nouveau procès pénal?* (2008) Société de législation comparée 201 at pp. 201-02.

[5] F. Ghelfi, "Les principles directeurs du droit de la peine à l'épreuve de la QPC" in Christine Courti, ed., *La QPC et la matiere penale* (2012) Bruylant at p. 76.

[6] J. Pradel, *Droit Pénal*, Tome 1 (1994) Editions Cujas, p. 667, para. 633. In contrast, general Canadian texts on criminal law do not include references to sentencing : G. Côté-Harper, P. Rainville and J. Turgeon, *Traité de droit penal canadien* (1998); D. Stuart, *Canadian Criminal Law: A Treatise*, 6th ed. (2011) Carswell; E. Colvin & S. Anand, *Principles of Criminal Law*, 3rd ed. (2007) Carswell; M. Manning & P. Sankoof, *Manning, Mewett & Sankoff - Criminal Law*, 4th ed. (2009) LexisNexis.

[7] *Loi No. 92-683 du 22 juillet 1992* (as amended), Title III, art. 131-1 to 133-17.

Yet despite sentencing's prominent place within the codification of criminal law, there are few legislative limits on French judges' sentencing discretion. However, recently enacted minimum penalties have challenged this. In turn, these minimums have been challenged under the constitution. The sentencing model is therefore under tension. This has produced some expected results (judicial interpretive resistance) and some innovation (a new constitutional principle). Surprisingly, it has raised the question of where the focus of the mandatory minimum debate should be – on the person being punished, on process or on which institution should have the last word on sentencing.

2. Statutory limits on minimum sentences

On its face, the French *Code Pénal* of 1994 marked a sea-change in legislative minimums. The previous *Code*, first promulgated in 1810, established both minimums and maximum penalties for all offences. The 1994 version abolished the minimums giving judges wide discretion to impose sentences with only maximum set out.[8] However, in practice, the shift was not revolutionary. The old minimums could be avoided by finding that certain mitigating circumstances were present and this practice became so routine that *de facto* the minimums were hardly ever taken into account. In effect, the 1994 Code merely recognized the judicial reality of a basically open sentencing canvas.[9]

This latitude granted to trials courts when sentencing is remarkable in an otherwise codified, civilian system. As one French commentator put it : "the imposition of sentence is more a matter for the trier of fact than the business of the legislator or the *Cour de Cassation*."[10]

However, this would change in 2005 and again in 2007 when the government introduced a series of minimum sentences for repeat offenders. A person committing a second offence with a maximum of three years would have to serve a minimum of one year. If the maximum was five years, then the minimum was two years and so forth. For a top-end recidivist committing an offence eligible for life imprisonment, the minimum

[8] There was one residual minimum left in 1994 – where the maximum was life, the minimum was either one or two years (art. 132-18) but the court could suspend its application: P. Beliveau & J. Pradel, *op. cit.*, p. 660, para. 1961, 1963.
[9] F. Zocchetto, *Sénat - Rapport No. 171* (2005), pp. 131-32 (Annexe 3).
[10] J. Leblois-Happe, *op. cit.*, at p. 202, 203

jumped from a year to 15 years.[11] The scheme was not absolutist and included two levels of possible exemptions:

> However, the court may impose a sentence below these thresholds taking into consideration the circumstances of the offence, the personal circumstances of its perpetrator or the guarantees of integration or reintegration submitted by him.
>
> When a crime is committed again in a state of recidivism, the court may only impose a sentence below these thresholds if the accused presents exceptional guarantees of integration or reintegration.[12]

Further amendments in 2011 also included minimum penalties for certain serious violent offences (regardless of whether they involved repeat offenders). Only the second, more onerous exemption applies to these minimums ("exceptional guarantees" needed).[13]

However, these new minimums are now all under legislative attack. The *Assemblée Nationale* passed their repeal on June 10, 2014 on the grounds that they had not reduced recidivism despite longer average sentences.[14]

In addition, as time passed, the judiciary was increasingly invoking the exemptions to these new *peines plancher* (floor sentences). Between 2007 and 2012, the percentage of recidivists not receiving the minimum climbed from an already high 49% to 63%.[15] Given the legislative presumption in favour of the minimum and assuming that French delinquents had not become substantially less dangerous since 2007, these numbers suggest judicial resistance to the fettering of their discretion. This resistance is shielded by the fact that French courts are not obliged to justify their sentences. Indeed, legislative efforts to require courts to issues reasons when imposing certain sentences have been consistently watered down by judicial interpretation.[16]

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[11] *Code pénal*, art. 132-18-1 and 132-19-1 amended by *Loi n°2005-1549 du 12 décembre 2005* and *Loi n°2007-1198 du 10 août 2007*

[12] Author's translation of art. 132-18-1 (similar exemptions exist under art. 132-19-1)

[13] *Code pénal*, art. 132-19-2 as amended by *Loi n°2011-267 du 14 mars 2011*

[14] *Projet de loi relatif à la prévention de la récidive et à l'individualisation des peines*, n° 1413, art. 3; D. Raimbourg, *Assemblée Nationale - Rapport no. 1974* (2014) pp. 55, 172-192.

[15] F. Leturq, *Peines planchers : application et impact de la loi du 10 août 2007*, (2012) Infostat Justice, no. 118 at p. 2, table 1 (2007 : 50.1%; 2008 : 42.8%; 2009 : 41.4%; 2010 : 38.9%); G. Fenech in D. Raimbourg, *op. cit.*, at p. 92 (2011 : 37%); slightly different figures in J.-P. Jean "Récidive: évolutions législatives et politique pénale, évaluation" presented at *Conférence de consensus sur la prévention de la récidive* (2013 – Poitiers) at p. 16 (2008 : 49.1%); (2009 : 48.2%); (2010 : 43.1%); (2011 : 44.2%); (2012 (first 10 months) : 36.2%)

[16] J. Leblois-Happe, *op. cit.*, at pp. 213-15

The bill repealing the minimums is now before the *Sénat*. If this repeal were enacted, it would be a return to entrusting judges with a wide sentencing discretion. This is a long-standing practice in France, established in reaction to the fixed sentences imposed the harsh revolutionary *Code pénal* of 1791.[17] But an even older document is required to understand the next step in the history of the modern minimums: the *Déclaration des droits de l'Homme et du Citoyen* of 1789.

3. Constitutional limits on minimum sentences

Unlike the constitutions of the United States[18] and Canada[19] or the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[20] the French constitution does not explicitly prohibit cruel and unusual punishments. Rather the *Déclaration* of 1789, art. 8 states :

> Law must prescribe only punishments which are strictly and evidently necessary…[21]

This provision echoed Cesare Beccaria's precept that "every act of authority of one man over another that does not derive from absolute necessity is tyrannical"[22].

Article 8 retains the character of this precept. It establishes a fundamental relationship of necessity between punishments and the public good and it covers all possible sentences. It is about the very structure of liberty in society. In sharp contrast, constitutional or quasi-constitutional prohibitions on cruel and unusual punishments

[17] J. Leblois-Happe, *op. cit*., at p. 203 and F. Zocchetto, *op. cit*., at p. 132 (Annexe 3).
[18] *The Bill of Rights*, Amendment VII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
[19] The *Canadian Charter of Rights and Freedoms*, s. 12: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Section 7 of the same *Charter* enshrines principles of fundamental justice that have been held to include a notion of proportionality between the mental fault requirement and the elements of the offence (which in turn has implications for the sentence): D. Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed. (2014) at pp. 90-92
[20] Art. 3 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The` author recognizes that this article applies to France. Indeed, an important European Human Rights Court decision on the need for graduated penalties emanated from a French driver disqualification case albeit under art. 6 of the *Convention*: *Malige v. France*, Decision 68/1997/852/1059 (Eur.HR.Crt) at para. 49. However, the recent challenges to legislative minimums have been brought invoking the Constitution before the *Conseil* and not the Convention before the regular courts.
[21] *Décision no. 2007-554 DC* [official translation]at para. 6
[22] *Of Crimes and Punishments and other writings*, (1764) trans. A. Thomas and Jeremy Parzen (2008) U of T Press at p. 11; cited in French translation in F. Ghelfi, *op. cit.*, p. 76

found elsewhere read like thou-shall-not Commandments. They isolate out the most extreme sentences for special scrutiny and do not speak directly to wider principles.

Accordingly, French constitutional law becomes a unique crucible to determine whether, despite no explicit protection from extreme sentences, the same basic analysis of mandatory minimums seen in other countries appears. The answer is yes but with a twist, a twist towards a broader defence of the role of the judiciary in sentencing.

In 2008, the French constitution was amended to give individuals, for the first time, the right to seek to declare laws invalid on constitutional grounds. Previously, only parliamentarians could refer laws to the *Conseil Constitutionnel* (Constitutional Court) and only before those laws took effect.[23] Though mandatory minimums continued to be challenged by parliamentary reference, individual cases also started to accrue. This individual mandate (called the *question prioritaire de constitutionnalité* (QPC)) had the effect on reinforcing the Conseil's control over sentencing principles.[24]

Four recent constitutional decisions illustrate this and can be grouped into two pairings: two challenges to the mandatory minimum sentences (those described above) and two challenges to lesser, mandatory ancillary penalties.

a. Challenges to Mandatory Minimums

In 2007, a parliamentary reference attacked the constitutionality of mandatory minimums enacted that year for repeat offenders.[25] Under the necessity principle, the *Conseil constitutionel* in *Décision no. 2007-554 DC* found that it did not have a "general power of appreciation" over sentencing legislation. Rather its task was limited to ensuring "that a punishment provided for is not patently disproportionate to the offence involved."[26] Thus, even though the words of art. 8 of the *Déclaration* posited a continuous, incremental relationship between the penalty and necessity, the *Conseil* announced a cut-off for review and a deferential one at that. It is a standard of disproportionality that aligns France with other jurisdictions that have explicit *Grundnorm* prohibitions on cruel and unusual penalities.[27]

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[23] *Constitution of the 5th Republic*, art. 61 and 61-1 as amended by the *Loi constitutionnelle n°2008-724 du 23 juillet 2008,* art. 28, 29
[24] F. Ghelfi, *op. cit.,* p. 75
[25] *Décision no. 2007-554 DC* [official translation]
[26] *supra,* at para. 7-8
[27] P. Béliveau & P. Pradel, *op. cit.*, p. 657, para. 1954 (Canada); I.P. Farrell "Abandoning Objective Indicia" (2013), 122 *Yale Law Journal (Online)* 303 at pp. 306, 314-15

The *Sages* (as members of the *Conseil* are referred to) would go on to rule that the legislation was constitutional. The minimums' were triggered by "a particularly serious objective circumstance" – repeat offending.[28] In addition, fixed at roughly a third of the normal maximum sentences, they met the necessity test.

But the parliamentarians behind the reference put forward another argument. They submitted that within art. 8 was the principle that punishments needed to be tailored to the "personality" (personal circumstances) of the offender. The principle of individualisation had been previously rejected by the *Conseil* as a constitutional value but this time it was accepted.[29] However, the decision noted that :

> 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.

The *Conseil* went on to explain that the law was not contrary to the *Déclaration* because judges retained the power to sentence below the minimum based on :

- the pre-existing power to suspend sentences in certain cases under art. 132-40 and 132-41 of the *Code penal*;
- art. 122-1 that allowed for further reductions in cases of mental disorder; and
- the two levels of exemption contained in the amendments themselves (personal circumstances and the "exceptional guarantees").

These exemptions were "worded in sufficiently clear and precise terms, [and] do not therefore infringe the principle of the tailoring of punishments".[30]

A second parliamentary reference made in opposition to the 2011 minimums on violent offences also failed. The *Conseil* repeated its standard of deference:

> whereas the necessity of the penalties associated with offences falls within the margin of appreciation of the legislator, it is for the Constitutional Court to ensure that the sentence liable to be imposed is not manifestly disproportionate with the offence[31]

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[28] *Décision no. 2007-554 DC*, at para. 10

[29] J. Pradel, *op. cit.*, at p. 183, para. 151; F. Ghelfi, *op. cit.*, at pp. 91-93 with reference to a 2005 decision where the principle came up in the context of a review of guilty plea procedures: *Decision No. 2005-520 DC.*

[30] *Décision no. 2007-554 DC, supra*, para. 14-19.

The *Sages* then looked for objective markers of seriousness to justify these new minimums:

> 23. Considering in the first place that the contested provision only applies to attacks against the physical integrity of other persons characterised by at least one or more aggravating circumstance and punished by a term of imprisonment of at least seven years; that it only establishes the principle of minimum sentences of at least eighteen months' or two years' imprisonment for particularly serious offences.

The ruling then assessed whether there was any residual sentencing flexibility left. The 2011 amendments only included the exemption for "exceptional guarantees" of safety and not the less onerous personal circumstances one. Nonetheless, the Conseil seem satisfied with the remaining exemption and with the continued application of the suspended sentence and mental disordered provisions (already highlighted in its 2007 ruling).[32]

Critics were disappointed in these twin results upholding the new minimums. There was only a "restrained" or "timid" control over disproportionality by the highest constitutional court.[33] On the other hand, the results can be read as rulings that mandatory minimums will only be upheld if they are, in fact, not mandatory given the Conseil's emphasis on the remaining escape hatches to the scheme.

Regardless of which reading one takes, it is clear that the Conseil spent more of its energy worrying about the ability to individualize sentences than the minimums' severity *per se*. This pre-occupation can be seen in a second set of recent constitutional decisions.

b. Challenges to Mandatory Ancillary Penalties

The first pair of decisions reviewed above were parliamentary references relating to amendments that introduced significant minimum sentences of incarceration. The next pair involves individual litigants disputing the constitutionality of ancillary penalties that flowed from certain convictions. These challenges have seen some success.

In 2010, the *Conseil* struck out, under art. 8, a provision mandating that tax evaders post copies of the judgment convicting them on designated billboards at city hall

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[31] *Decision no. 2011-625 DC* at para. 22 [official translation]
[32] supra, at para. 24-25
[33] F. Ghelfi, *op. cit.*, at pp. 76, 85, 102

and on the door of their residence for three months. The ruling did not base itself on the harshness of the measure but rather on the fact that the judge could not vary the duration of the posting or where it was posted. The judge's discretion to permit the posting of excerpts (instead of the reasons for conviction in their entirely) was held to be insufficient. The principle of individualization found in art. 8 required a judge to assess the particular situation before the court:

> The principle of the tailoring of punishments which derives from this Article implies that the punishment consisting in the publication of judgments in the press and their posting on notice boards or designated premises cannot be imposed unless a judge has expressly ordered the same, taking into account the specific circumstances of the case in hand. [34]

In a separate 2010 challenge, a provision depriving public officials of the right to vote or run for office was deemed unconstitutional. Under the provision, politicians lost their electoral rights for five years upon conviction for certain corruption-related offences. This ineligibility was imposed by statute and the *Conseil* found it to be punitive in nature. Article 8 therefore required that it be imposed by a judge, taking into account the situation of each offender. The after-the-fact ability to apply to court to have the ineligibility modified or shortened was not enough.[35]

Admittedly, the ancillary penalty decisions are not ones where emphasizing the harshness of punishment would get the claimant much mileage. However, it is still remarkable that the *Conseil*'s attention moved from the penalty to the mechanics of its imposition or, rather, to who imposes it and when. The lynch-pin to constitutionality appears to be that the judge must have some residual discretion before the penalty is imposed (almost regardless of its nature). In other words, the focus of art. 8 has shifted from the punishment to the status of the punisher. The preservation of judicial power is either the intent of this shift or, at the very least, its result. The *Conseil* achieves this by entrenching within art. 8 not just concerns about disproportionality but also requirement of individualisation which, in turn, requires a constitutionally protected individualizer.

To paraphrase a French commentator on this topic, the *Sages* have taken away Parliament's power to individualize sentences and vested it in the judiciary.[36] The case

[34] *Decision no. 2010-72/75/82 QPC* at para. 3-5
[35] *Decision no. 2010-6/7 QPC* at para. 4-5 and *Code pénal*, art. 132-21.
[36] F. Ghelfi, *op. cit*., at p. 75

law on mandatory minimum ends up mandating "minimum guarantees for the judge in the choice of sentence".[37]

4. Conclusion

It is an open question whether the inversion of the analysis from the punished to the punisher arises because the French Constitution contains no explicit prohibition on cruel and unusual punishment. The wording of art. 8 (the "Law must prescribe only punishments which are strictly and evidently necessary") is open enough that the focus could have gone either way. Indeed, the *Conseil* echoes disproportionality tests found jurisdictions that have direct prohibitions on excessive sentences.

Yet focusing on the procedure and need for judicial intervention brings a certain level of inter-institutional honesty into the debate about mandatory minimums. It reminds us that all discussions of sentencing – even two centuries after Beccari – are still about the attribution and rationalization of state power.

[37] *Op. cit.*, at p. 91 [emphasis added]. As evidence of this, the *Conseil* is more lenient on obligatory penalties where they are at least pronounced by the judge (even if there is no real individualization) as opposed to those imposed automatically by statute: *op. cit.*, at p. 93-96, 98-101.