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Individualization of Punishment In French Law

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More than a hundred years after Saleilles, the individualization of the sentence remains a very important topic. The principle of individualization of punishments also referred to as the principle of personalization of sentences, means that the sentences imposed by the judge must be proportionate to the offence actually committed. It requires that the punishments be adapted to the person who committed the offence, which implies taking into account his or her physical, social and family situation, personality and the circumstances in which the offence was committed. The motives, in particular, play an important role here. Individualization can modulate both the length of the sentence, which is based on the idea of punishment, and the nature and penalty system, which aims at the preservation of society.

1. Introduction. Individualization is generally defined as the «establishing a balance between the punishment of the offense and the individual's personality and to the particular situation of a person ». It is sometimes preferred to use the term personalization in reference, not only to natural persons, but also to legal persons. Personalization is then defined as «the action of adapting a solution to the personality of the one it concerns, more generally to all the circumstances of a species ». In these definitions, emphasis is placed on the offender's personality, but individualization must also be made in relation to the material circumstances of each species. Given the need to take into account the two elements, which is best placed to individualize the sentence?
Three actors are able to carry out this operation; hence, the existence of three kinds of individualization, One that would be legal, made as a package and in advance by law; the other, which would be judicial, and made by the judge.

Finally, the third, made in the course of punishment by the administration, and that would be the administrative individualization[1].
The first type: Legal individualization is a consequence of the principle of legality. The sentence must be designated by the legislature in a text that specifies its nature, quantum and establishes the legal regime. The legislature also determines the applicable penalties for each offence. The sentences are then reached in proportion to the severity attached to the offence and the circumstances surrounding it. The individualization carried out by the law is, therefore, an objective individualization, carried out according to the damage produced by the sanctioned behavior[2]. On the other hand, the legislature cannot know the personality of the offender, an idea which was thus expressed by Saleilles « the law can only provide for species, it does not know individuals ».
It is to the second type of individualization, the judicial individualization, that the mission is to adapt the sentence to the personality of the offender. This individualization is therefore subjective, carried out within the limits laid down by the law in the legal individualization. Judicial individualization is one of the fundamental principles recognized by the laws of the French Republic since a decision of the French Constitutional Council issued on 19 January 1981[3]. Article 132-24 of the French Penal Code in paragraphs (1) and (2) sets out the various interests to be reconciled by the judge in the context of his mission of Individualization: « Within the limits laid down by law, the Court shall pronounce the sentences and set their rules according to the circumstances of the offence and the personality of the perpetrator. [...] The nature, quantum and regime of pronounced sentences are fixed in such a way as to reconcile the effective protection of society, the sanction of the convicted person and the interests of the victim with the need to promote the reintegration of the condemned and notify the commission of new offences ».
On reading this article it appears that the judge individualizes the sanction according to the person of the offender and the circumstances of the offence. In the case of the person of the offender, the adjustment may be favorable or unfavorable. In his favor, the judge will take into account his psychological weakness and his perception of the facts at the time of the execution of the offence[4]. In this sense, the law of Minors establishes a general cause of mitiga-

[1] HULSROJ, *The principle of proportionality*, Springer Publishing House, Hornbaek, 2013, p. 29.
[2] AIRIAU, « Motivation de la peine criminelle, en avant toute ! », *Gaz. Pal.*, 10 avril 2018, n°14, p. 18.
[3] French Constitutional Council, 19 Jan. 1981, No. 80-127 DC: OJ 22 Jan. 1981, p. 308.
[4] BACHELET, « Généralisation de l'obligation de motivation des peines : les amendes contraventionnelles également concernées », *Gaz. Pal.,* 26 juin 2018, n°23, p. 23.

tion in favor of the minor and inspires the judge who is obliged to adapt his decision based on his personality. Adaptation can also be done at the expense of the author. For example, the judge will be able to take into account the criminal history of the author and in particular the state of recidivism from which a higher probability may be inferred that he still commits an offence. But the judge must also take into account the offence committed, the seriousness of the act which repercussions on the sanction. The judge may also take into account the motives of the author[5].

There is finally a third type of individualization, administrative individualization. It is then the prison administration that makes this individualization of a subjective nature. This power of individualization is exercised, as is judicial individualization, within the limits laid down by law. In the execution of the sentence, the sentencing judge will thus be able to grant an external placement, the semi-liberty, or even reductions of sentences[6].

These three types of individualization are complementary for the reason that they respond to different functions. Because of the intervention of these three different actors in the process of individualization, the sentence executed is often far from the maximas originally provided for by law according to the objective severity of the offence. In the course of history, two kinds of individualization have been alternately dominant, judicial individualization and legal individualization. From the 14th century onwards, the judges had freed themselves from the custom which formed a too rigid framework, leaving the judge no room for maneuver and thus preventing any variability of the sentence, whether objective or subjective[7].

The principle of legality of offences and sentences is then formulated by Montesquieu and Beccaria, the latter affirming that « it is only the law to award the punishment of crimes, and [...] the right to make criminal laws can only reside in the legislature, which represents the whole society united by the Social contract ». The principle of legality is devoted on 26 august 1789 to article 8 of the Declaration of the Rights of man and of the citizen which defines its content but not its scope.

The intermediary law gives the principle an extremely rigid scope by choosing a system of fixed sentences which leaves no power for judges. The sentence

[5] R. CARIO, *Justice Restaurative, principes et promesses*, 2e éd., L'Harmattan, Paris, 2010, p. 42.

[6] W. KAUFMAN, *Honor and revenge: a theory of punishment*, Springer Publishing House, London, 2013, p. 30.

[7] N. EMILIOU, *The Principle of Proportionality in European Law. A comparative study*, Kluwer Law Inetrnational, London, 1996, p. 37.

was fixed according to the severity of the offence and left no room for subjective individualization. However, this system quickly showed its limits, as jurors often preferred to acquit rather than to sentence them to a sentence they considered excessive. That is why the penal Code of 1810 put in place a more flexible legality, allowing the judge to adapt the sentence between a minimum and a legal maximum to which are added aggravating or extenuating circumstances. The law then becomes a framework within which the judge must pronounce a sentence[8].

Since then, judicial individualization has steadily gained ground on legal individualization, the judge having seen his freedom of appreciation steadily increased and the range of sentences proposed by the legislature having expanded. In accordance with the principle of the legality of the penalty, its powers are, nevertheless, governed by the law. The legislature must therefore impose the sentences to set limits on the powers of the judges, but is itself framed in this mission by the principle of necessity, derived from the principle of legality. The penalty that he establishes must therefore satisfy a certain logic; it must be proportionate to the seriousness of the offence. It is in this sense that the legislature will achieve an individualization of the sentence, objective individualization. Therefore, what exactly are these limits imposed on the legislature and how will he assess the seriousness of the behaviors in order to set a coherent sentence?

The legislature will proceed to the determination of the penalties (1) applicable for each offence in accordance with the principles of legality and necessity. But the study of the various sentences reveals the inconsistencies of the legislature in the context of this mission (2), inconsistencies resulting from ignorance by the legislature of the principles normally to govern the legal individualization.

1. The legislature's role in determining criminal sentences

The principle of legality, the fundamental principle of criminal law, requires that sentences, as well as incriminations, be set out in a text of legal origin. The sentence must, therefore, be fixed by the legislature in accordance with this principle (1.1.), with the legislature laying down a framework in which the powers of the judge will be exercised. To this end, the legislature has tools (1.2) allowing it to respect a certain proportion between the severity of the disorder and the sentence.

1.1. A determination imposed by the principle of legality

[8] S. MELANDER, « Ultima ratio in european criminal law », *European Criminal law Review*, no. 1, (2013) vol. 3, p. 5.

The principle of legality requires the legislature to provide for the penalties applicable to the various offences. The legislature can only determine these sentences in the light of the severity of the disorder caused to public order (1.1.1) by the offence. But in order to limit the powers of the legislature in this matter, the ranting of sentences must satisfy the principle of necessity (1.1.2).

1.1.1. An individualization based on the severity of the disorder resulting from the crime

The principle of legality of offences and sentences can be defined as the « principle which requires that the repressive system (in particular in the determination of the impugned acts and the applicable penalties) be organized and operated in accordance with rules enacted by the legislative power »[9]. This principle is proclaimed in article 8 of the Declaration of Human and Citizen rights, as well as in article 7 of the European Convention for the Protection of human rights, which gives it a constitutional and conventional value. Under these articles, the power to incriminate, and what interests us more particularly here, the power to punish, belong only to the legislature[10]. The principle is also contained in article 111-3 of the penal Code, which specifies its implementation in paragraph (2) concerning punishment: « No person may be punished by a penalty that is not clearly forbidden by law, if the offence is a crime or an offence, or by regulation, if the offence is a contravention »[11].

The penalty is in reality not always fixed by law, but also by the executive power in the case of contraventions. The regulatory authority, in its mission of sentencing sanctioning contraventions, nevertheless, carries out this operation according to the same method as the legislature, i.e. according to the severity of the disorder and will also have to respect the principle of necessity[12]. The criminal sanction always constitutes an infringement of individual liberty and the infringement being so serious that it is not carried out by law. This interference with regulatory power calls into question the legitimacy of repression and the informative function of the principle of legality[13], but this is not the purpose of our study. The setting of sentences must therefore be carried out in the same way by the executive branch as by the legislative power, both of

[9] G. CORNU et H. CAPITANT, *Vocabulaire juridique*, PUF, 8e éd., 2008, p. 55.
[10] M.-E. CARTIER, « Les principes constitutionnels du droit répressif », dans *La Cour de cassation et la Constitution de la République*, PUAM, 1995, p.156.
[11] French Penal Code, art. 111-3/2.
[12] R. VIENNE, « De l'individualisation de la peine à la personnalisation de la mesure », Mélanges M. Ancel, t. 2, Pédone, 1975, p. 177.
[13] E. DREYER, *Droit pénal général*, Lexis Nexis, 2e éd., 2012, p. 241 et s.

which are to respect the principles of legality and necessity, although only the legislature is mentioned here[14].

In accordance with the principle of legality, the legislature must fix the penalties corresponding to each criminality. In the event that the legislature failed to attach a sentence to an offence, the judge would not be able to sanction it. Indeed, the principle of legality obliges the legislature to set a framework which the judge cannot override and in which he exercises his powers[15].

As has already been said in the introduction, individualization must take into account two elements for its realization, the facts and the personality of the offender. Saleilles had put forward, at the beginning of the last century, that this individualization of the sentence when carried out by the legislature can only be objective, operating only in the light of the gravity of the facts, according to the material gravity of the crime[16]. In fact, at the stage of the storm the legislature cannot know the perpetrator of the offence, any individualization based on the person's personality, danger or reintegration capacity is therefore impossible, all circumstances that may arise that are not foreseeable by law. The principle of legality, coupled with individualization, then reveals the relationship between the legislature and the judge[17]. The legislature is bound by the principle of legality to determine the penalties applicable to such conduct, or in other words, to distinguish these sentences[18]. However, it can only achieve this individualization on the basis of the facts, and more particularly their severity[19].

The sentence set by the legislature is then « inevitably inadequate to the personality and situation of each offender »[20]. This individualization must therefore necessarily be supplemented by the judge who will then adapt the already objectively individualized sanction to the offender himself and then operate a subjective individualization. It appears that the actors involved in the process of individualization have different and complementary missions. Indeed, the three stages of individualization correspond to different functions of the sen-

[14] P. HULSROJ, *The principle of proportionality*, *op. cit.*, p. 45.

[15] N. EMILIOU, *The Principle of Proportionality in European Law. A comparative study*, *op. cit.*, p. 91.

[16] R. SALEILLES, *L'individualisation de la peine*, Paris 1898, F. Alcan, 3e éd., Paris 1927, p. 23 et 27.

[17] E. SENNA, « De l'individualisation de la peine au second degré de juridiction post-sentenciel », *Gaz. Pal.*, 21 août 2014, n° 233.

[18] E. BONIS, « Motivation de la décision prononçant une peine d'amende », *Droit pénal*, n° 4, avril 2017, comm. 69.

[19] M. AIRIAU, « Motivation de la peine criminelle, en avant toute ! », *op. cit.*, p. 18.

[20] M.-A. AGARD, « Le principe de la légalité et la peine », *Revue pénitentiaire et de droit pénal*, juillet 2011, n° 2, p. 294;

tence. The multiple functions of the sentence are appreciated at different times. Thus « the functions of the sentence are not identical at the stage of the ranting (by the legislature), the pronouncement (by the judge) and the execution (by the administration) »[21].

The penalty, fixed by the legislature, has an intimidating and afflictive function the penalty then allows the officer to weigh the pros and cons before carrying out his act and shows the will of the legislature not to leave unpunished the attacks on public order. It is logical that at this stage the sentence should be fixed according to the violation of this public order. On the contrary, the sentence imposed has a preventive function[22]. It dissuades third parties from imitating the perpetrator[23]. The sentence at the time of the pronouncement also has a neutralizing function, the judge having to ensure that the author does not make new attacks on public order[24]. At this stage, the judge is then the most capable of assessing the author's personality in order to fix a sentence which neutralizes the latter without being excessive in view of his reintegration capacities under article 132-24 (2) of the French Penal Code[25].

Finally, the sentence executed also has a function of neutralization, but also of amendment and resocialization. Who better than the prison administration could then judge whether the penalty has produced its effects so as to adapt it to the convicted? Since the functions of the sentence are not the same at the different stages of individualization, it is logical that this individualization is not carried out in the same way[26]. The sentence must therefore be individualized by the legislature according to the breach of public order and not according to the personality of the offender, whom he may not, at the stage of the sentencing, be aware of[27].

The individualization carried out by the legislature is therefore carried out in relation to the facts, and more precisely according to the breach of public order. The legislature's mission is then to « determine the rate applicable to a given conduct based on its damaging result for the corporation »[28]. The law must sanction behaviors that offend the values considered fundamental by

[21] E. DREYER, *Droit pénal général, op. cit.*, p.810

[22] E. BONIS, « Peine minimale en matière douanière », *Droit pénal*, n° 11, Novembre 2018, comm. 206.

[23] *Ibid.*, p. 812.

[24] J. RIVERS, « The presumption of proportionality », *the Modern Law Review*, no. 3, 77, 2014, p. 409.

[25] W. KAUFMAN, *Honor and revenge: a theory of punishment, op. cit.,* p. 88.

[26] O. BACHELET, « Généralisation de l'obligation de motivation des peines : les amendes contraventionnelles également concernées », *op. cit.*, p. 23.

[27] R. CARIO, *Justice Restaurative, principes et promesses, op.cit.*, p. 40.

[28] E. DREYER, *Droit pénal général, op. cit.*, p. 176.

French society and should be protected[29]. As a result, the more serious the violation of public order, the higher the corresponding sentence should be. Some have thus considered the emergence of the principle of legality in response to the arbitrariness of the old regime that sentences should be fixed only through objective individualization based on the violation of public order. Beccaria wrote then that « the true, the only measure of torts is the harm done to the Nation »[30]. In accordance with this strict conception of legality, sentences are then indexed on public order and allow equality before the penalty, thus justifying their fixity[31], particularly in the penal Code of 1791. But this position was not tenable because leading to sentences often judged too harsh, thus individualization could not be only objective[32]. For this reason, judicial individualization has gradually been reinstated at the risk of seeing the sentence "detached from the offence"[33], with subjective and judicial individualization increasingly important in comparison to objective and legal individualization[34].

With the resurgence of judicial individualization, the role of the principle of legality and legal individualization is changing. The sentence is no longer fixed, but bounded by a maximum and a possible minimum, leading to an indetermination of the sentence leaving a great margin of appreciation to the judge.

The penalty is thus the matter where the principle of legality was most weakened[35], to the point of changing the role of the sentence[36].

Many authors consider that the punishment no longer provides the functions of repression and prevention of criminal law, but "fulfils a purely technical role"[37]. In fact, with the increase in the powers of the judge, the penalty imposed by the law is no longer certain and its maximum is seldom pronounced, which affects the function of intimidation it should produce. The sentence

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[29] E. DREYER, « Motivation de la peine, légalité et individualisation », *Gaz. Pal.*, 26 avril 2016, n°16, p. 74

[30] C. BECCARIA, *Des délits et des peines*, GF Flammarion, 1991, p.75.

[31] D. DECHENAUD, *L'égalité en matière pénale*, LGDJ, 2008, p. 221.

[32] V. PELTIER, « Conformité de la période de sûreté de plein droit au principe d'individualisation de la peine », *Droit pénal* n° 12, décembre 2018, comm. 219.

[33] See J. CARBONNIER, « La peine décrochée du délit », in *Mélanges Legros*, éd. Université de Bruxelles, 1985, p. 23.

[34] M. LÉNA, « Exécution des peines, le projet de loi relatif à la prévention de la récidive et à l'individualisation des peines », *AJP* 2013, p. 566.

[35] M.-A. AGARD, « Le principe de légalité et la peine », *op. cit.*, p. 290.

[36] M. AIRIAU, « Motivation de la peine criminelle, en avant toute ! », *op. cit.*, p. 18.

[37] *Ibid.* p. 293.

abstractly fixed by the legislature on the basis of the infringement of public order has become a "theoretical instrument of reference", according to the expression used by many authors[38]. The sentences thus stormed by the legislature expresses a "hierarchy of values"[39] indicating the greater or lesser breach of public order resulting from the facts. The sentences determined by the act determine whether the offence is a crime, an offence or a contravention, and thus indicates the severity attributed by the legislature to the fact that the judge can derive legal consequences. Some authors conclude that " the law is an evaluation process for the judge"[40].

But if the principle of the legality of the sentences has been achieved in its application, the judicial individualization gaining ground on the objective determination of the sentence by the legislature, it is not attained in its principle. It is in fact always the legislature that delimits the powers of the judge[41]. The French Constitutional Council stated that Individualization could not undermine the principle of legality: « the principle of individualization of sentences (...) cannot preclude the legislature, while leaving the judge with a broad discretion, to set rules for effective enforcement of offences »[42]. The legislature is therefore the only one to set the penalties for an offence. But its power in this matter is not without limit[43].

1.1.2. The legislature is governed by the principle of necessity

As has been seen, the sentence can only be fixed by the legislature in relation to the severity of the breach of public order, but it is also an obligation for the legislature, the latter being subject to the principle of necessity of punishment. This principle is set out in our law by article 8 of the Declaration of Human and Citizen rights « The law shall establish only strictly and obviously necessary sentences ». Article 5 also refers to the principle, « the law has the right to defend only actions detrimental to society ». This restriction is explained by the fact that the use of criminal sanction constitutes a threat to individual freedoms[44]. These freedoms must remain the principle while the use of the

[38] M.-A AGARD, « Le principe de légalité et la peine », *op. cit.*, p. 294.
[39] C. GAU-CABEE, « Jalons pour une histoire du principe de la légalité des peines », *op. cit.*, p. 57.
[40] M.-A AGARD, « Le principe de légalité et la peine », *op. cit.*, p.294.
[41] C. GAU-CABEE, « Jalons pour une histoire du principe de la légalité des peines », *op. cit.,* p. 60.
[42] French Constitutional Council, 19 and 20 jan. 1981, no. 80-127 DC.
[43] M. GIACOPELLI, « La loi du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales : un rendez-vous manqué », *AJ pénal* 2014, p. 448.
[44] E. DREYER, *Droit pénal général, op. cit.*, p. 175-176.

sentence must be subsidiary, or in other words exceptional, « exceptions to the principle of freedom to remain of strict interpretation »[45].

The use of the sentence must necessarily be limited to the most serious infringements of the values considered essential[46]. Therefore, limits are imposed on the legislature, not only when he incriminates conduct, but also in order not to undermine freedoms when determining the sanction applicable to that behavior[47]. A sentence that would not meet the principle of necessity would indeed be illegitimate and the offence it sanctions. Some authors fear that a criminalization accompanied by disproportionate sanctions will be an opportunity for the legislature to « achieve other objectives than the mere restoration of public order »[48].

It follows the principle of necessity that the sanction must be proportionate, firstly, to the severity of the breach of public order resulting from the conduct complained of, and secondly, to the affliction felt by the convicted when executing the sentence[49]. The requirement of proportionality stemming from the principle of necessity is a hindrance to the power of individualization of the legislature's sentence because it prevents it from setting too severe sentences in comparison to the infringement caused by the punishable conduct. So the legislature cannot put too much punishment[50]. But conversely, it is also forced not to fix too low sentences in proportion to the breach of public order. Indeed, too high a sentence would offend individual freedoms, but a lesser sentence would not fulfill its functions of intimidation and affliction[51]. The Court of Justice of the European Communities is in this direction when it states that sentences must be proportionate, but also effective and dissuasive[52]. It is in this sense that the punishment must be proportionate to the affliction it provokes[53]. The necessity, as well as the proportionality resulting therefrom, acts as guarantees: guarantees of the absence of infringement of individual freedoms, guarantees of the coherence of a system by its adaptation to the

[45] *Ibid.*, p.175.
[46] E. GARCON, V. PELTIER, Droit de la peine, *Lexis Nexis*, 2010, p. 116.
[47] M. JANAS, « Les dispositions relatives au prononcé et à l'application des peines. De l'individualisation à l'industrialisation des aménagements de peines, des peines aménagées aux aménagements low coast ? », *Gaz. Pal.* 28 janv. 2010, n° 28, p. 30.
[48] E. DREYER, *Droit pénal général*, *op. cit.*, p. 175.
[49] *Ibid.* p. 176.
[50] E. BONIS, « Peine minimale en matière douanière », *op. cit.*, comm. 206.
[51] A. MIHMAN, « La motivation des peines (en matière correctionnelle) », *Gaz. Pal.* 28 mars 2017, n° 13. p. 17.
[52] Court of Justice of the European Communities, 8 July. 1999, *Nunes* and *Matos*.
[53] J.-H. SYR, « Les avatars de l'individualisation dans la réforme pénale », *RSC*, n° 2, 1994, p. 217.

gravity of the facts, guarantees of efficiency of a criminality by its proportion to the affliction and deterrence it provokes[54].

This idea of proportionality is found in the theory of righteousness or proportionate sentence theory, the purpose of which is to outlaw unjust results caused by punishment. According to this theory, the sentence must be proportionate to two elements. On the one hand, the sentence must be proportionate to the seriousness of the conduct, then the idea of proportion to the breach of public order to which the legislature must be bent is found. On the other hand, the sanction must be seen as a reprimand, then the idea is that the sentence should not be reduced[55].

In order to establish this proportion, the idea of the necessary respect for a scale of sentences appears. This scale makes it possible to make the requirements of necessity and proportionality effective[56]. It gives the legislature an instrument allowing it for each offence to rant a sentence corresponding to its abstract gravity[57]. This scale is constituted by the tripartite classification of offences in respect of crimes, offences and contraventions, each category comprising thresholds applicable to custodial sentences, crimes and offences, and amounts of fines, for the three categories[58]. With the help of this scale, the legislature sets a maximum of the sentence, depending on the greater or lesser severity of the breach of public order which it considers that the impugned conduct causes or even a minimum if it considers that the infringement is such that the cannot be less than this threshold[59].

However, the requirement of proportionality has been weakened correlatively with the increase in the powers of individualization recognized by judges[60]. Indeed, the individualization carried out by the judicial authority is mainly carried out, as has already been seen, with regard to the personality of the offender[61]. The judge may, by realizing this individualization, lose sight of the principle of proportionality of the penalty to the infringement caused to pu-

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[54] E. GARCON, V. PELTIER, *Droit de la peine*, *op. cit.*, p.139-141.

[55] J. WALTHER, « A justice équitable, peine juste ? Vues croisées sur les fondements théoriques de la peine », *Rev. sc. crim.* 2007, p. 23.

[56] O. BACHELET, « Généralisation de l'obligation de motivation des peines : les amendes contraventionnelles également concernées », *op. cit.*, p. 23.

[57] S. HALLOT, « L'individualisation légale de la peine », Mémoire de Master 2, Université Paris-Sud, Faculté Jean Monnet – Droit, Économie, Gestion, Année universitaire 2012-2013, p. 65.

[58] D. ALLIX, « De la proportionnalité des peines », in *Mélanges Soyer*, LGDJ, 2000, p. 3.

[59] N. EMILIOU, *The Principle of Proportionality in European Law. A comparative study*, *op. cit.*, p. 104.

[60] E. DREYER, *Droit pénal général, op. cit.,* p. 177.

[61] E. BONIS, « Motivation de la décision prononçant une peine d'amende », *op. cit.*, comm. 69.

blic order, especially since the principle of proportionality is only required of the legislature and not the judges, the law not imposing respect for this principle by the latter. It is thus considered that the requirement of proportionality is respected as long as the judges comply with the penalties laid down by law, the latter being supposed to be proportionate[62]. The sentence may not then be excessive, the judges acting within the limits laid down by law to their power of individualization and thus respecting the legal maximum, but it could prove to be too low in comparison to the severity of the violation of public order and therefore, in a sense, without proportion to this severity. The requirement of proportionality to be respected by legal individualization thus loses its effectiveness and hence its meaning[63].

But the requirements of necessity and proportionality can be weakened by the practices of the legislature itself in the absence of effective control of the latter[64]. The legislature has considerable leeway in assessing the seriousness of conduct because the assessment of the need for incriminations and penalties is considered to be one of the expressions of national sovereignty[65]. It is for this reason that the Constitutional Council considers « that it is not for it to substitute its own assessment for that of the legislature as regards the need for the penalties attached to the offences defined by it »[66].

The Council therefore does not control the need for sentences. In fact, it limits its control in the event that the penalties provided by legislature « are clearly disproportionate to the facts alleged »[67], which cannot be considered as a sufficient guarantee[68] since certain disproportionate sentences therefore escape its control as long as they do not cross the threshold required by the Constitutional Council to carry out its control[69].

The Council therefore does not control the need for sentences. It actually limits its control in the event that the penalties provided by legislature « are clearly disproportionate to the facts alleged »[70]. This cannot be regarded as a

[62] E. GARCON, V. PELTIER, *Droit de la peine*, *op. cit.*, p. 128-129.
[63] P. HULSROJ, *The principle of proportionality*, *op. cit.*, p. 77.
[64] T. PAPATHEODOROU, « De l'individualisation des peines à la personnalisation des sanctions », *RI crim. et pol. techn.* 1993, p. 107.
[65] E. DREYER, *Droit pénal général*, *op. cit.,* p. 176.
[66] French Constitutional Council, Dec. 19-20 Jan. 1981, No. 80-127 DC.
[67] French Constitutional Council, déc. 20 July 1993, n° 93-321 DC, *Loi réformant le code de la nationalité*, §15
[68] M. E. CARTIER, « Les principes constitutionnels du droit répressif », *op. cit.*, p.163-164
[69] J. LARREGUE*,* « De l'individualisation de la peine à la "décarcéralisation" », *Gaz. Pal.,* 6 déc. 2014, n° 340, p. 17.
[70] J. RIVERS, « The presumption of proportionality », *op. cit.,* p. 411.

sufficient guarantee, since some disproportionate sentences are therefore beyond its control as long as they do not cross the threshold required by the Constitutional Council to carry out its control[71].

Sentences must therefore be fixed by law under the principle of legality. But the power of the legislature is limited in this area by the obligation to respect certain principles of criminal law that are necessity and proportionality[72]. In order to establish sentences necessary and proportionate to the severity of the breach of public order, the legislature has tools to ensure coherence between gravity and punishment, but also a coherence between the severity of the sentences between them in the light of the facts they punish.

1.2. The tools of individualization of punishment

The legislature, in the context of its mission of individualization of the sentence in the light of the seriousness of the offence, has provided itself with tools enabling it to lay down coherent and proportional limits to the suppression of the offences properly and by setting a maximum and a possible minimum (1.2.1). It also has tools to vary the maximum so fixed according to specific circumstances varying the maximum normally expected for an offence due to their severity (1.2.2).

1.2.1. Fixing the maximum and minimum sentence

As has been seen, the principles of legality and necessity require that sentences be fixed by law in comparison to the severity of the breach of public order. The necessity, and more particularly proportionality, is expressed through the determination of a maximum by the legislature which reflects the seriousness of the offence and presents for the judge the character of an impassable limit. Most often this maximum is expressed in the form of a double sanction: a fine and the duration of the deprivation of liberty[73].

Technically, the legislature has provided itself with tools to make it easier to fix a sentence corresponding to the severity of the breach of public order and allowing it to respect a certain coherence[74]. This technical aid takes the form of a scale of sentences. The offences are classified by article 111-1 of the French Penal Code, according to their severity, among crimes, offences or contraventions. In fact, the Court of Cassation finds that the severity of a sentence is measured by its rank in the scale of sentences and not by its length or

[71] W. KAUFMAN, *Honor and revenge: a theory of punishment*, *op. cit.,* p. 92.

[72] M. TINEL, « Réflexions sur les apports d'une codification du droit de l'exécution des peines », *Droit pénal* n° 11, Novembre 2011, étude 23.

[73] G. VERMELLE, « Le maximum et le minimum », in *Mélanges Couvrat*, PUF, 2001, p.354

[74] S. MELANDER, « Ultima ratio in european criminal law », *European Criminal law Review*, no. 1, (2013) vol. 3, p. 9.

amount[75]. Ceilings have been set out in the penal Code for each category (Crime, Misdemeanor, Contravention), these ceilings constituting impassable barriers for the legislature who would have chosen to classify such an offence in such a category[76]. In the case of crimes, the maximum custodial sentence that may be provided by the legislature is perpetuity for imprisonment or criminal detention[77]. This custodial sentence may not exceed 10 years in the area of tort, while no custodial sentences can be incurred for a contravention[78].
In the matter of custodial or restrictive sentences, they may not be greater than three or five years in tort, whereas they may not exceed one year for contraventions. The legislature is, however, free to fix the criminal and tort fines, which are not capped, whereas the fine may not exceed € 1 500, or € 3 000 in the context of a recurrence[79].
But in addition to the maxima for each category of infringement, the legislature is also bound to comply with thresholds set within each category and therefore cannot freely set the custodial sentences or the amount of fines if he does not wish to sanction the behavior of the maximum sentence assigned to the class[80]. Thus concerning the imprisonment and criminal detention, the legislature can fix its quantum only to a maximum of fifteen, twenty or thirty years, unless to choose the maximum penalty that is perpetuity[81].
Similarly, the maximum of correctional imprisonment can be fixed by the legislature only at two or six months, one, two, three, five, seven or ten years[82]. The amounts of the fines may not exceed 38, 150, 450, 750 or 1500 €, these maxima applying respectively to the five classes fines[83]. By way of example, under these thresholds, in the event that the legislature incriminates a new conduct and deems it serious enough to classify it as a crime, it will not be able to set a maximum of 17 years of imprisonment or detention, but should

[75] Cass. crim., 4 février 1938.
[76] DI. TULLIO et J. VÉRIN, « La nécessité de services criminologiques pénitentiaires pour l'individualisation de la peine et le traitement rééducatif du criminel », ***RSC*** 1963, p. 311.
[77] A. MIHMAN, « La motivation des peines (en matière correctionnelle) », *op.cit.*, p. 19.
[78] E. GARCON, V. PELTIER, *Droit de la peine*, *op. cit.*, p. 35-36.
[79] R. CARIO, *Justice Restaurative, principes et promesses*, *op.cit.*, p. 34.
[80] E. DREYER, « Motivation de la peine, légalité et individualisation », *op. cit.*, p. 74.
[81] French penal Code, art. 131-1.
[82] French penal Code., art. 131-4.
[83] E. GARCON, V. PELTIER, *Droit de la peine*, *op. cit.*, p. 35-37.

Choose between the thresholds set by the criminal law i.e. fifteen or twenty years[84].

In accordance with the tripartite classification and their system of internal thresholds which the legislature is obliged to respect when determining the maximum penalty, the latter is obliged to proceed in two steps[85].

As a first step, he will choose, according to the severity of the sanctioned behavior, to qualify him as a felony, misdemeanor or contravention[86]. This choice is made in proportion to the severity of the breach of public order and the infringement of the protected social value. In fact, the criminal qualification is symbolically stronger and allows the legislature to emphasize the severity of the infringement. Nevertheless, some consider that this qualification may be distorted[87]. The penalty for rape was thus raised to fifteen years ' imprisonment, not because rape would now be in the legislature's mind of greater severity, justifying the rise of the sentence, but because it wished that this offence is always classified as a crime[88]. On the contrary, the importation or exportation of narcotics falls into the category of offences in order to avoid the bottleneck of the Court of Assizes and not because their severity would not justify a criminal qualification[89].

As a second step, the legislature must determine the sentence which, in the chosen category, best corresponds to the severity that it attributes to the conduct in accordance with the legal scale. The legislature therefore reasoned by deduction to set the maximum applicable to a behavior by determining its nature according to its severity, and then deducting the maximum[90].

The individualization of the sentence by the legislature can also be done in the form of the determination of a minimum. Under the old code, the severity of the breach of public order caused by the impugned conduct being expressed in the form of a fork, by reference not only to a maximum but also to a minimum[91]. The proportion to gravity is therefore respected by a maximum avoiding the imposition of an excessively high sentence in relation to the be-

[84] M. JANAS, « Les dispositions relatives au prononcé et à l'application des peines. De l'individualisation à l'industrialisation des aménagements de peines, des peines aménagées aux aménagements low coast ? », *op. cit.*, p. 30.
[85] E. GARCON, V. PELTIER, *Droit de la peine*, *op. cit.*, p. 35.
[86] M. AIRIAU, « Motivation de la peine criminelle, en avant toute ! », *op. cit.*, p. 18.
[87] G. VERMELLE, « Le maximum et le minimum », *op. cit.*, p. 355.
[88] E. SENNA, « De l'individualisation de la peine au second degré de juridiction post-sentenciel », *op. cit.*,, n° 234.
[89] *Idem.*
[90] E. GARCON, V. PELTIER, *Droit de la peine*, *op. cit.*, p. 35.
[91] J. LARREGUE, « De l'individualisation de la peine à la "décarcéralisation" », *op.cit.*, p. 20.

havior, as well as by a minimum below which the sentence would no longer fulfil its afflictive function and might be unrelated with the severity of the facts, in the sense of a deficiency. This requirement of a minimum disappeared in 1992 with the new French Penal Code[92].

The principle is now the absence of a minimum sentence, but some minima have survived. Indeed, in some cases the legislature considered that the impugned conduct was sufficiently serious to justify the existence of a minimum[93]. A minimum must thus be respected in terms of criminal imprisonment and detention[94]. The criminal qualification is attached to a seriousness that is sufficiently important that the criminal sentences of liberty imposed by the judge may not be less than two years when the legislature has provided for the offence a sentence, and one year when the legislature has provided for the offence a temporary sentence[95]. A minimum has also been reintroduced in the matter of recidivism by the law of 10 August 2007, with regard to offences and crimes, but only for custodial sentences. The judge must then pronounce a sentence between a minimum and a legal maximum.

This system thus allows the legislature to fix a sentence proportionate to the severity of the act and thus delimit the powers of the judge. However, « the maximum and the minimum are not equally present in the criminal matter » and do not have the same effectivity. Indeed « the maximum can be discussed in its position (too high or too low) »[96] but is not subject to a questioning in its principle[97].

On the other hand, the minimum in our law is within limitations and is, in the case of recidivism, only an indication of the severity attached to the habitual conduct. The judge may under certain conditions pronounce a sentence below the legal minimum[98]. Moreover, if the maximum allows the legislature to foresee a sentence which is proportionate to the gravity of the offence, in the sense of an excess, then the absence of a principle of a minimum could lead to the sentencing by the judge without proportion to that severity, but then in

[92] N. EMILIOU, *The Principle of Proportionality in European Law. A comparative study*, *op. cit.*, p. 120.
[93] G. VERMELLE, « Le maximum et le minimum », *op. cit.*, p. 357.
[94] M. LÉNA, « Exécution des peines, le projet de loi relatif à la prévention de la récidive et à l'individualisation des peines », *op. cit.*, p. 568.
[95] French penal Code, art. 132-18.
[96] G. VERMELLE, « Le maximum et le minimum », *op. cit.*, p. 365.
[97] M. JANAS, « Les dispositions relatives au prononcé et à l'application des peines. De l'individualisation à l'industrialisation des aménagements de peines, des peines aménagées aux aménagements low coast ? », *op. cit.*, p. 34.
[98] J. RIVERS, « The presumption of proportionality », *op. cit.*, p. 411.

the meaning of a deficiency, unless the legislature considers that the seriousness of the offences does not justify a minimum repression except for crimes and legal recidivism. Indeed, it is no longer the minimum that is volatilizes.
The scale of sentences is thus an instrument allowing the legislature to set a maximum for the suppression of an offence according to the infringement which it considers to be brought to public order by this conduct. But in addition to setting a maximum corresponding to the severity of the single offence, the legislature raises or decreases repression because of the severity attributed to certain particular circumstances[99].

1.2.2. Changes in the legal maximum due to the severity of the criminal offense

Often, certain circumstances add to the simple offence and thus alter the severity of the breach of public order. The maximum foreseen by the legislature therefore does not correspond to the severity of the behavior. It is for this reason that the legislature foresees aggravating circumstances which allow to raise the threshold of repression, but also the causes of mitigation, which enable it to achieve a better objective individualization of the sentence and Respect the principles of necessity and proportionality[100].
The legislature foresees for each offence circumstances likely to raise the threshold of repression which are named special aggravating circumstances. These circumstances increase the maximum penalty objectively set by the legislature for the so-called simple offence. This aggravation is explained by the fact that the legislature considers that the public order and the values it defends are more severely affected in the presence of these conditions of realization of the offence than in their absence[101]. These conditions of realization give additional severity to the act which justifies an increased severity of the repression[102]. This mechanism thus allows a better objective individualization by the legislature, taking into account the increase in the severity of the facts due to the presence of special circumstances in addition to the commission of the simple offence[103].
In respect of some coherence, the legislature will once again use the scale of sentences. The principle in the matter, or failing to be able to speak in principle, the rule of elevation applying to the majority of cases, is the elevation of a

[99] W. KAUFMAN, *Honor and revenge: a theory of punishment*, *op. cit.,* p. 102.
[100] M. AIRIAU, « Motivation de la peine criminelle, en avant toute ! », *op. cit.*, p. 18.
[101] E. GARCON, V. PELTIER, *Droit de la peine*, *op. cit.*, p. 37.
[102] E. DREYER, « Motivation de la peine, légalité et individualisation », *op. cit.*, p. 74.
[103] O. BACHELET, « Généralisation de l'obligation de motivation des peines : les amendes contraventionnelles également concernées », *op. cit.*, p. 23.

degree on the scale of sentences[104]. The aggravating circumstance is only an accessory of the offence, a character that the principle of elevation of one degree allows to respect, in addition to having the trump of simplicity[105]. The suppression of theft is the perfect example of this elevation of one degree[106].
According to article 311-3 of the French Penal Code, the legislature currently fixes the maximum penalty of the single theft to three years of imprisonment and a fine of 45 000 €, making it a misdemeanor. A list of circumstances aggravating this offence is set out in section 311-4 of the code. This article states in its first paragraph that the maximum penalty is increased to five years imprisonment and a fine of 75 000 € in the presence of one of these circumstances[107]. The penalty is therefore well-elevated by one degree. The same text stipulates in its last paragraph that the maximum incurred is 7 years of imprisonment and 100 000 € fine if two aggravating circumstances accompanied the execution of the offence, whereas this maximum is increased to ten years of imprisonment and 150000 € fine in the presence of three of these circumstances. It is clear from this example that the scale of sentences is perfectly respected according to the number of aggravating circumstances accompanying the commission of the theft[108].
This rule makes it possible to introduce some consistency- between the elevation of the sentence and the additional severity caused by the particular circumstances. It is more logical for the legislature to respect the scale it has developed. Nevertheless, some derogations seem to be imposed[109]. Indeed, the additional severity of the breach of public order is not the same for all aggravating circumstances[110]. If for the most part the aggravation of a degree is to remain the rule as objectively corresponding to the further interference with the public order, some aggravating circumstances are considered as encroaching more seriously to the public order. It would then be illogical to limit the aggravation to a degree[111]. The legislature, therefore, sometimes derogates from the scale of sentences in order to take into account the greater intensity

[104] V. PELTIER, « Conformité de la période de sûreté de plein droit au principe d'individualisation de la peine », *op. cit.*, p. 219.
[105] E. DREYER, *Droit pénal général*, *op. cit.* p.918-919
[106] *Ibid.* p. 919
[107] T. PAPATHEODOROU, « De l'individualisation des peines à la personnalisation des sanctions », *op. cit.*, p. 110
[108] E. BONIS, « Motivation de la décision prononçant une peine d'amende », *op. cit.*, comm. 69.
[109] J.-H. SYR, « Les avatars de l'individualisation dans la réforme pénale », *op. cit.*, p. 217.
[110] M. GIACOPELLI, « La loi du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales : un rendez-vous manqué », *op. cit.*, p. 450.
[111] S. HALLOT, « L'individualisation légale de la peine », *op. cit.*, p. 65.

of certain aggravating circumstances[112]. This is particularly the case for the suppression of sexual assaults other than rape, with the legislature having in their case provided three lists of aggravating circumstances whose intensity is taken into account by a different elevation on the scale of sentences[113].
Similarly, it seems logical that the elevation of the penalty produced by the same aggravating circumstance is the same for all offences for which the legislature has foreseen it. But just as a circumstance may have more intensity on the severity of the infringement, the same circumstance may prove more serious depending on the offence it accompanies[114]. If an aggravating circumstance should, therefore, be raised by the same number of degrees regardless of the offence, derogations are also conceivable, but in accordance with the scale of sentences to keep in mind a certain coherence and the need for proportionality to the attainment[115].
In some cases, the legislature also provides for causes of mitigation of the sentence. While the extenuating circumstances were abolished in 1994, at the same time as the statutory minima, the legislature, nevertheless, takes into consideration, in certain assumptions, the causes for mitigation of the sentence[116]; hence, allows for certain offences to have the penalty reduced, in the event that the individual who has committed or attempted to commit a crime or offence notifies the administrative or judicial authority and thereby permits the offence to be carried out or that it ceases, that it does not produce damage, or it allows to identify the other authors or accomplices[117].
The person then benefits in the case of an exemption or a reduction of sentence. In such cases, the legislature takes into account the conduct of the author of the declaration which has, thus, allowed to limit the severity of the breach of public order to abstractly individualize the sentence. Here again, the mitigation mechanism makes it possible to adapt the penalty to the severity of the breach of public order[118].
If the legislature has a system to enable the individualization of the sentence in relation to the severity of the infringement of public order, respecting a certain coherence and allowing the principle of legality to be respected, as well as

[112] M. TINEL, « Réflexions sur les apports d'une codification du droit de l'exécution des peines », *op. cit.*,, étude 23
[113] French penal Code, art., 222-28, art. 222-29 et art. 222-30.
[114] E. DREYER, *Droit pénal général*, op. cit., p.920-922.
[115] *Ibid.*, p. 918-920.
[116] French penal Code, art., 131-78.
[117] E. GARCON, V. PELTIER, *Droit de la peine*, *op. cit.*, p. 38.
[118] E. BONIS, « Peine minimale en matière douanière », *op. cit.*, comm. 69.

the necessity and proportionality of the sentences, the fact remains that the legislature too often misjudges these rules. Indeed, « contemporary legislatures give in to the temptation of ease, and do not question the relationship of the sanctions that it storms with the behaviors that these sentences punish »[119].

2. Inconsistencies by the legislature in determining sentences

To individualize the sentence, the legislature must respect certain fundamental principles of criminal law, including necessity. But inconsistencies arise when considering the sentences set by the legislature. The inconsistencies not only reveal that the principles that should govern sentencing by law are sometimes unrecognized (2.1), but also reveal the lack of coherence of the legislature when it sets the penalty against the severity of the violation of the order Public (2.2).

2.1. Ignorance of the principles of sentencing

The legislature sometimes misjudges the rules that it should respect when it sets the sentences. In this way, he misjudges the principle of necessity, which is particularly evident in the study of double-infractions (2.1.1.). But it also happens to fix sentences without examining their connection with the gravity of the facts as is the case with alternative sentences (2.1.2). In such cases, the legislature no longer carries out an objective individualization of the sentence as it should do under the principle of legality; the link between the penalty and the severity of the infringement dissolves[120].

2.1.1. Ignorance of the principle of necessity: infringements-duplicates

It sometimes happens that the legislature incriminates the same behavior in two different texts, which is called duplicates or offenses-duplicates. These duplications may be involuntary, caused by the inflation of criminal offences, which leads to an impossibility for the legislature, which nevertheless creates them, to count them and by way of consequence to reconcile them[121]. But these duplications are also sometimes a deliberate creation of the legislature, most often for pedagogical purposes, a provision of a code being copied into another code[122]. It is, of course, obvious that these double jeopardys are unne-

[119] D. DECHENAUD, *L'égalité en matière pénale*, *op. cit.*, p. 219.

[120] V. MALABAT, « Les infractions inutiles, Plaidoyer pour une production raisonnée du droit pénal », *in* V. MALABAT (Dir.), B. DE LAMY (dir.), M. GIACOPELLI (dir.), *La réforme du Code pénal et du Code de procédure pénale Opinio doctorum*, Dalloz, 2009, p. 71 et s.

[121] A. MIHMAN, « La motivation des peines (en matière correctionnelle) », *op.cit.*, p. 17.

[122] M. GIACOPELLI, « La loi du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales : un rendez-vous manqué », *op. cit.*, p. 452.

cessary, but they become totally incoherent when the two offences incriminating the same behavior are punished by different sentences[123].
The inconsistencies resulting from these double-checking offences reveal a lack of knowledge of the principle of necessity. Indeed, no one could doubt that the second incrimination of the same conduct was not necessary, even though it would be punished by the same sentence. The first offence and its punishment are sufficient to suppress the violation of public order, while the second, being the same, is not necessary.
According to Valérie Malabat, such a practice would result from the fact that, « used for its symbolic or pedagogical dimension, criminal law is no longer seen by the legislature today as the instrument of a necessary and serious sanction »[124]. Stemming from necessity, the principle of proportionality is also unknown. In fact, if the same behavior is punished in two different sanctions` texts, how could such sentences be proportionate to public order? What can justify such a difference? Especially since in some cases the quantum differences between these sentences can be substantial[125]. Duplicate infringements are the very illustration that the legislature does not, or at least not always, comply with the principles he should respect in terms of the legal individualization of the sentence[126].
These duplicates are found more often than we could believe in our law. Thus, moral harassment is implicated in the Criminal Code, but also in the Labour Code[127]. The penalties laid down in the Labour Code are lower than the penalties laid down by the law in the Penal Code. Article 222-33-2 of the French Penal Code punishes two years imprisonment and a fine of 30 000 € for moral harassment[128], while article L. 1152-1 of the Labour Code punishes the same behavior as one year's imprisonment and €3750 fines. The sentence of imprisonment is therefore doubled between the two offences while the fine is multiplied by eight. However, the definition of the moral harassment of article L. 1152-1 of the Labour Code does not present any particularity which could explain this difference. It is here blatant in the presence of identical be-

[123] V. MALABAT, « Les infractions inutiles, Plaidoyer pour une production raisonnée du droit pénal », *op. cit.,* p. 71-72.
[124] *Ibid.*, p. 71.
[125] S. MELANDER, « Ultima ratio in european criminal law », *European Criminal law Review*, no. 1, (2013) vol. 3, p. 12.
[126] R. CARIO, *Justice Restaurative, principes et promesses, op.cit.*, p. 30.
[127] V. MALABAT, « Les infractions inutiles », *op. cit.,* p. 73.
[128] Since the act of 6 August 2012, No. 2012-954, article 222-33-2 of the criminal Code, which had previously incurred a year's imprisonment for moral harassment and a fine of 15 000 €.

haviors and penalties so different that the principles of necessity and proportionality are ignored by the legislature[129].

This ignorance is all the more obvious because, despite the criticisms already expressed as regards this inconsistency between the sentences of the two offences, the legislature has increased the punishment of the offence contained in the penal Code without touching the Labour Code on the occasion of the law of 6 August 2012, and thus without any proportion to the violation of public order. However, some argue the specific procedural rules that apply within the framework of the Labour Code[130].

The suppression of sexual harassment is another example of a double offence showing the lack of necessity and proportionality of sentences. Since the act of 6 August 2012, the penalties under article 222-33 of the Criminal Code for sexual harassment are two years imprisonment and a fine of 30 000 €, while article L. 1155-2 of the Labour Code only punishes sexual harassment for one year Imprisonment and 3750 € of fines. In the same vein, the abuse of weakness is punished by five years imprisonment and a fine of 9 000 € by article L. 122-8 of the consumer code, while it is sanctioned by three years imprisonment and 375 000 € fined by the Penal Code[131].

However, the Constitutional Council[132], which was asked the question of the constitutionality of double jeopardy in 2002 concerning moral harassment, validated this practice. The Council found that the principle of proportionality of sentences was respected once the criminal judge respected the highest maximum set by law for the two offences. But according to some authors, and in particular Valérie Malabat[133], the council's analysis should have been based not on the principle of proportionality, but on the principle of necessity, which should have led it to punish double jeopardy. In addition to the uselessness of the duplicates, the difference in penalties incurred according to whether or not the offence is committed in the context of the work seems indeed difficult to explain[134].

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[129] N. EMILIOU, *The Principle of Proportionality in European Law. A comparative study*, *op. cit.*, p. 123.

[130] W. KAUFMAN, *Honor and revenge: a theory of punishment*, *op. cit.,* p. 59.

[131] M. JANAS, « Les dispositions relatives au prononcé et à l'application des peines. De l'individualisation à l'industrialisation des aménagements de peines, des peines aménagées aux aménagements low coast ? », *op. cit.*, p. 40.

[132] Constitutional Council, No. 2001-455 DC, January 12, 2002.

[133] V. MALABAT, « Les infractions inutiles », *op. cit.*, p. 74.

[134] S. HALLOT, « L'individualisation légale de la peine », *op. cit.*, p. 70.

It is therefore up to the legislature to contravene the principle of necessity in the absence of control of the Constitutional Council. But it also ignores the principle of proportionality by giving judges the possibility of imposing sanctions unrelated to the seriousness of the offences.

2.1.2. The lack of a link between severity of the criminal offense and punishment: alternative sentences

The penal Code provides for the possibility for the judge to substitute the reference sentences for specific sentences or certain additional sentences with the aim of limiting the use of short-term custodial sentences, as the alternative sanctions are provided by law. This substitution is, however, excluded for crimes and can therefore only be achieved in tort and fines. Alternative sentences are pronounced as principal sentences, "instead of imprisonment"[135] or "in place of the fine"[136].

These alternative sentences are the result of the reform of the French Penal Code of 1992, the legislature replacing the notion of alternative punishment with that of alternate sentences. This change in vocabulary illustrated the legislature's desire that these sentences were no longer as substitutes for the sentences abandoned for their application to the judges discretion, but the main sentences stormed by the legislature are now called alternative sentences[137]. In the spirit of the legislature of 1992, these alternative sentences were to be provided for the sanction of each offence or contravention for which they would be possible[138]. But in reality, alternative sentences are laid down in the form of lists by the penal Code without the incriminating texts referring to them. These alternative sanctions are, therefore, not intended for a particular behavior, but in a global way. Since they are not specially provided for in sanctioning a particular behavior, these sentences are therefore not related to the severity of the infringement caused by these behaviors[139].

There are a wide variety of these substitutable sanctions, but the incriminating text does not have to refer to it so that these sentences can be pronounced instead of the penalty provided for by this incrimination, on the conditions that such sentences are to be laid down in by the Penal Code and that the substitution process is respected[140]. The sentences then provided by legislatu-

[135] French penal Code, articles 131-5-1 ; 131-6 ; 131-7 ; 131-8 ; 131-8-1.
[136] French penal Code, article, 131-7,
[137] J.-H. SYR, « Les avatars de l'individualisation dans la réforme pénale », *op. cit.*, p. 220.
[138] J.-H. ROBERT, « La détermination de la peine par le législateur et par le juge », *op. cit.*, p. 245.
[139] O. BACHELET, « Généralisation de l'obligation de motivation des peines : les amendes contraventionnelles également concernées », *op. cit.*, p. 23.
[140] J. LARREGUE, « De l'individualisation de la peine à la "décarcéralisation" », *op.cit.*, p. 23.

re, that can be imposed for any offence, are no longer related to the severity of the facts.

Certainly, the principle of legality is not attained in principle by this practice. In fact, this mechanism is provided for by law, as are substitutable sentences. « Their democratic legitimacy cannot be challenged »[141] since it is within the framework provided by the legislature that judges operate their surrogate power. On the other hand, the principle of specialty is sacrificed, with the legislature pronuncing sentences that can be applied to any offence, without predicting them for each incrimination.

But these alternative sentences pose a problem in relation to the principle of proportionality. Indeed, these sentences are most often fixed in a comprehensive way and therefore not necessarily having to deal with the offences which they could punish. The legislature therefore fixes these sentences without examining their relationship, and therefore their proportion, with the severity of the breach of public order[142]. This lack of relation to the objective gravity of the tort resulting from alternative sentences, but also complementary sentences, made an author say that « the contemporary legislature gives in to the temptation of ease, and does not question the reports that the sanctions he storms with the behaviors that these sentences punish »[143]. Because of their diversity, alternative sentences do not always have a logical or criminological connection with the behaviors they sanction[144].

The powers of individualization recognized by the magistrates were for the consideration of weakening the principle of proportionality. The legislature forgets, in the case of alternative sentences, to objectively set these sentences in view of the severity of the conduct they sanction, and leaves it to the judge to make a choice between the different possible sanctions, not objectively, But subjectively depending on the personality and the ability of the individual to reintegrate. « Thus, the requirement of a strict proportion between the severity of the offence and the severity of the punishment was discarded, in accordance with the objectives pursued, but contrary to the teachings of the classical doctrine that the same Offence deserves the same sanction regardless of

[141] E. DREYER, D*roit pénal général*, *op. cit.*, p.273

[142] V. PELTIER, « Conformité de la période de sûreté de plein droit au principe d'individualisation de la peine », *op. cit.*, p. 221.

[143] D. DECHENAUD, *L'égalité en matière pénale*, *op. cit.*, p.219.

[144] M. LÉNA, « Exécution des peines, le projet de loi relatif à la prévention de la récidive et à l'individualisation des peines », *op. cit.*, p. 570.

the perpetrator »[145]. In fact, the law does not impose a link between the offence and the sentence imposed in the substitution mechanism. The courts thus have the possibility of sentencing unrelated to gravity, or even to the offence committed. One oft-quoted example is the possibility of a judge[146] convicting an individual principally of a suspension of the driver's licence, even though he would not have used an automobile to commit the offence for which he is convicted[147].

In such a context, the severity of the infringement can only be measured by reference to the main sentences. Proportionality is therefore purely symbolic since the judge does not have the obligation to pronounce these reference sentences and may, on the contrary, impose sentences unrelated to the offence. Which made Professor J. -H Robert that « in the mind of the legislature, this indefinite palette of sentences means that imprisonment is no more than an indication of the seriousness of the offence, a sort of account currency for an obligation that convicts can pay with other species »[148]. Indeed, the main sentence is no more than an « objective gravity mark of the tort »[149] which it is possible for the judge to substitute sentences related to the personality of the offender in order to achieve a judicial individualization. For some, the mechanism of substitution interferes with the principle of legality, because although it is not contrary to its principle, since the penalties are laid down by law, this mechanism prevents individuals from knowing and actually predicting penalties incurred in the event of a commission of an offence[150]. The alternative sentences translate, thus, for many a decrease of the legality[151].

Alternative sentences are, nevertheless, little implemented by the judge, mainly because of a lack of means and the attachment of public opinion to custodial sentences. It would, nevertheless, be appropriate to restore an actual objective individualization of the legislature in relation to these sentences by restoring their connection with the severity of the behaviors they sanction. Such recovery could include the prediction of adequate alternative sentences for each offence and not a comprehensive list that leaves too much power to

[145] J. FRANCILLON, Ph. SALVAGE, « Les ambiguités des sanctions de substitution », *JCP* 1984, I, 3133, p. 38.
[146] D. DECHENAUD, *L'égalité en matière pénale*, *op. cit.,* p. 219.
[147] E. DREYER, « Motivation de la peine, légalité et individualisation », *op. cit.*, p. 74.
[148] J.-H. ROBERT, « La détermination de la peine par le législateur et par le juge », *op. cit.*, p. 246.
[149] A. DECOCQ, « Les modifications apportées par la loi du 11 juillet 1975 à la théorie générale du droit pénal », *Rev. sc. crim.*, 1976, p. 26.
[150] D. DECHENAUD, *L'égalité en matière pénale*, *op. cit.*, p. 219-220.
[151] F. FRANCILLON, Ph. SALVAGE, « Les ambigüités des sanctions de substitution », *op. cit.,* p. 31.

the judge and thereby weakens the principle of legality. Such a measure would be part of the legislature's current tendency to give importance to proportionality and to limit the powers of individualization of judges. This movement is reflected in the emergence of mandatory sentences stormed by the legislature, which is imposed on the courts[152]. These sentences fixed only by the legislature must be stormed according to the objective severity of the conduct they sanction and thus be proportionate[153].

The Legislature, therefore, does not always respect the principles of criminal law that should be applied when it storms the sentence. It, thus, contravenes the principle of necessity and that of proportionality. But the shortcomings in the practice of legal individualization do not stop there, the legislature sometimes lacks coherence in sentencing and particularly when it comes to assessing the relationship between gravity and difficulty in complying with the Frameworks that it has set itself, including the scale of sentences.

2.2. The legislature inconsistencies in the relationship between the severity of the criminal offense and punishment

The legislature, in addition to not respecting the principles of necessity and proportionality which should be imposed on him, seems to have difficulties in assessing the severity of the infringement caused by conduct, which is illustrated by his Regular non-observance of the scale of sentences which he himself created to frame his power of individualization. This legislative practice is revealed by the study of the aggravating circumstances set by the legislature (2.2.1). This legislative incapacity is mainly the result of the current goals that the contemporary legislature wishes to achieve by storming a new sentence and preventing any overall vision of the sentences. To compel the legislature to set sentences that are actually objective, solutions must be considered in order to restore the effectiveness of legal individualization (2.2.2).

2.2.1. Irrationality in determining the aggravating circumstances for a sentence

The study of aggravating circumstances is indicative of the lack of rationality of the legislature at the time of the storming of sentences. It attests either to the difficulty faced by the legislature in storming coherent and proportionate sentences in the light of the particular circumstances aggravating the offence or of the lack of real will of the legislature to set Penalties for the objective severity of behaviors[154].

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[152] E. DREYER, *Droit pénal général*, *op. cit.,* p. 177-178.
[153] J. DIGNAN, *Understanding victims and restorative justice*, Open University Press, 2005, p. 83.
[154] W. KAUFMAN, *Honor and revenge: a theory of punishment, op. cit.,* p. 56.

Inconsistencies are revealed not only by the study of the aggravating circumstances set for the same offence, but also by the study of a single aggravating circumstance in its application to various offences[155]. These inconsistencies are the undeniable evidence that Parliament does not respect the rules it has imposed itself in order to achieve effective legal individualization, i.e. respecting the principles of necessity and proportionality. Indeed, the legislature often fails to comply with the scale of sentences, mainly by not applying the one-degree elevation rule to aggravating circumstances, which is detrimental to the need for and proportionality of the penalties incurred. The individualization carried out by the legislature proves to be of poor quality, as without internal coherence, an incoherence which attests to the absence of proportionality between sentences and the infringement of public order[156].

On the one hand, the inconsistencies exist in the study of aggravating circumstances for an offence. The principle is that the aggravating circumstance increases the repression of one degree in relation to the simple offence[157]. Derogations are justified in the event that certain circumstances are considered to have more serious public order. But sometimes the increase in repression is such that its amplitude is difficult to explain. It is possible to cite as an example the repeated threat of committing a crime or an offence[158].

This offence, when it is simple, makes it incur six months` imprisonment and 7 500 € fine. On the other hand, in the presence of a threat of death, a circumstance which aggravates the punishment of the offence, the penalties incurred are then three years imprisonment and a fine of 45 000 €[159]. The sentence of imprisonment is then raised by three levels and is sixfold the amount of the fine incurred, which is also multiplied by six. Such an amplitude seems disproportionate. Explanations can be made, this gap having given the legislature the possibility to insert between the two sentences mentioned another aggravating circumstance, racism and homophobia[160], and having shown the greatest severity attached to the Aggravating circumstance of death threat. The fact remains that the repression attached to this circumstance has no propor-

[155] M. LÉNA, « Exécution des peines, le projet de loi relatif à la prévention de la récidive et à l'individualisation des peines », *op. cit.*, p. 572.
[156] P. HULSROJ, *The principle of proportionality*, *op. cit.*, p. 99.
[157] E. DREYER, *Droit pénal général*, *op. cit.*, p. 919.
[158] French penal Code, article, 222-17.
[159] M. JANAS, « Les dispositions relatives au prononcé et à l'application des peines. De l'individualisation à l'industrialisation des aménagements de peines, des peines aménagées aux aménagements *low coast* ? », *op. cit.*, p. 30.
[160] French penal Code, art. 222-18-1.

tion to that of the offence and also to the seriousness of the facts. Sometimes the amplitude between the single offence and the aggravated offence can also be justified[161].

Another inconsistency for the same offence, the elevation is sometimes of different magnitude for the two aggravated sentences of imprisonment and fine. For example, the fraudulent abuse of the state of ignorance and weakness infringes five years imprisonment and a fine of 750 000 € if its perpetrator is the leader of a sectarian group, while for the simple offense, the penalties incurred amount to three years of imprisonment and 375 000 € fine[162].

The increase in the fine, which doubles, is then greater than that of imprisonment, which is aggravated only by a step on the scale of sentences[163]. The aggravation of sentences is therefore not the same, or there is nothing to explain it[164]. On the other hand, it is sometimes the increase in the sentence of imprisonment which is the strongest, as is the case for the illicit surrender or supply of narcotic drugs of article 222-39 of the French Penal Code, since when this offence is committed in respect of a minor the sentence of imprisonment is doubled and increases by two degrees, while the quantum of the fine remains the same[165]. It is difficult to understand that the rise of only one of the sanctions results from the increase in the severity of the facts[166].

On the other hand, inconsistencies can be found in the study of a single aggravating circumstance and its implications according to the offence to which it applies. The increase is sometimes diametrically different for two separate offences. A striking case is the aggravation when the victim is a 15-year-old minor. In the majority of cases, the prison term is high by one degree, for example, in rape[167] or sequestration and abduction[168]. But in the case of pimping[169], or deprivation of liberty, it is high at two levels and changes in nature since it is criminalized, while the fine is multiplied by twenty[170].

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[161] M. AIRIAU, « Motivation de la peine criminelle, en avant toute ! », *op. cit.*, p. 18.
[162] French penal Code, art. 223-15-2.
[163] M. GIACOPELLI, « La loi du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales : un rendez-vous manqué », *op. cit.*, p. 455.
[164] T. PAPATHEODOROU, « De l'individualisation des peines à la personnalisation des sanctions », *op. cit.*, p. 112.
[165] E. DREYER, *Droit pénal général, op. cit.*, p. 919-920.
[166] A. MIHMAN, « La motivation des peines (en matière correctionnelle) », *op.cit.*, p. 20.
[167] French penal Code, article, 222-24.
[168] French penal Code, article, 224-5.
[169] French penal Code, article, 225-7-1.
[170] E. DREYER, *Droit pénal général, op. cit.*, p. 920-921.

It is then difficult to justify the fact that the same aggravating circumstance results in such disproportionate elevations, even if a circumstance may be considered more serious in some cases[171]. There are also disproportions between the rise of the custodial sentence and the fine as attested by the case of procuring. In some cases, the explanation that a circumstance may be more or less serious depending on the offence it aggravates does not hold. The most obvious example is the aggravated fault which is an aggravating circumstance of homicide and involuntary injuries[172].

Indeed, as David Dechenaud[173] finds, when a total incapacity for work of more than three months has resulted from a serious imprudence, the imprisonment is aggravated by one degree[174]. But if it has resulted in only a disability of less than three months or less[175], imprisonment is aggravated by two and three rungs on the scale of sentences, respectively. It is astonishing that the aggravation in the event of deliberate misconduct is different depending on the damage caused, the severity of which is outside the author's will. The aggravation should on the contrary be of the same importance regardless of the damage[176].

A second inconsistency is raised by David Dechenaud regarding injuries that have resulted in no disability. In the presence of deliberate misconduct, the conduct is sanctioned by a fifth class fine, whereas if the same damage is intentionally caused it is sanctioned with a fourth class fine[177]. But the intention is more serious than the fault of recklessness, even aggravated. This case, therefore, reveals a lack of a flagrant proportion between gravity and punishment, as well as an inconsistency in the legislature's reasoning when determining the applicable sentences or a failure to take into account the objective gravity of the offence[178].

These inconsistencies can only be criticized. They betray the legislature's lack of objectivity when individualizing sentences, whereas the legal individualization of the sentence should be based on the objective severity of sanctioned conduct. This lack of objectivity is able to cause a sense of injustice among

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[171] S. MELANDER, « *Ultima ratio* in european criminal law », *European Criminal law Review*, no. 1, (2013) vol. 3, p. 8.
[172] J. DIGNAN, *Understanding victims and restorative justice*, *Open University Press, 2005*, p. 83.
[173] D. DECHENAUD, *L'égalité en matière pénale*, *op. cit.*, p.95-96
[174] French penal Code, art. 221-6 et 221-19
[175] French penal Code, art. R.622-1, R.625-3, R.625-2 et 222-20
[176] S. HALLOT, « L'individualisation légale de la peine », *op. cit.*, p. 72.
[177] R. VIENNE, « De l'individualisation de la peine à la personnalisation de la mesure », *op. cit.*, p. 177.
[178] W. KAUFMAN, *Honor and revenge: a theory of punishment, op. cit.,* p. 144.

offenders, particularly in the most flagrant case of aggravated carelessness. The lack of objectivity of the legislature, which reveals these inconsistencies, questions the legitimacy of the technique of aggravation of sentences by the legislature, which is not under any control. Neither the Constitutional Council nor the European Court of Human Rights have accepted the lack of proportionality of certain aggravations laid down by the law. It is obvious that certain circumstances are more serious than others, but in these cases the legislature must show rationality in respecting the grid which he has imposed himself by raising the penalty not one but two rungs to underline their Gravity. It would also be more rational if the custodial sentence and the fine were to be raised in identical proportions[179].

All these inconsistencies (offences-duplication, inconsistencies in aggravating circumstances, alternative sentences) are the result of the uses made by the legislature of the law. The sentence is no longer seen by the legislature only as a means of protecting the essential values of our society, but also as a means of communication, which is detrimental to respect for the principles of legality and necessity. To this is added a certain resignation of the legislature for the benefit of the courts in the interest of individualization according to the personality of the offender[180].

2.2.2. Reasons for inconsideration of the principles governing individualization of punishment and possible solutions

The punishment of the legislature must normally have the primary function of sanctioning the infringement of the fundamental norms of society and must therefore logically be proportionate to the severity of the disturbance to the public order provoked[181]. Now the legislature is using the penalty either in this sense, but more so for its expressive properties. Sentences have become a means for legislatures to react to a social fact as well as a political display tool. At the occurrence of a scandal the criminal law, and especially in our case the penalty, allows the legislature to « show that he did not remain without reacting even though he would not have attacked the causes of the phenomenon »[182]. Valérie Malabat summarizes this process used by the legislature by the triptych "television, emotion, legislation".

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[179] E. DREYER, *Droit pénal général*, *op. cit.*, p.920

[180] M. GIACOPELLI, « La loi du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales : un rendez-vous manqué », *op. cit.*, p. 448.

[181] E. SENNA, « De l'individualisation de la peine au second degré de juridiction post-sentenciel », *op. cit.*,, n° 233.

[182] V. MALABAT, « Les infractions inutiles », *op. cit.*, p. 75.

The criminal law then makes it possible to appease public opinion attached to security. The legislature will, therefore, intervene in every other fact by raising the maximum already incurred or by creating a new aggravating circumstance when the conduct in question was already sanctioned. It will create a new criminality if no text is applicable without looking at whether the common law could apply. Parliament, therefore, merely responds to various facts to show its intervention, but without having a more comprehensive view of criminal law, which leads, as has been seen, to unnecessary offences and penalties, as already existing, as well as to penalties disproportionate to the facts, not related to their severity[183]. This expressive use of the sentence only responds to a political impulse which prevents any harmonization of sentences and conceals to the legislature its mission to achieve an individualization of the adequate sentence, i.e. that meets the principle of necessity and ensures the proportionality of the penalty to the severity of the facts it sanctions. The inconsistencies raised are, in the majority, a pile of reforms without the will of the legislature to coordinate[184].

To some extent, the lack of proportionality between the penalty and the facts is also the result of a resignation of the legislature. According to David Dechenaud, in terms of individualization of the sentence, « It is the legislature that is gradually neglecting its role » for the benefit of the judges[185]. This is particularly apparent in the case of alternative sentences, with the legislature giving the judge the opportunity to impose sanctions unrelated to the facts[186]. Therefore, the legal individualization, which must be based on the objective gravity of the facts, no longer operates its role[187]. Objectivity and therefore proportionality are sacrificed for the benefit of the judge's subjective individualization. This practice can only lead to weakening the principles of legality and necessity. The result is that the penalty is no longer certain, which reduces its intimidating function, while the absence of proportion leads to a sense of injustice. If it is now necessary for the sentence to be adapted to personality, it must remain objective enough not to create this sense of injustice[188].

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[183] DI. TULLIO et J. VÉRIN, « La nécessité de services criminologiques pénitentiaires pour l'individualisation de la peine et le traitement rééducatif du criminel », *op. cit.*, p. 311.

[184] E. DREYER, *Droit pénal général*, *op. cit.*, p.277-278 et V. MALABAT, « Les infractions inutiles », *op. cit.*, p.74 et s.

[185] D. DECHENAUD, *L'égalité en matière pénale*, *op. cit.*, p. 221-222.

[186] O. BACHELET, « Généralisation de l'obligation de motivation des peines : les amendes contraventionnelles également concernées », *op. cit.*, p. 23.

[187] S. HALLOT, « L'individualisation légale de la peine », *op. cit.*, p. 80.

[188] W. KAUFMAN, *Honor and revenge: a theory of punishment, op. cit.,* p. 132.

In view of the legislature's practices, it seems necessary to find solutions to impose compliance with the principles governing legal individualization. This respect could go through a control of the legislature. The principles of legality and necessity are laid down in article 8 of the Declaration of the Rights of man and of the citizen and therefore have constitutional value. But if the Constitutional Council, which is responsible for monitoring the conformity of the law with the Constitution, enforces the principle of legality, since criminal sanctions can only be stormed by the law and by the regulation as regards contraventions, it shows less severe with regard to the principle of necessity and the requirement of proportionality which allows its implementation[189].
The Council does indeed sanction only the manifestly disproportionate sentences and refuses to carry out control outside this case on the ground « that it is not for it to substitute its own assessment for that of the legislature as regards the need for Sentences »[190]. This control is therefore limited and cannot currently be sufficient to force the legislature to adopt proportionately objective sentences, unless there is a change of course of the Constitutional Council. Indeed, « any punishment whose necessity does not appear in an obvious way » should be punished[191].
But the penalties set by the legislature could be the subject of a conventionality control. Indeed, the Strasbourg court held that if the rights guaranteed by the European Convention on human rights could be subject to restrictions, these should be of legal origin and necessary for the protection of public order, these restrictions must be proportionate to the legitimate purpose sought[192]. But a sanction is always a restriction on rights and freedoms. Thus, in application of the Convention, the legislature must proportion the sentences to gravity[193]. However, such control would be limited to the rights and freedoms set out in the Convention. The Court of Justice of the European Communities also ruled on the proportionality of sentences[194]. It has indeed judged, with regard to the criminal sanctions which the internal legislature adopts to ensure the effectiveness of European law, that the sanctions should be proportionate, effective and dissuasive[195].

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[189] E. BONIS, « Motivation de la décision prononçant une peine d'amende », *op. cit.*, comm. 69.
[190] French Constitutional Council, Dec., 19-20 January 1981, n°80-127 DC.
[191] J. LARREGUE, « De l'individualisation de la peine à la "décarcéralisation" », *op.cit.*, p. 24.
[192] E. DREYER, *Droit pénal général*, *op. cit.,* p.236
[193] ECHR, 24 Nov. 1986, Case, *Gillow v United Kingdom*
[194] D. ALLIX, « De la proportionnalité des peines », *op. cit.*, p. 5-7.
[195] Court of Justice of the European Communities, 8 July. 1999, *Nunes and Matos* ; CJEU, 7 December 2000, case C-213/99, *Andrade*.

A final path may be envisaged to compel the legislature to abide by the principles governing the legal individualization of the sentence. As has been seen earlier, the practices of contemporary legislatures lead to the ranting of sanctions that do not always meet the principles of necessity or proportionality. Some authors[196] propose to submit the elaboration of criminal laws providing for penalties for compliance with a particular procedure, and their vote should also be subject to a qualified majority. This stricter procedure would then be intended to make the legislature aware of the seriousness of the facts which he intends to sanction and thus to storm an adapted sentence. If he did not consider the sentence as necessary, then the stricter procedure should dissuade him from adopting it.

Conclusion

Legal individualization, which can only be objective, is an obligation for the legislature arising from the principle of legality of sentences. This power of individualization of the legislature is limited by the principle of necessity, which requires that the punishment be proportioned to the severity of the breach of public order resulting from the sanctioned conduct. The legislature has a system of thresholds, the scale of sentences, in order to establish a proportionate sentence. But this system is proving to be complex in its application.

However, if this complexity can be perceived as a necessary evil when it responds to a concern for legal individualization, it is in reality today only a lack of knowledge by the legislature of the principles of necessity and proportionality, as well as the rules he has imposed himself. The legislature storms the sentences without coordination between them and without an overall view. The result is inconsistencies and a right that becomes difficult to understand and is perceived as unfair. Solutions must, hereafter, be found to give back to the law of punishment its coherence and thus its credibility.

[196] E. DREYER, *Droit pénal général, op. cit.*, p. 276.