



# **EUI Working Papers**

**LAW 2008/23**

Race Judicata. Rien ne va plus for Race and Ethnicity  
in France and Europe?

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ISSN 1725-6739

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Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy

<http://www.eui.eu/>  
<http://cadmus.eui.eu/>

## **Abstract**

The French Constitutional Council recently declared that “racial and ethnic origins” are not objective legislative criteria and conflict with Article 1 of the French Constitution. Both earlier case law as well as the specific political background outside and within the Constitutional Council, indicate that the result does not come as a surprise. In fact, “race” and “racial origins” are extremely controversial terms, especially in France, where they clash with a universal, Republican view of citizenship. This has, for instance, led to the introduction of territorial measures which, as opposed to identity-based ones, have mostly passed constitutional muster.

The decision equally raises a number of broader issues. First, what relevance does it assume at the European level, especially when read in the light of Directive 2000/43 and case law by the European Court of Justice concerning affirmative action and indirect discrimination? Second, what influence may its reasoning exercise on other European constitutional courts that will in the future have to decide on similar issues? In fact, demographic changes due to immigration will sooner or later have to lead to an increase of measures taking into account the racial/ethnic origin of European citizens in order to fight discrimination of populations with an immigration background. In this sense, the Constitutional Council problematically adopted a very formalistic and short-sighted view, at the expense of a more substantive conception of the equality principle.

## **Keywords**

Non-discrimination – judicial review – fundamental/human rights - France



## *Race Judicata.*

### *Rien ne va plus for Race and Ethnicity in France and Europe?\**

Mathias Möschel

#### **The Decision**

On 15 November 2007<sup>1</sup>, the *Conseil constitutionnel*, France's Constitutional Court, decided on the constitutionality of the proposed *Loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile*, an Act intended to modify the currently existing legislation on immigration, integration and asylum contained in the *Code de l'entrée et du séjour des étrangers et du droit d'asile*. The decision was triggered by a group of members of parliament, pursuant to Article 61 of the Constitution,<sup>2</sup> and specifically targeted Articles 13 and 63 of the proposed Act. However, while most of the doctrinal comments in France<sup>3</sup> and abroad<sup>4</sup> have focused on this former provision

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\* The author wishes to thank Michel Troper, Bruno de Witte, Wojciech Sadurski, Costanza Hermanin, and Janine Silga for their invaluable and critical comments on this paper. Any errors or omissions are the author's alone.

<sup>1</sup> Decision CC 2007-557 DC, 15 November 2007. All decisions by the *Conseil* can be found at: <http://www.conseil-constitutionnel.fr/general/decision.htm>.

<sup>2</sup> Amongst other institutional figures, Article 61 gives 60 members of the *Assemblée nationale* or of the *Sénat* the possibility to refer Acts of Parliament to the *Conseil* before their promulgation. After promulgation it is not possible to raise the issue of constitutionality of an Act anymore in any court.

<sup>3</sup> See for example Guy Carcassonne, 'Les tests ADN', *Dalloz*, (2007), n. 42, p. 2992; Eric Fongaro, 'Tests ADN: traitement différent de situations différentes ou discrimination', *Droit de la famille*, (2008), n. 1, p. 13-16.

<sup>4</sup> See Paolo Passaglia, 'Il conseil constitutionnel interviene sulla nuova legge in materia di immigrazione', *Foro it.* (2008), part IV, p. 57.

containing the possibility of DNA testing for immigration purposes,<sup>5</sup> it is the holding on the latter one, concerning the constitutionality of ethnic or racial statistics for research purposes, which may echo well across the rest of Europe and therefore needs to be looked at more closely. In fact, this is the first time that a European constitutional judge decides on the legitimacy of legislative provisions using ethnic and racial criteria and clearly having populations with an immigration background as their addressees. There have certainly been decisions involving mostly ethnic criteria in other European constitutional court decisions, for example in Italy or Austria, and their analysis may indeed provide some interesting parallel reading. Nevertheless, those decisions usually dealt with special protection measures of linguistic minorities who had ended up being within one country because of various border shifts following the two World Wars and which were in some cases backed-up by international treaties protecting those minorities.

Proposed Article 63 would in the first place have modified and integrated parts of Articles 8 and 25 of the *Loi relative à l'informatique, aux fichiers et aux libertés*, an Act regulating the treatment of personal data, whose combined provisions prohibit any data controller established in France – including therefore both public and private entities such as companies - to collect data relating to ethnic or racial origin in studies on discrimination, integration and diversity of origins. In the second place, and by consequence, it would have introduced the possibility to make the ethnic or racial origin of a person appear in such studies, after having obtained an authorization from the *Commission nationale de l'informatique et des libertés* (CNIL)<sup>6</sup> while prohibiting at the same time the direct or indirect identification of the concerned individuals. This authorization would have substituted the required consent by the concerned persons to use such sensitive data. According to the CNIL such a consent is deemed problematic, especially within companies where the subordination aspect of employees and the hierarchical relationship may affect the sincerity of such a consent and could moreover provoke a negative reaction in someone who needs to formalize her/his consent by signature fearing some other consequences<sup>7</sup>.

The *Conseil* declared the use of such ethnic or racial statistics unconstitutional on strictly formal grounds, due to an irregular parliamentary amendment procedure. In recent years, based on the combined interpretation of Articles 39, 44 and 45 of the Constitution, the *Conseil* has developed a jurisprudence, which establishes that the right to propose amendments to a bill may occur at each state of the legislative procedure. However, in order to ensure the “*clarté et sincérité*” of the parliamentary debate, the

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<sup>5</sup> Article 13 establishes a procedure by which a visa or asylum applicant, who wants to rejoin in or accompany his or her family to France, may ask for DNA testing of the mother at the state's expense, after specific approval by a magistrate, if his or her civil status cannot be determined with certainty. In the view of the *Conseil*, while making some reservations, this procedure neither violates the principle of equality, nor the right to family reunification, the right to privacy or the principle of human dignity, as alleged by the petitioners (Points 5 – 23).

<sup>6</sup> The amendment was based on a recommendation by the CNIL, dated 16 May 2007, and had been introduced by two members of parliament who were also members of the CNIL. See Michel Verpeaux, 'Des jurisprudences classiques au service de la prudence du juge', *La Semaine Juridique, JCP G*, (2008), part I, 101, pp. 20-21.

<sup>7</sup> See Christophe Willmann, 'Statistiques ethniques en entreprise: le Conseil constitutionnel pose de nouvelles conditions', *Droit Social*, (2008), n. 2, p. 168.



amendment needs to have a logical legal nexus with the bill under discussion<sup>8</sup>. In the absence of such nexus the *Conseil* can declare the unconstitutionality of the provision object of an amendment, as it did in the current case. This type of judicial review tries to stem a tendency to introduce “piggyback” amendments having little or no connection with the proposed bill, so-called “*cavaliers législatifs*”, in order to bypass a real debate on them<sup>9</sup>. Undoubtedly, ethnic and racial origin statistics for scientific studies have little to do with a bill which basically modifies the *Code de l'entrée et du séjour des étrangers et du droit d'asile*, the reason why the *Conseil* did not hesitate in declaring the unconstitutionality of Article 63 on this ground (Points 25 – 27). At first sight, the formalistic reasoning does not seem to have any particular relevance in identifying a substantive conflict between ethnic or racial criteria in legislation with other constitutional values. However, the *Conseil* did not limit its reasoning to this argument. Adding what could be defined as a proper *obiter dictum*, it specified that:

“[c]onsidérant que si les traitements nécessaires à la conduite d'études sur la mesure de la diversité des origines des personnes, de la discrimination et de l'intégration peuvent porter sur des données objectives, ils ne sauraient, sans méconnaître le principe énoncé par l'article 1<sup>er</sup> de la Constitution reposer sur l'origine ethnique ou la race [...]” (Point 29).<sup>10</sup>

In other words, studies on discrimination, integration and diversity of origins, must rely on objective data. In the opinion of the *Conseil* ethnic and racial origins are not such objective data and therefore conflict with the principles of indivisibility and equality enshrined in Article 1 of the French Constitution, which provides that

“[l]a France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. Son organisation est décentralisée”.<sup>11</sup>

Upon closer examination, since the *Conseil* refers only to the principle laid down in Article 1 and does not explicitly mention which principle contained in Article 1 it deems to have been violated some doubts may arise as to whether it invokes the principle of indivisibility, equality, or both? Even though the former relates to the territorial unity of France as a state whereas the latter to anti-discrimination issues and therefore certainly address conceptually different concerns, in France they have tended to play out in a combined way which has especially prevented groups from affirming certain collective rights.<sup>12</sup> In fact, the recognition of differences for equality purposes has been extremely

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<sup>8</sup> See the following decisions for recent examples applying this principle: CC 2004–501 DC, 5 August 2004 (points 20- 23), decision CC 2005-532 DC, 19 January 2006 (points 23 – 31) and CC 2006-535 DC, 30 March 2006 (points 4 – 11).

<sup>9</sup> For an exhaustive description on the development of this type of case law since 1985 see Jean-Eric Schoettl, ‘Les cavaliers législatifs se suivent et se ressemblent’, *Les Petites Affiches*, (2007), n. 82, p. 17.

<sup>10</sup> “Although the processing of data necessary for carrying out studies regarding the diversity of origin of peoples, discrimination and integration may be done in an objective manner, such processing cannot, without infringing the principle laid down in Article 1 of the Constitution, be based on ethnicity or race [...]”

<sup>11</sup> “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.”

<sup>12</sup> This view stands at the very origins of the French modern state and has already been expressed in 1789 by Count Stanislas de Clermont-Tonnerre in connection with the emancipation of Jews and their accession to the French citizenship when he declared that “[o]ne has to refuse everything to the Jews as

problematic, because in France, since its inception, the equality principle has come to represent the unifying element of French citizenship, national sovereignty and unity, thus equaling any legislative differentiation to an attack on such general values.<sup>13</sup> For this reason the equality principle has also been read as the right to indifference.<sup>14</sup> In spite of the high probability that the *Conseil* intended to refer to the equality principle, in order to develop a coherent case law, it might have been helpful to specify whether and in which way these statistics were deemed to be a threat to France's unitary conception of the state and citizenship or rather a violation of the equality principle.

Additional uncertainties arise in connection with the wording contained in the *obiter dictum*. First of all, it is not clear what permitted objective measures may be and to what extent so-called subjective measures may still pass constitutional muster. The *Conseil* explicitly mentions name, geographic origins or prior citizenship to the French one as admissible, and dismisses ethnic and racial origin as subjective and thus unconstitutional. Indeed, an explanatory comment to its own decision published in the *Cahiers du Conseil constitutionnel*, specifies that

“[L]e Conseil n'a pas jugé pour autant que seules les données objectives pouvaient faire l'objet de traitements: il en va de même pour des données subjectives, par exemple celles fondées sur le «ressenti d'appartenance»”.<sup>15</sup>

Not only is the distinction between allegedly objective measures and subjective measure very problematic and itself highly dependent on subjective assumptions by the judges, as the explanatory comment to the decision clearly shows, but equally the technique of providing an interpretation of its own decisions written in general by the Secretary General of the *Conseil* in a review directed by the *Conseil*, raises the question why those explanations were not integrated into the decision itself? Moreover, the value of those comments is not clear either. Having been written by the *Conseil's* Secretary General himself, they lie somewhere between a simple doctrinal comment and an authoritative interpretation and usually provide an indication as to how a certain decision needs to be interpreted.

In the second place, while on the one hand it may appear more a question of linguistic style and avoidance of repeating the same expression within one sentence, on the other hand a fine line seems to run between permitted processing of data necessary for carrying out studies regarding the diversity of origin of peoples, discrimination, and integration which may *be done* in an objective manner (*peuvent porter sur des données objectives*) and prohibited statistics which may not *be based on* ethnic or racial origins (*reposer sur l'origine ethnique ou la race*). This very fine, if sophistic, difference between “*porter sur*” and “*reposer sur*” as well as the highly problematic and blurred distinction between objective and subjective data may potentially still allow surveys on

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a nation and grant them everything as individuals”. “*Il faut tout refuser aux Juifs comme nation et tout accorder aux Juifs comme individus*”. See Michel Winock, *La France et les Juifs: De 1789 à nos jours* (Paris : Editions Du Seuil, 2004), p. 18.

<sup>13</sup> Anne Levande, ‘Discrimination positive et principe d'égalité en droit français’, *Pouvoirs* (2004), n. 111, p. 58.

<sup>14</sup> Geneviève Koubi, ‘Le droit à la différence, un droit à l'indifférence?’, *Revue de la recherche juridique*, (1993), p. 460.

<sup>15</sup> *Les Cahiers du Conseil Constitutionnel*, n. 24, 2008, p. 13. “The *Conseil* has thus not decided that only objective data may become the object of such studies: the same can be said about subjective data, such as those based on the “feeling of belonging” (my translation).

ethnicity and race, by asking the skin colour or through self identification, could ultimately circumvent some of the most prohibitive effects of the decision.

For the moment, as a practical outcome, this judgment makes it much harder for researchers to assess the extent of discrimination suffered by France's growing visible minorities,<sup>16</sup> also known in France as *personnes issues de l'immigration*. In addition, the *Conseil* has indirectly made it clear that it will not hesitate to strike down any affirmative action programme,<sup>17</sup> called "*discrimination positive*", favouring groups identified by their ethnic and racial origin, because such origins cannot be deemed to be objective categories. In fact, while strictly speaking there were no ethnic or racial quotas involved in the legislative proposal, by this *obiter dictum* the *Conseil* made sure that the door for any planned legislative programme aiming in a similar direction remains closed.

### **The Legal Precedents**

In reality, from a strictly legal point of view the decision on ethnic and racial criteria does not come as a huge surprise. While it was the first time that the *Conseil* had to refer directly to the notions of ethnicity and race, previous decisions have already provided some indications on what the outcome of this case eventually would have been. In particular, two decisions stand out as precursors: the first<sup>18</sup> concerned the constitutionality of the *Loi portant statut de la collectivité territoriale de la Corse* (Act on the statute of the territorial unit of Corsica).<sup>19</sup> Here, the *Conseil* declared the reference made in some provisions to the "people of Corsica" as unconstitutional, because contrary to Article 1 of the Constitution. "[T]he French Constitution only knows the people of France composed of all French citizens without any distinction of origins, race or religion" (Point 13). However, as opposed to the decision under discussion, rather than the principle of equality it seems to be the principle of indivisibility which is being invoked.

The second decision to be mentioned<sup>20</sup> concerned certain provisions of the European Charter for Regional or Minority Languages signed in Budapest on 7 May 1999 which was to be ratified and transposed into French law. In particular those provisions which intended to encourage the use of regional or minority languages in public life and hence also in justice, administrative bodies and public services, were deemed to "undermine

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<sup>16</sup> The Canadian term "visible minorities" is being used consciously, so as to contrast it with the term "immigrant population". This makes sense, because France as well as other traditional European immigration countries such as the United Kingdom or the Netherlands, are currently dealing with racial or ethnic discrimination suffered by people who have long become citizens but are still viewed as immigrants and as second-class citizens because of their "different" look.

<sup>17</sup> Throughout the paper, instead of the terms "positive discrimination" or "positive action" that have developed in the European legal jargon, the American term "affirmative action" will be used. It seems to be the more neutral and appropriate term.

<sup>18</sup> Decision CC 91-290 DC, 9 May 1991.

<sup>19</sup> For one detailed comment on this decision amongst others see Constance Grewe, 'Le nouveau statut de la Corse devant le Conseil constitutionnel', *Revue universelle des droits de l'homme* (1991), p. 381.

<sup>20</sup> Decision CC 99-412 DC, 15 June 1999.

the constitutional principles of the indivisibility of the Republic, equality before the law and the unity of the French people” (Point 10) and were therefore declared unconstitutional. As opposed to the Corsica decision, where the unconstitutionality was limited to the legal recognition of the Corsican people, here the *Conseil* went a step further, by declaring the recognition of *any* group of people identified by its origin, culture, language, belief, race or religion absolutely incompatible with the French Constitution.<sup>21</sup>

A confirmation of this constitutional jurisprudence and logic can be equally observed at the administrative judiciary level. More specifically, the prestigious *Conseil d’Etat*, the highest body of the French administrative law courts, intervened with an advisory opinion to the government concerning the Framework Convention for the Protection of National Minorities. It held that since the concept of national minorities was intended by this convention as a grouping of people established on the territory of the State and having a common ethnic, cultural, linguistic and religious identity, differing from the majority, it would be contrary to the principle of unity of the French people and therefore incompatible with the French Constitution<sup>22</sup>.

As can be seen, the unitary Republican view of the French people, by which the only legitimate identity in the public sphere is citizenship, had already been used to make sure that any type of so-called “communitarian” instances in legislation would be stifled in their cradle. This is what happened as well in this case. If Corsican people and regional or minority languages do not pass the test, all the more ethnic or racial origins were bound to fail. First, and here comes the new point, they are not an objective category which, on the contrary, was not an element specified in relation with Corsican people and regional or minority languages. Second, they would undermine the unitary conception of the French people, because once one starts to recognize ethnic or racial origins as a distinctive category, even only for purposes of research and statistics, the step to a broader group recognition and affirmative action is not too long. Hence, the current decision certainly does not represent a *revirement* in the *Conseil’s* case law, but rather a logical sequel of it, even though as said before, there are some doubts as to which principle – equality or indivisibility - exactly has been violated.

## The Political Background

It would however be too easy to view this decision as a mere element of continuity in French constitutional jurisprudence. Indeed, it intervenes authoritatively in an ongoing general public debate around citizenship, immigration, public identity, racism and affirmative action in France. In order to understand the outcome, one also needs to look at the broader picture and the political climate and forces which led to this decision. What seems to be at stake is the long-established Republican ideal of citizenship in France. The philosophical-political conflict opposes universalist French republicanists pleading for a unitary integrationist - in the more benevolent cases - or even assimilationist state, in which only French citizenship matters in the public sphere on

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<sup>21</sup> See Michel Clapie, ‘Le français restera la langue de la République’, *Les Petites Affiches*, (2000), n.3, p. 14.

<sup>22</sup> Opinion n. 357-466, 6 July 1995 at <http://www.conseil-etat.fr/avisag/357466.pdf>

the one hand, to communitarian differentialists with a more pluralistic multicultural view in which the existence of various groups is openly recognized or even promoted by the state on the other. The complication added to this background by “ethnicity” or “race”, is that since the scientific type of racism has been refuted by UNESCO on four separate occasions during the 1950s and 1960s,<sup>23</sup> France vehemently started opposing the use of the word ‘race’, banning it into the realm of (science) fiction wherever possible. For the latest example of this view, a Socialist deputy from Guadeloupe asked that the word “race” should be eliminated from Article 1 of the Constitution because its use is shocking and dangerous.<sup>24</sup> Similarly, at the international level, when the European Commission on Racism and Intolerance (ECRI) introduced General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination, some believed – and it is most probable that French representatives were amongst them - that the word ‘race’ should be removed from the recommendation.<sup>25</sup> Another manifestation of this opinion occurred at the European level during the negotiations on what would later become Directive 2000/43<sup>26</sup> (the “Race Directive”). In fact, the introduction of Preamble (6) to the Race Directive stating that the use of the term “racial origin” does not imply an acceptance of theories which determine the existence of separate human races was proposed by the French negotiators.<sup>27</sup> The fear and reasoning behind such positions are that by using the term “race” or “racial origins” one might be implicitly recognizing the existence of different human races, when in reality there is scientifically speaking only one human race. This has led to the unique situation that in France any problem relating to racism and immigration has been, until recently, viewed as a social issue.

However, approximately around the end of the 1990s a change occurred at two different levels in this broad debate. In the first place, at the theoretical level, the issue of racism as a social problem on its own has taken the centre stage,<sup>28</sup> leading to a reading of daily events in “racial” terms. For instance, the riots of November 2005 were interpreted by many as a racial issue in France, something which would have been unheard of some years earlier.

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<sup>23</sup> Nora Räthzel, ‘Developments in Theories of Racism’, in The Evens Foundation (ed.), *Europe’s New Racism: Causes, Manifestations, and Solutions* (New York: Berghahn Books, 2002), p. 4.

<sup>24</sup> ‘Lurel demande la suppression du mot “race” de la Constitution’, *Agence France Presse*, 25 September 2007.

<sup>25</sup> See Giancarlo Cardinale, ‘The Preparation of ECRI General Policy Recommendation No. 7’, in Jan Niessen, Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden: M. Nijhoff, 2004), p. 84 at fn. 7.

<sup>26</sup> Directive 2000/43 CE of the Council, dated 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in OJ L180/p.22

<sup>27</sup> See Virginie Guiraudon, ‘Construire une politique de lutte contre les discriminations: l’histoire de la directive «race»’, *Sociétés contemporaines*, 2004, n. 53, p. 28.

<sup>28</sup> One recent publication highlights this change directly in the title: Didier Fassin, Eric Fassin (eds.), *De la question sociale à la question raciale?* (Paris: Editions La Découverte, 2006). Before that, one could also mention the 1999 landmark study by French sociologist, Philippe Bataille, on racial discrimination at work (*Le racisme au travail*).

The second change, preceded by some timid institutional initiatives,<sup>29</sup> occurred at the political level with the arrival of Nicolas Sarkozy as *Ministre de l'Intérieur* first and then as *Président de la République*. Himself son of immigrants, he may be more aware of certain difficulties and thus, on multiple occasions, he expressed himself in favour of affirmative action which takes into account race, ethnicity or religion. On 14 January 2004 while still Interior Minister, he proposed Mr. Aïssa Dermouche (of Algerian origins) as *préfet* of the Jura region and later on as President he appointed Rachida Dati (of Moroccan and Algerian origins) as *Ministre de Justice* and Ramatoulaye Yade (of Senegalese origins) as *Secrétaire d'Etat* under the *Ministre des Affaires Etrangères*, hereby continuing a policy he has been trying to implement since his appearance on the national political scene.<sup>30</sup> Whilst allowing ethnic and racial statistics is admittedly not the equivalent of affirmative action measures, scientific findings of widespread discrimination towards France's population with immigration background might certainly have represented a stepping stone for future affirmative action measures. With Mr. Sarkozy guiding France, the political will and constituency for adopting similar measures is given.<sup>31</sup>

The specific issue of ethnic or racial statistics object of the constitutional censure also emerged in connection with this general framework. Actually, the general public became aware of these statistics only in the late 90s, when they emerged from a limited scientific discussion arena, namely that of statisticians and demographers, to a national platform due to a number of articles published in major national newspapers.<sup>32</sup> The debate on this specific issue has opposed two main groups. On the one hand those in favour of such statistics, arguing mainly that they are one of the main instruments of proof in social sciences without which it is impossible to seriously study the phenomena of discrimination and thereafter propose some political/legal steps to combat them.<sup>33</sup> Moreover, such statistics would also have the advantage of providing the concerned population with a sort of social recognition,<sup>34</sup> by which the public institutions also start acknowledging the day-to-day reality which visible minorities face. On the other hand, the counterarguments are mainly that the introduction of such statistics may actually

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<sup>29</sup> Indeed, the first politician to openly address the issue of racial discrimination was Martine Aubrey (Employment Minister from 1997 to 2001). The first study on the institution of an agency against discrimination (Belorgey, 1997) followed by a second one in 1999 falls into that same time period. In 2000, the GED (*Groupe d'Etudes sur la discrimination*) - later transformed into the GELD (*Groupe d'Etudes et de lutte contre la discrimination*) - was created.

<sup>30</sup> It is also worth mentioning here that in the currently ongoing constitutional reform process, Sarkozy declared himself in favour of introducing the respect for diversity in the Preamble to the Constitution, thus confirming the tendency for a more explicitly multicultural state. See the summary of Sarkozy's press conference on 8 January 2008 in *La Semaine Juridique, JCP G*, (2008), Actualités, 43, p. 5 and the comment by Jean-Philippe Feldman, 'Le président, le Préambule et les droits de l'homme', *La Semaine Juridique, JCP G*, (2008), Actualités, 50, pp. 3 - 4.

<sup>31</sup> It is somehow surprising (and for many people worrying) that an exponent of the right wing who had once contemptuously defined young people with immigration background as scum (*racaille*) proposes such measures.

<sup>32</sup> 'Le curieux débat des démographes', *Mouvements* (1999), p. 110.

<sup>33</sup> Patrick Simon, 'Sciences sociales et racisme: où sont les docteurs Folamour?', *Mouvements* (1999), p.113.

<sup>34</sup> *Id* at 113.

reproduce, create, legitimise and entrench racist behaviour at the national level.<sup>35</sup> Again, the view that in the French public sphere only citizenship should appear as a relevant distinction plays a role here and also explains why since 1872 the national population census does not ask any questions about religious affiliation.<sup>36</sup> The objection to establishing types of statistics which let one's ethnicity or race emerge therefore in France ran so deep that even a number of NGOs (SOS Racisme, MRAP, LICRA, GISTI) and HALDE, France's administrative anti-discrimination authority, were strongly opposed to them,<sup>37</sup> even though HALDE later on declared to be in favor of the proposed amendment as long as the text offered sufficient guarantees to the concerned subjects.<sup>38</sup> Undoubtedly, the fact that the prohibition of such statistics was ultimately to be repealed by immigration legislation proposed by the current *Ministre de l'Immigration, de l'Intégration, de l'Identité nationale et du Codéveloppement*, Brice Hortefeux, must also have raised some doubts as to the use that could actually be made by the government with such data. Had the provision been inserted into a comprehensive anti-discrimination legislation the situation may have looked slightly different and appeared under a different light. Interestingly, the doubts by the latter as well as of the NGOs as to the ultimate use of ethnic or racial statistics in the immigration context, only seem to have been confirmed recently when, in the wake of the *Conseil's* decision, Mr. Hortefeux has decided to create a commission which should study the possibility to modify the Constitution, so as to allow the use of geographical quotas rather than ethnic ones (on the difference of these two models see immediately here below) in immigration law, thus permitting "selective immigration".<sup>39</sup> However, this commission presided by Pierre Mazeaud, the former president of the *Conseil*, subsequently rejected this proposal.<sup>40</sup>

There is nonetheless an additional objection to this type of statistics and the fear of potential misuse of ethnic and racial statistics: namely the spectres of France's Vichy regime during World War II and especially its participation in the Holocaust.<sup>41</sup> During that period, in fact, French citizens were racially categorized by the public authorities, thus facilitating the deportation of French Jews to the concentration camps. The

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<sup>35</sup> To this argument the response has been that statistics themselves are not and cannot be racist, only their interpretations are. See Laurent Mucchielli, 'Il n'y a pas de statistique raciste, seulement des interprétations', *Mouvements* (1999), p. 115.

<sup>36</sup> See Dominique Schnapper, 'Statistiques ethniques', *Commentaire* (2007), n. 117, p. 119. For a more detailed history of the French census and the debate on it, see Alain Blum, 'Resistance to identity categorization in France', in David I Kertzer, Dominique Arel (eds.), *Census and Identity* (Cambridge: Cambridge University Press, 2002), p. 121.

<sup>37</sup> See for instance HALDE's decision n. 2006-31, 27 February 2006, in which it declares the prohibition of all dispositions based on anthropomorphological data and recommends employers to refrain from collecting ethnic or racial data of their employees. This decision is published in HALDE's Annual Report 2006 at: <http://halde.fr/rapport-annuel/2006/>.

<sup>38</sup> HALDE decision n. 2007 – 233, 24 September 2007 at: [http://www.halde.fr/IMG/pdf/Deliberation\\_du\\_24\\_septembre\\_2007.pdf](http://www.halde.fr/IMG/pdf/Deliberation_du_24_septembre_2007.pdf).

<sup>39</sup> See Catherine Coroller, 'Hortefeux lance sa commission quotas', *Libération*, 8 February 2008, p. 17.

<sup>40</sup> See Catherine Coroller, 'Immigration choisie: la Commission Mazeaud attribue un zéro pointé', *Libération*, 7 July 2008, p. 15.

<sup>41</sup> The centrality of the memory of Vichy more in general and its effects on French antidiscrimination law has been recently highlighted by Julie Chi-Hye Suk, 'Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law', *American Journal of Comparative Law* (2007), p. 295.

evocation of these events and the parallelism with the currently proposed measures certainly made the debate very emotional and prevented a more objective view.<sup>42</sup>

Another element having little to do with the legal domain but much more with the political one, concerns the well known animosity between the former president Jacques Chirac and the current president Nicolas Sarkozy as well as the resulting influence of this conflict on the composition and this decision of the *Conseil*. Curiously, Mr. Chirac who as a former President has the right to sit on the *Conseil* based on Art. 56 of the French Constitution chose this decision to make his official entrance into the *Conseil*, even though there would have been earlier occasions. This stresses the highly political character of the decision being reviewed here.<sup>43</sup> In addition, based on the rules for naming the members of the *Conseil*<sup>44</sup> three of the current members have been named by Mr. Chirac.<sup>45</sup> This does not mean that they would not be independent and would blindly follow their nominator's wishes, but one can at least presume that ideologically they would be close to his ideals. Moreover, one may wonder what psychological effects the presence of Mr. Chirac in their decision-making process may have had. At least the "personal" opinion of one member is known: in a very unusual move, Jean-Louis Debré, who is actually also the current President of the *Conseil*, publicly expressed his opinion against ethnic and racial statistics in an interview with the daily newspaper, *Le Monde*,<sup>46</sup> somehow unveiling the otherwise anonymous opinions of one member and demonstrating his alignment with Mr. Chirac's ideas. The opinion of another member, Dominique Schnapper, is harder to gauge. While not being considered an "assimilationiste", i.e. a hard-core defender of the French republican model, she has been known for defending an approach defined as "intégrationniste". She therefore adopts the view that social relationships - especially in an immigration and multicultural context - should not be deregulated politically but should rather be based on the construction of a new type of inclusive citizenship.<sup>47</sup> Such a project logically excludes affirmative action or rigid measures in favour of specific groups of people. However, her positions on ethnic or racial statistics, expressed publicly prior to the decision, seem to be less radical,<sup>48</sup> the reason why it is not completely safe to assume that she voted against the adoption of such statistics.

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<sup>42</sup> See Esther Duflo, 'Délicates questions ethniques', *Libération*, 26 November 2007, p. 37.

<sup>43</sup> See Verpeaux, *supra* n. 6 at pp. 20 – 21.

<sup>44</sup> Article 56 of the Constitution establishes that "[t]he Constitutional Council shall consist of nine members, whose term of office shall be nine years and shall not be renewable. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council. [...]"

<sup>45</sup> Namely, Olivier Dutheillet de Lamothe, Pierre Steinmetz, Jean-Louis Debré.

<sup>46</sup> See 'La loi ne limite pas le regroupement familial à la filiation biologique', *Le Monde*, 17 November 2007, p. 9.

<sup>47</sup> See on this point, Manuel Boucher, 'Les théories de l'intégration et les violences raciales', in Manuel Boucher (ed.), *Discriminations et ethnicisation*, (La Tour d'Aigues: Editions de l'Aube, 2005), p. 305.

<sup>48</sup> See Schnapper, *supra* n. 36 at pp. 119 - 121. In fact, she states that "[t]he construction of ethnic categories is inherent in the process of democratization of social life, in the necessity of contemporary equality," and "[...] that by taking into consideration the ethnic distinctions, one takes an inevitable step towards democratic evolution and it depends on us all that the battle for equality, which is part of



Nonetheless, with their unusually overabundant motivation, the members of the *Conseil* may have seen this decision as an occasion to deal a blow at President Sarkozy, and give him a heads-up as to the normative limits of affirmative action measures in France.<sup>49</sup>

In conclusion, when viewing the decision here in discussion from both the legal and the political perspective, it certainly does not come as a complete surprise. One must wonder, nevertheless what its broader effects will be and whether it was a wise holding.

### **The French Alternative of Territorial Measures**

The first question arising at this point is how, before such egregious obstacles, an effective anti-discrimination policy can be structured in France, once it is clear that the categories of race and ethnicity are constitutionally speaking off limits?

Technically speaking, the answer is only by means of other constitutionally valid criteria or indirectly. Especially the indirect measures which, by chance or coincidence, have ended up granting some special benefits to visible minorities in France and its overseas' territories need to be mentioned here. In fact, while undoubtedly not seen as an effective anti-discrimination policy, the use of territorial or geographic measures has in some cases ended up working like a substitute or cover-up for ethnicity or race-based affirmative action policies.<sup>50</sup> France has a long-standing constitutional tradition, which has progressively established the principle of equality not between groups of people but between all parts of the territory.<sup>51</sup> Such tradition has passed muster in constitutional case law. For example, the *Conseil* found no instances of unconstitutionality in the *Loi portant sur le statut du territoire de la Nouvelle-Calédonie et dépendances* (Act on the statute of the territory of New Caledonia and dependencies),<sup>52</sup> where it allowed the local population preferential access to civil service.<sup>53</sup> However, even more interesting is the already mentioned Corsica decision.<sup>54</sup> In fact, while on the one hand the *Conseil* rejected the notion of a "Corsican people" as unconstitutional (Points 10 - 14), on the other hand it had no problems in declaring the constitutionality of an important number of special administrative rules in favour of this island which take into account its specificities (especially Points 15 - 44), thus demonstrating the existing dichotomy

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our common values, is not waylaid by the reinforcement of an ethnic conscience which will necessarily ensue." (my translation)

<sup>49</sup> This argument is also made by Ferdinand Mélin-Soucramanien, 'Le conseil constitutionnel défenseur de l'égalité républicaine contre les "classifications suspectes"', *Dalloz* (2007), n. 43, p. 3018.

<sup>50</sup> Indeed as has been noted, territories or geographical areas cannot strictly speaking become subjects of discrimination and consequently of positive discrimination policies. It is not the territories who pay taxes, or who suffer from imbalances or that are difficult, it is their populations. See Anne-Marie Le Pourhiet, 'Discriminations positives ou injustice', *Revue française de droit administratif* (1998), p. 521.

<sup>51</sup> In this sense, Ferdinand Mélin-Soucramanien, 'Les adaptations du principe d'égalité à la diversité des territoires', *Revue française de droit administratif* (1997), p. 918.

<sup>52</sup> Decision CC 84-178 DC, 30 August 1984.

<sup>53</sup> See Louis Favoreu, 'Le droit constitutionnel jurisprudentiel (mars 1983 – mars 1986)' *Revue du droit publique et de la science politique*, (1986), pp. 449 - 450.

<sup>54</sup> Decision CC 91-290 DC, 9 May 1991.

between constitutional territorial measures of affirmative action and unconstitutional origin-based ones within one single decision.

Even more recently, when deciding on the *Loi sur l'aménagement du territoire* (Act concerning the territorial planning)<sup>55</sup> and the introduction of the *zones urbaines sensibles* (ZUS, sensitive urban zones), the *Conseil* openly declared that

*“le principe d'égalité ne fait pas obstacle à ce que le législateur édicte, par l'octroi d'avantages fiscaux, des mesures d'incitation au développement et à l'aménagement de certaines parties du territoire national dans un but d'intérêt général”* (Point 34).<sup>56</sup>

This decision followed the introduction during the early 1980s of a system of special zones, called *zones d'éducation prioritaire* (ZEP, special education zones) to fight against school failures which had not given rise to any constitutionality issues.

By means of these different zones, rather than singling out immigrants or minorities as a group, through these areas the legislator identified territories with certain “structural” difficulties. Along with the *zones franches urbaines* (ZFU, free urban zones) and the *zones de redynamisation urbaine* (ZRU, zones of urban re-launch) they all benefit from a number of educational and fiscal advantages.<sup>57</sup> Needless to say, in those areas the percentage of immigrants and people with an immigration background is particularly high and that measures favouring such territories indirectly also benefit them.

One additional advantage of ZEPs was to be added thanks to the *Institut d'Etudes politiques* de Paris (IEP), also known as *Sciences-Po*, the elite college preparing for a career in politics and administration. The IEP introduced a special recruiting procedure for students of ZEPs by signing specific conventions with a number of high schools situated in ZEPs. The regular procedure to enter the IEP consists in a standardized test. ZEP high schools' candidates, on the other hand, were admitted without such a test, which was substituted by the requirement to write two papers to be defended before a jury at their high school,<sup>58</sup> and were eligible in certain cases to obtain scholarships based on merit of up to 6,100 € as well as housing aids up to 3,000 €. <sup>59</sup> Initially the program concerned only seven high schools<sup>60</sup> but in 2003 the number of high schools had already risen to 18<sup>61</sup> to reach today's 56.<sup>62</sup> Equally, the number of admitted students through this recruiting procedure increased from 15 in 2001 to 37 in 2003.<sup>63</sup>

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<sup>55</sup> Decision CC 94-358 DC, 26 January 1995.

<sup>56</sup> “[...] [T]he principle of equality does not prevent the legislator from granting fiscal advantages, so as to adopt measures in the general interest, encouraging development and the regional planning of certain parts of the national territory.” (my translation). On the importance of this declaration see the note by Ferdinand Mélin-Soucramanien, Joseph Pini, Jérôme Trémeau to decision CC 94-358 DC, 26 January 1995, *Revue française de droit constitutionnel* (1995), p. 389.

<sup>57</sup> See Christian Bonrepaux, ‘L’ascenseur social à la française’, *Le Monde de l’éducation*, (2004), n. 322, p. 22.

<sup>58</sup> For more details on the rationale for introducing this selection program as well as the arguments in favour and against its introduction, see Daniel Sabbagh, ‘Affirmative Action at Sciences-Po’, *French Politics, Culture & Society* (2002), vol. 20, pp. 52.

<sup>59</sup> See Martine Long, ‘Discrimination positive et accès à Sciences-Po Paris’, *L’Actualité Juridique Droit Administratif* (2004), vol. 13, p. 692.

<sup>60</sup> See Suzanne Daley, ‘Elite French College Tackles Affirmative Action’, *New York Times*, 4 May 2001, p. A4.

<sup>61</sup> Long, *supra* n. 59 at p. 689.

After the adoption of the alternative access channel some students belonging to the conservative student association, the *Union nationale interuniversitaire* (UNI), had brought an administrative action against the IEP claiming that the right to equal access to education had been violated by the college's decision to stipulate conventions over a five-year-period with high schools located in ZEPs. In the first instance the claim was rejected for lack of standing by the UNI.<sup>64</sup> However, considering the continuing legal risks the program was exposed to, Parliament passed an act granting the IEP the power to adopt differing access or admission channels so as to guarantee student diversity.<sup>65</sup> The constitutionality of this statute was upheld by the *Conseil*,<sup>66</sup> but only as long as the separate ways of access were based on objective criteria which guarantee the right to equal access to education. Therefore, it was not really the principle of diversified access channels to be under scrutiny but rather the criteria employed in the admission decisions to respond to this diversification. Again, one can see how "territorial circumvention" of ethnic or racial categories works quite well in France or at least in French constitutional case law.

Nonetheless, the last word in the legal battle surrounding the IEP's affirmative action programme belonged to the *Cour administrative d'appel de Paris*, the Parisian Administrative Court of Appeals.<sup>67</sup> On appeal from the first instance, this time granting standing to the UNI, the *Cour administrative d'appel* declared the resolutions by the Board of directors of the IEP adopting the programme as void and ordered that the conventions entered into with the various high schools located in ZEPs be annulled within three months from notification of the decision. Besides the finding that the duration of 10 years clearly exceeded the experimental character of the selection procedure, the main rationale behind the decision was that the director of the IEP had too broad a discretion in choosing the high schools with whom to stipulate the conventions, thus violating the principle of equal access to education amongst high schools within those ZEPs (discussion on Resolution n.3).<sup>68</sup> Applying the interpretation provided by the *Conseil*, the *Cour administrative d'appel* therefore held that the Board of directors had not based their decision on objective criteria and thus it had to be annulled.

The interesting points arising out of this litigious matter, concern on the one hand the confirmation at the judicial level, both the constitutional and the administrative one, of the French model of affirmative action programmes based on geographical criteria, but also the inherent limits this model encounters. Probably, similar programmes need to be drafted in such way as to avoid getting too close to resembling an American-type of

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<sup>62</sup> See [http://www.sciences-po.fr/admissions/pdf/lycees\\_2007.pdf](http://www.sciences-po.fr/admissions/pdf/lycees_2007.pdf)

<sup>63</sup> Luc Cédelle, 'Les grandes écoles se hâtent lentement', *Le Monde de l'éducation*, (2004), n. 322, p. 25.

<sup>64</sup> Tribunal administratif de Paris, 18 April 2001.

<sup>65</sup> It should be noted, that different access channels are a regular practice at Sciences-Po. For instance, foreign students and students finishing high school with the grade "très bien", or students with a PhD may enter without an access exam and are mostly selected on their curriculum and *dossier*. See Sabbagh, *supra* n. 58 at p. 56.

<sup>66</sup> Decision CC 2001 – 450 DC, 11 July 2001.

<sup>67</sup> *Cour administrative d'appel de Paris*, 6 November 2003, published in *L'Actualité Juridique Droit Administratif* (2004), vol 6, p. 344 with note by André Legrand.

<sup>68</sup> This same argument had indeed been one of those raised by the opponents to Sciences-Po's initiative in the first place, before the case was brought to court. See Sabbagh, *supra* n. 58 at p. 54.

affirmative action programme. The IEP apparently crossed that thin, invisible line, which unacceptably exposed the underlying identity and diversity politics which the IEP was pursuing. On the other hand, it is also interesting to see how the argument of equality, which also plays a pivotal role in the current decision by the *Conseil*, has been used in order to obstruct the realization of a programme directed at introducing diversity and combating discrimination, even when deployed in a territorial understanding. There is a certain irony, if not sarcasm, in this administrative decision, since the invalidation of the programme was justified by the pretended violation of the equality principle of the schools located within the ZEPs, when exactly instances of substantive equality had induced the IEP to introduce this programme in the first place.

Trying to look at the positive outcome of the decision, nothing prevents the IEP from concluding conventions with all high schools located within a ZEP or by choosing such schools based on clearly identifiable criteria, thus avoiding an excessive arbitrariness and administrative discretion. And indeed, the programme is still up and running. The objective criteria for becoming eligible are that any high school on the French territory may apply if it is either (i) classified in a ZEP or other “sensitive” zones identified in previous legislation; or (ii) has a percentage of students over 70% of the national average belonging to disadvantaged socio-professional categories; or (iii) has an average of students superior to 60% coming from a ZEP or other “sensitive” zones identified in previous legislation.<sup>69</sup> Interestingly, the description of the programme also contains a disclaimer specifying that these conventions are not to be understood as an affirmative action program.<sup>70</sup> Continuing on the positive note, one can mention that when ESSEC, an elite business school, introduced a programme with a similar aim, by providing studying assistance during the last high school years to students with a difficult social background in order to prepare them for the entrance tests, there were no similar negative reactions.<sup>71</sup>

In conclusion on this French territorial affirmative action, it should be noted that a first summary on these territorial measures contained in a report to the Parliament in 1999 seems to be a rather negative one.<sup>72</sup> The problems which have been indicated range from real estate speculation, limited positive impact on employment to ghettoisation.<sup>73</sup> It will be interesting to see for how long they will continue to be used as an involuntary substitute to explicit ethnic or racial measures, given that their existence is mainly a consequence of the French republican concept of citizenship.

## The Relevance at the European Level

A second question arising out of the decision here in discussion, is what relevance, if any, it could have at a broader European level, especially in connection with the

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<sup>69</sup> [http://www.sciences-po.fr/presse/zep/CEP\\_06.pdf](http://www.sciences-po.fr/presse/zep/CEP_06.pdf) at p. 4.

<sup>70</sup> *Id.* at p. 2.

<sup>71</sup> The programme is called *Une prépa, une grande école, pourquoi pas moi ?* and was introduced in 2003. See <http://www.pourquoipasmoi.essec.fr/>

<sup>72</sup> See Franck Abikhzer, ‘La discrimination positive en France: un concept mort-né? L’avenir juridique d’une conception identitaire’, *Revue de la recherche juridique* (2005), p. 2093.

<sup>73</sup> *Id.*

obligations under European Communities/Union law? The negative fate of statistics based on ethnic or racial origins and the potential negative fate of affirmative action measures based on similar criteria inflicted by this decision assume particular problematic relevance not only at the national level but equally when viewing it from a European perspective, especially in consideration of the Race Directive. In fact, in its Preamble (15) the Race Directive establishes that Member States may use statistical evidence to infer whether there has been direct or indirect discrimination. Moreover, Article 5 of the Race Directive allows Member States to introduce measures of positive action in favour of people of a certain ethnic or racial origin, in order to ensure full equality in practice without that the principle of equal treatment shall constitute an obstacle. This provision therefore gives Member States the explicit option to compensate for the disadvantages linked to ethnic or racial origin. Both ethnic or racial statistics as well as affirmative action programmes are optional measures. Hence, Member States have no legal obligation to introduce them. The *Conseil*, nonetheless, answers with a clear rejection of the first option and with a potentially equally clear no of the second one. Since there was not obligation, apparently little damage has occurred. A closer look, however, shows that there are some problematic aspects involved.

On the one hand, as regards the ethnic or racial statistics, the European Court of Justice (ECJ) regularly makes reference to statistics - so far in connection with gender discrimination cases - in order to ascertain the existence of indirect discrimination<sup>74</sup>. From a theoretical point of view, the absence of relevant official statistics could, in fact, seriously impair the success of discrimination claims based on ethnic or racial discrimination being referred to the ECJ. Proving that someone has been discriminated against on the basis of ethnic or racial origins becomes much harder and cumbersome when there are no statistics to bolster or support that claim. Allowing the use of ethnic or racial statistics would have been the first step at the national level in ascertaining to what extent visible minorities, who are not immigrants anymore but fully-fledged French citizens, suffer from discrimination. In the absence of such statistics, the other possible ways to gauge the level of discrimination visible minorities endure, is through the proxies of name, nationality, birth place of the parents, or by "testing".<sup>75</sup> But to obtain direct information, for example, if one wanted to see whether judges sentence visible minorities to more strict penalties than 'regular' citizens, one would need to attend a statistically relevant number of trials and draw one's own conclusions.<sup>76</sup> This is

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<sup>74</sup> See in particular Case C-167/97 *Seymour-Smith and Perez*, judgment of 9 February 1999 [1999] ECR I-623 (points 59 – 63) and more recently Case C-300/06, judgment of 6 December 2007, *Ursula Voß v. Land Berlin* (points 41 - 42).

<sup>75</sup> This consists of a method by which a number of fictitious applications for access to housing, goods, or employment are being sent, in which the "objective" characteristics such as diplomas or salary remain unvaried, whereas the fictitious applicants belong (or do not belong) to presumably discriminated categories. For more details on this method and its application in France see Willmann, *supra* note 7, at p. 169.

<sup>76</sup> Such a cumbersome mode of proceeding was indeed done in 2002, when a group of 16 volunteers attended 382 judgments by the *Tribunal de Grande Instance* of Montpellier. They found both an overrepresentation of non-citizens in criminal trials as well as a disproportionate severity in inflicted punishments towards non-citizens, namely prison as the main type of punishment. Here, however, the distinguishing criterion was based upon citizenship and therefore did not include visible minorities with French citizenship. On this study see Fabien Jobard, 'Police, justice et discriminations raciales', in Fassin (eds.), *supra* n. 28 at p. 215. Moreover, this overlap with immigration somehow distorts the picture because often jail is the only available punishment even for lighter crimes. Other alternative

how researchers will probably have to continue proceeding in France after this decision and the question arises in how far the ECJ is willing to use or rely on data obtained in such experimental ways or through testing in discrimination cases referred to its judgment?

On the other hand, in connection with affirmative action based on ethnic or racial criteria, one can only wonder what would have happened if the Race Directive had mandated the adoption of certain positive action measures in order to combat racial discrimination. We might have assisted to a real conflict between national constitutional law and legislation coming from the European level. To some extent such a conflict has actually emerged in another European country, the Slovak Republic. In its decision of 18 October 2005,<sup>77</sup> the Slovakian Constitutional Court affirmed the non-compliance with the Slovakian Constitution of the affirmative action principle contained in Article 8, paragraph 8 of the Anti-discrimination Act (*antidiskriminačný zákon*), which had implemented the Race Directive and adopted positive action measures in favour of Slovakia's Roma population. Again, since such measures were not imposed from the European level, the direct conflict has been avoided, but from this perspective both the French and the Slovakian decisions can be seen as a message for the policy makers and legislators in Brussels and their Anglo-Saxon race-conscious approach to anti-discrimination measures,<sup>78</sup> to refrain from imposing any ethnic or racial categories. In fact, neither the *Conseil* nor the Slovakian Constitutional Court would hesitate to place internal constitutional values above European concerns, thus applying in practice what other constitutional courts have so far only "threatened" to do and leading to the first open conflict between national constitutional values and the community order.<sup>79</sup>

### The Influence on other Constitutional Courts

A third question concerns the possible effects the French approach may have on other European constitutional decisions. Whereas it seems that many factors, from the French republican, universalist conception of the state and citizenship to the specific

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punishments, such as house arrest, can often not be used, because many of the convicted do not have a house or residence, making imprisonment the only available punishment.

<sup>77</sup> Published in Collection of Laws under no. 539/2005 on 7 December 2005. See also for a critical note on this decision: Martin Buzinger, 'Positive Action Declared Unconstitutional', *Indian Journal of Constitutional Law*, (2007), p. 198.

<sup>78</sup> On this view of anti-discrimination policies see Andrew Geddes, Virginie Guiraudon, 'Britain, France and EU anti-discrimination policy: The emergence of an EU policy paradigm', *West European Politics*, (2004), vol. 27, n. 2, pp. 334 and 346.

<sup>79</sup> See the "Solange" judgments (Solange I, Judgment of 29 May 1974, 37 *Entscheidungen des Bundesverfassungsgerichts* 271 and Solange II, Judgment of 22 October 1986, 73 *Entscheidungen des Bundesverfassungsgerichts* 339) where the *Bundesverfassungsgericht*, the German Constitutional court, established that it would review secondary Community law according to standards of the national Constitution. For further discussions on similar case law at the national level see Bruno De Witte, 'Direct Effect, Supremacy, and the Nature of Legal Order', in Paul Craig, Grainne de Burca (eds.), *The Evolution of EU Law*, (Oxford: Oxford University Press, 1999), pp. 201 - 205; for similar principles expressed in some Eastern European constitutional courts, see Wojciech Sadurski, 'Solange, chapter 3: Constitutional Courts in Central Europe – Democracy – European Union', *European Law Journal*, (2008), vol. 14, n.1, pp. 1 - 35.

particularities of the current political situation in France, as well as the composition of the *Conseil*, can hardly have any influence or relevance abroad, a closer look shows that this decision may well resound across its borders.

In the first place, the fear of introducing racial statistics because they had been used to persecute Jews raises just the same type of rejection in other countries, in particular Germany, Austria and Italy. Moreover, as opposed to most northern European countries others, especially Germany and most Southern European countries belong to the same tradition as France, which refuses to inquire about the ethnic origins in their statistics and/or census in the name of a construction of a national identity.<sup>80</sup>

In the second place, as stated earlier, this is the first time that a European constitutional court decides on the legitimacy of legislative ethnic and racial criteria, which clearly have populations with an immigration background as their addressees. It does not take a lot of imagination to see the legal reasoning in the *obiter dictum* applying this narrow view of the equality (or indivisibility) principle used in other constitutional courts. And indeed, an interesting parallel can be observed in the Slovakian decision mentioned earlier,<sup>81</sup> in which amongst others, the principle of non-discrimination contained in Article 12, paragraph 1 of the Constitution and the principle of equality contained in Article 12, paragraph 2 of the Constitution were used as a basis to strike down the affirmative action provisions contained in the Anti-discrimination Act. In declaring “that the Constitution prohibits both positive and negative discrimination for the reasons stated in this provision, i.e. having regard to sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status” and that the “adoption of specific compensatory measures, although generally recognized as legislative techniques for the prevention of disadvantages pertinent to racial or ethnic origin, is incompatible with the Article 12 paragraph 2 of the Constitution and therefore also with the Article 12 paragraph 1 of the Constitution”, the Court made clear that it also declared the principle of substantive equality as unconstitutional,<sup>82</sup> at least in connection with ethnicity or race. It is possible that other national constitutional courts or the ECJ may not be impressed by this decision and could find many arguments for distancing themselves from the French approach having already adopted (like Italy) a less formal and more substantive view of equality (or a less restrictive view of indivisibility) in other areas. In fact, for example the ECJ has shown that it is willing to accept not only the first prong in the Aristotelian formula of equality in the law corresponding to the formal ideal of equality, to treat like things alike but also the second prong corresponding to the substantive ideal of equality, namely to treat unlike things differently<sup>83</sup>. However, it has done so more limitedly in the field of sex equality and it remains to be seen whether it will extend this view more broadly<sup>84</sup>. Both the Slovakian Constitutional Court and the

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<sup>80</sup> Dirk Jacobs, Andrea Rea, ‘Construction et importation des classifications ethniques. Allochtones et immigrés aux Pays-Bas et en Belgique’, *Revue Européenne des Migrations Internationales*, (2005), vol. 21, n.2, p. 36. See also on this same point Emmanuelle Langlois, ‘Statistiques ethniques: un blocage très français; décryptage’, *Libération*, 10 December 2007, p. 16.

<sup>81</sup> *Supra* n. 77.

<sup>82</sup> In this sense Buzinger, *supra* n. 77 at p. 199.

<sup>83</sup> See on this argument Christa Tobler, *Indirect Discrimination* (Antwerpen, Oxford: Intersentia, 2005), pp. 25 – 31.

<sup>84</sup> *Id.*, at p. 31.

*Conseil* have to some extent reduced the hope that European courts, including the ECJ, would adopt a more substantive conception of equality than the case law on affirmative action of the United States' Supreme Court.<sup>85</sup>

Moreover, with its clear position on ethnicity and race, the *Conseil* places itself frighteningly close to the position of the United States' Supreme Court, and especially the views adopted by one of its most conservative justices. In his concurring opinion to the *Adarand* case, Justice Scalia affirmed that “[i]n the eyes of the government, we are just one race here. It is American.”<sup>86</sup> If France did not formally reject the notion of ‘race’ as explained before, the same words could just as well have appeared with the same emphasis in the *Conseil*'s decision: “In the eyes of the government, we are just one race here. It is French”. It is possible that other national constitutional courts may not be impressed by this decision and could find many arguments for distancing themselves from the French approach by adopting a more substantive view of equality or a less restrictive view of indivisibility. Unfortunately, the influence of the negative political and social climate cannot be underestimated and the probability that constitutional judges adopt a different, more formalistic type of reasoning when ethnic or racial origins are involved cannot be completely ignored, as the Slovakian decision seems to prove as well. The *Conseil*'s (as well as the Slovak Republic Constitutional Court's) clear answer at the national level paves the road for other European constitutional courts to do so as well and may provide them with additional ammunition for arguing that way.

On a more pragmatic level in many European countries nowadays, the issue of ethnic and racial origins is intimately connected with immigration. The obstacles in reality lie primarily on the level of an inexistent political constituency, willing to adopt affirmative action measures in favour of people with different ethnicity or race<sup>87</sup> because most probably the electorate would not agree with such an action. Hence, for the moment it is hard to imagine that politicians would want to expose themselves to a similar risk with their electorate, the reason why it is improbable that any ethnically or racially conscious measures will appear at all and consequently be challenged in national courts. To exemplify the current hostile political climate, even in a society known for its multicultural approach such as the Netherlands, employment legislation requiring companies over a certain size to strive for better representation of ethnic minorities among their workforce by means of monitoring, reporting and planning obligations<sup>88</sup>

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<sup>85</sup> This hope has been expressed by Kendall Thomas, ‘Constitutional Equality: The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.’, *Columbia Journal of European Law* (1999), p. 329. He bases his argument on an analysis of the two landmark cases by the ECJ in matters of positive discrimination, *Kalanke* (*Kalanke v. Freie Hansestadt Bremen*, Case C-450/93 judgment of 17 October 1995 [1995] ECR I-3051) and *Marshall* (*Marshall v Land Nordrhein-Westfalen*, Case C-409/95, judgment of 11 November 1997 [1997] ECR I-6363) and the more substantive conception of equality adopted especially in the second case. Both decisions dealt with affirmative action programmes in favour of women and even though the target group is a different one, the legal reasoning could theoretically be extended to quotas for racial or ethnic minorities.

<sup>86</sup> *Adarand Constructors, Inc. v. Peña* (515 U.S. 200 (1995)), p. 239.

<sup>87</sup> Such doubts are expressed by Thomas, *supra* n. 85 at p. 364.

<sup>88</sup> SAMEN Act; *Wet stimulerend arbeidsdeelname minderheden*.



was simply left to expire in December 2003, showing a clear shift in that country's societal model.<sup>89</sup>

Unfortunately, these developments are contrary to the demographic tendencies emerging in Europe. What is now perceived to be an immigration problem will increasingly become an internal discrimination problem, as soon as second or third generation immigrants will become - or already are - fully fledged citizens, who are nonetheless visibly different from the 'standard white European' and therefore continue facing discrimination because they keep being perceived as immigrants with all the negative connotations this has come to entail in Europe<sup>90</sup>. This phenomenon comes close to the situation in the United States, where racial discrimination occurs towards citizens, i.e. especially their African-American or Native-American population. Rather than becoming less important, ethnic or racial origins will probably become more and more prominent in Europe. With its decision, the *Conseil* has counterproductively missed the chance of finding out to which extent racial discrimination exists in France, of preparing the steps for combating it and also of symbolically legitimising the presence of ethnic or racial minorities in the public sphere.<sup>91</sup> In a sadly ironic twist it has done so by *prima facie* invoking the equality principle. Let's hope that other European constitutional courts take a less narrow and more far-sighted view, because otherwise some of the most progressive dispositions of the Race Directive will remain *lettre morte* and we will end up having to state that "*rien ne va plus* for race and ethnicity in France and Europe".

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<sup>89</sup> See Netherlands Third Country Report to the ECRI made public on 12 February 2008 (Points 62 – 67) at: <http://www.coe.int/t/e/human%5Frights/ecri/4%2DPublications>

<sup>90</sup> There is some sarcasm in continuing to refer to fully-fledged citizens as "second or third generation immigrants". It already reflects the distancing attitude existing in Europe, at both the linguistic and the rhetorical level, when referring to populations whose origins are not in Europe but, more likely than not, in the developing world. As a comparison, in the United States, these same groups of people are referred to as "first or second generation Americans".

<sup>91</sup> On this last point and especially the role of the state in publicly recognizing and legitimizing the presence of differences in the public sphere see Anna Elisabetta Galeotti, *Toleration as Recognition* (Cambridge, New York: Cambridge University Press, 2002).