Race judicata
The Ban on the Use of Ethnic and Racial Statistics in France

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Constitutionality of ethnic and racial statistics for research purposes – Principles of indivisibility and equality in Article 1 of the French Constitution – Visible minorities, discrimination and positive action measures – French republican conception of citizenship – Use of the word 'race' – Fear of misuse of ethnic and racial statistics – French alternative of territorial measures – Educational and fiscal advantages – Violation of the right to equal access to education – Ghettoisation – Problems in consideration of Directive 2000/43 (the Race Directive)

Introduction

On 15 November 2007,[1] 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,[2] and specifically targeted Articles 13 and 63 of the proposed Act.

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

[2] Amongst other institutional figures, Art. 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. The recent constitutional amendment of July 2008 (*Loi constitutionnelle* n. 2008-724, 23 July 2008, published in *OJ* 24 July 2008, p. 11890) has introduced the possibility of judicial review even after an Act of Parliament has entered into force. In fact, the new Art. 61-1 establishes that the *Conseil d'Etat* or the *Cour de cassation* may refer the question of constitutionality to the *Conseil* if a legislative provision allegedly violates a right or freedom protected by the Constitution.

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Article 13 establishes a procedure by which a visa or asylum applicant who wants to accompany his or her family to France or rejoin his or her family there 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 by other means. In the view of the *Conseil*, under certain conditions 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 was alleged by the petitioners (Points 5-23). While most of the doctrinal comments in France[3] and abroad[4] have predominantly focused on Article 13, the decision concerning Article 63 is just as interesting. It contains a paragraph on the constitutionality of statistics based on ethnic or racial criteria for research purposes.[5] This holding may well echo 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 court has decided on the legitimacy of the use of legislative ethnic and racial criteria, which clearly have populations with an immigration background as their addressees.

Surely, there have been decisions involving the use of ethno-linguistic criteria in other European constitutional court decisions, for example in Italy,[6] and they may certainly provide some interesting parallel reading. Nevertheless, those decisions usually dealt with special protection measures for linguistic minorities who had ended up being within one country because of various border shifts following the two World Wars and not because they had voluntarily migrated to Europe. Moreover, in some cases the protection offered to 'traditional' linguistic minorities was backed up by international treaties and gave constitutional courts additional arguments for granting special rights to such minorities. Both elements are

[3] *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; Olivier Lecucq, 'La loi du 20 novembre 2007 relative à la maîtrise de l'immigration, a l'intégration et à l'asile, et sa constitutionnalité', *L'Actualité Juridique Droit Administratif* (2008), n. 3, p. 141.

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

[5] The term 'statistics' will be used throughout the article. In the French debate this was the name under which these studies or researches where the ethnic or racial origin of people would become a relevant variable became known.

[6] *See* in particular Corte cost., decision n. 289/1987. The Constitutional court upheld a regional law of Trentino-Alto Adige which had created a new public body and had provided for a composition of a board of directors reflecting the proportion of linguistic minorities residing in the region, the so-called 'ethnic proportionality' (*proporzionale etnica*). Ultimately, this meant establishing linguistic or ethnic quotas. However, the Constitutional court did not follow the national government's reasoning that this would violate in particular Art. 3 of the Italian Constitution, which enshrines the equality principle.

absent in the case of 'new' visible minorities[7] who end up having to rely on the interpretation given by courts to the general equality principle.

Violation of the equality principle

The *Conseil constitutionnel* declared Article 63 unconstitutional for formal reasons. The Article intended to abolish partially the Articles 8 and 25 of the *Loi relative à l'informatique, aux fichiers et aux libertés*, the Act regulating the treatment of personal data, whose combined dispositions prohibit any public or private data controller established in France to collect data relating to ethnic or racial origin in studies on discrimination, integration and diversity of origins. Article 63, which resulted from a parliamentary amendment, would have introduced the possibility of making the ethnic or racial origin of a person appear in such studies, after having obtained an authorisation from the *Commission nationale de l'informatique et des libertés* (CNIL).[8] This authorisation would have substituted for the required consent by the concerned persons to use such sensitive data.

Following settled case-law that amendments need to have a logical legal nexus with the bill under discussion,[9] the *Conseil* declared Article 63 unconstitutional (Points 25-27). However, the *Conseil* added the following *obiter dictum*:

[7] The Canadian term 'visible minorities' is being used on purpose here 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' appearance. Moreover, it avoids the stigmatizing effects nowadays associated with immigration in many European countries.

[8] 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, p. 20-21.

[9] *See* the following decisions for recent examples applying this principle: CC 2004–501 DC, 5 Aug. 2004 (Points 20-23), CC 2005-532 DC, 19 Jan. 2006 (Points 23 – 31) and CC 2006-535 DC, 30 March 2006 (Points 4–11). The July 2008 constitutional amendment enshrined this principle at new Art. 45. Instead of providing that an amendment cannot be 'without any nexus' (*dépourvus de tout lien*), Art. 45 states that 'an amendment will be receivable […] as long as it presents a nexus, if indirect, with the deposited or transmitted bill' ('*tout amendement est recevable […] dès lors qu'il présente un lien, même indirect, avec le texte déposé ou transmis*'). It seems that this change will actually allow the legislator more discretion in introducing amendments. In this sense *see* Xavier Vandendriessche, 'Une revalorisation parlementaire à principes constitutionnels constants', *La Semaine Juridique, JCP G* (2008), part I, 174, p. 45. It is, for instance, imaginable that in this case, under the new wording, an indirect link between immigration regulation and ethnic and racial statistics could have been argued for, whereas under its old case-law the *Conseil* was simply able to brush away the issue as having no logical nexus with the bill.

> *Given that, if the processing of data necessary for carrying out studies concerning the diversity of origin of peoples, discrimination and integration can relate to objective data, they cannot be based on ethnicity or race without infringing the principle laid down in Article 1 of the Constitution […]* (Point 29).[10]

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

> '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'[…].[11]

In fact, 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, 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 and the latter to anti-discrimination issues, and they therefore certainly address conceptually different matters, in France they have tended to be combined. This has prevented groups from affirming certain collective rights.[12] In fact, the recognition of differences for equality purposes is extremely problematic, because in France the equality principle since its inception has come to represent the unifying element of French citizenship, national sovereignty and unity, thus equalling any legislative differentiation to an attack on such general values.[13] For this reason the equality principle has also been read as the right to indiffer-

[10] (Translation by the author). The original establishes: [*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 1er de la Constitution reposer sur l'origine ethnique ou la race […]* (Point 29).

[11] '*La 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*'.

[12] 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 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* (Editions Du Seuil, 2004), p. 18.

[13] Anne Levande, 'Discrimination positive et principe d'égalité en droit français', *Pouvoirs* (2004), n. 111, p. 58.

ence.[14] Although it seems probable that the *Conseil* intended to refer to the equality principle, it would have been helpful if it had specified this.

However, one of the major problems arising from the *obiter dictum* is related to the problematic distinction underlying the court's reasoning between permitted objective measures and unconstitutional subjective measures. This distinction is rendered even more questionable and blurred due to the explanatory comment published in the *Cahiers du Conseil constitutionnel*.[15] On the one hand, this comment explicitly mentions name, geographic origins or prior citizenship to the French one as admissible, objective criteria. On the other hand, it dismisses ethnic and racial origin as subjective and thus as unconstitutional. Nevertheless, the comment further specifies that the *Conseil* did not hold that data processing can only be based on objective data. The same applies to subjective data, for example, those based on the 'feeling of belonging'.[16] Therefore, there are objective data *and* some subjective data which are constitutionally admissible as legislative criteria; some other subjective data like race and ethnic origins are not. Especially researchers conducting studies on discrimination and demography are now wondering how future studies and polls can be legitimately conducted and whether they have to reframe questions in existing ones, such as the TeO (*Trajectoires et origines*) study by the *Institut national d'études démographiques* (INED) and the *Institut national de statistiques et études économiques* (INSEE).[17] Without any additional guidance, this distinction between allegedly objective measures and subjective measures is very problematic and ultimately highly dependent on subjective assumptions by the *Conseil*, and what is objectionable in its view. A simple reservation as to the interpretation of the terms race and ethnic origin might have represented a far better and more flexible solution in this case.[18]

[14] Geneviève Koubi, 'Le droit à la différence, un droit à l'indifférence?', *Revue de la recherche juridique* (1993), p. 460.

[15] 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*, also raises the question why those explanations were not integrated into the decision itself? Moreover, the value of those comments is not clear either. While they are not an authoritative interpretation, at the same time, the fact that they are written by the *Conseil's* Secretary-General clearly places them in a different league than that of a 'mere' doctrinal comment and usually provides an indication as to the interpretation to be given to a given decision.

[16] *Les Cahiers du Conseil Constitutionnel* (2008), n. 24, p. 13 (translation by the author). The original states: '*[c]es données objectives pourront par exemple, se fonder sur le nom, l'origine géographique ou la nationalité antérieure a la nationalité française. Le 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»*.'

[17] Laetitia van Eeckhout, 'Données ethniques : perplexité après la décision du Conseil constitutionnel', *Le Monde*, 25-26 Nov. 2007, p. 9.

[18] *See* Dominique Turpin, 'La décision n° 557 DC du Conseil constitutionnel sur la loi relative à l'immigration et à l'asile: le moustique et le chameau', *Dalloz* (2008), n. 24, p. 1644.

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, 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 positive action programme ('*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* closed the door to any planned legislative programme aiming in a similar direction.[19]

The legal precedents

From a strictly legal point of view the banning of 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 case-law has already provided indications on what the *Conseil*'s view on the substantive issues would have been had it not found the amendment procedure to be constitutionally flawed. The slightly unusual elements in this decision were that the otherwise not very prolific *Conseil* intervened with an *obiter dictum* and that Article 1 of the Constitution, rarely invoked before, was used as a ground for unconstitutionality. Two decisions stand out as precursors. The first[20] concerned the constitutionality of the *Loi portant statut de la collectivité territoriale de la Corse* (Act on the statute of the territorial collectivity of Corsica).[21] Here, the *Conseil* declared the reference to the 'people of Corsica' 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, in contrast to the decision under discussion, the principle of indivisibility is invoked here rather than the principle of equality.

The second decision concerned certain provisions of the European Charter for Regional or Minority Languages signed in Budapest on 7 May 1999.[22] 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 the constitutional principles of the

[19] In this sense also *see* Lecucq, *supra* n. 3 at p. 142.

[20] Decision CC 91-290 DC, 9 May 1991.

[21] For a 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.

[22] Decision CC 99-412 DC, 15 June 1999.

indivisibility of the Republic, equality before the law and the unity of the French people' (Point 10) and were therefore declared unconstitutional. While in the Corsica decision 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 incompatible with the French Constitution.[23]

So the *Conseil* has used the unitary Republican view of the French people, in which the only legitimate identity in the public – and to some extent private – sphere is citizenship, to stifle in their cradle so-called 'communitarian' tendencies in legislation. This is what happened as well in this case. If the distinctions of the Corsican people and of regional or minority languages do not pass the test, then distinctions based on ethnic or racial origins were all the more bound to fail. Once one starts to recognise ethnic or racial origins as a distinctive category, even only for purposes of research and statistics, the step to a broader group recognition and positive action is not too long. Hence, the current decision certainly is not a *revirement* in the *Conseil*'s case-law, but rather a logical sequel to it, even though as said before, there are some doubts as to which principle – equality or indivisibility – exactly has been violated.

The political background

However, it would 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 in France around citizenship, immigration, public identity, racism and positive action. In order to understand the decision one also needs to look at the broader picture and the political climate and the forces which led to this decision.

What is at stake is the long-established Republican ideal of citizenship in France. The philosophical-political conflict sees on the one hand 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, and on the other hand communitarian differentialists with a more

[23] *See* Michel Clapié, 'Le français restera la langue de la République', *Les Petites Affiches* (2000), n. 3, p. 14. The recent constitutional amendment of July 2008 has created a new Art. 75-1 which states that 'the regional languages belong to the French heritage' ('*Les langues régionales appartiennent au patrimoine de la France*'). It should be noted, that the amendment was not inserted into the more symbolic Art. 1 and that the reference is made to 'regional languages' and not 'minority languages', thus linking those languages to a territory and not to a group of people and confirming the French alternative of territorial measures described further below. *See* Michel Verpeaux, 'La révision constitutionnelle à l'arraché', *La Semaine Juridique, JCP G* (2008), part I, 170, p. 20-21.

pluralistic multicultural view, in which the existence of various groups is openly recognised or even promoted by the state. 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,[24] France vehemently started opposing the use of the word 'race', banning it to the realm of (science) fiction wherever possible. 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 – among them probably French representatives – believed that the word 'race' should be removed from the recommendation.[25] Equally, during the negotiations of what would later become Directive 2000/43,[26] the so-called 'Race Directive', the introduction of Preamble 6 stating that the use of the term 'racial origin' does not imply the acceptance of theories attempting to determine the existence of separate human races was a result of the efforts by the French negotiators.[27] The latest example of this position comes from a Socialist deputy from Guadeloupe who asked that the word 'race' should be eliminated from Article 1 of the Constitution because its use is shocking and dangerous.[28] The fears and reasoning behind such opinions are that by using the term 'race' one might be implicitly recognising the existence of different human races, when in reality there is scientifically speaking only one human race. This position has led to the unique situation that in France any problem relating to racism and immigration has been, until recently, viewed as a socio-economic problem.

However, approximately around the end of the 90s of the last century a change occurred at two different levels in this broad debate. At the theoretical level, the issue of racism as a social problem on its own has taken the centre stage.[29] 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.

The second change 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 a

[24] Nora Räthzel, 'Developments in Theories of Racism', in The Evens Foundation (ed.), *Europe's New Racism: Causes, Manifestations, and Solutions* (Berghahn Books, 2002), p. 4.

[25] *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* (M. Nijhoff, 2004), p. 84 at fn. 7.

[26] 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.

[27] Virginie Guiraudon, 'Construire une politique de lutte contre les discriminations: l'histoire de la directive «race»', *Sociétés contemporaines* (2004), p. 28.

[28] 'Lurel demande la suppression du mot 'race' de la Constitution', *Agence France Presse*, 25 Sept. 2007.

[29] One recent publication highlights this change directly in the title: Didier Fassin, Eric Fassin (eds.), *De la question sociale à la question raciale?* (Editions La Découverte, 2006).

son of immigrants, he expressed his favour for positive action which takes into account race, ethnicity or religion on multiple occasions. Apparently in line with this 'multiculturalist approach', 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 Etrangers*.[30] Whilst allowing ethnic and racial statistics is admittedly not the equivalent of positive action measures, scientific findings of widespread discrimination towards France's population with immigration background might certainly have represented a stepping stone for future positive action measures. With Sarkozy guiding France, the political will and constituency for adopting similar measures is given.[31]

The constitutional censure of ethnic or racial statistics also must be placed in the context of a scientific discussion between statisticians and demographers, with which the French public became familiar due to a number of articles published in major national newspapers.[32] Those in favour of such statistics, argue 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.[33] Moreover, such statistics would also have the advantage of providing the concerned population with a sort of social recognition,[34] by which the public institutions also start acknowledging the day-to-day reality which visible minorities face.

The counterarguments are mainly that the introduction of such statistics may actually reproduce, create, legitimise and entrench racist behaviour at the national level.[35] Again, the view that in France only citizenship should appear as a relevant distinction plays a role here. It also explains why since 1872 the national popula-

[30] 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 Jan. 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, p. 3-4.

[31] 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*) is proposing such measures.

[32] 'Le curieux débat des démographes', *Mouvements* (1999), p. 110.

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

[34] *Id.*

[35] 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.

tion census does not ask any questions about religious affiliation.[36] The resistance to establishing types of statistics which let one's ethnicity or race emerge in France runs so deep that even a number of both non-governmental and governmental organisations (SOS Racisme, MRAP, LICRA, GISTI and HALDE, France's administrative anti-discrimination authority), are strongly opposed to them,[37] even though HALDE later declared to be in favour of the proposed amendment as long as the text offered sufficient guarantees to the subjects concerned.[38] Undoubtedly, the fact that the repeal of the prohibition of such statistics was inserted in (anti-)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 doubts as to the use that could actually be made by the government of such data. Had the provision been inserted into a comprehensive anti-discrimination regulatory framework, such doubts would have been unjustified and it might have met a larger approval of those who were supposed to 'benefit' from such legislation.

The fear of potential misuse of ethnic and racial statistics is fuelled by the spectres of France's Vichy regime during World War II and the Holocaust.[39] French citizens were racially categorised by the public authorities, thus facilitating the deportation of French Jews to the concentration camps. The evocation of these events and the parallelism with the currently proposed measures certainly made the debate very emotional and prevented a more objective view.[40]

Another element having little to do with the legal realm, but much more with the political one, concerns the well-known animosity between the former president Jacques Chirac and the current president Nicolas Sarkozy. Curiously, Chirac, a staunch defender of the Republican principles who as a former President has the right to sit on the *Conseil* (Article 56 of the French Constitution), chose this decision to make his official entrance into the *Conseil*. This stresses the highly

[36] *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 University Press, 2002), p. 121.

[37] *See* for instance HALDE's decision n. 2006-31, 27 Feb. 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 which can be retrieved on the following website: <http://halde.fr/rapport-annuel/2006/>.

[38] HALDE decision n. 2007 – 233 of 24 Sept. 2007 at <http://www.halde.fr/IMG/pdf/Deliberation_du_24_septembre_2007.pdf>.

[39] 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.

[40] *See* Esther Duflo, 'Délicates questions ethniques', *Libération*, 26 Nov. 2007, p. 37.

political character of the decision under discussion.[41] One may presume that the three members of the *Conseil*[42] who have been nominated by Chirac[43] share his ideals. Moreover, one may wonder what psychological effect the presence of Chirac and of another former President, Valérie Giscard d'Estaing, may have had in their decision-making process.[44]

However, for different reasons it is very hard to assess the views of single members taken in specific decisions. Indeed, France's judiciary, including the *Conseil*, has a strong tradition of maintaining the secret of the decision-making process (*secret des délibérations*). This means that dissenting opinions are not allowed in the *Conseil*,[45] and that members of the *Conseil* take an oath to maintain the confidentiality of the discussions and the votes as well as not to publicly express themselves on questions relating to matters of their competence.[46] In addition, the archives of the *Conseil* are opened to the public after 25 years.[47] The 'personal' view of at least one member nominated by Chirac is known. In a very unusual move, Jean-Louis Debré, actually the President of the *Conseil*, expressed his opinion against ethnic and racial statistics in an interview with the daily newspaper, *Le Monde*.[48] The position of another member, Dominique Schnapper, a sociologist who has dealt with and spoken about matters close to the ones at stake, would be interesting to know. While not an '*assimilationiste*', i.e., a hard-core defender of the French republican model to which everyone living in France should ultimately subscribe, she has been known for defending an approach defined as '*integrationniste*'.

[41] *See* Verpeaux, *supra* n. 8 at p. 20-21.

[42] Art. 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. […].'

[43] Namely Olivier Dutheillet de Lamothe, Pierre Steinmetz, Jean-Louis Debré.

[44] On the dangers of a politicisation of the *Conseil* due to the presence of two former Presidents in this decision *see* Turpin, *supra* n. 18 at p. 1638.

[45] For a more detailed analysis on dissenting opinions by the *Conseil*: Wanda Mastor, *Les opinions séparées des juges constitutionnels* (Economica, 2005), p. 169-196.

[46] Art. 3, *Ordonnance* n. 58 – 1067, 7 Nov. 1958, *portant loi organique sur le Conseil constitutionnel*.

[47] This deadline has been reduced only recently to the standard 25 years for French public archives (*Loi organique* n. 2008-695, 15 July 2008 *relative aux archives du Conseil constitutionnel*). Before that they were accessible only after 60 years.

[48] *See* 'La loi ne limite pas le regroupement familial à la filiation biologique', *Le Monde*, 17 Nov. 2007, p. 9. This example shows that the limitation on public expressions by members of the *Conseil* is not an absolute one and really depends on the context in which they were made. In this sense *see* Michel Clapié, 'La relativité de «l'obligation de réserve» du président du Conseil constitutionnel', *Revue administrative* (2000), p. 487-490.

Like the *assimilationistes* she takes the view that French society – especially in an immigration and multicultural context – should not be decomposed socially, culturally and politically in favour of certain particular communities but as opposed to the former approach, *integrationnistes* insist on the construction of a new type of inclusive citizenship for everyone more than relying on the process of assimilation.[49] Such a project logically excludes positive action or rigid measures in favour of specific groups of people. However, her positions expressed publicly on ethnic or racial statistics prior to the decision seem to be less radical,[50] the reason why it is not completely safe to assume that she voted against the adoption of such statistics, as most probably the other members of the *Conseil* did.

Whatever the position of the single members may have been, by giving unusually elaborate grounds for their decision, they may have seen this as an occasion to signal to President Sarkozy the normative limits of positive action measures in France.[51]

In conclusion, when viewing the decision under discussion from both the legal and the political perspective, it certainly does not come as a complete surprise.

The French alternative of 'territorial measures'

What are the broader effects of the decision? How can an effective anti-discrimination policy 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, territorial or geographic measures have in some cases been used as a substitute or cover-up for ethnicity or race-based positive action policies. France has a long-standing tradition of promoting the principle of equality not between groups of people but between parts of the territory.[52]

[49] *See* on this point Manuel Boucher, 'Les théories de l'intégration et les violences raciales', in Manuel Boucher (ed.), *Discriminations et ethnicisation* (Editions de l'Aube, 2005), p. 304-305.

[50] *See* Schnapper, *supra* n. 36 at p. 119-121. In fact, she states that '[t]he construction of ethnic categories is inherent in the process of democratisation of social life, in the necessity of contemporary equality,' and '[…] that taking into consideration the ethnic distinctions one makes an inevitable step of democratic evolution and it depends on us all that the battle for equality, which is part of our common values, is not waylaid by the reinforcement of an ethnic conscience which will necessarily ensue' (translation by the author).

[51] 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.

[52] 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.

This tradition has passed muster in constitutional case-law, even though the principle of equality does not and cannot, strictly speaking, apply to territories, but involves populations living in different territories.[53]

For example, the *Conseil* found no instances of unconstitutionality in the *Loi portant sur le statut du territoire de la Nouvelle-Calédonie et dépendences* (Act on the statute of the territory of New Caledonia and dependencies),[54] which allowed the local population preferential access to civil service.[55] Even more interesting is the already mentioned Corsica decision.[56] While the *Conseil* rejected the notion of a 'Corsican people' as unconstitutional (Points 10-14), it accepted the constitutionality of an important number of special administrative rules in favour of the population of this island taken on account of its specificities (especially Points 15-44). It thereby underlined the existing dichotomy between constitutionally acceptable territorial measures of positive action and unconstitutional origin-based ones within one single decision. More recently, in its judgment on the *Loi sur l'aménagement du territoire* (Act concerning the territorial planning)[57] and the introduction of the *zones urbaines sensibles* (ZUS, sensitive urban zones), the *Conseil* openly declared that 'the principle of equality does not prevent the legislator from granting fiscal advantages, measures of encouraging development, or for the regional planning of certain parts of the national territory when acting in a general interest' (Point 34).[58] This decision had been preceded by the introduction of a system of special zones (*zones d'éducation prioritaire*; ZEP, special education zones) to fight against school failures during the early 1980s. Since this occurred by means of a *circulaire interministerielle*[59] it could not be judicially reviewed by the *Conseil* (which may review only statutes and not policy) and therefore had not given rise to any constitutionality issues. Instead of singling out immigrants or minorities as beneficiary groups, the provision rather identified a number of territories, the ZEPs, 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)

[53] Indeed as has been noted, territories or geographical areas cannot 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.

[54] Decision CC 84-178 DC, 30 Aug. 1984.

[55] *See* Louis Favoreu, 'Le droit constitutionnel jurisprudentiel (mars 1983-mars 1986)', *Revue du droit publique et de la science politique* (1986), p. 449-450.

[56] Decision CC 91-290 DC, 9 May 1991.

[57] Decision CC 94-358 DC, 26 Jan. 1995.

[58] On the importance of this declaration *see* the note by Ferdinand Mélin-Soucramanien, Joseph Pini, Jérôme Trémeau to decision CC 94-358 DC, 26 Jan. 1995, *Revue française de droit constitutionnel* (1995), p. 389.

[59] *Circulaire EN* n. 81-238, 1 July 1981, *relative à la création des zones d'éducation prioritaire*.

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these territories all benefit from a number of educational and fiscal advantages.[60] Needless to say, in those areas the percentage of immigrants and people with an immigration background is particularly high and measures favouring such territories indirectly also benefit them. In fact, that is their *raison d'être*.

The *Institut d'Etudes politiques de Paris*, also known as *Sciences-Po*, the elite college preparing students for a career in politics and administration, introduced another advantage for ZEPs in the form of a special recruiting procedure for students from ZEPs by signing specific conventions with a number of high schools situated in these zones.[61] The regular procedure to enter *Sciences-Po* consists of a standardised test. ZEP high schools' candidates 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.[62] Moreover, they were eligible in certain cases to obtain merit-based scholarships of up to € 6 100 as well as housing aids up to € 3 000.[63] Initially, the program concerned only seven high schools[64] but in 2003 the number had already risen to 18,[65] to reach 56 in 2007.[66] Equally, the number of admitted students through this recruiting procedure increased from 15 in 2001 to 37 in 2003.[67] The conservative student association, the *Union nationale interuniversitaire* (UNI), brought an administrative action against *Sciences-Po* claiming that the right to equal access to education had been violated. The Court of first instance rejected the claim, for lack of standing by the UNI.[68] However, considering the continuing legal risks the program was exposed to, Parliament passed an act granting the *Sciences-Po* the power to adopt differing access or admission channels so as to guarantee student diversity.[69] The constitutionality of this statute was

[60] *See* Christian Bonrepaux, 'L'ascenseur social à la française', *Le Monde de l'éducation* (2004), n. 322, p. 22.

[61] A programme named '*Une prépa, une grande école, pourquoi pas moi?*' having similar goals was introduced by ESSEC, an elite business school, in 2003. *See* <http://www.pourquoipasmoi.essec.fr/>.

[62] 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, p. 52.

[63] *See* Martine Long, 'Discrimination positive et accès à Sciences-Po Paris', *L'Actualité Juridique Droit Administratif* (2004), n. 13, p. 692.

[64] *See* Suzanne Daley, 'Elite French College Tackles Affirmative Action', *New York Times*, 4 May 2001, p. A4.

[65] Long, *supra* n. 63 at p. 689.

[66] *See* <http://www.sciences-po.fr/admissions/pdf/lycees_2007.pdf>.

[67] Luc Cédelle, 'Les grandes écoles se hâtent lentement', *Le Monde de l'éducation* (2004), n. 322, p. 25.

[68] Tribunal administratif de Paris, 18 April 2001.

[69] One should note here, 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 Ph.D. may enter without an access exam and are mostly selected on their curriculum and *dossier*. *See* Sabbagh, *supra* n. 62 at p. 56.

upheld by the *Conseil*,[70] under the condition that the separate ways of access were based on objective criteria which guarantee the right to equal access to education. The last word in the legal battle surrounding *Sciences-Po*'s positive action programme belonged to the *Cour administrative d'appel de Paris*, the Paris Administrative Court of Appeals.[71] On appeal from the first instance and granting standing to the UNI, it declared the resolutions by the Board of Directors of *Sciences-Po* adopting the programme void. The main rationale behind the decision was that the director of *Sciences-Po* 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).[72] Applying the interpretation provided by the *Conseil constitutionnel*, the *Cour administrative d'appel* therefore held that the Board of Directors had not based their decision on objective criteria and thus the decision had to be annulled.

As one can see, both the constitutional and the administrative courts have validated the French model of positive action programmes based on geographical criteria. At the same time, however, this also shows the inherent limits of this model: such programmes need to be drafted in a way which avoids getting too close to resembling an identity-based 'American' type of positive action programme. *Sciences-Po*, it seems, crossed a thin, invisible line, and exposed the underlying identity and diversity politics it was apparently pursuing. There is a certain tension emerging from this decision. On the one hand, the invalidation of the programme was substantiated by the violation of the (formal) equality of the schools located within the ZEPs, while on the other hand it was precisely the need for substantive equality that had induced *Sciences-Po* to introduce this programme in the first place. Moreover, the question arises of why, if the non-selected ZEP schools' equal right to access to education had indeed been violated, none of those schools had taken the matter to court instead of the UNI. UNI supposedly represents the interests of the (conservative) students. By admitting its standing, the *Cour administrative d'appel* let it effectively become the spokesperson for someone whose interests it has a rather dubious claim to be representing.

However – and this is the positive aspect of the outcome of the decision – nothing prevents *Sciences-Po* from concluding conventions with all high schools located within a ZEP or by choosing such schools based on clearly identifiable criteria, thus avoiding excessive arbitrariness and administrative discretion. And indeed, the programme is still up and running. The objective criteria for becoming

[70] Decision CC 2001 – 450 DC, 11 July 2001.

[71] *Cour administrative d'appel de Paris*, 6 Nov. 2003, published in *L'Actualité Juridique Droit Administratif* (2004), n. 6, p. 344 with note by André Legrand.

[72] 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. 62 at p. 54.

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 legislation; or (ii) has a percentage of students over 70% of the national average belonging to disadvantaged socio-professional categories;[73] or (iii) has an average of students superior to 60% coming from a ZEP or other 'sensitive' zones identified in previous legislation.[74] Interestingly, the description of the programme also contains a disclaimer specifying that these conventions are not to be understood as a positive action program.[75]

In conclusion on this French territorial positive action, it should be noted that a first analysis of these territorial measures contained in a report to the Parliament in 1999 seems to be rather negative.[76] The problems which have been indicated range from real estate speculation, limited positive impact on employment to ghettoisation.[77] 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

The ban on statistics relating to ethnic or racial origins and the potential ban on positive action measures based on similar criteria is also problematic from a European perspective, especially in view of Directive 2000/43 (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. This provision therefore gives member states the explicit option of compensating for the disadvantages linked to ethnic or racial origin. Both ethnic or racial statistics as well as positive action programmes are optional measures. Hence, member states are under no legal obligation to introduce them. When it comes to France, the *Conseil* nonetheless an-

[73] These are identified on the basis of a classification of professional categories used by INSEE, the French national institute for statistics and economic studies. They include skilled and unskilled workers, agricultural workers, retired employees or workers, people without any professional activity and unemployed who have never held any professional position. Children of parents belonging to such categories have statistically been shown to do particularly badly at school.

[74] <http://www.sciences-po.fr/admissions/cep.html>.

[75] *Id.*

[76] *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.

[77] *Id.*

swers with a clear rejection of the first option and with a potentially equally clear 'no' as to the second one. Since the Directive contains no obligation in this respect, apparently little damage has occurred. Nevertheless, a closer look shows that there are some problematic aspects involved.

First, as regards ethnic or racial statistics, the Court of Justice regularly makes reference to statistics – so far only in connection with gender discrimination cases – in order to ascertain the existence of indirect discrimination.[78] From this 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 before the Court. Proving that someone has been discriminated against on the basis of ethnic or racial origin 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 made it easier at the national level to ascertain 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, or birthplace of the parents, by 'testing',[79] or by other experimental methods.[80] This is exactly how researchers will have to continue proceeding in France after this decision, and the question arises of how far the Court of Justice is willing to use or rely on data obtained in such experimental ways or through testing in discrimination cases.[81]

Second, in connection with positive 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 at a real conflict between national constitutional law and Community legislation. To some extent such a conflict has actually emerged in another member state, the Slovak Republic. In its decision of

[78] *See* in particular Case C-167/97 *Seymour-Smith and Perez* [1999] *ECR* I-623 (Points 59-63) and more recently Case C-300/06, Judgment of 6 Dec. 2007, *Ursula Voß* v. *Land Berlin* (Points 41-42).

[79] 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* Christophe Willmann, 'Statistiques ethniques en entreprise: le Conseil constitutionnel pose de nouvelles conditions', *Droit Social* (2008), n. 2, p. 169.

[80] A broader overview of these possible 'alternative' measures is described by David B. Oppenheimer, 'Why France Needs to Collect Data on Racial Identity … In a French Way', *Hastings International & Comparative Law Review* (2008), p. 747-750.

[81] It should be mentioned that the *Cour de Cassation*, France's Supreme Court, has already allowed the use of 'testing' to prove racial discrimination and the Code of Criminal Procedure was in turn modified to codify this development. *Id.* at p. 748-749.

18 October 2005,[82] the Slovak Constitutional Court affirmed the non-compliance with the Slovak Constitution of the positive action principle contained in Article 8, paragraph 8 of the Anti-discrimination Act (*antidiskriminaèný zákon*), which had implemented the Race Directive and adopted positive action measures in favour of Slovakia's Roma population. The Court declared

> that the Constitution prohibits both positive and negative discrimination for the reasons stated in this provision, i.e. having regard to sex, race, color, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. For all that, adoption of specific compensatory measures, although generally recognised as legislative techniques for the prevention of disadvantages pertinent to racial or ethnic origin, is incompatible with the Article 12 paragraph 1 of the Constitution (principle of non-discrimination) and therefore also with the Article 12 paragraph 2 (principle of equality) of the Constitution.

The Court made clear that it also declared the principle of substantive equality unconstitutional,[83] at least in connection with ethnicity or race.

Again, since the Race Directive had not imposed any positive action measures, 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 with their Anglo-Saxon race-conscious approach to anti-discrimination measures[84] to refrain from imposing any ethnic or racial categories. In fact, especially after the *Conseil constitutionnel*'s recent decision affirming that the execution of directives is a constitutional duty based on Article 88-1 of the Constitution, except when the French constitutional identity is at stake,[85] the *Conseil* would not hesitate to place internal constitutional values above European ones. It would thereby align itself with other constitutional courts[86] who have so far only

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

[83] *Id.* at p. 199.

[84] On this view of anti-discrimination policies *see* Andrew Geddes, Virginie Giraudon, 'Britain, France and EU anti-discrimination policy: The emergence of an EU policy paradigm', *West European Politics* (2004), vol. 27, n. 2, p. 334 and 346.

[85] Decision CC 2006-540 DC, 27 July 2006. For a comment on the broader implications of this decision *see* Chloé Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*', *EuConst* (2007), p. 436.

[86] On this point, *see* Jan-Herman Reestman, 'Conseil constitutionnel on the Status of (Secondary) Community law in the French Internal Order. Decision of 10 June 2004, 2004-496 DC', *EuConst* (2005), p. 308-309.

'threatened' to do so, potentially leading to the first open conflict between national constitutional values and the community order.[87]

Conclusions: the influence of the French approach

The *Conseil constitutionnel* recently stated in an *obiter dictum* that ethnic and racial origins are not objective criteria and would conflict with Article 1 of the French Constitution. This decision is the result of legal precedents and a political background, both originating to some extent in the French unitary Republican conception of the nation. This conception has equally led to the use of territorial measures, in order to avoid policies which may bear any resemblance to identity politics, or as the French say, '*communautarisme*'. At the same time, however, the French Republican view risks to clash with certain legal instruments, in particular those adopting a more 'race and ethnicity conscious' perspective, put in place at the community level. Indeed, after the recent confirmation by the *Conseil* that it will not implement secondary community legislation if it conflicts with France's constitutional identity, policy-makers in Brussels should be warned to easily adopt or impose measures introducing ethnic or racial categories. It is possible that at least in France this may lead to a conflict between national constitutional law and Community law, given the central, symbolic position the Republican view of citizenship occupies.

However, this decision raises issues of substantive equality and justice as well. With this strictly formalistic, colour-blind approach there is a serious risk of not being able to assess the level of discrimination visible minorities are exposed to, even less to prepare instruments which eventually might address the issue of such discrimination. In this, the *Conseil* prevents certain data on discrimination to be used, for example, in indirect discrimination cases. The decision equally stands in contrast with the more substantive ideal of equality adopted by the Court of Justice. Indeed, it has shown itself to accept both the first prong in the Aristotelian formula of equality in the law, corresponding to the formal ideal of equality, to treat like things alike and the second prong corresponding to the substantive ideal

[87] *See* the 'Solange' judgments (Solange I, Judgment of 29 May 1974, 37 *Entscheidungen des Bundesverfassungsgerichts* 271 and Solange II, Judgment of 22 Oct. 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 University Press, 1999), p. 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, p. 1-35.

of equality, namely to treat unalike things differently.[88] Admittedly, the Court of Justice has done so to a more limited extent in the field of sex equality and it still remains to be seen whether it will extend this view more broadly to other fields.[89]

Apart from the legal aspects, the problem is ultimately a political one. In many European countries nowadays the issue of ethnic and racial origins is intimately connected with immigration. Politicians are unwilling to adopt positive action measures in favour of people with different ethnicity or race[90] because most probably the electorate would not agree with them. Therefore, it becomes highly improbable that, with the exception of penalization of racially motivated crimes or standard anti-discrimination legislation, more progressive and substantive ethnically or racially conscious measures will appear at all, and as a result 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[91] was simply left to expire in December 2003.[92]

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 to face discrimination because they keep being perceived as immigrants with all the negative connotations this has come to entail in Europe. This phenomenon comes close to the situation in the United States, where racial discrimination occurs towards citizens, i.e., especially the African-American or Native-American

[88] *See* on this argument Christa Tobler, *Indirect Discrimination* (Intersentia, 2005), p. 25-31.

[89] *Id.*, at p. 31. The hope that European courts, including the Court of Justice, would adopt a more substantive conception of equality is 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 Oct. 1995 [1995] *ECR* I-3051) and *Marshall* (*Marshall* v. *Land Nordrhein-Westfalen*, Case C-409/95, Judgment of 11 Nov. 1997 [1997] *ECR* I-6363) and the more substantive conception of equality adopted especially in the second case. Both cases dealt with positive 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.

[90] Such doubts are expressed by Thomas, *supra* n. 89 at p. 364.

[91] SAMEN Act; Wet stimulering arbeidsdeelname minderheden.

[92] *See* Netherlands Third Country Report to the ECRI made public on 12 Feb. 2008 (Points 62-67), published at the following website: <http://www.coe.int/t/e/human%5Frights/ecri/4%2DPublications>.

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 allowing a means to help find out to what 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.[93] Let's hope that this decision doesn't get a following, because otherwise some of the most progressive dispositions of the Race Directive will remain *lettre morte*.

[93] On this last point and especially the role of the state in publicly recognising and legitimising the presence of differences in the public sphere *see* Anna Elisabetta Galeotti, *Toleration as Recognition* (Cambridge University Press, 2002).

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