Positive Discrimination and the Principle of Equality in French Law

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On November 20, 2003, on the television channel France 2, Nicolas Sarkozy, the minister of the interior, internal security, and local freedoms, had "one hundred minutes to make a convincing argument." Taking a strong position, he affirmed, "I am in favor of positive discrimination. What makes such a statement 'communitarian?' Some groups within the population develop more disabilities than others. Therefore we need to give them more benefits and access to work… . I regret that fact that there is no Muslim prefect." When he was asked if there were high-functioning Muslims ready to be prefects, he retorted: "It's the story of the chicken and the egg. Do we need to wait until people are ready before we act?" He also invoked the need for "positive role models."

With these few words the minister of the interior reopened Pandora's box, creating the possibility of bringing "positive discrimination" – that well-worn subject of French political, and therefore constitutional, life – face to face with the key foundational and republican principle of equality. This is not a new debate: it systematically opposes a willed politics of "positive action" favorable to groups whose chances are compromised by racist or sexist practices or socioeconomic inequalities, to the juridical principle in which "men are born and remain free and equal in rights. Social distinctions can only be founded on the common good" (first article of the *Déclaration des droits de l'homme et du citoyen* [*Declaration of the Rights of Man and of the Citizen*; DDHC]).

Although an old debate, it has traditionally been considered closed in the context of French public law, inasmuch as the majority of authors considering positive discrimination to have no place in France. Directly

inspired by American affirmative action, it is seen as quite simply not adaptable to the French model founded on the principle of equality. Such a simple, even simplistic, analysis merits discussion.

If the opposition between the two concepts seems insurmountable, there are, nonetheless, differentiations that are made within French public law, some of which are at times qualified as "positive discrimination." This leads inevitably to a questioning of how such measures might pertinently give a full and vital effectiveness to the ideal of equality.

II The Principle of Equality versus Positive Discrimination, or the Irreducible Opposition of Two Concepts

The principles of equality and positive discrimination are presented traditionally as arising from two fundamentally different logics. The first, in its traditionally French sense, is conceived of as an absolute equality that is marked by absolutely egalitarian treatment. The second, American in origin, consists of introducing inequalities – discriminations – to better promote equality by giving preferential treatment to some people.

On a theoretical basis, the opposition of these two concepts is such that it is worth presenting them in succession. This method will reveal the impossibility of reconciling them.

Equality à la française – *The Structuring Principle of the Republic*

In respect of French constitutional history, the principle of equality is not quite like any other principle. Issuing directly from Jean-Jacques Rousseau's theory of the social contract, it is the sole revolutionary principle that has never been called into doubt since 1789.

In the *Declaration of the Rights of Man and of the Citizen* of 1789, it is presented as the most fundamental of the natural rights, "more fundamental even than liberty itself, because equality is man himself; it identifies man" (Vedel). In this sense, humanity itself is made up of a category of individuals of the same essence and so to deny equality is to reject humanity. Equality can therefore be analyzed as a manifestation of – even a substitute for – the dignity of the person, which was only established much later. [1]

1. Bioéthique, CC 94-343/344 DC, September 27, 1994.

Formally, this preeminence is manifested by the position that the principle of equality holds in the very text of the *Declaration of the Rights of Man and of the Citizen* of August 26, 1789. Some have at times been surprised that it does not figure in the ranks of "the natural and inalienable rights of man" articulated in article 2; however, this choice is explained by the fact that the text of the first article is dedicated to equality. Equality is thus the foundation of all natural law, "because there is no natural law if humans are not equal among themselves, in other words if humans do not exist" (Vedel). Equality is in itself a "founding" (Israël) or "formative" (Mathieu) principle.

Since 1789, the affirmation of this principle has not been limited to an abstract juridical equality. The natural equality of human beings has a bearing on the equality of all citizens before the law, which "must be the same for all, whether it protects or punishes" (article 6, DDHC) and must be taxed because "[a] general tax is indispensable for the maintenance of the public force and for the expenses of administration; it ought to be equally apportioned among all citizens according to their means" (article 13, DDHC). However, although absolute, equality is not absolutely egalitarian. In respect to their position in the face of the law, "All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents" (article 6, DDHC).

Following this affirmation of principle, all the declarations and preambles adopted during France's long constitutional history have taken into account the principle of equality. The preamble to the constitution of October 27, 1946, which is partially integrated into the current constitutional corpus, does not escape this rule, as its first paragraph affirms that "the French people proclaim again that every human being, without distinction of race, or religion or creed, possesses sacred and inalienable rights." In the same way, the 1958 constituent assembly chose to affirm, in the first article of the new constitution, that France, as an indivisible, secular, democratic, and social republic, "guaranteed equality before the law to all its citizens without distinction of origin, race, or religion."

The principle of equality represents, without a doubt, an irreversible revolutionary gain. However, its continued reaffirmation over two centuries is not enough to explain its importance in French public law.

The specificity of the principle of equality *à la française* lies mainly, in fact, in the way in which it has been used to establish and consolidate the modern French state, and in particular the unitary republican state.

Since 1789, the principle of equality has been thought of as essential to the understanding of the relationships between governments and governed, and more generally, between the state and citizens. "The modern state arises from a society of equals (political equality) and must consider all members of this society as equally subject to its power (civil equality)" (Jouanjan). The key to this relationship lies in the expression of the general will; this is the product of the representatives of equal citizens and applies to all citizens equally. The principle of equality is therefore present both upstream and downstream of the procedure for elaborating the law.

This dialectic makes the principle of equality the ferment of French citizenship. Strong and unified, citizenship is characterized by rights of participation and contestation and by the correlated obligation to submit to the law as an expression of the general will, with the rights and
IV obligations equally recognized and imposed on each citizen. However, the dangers inherent in the period when democracy was being realized led to a refutation of the theory of popular sovereignty, which Rousseau held to be a consequence of the principle of democracy.

Thus in France the consecration of the principle of equality is accompanied, paradoxically, by recourse to a theory of national sovereignty which, while it justifies an incomplete and potentially unequal democracy since it rests on a citizenry that is differentiated in terms of the electorate, enabled a national unity and identity to emerge. The constitution of 1958, like the constitution of 1946 before it, reinforced the paradox by announcing that "national sovereignty belongs to the people" (article 3C, 1958). However, the people who now hold the title to national sovereignty have preserved certain national characteristics in unitary republican France – however decentralized – in particular a unity that prohibits all differentiation.

France, therefore, does not recognize any peoples other than the French people, free from minorities and uniformly subject to the principles that constitute its identity. Furthermore, if different groups were identified within the French people, this would negate equality by affirming the failure of this ideal. The Constitutional Council has confirmed this analysis by refusing systematically to recognize the existence of minority groups or peoples.[2] In certain respects, secularism, thought of as neutrality in religious matters, may be attached to this way of thinking in that it refers to the prohibition of all signs of differentiation.

2. See in particular, Quotas par sexe, CC 82-146 DC, November 18, 1982; Peuple corse, CC 91-290 DC, May 9, 1991; Charte européenne des langues régionales et minoritaires, CC 99-412 DC, June 15, 1999.

This conception of equality appears fundamentally and radically incompatible with that of affirmative action.

American-Style Positive Discrimination – A Tool for Reestablishing Equality

American in origin, *affirmative action* is termed literally as *positive discrimination* when translated into French. Seen through the prism of equality *à la française*, this constitutes an oxymoron, since discrimination, by its very nature, can only be negative.

Specifically, positive discrimination is designated as a "compulsory program of preferential distribution of a benefit or service to a disadvantaged social group to compensate for social inequality" (Calvès). This is a method that consists of instituting inequalities in order to promote equality, in line with certain preferential treatment. Its declared aim is to reestablish equality – or at least an equality of opportunity – compromised by two phenomena: the generalization or the persistence of racist or sexist practices, on the one hand, and an increase in socioeconomic inequalities, on the other hand. It seeks to compensate for inequalities by creating discrimination that paradoxically redistributes equality.

Depending on whether one finds oneself in the first or second category, the implementation of positive discrimination obeys two very different logics. The reduction of racist or sexist practices leads to the identification of a "target population" based on innate characteristics, constitutive of the identity of the individual, such as sex or race. In contrast, the reduction of socioeconomic equalities requires that beneficiaries be identified on the basis of criteria related to their socioeconomic situation. There are, therefore, not one but two forms of positive discrimination.

According to the French view, the ambiguity of such a formula comes from the fact that the decision for positive discrimination is based on a forbidden criterion. In effect, the French Republic recognizes no minorities or disadvantaged groups; it only recognizes citizens, equal in their direction relationship with the state. So, insofar as it does not want to know about either ethnic origins or religions, this concept appears to be, a priori, the least racist and least discriminatory. Contrary to the experience in Anglophone society, notions of community and minority go against republican sentiments.

The irreducible opposition of these two concepts is the result of positive discrimination being defined as "a rule for choosing between candidates for a benefit or service that rests, at least to some degree, on the fact that the candidates belong to a disadvantaged social group."

There is, therefore, "real discrimination in this concept itself, in that it assigns a status to individuals, reducing them to membership in a group they did not choose (gender, color, or disability)" (Jouanjan).

Conceptually, this opposition seems to be insurmountable, leading French positive-discrimination proposals to be an exercise in political style. However, the reality of the principle of equality *à la française* reveals itself to be complex, offering examples of differentiations that can be applied to real discrimination.

Legally Acceptable Positive Discrimination, or the Paradoxes of the Principle of Equality

VI The principle of equality *à la française* is often relayed as a formula: "Equivalent situation; equivalent treatment." Therefore, by not applying egalitarianism, the principle of equality allows, and also sometimes imposes, differentiation. Such differentiations prompt public authorities, under the control of the judiciary, to identify situations that merit special treatment. Compatible with the principle of equality, they also constitute its implementation. In addition, certain differentiations, considered legal or constitutional, can be qualified as positive to the degree to which they appear to meet the definition of positive discrimination.

Legitimate Differentiations: Implementing the Principle of Equality

As is well known, this aspect of the principle of equality can only be evoked briefly here, to the extent that the administrative and constitutional judges, each within their own jurisdictions, have developed comparable jurisprudence.

The Council of State recognized very early the privileged place of the principle of equality, included in the ranks of the general principles of the law.[3] Enshrined in law, administrative bodies do not have much possibility of modifying the application of the principle of equality. This explains why, except in the case of express legislative authorization, discrimination implemented by the administration can only be justified by a difference in situation in relation to the goal of the law to be carried out, or by considerations of public interest linked to the demands of public service.

3. Société des concerts du Conservatoire, CE, March 9, 1951.

The Constitutional Council finds itself in a more delicate situation, because its role is to assess the conditions in which the legislature implements a constitutional principle stated in brief. This is what led to its elaboration of the formulation of the principle explaining the principle of equality. It only did it gradually, affirming that, "if the principle of equality before the law implies that similar solutions are applied to similar situations, this does not imply that different situations may not be the focus of different solutions." [4] Refining this argument, the constitutional judge indicated, in 1988, that "the principle of equality is not opposed to the legislature's ruling in a different manner in different situations, nor to its departing from equality for reasons of public interest, as long as, in both cases, the resultant difference in treatment remains in accord with the object of law underpinning it". [5]

On this basis, the legislature can establish differentiations which, justified by particular situations or by satisfaction of the general public interest, do not challenge the principle of equality, but, on the contrary, assure its implementation according to the distributive logic desired by the authors of the Declaration of 1789. This is "true equality" that requires the legislature "not to treat differently citizens who find themselves in the same situation, but likewise not to treat equally those who are in different situations" (Vedel).

Most of the decisions of the Constitutional Council relating to the principle of equality are strict applications of this way of considering the principle, and declare that differences in treatment conform to the constitution. Some of these differences are founded, for example, on the particular circumstances of some public-service users – including their home or workplace – or on the issue of continuity of public service or tax incentives for the development of certain activities. While such measures constitute discrimination in an etymological sense, they can, legally, be qualified as differentiations, insofar as they constitute a limitation but not an attack on the principle of equality.

It needs to be noted that such limitations do not aim, strictly speaking, to correct inequalities and cannot be compared to a policy of positive measures. This differs from certain differentiations that, though also judged or considered to be in line with the constitution, are akin to forms of positive discrimination.

4. Ponts à péages, CC 79-107 DC, July 12, 1979.
5. Mutualisation de la CNCA, CC 87-232 DC, January 1, 1988.

Positive Legal Differentiations – Drafts on Positive Discrimination à la française

A study of French legislation and regulations reveals the existence of legal regimes that correct inequalities. The optional nature of the constitutionality review explains why some of these have been expressly declared as conforming to the constitution, while others, which have not been submitted for review, are presumed to conform. A few examples should suffice to show that equality *à la française* does not exclude recourse to the methodology of positive discrimination as clearly as might have been thought.

Thus, going beyond its traditional reading of the principle of equality, the Constitutional Council has, on several occasions, chosen to declare that legislation conforms to the principle of equality when it appears to assign a status to an individual (Jouanjan) in order to compensate for an inequality. It is noteworthy that, when making these assumptions, the Council makes express recourse to the idea of differentiation.

The justifications for such differentiations vary. [6]

First of all, the Constitutional Council has estimated that positive differentiations can be justified by geographic localization on national territories. This is the case with Corsica, which is "endowed with a tax status designed to compensate for restrictions arising from its insularity," which the constitutional judge decided was not worth fully assessing in terms of its constitutionality. [7] The same applies to a specific tax levied on the Île-de-France region, which the legislature had intended to finance "investment programs to address the gravest imbalances." [8] In a similar manner, the council validated a legal measure promoting the inhabitants of New Caledonia's access to overseas territories' public services. [9]

Secondly, the council agreed to consider social criteria to justify differential treatment, considering, for example, that "far from violating the principle of equality before the law," the reference made by the law to "concepts of 'older workers' or employees 'with special social needs' … would ensure their application in differentiated situations." [10]

6. See in particular Ferdinand Mélin-Soucramanien, *Le Principe d'égalité dans la jurisprudence du Conseil constitutionnel* (Paris: Economica-PUAM, 1997).

7. Loi portant statut fiscal de la Corse, 94-1131, December 27, 1994 and Statut fiscal de la Corse, CC 94-350 DC, December 20, 1994.

8. Loi de finances rectificative pour 1989, CC 89-270 DC, December 29, 1989.

9. Statut du territoire de Nouvelle-Calédonie, CC 84-178 DC, August 30, 1984.

10. Prévention des licenciements économiques, CC 89-257 DC, July 25, 1989.

Finally, in the domain of public service, the Constitutional Council when validating the third competition for access to the ENA [National Administration School], indicated that the principle of equal access for public employees "did not oppose the fact that recruitment rules . . . might be different, in order to take into account both the range of merits to take in to consideration as well as the variety of public service needs." [11] In this case the Council seems to have agreed with the government's argument that this new way of recruiting allowed for real social equality.

Independently of cases in which the Constitutional Council's opinion was called upon, other differentiations are concealed in French legislation, which, justified by a desire to compensate for inequalities, appear to constitute positive discrimination. In this regard, we can mention the group of measures favoring youth employment and laws relating to the disabled (starting with the system of reserved occupations).

There can be little doubt that the group of measures referred shares a similar logic with that of positive discrimination, at least in one of its forms. Even though they vary one from another, such legal measures convey a form of public politics aimed at compensating for socioeconomic inequalities. It is therefore not strictly true to say that positive discrimination does not take place in France, even though it is qualified as differentiations, a formula reconciled more easily with equality *à la française*.

The reasons relating to the constitutionality – or legality *lato sensu* – of these measures can be understood easily. The relatively abstract approach to the principle of equality held by the *Declaration of the Rights of Man* must be taken into consideration alongside the actions of other parts of the constitutionality corpus. From this it can be seen that only three types of discrimination are expressly and constitutionally prohibited by the first paragraph of the preamble to the constitution of 1946 and the first article of the constitution of 1958. While the terms used have evolved, the spirit of the texts is identical: they are addressing discrimination based on origin (1958), race, and religion or beliefs. All discrimination based on another justification is therefore acceptable, in theory, as long as the measures taken by the legislature do not constitute an excessive attack on the principle of equality.

In as far as this itself leads to a validation of positive discrimination that is not named as such, the jurisprudence of the Constitutional Council would appear to be perfectly coherent, were it not for two

11. Troisième voie d'accès à l'ENA, CC 82-153 DC, January 14, 1983.

cases, which are difficult to comprehend. The first, historic today, led the Constitutional Council to refrain from making a ruling on the merits of an organic law that established positive discrimination based on origin and religion, while the second, more recent and current, resulted in the censure of positive discrimination on the grounds of gender, a criterion that is not evoked by the constitution. These two cases are important enough to merit a brief mention here.

In the first case, known as that of the "Muslim magistrates," the Constitutional Council was called upon to rule on an organic law putting forward special promotion of French Muslims in the magistrature. This text allowed some French citizens who were Muslims of Algerian origin to compete for a special recruitment of magistrates, once they had passed the first year of a law degree. The document also indicated that a quota of 10 percent of junior-magistrate jobs would be reserved for them each year. The submission was compulsory, and the measure was clearly discriminatory and positive. The constitutional judge chose not to rule on its merits, arguing that the new organic law was only "modifying the same spirit" of a previous ordinance of organic law, an ordinance "whose conformity to the constitution cannot be contested."[12] Hiding behind this juridical justification, the young Constitutional Council avoided ruling on a sensitive affair. In doing this, it implicitly validated true positive discrimination.

The second case, known as that of "quotas by gender," is the more recent and better known. The legislature intended to institute gender quotas on the lists of candidates for municipal elections. Oddly, the banning of gender discrimination does not figure in any of the constitutional measures relating to the principle of equality. Moreover, article 3 of the constitution of 1958 makes the provision that "all French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute." Such a measure does not exclude a priori the establishment of quotas because they do not figure in the rank of conditions determined by law. However in respect of the reconciliation of this measure with article 6 of the *Declaration of the Rights of Man and of the Citizen*, in which all citizens are equal in the eyes of the law, the Constitutional Council considers that "what ensues is that the status of citizen enables voting rights and eligibility under conditions shared by all those who are not excluded by reason of age, disability, or nationality or any other reason

12. Magistrats musulmans, CC 60-6 DC, January 15, 1960.

intended to preserve the freedom of the voter or the independence of those elected." [13] In this case, positive discrimination was forbidden, by the issuing of a "strict control … because it took place in a domain under this modality of jurisdictional control" (Mélin-Soucramanien). Such a solution should not be surprising, in spite of the fact that discrimination based on sex was not expressly prohibited, in that it is the clear expression of the principle of equality *à la française*.

This brief overview of constitutional case law allows for the provisional conclusion that "the constitution forbids some discrimination according to sex, religion, age, or opinion. Therefore, the legislature cannot discriminate in relation to these prohibitions. For the rest, it is absolutely free to discriminate as it deems necessary" (Leben). It is therefore likely that in order to avoid semantic ambiguity, the Constitutional Council considers that discrimination, positive or otherwise, is inherently contrary to the principle of equality, while differentiations, even positive ones, are possible.

Paradoxically, the French concept of the principle of equality is no less subject to constitutional control. If today the debate about positive discrimination is not closed, it is because of the reporting of an increase in certain inequalities.

On the Need for Some Form of Positive Discrimination, or Objective of Equality versus the Principle of Equality

In 1989, leading scholar Georges Vedel affirmed that "the most difficult debate … is to know whether or not de facto inequalities, known to be inevitable, should be (or have been) fought against by the law. This is the whole problem of extending equality to society or to the whole social organization. Equality needs to be a social equality, equality of conditions, of ways of life, of cultures".

Fifteen years later, the debate continues, requiring, where appropriate, a qualitative leap.

The last few years have seen a constitutionalism of real positive discrimination, which, through their insertion into the constitution have become constitutional requirements. These reforms, apparently very specific, lead us to question whether there has been a transformation in the principle of equality.

13. Quotas par sexe, CC 82-146 DC, November 18, 1982.

The Constitutionalization of Positive Discrimination

The constitutional principle of equality *à la française* forbids the legislature from developing a politics of positive discrimination. If such a measure appears to be indisputably necessary, the only way out lies in a revision of the constitution. The inclusion in the very text of the constitution of a framework allowing for positive discrimination can be interpreted as an express right given by the constituent to the legislature in order to depart from the principle of equality.

The last five years offer two illustrations of such practice.

The first example is that concerning the constitutionality of the principle of parity. After a long debate about the possibility of putting in place an obligation for political parties to allow women to take part in political life, on July 8, 1999, Congress adopted a constitutional law relating to equality between men and women.

The explanatory note on the draft constitutional law is explicit: "As there is insufficient participation of women in public life and institutions, it is necessary to promote the goal of equality between men and women, using appropriate measures." A constitutional revision was needed, as the council, in the "quotas by gender" ruling, had decided that the rules and principles applicable to political representation forbade all distinction between men and women. It was agreed, therefore, that article 3 of the constitution, which affirms the indivisible and universal character of national sovereignty, would be supplemented, in order to reconcile those principles with the aim of giving men and women equal access to mandates and offices. In its revised version, article 3, paragraph 5 now states "the law promotes men and women's equal access to mandates and functions." This constitutional law was the object of a large consensus, and was adopted by Congress by 741 votes out of 831, with forty-two against.

The aim of the constitutional amendment was to allow the legislature to look at practical implications. This was accomplished by law 2000-493 of June 6, 2000, aimed at promoting women's equal access to electoral mandates and elective offices, which fulfill the Electoral Code. Thus, for example, article L 300 of the Electoral Code (article 3 of the law), related to the election of senators, makes the provision that, on each list, the gap between the number of candidates of each sex cannot be greater than one, and that each whole group of six candidates in the order of presentation on the list must include an equal number of candidates of each sex. Identical rules are in place for the election of regional and municipal councils (article L 346), for the Council of Corsica (article L 370), for

elections to the European Parliament, and within TOM [Overseas Territories] assemblies. The penalty for political parties' noncompliance with these obligations is a decrease in aid and funding.

This principle of parity establishes positive discrimination in favor of women. The legislature could not make this choice constitutionally, insofar as it could not be seen as a simple differentiation. In contrast, the constituent, by virtue of its sovereign power, may do this without having to exercise any control over the constitution. [14] Legally, via the effect of its constitutionalization, positive discrimination disappears in favor of a constitutional requirement for parity, through which the Constitutional Council brings about conciliation between other constitutional provisions including, in this case, those that relate to the principle of equality.

The second, less well-publicized example, is part of the constitutional reform of decentralization. The constitutional law of March 28, 2003 relating to the decentralized organization of the Republic provides for, among other things, a development status for overseas territories. In this way, the new article 74 of the constitution provides a way for "the overseas communities governed by the present article [to] have a status that takes into account the interests of each of them within the Republic. This status is defined by an organic law… . The organic law may also determine, for those communities that are autonomous, the conditions in which … the measures justified by local necessities can be taken by the collective to promote its population, in matters such as access to employment, the right of establishment to pursue a professional activity, and the protection of land heritage."

The constituent has, therefore, once again issued the legislature with organic clearance to depart from the principle of equality. The organic law of February 27, 2004 regarding the status of French Polynesia embodies the first application of this reform. Most notably, its article 18 concerns "access to paid employment in the private sector" and the right of establishment for the exercise of unpaid professional activities. In doing this it recognized the competence of French Polynesia to put in place, by means of the law of the country, measures of each type and for each sector, that promoted the interests of the local population in respect of "objective criteria that relate directly to the need for support and the promotion of local employment." The "local population," the

14. Loi constitutionnelle relative à l'organisation décentralisée de la République, CC 2003-469 DC, March 26, 2003.

population targeted as the beneficiary of these measures of positive discrimination, is identified according to the criterion of "a sufficiently long period of residence" in French Polynesian territory, a period to be specified by the laws of the country.

Examining the organic law on the basis of article 61, paragraph 1 of the constitution, the Constitutional Council indicated that "there is no objection, subject to the provisions of articles 7, 16, and 89 of the constitution, to the constituent power introducing new measures into the text of the constitution, in necessary cases, which apply to the rules and principles underpinning constitutional values." [15]

Very different in object as well as in spirit from the parity reform, the organic law of February 27, 2004 might imply an attempt to establish a positive differentiation, as it hinges on the objective criterion of residence.

However, if this were the case, the use of a constitutional amendment for the empowerment of organic legislation would have been useless.

Two such reforms to constitutionalism, which relate to qualifiable measures of positive discrimination, lead us to question whether there has been a subtle transformation in the principle of equality.

A Constitutional Transformation of the Principle of Equality?

Indisputably, equality *à la française* is changing. It was originally conceived of as a natural law, presenting all the characteristics of a transcendent principle, ideal and absolute. In this sense, it contributes to the coherence and harmony of the French legal system. Like all rights to liberty, its implementation presupposes development; in contrast, equality is less susceptible to limitations than any other right or liberty, apart from those that allow for the reestablishment of a real equality.

The social as much as the juridical context of the last ten years has led to a rethinking of equality.

At a social level, increasing inequality is constantly being denounced. On a parallel level, the demand for equality – seen as egalitarianism – has also continued to increase, particularly in the name of the ideal of a state rule of law. This claim leads to an increase in demands on the state, which is asked to reestablish, in law, the equality that is the basis of its legitimacy.

On this legal level, the Constitutional Council initiated a turn qualifying equality before the law as a "required constitutional value," considering

15. Loi organique portant statut d'autonomie de la Polynésie française, CC 2004-490 DC, February 12, 2004.

that "the principle stated in article 13 of the *Declaration of the Rights of Man and of the Citizen* does not prevent the legislature from giving support to certain categories of persons with respect to special needs, most notably, to better the conditions of life of particular categories of persons." [16] A limitation remains: "This must not result in a rupture in equality as characterized in relation to public burdens."

Thus, the principle of equality, conceived of initially as a given quality inherent in human nature, is subtly transformed into a model to be consolidated and in some cases, overcome. From this double viewpoint, the role of the legislature is essential. This is implied already by paragraph 3 of the preamble to the constitution of 1946, which affirms that, in the matter of the equality of the sexes, "the law guarantees women, in all domains, rights equal to those of men," a measure that, curiously, has never served as the basis of any decision made by the Constitutional Council. While this very general formula can explain this choice, it remains that this article usefully completes the first article of the *Declaration* of 1789. Never mind that "men are born and remain free and equal in rights;" real equality is utopian. The law must not only refrain from questioning equality but also support it by guaranteeing it, by means of positive action if necessary. The state finds itself bound by a positive obligation that relates to processes and not results, apart from the transformation of equality as a principle into equality as a right.

Little by little, then, the equality principle has combined with an equality objective. Protected constitutionally to the degree that it is a principle, it is logical that equality be safeguarded and guaranteed constitutionally as an objective also. The paradox of positive discrimination is that it is negative for those who are not its beneficiaries. Therefore, the ordinary or organic legislature cannot practice it without giving rise to discrimination. Equality, as an objective, needs to be broken down into specific objectives, objectives that are constitutional or constitutionalized, to empower the legislature, if it is to be effective. Irreducibly opposed, the relationship between equality and positive discrimination cannot be resolved, in law, without being elevated to the constitutional rank of an equality objective pursued via positive discrimination, whose application then passes into the remit of the Constitutional Council.

To conclude his treatise on equality, Vedel in 1989 borrowed from President Luchaire a formula put forward in his work on the constitutional

16. Loi d'orientation relative à la lutte contre les exclusions, CC 98-403 DC, July 29, 1998.

protection of rights and liberties. Some fifteen years later, the ambivalent nature of equality persists: "Like Janus, equality has two faces, one turned towards the past, the other towards the future; the first condemns all distinction forbidden by the constitution, an arbiter that has no relationship with the object that it establishes in law; the second forced to correct with all necessary prudence the most shocking inequalities of the human condition. In respect of these two movements: one is the conserver of a certain juridical order, the other tends to push it forward. They both have their source in the same principle of equality which appears at one and the same time to be a protection against arbitrary actions and a myth regarding *social* progress."

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ABSTRACT

In French public law the equality principle and positive discrimination are fundamentally opposed. As a basic element of the French legal system, the equality principle postulates the absence of disadvantaged groups, unless it is acknowledging a failure of the system. However the confrontation between the ideal and the reality leads to the taking into account of objective differences that make it necessary to legally identify legitimate and necessary differentiations. A qualitative change occurs when equality becomes a demand: the equality principle is then combined with an equality objective.

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