

Equality versus Fraternity? Rethinking France and its Minorities

La liberté seule tue l'égalité; l'égalité imposée en principe unique tue la liberté. Seule la fraternité permet de maintenir la liberté tout en luttant contre les inégalités.

Edgar Morin, 2006¹

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Introduction

The relationship between France and its minorities is complex. Recent events including the 2015 terrorist attacks, the prohibition on wearing religious symbols in public, or the 2005 riots, have been perceived as symbols of great tension in French society when it comes to its minorities.² Indeed the ten-year anniversary of the riots prompted reporting that nothing had changed in the intervening period in the structures of inequality that caused them,³ while in January 2015, the French Prime Minister Manuel Valls declared that the country was facing a “territorial, ethnic and social apartheid”.⁴ This statement from the Prime Minister seems to be at odds with the overall policy of rejecting any targeted policies or laws to protect minorities in France. As a tradition France is against minority rights. French authorities have consistently rejected the use of

¹ “Liberty on its own kills equality; equality imposed as a solo principle kills liberty. Only fraternity allows us to support liberty while fighting against inequalities” [our translation] - Edgar Morin, in *Télérama* no. 2929, 1 march 2006, quoted in Hubert Herbreteau, *La fraternité: entre utopie et réalité* (Paris: Les Éditions de l'Atelier, 2009), 45.

² See: John R Bowen. *Can Islam be French? Pluralism and Pragmatism in a secularist state* (Princeton University Press, 2011); D. Duprez, “Urban Rioting as an Indicator of Crisis in the Integration Model for Ethnic Minority Youth in France”, 35 (5) *Journal of Ethnic and Migration Studies*. (2009), 753-770.

³ See for example Angelique Chrisafis, “Nothing's changed': 10 years after French riots, *banlieues* remain in crisis', in *The Guardian*, 22 October 2015.

⁴ See: Sylvia Zappi, “Manuel Valls, l'apartheid et les banlieues”, in *Le Monde*, 26 January 2015.

the term 'minorities', and have banned any form of special measures for national, racial, ethnic, religious or linguistic groups.⁵

At the international level, and in particular in terms of international human rights law, France is known for its stand against minority rights. "France is a country in which there are no minorities",⁶ reads its statement to the UN Human Rights Committee clarifying its reservation to Article 27, the minority rights provision of the International Covenant on Civil and Political Rights (ICCPR).⁷ This is justified by reference to the 'republican model' of integration based on the constitutional principle of equality under French law. The republican model is expressed in the foundational text of the 1789 Declaration of the Rights of Man and of the Citizen, the preamble of the 1946 Constitution, and the 1958 Constitution, collectively termed the *bloc de constitutionnalité*, or body of constitutional rules.

The republican model was not designed to integrate the diverse range of groups in contemporary France. Its objective was to achieve the integration of 'nationals', i.e. Bretons, Corsicans and others, and when viewed from this historical perspective, it has proven to be "unexpectedly successful".⁸ Yet concerns about the sustainability of the republican model have galvanised around socio-economic problems and exclusion in employment and housing that point towards a crisis in relations with 'newer' minorities in the country. As captured by d'Appollonia:

French republican principles and institutions have proved to be unable to prevent the emergence of new forms of racism, specifically the differential racism of social exclusion. As a result French society is facing an increasing tension between the belief in formal republican principles of equality and ethnic blindness, and the persistence of socio-economic inequalities coupled with ethno-cultural discrimination and racial prejudice.⁹

⁵ See: Norbert. Rouland, "La tradition juridique française et la diversité culturelle", 27 *Droit et société* (1994) 381-419.

⁶ CCPR/C/22/Add.2., quoted in Patrick Thornberry, *International Law and the Rights of Minorities*, (Clarendon: Oxford University Press), 245. See also: Jean Dhommeaux, "Le pacte international relatif aux droits civils et politiques, les minorités et le breton.", *Revue juridique de l'Ouest*, 1989-1. pp. 41-49.

⁷ Technically it is a declaration but it is usually considered to act as a reservation. See for example Gaetano Pentassuglia, 'On the Models of Minority Rights Supervision in Europe and How They Affect a Changing Concept of Sovereignty', 1 *European Yearbook of Minority Issues* 2001/2, 30-65, at 60 n.94. The French government has entered a similar reservation to Article 30 of the Convention on the Rights of the Child relating to the rights of children belonging to a minority group.

⁸ Ariane Chebel d'Appollonia, 'Race, Racism and Anti-discrimination in France', in Sylvain Brouard, Andrew Appleton and Amy Mazur (eds.), *The French Fifth Republic at Fifty* (New York: Palgrave Macmillan, 2009), 267-285, at 268.

⁹ *Ibid.*, 283.

Echoing these concerns, a wide body of independent international experts, in particular the UN treaty bodies and Special Procedures, have called for France to adopt some form of a minority rights-based approach. In 2008, the then UN Independent Expert on Minority Issues in her 'Mission to France' found "serious discrimination...experienced by members of minority communities in France", and concluded: "The State is under a positive obligation to create favourable conditions for the exercise of the rights of minorities."¹⁰ Her report noted how France has historically rejected the concept of minority rights and recognition of minority groups as incompatible with the French Constitution and the principles of the Republic.¹¹ She found:

This has been an obstacle to the adoption of policy initiatives that by their nature must acknowledge the reality of discrimination against specific population groups within French society. It has prevented any serious consideration of affirmative action programmes or the collection of statistical data concerning the socio-economic status of population groups that can be disaggregated by ethnicity or religion. The [I]ndependent [E]xpert recommends that such government measures, rather than being considered to violate the Constitution, should be seen as essential to achieving a true vision of "Liberté, Egalité, Fraternité".¹²

Whether one agrees or not with the need to reform the republican model, there remains a question as to whether it is legally even *possible* to do so. In particular, the pivotal role of the Constitutional Council is often overlooked in such calls for France to change its approach to minority rights. The importance of equality has been put forward by the Constitutional Council, in particular its pronouncement and defence of the *bloc de constitutionnalité* dominated by this key term, resulting in a veto practice that impedes on the ability of any French government to enact legislation recognising minority rights. This extends to ratifying regional (i.e. European) or international instruments that do the same. Hence the approach of the Constitutional Court on this issue is an impediment to the recognition of minority rights in France. No legislation affording recognition of minority groups in France would circumvent the Constitutional Council's current interpretative approach to equality that disbars minority rights, as set out in a number of key decisions.

The present article focuses on these constitutional principles with a view to examining how the *bloc de constitutionnalité* could be interpreted to adjust to the needs of French society regarding its minorities, in line with

¹⁰ UN Doc. A/HRC/7/23/Add.2, 'Report of the Independent Expert on Minority Issues: Mission to France' (2008), p. 2

¹¹ Report of the Independent Expert, *Ibid.*, p.3.

¹² Report of the Independent Expert, *Ibid.*

recommendations from international bodies. It notably identifies the term *fraternité* as a relatively dormant provision within the *bloc* that holds the potential for such a new interpretative approach.¹³ International human rights bodies are consistent in calling for a change, with most recently the Committee on Economic, Social and Cultural Rights recommending in 2016 that France “revisit its position on minorities”;¹⁴ and the Human Rights Committee stating in 2015: “The State party should reconsider its position on the official recognition of ethnic, religious and linguistic minorities.”¹⁵ Both Concluding Observations note the State Party’s belief that such recognition of minority groups would be “incompatible with the Constitution”,¹⁶ or of an “unconstitutional nature”.¹⁷ This position is challenged, and it is argued that the Constitution could be positively interpreted to recognise minority groups.

Section 1 examines the historical development of the republican model of integration, outlining how it evolved such that equality would mean a rejection of minority rights. It indicates how, in practical terms, this means that minorities are invisible, and the response of international bodies in agitating for a change of official approach to bring statistics to light on minority groups, as well as implement special measures. Section 2 revisits lost battles for minority rights in France, beginning with language rights. It focuses further on the meaning of special measures or positive action in France in order to contrast these with the international understanding, and explore the State position that it does in fact legislate to the benefit of such groups without employing minority indicators. Section 3 explores the concept of fraternity, describing its origins and meaning, and investigating whether there are sources of positive law on the term both in France and internationally. Fraternity emerges as a ‘subterranean’ value in French public law, and its potential role is identified in providing a constitutional underpinning to the elaboration of special measures in order to identify and protect the rights of minorities.

1. Equality and France’s Invisible Minorities

The 1958 Constitution of France recognises its revolutionary heritage and legally enshrines the principles of 1789. The Preamble reads:

“The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946”.¹⁸

¹³ On the history of fraternity in French public law, see further Michel Borgetto, *La notion de fraternité en droit public français: Le passé, le présent, et l’avenir de la solidarité*, (Paris: Librairie Générale de Droit et de Jurisprudence, 1993).

¹⁴ Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: France’, UN Doc. E/C.12/FRA/CO/4 (2016), para. 15.

¹⁵ Human Rights Committee, ‘Concluding Observations: France’, UN Doc. CCPR/C/FRA/CO/5 (2015), para. 6.

¹⁶ CESCR (2016) para. 14.

¹⁷ CCPR (2015) para. 6.

¹⁸ Constitution of 4 October 1958.

Then, article 1 affirms 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.”¹⁹ Article 2 adds that: “The language of the Republic shall be French (...) The maxim of the Republic shall be “Liberty, Equality, Fraternity (...)”.²⁰ These constitutional principles which form the current model of French citizenship were shaped from the seventeenth century ‘age of enlightenment’ by philosopher-politicians, who predominately viewed a nation as a community bound together by an implicit common good, sharing common institutions and traditions, and forming a dominant culture.²¹ This was based on an understanding of a people or nation as socio-culturally homogenous. The approach was that those peoples who did not share such a common culture should gradually be assimilated within the dominant society. These ideals have been particularly influential on the make-up of the French national republican order and the definition of citizenship, expressed in the *bloc de constitutionnalité*.

The 1789 revolution and the Declaration of the Rights of Man and of the Citizen mark an important moment in the definition of French citizenship and its relationship with minority groups.²² Article 1 of the 1789 Declaration states: “Men are born and remain free and equal in rights. Social distinctions can have no other basis than common utility”.²³ Studies have shown how the revolution entailed the domination of the spirit of individualism, or as noted by Rouland, “individualism trampled pluralism”.²⁴ There was no place for alternative collective identities, or communities, within this movement. At the time, the issue of the ‘other’ crystalized around the recognition of the citizenship of the Jewish population. A well-known speech by Count Clermont-Tonnerre captured the mindset:

“We must refuse everything to the Jews as a nation and accord everything to Jews as individuals. (...) We must refuse legal protection to the maintenance of the so-called laws of their Judaic organization; they should not be allowed to form in the state either a political body or an order. They must be citizens individually.”²⁵

¹⁹ *Ibid.*

²⁰ *Ibid.* For an analysis of these symbols see further Anne-Marie Le Pourhiet, ‘Les symboles identitaires dans la constitution de 1958’, in B. Mathieu (ed.), *Cinquantième anniversaire de la constitution française* (Daloz: Paris, 2008), 133-45.

²¹ See: W. Connor, “Nation-building or Nation Destroying”, 24(3) *World Politics* (1972), Pierre-Yves Chicot, “L’autochtonie sur les territoires du Canada et de la France: analyse juridique comparée du droit des minorités culturelles”, *Revue internationale de droit comparé*. Vol. 63 N°1, 2011. pp. 109-128.

²² See: Alain Fenet and Gérard Soulier (eds.), *Les minorités et leurs droits depuis 1789* (Paris: L'Harmattan, 1989).

²³ Declaration of the Rights of Man and of the Citizen, approved by the National Assembly of France, 26 August 1789.

²⁴ Norbert Rouland, “La tradition juridique française et la diversité culturelle”, *Droit et Société*, 27 (1994), pp.381-419.

²⁵ Quoted in Lynn Hunt (ed. and transl.), *The French Revolution and Human Rights: A Brief Documentary History* (Boston/New York: Bedford/St. Martin's, 1996), 86.

This statement is reflective of an outlook that, while modifying over time, would guide the French approach to citizenship and its relationship with its minorities. The ideal was based on a vision that all citizens should be treated equally, and as such no differences should be allowed. The statement, with its focus on a religious group, additionally highlights another strong feature of the revolutionary heritage - *laïcité* - loosely translated as secularism, but including the notion that it is illegal to distinguish individuals on the ground of their religion.²⁶ The revolutionary heritage underlines a fundamental notion of individualism and a rejection of communitarianism, across nation, race, religion or other collective grounds. It reflects the strong republican citizenship tradition contrary to any form of recognition of community particularism, on the basis that this would act against the unity and universalism of the French Republic.

The historical weight of the 1789 revolution and its approach to citizenship and equality cannot be ignored in today's political and legal landscape. The claim is that constitutional ideals that have emerged from the revolution of 1789 are based on the recognition of only two legal entities - the State and the citizen. There is no place for group rights or minority rights, which would go against the aim of absolute equality between all citizens. In the spirit of 1789, equality has been interpreted to justify the rejection of minority rights. There has always been a tacit agreement between political parties, on the left and right of the political spectrum, regarding the republican heritage on that issue. As noted by Oberti, it is based on the republican model of integration, which in turn is founded on a "national conception of citizenship that negates using certain criteria (such as ethnicity, race, or religion) to categorize individuals and to treat them as specific groups."²⁷

The model is based on the idea that the State should interact with the individual only, not communities or groups, on the absolute notion of equal treatment for all. Equality is seen as the best way to ensure integration of all citizens, to the benefit of both the State and the citizens themselves. This was highlighted in a 1996 report by a national body, the High Council on Integration:

"The French concept of integration should obey a logic of equality and not a logic of minorities. The principles of identity and equality which go back to the Revolution and the Declaration of the Rights of Man inform our understanding, being founded on equality of individuals before the law, whatever their origin, race or religion...to the exclusion of an institutional recognition of minorities."²⁸

²⁶ See for example Jacques Myard (collectif), *La Laïcité au cœur de la République*, (Paris: L'Harmattan, 2003).

²⁷ M. Oberti, 'The French Republican Model of Integration: The Theory of Cohesion and the Practice of Exclusion', 119 *New Directions for Youth Development* (2008), 55-74, at 56.

²⁸ Haut Conseil à l'Intégration 1996, cited in Ellen Wiles, 'Headscarves, Human Rights and Harmonious Multicultural Society: Implications of the French ban for Interpretations of Equality', 41(3) *Law & Society Review* (2007), 699-736.

It is in the name of equality that French authorities have consistently rejected a legal approach recognizing minority rights and this is reflected in the reports of the French government to international human rights bodies. For example, the 2007 report by France to the Committee on Economic, Social and Cultural Rights states:

“Under the French Constitution, the nation is defined as being composed of persons with equal rights: ‘France is an indivisible, secular, democratic and social Republic. It guarantees equality of all citizens before the law without distinction as to origin, race or religion’ (art. 2). It follows from the French position that minorities are not recognized as holders of collective rights, but this position does not prevent the public manifestation or expression of diversity.”²⁹

The report characterises this approach as the “French concept of the nation”.³⁰ Reporting again to the same Committee in 2014, it was emphasised: “France cannot recognize any collective rights that would take precedence over individual rights, by virtue of the principle of the indivisibility of the Republic, the principle of equality and the principle of non-discrimination.”³¹ It was responding to the Concluding Observations of the Committee, which called for the State Party to “consider reviewing its position with regard to the recognition of minorities under the Constitution”.³² The Committee articulated its belief that:

“the principles of equality before the law and prohibition of discrimination are not always adequate to ensure the equal and effective enjoyment of human rights, in particular economic, social and cultural rights, by persons belonging to minority groups.”³³

It cited *inter alia* limited employment opportunities, inadequate access to health care facilities and public transport, under-resourced schools and significant disparities in school performance, high exposure to crime and violence, and *de facto* discrimination suffered by racial, ethnic and national minorities, including women as members of these groups.³⁴ France responded that it “considers that the application of human rights to all citizens, on a basis of equality and non-discrimination, will normally provide them, irrespective of their situation, with the fullest protection to which they may aspire.”³⁵ The exchange highlights the centrality of the constitutional principle of equality in blocking any route to minority rights, as recognised by both the Committee and the State Party in their respective documents.

²⁹ Committee on Economic, Social and Cultural Rights, ‘State Report: France’, UN Doc. E/C.12/FRA/3 (2007), para. 44.

³⁰ *Ibid.*, para. 46.

³¹ Committee on Economic, Social and Cultural Rights, ‘State Report: France’, UN Doc. E/C.12/FRA/4 (2014), para. 23.

³² Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: France’, UN Doc. E/C.12/FRA/CO/3, para. 50. The Committee also calls for the withdrawal of the reservation to Article 27 ICCPR and Article 30 CRC.

³³ *Ibid.*

³⁴ *Ibid.*, paras. 16, 21, 28

³⁵ CESCR, ‘State Report: France’ (2007), para. 66.

More specifically, the constitutional principle of equality has been interpreted as prohibiting the Government from collecting data or statistics on the racial, ethnic or religious background of its citizens, in any context. This means for example that the socioeconomic status of groups across any indicators based on racial, ethnic, religious or other grounds is unknown. The current operative measure is the 1978 law regarding 'Data files, processing and individual liberties', which states in article 8:

The collection and processing of personal data that reveals, directly or indirectly, the racial and ethnic origins, the political, philosophical, religious opinions or trade union affiliation of persons, or which concern their health or sexual life, is prohibited.³⁶

This rejection of the collection of such statistical data is based on the constitutional principle of equality, since gathering such statistics would imply that not all citizens are equal. This was affirmed in a 2007 decision of the Constitutional Council which upheld the unconstitutional nature of any data collection process that would rely on grounds such as race or ethnic origin, stated to be a violation of Article 1 of the 1958 Constitution.³⁷ In practice it means that no statistical data can be relied on to provide an accurate vision on the racial, ethnic, religious or linguistic make-up of the country. As noted by Simon, one of the leading French experts writing on the issue, this "choice of ignorance" leads to an absolute invisibility of minorities:

"(...) invisibility therefore occupies a central position in the French political and legal framework, since it is supposed to ensure equality of all before the law and, consequently, in social life. Equality through invisibility - if we were to summarize the Republican strategy into a slogan - requires that ethnic and racial divisions not be represented."³⁸

This lack of population census has been consistently highlighted as an area of concern by international human rights monitoring bodies. Indeed data collection has become a central feature of human rights indicators at the international level, comprising an emerging rights-based approach to what has been termed a 'data revolution' that increasingly informs the work of the Office of the High Commissioner for Human Rights.³⁹ It requires linking the levels of disaggregation to the grounds of discrimination that are prohibited under international human rights law,⁴⁰ an obligation being consistently relayed by

³⁶ *Loi Informatique et Libertés*; Law no. 78-17 of 6 January 1978.

³⁷ Constitutional Council: decision No 2007-557 DC of 15 November 2007.

³⁸ Patrick Simon, 'The Choice of Ignorance: The Debate on Ethnic and Racial Statistics in France', 26(1) *French Politics, Culture & Society* (Spring 2008), 8.

³⁹ See the Independent Expert Advisory Group on the Data Revolution, available at: <http://www.undatarevolution.org>

⁴⁰ See OHCHR, 'A Human Rights-based Approach to Data Disaggregation', available at: <http://www.ohchr.org/Documents/Issues/HRIIndicators/DataDisaggregation.pdf> and 'Official Statistics and Human Rights', available at: <http://www.ohchr.org/Documents/Issues/HRIIndicators/StatisticsAndHumanRights.pdf>

human rights bodies. For example, as noted by CERD in its 2010 Concluding Observations on France:

The Committee repeats its view that the purpose of gathering statistical data is to make it possible for States parties to identify and obtain a better understanding of the ethnic groups in their territory and the kind of discrimination they are or may be subject to, to find appropriate responses and solutions to the forms of discrimination identified, and to measure progress made.⁴¹

The Committee's position is that reliable and detailed statistical data on the ethnic composition of the population, and specifically economic and social indicators disaggregated by ethnic origin and other grounds, are necessary to enable the government to evaluate and identify specific issues affecting these groups. The need to develop statistics was also one of the central recommendations of the 2007 report of the Independent Expert:

The collection of data regarding the socio-economic status of the population disaggregated by ethnic and religious identities as well as along gender lines is recommended as an essential tool to reveal the full extent of social problems experienced by persons belonging to different ethnic and religious minority groups. Such data will assist in the development of appropriate and effective policies and practices to combat the effects of discrimination.⁴²

Furthermore the most recent Universal Periodic Review on France called on the government:

to review its position on the recognition of the rights of minorities and that it begin collecting data on the socio-economic status of the population, disaggregated by ethnic identity, confession and gender, in order to identify social problems affecting ethnic and religious minorities.⁴³

Similar to the UPR, the 2015 Concluding Observations of the Human Rights Committee grouped 'recognition of minorities and statistics' in a single paragraph, recommending:

"The Committee notes the position of the State party regarding the unconstitutional nature of the collection of data disaggregated by ethnic or racial origin and the national development of various tools based specifically on self-identification. However, it regrets the lack of statistics

⁴¹ Concluding observations of the Committee on the Elimination of Racial Discrimination, France, UN Doc. CERD/C/FRA/CO/17-19 (2010), at 12. This was reiterated in its 2015 concluding observations, see: UN Doc. CERD/C/FRA/CO/20-21

⁴² Report of the Independent Expert, *supra* note 9, para. 82.

⁴³ Report of the Working Group on the Universal Periodic Review: France, UN Doc. A/HRC/8/47 (3 June 2008), para. 21.

in the report that would permit it to fully appreciate the enjoyment of the rights enshrined in the Covenant by indigenous peoples and minorities.”⁴⁴

Most recently, the 2016 Concluding Observations of the Committee on Economic, Social and Cultural Rights recommended that the State party gather statistics on “visible ethnic minorities” in accordance with the principle of self-identification.⁴⁵

The lack of data makes it hard to judge the level of discrimination that might be faced by minorities, but indicators are there. In her visit to France, the Independent Expert on Minority Issues was able to highlight many areas where minorities are facing discrimination.⁴⁶ This includes unequal access to housing, employment, health care, education and political representation, as well as unequal treatment by the police and in prisons. However, due to the prohibition of such data, apart from residual allowances to conduct testing in the private sector when persons are applying for jobs, there is an absolute lack of official comprehension on how discrimination based on these grounds is affecting minorities.

The issue is not ignored in France, with at times intense political debates at the national level around allowing statistical data on origin, race or religion, the constitutional grounds that tend to be at issue in domestic debate. In 2007, the government supported the establishment of a committee to evaluate and measure the diversity of discrimination.⁴⁷ However the idea was eventually rejected due to lack of political support.⁴⁸ At the international level, France continues to defend its refusal to collect such data, stating for example to CERD that its position on “ethnic statistics” is a clear one reflective of a wide consensus in civil society.⁴⁹ It cited the National Consultative Commission for Human Rights which declared itself opposed to the institution of any such system even for the purposes of combating discrimination, while, however, proposing the creation of quantitative tools to improve the application of the law on non-discrimination.⁵⁰ These “tools for detecting discrimination” cannot use race or ethnicity or such criteria, but instead can be based on name, geographic origin or even nationality prior to French nationality.⁵¹

⁴⁴ Human Rights Committee, ‘Concluding Observations: France’, UN Doc. CCPR/C/FRA/CO/5 (2015), para. 6.

⁴⁵ Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: France’, UN Doc. E/C.12/FRA/CO/4 (2016), para. 17.

⁴⁶ Report of the Independent Expert, *supra* n.9, para.2.

⁴⁷ Comité pour la mesure et l’évaluation de la diversité des discriminations (Comedd). See also: Rapport Héran, ‘Inégalités et discriminations, Pour un usage critique et responsable de l’outil statistique’ [Inequalities and discrimination, Ensuring critical and responsible use of statistics], 5 February 2010; and Yazid Sabeg, ‘Programme d’action et de recommandation pour la diversité et l’égalité des chances’, Rapport remis au Président de la République, Mai 2009.

⁴⁸ See: Eric Maulin, ‘Les statistiques ethniques et le mythe de la conception républicaine de l’égalité’, 20(2) *Bulletin de l’Observatoire des politiques économiques en Europe*, and Delphine Roucaute, ‘Quatre questions sur les statistiques ethniques’, *Le Monde*, 6 May 2015.

⁴⁹ CERD, State Report: France, UN Doc. CERD/C/FRA/20-21 (2013), para. 10.

⁵⁰ CERD, State Report: France, UN Doc. CERD/C/FRA/20-21 (2013), para. 10.

⁵¹ CERD, State Report: France, UN Doc. CERD/C/FRA/20-21 (2013), para. 10.

Hence there is in place a developed legal arsenal to fight discrimination in France.⁵² But the approach to discrimination is based on the individual approach to equality, whereby each citizen can be protected against discrimination, but such discrimination is based on the individual right to equality, rather than racial, ethnic, religious or linguistic group-belonging. Anti-discrimination measures are based solely on socio-economic criteria, such as the poor, young or old persons, or inhabitants of socially deprived areas, rather than racial, ethnic or religious identity. The legal framework on non-discrimination has been carefully calibrated to avoid referring to the rights of minorities; only the individual equal citizen is protected against discrimination, not the group. This renders discrimination faced by minorities specifically due to racial, ethnic, or religious affiliation, to the extent that this is discernable, invisible.

Despite the lack of data, a general sentiment of discrimination dominates, notably but not exclusively amongst Muslims.⁵³ The level of discrimination against Muslims or other groups is hard to judge in reality, since, as highlighted, these are invisible in the statistics of the country. As a result some anti-discrimination policies refer instead to the 'youth of the *banlieues*' or 'immigrants', even when the concerned populations are the third or fourth generation of French citizens.⁵⁴ The lack of proper demographical statistics has often led to unofficial numbers filling the gap, such as the affirmation that there are five million Muslims in France.⁵⁵ In reality these figures are often based on the notion that descendants of persons who have migrated from the Maghreb and North Africa are *de facto* Muslims, creating an amalgamation between individual 'descendants from immigration' and Muslims.⁵⁶ This is not limited to Muslims as in the same vein, the Roma are referred to as *gens du voyage* [travelling people], rather than by their 'ethnic' marker, Roma.⁵⁷ As captured by

⁵² For an in depth analysis, see: Olivia Bui-Xuan, 'Le droit public français entre universalisme et différencialisme', (Paris: Economica, 2004); and Sophie Latraverse, 'Country Reports of the European Network of Legal Experts in Non-discrimination: France', (2013).

⁵³ See: Amnesty International, 'Choix et préjugés. La discrimination à l'égard des Musulmans en Europe', avril 2012; Adida, Claire L., David D. Laitin, and Marie-Anne Valfort, "Muslims in France: Identifying a Discriminatory Equilibrium", 27(4) *Journal of Population Economics* (2014), 1039-1086.

⁵⁴ See: Jocelyne Cesari, 'Ethnicity, Islam, and *les banlieues*: Confusing the Issues', 30 *Social Science Research Council* (2005); Karima Laachir, 'France's "Ethnic" Minorities and the Question of Exclusion', 12(1) *Mediterranean Politics* (2007), 99-105; Sophie Body-Gendrot, 'Police Marginality, Racial Logics and Discrimination in the *banlieues* of France', 33(4) *Ethnic and Racial Studies* (2010), 656-674.

⁵⁵ Different figures have been put forward, see: Haut Conseil à l'intégration, 'L'Islam dans la République' (Paris, documentation Française, 2001); see also: Claude Dargent, 'La population musulmane de France: de l'ombre à la lumière?', 51(2) *Revue française de sociologie* (2010), 219-246.

⁵⁶ See: Azouz Begag, *Ethnicity and Equality: France in the Balance* (University of Nebraska Press, 2007).

⁵⁷ See: Christine Walsh and Brigette Krieg, 'Roma Identity: Contrasting Constructions', 39(1-2) *Canadian Ethnic Studies* (2007), 169-186; Jean-Pierre Liégeois, 'Roma, Gypsies, Travellers', (Council of Europe, 1994).

Cervulle: “the inability to name the specifically color-based nature of continuing discrimination[s], ultimately produces vicarious forms of essentialism fixing and trapping racial minorities in the figure of the ‘eternal migrant’ or ‘stranger’.”⁵⁸ Not only does the rejection of racial, ethnic, religious or linguistic data in the name of equality make minorities invisible, it also entraps them into other *de facto* categorizations that paradoxically render them outsiders to the French process of equal citizenship.

While debates around the invisible nature of discrimination in French society persist, the legal perspective is clearly and repeatedly affirmed by France across its engagements with international bodies; that any recognition of minority rights, whether through legal measures or data collection or otherwise, would be unconstitutional. Hence France does not so much argue that minority rights are unnecessary, or undesirable (although it may believe this), but rather that they are unconstitutional. The source of this assertion is not just the constitutional texts but also the interpretative rulings of the Constitutional Council, examined in the next section.

2. Lost Battles in the French Model of ‘Minority Rights’

As France has clarified before international bodies, its traditional view of minorities flows from principles rooted in its history and fixed by the Constitution. This view is founded on two basic concepts: citizens have equal rights, which imply non-discrimination; and the nation is united and indivisible, in terms of both territory and the population. The 1958 Constitution reaffirmed these principles.⁵⁹ France has emphasised that the approach is not “set in stone”, but rather based on an ongoing national debate.⁶⁰ That debate has many strands but the proposal to ratify the European Charter for Regional or Minority Languages (ECRML) serves to illustrate its current legal parameters; whereby Article 1 and its reference to indivisibility, secularity and equality is interpreted as not allowing for specific treaty measures for minorities.

The issue of language rights to a certain extent represents the older fault-lines in France’s relationship with its minorities. In 1999, the Constitutional Council was asked to examine the compatibility of an eventual ratification of the ECRML.⁶¹ The Council decided that ratification would be contrary to the constitution, notably articles 1 and 2.⁶² Article 1 and its affirmation of the fundamental principles of indivisibility and equality was seen to oppose the “recognition of collective rights to any group defined by their community of

⁵⁸ Maxime Cervulle, ‘The Uses of Universalism, “Diversity Statistics” and the Race Issue in Contemporary France’, 17(2) *European Journal of Cultural Studies* (2014), 124.

⁵⁹ CERD, State Report: France, UN Doc. CERD/C/FRA/17-19 (2009), para. 10.

⁶⁰ CERD, State Report: France, UN Doc. CERD/C/FRA/17-19 (2009), para. 11.

⁶¹ European Charter for Regional or Minority Languages, (ETS No. 148), entered into force January 3, 1998. [hereinafter ECRML]

⁶² Constitutional Council: Decision No. 99-412 DC of 15 June 1999. See F. Melin-Soucramanien, ‘La République contre Babel – A propos de la décision du Conseil constitutionnel’, No.99-412 DC du 15 juin 1999’, (1999) *Revue du droit public* 985-1000.

origins, culture, language or religion.”⁶³ The Council relied on its earlier 1991 ruling on a statute on Corsican autonomy,⁶⁴ which found a violation of the principle of equality in proposals for limited mandatory teaching in the regional Corsican language.⁶⁵ According to the Council, ratification of the ECRML would require a change of the constitution in its Article 2 regarding the affirmation that French constitutes the main language of the Republic, as well as Article 1 since the proposed Charter could challenge the principles of indivisibility of the Republic, and of equality of all citizens. ⁶⁶

In particular, the *ECRML* decision states that Article 1 of the Constitution holds that France is indivisible and ensures equality before the law for all citizens without distinctions of origin, race, religion or belief, and that the principle of unity of the French people has constitutional value; and that the constitutional principles of France are against collective group rights, whether defined by community of origin, culture, language or belief. It also adds that because the European Charter contains provisions that afford an imprescriptible right to practice a minority language in private and public life, these combined provisions confer rights on groups in violation of the constitutional indivisibility of the Republic and unity of the French people. In tandem with the 1991 decision on Corsican autonomy, the legal basis is: (i) indivisibility of the French people (Article 1); (ii) equality without distinction of origin, race or religion (Article 1); and (iii) for minority language measures in public life, the language of the Republic is French (Article 2). A subsequent constitutional change in 2008 would add article 75-1 to the constitution, to affirm that: “regional languages are part of the French patrimony”. However this amendment does not provide a right to minorities to use their own language in public life and other spheres, and is based instead on a cultural, ‘patrimonial’ or heritage-based approach to regional languages.

The issue of minority languages returned in 2014 when the National Assembly proposed the adoption of a new specific paragraph to the constitution allowing for the ratification of the ECRML.⁶⁷ The text was examined by the *Conseil d’État* which relied on the decision of the Constitutional Council to again deliver a negative verdict.⁶⁸ The Senate then rejected the text at its first reading.

⁶³ “Considérant que ces principes fondamentaux s’opposent à ce que soient reconnus des droits collectifs à quelque groupe que ce soit, défini par une communauté d’origine, de culture, de langue ou de croyance”, Constitutional Council: Decision No. 99-412 DC of 15 June 1999

⁶⁴ Constitutional Council, no 91-290 DC, 9 May 1991 (Corsica).

⁶⁵ Bruno de Witte, ‘Linguistic Minorities in Western Europe: Expansion of Rights Without (Much) Litigation?’, in Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change*, (Hart, 2014), 27-52, at 41.

⁶⁶ See the comments of the Council regarding this decision, *Les Cahiers du Conseil constitutionnel*, Cahier n° 7, Commentaire de la décision n° 99-412 DC du 15 juin 1999, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/99412DCccc_412dc.pdf

⁶⁷ Projet de loi constitutionnelle autorisant la ratification de la Charte européenne des langues régionales ou minoritaires, NOR : JUSC1514364L

⁶⁸ Conseil d’État, Assemblée générale, Avis sur le projet de loi constitutionnelle autorisant la ratification de la Charte européenne des langues régionales ou minoritaires, N° 390.268 (30 July 2015)

In the debate that took place the issue of indivisibility and equality was put forward by several members of the Senate who raised the spectre of 'balkanisation' and 'communitarism' as serious dangers to the constitutional principles of indivisibility and equality.⁶⁹ The debates were not so much on the content of the ECRML but on what was perceived to be a challenge to the indivisibility of the French model of citizenship.

The long battle relating to ratification of the ECRML illustrates how the republican model, rejecting any form of 'communitarism', is strongly embedded in the political and legal apparatus of the State. Often, and certainly at the international level, it is the reverse – the realisation and protection of equality is considered as requiring, not blocking, such measures. As de Witte observes in relation to the ECRML: "in other countries, and in the new European instruments, it is exactly the other way around: the principle of equality is the basis for a duty to provide some degree of minority language education."⁷⁰ The centrality of the ECRML decision to the wider, more general block on minority rights, is seen in its citation by France in its 2014 report to CESCR:

"The Constitutional Council, for its part, when considering the compatibility of the European Charter for Regional or Minority Languages, signed by France on 7 May 1999, considered that the principles of indivisibility of the Republic, equality before the law and oneness of the French people "prevent the recognition of the collective rights of any particular group, defined by a common origin, culture, language or belief".⁷¹

Here, France is arguing that recognition of minority rights is beyond the purview of the government. The *ECRML* decision has become code for the ability of the Constitutional Council to veto any action by any government that would implement minority recognition or rights in any form. Hence minority rights are beyond the reach of the executive and legislatures and could only be recognised by the Constitutional Council through a new interpretation of the *bloc de constitutionalité*.

The resistance towards minority rights is also expressed in relation to proposals regarding special measures, also termed affirmative action or positive discrimination.⁷² At the international level, special measures are seen as key

⁶⁹ The debates are available at:

http://www.senat.fr/cra/s20151027/s20151027_mono.html#par_229

⁷⁰ Bruno de Witte, 'Linguistic Minorities in Western Europe: Expansion of Rights Without (Much) Litigation?', in Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change*, (Hart, 2014), 27-52, at 41. De Witte continues: "A recent constitutional amendment giving recognition to regional languages is considered only a modest achievement, which has been held by the *Conseil constitutionnel* not to conform to a right which can be invoked before the courts to challenge existing legislative arrangements for the teaching of regional languages."

⁷¹ Committee on Economic, Social and Cultural Rights, 'State Report: France', UN Doc. E/C.12/FRA/4 (2014), para. 71.

⁷² On the meaning of affirmative action and special measures at the international level, see Marc Bossuyt, 'Final Report of the Special Rapporteur on Affirmative Action', UN Doc. E/CN.4/Sub.2/2002/21 (2002).

ingredients in the protection of minorities. In France, the concept is largely seen as anti-republican in pushing for special rights for specific groups of citizens, an approach considered contradictory to the fundamental principle of equality.⁷³ These measures are believed to create privileges for minorities, a concept viewed as running against that of equality.⁷⁴ The dominant view is that positive discrimination runs contrary to the republican notion of equal citizenship. Furthermore positive discrimination measures are often perceived as an 'Anglo-Saxon' approach to the issue of diversity, compared to the republican model of the individual, equal citizen.⁷⁵

More specifically, the Constitutional Council examined the constitutionality of positive discrimination measures in a 2001 referral. The question was whether legislators could authorise the Paris Institute of Political Studies, an elite public higher education institution, to recruit students from deprived areas known as a *zone d'éducation prioritaire* (ZEP), via a particular procedure reserved for them. The measure was allowed as it fulfilled the constitutional requirement of equal access to instruction (found in the 13th line of the 1946 Preamble), as long as the selection process among ZEP students was itself objective and not arbitrary; in other words that students within the zones could not be identified on 'minority' grounds.⁷⁶ In a 2004 text commenting on 'positive discrimination' in its jurisprudence, the Constitutional Council stated that the decision illustrates what it terms the "French concept of affirmative action".⁷⁷ It meant that while scholarships could be delivered to support equal opportunities, these should not be translated as allowing the targeting of specific categories of populations. In this case, the special measures of recruitment were allowed on a geographical basis, for very deprived suburban areas, but not for specifically targeted minority populations on the basis of race, ethnicity or religion within those areas.⁷⁸ The decision emphasised that such distinctions would be unconstitutional.

The 2004 commentary provides an overview on the Constitutional Council's approach to 'positive discrimination'.⁷⁹ It begins by highlighting that equality is the constitutional principle most often invoked before the Council, a consequence of what is labelled the "passion for equality" that characterises

⁷³ For analysis and references, see: Gwénaële Calves, *La discrimination positive* (Presses universitaires de France, 2008). The term 'positive discrimination' is not used at the international level. See further Bossuyt, *Ibid*.

⁷⁴ See: Mehdi Thomas Allal, 'Discrimination positive versus discrimination positive? L'émergence d'un nouveau modèle d'intégration au niveau local', (Editions Universitaires Européennes, 2010)

⁷⁵ See: Jean-Marie Woehrling, 'Le droit français de la lutte contre les discriminations à la lumière du droit compare', 148(4) *Informations sociales* (2008), 58-71.

⁷⁶ Conseil Constitutionnel, Décision n° 2001- 450 DC du 11 juillet 2001.

⁷⁷ Conseil Constitutionnel, 'Les discriminations positives dans la jurisprudence du Conseil constitutionnel', septembre 2004, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/positives.pdf

⁷⁸ Conseil Constitutionnel, Décision n° 2003-471 DC du 24 avril 2003.

⁷⁹ Conseil Constitutionnel, 'Les discriminations positives dans la jurisprudence du Conseil constitutionnel', septembre 2004, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/positives.pdf

French society.⁸⁰ It then highlights how the principle of equality is rigorously applied, and the law must be blind to characteristics such as sex, religion or race. The report supports the vision that special measures cannot be based on identity markers including race, ethnicity, or religion. The only exception to this approach relates to the specific status of the French Polynesian territories and New Caledonia which have been allowed to adopt special measures to benefit the local populations, based on the fact that these relate to very specific autonomous territories.⁸¹ Otherwise no collective special measures protecting specific minorities based on their racial, ethnic, religious or linguistic identity would be deemed constitutional. As a consequence special measures can occur only under limited administrative sleights-of-hand, seen in the above 2001 decision which approved the identification of economically deprived areas for special educational assistance that do not distinguish between candidates on the basis of minority or such grounds within those areas. The fact that, invariably, the majority of residents in these areas are also racial, ethnic or religious minorities is not germane to the model.

Given the perceived strict constitutional parameters limiting any minority rights approach, in 2008, a committee (the “Veil Committee”) was tasked by the President of the Republic with reviewing the Preamble to consider “whether and to what extent the fundamental rights recognized by the Constitution need to be supplemented with new principles”.⁸² The rationale for the review was specifically in order to propose principles that would favour better integration of populations derived from immigration.⁸³ Its mandate included examining whether a new approach to the principle of equality was needed that would permit differentiated policies based on ethnic origin. It characterised its deliberations on this question as swift and unanimous: “The committee quickly came to a consensus to refuse the promotion of diversity understood as allowing differentiations directly founded on race, origins and religion.”⁸⁴ Instead it found that: “the current constitutional framework cannot be regarded as an obstacle to the implementation of ambitious affirmative-action measures that could benefit, among others, people of foreign origin who are insufficiently integrated in French society”.⁸⁵ This signalled that the constitutional framework is adequate for pursuing affirmative actions measures, in accordance with the ‘French model’ outlined above. The report details the ZEP case and others, affirming that the

⁸⁰ *Ibid.*

⁸¹ Décision n° 2004-490 DC du 12 février 2004; Décision n° 99-410 DC du 15 mars 1999; and Décision n° 2003-471 DC du 24 avril 2003.

⁸² CERD, State Report: France, UN Doc. CERD/C/FRA/17-19 (2009), para. 11. The report is available here

⁸³ Olivier Pogon, ‘Constitution: Simon Veil doit compléter le préambule’, *Le Figaro*, 9 January 2008, available at: <http://www.lefigaro.fr/politique/2008/01/09/01002-20080109ARTFIG00007-constitution-simone-veil-doit-compléter-le-preambule.php> In French: “poser les principes qui, dans son esprit, doivent permettre de favoriser une meilleure intégration des populations issues de l’immigration”. It was also tasked with addressing subjects unknown in 1946 such as bioethics.

⁸⁴ Comité de réflexion sur la Préambule de la Constitution, ‘Rapport au Président de la République’, (“Rapport Veil”, 2008), p. 66, available at [in French only]: http://www.laicite-republique.org/IMG/pdf/Rapport_Veil.pdf

⁸⁵ CERD, State Report: France, UN Doc. CERD/C/FRA/17-19 (2009), para. 12.

constitution offers latitude to put in place positive differentiation, as long as it is not based on origin, race or religion which is not permitted.⁸⁶

The report notes that positive discrimination based on ethnicity could have a perverse effect – a weakening of the ‘living together’ philosophy, causing persons to attach too strongly to their communities in order to benefit from such measures, or generating competition between ethnic groups and dislocation in the nation as a whole.⁸⁷ In sum, the Veil Committee did not recommend the authorisation in the Preamble of a politics of special measures founded on ethnicity or race or other grounds, even if considered provisional or temporary, and did not propose modifying the Preamble or Article 1 assuring equality before the law without distinction as to origin, race or religion.⁸⁸ These arguments add little to the current situation in France whereby discrimination and exclusion appear to map closely to minority indicators. Access to civil, political, economic, social and cultural rights can fall to differentiations on the grounds of race, colour, ethnicity, religion or other indicators. The Veil Committee conclusions acknowledge this reality for “persons belonging to visible minorities or diversity”, to a certain extent: “from all the evidence – and this has been documented by multiple administrative and academic studies – such persons encounter specific difficulties, for example in access to employment or housing.”⁸⁹ Additionally, the report accepts that “the current model of integration has struggled to realise an elite [of minorities], sufficiently numerous so as to allow such persons to identify or see themselves represented and find an indication that the doors of high office are not closed to them; this failure acts as a powerful factor in discouraging and frustrating the aspirations of these young persons.”⁹⁰

The Veil Committee report supports the status quo in terms of the constitutional provisions and their interpretation. It is significant as this report represents the dominant legal and political approach on the issue of diversity and integration. It also represents the most recent open debate on whether or not the constitution should be amended to provide more space for diversity, cementing the belief that a minority rights approach would require constitutional change. It accepts that the current model has serious shortcomings in failing to realise an equal position for minorities in French society, recognised with examples from both the civil and political (“the doors of high office”) and economic and social (“employment or housing”) rights spheres. It does not believe that this requires constitutional amendments to support

⁸⁶ Veil Committee, *supra note* 84, p.72.

⁸⁷ *Ibid*, Veil Committee, p. 70.

⁸⁸ *Ibid*, Veil Committee, p. 71.

⁸⁹ *Ibid*, Veil Committee, p. 66. “De toute évidence - et la chose a été documentée par de multiples études administratives ou universitaires - ces personnes rencontrent des difficultés spécifiques, par exemple dans l'accès à l'emploi ou au logement.”

⁹⁰ *Ibid*, Veil Committee, p. 66. “le modèle d'intégration, tel qu'il a fonctionné jusqu'ici, peine à faire émerger, parmi elles, une élite suffisamment nombreuse dans laquelle elles puissent s'identifier et trouver l'indication que les portes des hautes responsabilités ne leur sont pas fermées ; et cette défaillance agit comme un puissant facteur de découragement dans les aspirations des jeunes concernés, nourrissant frustrations et repli sur soi, là où l'intérêt de la société tout entière serait de promouvoir engagement et responsabilisation.”

special measures or other positive action on the basis of origin, race or religion, with the understanding that such measures could not be realised without constitutional amendment. The following final section explores another possibility – whether the *bloc de constitutionnalité* contains already a means or direction to enact such measures through the provision ‘fraternity’, and whether recognising minority rights is necessarily unconstitutional.

3. A Constitutional Role for Fraternity?

Article 2 of the 1958 Constitution reads: “The maxim of the Republic shall be “Liberty, Equality, Fraternity”.⁹¹ Of the three terms in the *devise* or motto, fraternity is the least understood, particularly in terms of its legal significance. Borgetto’s 1993 study of the term found no previous works on its juridical meaning.⁹² In a preface to the same study, Ardant described a “mystery” to fraternity for jurists, with few if any echoes of the term in positive law.⁹³ The origins of the republican triptych ‘Liberty, Equality and Fraternity’ are not clear, but it is apparent that it acted as one of a number of mottos during the French Revolution.⁹⁴ It appeared in public debate before the proclamation of the First Republic, included by Robespierre in a speech in 1790, in which he proposed the inscription of the three terms on the National Guard uniforms.⁹⁵ Fraternity, however, was not included in the 1789 Declaration on the Rights of Man and of the Citizen, whereas equality and liberty were; an early marker that this term was different, potentially of a lesser legal significance. Martin describes a slow and gradual process by which the Revolution elevated fraternity to a position alongside the more prominent Republican ideals of liberty and equality, but it never gained the same official, legislative status in this period.⁹⁶

Fraternity later disappeared altogether from the motto during the Empire, reduced to the two terms of liberty and equality. It gained a more military outlook during that period serving as ideological inspiration, intended to create more egalitarian and effective combat brigades for the defence of the imperilled Republic.⁹⁷ As Martin highlights: “It was as a military concept that

⁹¹ Constitution of France, 1958, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>

⁹² Michel Borgetto, ‘La notion de fraternité en droit public français. Le passé, le présent et l’avenir de la solidarité’, (Librairie Générale de Droit et de Jurisprudence, 1993), at 1.

⁹³ *Ibid*, Michel Borgetto, xi.

⁹⁴ See: M. David, *Fraternité et Révolution française* (Aubier, Collection historique, 1987); Jonathon Israel, ‘Revolutionary Ideas: An Intellectual History of the French Revolution from the Rights of Man to Robespierre’, (New Jersey: Princeton University Press, 2014), 12; and also Marcel David, *Le printemps de la fraternité : Genèse et vicissitudes 1830–1851* (Paris : Aubier, 1992.).

⁹⁵ Maximilien Robespierre, ‘Oeuvres de Maximilien Robespierre’, Tome VI, Presses Universitaires de France (1950), 643. Discours sur l’organisation des gardes nationales, Article XVI: “Elles porteront sur leur poitrine ces mots gravés : LE PEUPLE FRANÇAIS, & au-dessous : LIBERTÉ, ÉGALITÉ, FRATERNITÉ.” (5 December 1790). The proposal was rejected. (see Martin, *infra*, at 29-30)

⁹⁶ Brian Joseph Martin, ‘Napoleonic Friendship: Military Fraternity, Intimacy, and Sexuality in Nineteenth-Century France’, (University of New Hampshire Press, 2011), 22.

⁹⁷ *Ibid*, 31.

fraternity entered the legislative discourse of both the National Assembly and the Constitution.”⁹⁸ It reappeared during the Revolution of 1848, with a religious dimension.⁹⁹ When the Constitution of 1848 was drafted, the slogan ‘*Liberté, Égalité, Fraternité*’ was defined as a ‘principle’ of the Second Republic in the preamble.¹⁰⁰ It was rejected during the Second Empire, but finally became established under the Third Republic, inscribed on the pediments of public buildings for the celebration of 14 July 1880.¹⁰¹ It then reappeared in the Constitutions of 1946 and 1958 as a *devise* or motto, rather than a principle, with Article 2 of the Constitution affirming that ‘liberty, equality and fraternity’ is the *devise* of the French Republic.¹⁰² As such, Article 2: “link[s] the 1958 constitution directly to the ideals of 1789 and provide[s] historical legitimacy to the present regime.”¹⁰³

The meaning or definition of fraternity has always been problematic and it is unquestionably the ‘weak link’ in the trilogy.¹⁰⁴ It appears separated from the first two, with the philosopher Paul Thibaud for example seeing rights inherent in liberty and equality, but only obligations in fraternity.¹⁰⁵ Liberty and equality were considered by the revolutionaries and their successors as natural and positive terms with fraternity located more in the realm of aspiration, what Le Pourhiet terms “purely moral wishful thinking”.¹⁰⁶ Nevertheless the contemporary interdependence of the three terms has been commented on, with the Canadian judge Charles Gonthier noting that “liberty and equality depend on fraternity to flourish”;¹⁰⁷ while South African judge Albie Sachs observed that “the detachment of fraternity from the triad of human aspiration had brought about the impoverishment of both liberty and equality”.¹⁰⁸

⁹⁸ *Ibid.*, 38.

⁹⁹ ‘Slogan of the French Republic’, available at: <http://www.france.fr/en/institutions-and-values/slogan-french-republic.html> It is noted that priests celebrated the ‘Brotherhood of Christ’ and blessed the trees of liberty that were planted at that time. See also: Michel Borgetto, *La devise « Liberté égalité, fraternité »* (Que sais je, Paris P.U.F., 1997).

¹⁰⁰ Anne-Marie Le Pourhiet, ‘Les symboles identitaires dans la constitution de 1958’, in B. Mathieu (ed.), *Cinquantième anniversaire de la constitution française* (Daloz: Paris, 2008), 133-145, at 139.

¹⁰¹ See: Gérald Antoine, ‘Liberté, égalité, fraternité ou les fluctuations d’une devise’, (Paris: UNESCO, 1981), and: Michel Borgetto, ‘La notion de fraternité en droit public français. Le passé, le présent et l’avenir de la solidarité’, (Librairie Générale de Droit et de Jurisprudence, 1993).

¹⁰² Anne-Marie Le Pourhiet, *supra note* 100, 139.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, 140.

¹⁰⁵ P. Thibaud, ‘Suite française: Fraternité, Solidarité, Fraternité’, www.marianne2.fr cited in Anne-Marie Le Pourhiet, *Ibid.*, 141.

¹⁰⁶ Anne-Marie Le Pourhiet, *Ibid.* In French: “*voeu pieux purement moral*”.

¹⁰⁷ Charles D. Gonthier, ‘Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy’, 45(3) *McGill Law Journal* (2000), 567-589, at 570.

¹⁰⁸ Albie Sachs, ‘Liberty, Equality, Fraternity: Bringing Human Solidarity Back Into the Rights Equation’, 4(3) *Journal of Human Rights Practice* (2012), 365-383, at 367.

Fraternity has never appeared as a solo term or value in decisions of the Constitutional Council, only ever cited along with liberty and equality in a wider reference to the *devise*. The absence of the attribution of a direct legal significance does not mean it lacks one. Borgetto has been instrumental in identifying the role fraternity has played as an indirect constitutional norm in the development of a jurisprudence on solidarity.¹⁰⁹ Although solidarity has been an important principle in several decisions of the Constitutional Council, it is not as such expressed in the constitution. Legally it is found in Article 1 of the Constitution stating that France is a social republic. But it is in connection with the principle of fraternity that solidarity has received a positive legal application. Under this approach, the Constitutional Council has made several references to the principle of solidarity, mentioning “a mechanism of solidarity”, a “principle of solidarity”, or an “objective of solidarity” embedded in the constitution.¹¹⁰ As Borgetto notes, this focus on solidarity is only a truncated approach to the value of fraternity as a constitutional principle, with fraternity the justification lying behind measures to promote solidarity.¹¹¹ These decisions on solidarity concerned the right to work, the protection of family life, or access to health and education.¹¹² This “institutionalisation of solidarity” was legitimised by fraternity, which includes solidarity but has a wider field of application.¹¹³ Its significance is beginning to re-emerge via the restoration of the principle of fraternity as fundamental to the Republic and to contemporary French public law. Borgetto writes:

“Underlying solidarity, fraternity continues on a somewhat subterranean and diffuse pathway, exercising its influence on a significant part of French public law.”¹¹⁴

This ‘subterranean’ influence is echoed by Canivet, in what he in turn identifies as the “subversive function” of fraternity.¹¹⁵ He views its value as twofold; internal order and international law. Internally, there is the myth of a homogenous national collective that corresponds less and less to social reality, with increasing “pluralist transgressions” along regional, cultural or religious lines which highlight problems with the French treatment of difference.¹¹⁶ At the

¹⁰⁹ Michel Borgetto, *La notion de fraternité en droit public français. Le passé, le présent et l’avenir de la solidarité* (LGBJ, Bibl. de droit public, 1993), p. 11.

¹¹⁰ Constitutional Council, *Décision n° 2000-436 DC* (décembre 2000), Rec., p. 176, cons. 37; *Décision n° 90-285 DC* (28 December 1990), Rec., p. 95, cons. 29.; *Décision n° 98-405 DC* (29 December 1998), Rec., p. 326, cons. 12.; *Décision n° 96-387 DC* (21 January 1997), Rec., p. 23, cons. 10.

¹¹¹ Michel Borgetto, *supra note 109*, p. 11-14.

¹¹² See: *La fraternité comme valeur constitutionnelle*, congrès de l’ACCPUF, juin 2003, rapport du Conseil constitutionnel français; Bertrand Pauvert and Xavier Latour, *Libertés publiques et droits fondamentaux* (Studyrama, 2006), pp. 269-275

¹¹³ Borgetto, *supra note 109*, at 14.

¹¹⁴ *Ibid*, Borgetto, 12. “*derrière la solidarité, la fraternité continuait alors de cheminer de manière plus ou moins souterraine et diffuse et donc d’exercer son influence sur une partie non négligeable du droit public français*”.

¹¹⁵ Guy Canivet, “Responsabilité, fraternité et développement durable en droit – Une conférence en mémoire de l’honorable Charles D. Gonthier” in *De la valeur de la fraternité en droit français*, 20-21 mai 2011 (conférence à la faculté de droit de l’université McGill), p.11.

¹¹⁶ *Ibid*, p. 12.

international level, there are decisions on intervention in other states in order to protect the rights of others, with the conclusion: “whether on an internal or international plane, the Law must reconsider the value of fraternity in order to respond to tragic realities and reshape the system of law.”¹¹⁷ Canivet thus hints at the potential for fraternity in a range of internal and international spheres, although the examples are somewhat arbitrary. He does not articulate a more defined role for fraternity in relation to France’s obligations under international human rights law regarding the rights of minorities.

Borgetto considers it time to evolve the role of fraternity in French public law.¹¹⁸ One such potential application lies in providing a balance to equality and a constitutional avenue to the realisation of international minority rights standards in France, without any required change to the constitution. Any measure that would implement the many recommendations of human rights bodies in this regard would need to be constitutional, and at present, the dominance of the principle of equality has resulted in an interpretation of the *bloc de constitutionalité* so as to limit ‘minority rights’ to the very strict French model. As noted by the UN Independent Expert, “[t]he acknowledgement of ethnicity, religion and heritage should not be considered to threaten the principles of unity and equality that are the foundation of French society.”¹¹⁹ Fraternity could act as the counterbalance to equality to provide justification for special measures within the *bloc de constitutionalité*. Rather than a “threat” to equality, such measures could be perceived as realising the constitutional direction on fraternity, enforcing the interdependence of the Article 2 *devise*.

No precedent for this exists in France, with a limited jurisprudence on a practical application of the principle of fraternity confined to the realisation of solidarity. However outside France, India provides an example of a practical deployment of fraternity as a term of constitutional significance that illustrates the potential pathway. Fraternity appears in the Preamble of the 1950 Constitution of India along with liberty, equality and justice.¹²⁰ It was inserted late in the drafting process by B. R. Ambedkar, the architect of the Indian constitution and a former ‘Untouchable’, who oversaw the inclusion of a range of provisions to counter caste-based discrimination.¹²¹ Ambedkar commented at the time on the interdependence of the three terms:

¹¹⁷ Our own translation, the original reads: “Que ce soit sur le plan interne ou dans l’espace international ou à l’interface des deux que constitue l’immigration, le droit est pressé de reconsidérer la valeur de fraternité afin d’agir sur une réalité tragique et rénover le système de droit” (p.12)

¹¹⁸ Borgetto, *supra* note 109, at 644.

¹¹⁹ UN Independent Expert, Mission to France, p.3.

¹²⁰ Constitution of India, 1950, available at: <http://lawmin.nic.in/coi/coiason29july08.pdf> It reads: “WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation (...).”

¹²¹ See further Christophe Jaffrelot, ‘Dr. Ambedkar and Untouchability: Fighting the Indian Caste System’, (Columbia University Press, 2005). The authors use the term ‘Untouchable’ only in its historical context.

These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.¹²²

The Supreme Court of India later relied on fraternity as a constitutional principle, in particular linking it with justifications for special measures in *Indra Sawhney vs Union of India* (1992).¹²³ The case involved a challenge to the workings of the constitutional system of 'reservations', or affirmative action, designed among other groups for the 'lowest' castes. The Supreme Court referenced "fraternity assuring the dignity of the individual" as relevant in the context of discussing inequality and extreme caste disabilities.¹²⁴ On the role of fraternity in the decision, Robinson writes:

Unity and fraternity were unattainable in the presence of immense substantive inequalities, which in turn threaten formal equality before the law. The judgment is significant not only for making a strong connection between equality and fraternity, especially of castes and socio-economic classes, but also perceiving the policy on reservations as a link connecting the ideals of equality and fraternity with real social, economic and political justice.¹²⁵

Later Supreme Court decisions have brought further interpretations of the term,¹²⁶ affirming it has an independent constitutional meaning and significance. However the Indian example implies not only that fraternity may have a positive and independent constitutional value, but also that this value lies in bringing a social dimension to political democracy through special measures. As Robinson summarises: "without the realisation of equality and fraternity in social as well as economic life, the structure of political democracy so carefully constructed would itself be at great risk ... [from] those suffering from inequity and a lack of a sense of worth."¹²⁷ In India, inequity crystallises around divisions on the basis of caste, and hence it is this issue that attracted the first Supreme Court intervention in 1992 premised on upholding fraternity. India emphasises that fraternity should be a term of constitutional significance to respond to deep inequalities that undermine the social and democratic order. As Ambedkar

¹²² B.R. Ambedkar, Constituent Assembly Debates of India, 25 November 1949, quoted in Rowena Robinson, *Ibid.*

¹²³ *Indra Sawhney vs Union of India* (1992), AIR 1993 SC 477, 1992 Supp 2 SCR 454.

¹²⁴ Cited in Rowena Robinson, *Ibid.*, 57.

¹²⁵ Rowena Robinson, 'In Search of Fraternity: Constitutional Law and the Context of Housing Discrimination in India', 26&27 *Economic and Political Weekly*, 27 June 2015, 54-62, at 57.

¹²⁶ See *S. R. Bommai vs Union of India* [1994] and *Nandini Sundar and Others vs State of Chattisgarh* [2011], cited in Robinson, *Ibid.* In *S. R. Bommai* fraternity was held to require the maintenance of secularism as a precondition on which to build a nation of many faiths, castes and cultures, while in *Nandini Sundar* fraternity was at issue in a region in which the State was engaged in conflict with Maoists and Naxalites, arming private vigilante citizen armies in violation of the Constitution.

¹²⁷ *Ibid.*

observed: “Without fraternity, equality and liberty will be no deeper than coats of paint.”¹²⁸ Fraternity acted as the constitutional trigger and justification to uphold special measures on the basis of caste in order to achieve political, economic and social equality.

Fraternity is also found as a constitutional principle in a number of other States, usually former colonies of France invoking the republican triptych, including Benin, Burkina Faso, Cameroon, Chad, Congo [Democratic Republic of], Haiti, Ivory Coast, Mauritania and Niger.¹²⁹ None of these have evolved jurisprudence around the term. The Indian example is thus an isolated one. It may be significant that fraternity entered the Preamble of the Constitution of India separately, added by Ambedkar who expressly linked it with the rights of subordinated caste groups at the time of drafting. As a result, within Indian jurisprudence it has perhaps always had an individual meaning distinct from equality and fraternity, but involving an interdependence with its sister terms. Nevertheless in the Indian courts that distinctness is clearly linked with special measures and the process of equalisation. It recognises that a sole focus on equality means that minorities, and the discrimination they may face, are rendered invisible and cannot be systematically addressed. India offers a positive example of the triggering of fraternity as a term of constitutional significance in order to enact special measures in line with, rather than in contrast to, preambular directives.

France repeatedly faces calls from international bodies to recognise minorities, provide data on the existence of groups based on origin, race or religion, and contemplate special measures to counter widely-reported discrimination in the civil and political, and economic and social, spheres. It argues in turn that it is constitutionally blocked from doing so. This is correct to the extent that the Constitutional Council’s dominant interpretation of equality continues to disbar any form of minority rights. The fact that France has formed committees to review the operative terms of its constitution indicates some official willingness to change this approach. But constitutional amendment may not be required; rather an evolutive approach to the *bloc de constitutionalité* ought to be encouraged. It may be that a new approach becomes increasingly necessary as the reality of discrimination and exclusion, mapping closely to minority indicators, persists. Fraternity offers a potential pathway, seen in the Indian jurisprudence. But the term itself originates in France as a legal concept, and it should explore further its relevance to contemporary society in line with the constitutional recognition of the continued relevance of the legacy of the principles of 1789. Additionally, it is under an international legal obligation to do so. France can argue that it does not wish to recognise minorities or implement special measures on their behalf. But its belief that it is constitutionally barred

¹²⁸ Constituent Assembly Debates of India, Nov 25, 1949, Book No. 5, at 979-980, quoted in People’s Union for Civil Liberties Karnataka, ‘Attacking Pubs and Birthday Parties: Communal Policing by Hindutva Outfits’ (2012), available at: <http://puclkarnataka.org/wp-content/uploads/2012/11/Mangalore-Report.pdf>

¹²⁹ See further Borgetto, *supra note* 109, p. 10 n.4.

from doing so needs to be challenged further both within France and at the international level.

Conclusion

One of the primary obstacles to the establishment of a legal framework to recognise and protect minority rights in France emerges from a narrow interpretation of the constitutional principle of equality, which allows for differentiations only in conformity with the 'French model'. There are many sources arguing that France needs to depart from the strict republican model, or rather the current interpretation thereof, to afford greater understanding and recognition of discrimination and exclusion. A sole focus on equality means that minorities, and the discrimination they may face, are rendered invisible and cannot be systematically addressed. As analysed, one of the main impediments to the establishment of a legal framework to recognise and protect minority rights in France, as repeatedly called for by international bodies, emerges from the *bloc de constitutionalité* as interpreted in the decisions of the Constitutional Council which has understood equality as against minority rights. In this context, equality has been strictly interpreted to counter special measures of protection for minorities, outside of the very restrictive 'French model' of positive action. This approach requires a narrow reading of the meaning of equality, and does not counterbalance it with other terms and provisions within the *bloc*. As proposed, the term 'fraternity' could be interpreted as allowing for recognition of minority groups in order to tackle exclusion that is undermining the French model of republican citizenship.

It ought to be recalled that although equality undoubtedly finds greater emphasis in the *bloc de constitutionalité*, not least in terms of frequency, it too was a dormant term until activated by the Constitutional Council in a 1973 decision, prior to which some jurists wondered whether values such as 'equality' had any constitutional status at all.¹³⁰ Initial studies on the meaning of fraternity have detected its 'subterranean' influence on related terms such as solidarity. However it has yet to be articulated as a term of potential significance in relation to special measures for minority groups. Fraternity may make it possible to recognise minority rights *within* the Republican model. Under this approach, constitutional change or amendment is not required. Moreover, evolving this understanding of fraternity as an essential constitutional principle would support and enhance the historically developed model of French citizenship, adjusting it to the contemporary make-up of the French society. An evolutive

¹³⁰ John Bell, 'French Constitutional Law', (Clarendon: Oxford University Press, 1992), 199, citing L. Philip, 'La Valeur Juridique de la Déclaration des droits de l'homme et du citoyen du 26 août 1789 selon la jurisprudence du Conseil constitutionnel', in *Études offertes à P. Kayser* (Aix, 1979), ii. 317, and others.

reading of fraternity would allow an interpretation of the existing *bloc de constitutionalité* that would justify special measures on the basis of origin, race or religion, or other grounds. It would involve an affirmation of the distinctive constitutional value of each of liberty, equality and fraternity, as well as their interdependence.