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Reestman, J.H.

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Citizenship and Nationality

The case of (post-)colonial France and Europe

JAN HERMAN REESTMAN

For the first time, the Treaty of Maastricht ... effects a dissociation between nationality and citizenship, by introducing a citizenship of the European Union superimposed upon national citizenships.¹ Although this statement, by a leading French legal scholar, is only partly true, it reflects the fusion of the two concepts of nationality and citizenship in our Western democracies. If we define nationality as the status of belonging in our Western as being part of the constitutive population of a state, and citizenship as full membership of a political community, this fusion is easily understood: the nationals of a state are also the full members of the political community that is organised *within* that state, i.e. that state's *citizens*.

Nevertheless, the two concepts can and should be distinguished: a person can be the national of a state without being a citizen, and vice versa. The colonial history of France, and especially the role of Algeria, offers a case in point. More recently, the connection between citizenship and nationality (or, by definition, the state) appears to have become looser. Apart from the introduction of European Union citizenship (which has been qualified, with some exaggeration, perhaps, as 'a symptom of the cosmopolitization of citizenship'), there is the imminent introduction of a New Caledonian citizenship within the French state. Unlike European Union citizenship, this New Caledonian development can be considered a 'regionalization of citizenship'. As result of these developments, some French nationals will in the very near future possess three distinctive and constitutionally consecrated citizenships.

On 4 March 1848, the provisional revolutionary government, that followed the downfall of Louis-Philippe, by decree declared Algeria, conquered from

1830 onwards, full part of the French territories. This decision was subsequently consecrated by Article 109 of the Constitution of the Second Republic (1848–52). It further stipulated that these French territories were 'to be governed by specific Acts until they are placed by a special Act under the regime of the current Constitution'. Thus was formulated, in essence, the *politique d'assimilation* which was to be instrumental in shaping, over a long period, the French relationship with Algeria (as well as with other incorporated colonies). The ultimate goal was to fully integrate Algeria in France. However, this could not be achieved immediately. Algeria first had to be Frenchified. Full parity between mainland France and France overseas had to be preceded by progressively bringing Algeria under the same rules as were applied on the mainland.²

A different policy concerning Algeria was formulated in 1851 and was to influence developments during the Second Empire (1852–70). A *Banque d'Algérie* was established with the task of the emission of an Algerian currency. This was the first expression of a *politique d'autonomie*,⁴ which was based on the idea that Algeria differed so much from France that assimilation was impossible utopianism. Algeria, therefore, had to have its own development within the French state; European standards could not apply there.⁵

Until 1956, when the government finally (and too late) opted for full Algerian integration, France vacillated between these two policies. In fact, it is not always easy to determine under which heading individual government Acts should be categorized. For, however different the objectives of these policies were in the long run, in the short run they both stressed that the native inhabitants of Algeria could not be treated in the same way as the metropolitan French. This idea found its legal expression in Louis-Napoléons famous *sénatus-consulte* of 14 July 1865 *sur l'état des personnes et la naturalisation en Algérie*. It stated that a native Muslim was French, but that he continued to be ruled by Islamic law; that a native Muslim could, on demand, be admitted to enjoy the rights of a French citizen, in which case the civil and political laws of France would be applicable to him.⁶ In short, the decree operated a distinction between nationality and citizenship.

Although the *sénatus-consulte* of 1865 offered native Muslims the possibility to become citizens, the overwhelming majority were not prepared to do so given the burdensome consequences. Once a Muslim had claimed citizenship, he would be subject to French civil law; this meant that he would have to give up the right to keep his *statut civil de droit local*, i.e. his right to have his personal affairs regulated by Islamic law. Given the close connection between religion and law in Islamic culture, this amounted to apostasy. Between 1865 and 1875 only 371 Algerian Muslims became French citizens.⁸

The distinction between nationality and citizenship also had consequences in public law, which became glaringly apparent in the Third Republic (1870–1940). Muslims did not share in the democratic advances made during that period. Although universal suffrage was installed, Algerian Muslims did not obtain the ballot for national elections. Famous Acts on civil liberties (freedom of association, of reunion etc.) were not extended to Algeria. Instead, a special code was introduced in 1881 (the *code de l'indigénat*), which contained special offences with special penalties for non-citizens, partly administered by the administration (and not the judiciary). To give a further example: non-citizens had to pay higher taxes than citizens.⁹

After the Second World War things changed, though not wholeheartedly. By ordinance of 7 March 1944, the *code de l'indigénat* was repealed. The Constitution of the Fourth Republic (1946–1958) solemnly stated that 'all the subjects of the overseas territories are citizens, in the same way as the French nationals on the continent' (Article 80). In addition, it gave those who wanted to keep their local *statut civil* the right to do so, and stipulated that their civil status could not in any way determine the refusal or limitation of the rights and liberties attached to citizenship (Article 82). Nevertheless, the era of discrimination had not yet ended. For while the same Constitution promised the ballot to all 'adult French nationals and subjects of both sexes' (Article 4), Algerian women had to wait until 1958 before they could exercise their voting rights. Other inequalities remained, partly as the result of a two-tier electoral system. (The electorate in Algeria was divided into two electoral colleges, the first filled almost exclusively with 'real' French, and the second with Muslims. Although the first college contained an infinite, smaller amount of voters than did the second, both elected an equal number of representatives in the National Assembly.¹⁰) Algerians had to wait for the Fifth Republic to come on equal footing.

Surprisingly perhaps, in that Fifth Republic the distinction between persons with a *statut civil de droit local* and those with a *statut civil de droit commun* regained importance in public law. The Act of 21 July 1962 on the consequences of Algerian independence stated that persons with the latter status living in Algeria automatically were to remain French, while persons with the former status could opt for French nationality by declaration before 1 January 1963.

For children of Algerian parents who were living in the metropolis at the time of their children's birth, Article 23 of the Nationality Act of 1973 had a surprise in store. For, in combination with Article 24, it stipulated that children whose parents were born in France (which, as we have seen, included Algeria before 1962), automatically were French if they themselves were

born in France. For those who had always considered themselves Algerian, not only legally but also politically, this was 'a violation of their personality, their familial attachments, and their membership of a newly emancipated nation'.¹¹ While they were thus regarded French by the French state because of the *ius soli* principle (i.e. because they were born on French soil), the Algerian state considered them Algerians on behalf of the *ius sanguinis* principle (i.e. because they were born of Algerian parents). The ensuing problem of their obligation to fulfil military service in two states was settled by a French-Algerian Agreement of 11 October 1983.

How, in actual practice, does the 'foreigner-friendly' practice of distributing French nationality by way of the *ius soli* principle relate to the long-standing distinction between nationality and citizenship? The use of *ius soli* nationalization has generously extended French nationality, and French citizenship, to children, born on French soil of numerous (first or second-generation) immigrants, not only in the metropolis, but also in the colonies. At first sight, that squares oddly with the distinction between nationality and citizenship. However, it should be remembered that the *ius soli* tradition was (and is) based on the assumption that these children, by the assimilative power of French life and culture which their parents had experienced and which they themselves would experience, would become French to the bone. In contrast, the refusal of the Algerian Muslims to embrace the French civil code could be interpreted as a clear sign that they had not (yet) assimilated, and did not even want to assimilate. In this sense, then, the two traditions are compatible.

As the Amsterdam Treaty points out, European Union citizenship does not replace national citizenship, but complements it. Under the terms of the European Community Treaty, every person holding the nationality of a member state is automatically also a citizen of the Union. The rights and duties conferred by this citizenship are laid down in the same EC-Treaty. They include the right (under certain conditions) of European citizens to participate, as voter and as candidate, in municipal elections and elections for the European Parliament in the EC country of their residence.¹²

Among predecessors of such European Union citizenship, commonwealth citizenship comes first to mind. France, however, can offer its own examples. For the colonies which were part of the French colonial empire but were not incorporated in the French state (such as Indochina, Tunisia, Morocco, Cameroon and Togo), the Constitution of 1946 installed a *Union française*. This Union had its own citizenship, defined by the Constitution

and invented with the purpose of creating a common political bond between all the subjects of the former empire. *Citoyen de l'Union Française* were all French nationals and all subjects of the Union; but this did not automatically bestow voting rights (at least not in France).¹³ The *Union française* was a complete failure and the Constitution of 1958 replaced it with a *Communauté française*, which also had its own citizenship. Its substance remained, however, unspecified, and in fact the *Communauté* and its citizenship remained stillborn.¹⁴

In 1982, the citizen regulations of the 1958 Constitution featured in a decision of the *Conseil constitutionnel* (the Constitutional Council created by the Constitution 1958 to keep Parliament within its limits). Parliament had voted an Act requiring that lists of candidates for local elections contain not more than 75 per cent persons of the same sex. The intention, of course, was to promote the candidacy of women. The Constitutional Council declared the Act contrary to the Constitution, reasoning that its Article 3 forbade every division in categories of electors and candidates. It was argued that 'citizenship gives the right to vote and to stand as a candidate on identical conditions to everyone who is not excluded for reasons of age, incapacity or nationality . . .; this holds for every political election, especially for the election of local councillors'.¹⁵

Strictly speaking, this reasoning of the Constitutional Council did not exclude that the ballot could be given to foreign nationals at political elections. However, the council implicitly linked the indivisibility of the political community with the indivisibility of the national sovereignty,¹⁶ which according to Article 3, 'belongs to the people, which exercises it through its representatives and by referendum'. This link was at the basis of the council's later ruling concerning the European Union.

In that ruling on the Treaty on European Union (which placed the articles on the Union citizenship in the EC-Treaty), the Council in April 1992 found that participation of member states' nationals in local French elections ran counter to Articles 3, 24 and 72 of the Constitution. Because local councillors are part of, or else elect representatives who are part of, the electoral college which in turn elects the members of the senate (the upper house of the French parliament), participation in municipal elections implies indirect participation in the exercise of French sovereignty. Thus, by giving voting rights at municipal level to nationals of other member states, those nationals were indirectly given the right to influence the exercise of French sovereignty. According to the Council, this is reserved for French nationals under Article 3 of the Constitution.¹⁷

Matter such as this contrariety necessitated an amendment to the French Constitution before the Treaty on European Union could be ratified. The

resulting constitutional amendment of 25 June 1992 explicitly authorizes the participation of other member-state nationals in municipal elections, but excludes them from becoming (deputy-)mayor and from participating in the election of the members of the senate.¹⁸ In short, the right to influence the exercise of French sovereignty is, even after the introduction of the Union's citizenship, a prerogative of French nationals.

By excluding the possibility of giving voting rights to foreign nationals at political elections, the Constitutional Council closed off a possibility which had been left open by the framers of the 1958 Constitution.¹⁹ One may add that the decision is in line with French constitutional tradition, insofar that since 1789 only (but, as we have seen, not all) French nationals have enjoyed voting rights.²⁰

While the Constitutional Council found voting rights of non-nationals at local elections contrary to the Constitution, no such problem presented itself concerning the right of non-nationals to participate in elections for the European Parliament. The Council simply reasoned that the European Parliament was not founded on the French Constitution (but on the EC-Treaty) and 'that (this parliament) is not destined to contribute to the exercise of national sovereignty'.²¹ Hence, in this context Article 3 formed no constitutional obstacle.

Although France changed its Constitution to be able to implement the Treaty provisions on European Union citizenship, the Treaty does not give European citizens the right to participate in local or European elections everywhere in France. The EC-Treaty is not applicable in the so-called *territoires d'outre-mer* of the French Republic.²² If the French parliament had not of its own accord granted voting rights to the European citizens residing in, for instance, New Caledonia or French Polynesia, the territorial scope of the EC-Treaty would have prevented them exercising these rights attached to the Union's citizenship.²³

Two questions arise from the limited territorial scope of the EC-Treaty in the French Republic. The first is whether French inhabitants of the *territoires d'outre-mer* actually have a constitutional right to participate in European elections.²⁴ The Constitutional Council answered this in the affirmative in August 1984. An Act concerning the powers and institutions of French Polynesia stipulated that membership of the French Polynesian government was incompatible with membership of the European Parliament. The council declared the provision unconstitutional because 'this incompatibility, which concerns the exercise of civic rights, affects certain citizens in their relations with a certain part of French territory; it thus

violates the indivisibility of the Republic formulated in Article 2 of the Constitution'.²⁵ Hence, the French Constitution also forbids excluding French nationals in *territoires d'outre-mer* from participating in European elections. One might add that this is in complete conformity with the EC-Treaty, which states that the European Parliament 'shall consist of representatives of the peoples of the States brought together in the Community' (Article 137). And since the French inhabitants of the *territoires d'outre-mer* belong to the French people, they should also have a say in the designation of the French representatives in the European Parliament.

The second question is whether French inhabitants of the *territoires d'outre-mer* actually are European Union citizens. Any possible doubts on that score were removed by the judgement of the European Court of Justice in the Micheletti case. Following Article 52 of the EC-Treaty, which grants freedom of establishment to nationals of member states, the court made the general statement that 'it is not permissible for the legislation of a member state to restrict the effects of the grant of nationality of another member state by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms laid down in the Treaty'.²⁶ Because the rights attached to European Union citizenship are exercised in other member states than the one of which one has the nationality; because the French inhabitants of the *territoires d'outre-mer* are French nationals; and because the Micheletti judgment forbids other member states from imposing the condition that a French national has to live in a part of the French Republic where the EC-Treaty is applicable if he wants to exercise the rights attached to his Union citizenship, there can only be one conclusion. The French inhabitants of the *territoires d'outre-mer* such as New Caledonia are undoubtedly European citizens.²⁷

France annexed New Caledonia, a small archipelago in the South Pacific, in 1853. In 1946 it became one of the *territoires d'outre-mer* of the Republic. These overseas territories enjoy a very special status in the French constitutional system. They enjoy a constitutional right to secede from France if the majority of their inhabitants want to do so. They also have a constitutional right to have a particular organization (powers and institutions) which takes into account 'their special interests within the common interests of the Republic' (Article 74 of the Constitution). It is parliament that defines this particular organisation, and in doing so it is even allowed to transfer powers to these territories which it should normally exercise itself.²⁸

New Caledonia has a segregated society. The original inhabitants of the territory, the Canaques, 42 per cent of the total population, have, despite their

French citizenship, never become French. Many of them have held on to their local *statut civil*.²⁹ They live culturally, sociologically and politically separated from the other inhabitants, who are largely of European origin. In their case, then, the *politique d'assimilation* has failed completely. The Canaques seek independence, but find the European population and the other non-native inhabitants in their way. In a local referendum (held 13 September 1987), 98.3 per cent of the participants voted against independence. However, 40.9 per cent of inscribed voters, i.e. the overwhelming majority of the Canaques, had stayed at home.

In 1988 tensions between the two parts of the population reached their nadir, when Canaques attacked a police post, killing four policemen and kidnapping several others. In the ensuing liberation action two soldiers and nineteen Canaques were killed. In an attempt to dispel the climate of civil war which hung over the territory, the 'Agreements of Matignon' were signed between the French government and the major political parties of the territory. These Agreements, which were approved by a national referendum on 6 November 1988, not only contained a whole range of reforms, but also foresaw a new local referendum on independence before the end of 1998.³⁰ With that date approaching, both sections of the population felt growing unease: its outcome was clear (given their minority position, the Canaques would not obtain independence) and it would solve nothing. Then suddenly, with time pressing, on 5 May 1998 at Noumea, the capital of New Caledonia, a new compromise agreement was signed. It was approved by the local population in a referendum on 8 November 1998.

The Noumea Agreement stipulates a local referendum on independence in fifteen to twenty years. The main interest of the agreement, however, lies in the extraordinary status New Caledonia will get in the meanwhile within the French constitutional context. This status, which is presented as transitional, will become perpetual and structural if, as can be expected, the referendum between 2013 and 2018 fails to lead to the territories' independence. The Agreement foresees, for instance, that, with the exception of matters of sovereign power (nationality, currency, public order, the administration of justice, defence, etc.), which are to remain exclusive competencies of the French state until independence, all other powers are to be transferred to New Caledonia or its territorial units (provinces).

The most remarkable thing about these transfers is the fact that they will be irreversible. Moreover, certain decisions of the territorial parliament will not only be called *lois du pays*, but they will also enjoy a privilege which hitherto was reserved for Acts of the (French) parliament: their constitutionality can be scrutinized by the Constitutional Council only (and not by other judges). Amongst these *lois du pays* will be rules restricting access to

the labour market and the right of establishment for non-inhabitants, whether French or foreigner. And in addition, a *citoyenneté de la Nouvelle Calédonie* will be installed, which, to put it briefly, only French nationals who reside at least ten years in the territory will obtain. Attached to it is the exclusive right to participate in elections for the territorial parliament and other local councils.³¹

The Noumea Agreement with its restrictive provisions on access to the labour market and freedom of establishment would be contrary to the EC-Treaty if that treaty were applicable in New Caledonia. Its implementation necessitated a constitutional amendment. Introduced in parliament on 27 May 1998, it had been accepted by both chambers individually by the end of June, was affirmed by *Congrès* (both chambers in a united session) on 6 July and promulgated a fortnight later. The Constitutional Amendment of 20 July 1998 stipulates that the Agreement will be implemented by Acts of Parliament.³² Bills to these purposes have already been voted by parliament and have recently been promulgated.³³

The speedy acceptance of the constitutional amendment and its voting record in *Congrès* (827 for, 31 against and 27 abstentions) reflects the almost total consensus of the French governing élite on the future of New Caledonia. That consensus is remarkable; however peripheral the territory of New Caledonia may be geographically, the Noumea Agreement strikes at the very heart of the French constitutional thought. The status of New Caledonia in what used to be the unitary state *par excellence*, is comparable, if not superior, to that of member state in a federal state. It thus violates not only the Republic's indivisibility, but also the corollary indivisibility of sovereignty.³⁴ Not surprisingly then, the Noumea Agreement itself uses the phrase of a *souveraineté partagée*, a shared sovereignty between France and New Caledonia. One cannot help but think this openness of the French political élite to this exceptional constitutional experiment is at least partly the result of the process of European integration. That process appears to have taught the French to think in terms of sharing state powers and, ultimately, sovereignty.

By now, most inhabitants of New Caledonia possess three distinctive and constitutionally consecrated citizenships: that of France, that of the European Union and that of New Caledonia. The creation of these latter two citizenships is a sign of the times. The (unitary) states in Western Europe are sandwiched, as it were, between two developments, which, though they point in different directions, have in common that they both would appear to erode the states' functioning. On the one hand, they transfer powers and

sovereignty to the European Union, on account of their wish to integrate economically, monetarily and politically. On the other hand, they transfer powers to their various territorial components, on account of growing feelings of regionalism and demands for devolution. European Union citizenship, and also, to some extent, New Caledonian citizenship, can be regarded as manifestations of such a development. There is a belief in some quarters that the states will in fact be strengthened by the simultaneous pressure of these developments. Others think that they will fragment under the strain. In that case, new citizenships will in due time replace the current national citizenships. This, however, is exactly what the new citizenships we have encountered do not do. They are complementary to national citizenships, and they are conferred only to those who already have a certain nationality. And as such their existence for the time being is indissolubly connected to existence of the state.

Notes and References

- 1 Jean Gicquel, *Droit constitutionnel et institutions politiques* (12th ed.; Paris: Montchrestien, 1993), 86: 'pour la première fois, le Traité de Maastricht ... procède à une dissociation entre la nationalité et la citoyenneté, en instituant une *citoyenneté de l'Union Européenne* superposée aux *citoyennetés nationales*'. See also David Ruzié, *Citoyenneté et nationalité dans L'Union Européenne*, (Saarbrücken: Europa-Institut der Universität des Saarlandes, 1994), 7.
- 2 Hans Ulrich Jessurun d'Oliveira, 'European Citizenship: Its Meaning, Its Potential', in: Joerg Monar, Werner Ungerer, Wolfgang Wessels (eds), *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic* (European Interuniversity Press, 1993), 147.
- 3 P.F. Gonidec, *Droit d'outre-mer* (2 vols.; Paris: Montchrestien, 1959 & 1960), 1: 92.
- 4 Act of 4 August 1851; Claude Colloot, *Les Institutions de l'Algérie durant la période coloniale (1830-1962)* (Paris: CNRS, 1987), 10.
- 5 P.F. Gonidec, op. cit., 1: 94 ff. Claude Colloot mentions a third policy, that of *assujétissement* (op. cit., 16).
- 6 'L'indigène musulman est français, néanmoins il continuera à être régi par la loi musulmane. (...) Il peut, sur sa demande, être admis jouir des droits des citoyens français; dans ce cas, il est régi par les lois civiles et politiques de la France'. See the full text in *La nationalité française. Textes et documents* (Paris: La Documentation française, 1985), 192.
- 7 From 1886 onwards restricted to family law (including marriage etc.), inheritance law and part of real property law.
- 8 See Charles-Robert Ageron, *Les Algériens musulmans et la France (1871-1919)* (2 vols.; Paris: PUF, 1968), 1: 344.
- 9 See Colloot, op. cit., 265 ff. It should be added that the distinction between nationality and citizenship was not common to all the incorporated colonies. An Act of 24 April 1833, which was never extended to Algeria, stipulated that every man born free or having legally obtained his liberty in the colonies, enjoyed civic and political rights. When slavery was abolished in 1848, this Act gave citizenship to all the natives in the incorporated colonies acquired by France before 1789 (St Pierre & Micquelon,

French Antilles, Guyana, Reunion, Sainte-Marie). Senegal, like Algeria a post-revolutionary conquest, offers another example. Although the 1833 Act was applicable there, the *Cour de cassation*, the highest judge in civil and criminal matters, on several occasions stated that it was not applicable to Senegalese who held on to their local *statut civil*. But when an Act of 1916 explicitly stipulated that the people originating from certain Senegalese villages and their descendants were French citizens, and as such subject to military service, the judges concluded that these people had to wait until the second half of this century before they enjoyed this privilege of being able to combine their local *statut civil* with citizenship. An Act of 9 February 1919, already gave certain Muslims the possibility to apply for citizenship without giving up their local *statut civil*. The administration did everything to frustrate the execution of this Act. In the period 1919–23 only 202 Muslims thus acquired citizenship. (Cf. Ageron, op. cit., 2: 1221–3). It is also noteworthy that parliament, recognising that the 1919 Act with its conditions was in a way more restrictive than the *sénatus-consulte* of 1865, decided not to repeal the latter. The Acts thus stood side by side. (Cf. generally François Borella, *L'évolution politique et juridique de l'Union française depuis 1946* (Paris: LGDJ, 1958), 175, and Gonidec, op. cit., 1: 115–16. Their factual information does not coincide fully.)

10 Gonidec, op. cit., 1: 423–4. For a more general account, see Borella, op. cit., 182–8.

11 Cited by Rogers Brubaker, *Citizenship and Nationhood in France and Germany*, (Cambridge, MS: Harvard University Press, 1992), 141.

12 See on European Union citizenship for instance: Epaminondas A. Marias (ed.), *European Citizenship* (Maastricht: European Institute of Public Administration, 1994); Jessurun d'Oliveira, op. cit.; Carlos Closa, 'Citizenship of the Union and Nationality of Member States', *Common Market Law Review*, 32 (1995): 487–518.

13 For nationals of other member states of the Union this citizenship implied that they had the right of abode in France and that they could not be expelled. See Borella, op. cit., 173 ff, and Gonidec, op. cit., 1: 374–7, 381–2.

14 Even so, the *travaux préparatoires* of the Constitution shed some light on what this citizenship might have included. In a discussion with the *Conseil d'Etat* on the bill that became the Constitution of 1958, a representative of the government that had framed it, commented its Article 3. This article gives all adult French nationals of both sexes the ballot 'under conditions specified in an Act of Parliament'. The representative did not exclude that such an Act could add 'other categories of voters' to the French nationals in Article 3. He also stated 'that one certainly is not going to exclude from voting rights non-nationals of the Republic, if they are nationals of Member States of the *Communauté*'. In short, the fathers of the Constitution of 1958 not only wanted to give voting rights to citizens of the *Communauté*, but more generally saw no obstacle in article 3 to extending voting rights beyond the French nationals. Cf. *Documents pour servir à l'histoire de la Constitution du 4 octobre 1958*, vol. 3 (Paris: La Documentation française, 1991), 48. In 1995 all articles relating to the *Communauté* were scrapped from the Constitution. On *Communauté* citizenship, cf. Pierre Lampué and Christian Purtschet, in: François Luchaire and Gérard Conac (eds), *La Constitution de la République française* (Paris: Economica, 1980), 900 ff; Gonidec, op. cit., 2: 173–4.

15 CC 18 November 1982, decision 82–146 DC: 'la qualité de citoyen ouvre le droit de vote et de l'éligibilité dans des conditions identiques à tous ceux qui n'en sont pas exclus pour une raison d'âge, d'incapacité ou de nationalité . . . ; que ces principes de valeur constitutionnelle s'opposent à toute division par catégories des électeurs ou des éligibles;

qu'il en est ainsi pour tout suffrage politique, notamment pour l'élection des *conseillers municipaux*' (my emphasis). On 18 June 1998, president Jacques Chirac and prime minister Lionel Jospin introduced a constitutional bill in parliament, with the purpose of removing this obstacle for affirmative action on behalf of woman in this context. The bill consists of one article, which states that to Article 3 will be joined the following text: 'La loi favorise l'égal accès des femmes et des hommes aux mandats et fonctions'.

16 Jean Boulouis, 'La loi no. 82–947 du 19 novembre 1982', *L'actualité juridique – droit administratif*, (1983), 74–80.

17 CC 9 April 1992, decision 92–308 DC. For a critique, see Dominique Rousseau, *Droit du contentieux constitutionnel* (Paris: Montchrestien, 1993), 271–2.

18 Article 88–3 of the Constitution: '... le droit de vote et d'éligibilité aux élections municipales peut être accordé aux seuls citoyens de l'Union résident en France. Ces citoyens ne peuvent exercer les fonctions de maire ou d'adjoint ni participer à la désignation des électeurs sénatoriaux et à l'élection des sénateurs'. This Article influenced the shaping of the EC-directive 94/80/CE of 19 November 1994, which specified under which conditions voting rights could be exercised. Cf. Peter Oliver, 'Electoral rights under article 8B of the Treaty of Rome', *Journal official*, 26 May 1998, 7975) executing 473–98. Act no. 98–404 of 25 May 1998 (*Journal officiel*, 26 May 1998, 7975) executing Article 88–3 and the mentioned EC-directive, was declared to be in conformity with the Constitution by the Constitutional Council on 20 May 1998 (decision no. 98–400 DC).

19 See note 14, above. A well-informed commentator explained that it was the failure of the *Communauté française* which in the Council's opinion precluded every possibility of giving voting rights to non-nationals; Bruno Genevois, 'Le traité sur l'Union européenne et la Constitution', *Revue française de droit administratif* (1992), 373–403 (esp. 389). Genevois was at the time of the decision secretary-general of the council.

20 See Eric Peuchot, 'Droit de vote et nationalité', *Revue du droit public* (1991), 481–524. The exception is the (never applied) Constitution of 1793, which under certain conditions allowed foreigners to exercise the rights of French citizens (Article 4).

21 CC 9 April 1992, decision no. 92–308 DC: 'assemblée . . . qui aurait vocation à concourir à l'exercice de la souveraineté nationale'.

22 On the basis of EC-Treaty Article 227, s. 3. See also the Court of Justice EC, 12 February 1992, *European Court Reports* 1992, I–0643 (Leplat v. Territory of French Polynesia). In contrast, in the so-called *départements d'outre-mer* (as opposed to the *territoires*) of the French Republic, the Treaty is fully applicable; see the Court of Justice EC, 10 October 1978, *European Court Reports* 1978, 1787 (Hansen).

23 See respectively Article 9 of Act no. 94–104 relative à l'exercice par le citoyens de l'Union européenne résident en France du droit de vote et d'éligibilité aux élections au Parlement européen of 5 February 1995 (*Journal officiel*, 8 February 1994, 2154); and Article 14 of Act no. 98–404 of 25 May 1998 déterminant les conditions d'application de l'article 88–3 de la Constitution relatif à l'exercice par les citoyens de l'Union européenne résident en France, autres que les ressortissants français, du droit de vote et d'éligibilité aux élections municipales, et portant transposition de la directive 94/80/CE du 19 novembre 1994' (*Journal officiel*, 26 May 1998, 7975).

24 For instance, Dutch nationals of the Dutch overseas territories Netherlands, Arulles and Aruba, where the EC-Treaty is not applicable either, are excluded from these elections, see Article Y2 *juncto* Article B1 *Kieswet*.

25 Decision of 30 August 1984, 84–117 DC: 'cette incompatibilité, qui intéresse l'exercice des droits civiques, touche certains citoyens en fonction de leur attaches avec une partie

déterminée du territoire de la France; qu'elle est donc contraire à l'indivisibilité de la République consacrée par l'article 2 de la Constitution'.

26 Court of Justice EC, 7 July 1992, *European Court Reports* 1992, I-4239 (Mario Vincente Micheletti and others v. Delegation del Gobierno en Cantabria).

27 Cf. Yves Roland-Gosselin, 'Situation de la Nouvelle-Calédonie au regard du droit communautaire', *L'avenir statutaire de la Nouvelle-Calédonie. Notes et études documentaires* no. 5053-54 (*La documentation française*, 1997), 140. Also, Hans Ulrich Jessurun d'Oliveira, note on the Micheletti-case, *Common Market Law Review* 30 (1993): 623-37, esp. 627; R.S.J. Martha, 'Antillianen, Arubanen en het vrije verkeer van werknemers in Europa', *Tijdschrift voor Antilliaans Recht-Justitia* 1992, 205-11 (esp. 211). See also Stephen Hall, *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht: Nijhoff, 1995), 24 ff.

28 However, these transfers are always reversible. Moreover, the Constitutional Council has set certain limits on them. The essential conditions for the exercise of public liberties, for instance, may not depend on decisions of local institutions and, by consequence, must always be defined by parliament. In other words, public liberties should be the same everywhere in France. See for instance its ruling of 9 April 1996, no. 96-373 DC.

29 See on its contents, Gérard Orfila, *La Nouvelle-Calédonie et le droit* (Paris: L'Harmattan, 1998).

30 On these developments, see for instance Edwy Plenel and Alain Rollat, *Mourir à Ouvéa: le tournant Calédonien* (Paris: Editions de la découverte & journal Le Monde, 1988).

31 This implies that non-French European Union citizens residing in New Caledonia will lose their right to participate in municipal elections.

32 The Constitutional Amendment introduced a new title XIII in the Constitution, entitled *Dispositions transitoires relatives à la Nouvelle-Calédonie* and consisting of two Articles. Article 76 declares that the populations (note the 's') of New Caledonia will vote on the Noumea Agreement before 31 December 1998. This referendum took place on 8 November 1998. Article 77 stipulates that when the Agreement is accepted, a *loi organique* (which needs to be accepted following a special legislative procedure and is obligatorily scrutinized by the Constitutional Council) implements the most important provisions (amongst them those on citizenship); the other points must be implemented by a 'normal' Act.

33 19 March 1999; Act no. 99-209 *organique relative à la Nouvelle-Calédonie* and Act no. 99-210 *relative à la Nouvelle-Calédonie* (*Journal officiel*, 21 March 1999, 4197 and 4226).

The Constitutional Council declared the former Act partly unconstitutional on 15 March 1999 (Décision no. 99-409 DC); it could nevertheless be promulgated (albeit without the provisions declared unconstitutional by the council).

34 Another contrariety with the Constitution is worth mentioning here. Although article 75 of the Constitution allows persons in the *territoires d'outre-mer* to keep their *statut civil de droit local*, it does not allow them to regain this status once they have opted for the *statut civil de droit commun*. The Noumea Agreement, however, allows this. It even allows persons whose ancestors once had the local *statut civil*, to opt for that status within a period of five years.