# ENDORSING MIGRATION POLICIES IN CONSTITUTIONAL TERMS: THE CASE OF THE FRENCH CONSTITUTIONAL COUNCIL

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*This article sets out to inquire into the French Constitutional Council's approach when dealing with immigration matters. It seeks to demonstrate how the Council's case law has endorsed, for the most part, the legislator's immigration policies, recognizing extensive police powers and striking down only the most excessive provisions of immigration laws. It is argued here that the Council's seemingly neutral methods of reasoning are in fact politically oriented instruments providing stable support for restrictive immigration policy preferences. An overall analysis of the Council's case law sheds critical light on the main methods of reasoning advanced by the Council to endorse immigration policies, even in their most recent restrictive trends. The Council has clearly opted in favor of stricter immigration control, deliberately rejecting a rights-based approach.*

**Keywords:** immigration, French Constitutional Council, constitutional review, methods of reasoning, constitutional reasoning, constitutional rights

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## I. INTRODUCTION

As in neighboring countries, immigration policies in France have taken a repressive turn in the past few decades, focusing more and more on the 'fight against irregular migration', both at borders and inside the country. The constant pace of legislative reforms is revealing in this regard. Almost every Government since 1980 has modified aspects of immigration law, mostly following a restrictive trend. In this context, the role of French courts appears more essential than ever. In the early 1970s, the *Conseil constitutionnel* (French Constitutional Council) began taking on responsibility for the protection of fundamental rights guaranteed by the French Constitution (and related documents). However, although the Council confirmed early on that *étrangers* (foreigners) are protected by the Constitution,[1] it has also been inclined to maintain an important margin of action for the legislator and the administration, on the basis of increasingly significant public order considerations.

This article sets out to inquire into the French Constitutional Council's approach when dealing with immigration matters. It seeks to demonstrate

[1] Cons const, décision n° 89-269 DC du 22 janvier 1990, *Loi portant diverses dispositions relatives à la sécurité sociale et à la santé*, cons 33. For the purpose of this article, we will use the term "foreigner" as the equivalent of the French term *étranger*. Article L. 110-3 of the *code de l'entrée et du séjour des étrangers et du droit d'asile* (French immigration code, CESEDA) defines *étrangers* as 'persons who do not hold French nationality, whether they have a foreign nationality or whether they do not have any nationality'. For the most part, this article deals more specifically with policies targeting individuals who are not citizens of the European Union (EU). Since the 1990s, EU citizens have acquired important rights attached to their fundametibntal freedom of movement within the EU. They are shielded by EU law from most French immigration control measures.

how the Council's case law has endorsed, for the most part, the legislator's immigration policies, recognizing extensive police powers and striking down only the most excessive provisions of immigration laws. The Council's role in confirming the main paradigms of French immigration policies can be understood first and foremost as one of translating the legislator's policies into constitutional terms.

While there are critical commentaries of specific cases pointing this out,[2] as well as a few systematic analyses of the earlier case law of the Council,[3] there is a strong need for an updated critical analysis of the Council's case law on immigration policies. This article aims at filling this significant academic gap by providing a critical overall analysis of the Council's case law on immigration matters (53 decisions since 1980). The analysis sheds critical light on the main methods of reasoning followed by the Council to endorse immigration policies, even in their most recent restrictive trends. It is argued here, from a legal realist perspective, that the seemingly neutral methods of reasoning used by the Council are in fact politically oriented instruments providing stable support for restrictive immigration policy preferences.

This article is divided into four parts. Part II will introduce the historical, political, institutional and legal context in which the Council has reviewed immigration policies. Part III will deal with the ways in which the Council has generally endorsed immigration policies in constitutional terms. Part IV will demonstrate that the Council has loosened its protection standards throughout the past decades, especially when dealing with immigration detention regimes, which have been significantly expanded since their creation in the early 1980s. Part V will provide some concluding remarks.

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2 See e.g. Serge Slama, 'Les lambeaux de la protection constitutionnelle des étrangers' (2012) 90 Revue française de droit constitutionnel 373-386.

3 Bruno Genevois, 'Le Conseil constitutionnel et les étrangers' in Xavier Robert (ed), *Mélanges Jacques Robert* (Montchrestien 1998) 253-277; Olivier Lecucq, 'Le statut constitutionnel des étrangers en situation irrégulière' (LLD thesis, Université d'Aix-marseille 1999); Raymond Coulon, *Des droits de l'homme en peau de chagrin. Le droit des étrangers dans la jurisprudence du Conseil constitutionnel* (L'Harmattan 2000); Justin Kissangoula, *La Constitution française et les étrangers. Recherches sur les titulaires des droits et libertés de la Constitution sociale* (Librairie générale de droit et de jurisprudence 2001).

## II. Context of the Constitutional Council's Case Law

This second part will introduce some basic context on the recent history and politics of immigration, the rise of the Constitutional Council as the potential guardian of fundamental rights in France and the indeterminacy of the French Constitution as regards the status of foreigners. This context will help illustrate the role of the Constitutional Council when reviewing immigration laws. It will demonstrate that the Council enjoys a rather wide margin of action on immigration matters as it is not particularly constrained by the Constitution in this regard.

### *1. Historical and Political Context: Contested Immigration Policies*

Like other Western countries, France has a long history of policies aimed at controlling human mobility.[4] Until the 19th century, such policies mostly focused on vagrant and indigent individuals, whether French or foreign.[5] Borders were local and national, as passports were required both internally and externally.[6] It was only in the second half of the 19th century that the "immigration problem" emerged and that policies aimed at foreigners as such – understood unambiguously as non-nationals rather than as mere outsiders – started to proliferate.[7] An 1849 law consolidated the French administration's power of *expulsion*, the deportation of foreigners for reasons

4 Andreas Fahrmeir, Olivier Faron and Patrick Weil (eds), *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn Books 2002).

5 In this regard, there are striking parallels with policies in place at the time in other countries. For a comparative perspective, see Fahrmeir, Faron and Weil (n 4). On the emblematic case of the United States, see in particular Kunal M. Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600-2000* (Cambridge University Press 2015).

6 Gérard Noiriel, 'Surveiller les déplacements ou identifier les personnes ? Contribution à l'histoire du passeport en France de la Ière à la IIIe République' (1998) 30 Genèses 77.

7 Gérard Noiriel, *Le Creuset français. Histoire de l'immigration. XIXe – XXe Siècle* (Editions du Seuil 2006), 71; Laurent Dornel, *La France hostile. Socio-histoire de la xénophobie (1870-1914)* (Hachette Littératures 2004).

of public order.[8] Between the late 1880s and the 1920s, other specific pieces of legislation were adopted to increase control over foreigners. Following the adoption of a decree in 1888, foreigners had to declare their residence to local authorities.[9] From 1917 onwards, they were required to obtain an identity card from the *préfet* (prefect) and to declare their first residence and any subsequent movement within the country, including any change of residence.[10] The 1930s witnessed a new wave of restrictive laws, in the context of a devastating economic crisis and rising xenophobia and antisemitism. A *décret-loi* (decree-law) adopted in May 1938 enacted more repressive immigration control measures, in addition to assembling existing ones in an unprecedented effort to offer a general legislative framework.[11]

After the Second World War, a new general framework was adopted.[12] It would become the basis for contemporary French immigration law, which was eventually codified in the mid-2000s as CESEDA. From 1945 to the late 1960s, France was in dire need of foreign labor. Authorities seldom enforced immigration control measures and foreigners were often able to obtain documentation once they had arrived in France.[13] In the early 1970s, as the country entered a lengthy economic crisis (related to the oil shock) and suffered massive unemployment, authorities announced their intention to close borders. Regulations were adopted to block labor and family migration and later on to foster or even force the departure of foreigners residing in

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8 See articles 7 and 8 of the *loi du 3 décembre 1849 sur la naturalisation et le séjour des étrangers en France*. For a brief summary of previous legislation, see Danièle Lochak and François Julien-Laferrière, 'Les expulsions entre la politique et le droit' (1990) 12 Archives de politique criminelle 75.

9 *Décret du 2 octobre 1888 relatif aux étrangers résidant en France*. See also *loi du 8 août 1893 relative au séjour des étrangers en France et à la protection du travail national*.

10 *Décret du 2 avril 1917 portant création d'une carte d'identité à l'usage des étrangers*.

11 *Décret-loi du 2 mai 1938 sur la police des étrangers*.

12 *Ordonnance du 2 novembre 1945 relative à l'entrée et au séjour des étrangers en France*.

13 Danièle Lochak, 'Les politiques de l'immigration au prisme de la législation sur les étrangers' in Didier Fassin, Alain Morice and Catherine Quiminal (eds), *Les Lois de l'inhospitalité. Les politiques de l'immigration à l'épreuve des sans-papiers* (La Découverte 1997) 31-32; Catherine Wihtol de Wenden, 'Ouverture et fermeture de la France aux étrangers. Un siècle d'évolution' (2002) 73 Vingtième Siècle. Revue d'histoire 33.

France.[14] A decree was successfully challenged before the *Conseil d'État* (Council of State), which recognized in a 1978 landmark decision that foreigners were entitled to the right to lead a normal family life.[15] This was an important step given the Council of State's longstanding reluctance to review the substance of immigration control measures.[16]

With immigration becoming an increasingly heated political issue, legal reforms have been adopted almost every two to three years since 1980.[17] Such reforms have mostly followed a restrictive trend, imposing more and more conditions on the residence of foreigners in France, reducing legal entry pathways as well as procedural and substantial guarantees and facilitating and aggravating deportation and detention measures.[18] In general, French immigration policies, as pursued by the legislator and the administration, have tended to focus more and more on the '*lutte contre l'immigration irrégulière*' ('fight against irregular migration'), while preserving the right to

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14 See e.g. *circulaire n° 9-74 du 5 juillet 1974 du secrétaire d'Etat auprès du ministre du travail, relative à l'arrêt provisoire de l'introduction de travailleurs étrangers*; *circulaires n° 11-74 du 9 juillet 1974, n° 17-74 du 9 août 1974 et n° 22-74 du 27 décembre 1974 du secrétaire d'Etat auprès du ministre du travail, suspendant provisoirement l'introduction en France des familles des travailleurs étrangers*; *circulaire n° 77-280 du 20 juin 1977 relative à l'application de 'l'aide au retour'*.

15 CE, Ass, 8 décembre 1978, *GISTI, CFDT et CGT*, n° 10097, 10677, 10679, Rec p 493.

16 In 1836, the Council of State refused to review the legality of administrative acts of deportation and detention, deeming these acts 'high police' powers of the French administration, immune from judicial review. CE, 2 août 1836, *Naundorff*, n° 12843, Rec p 379. It was only very gradually that the Council of State asserted authority to review such acts. At first, only questions of administrative procedure were open to challenge. See Stéphane Duroy, 'Le contrôle juridictionnel des mesures de police relatives aux étrangers sous la Troisième République' in Marie-Claude Blanc-Chaléard and others (eds), *Police et migrants : France 1667-1939* (Presses Universitaires de Rennes 2001) 91-104.

17 For a brief historical account of the evolution of immigration law between 1945 and 2011, see Thomas Ribémont, *Introduction au droit des étrangers en France* (De Boeck 2012) 12-20.

18 For a general overview of issues regarding the fundamental rights of foreigners in France, see Le Défenseur des droits, *Les droits fondamentaux des étrangers en France* (mai 2016) <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/736160170_ddd_rapport_droits_etrangers.pdf> accessed 15 January 2021.

asylum only to a minimal extent.[19] Recently, greater emphasis has been placed on 'integration', a vague term crystallizing ideological debates regarding the place of immigrants in France.[20] These debates rely, at least in part, on the widely held misconception that the proportion of foreigners has increased significantly over the course of the last century in France. Although the current proportion (7.6 per cent in 2020) is the highest attained over the past century, it is only slightly above 1931 and 1982 levels (6.6 and 6.8 per cent, respectively).[21]

In the past few decades, MPs and Senators have lodged numerous challenges before the Constitutional Council, mostly arguing that certain laws violated the constitutional rights of foreigners.[22] While the Council of State remains significant in reviewing the legality of administrative acts in the field of immigration,[23] the Constitutional Council has undoubtedly become a new battleground for politically charged challenges to French immigration

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19 For a critical account of this trend, see Karine Parrot, *Carte blanche. L'Etat contre les étrangers* (La Fabrique 2019).

20 Danièle Lochak, 'L'intégration comme injonction. Enjeux idéologiques et politiques liés à l'immigration' (2006) 64 Cultures & Conflits 131.

21 In 2020, there were around 5.1 million foreigners in France, thus amounting to 7.6 per cent of the total population of France (67 million inhabitants). This proportion has varied significantly over time. It went from 6.6 percent in 1931 to 4.1 per cent in 1954. It then peaked at 6.8 per cent in 1982 before decreasing to 5.5 per cent in 1999. It has increased again during the past two decades. 'L'essentiel sur… les immigrés et les étrangers' (Institut national de la statistique et des études économiques, 1 July 2021) <https://www.insee.fr/fr/statistiques/3633212> accessed 29 October 2021.

22 In some rare cases, members of Parliament have argued that the law in question granted excessive rights to foreigners and did not protect French nationals sufficiently. See in particular Cons const, décision n° 89-261 DC du 28 juillet 1989, *Loi relative aux conditions de séjour et d'entrée des étrangers en France*; Cons const, décision n° 91-294 DC du 25 juillet 1991, *Loi autorisant l'approbation de la convention d'application de l'accord de Schengen…*. The French Parliament is composed of two chambers: the *Assemblée nationale* (National Assembly) and the *Sénat* (Senate). Members of the National Assembly are called *députés* (MPs).

23 The Council of State also reviews the conformity of administrative acts to the European Convention of Human Rights, in particular article 8 which safeguards the right to respect for private and family life. CE, Ass, 19 avril 1991, *M. Belgacem*, n° 107470, Rec p 152; CE, Ass, 19 avril 1991, *Mme Babas*, n° 117680, Rec p 162.

policies on constitutional grounds.[24] Hence the necessity to examine carefully the approach followed by the Constitutional Council in order to determine the role it has played in the governance of migration policies.

### *2. Institutional Context: The Rise of the Constitutional Council*

A general introduction to the Constitutional Council and its rise is necessary to understand the role it plays in French jurisprudence. Created by the 1958 Constitution which founded the current Fifth Republic, the Council is composed of two types of members.[25] Nine ordinary members are appointed for nine-year non-renewable terms by three different political figures (three by the President of the Republic, three by the President of the Senate and three by the President of the National Assembly). A third of them are renewed every three years. A significant number of these ordinary members are former politicians who have served as members of Parliament and/or as government ministers.[26] In addition to the ordinary members, former Presidents of the Republic automatically become *membres de droit* (ex officio members) of the Council. However, not all of them have sat on the Council.[27]

The Constitutional Council was created primarily to protect the prerogatives of the executive power, which had been reinforced by the Constitution of the Fifth Republic.[28] Hence the institution's designation as a Council rather than a Court, which also reflects the traditional hostility towards judges in French legal culture. Initially, the Council could only review legislative bills before their promulgation, upon referrals by the President of the Republic, the Prime Minister, the President of the Senate or the President of the National Assembly.[29] However, the Council later acquired new powers, both through constitutional reforms and on its own initiative.

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24 The European Court of Human Rights and the European Court of Justice have also emerged as significant battlegrounds for challenges to French immigration laws.

25 Article 56 of the 1958 Constitution.

26 Francis Hamon and Michel Troper, *Droit constitutionnel* (Librairie générale de droit et de jurisprudence 2020) 804.

27 Ibid 806.

28 Ibid 802.

29 Article 61 of the 1958 Constitution.

In a landmark 1971 decision, the Council itself expanded its *normes de référence* (reference standards) beyond the four corners of the 1958 Constitution, resolving to consider also the documents referenced in the first paragraph of the Preamble to the 1958 Constitution.[30] Following this decision, the *bloc de constitutionnalité* (an expression used by constitutional law experts such as Louis Favoreu to designate the set of norms holding constitutional value in France) gradually expanded to include the 1789 Declaration of the Rights of Man and of the Citizen, the Preamble to the 1946 Constitution and the 2004 Charter for the Environment, as well as various principles and objectives of constitutional value.[31] This led to a much more substantial kind of review, extending *inter alia* to questions of fundamental rights protection.

Meanwhile, in 1974, a constitutional reform authorized referrals by any group of sixty MPs or Senators.[32] This became a new tool for opposition MPs and Senators, sparking an increase in referrals. This trend was reinforced by a major constitutional reform adopted in 2008 which opened a new preliminary ruling mechanism, the *question prioritaire de constitutionnalité* (QPC), to all litigants.[33] This procedure now allows any litigant, under certain conditions set by a 2009 organic law, to challenge the conformity of a legal provision to the rights and freedoms guaranteed by the Constitution.[34] Admissible requests are transferred by lower courts to the competent supreme court (Council of State or Court of Cassation), which may refer the matter to the Constitutional Council. This mechanism marked a significant change for at least three reasons. First, it opened up the possibility for litigants (including foreigners)[35] to challenge the constitutionality of laws, albeit only on the basis of rights guaranteed by the Constitution.[36] Second,

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30 Cons const, décision n° 71-44 DC du 16 juillet 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*.

31 Louis Favoreu and others, *Droit constitutionnel* (Dalloz 2018) 136.

32 *Loi constitutionnelle n° 74-904 du 29 octobre 1974 portant révision de l'article 61 de la Constitution*.

33 Articles 29 and 30 of *loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République*.

34 *Loi organique n° 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution*.

35 Article 61-1 of the Constitution does not set any condition of nationality.

36 Questions of legislative procedure, amongst others, thus remain out of reach for mere litigants.

this new mechanism allowed litigants to challenge the constitutionality of laws *after* their promulgation. Previously, once a law was promulgated, it was nearly impossible to challenge on constitutional grounds. Under this new procedure, a wide range of laws previously immune from challenge could now be brought under scrutiny by litigants. Third, as had been expected, this constitutional reform led to a further increase in the number of decisions rendered by the Council.[37] All these changes have reinforced the potential role of the Constitutional Council as a guardian of the rights of foreigners.

### *3. Legal Context: Constitutional Indeterminacy Regarding the Status of Foreigners*

There are only two references to foreigners in the 1958 Constitution, despite the country's immigration history and the prior existence of a general legislative framework on the admission and residence of foreigners. The only explicit reference can be found in article 53-1 of the 1958 Constitution.[38] The other reference is implicit, incorporated by reference to paragraph 4 of the Preamble to the 1946 Constitution.[39] Both of these provisions pertain to the right to asylum, as they regulate the status of 'any man persecuted in virtue of his actions in favor of freedom'.[40]

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37 Hamon and Troper (n 26) 842.

38 'The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum submitted to them. However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds'. Unless otherwise stated, translations of constitutional provisions are those provided on the English version of the Constitutional Council's website.

39 'Any man persecuted in virtue of his actions in favor of liberty may claim the right of asylum upon the territories of the Republic'.

40 The term *étranger* (which can also mean 'foreign' or, as part of the expression *à l'étranger*, 'abroad') can be found in three other provisions of the Constitution, which do not relate to the status of foreigners. Article 14 provides that 'the President of the Republic shall accredit ambassadors and envoys extraordinary to *foreign* powers; *foreign* ambassadors and envoys extraordinary shall be accredited to him'. Article 35 provides that 'the Government shall inform Parliament of its

The Constitution is otherwise silent on the status of foreigners. While the *bloc de constitutionnalité* contains various mentions of 'citizens', the interpretation of this term cannot be established with certainty.[41] In the rich and varied constitutional tradition of France,[42] citizens are not necessarily nationals, meaning that foreigners are not necessarily excluded from the category of citizens. However, references to *nationaux français* (French nationals) and to *le peuple français* (the French people) seem to exclude foreigners unambiguously. Foreigners do not participate in the exercise of national sovereignty, since it 'shall vest in the people, who shall exercise it through its representatives and by means of referendum'.[43] They are therefore not entitled to vote,[44] with the minor exception of citizens of the European Union, who are eligible to vote for and, under certain restrictions, hold office as members of city councils.[45]

Elsewhere in the *bloc de constitutionnalité*, in particular in the 1789 Declaration on the Rights of Man and of the Citizen, references are made to *les hommes* (men), *tout homme* (every man), *l'individu* (the individual), *nul* (none) and

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decision to have the armed forces intervene *abroad*, at the latest three days after the beginning of said intervention'. Lastly, article 73 provides that overseas departments and regions are not authorized to determine rules regarding certain areas, including '*foreign* policy'. Emphases added.

41 For a detailed analysis, see Danièle Lochak, 'L'étranger et les droits de l'homme' in *Service public et libertés : mélanges offerts au professeur Robert-Édouard Charlier* (Editions de l'Université et de l'enseignement moderne 1981) 615-633; Danièle Lochak, 'La citoyenneté : un concept juridique flou' in Dominique Colas, Claude Emeri and Jacques Zylberberg (eds), *Citoyenneté et nationalité. Perspectives en France et au Québec* (Presses Universitaires de France 1991) 179-207; Kissangoula (n 3).

42 Since 1789, France has known sixteen different constitutions.

43 Article 3 paragraph 1 of the 1958 Constitution. See also article 3 of the 1789 Declaration on the Rights of the Man and of the Citizen, which provides that 'the principle of any Sovereignty lies essentially in the Nation. No corporate body, no individual may exercise authority that does not expressly emanate from it'.

44 Article 3 paragraph 4 of the 1958 Constitution: 'All French *nationals* of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute.' Emphasis added. I have slightly modified the English translation provided by the Constitutional Council – which uses the term 'citizens' – to reflect the nuance between the terms nationals and citizens.

45 Article 88-3 of the 1958 Constitution.

*chacun* (each person). These expressions appear to encompass both nationals and foreigners,[46] although doubts have been raised when interpreting some of these terms.[47] Beyond this terminological matter, one searches in vain for a constitutional provision explicitly granting immigration powers to either the legislator or the executive. Although article 34 of the Constitution grants the legislator the power to set rules regarding nationality as well as 'civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties', it confers no explicit power upon Parliament regarding immigration matters.[48]

Former Constitutional Council Secretary General and Councillor of State Bruno Genevois confirms this constitutional indeterminacy as he notes that

> the main obstacle faced by the Constitutional Council [...] resides in the fact that the constituent did not take into account the situation of foreigners. Unlike the Fundamental Charter of other European countries, there are no general provisions on non-nationals in the 1958 Constitution [...].[49]

Genevois instead observes imprecision and 'great heterogeneity' within the *bloc de constitutionnalité* with respect to foreigners.[50] He believes that 'attempting to ground the constitutional rights of foreigners following a literal approach would have led to a great many approximations and even

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46 Henri Labayle, 'Le statut constitutionnel des étrangers – Rapport français' in Pierre Bon (ed), *Etudes de droit constitutionnel franco-espagnol* (Economica 1994) 31.

47 Members of the Constitutional Council have expressed hesitation as to the meaning of the word 'individual', notwithstanding the fact that it seems to refer universally to all persons. During a deliberation session, Councillor Jacques Robert stated: 'Indeed, the 1946 Preamble asserts that "the Nation provides the individual and the family with the conditions necessary to their development". Does the nation provide these conditions to all or to nationals only? I am not sure whether everyone, whoever they are, is targeted by this provision.' Minutes of the deliberation session of 22 January 1990, 33 (my translation).

48 Articles 34 and 37 of the Constitution define the substantive scope of statutes and regulations, respectively. According to article 37, any matter falling outside of the areas listed by article 34 is subject to regulation. Following a strict interpretation of both provisions, one might therefore conclude that immigration is a matter of regulation, not statute. However, the Constitutional Council has long recognized a broad scope for statutes, leaving considerable space for legislative intervention.

49 Genevois (n 3) 254-255 (my translation).

50 Ibid 255 (my translation).

inconsistencies.'[51] In a similar vein, Professor Henri Labayle wrote in the 1990s that

> the constitutional status of foreigners in France is marked by uncertainty and ambiguity. Uncertainty, [...] due to the silence of the Constitution, and ambiguity, above all, regarding the place to which domestic law assigns non-nationals. While it is true that the fundamental text and the rights it guarantees should bear an identity and a project, one is forced to recognize that the French Constitution only expresses indifference, if not ignorance, when it comes to immigration law.[52]

Due to this constitutional indeterminacy, the Constitutional Council has been compelled to 'fill in part of the gaps'[53] regarding the respective scope of the constitutional rights of foreigners and the immigration powers held by the legislator and the executive. This has undoubtedly provided the Council with a wide margin of action. Given these weak constitutional constraints, the Council could have followed a rights-based approach. As Parts III and IV will now show, it has instead aligned much of its case law with the immigration control priorities set by the legislator and the administration.

## III. Endorsing Immigration Policies on Principle

This third part will explore the ways in which the Constitutional Council has endorsed immigration policies as a matter of principle. The Council has done so by recognizing extensive police powers in the legislator and exercising its usual self-restraint on matters of constitutional challenge. By deeming constitutional most of the legal provisions brought under its review, the Council has expressed stable support for immigration policy preferences set by the legislator and the Government. This part will inquire into the specific methods of reasoning relied upon by the Council in support to such policy preferences.

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51 Ibid (my translation). He mentions the example of article 34 of the 1958 Constitution, according to which 'statutes shall determine the rules concerning: - civic rights and the fundamental guarantees granted *to citizens* for the exercise of their civil liberties [...]'. Ibid (my translation, emphasis in original).

52 Labayle (n 46) 48 (my translation).

53 Ibid 42 (my translation).

*1. Recognizing Extensive Police Powers*

As soon as the Constitutional Council started to review immigrations laws, it recognized broad legislative powers in the field of immigration. It has provided two complementary for doing so. Both were spelled out in a landmark decision rendered on 13 August 1993, which is considered to have established the 'constitutional status of foreigners'.[54] First, foreigners can be treated differently by the legislator since they are 'placed in a different situation than that of nationals' in the immigration context.[55] Consequently, immigration rules do not violate the principle of equality, as they pursue general interest goals. This justification has been applied to uphold concrete measures criticized by members of Parliament as discriminatory.[56] The Council has also stated that immigration measures can only affect foreigners and are therefore not discriminatory.[57] Another way in which the Council has justified the differential treatment between nationals and foreigners has been to assert that 'no principle or rule of constitutional value guarantees to foreigners general and absolute rights of access to and residence in the national territory'.[58] This formula has been reiterated by the Council many times.[59]

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54 Cons const, décision n° 93-325 DC du 13 août 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*. See Bruno Genevois, 'Le statut constitutionnel pour les étrangers' [1993] Revue française de droit administratif 871.

55 Ibid cons 2 (my translation). For an earlier assertion of this argument, see Cons const, décision n° 89-266 DC du 9 janvier 1990, *Loi modifiant l'ordonnance n° 45-2658 du 2 novembre 1945 [...]*, cons 7.

56 See e.g. Cons const, décision n° 93-325 DC (n 54) cons 13, 133.

57 Ibid cons 31, 72.

58 Ibid cons 2 (my translation).

59 Cons const, décision n° 97-389 DC du 22 avril 1997, *Loi portant diverses dispositions relatives à l'immigration*, cons 36; Cons const, décision n° 2003-467 DC du 13 mars 2003, *Loi pour la sécurité intérieure*, cons 35, 83; Cons const, décision n° 2003-484 DC du 20 novembre 2003, *Loi relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité*, cons 28, 38, 46; Cons const, décision n° 2005-528 DC du 15 décembre 2005, *Loi de financement de la sécurité sociale pour 2006*, cons 14; Cons const, décision n° 2006-539 DC du 20 juillet 2006, *Loi relative à l'immigration et à l'intégration*, cons 6; Cons const, décision n° 2011-631 DC du 9 juin 2011, *Loi relative à l'immigration, à l'intégration et à la nationalité*, cons 64; Cons

The second way in which the Council has justified broad legislative powers in the field of immigration has consisted in stating that foreigners' 'entry and residence conditions may be restricted by administrative police measures conferring extensive powers on public authorities and relying on specific rules'.[60] This position has also been recalled in a significant number of subsequent decisions.[61] The Council has also confirmed that it is for the legislator 'to determine, in conformity with constitutional principles, and considering its public interest goals, measures applicable to foreigners' entry and residence in France'.[62] Deeming most immigration control measures part of administrative police prerogatives has had far reaching consequences which will now be explored.

### A. Rejecting Criminal Law Guarantees

The first consequence of characterizing most immigration control measures as administrative police measures is that it places them outside the scope of criminal law guarantees. Akin to the United States Supreme Court's old case law considering that deportation is not 'punishment for a crime',[63] this move

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const, décision n° 2017-674 QPC du 1 décembre 2017, *M. Kamel D.*, cons 4; Cons const, décision n° 2018-762 DC du 15 mars 2018, *Loi permettant une bonne application du régime d'asile européen*, cons 9; Cons const, décision n° 2018-717/718 QPC du 6 juillet 2018, *M. Cédric H. et autre*, cons 9; Cons const, décision n° 2018-770 DC du 6 septembre 2018, *Loi pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie*, cons 87.

60 Cons const, décision n° 93-325 DC (n 54) cons 2 (my translation). For an earlier assertion of this principle, see Cons const, décision n° 89-266 DC (n 55) cons 6. It seems the Council was initially merely describing the regime established by the *ordonnance du 2 novembre 1945 relative à l'entrée et au séjour des étrangers en France* before the current Constitution was even adopted. In subsequent decisions, the assertion nevertheless became autonomous and appears to have become an implicit principle of French constitutional law.

61 Cons const, décision n° 2011-631 DC (n 59) cons 64; Cons const, décision n° 2017-674 QPC (n 59) cons 4; Cons const, décision n° 2018-762 DC (n 59) cons 9; Cons const, décision n° 2018-770 DC (n 59) cons 87.

62 Cons const, décision n° 97-389 DC (n 59) cons 24 (my translation).

63 *Fong Yue Ting v United States*, 149 US 698, 730 (1893). Three justices issued dissenting opinions in which they expressed their 'utter' disagreement.

has allowed the Council to refrain from examining claims asserting a range of rights attached to criminal procedures.

The Council has determined that in the exercise of its immigration powers the legislator may resort to either criminal or non-criminal measures.[64] As regards criminal measures, the legislator is quite free to determine the definition of criminal offenses and the penalties associated with them.[65] Such measures must however respect criminal law guarantees provided for in the *bloc de constitutionnalité*, in particular those contained in the 1789 Declaration of the Rights of Man and of the Citizen. The legislator may also resort to non-criminal – i.e. administrative – measures. The Council rarely challenges the legislator's characterization of a measure as non-criminal.[66] As early as 1980, the Council established that *expulsions* (a specific type of deportation that applies to individuals considered as a serious threat to public order pursuant to article L. 631-1 of CESEDA) were 'police measures which do not follow the same objectives as criminal repression'.[67] Based on this characterization, the Council upheld a provision that 'grants the administration with the power to take an expulsion measure based on facts which may justify a criminal conviction, but for which no permanent conviction has been pronounced by the judiciary authority'.[68] The Council therefore set aside the claim made by members of Parliament that the provision would violate the presumption of

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64 Cons const, décision n° 89-261 DC (n 22) cons 12; Cons const, décision n° 93-325 DC (n 54) cons 7.

65 See inter alia Cons const, décision n° 96-377 DC du 16 juillet 1996, *Loi tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire*, cons 11; Cons const, décision n° 98-399 DC du 5 mai 1998, *Loi relative à l'entrée et au séjour des étrangers en France et au droit d'asile*, cons 7.

66 For an exception, see Cons const, décision n° 93-325 DC (n 54) cons 49. The measure at issue was an *interdiction du territoire* (re-entry ban) that was automatically applied to individuals targeted by an *arrêté de reconduite à la frontière* (deportation measure). However, in 2011, the Council reversed its position and considered that an *interdiction de retour* (re-entry ban) was a mere police measure. Cons const, decision n° 2011-631 DC (n 59) cons 52.

67 Cons const, décision n° 79-109 DC du 9 janvier 1980, *Loi relative à la prévention de l'immigration clandestine et portant modification de l'ordonnance n° 45-2658 du 2 novembre 1945 [...]*, cons 6 (my translation).

68 Ibid (my translation).

innocence principle, guaranteed by article 9 of the Declaration of the Rights of Man and of the Citizen.

A few other examples will further illustrate the serious consequences of characterizing immigration measures as non-criminal. In the landmark August 1993 decision referenced above, the Council characterized refusal of entry decisions as relying on administrative police rules specific to foreigners. Accordingly, such decisions were not subject to criminal law guarantees and could be executed automatically.[69] In a March 2003 decision, the Council deemed that the withdrawal of a temporary residence card for reasons of public order was 'not a sanction but a police measure', to which the presumption of innocence therefore did not apply.[70] In a September 2018 decision, the Council refused to classify immigration detention as a criminal sanction even though the maximum length of such detention had been extended three months.[71] Consequently, it was not subject to the principle of legality. Finally, in December 2019, the Council decided that refusal of entry and border detention were not 'sanctions having the character of punishment, but police administrative measures', meaning that police interviews conducted in such connection could continue to take place without the assistance of a lawyer.[72]

B. Favoring Public Order over Rights

The second and main consequence of characterizing immigration control measures as administrative police measures is that it frames the Council's inquiry as one of balancing the rights of foreigners against the safeguarding of public order, which was first recognized as an *objectif à valeur constitutionnelle* (objective of constitutional value) outside of the immigration context in 1982.[73] Under traditional principles of French administrative law, administrative police measures may restrict fundamental rights in order to preserve public order. The Constitutional Council took direct inspiration

69 Cons const, décision n° 93-325 DC (n 54) cons 7.

70 Cons const, décision n° 2003-467 DC (n 59) cons 85 (my translation).

71 Cons const, décision n° 2018-770 DC (n 59) cons 69.

72 Cons const, décision n° 2019-818 QPC du 6 décembre 2019, *Mme Saisda C.*, cons 12 (my translation).

73 Cons const, décision n° 82-141 DC du 27 juillet 1982, *Loi sur la communication audiovisuelle*, cons 4-5.

from the Council of State's landmark *GISTI* ruling of 1978[74] when, in 1986, it first decided that public order considerations could prevail over foreigners' rights.[75] Later on, the Council presented its reasoning as a process of '*conciliation*' – a balancing operation pitting the public order principle against foreigners' rights. This would seem to imply that that there is no hierarchy between those two elements and that they hold the same value. However, in most cases, the Council has favored public order over foreigners' rights. Between 1986 and 2019, in the thirty-three instances in which the Council balanced public order against rights, whether explicitly or implicitly,[76] twenty-eight provisions were upheld[77] and a further three were upheld subject to *réserves d'interprétation* (explained below in Part III.2),[78] while only

74 CE, Ass, 8 décembre 1978, *GISTI, CFDT et CGT*, n° 10097, 10677, 10679, Rec p 493.

75 Cons const, décision n° 86-216 DC du 3 septembre 1986, *Loi relative aux conditions d'entrée et de séjour des étrangers en France*, cons 18. For an analysis of the Council of State's influence, see Kissangoula (n 3) 200-205.

76 This includes six instances in which no explicit mention was made of *conciliation*, but where public order considerations were clearly invoked (sometimes through other notions such as public interest or administrative police powers) to restrict constitutional rights. Cons const, décision n° 93-325 DC (n 54) cons 25, 60, 87; Cons const, décision n° 97-389 DC (n 59) cons 24, 52; Cons const, décision n° 2003-485 DC du 4 décembre 2003, *Loi modifiant la loi n° 52-893 du 25 juillet 1952 relative au droit d'asile*, cons 56.

77 Cons const, décision n° 86-216 DC (n 75) cons 18; Cons const, décision n° 93-325 DC (n 54) cons 19-22, 25, 56, 60, 63, 87; Cons const, décision n° 97-389 DC (n 59) cons 10-14, 21, 24, 36, 71-72; Cons const, décision n° 2003-467 DC (n 59) cons 110; Cons const, décision n° 2003-484 DC (n 59) cons 23, 38-39, 57; Cons const, décision n° 2003-485 DC (n 76) cons 56; Cons const, décision n° 2005-528 DC (n 59) cons 14, 16; Cons const, décision n° 2006-539 DC (n 59) cons 13-14; Cons const, décision n° 2007-557 DC du 15 novembre 2007, *Loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile*, cons 11; Cons const, décision n° 2011-631 DC (n 59) cons 72, 78-79; Cons const, décision n° 2016-580 QPC du 5 octobre 2016, *M. Nabil F.*, cons 12; Cons const, décision n° 2018-762 DC (n 59) cons 9-16; Cons const, décision n° 2018-770 DC (n 59) cons 63, 92, 99; Cons const, décision n° 2019-797 QPC du 26 juillet 2019, *Unicef France et autres*, cons 11.

78 Cons const, décision n° 97-389 DC (n 59) cons 52; Cons const, décision n° 2017-674 QPC (n 59) cons 11-12; Cons const, décision n° 2018-770 DC (n 59) cons 76.

two were struck down.[79] Over the course of these decisions, the Council has favored public order over the right to a normal family life, the best interests of the child, the right to private life, freedom of movement (within France), the right to individual liberty (including freedom from arbitrary detention), the right to an effective remedy and the right to asylum. Though expressed through the technical language of constitutional reasoning, this configuration is not the result of a purely mechanical operation dictated by strict rationality. Rather, it appears to express a relatively stable axiological hierarchy – i.e. a hierarchy of values – according to which public order almost always prevails over foreigners' rights.[80]

The concept of public order has remained quite vague throughout the Council's case law. Despite its weak textual basis,[81] it is never clearly defined and appears to cover a wide range of considerations. At times, one wonders how a specific measure under review effectively contributes to the preservation of public order. For instance, in a 2006 decision, the Council ruled, without any explanation, that the decision to extend the minimum length of time a foreigner needed to reside in France before she could bring her family over gave rise to public order considerations that trumped her right to a normal family life.[82]

Furthermore, the Council has widened the concept of public order in some respects over the past two decades. Since 2003, the concept includes the 'fight against irregular migration'.[83] This expansion seems to have been a reaction to the increasing importance of this goal in the legislator's and the Government's respective immigration policies. It also seems to have been a direct response to arguments raised by the Government in its observations

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79 Cons const, décision n° 97-389 DC (n 59) cons 43-45; Cons const, décision n° 2017-674 QPC (n 59) cons 10.

80 On axiological hierarchies, see Véronique Champeil-Desplats, *Théorie générale des droits et libertés. Perspective analytique* (Dalloz 2019) 305-330; Riccardo Guastini, *Teoría analítica del derecho* (Zela 2017) 119-122.

81 For instance, the Council has relied on article 34 of the Constitution, which makes no explicit reference to public order.

82 Cons const, décision n° 2006-539 DC (n 59) cons 11-14.

83 Cons const, décision n° 2003-484 DC (n 59) cons 23; Cons const, décision n° 2011-631 DC (n 59) cons 64; Cons const, décision n° 2018-717/718 QPC (n 59) cons 9; Cons const, décision n° 2019-797 QPC (n 77) (my translation).

before the Council, which already in 1997 presented the 'fight against irregular migration' as a significant public order issue.[84] There is, however, a paradox in the postures adopted by the legislator and the Government. While they claim to 'fight against irregular migration', their reforms have actually tended to 'produce' more and more foreigners in an irregular situation.[85] This contradiction was indeed pointed out by members of Parliament in their brief to the Council regarding the same 1997 case.[86] Nevertheless, it has not prevented the 'fight against irregular migration' from becoming a recurrent argument of the Government in its observations before the Council in defense of provisions of legislative reforms. In turn, the Council appears increasingly willing to rely on this policy objective, which it has thereby translated into a fully-fledged constitutional concept.

Beyond the vague nature and broad scope of the concept of public order, concrete justifications as to why it should prevail over rights are often very limited. As is the case for much of the Constitution Council's reasoning, which is typically formalistic and somewhat opaque,[87] explanations provided are cursory and at times incomplete from a logical standpoint. After asserting that it will resort to balancing to decide on the validity of a provision, the Council sometimes immediately jumps to its conclusion or simply reformulates the content of the provision.[88] It is also not always clear whether the balancing exercise is supposed to be performed by the legislator or by the Council. The degree of review thus varies from one decision to another.[89]

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84 See the Government's observations lodged before the Council in Cons const, decision n° 97-389 DC (n 59) (my translation).

85 Nathalie Ferré, 'La production de l'irrégularité', in Fassin, Morice and Quiminal (n 13), 47-64 (my translation).

86 Brief of MPs lodged before the Constitutional Council on 27 March 1997.

87 Arthur Dyevre, 'The French Constitutional Council' in András Jakab, Arthur Dyevre and Giulo Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017), 323-355.

88 See e.g. Cons const, décision n° 2011-631 DC (n 59) cons 79.

89 See inter alia Cons const, décision n° 2018-762 DC (n 59) cons 9-16; Cons const, décision n° 2018-770 DC (n 59) cons 70-76; Cons const, décision n° 2011-631 DC (n 59) cons 66, 72. Although in recent years, the Council has begun employing proportionality tests, it typically fails to follow rigorously the three-step process to determine whether a measure is adequate, necessary and proportionate. See

*2. Exercising Traditional Self-Restraint*

French legal culture has traditionally been hostile to judicial power. Even with the expansion of its role, the Council has remained careful to appear deferential to Parliament so as to preserve its institutional legitimacy. This is true even when it comes to the protection of fundamental rights, an area in which the Constitutional Council's case law has not escaped criticism.[90] Indeed, the Council has demonstrated self-restraint in most areas of law. Since 1975, it has stated many times that the Constitution 'does not grant the Constitutional Council a general power of appreciation and decision identical to that of Parliament, it merely gives it competence to review the conformity of challenged laws to the Constitution'.[91]

Quite significantly, this very statement has been invoked by the Constitutional Council to uphold diametrically opposed laws one after the other. In 2011, the Council confirmed the constitutionality of a set of provisions interpreted as restricting marriage to heterosexual couples.[92] Only two years later, the Council reviewed a legal reform opening marriage to same-sex couples and found it constitutional on the very same grounds.[93] In both cases, Councillors wrote that it was for the legislator, not the Council, to decide what sort of "different situation" could justify "different treatment" without violating the principle of equality. This allowed the Council to avoid any discussion of the substance of the matter. Decisions reviewing immigration laws tend to follow a similar approach. In fact, the Council has

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Michael Koskas, 'Le dynamisme de la proportionnalité : enjeux de la fragmentation tripartite du principe dans le processus juridictionnel' (2019) 15 Revue des Droits de l'Homme s 42.

90 For a critical assessment, see Danièle Lochak, 'Le Conseil constitutionnel, protecteur des libertés ?' (1991) 13 Pouvoirs 41; Véronique Champeil-Desplats, 'Le Conseil constitutionnel, protecteur des droits et libertés ?' (2011) 9 Cahiers de la recherche sur les droits fondamentaux 11.

91 Cons const, décision n° 74-54 DC du 15 janvier 1975, *Loi relative à l'interruption volontaire de la grossesse*, cons 1 (my translation). See footnotes immediately below for references of subsequent cases relying on the same statement.

92 Cons const, décision n° 2010-92 QPC du 28 janvier 2011, *Mme Corinne C. et autre*, cons 5, 9.

93 Cons const, décision n° 2013-669 DC du 17 mai 2013, *Loi ouvrant le mariage aux couples de même sexe*, cons 14, 22.

made the very same statement regarding its limited competence in several decisions reviewing immigration laws.[94] With the notable exception of a 1989 decision in which the Council confirmed the constitutionality of provisions that guaranteed foreigners' rights,[95] this position has mostly led the Council to refrain from striking down provisions which could be considered detrimental to foreigners' rights.

The Council has also manifested self-restraint in granting the legislator free rein to diminish fundamental guarantees it had previously adopted to ensure respect for constitutional rights. For a time, this seemed to contradict the Council's case law in other areas. Over the course of the last two decades of the 20th century, the Council issued several decisions that appeared to impose an '*effet cliquet*' ('ratchet theory') whereby Parliament could only strengthen the legal guarantees of fundamental constitutional.[96] This case law had serious limitations, though, as it applied only to 'fundamental rights' (as determined by the Council itself) and it still allowed the legislator to balance these rights against principles of constitutional value. The theory was applied sporadically and eventually abandoned.[97] In any case, when it comes to reviewing immigration laws, the Council has always appeared willing to accept the placement of restrictions upon even the most fundamental

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94 Cons const, décision n° 89-261 DC (n 22) cons 15; Cons const, décision n° 2011-217 of 3 février 2012, *M. Mohammed Akli B.*, cons 4; Cons const, décision n° 2015-501 QPC du 27 novembre 2015, *M. Anis T.*, cons 8; Cons const, décision n° 2017-674 QPC (n 59) cons 25; Cons const, décision n° 2018-717/718 QPC (n 59) cons 18.

95 Cons const, décision n° 89-261 DC (n 22).

96 Cons const, décision n° 83-165 DC du 20 janvier 1984, *Loi relative à l'enseignement supérieur*, cons 42; Cons const, décision n° 84-181 DC du 11 octobre 1984, *Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*, cons 37; Cons const, décision n° 93-325 DC (n 54) cons 81; Cons const, décision n° 94-345 DC du 29 juillet 1994, *Loi relative à l'emploi de la langue française*, cons 5.

97 Cons const, décision n° 2002-461 DC du 29 août 2002, *Loi d'orientation et de programmation pour la justice*, cons 67; Const. const., décision n° 86-210 DC du 29 juillet 1986, *Loi portant réforme du régime juridique de la presse*, cons 2. For developments on how the 'ratchet theory' was abandoned, see Véronique Champeil-Desplats, 'Le Conseil constitutionnel a-t-il une conception des libertés publiques ?' (2012) 7 Jus Politicum 15-17.

constitutional rights.[98]. As early as 1986, the Council was keen to observe that its review did not consist in comparing provisions of consecutive laws, but solely in comparing the law in question with constitutional requirements.[99] This position has been reiterated in various decisions reviewing immigration laws.[100]

Since 1975, the Council has also refused to examine the conformity of laws with international conventions, following a strict interpretation of articles 55 and 61 of the Constitution.[101] This position has likewise been reiterated in several decisions reviewing immigration laws,[102] and indeed has significant consequences in this area of law, where international treaties can at times provide more protective guarantees than the domestic normative framework. For instance, the Council has refused to review the conformity of immigration laws with the 1951 Geneva Convention Relating to the Status of Refugees[103] and the 1950 European Convention on Human Rights.[104] While the Council has indirectly recognized some international norms through its interpretation of related constitutional norms (e.g. right to asylum, best interests of the child, respect for family life), it has nonetheless

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98 One minor exception is the right to asylum, which was considered a fundamental right in a 1993 decision under the short-lived ratchet theory (Cons const, décision n° 93-325 DC (n 54) cons 81). However, this was not reiterated in later decisions and the Council has since confirmed the constitutionality of various legal provisions restricting the right to asylum.

99 Cons const, décision n° 86-216 DC (n 75) cons 14.

100 Cons const, décision n° 89-261 DC (n 22) cons 15; Cons const, décision n° 93-325 DC (n 54) cons 2; Cons const, décision n° 2011-631 DC (n 59) cons 67 ; Cons const, décision n° 2018-770 DC (n 59) cons 71.

101 Cons const, décision n° 74-54 DC (n 91) cons 1-7. Article 55 of the Constitution provides that 'treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. Given that article 61 provides that the Constitutional Council 'shall rule on [the] conformity of [referred bills] to the Constitution', one could argue that the Council should review the conformity of referred laws to international treaties so as to ensure respect for article 55 of the Constitution.

102 Cons const, décision n° 93-325 DC (n 54) cons 2; Cons const, décision n° 97-389 DC (n 59) cons 13.

103 Cons const, décision n° 98-399 DC (n 65) cons 11-12.

104 Cons const, décision n° 2018-770 DC (n 59) cons 54.

sustained autonomous interpretations of these norms that do not necessarily conform to those of supra-national bodies such as the European Court of Human Rights.[105]

The Council has also limited its review of laws not yet promulgated by examining only the provisions specifically referred to it by political authorities. From its very first decisions, the Council has recognized its own competence to review all provisions of a deferred bill, beyond the specific issues raised by political authorities.[106] Yet, in most decisions reviewing immigration laws, the Council examines only those norms specifically at issue and leaves aside important questions regarding other norms.[107] Exceptions are rare.[108] While this problem is not specific to immigration laws, it is particularly problematic in this area of law because it involves fundamental rights issues. Until 2010, when the QPC preliminary ruling procedure was finally implemented, any provision not reviewed before its promulgation became exceedingly difficult to challenge later on. Many provisions that were problematic from a fundamental rights perspective were thereby permitted to evade scrutiny. Although the Council decided in a 1985 case (unrelated to immigration) that it could examine already promulgated provisions if they

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105 Ibid.

106 Cons const, décision n° 60-8 DC du 11 août 1960, *Loi de finances rectificative pour 1960*, cons 5. This position was explicitly confirmed in a case regarding an immigration law in 1992. Cons const, décision n° 92-307 DC du 25 février 1992, *Loi modifiant l'ordonnance n° 45-2658 du 2 novembre 1945 [...]*, cons 1.

107 Cons const, décision n° 79-109 DC (n 67); Cons const, décision n° 89-261 DC (n 22) cons 32; Cons const, décision n° 89-266 DC (n 55) cons 9; Cons const, décision n° 93-325 DC (n 54) cons 134; Cons const, décision n° 97-389 DC (n 59) cons 77; Cons const, décision n° 98-399 DC (n 65) cons 21; Cons const, décision n° 2003-485 DC (n 76) cons 65; Cons const, décision n° 2006-539 DC (n 59) 30; Cons const, décision n° 2007-557 DC (n 77) cons 30; Cons const, décision n° 2011-631 DC (n 59) cons 96; Cons const, décision n° 2016-728 DC du 3 mars 2016, *Loi relative au droit des étrangers en France*, cons 7; Cons const, décision n° 2018-762 DC (n 59) cons 24.

108 But see Cons const, décision n° 86-216 DC (n 75) cons 21-22; Cons const, décision n° 92-307 DC (n 106) cons 35-37; Cons const, décision n° 2003-484 DC (n 59) cons 98-101; Cons const, décision n° 2018-770 DC (n 59) cons 115-118.

were modified, completed or affected by a new law,[109] it does not seem to have made much use of this power in decisions reviewing immigration laws.[110]

Lastly, the Council has attenuated the impact of its decisions in two ways. The first is the aforementioned '*réserves d'interprétation*', which allow the Council to maintain deference to the legislator by upholding questionable provisions under particular interpretations that the Council provides. This approach has clear limitations. First, when dealing with laws that are not yet promulgated, the Council may encounter difficulties in anticipating how a provision will be enforced.[111] Second, the Council's interpretations are sometimes quite vague, leaving plenty of room for subsequent interpretations by the administration and judges.[112] Furthermore, some of the Council's interpretations appear to afford rather weak protection against potential violations of foreigners' rights.[113] Lastly, there is no direct mechanism ensuring that the Council's interpretations will be faithfully applied by the administration and judges.

The second way in which the Council has attenuated the impact of its decisions – specifically preliminary rulings under the QPC procedure – is through *modulation des effets dans le temps* (postponing their effectiveness to a later date). By such means, the Council can strike down a provision but specify a grace period of several months before the censored provision will actually be abrogated. The rationale for this remedy is that immediate abrogation would in some cases have 'manifestly excessive consequences'.[114]

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109 Cons const, décision n° 85-187 DC du 25 janvier 1985, *Loi relative à l'état d'urgence en Nouvelle-Calédonie et dépendances*, cons 10. The exception did not apply to new provisions which merely implemented older provisions. This shielded a number of provisions from being challenged.

110 In a 2018 decision, the Council refused to examine provisions of an older law since they were left unmodified by the law under review. Cons const, décision n° 2018-770 DC (n 59) cons 64.

111 Genevois (n 3), 254.

112 See e.g. Cons const, décision n° 2003-467 DC (n 59) cons 86; Cons const, décision n° 2018-717/718 QPC (n 59) cons 14.

113 See e.g. Cons const, décision n° 92-307 DC (n 106) cons 33; Cons const, décision n° 93-325 DC (n 54) cons 16; Cons const, décision n° 2003-484 DC (n 59) cons 66.

114 Cons const, décision n° 2017-674 QPC (n 59) cons 25; Cons const, décision n° 2018-717/718 QPC (n 59) cons 23; Cons const, décision n° 2019-799/800 QPC du 6

Of course, these consequences invariably relate to public order considerations (i.e. maintaining immigration control measures), which are invoked to justify the continued violation of constitutional rights for several additional months.

## IV. Loosening Protection: The Example of Immigration Detention

According to professor Serge Slama, the Constitutional Council's case law on immigration matters can be described as a belt loosened at every weight gain.[115] This is particularly true for immigration detention regimes, which have become an increasingly significant tool in French immigration policy over the past few decades. As the analysis in this Part IV will show, after an initial period of vigilance, during which the Council rejected longer detention periods, the Council gradually weakened its standards and began to accept longer detention periods, from seven days initially to three months today. It has become quite clear that the Council is no longer inclined to hinder in any way the legislator's policy priority of 'fighting against irregular migration'. The example of immigration detention thus demonstrates the Council's willingness to reinforce stricter policy preferences by translating them into constitutional language. In particular, this analysis will show that policy considerations, while not explicitly acknowledged in the Council's reasoning, played an overwhelming role in the Council's decision to overturn its own case law.

### *1. Initial Vigilance: Rejecting Longer Detention*

In its early decisions regarding immigration laws, the Council was particularly vigilant when it came to immigration detention regimes. Article 66 of the 1958 Constitution asserts the right to be free from arbitrary detention and

septembre 2019, *Mme Alaitz A. et autre*, cons 11 (my translation). But see Cons const, décision n° 2018-709 QPC du 1 juin 2018, *Section française de l'observatoire international des prisons et autres*, cons 12.

115 Serge Slama, 'La rétention des « Dublinables » : le Conseil Constitutionnel admet une rétention préventive sans perspective immédiate d'éloignement' (2018) Lexbase, La lettre juridique n° 739 <https://www.lexbase.fr/revues-juridiques/45196432- document-elastique> accessed 3 September 2021.

entrusts the judiciary authority with protecting individual liberty. While the Council always accepted in principle the possibility of administrative detention to enforce deportation measures,[116] it was initially determined to enforce relatively strict criteria for judicial review and limits on duration. The Council did not hesitate to strike down provisions on these grounds in four different decisions between 1980 and 1993.

In a 1980 decision, the Council first established that *juge judiciaire* (judicial branch as opposed to administrative judges) must intervene as early as possible to review any decision imposing *retention administrative* (administrative detention) or extending its duration for an additional period.[117] The Council accepted one detention regime that provided for judicial intervention after forty-eight hours of administrative detention, but rejected another regime in which such intervention was not envisaged for more than seven days (either automatically or upon the detainee's request).[118] In a 1986 decision, the Council examined and struck down a detention provision on its own initiative, even though members of Parliament had not criticized it in their brief to the Council. The relevant law provided the possibility of a six-day extension of detention, followed by a second extension of three additional days, should the administration demonstrate that it encountered 'particular difficulties hindering the detainee's deportation'.[119] The Council deemed that the second extension, bringing the total duration of detention to ten days, could only be granted in cases of 'absolute emergency and particularly serious threats to public order'.[120] It deemed the law in question too broad to satisfy these constitutional requirements, as it was not limited to such exceptional cases.

In a 1992 decision, the Council rejected a provision establishing transit zones for foreigners whose entry in France was refused and for those requesting asylum at the border. It first confirmed that detaining foreigners at the border was a lesser restriction of individual liberty than detaining individuals

116 Cons const, décision n° 79-109 (n 67).

117 Ibid cons 4.

118 Ibid cons 3-4.

119 Cons const, décision n° 86-216 DC (n 75) cons 21 (my translation).

120 Ibid cons 22 (my translation).

already on French soil.[121] Although the Council did not explicitly justify this position, it seems to have been swayed by the fact that the law allowed foreigners detained at the border to leave the transit zone at any time by leaving France for a foreign destination where they could be admitted.[122] Nonetheless, given the degree of constraint and the duration of the measure, the Council still insisted that review by a *juge judiciaire* must be made available as early as possible, and that in any case the maximum duration of the measure had to be 'reasonable'.[123] The Council deemed that these constitutional requirements were not respected under the transit zone regime, which authorized the detention of foreigners for up to twenty days without any judicial review, subject to extension for an additional ten days by ruling of an administrative judge (not a *juge judiciaire*).

Finally, in the notable August 1993 decision cited multiple times above, the Council reiterated the rule it had established in 1986. The legislator had again attempted to authorize a second extension of administrative detention, for a cumulative total of ten days, in cases where 'the foreigner did not provide the competent authority with a travel document enabling the execution of a [deportation measure]'. The Council struck down the provision, maintaining its position that a second extension of the detention measure could only be allowed in exceptional cases of absolute emergency and particularly serious threats to public order.[124]

### *2. Later Shift: Accepting Longer Detention*

A shift started to occur in the late 1990s, as the legislator and the administration continued to harshen their immigration policies. In 1997 and 1998, the Council failed to examine provisions extending the scope of cases in which a second extension of a term of detention could be granted beyond seven days. In 1997, a law was brought before the Council that maintained measures originally taken in a December 1993 law that was not referred to the

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121 Cons const, décision n° 92-307 DC (n 106) cons 13-14.

122 This point was explicitly debated during the deliberation session. See minutes of the Council's deliberation session of 24 and 25 February 1992.

123 Cons const, décision n° 92-307 DC (n 106) cons 16 (my translation).

124 Cons const, décision n° 93-325 DC (n 54) cons 100 (my translation).

Council.[125] These measures violated the limits set by the Council in its 1986 and 1993 decisions, but the Council nevertheless declined to consider the relevant provisions.[126] In 1998, another law came before the Council that increased the length of the second extension to five days, thus bringing the total duration of detention to twelve days. It also extended again the scope of cases where a second extension could be requested. Yet the Council did not react,[127] signaling what would later be deemed tacit approval.[128]

Then, in a 2003 decision, the Council explicitly abandoned its earlier case law. It accepted a total duration of thirty-two days of detention, with two extensions of fifteen days after an initial forty-eight hours. The Council also relaxed the restrictions on cases in which a second extension could be granted. Indeed, the Council accepted the new regime wholesale, subject to the *réserve d'interprétation* that the *juge judiciaire* may interrupt detention at any time, either on its own initiative or upon the detainee's request.[129] The Council's ruling lifted virtually all of the previously applicable restrictions and essentially afforded the legislator the opportunity to extend the maximum length of immigration detention at will.

Indeed, in 2011, the Council authorized an extension of the maximum term of detention to forty-five days, referring explicitly to the objective of fighting irregular migration as part of the safeguarding of public order, a recognized *objectif à valeur constitutionnelle*. Its approval was subject to the same *réserve d'interprétation* it had formulated in 2003,[130] but this time the *juge judiciaire* was not required to intervene until five days into the term of detention (or, in cases where a foreigner was placed in custody prior to an order of administrative detention, up to seven).[131] The Council deemed that the legislator's decision that an administrative judge should intervene prior to the *juge judiciaire* served the interests of the good administration of justice, which

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125 Constitutional Council, 'Commentaire de la décision n° 2003-484 DC du 20 novembre 2003' (2004) 16 Cahiers du Conseil constitutionnel.

126 Cons const, décision n° 97-389 DC (n 59).

127 Cons const, décision n° 98-399 DC (n 65).

128 Constitutional Council (n 125).

129 Cons const, décision n° 2003-484 DC (n 59) cons 66.

130 Cons const, décision n° 2011-631 DC (n 59) cons 75.

131 Ibid cons 73.

has also been recognized as an *objectif à valeur constitutionnelle*.[132] One begins to wonder how this respects the Council's own requirement, established in 1980, that the *juge judiciare* must intervene *as early as possible*.[133]

Finally, in 2018, the Council accepted a maximum length of detention of ninety days, under the same reasoning and subject to the same *réserve d'interprétation* as in 2003 and 2011.[134] Although the Council pronounced the measure 'adequate, necessary and proportionate', its reasoning in reaching this conclusion remained superficial and abstract. It failed to respond to concrete arguments set forth by civil society, national human rights institutions and members of Parliament as to the inefficiency of long-term detention and its negative psychological impact on detainees.[135] Unfortunately, some of these concerns have materialized since the law entered into force.[136]

The dramatic shift in the Council's case law from 2003 onwards was clearly a deliberate effort to provide a wider margin of action for the legislator in the 'fight against irregular migration'. Although the 2003 decision itself offers only limited and formalistic reasons as to why the Council departed from its

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132 Ibid cons 72.

133 Admittedly, the Council did push back on part of the legislator's harsh immigration control agenda in its 2011 decision, striking down part of a provision authorizing the long-term detention of foreigners subject to an *interdiction du territoire* (re-entry ban) for terrorist acts or *expulsion* for behavior linked to terrorist activities. The Council found that this regime violated the right to individual liberty by allowing a twelve-month extension after an initial six-month period of detention. However, in doing so, it implicitly confirmed the constitutionality of the initial six-month period. Ibid cons 76.

134 Cons const, décision n° 2018-770 DC (n 59) cons 76 (my translation).

135 Assfam-groupe SOS Solidarités and others, 'Centres et locaux de rétention administrative. Rapport 2017' (2018) 15 <https://www.lacimade.org/wp-content/uploads/2018/07/La_Cimade_Rapport_Retention_2017.pdf> accessed 3 September 2021; Commission nationale consultative des droits de l'homme, 'Avis sur le projet de loi « pour une immigration maîtrisée et un droit d'asile effectif »', (2018) 38-41 <https://www.cncdh.fr/sites/default/files/180502_avis_pjl_asile_et_immigration.pdf> accessed 3 September 2021.

136 See e.g. Assfam-groupe SOS Solidarités and others, 'Centres et locaux de rétention administrative. Rapport 2019' (2020) 24 <https://www.france-terre-asile.org/images/RA_CRA_2019_web.pdf> accessed 3 September 2021.

previous decisions, the official commentary of the decision published on the institution's website explicitly acknowledges this reversal, essentially relying on the arguments presented by the Government in its written observations.[137] A communication from former President of the Constitutional Council Pierre Mazeaud in 2005 also offers precious insights. He himself labels the 2003 decision a '*revirement de jurisprudence*' (reversal of case law) grounded on 'considerations of a non-legal nature'.[138] Mazeaud explains:

> A 13 August 1993 decision deemed that, except in cases of particularly serious threats to public order, the Constitution prohibited the detention of foreigners targeted by deportation measures for more than a week.
>
> A decision of 20 November 2003 nevertheless validated provisions which, to provide the administration with sufficient time to enforce deportation measures in an efficient manner, increased the maximum duration of detention to thirty-two days. Realism played an important role in this decision. The fact that almost all European countries implemented a higher maximum duration could only influence the Council and push for a reversal. Another determinant factor was the legislator's will to solve a situation where only a low proportion of deportation measures were enforced, which public opinion struggled to accept.[139]

It is striking to observe how much the language of 'realism' used by the former President of the Council resonates with the Government's observations in the proceedings leading to an April 1997 decision reviewing an immigration law.[140] It is, of course, not so surprising if one considers the lengthy political career Mazeaud enjoyed before becoming a member of the Council. Many other members of the Council have had similar career paths, which helps

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137 Constitutional Council (n 125).

138 Pierre Mazeaud, 'La place des considérations extra-juridiques dans l'exercice du contrôle de constitutionnalité. EREVAN : 29 septembre – 2 octobre 2005' (Conseil constitutionnel, 2005) <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/pdf/Conseil/20051001erevan.pdf> accessed 15 January 2021, 13-14 (my translation).

139 Ibid 14 (my translation).

140 Government's observations before the Council in Cons const, décision n° 97-389 DC (n 59).

explain the institution's deferential approach vis-à-vis the legislator, as well as its shared policy perspectives.[141]

The Council's endorsement of stricter migration policies can be observed in several other recent decisions, which have confirmed the expanded use of immigration detention. In a June 2011 decision, the Council approved the creation of temporary border detention sites (outside of border crossing points) that do not offer the same guarantees as *zones d'attente* (waiting zones).[142] In a March 2018 decision, the Council also refused to strike down a provision which authorized the preventive detention of asylum seekers who are likely to be transferred to another member state of the European Union under the Dublin Regulation.[143] Last, but not least, in a September 2018 decision, the Council deemed constitutional the detention of children 'accompanying' adults targeted by deportation measures.[144]

## V. Concluding Remarks

For the most part, the French Constitutional Council has endorsed the immigration policy preferences of the legislator and the Government by translating them into constitutional language. This article has shown that the Council's seemingly neutral methods of reasoning are in fact politically oriented instruments providing stable support for restrictive immigration policy preferences. The Council enjoys a rather wide margin of action on immigration matters, as it is not substantially constrained by the Constitution itself in this area. Nonetheless, it has exercised considerable self-restraint on such questions, employing permissive methods of reasoning

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141 This is particularly manifest in the minutes of deliberation sessions of the Council, which are published twenty-five years after the publication of the decision itself.

142 Cons const, décision n° 2011-631 DC (n 59) cons 19-22.

143 Cons const, décision n° 2018-762 DC (n 59) cons 16. The measure was unprecedented, as immigration detention had always been used to enforce a deportation measure already taken by the administration in cases where there was a reasonable perspective that the foreigner would effectively be deported.

144 Cons const, décision n° 2018-770 DC (n 59) cons 64 (my translation). The Council considered that it was in the child's interest not to be separated from the adult she 'accompanied' and that her interest in not being detained could be balanced against public order considerations favoring the adult's effective deportation.

observed in many other areas of law. In so doing, it has recognized extensive police powers for the legislator, setting aside criminal law guarantees and favoring public order considerations over rights. Taking the example of immigration detention, after an initial period of vigilance during which the Council rejected longer detention periods, the Council gradually weakened its standards and allowed the legislator to lengthen terms from an initial seven days to three months today. The analysis in this article highlighted the Council's willingness and ability to adapt its case-law to support more restrictive policy preferences. It also demonstrated that policy considerations, while not explicitly acknowledged as such in the Council's case law, played an overwhelming role in the Council's decision to depart from its own established case law.

Overall, over the past few decades, the French Constitutional Council has remained faithful to the immigration policy preferences pursued by the legislator and the Government. The Council's most recent case law is particularly striking in this regard. As the 'fight against irregular migration' became an overarching goal of French and European immigration policies, the Council translated this aim into constitutional terms by linking it to the safeguard of public order, a recognized *objectif à valeur constitutionnelle* against which foreigners' rights – even the most fundamental – are often unfavorably balanced. The Council has thus deliberately abandoned a rights-based approach to immigration matters to facilitate stricter immigration control.