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# **SANS-PAPIERS, SANS RECOURSE? CHALLENGING RECENT IMMIGRATION LAWS IN FRANCE**

EMILY B. KANSTROOM\*

**Abstract:** The 1789 Declaration of the Rights of Man and of the Citizen established natural and inalienable rights not only for French citizens but also for all of humanity. This historic commitment to fundamental rights and liberties notwithstanding, immigrants without legal documents living in France (*sans-papiers*) often do not benefit from some of these most basic guarantees. In 2007, a Commission charged with modernizing and reforming the institutions of the Fifth Republic proposed amending the Constitution to allow individuals to argue that the law, as applied in their case, does not conform to the rights and liberties recognized by the Constitution. By December 2009, a constitutional revision law and an institutional act had combined to grant the Constitutional Council a striking new power: the ability to review laws after promulgation and to assess their conformity with the Constitution. This recent evolution may provide the basis for constitutional challenges to the restrictive legislation *sans-papiers* now endure.

## INTRODUCTION

The Declaration of the Rights of Man and of the Citizen, adopted in 1789 during the French Revolution, establishes natural and inalienable rights for French citizens specifically and for all of humanity more generally.<sup>1</sup> Authored with the intention of protecting individuals from government, this revolutionary document, according to some, served as “the principle vehicle of the ideas of liberty and equality around the globe.”<sup>2</sup> In 1958, the most recent French Constitution reaffirmed and

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<sup>1</sup> DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] (1789); ALEC G. HARGREAVES, IMMIGRATION, ‘RACE’ AND ETHNICITY IN CONTEMPORARY FRANCE 160 (1995) [hereinafter HARGREAVES, IMMIGRATION, ‘RACE’ AND ETHNICITY].

<sup>2</sup> DALE VAN KLEY, *Introduction* to THE FRENCH IDEA OF FREEDOM: THE OLD REGIME AND THE DECLARATION OF RIGHTS OF 1789, at 5, 6–7 (Dale Van Kley ed., 1994) (quoting

incorporated the Declaration of the Rights of Man and of the Citizen.<sup>3</sup> Despite France's explicit commitment to fundamental rights for all human beings in French society, immigrants without legal documents often find that some basic rights remain, in practice, reserved solely for citizens.<sup>4</sup> Where access to citizenship is necessarily predicated on overcoming increasingly restrictive requirements, including sufficient cultural assimilation, the result may be a country in which "rumors multiply, hate foment, and militias arm themselves."<sup>5</sup>

In November 2005, riots ravaged Paris and its northern *banlieues*, or suburbs, which were already filled with racial animosity and police-incited violence.<sup>6</sup> A few days prior to the start of the most serious violence, then-Interior Minister Nicolas Sarkozy explicitly referred to the population in these crime-ridden areas, primarily Arab and Black Muslim French people, as "rabble" and suggested that they be "cleaned with a power hose."<sup>7</sup> Two days after his remarks, two young boys, Zyed Benna and Bouna Traore, the sons of African immigrants, were electrocuted as they climbed into an electrical sub-station to hide from the police.<sup>8</sup> Muhittin Altun, one boy who survived the electrocution with burns covering approximately thirty percent of his body, explained that as the boys were returning home from a soccer game, the police had

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French historian Jacques Godechot); see HARGREAVES, IMMIGRATION, 'RACE' AND ETHNICITY, *supra* note 1, at 160.

<sup>3</sup> See 1958 CONST. pmbl.

<sup>4</sup> ALEC G. HARGREAVES, MULTI-ETHNIC FRANCE 160–61 (2d ed. 2007) [hereinafter HARGREAVES, MULTI-ETHNIC FRANCE]; see TAHAR BEN JELLOUN, FRENCH HOSPITALITY: RACISM AND NORTH AFRICAN IMMIGRANTS 38–39 (Barbara Bray trans., Columbia Univ. Press 1999) (1984).

<sup>5</sup> CODE CIVIL [C. CIV.] arts. 21-4, 21-24, 21-25 (Fr.). Article 21-24 reads: "None can be naturalized if he cannot demonstrate his assimilation to the French community, notably by sufficient knowledge, depending on his situation, of the French language," while Article 21-4, with respect to naturalization based on marriage, expressly allows the government to "oppose . . . acquisition of French nationality by a foreign spouse for indignity or insufficient assimilation. . . ." *Id.* arts. 21-4, 21-24 (author's translation); JEAN-PAUL GOURÉVITCH, IMMIGRATION: LA FRACTURE LÉGALE [IMMIGRATION: THE LEGAL FRACTURE] 281 (1998) (author's translation).

<sup>6</sup> Eddie Bruce Jones, *Race, Space, and the Nation-State: Racial Recognition and the Prospects for Substantive Equality Under Anti-Discrimination Law in France and Germany*, 39 COLUM. HUM. RTS. L. REV. 423, 446 (2008).

<sup>7</sup> *Id.* at 447; see also *Timeline: French Riots*, BBC NEWS, Nov. 14, 2005, <http://news.bbc.co.uk/2/hi/world/europe/4413964.stm> [hereinafter *Timeline: French Riots*] (detailing these events).

<sup>8</sup> See Jones, *supra* note 6, at 447.

arrived with sirens wailing and had chased them with police dogs.<sup>9</sup> He said further that the friends were not hiding because of any crime they had committed but rather to avoid the extended questioning by the police that youths in the *banlieues* often faced.<sup>10</sup> In addition to demanding identity papers, the police held these youths at the police station for hours.<sup>11</sup> During the riots that followed, thousands of cars were burned and hundreds of people were arrested as violence spread into Paris, its other suburbs, and even to other cities, resulting in one death.<sup>12</sup>

In the aftermath of the violence, Sarkozy (now the President of France) promised to tighten immigration controls.<sup>13</sup> He began discussing new immigration policies, immediately taking a tough stance on the riots that had plagued areas populated primarily by North African Muslims, also known as “*maghrèbins*.”<sup>14</sup> In a statement to the French Parliament, he explained that France has no desire to welcome “those people that nobody else in the world wants . . . [w]e want selective immigration.”<sup>15</sup>

Many of those living in the *banlieues* are part of a much larger and growing group of *sans-papiers*, or those without the documents necessary to grant them legal status in France.<sup>16</sup> They faced expulsion in the

<sup>9</sup> Jennifer Kolstee, *Time for Tough Love: How France's Lenient Illegal Immigration Policies Have Caused Economic Problems Abroad and Social Turmoil Within*, 25 PENN ST. INT'L L. REV. 317, 333 (2006).

<sup>10</sup> *Id.* at 333.

<sup>11</sup> Thomas Crampton, *Behind the Furor: The Last Moments of 2 Youths*, N.Y. TIMES, Nov. 7, 2005, at A10. “The resentment is huge here, and we were not surprised to see an incident like this spark it off,” said Mokded Hannachi, a government official involved in youth affairs who has been acting as a mediator between the police and the youths.” *Id.* Hannachi continued, “You cannot constantly stop people for no reason to check their papers and not have consequences.” *Id.*

<sup>12</sup> *Timeline: French Riots*, *supra* note 7.

<sup>13</sup> Molly Moore, *France Weighs Immigration Controls After Riots*, WASH. POST, Nov. 30, 2005, at A14; David R. Sands, *Tough Stance on Immigration Boosts Sarkozy, Riots Hurt Chirac's Popularity*, WASH. TIMES, Nov. 17, 2005, at A15.

<sup>14</sup> Moore, *supra* note 13; Sands, *supra* note 13. The term “*maghrèbin*” is derived from an Arabic word denoting the North African region. Although the “great majority” of *maghrèbin* immigrants are Muslims, some are not, and many speak a Berber language instead of Arabic. Richard Alba & Roxane Silberman, *Decolonization Immigrants and the Social Origins of the Second Generation: The Case of North Africans in France*, 36 INT'L MIGRATION REV. 1169, 1171 (2002).

<sup>15</sup> Moore, *supra* note 13.

<sup>16</sup> GROUPE D'INFORMATION ET DE SOUTIEN DES IMMIGRÉS [IMMIGRATION INFO. & SUPPORT GROUP], LES NOTES PRATIQUES: SANS PAPIERS MAIS PAS SANS DROITS [PRACTICAL NOTES: WITHOUT PAPERS BUT NOT WITHOUT RIGHTS] 1, 3–4 (2006), available at <http://www.gisti.org/doc/publications/2006/sans-papiers/index.html> [hereinafter GISTI]. The term “*sans-papiers*” (“without papers”) includes both immigrants who entered and remain illegally and those who may have entered legally but now remain in France illegally. *See id.* at 3.

immediate aftermath of Sarkozy's crackdown and remain in highly precarious circumstances.<sup>17</sup> *Sans-papiers* lack basic rights to housing, employment, and welfare benefits, though many are not actually facing deportation, which may leave them suspended for years in a long and confusing state of limbo.<sup>18</sup> Since the 2005 riots, however, with the passage of tough new immigration legislation championed by President Sarkozy, many immigrants, including a large percentage of children, now do face deportation.<sup>19</sup>

Part I of this Note discusses the historic difficulties *sans-papiers* have experienced integrating into French society and focuses specifically on the difficulties of *maghrèbin* immigrants. Barriers to integration and the accompanying cultural and social milieu in France are critical to understanding the recent trend toward restrictive immigration practices. Part II details the evolution of these laws, concentrating on those proposed primarily by Sarkozy in 2003 and 2006 and their impact on this particular group of immigrants. Part III analyzes these legislative and cultural trends and offers potential means of combating the progression of restrictive legislation by use of a new, legal, and institutional tool: the right of individuals to challenge the constitutionality of laws affecting their fundamental rights.

## I. BACKGROUND

### A. *France and Its Immigrants: A Riotous Clash?*

The complexities of integration or assimilation of other cultures are prominent in French society, which is now home to four to five million Muslims, "the largest Muslim population on the continent."<sup>20</sup> For some, the 2005 riots represent a broader clash of civilizations, symptomatic of France's struggle to fully integrate Muslims into all sectors of national life, the country's historic egalitarianism notwithstanding.<sup>21</sup> Despite the fact that France has sustained large-scale immigration for a

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<sup>17</sup> Alasdair Sandford, *Sarkozy Alters Tack on Immigration*, BBC NEWS, Jan. 12, 2006, <http://news.bbc.co.uk/2/hi/europe/4608108.stm>.

<sup>18</sup> *Id.* As of 2006, for the 200,000–400,000 clandestine immigrants estimated in France, 20,000 obtained legal papers every year. Catherine Coroller, *Le Projet de loi sur l'immigration en débat à l'Assemblée* [The Immigration Bill Debated in the Assembly], LIBÉRATION (Paris), May 4, 2006, at 13.

<sup>19</sup> John Lichfield, *Sarkozy in 'Public Lie' over Immigrant Residence Permits*, INDEP. (London), Sept. 20, 2006, at 24; see Caroline Wyatt, *French Fight for Illegal Children*, BBC NEWS, June 22, 2006, <http://news.bbc.co.uk/2/hi/europe/5104732.stm>.

<sup>20</sup> Stéphanie Giry, *France and Its Muslims*, 85 FOREIGN AFF. 87, 87 (2006).

<sup>21</sup> *Id.*

century and a half, French society remains far more homogenous than the United States, and its people are more likely to view ethnic or religious characteristics as divisive elements.<sup>22</sup> “A growing unease about a loss of national identity” has combined with a diminished desire to welcome an immigrant population perceived as unprepared “to submit to the rigours of full assimilation into the rights and duties of the Republic.”<sup>23</sup> Indeed, some argue that *maghrèbin* immigrants inspire a particular hostility, beyond even a generalized xenophobia.<sup>24</sup>

### B. *The Sans-Papiers and Demands for Fundamental Rights*

The French government has progressively withdrawn fundamental rights of *sans-papiers*, immigrants without documents authorizing them to live and work in France.<sup>25</sup> Immigrants lacking legal status create an “irregular” legal and administrative situation, though defining exactly what “irregular” means and how an immigrant in France arrives at such a classification is complex.<sup>26</sup> The term “irregular” applies both to those who entered France legally but now must take further steps to regularize their status as well as to those who entered France illegally and may therefore be removed from the country.<sup>27</sup> Drawing the line between these two groups is challenging, largely because of the evolution of legislation and how administrative practices have contributed to the creation of “irregular” immigrants.<sup>28</sup>

*Sans-papiers* lack many of the rights and privileges granted to citizens, such as complete health care as part of French social security and welfare benefits for the care of children.<sup>29</sup> A *sans-papiers* social and po-

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<sup>22</sup> *Id.* at 89.

<sup>23</sup> Jeremy Jennings, *Citizenship, Republicanism and Multiculturalism in Contemporary France*, 30 BRIT. J. POL. SCI. 575, 581 (2000); see also Christine Vanson, *In Search of the Mot Juste: The Toubon Law and the European Union*, 22 B.C. INT’L & COMP. L. REV. 175, 176 (1999) (arguing that the French concern for national identity extends even to the perceived need to protect the French language itself from modification).

<sup>24</sup> Monica Nigh Smith, “France for the French?” *The Europeans? The Caucasians?: The Latest French Immigration Reform and the Attempts at Justifying Its Disproportionate Impact on Non-White Immigrants*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 1107, 1128–29 (2005); see BEN JELLOUN, *supra* note 4, at 47–51 (providing a chronology of violent acts between 1982 and 1983 directed at *maghrèbin* immigrants).

<sup>25</sup> BEN JELLOUN, *supra* note 4, at 18.

<sup>26</sup> Nathalie Ferré, *La production de l’irrégularité [Producing Irregularity]*, in LES LOIS DE L’INHOSPITALITÉ [THE LAWS OF INHOSPITALITY] 47, 47 (Didier Fassin et al. eds., 1997).

<sup>27</sup> *Id.* at 48.

<sup>28</sup> *Id.*

<sup>29</sup> See generally GISTI, *supra* note 16. The GISTI Report is designed to educate *sans-papiers* about rights they may be able to claim in these areas depending on their particular

litical movement seeking regularized status for all immigrants lacking proper documents achieved notice in 1996 when 324 Africans occupied a church, demanding rights.<sup>30</sup> By February of the following year, the *sans-papiers* had issued a manifesto, demanding legal papers “so that we are no longer victims of arbitrary treatment by the authorities, employers and landlords.”<sup>31</sup> The manifesto continues:

We demand papers so that we are no longer vulnerable to informants and blackmailers. We demand papers so that we no longer suffer the humiliation of controls based on our skin, detentions, deportations, the break-up of our families, the constant fear.<sup>32</sup>

The *sans-papiers*' predicament demonstrates the difficulties many immigrants faced even before the most recent laws due to “incessant discrimination and, more than anything, a rise in xenophobia and racism.”<sup>33</sup> Moreover, the mere existence and subsequent treatment of *sans-papiers* created a “right-less zone” at the heart of French society, which some have argued is incompatible with the maintenance of a society founded on the protection of the basic rights and dignities of people.<sup>34</sup> Tens of thousands of men, women, and children are largely left at the whim of legislative evolution and its application by police and the legal machinery of the government.<sup>35</sup>

### C. *The 1958 Constitution and Judicial Review?*

If recent immigration laws affecting *sans-papiers* are indeed, as some have argued, contrary to the tenets of the basic human rights and liberties upon which the French state is predicated, the recourse avail-

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situation and legal status, which indicates that, despite the difficulties of navigating the system, there may in fact be more rights available than many people realize. *Id.* at 1.

<sup>30</sup> TERESA HAYTER, *OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS* 142 (2000).

<sup>31</sup> *Id.* at 143.

<sup>32</sup> *Id.*

<sup>33</sup> DIDIER FASSIN ET AL., *Présentation [Introduction] to LES LOIS DE L'INHOSPITALITÉ*, *supra* note 26, at 5, 5 (author's translation).

<sup>34</sup> Emmanuel Terray, *La lutte des sans-papiers, la démocratie et l'Etat de droit [The Sans-Papiers' Struggle, Democracy and the Legal State]*, in *LES LOIS DE L'INHOSPITALITÉ*, *supra* note 26, at 249, 249.

<sup>35</sup> *Id.*

able to these immigrants under French law has undergone a recent and critical development.<sup>36</sup>

The 1958 French Constitution provides for the establishment of a “Constitutional Council” empowered to determine whether laws adopted by Parliament are in conformity with the Constitution.<sup>37</sup> The Council was not intended as a mechanism to protect individual constitutional liberties against “legislative limitation.”<sup>38</sup> Instead, the predominant understanding is that the framers intended the Council “to facilitate the centralization of executive authority,”<sup>39</sup> ensuring that “Parliament respects the limits imposed on its legislative competence vis-à-vis the Government.”<sup>40</sup> Accordingly, under Article 61, the Council was able to decide whether a bill that had been “*definitively adopted by Parliament, but not yet promulgated by the executive*” was in conformity with the Constitution.<sup>41</sup> Only the President, the Prime Minister, the President of the Senate, or sixty deputies or sixty senators could submit laws to the Council for a decision, however.<sup>42</sup>

Once a law was promulgated, it was subject only to the jurisdictional control of the Parliament itself.<sup>43</sup> For over a decade, the Council fulfilled this limited mission and did not use the power of Article 61 to protect individual liberties.<sup>44</sup> Indeed, any notion of invalidating a law because it infringed on constitutional liberties was wholly “alien to French constitutional tradition”<sup>45</sup> according to which judges are “no

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<sup>36</sup> See HAYTER, *supra* note 30, at 149; Smith, *supra* note 24, at 1133–34; Terray, *supra* note 34, at 249.

<sup>37</sup> 1958 CONST. arts. 58–63; James E. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431, 431 (1972).

<sup>38</sup> Beardsley, *supra* note 37, at 431.

<sup>39</sup> ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 47 (1992).

<sup>40</sup> Beardsley, *supra* note 37, at 437.

<sup>41</sup> STONE, *supra* note 39, at 8 (“The control is thus a priori and abstract rather than a posteriori and concrete as in the American model.”); see also 1958 CONST. art. 61, *translated in* AMBASSADE DE FRANCE [FRENCH EMBASSY], SERVICE DE PRESSE ET D’INFORMATION [PRESS & INFO. DIV.], *THE FRENCH CONSTITUTION* art. 61 (1958) (“Organic laws, before their promulgation . . . must be submitted to the Constitutional Council, which shall rule on their constitutionality.”).

<sup>42</sup> 1958 CONST. art. 61, *amended by* Law No. 74-904 of Oct. 29, 1974, *Journal Officiel de la République Française* [J.O.] [Official Gazette Of France], Oct. 30, 1974, p. 11035 (extending this power to the sixty deputies or sixty senators).

<sup>43</sup> STONE, *supra* note 39, at 8.

<sup>44</sup> Beardsley, *supra* note 37, at 436.

<sup>45</sup> *Id.* at 431.

more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor.”<sup>46</sup>

Then, in a landmark 1971 decision, the Constitutional Council struck down a law it found not to be in conformity with the Constitution because the law contravened the “fundamental principle[]” of liberty of association.<sup>47</sup> This decision, acclaimed by some as “the spiritual descendant” of *Marbury v. Madison*,<sup>48</sup> was the first in which the Council held an act of Parliament not yet promulgated as law<sup>49</sup> unconstitutional because it violated the protection of liberties granted to citizens.<sup>50</sup> The decision was groundbreaking for a second reason: “[t]he French Constitution doubled in volume by the Constitutional Council’s will alone.”<sup>51</sup> The inclusion of a mere four words at the beginning of the Council’s decision ignited a judicial revolution;<sup>52</sup> the Council wrote, “In view of the Constitution and notably its [P]reamble . . .”<sup>53</sup> The Preamble proclaims the “solemn attachment” of the French people to the principles defined by the 1789 Declaration of the Rights of Man and of the Citizen, as well as to the Preamble of the 1946 Constitution, which in turn refers to “fundamental principles acknowledged by the laws of the Republic.”<sup>54</sup> In what some have called a “*juridical coup d’état*,”<sup>55</sup> the Council may have incorporated the Preamble, and thus the principles and documents to which it refers, into the “*bloc de constitutionnalité*”—

<sup>46</sup> BARON DE MONTESQUIEU, 1 THE SPIRIT OF THE LAWS 159 (Thomas Nugent trans., 1949).

<sup>47</sup> CC decision no. 71-44DC, July 18, 1971, J.O. 7114; George D. Haimbaugh, Jr., *Was It France’s Marbury v. Madison?*, 35 OHIO ST. L.J. 910, 914–15 (1974).

<sup>48</sup> Haimbaugh, *supra* note 47, at 926. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (forming the basis for judicial review in the United States).

<sup>49</sup> Beardsley, *supra* note 37, at 434 (“But for the decision of the Constitutional Council, [the act] would have come into force upon promulgation by the President of the Republic within fifteen days.”).

<sup>50</sup> *Id.* at 431–32. “The doctrine of separation of powers, the notion that Parliamentary legislation constitutes the authentic expression of the general will, and an aversion to ‘government by judges’ which dates back to the *ancien régime* have formed an insurmountable barrier to the introduction of judicial review in France.” *Id.* at 431.

<sup>51</sup> Jean Rivero, *Rapport de synthèse [Summary]*, 33 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.], 659, 662 (1981) (author’s translation).

<sup>52</sup> STONE, *supra* note 39, at 68.

<sup>53</sup> CC decision no. 71-44DC (emphasis added).

<sup>54</sup> 1958 CONST. pmbl.; 1946 CONST. pmbl.; see DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] (1789). The Preamble of the 1958 Constitution, as currently revised, also proclaims “solemn attachment” to the Environmental Charter of 2004. 1958 CONST. pmbl.

<sup>55</sup> Alec Stone Sweet, *The Juridical Coup d’État and the Problem of Authority*, 8 GERMAN L.J. 915, 923 (2007) (referencing the 1971 decision).

the ensemble of norms to which judges must refer in the exercise of constitutional review.<sup>56</sup>

Following the 1971 decision, one scholar argued:

The Council has thus interpreted its own authority under art. 61 in the broadest sense and has confirmed the demise of the next to last vestige of parliamentary sovereignty in French constitutional law. The last vestige, which appears to be safe from attack for the time being, is the immunity of legislation from substantive constitutional challenge after promulgation.<sup>57</sup>

With stunning, recent developments in the French legal and constitutional tradition, however, this “last vestige” may be on its last legs.<sup>58</sup>

## II. DISCUSSION

France has historically oscillated between opening and closing its borders.<sup>59</sup> Since the mid-1970s, however, immigration laws have tightened, leading to an increase in illegal immigration.<sup>60</sup> In 1974, for the first time, official discourse referred to the “control of the migratory channels,” leading to a generalized closing of the borders, severe controls on entry, and increased “policing” of clandestine immigrants already in the country.<sup>61</sup> When François Mitterrand and the Socialist Party came to power in 1981, immigrants were granted a brief respite: among other measures, deportations that were in progress were suspended.<sup>62</sup> This change arguably signified recognition of the immigrant population as a legitimate, accepted component of French society.<sup>63</sup>

Nevertheless, in December 1984, the movement towards restrictive immigration measures resumed when the government issued a decree

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<sup>56</sup> Federico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, 9 GERMAN L.J. 1297, 1303 (2008). *But see* Beardsley, *supra* note 37, at 442 (“An expression of the ‘solemn attachment’ of the people to certain ideals and principles is not a promising formula with which to impose upon a legislature a positive obligation to respect those ideals and principles.”).

<sup>57</sup> Beardsley, *supra* note 37, at 442.

<sup>58</sup> *See id.*; discussion *infra* Part III.

<sup>59</sup> Catherine Wiltol de Wenden, *Ouverture et fermeture de la France aux étrangers: Un siècle d'évolution* [*The Opening and Closing of France to Foreigners: A Century of Evolution*], 73 VINGTIÈME SIÈCLE 27, 27 (2002).

<sup>60</sup> Smith, *supra* note 24, at 1110.

<sup>61</sup> Danièle Lochak, *Les politiques de l'immigration au prisme de la législation sur les étrangers* [*The Politics of Immigration Through the Prism of Legislation About Foreigners*], in LES LOIS DE L'INHOSPITALITÉ, *supra* note 26, at 29, 33, 34 (author's translation).

<sup>62</sup> Lochak, *supra* note 61, at 35.

<sup>63</sup> *Id.* at 37.

prohibiting spouses and children from regularizing their status on French soil.<sup>64</sup> The most critical and sweeping reforms came in March 1986 and then in 1993, when the Interior Minister, Charles Pasqua, “put forth the goal of ‘zero immigration,’ later qualified to mean zero illegal immigration.”<sup>65</sup> These “Pasqua Laws” featured “[tougher] visa requirements, a reduction in the number of visas issued, an expansion of police enforcement powers, an extension of the permitted detention period, and a narrowing of the administrative review scheme.”<sup>66</sup> A harbinger of the severe laws to arrive in 2003 and 2006, the Pasqua Laws authorized restrictive measures designed to “halt the influx of immigrants—particularly workers from North Africa.”<sup>67</sup> Furthermore, the Pasqua Laws placed thousands of immigrant families in a poignant legal dilemma: undocumented parents of French citizen children could not legally be expelled, but were prevented by these laws from receiving residency papers.<sup>68</sup> Following the 1993 laws, restrictive immigrant legislation intensified (with only a brief reprieve in 1998), and the number of *sans-papiers* grew steadily.<sup>69</sup>

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<sup>64</sup> *Id.* at 38. Lochak notes, however, that this law actually had the opposite effect of the intended restrictive purpose; because it did not prevent families from joining the one worker established in France, they arrived anyway and simply remained in precarious legal status. *Id.*

<sup>65</sup> Smith, *supra* note 24, at 1118–19; Kimberly Hamilton, Patrick Simon & Clara Veniard, *The Challenge of French Diversity*, MIGRATION INFO. SOURCE, Nov. 2004, <http://www.migrationinformation.org/Profiles/display.cfm?id=266>.

<sup>66</sup> Pierre Legrand, *Bad U . . . ?*, 29 CARDOZO L. REV. 2153, 2153–54 (2008); *see* Law No. 93-1027 of Aug. 24, 1993, J.O., Aug. 29, 1993, p. 12196 (concerning the regulation of immigration and the conditions of entry, of reception, and of residence for foreigners in France); Law No. 93-1417 of Dec. 30, 1993, J.O., Jan. 1, 1994, p. 11 (formulating various provisions concerning the regulation of immigration and modifying the Civil Code).

<sup>67</sup> Rosemarie Scullion, *Viscious Circles: Immigration and National Identity in Twentieth-Century France*, 24 SUBSTANCE (SPECIAL ISSUE) 30, 30 (1995). “Pasqua’s sweeping policy initiative . . . places French society at considerable odds with its venerable post-revolutionary tradition of welcoming foreigners in need.” *Id.*; *see also* Lochak, *supra* note 61, at 43 (arguing that the 1993 Pasqua law reformed the extant law on nationality in a clearly restrictive fashion).

<sup>68</sup> Christian E. O’Connell, *Plight of France’s Sans-Papiers Gives a Face to Struggle*, 4 HUM. RTS. BRIEF (1996), *available at* <http://www.american.edu/hrbrief/04/1oconnell.cfm>. *But see* Kolstee, *supra* note 9, at 327–28 (arguing that despite this difficulty the French government was also able to resort to a number of expulsions, deporting nearly 20,000 illegal immigrants between 1995 and 1996).

<sup>69</sup> HARGREAVES, MULTI-ETHNIC FRANCE, *supra* note 4, at 161; Lochak, *supra* note 61, at 44–45 (identifying an increase in *sans-papiers*’ social and political advocacy movements); *see* Smith, *supra* note 24, at 1118–21.

### A. The 2003 Law

On November 26, 2003, the National Assembly passed a set of laws proposed by then-Interior Minister, Nicolas Sarkozy, providing even more stringent regulations to combat illegal immigration and regulate the admission and stay of foreigners.<sup>70</sup> In addition to stricter requirements with respect to the waiting period before an immigrant is allowed to apply for residency papers, the law stipulates that initial receipt of residency papers is contingent upon “integration” into French society.<sup>71</sup>

The 2003 law focusing on integration works in tandem with the French Civil Code provision on immigration and nationality, which grants the government broad discretion to determine whether an immigrant’s assimilation is sufficient.<sup>72</sup> The overall effect was an assimilation requirement nearly impossible for *maghrèbin* immigrants in particular to satisfy, due in part to an unfortunate history of racism.<sup>73</sup> France’s receptiveness to foreigners has followed a cycle of hostility, “periodically giv[ing] way to widespread and aggressive xenophobia,” directed in more recent years against Arab immigrants.<sup>74</sup>

### B. The 2006 Law: Selective Immigration

In March 2006, President Sarkozy proposed an immigration bill to the French National Assembly based on a principle of “*immigration choisie*,” or “selective immigration.”<sup>75</sup> Among other provisions, his proposal demanded that newcomers learn French language and culture, encumbered immigrant families’ ability to settle in France, restricted residency permits, and ended the automatic right of illegal immigrants to

<sup>70</sup> Law No. 2003-1119 of Nov. 26, 2003, J.O., Nov. 27, 2003, p. 20136; Kolstee, *supra* note 9, at 329.

<sup>71</sup> Law No. 2003-1119 of Nov. 26, 2003, art. 8.

<sup>72</sup> C. CIV. arts. 21-4, 21-24.

<sup>73</sup> See WILLIAM ROGERS BRUBAKER, *Introduction to IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA* 1, 8 (William Rogers Brubaker ed., 1989); Tom Hundley, *Muslim Immigrants Find France Far from Welcoming*, HOUS. CHRON., Nov. 23, 2003, at A28; see also BEN JELLOUN, *supra* note 4, at 51–55 (arguing that modern racism against the *maghrèbins* is rooted in the brutal oppression this community faced during the period of decolonization in the early 1960s). Some have additionally explained this restrictive legislation by arguing that *maghrèbin* immigrants are more visible and create “a better scapegoat for social ills.” Smith, *supra* note 24, at 1127–29.

<sup>74</sup> Scullion, *supra* note 67, at 30–31.

<sup>75</sup> Projet de loi relatif à l’immigration et à l’intégration [Bill Relating to Immigration and Integration], 2006, Bill [2986], available at <http://www.assemblee-nationale.fr/12/projets/pl2986.asp>.

receive residency papers after living in France for ten years.<sup>76</sup> Migrants must now sign an “integration contract,” which binds them to observe the “French way of life.”<sup>77</sup> The law also created a new type of residency permit, a “skills and talents permit” specifically for “foreigners with qualifications that are judged to be important for the French economy.”<sup>78</sup> Citing the 2005 riots, President Sarkozy insisted that France needed to be sure it was attracting immigrants who want to integrate.<sup>79</sup> “Human-rights groups, labor unions, leftist politicians and Muslim and Christian leaders in France” and abroad harshly attacked the bill: Marie-George Buffet, National Secretary of the French Communist Party called it a “shameful law,” while one member of the Socialist Party argued it is “dangerous, useless, and inefficient.”<sup>80</sup> President Sarkozy, seemingly unfazed by this criticism, unabashedly linked the suburban riots to immigration and the difficulty of integrating second-generation children in particular. He further provoked the ire of critics by arguing that France had effectively created a system that lets in only those who have neither jobs nor any useful skills.<sup>81</sup> Rushed into force, President Sarkozy’s bill became law on July 24, 2006.<sup>82</sup>

One predicted consequence was the creation of an even larger group of *sans-papiers* in a precarious and ill-defined “twilight” existence exacerbated by the new law.<sup>83</sup> The possibilities for *sans-papiers* to regularize their status and that of their families dwindled, as they were no longer able to gain citizenship after ten years of residence, hard-pressed to bring their families to join them in France, and competing with the preferred “selected” immigrants for residency permits (and the accompany-

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<sup>76</sup> *French Immigration Bill Approved*, BBC NEWS, June 17, 2006, <http://news.bbc.co.uk/2/hi/europe/5089744.stm>; Emma Jane Kirby, *France Reviews Immigration Rules*, BBC NEWS, May 2, 2006, [http://news.bbc.co.uk/1/hi/newsid\\_4964000/4964472.stm](http://news.bbc.co.uk/1/hi/newsid_4964000/4964472.stm).

<sup>77</sup> Agence France Presse, *France Approves Immigration Law That Favors Skilled Workers*, N.Y. TIMES, July 1, 2006, at A5.

<sup>78</sup> *Id.*

<sup>79</sup> Associated Press, *French Crackdown on Illegals, Sarkozy’s Message: Assimilate or Leave*, COM. APPEAL (Tenn.), Sept. 1, 2006, at A14.

<sup>80</sup> John Ward Anderson, *French Debate Immigration Limits; Assembly Approves Strict New Rules*, SEATTLE TIMES, May 18, 2006, at A13; Patrick Roger & Laetitia Van Eeckhout, *Le Parti socialiste demande le retrait du projet de loi sur “l’immigration choisie”* [The Socialist Party Demands the Retraction of the Bill on “Selective Immigration”], LE MONDE (Paris), May 3, 2006, at 13 (author’s translation in text).

<sup>81</sup> *France and Immigration: Let the Skilled Come*, ECONOMIST, May 6, 2006, at 28.

<sup>82</sup> Law No. 2006-911 of July 24, 2006, J.O., July 25, 2006, p. 11047.

<sup>83</sup> Sandford, *supra* note 17; Interview with Patrick Weil, Director of Research at the Centre National de la Recherche Scientifique, (Mar. 2, 2006), available at <http://www.ldh-toulon.net/spip.php?article1175>.

ing health and welfare benefits).<sup>84</sup> Nor could the growing group of *sans-papiers* continue to remain illegally, because the month prior to the official passage of the law, President Sarkozy announced plans to “expel anyone found to be living in France without official papers.”<sup>85</sup> He then instructed government officials to give residency papers to “any families well ‘integrated’ in French life, especially those with children in school.”<sup>86</sup> By September 2006, the government had received 30,000 applications, only 6,924 of which the government approved.<sup>87</sup> Estimating that there were about 400,000 illegal immigrants in France at the time, 50,000 of whom were children in school, a grassroots network of teachers and French families began hiding and protecting immigrants and their children from deportation.<sup>88</sup> Aiding these immigrants is a crime in France, potentially punishable by fine and imprisonment.<sup>89</sup>

In September 2006, shortly after President Sarkozy’s immigration law went into effect, many *sans-papiers*, including children, found themselves homeless and in danger of deportation.<sup>90</sup> Mass evictions, carried out by riot police storming buildings abandoned save for immigrants squatting there, became the symbol of the tougher immigration policy.<sup>91</sup>

### C. *The Balladur Commission and Proposition 74*

In July 2007, President Sarkozy issued a decree creating a commission, chaired by former Prime Minister Edouard Balladur, to modernize and reform the institutions of the Fifth Republic.<sup>92</sup> The Balladur Commission was further charged with studying the Constitution and accompanying texts and formulating and proposing any modifications it deemed necessary.<sup>93</sup>

In Proposition 74 of its report, the Commission recommended amending Article 61 of the Constitution so that individuals subject to trial would be able to argue that the law, as applied in their cases, does

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<sup>84</sup> See *French Immigration Bill Approved*, *supra* note 76.

<sup>85</sup> Lichfield, *supra* note 19.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Wyatt, *supra* note 19.

<sup>89</sup> *Id.*; see also GISTI, *supra* note 16, at 3 (explaining the punishments one may receive in France for aiding illegal immigrants).

<sup>90</sup> See Angela Doland, *Eviction Is a Symbol of France’s Immigration Woes*, DESERET MORNING NEWS (Utah), Sept. 2, 2006, at A13.

<sup>91</sup> *Id.*

<sup>92</sup> Decree No. 2007-1108 of July 18, 2007, J.O., July 19, 2007, p. 12158.

<sup>93</sup> *Id.*; Letter from President Nicolas Sarkozy to Former Prime-Minister Edouard Balladur, (July 18, 2007), available at [http://www.comite-constitutionnel.fr/decret\\_et\\_lettre/?intId=2](http://www.comite-constitutionnel.fr/decret_et_lettre/?intId=2).

not conform to “the fundamental rights and liberties recognized by the Constitution.”<sup>94</sup> Moreover, Article 62 would grant the Council power to abrogate the law in question, which would account for laws that had *already* been promulgated.<sup>95</sup> Therefore, Proposition 74, if adopted, would provide a potential basis for individuals to contest laws in force that violate their fundamental, constitutional rights.<sup>96</sup> On July 23, 2008, an amended version of Proposition 74 became the new Article 61-1 of the French Constitution.<sup>97</sup>

### III. ANALYSIS

The *banlieues* riots of 2005 showed that national unity with respect to immigrants in France is threatened by “government failures to provide effective remedies to long-standing problems of socio-economic inequality and racial discrimination.”<sup>98</sup> The French tradition of granting certain, basic rights enshrined in the Declaration of the Rights of Man and incorporated into the Constitution extends both to citizens and to all human beings.<sup>99</sup> The restrictive immigration laws of 2003 and 2006 and their predecessors, in contrast, do not reflect this tradition. The critical question is whether *sans-papiers* can challenge the constitutionality of promulgated legislation on the grounds that it contravenes the fundamental rights and liberties guaranteed to all people under the Republic’s founding documents.<sup>100</sup>

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<sup>94</sup> COMITÉ DE RÉFLEXION ET DE PROPOSITION SUR LA MODERNISATION ET LE RÉÉQUILIBRAGE DES INSTITUTIONS DE LA VÈME RÉPUBLIQUE [REFLECTION & PROPOSAL COMM. REGARDING THE MODERNIZATION & THE REBALANCING OF THE INSTITS. OF THE FIFTH REPUBLIC], UNE VÈME RÉPUBLIQUE PLUS DÉMOCRATIQUE [A MORE DEMOCRATIC FIFTH REPUBLIC] 90 (2007), available at [http://www.comite-constitutionnel.fr/le\\_rapport/index.php](http://www.comite-constitutionnel.fr/le_rapport/index.php).

<sup>95</sup> *Id.*

<sup>96</sup> *See id.* at 91 (delineating Proposition No. 74, which provided for the proposed changes to Article 61 codified in proposed Article 61-1); *see also La Réforme constitutionnelle à petits pas [Constitutional Reform in Small Steps]*, LE MONDE (Paris), Apr. 24, 2008, at 1 (noting that if the proposed changes to the 1958 Constitution are adopted, citizens at least would be able to defend their fundamental rights before the Constitutional Council).

<sup>97</sup> Constitutional Law No. 2008-724 of July 23, 2008, art. 29, J.O., July 24, 2008, p. 11890.

<sup>98</sup> HARGREAVES, MULTI-ETHNIC FRANCE, *supra* note 4, at 164.

<sup>99</sup> DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] (1789); HARGREAVES, MULTI-ETHNIC FRANCE, *supra* note 4, at 149; JACK MAHONEY, THE CHALLENGE OF HUMAN RIGHTS: ORIGIN, DEVELOPMENT AND SIGNIFICANCE 25 (2007).

<sup>100</sup> *See* CC decision no. 71-44DC, July 16, 1971, J.O. 7114.

### A. Constitutional Reform

On July 23, 2008, President Sarkozy promulgated a constitutional revision law, the purpose of which was to “modernize[] the institutions of the Fifth Republic.”<sup>101</sup> Particularly notable among the law’s provisions is the addition of Article 61-1, which grants the Constitutional Council a striking new power: the ability to exercise constitutional review of laws that have already been promulgated.<sup>102</sup> The new Article 61-1 reads:

If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d’État or by the Cour de Cassation to the Constitutional Council, within a determined period. An Institutional Act shall determine the conditions for the application of the present article.<sup>103</sup>

A modified Article 62, which accompanies this law, provides that provisions declared unconstitutional based on Article 61-1 will be abrogated.<sup>104</sup> Article 62 endows the Constitutional Council with the flexibility to determine both the date from which repeal will be effective as well as the “conditions and the limits according to which the effects produced by the provision shall be liable to challenge.”<sup>105</sup> A version of the “institutional act” required by Article 61-1 was promulgated on December 10, 2009, which explained particular aspects and mechanics of this provision.<sup>106</sup>

This addition to French law and to the French legal tradition may be a new and powerful tool for *sans-papiers* to challenge laws that ignore the French Republic’s fundamental principles.

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<sup>101</sup> Constitutional Law No. 2008-724 of July 23, 2008, J.O., July 24, 2008, p. 11890.

<sup>102</sup> *Id.* art. 29; see 1958 CONST. art. 61-1, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/page-d-accueil.1.html> (follow “La Constitution” hyperlink; then follow “version anglaise” hyperlink).

<sup>103</sup> 1958 CONST. art. 61-1, translated in Conseil Constitutionnel, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/page-d-accueil.1.html> (follow “La Constitution” hyperlink; then follow “version anglaise” hyperlink) (last visited Mar. 23, 2010). The Conseil d’État is the administrative court of last resort. See Le Conseil d’État, <http://www.conseil-etat.fr/cde/> (last visited Mar. 23, 2010). Similarly, the Cour de Cassation is the judicial court of last resort. See Cour de Cassation, <http://www.courdecassation.fr/> (last visited Mar. 23, 2010).

<sup>104</sup> 1958 CONST. art. 62, modified by Constitutional Law No. 2008-724 of July 23, 2008, art. 30.

<sup>105</sup> *Id.*

<sup>106</sup> Institutional Law No. 2009-1523 of Dec. 10, 2009, J.O., Dec. 11, 2009, p. 21379.

### B. *Inalienable and Sacred Rights*

The Preamble to the 1946 Constitution begins: “In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights.”<sup>107</sup>

When the Council incorporated the 1789 Declaration, the Preamble to the 1946 Constitution, and the “fundamental principles recognized by the law of the Republic” into the “*bloc de constitutionnalité*,”<sup>108</sup> it laid the foundation for constitutional review to be used as a tool to “enshrine substantive rights.”<sup>109</sup> In fact, in 1973, the Council found that a portion of a finance law was not in conformity with the Constitution because it was contrary to the “principle of equality before the law contained in the Declaration of the Rights of Man of 1789 and solemnly reaffirmed by the Preamble of the Constitution.”<sup>110</sup> Although some constitutional provisions do refer to “citizens” specifically, there are “constitutional values [that] clearly do apply to foreigners”<sup>111</sup> and indeed “inalienably to all human beings.”<sup>112</sup> The two groups encompassed by the Declaration of the Rights of Man *and* of the Citizen (“man” and “citizen”) are not “coterminous,”<sup>113</sup> yet *sans-papiers* living in France now struggle to benefit from even the most basic of human rights to which they are entitled.<sup>114</sup>

Since incorporating fundamental documents and principles into the “*bloc de constitutionnalité*” in 1971, the Council has referred to these documents and principles in jurisprudence relating to immigration and nationality laws. The Council has considered, for example, whether provisions of an immigration law resulted in “arbitrary internment”

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<sup>107</sup> 1946 CONST. pmbl., translated in Conseil Constitutionnel, Preamble to the Constitution of 27 October 1946, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution.25740.html> (follow “Preamble to the Constitution of 27 October 1946” hyperlink).

<sup>108</sup> See CC decision no. 71-44DC; discussion *infra* Part I.C.

<sup>109</sup> STONE, *supra* note 39, at 69.

<sup>110</sup> CC decision no. 73-51DC, para. 2, Dec. 28, 1973, J.O. 14004 (author’s translation).

<sup>111</sup> JOHN BELL, FRENCH CONSTITUTIONAL LAW 203 (1992).

<sup>112</sup> HARGREAVES, IMMIGRATION, ‘RACE’ AND ETHNICITY, *supra* note 1, at 160.

<sup>113</sup> *Id.*

<sup>114</sup> See BELL, *supra* note 111, at 203 (“There is thus a distinction between *human* rights and the rights of the *citizen*. Only citizens have equal rights to settle in France; to vote or to accede to public office. On the other hand, everyone has an equal right to human rights.”). See generally GISTI, *supra* note 16 (explaining the rights that *sans-papiers* do not have and providing legal ways in which *sans-papiers* may nonetheless be able to gain some access to the fundamental protections and assistance provided to citizens).

contrary to the 1789 Declaration and Article 66 of the 1958 Constitution,<sup>115</sup> recognizing that the principle of “individual liberty” applies to noncitizens.<sup>116</sup> On a separate occasion, the Council found that language from a nationality law did not conform to Article 8 of the 1789 Declaration.<sup>117</sup> In 1993, the Council explicitly considered whether provisions of a Pasqua-era law were in conformity with the 1789 Declaration and the 1946 Preamble.<sup>118</sup> The law at issue was later promulgated so as to reflect the Council’s decision.<sup>119</sup> To be sure, the Council recognized that no constitutional principle or rule guaranteed “foreigners” general or absolute rights to access or to remain on “national territory,” and that “foreigners find themselves in a different situation than nationals” in the legal arena; nonetheless, the Council noted that the legislature must “respect the liberties and fundamental rights of constitutional value recognized for all who reside on the territory of the Republic.”<sup>120</sup> The Council then explained that these rights and liberties include:

individual liberty and safety, notably the liberty to come and go, the liberty of marriage, the right to lead a normal family life; that in addition foreigners benefit from rights to social protection, from the time that they reside in a stable and regular manner on French territory; that they must benefit from being able to seek recourse to assure the guarantee of these rights and liberties.<sup>121</sup>

Instead, *sans-papiers* remain “victims of arbitrary treatment by the authorities, employers and landlords;”<sup>122</sup> subject to arbitrary detention;<sup>123</sup> restricted from housing, employment, and welfare benefits;<sup>124</sup> and potentially deportable, along with their children, if they do not sufficiently assimilate into French society.<sup>125</sup> This continuous refusal to

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<sup>115</sup> CC decision no. 79-109DC, paras. 1–2, Jan. 11, 1980, J.O. 84 (author’s translation).

<sup>116</sup> *Id.* para. 4.

<sup>117</sup> CC decision no. 93-321DC, para. 15, July 23, 1993, J.O. 10391.

<sup>118</sup> CC decision no. 93-325DC, Aug. 18, 1993, J.O. 11722 (concerning a law relating to the regulation of immigration and the conditions of entry, of reception, and of residence for foreigners in France).

<sup>119</sup> Law No. 93-1027 of Aug. 24, 1993, J.O., Aug. 29, 1993, p. 12196.

<sup>120</sup> CC decision no. 93-325DC, paras. 2–3 (author’s translation).

<sup>121</sup> *Id.* para. 3 (author’s translation).

<sup>122</sup> HAYTER, *supra* note 30, at 143.

<sup>123</sup> See Crampton, *supra* note 11.

<sup>124</sup> Sandford, *supra* note 17.

<sup>125</sup> See, e.g., C. civ. arts. 21-4, 21-24, 21-25 (assimilation requirements); Lichfield, *supra* note 19.

recognize fundamental rights and dignities of *sans-papiers*, if not remedied, may result in “substantial degradation of the liberties of all.”<sup>126</sup>

After the Council took the initial, prescient step of incorporating fundamental principles and documents into the “*bloc de constitutionnalité*,” the then-president of the Council explained that, by doing so, “[the Council] could thus create a veritable judicial bastion for the defense of the rights of citizens.”<sup>127</sup> Perhaps this same “judicial bastion”<sup>128</sup> can now be summoned to defend the rights of *sans-papiers* as a vehicle for guaranteeing their basic rights and the recourse necessary for them to seek protection of these rights, which the Republic intended to be available for all people—not just for citizens.<sup>129</sup> Over a decade ago, scholars called for the abrogation of restrictive legislation targeting *sans-papiers*, finding that legislation to be “indefensible, as much from the point of view of efficiency as from that of human rights.”<sup>130</sup> The more recent laws of 2003 and 2006 have diminished the legal position of *sans-papiers* and expanded the “right-less” zone at the heart of French society, at the price of fundamental rights and dignities.<sup>131</sup> The new and unprecedented power granted to the Council by Articles 61-1 and 62 presents the means by which the Council could abrogate these laws,<sup>132</sup> moving from protests and riots to resistance based on constitutional review.<sup>133</sup> Equipped with newfound authority to invalidate laws *after* promulgation, the Council can now benefit from seeing the application of laws and the impact such laws have on *sans-papiers* before deciding whether these laws conform to the Constitution.<sup>134</sup>

Granted, even if the Council were eventually to abrogate the 2003 and 2006 laws, *sans-papiers* would still face a daunting struggle to regularize their status. Nevertheless, abrogating these laws would be a critical and forceful step toward ending the repressive cycle, stabilizing the

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<sup>126</sup> Terray, *supra* note 34, at 260 (author’s translation).

<sup>127</sup> STONE, *supra* note 39, at 68 (quoting Gaston Palewski, *Proces leca contre Palewski et “la Revue”: Le jugement*, REVUE DES DEUX MONDES, 367, 372 (1979)).

<sup>128</sup> *Id.*

<sup>129</sup> See CC decision no. 93-325DC, para. 3; HARGREAVES, IMMIGRATION, ‘RACE’ AND ETHNICITY, *supra* note 1, at 160 (“The Rights of Man proclaimed in August 1789 was held to be valid not only for every individual in France, but for the whole of humanity.”).

<sup>130</sup> DIDIER FASSIN ET. AL., *Conclusion: Pour une politique de l’hospitalité [Conclusion: For a Policy of Hospitality]*, in LES LOIS DE L’INHOSPITALITÉ, *supra* note 26, at 263, 278 (author’s translation).

<sup>131</sup> Terray, *supra* note 34, at 258 (author’s translation).

<sup>132</sup> 1958 CONST. arts. 61-1, 62.

<sup>133</sup> Terray, *supra* note 34, at 260–61 (“We must ask ourselves if the moment has not come to move from protest to resistance.”) (author’s translation).

<sup>134</sup> See 1958 CONST. arts. 61-1, 62.

*sans-papiers*' situation, and ensuring that all people in France benefit from the fundamental rights they are guaranteed.<sup>135</sup>

#### CONCLUSION

France's historic struggle to integrate immigrants into French society erupted in violence in 2005. Repressive legislation promulgated notably in 2003 and 2006 has had an increasing impact on *sans-papiers*, and many now face deportation.

The Balladur Commission's recent proposal that the country adopt some mechanism for the Constitutional Council to declare promulgated laws unconstitutional in order to protect individual liberties provided cause for hope. When the Commission's proposal was adopted and included in the most recent constitutional revision, this hope moved exponentially closer to becoming reality. Depending on how this new law is applied and construed, *sans-papiers* may be able to challenge repressive immigration laws as inconsistent with the fundamental rights and liberties guaranteed by the founding documents of the French Republic. At a minimum, this recent evolution of constitutional review in France reveals an increased recognition that legislation, even after promulgation, may not be in conformity with fundamental rights and, accordingly, should be repealed.

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<sup>135</sup> See GISTI, *supra* note 16, at 1 (asserting that promoting the fundamental rights of *sans-papiers* stems from an obligation of citizens to act in favor of equal treatment as between French people and foreigners as well as to promote the rule of law more generally); see also Terray, *supra* note 34, at 249 (arguing that the *sans-papiers*' struggle to gain basic rights should be of concern to French citizens as the plight of the *sans-papiers* is inconsistent with the continued existence of a state founded on law and human dignity).

