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*Scientific approximation and ethno-racial categories in French Jurisprudence:
an ambivalent situation*

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Positive French law and, more deeply, French legal culture seem to follow a model that is diametrically opposed to the one shaping American law. Referring to universalistic and egalitarian values, related to scientific discourses denying the existence of racial characteristics (notably elaborated at the end of the 50's at UNESCO headquarters in Paris¹), French law clearly demonstrates that it is hostile to the use of ethnic and racial classifications. French lawyers, particularly constitutional-law specialists, have repeatedly debated expunging all reference to "race" from legal texts, even when the word is used to combat racism and discrimination², and this topic appears from time to time on the political agenda (for example during the last presidential campaign and in several bills drafted to remove the word "race"³). From this legal angle, France appears to be a color-blind country. Nevertheless, doubts may be raised about the robustness of this supposed "counter-model." Does this color-blind basic premise really systematically apply in judicial proceedings? And do all the safeguards really protect France from an awkward use of ethnic or racial distinctions? These questions have to be asked taking into account two contextual elements. Firstly, ethno-racial categories are still used in medical and scientific fields, with recent developments in genomics and pharmacogenomics. Secondly, some "scientific" belief still pervades French culture (in Descartes and Pasteur Country). How this context is affecting the field of law enforcement?

To assess the impact of such phenomena on judicial proceedings, the most relevant material to study may not be court rulings punishing racist crimes or discriminatory practices. Paradoxically, it may be also very enlightening to analyze court orders where the terms "race" or "ethnicity" appear marginally, or implicitly, without being at the core of the debate. Indeed, certain court rulings mention ethnic or racial origins incidentally to disputes that center on other questions. Most of the time, "race", "ethnic origin", or "apparent physical characteristics" are then referred to in the context of forensic (scientific or medical) expertise. To date, we have to remember that in the French judicial system, experts work for the judge (and not for the claimant

¹ *Le racisme devant la science*, [1956] UNESCO / Gallimard, 1960.

² See, in particular, *Sans distinction de race*, Numéro dédié de la revue Mots. Les langages du politique, Année 1992, Volume 33, n° 1; P. Mbongo, "Un antiracisme scripturaire: la suppression du mot "race" de la législation," *Recueil Dalloz* 2013 p. 1288; N. Malherbe, "Quelles seraient les conséquences juridiques de la suppression du mot "race" de notre Constitution?," *Recueil Dalloz* 2013, p. 1012

³ Proposition de loi constitutionnelle n° 559 visant à supprimer le mot "race" de l'article 1er de la Constitution, 2007; Assemblée nationale, proposition de loi (n° 218) tendant à la suppression du mot "race" de notre législation, 16 mai 2013. (Constitutional law proposal n° 559 aimed at banning the word "race" from Article 1 of the Constitution, 2007; Assemblée nationale, Bill (n° 218) suggesting a ban on the word "race" from our legislation, 16 May 2013.)

or the defender) who appoints them. And one can find that, through the expertise, ethno-racial origins or categories may be used without being stigmatized. Some recent cases, both in civil and criminal matters, attest to this fact.

One first example, in civil matter, concerns the liability of a drug manufacturer. A person who developed multiple sclerosis after being vaccinated decided to sue the laboratory in order to establish its liability. Such a claim was not new, but appears to be one between several others very similar. Nevertheless, in a ruling dated 10 July 2013, the Court of Cassation – the highest jurisdiction in France for civil and criminal matters – recognized for the first time that the ethnic origins of the claimant could be taken into consideration. Here, the ethnicity became a piece of serious, precise, and corroborative circumstantial evidence enabling to establish proof of a causal link between a medical product – the vaccine – and damage suffered.⁴ In doing so, the Court broke ground for differential treatment of victims depending on the ethnic or racial category to which they belong. And the color-blind basic principle seems to be forgotten. At the same time, the Court remained silent about the controversy surrounding the role of ethnic background in a disease of unknown aetiology.

In other rulings, a person's racial background was discussed in relation to the results of bone X-rays carried out in order to establish whether that person was a minor, as he claimed.⁵ Illegal aliens on French territory attempted to avoid deportation by claiming protected-minor status. However, authorities suspected the birth dates on identity documents might have been falsified and, to detect such fraud, had carried out clinical examinations and bone X-rays. The purpose was to establish an approximate age by comparing the suspect's bone measurements with a table of average measurements at various stages of child development. As part of the trial proceedings, the judges had to decide whether or not such table was a reliable and acceptable evidence. On one hand, some experts testified that the bone-development tables to which the police referred had been established on the basis of data collected from "North American 'Caucasian' populations, which therefore failed to account for development and particularities specific to African populations"⁶. And, in 2005, an opinion published by the Comité Consultatif National d'Ethique (the National Consultative Ethics Committee) stated that "such reference tables contain the risk of major errors in relation to non-Caucasian children from Africa or Asia, whose bones may develop at entirely different ages in relation to North American and British averages."⁷ On the other hand, a 2007 report from the Académie Nationale de Médecine concluded "the simplest and most reliable method for estimating bone age is to compare X-rays

⁴Cour de cassation, 1^{ère} chambre civile, 10 juillet 2013, pourvoi n° 12-21314.

⁵ See, in particular, Cour d'appel de Rennes, 6ème chambre b, 28 octobre 2014, quatre affaires: RG n° 13/07652; n° 13/08852; n° 14/01051 et n° 13/08052; Cour d'appel Metz, Ordonnance 24 Mars 2014, n° 14/00154; Cour d'appel de Limoges, chambre spéciale des mineurs, Audience publique du lundi 13 mai 2013, deux affaires, RG n° 12/00088 et n° 13/00057; Cour d'appel de Limoges, chambre spéciale des mineurs, 7 octobre 2013, RG n° 13/00043.

⁶Cour d'appel de Limoges, 13 mai 2013, cited above.

⁷ Comité Consultatif National d'Ethique pour les Sciences de la Vie et de la Santé (CCNE), Avis n° 88 Sur les méthodes de détermination de l'âge à des fins juridiques

of the left wrist and hand to the Greulich & Pyle Atlas, the reference most commonly used. Note that, to date, no racial difference has been demonstrated.”⁸In most of the court-orders, the judges chose to follow the latter opinion and admitted as evidence the comparison to bone-growth tables in addition to clinical examinations. In all these cases, they seem to follow a half pragmatic and half scientific reasoning. Their decisions neglected controversies relative to the scientific consistency of the tables and medical expertise seem to have neutralized the socio-political implications of ethno-racial categories. By ruling in this manner, judges strengthen the fallacious idea that medical and scientific interpretation of racial categories is not open to question. Again, that brings us to the conclusion that even in the French legal order ethno-racial distinctions are not absent. Consequently, one may say that there is no pure “French alternative model.”

Examples may also be found outside the domain of civil law. A recent criminal case deserves plenty attention. The issue is DNA phenotyping. Certain laboratories claim to be capable of producing a facial composite sketch of a suspect on the basis of a DNA sample. Once again, France might seem to be exempt from any risk of abuse. For example, in 2007-08, an attempt to implement the practice in France raised a furor in the press. Evoking the “Test d’Orientation Géo-Génétique” (TOGG, Geo-Genetic Orientation Test)⁹, journalists spoke out against an “ethnic database” and possible abuse of the “genetic composite portrait” in the hands of the police. As it is often done, they pointed to British and American law enforcement practices as examples to be shunned.¹⁰ When French judges were interviewed, they expressed their “alarm at such an inadmissible program.”¹¹ In June 2011, the French justice ministry took the precaution of circulating a memorandum to the State’s Prosecutors, judges, and officers of the crime-investigating police, enjoining them to turn down proposals for anatomical profiling from phenotyping laboratories.¹² Signed by the head of the Criminal Matters and Pardons Division, it read: “My attention has been drawn to the fact that in criminal investigations, new methods for determining a person’s physical features or ethnic or geographic origin, based on the results of DNA phenotyping of biological material collected at the scene of the crime, have been offered to certain investigating police or judges. The method was referred for deliberation to the commission that approves the persons qualified to carry out identification assignments using DNA phenotyping within the framework of legal procedures. The commission has concluded that such methods must be considered with the utmost caution. Being in full agreement with this position, I

⁸ Académie nationale de Médecine, Rapport 07-01 Sur la fiabilité des examens médicaux visant à déterminer l’âge à des fins judiciaires et la possibilité d’amélioration en la matière pour les mineurs étrangers isolés.

⁹ According to its designers, TOGG is theoretically capable of determining, with a reliability rate of 95 to 99.99%, the “ancestral” or “geographic source” of a DNA sample; i.e., if the source is “Caucasian,” “Sub-Saharan Africa,” “Eastern Asian,” “Mediterranean African,” or “Indian” in type.

¹⁰ C. Louis, “Le nouvel arsenal de la police scientifique,” 11/11/2008, *Le Figaro*; G. Charles, “Les apprentis sorciers du fichage ethnique,” 28/03/2007, *L’Express*.

¹¹ F. Arfi, “Des juges contournent la loi pour utiliser des tests ADN “ethniques”,” *Mediapart.fr*, et “Un juge dit son “effarement” devant un programme “inadmissible”,” *Mediapart.fr*: <http://www.mediapart.fr/journal/france/280508/un-juge-dit-son-effarement-devant-un-programme-inadmissible>

¹² CRIM-PJ N° 08-28.H5 du 29 juin 2011: http://www.syndicatmagistrature.org/IMG/article_PDF/JSM/Circulaire%20ADN.pdf

thank you for your cooperation with my request that you ensure that such proposals be refused. To me, they present prohibitive legal and scientific disadvantages.” The question seemed to be settled, once and for all. However, on 25 June 2014, the Criminal Division of the Court of Cassation handed down an especially revealing decision. The point was to legitimate or refuse the possibility that a French investigating judge could order an expertise to be carried out, aimed at obtaining information describing a suspect’s physical appearance using traces found at a crime scene. In this case, the victim of a rape was unable to provide the police with any description of her attacker. Investigators had found biological material, and compared the DNA to profiles archived in a national DNA database, the Fichier National Automatisé des Empreintes Génétiques (FNAEG) made up of samples taken from persons suspected in connection with crimes.¹³ However, the comparison led nowhere. In the absence of an eyewitness, clues about the identity of the rapist were severely limited. At that point, the investigating judge asked an approved laboratory to carry out tests to extract “essential data from the DNA” and to give investigators “all the components related to the suspect’s apparent physical features.” The judge’s request was daring and unprecedented, and a rejection would have harmed both the procedure and his career. To avoid this outcome, the judge himself then requested the annulment of the order by the investigating chamber. He was thereby forcing the justice system to take a stand on whether this type of evidence from DNA profiling was admissible in French courts.

In order to understand the situation better, and because the question is technique, I shall present the state of French law in detail. Positive law provides, on the one hand, for free evaluation of evidence in criminal matters, in the absence of a conflicting legal presumption,¹⁴ and, on the other hand, for a distinction between the examination of genetic characteristics—admitted solely for medical or research purposes—and DNA sequences—that are admissible for the purposes of identification, notably within the framework of law enforcement. Thus, article 16-10 of the French Civil Code states: “An examination of the genetic characteristics of a person may only be undertaken for medical purposes or for scientific research. The express consent of the person must be obtained in writing before the carrying out of the examination, after the person has been duly informed of its nature and its purpose. The consent shall specify the purpose of the examination. It may be revoked at any time without any formality.”¹⁵ This law is supposed to be applied to any analysis of a DNA sequence carried out under the authority of French law enforcement. Article 16-11 (§1-2) of the same code provides that “The identification of a person by his genetic fingerprint may only be sought: 1°) Within the framework of investigative measures or the preparation of a case during a judicial proceeding; 2°) For medical purposes or for scientific research; 3°) In order to establish, when it is unknown, the identity of deceased

¹³ Article 706-54 du Code de procédure pénale.

¹⁴ Paragraph 1 of Article 81 of the Code de procédure pénale states “In compliance with the law, the investigating judge proceeds with all of the investigative measures he deems useful to demonstrating the truth. He investigates incriminatory and exculpatory information.”

¹⁵ Violation of the provisions of article 16-10 of the Civil Code constitutes the offense punished in article 226-25 of the criminal code.

persons.” This text allows for the comparison of DNA sequences if needed to establish identity or kinship. Therefore, the question that arose concerned the qualification of DNA profiling aimed at establishing a “composite sketch” of physical features. Was the purpose of such profiling the identification of an individual, and therefore legal within the context of criminal investigation? Or was it more a matter of examining genetic characteristics, which are supposed to be barred from admission as evidence? The first jurisdiction to examine the matter – the Chamber of Investigation – replied by ruling that articles 16-10 and 16-11 of the French Civil Code were not applicable to traces collected at the crime scene, but only to samples taken from the human body. The Court of Cassation confirmed this interpretation and moreover specified that “as long as the expertise requested by the investigating judge on the grounds of article 81 of the code of criminal procedure consisted solely of revealing apparent physical features for the sole purpose of facilitating identification of the unknown culprit of a crime, using a DNA sequence left at the crime scene, the order shall not be censured.” This ruling is eminently contestable, as a statement of grounds and by its implications.

Both parts of the statement of grounds can be contested. First of all, it is not at all convincing to limit the application of articles 16-10 and 16-11 of the Civil Code to samples that are taken from the human body.¹⁶ This ruling by the Chamber of Investigation, upheld by the Court of Cassation, actually undermines the scope of these laws significantly, depriving them of any value. The purpose of these provisions is to protect personal privacy and dignity, and to combat any discrimination that might result from abusive usage of genetic data. If it is admissible to proceed with sequencing in the absence of consent, as long as the information is derived from traces of DNA that are detached from a human body, the laws fail to achieve their goal. To assert that the need for informed consent applies only to samples taken directly from the body (of a living person or a corpse) is the same as saying that it is freely permissible to carry out DNA testing on biological material that is detached from another’s body: hair, flakes of skin, or fingernail clippings. Yet this is a direct contradiction of the legislators’ intention.

Next, the conditions under which the Court of Cassation upheld the legality of DNA profiling for the purpose of revealing physical features can be criticized sharply. Two types of remarks can be made with regard to the Court’s validation for the expertise consisting “solely of revealing apparent physical features for the sole purpose of facilitating identification of the unknown culprit of a crime, using a DNA sequence left at the crime scene.” First, the Court of Cassation decision infers that the analysis ordered does indeed consist of “identification.” It implies that finally, there is no difference between comparing DNA sequences and extracting information from a sequence. Many commentators expressed concern about the implications for French law of abandoning the distinction between coding and noncoding genomic DNA. Until then, the law had stipulated that of the two types of DNA, coding and noncoding, only the

¹⁶ See, esp., J. Danet, “Poussée de fièvre scientifique à la chambre criminelle, le recours au “portrait robot génétique » (mais approximatif) est validé,” *Revue de science criminelle* 2014 p. 595. *Contra* C. Girault, “La tentation du portrait-robot génétique,” *AJ Pénal* 2014 p. 487.

lattershould be archived for the purposes of comparing sequences.¹⁷ Actually, the legislation was drafted at a time when scientific and technical knowledge led experts to believe that personal data could not be extracted from noncoding DNA. It is important to note that it was only on the basis of the presumption that noncoding DNA yielded no more than a “genetic fingerprint” that the legislation creating the FNAEG, a huge database of DNA sequences, was declared constitutional.¹⁸ This archive includes samples collected from convicted offenders, but also DNA from suspects, as well as from biological materials collected at crime scenes where several persons with no link to the crime may have deposited such traces.¹⁹ However, progress in genetics and biotechnologies has partially negated the presumption that noncoding DNA is innocuous. Currently, noncoding DNA can be made to yield a profile indicating physical features.²⁰ For example, the document written by the laboratory manufacturing the TOGG Test, which elicited indignation in 2007-08, already mentioned that indications regarding ethnic origins were obtained from noncoding segments of DNA. We can therefore state that coding versus noncoding is no longer a valid criterion “for differentiating the examination of physical features from identification by profile.”²¹ Secondly, it can be noted that, according to the statement of grounds, extracting information from a DNA sequence for the purposes of profiling is acceptable, as long as this information concerns only visible physical features, and that it is extracted and used within the framework of a legal proceeding. Certain scholars may interpret this ruling as an effort to reassert the “sensitive” nature of certain data still disqualified from use in a criminal proceeding, such as the predisposition to develop a disease. However, this statement implies *a contrario* that physical features are not sensitive data. Yet there is nothing convincing about this assertion and, moreover, the solution allows us to assume that information about physical appearance is based unequivocally on the sequence tested, and that the extraction is not liable to either doubt or interpretation. Such a vision of current DNA profiling capabilities is totally inaccurate. Once again, it illustrates the temptation to find infallible proof in the expertise. On the contrary, it would be wiser to take account of the conjectural nature of scientific

¹⁷ Article 706-54 of the Code of Criminal Procedure provides that “The DNA sequences recorded in this database may only be taken from uncoded segments of deoxyribonucleic acid, with the exception of the segments corresponding to the sex markers..”

¹⁸ Article 706-54 of the Code of Criminal Procedure thus provides that “The national automated database of DNA sequences, placed under the supervision of a judge, is designed to centralize the DNA sequences resulting from biological traces, and also the DNA sequences of persons convicted of the offenses outlined in article 706-55, in order to facilitate the identification of and the search for the perpetrators of these offenses. The DNA sequences of persons prosecuted for one of the offenses mentioned in Article 706-55 who have been ruled unfit to stand trial on the grounds of Articles 706-120, 706-125, 706-129, 706-133 or 706-134 are regulated by the same statutes. The DNA sequences of persons against whom there is serious or corroborating evidence rendering it likely that they have committed any of the offenses mentioned in article 706-55 are also stored in this database by order of the judicial police officer either automatically or at the request of the district prosecutor or of the investigating judge. This decision is recorded in the case file.[...]”

¹⁹ Conseil Constitutionnel, Décision n° 2010-25 QPC du 16 septembre 2010.

²⁰ O. Millot, interview with geneticist Catherine Bourgain, “L’ADN va révéler de plus en plus d’informations,” *Libération*, 31 janvier 2012.

²¹ E. Verges, “Vers un portrait-robot génétique? Le profil morphologique d’un suspect face aux droits fondamentaux,” *RDLF* 2014, chron. n°25 (<http://www.revuedlf.com/droit-penal/vers-un-portrait-robot-genetique-le-profil-morphologique-dun-suspect-face-aux-droitsfondamentaux-cass-crim-25-06-2014-n-13-87-493-pbri/>)

knowledge and the possibility of different interpretations. Furthermore, how can we be sure that “genetic composite portraits” derived from DNA traces collected on crime scenes will not be used following a hidden racial pattern?

To conclude, in civil matters, ethno-racial origins do take a role in judicial proceedings in France (notably through forensic (medical or scientific) expertise). Today, French judges take into account ethnic origin to prove a causal link between a medical product and damage. In criminal matters, investigating judges have the power, from now on, to request that physical features such as the color of a suspect’s skin, eyes, and hair be “revealed” to them on the basis of biological items found at the scene of the crime. Tomorrow, on the same grounds, they will also be able to ask about the shape of the ears or nose, because progress in that field of DNA research is underway.²² We therefore have no choice but to note that by accepting DNA profiling for physical features, the Court of Cassation is doing today what the Justice Ministry and judges claimed they expressly wished to avoid doing yesterday, with the “Test d’Orientation Géo-Génétique.” A ruling like this has socio-political implications that must not be ignored. Not only does France’s highest legal jurisdiction support the principle that “genes contain everything” and that a DNA sequence can simply be “read,” it also opens the door to a form of ethnic genetic archiving for the purposes of police work. What will the national DNA database, the FNAEG (Fichier National Automatisé des Empruntes Génétiques), do with this information about skin color? Will it be fine-tuned somehow, to take mixed racial backgrounds into account? Is there a way to articulate such specifics without virtually reverting to racial distinctions reminiscent of law in slave-trading times? It is to be feared that the egalitarian color-blind banner will not be sufficient to protect the French legal order from pitfalls. Likewise, hiding our half-pragmatic, half-scientific way of dealing with the usage of ethno-racial categories may have driven us in a totally ambivalent situation.

²² See, for example, reports by the forensic hematology laboratory in Bordeaux.